The Second PART of the

REPORTS

OF

CASES

AND

Special Arguments,

ARGUED and *ADJUDGED*

IN THE

COURT

OF

King's Bench,

Beginning in *Easter* Term the Thirtieth of King CHARLES the Second, and Ending in *Easter* Term the Third of King JAMES the Second.

With Many Marginal Notes and References: With two Compleat Tables, one of the Names of Cases, the other of the principal Contents.

By Sir *BARTHOLOMEW SHOWER*, Knight.

In the *SAVOY:*

Printed by Eliz. Nutt and R. Gosling, (Assigns of *Edward Sayer* Esq;) for *D. Browne*, at the *Black Swan* without *Temple-Bar*; *J. Walthoe*, in the *Middle-Temple-Cloysters*; *W. Mears*, and *F. Clay*, without *Temple-Bar*. MDCCXX.

TO THE

READER.

IN all Prefaces to Books publiſhed after the Author's Deceaſe, two Things more eſpecially ſeem neceſſary, *viz.* Firſt, To render ſome Account of the Author. And Secondly, Of the Work it ſelf; I confeſs the former ſeems needleſs at this Time, not only from what has been already ſaid on that Subject, in the Preface to the *other Volume of theſe Reports*, but likewiſe and more effectually from that eſtabliſhed Character and Reputation our *Author* acquired with all that knew him; of which many eminent Perſons are ſtill living, and ready to atteſt. *Vide Seld. Epiſt. ad Hengham.*

As to the Work it ſelf, it is evident from ſeveral Parts of the original Manuſcript, which ſtill remains in the Publiſhers Hands; That the ſame was not only collected and tranſcribed by Sir BARTHOLOMEW SHOWER's own Direction, but it was in many Places corrected with his own Hand; and 'tis certain, that he himſelf would have finiſhed and corrected it from the Preſs, had not Death prevented him.

'Tis

To the READER.

'Tis very obſervable, our Author appears to have been more than ordinary careful to inſert in this Part of his Collection, not only ſuch Caſes and Arguments as relate to *Pleas of the Crown*, and *Criminal Matters*; but likewiſe all ſuch Special Precedents and Pleadings as concern thoſe Matters; and the Reaſon hereof he himſelf declares, *viz.* For preſerving the ſeveral Forms of thoſe Precedents.

See the Table, Tit. Indictments, *&c.*

And hence it is you have divers Forms of Indictments, Informations, Inquiſitions, Convictions and Orders of Seſſions, and the like; ſeveral whereof I may juſtly affirm, are not to be met with in any other Book of the Law. And this alone might ſufficiently recommend the Work, eſpecially ſeeing it has been long ſince obſerved by my Lord *Coke*, *That there is no Knowledge, Caſe, or Point of Law, ſeem it of never ſo little Account, but will ſtand a Student and Profeſſor of the Law in Stead at one Time or other; and therefore in reading, nothing is to be pretermitted.*

1 *Inſt.* 9. *a.*

I Shall add no more touching the Work or the Author, but only conclude with this Advice to the Reader: That ſome few Miſtakes in the Orthography of the Names of the Caſes, may be eaſily corrected by the enſuing Table.

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DE

Termino Paſchæ

30 Car. 2. B. R.

Dominus Rex verſus Johnſon.

(1.) Subornation attempted.

Relv. 72. *Cro. Jac.* 158. *Cro. Car.* 337. 2 *Keb.* 399. 3 *Mod.* 122. Stat. 5 *Eliz.* c. 9. 1 *Sid.* 216.

INformation againſt the Defendant, for that at a Trial at Law a Deed was produced by the Lady Ivy, againſt Dr. Whitchcott's Lady and her Tenants, which though the Defendant denied it to be true, yet the Jury ſo much relied on it as thereupon to give a Verdict for the Plaintiff; whereupon the Defendant agreed with another Perſon to give him 350 l. to prove that the ſaid Deed was forged; and of this Agreement he is found guilty.

Mr. Pollexfen moved in Arreſt of Judgment, ſaying, Firſt, Johnſon is found guilty of no Crime, for the Information doth not ſurmiſe or alledge that the Deed was true, (this they dared not do, for then they muſt have proved it again, and ventured another Trial, which they were afraid to do.)

Secondly, 'tis found that they have agreed to prove the Deed forged; now proving a Deed to be forged is lawful, and therefore 'tis no Crime to agree to prove it forged; for any Man may agree with another to give him Money to do a lawful Act, as to prove a Deed to be forged; and this is really ſo, but he could not elſe prove it.

Thirdly, That in the Information they do not ſo much as ſay 'twas factum, but only quoddam ſcriptum; then 'tis ſaid, that he gave diverſas denariorum ſummas,

which I think is too uncertain; for Informations are of the ſame Nature with Indictments, and both theſe muſt be certain. Lambard's Juſt. 456. Fitzh. Tit. Indictment 10. Roll. Abr. Tit. Indictment. 89. 1 Cro. 380, 381. In all theſe and in many more Caſes the Words diverſa, &c. have been adjudged too general: Now the giving theſe Sums of Money is the only Thing he is charged with, and found guilty of, and yet non liquet what the Sums were.

Fourthly, 'Tis ſaid 350l. was put in a Cheſt to be paid upon, &c. according to the Agreement, and do not ſay there was any ſuch Agreement.

Fifthly, Then ſuppoſe there was ſuch an Agreement, here's no Place alledged where ſuch Agreement was made, and therefore there could be no Venire Facias for its Trial; for the Place of keeping the Money is not material.

Sixthly, In the Diſtringas one is named Bartholomew Perryman, and in the Panel 'tis Ferryman, the which is Error; for there are but twenty-three returned: And 'twas ſaid by Mr. Williams, That in this Caſe they do not ſo much as ſuggeſt a Conſpiracy in their Information.

In Trinity Term following, Mr. Pollexfen moved the ſame Exceptions as he did before (Rainsford being then removed, and the Lord Scroggs made Chief Juſtice) adding further, That if it were no Crime, the Verdict finding the Fact done malitioſe, with the other uſual Adverbs, will make it no more ſo than if thoſe Words had been omitted, as 'twas adjudged in Barnadiſton's Caſe in the Exchequer-Chamber about the double Return; but the main Matter they inſiſted upon was, That there was no Time nor Place alledged in the Information when and where the Articles of Agreement were made.

V. 1 *Show.* 190, 2 *Leon.* 211, 214. 3 *Leon.* 230. *Hetl.* 12. *Cro. El.* 105, 147. *Savil* 43.

Mr. Serjeant Maynard, econtra, moved, That the Place is not material becauſe 'tis not traverſable, &c.

Mr. Sollicitor likewiſe pro rege ſaid, As for diverſas pecuniæ ſummas 'tis ſo far from being ill, that were it to lay again, the King's Counſel would make it the ſame; for a particular Certainty would have been almoſt impoſſible for the King to prove, becauſe theſe Things are always tranſacted in ſecret.

Mr. Finch urged, That the Agreement cannot be preſumed to be made any where elſe than where the Money was depoſited, and 'tis all but one Act and one entire Offence.

Sir William Jones ran over all the Exceptions, and then urged, That to give a Juryman Money after he is returned is a good Cauſe of Challenge; nay, ſuppoſe you know he will be returned, if you give him a great Sum of Money to go according to his Conſcience, it is unlawful: As for the Adverbs, Tho' it doth not make a lawful Thing a Crime, yet if it be indifferent it will make it faulty, and are of great Signification ſurely to aggravate, if not to make a Fault: Diverſas ſummas, &c. I take it to be good enough, and with this Diſtinction, where the Certainty and Quantity (if known) will greaten or leſſen the Fault or Fine; but we are upon a Fault where the particular Sum is not material, as in Caſe of Simony or Perjury.

Lord Scroggs ſaid, He thought it an Offence and a great one. *Curia.*

Twiſden. As to the Agreement, you cannot traverſe that ſingly, but all together by pleading Not guilty; as for the Offence I judge it great.

Wylde. 'Tis a great Offence, for no Witneſſes are to have Money given them; and for the diverſas, &c. the Caſes Mr. Pollexfen cited are adjudged naught for another Reaſon, as that of diverſa cottagia, becauſe the Number is neceſſary to be known, the Statute ſetting a certain Penalty upon every Houſe; and ſo for the Straw, the Puniſhment is meaſured according to the Quantity, and therefore naught becauſe uncertain; here 'tis not ſo.

Jones. I judge it an Offence, for Witneſſes ought to come unbiaſſed and not affected with Money; but he thought there was a miſtrial, and the Information imperfect, no Place being laid where the Agreement was made; but three to one gave Judgment for the King.

Some few Days after this Mr. Serjeant Maynard moved to have the Fine ſet and Johnſon called, who appeared and deſired his Affidavits might be read to extenuate the Offence; after which, and Counſel heard on both Sides, one aggravating, the other leſ-

ſening the Crime, there was an Interlocution amongſt the Judges.

Curia. Jones ſaid, This is no Subornation of Perjury, but only an Endeavour to procure one to get another to prove a Writing forged, &c. Here is no Perjury committed, no Act executed; for Subornation the Statute gives but 40 l. Fine, and this is not ſo great a Crime as that; and therefore I think 40 l. Fine enough.

Wylde. Johnſon was not the Contriver of this Knavery, for Holton was the main Agent as appears to me, and my Brother Jones's Opinion ſways with me as to the Penalty by the Statute, and therefore I think 50 l. Fine enough; to which Jones conſented for Agreement-ſake.

Twiſden. I muſt go according to what the Jury finds, and therefore am for 500 Marks, Sureties for his Good Behaviour for ſeven Years, and his Name to be ſtruck out of the Attorney's Roll.

Scroggs ſaid, He was for 500 l. but to prevent a leſſer Sum, he would agree with his Brother Twiſden.

But before this he made a long Speech to aggravate the Fault, with a Hint or two that he did it not out of Malice, or any Remembrance of paſt ☞ Faults. An Endeavour (ſaid he) in the Divine Law, makes a Man as guilty as the Commiſſion: Perjury is a heinous Crime, and was in old Time puniſhed with Death; and afterwards the Member that was inſtrumental therein was cut off from the Body; but now the Statutes are more tender and not ſo ſevere, and the Reaſon was, becauſe few were then convicted by Reaſon of the Compaſſion of Juries, and the Puniſhment was leſſened that more Perjuries might be detected; but when we have found them out and the Party convict, and no certain Penalty, but left to the Diſcretion of the Court, we ought to make them Examples; for as Anger doth not become a Judge, ſo neither doth Pity, for one is the Mark of a fooliſh Woman, as the other is of a paſſionate Man.

And Twiſden ſaid, Upon Indictments for Perjury, if they have not concluded contra formam Statuti, the Fine hath been heightned many Times.

Note, Johnſon being in Cuſtody, was upon this bailed, but it broke his Heart that he died ſoon after, much lamented, and without Reproach; for every one thought this an hard Caſe; and this Crime was committed in Order to the Detection of a Forgery of the Lady Ivy's Deed, which in a Trial at the King's Bench-Bar many Years after this, was proved forged, in Neal's Suit againſt her. Bailable.

Note alſo, That this Johnſon was Attorney in proſecuting Scroggs for a Debt whilſt he was a Serjeant.

Dominus Rex verſus Marriot.

ON an Indictment for Forgery Exceptions were taken thereto. (2.) 2 *Lev.* 221. Forgery.

1. That it was vi & armis, which thoſe Indictments uſe not to have; and after Search of Records Mr. Pollexfen came, and ſaid, That they found three with vi & armis, and ſixteen without it; whereupon 'twas referred to Mr. Aſtry to examine the Records.

2. Another Exception was, That the Jury had found him guilty de Forgeria ſupradict. Now there is no ſuch Word as Forgeria, either in Law or Grammar Latin. But notwithſtanding theſe Objections, Judgment was afterwards given for the King. And thereupon a Writ of Error was brought. *Noy* 101. 1 *Sid.* 16, 155, 278, 451. *Raym.* 81. 1 *Lev.* 138. 1 *Fo.* 325. 3 *Mod.* 66.

And now upon the Writ of Error Mr. Williams moved ſeveral Exceptions, as that above, That the Jury found him guilty de forgeria: Non allocatur, for the Words make it plain enough what their Verdict and Meaning is, and a Jury of Lay Gents are not ſuppoſed to underſtand much Latin.

2d. Exception, That it ought to be a Deed ſealed, and here it is only ſcriptum, whereas the Statute requires it ſhould be a Deed ſealed; and this was Newton's Caſe in this Court, where ſuch Indictment was quaſhed becauſe not ſaid ſigillat'.

Sed non allocatur, becauſe in this Caſe when the Deed is recited, 'tis concluded with datum & ſigillat' ſuch a Day and Year, though before it is only ſaid quoddam ſcript'.

3d Ex-

3d. Exception, 'Tis per Sacrament' duodecim, and doth not ſay proborum & legalium, and this was Oly's Caſe in 2 Cro. 635. where an Indictment ſuper viſum corporis was quaſhed for this Fault.

Non allocatur; for in Caſe of a petty Jury for Trial of an Iſſue, 'tis always conciſe and ſhort as here, only duodecim; but in Caſe of the firſt Jury that finds the Indictment or Inquiſition, 'tis always then with proborum & legalium.

4th Exception, The Indictment is ſaid to be by a Jury ſworn ad inquirend' pro Domino Rege & corpore Com', whereas it ought to be pro Domino Rege pro corpore, and without an &; ſo that here is a Diſtinction where none ought to be; for the Oath is, You are to enquire for our Soveraign Lord the King for the Body of the County: *Sed non allocatur*, for 'tis all one, and there is no Difference.

5th Exception, The Statute requires that the Party convicted ſhall pay double Coſts to the Informer, and this is Part of the Judgment; but here is no ſuch Thing upon Record, and therefore the Judgment is imperfect.

But held by the Court to be nothing material; for that is only in Caſe there be an Informer, here's none, and 'tis upon the Informer's Account, and he might waive it or releaſe it, if there were ſuch.

Judgment was affirmed.

Liſle *verſus* Gray.

(3.) 2 *Lev.* 223. Covenant to ſtand ſeized. *Vide Nelſon's Lutwyche*, 242.

Ejectment. Special Verdict. A. covenants to ſtand ſeized of Lands, to and for the Uſe of himſelf for the Term of his Natural Life, and after his Deceaſe to Edward his eldeſt Son for Life, then to the firſt, ſecond, third, fourth, fifth and tenth Son, &c. as is uſual, and then there is this Clauſe, And ſo ſeverally and reſpectively to all and ſingular the Heirs males of the Heirs males of the Body of Edward, &c. the Queſtion was, What Eſtate Edward had?

Mr. Levinz argued, That Edward is but Tenant for Life: All Courts will interpret all Conveyances according to the Intent of the Parties as far as the Words will bear; it is expreſly limited to him for

Life, and there is no Inheritance in him at all: And another Clauſe in the Deed makes it clear, viz. If Edward die without Iſſue, there is Proviſion made for Daughters; if he had been deſigned Tenant in Tail, there needed not that Proviſion, for he would have been able, &c. for the Words themſelves in the laſt Clauſe on which the Doubt ariſeth, where the Heirs males are; 'tis clear, 'twas only a Miſtake in the Scrivener, inſtead of Sons, to write Heirs males, elſe it had been the common Limitation for Life; I confeſs Heirs males import an Inheritance, yet they may be ſo qualified as to imply nothing but an Eſtate for Life as if I grant an Eſtate to a Man and his Heirs for the Life of another; there Heirs are ſo qualified as to make no Inheritance; ſo if Tenant in Tail grants an Eſtate to a Man and his Heirs for his Life; and ſo here in our Caſe. And as to ſo ſeverally and reſpectively, So there doth only demonſtrate what Heir, and it is as in a Sheriff's Return, ſic reſpondet. I have known it ruled in this Court, That when a Venire facias hath gone præceptum eſt per cur' and in another Venire facias, per cur' hath been omitted, and it run only præceptum eſt ſicut prius, and adjudged good, and ſo it may be here as it was in 1 Inſt. 20. where a Gift to a Man & hæredibus de corpore exeunt. Remainder to B. in forma prædict', this was ruled to create a Tail; ſo here the Word ſo ſhould reſtrain and qualify the Words ſo as only to mean Sons, &c.

On the other Side it was argued to be an Eſtate-tail executed, and that there are ſufficient Words to make it ſo. 1 Inſt. 22. Feoffment to the Uſe of a Man's ſelf for Life, and then to the Uſe of the Heirs males of his Body, &c. this is a good Eſtate-tail veſted and executed in himſelf, and the Limitation is good by way of Uſe, and though it be a double Limitation, yet 'tis good, and ſo is Shelly's Caſe. 1 Rep. 95. there was alſo cited the Caſe of Boreton *v.* Nichols, 1 Cro. 364.

Curia. Judge Wylde compared it to Archer's Caſe. 1 Rep.

Lord Scroggs ſaid, That the Intention of the Party ought to be reſpected, and it ſeems to me that Heirs males are nothing but inſtead of Sons.

And

And Jones ſaid the ſame, and they all three (Twiſden abſent) inclined to be of Opinion that he was but Tenant for Life. Adjornat'.

Gunning *verſus* Gunning.

(4.) Waſte.

WAſte. The Defendant pleaded no Waſte committed modo & forma prout, &c. The Jury find he did modo & forma as in the Count.

Moved in Arreſt of Judgment, That the Plaintiff in his Declaration doth not ſo much as alledge a Waſte done, but leaves it abſolutely uncertain; for he ſays, That the Defendant did plough up his Land which was paſturable, & ſic Vaſtum fecit, and ſo non conſtat to the Court that it was Waſte; and the Verdict doth not help it, for that only ſays they did it modo & forma prout in narratione: Now the ploughing of Paſture may be, or may not be Waſte; and to make it ſuch, it ought to have been ſo Time out of Mind, and 'tis not enough to ſay that this was Paſture Ground diu ante.

Vide 1 *Lev.* 309. 2 *Saund.* 252. 1 *Mod.* 94. 3 *Mod.* 90, 113. 2 *Saund.* 254, 255.

Juſtice Jones ſaid, Arable and Paſture Ground are convertible, and that which is one of them this Year, may be the other the next, and the Law doth not ſo much diſtinguiſh; and therefore Judgment was ſtayed.

Frederick *verſus* Cotton.

(5.) Bill of Exchange.

CASE upon the Cuſtom of Merchants againſt the Accepter of a Bill: After Verdict it was moved in Arreſt of Judgment, That the Parties were not averred to be Merchants; and upon Debate the Court ſaid, That they would intend them ſuch.

Nelſon's Lutwyche, 70, 71, 270, to 277. *Poſt Caſe.* 178, 234.

Then another Exception was moved, That the Bill was payable to the Order of the Plaintiff, and there was no Order alledged.

But the Court reſolved without any Difficulty, That if by Deed, Bill, or other Writing, Money be to be paid to a Man's Order, it is due to himſelf; ſo the Plaintiff had his Judgment.

Note,

Note, A general Indebitatus Aſſumpſit does not lie on a Bill of Exchange, but the Party ought to declare ſpecially on the Cuſtom of Merchants, ut ſupra. Vide 6 Mod. 129, 131. 1 Lev. 298. 3 Lev. 118. 1 Lutw. 180. Nelſon's Lutw. 510.

DE

Termino Trin.

30 Car. 2. B. R.

Trigg *verſus* Turner.

(6.) 2 *Keb.* 746. *Paſtex.* 443.

REplevin. The Defendant avows as Bailiff in diſtraining for Damage-feaſant.

The Plaintiff in Bar to the Avowry pleads Preſcription, to have Common all Times of the Year in the Place where, being Foreſt.

Avowry for Common in a Foreſt *per totum Ann.*

Serjeant Strode moves in Arreſt of Judgment, there having been a Verdict for the Plaintiff in the Replevin: He would have all Preſcriptions to Common in Foreſt-Land to be void, unleſs the Land to which, &c. be Foreſt-Land too: It hath been adjudged in this Court, That the Foreſt-Law is not the Common Law of England; if a Man have a Right to Common in a Foreſt, yet if he do not claim it, and if it be not allowed in ſome Eyre, he loſes his Right.

Vide 1 *Jones* 99, 286, 288, *&c.* *Nelſon's Lutw.* 30, 473.

Then he inſiſted, That the Preſcription was too large and general; for by the Foreſt-Law there is a Fence-monty, in which 'tis a Forfeiture to put in their Cattle, and they have mentioned nothing thereof in their Plea; ſo that tis laid too general.

Mr. Holt likewiſe on the ſame Side: No Man can preſcribe for Common in a Foreſt if he have no Land in the Foreſt. Jones 292. A Preſcription extra Foreſtam is not good without Allowance. Manwood's Foreſt-Law, 77, 78. Tit. Common. A Man cannot depaſture any Cattle there without a Special Preſcription: Then if he have it, as this Caſe is, it can have no good Commencement, neither can it be tried; for if triable by any, it muſt be by the Verderors, &c. and they cannot, becauſe it is appendant to Land without the Foreſt; and their Juriſdiction is limited by 33 Edw. 1. where 'twas enacted, That thoſe whoſe Lands be exempted from the Foreſt, ſhall not by Right of thoſe Lands have Common in the Foreſt, but if they will return, they ſhall; as for the Fence-month, which begins about the ninth of June, and ends about fourteen or fifteen Days after Midſummer, there is an expreſs Law, that none ſhall have Common there that Month.

Preſcription Manwood, 74, 75. Now here is a Preſcription for the whole Year, and it can be had but for eleven Months only, 'tis therefore naught; for if in any Caſe a Man lays his Preſcription larger than the Law allows,

1 *Jones* 286. 'tis all void; as Preſcriptions, Cuſtoms and By-Laws within Manors to bind all Perſons, when in the Particular 'twill bind only the Tenants, and not Strangers, ſuch is void. 11 Hen. 7. 14 and 21 H. 7. 40. alſo, that if any Cattle be upon ſuch and ſuch Land, and do break their Bounds, that they ſhall be forfeited, Now though this be good againſt a Tenant of the Manor, yet 'tis void againſt a Stranger; and therefore in that Caſe it was adjudged void, being laid too general in Action brought thereupon. Another ſuch like Reſolution you have in the Caſe of Harbin & *Uxor' v.* Green, in Hob. 189. A Preſcription is an intire Thing, &c.

Mr. Pollexfen for the Plaintiff. They ought to have alledged in their Avowry, That it was a Foreſt which had the Offices and Places uſually appendant, Coke in his 4th Inſt. 298. ſaith, That by Preſcription a Man

may have Common for his Sheep within the King's Foreſt: Beſides, there are a great many nominal Foreſts; but ſuppoſing this be a Foreſt, yet according to Coke, as I ſaid before, a Preſcription may be for Common therein; for ſuppoſe the King doth, as he may, diſafforeſt his own Land, yet thoſe that had Common there before ſhall have it ſo ſtill, as by Charta de Foreſta doth appear. Manwood, 77, 78. and this may be for all the Year, ſuch as it was before; and then he ſays, That Swine and Geeſe are forfeited if put into Common the Fence-month, which implies that other Cattle may be in that Month; and alſo the Articles about Foreigners, that they may not have Common or put in any Cattle in the Fence-month, implies, that thoſe who have an ancient Right may, and there is no poſitive direct Authority againſt me; the Statute of Ordinatio Foreſtæ (though the Lord Coke ſays it is no Statute, yet perhaps it is ſo) grants Common, &c. As to the Objection about the Trial, the 4th Inſt. in the Chapter about the Courts of Foreſts ſaith, that the very Fact of the Verderors may be traverſed, and if there be any Claim diſallowed there, yet 'tis not final.

Further, 'tis not ſaid, That our Lands (to which we preſcribe this Common to belong) are within or without of the Foreſt, and therefore they may be within as well as without, and ſo intended; he alſo cited the Caſe of Leiceſter Foreſt in 2 Cro. 155.

Lord Scroggs ſaid, That he was inclined to believe they might have Common, and a Preſcription preſuppoſes a Grant from the King; and he quoted the Caſe of Sir Edward Sawyer in Jones, 287. where it was allowed to Copyholders to preſcribe for Common generally. *Curia.*

Judgment for the Plaintiff.

Colton *verſus* Senhouſe.

(7.)

2 *Lev.* 225, 226.

EJectment. Special Verdict finds an Indenture between the Son, who was ſeized of the Lands in Queſtion by Diſcent from his Father of the one Part, and his Mother and her ſecond Huſband of the other Part; whereby the Mother and her Huſband do releaſe and confirm to the Son, the Land for and during

Covenant to Uſes. *Vide Pollex.* 523 to 537. 2 *Lev.* 226. 3 *Lev.* 120, 370, 372. 2 *Vent.* 149, 260, 266.

the Life of, &c. and 'tis covenanted and agreed by and between them and the Son, &c. That if he die without Iſſue of his Body, then he grants and gives the ſame to his Natural Mother and her Heirs for ever; the Son dies without Iſſue, the Mother enters, the Heir makes a Leaſe to the Plaintiff; the Queſtion is, If any Uſe was raiſed by this to the Mother?

Mr Levinz for the Plaintiff. No Uſe can be granted out of an Eſtate of which a Man is not ſeized; a Feme covert cannot covenant, nor can the Father-in-law covenant, becauſe the one is not of the Blood, the other is under Covert-Baron; therefore 'tis not an Uſe, but only a Covenant or Agreement binding them during their Lives, and it ſhall afterwards go to the right Heir: And he urged the Caſe of Buckler and Symonds *& al'.* 2 Roll. Abr. 788. A. ſeized in Fee covenants with B. in Conſideration of a Marriage to be had between the Son of A. and Daughter of B. That the ſaid Land ſhall, from and immediately after the Death of A. remain and be unto the ſaid, &c. In this Caſe, albeit the Marriage took Effect, yet no Uſe aroſe by the Covenant, becauſe there were no apt Words; he did not covenant to ſtand ſeized, but only that it ſhould remain; and the Caſe of Pitfeild and Pierce in March 50. Caſe 78. and the ſame in 2 Roll. Abr. 789. A. ſeized in Fee, did in Conſideration of the Marriage of his Son B. to E. ſeal and deliver a Deed-Poll to this Effect. Be it known, *&c.* That I *A.* do give and grant by theſe Preſents, unto my Son *B.* the ſaid Land after my Deceaſe to have and to hold. In Witneſs whereof to this my Deed of Gift I have hereunto ſet my Hand, *&c.* This not being executed by Livery or Inrolment, the Queſtion was, If it ſhould paſs by way of Covenant to ſtand ſeized? And held it ſhould not, becauſe it did not appear that he intended to ouſt himſelf of the Land during his Life; for he granted it to B. after his Death before the Habendum, ſo that he did not intend to make himſelf barely Tenant for Life, which is our Caſe; for the Son ſaith, If he dies without Iſſue, then he gives and grants to his Mother, &c. Then 'twas moved again in the Caſe of Pitfield and Pierce, that it ſhould not alter the Eſtate of the Father, but that he ſhould be ſeized in Fee during

ring his Life, and his eldeſt Son ſhould have it by way of contingent Uſe after his Death. But the Court ſaid, That would be harder to maintain than the former, and therefore they gave Judgment as afore, That his Intent was to convey at the Common Law. But they agreed, That if it appear by a Deed to be the Intent of him that is ſeized of the Land, that it ſhall paſs an Eſtate according to the Rules of Law; and ſaid, That this ſhall ſo paſs, although that there are not formal Words of Covenant in it. Intent.

He urged further the Caſe of Foſter & Foſter, in Hill. 13 and 14 Car. 2. in this Court, where the Mother gave all her Land to her Son, with an Item, 'Tis covenanted and granted by and between the Parties, that ſhe ſhould enjoy it during her Life; and ruled to be only an Agreement, and not a Covenant to ſtand ſeized. Here the Words are, if he dies, then he gives and grants, *i. e.* if he ſhall die he will give and grant, as 'tis uſual in common ſpeaking to ay, To-morrow is a Feaſt, *i. e.* will be a Feaſt; and 'tis only a Deed of Articles and Covenants, and deſigned for no more; the Words themſelves will not veſt an Eſtate, for Eſtates muſt be guided by the Law and its Rules; and ſo is Dr. and Stud. lib. 1. cap. 24. where 'tis held, That if the Intent of the Parties be not according to the Rules of the Law, 'tis void; as in Caſe of a Leaſe for Years to a Man and his Heirs, the Intent is void, for 'tis the Law muſt direct and govern the Eſtate. 1 *Sid.* 82. 1 *Lev.* 55, 56. 1 *Mod.* 177. 1 *Keb.* 160.

There was alſo cited a Reſolution in Chudleigh's Caſe. 1 Rep. 129. That no Uſes ſhall be executed by the Statute of 27 H. 8. which are limited contrary to the Common Law; for it appears by the Preamble, that the Intent of the Makers was to reſtore the ancient Common Law of the Land; and he cited Engleſield's Caſe in Popham, 20, 21. which you may peruſe at large, for 'twas much inſiſted upon.

Mr. Pollexfen econtra. That here an Eſtate doth ariſe by way of Uſe; the Son was ſeized in fee by Deſcent as the Jury find it; he by Deed indented between him and his Mother and her ſecond Husband, doth covenant and agree to and with, &c. That if it ſhall happen that he ſhall die without Iſſue of his Body, then he gives and grants the Lands in Queſtion to his Mother and her Heirs for

ever;

ever; he urged, that Uſes before the Statute were of an equitable Nature; that they were not Eſtates in the Land, but only Truſts and Confidences, and not ſubject to the Rules of Law until they were veſted and raiſed: But in raiſing of them they are different from all manner of Eſtates at Common Law; and therefore they need not ſuch ſet Form of Words to raiſe them as other Eſtates do: At beſt they were themſelves but an equitable Intereſt or Right. He alſo urged Fox's Caſe, 8 Rep. 93. where a Demiſe and Grant was adjudged to amount to a Bargain and Sale within the Statute of Uſes; for to make a Freehold or Inheritance paſs by Deed indented and inrolled, there needs not the preciſe Words of Bargain and Sale, but Words equivalent or tantamount are ſufficient; and ſo he would have it here, That a Conſtruction may be to raiſe an Uſe, though the Words are give and grant, &c. for ſaid he, If a Covenant to ſtand ſeiz'd upon a Valuable Conſideration may be deemed a Bargain and Sale, it may econtra.

He further argued, That for the raiſing of an Uſe here were Words more ſignificant then that of Covenant; for Covenant alone would never paſs any Eſtate in Land, but the Word Grant might; and cited a Caſe of || Scudemore and Croſſing, Trin. 22 Car. 2.

|| 1 *Mod. Rep.* 176. 1 *Ven.* 137.

And as to the Caſe of * Pitfield and Peirce, which they ſo much relied upon of the other Side, he anſwered, That the ſame was never much argued, for neither Croke nor Jones mentioned it in their Reports; and it differed from the preſent Caſe; for that here is nothing to make a Tenant for Life, but all upon a Contingency, and no preſent Grant; whereas Pitfield's Caſe is a preſent Grant to commence after his Death; and ſo he anſwered the grand Objection of raiſing a Freehold in futuro; for that, ſaid he, may be by way of Uſe upon a Contingency: Uſes (ſaid he) may be raiſed in this manner, as in Shelley's Caſe, 1 Rep. and Bro. Feoffment to Uſes 59. 2 Roll. Abr. 791. 3 Cro. 439. the Caſe of Woodliff *v.* Drury. Mich. 37, 38 Eliz. where Lands were to the Uſe of a Wife that ſhould be; and the Feoffor afterwards marrying, 'twas held the Wife ſhould take by that Limitation, though 'twas objected, that preſently by the Feoffment the Fee was in the Husband by the Poſſeſſion executed to the

* *March* 50. c. 78. 2 *Roll. Abr.* 789.

Uſe which he had before the Marriage, and that Uſes in futuro could not riſe upon ſuch future Acts; for then an Uſe might riſe out of an Uſe. But 'twas there ruled by all the Court, That though he were ſeized in Fee in the mean Time; yet by the Marriage the new Uſe did ariſe and veſt, there having been no Act in the mean Time to deſtroy the future Uſe; then 'tis not neceſſary that there be an Intent apparent in the Deed to raiſe Uſes. 2 Roll. Abr. 786. Tebb *v.* Popplewell, Scudmore and Croſſing, *in* Mod. Rep. 175, 176. The Words of Covenant to ſtand ſeized are not neceſſary, and upon this Caſe he moſtly inſiſted: And in the preſent Caſe is no Intention that appears to make any Eſtate to paſs at the Common Law, and it may well bear an Uſe, it ought ſurely to work ſome way if poſſible: All the Caſes cited on the other Side did not ſhew any Reference or Intention to Conveyance by the Deed, but here's expreſly, doth grant: The Judges will not deſtroy a Deed for its Informality, or the Ignorance of former Times; therefore he concluded, an Eſtate was raiſed to the Defendant, there being a manifeſt Intention that ſhe ſhould have it, and Words tantamount to a Covenant to ſtand ſeized, &c.

And afterwards in Paſch. 31 Car. 2. Judgment was given accordingly, That the Limitation to the Mother amounts to a Covenant to ſtand ſeized, &c. and this Judgment afterwards affirmed upon a Writ of Error, &c. Vid. Poll. 537.

See the Caſe of Coryndon & Ux' adjudged in C. B. Paſch. 1717.

Holmes *verſus* Ivy. (8.)

DEbt upon a Bond, Defendant demands Oyer of the Condition, which was for the Delivery of 35000 Tiles to the Value of 144 l. at 15 s. 6 d. per Thouſand; he pleads, That he did deliver the full Number of 35000 Tiles, worth 15 s. 6 d. a Thouſand: The Plaintiff demurs, becauſe he did not alledge that they were in all worth 144 l. which was the Thing that they intended, and the Penalty was double the Sum, viz. 288 l. Note, The Condition ſhould have been to deliver 185000 Tiles, which according to the Condition would have amounted to the full Sum of 144 l.

Obligation, Condition repugnant. *Vide Raym.* 61. 1 *Lev.* 85, 86.

Lord

Curia. Nelſon's Lutwyche, 189, 207, 215, 216.

Lord Scroggs ſaid, 'Twas juſt to ſupply Miſtakes in the Conditions of Bonds; and it ſeems very plain, that the Intent of the Party was to ſatisfy a Debt of 144 l. and that they agreed it ſhould be paid in Tiles, at 15 s. 6 d. per Thouſand, and 'tis the Sum of Money and not the Number of Tiles is the Thing material; we ſhall not therefore invalidate the Bond. and if according to the Miſtake the Condition be impoſſible and cannot be performed, then 'tis againſt the Defendant too, for then the Condition is void, and the Bond good becauſe ſingle and ſtill obligatory: So utraque via 'tis with the Plaintiff; And accordingly Judgment was for the Plaintiff.

(9.) Helmore *verſus* Shuter *& al'*.

Parol Promiſe before the Stature, of Frauds. 1 *Vent.* 330. 2 *Jones* 108. 2 *Vent.* 227.

CAſe upon a Promiſe by Parol in Conſideration of Marriage to pay in his Life-time, or leave at his Death the Sum of 2000 l. The Promiſe was made and laid to be made in February 1676. the Action was brought in Michaelmas Term 1677, the Defendant's Teſtator died in Auguſt 1677: In the Interim between the Promiſe and that Time, was the Act againſt Frauds and Perjuries made, whereby 'twas enacted, viz. in 29 Car. 2. cap. 3. That no Action ſhall be brought whereby to charge any Perſon upon any Agreement in Conſideration of Marriage, unleſs ſome Note or Memorandum thereof be in Writing ſigned by the Party, or ſome other Perſon thereunto by him lawfully authorized: The Words are, That from and after the 24th of *June*, 1677. no Action ſhall be brought, *&c.* and all this Matter was found in a Special Verdict.

Mr. Serjeant Maynard argued, That the Promiſe was void by the Statute, the Action being commenced after the Statute, though the Promiſe was before; and inſiſted upon the Words of the enacting Clauſe, which was, That from and after the 24th of June no Action ſhould be brought, than which, he ſaid, nothing could be plainer; for 'twas not that no ſuch Promiſe after ſuch Time ſhould bind, but no Action ſhould, &c.

Mr. Pollexfen for the Plaintiff. The Penning and Words of the Statute do plainly intend only Promiſes after the 24th of June, and never deſigned a Retroſpect to avoid Marriage-Agreements made and concluded at any Time before, and ſo were (as he ſaid) the Judges Opinions at Serjeant's-Inn, in a certain Caſe of a Deviſe of Land by Will in Writing, not having three Witneſſes to it, made and publiſhed before the Act, whoſe Teſtator died after the Act, yet held good; though the Words of this Act about Wills are no Deviſe or Bequeſt of, &c. Now 'tis no Deviſe till after the Teſtator's Death; and yet 'twas held good enough; and though this was no judicial Opinion, yet he ſaid, The Title and Style of the whole Act was plain enough, that it deſigned only a Proſpect for the future, the Title being An Act for the Prevention of Frauds.

Lord Scroggs, Wylde and Jones (Twiſden abſent) ſaid, They believed the Intention of the Makers of that Statute was only to prevent for the Future, and that it was a cautionary Law; and if a Motion were made in the Houſe of Lords concerning it, they would all explain it ſo; beſides, 'twould be a great Miſchief to explain it otherwiſe, to annul all Promiſes made by Parol before that Time, upon which Men had truſted and depended, reckoning them good and valid in Law, as they are yet amongſt honeſt Men: and therefore Judgment was given for the Plaintiff. *Curia.*

Bourne *verſus* Cooling. (10)

CAſe upon an Eſcape againſt the Defendant, being Marſhal of the King's Bench, for the Eſcape of a Priſoner formerly in the Fleet; and upon an Habeas corpus brought before a Judge of this Court, and turned over to the King's Bench. Eſcape. *Vide* 2 *Jones* 60, 97, 139.

After Verdict it was moved in Arreſt of Judgment, and theſe Exceptions were taken to the Declaration, viz. That it was Guardino inſtead of Guardiano for the Warden of the Fleet; then 'twas ſaid, Virtute brevis de habeas corpus directed to the Warden of the Fleet, he

was debito modo commiſſus to the King's Bench; which is repugnant.

Thompſon for the Plaintiff ſaid, That in his Paper-Book which was ſigned by the Officer of the Court, the Clerk of the Papers, it was right, Guardiano, and that it was ſo in the Plea-Roll; and he did hope that the Miſtake of a Letter in the Niſi prius Roll, ſhould not be ſufficient to arreſt a Judgment. And as to the other Exception he thought debito modo would help it.

Curia. But the Court took this laſt Exception as material, becauſe it doth not appear that he was committed; for he cannot be committed by an Habeas corpus: And Judgment was thereupon arreſted.

(11.) Wetherhead *verſus* Brookborne.

2 *Lev.* 233. Words. CAſe for Words, wherein the Plaintiff having uſed the Art and Myſtery of a Dancing Miſtreſs for divers Years paſt, and that the Defendant did ſay of her, She is no more a Woman than I am, ſhe had had a Baſtard on *J. S.* ſhe is an Hermaphrodite; and by reaſon of theſe Words ſhe loſt many Scholars to her Damage of 40 l. And Verdict for the Plaintiff.

Hermaphrodite.

1 *Salk.* 16. Mr. Levinz and Mr. Saunders moved in Arreſt of Judgment, That Hermaphrodite is no Word of Turpitude or Crime, but only an Imbecility: (to which

Curia. Wylde anſwered, There muſt be prævaleſcentia unius Sexus) and 2dly, That ſeveral Years paſt, might be above twenty Years ago, it not being ſaid laſt paſt.

But Wylde ſaid, The Matter is ſcandalous, and the very Words carry Damage, and no Need to alledge any Special Damage; and for the laſt he cited a Caſe of Necroft and Dunkirk, in this Court, in Caſe for Words, where the Plaintiff did declare himſelf to have been a Merchant per diverſos annos præteritos, &c. and held good, though he could not be a Bankrupt if he had left off his Trade; and here the Jury have found it as ſhe hath laid it, and for the laſt the Jury would intend it, or elſe preſume, that being once a Dancing Miſtreſs ſhe continues ſo until that the Contrary do appear.

Sed adjornat' quia cur' adviſare vult.

Afterwards 'twas moved again by Mr. Holt for Judgment. Where the Loss is particular, the Allegation ought to be so; but if it be of many Customers, a general Allegation will suffice without particularizing any Person.

And per Cur'. The Words are actionable in themselves; to say a Physician is no Scholar is actionable, though a Man may be so without Learning, only it renders him less qualified. See 1 Roll. Abr. 55. Adjornat'. *Curia.*

D E

Termino Mich.

30 Car. 2. B. R.

Light *versus* Hooper. (12.)

REplevin. The Defendant makes Conusance as Bailiff to the Skinners Company for a Rent, &c. and after rien arrere pleaded, Verdict was for the Avowant. Avowry ill.

'Twas moved in Arrest of Judgment, That there was not a good Title set forth in one Assignment; for 'twas mentioned to be by Deed indented, but no Consideration, and in another no Attornment.

Wylde, He must make a good Count of his Title in his Avowry; for the Avowant is in Nature of a Plaintiff. *Curia.*

Scroggs, Pleading rien arrere and Verdict for him ſeems to ſupply it; for 'tis ſaid, virtute cujus fuit ſeiſitus in Dominico ſuo ut de feodo, and you come and ſay No, and found againſt you; Now if the Plea and Verdict helped it is the Queſtion.

Another Exception was, That the Place where he took the Cattle pertinebat manerio, and it might belong to it, yet be no Parcel of it. Adjornat'.

(13.) *Dominus Rex verſus* Emerton.

Counterfeiting a Letter.

INformation for Deceit, by Writing a Letter in the Lord Chief Juſtice Rainsford's Name, to get Sir Robert Vyner to come to Brentford. And after Verdict, 'twas moved in Arreſt of Judgment;

Vide 1 *Sid.* 16,151,451. 1 *Rol. Rep.* 431. 1 *Roll. Abr. pl.* 8, 9. *Cro. El.* 166, 296, 853. *Yelv.* 146. 3 *Bulſt.* 265. *Winch* 40, 90. *Sed* 1 *Sid.* 142, *contra.*

First, 'Tis ſaid Raroli inſtead of Caroli; but that was amended by Rule of Court.

The next Exception was chiefly, That 'tis a private Letter, and only deſigned to draw a Man to a certain Place, and no Inconvenience ariſes thereupon; there is no Wrong or Injury done to any particular Perſon.

But Mr. Attorney General ſaid, That the Counterfeiting is an Offence; He agreed, That in Caſes of Perjury and Forgery upon the Statute, it muſt be material to the Queſtion in Hand, and detrimental to ſome one or other; but at the Common Law 'tis not neceſſary.

Wylde. Suppoſe I have a Mind to a Man's Company, I write a Letter to him in another Man's Name to bring him thither, becauſe he would not come for my ſending: Is this an Offence? No Miſchief is intended, nor doth any enſue: The Statute is made to make Counterfeiting an Offence, if any Evil follows thereupon; therefore it was not ſo at the Common Law. Suppoſe I would have a Judge come to me at Brentford, who will not come upon my Requeſt, I therefore write to him from another Judge: Will an Indictment lie hereupon? Surely no; 'tis only a Lie in Scriptis. The Court were divided, Scroggs and Twiſden that twas an Offence; Wylde and Jones that it was not; and ſo it reſted, and no Judgment in the Cauſe. Quære therefore, Whether a Falſity

Court divided.

a Falſity written be puniſhable as an Offence at the Common Law, when no Miſchief is done or intended?

Howard *verſus* Wood (14.)

CAſe ſur indebitatus aſſumpſit for the Fees and Profits of the Office of Stewardſhip of a Court-Leet and Court-Baron, is brought by a Grantee of the Reverſion of the Office for Ninety-nine Years; againſt a Stranger who took the Fees and Profits thereof, &c. 2 *Mod.* 260. 3 *Mod.* 173. 2 *Jo.* 126. 2 *Lev.* 145.

In this Caſe the Queſtions were two:

1. If ſuch Office be grantable in Reverſion?
2. If this Action lies?

As to the firſt it was argued, That a Stewardſhip is a miniſterial Office, and therefore is grantable in Reverſion; the Reaſon why a judicial Office is not grantable in Reverſion is, the great Regard which the Law hath thereto; which it hath not to a miniſterial Office, that being but of a mean Conſideration in the Eye of the Law: In Young and Fowler's Caſe, Trin. 15 Car. 1. B. R. in 1 Cro. 555. 'tis adjudged, That the Regiſterſhip of an Eccleſiaſtical Court is grantable in Reverſion, becauſe exercend' per ſe vel per deputatum ſuum: See the ſame in 1 Cro. 279. although Sir John Savage's Caſe in Dyer 259. ſeems to the contrary. But ſurely a Steward's Office is grantable in Reverſion: The grand Objection was, That 'tis partly judicial, partly miniſterial, as is Auditor Curle's Caſe, 11 Rep. 2, 3. where the Grant of an Auditor's Place in Reverſion is void, becauſe partly judicial as well as miniſterial, and cannot be divided; and the Rule is, quod Officia judicialia non concedantur antequam vacent; for that otherwiſe great Inconveniences would enſue, for he who at the Time of the Grant in Reverſion was able and ſufficient to ſupply the Office of Judicature, and adminiſter Juſtice to the King's Liege Subjects, before the Office falls, may become unable and inſufficient to perform it. But 'twas argued, That the Stewardſhip of the Leet and Court-Baron here were diſtinct; for the former comes by Preſcription, the latter of common Right; Offices grantable in Reverſion.

Right; one may be holden at one Time, the other at another Time; there may be two Stewards, therefore that of a Court-Baron at leaſt may be grantable in Reverſion.

Then the next Point is, If the Plaintiff having a Right to the Place can have an Indebitatus aſſumpſit.

'Twas argued that he might, becauſe 'tis his Money, and he hath a Right to it; and by Conſtruction of Law the Defendant receives it to his Uſe, and then the Plaintiff by bringing his Action doth give his ſubſequent Aſſent thereto: In Tottenham and Bedingfield's Caſe, 3 Leon. 24. it is agreed, That if one doth receive my Rents I may implead him in a Writ of Account; and then by the bringing of my Action there is Privity; for I may make a Privity by my own Conſent, and I may as well bring Caſe as an Account, and ſo is the Caſe of my Lady Cavendiſh *v.* Middleton, 1 Cro. 141. And for late Authorities there have been two known Caſes expreſs in the Point, as that of Awas *v.* Stukely in Scaccario, about a Year ſince; Indebitatus aſſumpſit for the Fees of the Office of the Controller of the Cuſtoms at Exeter; and held upon Debate that it would lie; for the Plaintiff in ſuch Action muſt prove his Title to the Office ere he can make a Right to the Money, and this is as neceſſary here as in an Aſſize; ſo that a Title to an Office may be tried in this Action as well as in that: Alſo here was in this Court the Cauſe of Aſton *v.* Woodward, the two preſent Clerks of the Papers, concerning that Office; tried at this Bar in this Action.

As for its being granted for Years, 'twas anſwered, That 'twas for Ninety-nine Years, if they ſhould ſo long live.

Mr. Bigland econtra. An Aſſize properly lies of an Office; the Books are full thereof, a Special Action of the Caſe will lie, but not a general Indebitatus aſſumpſit; there muſt be a Contract or Agreement of the Parties before ever the Law will raiſe a Promiſe; therefore he thought the Action would not lie. The Declaration ought to be according to the Fact; 'tis laid that the Defendant received the Fees ad uſum & commodum querentis, whereas in Truth he received them to his own Uſe. This Courſe will turn out Aſſiſes and Ejectments too, for they will now try all ſuch

Titles by this Action; nay, they may by the ſame Reaſon try Titles to Land by bringing this Action for the Profits thereof. The Office of a Stewardſhip of a Manor is not grantable in Reverſion, Sir John Savage's Caſe, Dyer 259. Auditor Curle's Caſe, 11 Rep. 2. 1 Inſt. 3. None can give Judgment in futuro; none can take an Office in Reverſion, therefore none can grant it; the Office is granted to two Perſons, viz. to the Lord Howard and his Son; now a Stewardſhip is not dividable: So a Prothonotary's Office is not grantable to two, for two cannot have the Cuſtody of the Rolls, and ſuch Patent is void; ſo Sir John Fogges's Caſe, 18 Edw. 4. 7. where 'tis likewiſe held, that ſuch Grant of the Office of Chief Juſtice to two Perſons would be void; for it may be granted to twenty as well as to two: As for that Caſe of Auditor Curle, there was an Act of Parliament to make two Perſons one Officer; ſo he concluded that the Grant was void, and he urged, that the Action was ill brought: The firſt Caſe where an Indebitatus Aſſumpſit was brought for the Profits of an Office, was Bruehill and Foukes's Caſe, of a Coal-meeter's Place.

In Trinity Term following Mr. Williams urged, That if it be a miniſterial Office it may be granted in Reverſion. The Counteſs of Shrewsbury's Caſe, 9 Rep. 47. is expreſs therein, and that he may make a Deputy is expreſly reſolved in the ſame Caſe, though there be no Words in the Grant to that Effect. In Dyer 270. Plead. 23. is another direct Reſolution in the Point.

The main Objection is, That the Office is to be Steward of a Court-Leet and Court-Baron both; that of a Court-Leet being a judicial Office, that of a Court-Baron is only miniſterial, and therefore they would have it a void Grant as to the Whole.

He anſwered, That it ſhould enure as two ſeveral Grants; for he firſt grants the Stewardſhip of a Court-Leet, and then that of the Court-Baron; they may be diſtinct and ſeparate in Grant as they are in their Nature; they are two Offices, and there may be two Stewards; there may be two Grants in one Deed. And as for the Action, there may be many Injuries without Force.

Mr. At-

Mr. Attorney General econtra. It is a Question whether a Subject may grant this Office in Reversion? I think not, Sir John Savage's Case in Dyer 259. afore-cited, is positive, That if it be a judicial Office it can't be granted in Reversion; and if this be but one Office, it can't be good for one Part and void for the other; it must be void for the Whole. As to the Indebitatus assumpsit, he cited F. N. B. 117. a. That if a Man enters into my Lands and receives the Profits, I shall have a Writ of Account. Bro. Tit. Accounts, 89. That Account lies not against Disseisors for Want of a Privity, which there ought to be in Law or Fact, as by Assignment, or Guardian, or on a Pretence of the Defendant to the Plaintiff's Use; but cannot be where the Defendant claims to his own Use. He urged many Things insisted on before, &c.

In Hillary Term following the Lord Scroggs delivered the Opinion of the Court.

We have considered of the Case by our selves, and discoursed it together, and are agreed on both Points. 1. If an Indebitatus assumpsit lies against a Man that receives the Profits of an Office claiming a Right, if this were now an Original Case, we are agreed it would by no Means lie; for nothing then which might not be tried by it self, but because Judgments have been upon it, and that on solemn Arguments; and many Judgments, though some passed sub silentio, yet others have been debated and settled, and particularly in the Exchequer, We are therefore willing to go the same Way, and are of an Opinion, It is better to comply with Things once used, that are not of very pernicious Consequence, than to make one Court thwart and contradict another in its Judgments: And certainly the Inconvenience is not so very great, since the Title must be given in Evidence and so is well tried. We do upon that Account judge the Action doth well lie.

2d Point, Whether the Stewardship of a Court-Leet and Court-Baron be grantable in Reversion for ninety-nine Years, if they shall so long live: We take this to be different from Sir George Reynold's Case in 9 Rep. because that was a Lease for Years absolutely, which carries it to Executors and Administrators, and so perhaps to Persons unable; for if it had

9 Co. 95. 2 Cro. 545, 657. Bridg. 6.

been to J. S. for ninety-nine Years if J. N. should so long live, that then that had been naught; but the Case in Question is not so, and therefore the Reasons of Reynold's Case do not reach this. Farther, we make a great Difference between the Place of Judges here in a Court of Record, and Stewards, who inter alia have the keeping of a Court of Record; the former must be personally attendant, the latter may exercise the Office by Deputy: So Auditor Curle's Case must be understood secundum subjectam materiam; an Auditor's Place which is an Office very great and can't be exercised by Deputy; and so it is of any Office partly judicial and partly ministerial, if personal Attendance be requisite, and where a Deputy can't be made, there the Reversion can't be granted; but this Office may, and usually is exercised by Deputy; for several Noblemen have the Stewardship of Courts belonging to several Bishops, and they exercise them by Deputy; and this was agreed upon by the whole Court. And Judgment for the Plaintiff; which was Sir Robert Howard.

Note, These reversionary Grants of Offices are of late Invention, being first introduced *Temp. Jac.* 1. and are contrary to the Rule and Reason of the Common Law. *Nemo enim potest dare id quod non habet, &c.* Bract.

Browne *versus* Averie.

(15.)

PRohibition to the Ecclesiastical Courts. Moved for a Libel there for the Words Whore and old Whore, for that in the Common Pleas they constantly grant Prohibitions in such Cases; but in the King's Bench they deny it, though an Action in London lies for those Words, because the Suit Spiritual is only pro reformatione morum, and no Damages are recoverable there. Besides, that there were two Sentences in the Suit there, viz. one in the Consistory-Court below, and another upon an Appeal before the Delegates, after which, if they have any Jurisdiction no Prohibition lies. Smith versus the Executors of Poynderil, 1 Cro. 97. After Admittance of their Jurisdiction there ought not to be a Prohibition: Besides, for

Words of Spiritual Cognizance. *Vide* 2 *Salk.* 691, 692, 693, 696, 552. 1 *Salk.* 404. Prohibitions denied.

Words of this Nature Prohibitions have been denied, as of or to a Woman, Thou art a Welch Jade, with an Averment that Jade ſignifies Whore, Prohibition denied, Pew and his Wife v. Jeffries. 1 Cro. 457. So for Cukoldy Knave, it hath been denied; and ſo for theſe Words, old Bawd, old Whore, it hath been denied; and in the principal Caſe 'twas denied upon ſolemn Debate.

(f6.)

Edgecomb *verſus* Burdell.

Avowry for the third Part of a Penny.

REplevin. There were two Tenants in Common of the Rent of a Penny; one of them avows for the third Part of a Penny, and that ut in terris diſtrictionis ipſius l'avowant oneratis & obligatis; Demurrer thereto.

2 *Jo.* 138.

'Twas argued, That it was ill for the Form, as 'tis reſolved in Dyer 257. pl. 11. for ſuch Form is always intended of a Rent-charge, and here in this Caſe he ought to have avowed upon the Tenant per le manner' and not upon the Land. And 5 Hen. 7. 11. Avowry

9 *Co.* 135. *Raym.* 257.

ought to be as upon the Matter; and in 2 Hen. 4. 24. Avowry upon Tenant for Term of Life by Leaſe from the Avowant for Rent reſerved upon the Leaſe, he ſhall not avow upon him as upon his very Tenant, but as upon his Tenant by the Manner, unleſs he were Tenant of the Fee-ſimple or Fee-tail: And ſo is 1 Inſt. 269. b. that he ought to avow upon the Leſſee, viz. ſuper materiam præd' in terris & tenementis præd' ut infra feodum & dominium ſuum.

It was urged likewiſe, that the Avowry for the third Part of a Penny is naught; for that they could not pay it, there being no ſuch Coin. Tenants in Common may and muſt join where the Rent cannot be divided or ſevered; as if it be an Horſe, Hawk, &c. and ſo is Littleton's Text expreſly, Litt. Sect. 314.

On the other Side it was urged, That for the Form, 'twas helped by their general Demurrer, the want of Form not being ſpecially aſſigned for Cauſe of Demurrer. And for the Rent, Tenants in Common may ſue ſeverally and avow ſeverally; and this Rent is not a punctum indiviſible as they would have it. 'Tis not like a Horſe; this hath four Parts, and they ought to have tendred the Farthing, and having

ſo

so done would have been well, because no less Coin, &c. Judgments have been many Times for an Halfpenny; and in the principal Case the Court were of Opinion that the Avowry was well enough; and accordingly Judgment was given for the Avowant, nisi causa, &c. *Curia.*

Dunstall *qui tam, &c. versus* Dunstall. (17.)

Fort. NB. I. 62.

ERror sur Judgment in Debt upon the Statute of Conventicles for 20 l. Errors assigned ore tenus were, 1st. 'Tis all but Recital in the Declaration by a quod cum, so that there is nothing laid positively, no Averment direct that there was a Conventicle held or kept. In Trespass quod cum is naught, though good in Case: Surely in Suit upon a Penal Law the Charge ought to be positive. *Quod cum,* 2 *Lev.* 193. *Post,* Case 413.

2dly, The Judgment is here quod defendens sit in misericordia, whereas it ought to be quod capiatur, which is also naught; as 'tis Error in a Judgment on a Scire facias on a Judgment to say, quod recuperet debitum suum prædict', whereas it ought to be, quod habeat executionem: Good Forms ought to be kept in Judgments, and this is not barely informal, for here by this Misericordia the King hath lost a Fine due to him which he would have had upon the Award of a Capiatur; and for these Causes Judgment was reversed. See now the Stat. 4, & 5 *Annæ*, cap. 16. *Capiatur.*

Prideaux *versus* Rawlins. (18.)

ERror upon a Judgment in Case upon a Promise, which was to pay the Plaintiff 10 l. if he would discharge J. S. of such a Process, and alledges in his Declaration, That he did discharge him; but shews not how, whether by Release or otherwise. Exception to the Declaration taken in this Matter now here in the Writ of Error; and for the Plaintiff in the Writ of Error was urged the Case of Leveret *v.* Renit, 2 Cro. 503. in the like Case the Declaration was held 2 *Jones* 125. Promise.

Consideration. held ill, because the Consideration was not alledged to be well performed, not shewing how: But on the other Side was alledged the Case of Langden *v.* Stole, 1 Cro. 383. which was a later Authority and directly the contrary; and therefore the Court here in the principal Case held it to be well enough, especially being after Verdict. *Curia.* Perhaps it would have been otherwise upon a Demurrer to the Declaration; saying also, That in former Times they were more nice and curious in Actions of the Case than of later Days, wherein they have grown so common. And Judgment was affirmed.

(19.) Absor *versus* French.

2 *Lev.* 234. Justification for a Way *Nelson's Lutw.* 396. TRespass. Defendant pleads, That there was a Highway from such a Place to such a Place; that the Plaintiff stopped the same so as he could not pass, and therefore went over the Plaintiff's Close, doing as little Harm as he could; and held good upon Demurrer; for if the Way be so foul as is not passable, I may then justify the going over another Man's Close next adjoining. Judgment for the Defendant.

(20.) 2 *Lev.* 220. Seaton *versus* Henson.

DEbt on a Bond; the Case was, four Persons were bound in a Bond jointly and severally, and did each of them seal and deliver the same; the Seal of one was broken off, the Obligee sues the Defendant whose Seal was still affixed to the Bond; he pleads the Special Matter and concludes non est fact'. The Question was, If the Bond hereby became void as to all the Obligors, or only to him whose Seal was torn off?

Seal debruised. Mr. Saunders urged pro defendente, That though the Obligation be joint and several, yet 'tis but one entire Debt, and therefore 'tis now become void as to

all; for otherwiſe 'twould be at the Election of the Creditor to make one free, and the other not. Mathewſon and Lydiate's Caſe, 5 Rep. 22. that was a Caſe of ſeveral Covenants which was as much as ſeveral Deeds written within one and the ſame Parchment; but in this Caſe 'tis one intire Obligation: He urged the Caſe of Bayly and Garford in March's Rep. p. 125. Caſe 205. Three bound in a Bond jointly and ſeverally, the Seal of two are eaten by the Rats and Mice, the Bond adjudged void as to the third; and this is the ſame with an Interlineation or Raſure; for now it was not the ſame as it was before, 'twas a joint as well as ſeveral Obligation; he inſiſted on 1 Inſt. 232. where a Releaſe to one Obligee may be pleaded in Bar by the other; and thereupon the Court did all incline for the Defendant, That the Bond was void as to all, it being by his own Laches: Judgment pro Defendant niſi cauſa, &c.

Vide poſt pl. 22.

See Michael's Caſe, Owen's Reports 8. Two bound, and after Iſſue joined, and before the Niſi prius, the Seal of one is broken off; agreed, that had it been before Iſſue joined it would have avoided the Bond; and ſee the Caſe of Michael and Stockwith in Dyer 59.

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Termino Hill.

30 & 31 Car. 2. B. R.

(21.)

Dominus Rex verſus Stanton.

Nuſance. Water-courſe. *Vide poſt*, Caſe 242, 255.

INformation for cutting down the Banks of the River Wye, whereby the Water-courſe was inverted; 'twas urged, That this River and the cutting of the Soil was ſettled by Act of Parliament in 5 Eliz. and that by that Statute an Action is given, it being by the Act made a private Intereſt, and therefore they would have no Information to lie; for by the Special Verdict, 'tis found to be made a navigable River by the Act, and therein are new Remedies thereby provided; ſo that they were excluſive of all others; an affirmative Statute concerning any Thing that was not at the Common Law, implies a Negative of all other Things. And in 2 Cro. 643. Caſtle's Caſe, it was reſolved, That when a Statute appoints a Penalty for any Thing that was not an Offence before, and preſcribes how it ſhall be recovered, the Party ſhall be puniſhed that way and not by Indictment; and in our Caſe by the Statute they are to have treble Damages, and therefore not to be puniſhed by Indictment or Information; for then they might be puniſhed both ways.

Statutes. Expoſition.

Mr. Pollexfen econtra pro Rege. There may be Damages to the Party grieved, and yet an Indictment too, as in Caſe of Forcible Entry, the Remedy of the Party at Common Law is not taken away by

affirmative Statutes. In Caſtle's Caſe the Fact was no Offence before the Statute, but here it was; and an Indictment and Action will lie for a Nuſance, though in a private Man's Soil, and ſo it is for a Treſpaſs vi & armis in a private Man's Houſe, both Action and Indictment lie; and Judgment for the King by the whole Court. *Curia.*

Mancheſter-College *verſus* Trafford.

(22.)
2 *Lev.* 241.

ERror on Judgment given on a Special Verdict in the Common Pleas, where the Caſe was, A. Leaſes Tithes to *B.* to have and to hold to the End and Term, and for and during the Time of twenty-one Years from the Date, fully to be compleat and ended; and it is further covenanted and agreed by and between the ſaid Parties, That the ſaid *A.* doth covenant and grant to and with the ſaid *B.* That the ſaid *B.* ſhall have the ſame for one and twenty Years more after the Expiration of the ſaid Term, and ſo from one and twenty Years until ninety-nine Years be compleat and ended. And the Queſtion was, If the firſt twenty-one Years were to be included in the ninety-nine. Leaſe of two Terms. Two Leaſes.

Mr. Serjeant Pemberton for the Plaintiff. The Intention of the Parties is here to be looked after, the Words and ſo ſeem to refer to both, even to the firſt twenty-one Years; then there is a Condition of Re-entry for Non-payment of Rent after all, which muſt be referred to all the Terms, and extend to the firſt twenty-one Years; the chief Doubt is upon the Words Coveuant and Grant, which are mentioned again after the firſt Term for twenty-one Years; but the whole Conterture ſeems to be only, that the Party ſhould have ninety-nine Years in all and no more; now if they be two Leaſes and the Clauſe of Re-entry extended to both, then the Condition will be ſuſpended during the ſaid Term.

Dolben. The Words from thence next enſuing, may be referred to the Beginning of the firſt Term, or to the End of it. *Curia.*

Lord Scroggs ſaid, That therefore it ſtanding ſo indifferent, we ought to conſtrue it moſt ſtrongly againſt the Grantor.

Wylde,

Wylde. A Leaſe of a future Entry doth not toll an Entry as the Grant of a Reverſion will; and in this Caſe 'tis only a future Intereſt, and therefore the Judgment was affirmed, and the Leaſes adjudged to be good and to be two Leaſes, and not one, viz. for twenty-one Years and for ninety-nine Years beſides.

(23.) Hinton *verſus* Wilmore.

Principal and Intereſt.

DEbt on a Bill under Seal to pay 500 l. and Intereſt until the Defendant took up the Note; the Plaintiff demanded in his Declaration the 500 l. only, Demurrer thereto, and ſaid by the Defendant's Counſel, That the Plaintiff could not ſue for the Principal without the Intereſt, and that he could not divide them; but held to be well enough, for that the direct Obligation was to pay the 500 l. And Judgment was for the Plaintiff.

(24) Scoble *verſus* Lee.

Words. Regrator.

CAſe for Words, Thou art a Regrator, and didſt regrate by ſelling at 12 *s.* when thou boughteſt at 10 *s.* but on a Motion in Arreſt of Judgment the Words were held not actionable; the Thing not being a malum in ſe, nor carrying a Scandal in it, nor importing any Crime that expoſed to Loſs of Life or Limb; and theſe Words are no more actionable than to ſay, Thou haſt built a Cottage and not laid out four Acres thereto. Judgment pro Defendant.

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Termino Paſchæ

31 Car. 2. B. R.

In the Beginning of this *Eaſter* Term, Juſtice *Wylde* was removed, and Mr. Serjeant *Pemberton* ſworn Judge in his Place at the Lord Chancellor's Houſe.

Goodwin *verſus* Browne. (25.)

CAſe for Words: You are a forſworn Blade, and you are forſworn in your Anſwer, That the Land in ſuch a Place was purchaſed in my Daughter's Name. The Queſtion is, If actionable, becauſe not alledged that the Cauſe was within the Juriſdiction of the Court where the Anſwer was?

Words. Forſworn. 1 *Danv.* 86, to 91, 136, 137. 3 *Inſt.* 166. *Nelſon's Lutw.* 410. *Curia.*

Pemberton. The Action lies though the Oath be in a Court which hath not Juriſdiction; for the Scandal is the ſame.

Jones ſaid, A Man cannot be indicted for Perjury in a Cauſe out of the Juriſdiction of the Court where the Oath is.

Juriſdiction.

Dolben. If it do appear upon Record, that 'tis out of their Juriſdiction, 'tis all coram non judice, and no Perjury lies: Sharpe's Caſe. 1 Cro. 352. proves it.

Yet at laſt the Declaration was held good, and Judgment pro Plaintiff.

(26.) Hill *verſus* Priour.

TReſpaſs. The Defendant pleads as to all except the taking one Quart of Datmeal, Not guilty, as to the reſt he juſtifies the taking thereof as Toll in Penzance Market, which hath been always paid Time out of Mind to the Duke or to the King in the Right of the Dutchy of Cornwal: The Plaintiff replies, That Queen Elizabeth, ſeized of the Manor and Markets, did by Letters Patents diſcharge the Inhabitants of Helſton in Penzance, and gave them a perpetual Exemption ab omni & omnimodo theolonio, pontagio, ſtallagio, and ſeveral other Sorts, even all which King John and King Richard II. had granted to them to be diſcharged from: Defendant rejoins, That the ſaid Toll had been always received Time out of Mind, and the Inhabitants of Helſton had conſtantly paid the ſame: Demurrer thereto, for that they ought to have rejoined ſpecially the Patent of Diſcharge, either by traverſing or avoiding it; 'twas urged, That the Replication was ill, and that the Grant of King John could not avoid the Toll, being by Preſcription in the Dukedom of Cornwal; and that the Queen's Grant reciting the former, ſhould not enlarge it.

Toll. *Vide* 2 *Jo.* 207. *Nelſon's Lutw.* 357, 835, 422, 443, 488.

Saunders on the other Side argued, That the Queen being ſeized of the Toll, and having an Intereſt therein, had Liberty to diſcharge the ſame without wronging any Perſon: He confeſſed, that the Word Stallage would not include Toll; but the Word theolonium, Toll, included Stallage, Piccage and Toll, &c. as a Genus doth its ſeveral Species.

King's Grant.

At another Day Mr. Pollexfen argued pro Plaintiff, That a Grant from the King to be quit of Toll in general is void for the Uncertainty, becauſe there are ſo many ſeveral Sorts and Kinds of it: Here are in the Patent divers Particulars mentioned, and therefore theolonium ſhall never include this ſort of Toll for a Market; for then the Queen would be deceived in her Grant, theolonium being a general Word, and ſeveral Particulars being named after it; therefore it can be only intended to be by way of Videlicet, as from all ſorts of Toll, to wit, Stallage, Piccage, &c. Beſides,

ſides, whereſoever the Words are any way ambiguous, the Conſtruction ſhall be in favour of the King: Alſo here the Queen hath a Market and Toll as Seigniorels of a Manor, which ſhe hath by Diſcent in Right of the Dutchy of Cornwal, and this is not mentioned; ſo that one Queſtion will be, If a general Grant ſhall paſs away that which ſhe hath a particular Intereſt in? She grants no more than King John had; now this particular Intereſt deſcended to her from the Duke of Cornwal: And he cited the Caſe of Torrington Market in Dyer 276, 277. and alſo the Caſe of the Dutchy of Cornwal, Dyer 268. And further urged, That the Word Theolonio will not be conſtrued for all Toll, but ſhall be conſtrued and reſtrained by the later Words, the ſeveral particular Kinds.

Mr. Saunders econtra. 'Tis a Grant of Exemption both from Toll and Pontage, &c. elſe there need not have been a Subſtantive precedent, but ab omni Pontagio would have been good; and according to the ſtrict Senſe of the Word Theolonium, (as 'tis in Raſtall's Terms of the Law) it ſignifies a particular Toll for Goods bought and ſold in a Market: There is a great Diverſity between a Grant to diſcharge a Man from paying Toll, and a Grant of Toll; for in the later there ought to be a greater Certainty and a more particular Recital, becauſe a new Thing is granted; but a Grant to be diſcharged of Toll, whether in a new Market or an old one, is all alike; and according to their Objection this could not have been good except it had taken particular Notice of all the Markets in Cornwal, and it is not a Confirmation but a Grant; for it doth not ſay the Privileges above granted, but prærecitata; it is by the Word concedimus; this is not the uſual Form and Way of Confirmation; ſhe cannot paſs the Intereſt of another, and therefore it muſt be of ſomewhat belonging to her ſelf.

Court. The Grant will not be void if we ſhould judge for the Defendant, for all the other Markets in Cornwal, will they be exempted from Toll, and this not, becauſe the Queen came to have it by the Duke of Cornwal; and King John never had it? Now the Queen's particular Intereſt is not recited at all: As to the Word Stallagium, Spelman ſaith, It includes Toll *Curia.*

for ſhewing Goods in a Market; theolonium is a barbarous Word, and derived from Τέλος and Τελῶναι, Receivers of Tribute.

Pemberton ſaid, It had been good if general without Recital, becauſe it would and ſhould have paſſed what the Queen had; but here it refers to King John, and he never had this.

Scroggs. The Queen only paſſes thoſe Tolls which belonged to the Kings of England, particularly which King John had, and not thoſe which came to her ſince, and by another Means: To which the reſt agreed, and Judgment was given for the Defendant.

(27.) *Dominus Rex verſus* Medlor.

Indictment for keeping Cockfighting.

INdictment for keeping and ſuffering the unlawful Game of Cockfighting in his Houſe per vigint' dies, for the getting Lucre and Gain to himſelf thereby: Motion in Arreſt of Judgment, That 'twas no unlawful Game; and then by the Court was remembred the Opinion of the Lord Chief Juſtice Hale, That it was a publick Nuſance, not for the unlawfulneſs of the Thing it ſelf, but for keeping Houſes to decoy idle Perſons and Apprentices, and conſequently it becomes a Means of debauching the Youth of the Nation; it muſt be done for Lucre-ſake, it muſt be often and not once only; but the Forfeiture is 40 s. a Day: And all the Court did ſeverally give their Opinions, That ſuch Cock-fighting was an unlawful Game, and prohibited by the Law: And Judgment was given pro Rege.

Curia.

(28.) Freak *verſus* Lee.

Deviſe of Legacies out of Land, and the Land to another, gives a Fee. *Vide* 2 *Lev.* 162, 249. & *poſt pl.* 35. *Poll.* 553. 2 *Jones* 113.

EJectment. Special Verdict. A. ſeized of Lands in Fee makes his Will, and therein gives his Couſin B. 20 l. to be paid out of his Lands within one Year. Item, 20 l. to, &c. to be paid within two Years after his Deceaſe, and 50 l. more to, &c. to be paid out of his Lands within two Years. Item, 50 l. to B. out of his Lands when he ſhall come of Age; then gives all his Lands to Richard generally; then 'tis

found, That there was but 10 l. per Annum in Poſſeſſion, and 30 l. per Annum in Reverſion expectant upon an Eſtate for one Life; the Teſtator dies, the eldeſt Son and Heir enters, then the Deviſee Richard dies, and his Son enters, and the Heir brings his Ejectment, & ſi, &c. The Queſtion on the Whole was, What Eſtate Richard had by this Deviſe, whether in Fee or only for Life?

It was argued for the Heir, the Leſſor of the Plaintiff, That Richard had but an Eſtate for Life, the Legacies not being to be paid by Richard, but out of the Lands, into whoſe Hand ſoever the Lands ſhould come; they agreed the Caſe of Wellock and Hammond cited in Boraſton's Caſe in 3 Rep. 20. and reported in 2 Leon. Caſe 152. but urged, that here is no Perſon limited to pay the Legacies, nor is the Non-payment made by the Will to be a Forfeiture or Determination of the Eſtate deviſed; but only in Equity, the Legacies are to be paid out of the Profits of the Land. Beſides, that here is nothing in the Will from whence it can be imagined to be the Intent of the Teſtator utterly to ouſt his Heir at Law: And the Caſe of Taylor & Ux' v. Sayer in 3 Cro. 74 was cited, as likewiſe the Caſe of Wilkinſon v. Merryland, in 1 Cro. 447, 449. where 'twas adjudged, That by a Deviſe of all his Eſtate no Fee paſſed.

Econtra, 'twas argued, That here was an 100 l. to be paid out of theſe Lands in two Years Time; and who ſhould pay them? The Deviſee could not, if he ſhould have it but for Life; for the Land is but 10 l. per Annum in Poſſeſſion; and the Deviſee may die before the two Years are out; and the Heir is not bound to pay it: In Collier's Caſe, 6 Rep. 16. where 'twas, it ſhould remain to the Brother, paying to one 20 s. and to others divers ſeveral Sums, amounting in all to 45 s. and the Land was 3 l. per Annum in Value, and adjudged a Fee-ſimple; and if it had been out of the Profits of the Land, 'twould have been otherwiſe; but as that Caſe was, and as this Caſe is, the Deviſee might pay the Legacies, and after Payment he may die before Satisfaction made to himſelf out of the Land bequeathed, unleſs a Fee be given him, and a Power to ſell.

Mr. Juſtice

Curia. Mr. Juſtice Jones. 'Tis as much and all one, as if the Deviſor had ſaid, I give my Land to the Defendant, he paying ſo much Money, and there it is a Condition; now here in this Verdict, 'tis found that the Legacies are not paid; and therefore the Condition is broken, and the Entry of the Heir is lawful.

Pemberton. A Bill in Chancery might have been brought againſt the Deviſee and Heir, and ſo the Lands would have been forced to be ſold.

Dolben. The Deviſee can have no Profit by the Deviſe, if it be but for Life; if it were out of the Profits of the Lands, Equity cannot help to a Payment; but if out of the Land, then the Land is charged, and it ſhall be ſold. The Court inclined that it was a Fee. Adjornat'.

But Quære, If it were a Condition, as Mr. Juſtice Jones would have it; for if a Fee, it ſeems to be a Condition; for otherwiſe there would be no legal Means to compel a Payment of the Legacy; all the Remedy would be in Equity: But this Point was not moved by the Counſel that argued it at this Time, the Plaintiff's Counſel thinking their Caſe well enough, in that the Deviſe could be but for Life as they argued; and the Defendant's Counſel inſiſted only how to anſwer the others Objections.

In Trinity Term following, Mr. Gould argued pro Plaintiff, and he raiſed both the Queſtions.

1. What Eſtate the Deviſee hath?

And 2dly, Whether it be in Truſt or upon Condition?

For the firſt he agreed, That according to Collier's Caſe above-cited in 6 Rep. 16. had it been a Deviſe of the Lands to Richard, paying ſo much Money, 'twould have been a Fee-ſimple; and ſaid, That he granted that to them of the other Side, and that they muſt grant unto him, that if theſe Legacies were bequeathed out of the Iſſues and Profits of the Land, it would be certainly but an Eſtate for Life; then ſuppoſing it fell out, that the Profits would not pay the Legacies in the Time, yet he took it out of the Land and out of the Profits of the Land, to be the ſame Thing; for if a Man grants the Profits the Land paſſeth; and a Levari facias is de terris, and yet reaches but the Profits, &c.

Then

Then 2dly, The Queſtion is, Whether they being to be paid within ſuch a limited Time will alter the Caſe? He urged, that it was only to be paid within ſuch a Time, if poſſible, if the caſual Profits happened to be ſufficient; and this Senſe, he argued, was both natural and reaſonable; natural becauſe 'tis a Debt charged upon the Land, and then you muſt take it as the Land will pay it; 'tis reaſonable, for the deviſing Part is giving the Legacy, the other is but a Circumſtance of Time as to the Payment, &c. Poſſibly it may happen that the Profits of the Lands may diſcharge theſe Legacies, as if the Reverſion fall preſently, for one of the fifty Pounds is not charged upon the Land, but only to be paid generally.

In Caſe of a Deviſe to J. S. paying, &c. 'tis but of late Years that that hath been reſolved a Fee-ſimple; for in the Caſe of Bacon *v.* Hill. Moore 464. the contrary is ruled, that paying, &c. ſhall not make a Fee-ſimple; but the Payment was intended for the ſame Eſtate which was deviſed; and to the ſame Purpoſe he cited the Caſe in Dyer 371. pl. 5. where the Father Tenant for Life, Remainder in Fee to the Son, the Son deviſeth the Land which he had or might have in Reverſion after the Death of his Father, to his Wife, yielding and paying during her natural Life 40 s. Rent per Annum, to the right Heirs of his Father, and dies, living the Father: 'Twas ruled, that no Eſtate paſſed by this Deviſe to the Wife but for Term of her Life, and that the Payment of the Rent ſhould not begin until the Remainder fell after the Death of the Father, inſomuch that he hath no right Heir during his Life.

And as to its being a Condition, he cited Mary Pottington's Caſe, 10 Rep. 38. and the Caſe in Dyer 163. pl. 52. where the Words were not paying but in Truſt, and for the Intents and Purpoſes following, Item, I Will, and my Will and Intent is, That out of the Rents and Profits, &c. The Judges all inclined that 'twas a Condition in that Caſe.

Mr. Saunders argued on the other Side, ſaying, That as to the firſt Point he thought they had reſolved it the laſt Term; and that the only Doubt had been about its being a Condition; For who ſhould pay thoſe Legacies, the Heir will not, for the Land

is

is given away from him: If the Deviſee be bound, 'tis more than the Profits can amount unto; therefore he muſt have a Power to ſell, and conſequently a Fee, elſe inſtead of having an Advantage, he will have a Prejudice by the Deviſe.

As for that 50 l. which is to be paid generally, he ſaid, that the Land is chargeable therewith, for the Items both before and after it are to be paid out of the Land; therefore if the Reverſion ſhould have fallen, the Profits would not pay the Legacies; and 'tis very unlikely the Teſtator ſhould ſuppoſe the Tenant for Life ſhould die within a Year after him.

As to the other Queſtion, there are no Words to make it a Condition, but 'tis left wholly to a Conſtruction upon the Deviſe; if it ſhould be a Condition, then upon the firſt Failure of the firſt Payment, the Heir might enter, and alien before the ſecond Time of Payment comes: And the Purchaſor having no Notice of the Legacies (he buying of one that is Heir at Law) would not be liable at Common Law, and ſo you muſt run into Chancery, and certainly there they would give you more Remedy againſt the Deviſee than againſt the Heir; now no Sale by the Executors or Deviſees can bar the Legatees, becauſe the Purchaſor is bound to take Notice of all the Charges and Incumbrances laid upon the Land by the Will, for they muſt come in and derive their Title by the Will; ſo that the ſame Means they have to know their Title, they have to know the Incumbrances and Charges.

Martindale *v.* Martin, Mich. 34 Eliz. in 3 Cro. 288. where a Leſſor deviſed his Land to his Leſſee for Years, for the ſame Term he had before, paying the ſame Rent at the ſame Days, and under the ſame Covenants which were in the former Leaſe: Adjudged that 'twas not a Condition, but only a Covenant, or rather a Truſt.

Curia. Lord Scroggs. Though Lands and Profits of Lands do ſometimes ſignify one and the ſame Thing, yet not always; therefore we cannot conclude from that, that 'tis out of the Profits; it is plain, he meant two Things, firſt to have ſo much Money paid, and then ſecondly, within ſuch a Time.

He ſaid, That the Contingency of Reverſions falling ſeemed to him to ſignify nothing, for the Teſtator could not be ſuppoſed to ground his Deviſe upon that Suppoſition; and ſuppoſe it ſhould have fallen within a Year after his Deceaſe, the Profits of the Land as the Verdict hath found them could not anſwer the Legacies, for that he conceived certainly that the 50 l. generally given, being ſo placed, ſhall be charged upon the Land, and therefore he thought it a Fee-ſimple.

As to the ſecond Point about the Condition, he conceived what Mr. Saunders urged to be very material, and much better for the Legatees to have the Lands liable upon a Truſt than upon a Condition, and better to ſend them to Equity againſt the Deviſee than againſt the Heir, and therefore he reſolved it to be a Fee and a Truſt.

Mr. Juſtice Jones. Though the Circumſtances of Time ſhall not avoid the Subſtance of a Deed or Will, yet being a Circumſtance, it may and doth explain the Intention of that Subſtance: As to the ſecond Queſtion, He ſaid he did ſomewhat doubt, for that 'twas moſt certain, that Words which ſeem to be of leſs Compulſion than thoſe in the Will in Queſtion, will ſerve to make a Condition in a Will, which will not in a Grant; 'tis in vain to cite Caſes, none can deny it. Crickmere's Caſe, 1 Inſt. 236. the ſame in 1 Roll. Abr. 410. is in this Point expreſs. A Man ſeized of Lands hath Iſſue two Daughters, A. and B. and deviſeth all his Lands to A. and her Heirs, to pay unto B. a Sum of Money at a certain Day and Place; the Money was not paid; and held, that theſe Words, to pay, &c. did in a Will amount to a Condition; and the Reaſon was, That the Land was deviſed to A. for that Purpoſe; otherwiſe the Party to whom the Money was appointed to be paid, would be remedileſs: Mr. Saunders's Objection is equally againſt that Caſe as againſt this, there 'tis ſaid, She had no Remedy at Law, and we are not to judge of Remedies in Equity.

Dolben. That it is a Fee-ſimple none can doubt, and why it ſhould be a Condition, I can ſee no Reaſon: The Caſe in 1 Inſt. I have ſeen and read, and in Caſe there were any Remedy at Law againſt the Heir

after his Entry, I ſhould agree thereto; but there is none, in Equity there is; and ſince the Legatees are forced thither both againſt the Heir and Deviſee, they may expect more Favour in Chancery againſt the Deviſee than againſt the Heir.

Pemberton. 'Tis clear the Teſtator intended a Fee-ſimple ſhould paſs, for every Deviſe is preſumed in Kindneſs to and for the Advantage of the Deviſee. For the other Queſtions there is no great Reaſon in the Will to ſhew that he intended the Eſtate ſhould be conditional; 'tis plain, we do and may take Notice of Equities, for that the Chancery is a Court known and ſettled by the Common Law; and though in a ſtrict Senſe it be diſtinguiſhed from the Common Law which we uſe here in theſe Courts, yet 'tis the Common Law that allows of ſuch Proceedings by Equity; therefore he conceived it a Truſt.

Lord Scroggs. The Reaſon why ſuch ſmall Matters ſhall make a Condition in a Will, is in Favour of Legatees; and there is much more Favour allowed them in this Conſtruction than in the other. Judgment pro Defendant.

Sed vide Poll. 559. That Judgment was pro quer' &c. which ſeems a Miſtake.

(29.) Collop *verſus* Brandon.

Plea in Abatement to a *Scire facias* on a Judgment. *Nelſon's Lutw.* 402, to 404.

SCire facias to receive a Judgment: Defendant pleads a Plea in Abatement, viz. That there was another Terre-tenant of Part of the Lands of the Conuſor at the Time of the Writ purchaſed: Plaintiff replies, That there was no ſuch Terre-tenant, & de hoc ponit ſe ſuper patriam; the Defendant demurs.

Serjeant Weſton comes and moves for final and peremptory Judgment; and makes a Diverſity between a Scire facias and an Original in this Caſe, and cites Weſtm. 2. cap. 45. in 2 Inſt. 470. In a Scire facias by that Statute, there ſhall not be that Solemnity of Proceeding as in other Proceſs; nor ſhall the Tenant or Defendant, though a Stranger to the Recovery, plead any Thing that proveth it erroneous or voidable; but only ſuch Matter as proveth it void, or is a bar of Execution. He likewiſe cited 43 Edw. 3.

13. and they have here pleaded a dilatory Plea, and we have tendred an Iſſue to them; it ſhall therefore be peremptory to them; he urged Long Quinto 5 Edw. 4. 139. that a Plea after the laſt Continuance was peremptory. Stoner *v.* Gibſon, Hob. 81.

Saunders econtra. Where the County is not troubled with the Trial of an Iſſue upon a Plea in Abatement, but there is a Demurrer; there the Defendant may always plead over: He agreed it true, where there is a Plea in Bar and afterwards a Plea in Abatement, there 'tis peremptory becauſe it is a Waiver of the Plea in Bar, otherwiſe not.

Mr. Juſtice Jones remembred them of the Caſe of Moor and Hawkins in Yelv. 181. where Entry into Parcel after Ejectment brought, was pleaded at the Aſſizes and held allowable, and to be peremptory, but this Caſe differed from that. *Curia.*

Scroggs ſaid, 'Twould be inconvenient to make this Plea peremptory, for perhaps the Defendant thought J. S. to be a Terre-tenant, but afterwards found him to be only Leſſee for Years; and Saunders averred, and in Truth 'tis ſo, that the Plea in Abatement in Long quinto Edw. 4. 139. was at the Niſi prius before the Juſtices there after a former Plea in Bar; and ſo it differs from the Caſe at Bar: And all the Court inclined to give Judgment that the Defendant ſhould anſwer over, but upon Weſton's Importunity they did concede to adviſe, and look into the Books he had cited. Reſpondeas ouſter.

See the whole Pleading in this Cauſe in Theſaur. Brevium, 282, 283.

Staples *verſus* Mellor.

(30.) Preſcription for Common pleaded to an Avowry. 1 *Saund.* 343. 2 *Saund.* 45. 1 *Lev.* 196. 2 *Lev.* 2. 1 246. 1 *Mod.* 74. 1 *Vent.* 163, 383. *V. poſt, pl.* 62.

REplevin. Defendant avows for Damage-feaſant: Plaintiff replies, That they and their Predeceſſors, and all the Burgeſſes, &c. have Time out of Mind had Common in ſuch, &c.

Mr. Serjeant Weſton moves in Arreſt of Judgment (there having been a Verdict pro Plaintiff) That their Preſcription is only for Cattle belonging to the Corporation, &c. and takes a Diverſity between Intereſts and Caſements; for Intereſts are ſo applied

See *Nelſon's Lutw.* 431, 473.

to the Body politick, that none can make Uſe of them but in their politick Capacity; and if the Plaintiffs would have pleaded well, they ſhould have preſcribed as particular Tenants to the Mayor and Burgeſſes.

Mr. Holt econtra. This very Caſe in totidem verbis hath been adjudged in my Lord Hale's Time, between Walker and Miller, where the Defendant juſtified in the Bailiff and Burgeſſes quouſque, &c. and then in the Mayor, Aldermen and Burgeſſes, for all Cattle levant and couchant infra burgum, and that the Defendant is a Burgher: Demurrer thereto, becauſe ſaid not ſeized of any Land to which it might be Appurtenant; and held they might have Common Appurtenant to the Borough by Preſcription; the Caſe is reported in Sid. 462. and 2 Keb. 658. and the common Courſe is to lay it in this Manner, there is no other Way to alledge it but this; the Entries are all ſo, and when it is ſaid for their Cattle it is meant diſtributively; and not as Mr. Serjeant Weſton would have it, only for the Cattle which do belong to the Corporation in general: If a Grant be to a Corporation of all its Freemen to be exempt from Toll or the like, and any of them be diſtrained, he may bring an Action in his own Name.

It was afterwards moved again by Weſton, who argued, That this being a Common Appurtenant, for all Beaſts infra burgum was naught, becauſe a Common appurtenant can't be preſcribed for Beaſts levant in alieno ſolo, and cited Roll. Tit. Common, 403. and he inſiſted upon the Caſe 15 Edw. 4. 29 & 30. where ſuch a Preſcription is held naught, but agreed by Coke, that it may good for the Mayor, &c. to preſcribe for themſelves and all the Inhabitants, becauſe they ſhall be ſuppoſed Tenants at Will; but to lay it in the Burgeſſes for all themſelves is ſurely naught.

Mr. Holt econtra. The conſtant Rule is, that which may be ſuppoſed to have a reaſonable Commencement, for ſuch a Thing a Preſcription may be. 'Tis no new Thing for a Corporation to have an Eſtate, and the Members to have an Intereſt. In Waller and Hanker's Caſe of the Corporation of Derby, in Mod. Rep. 6. 'tis held, A Corporation may preſcribe to have a Common ſans Number in groſs, and Hoskins *v.* Robins in eodem lib. 73. by way of Cuſtom 'tis held good; we

have not laid it a Common appendant, for then we muſt have laid it in a Vill, and that they were ſeized of all the Vill, but 'tis laid as a Common ſans Number, and a Corporation may have that: Upon a like Reaſon a Common may be ſtinted for particular Beaſts, And why may not a Corporation have it? Why may not a Man have an Intereſt of Common for his own proper Beaſts in the Right of the Corporation of which he is a Member? He may be ſued by his proper Name and the Corporation both, if he commit a Treſpaſs by Command of the Corporation, 9 Hen. 6. 36. in Miller and Spakeman's Caſe in Sid. 461. Mich. 21 Car. 2. 'tis held, That if it had been ſaid for Beaſts levant and couchant within the Vill, it would have been good.

Weſton granted that a perſonal Preſcription may be ſo as Mr. Holt would have it, but not a real Preſcription; for there the Inhabitants have too weak an Eſtate.

And Juſtice Dolben ſaid, There may be a Preſcription for Common by way of Cuſtom, as there is in York and Glouceſter, where they have by Uſage a Common in Lands adjoining for half the Year, even from Michaelmas to Lady-day. *Curia.*

Pemberton. The only Difference between you two, ſeems to be whether this ought to be laid by way of Cuſtom or by way of Preſcription.

Scroggs. The pure Nature of a Common in groſs, is for all his Cattle throughout the whole Kingdom, ſo they be Cattle of the Owner of the Common; this at the Bar in a ſtrict Senſe can be neither in Groſs nor Appendant nor Appurtenant, but is as Shack Common, and Common in ſome Places in Lincolnſhire, and many others that can never come under either of theſe three; and I ſee no Reaſon why it is not a Common in groſs when it is for all my Cattle levant and couchant, on ſuch and ſuch Acres of my Land as well as for all my Cattle throughout the Kingdom: The Jury find a Right of Common, and becauſe ſtrictly it cannot be preſcribed for, as one of the three ſorts as Mr. Littleton mentions, ſhall a Man therefore looſe his Common? Though we are to follow the Rules of Law, yet Reaſon is to be obſerved too.

Pemberton.

Pemberton. There may be other Commons that are not preciſely of theſe three, and it's fit there ſhould be a Remedy where it is clear that a Man hath a Right; to which the reſt agreed, and Judgment was given for the Plaintiff, viz. That ſuch a Common is well enough alledged by Preſcription as well as by Uſage and Cuſtom.

(31.) Butler *verſus* Waterhouſe.

Fraudulent Settlement.

Vide 2 *Lev.* 146. 3 *Keb.* 840, 858.

TRover and Converſion. Special Verdict finds a Deed of Settlement for eighty Years, with ſeveral other Limitations, with a Proviſo of Revocation as to all the Uſes ſave the eighty Years, and afterwards a Sale to the Defendant without Revocation or Conſent of Truſtees; concluding, That if by the 27 Eliz. it be void againſt the Defendant as fraudulent, then they find for the Plaintiff. The Queſtion was, If the Court could judge of Fraud? And 'twas argued that they could not judge it fraudulent, unleſs the Jury had found it ſo. On the other Side 'twas urged, That the Court might judge of the Proviſo in the Stat. 27 Eliz. and if this Settlement were void within that Act by Reaſon of the Power of Revocation, there was cited Standon and Bullock's Caſe, 3 Rep. 82. Brownlowe 190. Bridgman 23. Lane 22. Adjornat'.

(32.) Morris *verſus* Wilford.

2 *Lev.* 214. 3 *Keb.* 814, 840. Releaſe reciting a particular Purpoſe.

COvenant to ſave the Plaintiff harmleſs as to the perſonal Eſtate of Sterling, the Teſtator, in Truſt for his Wife and Children: Breach aſſigned in a Suit againſt the Plaintiff and putting him to Charge: Defendant pleads a Releaſe of all the Plaintiff's Right and Demand of, in and to the perſonal Eſtate of, &c. according to the Cuſtom of London, or otherwiſe: The Plaintiff demurs becauſe the Releaſe is particular, and the Breach was in the Teſtator's Life-time, and the Damage was uncertain and therefore could not be releaſed; the Executors could make no Compoſition for it till 'twas determined,

termined, for that would be a Devaſtavit in them; as was Norden and Levett's Caſe, 26 Car. 2. which is reported in 3 Keb. 691. a Releaſe of all Demands bars not a Covenant. 25 Aſſize 7. And that Caſe hath been taken for Law all along. 1 Inſt. 185, 265. Hore's Caſe, 5 Rep. Releaſe of Demands in a perſonal Eſtate, no Bar to Action for Battery before; and notwithſtanding a Releaſe of all Demands in or to the Goods and perſonal Eſtate to the Executor, yet may they be taken in Execution for Damages recovered after on Breach of Covenant before; and this is no more than a Releaſe of Right to Land by Debtee to Debtor, or his Heir. On the other Side it was urged he can never have Execution againſt his own Releaſe, here is nothing liable but only the perſonal Eſtate; and therefore that is diſcharged by the Releaſe. Adjornat'. 3 *Lev.* 273, 274.

Dominus Rex verſus Carpenter. (33.)

INformation in Nature of a Quo Warranto againſt the Defendant, who as a Farmer of the City of London, claimed ſeveral Duties belonging to the Water-bailage, as 2 d. a Chaldron for Coals imported. *London* Water-bailage.

And held per cur', That a Verdict upon the Quo Warranto upon the meer Right concludes the King; but on an Information it does not. Held, That the Mayor hath been Time out of Mind Conſervator of the Thames: Held and reſolved, That if an Indictment be againſt a Man for not repairing a publick Bridge which he is bound to ratione tenuræ, that in ſuch Caſe Perſons of the Country are allowed to be Witneſſes, becauſe none elſe can teſtify, &c. In Caſe of Action on the Statute of Hue and Cry againſt an Hundred, none of the Hundredors can be Witneſſes, becauſe any one of them is liable to pay the Debt after Judgment againſt the Hundred. A Parishioner cannot be a Witneſs in Caſe of a Queſtion, Whether Land be within the Parish or not: but a Legatee of a ſmall Sum of Money hath ſometimes been allowed a Witneſs to prove a Will. In Caſe of Queſtion about a Toll for a Ferry, Watermen have been allowed Witneſſes, and Freemen here in this Caſe of London, where 'tis hard to have other Witneſſes, and 'tis very improbable *Curia.* Witneſſes Evidence.

improbable they ſhould be biaſſed in their ſwearing, it being ſo very little or nothing to their Advantage: And all the Judges (except Mr. Juſtice Jones) held that Freemen might be Witneſſes.

'Twas held likewiſe by the Court, That if a Witneſs ſwear in a Cauſe and die, that in another Trial one that heard him may upon Oath repeat his Teſtimony, and it ſhall be good Evidence. But a Verdict between private Perſons may not be read as any Evidence againſt the King in an Information upon a Quo Warranto.

Mr. Serjeant Maynard urged, that in 34 Edw. 1. the City complained of bringing in Coals as a Nuſance; and therefore their Duty could not be before that Time. In Richard II. they have a Grant from the King for a Half-penny a Chaldron of Coals, and therefore it cannot be a Preſcription; 'Tis moſt plain Sea-Coals have not been burned Time out of Mind here in London, and therefore no Preſcription; and among their Duties they claim for Hops which have been not Time out of Mind; however upon Evidence of conſtant Payment, and their ancient Tables of Duties for Goods imported into London, Verdict was pro Defendant.

(34.)

Anonymus.

Will probate.

Held per Cur' upon Motion, That to prove a Will in Common Form, and to have a Probate under Seal, a Writ of Mandamus lies. Fitzh. 202. Style 22. Dunkomb's Caſe here in this Court in the Lord Hale's Time; and a Mandamus was accordingly granted in this Caſe.

Republication.

In a Trial at the Bar upon an Iſſue directed out of Chancery, concerning the Republication of a Will, It was reſolved by all the Court, that theſe Words, My Will in the Hands of J. S. ſhall ſtand, amounts to a good Republication.

Lee *verſus* Stephens *& al'*. (35.)

EJectment, Speeial Verdict. A. ſeized of the Lands in Queſtion deviſes the ſame to James conditionally, That he ſhall allow unto my Son Nicholas, Meat, Drink, Apparel, Waſhing and Lodging during his Natural Life; and the ſole Queſtion was, If James took a Fee-ſimple by this Deviſe, or only an Eſtate for his own Life?

Vide 2 *Jo.* 107. 2 *Lev.* 162. *& ante pl.* 28. A Fee deviſed by Implication.

Mr. Pollexfen urged Collier's Caſe, 6 Rep. 16. that where the Money is to be paid annually and not as a Sum in groſs, but ſuch which may ariſe out of the Profits, that then the Deviſee hath only for Life; here the Teſtator intended it ſhould be out of the Profits that Nicholas ſhould be maintained: But Pemberton took a Diverſity in thoſe Caſes cited by Mr. Pollexfen, That there the Money to be paid was ſomewhat granted and ſecured before the Death of the Teſtator, and where the Charge is laid by the Teſtator on the Deviſee. Saunders argued that it is a Fee-ſimple, for Nicholas hath no manner of Proviſion elſe, but only an Allowance of Meat and Drink; 'tis plain the Teſtator deſigned the Maintenance to be for Nicholas's own Life, and not that when James ſhould die, Nicholas ſhould ſtarve: And therefore tis clear that James muſt have a larger Eſtate than for his own Life, for otherwiſe inſtead of having a Benefit by this Will, he will be damaged and prejudiced by it if he ſhould perform the Teſtator's Will, viz. provide for Nicholas during his Life; if this were not a Fee, Nicholas muſt faſt, and have no Lodging till the Quarter's Rent be paid, or the Profits come in, and ſo there would be a Charge without any Profit: For ſuppoſe James ſhould maintain Nicholas for half a Year and then die, he would have loſt by the Will, Nicholas muſt be provided for daily; now Profits iſſue not daily out of the Land. For which Reaſons it was adjudged by all the Court that James had a Fee-ſimple. Judgment.

(36.) **Baſtard *verſus* Stockwell.**

2 *Lev.* 209. *& poſt.*

Eccleſiaſtical Juriſdiction.

See 1 *Lev.* 164. 2 *Lev.* 162, 187, 217, 209, 222.

MR. Pollexfen moved for a Prohibition; le caſe fuit tiel, *J. S.* libels in the Conſiſtory-Court of the Biſhop of Exeter, againſt C. and D. two Siſters to B. and Executors of his laſt Will, for a Legacy left, &c. They pleaded no Aſſets, and made a Special Allegation that A. their Father was poſſeſſed of ſeveral long Leaſes in ſeveral Tenements, and deviſeth them to B. his Son; but if he ſhould die unmarried, or if he ſhould marry and die without Iſſue, then C. and D. his two Daughters to have thoſe Leaſes, &c. and that B. dying without Iſſue, they claim as Deviſees of A. their Father, and not as Executors of B. their Brother; and the Court there over-ruled this Plea of theirs; and a Prohibition was granted becauſe 'tis Matter of Title with which they ought not to meddle: And held per Cur', That none can ſue in the Eccleſiaſtical Court for a Legacy ariſing out of Land, becauſe not within their Conuſance.

(37.) **Pollard *verſus* Evans *& al'*.**

Conſpiracy. *Vide Raym.* 118, 176. 1 *Vent.* 12, 18, 234. 1 *Saund.* 229, 230.

CAſe in Nature of a Conſpiracy: Declaration, That they by Combination and Conſpiracy, &c. did procure the Plaintiff to be cauſeleſly indicted of, &c. The Defendants are all found Not guilty, except Evans, againſt whom there was a Verdict; and moved in Arreſt of Judgment; That upon this Record it appears the Declaration is falſe; that a Conſpiracy can't be in or by one, but between two at the leaſt, and F. N. B. was cited for it; but anſwered and reſolved per Cur', That in a Writ of Conſpiracy 'tis true, but in an Action of the Caſe 'tis otherwiſe; and tho' this be like the other, yet 'tis not the ſame. And this Diverſity hath been often allowed in this Court; as likewiſe that in a Writ of Conſpiracy, it muſt be alledged that the Party was legitimo modo acquietatus inde, and ſhew that 'twas a fair Acquittal; but this Action will lie for ſuch a malicious Proſecution

where the Jury find an Ignoramus &c. Judgment pro Plaintiff.

Gardiner *verſus* Dudgate. (38.)

DEbt on a Sheriff's Bond; upon Oyer of the Condition, it appeared to be for an Appearance in the King's Bench Court, in Treſpaſs of 100 l. whereas the Writ was de placito tranſgreſſionis ac etiam billæ de debito 100 l. Argued by Mr. Pollexfen, That this Bond was not warranted by the Statute of Hen. 6. upon Account of this Variance. Sheriff's Bond for Appearance. *Vide* 2 *Lev.* 123, 177, 180.

Holt. The Appearance, and the Day, and the Court, and the Party at whoſe Suit, &c. are all well expreſſed as they ſhould be; and the ac etiam is not of the Subſtance of the Writ, but only declares the Intention how he will declare, and is grounded on the 13 Car. 2.

Mr. Juſtice Dolben cited the Caſe of Villers and Haſtings, Mich. 9. Jac. B. R. 2 Cro. where Exception was taken becauſe the Obligation was for 100 l. for that a Bond of 40 l. was ſufficient to excuſe the Sheriff from Eſcape; but held well enough, though a greater Sum; and the Writ was de placito debiti 100 l. and the Condition of the Sheriff's Bond was only debiti, and yet held good: The Deſign of the Statute was to prevent Extortion and Oppreſſion; and here, in this Court, Hill. 27 & 28 Car. 2. a Bond was adjudged good where the Condition was to appear coram Juſticiariis de Banco, where it ſhould have been coram Domino Rege: Reſolved that the Bail-bond was good in the principal Caſe, and Judgment pro Plaintiff. Agreed per Cur', That the Bail-bond to the Sheriff is to make him appear according to the Writ, and not according to the Condition of the Bond; and the Bail are by Vertue of the Bond engaged that he ſhall anſwer according to this Writ, if it require Special Bail, either to render him or to give Special Bail; which if he doth not, they will not file his Appearance but ſue the Bail-bond, and the Bail can never plead to it quod comperuit ad diem; for it is no Appearance till filed: This is the conſtant Practice of the Court, every Bail ought at his Peril to ſee and take Bail Bond.

Notice of the Writ before he be bound, and thereby he may know what it is he engages for; if he do otherwiſe, he is bound to do he knows not what, and he muſt ſuffer for it.

(39.) 2 *Lev.* 250.

Hill *verſus* Boomer.

Prieſt or no Prieſt, how triable. See 3 *Keb.* 567, 827. 1 *Vent.* 309, 319. 2 *Lev.* 199.

PRohibition; Declaration therein and Plea to it, and Demurrer thereon. The Caſe was, A Perſon is cited to appear before his Ordinary for that he being a Layman took a Benefice; he declares that he was a Prieſt ordained, &c. Plea, That he was not a Prieſt at the Time of the Admiſſion, Inſtitution, &c. & hoc parat' eſt verificare: The Plaintiff replies, That he was a Prieſt ordained according to, &c. at the Time of his Preſentation, Admiſſion, Inſtitution and Induction at Boſton in the County of Cornwal, & hoc parat' eſt, &c. The Queſtion was, Whether Prieſt or no Prieſt ſhould be tried per pais? By 14 Car. 2. cap. 4. none is capable of any Benefice unleſs ordained; and urged, that the Plea is good becauſe it ſhall be tried per pais, it being a Special Iſſue it ought to be ſo, 9 H. 7. 2. and the Defendant could not pray a Writ to the Biſhop, becauſe the Plaintiff in his Declaration lays not by what Biſhop, but only that he was a Prieſt: In Raſtal's Entries 220. b. 9 Edw. 4. 24. Yelv. 213. Litt. Sect. 200. in pleading a Bargain and Sale he ought to ſay in what Court, otherwiſe 'twould be infinite Labour to ſearch all Courts. So in our Caſe, to ſend Writs to all the Biſhops. Dyer 233. Hob. 148. This purely belongs to the Biſhop, and there is no way to get him out but by Deprivation firſt.

Mr. Pollexfen econtra. This is within the Juriſdiction; the Act of Uniformity ſaith the Church is void and not full, except a Prieſt ordained, &c. and therefore it may be tried at Common Law, as it may by Ejectment; if he could be turned out only by Deprivation, then the Eccleſiaſtical Court might have Conuſance, now they are not Judges of the Fact at all; they would have Prieſt or no Prieſt tried by the Country, and Admiſſion and Inſtitution tried by the Biſhop's Certificate; if they had made the Time to be the ſole Point in Iſſue, as by granting that he

was a Prieſt, but that he was not ſo when preſented, admitted, &c. but here are ſeveral Things heaped together in their Iſſue; moſt of which do belong to the Eccleſiaſtical Courts; (Quære Mr. *Pollexfen's* Arguments for I could not well hear it)

Lord Scroggs. Time here is meerly a Circumſtance in the Iſſue tendred.

Jones. The Trial here in this Caſe ought to be by the Biſhop; where a Time is only a Circumſtance of a Spiritual Act, there the whole Matter ought to be tried by the Biſhop; but if the Spiritual Act is admitted as Poſſeſſion, &c. and the Time only is queſtioned, this ſhall be tried per pais.

Mr. Juſtice Pemberton. The ſole Queſtion ſeems to me in this Caſe to be, Whether or no the Living or Benefice be abſolutely void by the Statute? If it be void by the Statute, and ſo abſolutely void by the Statute, that there needs no Deprivation to make it ſo, then no Conſultation ought to go; for they have nothing to do therewith, being an abſolute Avoidance by Statute: At the Common Law the Suit ought to be there for Deprivation quia mere laicus; and we could not prohibit it becauſe it muſt be avoided by Deprivation.

Dolben. The Words are ſtrong to make it void; No Perſon who is not already in Orders by Epiſcopal Ordination, or ſhall not be before, *&c.* ſhall hold and enjoy, *&c.* but ſhall be diſabled and *ipſo facto* deprived of the ſame, and the ſame to be void as if he were dead, *&c.*

In Hillary Term afterwards, 'twas argued again by Mr. Holt, That a Conſultation ought to go, for the Matter is nothing but this, a Rector is libell'd in the Court-Chriſtian to be deprived, becauſe not a Prieſt at the Time of his Admiſſion, &c. the Spiritual Court had Conuſance of this Matter before any Act of Parliament; for to be a Prieſt was a neceſſary Qualification by the Common Law as to that Matter. Dyer 292. and the Act of Uniformity is no more but an Affirmance of the Common Law, and doth not make it ipſo facto void, but only voidable by Deprivation, which only can be in the Spiritual Court; now here are no Words that take away their Juriſdiction,

diction; it ſays a Man ſhall be incapable, but it doth not ſay his Admiſſion, Inſtitution and Induction ſhall be void; now this Incapacity makes it only void at Common Law; ſuch as is the Diſability of a Perſon attaint or alien, he may purchaſe but can't retain; this doth not make the Acceptance void, ſo that Deprivation ſeems to be ſtill neceſſary: Beſides, the Ordinary, quatenus Ordinary, hath Juriſdiction of the Cauſe; then admitting the Act makes it void ipſo facto as in Caſe of Simony, yet this doth not take away the Eccleſiaſtical Juriſdiction, for they may examine Simony, and though as to Simony there be a Clauſe that ſaves their Juriſdiction as to puniſhing the Party, yet doubtleſs they might do it had there been no ſuch Clauſe. 3 Cro. 685, & 788. As to the Pleading, we have pleaded that he was no Prieſt at the Time, and concluded with the Country; though Prieſt or no Prieſt be triable only by Certificate, yet the Time is triable per pais. 1 Hen. 7. 2. But if that be naught, how comes their Prohibition to be good? For that he was a Prieſt is their Suggeſtion.

Mr. Saunders econtra. If a Special Iſſue be joined, the Biſhop ſhall try Prieſt or no Prieſt; but if the Patron had preſented, as doubtleſs he might, and the Biſhop had refuſed, a Quare Impedit might have been brought; or if after Admiſſion, Inſtitution and Induction an Ejectment had been brought, it ſhould be tried per pais; the Biſhop can't originally convene this Cauſe before him, though he ſhall try it when the King's Courts write to him, as in Caſe of general Baſtardy, Loyalty of Marriage, &c.

Curia. Lord Scroggs. This Thing is triable only per pais when 'tis a collateral Matter; at Common Law a meer laicus was uncapable. By a Statute in Queen Elizabeth's Time, a Deacon was made capable, by this Statute none but a Prieſt is ſo, and ſo 'tis reſtorative of the Common Law, ſo that regularly and properly this is of Spiritual Conuſance; I take the Statute to be declarative of the Common Law, and the Benefice not to be ipſo facto void, but that there muſt be a Deprivation; and 'tis not like the Caſe of a Woman preſented, for that is a perfect Nullity; certainly there cannot be any Lapſe, for when a mere Laicus is in, the Church is full, and the Patron muſt have

Notice,

Notice, and Notice is concluſive; and how can the Biſhop give Notice if he may not examine? And he cannot examine unleſs he can cite the Party.

Jones. I think it void; and the Statute not declarative of the Common Law, for the Words are (as I take them) and ſhall be void as if he were actually dead.

Dolben. I think the Act only reſtorative of the Common Law: And ſuppoſe there be another Remedy, ſhall this take it out of the Ordinary's Hands? They do uſually deprive for Simony; nay, in Green's Caſe 6 Rep. they deprive for not reading the thirty-nine Articles, and yet that was no Offence before the Statute. A Conſultation was afterwards granted per tout le Court, and Jones declared himſelf clearly of Opinion with the others, though he doubted upon the ſecond Argument.

Roch *verſus* Cooling. (40.)

Debt on Judgment ſtayed, pending Error.

UPon Motion here to ſtay Proceeding in an Action of Debt brought on a Judgment here, whereupon a Writ of Error was ſued and pending in the Exchequer-Chamber, and granted, all Things being ordered to ſtay till the Writ of Error be determined; although held by the Court (as it hath been ſeveral Times here reſolved) that ſuch Writ of Error is no Plea to ſuch Action brought on the ſame Judgment whereof the Error is ſued; and ſaid per Court, That ſuch Actions of Debt are not to be countenanced, unleſs there be good and ſufficient Cauſe why they ſhould not take the ordinary Courſe of ſuing out Execution on their principal Judgment.

Dingley *verſus* Halſe. (41.)

Vide 1 *Vent.* 351, 355. Debt on Judgment *v.* an Executor allowed.

DEbt *v.* an Executor, no Aſſets pleaded, Aſſets found, and upon a Devaſtavit returned, there is Judgment againſt him de bonis propriis: The Plaintiff brings a new Action of Debt upon that Judgment, reciting all that Matter, and laid in the debet and detinet;

1 *Vent.* 355. *acc. ſed ib.* 321, 315, *&c.* *Vide* 2 *Lev.* 122, 145, 189, 209. 1 *Lev.* 147, 255, 256.

detinet: Reſolved, That the Defendant is bound to put in Special Bail though an Executor; becauſe there might have iſſued a Fieri facias de bonis propriis; and though this be a new way to recite, &c. yet the Court knew no Inconvenience in it, it being now become the Executor's own Debt: The ſole Reaſon why Executors are not bound to put in Special Bail, is becauſe non conſtat whether they have Aſſets or no; but the Jury having found Aſſets, they ought to put in Special Bail to an Action of Debt on ſuch Judgment. Ruled per tout le Court.

(42.)

Anger *verſus* Brookhen.

Damages. 2 *Jones* 128. *V. poſt pl.* 82. 1 *Vent.* 337, 348, 362. *Raym.* 387, 388. *Sed Relv.* 107, *contr.* 1 *Saund.* 285. 2 *Saund.* 171, 379.

ERror. The Verdict was dampna 100 l. & pro miſis & Cuſtagiis 6 d. The Judgment was quod recuperet dampna ſua præd' ad Cent' libras & pro increment' 10 l. Error aſſigned that there was no Judgment for the 6 d. And the Court inclined that ad cent' libras ſhould be Surpluſage, and then dampna ſua prædict' would be well enough; if it had been recuperet dampna ſua præd' ad valentiam 10 l. the ad valentiam ſhould be void, and the Plaintiff ſhould recover all. In Osborne's Caſe 'twas only dampna ſua without præd', and ſo it could not have Reference to any Certainty, if you leave out thoſe Words ad, &c.

Osborne's Caſe.

Note, That Caſe of Osborn, which was Mich. 30 Car. 2. in B. R. Osborn *v.* Exton. Error upon a Judgment in the King's Bench in Ireland, where the Jury gave 10 l. 6 d. for Damages and Coſts, and the Judgment entred was quod recuperet Dampna ſua per Juratores aſſeſſ. ad valorem 10 l. and no Notice was taken of the 6 d. nor was that Part releaſed; and 'twas held naught, becauſe Damages and Coſts are all Dampna, and both included by that Word in the Judgment. And Judgment was reverſed (niſi)

Webb's Caſe.

Note alſo the Caſe of Webb *v.* Webb, Mich. 29 Car. 2. in B. R. where Error was brought upon a Judgment by Default in Caſe in C. B. and the Error aſſigned here was, That the Jurors upon the Writ of Inquiry had aſſeſſed more Damages than were laid in the Declaration; and the Judgment being Quod recuperet Dampna ſua prædict' per Juratores prædict' aſſeſſ. &c. was naught:

naught: And for this Error the Judgment was accordingly reverſed.

But obſerve, That in this laſt Caſe the Plaintiff might between the Verdict and the Judgment, have releaſed the Surpluſage of the Damages here meant, and ſuch Releaſe being entred upon the Record, would have rendred the Judgment well enough. Vide Yelv. 45.

Whitfield *verſus* How.

(43.)

Ejectment. The Caſe was, A. ſeized in Fee covenants to ſtand ſeized to the Uſe of himſelf in Tail, and after the Determination of that Eſtate to the Uſe of him for forty Years, &c. reſerving a Power by Proviſo, That it ſhould and might be lawful to and for him and his Aſſignees of that Term, to make Leaſes for twenty-one Years or three Lives; A. aſſigns the Term, the Executor of the Aſſignee aſſigns over to J. S. the Queſtion was, If J. S. being the Aſſignee of the Executor of the Aſſignee, if he may make Leaſes for twenty-one Years by Vertue of that Power?

1 *Vent.* 338, 339. 2 *Jo.* 110. Power coupled with an Intereſt, *&c. Vide* 2 *Jo.* 110, *&* 205. 2 *Mod.* 317.

Saunders argued, That he cannot take Advantage of the Power reſerved; the Power ought to be conſtrued ſtrictly, and ſhall only go to the immediate Aſſignees of A. To run to the Aſſignee of the Executor of an Aſſignee is further then an Aſſignment of Commiſſioners of Bankrupts can go.

Dolben. That is a Queſtion, and that alſo differs from our Caſe here; for they are not Aſſignees of the Party, but do come in, in the Poſt.

Jones. This Power is not bound up to the Perſons, but is annexed to the Term: and Agreed by Jones, Dolben, and Mr. Juſtice Pemberton, (Scroggs abſent) That the Aſſigns of the Executor of the Aſſignee had Power to make Leaſes, and Judgment ordered accordingly, niſi, &c.

However the next Term 'twas argued again by Mr. Saunders, who urged, That at Common Law a Covenant could not be aſſigned over for Default of

Privity: If a Man deviſes a Term to his Executor, and that he ſhall have Power to make Leaſes, and dies, the Executor proves the Will and makes another Executor and dies; the ſecond Executor is Executor to the firſt Teſtator, and ſhall have the Benefit of the Term; yet he conceived it clear by the Books that he ſhould not have this Power of making Leaſes.

He alſo cited this Caſe, If a Man have Power to revoke by the Conſent of four, and one of them dies, that now the Party could never revoke; and he urged that the Caſe in Queſtion was much ſtronger; and ſhould theſe remote Aſſignees have the Power, then he that comes to have the Term upon a Fieri facias, or if he were outlawed, and the King ſhould grant over his Term or keep it himſelf, all theſe might make Leaſes.

Then he urged an Exception, which was, That he inter alia dimiſit the five Acres reddend' & ſolvend' proinde, &c. now that alia may be ſomewhat out of which a Rent is not iſſuable, or if it be rentable, then the Rent muſt be apportioned; and ſo not the ancient accuſtomed Rent reſerved for the five Acres according to the Power.

Pollexfen argued on the other Side, That Mr. Saunders's Conſtruction might hold true in Caſe of naked Powers, but this was not ſo, 'tis coupled with an Intereſt and annexed to the Term; and upon the account of it the Term was more valuable.

And as to the Exception, he ſaid, That in one Leaſe may be ſeveral Reddendums, and when a Man ſaith that inter alia dimiſit five Acres reddend' proinde, &c. the Proinde ſhall relate to the five Acres only.

And Mr. Juſtice Jones held this the ſtrongeſt Objection, for that proinde was the moſt common and general Word uſed in Leaſes for all the Things demiſed, but as to the other they all continued of the ſame Opinion; — and as to the proinde,

Mr. Juſtice Pemberton remembred Saunders of the Caſe where were Manors, Lands, and a Fair letten without a Rent reſerved generally, and 'twas conſtrued to ariſe out of the Manors and Lands, and not out of the Fair at all: And afterwards that Exception being waved, the Counſel referred the Conſtruction

ſtruction of the Power to the Court as the Thing they inſiſted on; and about the End of the Term the Court delivered their Opinions again;

That the Aſſignee of the Executor of the firſt Aſſignee was within the Benefit of the Proviſo, and had the Power to make Leaſes, ſaying withal, That a Deviſee was an Aſſignee in Law.

Osbourne *verſus* Rey.

(44.)
1 *Ven.* 337.

CAſe for ſlanderous Words, pro eo that the Defendant did go to a Juſtice, &c. and ſaid, I have loſt ſome Sheep, and do ſuſpect *quendam Johannem Oſbourne* (innuendo the Plaintiff) and thereupon procured præd' Johannem arreſtari, &c. Words.

After Verdict, 'twas moved in Arreſt of Judgment, That the Innuendo is not a ſufficient Averment that the Plaintiff was the Party which the Defendant meant by one John Osbourne, and no Colloquium or Communication laid, &c. ſo to ſay, Thy Landlord is a Thief, Action will not lie unleſs the Plaintiff aver, That he at the Time of ſpeaking of the Words was Landlord to the Party to whom the Words were ſpoken. Forſworn before ſuch a Judge; not actionable without laying of what Court, and averring a Cauſe to be depending, &c.

And Judgment was ſtayed in the principal Caſe.

Hull *verſus* How.

(45.)

ERror on a Judgment in Common Pleas by Default, and Writ of Enquiry; Exception taken that there were but eleven Jurymen mentioned, and allowed Error; the ſame would it be if twelve were writ in Figures. Judgment erroneous.

(46.) *Dominus Rex verſus* ——

Fine on Convictions.

REſolved, That in Caſe a Man comes hither to receive his Fine upon a Conviction of a Nuſance, he ought not to be fined before he removes it, and hath ſued out a Conſtare facias to the Sheriff, and obtains a conſtat returned that it is removed: But in Caſe of repairing an Highway a Certificate from two Juſtices of the Peace next adjoining that the Way is repaired, and Affidavit that they ſigned that Certificate produced is ſufficient.

Outlawries reverſed. *Vide poſt, pl.* 52.

This Term ſeveral Outlawries reverſed for want of *pro Com'*, or *nec eorum aliquis* or *per judicium coronator'*.

And the like in *Eaſter* Term following, for that in the Exigent the Year of our Lord was writ in Figures, and not in Words at length. *Dominus Rex verſus* Read.

D E

DE
Termino Trin.
31 Car. 2. B. R.

Adams *verſus* Staley. (47.)

DEBT upon an Award, and Verdict pro Plaintiff. The Award was laid to be, That the Defendant ſhould pay 30 l. to the Plaintiff out of the Eſtate of Wolley, and the Submiſſion was general of all Controverſies, and no mention made therein of the Submiſſion of Wolley, or any Thing that the Defendant had of his Eſtate, nor any Thing of his being liable to pay Debts of Wolley's; ſo that the Award exceeds the Submiſſion: A Man may ſubmit for another's Debt, but then it muſt be mentioned in the Submiſſion; the Court here is to be Judge of the Record before them, and not upon Affidavits that more was ſubmitted than is expreſſed: Judgment was arreſted.

Vide 2 *Lev.* 235. 1 *Danv.* 545. Award exceeds Submiſſion. 1 *Lev.* 58. 1 *Saund.* 33. 2 *Saund.* 292. 3 *Lev.* 188.

Harvey *verſus* Harvey. (48.)

WRit of Error on a Judgment in a Writ of Dower in the Common Pleas, where the Tenant pleads an Eſtate for Life ſettled on the Demandant, and avers it was in Lieu of Dower, viz. for her Jointure: Upon this Iſſue was joined, and at the Day in Bank the Tenant made Default, upon that

Error on a Judgment in Dower. *poſt*, Caſe 161. *Nelſon's Lutw.* 226, 230, 232.

that iſſues a Petit cape, which being returned Judgment was given for the Demandant, and a Writ of Seiſin; then a Writ of Enquiry was to the Damages; common Error aſſigned.

Mr. Pollexfen urged ſeveral Errors ore tenus.

1. Want of an Original and Want of Continuances.

2. The Demand of Lands lying in three Hills, and the Venire but out of one.

3. The Petit cape is of a third Part of a Manor, and as to the other Lands a third Part of a Moiety, and the Return is virtute brevis Domini Regis mihi direct' cepi in manus tertiam partem Tenement' infra ſpecificat'.

4. That the Demand is of thirty Acres of Paſture, and ſo is the Judgment and Writ of Seiſin, but the Writ of Enquiry for Damages is only for twenty Acres.

Mr. Saunders econtra. 1. The Original is certified by Certiorari, but no Continuances; if they had inſiſted upon it that there were no Continuances, we could have got them certified too; the Continuances are with the Lord Chief Juſtice, and we needed no Certiorari to him, becauſe all that was ſtood on was want of an Original.

2. As to the Venire facias, though it be not helped by the Statute of Jeofails, becauſe no Verdict in the Caſe, and here Judgment was by Default; yet it being ſo, at Common Law, whether the Venire be right, or whether the Jury came out of a right Hill, is not material, when there is no Verdict in the Caſe, and Judgment is by Default as here.

3. As to the Petit cape, and a Return of the third Part of the Lands infra ſpecificat'; the Petit cape is to ſeize a third Part of ſome, and a third Part of the Moiety of other Lands, and to ſummon the Tenant to hear Judgment; ſuppoſe the Sheriff ſhould ſeize the whole Lands and ſummon the Tenant, the Tenant is well ſummoned, and upon that Judgment is given; certainly it ſhall not make the Whole naught becauſe he doth more than he ought.

4. As to the Writ of Enquiry that is only for Damages ſince the Death of the Husband; and notwithſtanding that, the Judgment is good as to the Dower,

and will not be affected with any Thing about Damages.

Lord Chief Juſtice. If a Man do demand a third Part of the Moiety of a Rent, and the Return is of a third Part of the whole Rent, and Judgment is of a third Part of a Moiety, and ſo purſuant to the Præcipe, we ſhall intend that he did ſeize a third Part as it was demanded; beſides the Return is tertiam partem tenementor' infra ſpecificat', and not ſpecificatorum, and therefore it ſhall refer to partem and not to tenementor'; and then it is well enough, tertiam partem tenementorum infra ſpecificatam.

Then Mr. Juſtice Pemberton. As to the Venire, There is no Miſ-trial in the Caſe, and ſo cannot be Error when Judgment is by Default, and it is not a void, but a voidable Venire, and therefore may well enough make a good Continuance; and it will be and can be avoided only when there is a miſ-trial, which is not in our Caſe. Adjornat'.

Stead *verſus* Berier. (49.)

Deviſe to *R.* the Son, *R.* the Grandſon takes. 3 *Keb.* 845. 1 *Mod. Rep.* 267. Sir *T. Jo.* 135. *Poll.* 546. 1 *Ven.* 341. 2 *Mod.* 313. *Raym.* 408. 2 *Lev.* 243.

WRit of Error to reverſe a Judgment in Ejectment in Com. Banco, when Scroggs was puiſne Judge there, and againſt his then Opinion; le Caſe fuit tiel, A Grandfather hath a Son called Robert, who hath a Son called Robert; the Grandfather makes a Will, and gives his Eſtate to his Son Robert, who dies in his Life-time, and then makes a Codicil, and thereby gives two Cloſes to his Couſin Judith, and the ſame Day he republiſheth his Will, & animo teſtandi, declares that Robert the Grandſon ſhould have the Lands which he had given to his Son Robert.

The Queſtion was, Whether the Grandſon ſhould take by this Deviſe?

Serjeant Baldwyn, pro Quer' en breve de Error.

'Tis againſt the expreſs Words of the Statute of Hen. 8. that Lands ſhould paſs by Deviſe without Will in Writing, a Parol Declaration may deſtroy or make void a Will, but can never ſupport or ſet up a Will; if it be good it muſt work a great deal of Violence: firſt It muſt amount to a new Will in writing, and ſecondly, It muſt take away the Effect of the Codicil

Codicil which was made the ſame Day: He cited Brett and Ridgden's Caſe, Plowd. 345. where 'twas adjudged, That the Deviſee dying in the Life of the Teſtator, the Teſtator's ſaying that the Deviſee's Son ſhould have the Land, would not paſs to him the ſame, unleſs reduced into Writing; and as for the Caſe of Fuller & Fuller, Moore 453. fol. 353. where the Caſe was, A. deviſed his Land to his Son Richard in Tail, Remainder to Edward, Richard dying in the Life-time of A. A. ſays, I Will that my Will ſtand good to the Children of *R.* as if he had over-lived me: Wherefore he ſaid, There being a Remainder over 'twas not the Teſtator's Intention he ſhould take till the Eſtate-Tail ſpent; but in the Caſe in Queſtion, 'tis a Fee, and the Will is become void, and cannot be ſet up by a new Declaration: And as for Beckford and Pancourt's Caſe, Moore, Caſe 519. 3 Cro. 493. there the Words of the Will paſſed all the Lands he had in D. and the Lands newly purchaſed were in D. alſo, and ſo the new Publication is ſufficient, but here it is not ſo; here muſt be a new Eſtate to the Grandſon new created.

Mr. Sollicitor General. The ſole Queſtion is, If this be a good Republication? But if there be ſufficient operative Words in a Man's Will written, the Land ſhall paſs; an Averment that will ſtand with the Will ſhall be received, and ſo is Cheyney's Caſe, 5 Rep. now to republiſh is all one with an original Deviſe; and the ſame Thing as if it had been writ over again, and here is no other Perſon of this Denomination but the Grandſon; had no Son Robert been alive at the making of the Will, then Robert the Plaintiff ſhould have taken as Son, as reputed ſo and by that Name.

Lord Scroggs continued in the ſame Opinion as when in the Common Pleas, ſaying, That the Strength of the Objection lies in the Likeneſs of the Name; whereas had the Grandſon been named Thomas, he could never have taken, and can any one make two diſtinct Perſons to be but one; the very Parol Declaration makes them two as really they were: It is apparent that the Son intended in the Will was one, and the Perſon named in the Decla-

ration is another; I will allow such a Republication good in the Case where a Man gives all his Lands to J. S. then he purchaseth other Lands, and then republisheth his Will, because there if he should write it over again he should use the same Words; but here he would have expressed it otherwise if he had wrote it a-new; he would never have said these Words, I give to my Grandson what his Father should have had.

Jones agreed with the Chief Justice.

Dolben disagreed, and conceived it of as much Force as an original Devise, and compared it to the Case where a Man deviseth to his Son John, and he dies, then he hath another Son Christened by the Name of John, and republishes his Will, & animo testandi declares that his younger Son John should take.

Mr. J. Pemberton agreed with the other two, that it could never go to the Grandson; when we say generally Son we do not mean Grandson, though it be improperly sometimes so called; a Son-in-Law is called Son: But suppose a Man hath a Son called Robert, and deviseth Lands to his Son Robert, then he marries another Wife who hath a Son called Robert, which is also commonly called Son to the second Husband; his own Son Robert dies, now would any Man imagine that the Republication of this should pass any Thing to the Son-in-law? Suppose the Son had been alive, would those Words have passed to the Grandson? And who can tell me any Reason why the Grandson should have it the sooner because the Father is dead rather than when he is alive, since a Revocation is more easy than a transferring; at this rate of Construction I may write a Man in my Will forty Years before he is born; and I take a great Diversity between Averments and Parol Declarations to explain the original Will.

In Hillary Term following it was argued again by Mr. Saunders, That though the Grandson may in some Sense be called Son, yet he is not so in the Testator's Sense in this Will; for there he gives his Land to his Son Robert, and to his Grandson Robert a personal Legacy.

Mr. Holt econtra, argued, That a bare Republication of his Will after the Death of his Son would have done it; and admitting that would not, yet a Republication ea intentione would have done it as here it is: If this were an original Devise this Person might now take by this Description as a Son, though in Truth he be a Grandson; now a Republication hath the same Effect and Operation as the making of a new Will, not from the first Time, but from the Republication, and it shall have and bear the Sense it is capable of at the Time of being republished. He quoted 1 Roll. Tit. Devise, 618. pl. 9. but that which he most relied on was 3 & 4 P. & M. Dyer 143. Trevilian's Case.

Then he argued that this was ea intentione, to that very Purpose, that Robert the Grandson might take, though an Averment can't be out of a Will, yet the Exposition of a dubious Sentence, may be from some Matter collateral.

Scroggs said, I am not a Whit stirred by what has been offered.

And the next Term the Opinion of the Court was delivered, That the Grandson could not take by that Devise; and the Judgment was reversed per tout le Court nisi Dolben.

Dominus Rex versus Sanchar.

To restore an Alderman. *Vide* 1 *Vent.* 19, 77, 82, 302, 342. *post*, Case 55, 184. 6 *Mod.* 18. 5 *Mod.* 404, 452.

MAndamus to restore to the Office of Alderman in Norwich; the Case appeared on the Return to be, That an Alderman being sworn truly to execute the Office, and having taken the Alderman's Oath, did not take the Oath required for Renunciation of the Solemn League and Covenant required by the Act of, &c. for Corporations. till some Time afterwards, viz. four Years; whereupon were two Questions,

1. Whether the Oath ought to be tendred to him?

Argued by Mr. Holt for the Alderman, That it ought, otherwise there is no Default in the Officer, and he was a good Officer till Refusal of those Oaths; it may be taken at another Time after the Oath for the Execution of the Office; for the Words of the Act

are, In Default of ſuch, then by two Juſtices of the Peace of the Town, Borough, &c. if ſuch be, or otherwiſe by two Juſtices of the County: All which implies it may be taken at different Times.

2. Another Queſtion is, If it be void, or only voidable? The Statute of Fines and that of Biſhops Leaſes are conſtrued to be only voidable, though the Words be void: If an Officer after Election refuſes the Oath for due Adminiſtration, &c. if he will take it before any Advantage is taken thereof 'tis well enough; and why ſhould it not be ſo in this Caſe too?

Mr. Attorney General econtra. Tender muſt be conſtrued of the ſame Signification with Adminiſter, which is joined therewith as exegetical one of another; then the Clauſe that comes after it clears all; That for Default thereof the Office ſhall be void; if 'twere otherwiſe 'twould lie in the Breaſt of the Corporation to tender it or not, and the Juſtices cannot be ſuppoſed ſo eaſily to know it, and there muſt firſt be Complaint made; the not taking it by the Party is a Refuſal in Law; a Breach of one Point of the Act of Parliament is a Breach of the Whole; and this would be to repeal the Act, or at leaſt to fruſtrate its Deſign.

And as to the other Queſtion, the Act doth not ſay that the Place ſhall be void, for then perhaps it ought to be avoided in a judicial Way; but 'tis ſaid, That the Election and Choice ſhall be void; ſo that there is nothing appears whereby he is brought into the Place: If there ſhould be a Tender requiſite there is no Penalty inflicted upon any for default of Tendring, when the Act ſaith, It ſhall be by him that adminiſters the Oath of Office, and in Default of ſuch, by two Juſtices; it is to be intended all at one Time.

Lord Scroggs. This is an Act of Parliament for our Safety, and therefore to be favoured; the firſt Point is of great Weight, and therefore to be conſidered of: But as to the other Point he and all the other Judges agreed, That the Office would be void, and not only and barely voidable. Adjournatur.

Note, Here was mentioned a Caſe ruled laſt *Hillary* Term, between *Every* and *Norris*, viz.

(51.) Every *verſus* Norris.

Officer not taking the Oaths.

Vide Raym. 212. 2*Saund.* 289. *Nelſon's Lutw.* 54.

ERror on a Judgment in Debt on a Bond: Error aſſigned was upon the 13 Car. 2. That at the Return of the Venire the Sheriff had not taken the Oaths and Sacrament; and reſolved, That the Office ſhould not be void as to all theſe Duties which he perform'd as Sheriff; for that it would be of ill Conſequence if all Judgments depending on his Proceſs ſhould be reverſed for that Default; and ſaid, That the Statute did intend only he ſhould take them when tender'd, and be required to do ſo; and that 'twas the Neglect of thoſe whoſe Duty 'twas to tender; and therefore not Error aſſignable, and the Judgment was affirmed.

Quære tamen as to the Tender.

(52.) Buckley *verſus* Wilkinſon.

Outlawry reverſed, the Party to be reſtored. *Vide* 2 *Jo.* 101. *Nelſon's Lutw.* 15.

WRit of Error to reverſe an Outlawry after Judgment, and a Scire facias thereon: The Queſtion was, Whether the Plaintiff ſhould be alſo reſtored to the Money levied on the Outlawry after its Reverſal? And argued he ſhould, the original Judgment being reverſed; for the Outlawry is at the Suit of the Party. Yelv. 19. 3 Cro. 910. and what the Sheriff ſeizeth is to the Party's Uſe. 9 H. 6. 20. If it be in a perſonal Action he forfeits only the Profit of the Lands and not the Lands themſelves; Statham's Abr. Outlawry 6. 3 Cro. 278. 1 And. 277. The King's Intereſt is but conditional, and if the Outlawry be reverſed the Goods ſhall be reſtored alſo, and then the Party is ſet where he was, as if the Outlawry had never been: But the contrary was urged to be the Practice of the Exchequer, to which the Court agreed, and there was Brownl. Tit. Reſtitution 18. cited.

Vide les Authorities cité en cet Caſe.

Abrahal *verſus* Bubb. (53.)

UPon Bill in Chancery, Reſolved by the Lord Chancellor Finch, That Tenant in Tail after Poſſibility of Iſſue extinct, ſhall be reſtrained in Equity from doing Waſte, by Injunction, &c. becauſe that Court would never ſee a Man diſinherited; and he took a Diverſity between where a Man is not puniſhable for Waſte, and where a Man hath Right to do Waſte. Vide Uvedal's Caſe, 24 Car. 1. ruled by the Lord Rolle, and cited by him to warrant that Diſtinction.

Tenant *apres* Poſſibility reſtrained from Waſte.

Impe *verſus* Pitt. (54.)

DEbt ſur Obligation, The Condition whereof was, To leave and bequeath unto the Obligee the third Part of his Eſtate, &c. the Obligor joins him with two others as Executor; the Obligee dies inteſtate, the Adminiſtrator of the Obligee brings an Action on that Bond: The Queſtion was, Whether that were a Performance of the Condition?

Another Queſtion was, Whether an Adminiſtrator (pendente lite about a Will) be liable to an Action? And clearly agreed by all that he is liable, for that he is fully an Adminiſtrator for the Time, &c.

Action *v.* Adminiſtrator *pendente lite.*

Dominus Rex verſus Majorem & Balliv. de Cambr. (55.)

MAndamus at the Suit of Mr. Peachy of the Inner-Temple, to be reſtored to the Office of Recorder of that Town, (which was by Charter *ad terminum vitæ* or *ad voluntatem*) And they return, That they had Power to chuſe a Recorder by Charter ad terminum vitæ, or ad libitum; and that ſuch a Day they did chuſe him ad libitum, and that ſuch a Day they did remove him. Mr. Wallop took Exceptions to the Return, That they did mention no Cauſe.

Mandamus to reſtore. *Vide* 5 *Mod.* 404, 452. 6 *Mod.* 18. *ante* Caſe 50. 1 *Vent.* 342.

The

The Court reſolved they need not, if they had ſuch a Cuſtom; they choſe him habend' officium ad libitum eorum, &c. Here was cited Blagrave's Caſe, the Steward of Reading; and in Warren's Caſe, 2 Cro. 'tis ſaid, That where ſuch a Cuſtom is, a Counſel, &c. might be amoved without ſhewing any Cauſe for it, but not an Alderman or Freeman; and reſolved, That the Cauſe returned was ſufficient. And Lord Chief Juſtice ſaid, Mr. Peachy knew this Cuſtom well enough, and might have choſen whether he would accept it or not.

Another Exception urged was, That it is not alledged how he was removed; and a Corporation could do nothing but by Deed or Charter: Anſwered, That he was removed as he was choſen, and in Caſe he had been choſen by Charter he muſt have been removed ſo. And the Return and Cauſe were allowed.

(56.)

Wortley *verſus* Watkinſon.

3 *Keb.* 660. 2 *Jo.* 118. 2 *Lev.* 254. Marriages inceſtuous. *Vide Vaugh.* 206, to 250. and 302, to 329. 2 *Vent.* 9. 2 *Lev.* 254, 255. 3 *Lev.* 364. 4 *Leon.* 16. *Nelſon's Lutw.* 341.

PRohibition; upon a Demurrer to the Declaration the Queſtion was this, Whether the Marriage of a Man with his Wife's Siſter's Daughter be inceſtuous?

Mr. Saunders againſt the Marriage and for the Conſultation. The only Ground of Scruple is Parſon's Caſe. 1 Inſt. 235. which ſays, a Prohibition was granted; but in that Caſe there was Rule for Conſultation in Hillary Term two Years after that; and certainly it is within the 32 Hen. 8. and for Man's Caſe in Moore 907. 'tis only ſaid a Prohibition went; but in 3 Cro. 228. the ſame Caſe is reported, and there indeed a Prohibition went: But afterwards a Conſultation was awarded on ſtrong Debate; and ſo was the Caſe of Remington cited in Bartlett and Howard's Caſe in Hob. 181. and this was 16 Jac. after Parſon's Caſe, 1 Roll. 832. 2 Inſt. 683. A Woman may not marry with her Aunt's Huſband, and that Caſe of Parſons my Lord Coke reports it not as his own Opinion, for it is otherwiſe in 2 Inſt.

Vide Noy.

Mr. Wallop. The Marriage of a Man's own Niece is not within the expreſs Words of the Levitical Law, nor is there any expreſs Caſe in our Law that

makes a Man's Marriage with his own Niece to be incestuous. Sir John Allington's Case tempore Car. 1. He was fined 1200 l. by the High Commissioners, but a Prohibition went; it must therefore be Parity of Reason that must govern this Case, for it is not expressly within the Levitical Degrees.

Now for Parity of Reason I do not wholly disallow it, but offer these Things concerning it: It is very difficult, if not impossible, to assign the true Reason of the Levitical Prohibition; now Parity of Reason is a relative Thing, therefore certainly we cannot give an Account of that that is not expressed. Grotius de Jure Belli ac Pacis lib. 2. Par. 12. Selden de Jure Naturali & gent' lib. 5. p. 594. those that think they have found out the true Reason do not agree; so Dr. Hammond in his sixth Quære concerning Marriage, p. 38. They argue, That they are in equal Degree from 18 Levit. 17. Selden Uxor Hebraica. 25. they take non causa pro causa: They make Propinquity the only formalis ratio of all those Prohibitions; but this can never be maintained, for consider we the first Marriage and we shall find Eve was to Adam as his Daughter. Selden 581.

Now if in some Cases Marriages are unlawful, and others more unlawful, and both alike near, and others that are nearer, and yet lawful, then there must be some other Cause for the Prohibition besides Propinquity of Blood; now Cousin-Germans are not prohibited: Then they go upon another Error in that they argue from the right Line to the collateral, and that is apparent in Harrison's Case, Vaugh. 242. 'tis true, that Case is only about the Degrees of Consanguinity, but yet Affinity also doth work more strongly in the lineal than in the collateral Line; and that which is strong in the Case of the right Line (as Selden afore-cited, cap. 10. p. 593, 594.) will not work at all in the collateral Line; there is no express absolute Prohibition with the Wife's Kindred but in the right Line; another Reason they draw from those Words in Leviticus: For she is thy near Kinswoman; and therefore Propinquity must be the formal Cause.

Now

Now by Propinquity they must either mean the immediate next of Kin, which cannot be according to them, for then we should not be at all prohibited; or else it must be in the largest Degree and Sense, and then all Kindred whatsoever would be prohibited; it must be therefore Kinswoman propinqua in the right Line, i. e. such as may come to be thy Mother or Guardian; the right formal Reason of those Prohibitions is, because the Order of Nature would be inverted; and there is a great Diversity always taken between marrying my Aunt and my Niece, and between marrying of my Wife's Aunt and her Niece. Episcopus theolog'. Inst. 37. and the Thalmudists do not hold a Marriage between the Uncle and his Niece to be incestuous. Selden 523.

As to the Dilemma in the Case between Wood and Hill, Vaughan's Rep. 312, 313. I answer, That though it was not utterly unlawful, yet because it is next to it, and looks like it, on that Account the Church might prohibit such to be Priests, and for this Reason did the Apostles prohibit Widows that had two Husbands, &c. This Diversity between a Niece and an Aunt doth well answer Dr. Hammond, p. 34. Superior Relations and Vice-Parents may not marry, because they cannot both command and be commanded; so that one that may be a Mother, cannot marry a Nephew's Son, but yet a Vice-Parent may marry a Niece's Daughter, because he may command both ways.

In the collateral Line only the superior Relations, cannot decently make Wives, but in the lineal they may.

For Authorities 'tis observable, That the Romans who were most strict about Marriages, and therefore did not only forbid the marrying one's Niece, but the Marriage of Cousin-Germans; and so they went further than we, yet did not prohibit the Marriage of a Wife's Sister's Daughter. Beza Franciscus Connenus, Valerius Maximus cap. 4. de Hominibus, gives an Instance of Sicilia and Misylus.

He also cited 1 Inst. 235. the Case of Parsons, and though as the Lord Vaughan says 248. there was a Consultation granted, yet that was for a Defect in the Declaration, and so was that of Mann's Case;

the Case of Hobart is very dark, the Words are (though there were Cause) 'tis nothing but a Supposition, Words spoken obiter. There is against me the 99 Canon, 1603, but I must submit to you, Whether a Canon passed in the Convocation, and that's confirmed by the King only, and not by Act of Parliament, whether such a Canon binds all the King's Subjects? No Canon can prescribe against a Statute, and therefore cannot make any Thing within the Degrees there prohibited, that was not so before; for all Marriages not within the Levitical Degrees, &c. are by that Statute of Hen. 8. allowed good.

Lord Scroggs said, That he was apt to think really, those Prohibitions were partly for avoiding Confusions, which would ensue by having Persons both commanding and commanded, and had it not been for those, how could any Law have determined the Course of Descents, and who should be Heir and inherit? *Curia.*

Jones. I think that Propinquity was the Reason of Prohibitions, and to me it seems clear, we ought to reverence and follow the Judgment of the Church of England; and all along since the making of the Statute of Hen. 8. the Ecclesiastical Courts have put this up in their Tables amongst the incestuous Marriages, and have always reckoned it such; and all our Doctors and Divines do account it such.

Dolben. It being of great Weight, deserves to be spoken to again; but I wonder our Clergymen do not get an Act of Parliament for the settling those Marriages, since doubtless they may so easily have it; I know several Marriages of the like Kind that are not yet in Question.

Mr. J. Pemberton. It is fit I think to be spoken to before all the Judges; and (Mr. Wallop) your Cause depends wholly on this, That the Consultations were granted for Defects of or in the Declarations, for those Precedents will be our Guide; however, I shall be cautious in the Matter, for that there are three or four Children in this Marriage which must be all bastardized if this Marriage be incestuous; but this is not of Record, and this is not a single Case, but a general Question of great Consequence,

and fit to be argued again. Adjournat'. But ſee 2 *Jones* 118. That a Conſultation was afterwards awarded.

Dominus Rex verſus Surrey-*Juſtices.*

(57.)

MAndamus moved for by Sir Francis Winnington, to the Juſtices of the Peace of Surrey; commanding them to diſcharge a Priſoner upon the late Act for Relief of the poor Priſoners, or elſe to return the Cauſe why not: The Caſe was thus, The Party was in Cuſtody the 29th of May, but the Debts were contracted afterwards; all the Creditors were ſummoned, and the Juſtices doubtful, though the Words of the Statute are plain, For all Debts contracted before the Diſcharge, *&c.*

Poor Priſoners.

He urged, That this Court hath Juriſdiction over all inferior Courts, and cited Bagg's Caſe, 11 Rep. 'Tis the Happineſs of the Subject that there is a King's Bench; no Caſe ſo final there but you may have an Inſpection over them, you have and may again command them to do Juſtice, Mandamus's have gone to prohibit them, &c. you command the Ordinary to grant Letters of Adminiſtration, &c. You have ſent Mandamus's to them about Baſtard-Children, be it what it will, if Matter of Government they are under your Power; and whereſoever a Man hath a Right (as the Party hath here upon ſwearing, &c. and ſummoning his Creditors, to be diſcharged) the Law gives him a Remedy.

Curia. Scroggs. If it had been a total Omiſſion of their Duty, as Refuſal to do their Duty, to conſider the Petition or examine the Matter or the like, we might command them by a Mandamus: But when they have examined the Matter, 'tis hard for us to enjoin them one way or other, they having the Conuſance of the Thing. And of this Opinion was Mr. Juſtice Pemberton: But however Scroggs ſaid, We may ſend a Mandamus to them to diſcharge the Priſoner or return the Cauſe, and ſo we may after leave it to them when 'tis before us. And a Mandamus was granted accordingly by Scroggs, Jones, and Dolben, Mr. Juſtice Pemberton nolente: But always ſince the Court hath refuſed to intermeddle in that Act, and put them to their Audita Querela.

Preſcott

Preſcott *verſus* Pemberton. (58.)

Covenant. Breach. *poſt*, Caſe 60. 1 *Salk.* 139, 140. 5 *Mod.* 133. *Nelſon's Lutw.* 95, 193.

COvenant that the Plaintiff ſhould have the firſt Quarter's Rent due at Lady-day, after the Date of the Deed; Breach aſſigned that the Defendant obſtruxit & impedivit eum (the Plaintiff) a recipiendo, &c.

Mr. Darnell moves in Arreſt of Judgment, Becauſe the Plaintiff ſhews not how he was hindred, and cited 1 Bulſt. 139. 3 Cro. 121. Pen and Clover.

Sir C. Levinz econtra. I conſeſs non permiſit is too general, for there is no Act done; but by impedivit & obſtruxit, 'tis clear ſome Act was done to the Plaintiff's Hindrance, which Act the Defendant beſt knows himſelf. Adjournat'.

Dominus Rex verſus Bettſworth. (59.)

1 *Vent.* 344.

Refuſing the Office of Conſtable. 1 *Salk.* 175, 380. 1 *Mod.* 13. 5 *Mod.* 96, 179, 6 *Mod.* 96. 2 *Saund.* 290.

INdictment for refuſing the Office of High Conſtable, Special Verdict, the Queſtion was, Whether a Tenant in ancient Demeſne may be made Conſtable of a Hundred which reaches further than the Demeſnes? He is freed from Payment of Toll, from Payment of Wages to Knights of Parliament, from being upon Juries, &c. and the Reaſon of all this is, becauſe he ſhall not be drawn out of the ancient Domaines, where his Employment was by the ancient Law ſuppoſed to be; the ſame Reaſon is here: If he had other Lands, 'tis true, he were liable.

Juſtice Jones. I wonder the Privilege was never claimed; now he is Tenant of the King's, and this is an Office for the King, and it therefore may be a Queſtion; this hath been a Doubt in our Books, Whether he may not be a Juryman in perſonal Actions? And ſaid, none can be Tenant for Years and hold in Demeſne. Adjournat'.

In Michaelmas Term following it was argued again by Mr. Saunders, who added to what he urged before, That a Tenant in ancient Demeſne is diſcharged from Toll, Pontage, and Murage. F. N. B. 168. Regiſter 181. there is a Writ to diſcharge him from At-

tending the Sheriff's Turn or Leet out of the Manor; now a Constable was an Officer at the Common Law, and eligible at the Court-Leet, and in many Places they are chosen still there. 2 Inst. 443. they are not to appear in any other Turn out of the Manor. Serving on Juries is a necessary Part of Justice for the Trial of Mens Causes, and yet they are exempted.

Mr. Pollexfen econtra. We must understand the 2d Inst. and its general Words there secundum subjectam materiam, i. e. serving on Juries, not that they are exempt from obeying the Summons and Warrants of the Sessions, and they must appear there in Cases of the Peace: I agree to those Privileges, but those are not personal, they are only annexed to the Land; for Merchandizes and Things that arise out of the Land they shall pay Toll; That of Juries is only that those Lands which they held in ancient Demesne shall not render them liable, but if they have other Lands they may, F. N. B. 166. As to this of Constable, we have no Case about it, but I think the strongest Authority to be that High Constables were not before 13 Edw. 1. the Statute of Winchester; there are different Opinions about it, but the Statute seems express, and my Lord Coke in his 4th Inst. and Mr. Lambard, an ancient Writer, are of his Opinion; and this Office is nothing relating to the Land, for a Man may be an Idoneus homo for this Office, if he have Substance in other Things than Land.

Curia. Court. The being of a Jury hath not such immediate relation to Justice as the Office of a Constable, which is for the Preservation of the Peace and Government; this being an High Constable is by the Statute, and certainly a personal Thing, and ancient Demesne exempts not from it; Tenants in ancient Demesne may be, and in some Places are Churchwardens and Overseers for the Poor; now in such Cases their Attendance is necessary at the Sessions and out of the Manor.

Scroggs. The first Reason and Ground of their Privileges was the manuring the King's Land, and were always supposed to have no other Estate: In truth anciently they were nothing but the King's Ploughmen. Judgment pro Rege.

4 Anonymus

Anonymus. (60.)

COvenant for Payment of Rent which was reſerved, payable at the two moſt uſual Feaſts of the Year, St. John the Baptiſt and Chriſtmas; or within fourteen Days after; the firſt Payment to be at Chriſtmas next after the Date. Breach aſſigned in Non-payment of the Rent at Chriſtmas firſt, and took no Notice of the fourteenth Day after; and upon Demurrer 'twas urged, That the fourteen Days after ſhould not refer to the firſt Payment at Chriſtmas, but that it was to be abſolutely on Chriſtmas Day, but held by the Court, That the Defendant had fourteen Days after the firſt Chriſtmas as well as any other to pay his Rent in; and therefore Judgment was given pro Defendant. Covenant. Breach. *Ante* Caſe 58.

Bonfield *verſus* Linton. (61.)

CAſe for Words, He is as very a Rogue as ever went by the Highway, he killed a Man Aboard of a Ship, and if he had not bought it off with a Piece of Money, he had ſuffered for it. 'Twas moved in Arreſt of Judgment, That the Words were not actionable, and there was cited the Caſe in 1 Roll. Abr. 72. Parrama &. Words. Felony.

Thomſon econtra. That of ſuffering ſhall make it be intended a felonious killing.

Lord Scroggs. Theſe Caſes have often varied, and few of them but have received croſs Reſolutions; that of Rolle is long ſince, even in the 6 or 7 Jac. We muſt here, after Verdict, take it for granted that the Words are falſe, and I am ſure they are ſcandalous, and may expoſe a Man to a great deal of Trouble; now can we imagine it any other than an unlawful killing, when 'tis ſaid, That he would have ſuffered for it? That he killed a Man is not actionable, for that may be lawful, and Words ſhall be taken in mitiori ſenſu: Now if I kill a Man that aſſaults me on the Highway, or breaks my Houſe for to ſteal, in this Caſe I need no Pardon, I am not indictable; and if I am indicted I may juſtify, and the Jury muſt find me Not Guilty.

Guilty; whereas in the Caſe of Se defendendo, the Jury muſt find the Special Matter, and the Party forfeits his Goods, and he ſtands in need of a Pardon though it be of Courſe: And per Cur' the Words were reſolved actionable, and Judgment pro Plaintiff.

(62.)
2 *Lev.* 252.

Hinkes *verſus* Clarke.

Corporation. Every Member may preſcaibe.

Vide 2 *Lev.* 246, 252, 253. 1 *Lev.* 196. 1 *Vent.* 163, 383. *ante pl.* 30. 1 *Saund.* 343. 2 *Sannd.* 4, 5. *Nelſon's Lutw.* 431, 473.

WRit of Error on a Judgment in an inferior Court: The Plaintiff there in his Declaration alledges a Common by way of Cuſtom in the Freemen and Inhabitants of ſeveral ancient Meſſuages, &c. the Jury find that the Freemen and Inhabitants of the ancient Meſſuages, &c. had Common for ſo many Beaſts modo & forma as in the Iſſue, & ulterius dicunt that the Freemen had Common for twenty more, &c.

Mr. Holt pro Plaintiff en breve d'Error inſiſted, That the Cuſtom was not found as in the Iſſue, but quite another Cuſtom; and that the Court muſt judge upon the Whole; and cited Foſter and Jackſon's Caſe in Hob. and that the laſt Matter found is Part of the Cuſtom.

Mr. Juſtice Jones. 'Tis another Cuſtom and therefore Surpluſage, for the other Cuſtom they have found is, That the Freemen, and doth not ſay Inhabitants of the ancient Meſſuages.

Mr. Juſtice Pemberton. They have found the Iſſue modo & forma, and ſeveral other Things which are idle.

Then another Thing which they inſiſted upon was, That it ought to have been a Preſcription and not by Cuſtom.

Lord Scroggs. In Staples and Mellar's Caſe, (ſupra Placito 58) they inſiſted it might be good by way of Cuſtom but not by Preſcription; it is the ſame Caſe, we are for maintaining of Right, and if you ask what Common it is, I ſay 'tis an ancient Common, and for that you alledge the Inheritance of Common muſt be in ſome Body, and therefore cannot be in Freemen Inhabitants; I would fain know where is the Inheritance of a Copyhold Common? You ſay that that is cuſtomary; ſo is this: There are many

mons by Custom that the Inheritance of them is in Nobody; and yet the Lands are charged with them, in the North Country are many such, and poor Men would lose their Right of Common if such Pretences should be material Objections: What we resolved in Staples and Mellar's Case, will settle this; the Custom is good, and the Verdict hath found it well enough: Judgment affirmed.

Cockram *versus* Welbye. (63.)

DEbt *v.* the Defendant having been Sheriff of the County of and levied Money on a Fieri facias sued by the Plaintiff, on a Judgment he had obtained against J. S. Defendant pleads the Statute of Limitations: Plaintiff demurs; The Question was, If Debt lay against the Sheriff for Money levied on a Fieri facias before the Return of the Writ? And held that it does, else an Inconvenience would follow, that the Sheriff should take Advantage of his own Wrong, viz. not returning the Writ; and then, Whether this Action be within the Statute of Limitations? And held not, for though it be not a Matter of Record till the Writ be returned, yet it is founded upon a Record, and hath a strong Relation to it. See 1 Cro. 529. Culliford's Case.

Money taken in Execution. *Vide post*, Case, 117, 166, 157, 271.

Limitations. *Vide post*, Case 105.

Harwood *versus* Wheeler and his Bail. (64)

JUdgment is had against the Principal, and after the Return of the Capias they sue out a Latitat against the Bail; and after the Return of the Latitat, and before the Delivery of the Declaration, the Bail do render the Body of the Principal to Prison, notwithstanding which the Plaintiff proceeds on Motion in Behalf of the Bail.

Court. Though this Practise in strict Rigour of the Law be good, yet it is not fair, for the usual Course is by Fieri facias; and till Return of the second Facias or on the first a Scire feci the Principal may be rendred in Discharge of the Bail; and we always stay Proceedings

Bail surrender the Principal. *Vide post*, Case 128.

ceedings thereupon: Now Bail are to be favoured, and if the Plaintiff hath the Body of the Debtor, what can he deſire more? In this Latitat is no ac etiam, no Mention made of any Thing that would ſignify to the Bail that it concerned this Debt; and how can they render the Body before the Latitat be returned, when perhaps they had Notice of it but the Night before? The Attorney and Counſel both were check'd for this ſnapping Practiſe, the Counſel anſwered, That he knew not the Opinion of the Court, but he had many Precedents for it.

Imparlance. Scroggs. Since you have gone ſo rigorouſly to work we will uſe the Rigour of the Law againſt you, as we may do by Imparlances; we grant therefore an Imparlance till next Term, and then move again for the Bail.

(65.) *Dominus Rex verſus* Hide.

NonProſ. Vide 6 Mod. 261, 262. 5 *Mod.* 394. HEld by the Court, That after two Aſſiſes and two Notices of Trial in an Information, and no Proceeding, that upon the Defendant's Motion there ſhall be a Non Proſ. as was done in this Caſe.

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Termino Mich.

31 Car. 2. B. R.

Pepyn *verſus* Buſtine. (66.)

Nuſance.

6 *Mod.* 245; 311, 314. 1 *Salk.* 21; 360. 1 *Show.* 64.

CASE for ſtopping a Gutter through which Water deſcended to, &c. Declaration, That he was poſſeſſed of an Houſe and Yard, and that he and all, &c. Mr. Pollexfen excepts hereto, becauſe he lays himſelf but in Poſſeſſion of the Houſe and Yard, and doth not alledge a Seiſin in Fee, (as he ought to do) in the Party in whom he preſcribes; but he granted 'twould have been good if he had laid a Poſſeſſion of the Gutter, but this he doth not neither, ſo that it comes within neither of the Rules. Judgment ſtayed quouſque moveatur ex altera parte.

Baſtard *verſus* Baſtard. (67.)

Common Carrier.

1 *Salk.* 26. 1 *Sid.* 36. 2 *Mod.* 270; 1 *Vent.* 238. *poſt*, Caſe 108.

CAſe againſt the Defendant as a common Carrier, for a Box delivered to him to be carried to B. and loſt by Negligence.

Williams moved in Arreſt of Judgment, for that there was no particular Sum mentioned to be paid or promiſed for Hire, but only pro mercede rationabili: Reſolved well enough, and Judgment given pro Plaintiff; for perhaps there was no particular Agreement, and then the Carrier might have a quantum meruit for his

his Hire; and he is therefore as chargeable for the Loss of the Goods in the one Case as the other.

(68.) Malett *versus* Stukely.

Amendment.

Motion was made after a Writ of Error to amend a Mistake in the Return-Day, as proxime post, when it should have been in Crastinum, and also the Omission of Vicecomiti, and the Award of the Writ of Inquiry was ideo præcept' est: Granted, and ordered that the Defendant in the Action do file Bail, for that is his Work, and he shall not take Advantage of his own Wrong upon a Writ of Error.

Bail.

(69.) ——— *versus* Sterne.

Gaming.

Assumpsit, indebitatus & insimul computassent, after Verdict Exception taken in Arrest of Judgment, because the Account is for Money won at Play & alias denarior' summas: Adjudged it lay, for Debt lies at Common Law for Money got at Play: And now provided it be under 100 l. at one Sitting by the Statute of this King; and an Account lies not for Rent because certain, but for Rent with other Matters it will lie; Indebitatus Assumpsit lies for a Wager, and at Play there are mutual Assumpsits, and being so alledged it will lie.

post, Case 189. *Nelson's Lutw.* 59.

(70.) Stone *versus* Exton.

Copyhold surrendred by Feme covert. *Cro. Jac.* 36, 536. 4 *Co.* 22. *Yelv.* 145. 1 *Vent.* 359. 2 *Mod.* 287.

Writ of Error on Judgment in Ejectment in Com. Banc. A Copyholder in Possession by a wrongful Title, the Right being in a Feme covert, who with her Husband comes into Court; and being secretly examined before the Steward releases in Court by Surrender to the Tenant in Possession, the Husband dies; Question, If good and binding?

'Twas urged this can't be, the Jury cannot find Impossibilities, as that she should release by Surrender to the Tenant who cannot take a Surrender,

and that 'tis void after the Death of the Husband. cited 10 Rep. 43. 10 Edw. 4. 13. Kite and Queinton's Case, 4 Rep.

But per Cur'. There the Question was, Whether it could be released by Deed? But never any Doubt but that it might be surrendred in Court, and there is no need of a particular Custom for it; here the Release is to the Tenant in Possession, and there needs no new Grant or Admittance of the Lord; and if the right Tenant had been admitted, the other had been out: As for the Jury's finding it, 'tis a Surrender in Court to the Tenant's Use, the Release is good; and Judgment affirmed. *Curia.* *post*, Case 135.

Midwinter *versus* Partridge. (71.)

EJectment, Special Verdict, le Case was on the Words of a Will, I give and bequeath all my Houses in *L.* to my Wife, for and towards the Maintenance of my Daughter's Child; and if she refuse to maintain him, my Will is, That my Executors shall enter, *&c.* The Question was, If the Wife had a Fee? Will. Devise.

Molloy. This is a Fee according to Collier's Case, 6 Rep. because else 'twould be a Prejudice to her, and she is bound to maintain him immediately before she receives any of the Profits; for and towards are the same with maintaining, and maintaining the same with allowing and paying; for if I bequeath such a Sum towards the paying, it is the same with giving so much; and he cited the Case of Lee and Stephens, supra, placito 64. *Vide ante* Case 28, 35.

Mr. Attorney econtra. For and towards is but a Trust to maintain the Child; and this annually, and not a Sum in Gross; for and towards, i. e. so far as the Profits will reach; and he cited the Case in Dyer, 371. b. where was a Remainder to B. and he deviseth the Land which he had or might have in Reversion or Remainder to his Wife, rendering 40 s. per Annum during her Life to, &c. Held, That she should have no Estate but for Life to commence when the Remainder fell, and then the Payment should begin; so the Maintenance is to be as the Profits do arise; he argued that this Estate is and always will be charge-

able with this Truſt, and the Heir, if it comes to his Hands, will be chargeable therewith; he cited Wellock and Hammond's Caſe, 3 Rep. and the ſame Caſe is better reported in 3 Cro. 204. and Anneſley and Chapman's Caſe, 1 Cro.

Scroggs. I confeſs that maintaining the Child muſt neceſſarily be before any Profits can be received, but for and towards ſeems not ſo ſtrong, but only that the Maintenance ſhall be out of the Profits.

Jones. A Fee paſſeth becauſe 'tis a preſent Charge.

Dolben. The Heir at Law is always to be favoured, unleſs there be expreſs Words that give away the Eſtate, and the Teſtator's Good-will ſeems to be only for the Maintenance of the Child, and no Deſign to the Wife; perhaps there is ſomewhat elſe for its Maintenance beſides, for this is only towards her Maintenance.

Pemberton. I think it a Fee, the Deſign being that the Child ſhould have a Maintenance during his Life, and if the Wife have but an Eſtate but for her Life, and ſhould die, the Child would want a Maintenance.

Adjournat'.

(72.) *Dominus Rex verſus* ——

Reſcous. INdictment for a Reſcous committed by the Defendant, Wife of J. S. & al'. The Exception was, There was no Addition but only Uxor of J. S. of ſuch a Pa-
Addition. riſh, without giving him any Addition.

Tremayne urged econtra. 2 Inſt. 665. Reſcous according to my Lord Coke is not within the Statute of Additions and therefore Uxor of ſuch a one is ſufficient. Adjournat'.

Note, J. S. Servant to J. N. Eſq; or A. B. Wife of T. B. Gent. are ſufficient Additions. 9 E. 4. 8. 3 H. 6. 31. 6 Mod. 58.

Parliament Privilege. Reſolved in the Houſe of Lords the laſt Parliament, in the Caſe of Mr. Killigrew, That the King's Servants, as well as Noblemen's Servants, are privileged in Time of Parliament from Arreſts. *Ut Dixit Dominus* Scroggs.

Memorandum, In this *Michaelmas* Term was Sir *Creſwell Levinz* made Attorney General, Sir *William Jones* having laid down his Place the latter End of *Trinity* Vacation.

DE

Termino Hill.

31 & 32 Car. 2. B. R.

Anonymus. (73.)

UPon Motion, agreed per Curiam, That a Writ of Error on the Judgment againſt the Principal is not a Superſedeas to the Proceedings againſt the Bail, though when the firſt Judgment is reverſed, the other fails; but yet if a Capias be awarded againſt ſuch Principal after the Writ of Error be brought, it is irregular, and ſhall be ſet aſide, quia improvide emanavit. Per tout le Court.

Brief *d'Error* no *Superſedeas*. *poſt*, Caſe 98.

Dominus Rex verſus Deane & Bird & *al'*. (74.)

UPon Motion for Reſtitution to a Poſſeſſion, which the Party had been put out of by Colour of a Fieri facias, it was held by the Court, That if a Sheriff on a Fieri facias do ſell a Leaſe or Term of an Houſe, he cannot and muſt not put the Perſon out of Poſſeſſion,

Fieri facias. Sale thereon. *poſt*, Caſe, 78.

Poſſeſſion, and the Vendee in, but the Vendee muſt bring his Ejectment. Per cur'. Vide poſt pl. 78.

(75.) Anonymus.

Admiralty. UPon Motion held, That if all the Mariners of a Ship join to ſue the Maſter in the Admiralty-Court, they may do it, and no Prohibition lies; but if the Maſter and Seamen join in a Suit againſt the Owners for Wages, there a Prohibition may iſſue on Motion.

(76.) Hodder *verſus* Saunders.

Writ of Inquiry quaſh'd. *Vide poſt*, Caſe 203. ASſumpſit for 144 l. part for Wares ſold, and Judgment by Default, Writ of Inquiry awarded and executed at Topſham, in Preſence of Shapcott and Tremayne Counſel. Shapcott would not prove any Thing of the Sale and Delivery, or the quantum was ſold, but ſaid, The Defendant had confeſſed it, or at leaſt it lay on them to diſprove it, and ſo the Jury gave the whole full Damages to 144 l. Now upon Affidavit thereof the Writ of Enquiry was ſet aſide on that Account, that the Plaintiff ought to prove the Quant' and Value. Ex motione mea. Vide Yelv. 151, 152. Goodwin *v.* Overet.

(77.) Pawlett *verſus* Savage.

Covenants. Performance. DEbt on a Bond, after Oyer craved of the Condition, it appeared to be for Performances of Covenants in a certain Indenture made between the Plaintiff and Defendant: The Defendant pleads quod performavit omnia & ſingula ex ejus parte, &c. and mentions none in particular; and held naught, for he ought to ſet them forth.

Dominus Rex verſus Bird.

(78.)
Ante pl. 74.

REſolved by the Court on Motion, That on a Fieri facias the Sheriff may ſell the Goods, and if he pay the Money to the Party it is good, and the Court will allow of ſuch Return, becauſe the Plaintiff is thereby ſatisfied, although the Writ run, Ita quod habeat coram nobis, &c. or elſe he may return that he hath them in his Hands for want of Buyers, and then a Venditioni exponas goes, commanding him to ſell them at the beſt Rate he can; and he muſt not appraiſe them too high, for if he values them ſo high that none will take them at that Rate, he muſt himſelf; yet if before Sale the Defendant, or any other Perſon for him, do tender him the Money, &c. he can't ſell them.

Fieri facias.

Venditioni exponas.

Mr. Williams here did remember the Caſe of Hardy the Sheriff of Cheſter, who was laid by the Heels here for keeping Goods in his Cuſtody, and not ſelling them when he had Opportunity.

Agreed likewiſe per Cur', That on a Fieri facias when the Officers are once in the Houſe, they may break open any Chamber-Doors, or Trunks for doing their Execution: And upon a Capias utlegatum, though on Mean Proceſs, and at the Suit of the Subject, yet upon that Writ they may break open any outward Doors after Demand and Refuſal.

Dominus Rex verſus Deane & Pepys.

(79.)

REſolved by the Court, That a Man committed by this Court is not within the Benefit of the late Habeas Corpus Act, and that that Act reaches only to extrajudicial Commitments by King and Council, or Secretaries of State, and the like; and accordingly the Defendants were denied the Benefit of it.

Commitments *per Cur'.*

Dominus

(80.) *Dominus Rex verſus* Deane *& al'.*

Commitments.

THE Defendant being committed by the Court for a Contempt, cannot be charged with an Action without Leave of the Court, but upon Motion they generally give Leave, as they did in this Caſe to Pinkney, a Creditor of Deane's: And 'twas declared by the Chief Juſtice, That no Priſoner committed by this Court, ought to have the Benefit of the Day-Rule of going abroad in Term-Time, for their Impriſonment was their Puniſhment for their Contempt or Misbehaviour.

(81.) Calcott *verſus* Hatton:

Courts inferior. *poſt*, Caſe 170, 179, 346, 360.

ERror to reverſe a Judgment in Caſe of Aſſumpſit in the Sheriff's Court of the City of York: Reſolved, That an Indebitatus Aſſumpſit, or a Special Aſſumpſit, though it be on a Special Promiſe to pay another Man's Debt, and though it be collateral, is within the Statute of Frauds and Perjuries; yet the not alledging a Note in Writing in the Declaration is not Error, for this Court will intend there was a Note given in Evidence; yet many ſince that Act do declare quod aſſumpſit ſuper ſe prout per notam, &c. but this is not neceſſary, for the Want of it is not Error. Judgment affirmed.

(82.) *Vide ante pl.* 42. *poſt*, 86, 184. Damages too much, *&c.*

Anger *verſus* Brookhen.

ERror on a Judgment in B. R. in Ireland, which was by Default, and Writ of Inquiry; and the Jury aſſeſs 100 l. and 6 d. Coſts, and Judgment is quod prædict' querens recuperet dampna ſua prædict' ad cent' libras per inquiſition' prædict' compert' & pro increment' 7 l. &c. agreed, That if ad cent' had been left out, it had been doubtleſs good; argued therefore, that the reſt ſhould be Surpluſage, or elſe miſcounting, which will not vitiate the Judgment.

Scroggs. It cannot be a Miſcounting becauſe no Notice is taken of the Coſts aſſeſſed by the Jury.

Dolben. If it had been 5 l. more than the Whole came to, we ſhould have reckoned it a Miſcounting; for dampna would have included both Coſts and Damages. Saunders urged Daux and Fellowes, in this Court Paſch. 22 Car. 2. Rot. 299. to be reverſed for this very Reaſon, and the Reverſal entred; and the Caſe of Osbourn and Exton ſupra 44. reverſed for this very Reaſon. *Vide* 1 *Roll. Abr.* 578, 579.

Scroggs. If it had been attingent' 'twould be a Miſſumming.

Pemberton, 'Tis dampna ſua prædict' which includes all: There was urged the Caſe of 1 Roll. 773. Motlock and Cowle's Caſe; and that attingent' is all one with ad and ad with attingent', and that whether the ad do hit the Sum right or no is but Miſcounting, for if more or leſs 'twere good. *Attingent' & ad.*

Scroggs. The Jury here give Particulars, and the Judgment is but for one of thoſe particular Sums.

Jones. Dampna prædict' is enough, and all the reſt naught and Surpluſage; ad is as much as attingent', for its Meaning elſe is no Senſe; 'twill be hard to make the Word ad reſtringent when the Court ought to give Judgment for the Whole; ad is the uſual Word in all Judgments, and reaches the Whole, and 'twas the Intent of the Court to give all; where they intend but Part, they ſay quoad: in the Common Pleas they ſay dampna ſua prædict' ad then comes the Increment', and after that the quæ quidem, &c.

Pollexfen, They give an Increment' for Coſts, which cannot be if the Court did not intend Coſts ſhould be given before; if they had intended to omit it, they would have ſaid nullo reſpectu habito de 6 d. However, upon the two Caſes which Mr. Saunders cited the Rule was quod reverſetur Jud' niſi, &c.

Tamen quære; for dampna being a general Word for the Coſts and Damages, it ſeems to be a compleat Judgment in that quod recuperet dampna ſua prædict', and the reſt coming after is Surpluſage; for if they had ſaid no more than this, quod recuperet dampna ſua prædict' & de increment', &c. ad requiſition', &c. 'twould doubtleſs have been well enough.

(83.) Carthage *verſus* Manby.

Covenant before Breach not releaſed by the Word *Demands*, &c.

COvenant for Payment of Money at a future Day: The Defendant pleads a Releaſe made before that Day, of all Debts, Dues, Actions and Cauſes of Actions, Bills, Obligations, Writings obligatory, &c. Demurrer thereto.

Vide 1 *Lev.* 99, 101, 272, 2 *Lev.* 210, 214. 3 *Lev.* 273. 1 *Mod.* 99. 1 *Sid.* 141.

Mr. Pollexfen pro Plaintiff. A Releaſe of all Demands is no Releaſe of a Covenant before 'tis broken, and cited the Caſe of one Hen and Hanſon, 25 Car. 2. in this Court: Adjudged in this Court, That a Releaſe of all Demands is no Releaſe of Rent; And the Lord Hale declared the Caſe to be good Law.

Thompſon econtra. Demand is a general Word, and the largeſt Word that can be uſed in a Releaſe, and cited Littleton's Text for it, and 2 Cro. 587. and no doubt if the Word Covenant were mentioned, 'twould releaſe it though not broken; beſides, an Action of Debt as well as Covenant will lie on a Covenant to pay Money; therefore Writings obligatory will not reach it, for a Covenant in Writing is a Writing obligatory; and by Writings obligatory can't be meant Bonds, for that's included in the Word Obligation. Adjournat'.

In Trinity Term 'twas adjudged, That the Releaſe of all Writings obligatory did not releaſe Covenants not broken, for that is releaſable only by Special Name; and although a Covenant be a Writing Obligatory, yet it hath a particular Signification, as when we declare per Script. obligatorium, it means no more than a Bond, and Demands will not reach it, for that will not releaſe a Rent before 'tis due, as was in this Court formerly adjudged in the Lord Hale's Time. Judgment pro Plaintiff.

Harris *verſus* Belchey.

(84.)
1 *Ven.* 345.
Raym. 413.
Sir *T. Jones*, 136.
Feoffment to Uſes.
Vide poſt, Caſe 243.

EJectment, Special Verdict finds a Feoffment in Fee to the Uſe of Paul and his Daughter Sarah for their Lives, and after their Deceaſe, to the firſt, ſecond, third, &c. Sons of Sarah in Tail ſucceſſive; Remainder over to Paul in Fee: Before any Iſſue had by Sarah, ſhe releaſes all her, &c. to Paul: The Queſtion was, If this ſhould deſtroy the contingent Remainders?

Mr. Holt argued, That it doth not from Lewis Bowles's Caſe, 11 Rep. 2 Cro. *696.* the ſame Caſe in 2 Roll. 398.

Mr. Pollexfen econtra. I agree they are Jointenants, and that the Releaſe ſhall not enure as a Grant, but only as a Releaſe, and it will be agreed to me, that no contingent Remainders can be preſerved without a particular Eſtate; and no longer can it continue than the particular Eſtate continues. Litt. Sect. 283. 1 Inſt. 182. if the Jointenancy be deſtroyed then the Fee comes down on Paul, and then the contingent Remainders are gone. Lewis Bowles's Caſe differs from ours, for in that there was an Eſtate-Tail executed, but here is a joint Eſtate for Life; further, the Law takes a great Difference between the Caſe where 'tis by one Conveyance and where by ſeveral, for in the former the Law preſerves the Eſtates diſtinct, otherwiſe if by ſeveral Deeds; here they are ſeveral Eſtates at firſt in Paul, then that which mires them together is the Releaſe, and by that the particular Eſtate is deſtroyed, and by Conſequence the contingent Remainders are deſtroyed likewiſe: All agree theſe Eſtates in Paul are but one as to Rights and Remedies, and as to Strangers, but they are ſeveral as to the Parties for the Benefit of Survivorſhip.

Scroggs. You muſt agree, That if Sarah had releaſed to Paul without Words of Inheritance, the contingent Remainders would ſtill have been ſupported.

Jones. A Releaſe by one Jointenant to another makes but one Degree, it makes not Degrees.

Mr. Justice Pemberton. They might maintain Waste, which shews that the Reversion was executed, and so as to a Moiety he might have pleaded an Inheritance against a Stranger, yet between themselves 'tis not so.

Jones. As to a Moiety there's no Difference between this and Lewis Bowles's Case.

Mr. Saunders afterwards argued this Case, that the contingent Remainders are not destroyed; for if she had died this would not have destroyed it, and a Release of one Jointenant is no more than Death and Survivor; he cited Lewis Bowles's Case, 11 Rep. and 1 Inst. 184. and a Release of one and Death of one is the same to all Purposes, excepting the Case of Charges and Incumbrances; where the Law for the Benefit of a third Person by a Fiction doth suppose the Charge to continue, he agreed, That a Discent of the Fee would, &c. Adjudged by all the Court in Michaelmas Term following (except Dolben) That the Release hath the same Effect with a Death and Survivor, to the Contingency not destroyed.

Curia.

But Note, it was afterwards adjudged, That the Remainder was destroyed. Vide 2 Jones, 137.

(85.) Thomas *versus* Gifford.

Tithes. Barren Land. *post*, 195. Suggestion.

PRohibition. Resolved that by Stat. of Edw. 6. The Suggestion of barren Land newly improved, and therefore exempt from Tithes for 7 Years; that such Suggestion ought to be proved within six Months, otherwise a Consultation to go. 1 Cro. 208. State *v.* Eskins. 1 Brownl. 198. Lobb *v.* Hunt; and all affirmative Suggestions ought to be proved as is implied in 2 Inst. 662. and for want of this Proof a Consultation was granted in this Case accordingly.

(86.) Holton *versus* Croft.

Damages. *Vide* Case 42, 82, 102, 184.

ERror on a Judgment in an inferior Court, in Indebitatus assumpsit for 400 l. the Jury find Damages to 300 l. and Judgment is accordingly quod recuperet 300 l. and no eat sine die, as to the rest: Non allocatur;

allocatur; because in Case, otherwise if it had been Debt: Another Exception taken was, That the Jury found the Assumpsit modo & forma prædict' le placito allegavit & narravit, and do not say prout; and held naught, and Judgment reversed nisi, &c. *Prout.*

(87.)

Skidmore *versus* Boucheir.

ERror upon a Judgment in the Common Pleas: The Writ was a Trespass for entring into his House and several Closes; and the Declaration is of an Entry into his House & in unum clausum & unum toftum: Held naught, for that Toftum is not a Close, but Ground whereon a House formerly stood. Variance. *Toftum.*

Dominus Rex versus Hemings & al'.

(88.) *Vide* Case 132, 267, 235.

INdictment and Assault on my Lady Mohun; the Jury find them Not guilty of the Riot, but Guilty of the Trespass and Assault.

Mr. Saunders moved in Arrest of Judgment, for that it was one entire Offence, and the Jury could not sever it; but over-ruled and allowed good, for so it hath been often judged: Although if a Man be indicted of Felony he cannot be found guilty of Trespass, because they differ toto genere, but Riot and Assault are as near of Kin as Murder and Manslaughter. Riot and Assault are *ejusdem generis.*

Dominus Rex versus Mayor of Saltash.

(89.)

INdictment for a Riot, and the Defendant being in Execution for his Fine to the King was bailed, because he had brought his Writ of Error, he giving Security to prosecute it with Effect and get it reversed, or pay the Fine, though the Court did all agree he could not be taken in Execution again; and here was cited the Case of the King and one Leiger, where the Lord Hale refused to take Bail, he being in Execution, and having brought his Writ of Error, unless he brought the Money into Court. Convicted of Riot. Bailed.

Memorandum,

Memorandum, After this Term Sir *Francis Pemberton* received his *Quietus*, and afterwards practiſed again in all the Courts in *Weſtminſter-Hall*, but without the Bar as a Serjeant; and in his Place ſucceeded Sir *Tho. Raymond*, and Sir *Job Charlton* as Puiſne Judge in the Common Pleas; and Sir *George Jeffreys* ſucceeded him in the Office of Chief Juſtice of *Cheſter*; retaining ſtill his Place of Recorder of *London*.

DE

Termino Paſchæ

32 Car. 2. B. R.

(90.)
2 *Jones* 139.
S. C.
Sheriff's Bond.
Ante Caſe 38.

Ruſhworth *verſus* Wade.

DEBT on a Bond, whoſe Condition was to ſurrender himſelf at the End of ſix Days, as a true Priſoner upon a Latitat for, &c. ac etiam pro debito 1400l. Demurrer to the Declaration after Oyer of the Condition: Argued, That a Man may be let at large, and render himſelf again upon Mean Proceſs; ſo that he be there at the Return of the Writ; and there was cited 3 Rep. 44. Boyton's Caſe, where that Diverſity is allowed; and the Caſe of Benskin and French, 15 Car. 2. B. R. in Caſe of a Promiſe an Aſſumpſit was brought thereon, and held good, and Judgment pro Plaintiff: The Caſe is

in 1 Keb. 483. and no Difference between a Bond and an Aſſumpſit as to this Purpoſe. Adjournat'.

Kirby *verſus* Towerſon. (91.)

CAſe ſur Aſſumpſit, That if the Plaintiff would endeabour to get Jane's Conſent to marry the Defendant, he would pay him 10 l. And he avers he did perſwade her & utebatur omnibus modis quibus poterat; The Queſtion made was upon the Word poterat, becauſe uncertain, but becauſe he had laid a particular Act of Perſwaſion, it was held good being after Verdict. Judgment pro Plaintiff. Promiſe. Endeavour, a good Conſideration.

Harris *verſus* Roberts. (92.)

CAſe for ſcandalous Words, ſpoken intentionally to diſinherit the Plaintiff, &c. You are no *Harris*, and have none of the Blood of the *Harris's* in you. Judgment arreſted as in 1 Roll. 37. for that the Court thought the Words not actionable; for they might be meant as to Courage, Humour or good Nature, and did not of themſelves import him a Baſtard. Judgment ſtayed. Words.

Trinity-Houſe verſus Criſpe. (93.)

DEbt on a By-Law, ſetting forth, That they were a Corporation Time out of Mind, and had for all that Time uſed to make By-Laws and Orders for the better Government of Seamen; and ſet forth a Charter of Confirmation from the preſent King, and the By-Law they declared upon was, That no Ship in any Port of *England*, ſhould be laden with Gun-powder above 24 Hours before it puts to Sea, nor ſhould any be kept there above 24 Hours after it lies an Anchor, *ſub pœna* Forfeiture ſo much; and this they alledged to be for the publick Good for Prevention of Fires among the Ships, &c. then that the Defendant did, &c. to which there was a Demurrer. By-Law. Gunpowder. *Vide Stat.* 5 *Georgii, cap.* 26.

Thompſon

Thompſon pro Plaintiff argued, That By-Laws will not bind any Strangers but only their own Members if it concern a private Matter, otherwiſe if it relate to the Publick: He cited the Chamberlain of London's Caſe, 5 Rep. Bulſt. 11. Franklin and Green's Caſe, to prove this Diverſity.

Saunders econtra. All By-Laws do bind either ratione loci or ratione perſonæ; but theſe Letters Patents and the By-Law in Purſuance of them, do extend to all Mariners in Eng'and, if they are good, they have the Effect of an Act of Parliament; a Statute can do no more than this By-Law of theirs, the Defendant is not of their Company, and the Fact was at Greenwich-Court; we muſt agree this By-Law to be good and uſeful for the Weal-publick: But again on the other Side, 'tis ſo general, and looks ſo much like an Act of Parliament, that it ſeems too much for the Power of a Corporation or Company to ordain.

(94.) —— *verſus* Fetherſton.

Preſcription *Tenemento.*

TReſpaſs on the Caſe for ſtopping up ancient Lights by the Erection of a Wall; Preſcription in quodam meſſuagio ſive tenemento antiquo, is good enough, though an Ejectment will not lie de uno meſſuagio ſive tenemento, becauſe the Sheriff will not know what to deliver Poſſeſſion of: Judgment pro Plaintiff.

poſt, Caſe 250.

(95.) *Duke of* Buckingham *verſus* Hatherington.

Scand' Mag'. Poſt, Caſe 243, 307, 467.

SCandalum Magnatum. The Defendant moved to change the Venue from London to Yorkſhire, upon common Affidavit, That the Words were ſpoken in Yorkſhire, if any ſuch; and denied unleſs the Plaintiff would conſent.

Girton *verſus* Gilder. (96.)

Prohibition. Penſion, &c. *Vide Nelſon's Lutw.* 339.

PRohibition. Libel in the Eccleſiaſtical Court for ſo much per Annum for Procuration, granted on a Suggeſtion, That it was a Penſion which charged the Impropriator's Inheritance; and in Defence of the Prohibition was cited F. N. B. 2. 51. 2 Inſt. 432. 2 Cro. 266. Hetley 32. 2 Roll. Abr. 283. A Preſcription is not triable there.

Holt, for a Conſultation. F. N. B. 152. a Preſcription about a Spiritual Matter may commence in another manner than an Annuity can at the Common Law; this Preſcription is by Common Law, and every Eccleſiaſtical Living charged therewith, Lyndewode 67. and 'tis to be paid to the Archdeacon for his Viſitation; and no Action lies for it at Common Law, in 1 Inſt. 162. ſix laſt Paragraphs in Chap. of Rents.

Scroggs. That of the Legality of its Commencement is nothing, for that is always ſuppoſed in every Preſcription, and on the Trial you do only enquire if paid or not paid.

Jones. Procuration is due of common Right, as the Caſe of Proxies in Davis's Iriſh Reports clearly proves; and at firſt the Archdeacon with his Servants at the Viſitation were all entertained at the Charge of the Parſon; but when his Retinue increaſed, a certain annual Sum became payable in Lieu thereof, which is now due of common Right, as Dolben ſaid.

Scroggs. They demand a Compenſation for this Procuration, and in ſome Places, and from ſome Perſons a greater Sum is paid than from others; and if the Difference be about the quantum, we will grant no Conſultation; but then in the Suggeſtion they ought to have ſaid, That ſo much is due and no more, but here the Whole is denied. Adjournatur.

Agreed in this Caſe, That a Suggeſtion cannot be amended after a Prohibition is gone, nor in this Prohibition. Per tout le Court.

(97.) *Lord* Clare *verſus* Reach.

Error *coram nobis*, no *Superſedeas*. *Ante*, Caſe 73. Conſent, *&c.*

ERror on a Judgment in Ejectment in Ireland; Reſolved per Cur', That a Writ of Error coram nobis is not a Superſedeas: And agreed likewiſe, That Conſent to a Trial of Title to Land in another Country than where the Land is will not help, it being an Error, though ſuch Conſent be of Record.

(98.) Cade *verſus* Ireland.

The King grants a Hundred, *&c.* *Vide* 3 *Mod.* 199, 200. 1 *Vent.* 399. to 412.

TRespaſs. Special Verdict finds Letters Patents to the Defendant, of an Hundred in the County of Leiceſter, and the Offices and Profits thereunto belonging, with the Execution of all Writs within the ſame for twenty-one Years; whereon the Queſtion was, If they were good to the Excluſion of the Sheriff from his Duty and Office of executing Writs in his County, notwithſtanding the ancient Statutes which were alſo found at large?

Mr. Lovel argued pro Plaintiff, That all Grants of Hundreds (he agreed) before the Time of Edw. 2. are good, but thoſe ſince are void; but here it will not be amiſs to obſerve the Original and Nature of Hundreds and Sheriffalties.

Original of Hundreds, *&c.* *Vide* 1 *Vent.* 404, *&c.*

I find in our Books, That in King Alfred's Time the Kingdom was in Groſs, and then divided into Counties and Hundreds, and all Perſons then came within one Hundred or other; and then the King's Relations had the Government of them, and therefore they were called Conſanguinei, and ſo are the Earls, Lord Lieutenants, &c. at this Day; and then when the Office became troubleſome, there were ordained Vicecomites, which Name remains to this Day, and the others continue to be called Conſanguinei, but have no Power in the County, having only the honorary Name of Earls or Comites of ſuch or ſuch a County, &c. And for the better Government of theſe Counties, the Vicecomites had two Courts; but out of thoſe the King granted Petty Leets and Court-Barons; but the Turn of the Sheriff had yet a ſuperin-

perintendent Power, they being derived out of the Sheriff's Turn, as in Dyer 13. And then afterwards the King granted away ſome Hundreds in Fee-ſimple, and ſome Franchiſes, and the laſt excluded the King utterly, but the Hundreds granted in Fee were not wholly exempt.

On this aroſe ſome Confuſion, and the Parliament hereon took Notice, that the Execution of Juſtice was by this much interrupted, and therefore came the Stat. 9 Edw. 2. That Sheriffs ſhould be ſufficient Perſons, and have Lands in the County, and ſo be able to anſwer both the King and Country; and that Bailiffs and Farmers of Hundreds ſhould be ſufficient Men. And at this Time Hundreds were grantable for Years.

Then came the Stat. 2 Ed. 3. cap. 4, and 5. That Sheriffs ſhould continue but for one Year. But this took not away the whole Inconvenience; for the Crown ſtill granted away Bailiwicks and Hundreds, for Lives, at Rents on ſuch exceſſive dear Rates, that made them endeavour to make up their Money by unlawful Means; and thereon came the Statute 2 Edw. 3. 12. and 14 Edw. 3. 9.

By the firſt 'twas enacted, That all Hundreds and Wapentakes granted by the King, ſhall be again annexed to the County, and not ſevered. And by the other Statute, That all ſhould be annexed, and the Sheriff ſhould have Power to put in Bailiffs, for which he will anſwer, and no more ſhould be granted for the Future. And one Reaſon of this was, Becauſe the King granted away Hundreds, and abated not the Sheriff's Farm.

Now this Grant conſiſts of all Courts and Profits of Courts, and the Officers and Bailiffs thereof.

1. I conceive the Grant of Courts is not good; for the Statute of 31 Edw. 3. 4. doth call it the Sheriff's Turn. 6 Hen. 7. 2. adjudged not the King's Court. Mitton's Caſe, 4 Rep. the County-Court is the Sheriff's Court, and the King cannot grant away the Office of Clerk of the County-Court; but the Sheriff ought to have the Diſpoſal thereof: And in all Writs to the Sheriff for making of Proclamations, they ſay, in com' tuo: So is the Return of Exigents ad com' meum; and ſo is the Style of the Court, Curia com' vicecomitis, &c. and ſo it is called in the Statute of 32 Hen. 8. 13.

and therefore I do conclude the King hath no Power to grant them away from the Sheriff.

2. For the Offices; if the Courts be the Sheriffs, then the Offices muſt likewiſe be his: Scrogg's Caſe, Dyer 175. The Office of Cuſtody of the Gaol is likewiſe in the Sheriff, becauſe he is to anſwer for all Eſcapes; ſo for the Clerk of his County-Court, he is anſwerable for all his Miſdemeanors.

3. For the Fines and other Profits of his Court, and I conceive theſe cannot be granted from the Owners: We find in 1 Ed. 3. 2. That Amerciaments in the Turn ſhall be to the Uſe of the Sheriff, although the Eſtreat be not returned till his Year be out, 6 Hen. 7. 2. for they are the Conſideration why he is anſwerable over.

4. The Bailiff; that is not grantable away, for all Eſcapes by the Bailiff are Eſcapes by the Sheriff, and he is reſponſible, unleſs in Caſe of Franchiſes and Liberties; nay, he is anſwerable for Bailiffs in Fee. Bro. Franch. 24. Dyer 24. Fitzh. 22.

Now in our Caſe the King hath granted the Bailiſhip for twenty-one Years, and the Sheriff cannot engage him to give any Security, and yet is bound to anſwer for him; by the Statute above-mentioned a Bailiff is not to continue in above one Year.

5. The laſt Thing is the Cuſtody of the Hundred; and this is a Branch of the higheſt Concern in the whole Patent; now this Grantee hath not the Means or Power to keep the Hundred as the Sheriff hath, who can raiſe the Poſſe of his whole County in his Aid of any one Part thereof; this Grantee cannot do ſo without Warrant from the Sheriff, ſo that it is not in his Power to preſerve the Peace as 'tis in the Sheriff's, who hath by his Patent the Cuſtody of the whole County.

I agree, the King may determine the Office of a Sheriff as to the Whole whenſoever he pleaſes; but he cannot determine the Office as to Part, becauſe 'tis entire, unleſs he divide the County and make more Sheriffs, which he may do. 4 Inſt. 267. is Sir John Found's Caſe, 1 Car. 1. 18. expreſs Form.

By the Statute 14 Ed. 3. All Hundreds (except ſuch as were then granted in Fee) are rejoined, as to the Bailiwicks of the ſame, to the Counties; and all

Grants of the Bailiwicks of Hundreds, made ſince that Statute, are void; and the making Bailiffs thereof belongs to the Sheriffs, for the better Execution of Juſtice, and of his Office; and ſo is it reſolved in Sir John Forteſcue's Caſe, which he there reports.

And for theſe Reaſons, and on thoſe Caſes, I conclude the Grant is void.

Mr. Bigland econtra. For the Validity of this Grant, I think it good.

The Reaſon of Melton's Caſe in 4 Rep. is particular, becauſe of the Entry and Cuſtody of the Rolls, for the embezilling whereof the Sheriff is anſwerable.

But to conſider what the King's Power was at the Common Law as to the Conſtitution of a Sheriff. 1 Roll. Rep. 118. he can make two Sheriffs, as he did for Buckinghamſhire and Oxfordſhire, which had formerly but one Sheriff; and ſo for Leiceſterſhire and Warwickſhire.

He may grant the Return of Writs to a Will, which takes not away the Sheriff's general Juriſdiction, but only his immediate Jurisdiction.

The King hath granted Court-Barons and Hundred-Courts, which by his Letters Patents are derived out of the Turn, and do diminiſh the Sheriff's Profit. 2 Inſt. 11. And notwithſtanding the Courts here ſettled in Weſtminſter-Hall, he may grant to one to hold Pleas within a certain Precinct. Now for an Hundred ſee 8 Hen. 7. 2. 13 Hen. 7. 2. 12 Hen. 7. 167.

By the Common Law an Hundred belongs to the King of Common Right; and whoſoever will claim it muſt derive it from the Crown. 11 Hen. 4. 90. 2 Roll. Abr. 73. 13 Hen. 4. 9.

Now for the Statutes: Thoſe which concern this Matter are found in the Special Verdict, and the Penning of them will give Determination to this Matter.

The firſt Statute extends only to thoſe Hundreds let by King Ed. 2. and leaves the reſt at Liberty.

As for the 14 Ed. 2. 'tis thus, All Wapentakes and Hundreds which be ſevered from the Counties ſhall be annexed, *&c.* and this is relative to the former; upon the

the reading hereof it plainly appears it cannot extend to all.

And 'tis a general Rule: Where ancient Grants are dubious, they ſhall be conſtrued and expounded according to Uſage.

And here is no Damage to the Subject; for the ſame Remedies are by the Statute made for Bailiffs as for Sheriffs. 2 Cro. 551. 1 Roll. Abr. 349. And if there be Defect in them, the Sheriff hath ſtill a Power ſuperintendent.

Where no Grants have been made ſince thoſe Statutes, you will intend they were let by Ed. 2. and ſo are annexed to the Counties by thoſe Statutes; but thoſe which have been granted ſince are not within it: This was granted by Ed. 4. Adjournat'.

In Eaſter Term 34 Car. 2. the Grant was reſolved void, and Judgment pro Plaintiff.

(99.) *Dominus Rex verſus* Ballatt.

Bankrupts. Commiſſioners.

1 *Salk.* 111, 112.

THE Defendant being committed by Commiſſioners of Bankrupt, was brought hither by Habeas Corpus; and upon Debate about the Return 'twas agreed, That Commiſſioners having once examined a Man cannot examine him again, unleſs it be upon a new Commiſſion: But Quære, If their Examinations be loſt by Fire, &c. if there ought in ſuch Caſe to be a new Commiſſion.

Serjeants called.

In Chancery this Term on the 12th of *May*, appeared Sir *George Jeffreys*, Sir *John Kelynge*, *Hamſon*, *Weſt*, *Walcott*, *Boynton*, *Bigland*, *Richardſon*, *Bugby*, *Wright* and *Manley*; each with their Writ in their Hands, which was to appear *in Cancellar' ad proficiend' ad ſtatum & gradum Servientis ad legem ſub pœna mille librar'*. Then they prayed their Writs might be read, and their Appearance recorded, which was done; then they took the Oaths of Supremacy and Allegiance all together; then they ſeverally took the Serjeant's Oath, *You ſhall Swear, that well and truly you ſhall ſerve the King's People as one of the Serjeants at Law, and you ſhall truly counſel them that you ſhall be retained with, after your Cunning, and you ſhall not defer, tract or delay their*

Cauſes willing for Love of Money, or covetous of any Thing that may turn to your Profit; and you ſhall give Attendance accordingly, as God you help by the Contents of this Book.

Ruſhworth *verſus* Hodſon. (100.)

TRover and Converſion of Money as Aſſignee of the Commiſſioners of Bankrupt, of Forth the Bankrupt; in the Evidence on a Trial at the Bar the Caſe appeared to be thus: Two Creditors, joint Brewers, one became a Bankrupt, the whole Debt is aſſigned over; reſolved that Debt would have lain, and the Aſſignee ſhould have recovered a Moiety; for one Moiety only did paſs by the Aſſignment: But as in this Caſe the Money was received as the joint Traders Money, here the Aſſignee cannot bring Trover for the Whole, becauſe he lays, by that, the ſole Property in himſelf, which was not ſo; and an Aſſigne can only have ſuch Action as the Bankrupt himſelf might have had.

Bankrupts Aſſignee.

Nelſon's Lutw. 85, 219, 135. *Poſt*, Caſe 236, 248. 261.

Anonymus. (101.)

IN Treſpaſs for taking of ſeveral Goods, and as to ſome the Plaintiff lays no Property in himſelf, and in others he doth, and Demurrer is general to the Declaration; 'twas ſaid, That in ſuch Caſe, upon Prayer of the Plaintiff, Judgment may be given for that which is well laid; ſo in Trover, ſo in Caſe upon two Promiſes; and this hath been frequently done before a Writ of Inquiry; otherwiſe afterwards, for then if entire Damages be given it cannot be ſo. Per Mr. Attorney General, and Mr. Serjeant Maynard, and Mr. Aſton, and Mr. Woodward the Clerks; tamen quære for the Court doubted it.

Declaration.

Judgment.

Damages. *Ante* Caſe 42, 82, 86, 184.

This Term *Le Marre* and his Mother, and one *Loveland* were tried and convicted of a Conſpiracy to charge the Duke of *Buckingham* with Buggery.

DE

DE

Termino Trin.

31 Car. 2. B. R. In Cam. Scacc.

(102.) *Poll.* 491. 2 *Jones* 237. *Raym.* 260, *&c.* A Fine of Lands, the Reverſion in the King. *Vide* 2 *Mod.* 131, 132.

Murry *verſus* Eyton & Price. *Earl of* Derby's *Caſe.*

EJectment for the Manor of Hope, *alias* Queen-hope, *&c. in Com' Flint*, on the Demiſe of William-George-Richard, Earl of Derby, made May 2. Car. 2. upon Not guilty pleaded the Jurors find a Special Verdict to the Effect following; That Richard the Third was ſeized in Fee of this Manor in Right of the Crown, and that he Anno ſecundo Regni ſui, did grant the ſame (inter alia) to Sir Thomas Stanly (afterwards Earl of Derby) and Sir George Stanly his Son and Heir apparent, to hold to them and to the Heirs Males of the Body of the ſaid Sir Thomas, by Knights-ſervice; and they find the Letters Patents in hæc verba: That Sir George had Iſſue Thomas Stanly (afterwards Earl of Derby) and died in his Father's Life-time; then Sir Thomas the Patentee dies, and the Manor deſcends to Thomas the Grandchild, and from him deſcended to Edward his Son, and from him to Henry his Son, and from him to Henry, and from him to Ferdinand; that Earl Ferdinand had no Iſſue male, but left three Daughters, (viz. Ann, married to Lord Chandos, Frances to Sir John Egerton, and Elizabeth to the Earl of Huntingdon) that by the Death of Earl Ferdinand, the Manor deſcended to William Earl of Derby his Brother, that he entred and was ſeized in Tail-male: That afterwards

wards for determining certain Differences arisen between Earl William, and the Daughters of his Brother Earl Ferdinand, and their Husbands, 18 Nov. Anno 4 Jac. 1. there was an Act of Parliament made, whereby it is (inter alia) enacted, That *Alice*, Countess of *Derby*, during her Life, and after her Decease *William* Earl of *Derby* for his Life; and after his Decease *James* his Son and Heir apparent, and the Heirs males of his Body; and for Default of such Issue, the 2d, 3d, 4th, 5th, 6th and 7th Sons of Earl *William*, and the respective Heirs males of their respective Bodies successively; and for Default of such Issue Sir *Edward Stanley* during his Life, and afterwards his 1st, 2d, 3d, 4th, 5th, 6th, and 7th Sons, and the Heirs males of their respective Bodies successively; and for Default of such Issue, *Edward Stanley*, for his Life, and after his Decease all his Sons to the seventh, and the Heirs males of their respective Bodies successively; and in like manner *James*, the Brother of *Edward* for his Life, and after his Decease and all his Sons to the Seventh, and the Heirs males of their Bodies successively shall enjoy this Manor.

They find further, that in that Act there is a Proviso, That Earl William, Sir Edward Stanley, Edward Stanley, and James his Brother (who had only for their Lives) when actually seised, might make Leases by Indenture of any Term not exceeding twenty-one Years, or for one, two or three Lives or Years so determinable, reserving usual Rents; and to make Jointures for their respective Wives, or eldest Sons Wives, not exceeding a third of the Whole: And they find further, that there is a Proviso, That the King, his Heirs and Successors (except such as have Estates by that Act, &c.) shall have and enjoy the same, and such Estate and Estates, Rights, Titles, Interests, Reversions, Rents, Services, Tenures, Primer Seisin, Liveries, Warranties, Uses, Possessions and Demands as before, &c. And they find Sir Edward and James to be Persons inheritable to the first Intail secundam formam doni, &c. si, &c. They find Alice died the first of May, 1636. that Earl William entred and died the 29th of Sept. 1642. that Earl James entred and died the 15th of October, 1651. that Earl Charles his Son entred and was seized prout lex postulat, that he and the Lady Dorothea Helena his Wife, 14 Feb. 1653. made a Feoffment and Grant executed by Livery and

Attornment of Tenants of this Manor to Sir Charles Wolsely and others their Heirs, with a Covenant to levy a Fine; and afterwards the 10th of April, 1654, levy a Fine with Proclamations in the Court of Grand Sessions for the County of Flint, of this Manor, to Sir Charles Wolsely, and others, and their Heirs: And they find that Earl Charles afterwards 21 Decemb. 1670. died, and that the now Earl of Derby is his Son and Heir, and then was of the Age of sixteen Years and nine Months and fourteen Days; and that he entred the 2d of Feb. Anno 29 Car. 2. and made the Lease to the Plaintiff, who entred and was possessed till the Defendant ejected him; and they find the Act of 34 Hen. 8. against feigned Recoveries by Tenant in Tail, where the Reversion is in the King: And whether the Defendants are guilty they know not, but pray the Advice of the Court upon the whole Matter.

This Case was first argued in the Court of Exchequer, and the Barons being divided two against two, the Cause was then adjourned into the Exchequer-Chamber propter difficultatem before all the twelve Judges, where 'twas argued on the Behalf of the Earl of Derby, and two Questions were made, First, Whether the Act of King James I. hath so altered the Estate as to render it out of the 34 Hen. 8.? And 2dly, Whether the Tail was barrable by Fine by the Statute of Hen. 7.? For the first 'twas argued, That there was no Alteration in Substance, for though the Countess had now an Estate for Life, she was dowable before; and although here's a Liberty for the Issues to make a Jointure, yet 'tis but a third Part; and that their Wives might claim in Right of Dower before the Act, and although there be several Estates added, yet they are all of Persons who were inheritable to the Tail, and 'tis but a new moulding of it, it remains the same Thing in Substance; the Estate-tail is the same Thing as to Continuance of Time: There is a very full Proviso for the Saving to the King his Reversion, &c. cited 1 Inst. 372. That the Parliament only new shaped the Estate, and is not the Donor; but the King gave it by the Letters Patents: And as for the other Point, the Parliament by 32 Hen. 8. enacts Fines to be a Bar, because they

thought that of 4 Hen. 7. did not; and 34 Hen. 8. ſays it ſhall be a Bar to common Eſtates-tail, and not to ſuch whoſe Reverſion was in the Crown: 'Till Hen. 8. Eſtates were not forfeitable for Treaſon, much leſs barrable by Fine, the Statute de modo levandi Fines hath the very ſame Words in it as that of H. 7. and yet it was never thought a Bar.

2 *Mod.* 131.
2 *Jones* 57.
2 *Lev.* 169.
1 *Vent.* 299.

Mr. Holt econtra pro Defendant. 1. As to the laſt Point, That a Fine would have barred the Iſſue by the Statute 4 Hen. 7. the Words any Lands or Tenements ſhould elſe be void unleſs to bar the Iſſue, for before that Statute Tenant in Fee could have barred his Heirs by Fine; as to the Objection that the Statute de modo levandi Fines, hath not been extended to the Iſſue in Tail though it hath the Word Privity in it; he anſwered, That that doth not enact but declare the Uſe of a Fine at the Common Law; if the 4 Hen. 7. did bar, then 32 Hen. 8. is out of the Caſe; and by 1 Inſt. 372. the King having the Reverſion the Eſtate-tail was barred by 4 Hen. 7. 1 And. 171. compared with Moor 250. 3 Rep. 90. As to the other Point he urged. That they are other Eſtates now than before, and are therefore barrable, Brook, Tit. Remitter. pl. 50. A Fine makes an Alteration in an Eſtate, though it be the ſame in its Proportion as before; much more an Act of Parliament, 6 Rep. 41. 1 Roll. 39. This Tail is barrable becauſe 'tis raiſed out of a Subject's Eſtate, and not out of the King's: Suppoſe Tenant in Tail, Reverſion in the King before the 34 Hen. 8. ſuffers a Common Recovery to the Uſe of himſelf for Life and in Tail, Remainder to himſelf; afterwards comes the 34 Hen. 8. if the Remainder falls he might bar his Iſſue notwithſtanding the Reverſion were in the Crown; now this Eſtate is raiſed by Act of Parliament, 2 Rep. 46. and the Act of King James doth quite deſtroy the former Gift, Tenant for Life thereby hath Powers which Tenant in Tail hath not, as to make Jointure for his own Wife and for his Son's Wife. And as to the Objection, That though this Caſe be not within the Words, yet it is within the Reaſon of the 34 Hen. 8. I anſwer, That this Act being in Reſtraint of Alienations, ought to be conſtrued ſtrictly, as the Sta-

tute de donis was always taken ſtrictly in thoſe Words, they may not alien, yet they may alien for their Lives. 2 Inſt. 335. Lord Cheſterfield's Caſe.

Mr. Serjeant Maynard argued on the ſame Side: He wondered the Quære ſhould be revived, Whether Iſſue in Tail be a Privy within the Statute of Hen. 7.? and argued, That ſince the Act of King James, this Eſtate is not within the 34 Hen. 8. for the Iſſue in Tail in a Formedon, ſince that of King James, cannot make a Donor. Hob. 277. and the Eſtate created by Quarto Jacobi is meerly out of the Eſtate-tail which was before, and not out of the King's Eſtate or Reverſion, and the Eſtate given by 4 Jacobi can never determine ſo long as the ancient Tail remains, and therefore not out of the King's Reverſion: The Reaſon of a Common Recovery being a Bar, is not for that 'tis a Common Aſſurance; for at Common Law there was no falſifying by Tenant in Tail: Nay, at Common Law 'twas a Doubt if 'twere not ſo of Tenant for Life; the Bar aroſe from the Statute de donis and Weſtm. 2. In a Recovery the Court cannot judge if there be a Right or no in the Perſons that ſuffer a Recovery to ſuffer it or not; becauſe being of an Inheritance there lies no Falſification, which is the Reaſon of a Recovery's being a Bar: The Authorities that ſeem againſt me are Stafford's Caſe, 6 Rep. 2 Cro. 612, 595. Roll's 1 Rep. 171. to which I anſwer, Judgment was given in thoſe Caſes upon the Point of Pleading, Hob. 332. ſays, That the Judgment in Stafford's Caſe was a very oblique and indirect Strain, 'tis out of the Words of the Statute, the Deſign was againſt Recoveries only, and the Words, or any other Thing, refer to the Whole where there was a Recovery ſuffered: General Words in a ſecond Act of Parliament ſhall not take away a Power which was given by a former Act; as here a Power is given by 4 Hen. 7. and 26 Hen. 8. then comes 34 after it; See 29 Edw. 3. laſt Caſe ſave one, and Keilway 173. and Noy 14. there was more Reaſon they ſhould provide againſt a Recovery by 34 Hen. 8. than againſt a Fine; for that a Recovery might have operated further than againſt a Tenant in Tail's own Iſſue.

2 *Lev.* 27, 29, 55. 2 *Salk.* 51, 52.

Vide poſt.

I did not hear Mr. *Saunders* or Mr. *Williams*, who argued this Caſe, as did alſo Mr. *Pollexfen*, (whoſe Argument is now in Print,) nor did I hear the Judges, except Mr. Baron *Street*, Juſtice *Levinz*, and Lord Chief Juſtice *Pemberton*.

Vide Poll. 491, to 521.

In Hillary Term 33 & 34 Car. 2. Baron Street argued the ſame Points: As to the firſt, that Maſter Littleton was expreſs, That if the Reverſion or Remainder were in the King, Tenant in Tail could not bar, &c. The Contrivance of the Common Recovery made way for the 4 Hen. 7. and it was a Doubt in the 19 Hen. 8. Whether the Iſſue of a Tenant in Tail of the Gift of a Subject were barred by a Fine? Then comes 34 Hen. 8. That it ſhall not bar: And this Law hath always had a ſtronger and more favourable Conſtruction than the 4 Hen. 7. and he cited Bro. Tit. Fines, 127. Dyer 32. Benl. 214. the ſame Caſe 1 And. 142. Jackſon's Caſe, Moore's Rep. 115. which is another expreſs Authority; that the Statute of 4 Hen. 7. was not a Bar. Wiſeman's Caſe, 2 Rep. Brook. Tit. Aſſurance, 6. Hob. 257. 1 Inſt. 325, 375. 3 Cro. 595. 1 Inſt. 73. Stafford's Caſe, 8 Rep. 78. Lord Chandois's Caſe, 6 Rep. As to the ſecond Point, he thought that minute Things and ſmall Matters ſhould not make an Alteration; none are let in here into the Eſtate-tail, but ſuch who were in ab origine, no new Perſons brought in, the Inheritance goes ſtill with the ſame Family; then there's a Saving to the King, his Heirs, &c. in the ſame manner, ſo that the ſame Eſtate which the King had before he hath ſtill, not in the leaſt altered; if the King were Donor before this Act (as certainly he was) then he continues ſo; it all doth here remain in the Iſſue male of this honourable Family: 'Tis true, if the Crown ſhould give Leave to alien or join in an Alienation, or had aliened the Reverſion, then the Iſſue might have been barred, Wiſeman's Caſe, 2 Rep. I agree, That if the Reverſion had been free but for an Hour (though regranted to the Crown) yet 'twould not be within 34 Hen. 8. the Nature of a Saving is not to create a new Right but to preſerve an old one; and there are no Words in this Act that do diveſt him of his Reverſion, ſo that upon the whole Matter I conceive that Judgment ought to be given for the Earl of Derby.

Mr.

Mr. Juſtice Levinz. Quære 1. Whether or no this Act of 4 Jac. hath made ſuch an Alteration as that it is now become an Eſtate out of the 34 Hen. 8? 2. Whether ſuch an Eſtate, the Reverſion being in the Crown, not of the Gift of the King, but now as altered by this Statute be barred by this Fine? For the little Points that have been ſtarted, the Reverſion being in the Crown, there can be no Diſcontinuance; the Statute of Limitations is nothing to the Caſe, for Charles could not have entered againſt his Feoffment; and another Thing is the Warranty which ſignifies nothing, being lineal, and no Aſſets found. As to the firſt Point I think and agree, That no Eſtate is within the 34 Hen. 8. but what is of the Gift of the King, and this is ſuch. And by the Statute 4 Jac. nothing is given but what is within the Patent, and no Perſons within the one but what were within the other; as there is no greater Eſtate in Quantity, ſo is it the ſame in Quality; beſides, this Act is made to countenance an Award, and it cannot be extended further than the Award it ſelf; the Nature of every conſequential Thing ought to be taken from its Principal, and theſe Arbitrators had no Power to make the Lands alienable, the Words are ſaving to the King his Tenure Reverſion, &c. and then 'tis, they ſhall be held and enjoyed, which are not proper Words to create an Eſtate, or to alter one. Now ſhall this Act by an oblique Conſtruction come and take from the King that Privilege which 34 Hen. 8. had given him? It's commonly ſaid in our Books, That the King's Grants ſhall not enure to two Purpoſes. 17 Edw. 3. 39. 7 Rep. 13. Now if the Tenure be not altered then the King continues Donor, every Donee ſhall hold of the Donor; I ſay, every Donee ſhall ſo do, yea, even in Frankmarriage till the fourth Degree be paſt, although he do no Services. If an Alienation be good, pray of whom do thoſe Men hold? They muſt hold of my Lord Derby, for he hath the immediate Reverſion; the Powers given were only to make Jointures, which was the ſame as Dower was before, and then they make him Tenant for Life to prevent Waſte; then for Jointure the Words are, excepting the Capital Meſſuage belonging to the Family: We know where the Husband is Tenant in Tail, the

8 *Co.* 78. 2 *Brownl.* 253.

Wife ſhall not be endowed of the Capital Meſſuage; the Statute de donis hath been conſtrued as largely as any Statute whatſoever, for more Eſtates have been conſtrued to be Tail within it, than are mentioned there. The Statute of Hen. 8. hath alſo been conſtrued largely, for all Recoveries that have been ſuffered ſince have been conſtrued within it, although the Words of the Act literally ſeem to intend only Recoveries before the Act: It hath been objected, That if my Lord were to bring a Formedon, he muſt ground it on 4 Jac. and therefore he is in by that: I anſwer, This is a Suppoſitum quod non eſt ſupponendum; for the Reverſion being in the Crown there cannot be any Diſcontinuance, and therefore no Formedon, although there might be a Bar; but ſuppoſe it ſo, if for a Deſcender or Remainder it may be founded on the Act, but for a Reverter he muſt found it on a Seiſin before the Act. If my Lord Derby were now to bring a Formedon on the Statute, they would plead the Fine in Bar, and if he ſhould reply the Patent of R. 3. that would be a Departure from his Count, and therefore I think he might bring it on his Patent, and ſo diſcloſe his whole Caſe; and I am of Opinion in that Caſe he ought to recover: But ſuppoſing it an Eſtate-Tail by Act of Parliament, with a Reverſion in the Crown, and ſuppoſing the Statute of Hen. 8. out of the Act; I think the Fine no Bar by 4 Hen. 7. the Objection is, What becomes then of all the Fines levied between the 4 Hen. 7. and 32 Hen. 8.? I anſwer, That a Fine at Common Law with a Year's Poſſeſſion and Non-claim, was in Effect the ſame Bar, with a Recovery in a Writ of Right and Poſſeſſion for an Year and a Day; and there were then the common Exceptions of Infancy, Impriſonment, over the Seas, &c. 2 Inſt. 517. The Statute adds nothing of Validity, but becauſe the Fine was ſo high a Bar, it requires ſeveral Solemnities to be added; it does not enact the Fine to be a Bar, but only ſays, becauſe 'tis ſo; ſo that as to the Bar, 'tis but declarative of the Common Law, and not introductive of a new Law: As to the Solemnities 2 Inſt. 516. a Fine was nevee taken to be a Bar of an Eſtate-tail upon any of thoſe Statutes, but upon a Non-claim for a Year and a Day, Litt. 262. and yet

ſome

ſome Perſons were barred who could not claim within the Year and Day, as Reverſions and Remainders; thus the Law ſtood for above two hundred Years together, that a Fine was no Bar. then comes 4 Hen. 7. and enacts, That Fines ſo levied ſhall conclude Privies as well as Strangers: Theſe are the Words; I cannot ſee by what Colour 'twas ſaid at the Bar, That that Statute was made on purpoſe to bar Eſtates in Tail, for all the reſt of the Statute are Savings and Solemnities: The Statute de donis hath not been taken ſtrictly, 11 Rep. 65. Eſtates-tail are not forfeited by Præmunire, nor are they within the Statute of Recuſancy: There are two ways of convicting Recuſants; if it be by Proclamation his Eſtate may indeed be ſeized upon the King's Election of a third Part, or by way of Diſtreſs for 20 l. per Month, but when he dies his Land ſhall be diſcharged in the Hands of his Heir, for the Words Tenement or Hereditament will not reach it; but otherwiſe when convicted by Trial on a Venire, and Judg be againſt him thereupon, for then he becomes a Debtor to the King; and thereby Eſtates-tail are forfeited to the King by the Word Hereditaments, 19 H. 8. 6. Bro. Tit. Tail, 2. Hob. 332. Dyer 32. the Statute of 32 H. 8. bars Eſtates-tail in plain Words; Tails were always reckoned Incumbrances, and endeavoured to be ſet at large, 2 Inſt. 517. my Lord Coke ſays it bars by both of them, but I do not find that there was any ſettled Opinion that they were Bars by 4 H. 7. but only by 32 H. 8. and I do not ſee in my Judgment how Fines could be Bars in any Caſe by 4 H. 7. which were not ſo by the Statute de modo levandi Fines, and therefore Tails are not within it; where the Reverſion is in the Crown I think the Fine cannot be a Bar, the enacting Clauſe is for all ſorts, and then the Proviſo excepts the King's Dances; can it be ſuppoſed that when a Parliament takes Notice of a Doubt, Whether Fines ſhould be Bars, that they ſhould leave it as much a Doubt as before? And therefore I think they took it to be no Bar, Stafford's Caſe was not ſolely adjudged on the general Words of 34 H. 8. but on the 32 H. 8. 2 Rep. 46. other Ways or Means ſhall extend to lower, but not to any Thing of higher Degree than what was mentioned before;

a Fine was above a Recovery, and an old Common Law Bar, and therefore cannot be within the Words other Thing or Things, Dyer 29. 1 And. 46. that was the Gift of a common Person, Bro. Assurance, 6. Bro. Tit. Fines de terres, 126. this was a contemporary Opinion, and he in all Probability was privy to the making of the Act. 2 Rep. 15. there is my Lord Coke in his Reports against my Lord Coke in his Institutes, Stafford's Case, 8 Rep. 78. and Little and Notley's Case, in Savile's Reports, there's not one Word in it of 34 H. 8. for my Part I do not rest upon my Lord Coke's Reason of Discontinuance; I am of Opinion that Judgment ought to be for the Plaintiff. *Sav.* 105, 106.

In Hillary Term 34 & 35 Car. 2. the Lord Chief Justice Pemberton argued this Cause; a Copy of whose Argument from his own Manuscript is as follows:

In this Case the general Question is, Whether this Fine with Proclamations levied by Earl Charles, have barred the Lessor of the Plaintiff, being Son and Heir male of the Body of Charles; and also Heir male of the Body of Thomas, the first Donee?

But this has been considered under two more particular Questions.

1. Whether the Statute of 4 H. 7. 24. whereby 'tis enacted, That Fines levied with Proclamations (in such manner as by that Statute is directed) shall be a final End and Bar, as well to Privies as Strangers (except such Persons whose Interests or Estates are preserved by the Salvo's or Exceptions therein contained) Whether this Statute extends to enable Tenants in Tail in any Case to bar their Issue?

2. Admitting that a Tenant in Tail is enabled by the Statute of 4 H. 7. to bar his Issue by Fine, then whether this Manor being originally of the Gift of the Crown to the Ancestor of Earl Charles, with the Reversion left in the Crown, and so protected from being alienated from the Issues by the 34 H. 8. cap. 20. be now set at large, and the Estate so altered by the Act of Parliament made in 4 Jac. as that it might be barred by the Fine of Earl Charles? Or (as some that have argued have put it in other Terms) Whether the Statute of 4 Jac. hath destroyed the first Estate given by R. 3. and created such new Estates of this

Manor in the Family of the Earl of Derby, as that now a Fine may bar the Iſſues in Tail?

This I take to be the Subſtance of the two Queſtions made in this Caſe, and I ſhall follow the ſame Method, and in delivering my Opinion ſhall conſider them both: I ſhall firſt ſtate the firſt Queſtion as it relates to the Caſe in Hand. The Statute of 4 H. 7. makes Fines to be a final End, and enacts, That they ſhall conclude Privies as well as Strangers, except, &c. Then comes the Statute of 32 H. 8. and taking Notice that there had been ſome Doubts, Whether by the Statute of 4 H. 7. Fines would bar Eſtates-tail? For ſettling this Point it enacts, That Fines levied according to the Statute of 4 H. 7. ſhall be a good Bar of Eſtates-tail.

But in this Statute of 32 H. 8. cap. 36. there is a Proviſo, That this Statute ſhall not extend to Intails made by Act of Parliament; ſo that the Eſtate of Earl Charles being an Eſtate-tail, made by Act of Parliament 4 Jac. and not within the Statute of 32 H. 8. doth remain ſtill in being notwithſtanding the Fine of Earl Charles, unleſs the Statute 4 H. 7. enables a Tenant in Tail to bar his Iſſues in Tail by a Fine.

And as to this firſt Queſtion, I am of Opinion, That this Statute of 4 H. 7. doth enable a Tenant in Tail to bar his Iſſue by a Fine with Proclamations levied according to that Statute: I am not ignorant that there hath been great Variety of Opinions concerning this Matter; the many Books that have been cited by thoſe that have argued on either Side, ſufficiently teſtify this, and I will not ſay but there is Room enough for Doubts and Difference of Opinions concerning this Matter, from the Penning of that Act. It hath been made a Queſtion in this Caſe, Whether the Iſſue in Tail be included in the Word Privies? And ſure methinks they are; there is always a Privity of Blood between a Tenant in Tail and his Iſſue, of Neceſſity; and there is a Privity of Eſtate that enables the Iſſues to bring a Writ of Error, or a Formedon in Deſcender: He muſt make his Title by his Anceſtor, he is ſubject to his Warranty if he hath Aſſets; all which ſhew him to be Privy; and ſo are the Books, Dyer, 3. Hobart in Mac-

Macwilliams's Caſe, 333. 2 Inſt. 516. and many other Books: But I do not take the Doubt to ariſe meerly upon this, whether Iſſues in Tail may be comprized within the Word Privies in the enacting Part of the Statute; for the Purview of the Statute is in general Words, viz. And the ſaid Proclamations ſo had and made, the Fine to be a final End, and to conclude as well Privies as Strangers: Now whether the Iſſue be within the Word Privies or not, yet certainly they are within the Generality of thoſe Words, for they extend to all the King's Subjects of what Condition, Quality, Age, or Sex ſoever; and all had been bound by it, as it's holden in Dyer, 3. in Caſe there had been no Salvo's: So then the Matter of the Doubt ariſes upon this, Whether the Iſſues in Tail are not within the Benefit of the third Salvo, of the Intereſts of ſuch to whom any Right ſhall come after the levying the Fine? Before this Statute, if Tenant in Tail had levied a Fine, yet upon his Death a Right had deſcended to his Iſſue; and if that Right be ſaved now by this Salvo, is the Queſtion; for if it be ſo, then though he be within the Words of the general Purview, yet he will be out of the Act: And this I muſt confeſs to be not without ſome Difficulty; for there is nothing in the Salvo which may incline one to extend it to Strangers only, and not to Privies; and if it were a new Caſe it might bear ſome Diſpute, whether the Iſſue is not within the Benefit of that Salvo? The former Salvo is, Saving to all and every Perſon and Perſons, other than the Parties to ſuch Fine, all ſuch Right as they had at the Time of the Fine levied; and this is, Saving to all other Perſons, all ſuch Right as ſhould accrue after: The Words of the former comprized Privies, and why they ſhould not here may ſeem a Doubt: But it having had ſuch great Agitation formerly, and having of late Years ſlept, and not been ſtirred, as I know of, till this Caſe; and the more and greater Authority as they ſeem to me (which I purpoſely omit to mention, becauſe they have been already ſo often and ſo copiouſly cited in this Caſe) having been that a Fine with Proclamations did by that Statute of H. 7. bar the Iſſue in Tail, and no Judgment (to my Knowledge) ever againſt it, I am willing to look upon it as a Point ſettled; and for many Years paſt

acquieſced in, without labouring it further; eſpecially ſince I conſider, that ſince that the Stat. of 32 H. 8. cap. 36. hath eſtabliſhed, That Fines with Proclamations according to the 4 *H.* 7. ſhall be a Bar of Eſtates-tail: It's hardly ever like to come in Queſtion again, what the Effect of 4 H. 7. as to this Purpoſe was; and I think it not to be material in this Caſe, which I take wholly to depend on the ſecond Queſtion, viz.

2. Queſtion, Whether the Statute of 4 Jac. found in the Verdict, hath made ſuch an Alteration of the original Eſtate of this Manor given by King Richard III. to Thomas, Earl of Derby, as that now ſince this Statute, it ſhall be out of the Reſtraint laid upon it by the 34 H. 8. cap. 20. which reſtrains Tenant in Tail of the Gift of the Crown from alienating the Land from his Iſſues, ſo long as the Reverſion remains in the Crown? And as to this Queſtion in the firſt Place I muſt acknowledge, that I take the Eſtates mentioned and limited by that Act of 4 Jac. in a ſtrict Senſe and Acceptation of Law to be new Eſtates limited and directed by that Act: The Eſtates of Alice and Earl William for their Lives, ſeem to me to be new Eſtates; the Eſtate limited to James, the Son of Earl William, and the Heirs males of his Body; and the Eſtates-tail to Earl William, to the ſeventh Son ſucceſſively, are all new Eſtates; and ſo are all the ſubſequent Eſtates limited in that Act; otherwiſe Earl William would have an Eſtate-tail, and James, nor any of the reſt of them, could not have had any Eſtate in this Manor in the Life of Earl William, as my Brother Dolben well obſerves; and as he likewiſe obſerves, James might have entred upon his Father's Alienation ſince the making this Act, if he had made a Feoffment; and James ſince this Act might have forfeited the Manor for Treaſon in his Father's Life-time, and his Father could not make any ſuch Forfeiture: All which would have been otherwiſe if the old Eſtate had ſtood as it did before the making this Act, without any Alteration; and they ſeem to be undeniable Arguments that theſe Eſtates are new Eſtates in the Strictneſs of the Law; beſides, James and all the Sons of William, and thoſe that follow after, take the Lands by Purchaſe ſince

the Act; whereas if the Act had not been made, they could have taken nothing in the Lands but by Deſcent; and if James, or any of his Iſſue, ſhould forfeit for Treaſon ſince the Act, they could forfeit no more than their own Eſtates; and the others, to whom Remainders are tailed, would have no Prejudice by it; but before the Act it would have been a Forfeiture of the whole Eſtate; and if the King ſhould have granted his Reverſion ſince the Act, James's Fine, or the Fine of any of his Iſſues, would ſurely have barred only their own Eſtates; and if they had died without Iſſue, the Remainder-Men might have then maintained Formedons; but it muſt have been in the Remainder, not in the Deſcender: All which ſeems to me to demonſtrate thoſe Eſtates created by the Act to be new Eſtates.

But yet though I take theſe Eſtates created by the Act to be new Eſtates, yet I conceive that Charles's Fine hath not barred his Iſſue in this Caſe; for I am of Opinion that this Eſtate limited to James, and all other the Eſtates-tail created by the Statute of King James, are protected from being barred by the Statute of 34 H. 8. ſo that a Fine levied by any of thoſe Tenants in Tail ſhall not bar his Iſſue while the King's Reverſion is in him.

I take it for granted that an Alienation by Fine is as much prohibited by the Statute of 34 H. 8. as an Alienation by Common Recovery, and that by force of theſe Words, The Heir in Tail may enter, the ſaid Recovery or any other Thing or Things, to be had, done or ſuffered by or againſt ſuch Tenant in Tail to the contrary notwithſtanding. And accordingly is the Lord Coke in 1 Inſt. 372, 373. and the laſt Reſolution in the Lord Stafford's Caſe, 8 Rep. and though the Lord Hobart in Mackwilliams's Caſe, p. 333. call it an oblique and indirect Strain (as Brother Maynard objected) yet it hath obtained to this Time; and it ſeems to have a great Foundation in the very Act of Parliament it ſelf; for it's plain by the Preamble of the Act, that it was the Alienation of the Land they intended to hinder, not the manner of the Alienation: And it had been to little Purpoſe to hinder Tenant in Tail in that Caſe from aliening by Recovery, if they had left him the Power to bar his Iſſue by a Fine; and theſe Words,

Words, any other Thing or Things, shews that they intended not only to hinder Recoveries, but any Thing else that might be made use of to bar the Issue; therefore it seems 'twas wisely done to extend the Statute, as they did, to Fines. It's true, that only Recoveries are mentioned in the Act, but I think the Reason of that to be, because in all Probability Recoveries were the Assurances then used for the barring Intails where the Reversion was in the Crown. It was a Case excepted out of the 32 H. 8. and it was at that Time questioned, Whether the Statute of 4 H 7. extended to Intails or not; but Recoveries were by all holden to bar the Issue in Tail, so in Probability they would rather make Use of them in such Case, than to rest upon Fines, upon the doubtful Interpretation of an Act of Parliament then controverted; so that to me it seems the Reason why they mentioned only Recoveries in the Statute was, because that was the usual Security in such Cases; but they did it with the Addition of any other Thing or Things, to shew that if Use were made of any other Assurance to bar the Issue, that should be invalid too in such Case; for the Alienation was the Thing that they intended to restrain. In the next Place I lay this down as the Ground of my Opinion, and as a Foundation of all I have to say in this Case; That the Crown was intended to have, and in Truth had a real Benefit and Advantage by the Statute of 34 H. 8. The End of the King's giving Estates to his Subjects that have done him great and acceptable Services, is partly to reward them and their Posterity, and to oblige the Children to follow the Example of their Ancestors, when they shall be sensible how well they have been rewarded, and to encourage others to do the like Services, upon Hopes of the like Rewards: These are not slight Things, but of mighty Moment to the Crown, and more valuable than the Manors they give; for the Strength of the Crown is much built upon the real Services and Faithfulness of the Subjects, and their Readiness and Willingness to serve their Sovereign according to their Duties. By the Preamble of this Act it appears, That the Kings of this Realm had this Consideration in their Eye when they gave such Estates-tail to their Subjects; and it

alſo by the Act, That the Makers of the Act had it in their Eye to give this a Continuance and Duration according to the King's Intention, and for the Advantage of the Crown, it being as a quid pro quo to the King for his Liberality: It being a great Advantage to a Sovereign oftentimes to part with a little Eſtate to purchaſe the Hearts and Love of his Subjects. Now theſe Intentions of the Kings in rewarding their Subjects, would be of little Avail, if the Iſſue might alien their Eſtates as ſoon as they had them; the King's Bounty would be ſoon forgot when the Land was gone, and he would quickly loſe his Aim; therefore it was the Intereſt of the Crown to perpetuate thoſe Eſtates that the King gives as much as may be, and to continue them in the Family: For the Miſchief that the Act intended to remedy, appears in the Preamble to be, that by ſuch Alienations not only the Iſſue in Tail were deprived of the Benefit which by the Crown was intended to them in that Gift, but that the Crown was likewiſe prejudiced thereby, in having that made away and alienned from the Family, which by the Gift was intended to be and ſhould, and in all Reaſon would have been, not only a continuing Obligation on the Family of the Donee as long as it ſhould endure, but likewiſe an Incouragement and Inducement to other Families to perform faithful and diligent Services to the Crown, when they ſee how well others have been rewarded by their Sovereigns for ſuch Services.

The King could not anner any ſuch Reſtraint to his Gift of it; the Iſſue, but Nobody elſe, might be barred by the Alienation where the King gave a Fee-ſimple conditional, at the Common Law, though the King could not; and ſince the Statute de donis, by which conditional Fee-ſimples are made Intails, the King's Prerogative could not reſtrain the Alienation ſo as to bar the Iſſue, as appears, Dyer 32. But as ſoon as Fines were made Bars of Intails (1 Inſt. 372. b.) the King's Donees might bar their Iſſues, and ſo would Recoveries, though they could not ſtir the King's Eſtate: This was miſchievous to the Crown, therefore to help this the Makers of this Act annexed this in Nature of a Condition or Limitation to all the King's Grants in Tail, that they ſhould not be alienned

alienеd by the Donee or his Iſſues; this was for the King's Advantage, and this the Makers of the Act ſeem to have in their Eye equally, if not more, than the Iſſue in Tail; for the Act ſounds in Diſability both to the Donees and their Iſſues; if the King parted with his Reverſion, they took no Care what became of the Iſſues; the King had Power to take off this Reſtraint at Pleaſure, but the Donees nor any of their Iſſues could not free themſelves from it by any Thing they could do; and it's not any Quali-fication or Alteration of the Eſtate-tail, nor any Thing inherent in the Eſtate-tail; but if it be inherent in any Thing, it is inherent in the King's Reverſion:

Theſe Things being premiſed, I ſhall go on to ſee how far this Caſe is within the Letter and Meaning of this Act of 34 H. 8. The Words of the Act are, Whereas the King hath granted, or otherwiſe provided to his Subjects Manors, *&c.* to them and the Heirs males of their Bodies; and whereas ſundry ſuch Donees and their Iſſues, have ſuffered feigned Recoveries of ſuch Manors, whereof the Reverſion is in the King; and then it provides, That the Iſſue in Tail ſhall not be barred, *&c.* but may enter, *&c.* Now in our Caſe this Manor was given by King Richard III. to Thomas, Earl of Derby, Anceſtor of Earl Charles, in Tail male; Earl Charles is the Heir male of the Body of the Donee, and he levies a Fine, the Reverſion being in the King; ſo here the Iſſue in Tail levies a Fine of a Manor of the Gift of the Crown, the Reverſion being ſtill in the Crown. Thus far it ſeems to be within the Protection of the Statute; but then it is objected, that the old Intail that was made to Earl Thomas, was by the Act of 4 Jac. altered and made into new Eſtates; I take it that by this Alteration of the Eſtate the King hath not loſt the Advantage and Benefit which the Statute 34 H. 8. gave him, of reſtraining this Gift of his from being alienated out of the Family: It is obſervable, that all theſe new Eſtates put together, do but make up the old Eſtate-tail; they taken all together are neither longer nor ſhorter, broader nor narrower than the old and original Eſtate of Earl Thomas; none ſhall take by theſe new Eſtates but thoſe that ſhould have taken by the old (except Alice, and

ſuch as ſhould come under the new created Powers of making Leaſes, or of Jointures) which whether they can make any Alteration as to this Purpoſe I will examine afterwards; there is not any Perſon which ſhould have enjoyed under the firſt Gift, but ſhall enjoy it under this new Model, and that in the ſame Method that they ſhould before, without inverting the Order of the Succeſſion in the leaſt; and they ſhall take the like Eſtates, and as beneficially by this Model as they ſhould by the firſt Gift. They ſhould have had Eſtates-tail by the firſt Gift, they ſhall have Eſtates-tail by this Act of Parliament; all but William, and thoſe others particularly named, who by their own Conſent have confined themſelves to Eſtates for Life in Lieu of Intails; the firſt Gift ſays, That Earl Thomas, and the Heirs males of his Body ſhall enjoy the Manor: This Act of Parliament ſaith, That *James*, and others who muſt be Iſſues male of the Body of Earl *Thomas*, and the Heirs males of their Bodies (which muſt be all Heirs males of the Body of the firſt Donee before they can take) ſhall hold the Manor ſucceſſively: This we call new Eſtates, and properly enough according to the Acceptation of the Law; but 'tis plain they are the ſame in Subſtance with the old one, the old Eſtates tranſlated into a new Mode, which remain the ſame in Subſtance, and why it ſhould not be under the ſame Reſtrictions and Qualifications as it had before, I cannot underſtand: I cannot look upon theſe Eſtates thus created by 4 Jac. as new Gifts, but as new modelling and ordering of the old Gift; the King's Gift ruins them all, and to that it is that the Reſtraint of Alienation is annexed by that Statute of 34 H. 8. Alſo none will deny but this is ſtill a Manor given to the Derby Family by the Crown, and therefore the Reverſion being ſtill in the Crown, I ſee not how it can be alienated: If the King had originally given the Manor with ſuch Remainders as are created by this Act, all theſe Eſtates had been within the Statute of Hen. 8. The Lord Coke makes this his third Conſultation upon this Statute, 1 Inſt. 372. and why, when the Act of Parliament hath diſtributed the old Intail, and digeſted it into new Eſtates, they ſhould not be within that Statute of 34 H. 8. I cannot underſtand. King

James, at the Request of the Family gives Leave to new-modify this Estate, keeping it still within the Bounds of the Family; and this to comply with the Peace of the Family too, as appears by the very Act: Now it would be very hard to interpret him out of the Benefit and Advantage that the Statute of 34 H 8. gave him over this Estate, by any Implication not so much as hinted at in the Act, and that contrary to his Intention; for it seems plain to me that the King never intended to part with any Interest or Power that he had over the Estate; this I think any one is warranted to say by the Proviso for the King's Interest (which I cannot agree with my Brother Dolben, to signify nothing) I take it to be very significant, to declare the Meaning of the Act to be, not to prejudice any Power, Advantage or Interest which the Crown had in, or over this Estate; and I think it would be very hard to strip the King (by a strained Interpretation) of this Power that he had by 34 H. 8. over this Estate, to prevent it from being alienes from the Family, unless there were some Words in the Act to lead particularly to such Interpretation: It's considerable in this Case, that the Reversion stands still in the Crown in the same Plight as it was at the Time of the original Gift of Richard III. not any ways altered or impeached by this Statute of King James. I do not take the new modelling of the Grant of Richard III. by this Statute of King James, to be in this Respect any ways compared to the King's parting with the Reversion out of himself; for if the King parts with his Reversion, he implicitly parts with his Power of restraining the Issues Alienation; the Reason is plain, because this Power of restraining is by the Statute of 34 H. 8. annexed to the Reversion as it is in the Crown for the Benefit of the Crown; and this Power of restraining Alienations, is not communicable to a Subject, therefore if the King alien his Reversion, that Power of restraining Alienations cannot pass with the Reversion, but dies and is extinct; and being once extinguished cannot be revived, though the King should have a Re-Conveyance of the Reversion; this is evident by the Lord Coke's second Conclusion upon this Statute, 1 Inst. 372. But nothing that the Donee or

any of his Iſſues can do, can extinguiſh this Power of reſtraining, though they ſhould all join together; for indeed this Power by the Stat. 34 H. 8. is primarily intended for the Benefit of the Crown, to continue that Obligation and Tie that the Crown had upon the Family by this Gift, and the Encouragement it would give others to ſerve the Crown. But there was a Benefit did ſecondarily redound to the Iſſue, by having the Eſtate continued to them, but this they can by no Means ſtrip themſelves of.

The Power of reſtraining Alienation I take to be annexed to the King's Reverſion, and not to the Donee's Eſtate; the changing the Reverſion may deſtroy it, but the changing of Eſtate cannot, eſpecially ſo long as it remains within the old Bounds: Again, it is obſervable, that this Act 4 Jac. is made upon an Award made in the Family, amongſt themſelves, concerning this Manor, (among others) for the Determining how and in what Manner it might be enjoyed by the reſpective Branches of the Family, which Award needed the Confirmation of an Act of Parliament to make it valid; the King joins in it only to make it an Act, and to give it the Stamp and Power of an Act of Parliament, not to part with any of his Intereſts, Advantages and Privileges; (this appears plainly by the Proviſo) and the Award is that this ſhall be enjoyed, by one in Tail, and by another in Tail, and by another in Tail, as they ſhould have taken by the firſt Grant of the King: Now ſhall this be expounded to give a Liberty for any of the Iſſue to alien? Which they had not before, nor could have had by any Thing he could do, and that in Prejudice of the Crown; as that it ſeems contrary to the Award which was to ſettle it in the Family. This is an Act that is grounded on the Award, and participates of the Award thus far, that as the Award was within the Family and amongſt themſelves; ſo this is an Act of Parliament made within the Family, and none but the Family Parties to it; ſo as by the Authority of Barrington's Caſe, 8 Rep. 138. it ſhould not have barred the Right of a Stranger, though a Subject; as if William before the Award had granted a Rent-charge, Alice ſhould not have avoided it, tho'

theee had been no Salvo: And shall this be taken to bar the King of the Power and Advantage he had to restrain the Alienation of the Issues? I cannot in this Respect but liken it to the Prior of Castle-acre's Case, cited in that of Sir Francis Barrington, where by an Act of Parliament, the Lands of Priors Aliens are given to the Crown, yet this shall not prejudice the Rent that the Prior of Castle-Acre had out of a Priory alien, though no Salvo in the Act: Shall a Subject's Right be preserved without a Salvo, because 'twas said the Act was between others, viz. the Priors Aliens? And shall not the King's Interest be preserved here, where he hath a Proviso, and the Act made between Persons all of the Derby Family, and the King no otherwise concerned than to consent that it may be an Act of Parliament? I think if there had been no Proviso, yet this Restraint of Alienation being for the Advantage of the Crown, would not have been discharged; but being there is such a Proviso, 'tis much the stronger. Alice, and the Estates under the Powers can make no Alterations, for the Statute 34 H. 8. enables the Tenant in Tail to make Leases for Lives, yet by common Experience we find, that notwithstanding such Leases, the Restraint of this Statute as to the Alienation by the Donee or his Issues, by this Statute remains; and by this very Statute, the Power given to such Tenants in Tail to make Leases is saved, though the Alienation of their Estates is prohibited. The Privity that Brother Gregory conceived to be necessary in this Case, I conceive to be nothing; for there is no Privity required to make such a Restraint. If the King procure another for Money or otherwise, to settle an Estate upon A. B. in Tail, with the Remainder to the King and his Heirs and Successors, there is no more Privity than here; and yet no Question but the Alienation of A. B. is restrained there by this Statute, so long as the Remainder is in the King; so is Stafford's Case, 8 Rep. After the King had made a Gift in Tail, he grants the Estate to another in Tail in Reversion; yet it was adjudged, That the Restraint laid upon the first Tenant in Tail by the Statute remained, notwithstanding the King's second Grant; for as long

as any Reverſion remained in the King it was that which reſtrained the Alienation, and the Iſſue ſhould have Advantage of it, and ſo ſhould the ſecond Tenant in Tail; for the King's Reverſion protected both. As to Brother Maynard's Quære in this Caſe, Who ſhould be Donor? Its no Matter whether there be any or not: Tails may be without Donors in ſome Caſes; as where the Intail is meerly and ſolely by Act of Parliament, unleſs the whole Kingdom be Donors; and ſo is the Poſt-Office (if it may properly be ſaid to be within the Statute de donis, &c.) ſettled by Act of Parliament on James Duke of York, and the Heirs males of his Body. Huic pater eſt populus; pater eſt huic nullus. But in this Caſe in a Formedon, &c. the Donee might declare of a Gift from the King, I think, and the ſpecial Matter ſet all forth will maintain it; as where a Formedon is brought of Lands that are recovered in Value, it's uſed to declare upon ſetting it forth as a Gift from the firſt Donor, and the ſpecial Matter will maintain it: And concluded upon the whole, That Judgment ought to be for the Plaintiff. Lord *North* being made Keeper could not argue it. However, the Lord Chief Juſtice Pemberton delivered his Opinion by his Appointment, That he held that Judgment ought to be for the Plaintiff upon the latter Point, becauſe the new Eſtate-tail raiſed by the Statute 4 Jac. ſhall have the ſame Protection as the old Eſtate had. But for the firſt Point he held, That ſince the Act 32 H. 8. hath expounded the Statute 4 H. 7. to make the Fine of Tenant in Tail to be a Bar to his Eſtate, it muſt be adjudged to be ſo in all Caſes, notwithſtanding the Proviſo in that Act. 32 H. 8.

Sir Edmund Saunders, who was made Chief Juſtice de B. R. this Term, * was of Opinion alſo with the Plaintiff, and would have argued it, but that the Cuſtom is in an Exchequer-Chamber Caſe, That after it hath been once argued by a Judge, 'tis not to be argued by any new Judge, and ſo there were ten Opinions with the Plaintiff, and only three againſt him, viz. Juſtice Dolben, Baron Gregory, and Baron —— Mr. Pollexfen was likewiſe in his own private Thoughts really of Opinion with the Plaintiff, as I heard

* *i.e. Hill.* 34 & 35 *Car.* 2. *Vide ante.* And *note*, *Pemberton* was the ſame Term removed to *C. B.*

heard himſelf declare to Sir George Jefferyes. Judgment pro Plaintiff.

(103.) *Dominus Rex verſus* Maſon.

Indictment quaſhed.

INdictment againſt the Defendant for ſhooting in a Gun, quod non habens terras aut tenementa ad valorem nono die Aprilis anno, &c. apud, &c. ſagittavit. Exception was taken and allowed, for that he not having, ſhall be intended to relate to the Time of the Indictment, and not to the Time of the Fact; and therefore quaſhed.

(104.) Dickſon *verſus* Thomſon.

Statute of Limitations.

CAſe ſur Aſſumpſit, Statute of Limitations pleaded: Replication quod aſſumpſit infra ſex annos, Iſſue thereon ruled by the Lord Scroggs upon Evidence, and agreed by all the Counſel, That Promiſe of Payment within the ſix Years, though the Debt were contracted long before, will evade the Statute of Limitations; but Confeſſion or only Acknowledgment that he owed the Plaintiff ſo much will not do it.

(105.) Anonymus

Evidence in Ejectment.

IN Ejectment upon Evidence in a Trial before the Lord Scroggs, held, That Payment of Rent to the Leſſor or to any for his Uſe, is a ſufficient Title for the Plaintiff, if the Defendant hath no Title at all but Poſſeſſion: And held alſo, That a Fine with Proclamations when given in Evidence, ought to have the Proclamations indorſed on it; and 'tis not enough to ſay, that 'tis ſecund' formam Statut.

(106.) Edgecomb *verſus* Sparks.

Diſtreſs for Poor's Rates.

THE Plaintiff being a Cooper in Exeter, brought Treſpaſs in the Sheriff's Court there, againſt the Defendant, being a Conſtable, quare domum fregit

git & intravit, and divers Goods, viz. &c. did take and carry away: And upon Not guilty pleaded, the Evidence before Sir Thomas Cary, their Recorder was, That the Plaintiff conceiving himself aggrieved by a Rate to the Poor of the Parish where he inhabited, refused its Payment; whereupon the Overseers with a Constable by a Justice's Warrant made a Distress, and thereupon took the Tools in his Shop; which I being of Counsel for the Plaintiff urged, That they were not distrainable, being the Utensils of his Trade, and consequently the Instruments of his Livelihood; and so within the Rule of the Common Law, he having other Goods at that Time in his House sufficient to have answered the Distress; but the Recorder over-ruled me, being of Opinion that that Rule held not in Case where Distress was given by Act of Parliament, as for Poor's Rates, Hearth-Money, and the like; and that it did only extend to Distresses for Rents and Amerciaments; quære tamen for that Matter.

What distrainable.

Lovett *versus* Hobbs. (107.)

CAse. Plaintiff declares, For that Richard Hobbs, 1 Nov. Anno 31 Car. 2. and long before and after was, and yet is a common Hackney Coachman, and a Common Carrier as well of Mens Persons, as of their Goods and Chattels, in his Coach from the Borough of Marlborough to the City of London; and thence to Marlborough, pro mercede & stipendio, to be paid for Persons and their Goods; and also, that all common Coachmen and common Carriers by the Law and Custom of England, ought safely and securely to keep all Passengers Goods and Chattels from Loss; and whereas the Plaintiff the Day and Year aforesaid, at Marlborough aforesaid, had delivered to the Defendant one Bor, in which were several Goods and Chattels of the Plaintiff's, viz. &c. to be carried from Marlborough to the City of London, and safely to be delivered to the Plaintiff there, and the Plaintiff in Fact saith, That the Defendant afterwards, viz. 1 Nov. aforesaid, took his Journey towards London, and the 2d of Nov. performed his Journey and came to London, and yet notwith-

A Coachman for Hire is a Common Carrier. *Vide ante*, Case, 67.

notwithſtanding, the Defendant being negligent of his Office of a Common Coachman and Common Carrier, did not ſafely and ſecurely carry the ſaid Box and Goods, and deliver them to the Plaintiff; whereby the Plaintiff loſt her ſaid Goods to the Value of 60 l. and lays it to her Damage of 100 l. Upon Not guilty pleaded it came to Salisbury Aſſizes, before the then Mr. Juſtice Jones, where upon Evidence the Caſe appeared, That the Plaintiff was a Paſſenger in the Defendant's Coach, which was a Stage-Coach between London and Marlborough, and the Goods carried with her; upon which I being of Counſel with the Defendant, urged, That this Action lay not, for that a Common Coachman is but a new Invention, and not within the Common Law or Cuſtom of England concerning Common Carriers: That this is not for Conveyance of Goods, but of Perſons; and whatſoever Goods of Paſſengers are by them carried are ſtill in the Paſſengers Cuſtody, and they remove them to their own Chambers at Nights in their Inns; and if this ſhould hold, where would it end? It might as well be brought for the Rings on their Fingers, or Money in their Pockets which Highwaymen rob the Paſſengers of; but the Judge was of Opinion, That if a Coachman commonly carry Goods, and takes Money for ſo doing, he will be in the ſame Caſe with a Common Carrier, and is a Carrier for that Purpoſe, whether the Goods are a Paſſenger's or a Stranger's: The like of a Waterman or Graveſend Boat, which carries both Men and Goods: Then we were forced to give Evidence of our Coach's being full, our Refuſal to carry them, that without our Knowledge at firſt the Porter put up the Box behind the Coach, which when we perceived, we denied to take the Charge of it; which the Judge agreed to be a good Anſwer, for if an Hoſtler refuſes a Gueſt, his Houſe being full, and yet the Party ſays he will ſhift, &c. if he be robbed, the Hoſtler is diſcharged. White's Caſe, Dyer 158. Dr. and Student, 138, 139. F. N. B. 14, 15. Dyer 266. which Fact being left to the Jury, there was a Verdict for the Defendant. Mr. Pollexfen & alii pro Plaintiff. Mr. Eyre and my ſelf pro Defendant.

In this Caſe 'twas agreed, That there needs no particular Agreement for Hire to render a Common Carrier liable, becauſe when there is none, the Carrier may have a quantum meruit for it.

There was one Exception not obſerved, viz. The Defendant was alledged to be a Common Carrier from Marlborough to London, and he never came ſo far, 'twas only to St. James's Market and no farther, and there he took the Goods up when he came towards Marlborough, which is a different terminus ad quem from what they declared upon, which is, That he did not deliver at London; now on the Evidence it appeared he never came to London, and ſo was not bound thereto: Nor ſuch a Carrier as they had declared of.

DE

Termino Mich.

32 Car. 2. B. R.

Dominus Rex verſus Thomas (108.)

ORDER of Seſſions upon a reputed Father of a Child: I moved to quaſh it, for that the Order was, That he ſhould pay ſo much a Week till farther Order, which the Juſtices had no Power by the Statute to make, for that further Order may be forty Years hence: Now after the

Baſtard-Child. 1 *Salk.* *Vide poſt.* Caſe 111, and 264.

Child's Death or Arrival to twenty-one Years of Age, the reputed Father is discharged. Quashed, Vide post Rex *v.* Selbourn.

(109.) Zinzon *versus* Talmash.

S. C. Raym. 402. 2 *Jo.* 142. *Poll.* 561. Copyhold Custom to bar Remainders by Surrender. *Vide* Case 70, 135.

ERror on a Judgment in Com' Banco: On a Special Verdict, the Case was, A Copyhold is granted to A. B. and C. successively, as named, secundum Consuetudinem, &c. A Custom is found, That if an Estate be so granted, the Party that is first named and is the first Taker, may surrender the Land into the Lord's Hands, and so destroy and determine the whole Estate, &c. A. Tenant for Life by Copy, Remainder to B. for Life, Remainder to C. for Life, and in the Manor is such a Custom as aforesaid; A. and the Lord join in a Deed of Covenants to levy a Fine, and afterwards they levy a Fine accordingly to the Use of other Persons; If this be a good Surrender?

Mr. Pollexfen, That this is a good Custom is no Question; for A. is intended the Purchasor, and therefore this Custom may be reasonable enough; but then we must inquire what kind of Surrender, and what Act is sufficient to make a Surrender within this Custom, 'tis not found that in the Surrender any Estate should be expressed, but only that the Surrender should be into the Lord's Hands; and in the first Inst. Surrender ought to be general: So here is no particular Mode found necessary; the Words are that by the Custom of the Manor such first Taker, may surrender the Land according to the Custom of the Manor into the Hands of the Lord: Now these Words according to the Custom are not material, for what is it to surrender according to the Custom of the Manor? For there are a great many Customs belonging to all Manors wherein are Copyholds; and amongst those is a Surrender from Tenant to Lord; 'tis the same in all Manors, and there is no Case of any particular Manor where a certain Mode is required in surrendring or giving an Estate to the Lord: If it had been to another's Use, then the Lord would be only an Instrument of Conveyance, and then all the particular

2 Modes

Modes must be observed, as Rod, Pen, &c. and there must be an Entry of it in the Rolls; but in this Case 'tis only to drown the particular Estate; now by the Deed and Fine there is a Surrender, and it's a good Surrender wheresoever there is a Consent that the Copyhold Estates shall be drowned and extinct; whether it be expressed in Words or Deeds: A Bargain and Sale to the Lord is a Surrender. Jones 141. a Parol Agreement adjudged a Surrender. 1 Leon. 181. and a Freehold Estate for Life may be surrendred without Deed; as is 1 Inst. 318. Bro. Tit. Surrender, 35.

Mr. Serjeant Maynard, pro Defendant en breve d'Error. If A. had done it by Deed, I think that not sufficient, and here is not so much, for 'tis only a Covenant; now certainly a Covenant is no Surrender: And for the Fine that conveys the Land to a third Person; a Lease is not a Surrender according to the Custom of the Manor, but according to the Common Law, A. passeth nothing by the Fine, this Estate cannot pass by that Conveyance, being a Copyhold, and it only concludes him by Estopel; a Custom is always infra manerium, and a Matter extra manerium can never be by the Custom, as a Custom to have Common out of a Manor is void; now 'tis impossible a Fine can be said to be a Surrender Secundum Consuetudinem manerii, and the End of it is, That all Persons may know who is Tenant; none but the Lord passeth any Thing by his Fine: I confess a Man may surrender in any Part of the World, but then 'tis not Secundum Consuetudinem, because the particular Estates must be drowned Secundum Consuetudinem; and this Custom must be taken strictly, and certainly the first Taker cannot bar the Remainder by Deed.

Court. If it were but one single Estate a small Matter might suffice to throw it into the Lord's Hands: But here is the Interest of a third Person concerned, and 'tis by a Custom that this Remainder only can be barred, and that Custom ought to be strictly pursued, therefore a Surrender by Implication will not suffice: And Mr. Pollexfen's Construction would take away the Assurance of the Copyhold Titles, which is accounted the best, because none can

have a Title but that which may be ſeen on the Court-Rolls. And the Judgment was affirmed.

(110.) *Dominus Rex verſus* Selbourne.

Baſtard-Child. 1 *Salk.* *Ante* Caſe 109. *Poſt*, Caſe 264.

ORder of Seſſions for the Maintenance of a Baſtard-Child, naught, becauſe no Order firſt made by the two next Juſtices of the Peace: Order to pay 50 l. or any ſuch other Sum in Groſs, is ill; unleſs it be for Weeks paſt from the Birth of ſuch Child, or for the Charge of Midwifry and other Neceſſaries in the Woman's Labour, which, my Lord Hale held, that the reputed Father was liable to; though the Words of the Statute ſeem only to intend a Maintenance from the Time of the Order: The Father is not compellable to give the Child a Portion, or to put it out Apprentice; 'tis naught if to pay ſo much a Week till ſuch an Age, without ſaying, if it live ſo long: *Tamen quære* of this, for the Law ſeems otherwiſe, becauſe an Order, though ſo general, will determine upon the Child's Death; for its Maintenance ceaſing, the Weekly Payments for its Maintenance muſt likewiſe ceaſe.

Vide ante Rex. v. *Thomas.*

(111.) Manling *verſus* Smith.

Prohibition. See *Nelſon's Lutw.* 49, 327.

IN Caſe of Articles in the Arches, if a Copy of them be denied, a Prohibition lies, as well as in Caſe of a Libel when a Copy of that is denied, a Prohibition lies, but it is only quouſque, &c.

(112.) Anonymus *verſus* Anonymus.

Felons Goods. See *Nelſon's Lutw.* 49.

ACTION upon the Statute of Richard II. That none ſhould ſeize Felons Goods before Conviction: After Verdict it was moved in Arreſt of Judgment, for that the Declaration recited the Statute and ſaid, No Sheriff, nor Under-Sheriff, nor Eſcheator, nor any other Perſon; and in the Statute Under-Sheriffs are not mentioned, yet held that this doth not enlarge the Statute, for that 'tis included in the Word Sheriffs; and

then 'tis, nor any other Perſon, and therefore that is well enough.

Another Exception taken was, for that it ſays bona & catalla, and then alledges Money and Goods; whereas Money is not included under bona, Fitzh. Abr. Tit. Brief, 312. but anſwered, That 'tis true, that Money can't be demanded by the Name of bona, yet it may be granted by that Name, for the Perſon who hath a Grant of bona felon' & fugitivorum, ſhall ſans doubt have his ready Money, though a Declaration for Money is pro pecuniis numeratis. 3dly, The Statute ſaith only bona, the Declaration is bona & catalla; anſwered, That the Verdict helps it by giving 20 l. Damages pro bonis & reſid' pro Defendant. Agreed, That notwithſtanding a Pardon, a Man may be ſaid convict within this Statute.

Another Exception was, That 'tis diverſa bona & catalla, and agreed, That in Treſpaſs it is naught, otherwiſe in Caſe or Debt, with Averment that they are the ſame Goods, which will be a Bar in another Action. Judgment pro Plaintiff.

Aſhurſt *verſus* Mingay.

(113.)
2 *Jones* 144.

COvenant. A. leaſes to two, rendering Rent, &c. one Leaſes to the other all his Part, &c. A. aſſigns his Reverſion to B. who accepts the whole Rent of the Leſſee, to whom, &c. If B. may charge the other with Covenant? Agreed by all, That in Caſe a Leſſee aſſign over his Eſtate, and the Rent is accepted of the Aſſignee, that then the Leſſee is not chargeable with Debt for the Rent after the Aſſignment; but alſo agreed, that Covenant lies againſt ſuch Leſſee after ſuch Aſſignment and Acceptance; for being an expreſs Covenant, the Acceptance of another will not diſcharge the Covenantor: But here the Doubt is concerning the Aſſignee of the Grantee of the Reverſion, if he ſhall have Covenant? Now the Statute of 32 H. 8. ſays, That Aſſignees of Reverſion ſhall and may have Covenant, *&c.* in the ſame Manner that the Leſſor might have had; which is as much as if he had been Party to the Deed, and in Caſe of Reparations 'tis ſo. In Bayly and Ford's Caſe, 1 Cro. reſolved, That an

Covenant brought by Aſſignee. *&c. Vide poſt*, Caſe 203.

Vide Nelſon's Lutw. 97, 211, 212, 109, 145, 136.

an Aſſignee of a Term ſhall have Covenant by way of Retainer againſt the Aſſignee of the Reverſion, and in Batchelor and Gage's Caſe, 1 Cro. 'tis reſolved, that for Covenant not to erect any Building in the Garden, that notwithſtanding an Aſſignment and Acceptance of the Rent from the Aſſignee, and Death of the Leſſee, yet it being an expreſs Covenant, an Action of Covenant lies againſt the Executor of the Leſſee. Now he in Reverſion is without doubt as much concerned to have the Rent paid, as to have the Houſe, &c. repaired.

Saunders econtra. In 1 Inſt. 215. where my Lord Coke doth expound this Statute, he ſaith it extends not ſo far as the Words ſeem to include; for the Payment of a Sum in Groſs, Delivery of Corn or the like, is not within it. Now ſuppoſe the Leſſee and another had covenanted to pay Rent, it would have been collateral, and the Aſſignee could not have taken Advantage of it; for as to the third Perſon covenanting, the Leſſor hath it not as a Leſſor; now in our Caſe the Acceptance of Farrer for his ſole Tenant makes Mingay's Covenant to be collateral; and Mingay is only chargeable with the Covenant to the Leſſor, for he is now a collateral Perſon, and chargeable only with the Covenant, and not with the Rent: And for his Part he ſaid he thought, If a Releaſe had been of the Rent to Mingay, after the Aſſignment and Acceptance, it would have wrought nothing; and there is a great Difference between this Caſe and that of Brett and Cumberland, 2 Cro. for there the Acceptance was before the Grant of the Reverſion, and ſo the Covenant was ſettled by the Acceptance; and he ſues him on the Covenant as on a collateral Security, not as Tenant.

Cro. Jac. 522. *Vide* 2 *Bulſt.* 282.

Curia. My Lord Coke ſaith collateral Things, but Mr. Saunders interprets this of collateral Perſons; now the Rent is no collateral Thing though the Perſon be ſo, for here was really Rent due from Mingay. Adjournat'.

But ſee 2 *Jo.* 144. *Term. Paſch.* 33 *Car.* 2. Judgment was given for the Plaintiff.

Pilkington *verſus* Peach. (114.)

CAſe, wherein the Plaintiff declares upon a quantum meruit for a Houſe, and alledges an Entry and Enjoyment for ſo long a Time, &c. Upon Non aſſumpſit pleaded there is a Special Verdict found, wherein 'tis found, That the Defendant was an Alien Artificer, and the Statute of 32 H. 8. which makes Leaſes to them void, and finds an Indenture of Leaſes by the Plaintiff to the Defendant for the Time mentioned in the Declaration; and that there was no Special Promiſe beſides the Indenture of Leaſe; & ſi, &c. The Queſtion was, If a quantum meruit lies in this Caſe? Arged, That in Caſe a Bond be founded on an uſurious Contract, which is vacated by the Statute, no quantum meruit lies, becauſe the very Contract in ſuch Caſe is void; a Promiſe in Law takes Place only where there is no actual Agreement: In this Caſe he is no Treſpaſſor, and can be accounted but a Tenant at Sufferance, and then no Aſſumpſit will lie, becauſe no Privity at all; alſo an Aſſumpſit is a meer perſonal Thing, but this ſavours of the Realty.

Caſe for Rent, *v.* Alien Artificer.

V. 1 *Saund.* 6, 7. 1 *Sid.* 308, 309.

Court. The Intent of the Statute was, That no Alien Artificer ſhould have a permanent Eſtate, and alſo, that they ſhould not exerciſe any Trade here, and this Statute making void all Leaſes of Houſes to them, was thought the moſt effectual Means, and this quantum meruit will evade the Statute if good. Yet are there other ways to evade it, as to make an Agreement for ſo long as you and I pleaſe, at the Rate of 20 l. per Annum, and an Aſſumpſit will lie thereon, or you ſhall have my Houſe for ſo long as you and I pleaſe for ſo much as 'tis worth; yet agreed that a Contract which amounts to a Leaſe is void by this Statute. Adjournat'.

There was cited in this Caſe by Juſtice Raymond, a Caſe between Jevan and Harridge, 18 Car. 2. B. R. where Bond for Performance of Covenants in ſuch a Leaſe was adjudged void, 'tis Sid. 308. and the Caſe is

1 *Saund.* 8, 9. *Vide* 1 *Danv.* 321. 2 *Danv.* 247.

is likewiſe reported in 2 Keb. 116. and in Saund. Rep. 6, 7, *&c.* and agreed by all the Court and Counſel at the Bar to be good Law. Adjournat'.

(115.)

Holmes *verſus* Maynill.

S. C. 2 *Jo.* 172. *Raym.* 452.

A Deviſe guided by the Intention. *Vide poſt*, Brown *v.* Cutler.

EJectment. Special Verdict, Iſaac Maynell deviſes all his Lands to A. and B. his two Daughters and their Heirs, equally to be divided betwixt them, and if they die without Iſſue, then to my Nephew F. M. and the Heirs male of his Body, with divers Remainders over: One of the Daughters dies without Iſſue, and the Queſtion was, If this Remainder to F. M. ſhould take Effect immediately for a Moiety, or ſhould wait till the Death of both Daughters without Iſſue?

Mr. Finch, pro Plaintiff. Theſe Words muſt be taken diſtributively, as if two Tenants in Common join in Grant of a Rent, though the Words are joint, the Grant is double, and they ought to be taken diſcretivé, as is Ayler and Chep's Caſe, 2 Cro. One deviſeth his Lands to his two Sons, and to the Heirs of their two Bodies; and ſaith, That his Executors ſhall have his Land till they come to their ſeveral Ages of twenty-one Years; one attains the Age of twenty-one Years; held, That that Son might enter, for the Words being, Till they ſhall accompliſh their ſeveral Ages, *i. e.* reddenda ſingula ſingulis, when either came to the Age of twenty-one Years, he ſhould have his Part: And if it ſhould be otherwiſe, then the ſurviving Daughter would have a Remainder in the other Part by Implication; whereas Eſtates made by Implication are never favoured in Law, and never allowed but for neceſſity; as if a Term be deviſed to a Stranger after the Death of the Deviſor's Wife, if there be no more ſhe ſhall have no Eſtate, but if it were to Executors after his Wife's Death, there 'tis of a Neceſſity that the Wife hath an Eſtate for Life, becauſe there is none elſe to enjoy it, and the Teſtator plainly ſays, the Executors ſhall not have it till after her Death; and here is nothing found in this Verdict that ſhould induce a Belief that the Teſtator intended any ſuch Thing as Croſs Remainders: They have

2 *Cro.* 259. *Yelv.* 183. 1 *Cro.* 75. *Vide* 2 *Cro.* 104. *Mod.* 771.

Remainder by Implication.

Croſs Remainders. 2 *Cro.* 655. 2 *Rol. Rep.* 281.

ſeveral Freeholds and ſeveral Inheritances; the ſubſequent Words therefore ſhould be ſeveral; he hath expreſly given them an Eſtate-tail, and that in Severalty, and therefore no Eſtate by Implication, for the Law never creates an Eſtate by Implication where the Party hath given an expreſs Eſtate: Dyer, 331. Clarke's Caſe is expreſly ſo; and 2 Roll. Tit. Remainders, 416. 4 Leon. 14.

Mr. Pollexfen pro Defendant argued, That he in the Remainder cannot take till they die, i. e. both: Here the firſt Words do originally give them a Fee, but then come thoſe other Words, and if they die without Iſſue then; the ſole Reaſon why this is conſtrued a Tail is, That purſuant to the Party's Intention he in Remainder may be let in, and therefore 'twill be hard to ſtretch it any further for his Advantage who hath nothing but by a Stretch; we muſt never make a Diſtribution to deſtroy, but only to ſerve the Intention. 2 Cro. 448. Counden's Caſe, Hob. 33. there is a vaſt Difference where the Deviſe is to three, and where only to two; no croſs Remainder ſhall be admitted in Caſe of three, becauſe 'tis uncertain unto which of the Survivors it ſhall go on the Death of one. He cited 3 Cro. 3442. 2 And. 134. Roll's 2 Rep. 281. and Cole and Leviſton's Caſe, Mich. 24 Car. 2. 'tis in 3 Keb. 3. this very Point was adjudged by the Lord Hale, and this Difference allowed good.

Vide Poll. Rep. 172.

Vide 2 *Cro.* 416, 448. *Moore.* 853. 1 *Rol.* 833, 835, 836. 1 *Mod.* 263. 2 *Jo.* 107, 173.

This Caſe was argued again but I heard them not; but in Michaelmas Term following, Sir Francis Pemberton being then Chief Juſtice, delivered the Opinion of the Court in theſe Words, or to the like Effect. The Caſe ariſes only on the Clauſe of the Will, and the Queſtion is, Whether Francis Maynell, the Remainder-Man, ſhall have any Eſtate in Part of the Land on the Deceaſe of one Daughter without Iſſue, during the Life of the other Siſter? And we are all unanimouſly of Opinion with the Defendant; for we take it here, that the Leſſor of the Plaintiff is to have no Eſtate till both Daughters are dead without Iſſue; for it being in the Caſe of a Deviſe, we muſt be ruled and governed by the Intention of the Party, whether there be any Words legally to carry it or not; the Caſe of 13 H. 7. doth ſeem to make this out very plain, for there a Man deviſes his Land to his

2 *Jo.* 172. 13 *H.* 7. 17. *b.*

his Heir after his Wife's Decease; and 'twas held his Wife had an Estate for her Life; this could be but darkly collected from the Words, and yet they took his Intent and Meaning to be so; here is a plain Intention that Francis should have nothing till both Children be dead, and 'tis such an Intention as both Nature and Prudence directs, a Man by Nature being to provide for his Children before any others; besides, any other Construction would be a Violence to the very Words themselves, for 'tis if they die, i. e. if they both die, &c. 4 Leon. 14. is a Case in the Point, and this is very much stronger than that, for there was a Devise of several Parcels of Lands to two Sons severally, and then 'tis, if any of them die, &c. I confess it to be an Anonymus Case, but I don't find any Book to impugn or contradict that Judgment. There was the Case in Moor's Rep. 124. and 3 Cro. 16. Glover *v.* Latches, Frenchman's Case in Dyer, all of the same Import: I take that of Moor and Crook to be all one, though in the first Book 'tis Anonymus: They are to a Man and the Heirs males of his Body, and if he die without Issue of his Body, &c. his Heir female shall not take by this Devise, and this is plainly according to the Intention of the Party Devisor; and no way contrary to this Judgment, Dyer 330. As to Bryon and Cauzon's Case, 2 Roll. Rep. 281. there is no Colour why our Case should be affected thereby, and I have heard great Opinions against the Law of that Case, but take it as you will, there the Opinion was, That where the Party had expressed his Mind in particular Limitations over on Condition, there they would not find out Remainders by Implication, which implies, that if there had been no cross Remainders expressed, there should have been some by Implication. The Case of Johnson and Smart in Roll's Abr. Tit Remainder, 416. seems the strongest Case against us; there a Devise was to two for their Lives, Remainder to the two Sons equally to be divided, and to their Heirs, and each to be the other's Heir, and if they die without Issue, then to remain to a third Person: 'Tis said there, That on the Death of one without Issue, his Part shall go to him in Remainder. If there were such a Case I think the Law is quite otherwise, but I believe he took it at second

See *Coke v. Gerrard. Saund.* 185. 2 *Cro.* 416, 448.

Hand, for he was ſcarce of Age ſufficient to report at that Time; and in Truth as I have ſeen a Manuſcript ſhewn me by my Brother Dolben, 'twas the Opinion of the Court upon Evidence in a Trial at Common Pleas Bar, there was nothing of a Deviſe in the Caſe, for 'twas if a Copyholder ſhould make a Surrender to the Uſe of A. and B. his two Sons; and if one die without Iſſue, the other to be his Heir, and if both of them die without Iſſue, then to C. in Tail: And the Court was of Opinion, That if A. die without Iſſue, B. ſhould be ſeized in Tail thereof; and during the Life of B. it ſhould not go to the Stranger. So that this is a very ſtrong Caſe for us, and quite miſtaken by Mr. Rolle. Gilbert and Wittie's Caſe in 2 Cro. according to the Account that Doddridge gives of it, is by no Means to be cited for the Plaintiff; two croſs Remainders may very well ſtand together, but otherwiſe in Caſe of three, for that would make ſuch Confuſion as the Law abhors; and that was the Reaſon of the Judgment in that Caſe, and I take it to be ſound Law: Theſe are the principal, if not all the Caſes that were cited, and I think none of them will impugn our Judgment, but 'tis agreeable to the Rules of Law, and here is a pregnant Intention with the Plaintiff: The Lord Hale declared himſelf of this Opinion, and took a mighty Difference between the Caſes of a Deviſe and of a Conveyance at Law. Judgment pro Defendant.

——— *verſus* Morton. (116.)

DEBT on a Judgment, Defendant pleads, That the Plaintiff had proſecuted a Capias ad ſatisfaciendum againſt him upon that Judgment; that ſuch Capias was delivered to the Sheriff, that thereupon he had paid the Condemnation-Money to the Sheriff. Plaintiff demurs: And per Cur' The Plea is naught, for he is not bound to pay the Money to the Sheriff, but to the Party, and the Sheriff by that Writ only had Authority to take his Body, not his Money; and ſuppoſe that the Sheriff die or become inſolvent, the Plaintiff muſt not loſe his Debt; other-

Money paid to the Sheriff.

Vide poſt, Caſe 157, 166, 271. *Ante* Caſe 63.

wiſe if the Money had been paid to the Plaintiff's Attorney upon Record, for that would have been a Payment to the Plaintiff himſelf, (and by ſome it would be otherwiſe if paid to the Sheriff upon a Fieri facias) Judgment was for the Plaintiff in this Caſe.

(117.) *Sir* John Cutler *verſus* Friend.

Words.

Papiſt, *&c. Vide poſt*, Caſe 257.

CAſe in Com. Banco for Slander, alledging him to be a Juſtice of the Peace, and a Deputy-Lieutenant; the Words were, He is a Papiſt and a Penſioner. Moved in Arreſt of Judgment, that the Words are not actionable; but agreed, to ſay He is a Papiſt convict, is actionable, becauſe he cannot be an Executor, &c. and it is actionable though no ſpecial Damage be laid, but Papiſt is not ſo; and it is clear that Penſioner is not actionable, unleſs joined with other heightning Words; cited 2 Cro. 484. Roll. 1 Abr. 50. 1 Leon. 335. Papiſt ſpoken of a Biſhop is actionable, becauſe it touches him in his Office; but this reaches not the Plaintiff in his Office. Knighton, Hull, Godbolt, and 2 Brownl. 166.

On the other Side it was urged he might be turned out of his Office for being a Papiſt, or rather it is inconſiſtent with his Office; 'tis alledged he was at that Time a Juſtice, and Deputy-Lieutenant, and ſtood for Burgeſs in Parliament when the Words were ſpoken, and Penſioner is with an Innuendo, one that would ſell his Vote for Money. Papiſt as to Point of Action is as Thief, and tho' not convicted yet he may be: Juſtices of the Peace are to prevent the Increaſe of Papiſts, and to diſarm them; therefore to ſay he is a Papiſt is a Reflection on him in Point of his Office: Things may be actionable at one Time that are not at another; as in Caſe of Waſte of Wood, reputed Timber in ſome Places that is not ſo in another; Papiſts are now more dangerous than formerly; the Caſe of a Biſhop and a Juſtice are much the ſame, both being as Judges. Lord North and Wyndham held for the Plaintiff, the others doubted. Adjournat'.

Wayte & al' verſus German.

(118.)

1 *Vent.* 367. 1 *Mod.* 79, 194, 236. 4 *Mod.* 148. 5 *Mod.* 390. *Raym.* 246.

PRohibition moved for in Com. Banco: The Church of St. Clement Danes, Weſtminſter, was ruinous and like to fall; the Biſhop of London gave Leave to pluck it down and build a new one, and a Rate made accordingly for repairing the Body of the Church (the Steeple ſtanding) they ſuggeſt that the Rate was for building a new Church, and not for repairing an old one; and that the Tax was unreaſonable, viz. at the rate of ten Years to be paid preſently, and that they had not Leaſes of their Houſes for ſo long a Time. The firſt Queſtion was, Whether the Pariſh might not be taxed for the rebuilding a new Church where the old one ſtood, though the Foundation be ſomewhat enlarged, the Church being made bigger? Then the 2d Queſtion, Whether they could tax at the rate of ten Years to be paid preſently, when a Man hath a Leaſe but for one Year? There was Jefferie's Caſe in 5 Rep. and that when a Tenant covenants to repair a Houſe, and pulls it down and builds it up again ſubſtantially, if it could not be otherwiſe repaired; this is no Breach, 4 Co. Luttrell's Caſe, and Daniel *v.* Clerke; One had an ancient Mill which had a Watercourſe to it, which is diverted, the Tenant builds a new Mill, following the Stream in the ſame Tenement, and well enough: So a new Church in the ſame Pariſh; the Spiritual Court hath Juriſdiction of the Principal Matter, and therefore alſo of the Acceſſory. Poph. 179. Roll. Tit. Prohibition, 289. Chamberlain of London's Caſe, 5 Rep. Hill. 7 Jac. Brownl. 215.

Rates for Churches rebuilt, &c. *Nelſon's Lutw.* 326, 327.

Vide 5 Co. 66, 67. *Cro. El.* 659. *Hob.* 212. *Hard.* 379. 2 *Jo.* 122. 1 *Mod.* 261. 5 *Mod.* 390, 447.

4 *Co.* 86, 87, 88. *Hut.* 58. *Cro. Jac.* 182. *Cro. El.* 557. *Hob.* 39. *Poph.* 172.

Baldwin econtra argued, That in Caſe of Neceſſity the major Part of the Pariſh ſhall bind the reſt, but in the Libel they do not ſay the major Part made the Rate.

Lord North. 'Tis ſaid the Pariſh or ſome of them did rightfully make the Tax, and can that be underſtood otherwiſe than of the major Part? And if but forty of the Pariſh appear the major Part may tax the whole Pariſh: Baldwin agreed to the Caſe of the Mill for Neceſſity, but here the Church might have been

been built on the ſame Foundation, Keilway 189. 1 Hen. 7. 25. the Pope nor any Eccleſiaſtical Powers have to do with building of Churches, but the King only; and the bringing in Parochial Churches is not ſo very ancient as is pretended. Winch, 53, 63, &c.

Jefferyes. The Perſons of another Pariſh could not have been taxed for the Amendment of a Church where he was not an Inhabitant; our Caſe as we lay it in our Suggeſtion is, That the Spiritual Court have refuſed to admit our Plea, and therefore we hope to have a Redreſs here; they ought to have gone to the King or got an Act of Parliament, we alledging in our Suggeſtion that the Tax was not made by the Majority, we hope your Lordſhip will not intend upon ſuch an Ambiguity as is in their Libel, for that will be certifying of their Libel here, and the Freehold of the Church is in Abeyance, and therefore without the Patron as well as Ordinary it cannot be enlarged; the Church-Yard is conſecrated to one Purpoſe, and the Church to another. Roll. 2 Rep. 147, 247.

Lord North. I have only to conſider whether it be within their Juriſdiction; if they wrong you, you may appeal, we cannot prohibit unleſs they incroach on our Juriſdiction: In Jefferye's Caſe 'tis plainly adjudged that this Caſe is within their Juriſdiction, I ſuppoſe that before the Statute of a Juſtice of the Peace's charging an Hundred upon a Robbery, that a Majority might have proportioned the Charge; certainly a Church may be new built that is likely to fall down, and this is quite different from building new Churches where were none before, as to build two in a Pariſh where was never but one; and the Tenant might have provided with his Landlord in his Contract not to bear the Charge of ſuch Rates and Taxes; 'tis clearly of Spiritual Juriſdiction.

5 Co. 66, 67. Cro. Eliz. 659. Hob. 212. V. 2 Saund. 423.

Wyndham. We muſt ſuppoſe that in Matters of their Juriſdiction, that they go according to their Laws: For the building a new Church where there was none before the King muſt agree, &c. but not ſo for building a Church that is fallen down.

Charlton. The beſt Objection they have is, That the Libel doth not ſay abſolutely that the major Part agreed to this Tax, but nevertheleſs it is of Eccleſiaſtical Conuſance.

Levinz. When there was a pretended Power of the Pope in oppoſition to the King, 'twas an Objection fit to be made, but now it is the King's Eccleſiaſtical Law; but he doubted of the Libel's not expreſſly declaring the major Part's Conſent to the Tax, and therefore was for having it amended; and then, &c.

North and Wyndham conceived it well enough, ſince 'twas ſaid to be rightfully taxed, and ſaid, they could not take Notice of the Forms and Modes of Allegation uſed in thoſe Courts; and ſo no Prohibition. And I never heard that 'twas moved in any other Court, but that they ſate down ſatisfied and paid the Rate. Sed Quære Legem.

Lee *verſus* Garret.

(119.)
S. C. Raym. 416.

DEbt ſur Obligation, condition'd to pay Money to the Adminiſtrators of the Obligee within two Months after his Deceaſe: Defendant pleads, That there were no Letters of Adminiſtration granted in two Months and more after the Obligee's Death; and that he was ready to have paid it, but that there was no Adminiſtrator to receive it. The Plaintiff demurs for want of an uncore priſt.

Uncore priſt, and Tender. *V. Nelſon's Lutw.* 87, 111, 119.

Pollexfen. There needs no Tender becauſe it is rendred a Thing impoſſible by the Act of God, and therefore the Tender is excuſed; when the Condition is general and without Place, we muſt ſeek him if within the four Seas, but if beyond Sea the Forfeiture is ſaved; but yet when he returns the Principal is due, but when the Act is made impoſſible 'tis become no ways obligatory, and a Tender is executed.

Saunders econtra. If it had been a collateral Act, and that Matter becomes impoſſible afterwards, 'tis void, but not ſo where the Condition is Parcel of the Duty contained in the Obligation. 1 Jo. 171, 471. If Bond be for Payment of Money before Michaelmas to A. and A. dies inteſtate before that Time, and no Letters

ters of Administration granted before that Time, the Forfeiture is saved, yet the Debt is not lost. And Judgment for the Plaintiff.

(120.) *S. C. Raym.* 417.

Dominus Rex versus Curtis & Christian & *al'*.

Indictment. Variance in the *Venire.*

INdictment for their Information against the Duke of Buckingham; after Verdict it was moved in Arrest of Judgment, That the Venire is duodecim probos & legales homines, and the Statute is liberos & legales; & habentes terras & tenementa ad valorem 20 l. per Annum, whereas the Statute is but quatuor. Precedents on the Crown-Side are always Probos & legales, except some few since the Exception taken. Roll. Ent. Error. 832. 2 Cro. 672. 1 Inst. 155. adjudged that it is no material Variance, and legales includes both liberos and Probos, and viginti includes quatuor, and the Statute saith 4 l. per Annum at the least, so that it may be more, and 'tis the Substance which is regarded by that Statute. Judgment pro rege.

Vide 6 Mod. Tutchin's Case.

'Twas said by Dolben, and not denied by any of the other Judges, That Indictments and Pleas of the Crown-Side are not within the Statute of Amendments, for the Preamble is Pleas between Party and Party.

(121.) *S. C.* 2 *Jo.* 132. Raym. 418.

Gray *versus* Dight. *Entred* Trin. 29 Car. 2. B R. Rot. 96.

Case for a malicious Prosecution. *Vide post, Box*, &c. 139. and *Dixon*, &c.

ACTION sur le Case by a Church-warden for a malicious Prosecution of him in the Ecclesiastical Court, setting forth, That the Defendant summoned him to account, upon which he appears, and being bid by the Judge to account, and he does so; and yet the Defendant prosecuted him again, and went and told the Judge that he would not account, on which he is excommunicated: Moved in Arrest of Judgment, That this Action lay not; but held it did lie for a malicious Prosecution in the Court-Christian, 1 Cro. 291. 1 Roll. Abr. 112. Hob. 203. Wild *v.* Beny. 2 Cro. 667. 1 Roll. 72. And this was adjudged for the Plaintiff, though they did not shew the Cause on

which he was prosecuted, but only to account generally. But held, to cite a Churchwarden to account that hath accounted before is actionable, tho' he go no further; and resolved the Action lies, though nothing ensued but an Excommunication, and no Capias, nor any express Damage laid; for this Court will consider of the Consequences of an Excommunication; and an Action lies for a malicious Prosecution, though the Judges Proceedings are erroneous, for that is not material in this Case. Judgment for the Plaintiff by the whole Court on a solemn Debate.

V. 1 *Jo.* 312. 1 *Co.* 63. *Cro. Car.* 291. *Cro. Jac.* 351. *Cro. El.* 838.

Thomlison *versus* Freeman. (123.)

PRohibition granted after Sentence and Appeal, it appearing upon the Libel it self, that the Cause was out of their Jurisdiction. Vide post, Case 141. and Owen *v.* ——

Prohibition after Sentence.

Jenkes *versus* Lyon. (124.)

DEbt upon a Bond, Defendant pleads Privilege of the Common Pleas as an Attorney there: Plaintiff demurs, because 'twas after Imparlance; and held by the Court that such Plea comes too late after Imparlance. Judgment pro Plaintiff.

Privilege pleaded.

Anger *versus* Brown. (125.)

Vide 1 *Vent.* 337, 348, 350. 2 *Jo.* 128.

ERror on a Judgment in Ireland in Prohibition, the Question was, If a Place needs be alledged in the Declaration, to direct where a Venue should come? Said, That Precedents had been in multitudes both ways, with it and without it; but here held necessary because Damages were given, and tho' the Prohibition be delivered only to the Judge; yet there having been Proceedings against the Party, for proceeding contra regiam prohibitionem, they ought to shew where the Court is held that they proceed in; and when the Prohibition was delivered the Contempt

Venue in a Prohibition.

is the Ground of the Damages, and that is wholly uncertain. Adjudged that the Venue is neceſſary to be alledged, and the Judgment reverſed per tout le Court.

(126.) Sheffield *& al' verſus Archbiſhop of* Canterbury.

Prohibition to the Arches, citing out of the Dioceſs, *&c. Vide poſt*, 141.

PRohibition moved for to a Suit of the Archbiſhop's in the Arches, for a Legacy of Books given to the Library at Lambeth. Suggeſtion, That the Plaintiffs were cited out of the Dioceſs, and alſo that he was Judge of the Arches, and ſo would be Arbitrator in his own Cauſe.

Mr. North oppoſed the Prohibition, becauſe the Gift is not for himſelf.

Pollexfen. Books are properly the Chattels of the Archbiſhop, and will not go to the Succeſſor; though 'tis to be hoped they will be tranſmitted, yet the legal Property is in him, and though ſome Doctor ſits as Judge in the Arches, yet the Archbiſhop may ſit there himſelf whenſoever he pleaſes: And the Archbiſhop in this Caſe hath no Remedy but a Commiſſion of Delegates originally; as the Archbiſhop of York, when he was tranſlated thither, was ſued for Dilapidations in his former Biſhop's Palace, by an original Commiſſion of Delegates: And a Prohibition was granted in this Caſe, and the Plaintiff ordered to declare thereon.

(127.) *City of* London *verſus the unfree Merchants.*

1 *Ven.* 351.

London Cuſtoms. *Nelſon's Lutw.* 425, 426, 441.

Witneſſes.

TRial at Bar touching a Cuſtom or Duty for Goods imported; which was agreed to be payable for Goods brought from other Ports in England unto London, but denied for Goods imported from Foreign Parts: A Queſtion aroſe, If Freemen Citizens might be Witneſſes? And denied, and a Verdict for the Defendants; and a Bill of Exceptions on the Plaintiff's Side, for that Freemen were denied to be Witneſſes; held they might be Witneſſes for the Defendants, becauſe that is againſt themſelves; Unfreemen that were not Traders were allowed likewiſe pro Defendant. Then the Queſtion was, Whether

the Bill of Exceptions might be determined before Judgment, or whether on a Writ of Error? But leaving that Point the Court gave Judgment for the Defendants according to the Verdict: But agreed, that a Bill of Exceptions lies on a Trial in this Court, by Westm. 2. cap. 31. 2 Inst. Bill of Exceptions. *Vide post*, Case 286.

Cresley *versus* Darling (128.)

SCire facias *v.* Bail; the Case was thus: In a joint Action against two, the Defendant was Bail for one of them. Judgment was against the Principals, and a Scire facias against the Defendant as Bail for one of them; and says only, that the Party Principal for whom the Defendant was Bail, had not paid the Money, &c. Bail. *Vide* 2 Jo. 75, 96, 188.

Mr. Thompson took Exception, For that it ought to have been alledged, that neither one nor the other of the Principals had paid the Money, it being a joint Debt, the Payment of either would have discharged the Bail.

Dolben and Raymond, It is well enough, for his Recognizance was to be Bail for such one Person, and they need not aver further than that that Person hath not paid; but if the other had paid it, the Bail ought to have pleaded it. Judgment pro Plaintiff. Nisi, &c.

Anonymus. (129.)

WHen a Statute requires a Thing to be done in England, 'tis sufficient to alledge it done in Com. Devon. without saying in England, for the Court will intend that, and they do judicially take Notice of all the Counties of the Realm. Locality of Actions.

In Case of cepit & abduxit, the Price and Value ought to be alledged by the Rule of the Register, but not so in Case of Detention or Wrong done to Goods. Trespass. Value.

A Visne may be well enough of a Forest, though it extend into several Hills; in our Court we say, apud Forestam de L. in Com' prædict'. Visne.

Continuances in Grand and *Petit cape*, *Ante* Caſe 48, 233.

In Caſe of a Grand Cape in Dower on a Writ of Erroꝛ, there are no Continuances returned, and they are only entred in the Filizer's Roll, but foꝛ a Petit Cape, there all the Proceſs and Continuances muſt be entred.

DE

Termino Hill.

32 & 33 Car. 2. B. R.

(130.)

Anonymus.

Habeas Corpus to *Feverſham.*

MR. Serjeant Jefferyes moved foꝛ an Habeas Corpus cum Cauſa to the Court of Feverſham, which is one of the Cinque-Ports; and granted, becauſe that the Action was there foꝛ a Duty oꝛ Cuſtom foꝛ Fruit imporꝛted thither, in which the Judges were quaſi Parties to the Suit: He cited Witherly's Caſe in Roll. Abr. Tit. Habeas Corpus, and the ſame is allowed in Caſe of the City of London, when they bring Debt on a By-Law, and the Cauſes being removed, this Court oꝛders a Trial by a Jury of Middleſex.

(131.)

Ulcott *verſus* Belchy.

Vide poſt, *Oliett* v. *Beſſey*, Caſe 214.

TReſpaſs *v.* the Defendant foꝛ falſe Impꝛiſonment, wherein the Caſe was, The Plaintiff was taken out of a Liberty, and carried by the Bailiffs to the

Defendant, who was Keeper of the Gaol within the Liberty, and had no Notice of his being taken out of the Liberty.

Saunders urged, That Treſpaſs lies not againſt the Gaoler, though the firſt Taking was certainly wrongful, and it is one intire Act as to the Party Plaintiff, and cannot be ſevered, yet when in Cuſtody the Gaoler hath him charged with the Action; and it is an Eſcape in him to let him go, though wrongfully taken at firſt.

Mr. Attorney econtra. No Notice in Treſpaſs is no Excuſe, as in Felony it is; for in Treſpaſs a Man is bound to take Notice whoſe Goods he meddles with, and whoſe Ground he walks over: Here it is but one continued Treſpaſs, and the Bailiffs and Gaoler are all of a Gang; and if Notice ſhould be neceſſary it muſt be given by the Bailiffs, and not by the Plaintiff. 3 Cro. 918. Price and Allington's Caſe, where a Capias ad ſatisfaciendum was delivered to the Sheriff, who made a Warrant to his Bailiffs to do Execution; afterwards a Superſedeas was delivered to the Sheriff, the Defendant being Bailiff, having no Notice of the Superſedeas takes the Party, who eſcapes, and he retakes him; and held that falſe Impriſonment would lie, for he being the Sheriff's Servant, and having Time given him by Intendment to have Notice from his Maſter of the Superſedeas, he ought at his Peril to take Notice thereof, and his Act afterwards is not excuſable. Adjournat'.

Dominus Rex verſus Stroude. (132.)

Riot. *Vide ante* Caſe 88. 3 *Mod.* 141. 6 *Mod.* 43. *Poph.* 121. *H. P. C.* 137. 5 *Mod.* Caſe *ult.*

INformation for a Riot, for entring with Force into the Houſe of an Envoy, &c. Trial at the Bar: The Defendant being Bailiff of Weſtminſter, entred on Pretence of a Forfeiture by one Doughty, who was convicted of Murder; but the Court would not admit it in Evidence, for were it ſo, they were all of Opinion, That let a Man's Poſſeſſion be rightful or wrongful, a forcible Entry on the Houſe, though with a lawful Pretence is a Riot, if the Envoy were

were not lawfully poſſeſſed, much more if the Envoy were Tenant at Will of Doughty: So if Doughty had Goods there, he ought to bring Trover, &c. though in this Caſe of the King an Entry for a Forfeiture may be by Force, yet if the King grants bona felonum to another, the Grantee cannot enter by Force, for 'tis a perſonal Prerogative and not communicable; reſolved thus per Cur' on Evidence in this Cauſe.

(133) Benſon *verſus* Strode.

Copyholder for Life attainted of Felony and pardoned, he in Reverſion enters.
2 *Jo.* 189, 190.

EJectment. Special Verdict; the Lands in Queſtion were Parcel of a Copyhold Manor, grantable for Life and in Reverſion, the Defendant had a Grant for Life, and the Leſſor of the Plaintiff had another Grant in Reverſion for his Life, to commence from and after the Death, or ſooner Determination of his Eſtate; the Defendant is attainted of Murder and pardoned, The Queſtion was, If he in Reverſion might enter preſently? 'Twas argued this Term, but I being called out of Court, could not hear the Arguments. 'Twas argued again in Michaelmas Term following, and then urged, That the Pardon could operate nothing in this Caſe, for the King could not hold the Eſtate; as is Owen's Rep. on a Seizure of a Copyhold for Recuſancy, and the King therefore remits nothing; a bare Commiſſion of Felony is no Forfeiture without an Attainder. Hill. 2 Car. 1 Leon. Ivy and Pawlett. So of a Conviction before a Preſentment of it, but by the Attainder he is become dead in Law; and this is a Forfeiture that does not depend upon a Cuſtom, and the Defendant being ſo dead, was not able to hold it, and the King cannot take it; ſo that the Lord or the Grantee of the Reverſion or Remainder muſt have it: the Lord cannot, becauſe this extinguiſhes the Copyhold, and therefore the Grantee muſt have it immediately; I confeſs in Caſe of a Forfeiture by Cuſtom, the Remainder-Man cannot enter without a Special Cuſtom, for then the Lord's Entry is ſometimes neceſſary, and other Incidents may be neceſſary; but in

Vide Owen, 63. *Cro. Jac.* 301. *Cro. Car.* 233.

Caſe the Eſtate is determined as in Winch 27. Allen v. Brach; and in many other Caſes; as if the Lord make a Leaſe for Years to his Copyholder, he cannot enter againſt his own Leaſe, but the Reverſioner muſt: And if in any Caſe it be lawful why not in this Caſe?

Saunders pro Defendant. The Pardon is not material, that comes too late, and yet the Grantee cannot enter; Attainder is a Royal Forfeiture, and not common to every Tenure, for the King only hath the Advantage of it in Caſe of Freeholders being attainted of Felony, and in the King's Caſe it falls not without Office; and in Caſe of a Subject an Entry muſt be made in Lieu of it; how doth this differ from the other Caſes of a Freeholder? There may be a poſſeſſio fratris of a Copyholder; Cuſtom hath ſo fixed and ſettled it that 'tis almoſt as good as any other Eſtate, though at the Common Law it be only at Will: The Queſtion is, Of whom this Copyhold was held at the Time of Attainder? 'Tis of the Lord of the Manor, even after a Grant of the Reverſion; this Grant in Reverſion is to commence after the Determination of the former Eſtate, and not by the Word Forfeiture: And till ſuch Determination, in this Caſe the Lord may (notwithſtanding the Forfeiture) diſtrain for his Rent and Services; and after this Forfeiture he hath his Election if he will have the Tenancy or the Services, and the Party cannot deprive him of his Election; then before the Lord's Entry the Copyhold Eſtate is not forfeited, for it is not determined by the Forfeiture, and ſo is the Caſe of Fenn and Perryman. 1 Cro. 233. and Lady Mountague's Caſe, 2 Cro. 311. Though there be a Forfeiture yet there muſt be an Entry before the Eſtate can be determined, and there is no Difference between that Caſe and ours: If a Grant had been to me for Life, Remainder to another for Life, and I had made a Feoffment, the Lord muſt have entred to have determined my Eſtate, and therefore without his Entry the Grantee cannot take; as in 1 Inſt. 169. Borough-Engliſh Land in Caſe of Conditions, the eldeſt Son hath the Entry and the youngeſt the Eſtate.

Lord

Lord Chief Juſtice. This is not underſtood to be a Grant of the Reverſion; and yet he doubted whether there have been conſtant Entries in ſuch Caſes by the Lords of Manors: The Lord doth not always make an actual Entry, but generally there is a Precept to the Steward to ſeize the Land, and that is a Sign the Lord hath a Right, and that is in the Nature of an Habere facias poſſeſſionem, and does not give Title but ſuppoſes one; becauſe the Copyhold is determined, or rather, becauſe it appears to be determined by the Preſentment that's made of ſuch a Forfeiture; it is quite different from an Entry which veſts an Eſtate, and 'tis the Preſentment (if any Thing) ſeems to determine the Eſtate, for the Precept to ſeize is in Nature of an Execution.

Dolben. If a Copyholder commits Waſte, the Lord may leaſe without an Entry.

Lord Chief Juſtice. There needs no Entry upon the Forfeiture of an Eſtate at Common Law: And it was ſaid, That the Entry is only neceſſary as to the Profits; for if a Forfeiture be preſented before Seizure, the Lord cannot have Treſpaſs for the Profits: (Sed quære de eo) 'Twas alſo ſaid, Suppoſe the Tenant had made a Feoffment, if the Lord had not entred, the Eſtate of the Feoffee had been good till Entry, And why not in this Caſe of an Attainder? It was anſwered, That the Attainder would have been a good Plea in Bar to an Action brought by the Copyholder. Adjournat'. See 2 Jo. 190.

(134.) *S. C. Raym.* 427, 428.

Brown *verſus* Cutler.

Deviſe for Life on Condition.

EJectment. Special Verdict: Deviſe to his Wife during her natural Life, if ſhe do not marry, and if ſhe do marry, then preſently to his Son and his Heirs of his Body; and if he die without Iſſue, then to J. S. The Queſtion was, If the Eſtate to the Son were contingent? And argued by Winington pro Plaintiff, and Saunders pro Defendant; and now adjudged by the Court, That the Wife had a Widow's Eſtate, and the Remainder not contingent; for that they

they took it plainly to be the Intention of the Deviſor, that his Wife ſhould have it for her Life, if the other ſhould have an Eſtate-Tail. Per Jones, Dolben and Raymond. *Vide ante* Holmes *v.* *Maynil.*

Pitt *verſus* Moore.

(135.)

S. C. 2 *Jo.* 153. 1 *Vent.* 359. 2 *Mod.* 287. *Ante* Caſe 70, 110. Copyhold a void Surrender.

ERror on a Judgment in Ejectment in C. B. where on a Special Verdict the Caſe was, That a Biſhop being in the late Times diſſeiſed of a Manor, a Copyholder ſurrenders to the Diſſeiſor to diſpoſe of the Copyhold as he pleaſes, the Biſhop enters, the Copyholder brings his Ejectment: Held in the Common Pleas, That the Copyhold was not extinguiſhed, and that it was a void Surrender; otherwiſe if he had ſurrendred to the Uſe of a Stranger who had been accordingly admitted, though by the Diſſeiſor: The Caſe was only opened, and the Arguing it adjourned till next Term. *Ante* Caſe 70.

Anonymus.

(136.)

Words: Bankrupt. *Vide* 2 *Jo.* 140.

CAſe for Words, viz: He is a Bankrupt, and hath been ſo theſe ſeveral Months: And lays no particular Damage, but only that he was a Tradeſman. After Verdict and on Motion in Arreſt of Judgment; 'twas held, That if a Declaration be, that he got his Livelihood by Buying and Selling, and doth not ſay by what Trade, 'tis ſufficient to maintain an Action for being called a Bankrupt, 1 Roll. 46. And though a Man avers not in his Declaration that he hath loſt his Credit, or hath had any particular Damage, yet if he ſhews himſelf to be, and to have been a Tradeſman, 'tis a ſufficient Declaration, for the Slander of Bankrupcy, or being a broken Tradeſman: If a Man keep a Shop though cloſe, yet he is a Trader within the Statute of Bankrupts. Judgment pro Plaintiff.

(137.) *Dominus Rex verſus Sheriff of* York.

Return. MAndamus ſued by an Attorney of that Court, and held a good Return thereto, that he was not debito modo Electus, without alledging the Special Matter, and ſuch Nicety is not obſerved in Returns as hath been formerly: And this is the beſt way, becauſe it very properly puts the whole Proof on the other Side, as a Plea of Nil debet doth.

(138.) *Dominus Rex verſus* Selbye.

Apprentice's Freedom. MAndamus was prayed to the Mayor and Burgeſſes of Maldon, to make a Man Free of the Corporation, that hath ſerved out his Time of ſeven Years Apprenticeſhip there to a Freeman; the Court doubted much if it could be granted, but it was ſaid there were ſeveral Precedents of it; and therefore Time was given to ſearch.

(139.) *Vide ante Gray & Dight & poſt, Dixon & Thompſon.* 1 *Salk.* 14, 15, 21. 5 *Mod.* 394, 405. 1 *Vent.* 86. 6 *Mod.* 25, 216, 261. Box *verſus* Taylor.

ACTION ſur le Caſe, for a falſe and malicious Proſecution of a Suit in an inferior Court, and ſaith only, abſque cauſa juſta; and held naught, becauſe it might be with a probable Cauſe, and if there were a probable Cauſe for the Suit, then it could not be malicious, and this Action will not lie; abſque aliqua cauſa will do, or ſine cauſa juſta vel probabili, but abſque cauſa juſta is not good for the Reaſon aforeſaid: And Judgment pro Defendant.

(140.) Anonymus.

Declaration. IF there be a Fault in a Declaration on which the Plaintiff muſt be Nonſuit, and the Defendant taking Notice of it, do prepare no Defence for the Trial, but depends thereon, and the Plaintiff a-

mends his Declaration without Rule for so doing, and so surprizes the Defendant and gets a Verdict, this Court will set such Verdict aside, and will grant a new Trial. Verdict.

Upon the Allowance of an Audita querela surmising a Release, the Release ought to be produced under Seal, and received and approved in Court by Witnesses viva voce. *Audita Querela.*

On Debt on a Bond, if the Obligation be false Latin, the Declaration ought to be good and true Latin; as if the Obligation be wiginti, the Declaration should be viginti; and then the Court is to construe it if it be a Variance. False *Latin.*

Anonymus. (141.)

INdictment for using a Trade, not having served seven Years Apprenticeship in England or Dominion of Wales, held naught; because limited to England or Wales when the Statute is general. Apprentices. *Post*, Case 218.

In Case one be cited out of the Diocese, no Prohibition is to be granted after Plea, for thereby the Defendant hath owned the Jurisdiction of the Court; and none can be granted after a Plea of a general Negative, though that Court will perhaps admit of a new Allegation. Agreed per tout le Court. Prohibition. *Vide ante* Case 21, 123, 126.

Note, In *Easter* Week in this Vacation, Sir *Francis Pemberton* was made Chief Justice of the King's Bench Court in the Room of Sir *William Scroggs*, who was displaced. 1 *Vent.* 354.

DE

Termino Paſchæ

33 Car. 2. B. R.

(142.)
S. C. 1 *Vern.* 360.
2 *Jo.* 396.
Bankrupts Commiſſioners aſſign Lands.

Berris *verſus* Bowyer.

Inrolments.

TRespaſs. **Commiſſioners of Bankrupts aſſign Lands to C. by Deed indented, the Aſſignee makes a Leaſe of Part of the Lands before Inrolment; and then the Deed is inrolled. If the Leaſe be good was the Queſtion? Argued, That the Deed of Aſſignment is good without Inrolment, and that in pleading they need only ſhew the Aſſignment, and not the Inrolment; and this Caſe was compared to that of Attornment, and that the Inrollment ſhould have Relation, and there were cited** 2 Rep. 26. Bankrupt's Caſe, Hob. 20. Latch 167. Hill and Dennis. Bellingher's Caſe, 2 Cro.

Relation. *Vide poſt*, Caſe 199.

Mr. North econtra. The Caſes of Relations in the King's Grants are not the ſame with this; here is not any Time limited by the Statute when the Inrolment ſhall be made; and if the Eſtate ſhould paſs by the Deed, the Inrollment may be forty Years after; as to the Caſe of Bankrupts in 2 Rep. that is of Goods which are tranſitory, this is of Lands in Fee. The Words of the Act are, Lands, Tenements, and Freehold ſhall be ſold by Deed inrolled, and by any other Conſtruction this Word inrolled would be void; beſides, this is a Power and Authority given to the Commiſſioners, and ſuch ought to be ſtrictly purſued, and this will prevent Frauds and double Sales

which are neceſſary to be avoided in Caſes of Bankrupts.

In Hillary Term following Mr. Holt argued pro Plaintiff to this Effect, viz. An Inrolment is neceſſary, and the Law requires it; the Sale is to be by Deed inrolled; before the Statute of Inrollments, Inrollment was neceſſary where a Conveyance was made by, or to the King, and alſo in Caſe of a Recognizance: Now in theſe two Caſes Inrollment was neceſſary, abſolutely neceſſary; yet when it comes, it takes Effect even from the firſt Act, and not from the Inrollment; Needler's Caſe, Hob. 221. Now this is by the Common Law, And why ſhould it not be ſo by Act of Parliament? It is common to expound Statutes by the Rules of Common Law: Hob. 198. Hill *v.* Wintour, livor d'Entries 635. Tit. Scire facias. How a Bargain and Sale by the Statute of Bankrupts differs from the Common Law I know not: Jennings and Mallorie's Caſe. 2 Inſt. 674. 2 And. 160. Ledgingham *v.* Alſop. 2 Inſt. 675.

Mr. Saunders pro Defendants. At this Time the Plaintiff's Title was not compleat, but ſay the Inrollment ſhall have Relation to the firſt Act; I ſay there's no Need or Occaſion to make a Relation in this Caſe; for there's another manner of Relation beyond both, viz. to the Time of the Party's becoming a Bankrupt, to avoid all mean Conveyances and Charges, and to veſt it in the ſame Plight in the Aſſignee as 'twas in the Bankrupt; the Statute ſaith, by Deed inrolled in one of the Courts of Record at *Weſtminſter*: And this Inrollment may be ſeven Years afterwards, and the Statute of Bankrupts hath not limited any Time, ſo that the Parties living it may be inrolled twenty Years after, and therefore Relation would be unreaſonable; the Caſes at Common Law make nothing to this; for firſt in that Caſe of the King, the Thing paſſes by the King's Prerogative. and the Party intereſted ſealing the Deed is all his Work, and the Laches of the King's Officers ſhall not prejudice him, but it ſhall paſs preſently: Now none can ſay the Commiſſioners have any Intereſt, and in Litt. 310. Grant and Attornment are both neceſſary, and nothing paſſes without both; the Grant

Grant is not compleat without both: Then as to the Caſe of Recognizances, that is by Reaſon of the Common Law, which ſays, that a judicial Act done by a Judge ſhall be good from the Time of the Act done; and the Inrollment is only for the Eaſe of the Clerks. For the Caſe of a Bargain and Sale, I am ſure it hath been doubted whether a Bargainee ſhall be ſuch a Tenant as to maintain an Action before Entry before Inrollment: I ſay it hath been doubted, the Commiſſioners have barely an Authority, the Bargainee cannot be ſaid to be in by the Bankrupt, nor barely by the Commiſſioners; whereas in Caſe of a Will the Deviſee comes in by the Deviſor, though the Executors or Truſtees do convey; this rather is like a Forfeiture: 'Twas ſaid per tout le Court, that in Bellinger and Alſop's Caſe, the Opinion of the two againſt the three hath been held the current Opinion, although Iſham and Morris's Caſe be otherwiſe: I queſtion if a Bargain and Sale may not make a good Tenant to the Præcipe before Inrollment: And if Tenant in Tail becomes a Bankrupt, and the Commiſſioners aſſign the Land by Bargain and Sale, the Bargainee ſuffers a Recovery, then there is an Inrollment; Quære, If the Recovery be good? 'Twas ſaid by Mr. Pollexfen, That an Uſe will not paſs by Parol without Deed, but the Lord Chief Juſtice Pemberton ſaid, 'Twould be a good Chancery Uſe or Truſt if for Money. Adjournat'.

In Eaſter Term following 'twas adjudged per tout le Court, That Inrollment is neceſſary before any Thing can paſs by ſuch Deed of Aſſignment, or Bargain and Sale from the Commiſſioners. See now the new Statute againſt Bankrupts. 5 Georgii cap. 24.

(143.)

Mayor of the City of Exon *verſus* Starre.

Fine by By-Law for refuſing an Office.

DEbt for a Fine, for refuſing to take the Oath of Officer required by the Corporation-Act, being choſen to be an Officer, the By-Law was 60 l. for the Refuſal of the Office of Steward of the City of Exeter; the Defendant would take the Oath of the Office, but refuſes the Corporation Oath againſt the

Covenant: Held, that he is puniſhable for ſo doing, for 'tis a Refuſal of that without which the Office is void and cannot be held; the ſame ruled in the Sheriff of York's Caſe. Trin 22 Car. 2. Rot. 48. in the Lord Hale's Time, for refuſing the Oaths of Supremacy and Allegiance; and although the Election be void, and he be now puniſhable for holding it, yet 'tis he that hath diſabled himſelf; but afterwards on nil debet there was a Verdict pro Plaintiff. *Vide poſt, Rex verſus Vaughan.* 1 *Vent.* 171. 2 *Saund.* 389. *Raym.* 212, 374. 1 *Mod.* 81.

And in Eaſter Term following Mr. Tremaine took ſeveral Exceptions:

1. They ſay there is an ancient Court held before the Mayor and Bailiffs, &c. and they have not averred that before their Charter 'twas their Uſage to ſwear the Mayor and Bailiffs in that Court; for the Charter is a Charter of Confirmation, and ſays, ſecundum laudabilem conſuetudinem.

2. That they lay no Title to the Fine in the Corporation, for if the King grant them not the Fine, but only Power to fine, this will not intitle them to the Fine: But anſwered, as to the firſt the Court would ſo intend it now; for the ſecond, there was enough expreſſed to ſhew the Title to the Fine; they ſay that they have Power to convict till he do pay the Fine to the Uſe of the Corporation, which ſhews the Fine was to be to their Uſe, though the Commitment be illegal: The King's Patent is never reckoned naught for a falſe Suggeſtion, when he parts from nothing; and although perhaps it may be ſo if the King bring a Scire facias, yet a Defendant in Debt on a By-Law ſhall not take Advantage thereof. In Caſe a Man hath a Grant of bona & Catalla felonum upon the Conſideration of Money paid, and the Patentee hath Occaſion to bring Detinue for ſuch Goods, he need not allege he hath paid the Money into the Exchequer. Judgment pro Plaintiff. 1 *Saund.* 274, 275.

Walkin *verſus* Osborne.

(144.) See 2 *Jo.* 154.

IN an Appeal of Felony, urged that Pledges may be put in any Time before Judgment; where an Original is, the Pledges are filed or indorſed on the back *Raym.* 414. Pledges in Appeal.

back of the Writ, and ſometimes mentioned in the body of the Writ; but whether the Party be in Cuſtody or not, he ought to find Pledges to ſecure the King of his Amerciament. And held, that in Appeals Pledges ought to be found before any Anſwer by the Appellee.

(145.) See *Raym.* 433, 434. *Poſt*, 215, 340.

Dominus Rex verſus Forbis.

Indictment. Nonconformity. *Nelſon's Lutw.* 63, 64. 6 *Mod.* 189. Intendment of Days.

INdictment for not coming to Church, taken at a Seſſions held 13 Jan. Anno 32 Car. 2. for that the Defendant being of ſuch an Age on the firſt of January laſt paſt, and for ſix Months after he forbore to come to any Church or Chapel, &c. and upon Motion to quaſh it, held per Cur' that the firſt of January laſt paſt, ſhall be intended to be the Month laſt paſt, and not the Day. And though a Bond dated the 5th of March, conditioned for Payment of Money the 25th of March next, ſhall refer to the Day and not the Month; yet ſuch a Conſtruction ſhall never be made, to loſe a Debt, deſtroy an Indictment, or vacate a Judgment, but only when 'tis in Maintenance of them.

(146.)

Shelden *verſus* Hentley.

Specialty payable to Bearer.

DEclaration on a Note under Seal, whereby the Defendant promiſed to pay to the Bearer thereof upon Delivery of the Note, an 100 l. and avers that it was delivered to him by the Bearer thereof, and that he was ſo.

Saunders pro Plaintiff. There being an Averment it is ſufficiently certain, and not an individuum vagum: A Specialty need not name the very Name of the Perſon ſi conſtat de perſona at the Time of the Delivery; ſo that it is no more than to be bound to the Churchwardens of ſuch a Pariſh, which in my Lord Hale's Time was adjudged good.

Mr. Juſtice Jones. At the Time of the Sealing whoſe Deed was it, and to whoſe Uſe?

Saunders anſwered, That 'twas no Deed till the Delivery, and then it was the Plaintiff's.

Mr. Holt econtra. It is not averred that 'twas ſealed to the Plaintiff's Uſe; no Perſon can take by Deed that falls not under a Deſcription before the making of the Deed: as a Baſtard that hath not gained a Name by Reputation cannot take by the Name of Son; here is no Perſon aſſigned till the Delivery.

Court. The Perſon ſeems ſufficiently deſcribed at the Time that 'tis made a Deed, which is at its Delivery: And ſuppoſe a Bond were now made to the Lord Mayor of London, and the Party ſeals it, and after this Man's Mayoralty is out, he delivers the Bond to the ſubſequent Mayor, this is good; & traditio facit Chartam loqui: And by the Delivery he expounds the Perſon before meant; as when a Merchant promiſes to pay to the Bearer of the Note, any one that brings the Note ſhall be paid.

But Mr. Juſtice Jones ſaid, 'Twas the Cuſtom of Merchants that made that good; and he puts this Caſe, That if a Man is bound to pay to (Blank) and ſeals it, and afterwards a Name is put in, this is not a good Bond. Adjournat'.

Chivers *Vicecom.* Wilts *verſus* Fenn & *al'*. (147.)

DEbt on a Bail-bond, the Principal gives a Warrant of Attorney to appear for himſelf to Mr. Twyford, and his Bail being his Neighbours, he orders him to appear for them too, which Twyford does; and for want of a Plea Judgment is had againſt all three: But upon Motion Judgment was ſet aſide as to the Bail, the Principal's Order not being a Warrant to appear for more than himſelf; but it being by Ignorance of the Law, and not a wilful Act, the Judges on Motion diſcharged the Attorney as to any Contempt.

Warrant of the Principal for Appearance, Extends not to the Bail.

Anonymus. (148.)

IN Trover and Converſion for a Horſe in an Innkeeper's Hands, Denial to deliver him is no Converſion, nor Evidence of a Converſion, unleſs the Plain-

Denial a Converſion.

Vide poſt, Caſe 176.

tiff tender in particular what the Horſe has eat out, and the Jury is to judge if ſufficient. Ruled ſo on Evidence coram Domino North.

See 2 Salk. 655. 2 Mod. 245. 3 Mod. 2. and note 6 Mod. 212.

DE

Termino Trin.

33 Car. 2. B. R.

(149.)

Cockman *verſus* Farrer.

Error to reverſe a Fine. 2 *Jo.* 181.

WRIT of Error to reverſe a Fine, the Defendant pleads thereto that the Fine was unlawful, and five Years paſt, and Non-claim. Argued not good, for that it is the ſame with a Writ of Error to reverſe an Attainder or Outlawry, and the very Suppoſition of the Writ is, that there was no lawful Fine.

(150.)

Latin.

IN an inſimul computaſſet 'twas ſaid, inventus fuiſſet inſtead of fuit; and urged in Arreſt of Judgment, that fuiſſet was Nonſenſe; yet held good: Otherwiſe if it had been inventus erit.

(151.)

4 *Raym.* 378.

Anonymus.

Convictions quaſhed, *ſans* Writ of Error.

MOtion was to quaſh a Conviction for Hunting, within the late Statute, and thereupon 'twas queſtioned, If they might be quaſhed without a Writ

of Error? Vide Berrie's Case. Roll. Tit, Error, 743. If a Man be convicted on the Statute 7 Jac. by two Justices, for killing of Partridges with Nets; on Proof or Confession without Indictment, such Judgment or Conviction may be reversed without a Writ of Error, being removed into the King's Bench by Certiorari; and 'twas said per Cur', That Convictions for not repairing of an Highway, are made so foolishly that they are not Judgments; and this Court hath quashed them without any Writ of Error.

Anonymus. (152.)

Upon the Trial of a Devastavit vel non, &c. my Lord Pemberton allowed for Evidence an Inventory, tho' not exhibited by the Party Defendant, but by Commissioners on a Commission out of the Spiritual Court, &c. and said likewise, That if the Defendant would not, or did not exhibit an Inventory, it should be taken pro confesso that he had Assets. Evidence.

Per Cur', If a Witness be to testify what another said at a former Trial upon his Oath that is now dead, the Record of that Trial must be produced, or else such Evidence is not to be admitted.

By Mr. Pollexfen. In real Actions, as Dower or the like, where Infancy is in Issue, it shall be tried where the Land lies, but in personal Actions, where the Action is brought. Vide post, Case 162. Infancy Trial.

(153.)

This Term Fitz Harris was tried for Treason, his Plea of Impeachment in the House of Lords being over-ruled the last Term. See the Arguments printed at large in the Collection of State-Trials. 1 *Ven.* 354.

DE
Termino Mich.
33 Car. 2. B. R.

(154.) Dare & Chaſe *verſus* Chaſe.

S. C. 2 *Jo.* 167. Award Exceeds Submiſſion. *Ante* Caſe 47.

DEBT on a Bond, Condition to perform the Award of two, if made on the 21ſt of March, and for want of ſuch to obſerve and obey the Award of an Umpire, ſo it be made on or before the 22d of March, and the Umpire made his Award on the 21ſt of March. Verdict for the Plaintiff.

Tremayne moved in Arreſt of Judgment, for that here may be two Awards; and it is a concurrent Authority. Anſwered, That in the Pleadings it appears the Arbitrators made none. And per Cur', What Damage if both ſhould award? the Arbitrators ſhall be firſt preferred. There was cited 1 Roll. Abr. 262. Barnard *v.* King, Style 306. Ruſh and Crab in Hill. 18 & 19 Car. 2. B. R. Rot. 1040. Copping *v.* Harnard. Hill. 20 & 21. Car. 2. B. R. Rot. 101.

2 *Saund.* 129. 1 *Sid.* 428, 455. 1 *Lev.* 285. 1 *Mod.* 15. 2 *Mod.* 169. *Raym.* 187.

Another Exception moved, That Releaſes are awarded to be made to the Day of the Award, which exceeds the Submiſſion. Aleyn's Rep. 85. Kynaſton and Jones's Caſe was cited, whereupon Mr. Juſtice Dolben took occaſion to ſay, The Publiſher had much wronged the Author, for that he had the original Manuſcript, and had compared them, and found it to be miſtaken in ſeveral Caſes, even as to the very Reſolutions of the Court: Agreed per Cur', That an Award ought not to be pleaded in Engliſh, but ſet

out in Latin; and if it be otherwiſe it is Error: Judgment ſtayed till it be moved on the other Side.

As to the firſt Point, that of an Ampire, ſee Copping and Harnard, 1 Mod. Rep. 15. 2 Saund. 129, 130, &c. ſupra.

Dominus Rex verſus Smith.

(155.) S. C. 2 Jo. 163.

INformation for Perjury, the Caſe appeared to be, That the Defendant Smith, went with the Juſtices, Conſtables & al', to diſturb a Conventicle in a Town in Leiceſterſhire, and that he asked a Fellow there his Name, and he ſaid James; (who was a known Conventicler) whereas in Truth the Man named was not there, and the Fellow that anſwered knew it, but the Defendant did not; but however believing it, he ſwears before the Juſtice that James — was at the Conventicle, and thereupon a Conviction was had; and now upon Motion it being a plain Miſtake the Verdict was ſet aſide, the Oath not being wilful and corrupt Perjury: And the Court urged as Authority for granting a new Trial, two Caſes where Verdicts of the ſame Nature had been ſet aſide. Jackſon's Caſe of Glouceſterſhire, and Fielding's Caſe in my Lord Hale's Time.

New Trial after Verdict for the King in Perjury.

Tyack's *Caſe.*

(156.)

TYack being to draw a Deed, hath Writings brought to him, amongſt which he finds one that concerns himſelf and his Title, and he detains it; the Court forced him to deliver it up, and left him to take his proper Remedy at Law; and per Cur', and Counſel at the Bar, 'twas ſaid to have been ſo done in one Paine's Caſe in this Court, 21 Car. 2. where a Scrivener detained Writings; and Doble of Somerſetſhire's Caſe in my Lord Hale's Time was the ſame, and ſo ruled, as Saunders and Tremayne ſaid.

So in Caſe of an Attorney, Sollicitor or Counſel that gets Writings, the Court forces a Delivery very often.

Attorney retains Writings.

Dominus

(157.) *Dominus Rex verſus* Webb.

Sheriff takes Money in Execution. *Vide poſt*, Caſe 166.

UPon Motion againſt the Sheriff of Eſſex, for taking Money, &c. in Execution; 'twas ruled by the Court, that though one be in Execution for a Fine to the King, yet a Levari facias lies de bonis & catallis, and by ſuch Writ the Sheriff may take ready Money; and here was cited in Kelynge's Time one Cadmore's Caſe the ſame Rule.

(158.) *Preſident and College of Phyſicians verſus* ——

Phyſick. *Vide* 4 *Mod.* 47. 5 *Mod.* 327, 328. 2 *Salk.* 451.

DEbt on the Statute for 5 l. a Month for adminiſtring Phyſick within London, not being of the College, &c. upon nil debet, Trial at Guildhall, the Lord Pemberton allowed of the printed Statute-Book as Evidence of their Charter and Statutes, without any Exemplification or ſworn Copy of either, and ſaid he would intend them right, unleſs they did ſhew a Variance between that and the Original in Parliament; then a Copy of the Statute was produced by the Defendant, and ſworn to be a true Copy taken out of the Rolls's Chapel, and no Le Roy Veult in it, and alledged that Cardinal Wolſey had a great Sum of Money to foiſt it in among others: But my Lord diſallowed the Exception; ſaying, there were ſeveral Forms of Statute in Ages paſt, and this had been allowed an Act of Parliament ſo often, and in ſo many Caſes, that he would not diſpute it now: Then they took Exception that the Preſident only ſhould bring the Action, but he ſaid that had been over-ruled frequently: Then 'twas urged the Practiſing was in Weſtminſter and the Action laid in London, Quære, If good by the Statute of King James, which lays popular Actions in their proper County, and ſays, That if it appears upon the Evidence to be committed in another County, then where brought, the Defendant ſhall be found Not guilty; If this Action of Debt be within this Statute? As to the laſt Point a Special Verdict was found. Queſtion alſo, If that the Offence be committed above one Year before the Action brought?

Bellamy *versus* Ruſſell.

(159.)
S. C. 2 *Jo.* 168.

COvenant upon a Charter-Party between the Merchant and a Maſter, the Merchant was to pay ſo much for Freight, and the Maſter to deliver the Goods at ſuch a Port; Breach is aſſigned in Non-payment of the Freight; the Defendant pleads, That the Maſter hath damaged, waſted and imbezilled the Goods to the Value of the Freight; and that there was a Cuſtom to detain the Money which ſhould be paid for the Freight in Lieu of the Goods: Plaintiff demurs; the Court thought that Plea good, though to Covenant, if there was ſuch a Cuſtom, wherefore the Plaintiff prayed Leave to waive his Demurrer and to take Iſſue, which was granted.

Charter-Party. Freight.

Poſt, Caſe 277.

Note, Such a Cuſtom there is between the Maſter and hired Seamen, to deduct out of their Wages what Goods are dampnified, which makes them the more careful; as ſeveral of the Bar ſaid.

Dominus Rex verſus Sowton.

(160.)

QUare impedit by the King on the Statute of 31 Eliz. of Simony, againſt L. the Incumbent: Defendant pleads in Abatement, That the very Patron is not named: Argued, that in all Caſes of a Diſturber the Parſon or Patron ought to be named, Hob. 320. 5 Hen. 7. 35. Smalb. 410. Hob. 316. 3 Hen. 4. 2. 22 Edw. 4. 44 47 Edw. 3. 12. 7 Edw. 4. 44. Authorities direct are Hob. 320. 42 Edw. 3. 7. 18 Edw. 3. 20. No Patron ought to loſe his Right at Common Law without being heard, though another may ſay as much; yet 'tis but reaſonable to hear him, for the Incumbent may confeſs the Simony, &c. Econtra 'twas ſaid, All the Reaſons given are, that he may make his Defence, here he can have none to make, for the Declaration charges not the Parſon, but only that the Incumbent is a Simoniack.

Simony. Plea. 3 *Lev.* 16. *Vide Nelſon's Lutw.* 346.

Lord North. He need not be named, Wyndham of the ſame Opinion, where his Right is concerned he muſt

must be named, otherwiſe where it is not: And he cited Hall's Caſe, 7 Rep. and Palmer's Reports, 207.

Charleton. It ſtartles me, for that the Patron ought to have a Regard to his Preſentee, and defend him when he is in, and his Work is not done by meer Preſentation. Levinz of Opinion that the Plea is ill, and that the Patron ought not to be named; And Judgment was for the Plaintiff.

(161.) Strode *verſus* Deering. *Entred* Trin. 32 Car. 2. B. R. Rot. 945.

Juriſdiction. 2 *Jo.* 165. *Nelſon's Lutw.* 293.

TReſpaſs for falſe Impriſonment: Defendant pleads, That at a Court in the Borough of Melcombe Regis, a Plaint was levied againſt the Plaintiff, and afterwards a Precept awarded, returnable at next Court; by Virtue thereof he was taken at ſuch a Place infra juriſdiction Cur', &c. Exception taken and allowed, becauſe they do not ſet forth how that Court had its Commencement, whether by Charter or Preſcription; nor what Juriſdiction it hath, nor when the next Court was held: And Judgment pro Quer'.

(162.) *Raym.* 456, 457.

Error. Infancy. Dower. *Vide ante* Caſe 48.

Morgan *verſus* Vaughan.

ERror upon a Judgment in Dower in the Seſſions at Brecknock. Error aſſigned was, That he was under Age, viz. of the Age of fourteen Years, and appeared by Attorney; and upon Iſſue of infra ætatem, the Trial was in A. where the Tenant was commorant: 'Twas argued now that the Judgment ſhould not be reverſed, becauſe it appears of the Plaintiff's own ſhewing that he was under Age when he brought his Writ of Error, and at the Time of his Aſſignment of Errors, which he hath done by Attorney: Now he ſays he was then of fourteen Years of Age, which is not ſeven Years ſince; this is material, and though it be Surpluſage, yet himſelf ſhall be bound by it; Cited Hob. Herd *v.* Baskervill, 233. 4 Rep. 42. Holden *v.* Wolfe. Palmer 153. this Surpluſage muſt compell us to ſay the contrary, then here's a Miſtrial: It appears

pears the Land lies in B. Error is brought in Middlesex, the Tenant was in A. in which is the Assignment of Nonage; and the Trial was in A. Now the Trial ought to have been where the Land lies: Dower is a real Action, and a Writ of Error to reverse Judgment in Dower is the same; and Infancy in such Case should be tried where the Land lies; Roll Abr. Tit. Trial, 604, 608, 609. Green *v.* Rose. 3 Cro. 818. And in personal Actions where the Action is brought, otherwise the Defendant might be carried any where. Trial. *Vide ante* Case 152.

Mr. Holt econtra. As to the Viz. that is not any material Part of the Plea, but meer Form; and if 'twere more 'twould be issuable, which 'tis not, for the Substance is, if he were within Age at the Time, and not whether he were fourteen Years of Age, &c. Alledging of a Thing not materaial shall not estop; 'tis a general Rule it doth not destroy the Right; and an Allegation that does not go against the Right will never prejudice: As to the Trial, 'tis assigned for Error that A. of such a Place was within Age, which is all one as if said he was commorant in A.; this being a Writ of Error on a Judgment in Dower, whether Infant or not is collateral to the Title of the Land, viz. Dower; if the Right of the Land depend upon Infancy it must be tried where the Land lies, but otherwise if the Right be not, &c. Fitzh. 63. 1 Bulst. 120, 179.

Lord Chief Justice at first said, That where Infancy is alledged generally without a Venue, it must be where the Land lies, but where a Special Venue is laid it may be tried there. *Curia.* Venue.

Jones took a Difference. Where the Defendant pleads a Release, and the Plaintiff replies deins Age, there it need not be tried where the Land lies.

Lord Chief Justice. As to the viz. if that be of a Thing which is impossible, 'tis no Conclusion or Estoppel, and 'twould be hard to make it so in this Case: And at last per tout le Court resolved, the Trial was well enough; and a Rule for Reversal of the first Judgment in C. B. nisi, &c.

(163.)
S. C. 2 Jo. 174, 175.
Vide Raym. 101, to 113.
Fellow of a College.
Poſt, Caſe 174.

Dominus Rex verſus Alſop.

MAndamus to ſwear one Fellow of a College, to which they return, That the Archbiſhop is their Viſitor, and they were all ſubject to his Orders, and that, &c.

Mr. Pollexfen againſt the Return. They have not ſet forth that at the Time of the Refuſal there was any Viſitor; and if ſo there was no Power that extended to this Caſe; there are Caſes adjudged that this Court hath Juriſdiction: In Mr. Patrick's Caſe, 13 & 14 Car. 2. about the Preſidentſhip of Queen's College, the Court was divided if Viſitors ought firſt to be applied to. In Mr. Appleford's Caſe 'twas agreed, That if there be no Viſitors 'tis within the Juriſdiction of the Court; there is neither Ordinary nor Viſitor in the Caſe in Queſtion: If there muſt be a Viſitor, yet unleſs he can redreſs, this Court hath Juriſdiction; they have only returned that he was Archbiſhop, but not at the Time; and therefore it muſt come hither.

Viſitor.

Preſident.

Dolben. Reſolved by my Lord Hale in Mr Roberts's Caſe, That if there be a Viſitor, this Court hath no Juriſdiction, for he is like a Judge choſen by themſelves; the putting out belongs to him, as by the Return appears, a fortiori the Admiſſion, and being duly elected is under his Judgment: The general Words do ſtrongly imply it; as to the Objection, that it is not ſaid he was Viſitor at the Time of the Refuſal; that is inſignificant, for there is a Viſitor ſet forth to whom they muſt appeal, and this is enough; and if this Court ſhould take Juriſdiction there, 'twould deſtroy the Right of all Foundations, I mean the Power of Viſiting; Appleford's Caſe was 23 Car. 2.

Curia. Lord Chief Juſtice. It ſeemeth that the Viſitor hath an intire Power, and there can be no Appeal from him, and the Caſes are ſtrong, that the Viſitor hath Power as ſuch to determine theſe Matters that belong to the College, and it is almoſt an arbitrary Power: The Objection as to the Time hath no Weight; becauſe if the Viſitation be made after the Election, it

all one; for if the Archbiſhop be conſtant Viſitor, he may viſit and compound ſuch Things done in his Predeceſſor's Time.

Progers *verſus* Fraſier.

(164.)
3 *Mod.* 43.
S. C.

IN Cancell. The King grants the Cuſtody and Guardianſhip of an Ideot to Sir Alexander Fraſier and his Aſſignes for Years, if the Ideot ſhould live ſo long; Sir Alexander dies: If this ſhould go to the Executors, or the Guardianſhip be committed a-new, was the Queſtion. It was urged for Progers the Committee, that an Office cannot be granted for Years; upon Sir George Reynold's Caſe, 9 Rep. 95. and Lentall's Caſe in Cro. Car. 'twas urged on the other Side for Madam Fraſier the Executrix, that here is an Intereſt and no publick Truſt; and that Caſe of an Office hath been denied to be Law by my Lord Hale, upon the Reaſons even of the Book; and ſo ruled in Deal and Priour's Caſe in the Exchequer, when he was Lord Chief Baron, That the Office of the Policies of Aſſurance was held grantable for Years, upon ſolemn Debate and Conſideration; and the Lord Hale ſaid, the true Reaſon of Sir George Reynold's Caſe was the Cuſtom of its being granted in Fee. Ideot.

Lord Chancellor Finch. I am of Hale's Opinion, That an Office may be granted for Years; for the ſame Inconveniences attend a Fee, and a Perſon unknown and unfit, as Infant or Feme covert may happen to have the ſame under an Eſtate of Inheritance; but here 'tis a Branch of the King's Prerogative, and a great Branch too, 'tis part of that Protection which he owes to his Subject; and here this Guardianſhip might have been in Suſpence, and ſo a Failure of that Protection; for 'tis eaſily ſuppoſeable that there might be a Conteſt about the Executorſhip and Adminiſtration, and none perhaps granted to this Day; And then what would have become of the Ideot in the mean Time? And therefore he overruled the Plea which Madam Fraſier had put in to the Bill, which Progers having a new grant of the Cuſtody had brought there; but ſaid, that Progers's Title was bad too, being grounded upon an Inquiſition *Curia.*

that was naught, and on that he would have dismissed the Bill, but at last ordered the Party to be brought into Court.

Note. Lunatick. Note, The Inquisition said she became so per visitationem Dei; and Mr. Attorney General said, the Fact was, that 'twas a fine Child till eight Years of Age, and consequently not an Ideot, but a Lunatick, and the Guardian accountable; on which the Lord Chancellor said, That no such Committee should get 6 d. by a Lunatick, save for Food, Clothing and Physick, they should daily account before a Master, and the Overplus be placed out on Security, where the Administrator of the Lunatick might know how to find it.

(165.) *Dominus Rex versus* Greenway.

Habeas Corpus. Gaoler. RESolved by the Court, That upon an Habeas Corpus, the Gaoler is bound to bring the Body, although he hath not his Charges tendred him, but he may move the Court, and they will rule that he shall have his Charges first; and this was ruled in the Case of the Defendant, who was Steward of a Manor-Court in Cornwal, who was brought hither on an Attachment for making such a Return to an Habeas Corpus, viz. That he was not paid or tendred his Charges.

(166.) *Dominus Rex versus Viscount of* Hertford.

RESolved by the Lord Pemberton, in the Case of a Clerk belonging to the late Sheriff of Hertford; upon Evidence at Guildhall in a Trial against him, that if Money be delivered to one to keep generally without any Consideration or Reward for so doing, if the Person be robbed he is discharged, and the Owner shall bear the Loss, contrary to Coke in 1 Inst. the Fact was; There being an Execution against the Plaintiff, he brings 90 l. to the Defendant, Part of the Condemnation Money, which he refused to take, saying the Plaintiff in the Action would not accept it, and he had nothing to do with it, he must go to him;

Execution. *Vide ante* Case 117, 157. *Post*, 271.

him; and the Party ſaid he would be in Town next Friday, pray do you keep it till then, and I will come again to you when the Plaintiff will be here, and accordingly went away; and before the Friday the Defendant's Chamber was robbed. And now held no Action lies againſt him.

DE

Termino Hill.

33 & 34 Car. 2. B. R.

Thompſon *verſus* Goodfellow. (167.)

MR. William Thompſon ſues a Mandamus to be ſworn Judge of the Sheriffs Court, London; and upon Debate 'twas agreed, That the Election or Nomination of a Perſon to that Office lay in the Common-Council, and not in the Lord Mayor or Sheriffs; and ſaid, that in Proctor and Philip's Caſe in the Lord Hale's Time 'twas controverted and at length ſo determined; but Thompſon afterwards deſiſted, though ſaid to have had the Majority of Voices in the Common-Council. *London.*

Holborne *Vid. verſus Sir* Philip Lloyd. (168.)

INdictment for Murder within the Verge, and on a Trial there the Defendant was convicted of Manſlaughter, though by ſome held to be plain Murder; he *Murder, &c.*

Appeal.

Vide poſt, Caſe 361.

he appearing here and the Widow having brought her Appeal, he prays his Clergy, and that his Prayer might be recorded; but the Court denied it, and ſaid, he ſhould be firſt arraigned on the Appeal which the Widow of the Party ſlain had brought, and ſo he was, and then had a Week's Time given him to plead; and as to his Prayer of Clergy they ſaid they would conſider of it: And ſo done in the Caſe of Widow Sampſon *v.* Tothill, Paſch. 21 Car. 2. B. R. Sid. but this was afterwards agreed. Vide infra le Caſe del Siddins *v.* Johnſon.

(169.)

Anonymus.

Judgment Special.

DEbt on a Bond againſt an Heir, and Judgment by nihil dicit: Argued by Finch the Sollicitor General, that the Judgment ought to be Special, and he ſaid, there were great Opinions againſt the Caſe of Pepis, in Plowd. Com. but the Lord Pemberton inclined to the contrary, and ſo did the Bar and all the Court, who bid him bring his Writ of Error.

So Execution.

Mr. Girdler ſaid, He had ſeen ſeveral Caſes in this Court, where upon Prayer there was a Special Execution, and that he had the Number-Rolls of ſeveral which he had peruſed; and in ſome Caſes ſuch a ſpecial Execution may be very advantageous, for that then ſuch Lands were chargeable from the Teſte of the Original; whereas on a general one they might be aliened before Execution.

(170.)

Percivall *verſus* Griſpe.

London.

Diſtribution.

PRohibition. A Freeman of London dying Inteſtate, the Queſtion was, Whether the Act of Diſtribution ſhould reach the Adminiſtrator's third, or the Death's Part, or whether the Saving that is in the Statute of the Cuſtom of London, ſhall preſerve the Adminiſtrator's Third from a Diſtribution? 'Twas argued, That an Adminiſtrator was only ſince the Statute of 31 Edw. 3, and conſequently within the Time of Memory; although in Snelling's Caſe, 5 Rep. 82. ſeems to be held, that it was before Time of Memory;

mony; 'tis true, an Administrator shall have a Third by the Custom of London, but yet he shall make a Distribution, for it is not descriptio personæ but of the Office, 'tis called the Death's Part, and he might have devised it, or Part of it away; but he could not meddle with or dispose the other Parts; and the other Construction of its not being distributable is to set it on the same Foundation with the other two Parts: And if the Administrator hath it according to Custom, then supposing a Will and no Executors, he shall not be forced to pay the Legacies according to that; a Custom never gives the same Interest which the Law doth; the Words of the Statute of Distribution are, That it shall not prejudice the Custom of particular Places: And 'tis only confirming as to the two Parts which are Customary. 'Twas urged econtra, That at Common Law the Ordinary was Administrator, and by the Custom the Administrator hath his Part, and he is a customary Administrator, and the Statute hath done no more then it supposes the Intestate would have done had he lived and made a Will. *Vide Carter* 125 to 136. *Post*, Case 379, 450. Custom.

Dolben. If a Citizen dies without a Wife or Children, then this Statute shall make a Distribution. *Curia.*

Lord Pemberton. Then there is no Custom.

Dolben. But then if it reach to two Thirds only it cannot be a Custom to the Whole; 'twas said he cannot devise a Possibility, that if one Child die it shall go to another, but there must be a new Division; Quære, Where there are two Children and one dies, If his Part will survive by the Custom of London; or if it should go to the Administrator?

Then 'twas urged again, that there was no Administrator at the Common Law, and cited Henslowe's Case, 9 Rep. 39. the Ordinary he had a peculiar Power, he could neither sell nor dispose of any Thing, he could neither sue nor be sued, saith Plowden; cited 2 Inst. 398. 1 Cro. 62. Fotherbie's Case; no such Creature as an Administrator at the Common Law; and if any Person died intestate, his Estate was to be called into the Care of the Ordinary, and he did appoint an immediate Curator, but it was not such a Thing as an Administrator is now; a Man must alledge an Office to be antiquum before he can prescribe to it *9 Co.* 38. *Hob.* 83. *Cart.* 126, 127, &c.

or

or any of its Perquiſites; and if you would intitle your ſelf to be Adminiſtrator by Cuſtom, you ſhould ſay there was ſuch a Thing Time out of Mind; beſides, this is an Adminiſtration committed by the Metropolitan, and that is expreſly within the Statute. Agreed by all that the Heir is not excluded, but ſhall come in for his Part, and ſhall have it by the Cuſtom of London; F. N. B. 122. this Cuſtom is laid to be of the whole Eſtate.

Curia. Lord Chief Juſtice: If Snelling's Caſe ſtand for good Law, then an Adminiſtrator may preſcribe to his third Part: A Man may have a Thing in his own Right, and yet it cannot deſcend as in Caſe of an Occupant.

Note, It was agreed, That if a Freeman gives Legacies in his Will, and names no Executor, whereupon there are Letters of Adminiſtration granted cum teſtamento annexo, that it is plainly out of the Statute of Diſtribution. Adjournat'.

(171.)

Dominus Rex verſus Smith.

Information on Appearance in Court.

AAron Smith being bound by Recognizance to appear here the firſt Day of the Term, and appearing accordingly was charged with an Information for Words, and forced to plead preſently; for that in ſuch Caſe he is in the ſame Condition with an Attorney or Clerk of the Court, who are always ſuppoſed preſent in Court, and have the Benefit of an Imparlance; but in Caſe a Man come in upon Proceſs and appears to an Information, he hath then an Imparlance till the next Term after: And 'twas ſaid by Mr. Pollexfen, That all Perſons had an Imparlance till Sir Samuel Aſtrey's Time.

(172.)

William Thompſon *verſus Sir* William Scroggs.

Venue changed Barriſters. *Poſt*, Caſe 239.

TReſpaſs for a Battery, laid in London, the Fact was committed at Bury in Suffolk: Upon Motion to change the Venue, 'twas agreed per Cur', That changing a Venue is ex gratia Curiæ, and not ex debito Juſticiæ; ſo reſolved in the Caſe of the Lord Culpeper and

Sir Thomas Taylor; and the granting Motions for the Change thereof are upon account of the Convenience of the Subject, it being ſuppoſed to be more for their Eaſe that the Fact ſhould be tried in the Place where committed; and it was likewiſe agreed that Bacon's Caſe in this Court was Law, that a Plaintiff being a Barriſter had Privilege to lay any tranſitory Action which he brought, in the County of Middleſex; for his Attendance is ſuppoſed to be continually on the Courts at Weſtminſter; and ſo if he were Defendant: But Privilege in the Defendant takes not away the Plaintiff's: And here they being both Barriſters, if Mr. Thompſon would lay it in Middleſex they would not change the Venue, which he agreed to do: Thereupon Mr. Serjeant Jefferyes moved for a Trial at Bar, and granted; but afterwards Mr. Thompſon forgave it, and deſiſted; on a Treat given by Sir William Scroggs, &c.

Vide 2 *Salk.* 668. 2 *Vent.* 47. *& poſt*, *Rowe* verſus *Ruſſel.*

Wedgewood *& al' verſus* Bayly.

(173.) *S. C. Raym.* 463.

TRover and Converſion; one of the Plaintiffs dies before Verdict, which is after found pro Quer'; this is aſſigned for Error on a Writ of Error; and here were cited the Caſe of Spring and Ballet, 2 Bulſt. 262. where held on Motion that the Writ is not abated; here 'tis on Writ of Error: Sir Oliver Lee's Caſe: Spencer & Woodward's, and Leigh & Burgany's Caſe in 2 Cro. 19. Treſpaſs brought by two Jointenants, one dies, and held the Writ ſhould abate, as 'tis in all Caſes; unleſs of neceſſity or in a Quare Impedit and Audita querela: Spencer and Woodward's Caſe in Yelv. 208, 209. Liſle and Gray's Caſe; and in a Writ of Error here about a Twelvemonth ſince, one of the Plaintiffs dying we brought a new Writ of Error, the Judges being of Opinion that the Writ abated.

Abatement. One Plaintiff dies before Verdict. *Vide* 1 *Salk.* 8.

Dolben. In perſonal Actions where two do join, it many Times ſurvives; beſides, Why ſhould it abate in the Plaintiff's Caſe more than in the Defendant's? Two Tenants in Common of a Shop, one may bring an Action for his Moiety of the Shop; and ſo for half a Negroe, and ſo it has been allowed.

Lord Pemberton. It is dark as to the Reason of it; for why should they join in Case of an Horse, and sever in Case of a Negroe? And 'twas said by all, That Chancery hath been and still is endeavouring to destroy Survivorship, and that it was the Attempt of the Commissioners in the late Times.

In the next Term 'twas moved again, and then urged the Case of Hill and Tempest, 3 Cro. 145. that one Defendant dying before the last Continuance, in regard the Judgment was only against him that survived, the Writ should not abate as to him; and that in the Case of Spring and Ballot, 2 Bulst. 262. 'tis held on Motion, that though one Plaintiff dies yet it should not abate; and Sir Oliver Lee's Case was in 1 Jac. but Read and Readman's Case was 10 Jac. 'tis in 10 Rep. 134.

Econtra. 'Twas argued that the Right to one Moiety accrued after, and therefore at the Time when this Action was brought, he had such a Right to a Moiety only: Now a Right accrued pending an Action, will not supply the want of it when the Action was brought: The Case of an Avowant will not be like this, because here in our Case the Action is begun, and the Thing to be recovered is mentioned before. Whittingham *v.* Lord Derby's Tenants, Hob. 287. a Scire facias by Baron and Feme, and the Baron dies; the Report there is a Cur' advisare vult, but in Hutt. 37. 'tis said per totam Cur', that it shall abate. Adjournat.

(174.)

Dominus Rex versus Colleg' Medic'.

No *Mandamus* for a Fellow of a College. *Vide ante* Case 163.

MAndamus prayed for Dr. Merrit to the College to receive him to be one of the honorary Fellows.

Lord Chief Justice Pemberton. No Mandamus lies, for 'tis no Place of Profit, no way advantageous to him, nor in the least relating to the Government; 'tis a Thing spontaneously raised among themselves; and like to the Inns of Courts, which are voluntary Societies; and in Boreman's Case in March's Reports, they could never get one: And I remember when Serjeant Glynne sate here, Mr. Allen moved strongly for such a Mandamus, and on solemn Debate it was

was denied; and the Reaſon why it lies for a Common-Council-Man is, becauſe it concerns the Government.

Ogden *qui tam, &c. verſus* Kennet.

(175.)
S. C. Raym. 391, 465.

Debt for 20 l. per Month, &c. on the Statute of Recuſancy, and the Queſtion was, If a Submiſſion and Conformity will ſerve as well on a qui tam, &c. as on Indictment? See 4 Leon. 54. 2 Bulſt. 324. Roll. 1 Rep. 95. Shoile qui tam *v.* Foſter, Hob. 204. Hill. 27 Car. 2. Information againſt Fenton; look the Caſe of Peters qui tam *v.* White, and Workman qui tam *v.* Gaylard, infra, and among my Arguments; in both which Cauſes I was of Counſel; in the firſt pro quer' in the latter pro Defendant. Adjournat'.

Recuſancy.

Brook *verſus* Miller.

(176.)

Error on a Judgment in Trover in an inferior Court, where was a Special Verdict, That the Plaintiff's Horſe came to the Defendant's Hands, and that the Plaintiff demanded of him the Horſe, and the Defendant delivered him not, but refuſed; & ſi &c: and Judgment is there pro Quer': Now reſolved here, that the Jury not having found any Converſion the Judgment ought to be reverſed; for though Demand and Denial be Evidence of a Converſion, and ſufficient Inducement to a Jury to find a Converſion, yet that of it ſelf is not a Converſion. Judgment Reverſat'. Sed Vide contra. 6 Mod. 212. per Holt Chief Juſtice.

Trover, *&c. Vide ante* Caſe 148.

See 5 *Mod.* 426. 2 *Mod.* 245. 2 *Salk.* 655. 6 *Mod.* 212.

Plory *verſus* Bluett.

(177.)

Error in a Judgment in the Court of Southampton; Declaration was of an Aſſumpſit apud villam & Com' Southampton, and the Venire facias only de villa Southampton, good enough: Venire facias was directed to the Serjeant of the Mace, and does not ſay Miniſter Cur', but becauſe the ſame Man and ſame Of-

Juriſdiction.

Venire facias.

ficer was laid to be ſo before; they held it well enough: Scire poſſit inſtead of poterit, well enough, and Judgment was affirmed.

(178.) Tyler *verſus* Bendlowe.

Conſideration. INdebitatus Aſſumpſit, but in conſideratione inde left out; and held well enough, for it being well alledged that he was indebted, the Law raiſes the Promiſe, and they could not but intend it to be in Conſideration of that Debt; for 'tis ſaid, That being ſo indebted he did afterwards aſſume upon himſelf, but *Venire facias.* the Venire facias was duodecim, &c. whereas thirteen Perſons were ſworn, and held naught: And for this Error Judgment was reverſed.

(179.) Mercer *verſus* Southwell.

Bill of Exchange. Acceptance. CAſe on the Cuſtom of Merchants againſt the Drawer of a Bill of Exchange: Demurrer to the Declaration, becauſe it ſays only that the Party to whom 'twas directed did not accept it, but doth not ſay that it was ſhewn or tendred to him; and then 'tis with a quod cum, which is Argumentative and no direct Averment. As to the laſt Exception non allocatur becauſe in Caſe, otherwiſe if it had been Treſpaſs vi & armis: But as to the firſt 'twas held naught, for elſe it would be in the Plaintiff's Power to charge the Drawer, when perhaps the Perſon on whom, &c. was ready to pay the Money according to the Tenor of the Bill, if it had been tendred to him; although the Cuſtom was laid to be among Merchants thus, that if not accepted it ſhould charge the Drawer. Judgment pro Defendant.

Nelſon's Lutw. 270, 273, 504. *& poſt,* Caſe 234, 389, 400, 404, 462,

(180.) Cholmely *verſus* Morton. *Entred* Mich. 33 Car. 2. B. R. Rot. 566.

TReſpaſs for Falſe Impriſonment: Juſtification by a Proceſs out of the Pie-Powder Court at, &c. and only ſet forth a Plaint levied and a Recovery,

but does not recite the Declaration, nor do they shew that the Cause of Action arose within the Jurisdiction; now if it be out of their Jurisdiction, then all is void, and 'tis no Justification; whereas if they had a Jurisdiction, although the Process be erroneous the Imprisonment will be justifiable, as Marshalsea's Case, 10 Rep. besides they lay the Court to be held before the Mayor, and that cannot be as Mayor; for though a Mayor may be Steward, yet in that Case he ought to be laid so. Jurisdiction.

Agreed per Cur', That if two Men make a Contract for Land in a Fair, that cannot be within their Jurisdiction, and they ought not to hold Plea of such a Contract, but only of buying and selling Goods in the Fair; and that the Mayor, if Owner of the Fair, cannot be a good Steward of it. *Curia.*

Then Mr. Holt took Exceptions to their Declaration, that it was quod cum, and not pro eo quod, which in Trespass is naught, *Vide ante* Case 17, 179. *& post*, Case 294. 2 *Jo.* 197. 2 *Lev.* 206.

Mr. Pollexfen answered, That their Plea of Justification, which is a Confession of the Fact, helps it; as when a Venue is wanting in a Declaration, if a Release be pleaded in Bar with a Venue that helps it; (sed Quære, If it will help it on a Demurrer, for 'tis most true, that the Plea helps it if Issue be taken on the Release) besides, here the quod cum is only to the Plaint, and then 'tis, necnon the Defendant did imprison him; which is affirmative and direct.

Mr. Holt replied, That necnon there is comparative and copulative, referring only to the first, which was by way of Recital; but Lord Chief Justice Pemberton thought it began a new Trespass. Adjournat'.

Dominus Rex versus Mills. (181.)

INdictment against the Defendant, being one of the Sheriffs of the City of Glouceſter, for neglecting to execute a Warrant directed to the two Sheriffs of Glouceſter, by three Justices of the Peace out of Sessions, for apprehending of a Constable who had refused to do his Office: Quære, If criminal in the Sheriffs, or if the Justices ought not to have made their Sheriff indicted.

their Warrant to other Conſtables, ſince Glouceſter is but one Hill, and the Conſtables Authority reaches throughout. Adjournat'.

(182.) *Dominus Rex verſus* Fownes.

Habeas Corpus. Exceptions.

Defendant being brought hither by Habeas Corpus from Briſtol Gaol, Exceptions were taken to the Commitment, viz.

1. That 'twas by ſeveral Men, not naming themſelves Juſtices of the Peace.

Court. That is helped by the Return, in which 'tis ſaid they were Juſtices.

2. That it was, for that being at a Conventicle and taken Preaching in a Borough which ſent Burgeſſes to Parliament, they committed him to Gaol for ſix Months; and doth not ſay he had not taken the Oaths, which Commitment muſt be on the Oxford Act againſt Diſſenters living within five Miles of a Corporation, which is on their Refuſal to take the Oaths. The Exception was allowed, and he was diſcharged on my Motion.

(183.) Richardſon *verſus* ——

Bail on *Habeas Corpus.*

Upon Motion 'twas agreed, That a Man may be removed hither upon Habeas Corpus, having been arreſted by Proceſs out of an inferior Court, and that formerly in all ſuch Caſes he ought to put in Special Bail here: But now only in ſuch Caſes where the ſame Cauſe of Action would have required Special Bail in the Courts above; and if it be under 10 l. or the like, then only common Bail to be, though removed by Habeas Corpus.

Et Capi Corpus.

Alſo, That Bail on a Capi Corpus formerly was an Appearance for all manner of Actions that Term, and the Bail were chargeable with the ſame: And now in Caſe a Man be Bail on a Capi Corpus, and a Declaration is delivered by the By againſt him, the Bail are chargeable to that Action as well as to the firſt: But if ſuch Declaration be delivered againſt him and another, then the Bail are not chargeable.

One comes in upon a Bill of Middlesex, and another upon a Latitat, and both of them are bound to B. he may declare against both; but the Bail is only for his own Principal.

But note, By a new Rule of Court the Bail shall be only liable for that Action upon which the Arrest was, or if removed by Habeas Corpus, on those Actions that are returned, and not to any other; but it shall be an Appearance for the Principal himself, to charge him with any such Declaration by the By, and the Bail shall be liable only for that Sum mentioned in the Writ: As if a Man be arrested for 100 l. and the Declaration be for 800 l. the Bail are only liable for 100 l. So ruled by the Lord Jefferyes and the rest, &c. Vide infra. Bail. *Vide post*, Case 345.

Anonymus. (184.)

Upon a Quantum meruit brought by a Surgeon for a Cure, this Court will never grant Leave to strike so much out of the Declaration, and the Plaintiff to proceed for the rest at the Peril of Costs. They will do it where the Damages are certain, and the Action in Nature of a Debt or Contract, but not in other Cases; and they said he might as well do it in Case for Words as in the Principal Case. And Note, They will never do it after Issue joined. Declaration. Damages. *Ante* Case 42, 82, 86.

Anonymus. (185.)

Mandamus was to swear an Alderman: They return that he was a Maintainer and Frequenter of Conventicles, &c. if good, much doubted by the Court because too general; but agreed, That where the Conviction would be a Disability, a Return of that Thing or Cause without mentioning any Conviction is a good Return, for that it must be proved in an Action of the Case for a false Return. Return.

Anonymus.

(186.) Anonymus.

FOR Meat and Drink for a Baſtard-Child an Indebitatus Aſſumpſit will lie, per Lord Chief Juſtice Pemberton: And 'twas ſaid by the Counſel to be my Lord Hale's Opinion, That where there was common Charity and a Charge it would lie, and undoubtedly a Special Promiſe would reach it; but then that would be within the Statute of Frauds, &c. as a collateral Promiſe.

(187.) Anonymus.

Churches, &c. IT was ſaid in this Caſe, That the Churchwardens have a Right to the Church-yard, and not to the Church, for the Parſon only hath that, although here about London the Church-wardens take Money for breaking open the Ground in the Churches, and the Parſon only for the Chancel. And Note, By Spelman 'tis but of late Years that they have buried in Churches ſo commonly as now.

Tithes not ſet out Agreed by the Lord Pemberton, in Evidence on Debt for treble Damage for not ſetting out of Tithes, that the ſetting them out and taking them away himſelf, is not good within the Statute; otherwiſe if they are taken away by a Stranger.

(188.) Chapman *verſus* Sharpe.

Copyhold. EJectment. Trial at Chelmsford this Lent Aſſizes before Lord Pemberton, and reſolved by him, that an Ejectment will not lie for a third Part of a Copyhold Tenement in Nature of Dower; for they ought Dower. to levy a Plaint in Nature of a Writ of Dower in the Manor-Court, and the Homage to ſever and ſet out the ſame; but if the Cuſtom had been for the Widow to have the Third Part, not in Nature of Dower, but in Common with the Heir, 'twere then otherwiſe.

Noell *verſus* Reynolds. (189.)

Gaming. *Vide Nelſon's Lutw.* 59. *Ante* Caſe 69.

ASSumpſit for Money won at Play: Reſolved by Lord Chief Juſtice Pemberton at the ſame Aſſizes, That if above an 100 l. be loſt upon Tick at one Sitting, although to ſeveral Perſons, yet 'tis void by the Statute of Gaming; otherwiſe if at ſeveral Times.

Peirſon *verſus* Sorrel. (190.)

EJectment at the ſame Aſſizes: Held by Lord Chief Juſtice Pemberton, That if Legacies be given by Will, and that in Caſe of Non-payment the Legatees may enter and enjoy the Profits of ſuch and ſuch Land till ſatisfied, no Demand is neceſſary; for 'tis no Forfeiture, but an executory Deviſe, although there be a Place and Time appointed for Payment, &c. So was the Caſe of Tyrrel *v.* Glaſſack here.

DE
Termino Paſchæ,
34 Car. 2. B. R.

Herring *verſus* Browne. (191.)

1 *Vent.* 368, 371. Power of Revocation.

EJectment; on a Special Verdict, the Caſe was; A. and B. are Tenants in Common, A. makes a Settlement with a Power of Revocation by Deed indented, and ſigned by two or more Witneſſes: A. levies a Fine, and afterwards by Deed in-

indented ſigned by two Witneſſes, he declares the Uſes of the Fine new and different from thoſe of the Settlement; and the Jury find the Fine to be levied with an Intention to make Partition between A. and B. and to the Uſes declared in the new Indenture. The Queſtion was, If this were a good Revocation, or if the Fine were an Extinguiſhment of the Power? 'Twas argued by Mr. Bonython for the Plaintiff, That the Revocation is good; for that if by a Deed circumſtantiated according to the Power, new Uſes be declared, it ſhall be a Revocation, though there be no mention made of an Intention to revoke; and it will alter them though the Deed be upon another Conſideration. Scroop's Caſe, 10 Rep. 143. Kibbit *v.* Lee, Hob. 312. And here it was found that the Fine was levied with an Intention to make a Partition, and to the Uſes of this ſubſequent Indenture: An Indenture ſubſequent to a Fine will declare the Uſes of it, Dowman's Caſe, 9 Rep. 8. 1 And. 145. Moore 191, 192. Cromwell's Caſe, 2 Rep. 69. Albany's Caſe, 1 Rep. Digby's Caſe, 1 Rep. 3 Bulſt. 256. 2 And 72. 1 And. 162. Then in the Caſe of Nixſon and Garret, Hill. 1675. in this Court; 'tis entred Trin. 26 Car. 2. B. R. Rot. 960. and reported in 3 Keb. the Deed was firſt and the Fine afterwards. and adjudged that the Deed and Fine was an Execution of the Power; though the Deed alone had not been a Revocation, yet both together make it ſo. 1 And. 162.

Mr. Holt econtra. The Fine and Deed ſubſequent cannot be a Revocation according to the Power; for firſt conſider the Fine alone, and what Relation it hath to the Power of Revocation; the Fine being levied before the Deed, and no Deed being at the Time of levying the Fine, it produceth two Effects: Firſt, 'Tis a Forfeiture of his Eſtate for Life, he being but barely Tenant for Life, and an immediate Right is given to him in Remainder. Secondly, It is an Extinguiſhment of the Power, for by Virtue of the Fine the Power of Revocation is gone; as are Albany and Digby's Caſes in 1 Rep. And as to the Intention of the Parties, that is nothing; for an Intention is not to be purſued by illegal Means: Sir Moyle Finch's Caſe, 6 Rep. the Severance of the Demeſnes there was but for an Inſtant,

and the Intention of the Parties was otherwiſe; and when once there is a Forfeiture it can never be retrieved. 1 Inſt. 202, 252. So that here was a Time when there was no Power left: There can be no Pretence put on Scroope's Caſe, becauſe there are new Uſes raiſed; but this Deed doth not raiſe the Uſes, they are raiſed before; the Deed is only to declare them. 3 Cro. 856. Atwood *v.* Buet. If a Man once levy a Fine, he cannot limit any new Uſes but what are raiſed by the Fine; the Deed it ſelf doth not raiſe or pretend to raiſe any new Uſes, but only recites a Fine levied to the Uſe of Sir John Williams and his Heirs. 2 Roll. Abr. Tit. Uſe, 795. In Nixſon and Garret's Caſe, at the Time of the Deed there was a Power extant in being, but otherwiſe in our Caſe. Adjournatur.

In Trinity Term following it was argued by Williams and Saunders. Williams pro Quer'. That a Power of Revocation is always favourably taken for the Perſon whoſe Eſtate it was. Hob. 312. If there be any Inconſiſtency between the firſt Eſtate and the laſt, though there be no Words of Revocation, yet 'twill be ſo: I confeſs that Circumſtances and the Forms of the Power muſt be obſerved: This Power is as general as any whatſoever; if the old Deed be determined then there is no need of any more; the mean Remainders are deſtroyed by Death without Iſſue, and if the laſt be deſtroyed there is a plain Title for us: Had there been no Fine in this Caſe, the Deed executed according as the Power of Revocation requires, would have been ſufficient for us: This is a Caſe of Conſtruction, and every one may apprehend that he intended this Fine as an Execution of his Power. And I take it all but as one Aſſurance, and the Fine but a Part of it: Now to conſtrue Part an Extinguiſhment, and the Deed afterwards to be a Revocation, is ſomewhat ſtrained: The Deed is between the ſame Parties, and of the ſame Eſtate; and 'tis a common Practice to acknowledge a Fine, and afterwards at leiſure to execute the Deed of Uſes: And it is found expreſly, that the Fine was levied for the making of Partition, and alſo to and for the Uſes in the Deed mentioned, and that

this was the Meaning of the Parties; and likewiſe found negatively, that there was no other Uſe of the Fine.

Objection. Take the Fine a-part and 'tis an Extinguiſhment; but I anſwer, they are not diſtinct, but the ſame Aſſurance.

Objection. When a Power of Revocation is once extinguiſhed, it can never be revived: But I ſay it is not extinguiſhed, and being but one Conveyance, the Intent governs both.

Objection. A ſubſequent Deed cannot raiſe an Uſe, though it may declare one; I conceive it may, the Intent of the Fine being to this Purpoſe; however 'tis not neceſſary it ſhould be ſo: Obſerve the Conſequence of this; if it were an Extinguiſhment, then 'twere a Forfeiture. Dyer 136. Bowman's Caſe, 9 Rep. And. 176. There is no Special finding of the Intention of the Parties, as there is here; if a Man agrees to levy a Fine, the Uſe may be declared by Word of Mouth; the Fine is the ſuperior Act, and draws the Deed to it; the Agreement is the Thing, the Intention governs all: Then he cited the Earl of Leiceſter's Caſe between Nixſon and Garret: There was a Power of Revocation; the Earl covenants to levy a Fine to other Uſes, and afterwards the Fine was levied; and there Sir William Jones argued as they do now in this Caſe, but ruled however to be a Revocation: If this Fine had been general, perhaps it might have been an Extinguiſhment, the Court perhaps might have conſtrued it ſo; but here is an Intention found to limit new Uſes.

Mr. Saunders econtra pro Defendant. It doth appear that at the firſt they were Tenants in Common in Fee, and that the Fine was levied to make a Partition, and I hope your Lordſhip will not conſtrue it ſo; and if this be not conſtrued a Partition, then all Sir John Williams's Statutes and Recognizances will bind a Moiety of the other's Eſtate ſtill: The common way is to levy a Fine to Truſtees, and to declare the Uſes ſeverally; and 'tis doubted if they can do otherwiſe: By the Common Law they were not compellable to make Partition, and they are ſeized of ſeveral Freeholds, and one will not paſs to the other without Livery; ſo that here is a Partition made:

Then I conceive here is no Revocation; for by the Fine (were there no more in the Caſe) this Power would be extinguiſhed; here was a Fine levied and a Time when there was no Deed, And how was it then? Suppoſe Sir John had an Eſtate greater than for his own Life, and had then died before any Deed made, the Power had been gone: In the Earl of Leiceſter's Caſe, the Deed was precedent and purſuant to all the Powers of Revocation, while the Party had his Power not extinguiſhed; if there had been no Deed made there had been the ſame Uſes as now, the Fine being levied by Sir John Williams, to the Uſe of himſelf and his Heirs, and yet without ſuch Deed it would have been no Revocation: In Dowman's Caſe they ſay, that a Declaration of Uſes may come after a Fine, and be ſufficient, if there be no mean Eſtates or Intereſt to be defeated: Relation or Fiction is always to uphold a Right, and never to defeat one; if they will have it as one Conveyance they can have it only as relating and ſuppoſed to be made at the Time of the Fine: And where will they terminate at what Time a Deed ſhall relate? If ſix Months, it may be ſeven Years after; and ſuppoſe it ſo, yet according to them it ſhall relate to make but one common Conveyance: Here was the Caſe of Bury and Bowyer, which ſee above, Pl. 36. where an Aſſignment of Lands by Commiſſioners, ſhould paſs only from the Inrollment, and not from the Deed; for there being no Time limited when it ſhould be inrolled, it might be inrolled ſome Years after and yet relate to the Deed, which they would not allow of: They rely much upon the Intention of the Parties, and I agree it to be of Weight; but there is not one Word or Syllable that 'twas the Intention of the Parties to revoke the Uſes, but only to have a Fee; and the Fine wrought that as much without the Deed as with it. If this Deed ſhould work by way of Revocation, it is all one whether he in Remainder had entred for a Forfeiture, yea or no; for this Relation would have diveſted him.

Lord Chief Juſtice. You cannot ſay he did not intend to revoke when he did intend to limit new Uſes. Adjournat'.

In

Relation. *Vide ante* Caſe 142.

In Michaelmas Term following it was argued again by Sir Francis Winnington pro quer, and Mr. Pollexfen pro Defendant: Winnington argued much to the ſame Effect with the former, but inſiſted more on the Law of Relations, and ſaid, that if ſo be the Fine and Deed are to be conſtrued ſeparately, then it would be againſt us: The true Intention of the Parties is to make but one Settlement; the Law makes a Strain to follow the Intention, but never to deſtroy it: He cited Sir Rowland Hayward's Caſe, 2 Rep. the ſame in Poph. 95. the Judgment ought to be upon the intire Act. Ceſar and Brooke's Caſe, Trin. 11 Jac. Hugh's Abr. Tit. Wills. If a Deed of Feoffment be at one Time, and Livery at another, yet all ſhall be conſtrued together as one Act: It ought to be reckoned but as one Aſſurance, for 'tis no more. 10. 19 Hen. 8. 12. In ſome Caſes the Law will find out an Intention to make a Conveyance good, as in 1 And. 164. ſame 2 Rep. 57. Lord Cromwell's Caſe, 2 Rep. 70. ſame in Moore 471. Snape *v.* Turton, in 1 Cro. 339. ſame in Jones, 392. The Law will not judge by Parcels, but after all the Act is done, the Law will judge and make Conſtruction upon the Whole.

Mr. Pollexfen econtra. I agree, that to make a Revocation they need not mention or take Notice of the Power, but a Conveyance to contrary Uſes will amount to a Revocation; the Fine of it ſelf hath none of the Qualifications mentioned and required in the Power: It is the Fine alone that makes the Conveyance, the Deed is not Part or Parcel thereof, and conveys nothing: Theſe Uſes did and muſt ariſe at the Time of levying the Fine, and could not ariſe in futuro; it cannot be ſuſpended in any ſort; the Uſe of a Fine requires neither Deed nor Parol to raiſe it: It's true, the Jury have found that the Fine was levied to the Uſes in the Indenture, which makes neither one way nor other; if it have any Influence it will be for us, (viz.) that at the Time of the Fine theſe Uſes were raiſed, and the Intention governs all, the Jury have found the ſame; and ſo it was by their finding a perfect Conveyance at that Time: Now a Fine to ſuch Uſes is no Revocation; and the Jury have not found that the Parties at the Time of

levying the Fine did intend to make ſuch an Indenture, but only that the Fine was to ſuch Uſes: Dowman's Caſe, Moore 192. when a Recovery is had, the Parties cannot declare an Uſe ex poſt facto, and if there had been the Word then, it would have been all void: All that is ſubſequent is but a Recital of their Thoughts; ſuppoſe there had been only a Parol Declaration, Would that have done it? The Conveyance was fully ended before this Deed came, the Uſe muſt ariſe then; it cannot ariſe by this Deed which could not ſpeak before it was made. A ſecond Reaſon that I do obſerve in this Caſe is, That the Fine had deſtroyed this Power; ſuppoſe that after the Fine levied and before the Deed, Sir John Williams had made a Deed, and expreſly revoked theſe Uſes, and afterwards had by Deed declared the Uſes of the Fine, your Lordſhip would have conſtrued this Deed of expreſs Revocation to have been void: Now if after this Fine he could not expreſly revoke, how could he then by Implication and Conſtruction make a Revocation? In Digge's Caſe there are two Things conſiderable, Firſt, By the deſtruction of the Eſtate the Power of Revocation is gone. Secondly, If there be two Things requiſite to execute the Power, and between theſe two Things comes a Fine, the Power is deſtroyed. A third Reaſon is this, That there is no Time limited how long after he may declare Uſes; then according to this he may do it at any Time during his Life; in Dyer 136. 'twas four Years after the Fine: Now what a myſterious Conſequence this may have! Suppoſe he in Remainder had entred for a Forfeiture, and made Conveyances and Settlements; all the Counſel in England would have reckoned them good, the Fine being no Revocation, but rather an Extinguiſhment; and yet after all this here might be a Declaration of Uſes, and ſo a Revocation; beſides, here is no Caſe where the Eſtate of a Stranger was concerned, that Deeds and Acts ſhould be conſtrued to relate to deſtroy ſuch Eſtate; here the Eſtates of thoſe in Remainder are ſo: Then for a Man to forfeit his Eſtate, and afterwards by his own Act to avoid or defeat the Forfeiture, is hard to ſuppoſe: Lady Baltinglaſſe *v.* Temple, She being Tenant

nant for Life ſuffers a Recovery, this is a Forfeiture; and although the afterwards reverſed this Recovery by Writ of Error, yet it continued a Forfeiture; Relation ſhall never work a Wrong: For the Caſe of Nixſon and Garret, it's nothing to the Purpoſe, for the Deed was precedent, and the Deed raiſed the Uſes of the Fine, and the Fine, though it conveyed the Land, yet it did not raiſe the Uſes, the Deed did it: In ours it is quite contrary, by the Fine here's a perfect Conveyance, and here is the Eſtate of the Conuſor deſtroyed before the Deed came, and the Intereſt of the Remainder-Man to enter was veſted before the Deed came: And that it ſelf was a new Caſe, although I queſtion not the Law thereof, yet they then took a Difference between that Uſe and this, both Bar and Bench did ſo; now when they of the other Side ſay it is one Conveyance, I know not what they mean; the Deed after is no Conveyance, nor Part of it, 'tis only the putting into Writing in Parchment the Uſes which the Fine raiſed by way of Memorandum: All their Caſes are where there were two Parts to be executed, and one is done before the other, there it ſhall relate; becauſe that which was done was imperfect: But what is all that to our Caſe, where the Conveyance was perfect before? In Cromwell's Caſe which they ſo much inſiſt on, they were Conveyances made between the Parties, and none of them affected any Stranger as in this Caſe it doth; here is ſomewhat comes afterwards which is no Conveyance, nor Part or Parcel of the Conveyance; all the Diſcourſe about Fraction is wide from the Point.

Lord Chief Juſtice. Suppoſe that after the Fine there had been an Attainder of Treaſon, and after that a Deed; ſuppoſe a Man levies a Fine and then marries, and then declares the Uſe: In Hinde's Caſe, 4 Rep. a Bargain and Sale, and then a Fine, and then Inrollment: If the Bargain and Sale and Fine were but one Conveyance, all would paſs by the Fine. Adjournat'.

It was argued again afterwards by the ſame Counſel upon the Death and Change of Judges, and

afterwards in the Lord Jefferyes's Time by Mr. Solicitor General and Mr. Serjeant Pemberton.

Dominus Rex verſus Clerke. (192.)

ORder of Seſſions quaſhed, becauſe the Juſtices cannot force a Man to take an Apprentice againſt his Will; and an Order of Seſſions to that Purpoſe is void; and here was remembred the Caſe of the King and Pyne, v.z. Seſſions. Apprentices.

IN Mich. 29 Car. 2. B. R. An Indictment againſt Pyne, for refuſing to take an Apprentice put on him by the Pariſh, was quaſhed; the Court being then of Opinion, That the Juſtices of Peace cannot force a Man to take an Apprentice againſt his Will; (though if he doth take him the Statute will be binding, both upon the Maſter and the Servant and his Parents) except the party doth perſonally occupy Husbandry, and then he is compellable. See 3 Keb. 854. 3 Mod. 271. Raym. 66, 177. 1 Sid. 99 & 411. Cart. 116. and 1 Lev. 84. accordant. But note, The latter Reſolutions in 1 Salk. 67. 1 Show. 76, &c. are contra. And the Statute 8 & 9 W. 3. c. 30. ſays expreſly, That where any poor Children ſhall be appointed to be bound Apprentices, purſuant to the Act of 43 *El.* c. 2. The Perſon ſhall receive and provide for them, according to the Indenture and on Refuſal ſo to do, and Oath thereof made by a Churchwarden or Overſeer before two Juſtices, he ſhall forfeit 10 *l.* to be levied by Diſtreſs and Sale, to the Uſe of the Poor of the Pariſh where — Saving to the Parties their Appeal to the next Quarter Seſſions for that County, whoſe Order therein is to be final. (193.)

Bettiſon *verſus* Ellwayes. *Entred* Hill. 32 & 33 Car. 2. B. R. Rot. 548. (194)

EJectment. The Caſe was, Baron and Feme Tenants in Special Tail for the Jointure of the Wife; the Husband dies, leaving Iſſue by his Wife two Daughters, who levy a Fine, the Wife makes

a Leaſe for ſixty Years: If this Leaſe be void and within the Statute of 19 Hen. 7. was the Queſtion?

'Twas argued by Mr. Holt, That the Statute diſables any Tenant in Tail after Poſſibility of Iſſue extinct, or Tenant in Dower, or for Life, of the Proviſion of the Husband, and leaves them juſt as bare Tenant for Life; and where-ever the Tenant for Life takes upon himſelf to have the Diſpoſal of the whole Eſtate, and doth diſaffirm the Reverſion to be in him that hath the Reverſion or Remainder, and affirms it to be in a Stranger; this is a Forfeiture of his Eſtate: The Objection here is, Becauſe 'tis no Diſcontinuance or diveſting of the Eſtate; a Bargain and Sale is no Diſcontinuance, and yet may bar the Iſſue. 3 Keb. 4. 13, 14. A long Leaſe is an Alienation in Mortmain, becauſe within the ſame Miſchief. See Moor's Rep. 250. Pigott and Palmer's Caſe. Acceptance of a Fine with Render to a Stranger for 100 Years, was reſolved within the Statute, and an Avoidance of the Wife's Eſtate by the Statute, 2 Leon. 168. Parker and Tayler, 8 Rep. 90. 1 And. 60. Threeſcore Years Poſſeſſion is a Bar to the higheſt Action, that is but a Writ of Right by the Statute of Limitations.

Mr. Pollexfen econtra. All agree the Mother Tenant in Tail (notwithſtanding the Statute) as to all Purpoſes but Alienation: Now if Tenant in Tail make a Leaſe, the Iſſue may affirm or avoid the ſame; and therefore there was no Reaſon why a Leaſe for Years raiſed by Deed ſhould be within the Statute; the Caſes which Mr. Holt put are plainly within the Miſchief of the Statute, for there the Iſſue was bound and could never avoid the Leaſe, being by Fine ſur Grant & Render, and the Iſſue being barred by them they are plainly within the Statute, and there is no other within it; ſo does a Leaſe for Life ſaith the Caſe of Sir George Browne, becauſe the Words any Bar or Diſcontinuance is within it. I think that if the Feme had granted a Rent by Fine out of the Lands, that this would have been an Alienation within the Statute, ſo as to be avoided. 1 Jones 60, 61. Bridgman 57. and in Hutton. The Length of the Term is nothing; for a Leaſe for 21 Years, if by Fine, would

be within it: Such an Eſtate as this cannot be within the Miſchief, becauſe without the Help of this Statute it might be avoided by the Iſſue; here is the Alienee of the Iſſue which was never thought on by the Law-Makers; we extend the Words of a Statute many Times to prevent the Miſchief intended by the Statute to be remedied, but never farther than the Miſchief which they intended to prevent.

Owen *verſus* ——— (195.)

PRohibition. There was a Suit for Tithes, and a Prohibition granted hence upon a Suggeſtion of the Lands being barren and newly improved; hereupon a Trial is had on a Declaration on the Prohibition, and a Verdict for the Parſon, that the Lands were not barren; and thereupon there is a Conſultation, and he proceeding there, gets a Sentence, from thence there is an Appeal to the Arches, and there they enter an Allegation that the Land is barren, and the Court there is proceeding to repeal the Sentence becauſe barren Land, though contrary to the Verdict at Law: And upon all this Matter the Court grants a Prohibition, quoad the Allegation of barren Land. See before pl. 21. A Prohibition after Sentence and Appeal.

Tithes. Prohibition after Sentence, *&c.*

Barren Lands. *Ante* Caſe 85.

Scoble *verſus* Skelton. (196.)

TReſpaſs for diverting a Watercourſe, that Time out of Mind run to his certain Meſſuage or Tenement; held well enough, becauſe every Meſſuage is a Tenement; then Exception was taken, becauſe 'twas for him and his Servants, whereas his Servants had no Eſtate; but held well enough: Then 'twas urged, That he preſcribed in a que Eſtate, and that he ſays only Seiſitus eſt, and doth not ſay in Feodo, whereas he ought to alledge a continuing Eſtate to make a Preſcription. 1 Inſt. 121. Stayed till moved on the other Side.

Watercourſe. *Vide* Caſe 21, 242, 255, 470.

Que Eſtate. Vide 1 *Mod.* 231. 2 *Mod.* 143, 144. *Nelſon's Lutw.* 29. 1 *Lev.* 190. 2 *Salk.* 562. 5 *Mod.* 150, 151. *Poſt*, Caſe 445.

(197.)

Dominus Rex verſus Vaughan.

Vide 1 *Mod.* 81. 1 *Vent.* 171. 2 *Saund.* 389. *Vide Raym.* 212, 374. *Ante Exon. Civit.* v. *Starr.* Oaths refuſed.

ERror on a Judgment of Præmunire for refuſing the Oaths, reciting the Statute, That whoſoever refuſes to take the Oath, *&c.* and doth not ſay recuſavit præſtare Sacrament', (as all the Precedents are) but only recuſavit Sacrament', and it might be he refuſed to adminiſter the Oath; but Judgment was affirmed notwithſtanding, for that to refuſe the Oath is to refuſe to take it.

(198.)

Clayton *verſus* Gillam *& al'*.

S.C. 1 *Vent.* 363. 2 *Jo.* 194.

Continuando. Vide Raym. 396. 1 *Sid.* 224, 242. *Nelſon's Lutw.* 417.

TReſpaſs for breaking open the Plaintiff's Cloſe, and digging up his Stakes, &c. with a Continuando tranſgreſſionem prædict', &c. Exception was taken to the Continuation by Sir Francis Wythers in Arreſt of Judgment, but held good enough, being general; and the Continuando may and ſhall be referred to that which may be a continued Treſpaſs; and here was by the Court mentioned the Caſe of Litchfield and Elliot, 16 Car. 2. in this Court about Logwood; 'tis in 1 Keb. 786. but anſwered by the Court, That there it was reſtrained to the throwing ſo many particular Pieces on the Ground; and in Confirmation of this their Reſolution, was cited the Caſe of Howel and Reynolds, about four Years ſince in this Court, viz.

(199.)

Vide 1 *Vent.* 329.

PAſch. 30 Car. 2. B. R. Howel *v.* Reynolds. Treſpaſs was brought for taking and carrying away Oyſters in ſeparali Piſcaria of the Plaintiff, with a Continuando as to the Taking; and upon Motion in Arreſt of Judgment 'twas held well enough, and that there might be a Continuance thereof; and for this was cited an Anonymus Caſe, 1 Brownl. 223. Where a Continuando of a Treſpaſs was laid, in breaking and entring his Houſe for divers Days together, which was there objected to be a new Treſpaſs every Time

he entred the Houſe: But the Court held 'twas well enough, for that the Continuando was only for aggravation of the Damages. And ſee F. N. B. 91. L. That a Continuando may be as well for breaking a Houſe as for eating of Graſs.

Earl of Shaftsbury *verſus* Grayham & Craddock.

(200.)

1 *Ven.* 363, 364. *Vide* 2 *Jo.* 179, 192. *Ante* Caſe 37. Of changing Venues. *Poſt*, Caſe 307.

CASE in the Nature of a Conſpiracy laid in London, wherein the Plaintiff declared, That the Defendants did falſly and maliciouſly conſpire to cauſe him to be indicted, convicted, condemned and deſtroyed for High Treaſon; and in Order thereto did ſollicit and labour one Wilkinſon, being in the King's Bench Priſon in Surrey, to ſwear againſt and charge him with Treaſon: And in further Proſecution of this their wicked Deſign, did cauſe to be drawn and ingroſſed in Parchment an Indictment, and the ſame did exhibit at the Old Baily; and did then and there endeavour to prove the Contents thereof, &c.

Mr. Attorney General now moved to change the Venue out of London, upon Affidavits of the Plaintiff's Intereſt with the Sheriffs and Juries in London, and upon the Declaration it ſelf. And he urged, That in this Action the Conſpiracy is the Principal, ſo that by an Artifice this is drawn into London; 'tis not for indicting him, or exhibiting an Indictment, 'tis for Conſpiring, Suborning, and Cauſing an Indictment to be exhibited, the moſt Part whereof is in Surrey.

Mr. Serjeant Jefferyes ad idem. That the Common Courſe is ſo always, as in Caſe of Goods bought here and to be delivered at Exon; the Plaintiff hath his Election; yet if he lay it in London, as he may; upon Affidavit that they were paid for, and that the Payment was in Exon, and the Witneſſes to prove ſuch Payment live there, this will be Ground enough to change the Venue, ut experientia docet; and ſo the Venue may be changed, provided there be Cauſe even where the Plaintiff otherwiſe hath his Election; and this is not grounded on any Record.

In

In a tranſitory Action the Venue of it may be altered if there be occaſion; where a Record is the whole Ground of a Man's Action, there 'tis certainly local, but upon a Conſpiracy which is perſonal, it may be brought in any County in England, for 'tis no more than Caſe, and the Proſecution of an Indictment is but Aggravation of Damages; the Conſpiracy is the Mint of the Action, and if there were an Exhibition of an Indictment without a Conſpiracy, the Defendant muſt be found Not guilty; and an Action of the Caſe lies, though no Indictment were exhibited if there were a Conſpiracy: And of the Indictment a Copy is ſufficient Evidence: And what have the City of London to enquire of, but only the Conſpiracy and the Endeavours of Subornation, which were all done in Surrey?

Mr. Jones. If it be in my Lord Shaftsbury's Election to lay it in any other County, then ſurely it may be changed; and if in London, you may inquire of the Conſpiracy in Surrey, why may you not in Surrey inquire of the Indictment in London? In the Caſe of the Lord Gerrard *v.* Spencer, my Lord Chief Baron Hale directed a Trial at Law upon a Suit there in Equity; and though the Lands lay in Lancaſhire, yet he being a Man of Intereſt there in that County, my Lord Hale made them turn their Ejectione firmæ into a feigned Iſſue, to try it in another Place for indifferency-ſake: And in my Lord Shaftsbury's own Caſe againſt Digby, the Venue was ſo changed by my Lord Hale, and that in Caſe of a Scandalum Magnatum.

By the Court. Here the chief Evidence muſt ariſe in Surrey, viz. the Conſpiracy and Labouring; all that is in London, and can be inquired of there is the Indictment, to which nothing is needful but a Copy and one Witneſs to prove it true; and even in a Scandalum Magnatum the Venue may be changed for unindifferency's-ſake, though not upon the common Affidavit: And at laſt after ſolemn Debate the Venue was changed, which being done, the Plaintiff never proceeded.

Dominus Rex verſus Ripley.

(201.)
2 *Jo.* 198.

INquiſition of a Felo de ſe returned hither by Certiorari; Sir Francis Withins moved for a melius inquirend', on Affidavit of Melancholy and Diſtraction, but denied; and held by the Court not grantable, unleſs there had been ſome Irregularity in the Caption of it, and ordered the Adminiſtrator to traverſe the Inquiſition, as is uſual in the Exchequer in Caſes of Inquefts of Office; as talis venit & queritur ſeipſum colore, &c. gravari & minus rite, &c. And agreed by all the Bench, that he might do ſo; but held by ſome of the Bar, that 'tis not traverſable; upon an Action of Trover for Goods of the Deceaſed's, it will hold good and cannot be traverſed: But Dolben ſaid, That a Preſentment in a Court-Leet by the old Books, is not traverſable, but being removed hither by Certiorari it is every Day traverſed.

Felo de ſe.

Dominus Rex verſus Stenhowe.

(202.)
2 *Jo.* 199.

MAndamus prayed for admiſſion to a Canon's Place in a Cathedral, by Dr. Owen; and alledged on his Behalf, that to Suit in Court-Chriſtian concerning this Place, the Court of Common Pleas have granted a Prohibition as being a Lay Fee, and therefore no Remedy but a Mandamus: The Chapter is to aſſiſt the Biſhop in his Temporalities, as to the paſſing or granting of Eſtates. Weſtm. 1. cap. 5. All Elections ſhall be free, now this Statute reaches to all Corporations whatſoever. 2 Inſt. 602. And in Eaſter Term 1659. in this Court a Mandamus was granted in one Coxe's Caſe.

Canons, Precentor.

Note.

Econtra urged, That this is not a Dean and Chapter, but a Precentor and Canons, which is purely Spiritual; in their original Inſtitution they were only to ſay Prayers: Two Statutes take Notice of them as purely ſpiritual and religious; and here was cited Daniel Appleford's Caſe, Mich. 22 Car. 2. Mod. Rep. 82.

Court.

Court. As to that of a Prohibition 'tis nothing in the Caſe, for if a Libel be there about an Induction and Inſtitution, a Prohibition lies, but not a Mandamus; and in many Caſes a Prohibition, but no Mandamus, will lie: In Caſe a College chuſe a Fellow during a Plenarty, they are not bound by that Election, but may chooſe a-new when there is a Vacancy, although the Uſage be to confirm the ſame, yet 'tis not done de jure.

(203.)

Creſwick *verſus* Saunders.

Covenant. Aſſignee. *Ante* Caſe 114. 2 *Jo.* 144. *Nelſon's Lutw.* 97, 109, 136, 145, 211 & 212.

THis was an Action of Covenant for not repairing an Houſe in Eſſex, by an Aſſignee of the Reverſion, brought in London; held it would not lie, there being no Privity of Contract, that being gone by the Aſſignment, and the Plaintiff being intitled thereto, only by Reaſon of his having the Land; therefore the Action ought to have been brought only in the County where the Land lies; and ſo is Bord and Cudmore's Caſe in 1 Cro. 183. and Thursby and Plant's Caſe.

Vide 1 *Sid.* 401. 1 *Saund.* 237.

Afterwards it being laid in Eſſex, there was Judgment by Default, and a Writ of Inquiry iſſued, on the Execution whereof it was ſworn by a Bricklayer and Carpenter, that it could not be put in Tenantable Repair under 100 l. and yet the Jury gave but 6 l. Damages; and being asked by the Sheriff, How they could do ſo? They replied, They were Judges of the Damages, and might give but 2 d. if they pleaſed, and were not bound to give an Account why they did ſo. All this being proved by Affidavit, as alſo that before the Jury was ſworn the Defendant offered the Plaintiff 40 l. to end the Buſineſs, but the Plaintiff would not accept it.

New Writ of Inquiry. *Vide ante* Caſe 76.

And upon my Motion for the Plaintiff, a new Writ of Inquiry was granted, though at the Bar 'twas ſaid to be unuſual, it being found for the Plaintiff.

Honor *verſus* Gale. (204.)

IN Ejectione firmæ for not appearing at the Trial to confeſs Leaſe, Entry and Ouſter, there was Judgment againſt the caſual Ejector, and upon my Motion ſet aſide, becauſe no Bail was filed. Leaſe, Entry, &c.

Note, In Hillary Term 31 & 32 Car. 2. B. R. it was declared by Scroggs, Chief Juſtice, to be the Opinion of all the Judges, That where an Entry is required, and even neceſſary, the Confeſſion of Leaſe, Entry and Ouſter did ſupply it, (though no actual Entry) and this he ſpoke for the Satisfaction of the Bar; it having been a Queſtion oftentimes upon Trials. Vide 1 Vent. 332, 355, &c. 1 Sid. 223. 1 Salk. 259.

Dominus Rex verſus —— (205.)

QUo Warranto againſt ſeveral Bakers of the County of Cheſter, that came in and ſold Bread at Glamerſtone, nigh the City of Cheſter, for ſelling there extra Shopam & abſque aliquo Mercat' in loco aperto quaſi & tanquam mercat'. Bakers. Market.

Reſolved not good, becauſe 'tis no Incroachment without a Demand of Toll, or the like; and if it had been for keeping a Market, they would have diſclaimed. And Judgment for the Defendants; and here was cited the Caſe of Toller and Cooke, and others, in the Caſe of the Bakers of Honiton and Ottery in Devon, in Scacc. laſt Trinity Term, and the ſame Judgment given.

Dominus Rex verſus Mayor and Burgeſſes of Warwick. (206.)

INdictment for not repairing a Way to a Church, and ſay, the Defendants ought to repair the ſame, but do not ſay how, whether by Reaſon of Tenure or otherwiſe; naught, becauſe prima facie and regularly the Pariſh or County ought to do it of Common Right. Way.

(207.) Anonymus.

Executor. Aſſets. IN Caſe an Executor hath three or four Bonds againſt him, and they all come to Trial at once, being for 20 l. a-piece, and the Executor hath Aſſets to one 20 l. yet he ſhall be chargeable to them all, therefore it would have been beſt for him to have confeſſed a Judgment to one of them, and that he might have pleaded to the other.

(208.) Anonymus.

Bail. LOrd Chief Juſtice. Manucaptors are but Gaolers pro tempore; and in Caſe a Man abſconds, and his Bail cannot find him, they ſhall have a Warrant or Tipſtaff to take him out of White-Friers, or other pretended Place of Privilege, in order to ſurrender him, becauſe he is a Priſoner to the Court, and they may call him at Pleaſure, &c. But to enable a Plaintiff to take a Man on mean Proceſs they will not grant it; but in Caſe a Reſcous be returned they will.

(209.) Anonymus.

Condition. Covenant. LEaſe of Land paying Rent is no Condition; ſo a Power to dig up Trees, making up the Hedge again is not a Condition, but Covenant lies for not repairing the Hedge.

(210.) Anonymus.

Courts inferior, &c. LOrd Chief Juſtice ſaid, he thought it aſſignable for Error in Fact, in a Writ of Error on a Judgment in an inferior Court, that the Matter aroſe out of the Juriſdiction.

In an inferior Court they will have full Coſts, though the Damages found be under 40 s. for that they are not within the Statute; a Writ of Inquiry upon Judgment by Default is not within it, and though the Act be temporary as to the Law-Duty, yet 'tis not ſo as to this Proviſion, for the Words are not that the Act ſhall continue in Force but for nine Years, but only that the Duty ſhall continue ſo long and no longer. Per tout le Court. Coſts, &c.

Melhuiſh *verſus* Carneſam. (211.)

ERror to reverſe a Judgment in Debt on a Bond for Performance of Covenants; for that after a Relicta verificatione the Judgment is entred quod Capiatur: And held naught, and Judgment reverſed. See Beecher's Caſe, 8 Rep. 58. Judgment erroneous.

Smith *verſus* Prickman. Intr. hocce Termino Rot. 76. (212.)

AUdita Querela on the poor Priſoners Act: Upon Demurrer adjudged by the whole Court, That a Man in Execution for 500 l. is not to be diſcharged by that Act. Poor Priſoners.

DE

Termino Trin.

34 Car. 2. B. R.

Smallwood *verſus* Berthouſe.

(213.)
2 *Jo.* 210.

Age to make a Will, *&c.* *Vide* 1 *Salk.* 39, 44. *Raym.* 84; 1 *Sid.* 162. 2 *Salk.* 625. 2 *Mod.* 315. 6 *Mod.* 260. *Nelſon's Lutw.* 199.

PRohibition prayed by Tremaine, for that the Eccleſiaſtical Court allowed a Will to be proved, and the Party but fifteen Years of Age; upon a Suggeſtion that by our Law he could make none till ſeventeen Years old; he urged 1 Inſt. and Pigott's Caſe, 5 Rep. 29. that an Adminiſtration durante minore Ætatæ was determined at ſeventeen Years of Age.

But after ſolemn Debate 'twas denied, for that they are proper Judges thereof, and an Appeal lay to the Delegates; and whatſoever our Law-Books ſay concerning it, 'tis only as directed by their Law.

Oliet *verſus* Reſſey.

(214.)
S. C. 2 *Jo.* 214. *Raym.* 421, 465. *Vide ante* *Ulcot* verſus *Belchy.* Caſe 131. Falſe Impriſonment.

TRespaſs for Falſe Impriſonment quouſque finem fecerit, argued, That the Gaoler is liable, for that he may bring his Action againſt the Bailiff as well as the Plaintiff; and a Caſe was cited to have been in the Common Pleas, where Eſcape was brought for one in Execution, and a Special Verdict found the whole Proceedings in an inferior Court, viz. Declaration on Bond, and laid to be ſealed and delivered infra Jurisdiction' Cur', and non eſt fact' pleaded,

ed, and Verdict and Judgment pro Quer', and the Party taken in Execution and permitted to eſcape; but alſo they found that the Bond was ſealed and delivered extra Jurisdiction', &c.

And upon this Verdict on ſolemn Debate there was Judgment againſt the Plaintiff.

Then Exception was taken to the Defendant's Plea, becauſe he pleads that by Virtue of ſuch Proceſs he was taken and brought to his Priſon, and detained ſo long and not guilty to all the reſt; whereas here is no Anſwer to the Fine.

Lord Chief Juſtice. The quouſque finem fecit is but for Aggravation of Damages, and generally laid without Time or Place. Adjournat'.

Dominus Rex verſus Spiller & *Ux'*. Per Indict. Paſch. 34 Car. 2. Inter placita Coron'. (215.)

AD generalem Seſſionem pacis pro Com. Civit. Exon apud Guihald ibidem tent. tertio die Octobris Anno Regni Domini noſtri Caroli Secundi nunc Regis Angliæ, &c. 33. Civitas. Exon. ſſ. Juratores pro Domino Rege ſuper Sacrament. ſuum præſentant quod Willielmus Spiller nuper de Paroch. beatæ Mariæ Major. in Com. Civitat. Exon prædict. Aromat. & Agnes Uxor ejus quinto die Septembris Anno Regni Dom. noſtri Caroli Secundi Dei Gratia Angliæ Scotiæ Franciæ & Hiberniæ Regis Fidei Defenſor. &c. 33. fuer. & uterque eor. fuit ætatis ſexedecim annor. & amplius & ab eodem quinto die Septembris Anno 33. ſupradict. non acceſſerunt nec eorum aliquis acceſſit (Anglice did not repair) ad eccleſiam ſuam parochialem beatæ Mariæ Major. prædict. nec ad aliquam aliam eccleſiam capellam aut uſualem locum communis præcationis nec ibidem morat. fuer. nec alter eor. ibidem moratus fuit tempore communis præcationis ibidem ad aliquod tempus infra unum menſem integrum extunc proxime ſequent. ſed abſtinuerunt & uterque eor. abſtinuit ab eiſdem (Anglice have forborn the ſame) per præd. ſpacium præd. unius integri menſis contra formam Statut. in hujus modi caſu edit. & proviſ. & contra pacem dict. Domini Regis nunc coronam & dignitat. ſuas & in pernicioſum exemplum aliorum in tali caſu delinquentium.

Indictment for Recuſancy, or not coming to Church. *Vide ante* Caſe 145. *Poſt*, 216, 340.

Which

Which Indictment I moved might be quaſhed for theſe Exceptions.

1. To the Caption, for 'tis ſaid to be ad generalem Seſſionem pacis, and doth not ſay quarterialem as it ought to do, Taylor's Caſe, Palmer 44. Steven Burton's Caſe, Style 123. ſed non allocabatur per Cur', for they would intend it at a Quarter-Seſſions, being held after Michaelmas, for the County; and 'twas ſaid at the general Seſſions, and by ſome held, that it need not be a Quarter-Seſſions; for an Indictment may be at any Seſſions for that Offence; ſed quære the Statutes.

2. Another Exception I took was to the Concluſion, it ſaying contra formam Statut. and doth not ſay which or what Statute: But the Court held that well enough, for though one Statute create an Offence, and another Statute give a greater Penalty, yet Statut. with a Dash was well enough, and might be Statutorum as well as Statuti. See Moon's Caſe, 2 Cro. 142. held that Statuti was good enough.

3. Exception was to the Body of the Indictment, for the Offence by the Statute is a Month's Abſence from Church; which being a Penal Law, ought to be reckoned Kalendar Months; and ſo is intended where the Matter expoſes the Party to a Miſchief or Penalty, as Weſtm. 2. cap. 5. for the account of Lapſe; and the 2 and 3 Edw. 6. cap. 11. for proving a Suggeſtion. 1 Inſt. 135. 2 Rep. 166. Yelv. 100. Hob. 197.

But the Court held twenty-eight Days or a Lunary Month was intended by this Statute, and ſo well enough; and the rather, becauſe coming to Church once in four Sundays, or on Holydays within the Month, was the Thing required by this Law, and the Forbearance ſo to do is the Offence; and they ſaid, It had been ſo adjudged, that a Lunary Month was here intended, and this frequently reſolved.

4. Then I urged here was not a Lunary Month, here was but ſix-and-twenty Days, for 'tis ſaid to be a quinto die Septembris Anno Regni 33. (which is excluſive of that Day) per ſpacium unius integri menſis extunc proxime ſequent' and the Indictment is taken before the Month is out, viz. the 3 Octobris 33. Anno, which Day of Taking the Indictment can never be reckoned one;

for he might go to Church the third of October after the taking of the Indictment.

Lord Chief Juſtice Pemberton. That's true, neither of thoſe Days can be reckoned into the Monty, but we do not uſe to quaſh ſuch Indictments.

Dolben. Not for any ſmall Error or doubtful Word, but this can never be made good after a Verdict, and therefore 'tis in vain to put them to try it; whereupon 'twas quaſhed per Cur'.

Dominus Rex verſus Spiller. Per Indict. Paſch. 34 Car. 2. B. R. inter placita Coron. Rot. Num. 154. (216.)

Exon. ſſ. MEmorandum quod ad generalem Seſſionem pacis Domini Regis in & pro Com. Civitat. Exon. prædict. tent. apud Guihald ejusdem Civitat. in Com. Civitat. prædict. die Iunæ in prima ſeptimana poſt feltum Epiphaniæ, viz. nono die Januarii Anno Regni Domini noſtri Caroli Secundi Dei gratia Angliæ Scotiæ Franciæ & Hiberniæ Regis Fidei Defenſor. triceſſimo tertio coram A. B. C. & D. Aldermanis dict. Civitat. cuſtod. pacis dicti Domini Regis ac Juſticiariis ſuis ad diverſ. felonias tranſgreſſiones & alia malefact. infra Com. Civitat. Exon præd. perpetrat. audiend' & terminand. aſſignat. ſuper Sacrament. L. M. N., &c. gener. exiſtent. probor. & legalium hominum ejuſdem Civitat. & Comitat. ejuſdem Civitat. debite impanellat. jurat. & onerat. ſuper ſacroſancta Dei Evangelia ad inquirend. præſentand. pro dicto Domino Rege & corpore Com. ejuſdem civitat. de omnibus feloniis tranſgreſſionibus malefactis ac de aliis offenſis & articulis inde quibuſcunque fact. perpetrat. ſine commiſſ. contra pacem dict. Domini Regis infra eandem Civitat. & comitat. ejuſdem civitat. ad eandem generalem ſeſſionem pacis præd. præſentat. exiſtit; quod cum ad generalem Seſſionem pacis Domini Regis in & pro Com. civitat. Exon præd. apud Guihald ejuſdem civitat. tent. die Lunæ, viz. 3°. die Octobris Anno Regni Domini noſtri Caroli Secundi Dei Gratia Angliæ Scotiæ Franciæ & Hiberniæ Regis fidei Defenſoris, &c. 33. coram A. B. C. & D. Aldermanis dict. civitat. & aliis Sociis ſuis Alderman. cuſtodibus pacis dict. Domini Regis ac Juſticiariis ſuis ad diverſ. felonias tranſgr. & alia malefacta infra Com. Civitat. præd. perpetrat. audiend.

Indictment for ſlandering the Grand Jury.

&

& terminand. aſſignat. quidam L. M. N. &c. gen. exiſtentes probi & legales Homines ejuſdem Civitat. & Com. ejuſdem Civitat. fuer. debite impanellat. jurat. & onerat. ſuper ſacroſancta Dei Evangelia ad inquirend. & præſentand. pro dict. Domino Rege & corpore Com. ejuſdem Civitat. de omnibus felonii; tranſgreſſionibus maleſactis ac de aliis offenſis & Articulis inde quibuſcunq; fact. perpetratis ſive commiſſis contra pacem dicti Domini Regis infra eandem Civitat. & Comitat. ejuſdem Civitat. ad eandem generalem Seſſionem pacis præd. Cumque præfat. Jurat. pro dicto Domino Rege, viz. L. N. N. &c. ſecund. tenorem & exigentiam Sacramentor. onerum & officiorum ſuorum præd. poſtea ſcil. eodem tertio die Octobris Anno triceſſimo tertio ſupradict. ad eandem general. ſeſſionem pacis præd. inquiſiviſſent & præſentaſſent inter alia quendam Willielmum Spiller, nuper de Civitat. Exon præd. in Com. præd. aromatar. pro recuſantia (Anglice for not coming to Church) præd. Willielmus Spiller præmiſſorum & præſentament. præd. ut prefertur non ignarus ſed machinans & malitioſe intendens jurat. præd. L. M. N. &c. in infamiam & ſcandalum inter ligeos dicti Domini Regis inducere & inferre poſtea ſcilicet 19°. die Decembris Anno ſupradicto vi & armis, &c. apud Civitat. Exon præd. in Com. Civitat. Exon præd. ut pacis dicti Domini Regis nunc perturbator de præd. L. M. N. &c. jurat. præd. in præſentia & auditu quamplurimorum dict. Domini Regis nunc ligeorum illicite malicioſe & injurioſe dixit propalavit & alta voce aſſeruit & promulgavit hæc falſa ſcandaloſa contemptuoſa & opprobrioſa Anglicana verba ſequentia videlicet the laſt Grand Jury (præd. L. M. N. &c. jurat. præd. innuend.) that preſented me (ipſum Willielm. Spiller innuend.) are damned perjured Rogues & Jurat. pro dicto Domino Rege ulterius dicunt & præſentant quod præfat. L. M. N. &c. fuer. ultimum magn. jurat. qui preſentaverunt præd. Willielmum Spiller (Anglice the laſt Grand Jury that did preſent præd. Willielmum Spiller) ad grave dampnum præd. L. M. N. &c. jurat. præd. in magnam defamationem omnium eorund. Jurat. præd. & in malum exemplum omnium alior. ſubditorum dict. Domini Regis in tali Caſu delinquentium in manifeſtum contemptum dicti Domini Regis nunc legumque ſuarum necnon contra pacem dicti Domini Regis Coron. & dignitat. ſuas, &c.

This (Indictment or Preſentment) I moved to quaſh, and took theſe following Exceptions thereto.

1. It ſets forth, that whereas they had preſented one William Spiller pro recuſantia (Anglice for not coming

to Church; now Recuſancy in legal Signification is a Refuſal of the uſual Oaths, and no ways ſignifies a not coming to Church; and where the Word is true Latin, and hath a proper Signification, Anglice another Thing is naught; and Anglices are only allowed where there is no proper Latin Word for the Engliſh. *Anglice.* *Poſt*, 217.

But per Cur'. The Anglice is Surpluſage, and ſuppoſing it out 'tis well enough, for this is only Recital; and if it had only ſaid, Whereas the laſt Seſſions the Grand Jury had preſented ſuch a one, that had been well enough; ideo non allocatur.

2. As it appears on this very Indictment, here are Ten of that Grand Jury that are Jurors now, and make this laſt Preſentment; they that pretend themſelves aggrieved by theſe pretended Words, do find this Indictment.

Court. That's nothing, for if a Battery be committed on a Gentleman, and he the next Seſſions is of the Grand Jury, ſurely he and his Fellows may preſent the Treſpaſſor for the ſame.

Then I urged, that theſe very Men had brought their ſeveral Actions: But to that 'twas anſwered, Perhaps the Action will not lie; however a Man may be indicted and puniſhed that way for the ſame Thing for which an Action lies; as in Caſe of Battery or the like.

3. It doth not ſay the Words were ſpoken in the Hearing of any of the King's Subjects, but only ligeorum, which is a Noun Adjective, and it being an Indictment, ought not to be helped by a Subintelligitur ſubditorum. But ſaid by the Court, That ligeus ſignifies a Liege Subject when alone.

4. As to the Words themſelves, Queſtion if indictable, for they import no Crime, though 'tis laid ad grave dampnum of the Grand Jury; they cannot be puniſhed by Indictment for Perjury if they make a falſe Preſentment, nor doth an Action lie againſt them for ſo doing.

Court. A Grand Jury are puniſhable for ſtifling and concealing Offences, and not preſenting them, by the Statute of 3 H. 7. chap. 1. againſt Jurors Concealments; and that theſe Words are certainly criminal, being a Scandal to the Proceedings of Juſtice.

5. They do not say that the Grand Jury were not perjured Fellows, or that the first Presentment was true, or that 'twas upon Information of Witnesses, or their own Knowledge, or with a probable Cause, or that Spiller was a Recusant; so that for ought appears the Words may be true, and by Consequence no Offence.

Court. The Words are scandalous and an Offence, though the Presentment were false; for a Grand Jury ought not to be called Damned perjured Rogues, though they had by Mistake or Misinformation made a false Presentment.

6. As to the Caption 'tis said, that those before whom, &c. were custodes pacis and do not say they were Justices of the Peace, &c. and every Constable is Custos pacis, and every good Subject ought to be Conservator pacis, and yet cannot take an Indictment.

Court. That is well enough, it is their constant Style, and they are said to be the King's Justices, assigned to hear and determine Felonies, Trespasses, and other Misdemeanors within the County of the City of Exon. And the Indictment was held good, and my Client ordered to traverse the same.

(217.) Pigg *versus* Gardiner.

Scire facias. ERror. In Case Judgment be reversed on a Writ of Error, a Scire facias lies on Suggestion of a Payment of the Money condemned by the first Judgment; and upon two Nihils returned then Restitution lies and a Writ of Execution; though the Party Plaintiff in the first Action knows nothing of the Matter: And the Case of Weekes *v.* Long, in this Court was agreed to have been so.

(218.) *Dominus Rex versus* Green.

Trade. Apprentices. *Vide ante* Case 141. INdictment for using the Trade of a Baker, not having served seven Years Apprenticeship, contrary to 5 Eliz. and doth not say he did not use the Trade at the Time of making the Act; and 'twas quashed, but agreed and declared by all the Court that this Exception

tion should never be allowed for the future; and now they would intend that no Man did use that Trade at that Time.

Putt *versus* Royston. *Entred* Mich. 33 Car. 2. Rot. (219.)

TRover and Conversion for Goods, the Defendant pleads in Bar Trespass brought for the same Goods; and that upon Not guilty pleaded, there was a Verdict for the Defendant; Plaintiff demurs: There was urged Coke's Ent. 38. and Ferrer's Case, 6 Rep. 7. That if the Plea be to the Action, and he be barred by Judgment upon Demurrer, Confession or Verdict in a personal Action, it is a Bar for ever. Noy 58. Trover after Trespass. 2 *Mod.* 318. 3 *Mod.* 1. 1 *Raym.* 472. *Poll.* 634. *Cro. El.* 676. *Cro. Jac.* 15.

Mr. Serjeant Maynard pro Quer'. In Ferrer's Case, the Property is barred because of the Jurisdiction, and therefore the Judgment is, That the Defendant may justify the Taking as an Heriot; so that it appeared plainly, that he had a Right, and so there is a Right adjudged to him; which is as much as a Recovery, and that's a Bar in any Action of no higher Nature; but here is only the Mint of the Action mistaken.

Lord Chief Justice. As to Lacon and Barnard's Case, 1 Cro. I dislike the Pleading in that Case, and I believe there is none like it now; to come and aver that the Reason why the Jury gave a Penny Damages was, &c. which is a Thing not triable, and Yelverton is against it. *Cro. Car.* 35. *Hutt.* 81. *Style* 202.

In Michaelmas Term following it was argued again.

Saunders pro Quer'. A Recovery in Trespass is a Bar in Detinue or Trover for the same Thing; and the Reason is, because by the Damages given the Property of the Goods is altered, and out of the Plaintiff; the Recompence being given to him for them in Damages: But otherwise where a Man mistakes his Action; and in Lacon and Barnard's Case, Cro. Car. where a Man brings Trespass for Taking and Driving, and recovers Two-pence, he may yet bring Trover: So if Trespass be brought quare cepit & abduxit, and upon Not guilty there's a Verdict pro Defendant,

fendant, that is only that he did not take them by way of Treſpaſs, and it may be he did not ſo, but had them of the Plaintiff's own Delivery, and ſurely then the Plaintiff may demand his Goods again. In Sir Humphry Ferrer's Caſe, v. Arden. 3 Cro. 667. 'tis ſaid, That if I do deliver Goods to keep, and am barred in Treſpaſs, I may bring Detinue, and if he may bring Detinue, then he might bring Trover.

Beſides, the Trover and Converſion is laid to be an Year after: But to that it was anſwered by the Court, that that's not material.

Mr. Pollexfen pro Defendant. If another Action of Treſpaſs had been brought, and the former Treſpaſs pleaded in Bar, that would be agreed a good Plea: Then ſuppoſing it ſo, the Queſtion is, If it be a good Bar in Trover? When one is barred by Judgment, Confeſſion or Verdict, he is barred not only in that Action, but in every Action of that Nature. Bro. Action ſur le Caſe, 110. the Rule in Sparrie's Caſe, 5 Rep. 61. Pro uno debito nemo debet bis puniri vel vexari. 12 Edw. 4. Bro. Bar. 111.

As to the Caſe of Lacon and Barnard, that is not much to the Purpoſe, for that is in Caſe of a Recovery by the Plaintiff: Now theſe Actions are of the ſame Nature, and the Variance is only nominal, and the coming of the Goods to the Defendant's Hands is the main Matter in both, for Damages are to be recovered in both; they are more of the ſame Nature than any two Actions in the World: If an Action of Treſpaſs were brought, and then Trover in this Court, and the Treſpaſs pending were pleaded in Abatement, I conceive that this would be a good Plea; ſhew me one Caſe where Trover will lie and Treſpaſs will not. Litt. Sect. 71. 1 Inſt. 57. I may bring Treſpaſs againſt a Man for Goods come to his Hands by my own Delivery; when Treſpaſs is brought and Verdict for the Defendant, I conceive that the Property is thereby for ever affirmed in the Defendant: The Judgment is, Nil capiat per billam & defendens eat inde ſine die; which diſcharges the Party from all Actions.

By Higgins's Caſe, 6 Rep. 44. tranſit in rem judicatam, and finis litium is the End of the Law; and that ſeems to be the Reaſon that always governed the Judges in

this Point: And why ſhould not, in all common Juſtice, a Verdict for the Defendant be as final and concluſive as when for the Plaintiff? Brown and Wootton's Caſe, Judgment upon a Demurrer is concluſive, 2 Cro. And what Reaſon of Difference between a Demurrer and a Verdict? A Verdict is a Thing of the higheſt Nature for the aſcertaining of Truth: Here was the Caſe of Turberville *v.* Savage, Aſſault and Battery, and ſon Aſſault Demeſne pleaded, and Verdict and Judgment pro Quer'. Savage goes into the Common Pleas, and brings his Action againſt Turberville, and he pleads the former Action, Plea and Verdict.

Lord Chief Juſtice. I take Ferrer's Caſe to be good Law, and not at all to be ſhaken; and I reckon the Difference and Reaſon to be this: Where the ſame Evidence will maintain one or the other, there without Queſtion a Bar in the one will be ſo in the other, as in Ferrer's Caſe; but where the Evidence will not, 'tis otherwiſe.

And whereas you ſay, that Treſpaſs will lie where-ever Trover will, it is a manifeſt Miſtake; for Treſpaſs lies not on a bare Denial, as Trover will on a Demand and Denial: In an Action of the Caſe and Detinue, the ſame Evidence will maintain both, ſo that 'tis not the Action in its own Nature, but the Evidence that doth ſpecificate them; when a Man miſtakes his Action 'tis unreaſonable to ouſt him of any other: In Ferrer's Caſe the Evidence was diſcovered, but here 'tis generally Non Cul': Where the Verdict is for the Plaintiff there the Property is altered, becauſe of the Recompence given in Damages; and you know a Record with Satisfaction is a good Bar, which is not ſo high as a Judgment; ſo that the chief Buſineſs is the Satisfaction: But this Verdict for the Defendant doth not alter the Property; ſo that I think it no Bar, for we muſt intend it a Miſtake of the Action; and that Treſpaſs would not lie, nothing appearing to the contrary.

See 2 *Mod.* 245. 3 *Mod.* 2. 6 *Mod.* 212. *Ante* Caſe 148, 175, 176.

Judgment pro Quer' per Lord Pemberton, Jones and Raymond; Dolben hæſitante.

Lord Chief Juſtice. Suppoſe I bring Aſſumpſit on a Bond, Would a Verdict for the Defendant have barred me in Debt?

Anſwered

Anſwered by Dolben, that would be all naught.

Lord Chief Juſtice. I agree when the original Action is a tortious Converſion, there either Treſpaſs or Trover will lie, and ſuch Matter being diſcloſed, a Verdict for the Defendant in the one, will be a Bar to the other.

(220.) Linch *verſus* Lucey.

Judgment amended. *Vide* Stat. 4 & 5 *Annæ*, *cap.* 16.

IN Caſe for Wares ſold, Judgment was entered quod Capiatur, inſtead of quod ſit in miſericordia, which was purely the Miſtake of the Clerk, and therefore a Rule was to amend it on my Motion; and they moved againſt that Rule the ſame Term, becauſe a Writ of Error was brought, and that they had inſiſted on that Error; beſides, 'twas a Judgment by Default, and a Writ of Inquiry executed without Defence, and the original Cauſe of Action was ill, being a Trick on a young Heir.

Which Motion I defended upon theſe Reaſons, viz. That this Court hath amended Judgments to make them good, but never altered them to viciate or make them naught; that it hath helped Errors, but never willingly made them: That the Record now is fair and bright as it ſhould be: In the Caſe of an Almanack it hath been obſerved as a Rule here, never to recur thereto for to vacate a Judgment, but to ſupport a Judgment 'tis frequently done; if it had been amended without Rule of Court, the Attorney might have been laid by the Heels; but it would have been ſaid, as it hath been here often by Mr. Juſtice Twiſden, Bleſſed is the mending Hand, and the Judgment ſhould have ſtood good; and ſo they amend in the Common Pleas frequently on Writs of Error brought here: This is not ſo bad as a Diſcontinuance, or the like, this is your own Judgment which you have helped; for the Merits of the Cauſe that is nothing to the Purpoſe now: They might have pleaded to the original Action, or defended it in the Writ of Inquiry if they had ſo pleaſed; now they are too late.

The ſole Objection is, its being a Judgment of ſo long a ſtanding; and for that the Caſe of Rawlins, 4 Rep. 52. is a full Anſwer, a Verdict was there amended three Terms after, much more a Judgment ſhould be ſo; and the Record in our Caſe is not certified.

In Woodden and Hazell's Caſe, 1 Leon. 134. 'tis expreſly reſolved, That there could be no Alteration or Amendment of a Record, but in Affirmance of a Verdict or Judgment, and not in Defeaſance of either; that Caſe was on an Eſſoin; but in Caſe of a Judgment there is Wheeden and Sugg's Caſe, Hill. 13 Jac. 'tis in 2 Cro. but there is only the Point of Law on the Demurrer queſtioned, 'tis in Rolle 1 Abr. Tit. Amendment, fo. 205. where my Lord Rolle ſaith, That if a Judgment be given againſt the Plaintiff on a Demurrer, and the Judgment be entred thus, That at ſuch a Day the Plaintiff exactus non venit Ideo nihil capiat per breve, which is the Form of the Entry of a Nonſuit, and not of a Judgment upon a Demurrer, this ſhall be amended; becauſe 'tis the Default of the Clerk.

Now no Difference can be aſſigned as to the Point of Amendment between this Caſe and ours; however it being once amended it cannot be altered, unleſs you repent of having given a true Judgment, and will deliberately make it erroneous; and ſay, Defendens quod capiatur when 'tis Caſe and no vi & armis in the Count, and ſo no Fine to the King; and therefore not a capiatur, and you may ſet it aſide if irregularly obtained; but this Judgment was regular.

Notwithſtanding which the Court inclined that it might be altered, but on what Reaſon I know not, ſave that they thought it an Hardſhip upon the Defendant, and ſo did not much conſider of it; however at laſt by Conſent the Judgment was ſet aſide; and the Defendant pleaded Non Aſſumpſit, &c. *Curia.*

Dominus

(221.) *Dominus Rex verſus* Record. Per Indict. Mich. 31. Car. 2. Regis Num. 111. inter placita Coron.

Nuſance. PResentment for a Nuſance in keeping Hogs to the Annoyance of the Neighbourhood, at a Court-Leet for the Manor of Stepney. I moved to quaſh it for theſe Exceptions, Becauſe it was ſaid to be at Caſtle-Lane, and does not ſay where that is; beſides, it did not ſay where: And quaſhed per Cur'.

(220.) *Dominus Rex verſus* Eveley & Ux'. Per Indict. Trin 34 Car. 2. Regis Num. 35. inter placita Coron.

Indictment for hearing Maſs. *Vide ante* Caſe 215, 216.

Midd. ff. JUratores pro Domino Rege ſuper Sacrament. ſuum præſentant, Quod Thomas Eveley nuper de paroch. Sanctæ Margaret. Weſtm. in Com. Midd. præd. Yeoman & Anna Uxor ejus primo die Junii Anno Regni Domini Caroli Secundi nunc Regis Angliæ, &c. triceſſimo quarto, & diverſis aliis diebus & vicibus tam antea quam poſtea apud paroch. Sancti Egidii in Campis in Com. præd. illicite injuſte & voluntarie fuerunt præſentes & uterque eor. fuit præſens & adtunc & ibidem illicite injuſte & voluntarie audiverunt & uterque eor. audivit maſſam (Anglice Maſs) in contempt. legum hujus regni Angliæ in malum exemplum omnium alior. in tali caſu delinquentium, ac contra pacem dicti Domini Regis nunc Coron. & dignitat. ſuas, &c. necnon contra formam Statut. in hujuſmodi caſu edit. & proviſ.

To this Indictment I took theſe Exceptions.

1. 'Tis ſaid they were preſent, and does not ſay with whom, or to what Purpoſe, nor is it ſaid they were preſent on a Religious Account, or with any Prieſt that read it, nor is it ſaid ea intentione ad audiend.

2. 'Tis ſaid audiverunt maſſam, which is no Latin Word but for a Lump, and then 'tis Nonſenſe: * Miſſa is the true proper Word for the ſame, and ſo is Gouldman's Dictionary; and the like of Calvin's Lexicon Juridicum verbo Miſſa, where he quotes divers Claſſical and other Authors, both Lawyers and Divines, that

* All the Indictments are *miſſa*, and ſo is *Dyer* 203, & 323, 324.

that is the proper Word for a Sacrifice; from hence 'tis plain the Anglice cannot help it; for wherefoever the Engliſh Word hath a proper Signification, and a true Latin Word to expreſs it by, and the Latin Word hath no colourable Senſe of that, 'tis not good; and this is the common Rule in Conſtruction of Anglices; as to ſay Equus, Anglice a Man, would be ſtark naught, and if the Anglice be reckoned Surpluſage and void, then 'tis naught certainly, for 'tis audivit maſſam, a Lump. *Anglice.* *Ante* 209.

But the Court would not quaſh it, but bid us demur to it, for that they would not quaſh an Indictment for ſuch an Offence, no more than they would for Perjury; and bid us try it or demur at our Peril, which we would, &c.

Dominus Rex verſus Deane *of* Exeter. (223.)

MAndamus prayed, to be reſtored to the Place of one of the Eight Men of Aſhburton in the County of Devon; and urged, that there was a Mandamus to be ſworn of one of the four-and-twenty Men of Tiverton, and they have no other Name; theſe eight Men make all the Rates for the Pariſh, and have the Poor's Stock. Eight Men of *Aſhburton, &c.*

Per Cur'. The Truſtee of an Hoſpital may in Time come and demand a Mandamus as well as you do here.

But at laſt a Mandamus was granted, and ordered to make a Special Mandamus, and to recite therein ſo much of the Office as it may appear to be an Office; otherwiſe it ſhall do you no Kindneſs. Special *Mandamus.*

Franklyn *verſus* Johnſon. (224.)

ERror upon a Judgment in Replevin, wherein the Plaintiff was nonſuit, and Judgment was quod Averia præd. ſint irreplegiabilia, and held naught; for that on this Judgment no ſecond Deliverance can be brought. Judgment in Replevin.

DE

Termino Mich.

34 Car. 2. B. R.

(225.)
S. C. Raym. 473.

Dominus Rex verſus Lord Grey.

INformation againſt him for ſeducing away a Daughter of the Lord Berkley, ſhe being his own Wife's Siſter, and detaining her ſecret in his Houſe, and committing Fornication with her; and upon a Trial at the Bar he was found Guilty: And thereupon he was afterwards proſecuted with a Writ de homine replegiando, and at the Return thereof he appears, and prays his Appearance may be recorded, and that he might be admitted to plead and traverſe the Return, which was, that he had eloigned Dame Henrietta Berkeley ſo as the Sheriff could not find her.

Homine Replegiando.

On the other Side it was prayed that he might be committed, for that in F. N. B. 68. 'tis ſaid, That on a Return of an Elongavit a Capias in Withernam lies to take the Body of the Defendant, to detain him quouſq; &c. be he Peer of the Realm or common Perſon: And in that Book is cited the Caſe of M. 11 Hen. 4. Tit. Homine Replegiando, Dame Spencer's Caſe, and a Declaration againſt her in Cuſtodia; and in that Caſe is cited one Matthew Redman's, in the Time of Richard II. and now his being in Court ſupplies a Capias in Withernam.

Holt econtra. We come in at the Return of the Writ and appear, let them declare and we will plead inſtanter;

inſtanter; and he cited 21 Edw. 4. 63, 64. if there were a Default it might be as they ſay.

Serjeant Jefferyes. This is not like the Caſe of a common Replevin, he ought to bring in the Body.

Mr. Pollexfen. He is to come in upon a Capias in Withernam, and not before; this is a Writ which the Law gives to relieve againſt Impriſonment, and if it ſhould be otherwiſe then the Miſchief would be of our Side; we muſt lie in your Cuſtody till their Plea be determined, and then the Debate and Conteſt muſt be between you, the Defendant and us, who are in your Cuſtody; if he will bring in the Body then he ſhall plead: The Lord of a Manor may plead that the Plaintiff is his Villein, but then he muſt bring in the Body firſt.

Lord Chief Juſtice. Now upon this Return we find an Elongavit by my Lord Grey, and upon his Appearance we ſee no need of a Capias for Bail; you remember the Caſe of Wells, where upon ſolemn Debate 'twas denied; and hereupon the Lord Grey was committed: But the Lord Chief Juſtice told him, That if he would ſend for the Body ſedente Cur' they would admit him to Bail.

Quære, If in ſuch Caſe the Sheriff is bound to return the Body or an Elongavit, and may not return a Non cepit? In Wilmore's Caſe laſt Eaſter Term 'twas ruled that nothing elſe could be returned, and the Court refuſed any other Return, and forced the Sheriff to return an Elongavit.

But me ſeemeth the contrary, for he may return that the Defendant claimed him as his Villein. F. N. B. 66. and if he may not return a Non cepit, then here may be a Caſe where a Sheriff cannot make a true Return, which ſeems abſurd to affirm: For ſuppoſe ſuch Writ be ſued for the Body of A. againſt B. who knows nothing of A. nor ever had him in his Cuſtody; and if the Sheriff cannot make any other Return than a Replevin or an Elongavit, then he cannot make a true Return, and is of neceſſity liable to an Action: Ideo Quære'.

The next Day Serjeant Maynard comes and moves on the Behalf of the Lord Grey, that Mainprize might be taken: This is a rare Writ and the Courſe is not determined; in King John's Time we find never a Mainprize.

one in Edward I's Time but one, and that is 18 Edw. 1. the Party may plead and juſtify, or he may deny the Taking.

In B. R. Hill. 16 Rich. 2. Rot. 16. was a Writ de homine Replegiando againſt the Earl of Warwick, there was an Elongavit returned and a Capias iſſued, and a Superſedeas, becauſe he had found Mainprize for the bringing in the Body on Pain of 500 l.

15 Hen. 4. Rot. 25. B. R. one was taken upon a Capias, and there was a Conceſſum eſt, that he find Mainprize, and he did ſo, and a Superſedeas: Although he be committed for the Contempt, yet he may come in and plead.

Then for printed Caſes, there is 12 Edw. 4. Raſtal's Entries, 402. he may plead without Appearance of the Party; there was a Prayer to gage Deliverance, he there found Pledges to deliver him, but yet conditionally if he have taken him; and this is declared by Vavaſor to be the Opinion of all the Judges: Here is no Conviction, and yet he may plead any Thing, here is no unde queritur, here is no Plaintiff, 'tis only a Captus eſt ut dicitur.

Mr. Holt. That the Party may be bailed, 5 Hen. 7. 3. 13 Hen. 7. 17. he has Liberty to gage Deliverance, to find Mainprize if he have taken him for the having of the Body here. Raſtal 402. The Return of the Sheriff cannot conclude the Merits of the Cauſe, nor can he make Return againſt the Suggeſtion of the Writ quod captus eſt: I find no ſuch Return as non cepit in a common Replevin, and then ſurely a Man may plead non cepit. 21 Edw. 4. 64. Keilway 71. F. N. B. 74.

Lord Chief Juſtice Pemberton. I do not think you may plead in this Caſe, but I do much doubt if he can be bailed; thoſe Pleadings you mention are generally on a Special Return: And I do yet grant further, that upon ſuch a Return as this is there may be Pleadings; if he will come and own that he hath the Party, and juſtify, he may; and ſo it was I ſuppoſe in the Caſe of the Earl of Warwick: 'Tis the ſame with the Caſe of Executor; if a Sheriff on a Fieri facias will return a Devaſtavit, 'tis not traverſable, though ſuch a Return on a Scire facias with an Inquiry be traverſable.

I agree further, That if you bring an Action against the Sheriff, and he be found guilty of a falſe Return we will deliver him; or if you will bring in the Body, or if my Lord will come in and own the taking, and juſtify the ſame, and give Security to render her, if it be found againſt him, we will bail him; however, let us ſee theſe Caſes and we will conſider thereof.

Afterwards he produced her in Court and was bailed. See the next Caſe.

Turbet *verſus* Daſſigney.

(226.)
S. C. Raym. 474.

AN Information having been ſued againſt Daſſigney, for unlawfully carrying the Plaintiff Turbet to Jamaica, in the Parts beyond Seas, and for this he was convicted and fined 500 l. and is likewiſe charged with a Capias in Withernam, being in Execution for the ſaid Fine by the Court of the King's Bench, on the Return of an Elongavit to a Pluries homine replegiando he applying himſelf to the King's moſt excellent Majeſty for a Remiſſion of the ſaid Fine, 'tis referred to the Lords Commiſſioners of the Treaſury, who make a Doubt, ſuppoſing the Defendant pardoned his Fine, if he be bailable; and thereupon by Letter deſire the Lord Chief Juſtice Pemberton's Opinion, who deſiring the Aſſiſtance of the other Judges of the King's Bench, and Mr. Juſtice Jones, Dolben and Raymond.

Withernam.

Where was Sir Francis Winnington pro Turbett, Mr. Thompſon and my ſelf for Daſſigney.

I argued moſt of what I had before prepared in theſe Words, They ſue an Homine replegiando in the Name of the young Turbett; and after an Alias and a Pluries they get an elongatus eſt per quendam Philippum Daſſigney infra nominat'; this was to the Sheriff of London, whereas the Defendant never lived in London, but at Wapping in Middleſex; and this the Sheriff does without ever demanding the Body of Turbett from the Defendant Daſſigney; ſo that though it may be a true Return, it can never be an honeſt one, for 'tis not true of his own Knowledge; for the Sheriffs of

of London could not know but that Daſſigney might have had the Body of Turbett, ſo as the Sheriff might have replevied him; and though the Conviction in London on the Information might excuſe him from an Action for a falſe Return, yet the true and proper Return for the Sheriff of London to have made (the Defendant Daſſigney, living in Middleſex, and now being in the King's Bench) would have been a non eſt inventus as to Daſſigney infra ballivam ſuam; for ſuppoſe a common Replevin were ſued to the Sheriff of York for Cattle diſtrained by me in London, muſt he have returned an Elongat' ſunt becauſe he could find neither the Defendant nor the Cattle? He ought to have returned that nullus ex parte Quer' venit ad oſtendend' quæ quot & qualia catalla of his the Defendant had taken; and as to Bail, that it is in the Power of this Court to take Bail: There is no Action between Subject and Subject, and but one between the King and a Subject, where before Verdict, Conviction or Attainder the Defendant is not bailable; and in this Caſe you may bail him: For firſt, This is an Action for the Recovery of Damages: And ſecondly, In other Actions where the Suit is in propria perſona as it is here, the Defendant is bailable, Verdon the Under-Sheriff of Norfolk was bailed here on an Appeal of Murder; and ſo it is done every Day on Appeals of Murder, Rape, and the like: This Court hath the largeſt Power as to Bail of any Court in England, both in Civil and Criminal Cauſes. 3. I humbly take it for a Rule, that whereſoever the Cauſe of a Man's lying in Priſon may not be true, there he may be bailed, and that although he be in Execution; as one in Execution of a Judgment, on a Verdict, for which he brings his Attaint; one in Execution on a Judgment for which he hath brought his Writ of Error; one in Execution, and he complains himſelf to be aggrieved thereby, and thereon he brings his Audita querela; in all theſe Caſes the Party may be bailed: The Caſe of an Attaint, &c. is much ſtronger than ours, for there is Verdict, Judgment and Execution, which my Lord Coke ſaith is the End of the Law; and yet there when he brings his Attaint he is bailable, becauſe then it becomes doubtful if his Impri-

priſonment were on a juſt Cauſe: And in our Caſe here is nothing but the Return of the Sheriff, which is a Return impoſſible to be true of his own Knowledge. The Conviction upon the Information is no Bar in the way of our being bailed, for in that Caſe the preſent Plaintiff was no Party, nor had any Thing to do; the Return of the Sheriff is not concluſive, for there is a manifeſt Difference between a Return of an Act done by the Sheriff himſelf, and a Matter he is not conuſant of; now as I ſaid before, this cannot be true of his own Knowledge: In Caſe a Scire facias be brought againſt Terre-Tenants, and the Sheriff returns A. B. and C. Terre-Tenants, they may yet come in and plead a Special Non-tenure, nor doth this do the Defendant any more Miſchief than the Return of an Elongavit in a common Replevin; for in an Homine replegiando there may be a Gager of Deliverance, 13 H. 7. 17. One brings Treſpaſs upon the Caſe, wherein by his Count he ſuppoſeth himſelf free, and the Defendant claimed him as his Villein, ſo that he dares not go abroad, &c. and prays that he might gage Deliverance of ſome of his Goods which he had taken, and that he may find Security not to intermeddle with any of his Goods or his Body, pending the Suit: And there was held he ſhould gage Deliverance as in an Homine replegiando, for the End of both is to try the Liberty of the Plaintiff; and they all held, that in an Homine replegiando it ſhould be and was ſo; now 'twould be a vain Thing to lie in Cuſtody and yet to gage Deliverance; in this Action upon the interpleading as to the Goods a Releaſe may be pleaded; and ſo is it in 5 H. 7. 3. Beſides which there is an expreſs Caſe in 12 Edw: 4. 4. en homine Replegiando, le Defendant apparut and alledges Villenage in the Plaintiff, and the other ſaith he is Frank, but becauſe it was a Pledge for him that the Plaintiff was not yet delivered, it was prayed for him that he might gage Deliverance, to which it's ſaid, that the Fact might be ſo, that the Defendant had not took him, Vavaſor ſaid 'twas the Opinion of all the Juſtices, That he ſhould find Pledges to deliver him if he had ſeized him, and if he had not nulla ſequitur pœna, and a Writ ſhall iſſue to the Sheriff to deliver him if he be detained; here was

was no Special Return of a Claim of Villenage, for the Villenage is claimed by the Defendant after his Appearance; here was Interpleadings before the Party was delivered, here was a Gager of Deliverance; which were needless, thus to put in Pledges to discharge him if the Party must lie by it till he be discharged. This Withernam is but Process, 'tis no Execution, 'tis but a Means to try a Title to Liberty, 'tis not as I find in any of the Entries, awarded by the Court, but a Writ sued out of Course, there is not so much as a fiat breve entred: In most other Particulars 'tis as in a common Replevin, as in that so in this, there must be Pledges found for to prosecute with Effect. Bro. Tit. Replevin, 66. and 49. 8 H. 4. 2. It ought to be before you have a Writ to the Sheriff to deliver, &c. In a common Replevin, the Sheriff may return a Claim of Property; so here may he return a Claim of the Plaintiff as his Villein, and an Imparlance lies in this Action as in a common Replevin.

In the second Precedent under this Title in Rastal's Entries, the Abbot's Servants came & per Attornat. suum claimed Villenage in the Plaintiff to their Master, and the Form of their Plea shews that they were not in Custody in Withernam, for 'tis unde non intendunt aliquam injuriam in hac parte personis suis assignari posse, &c. which by Implication argues they had not already sustained Punishment in personis suis; and this was not on a Special Return, but upon an Elongat. generally.

In the former Case in 12 Edw. 4. 4. there was a Count before the Delivery in Dame Spencer's Case, 11 H. 4. 15. and as Bro. hath it Tit. Replevin, 19. there were Pledges and Count before the Delivery.

In Hillary 16 Rich. 2. Rot. 16. is a Record where Bail was taken and a Supersedeas to the Capias in Withernam, upon a Surmise of Bail put in here above, the Tenor whereof follows in these Words.

Hill. 16. Rich. 2. Rot. 16.

INter Recorda Domini Regis Richardi Secundi in Theſauro Recept. Scaccarii ſui ſub Cuſtodia Dominorum Commiſſionarior. Theſaur. & Camerar. ibidem remanent. viz. inter placita de tempore Regis Richardi Secundi inter alia ſubcontinetur ut ſequitur, viz.

Rotulus placitorum coram Domino Rege apud Winton (which muſt be the Court of King's Bench held then in Fact before the King; as the Style remains now at this Day ubicunque tunc fuerimus in Anglia, wherefoever the King then was) de Termino Sancti Hillarii Anno Regni Regis Rich. 2. Sextodecimo.

W. Clopton.

Adhuc de Termino Sancti Hillar.

Cornub. ſſ. DOminus Rex mandavit Vicecom. Cornub. breve ſuum Clauſum in hæc verba: Richardus Dei Gratia Rex Angliæ & Franciæ & Dominus Hiberniæ Vicecom. Cornub ſalut. Cum pluries tibi præcepimus quod juſte & ſine dilatione replegiari facias David Tregoyes quem Thomas de Bello Campo Comes Warr. & Michael Trewynneleck ceperunt & captum tenent (ut dicitur) niſi captus eſſet per ſpeciale præceptum noſtrum vel capitalis Juſticiarii noſtri vel pro morte hominis vel pro Foreſta noſtra vel pro aliquo alio recto quare ſecund. conſuetudinem Angliæ non ſit replegiabilis vel tu ipſe eſſes coram nobis in Craſtino Animarum ultime præterito ubicunque tunc eſſemus in Anglia oſtenſurus quare mandata noſtra præd. toties tibi inde directa exequi contempſiſti; Tuque ad diem illum nobis retornan. quod præd. David elongatus fuit extra ballivam tuam per præd. Thomam de Bello Campo & Michaelem Trewynneleck ad loca ignota ita quod viſum præd David. habere non potuiſti, ſic nec corpus præd. David replegiari feciſti, Et Ideo tibi præcipimus quod corpus præd. Michaelis in Withernamio capias & eum ſalvo & ſecure in priſona noſtra cuſtodire facias quouſque præd. David juxta tenorem mandatorum noſtror. prædictor. tibi pluries inde directorum replegiari voluit præcipimusq; etiam tibi omnia bona & catalla terras & tenement. præd. Comitis in balliva tua in manus noſtras ſeiſiri faceres & *Capias in Withernam.*

ea ſalvo & ſecure cuſtodires quouſque præd. David permittere replegiari voluerit, Et qualiter præcepta noſtra præd. fueris executus conſtare facias nobis a die Sancti Hillarii in quindecim dies ubicunque tunc fuerimus in Anglia; Ut ulterius ſuper premiſſis facere valeamus prout de jure & ſecundum legem & conſuetudinem regni noſtri Angliæ fore viderimus faciend. Et habeas ibi tunc hoc breve Teſte W. Clopton. apud Ebor. nono die Novembris Anno regni decimo ſexto.

Return. Indorſamentum ejuſdem brevis ſequitur in hæc verba; Quoad capiend. Michaelis præd. infraſcript. & eum ad Cuſtodiam faciend. in priſona noſtra quouſque replegiari voluerit David Tregoyes Et ad ſeiſiri faciend. in manum veſtram omnia bona & catalla terras & tenement. Thomæ de Bello Campo Comitis Warr. infraſcript. & ea ſalvo & ſecure cuſtodiend. inde nihil actum eſt ad præſens, quia Dominus Rex mihi mandavit breve ſuum de ſuperſedend. interim, cujus brevis de executione iſtius brevis ulterius faciend. ſuperſedi; & eſt breve de ſuperſedend. huic brevi conſut. Quod quidem breve

Writ of *Superſedeas* on finding Security, *&c.* ſequitur in hæc verba Richardus Dei Gratia Rex Angliæ & Franciæ & Dominus Hiberniæ, Vicecom. Cornub. ſalutem, cum pluries tibi præcepimus quod juſte & ſine dilatione replegiari faceres David Tregoyes quem Thomas de Bello Campo Comes War. & Michael Trewynneleck ceperunt & captum tenent ut dicitur niſi captus ſit per ſpeciale præceptum noſtrum vel capitalis Juſticiarii noſtri vel pro morte hominis vel pro Foreſta noſtra vel pro aliquo alio recto quare ſecundam conſuetudinem regni Angliæ non ſit replegiabilis vel cauſam nobis ſignifices quare mandatum noſtram alias tibi inde direct. exequi non potuiſti, ac tu nobis ſignificaveris quod præd. David elongatus fuit extra ballivam tuam per prædict. Comitem & Michaelem ad loca ignota ita quod viſum prædict. David. habere non potuiſti, ſic nec corpus præd. David. replegiari feciſti, ſuper quo per breve noſtrum de Judicio tibi præcepimus quod corpus prædicti Michaelis, ſi inventus fuit in balliva tua caperes in Withernamio ac omnia terras & tenement. bon. & catalla prædict. Comitis in balliva tua in manum noſtrum ſeiſiri ac ea ſalvo cuſtodiri necnon corpus præd. detineri faceres quouſque præd. David. ſecundum legem & conſuetudinem regni noſtri Angliæ replegiari poſſes juxta tenorem mandatorum noſtrorum tibi prius inde direct. Et qualiter mandat. noſtrum fuiſſes executus ſciri faceres nobis a die Sancti Hillarii in quindecim dies proxime

Manucaptores. futur. ubicunque tunc fuerimus in Anglia per literas tuas ſigillat. Jamque Johannes Dantre de Com. Glouceſt. Clericus &

Rogerus Ulbaren de Com. Warr. coram nobis in Cancellar. noſtra perſonalit. conſtituti manuceperunt viz. uterque eorum corpus pro corpore ac ſub pœna treſcentar. librar. pro præfat. Comite & Michaele quod ipſi præfat. David. in Curia noſtra coram nobis ad quindena prædict. ubicunque tunc fuerimus in Anglia ad faciend. & recipiend. quod Curia noſtra conſideraverit in hæc parte præceptum habebunt & paratum, quas quidem treſcentas libras iidem manucaptores de terris & catallis ejus ad opus noſtrum levari conceſſer. ſi idem David coram nobis ad diem prædict. non venerit in forma ſupradict. Ideo tibi præcipimus quod caption. Corporis prædict. Michaelis ac ſeiſinam terrar. & tenementor. bonor. & catallor. præd. Comitis in manum noſtram occaſione præd. faciend. interim ſuperſedeas, Et ſi ipſum Michaelem ea occaſione ceperis tunc ipſum a priſona qua ſit detent. ſi eá occaſione & non alia detineat. in eadem, interim deliberari ac manum noſtram e terris & tenementis bonis & catallis præd. Comitis, ſi per te occaſione præd. & non alia captá ſunt in manum noſtram, interim amoveri facias per manucaptionem ſupradict. Et habeas coram nobis tunc hoc breve Teſte meipſo apud Ebor. 24 Novembris Anno Regni 16°.

Ad quem diem coram Domino Rege apud Winton venerunt prædict. Comes & Michael in propriis perſonis ſuis, & hic in Cur. præfatum David. duxerunt & Cur. hic deliberaverunt. Delivery of the Perſon.

Et præd. David inſtanter in propria perſona ſua queritur quod prædict. Comes & Michael ſimul cum, &c. die Martis proxime ante feſtum Sanctæ Mariæ Virginis Anno Regni Regis 16. ipſum David. apud Tregoyes in Com. præd. ceperunt impriſonaverunt & ipſum extra Comitatum præd. duxerunt Et in priſona detinuerunt a prædict. Die Martis uſque ad prefat. quindena Sancti Hillarii unde dicit quod deteriorat. eſt & dampnum habet ad valenciam duarum mille librarum & inde producit ſectam, &c. Count.

Et præd. Comes dicit quod præd David. reſpondere non debet quia dicit quod idem David eſt Nativus ipſius Comitis pertinens ad Manerium ſuum de Carnaut in Comitatu præd. & quod ipſe & omnes Anteceſſores ſui Domini Manerii præd. a tempore quo non extat memoria ſeiſiti fuerunt de prædict. David. & Anteceſſoribus ſuis ut de nativis ſuis tanquam pertinentibus ad manerium ſuum prædict. & petit Judicium ſi præd. David. in hac caſu reſpondere debeat, &c. Plea.

Et prædict. Michael defendit omnem injuriam & quicquid, &c. & dicit quod prædict. David eſt nativus præd. Comitis pertinens ad Manerium ſuum de Carnaut in Com. prædict. & quod idem Comes & omnes anteceſſores ſui Domini Manerii prædict. a tempore quo non extat memoria fuerunt ſeiſit. de prædict. David. & anteceſſoribus ſuis ut de Nativis ſuis tanquam pertinentibus ad manerium ſuum prædict. Et pro eo quod idem David fuit rebellis & ſe juſticiari noluit per miniſtros Domini Comitis idem Michael ut ſerviens ejuſdem Comitis & per præceptum Domini Comitis ipſum David. cepit & impriſonavit prout ei bene licuit, & petit Judicium ſi præd. David actionem ſuam præd. in hac caſu verſus eum manutenere debeat.

Iſſue. Et idem David dicit quod ipſe eſt liber homo & liberæ conditionis & non Nativus dicti Comitis prout prædict. Comes & Michael ſupponunt. Et de hoc ponit ſe ſuper patriam, & prædict. Comes & Michael ſimiliter, &c.

Jurat. Ideo veniat inde Jurata coram Domino Rege a Die Paſchæ in tres ſeptimanas ubicunque, &c. Et qui nec, &c. Idem dies dat. eſt partibus prædict. &c.

Pledges *ad proſ.* Et ſuper hoc veniunt Johannes Treverlyn Johannes Tremarram Rogerus Inyll & Thomas Polſone omnes de Com. Cornub. & manuceperunt habend. Corpus præd. David. coram Domino Rege ad præfatum Terminum & ſic de die in diem quouſque, &c. Et quod idem David proſequi debeat præd. placitum modo & feſtino (ſine colluſione fraude & tardatione) quo poterit in propria perſona ſua de die in diem verſus dict. Comitem & Michaelem de præd. Captione corporis ſui quouſque placitum inter ipſos inde terminetur, Et ſi return. Corporis præd. David. dicto Comiti adjudicetur ſuper placito præd. quod tunc idem David ad poſſeſſionem ipſius Comitis ſe reddat & liberabit hic in Cur. per præd. manucaptores tanquam nativus ipſius Comitis.

Et iidem manucaptores recognoverunt ſe Hæredes & Executores ſuos teneri ſolvere præd. Comiti & hæredibus ſuis ſexcent. Marcas Sterlingor. ſi præd. David & Manucaptores ſui præd. omnia & ſingula non fecerit vel facerent vel quod idem David aliquid fecerit in contrar. aliquorum præd. præmiſſor. & præd. manucapt. & quilibet eorum per ſe conceſſit quod præd. ſumma ſexcentar. Marcar. de terris & catallis ſuis fieri poſſit per Vicecom. & præfato Comiti & Hæredibus ſuis liberari, &c. Et ſimiliter iidem manucaptores manuceperunt quod præd. David ſe bene geſſerit erga Dominum Regem & populum ſuum & præcipue erga miniſtros & tenentes præd.

Comitis, quod eis non inferret per ſe nec per alios ſuo procuramento aliquod malum de Corporibus ſuis ſub pœna ſupradict. Et A. B. C. & D. pro præd. Comite & Michaele quod ipſi per ſe nec per alios per eorum procurationem non impedient nec aliquis eorum impediet præd. David. quin ipſe proſecutionem ſuam præd. legitimo modo proſequi poſſit quoquomodo ſub pœna centum librar. &c.

Et continuato inde proceſſu inter præd. David. & præd. Comitem & Michaelem per jurat. poſit. in reſpect. coram Domino Rege uſque a Die Paſchæ in unum menſem Anno Regni Regis Richardi Secundi decimo ſeptimo ubicunque, &c. pro defectu jurat', &c.

Ad quem diem coram Domino Rege apud Weſtm. venit præd. David in propria perſona ſua per manucaptionem ſuam præd. Et præd. Comes & Michael in propriis perſonis ſuis ſimiliter veniunt, & jurat. veniunt qui tam de Aſſenſu præd. David. quam præd. Comitis & Michaelis ad hoc electi triati & jurat. dicunt ſuper Sacramentum ſuum quod præd. David eſt liber Homo & liberæ conditionis & non Nativus præd. Comitis prout præd. David Tregoys ſuperius allegavit & aſſidunt dampna occaſione præd. ad quadragint libras, &c. Et ſuper hoc conſideratum eſt quod præd. David recuperet verſus præd. Comitem & Michaelem dampna ſua præd. ſuperius per jurat. præd. ad 40 Libras taxat. & quod præd. Comes & Michael capiantur.

A Copy of which Record was produced before the Judges, it thereby appearing that it is in the Power of the Court to ſuperſede a Capias in Withernam, upon the giving Security to produce the Body of the Plaintiff: And although it was to be at the Return of the Pluries Capias, yet that alters it not, for he ought to have been produced at firſt; and in our Caſe there is a moral Impoſſibility to produce this Boy under ſix Months, he being in the Plantation of Jamaica, and for that we are ready to give any Security.

Then there is another Record in Mich. 5 H. 4. Rot. 25. a Copy whereof we then likewiſe produced, which I have here tranſcribed for the Rareneſs of this Suit, and the Obſcurity of the Law herein; it is inter Recorda Domini Regis Car. 2. in theſauro recept. Scacc. ſui ſub cuſtodia Dominor. Commiſſ. ibidem remanent, viz. inter placita de Tempore Regis Henrici quarti inter alia ſic continetur ut ſequitur, viz.

Rotulus

Mich. 5 *H.* 4. *Rot.* 25. *Pluries Homine Repleg.*

Rotulus placitor. coram Domino Rege apud Weſtm. de Termino Sancti Michaelis Anno Regis Hen. 4°. poſt conqueſtum 5°. Will. Gaſcoigne.

Adhuc de Termino Sancti Michaelis. W. Gaſcoigne In dorſo.

Devon. ff. Dominus Rex mandavit breve ſuum clauſum in hæc verba Henricus Dei Gratia Rex Angliæ & Franciæ & Dominus Hiberniæ Vicecom. Devon. ſalutem. Cum pluries tibi præcepimus quod juſte & ſine dilatione replegiari faceres Willielmum filium Adæ Scutt quem Simon Bryt & Johannes filius ejus ceperunt & captum tenent (ut dicitur) niſi captus ſit per ſpeciale mandatum noſtrum vel Capitalis Juſticiarii noſtri vel pro morte hominis vel pro foreſta noſtra vel pro aliquo alio recto quare ſecund. conſuetud. Angliæ non ſit replegiabilis; vel tu ipſe fuiſſes coram nobis a die Sanctæ Trinitatis in quindecim dies ultime preterit. ubicunque tunc fuiſſemus in Angliæ oſtenſurus quare mandata noſtra præd. toties inde tibi direct. exequi tu contempſiſti, Tuque ad diem illum nobis retornari. quod præd. breve adeo tarde tibi liberat. fuit quod nullam executionem inde fieri potuiſti propter temporis brevitatem & quod nulla alia brevia de replegiando præd. Willielmum tibi venerunt ante receptionem dict. brevis; Ideo tibi præcipimus quod juſte & ſine dilatione replegiari facias præd. Willielmum filium Adæ Scutt quem præfat. Simon Britt & Johannes filius ejus ceperunt & captum tenent, ut dicitur, niſi captus ſit per ſpeciale præceptum noſtrum vel Capitalis Juſticiarii noſtri vel pro morte hominis vel pro foreſta noſtra vel pro aliquo alio recto quare ſecundum conſuetud. Angliæ non ſit replegiabilis vel tu ipſe ſis coram nobis a Die Sancti Michaelis in quindecim dies ubicunque tunc fuerimus in Anglia, oſtenſurus quare mandata noſtra præd. toties tibi direct. exequi contempſiſti, Et habeas ibi hoc breve Teſte Willielmo Gaſcoigne apud Weſtmonaſterium 30. die Junii anno regni noſtri quarto.

Return.

Alias pluries.

Ad quem quindena Sancti Michaelis coram Domino Rege apud Weſtmonaſterium, Vicecom. Devon. retorn. quod præd. Willielmus filius Adæ Scutt amotus eſt & elongat. extra ballivam ſuam per præd. Simon Britt & Johannem filium ejus in Com. Somerſet quare de ipſo Willielmo replegiand. juxta formam dict. brevis adtunc nihil facere potuit.

Elongatus returned.

Ac ex parte præd. Willielmi filii Adæ Scutt in Curia Regis coram ipſo Rege ſufficienter teſtatum eſt quod præd. Simon & filius ejus præd. latitant & diſcurrunt in Comitatu Somerſet.

Et Ideo præceptum eſt Vicecom. Somerſet quod Corpora præd. Simonis & filii ejus in Withernamio capiat & eos ſalvo & ſecure cuſtodiri faciat quouſque iidem Simon & Johannes filius ejus præfat. Willielmum filium Adæ Scutt replegiari voluerint Et qnaliter, &c. conſtare facias, &c. *Capias in Withernam* to another County.

Poſtea ſcill. 22°. die Januarii Anno Regni Dom. Regis nunc quarto coram Domino Rege apud Weſtmonaſterium veniunt Willielmus Pawlett & Simon Britt Jun. de Com. Somerſet & Johannes Halſe & Thomas Prowſe de Com. Devon. aſſerentes dict. Vicecom. Somerſet corpus præfat. Simonis Britt occaſione præd. cepiſſe & ipſum in priſona Domini Regis ſub cuſtodia ejuſdem Vicecom. fore detent. & manuceperunt habend. corporis præd. Simonis Britt coram Domino Rege ad præfat. Term. & quilibet eorum ſub pœna 40 l. quam quidam ſummam quilibet eorum manucapt. ſeparatim cogn. de terris & catallis ſuis ad opus Domini Regis fieri ſi contingat ipſos corpus præfat. Simonis Britt coram Domino Rege ad præfat. Terminum promptum non habere ad faciend. quod Curia Domini Regis conſideraverit in hac parte, Et petunt breve de Superſedeas præfat. Vicecom. direct. de non detinendo ulterius corpus præd. Simonis in priſona Domini Regis occaſione prædicta. Manucaptores. *Superſedeas.*

Et eis conceditur, &c.

Now by this Record 'tis plainly in the Power of the Court to bail a Man taken in Withernam, after an Elongat. returned, and we will give any Security for Daſſigne's Appearance. Bail in *Withernam.*

This is a Caſe of great Hardſhip, for either the Sheriff can make no other Return but this, and a Replevy, as the Court ſeemed to be of Opinion in Wilmore's Caſe laſt Term; and then certainly no Action will lie againſt the Sheriff, though it be falſe, becauſe he can make no other Return: And if an Action will lie, and the Party be not bailable till he hath falſified the Sheriff's Return by an Action, ſuppoſe then the Sheriff ſhould die, in what Caſe will the Defendant be? And what an Hardſhip will it be on a Man who perhaps never took him, if there can be no Interpleading till the Delivery of the Body; but ſurely there may; for as it appears the Writ is grantable on the Prayer of any Procheine amy, and the Teſtatum may iſſue into another County upon the Suggeſtion of ſuch; ſo the Count and Interpleading may be by them; and ſo was it in the Caſe of 12 Edw. 4.

for

for the Gager of Deliverance was after the Count, &c. Vide ante.

Upon which and Mr. Thompſon's Argument, which was much to the Purport as to the laſt Record and Gager of Deliverance, upon which two Points he only inſiſted, the Judges inclined he might be bailed, and that 'twas in the Power of the Court ſo to do, and the laſt Day of Hillary Term after, he got off the Fine; and on giving Security to bring home the Boy in ſix Months, Death and the Peril of the Seas excepted, he was diſcharged on Bail: In Trinity Vacation the Boy came Home, and being brought into Court was delivered to the Father, but they never proceeded. But in all this the Judges ſtill ſeemed of Opinion, that the Sheriff could not return a Non cepit, for that would falſify the Suggeſtion of the Writ it ſelf.

(228.) Hughes *verſus* Cornelius. *Entred* Trin. 32 Car. 2. Rot. 1229.

Admiralty-Sentence. *S. C. Raym.* 473.

TRover brought for a Ship and Goods, and on a Special Verdict there is found a Sentence in the Admiralty-Court in France, which was with the Defendant; and now per Cur' agreed and adjudged, That as we are to take Notice of a Sentence in the Admiralty here, ſo ought we of thoſe Abroad in other Nations, and we muſt not ſet them at large again, for otherwiſe the Merchants would be in a pleaſant Condition; for ſuppoſe a Decree here in the Exchequer, and the Goods happen to be carried into another Nation, ſhould the Courts Abroad unravel this? It is but agreeable with the Law of Nations that we ſhould take Notice and approve of the Laws of their Countreys in ſuch Particulars; if you are aggrieved you muſt apply your ſelf to the King and Council, it being a Matter of Government he will recommend it to his liege Ambaſſador if he ſee Cauſe; and if not remedied, he may grant Letters of Mart and Reprizal.

And this Caſe was ſo reſolved by all the Court upon ſolemn Debate; this being of an Engliſh Ship taken by the French, and as a Dutch Ship in Time

of War between the Dutch and French. Judgment pro Defendants.

Dominus Rex verſus James.

(229.)
S. C. 2 Jo. 225.

DEfendant brought hither by Habeas Corpus; the Return is two Warrants of Commitment, one of which is altogether void, the other was for living and being in a Corporation not having taken the Oaths, &c. four Exceptions were taken thereto.

Habeas Corpus. Return the Corporation Act, Oaths, *&c.*

1. Becauſe it doth not ſay upon Oath, but only on due Proof.

2. The Commitment was to the new Priſon, and not to the County-Gaol; but that was held they might well enough.

3. There were two Warrants, and two Judgments conſequently, and ſo two Executions for one and the ſame Cauſe: To that the Court anſwered, We will diſcharge him as to the firſt Warrant, and then 'tis general for not taking the Oaths and making the Declarations required in ſuch a Statute (whereas the Renunciation of the Covenant is not now required; the Time for it being now expired.) And,

Quære then what occaſion for the late Statute 5 *Georgii.*

4. Mr. Holt urged, That of Common Right a Man ought to be ſummoned, and have Liberty of Anſwering before he be committed.

Lord Pemberton. True; of any Offence at Common Law; but when a particular Statute preſcribes a particular Mode of Conviction, you cannot ſay 'tis neceſſary; as in Caſe of Deer-ſtealing: Then he is not puniſhed for not taking the Oaths and Declarations, but for living within a Corporation; the former is not the Offence, but only the Qualification. Adjournatur.

Hitchin *verſus* Stevens.

(230.)
S. C. 2 Jo. 217, 232.

BArgainee of a Reverſion brings Debt for Rent, and alledges no Attornment; Nil debet pleaded, and a Verdict pro Quer'. Moved in Arreſt of Judgment, becauſe the Plaintiff hath ſet forth no Title to the Rent, as he hath none without Attornment; there

Attornment.

were cited Latch 14. King and Somerland, Hope *v.* Skinner in Hob. Rolle 489. But a Rule was taken and agreed by all the Court, That in any Case where any Thing is omitted in a Declaration, though it be Matter of Substance, if it be such as without proving it at the Trial the Plaintiff could not have had a Verdict, and there be a Verdict for the Plaintiff, that such Omission shall not arrest the Judgment; and upon this after solemn Debate in Hillary Term following, Judgment was given pro Quer'.

(231.) Smith *qui tam, &c. versus* Langham.

DEbt on the Statute of Conventicles, for 100 l. against the Defendant, being a Justice, for Nonfeazance of his Duty by that Act; and after Verdict divers Exceptions were made in Arrest of Judgment; as that the Title of the Act was mistaken as to the Adjournments of the Parliament, it being according to the printed Book, which is plainly wrong, for 'tis said adjourned such a Day from a Day before.

But Per Cur'. That is well enough, the Prorogations being truly alledged, and all the rest is trifling and immaterial.

Saunders said, The Act against buying and selling of Titles is mistaken in the Print; in some it being the 13th, and in others on the 15th of January, whereas on the Roll 'tis the 30th of January: And for this Conventicle-Act, and the others as to the Time of the settling them, it was left to the Chancery-Clerks, who ignorantly like themselves made them as now they are printed.

Another Exception taken was, That the Information was given to the Defendant by two, and the Action brought only by one: Answered, That the Action is given to any, and a Stranger might have brought it.

Another Exception, It says that there was at the Conventicle twenty and more of the Age of sixteen Years, besides the Family; then it comes and says, that for eight of them present, the Informers prayed a Conviction and Warrants, but doth not say these

eight were of ſixteen Years of Age. Adjournat. And afterwards Judgment pro Quer'.

See a Note of ſome Reſolutions in this Caſe in the Lord *Saunders's* Obſervations upon this Act, *pag.*

Duke of Norfolk *verſus* Charles Howard *Ar'*. (232.)

CAſe ſur Special Promiſe on a Note, wherein the Defendant promiſed to pay unto the Plaintiff 50 l. at any Time during the joint Lives of the Plaintiff and Defendant, within three Months after the Plaintiff ſhould demand the ſame; and no Demand modo & forma pleaded; and on the Trial by Niſi Prius at Guildhall, before the Lord Chief Juſtice Pemberton, it appeared in Evidence; that one Manſon, the Plaintiff's Attorney, delivered a Demand in Writing at the Defendant's Houſe to his Maid, by whom he ſent it up to the Defendant, being ſick and not to be ſpoken with, the Maid brought down Word ſhe had delivered it to her Maſter: Held no good Evidence to maintain the Action, for the Demand ought to be perſonal; and Delivery of a Demand in Writing to the Servant at the Houſe, no good Demand. Jefferyes of Counſel with the Defendant. Demand.

Cooke *verſus* Batthurſt. (233.)

UPon a Judgment above a Year's ſtanding, you may have an Elegit without a Scire facias; but not a Fieri facias, for that on the Elegit they enter their Continuances all along from the Judgment: and ſo was it ruled in this Caſe upon Mr. Liveſay's Report and Mr. Saunders's Motion. *Elegit.* Continuances.

Cart. 203.

Hinton *verſus* ——— (234.)

CAſe on a Bill of Exchange againſt the Drawer, Bill not being paid, and payable to J. S. or to the Bearer, the Plaintiff brings the Action as Bearer; and upon Evidence ruled by the Lord Pemberton, that Bill of Exchange. *Vide ante* Caſe 5. 179. *Poſt*, Caſe 389, 400, 404, 462, 473.

he muſt intitle himſelf to it on a valuable Conſideration, though among Bankers they never make Indorſements in ſuch Caſe; for if he come to be Bearer by Caſualty or Knavery, he ſhall not have the Benefit of it.

(235.)

Dominus Rex verſus Sir Robert Atkyns, *Sir* John Knight *& al'.*

Riot, *&c.* 3 *Mod.* 3.

INdictment for a Riot at Briſtol, in aſſembling themſelves, and chuſing Mr. Thomas Day in the Place of Sir John Lloyd for an Alderman, without the Preſence or Privity of the Mayor, &c. Sir Robert Atkyns comes here in Perſon, and moves in Arreſt of Judgment. They only ſay Secundum privilegia conceſſa by Queen Elizabeth's Letters Patents they uſed, &c. and do not aver in Fact a Grant, or that there were ſuch Letters Patents, &c. nor do they ſo much as ſay that 'tis Antiqua villa, or Civitas, nor ſo much as that there is a Mayor, or that the Mayor is a Member of the Corporation, nor that it is a Corporation: They barely ſay, That we took upon us to chooſe another Alderman in the Place of one that was dead, without the Privity or Conſent of the Mayor. Dyer 279. in Latch 229. 11 Rep. 14. James Bagge's Caſe; In the Margin of that Caſe, as 'tis printed (which I take to be the Lord Coke's Opinion) they ought to have preſcribed that they were a Corporation, and to ſhew how; they do not directly ſay there were any Letters Patents granted, nor ſo much as a Continetur, which is naught in Pleading; 'tis only ſecundum privilegia conceſſa pro, &c. prout per eas ſhewn to the Jury more at large appeareth: All criminal Proceedings muſt be exact, and this is the King's Count or Declaration; the Statutes of Jeofails extends not to them, but Informations are expreſly excepted; and if Informations are, then certainly Indictments are alſo: It ſays the Recorder and Aldermen are de privato concilio, but 'tis with the Mayor; whereas in Bagge's Caſe it is with the City or Corporation: The Indictment ſaith they have no Cuſtom (for 'tis laid negatively) to meet about any publick Buſineſs without the Summons of the Mayor; it cannot be a

Custom for that must be Time out of Mind; and there was no such Thing as Election there before Queen Elizabeth's Time: By the Charter the Mayor is not of the Quorum, nor is his Person necessary at the Election, but as to the swearing of an Alderman both Mayor and Recorder are of the Quorum; and so it is in their Charter as to the Gaol-Delivery: Then for the Mayor, he is no Officer at the Common Law, as Coroners and Conservators of the Peace are; he is only a Creature of the Charter's, and hath his Being purely thereby: His Name is but Major, not Maximus, and the same as Prætor amongst the Romans, which is from præcedere; then as for a Corporation, 'tis only for the Benefit of Trade that 'twas first instituted, 8 Rep. 125. and suppose a Corporation made and no Powers given them, they would be able only to make Orders for the Advancement and better Government of Trade; they cannot fine or imprison; they cannot choose but by the Power given them by the Charter; and if their Charter gives them no Power to choose new Officers on the Death of old ones, they cannot do it; though there be an Opinion that they may in such Case; yet the Case of Dungenon in Ireland is direct, that when they are all dead the Corporation is dissolved; so that the sole Power arises from the Charter, and that doth not make the Mayor's Presence necessary: Mayor of Oxford's Case in Latch's Rep. They whose Power is to constitute a Court, they only can summon it: As in Commissions of Peace and of Gaol-Delivery, unless there be a Clause nominating who shall, &c. so they who have Power of Election have the Power of summoning the Assembly or Meeting for that Purpose; as to the Mayor's Presence I know no Necessity thereof: I confess there is the Case of Hicks and the Town of Launceston, in Rolle's Abr. Tit. Corporation, where two Judges are of Opinion, that the Mayor's Presence was necessary; but that was not an Action or Suit in the Case, so that 'tis none of the best Authorities, nor upon any Argument, for that two Judges only were present, which in Case of Argument is usually suspended till the Court be full. And in that Case the Mayor was absent at the Time of the Death of the Alderman, and so he was not wilfully absent;

nor

nor do I find that they were indicted for a Riot, or ſo much as blamed, it being only a Miſtake in Judgment: But upon a Complaint a Writ was granted for a new Election. By Weſtm. 1. Elections ought to be free and he cited likewiſe Eden's Caſe in Cro. Eliz.

Lord Chief Juſtice. This would have done better on a Demurrer, than now after a Verdict. Adjournat'.

It was afterwards moved again, and the Court agreed the Indictment to be vitious for want of a Recital of the Letters Patents; and the prout per eoſdem to be ill.

Dolben cited a Caſe of an Indictment for a forcible Entry, where 'twas ſaid Exiſtens liberum tenement. ſuum prout per indenturam quandam dat. &c. Juratoribus præd. monſtrat. plenius liquet & apparet; and that was held ill: Judgment ſtayed.

Then Sir Robert Atkyns, on the Lord Pemberton's and his Brother's perſwaſion, did reſign his Recorderſhip; which was all that the City of Briſtol aimed at by their Indictment.

(236.) Middleton & al' *verſus* Whitehead.

Bankrupt's Aſſignees. *Vide 6 Mod.* 131. 1 *Salk.* 111. *Poſt*, Caſe 261, *&c.*

INdebitatus Aſſumpſit brought by the Aſſignees of the Commiſſioners of Bankrupts of one Legat, for Money received to the Plaintiff's Uſe; on the Trial it was held, That the Declaration ought to have been ſpecial, it having been received to the Bankrupt's Uſe.

(237.) Peters *qui tam, &c. verſus* White.

Nonconformity.

ACTION of Debt upon the Statute of 23 Eliz. for 20 l. per Month, for not coming to Church, Verdict for the Plaintiff; the Defendant comes upon a Suggeſtion of Conformity, and prays Leave and Time to enter ſuch Plea on the Roll, which after ſome Debate was permitted per Court, ſaying they might demur thereto; but they not putting it in, the Plaintiff for whom I was of Counſel, entred his Judgment; thereupon they in the Vacation Time petition my Lord Chancellor Finch for an Audita querela,

and there is a fiat for that only; however they get a Fiat and a Superſedeas; and I moved for the quaſhing of it, for that, if upon Examination in this Court, it appears that the Audita querela lies not, this Court may quaſh it without forcing the other Side to demur; and ſo was it done in Tovey and Aday's Caſe, 2 Bulſt. 140. (which Caſe they cited on the other Side, that Bail might be taken as it was in that Caſe) there Debt was brought on a ſingle Bill, and after Judgment the Defendant being in Execution, brings his Audita querela, and upon a ſingle Averment of Payment made, he was bailed, and the Plaintiff comes into Court and moves for ſome Remedy, for that ſuch Plea againſt a ſingle Bill is not good: Et per Cur', the Writ was quaſhed, and the Bail taken off the File, and the Party being in Court, taken again in Execution, and an Attachment granted againſt the Attorney who proſecuted it, for that no Audita querela ought to be allowed but in open Court; the Venire facias cannot be returnable in any other Court than where the Judgment is whereof the Party complains, nor can nor ought a Superſedeas to go till the Parties and Plaintiff be allowed in this Court and Bail put in: here they have tack'd a Superſedeas to their Venire facias; the Caſe of Baker and Chew in 2 Bulſt. 120. where on a Suggeſtion in Chancery on an Audita querela they obtained a Superſedeas, as they did here, there this Proceeding is cenſured, and a great Doubt is made, If the Party being in Execution, ſhould be thence diſcharged by ſuch a Superſedeas, whether it would not be an Eſcape?

Audita querela.

Superſedeas.

Et per Cur'. This Superſedeas was certainly irregular: But the Queſtion now is, If we ſhall upon taking Bail ſtay Execution? As to that I urged, that before Allowance of the Writ the Court does always examine whether it lies or no, and ſo are the Books, as is the Caſe alſo of Cowley and Lydiat, 2 Bulſt, 97. The End of putting in Bail is to anſwer the Condemnation if they do not proſecute it with Effect; and then 'tis when the Matter alledged is doubtful, and an Iſſue to be tried concerning ſome Fact; but here we agree the Fact ſo as they pretend, but we ſay that ought not to hinder the Plaintiff of his Execution; and in all the Caſes that I can find, they

they firſt argued, Whether an Audita querela did lie upon the Suggeſtion they made for their Venire facias, before its Allowance by the Court? Whereupon the Court ſaid, Why ſhould it not lie in this Caſe? To that I urged, That as for the King's Part it could be never avoided by an Audita querela, they muſt plead it, and as to the other they could have no Advantage of it any way, it being after Judgment; now as to the King's Part he hath no Remedy but by Petition, and ſo is it in the Caſe of Shoyle qui tam, &c. v. Mr. Forſter, in 2 Bulſt. 325. then as to the Informer's Part it cannot lie, becauſe the Conformity is laid to be before Judgment, and he might have pleaded it before Judgment; and 'tis a Rule, That you ſhall never have an Audita querela upon any Cauſe whereof you might have taken Advantage by Plea before Judgment.

Et per Cur', That is a true and a good Rule, but your Judgment is of Michaelmas Term, though ſigned the laſt Day; and ſo as to Purchaſors it binds, but from that Day by the Statute of Frauds and Perjuries; yet as to this Purpoſe it ſhall relate to the firſt Day of Term, and ſo their Conformity is within the Rule; ſeeing the 19th of November is ſubſequent to the Judgment: Then I urged another Rule, That there ought to be ſome Deed under Hand and Seal, as Defeaſance, Releaſe or the like, to ground the Audita querela upon.

Mr. Juſtice Dolben ſaid, That's true too, but here is a Certificate under Hand and Seal of the Biſhop, which anſwers that Rule: Then as to the Merits of the Cauſe he comes too late, for now 'tis become res Judicata, the Penalty is attached, and there is a Debt due to the Informer, which his Executors may take Advantage of if he ſhould die, by 23 Eliz. c. 1. Sect. 10. But note, he is not within that Statute, for 'tis before Judgment; alſo there the Words are Arraignment and Trial, which refer to an Indictment only, ours is an Action of Debt: And by 3 Jac. c. 4. Sect. 17. he cannot be helped, for ours is an Action not an Indictment; ours is brought on the 23 Eliz. and not on that Statute; as the Words of this Proviſo require it ſhould be, for the Words are, So indicted, in ſuch Manner and Form as if this Act had never been made; now our Action

would have held good if that Act of Parliament had never been made; and there 'tis receive the Sacrament; ſo that he can never take Advantage of the Clauſe in this Act, unleſs he receive the Sacrament, which he hath not done.

Alſo by 1 Jac. cap. 4. Sect. 2. which is the largeſt and moſt beneficial Clauſe for Conformity, and moſt inſiſted upon of the other Side in theſe Words, (That if any that is or ſhall be a Recuſant, ſhall ſubmit or conform him or her ſelf, and become obedient to the Laws and Ordinances of the Church of *England*, and repair to the Church, and continue there during the Time of Divine Service and Sermon, according to the true Meaning of the Statutes in that Behalf in the ſaid late Queen's Time made and provided, That then every ſuch Perſon for and during ſuch Time as he or ſhe ſhall continue in ſuch Conformity and Obedience, ſhall from thenceforth be freed and diſcharged of and from any the Penalties and Loſſes which the ſame Perſon might otherwiſe ſuſtain or bear, in Reſpect or by Reaſon of ſuch Perſon's Recuſancy) This cannot help him for theſe Reaſons, viz. 1 *Jac.* 1. *c.* 4. *Sect.* 2.

1. The Words are plainly relative to former Laws, and thoſe Laws ſay before Judgment.

2. It ſeems deſigned to diſcharge a conforming Recuſant from the incurring Penalty, and no more.

3. It muſt be during Sermon, which his Certificate reaches not to; and it will be an abſolute Diſcouragement to all ſuch Suits, if after the Preſenter hath been at ſo much Charges as to bring it to a Determination, and proved that he has forfeited 100 l. for an Offence, and the Court judges ſo to, and yet upon a ſtrained Conſtruction he ſhould be ſtripp'd of all the Fruit of his Action.

Mr. Pollexfen praying Time to ſpeak thereto, the Court bid him move at Pleaſure: But in the mean while the Defendant compounded the Matter, and gave my Client 60 l. and there it ended.

(239.) Row *verſus* Ruſſel.

Venue changed. Barriſters Privilege. *Ante* Caſe 172. *Vide* 2 *Salk.* 668, 670, 671. 2 *Vent.* 47.

TRespaſs for a Battery in Eſſex, laid in Middleſex, the Venue was changed upon the common Affidavit: and now Mr. Saunders moves, that the Plaintiff being a Barriſter at Law, the Venue might lie in Middleſex Secundum Privilegium, his Attendance being ſuppoſed requiſite on the Courts here: And granted accordingly, although it was alledged that he had diſcontinued his Practice, and lived in the Country for many Years paſt, yet becauſe he had been a Practitioner here, 'twas ordered to lie in Middleſex.

(240.) Overbury *verſus* Overbury.

Will. Revocation.

UPon an Appeal before Sentence to the Delegates, it was adjudged, That if a Man make his Will and diſpoſes of his perſonal Eſtate amongſt his Relations, and afterwards hath Children and dies, that this is a Revocation of his Will, according to the Notion of the Civilians, this being an inofficioſum teſtamentum.

(241.) —— *verſus* ——

Diſtribution.

IN Cancell. If a Man deviſeth a perſonal Eſtate by his Will, or thereby raiſes Money out of his Land to be diſpoſed among his younger Children, according to the Diſcretion of two or three Perſons; Decreed by the Lord Chancellor, that the Diſtribution ſhould be equal.

Palmes *verſus* Kebelthwayte. *Entred* Termino Ult. Rot. 3334. (242.) *Poſt, ante* Caſe 21, 255.

CAſe for diverting a Watercourſe from the Plaintiff's Mill, with only a debet & ſolet currere, and doth not ſay 'twas antiquum molendinum: Argued that this was only a poſſeſſory Action and need ſay no more: Earl of Rutland and Bowler's Caſe, in Palmer 290. is expreſly the ſame Declaration, and held good; and there was urged Luttrel's Caſe, 4 Rep. 1 Leon. 373. Symonds and Seaborne, 1 Cro. 325, 575. Sand's and Treſuſis, 2 Cro. 499. Adjournat'. Watercourſe. *Vide 6 Mod.* 312, 313.

Hardie *verſus* Pawling. *Entred* Mich. 32 Car. 2. B. R. Rot. 90. (243.)

ERror on a Judgment in Com. Banco, in Replevin for Cattle taken at Southpetherwin; Avowry that the Place where is three Acres, parcel of a Meſſuage or Tenement, with the Appurtenances in Tregovile in the Pariſh of Southpetherwin; and that Thomas Tregedwick was thereof ſeized in 24 Eliz. and conveyed the ſame to Mohun and Courtney, and their Heirs, to the Uſe of himſelf for Life, and afterwards to Nicholas Tregedwick his Son, and the Heirs of his Body, and afterwards to Joan Cooke in Tail; and after that to Roger Tregedwick in Tail, and to John Tregedwick in Tail; and afterwards to William Lower and John Treſey in Fee: That Thomas died ſeized, that Nicholas entred, and the laſt Day of November, 31 Eliz. demiſed the Meſſuage to William Jordan and Grace Jordan, during the Lives of them two, and the longer Liver of them; that Nicholas the 10th of Jan. 1 Jac. dies without Iſſue, the Reverſion deſcending to Joan Cooke, who 18 Martii, 16 Jac. for Service done her by Jane Mallet, and for Money paid, did grant to Treſuſy and Samſon, the Meſſuage for ninety-nine Years, if Jane Millet ſhould ſo long live, to begin at the End of the former Leaſe to Jordan, rendring eight Shillings annually, Avowry for Rent. *Vide poſt,* Caſe 426.

and two Capons at Michaelmas every Year, of the Value of 2 s. and one Day's Work in Seed-Time, and one Day's Work in Harvest: And afterwards William and Grace Jordan do ſurrender to Joan Cooke, and Chriſtopher her Son, their Eſtate upon Condition for Payment of 100 l. 1 April, 17 Jac. by which Joan Cook was ſeized; that ſhe and her Son Chriſtopher, Mich. 17 Jac. did ſuffer a Common Recovery with a ſingle Voucher, which Recovery was to the Uſe of Joan Cook and her Heirs; and that afterwards Joan Cook and her Son Chriſtopher, and Nicholas the Son of Chriſtopher, and Anthony Cook, and Leonard Treſey, for 3 l. 6 s. 4 d. do grant the Meſſuage, &c. by Deed to William Hardie and his Heirs; that William and Grace Jordan did attorn; that William Hardy dies, leaving John Hardy his Son and Heir; John Hardy demiſes to John Hicks and his Heirs; that Grace and William Jordan die, that Treſuſis and Sampſon enter, then John Hicks dies, and the Land deſcends to John his Son; who by his Will in Writing deviſes it to the aforeſaid John Hardy, and his Heirs, and dies, and juſtifies the taking for five Years Rent, viz. 44 s. per Annum: Hereto there is a Demurrer, and Judgment quod nil capiat per breve, and Writ of Inquiry according to the Oxford Act: And no Judgment de Retorno habendo.

Feoffment to Uſes. *Vide ante* Caſe 84.

Pollexfen pro Quer'. He took two Exceptions to the Pleading, as to its Form.

1. That in the Avowry the Surrender is ſaid to be to Joan and her Son Chriſtopher, whereas the Reverſion was in Joan alone.

2. It is ſaid that Joan and others did infeoff and grant to Hardy, whereas of their own ſhewing Joan only had the Title. As to the Subſtance the Caſe ſtands thus, Tenant in Tail makes a Diſcontinuance for Life, the Reverſion in Fee deſcends to the Tenant in Tail in Remainder; then he makes a Leaſe rendring Rent, and the Tenant for Life ſurrenders upon Condition to him, then a Recovery is had with a ſingle Voucher to the Uſe of, &c. then Tenant for Life dies, and an Avowry is for the Rent: Now if the tortious Reverſion be gone, then the Rent is likewiſe gone. Litt. Sect. 632. 1 Inſt. 336. The Diſcontinuance being but upon a Condition, and that

 defeated;

defeated, the Entry of the rightful Party is lawful, 3 Rep. 43. The Eſtate for Life was gone, and Joan remitted, and ſo ſhe was Tenant in Tail; he agreed that where the Diſcontinuance was in Fee, the taking back of the Eſtate will not do it: The Recovery was naught, becauſe Joan only was Tenant; by Jordan's Surrender the Diſcontinuance is gone, by the Remitter the Rent on the Leaſe for Years is gone; 1 Inſt. 333. by the Surrender the Eſtate for Life is extinct, and therefore Joan Cook muſt be remitted, and the Condition annexed to the Surrender cannot hinder the Remitter; for the Diſcontinuance being once purged can never be revived: If Joan be remitted the Rent is gone, becauſe the wrongful Reverſion on which it depended is gone; for there ought to be a Privity of Eſtate to preſerve the Rent; which fails here, 1 Inſt. 318. Moor 98. And if there be no Remitter, then Joan being not in as Tenant in Tail, but of a tortious Eſtate by Diſcontinuance, and coming in as Tenant to the Præcipe, and not as Vouchee; the Recovery is naught. Cuppledike's Caſe, 3 Rep. 5. He agreed, that if ſhe had been Tenant in Tail, her Son's joining as Tenant to the Præcipe, would not vitiate the Recovery; for that Eure and Snowe's Caſe in Plowd. Com. Then as to the Pleading it is double, Dyer 74. pl. 19. Dominus Rex *v.* Trinity-Houſe, Trin. 14 Car. 2.

Mr. Saunders pro Defendant agreed it a Remitter, but argued that the Rent continued notwithſtanding; for that the Rent was good againſt Joan, and by the Common Recovery it is confirmed, and the Feoffee ſhall never avoid it, Ewer and Snowe's Caſe, Plowd. 1 Inſt. 376. Adjournat'.

It was afterwards argued again, and a Difference being taken was inſiſted on between a Rent iſſuing out by way of Reſervation and the Grant of a Rent. Lord Chief Juſtice Saunders declared there can be no Remitter againſt a Party's Non-acceptance, where the Perſon is of full Age and his Entry not lawful; and Joan Cook being not remitted, the Recovery could not bind the Iſſue in Tail, for ſhe was then ſeized of another Eſtate (viz.) a tortious Fee, ſhe being a Tenant to the Præcipe; otherwiſe if ſhe had been a Vouchee. Rent. Remitter.

Vouchee. Quære cet Caſe & Vide les livres. Adjournatur.

(244.)

Dux Ebor' *verſus* Pilkington.

Scand. Mag. Ante Caſe 96. *Poſt*, Caſe 399, 467.

SCandal. Magnat. for that there being a Diſcourſe concerning the Plaintiff, the King's only Brother and Heir, and one of the chiefeſt Peers of the Realm; the Defendant ſaid of him, He had burned the City, and is now come to cut our Throats: Upon a direct and full Proof by Sir William Hooker, and Sir Henry Tulſe, Aldermen of London, he was found by a Jury of Hertfordſhire Gentlemen to be guilty, and Damages 100000 l. and the laſt Day of Term he rendred himſelf in Diſcharge of his Bail.

(245.)

Dixon *verſus* Thompſon.

Caſe on a malicious Proſecution. *V.* 1 *Saund.* 228, 229. 1 *Salk.* 14, 15, 21. 2 *Salk.* 456. 2 *Jo.* 132. 6 *Mod.* 261. *Ante, Gray*, &c. & *Box*, &c. *Vide* 5 *Mod.* 177.

ACTION of the Caſe for the malicious Proſecution of a Suit in an inferior Court without Cauſe: The Defendant pleads that the Plaintiff was indebted to him by Bond in the Sum of 600 l. & pro recuperation. ejuſdem, &c. Demurrer to it, becauſe he doth not ſay expreſly that the Money was due and recoverable, for it might be (and the fact really was) that the Day of Payment in the Condition of the Bond was not come. Adjournat'.

Lord Chief Juſtice Pemberton. That whereſoever the Plea amounts to the general Iſſue, that there you may demur is a fallible Rule; for where-ever there is a Matter of Law in it, which may inveigle the Jury, they may plead it ſpecially, as Entry and Suſpenſion.

(246.)

Osborne *verſus* Jerome.

Jurisdiction. *Vide poſt*, Caſe 430.

ERror on a Judgment in Aſſumpſit in an inferior Court; Declaration, That he was indebted at Derby within the Juriſdiction of the Court, for divers Wares ſold and delivered; and being ſo indebted, did at Derby aforeſaid, within the Juriſdiction

of the Court aſſume and promiſe; and aſſigned for Error, that the Goods were not alledged to be ſold and delivered within the Juriſdiction of the Court; and allowed, and Judgment was reverſed.

Powel *qui tam verſus* Weekes. (247.)

DEbt for 40 l. on the five Mile Act, againſt the Parſon for coming within a Corporation, &c. and upon Debate 'twas adjudged, that the Action lies for the Penalty, though the Party hath ſuffered ſix Months Impriſonment according to the Tenor of the Act: Then 'tis ſaid, quod cum he having been a Preacher, &c. which is a Matter traverſable, and therefore not ſufficiently averred; ſed non allocatur: Then another Exception taken did hold good, (viz.) No Place was laid where he came, but generally ad Civitat' de Briſtol; whereas the Penalty is Part thereof given to the Pariſh, where, &c. and therefore 'tis neceſſary to alledge a Pariſh where; and upon this there was Judgment pro Defendant. Note, That generally we never lay the Venue in a Pariſh unleſs in London; for a Pariſh may extend into divers Hills, &c.

Corporation.

Quod cum

Anonymus. (248.)

REſolved per Lord Pemberton at Guildhall, That Commiſſioners of Bankrupt cannot break open a Houſe to ſearch for the Bankrupt's Goods, unleſs it be the Bankrupt's Goods in the Houſe of the Bankrupt.

Bankrupts.

Checkley *verſus* Checkley. (249.)

DEbt on a Bond made to a Feme during Coverture, and by her Husband's Conſent: Defendant pleads, That the Husband made him his Executor; held no good Plea; ſaid, that perhaps the Reaſon why he made him his Executor was his giving that Bond.

Feme Covert.

Scambler

(250.)
S. C. 2 *Jo.* 227.

Scambler *verſus* Johnſon.

Common.

IN Treſpaſs, Preſcription for Common of Paſture for all Beaſts levant and couchant upon a Meſſuage, in which he alledges himſelf to have an Eſtate for another's Life: Exception taken becauſe of the Word Meſſuage; but held good enough, and ſaid to have been ſo adjudged frequently; for a Meſſuage hath included in it Yards and Curtilage, and the like: Another Exception taken, becauſe it doth not aver the Life of ceſtuy que vie to be in being, but ſaith only adhuc ſeiſitus; held adhuc ſeiſitus is a ſufficient Averment of the Life.

Vide ante Caſe 95.

(251.)
Vide poſt, N°. & 2 *Jo.* 229.

Copping *verſus* Slaymaker.

Declaration ill.

COvenant. Demurrer to the Declaration; the Memorandum is de placito Conventionis fractæ, but the Declaration is quod per talem Indenturam aſſumpſit & agreavit, and ſets forth in the Declaration the Indenture, and concludes like to a Declaration in Caſe, without any & ſic infregit Conventionem ſuam prædict. Per Cur' It ſeems to be ill, becauſe altogether informal; but the Exception on which they adjudged the Declaration naught, was this; the Covenant was, he ſhould not alien without Licence; and the Breach was, he made a Leaſe contra formam & effect. conventionis præd. and doth not ſay abſque licentia: Held naught. Judgment pro Defendant.

(252.)

Caldicot *verſus Comit. de* Pembroke.

Jury.

EJectment. This Cauſe was appointed for Trial at the Bar of this Court by a Jury of Wilts, and a Venire returned, and the Jury ſummoned; but before the Day the Parties agree, and the Summons not being countermanded, ſeveral of the Jury appeared, and I moved that they might have their Charges; and 'twas ordered that the Attorneys on

both Sides ſhould pay them between them, as was uſual in other like Caſes, as the Court ſaid.

Bouchier *verſus* Friend. (253.)

IN Caſe of Judgment againſt the caſual Ejector, there ought to be a Latitat ſued out againſt, and common Bail filed for the caſual Ejector; as was agreed by the Court in this Caſe, and the Judgment ſet aſide for want of it, on my Motion. Ejectment.

Reeve *verſus* Winnington. (254.)

S. C. Vide 3 *Mod.* 45.

BY Direction out of Chancery a Special Verdict found J. S. to be a Freeman and Citizen of London, and to be ſeized of an Eſtate in Fee-ſimple in the Houſes in Queſtion; and that ea intentione to make his Will and Teſtament, he ſaid theſe Words, I hear *John Reeve* (who was Plaintiff and Heir to the Teſtator) is inquiring after my Death, but I am reſolved he ſhall have nothing but what his Father left him, and I give all my Eſtate to my Wife: Find that this was proved and inrolled in the Huſtings, prout alledged in the Pleading; and they find the Cuſtom as alledged, which was of Deviſes in the City of London: And that J. S. had a perſonal Eſtate to the Value of 500 l. and a Leaſe for Years in an Houſe in the Strand in Middleſex. Deviſe. *London* Cuſtom.

Lord Chief Juſtice at the Trial ſaid, That doubtleſs by the Cuſtom an Inheritance may be paſſed by a Deviſe, and that theſe Words in a Will will carry a Fee, and not barely for Life; but the Queſtion will be, If the Cuſtom will reach to paſs it under the Word Eſtate, without a particular Name: And Judgment was afterwards pro Defendant.

Palmis *verſus* Heblethwait. (255.)

Ante Caſe 242.

CAſe for diverting a Watercourſe laid three ways, upon one was found a Special Verdict, and as to that the Caſe was, A Man hath an ancient Watercourſe through his Lands to an old Mill, and he pulls 1 *Show.* 64. Watercourſe.

pulls that down and builds a new Mill; a Stranger abates a Dam, which guides the Stream, the Dam ſtanding on this Stranger's Ground, and guiding the Water to the Defendant's and Plaintiff's Ground both: And as to this third Offence whereon this Verdict was found, per all the Court it was held pro Quer'; but as to the other, Adjournat'.

(256.) 1 *Vent.* 365.

Beningſage *verſus* Ralphſon.

Aſſumpſit and Warranty.

CAſe. Declaration on Aſſumpſit to deliver Merchantable Commodities, and that he delivered dirty Aſhes inſtead of them; and declares likewiſe on a Warranty: Demurrer to the Declaration.

Thompſon pro Quer', cited Brownl. fo. 8. and the Caſe of Golding and Goteer, Hill. 16 & 17 Car. 2. B. R. 'tis in 1 Keb. 847. Caſe for miſuſing his Horſe, and for Money for the Hire of him too: And the ſame Term Matthews and Hopping in Keb. 852. Caſe againſt a Carrier on the Cuſtom and Trover joined: But Saunders oppoſed it, ſaying, Theſe are of ſeveral Natures, one is in the Tort, the other in the Right, they require ſeveral Iſſues; and Judgment was pro Defendant.

Joinder.

And we afterwards were forced to declare in Deceipt only, and recovered 100 l. Damages. I being of Counſel in this Cauſe for the Defendant.

Row *verſus* Clargis.

S. C. Raym. 482, 483. 3 *Mod.* 26. 3 *Lev.* 30.

Words. Papiſt.

ERror on a Judgment in Com. Banco in Caſe for Words, You are a Papiſt; ſpoken of him being a Juſtice of the Peace, and a Deputy-Lieutenant.

Mr. Holt pro Quer' en breve de Error, That the Words are not actionable in themſelves if not ſpoken of an Officer; and reproachful Words, if they do not draw a ſcandalous Puniſhment, are not actionable. 2 Roll. Abr. 65. pl. 7. Witch not actionable, nor Sorcerer, nor Inchanter, if no Act be alledged to bring him within the Statute of King James I. 13 Rep. 59. A Papiſt if he come not to Church is puniſhable for that, but not for being a Papiſt; and theſe two Offices that

are ſet forth will not make it actionable, becauſe the Words touch not thoſe two Offices or Places, though perhaps his ſaying ſo may occaſion his being put out of them; yet that will not make them actionable, Hutt. 52. They are not Places of Profit, but Honorary. Bill's Caſe of Buffleheaded Juſtice not actionable, becauſe the Place is not profitable. 2 Roll. Rep. 43. compared with his Abridgment, 56. as to the Caſe of 3 Cro. 191. Nelgrave and Agar, he anſwered, That Judgment was given there becauſe it touched his Allegiance, then that was a profitable Office; and the Times (as is objected) ſurely cannot make an Alteration of the Laws.

1 *Sid.* 67.
1 *Lev.* 72.

Mr. Bonython argued econtra. 1. 'Tis actionable in it ſelf, becauſe it expoſes him to all the Penalties of the Statutes. 2. It's certainly ſo by Reaſon of the Offices and Places; Papiſts are made uncapable of Offices, and it's all one with Papiſt convicted; ſeveral Statutes make them to be diſarmed; and he cited 2 Cro. 56. Yelv. 57. Moor 151. and 1 And. 119. 2 Cro. 90, 242. 3 Cro. 313, and 883. Moor 401. 3 Cro. 291. 1 Leon. 335. Roll. Abr. 75. and that moſt of the Caſes cited on the other Side were before the Statute of King James.

In Hillary Term following Winnington argued for the Plaintiff in the Error. In 27 Hen. 8. 14. an Heretick and Lollard not actionable; no Indictment lies for being a Papiſt, Jones 308. Why ſhould not an Action lie as well for calling a Man Puritan or Conventicler?

Mr. North econtra. A Papiſt may be convict without Summons or being heard, upon Proclamation, which may be all done on a common Report: The Rule is, not that they muſt imply a Conviction, but that they charge with ſuch a Crime as may ſubject him to Proceſs, as Thief or the like; a Papiſt ſignifies a Traitor, one that oppoſes the King's Supremacy, as 'twas uſed in King Henry the Eighth's Days; and it is now uſed to diſtinguiſh Allegiance, and not Opinions: A Deputy Lieutenant hath a great Truſt, and he is to diſarm Papiſts and ſuſpected Papiſts; and Words of a Juſtice are actionable (tho' no Office of Profit) if ſpoken reſpectu Officii. 3 Cro. 191.

All the Court inclined that they were actionable; and the Judgment was afterwards affirmed.

(258.) Ingram *verſus* Skinner & Ux'. *Entred* Trin. Ult. Rot. 1159.

DEbt on a Bond againſt Skinner, and Grace his Wife, as Executors of the Teſtament of John Dingley, for 400 l. After a Special Imparlance the Defendant pleads in Abatement, That Grace the Defendant, and one Francis Bingham were Executors, and that both proved the Will and adminiſtred; but doth not ſay that Francis Bingham is living, and the Plaintiff by Proteſtation quod Franciſcus nondum ſuperſtes & in vita exiſtit prout in placito præd. allegat. (but 'tis not ſo alledged there) pro placito dicunt that Francis died before the Bill exhibited; and upon this there is a Demurrer. Vide poſt.

(259.) Pagram's *Caſe*.

Judgment. IN Caſe of a Warrant of Attorney to confeſs a Judgment, after a Year Judgment is not to be entred up without Leave of the Court, upon Motion, and Affidavit of the Party's being living, eſpecially the Defendant or the Conuſor, as alſo that the Debt is not ſatisfied; accordingly I moved one Pagram's Caſe this Term, which the Court granted.

(260.) About *Chriſtmas* in this Vacation the Lord Chancellor *Nottingham* died, and in his Room was Sir *Francis North* made Keeper of the Great Seal; and in his Place ſucceeded Sir *Francis Pemberton*, being made Chief Juſtice of the Common Pleas; and in his Place ſucceeded Sir *Edmond Saunders*, being made a Serjeant in order to it the firſt Day of *Hillary* Term; and his Serjeant's Rings had this Motto, *Principi ſic placuit*, and the ſame Day was made Chief Juſtice of the King's Bench.

DE
Termino Hill.
34 & 35 Car. 2. B. R.

Duncomb *verſus* Walter.

(261.)
S. C. *Raym.* 479, 480. *Vide* 1 *Lev.* 13. *Ante* Caſe 236. *Poſt*, Caſe 476.
Bankrupts.
Commiſſioners.
Aſſignees.

CASE by Aſſignees of Commiſſioners of Bankrupts; Special Verdict in Com. Banco, and Judgment pro Defendant there; and Writ of Error brought here: The Verdict finds Staley the Goldſmith, a Trader, and the King's Subject, and to be indebted to one Clarke in 1000 l. Clarke dies, and makes Crew his Executor, who arreſts Staley upon a Bill of Middleſex, he puts in Bail; Crew then proves the Will before the Return of the Writ, and then Staley renders himſelf in Diſcharge of his Bail, and lay in Priſon two Years, not paying or ſatisfying the Debt: The Queſtion was, Whether he was a Bankrupt from the Time of the Arreſt? The Clauſe is, If he ſhall lie in Priſon ſix Months from his Arreſt, *&c.* Argued that he ſhould be a Bankrupt from the firſt Arreſt: Here he renders himſelf before the Return of the Writ, and two Months after his Arreſt; his putting in Bail is nothing to the Creditors, they can make no Uſe of the Bail; though Crew had not then proved Clarke's Will, yet the Jury have found it juſtum & verum debitum, and 'tis debitum before Probate; he is Executor by the Act of the Party, and not by the Act of Law as an Adminiſtrator is; he may be Defendant before Probate, and Plaintiff ſo as to bring a Writ, though he cannot

not declare; and here the Will is proved before the Return of the Writ, and that is well enough; for before that Time there is no Action pending in Court: Here in this Court the Writs both of Latitat and Bill of Middlesex, are general, and not as Executors; now when the Will was proved it hath Relation to the Death of the Testator, so that the Arrest was good ab origine. Roll. Abr. 517.

Serjeant Walcott econtra. Here are two Questions. 1. If he be within the Act of Parliament? 2. As to the Point of Relation? As to the first an Arrest cannot make a Man a Bankrupt, for 'tis no Offence to be in Debt: They do not find any Act done from the Time of the Arrest to the rendring himself; to make good this Action there must be two Relations from the Probate of the Will to the Arrest, and likewise from the rendring himself in Discharge of his Bail to the Time of the Arrest; Relations are but Fictions in Law, and shall never work a Wrong or Charge to a third Person: Judgment was given in the Common Pleas after three solemn Arguments, and all the Judges agreed in Opinion for the Defendant.

Curia. Court. 'Tis not a slight Matter, they do not so much insist on the Relation, as on the Words of the Act of Parliament, the Words whereof are, That if a Man being arrested, do not pay or compound the same within six Months after due, or being arrested do escape out of Prison, or get Enlargement on Common Bail, and shall lie in Prison two Months: Then it comes and says, And in the said Cases of Arrest, or lying in Prison for such Debts, and get out on common or hired Bail, he shall be a Bankrupt from the Time of the first Arrest; and the Judges construed this to be only relative to the two last Clauses, and not to the not paying in six Months after Arrest, and that he should be a Bankrupt only from his rendring himself to Prison; for that the best Man upon the Exchange may be arrested and put in Bail, and afterwards become poor, and so be forced to surrender himself to save his Bail, and 'twill be hard to construe him a Bankrupt from the first Arrest when he was able. And Judgment was affirmed; but as to the other Point they held an Executor hath the same Right before as after Probate, and he

may make an Avowry for Rent before Probate. Vide poſt, Caſe 468.

Rogers & Ux' verſus Goddard. (262.)

ASSault and Battery, for an Aſſault on the Feme: Held by the Lord Saunders on the Trial of this Cauſe in Middleſex, being the firſt Sitting this Term; That a Verdict on a former Trial ought not to be read as Evidence on a new Trial in the ſame Cauſe; for when a new Trial is granted, the old Verdict is ſet aſide, and the Party pays Coſts for the ſame, and the Deſign of the Court is, it ſhould be tried originally, &c. And 'twas held likewiſe by him, That Baron and Feme ought not to join in Treſpaſs for an Aſſault on the Feme, if the ſame were with her Conſent; for where they join the Action ſurvives: Now here if the Husband dies, the Wife cannot proceed or begin de Novo with this Action, becauſe it was with her own Conſent, and in ſuch Caſe therefore the Husband may and ought to bring the Action alone upon his Special Caſe; for though the Wife conſent, that will not excuſe the Defendant; for ſhe hath not poteſtatem Corporis ſui: And Holt ſaid, That the very laſt Aſſizes the Lord Chief Baron over-ruled him in that very Exception, and ſo ſaid Serjeant Jefferyes that the Lord Hale had done; but the Lord Chief Juſtice Vaughan did allow it, and always held they could not join. Baron and Feme.

Dominus Rex & Chiſwick *verſus Les Inhabitants de* Bitton. (263.) *S. C. Raym.* 487.

WRIT was awarded to the adjacent Hills (on the Statute of Weſtminſter) for Reparation of Fences thrown down in the Night: Defendants being A. B. and C. come and alledging themſelves to be Inhabitants there, do plead that Sir John Newton for him and his Tenants of ſuch a Manor, had Common in loco quo, &c. and that it was incloſed, and that they demoliſhed theſe Incloſures in the Day-Time, abſque hoc that they in the Night did throw down

down thirty Perch: To which there were Exceptions taken.

1. They were no proper Perſons.

2. That the Traverſe is ill, becauſe doth not ſay aut aliquam inde partem, and ſo tie it up to the Number, and make the Number the ſole Matter.

But Mr. Juſtice Jones took Exceptions to the Writ.

1. That it was for Trees growing, which is not within the Statute.

2. The Writ is brought too ſoon, the Proſtration is laid to be the firſt of December & diverſis vicibus to the 21. and the Writ is the 16th.

(264.) *Dominus Rex verſus* Eve.

Order for the Maintenance of a Baſtard-Child. *Ante* Caſe 111. *Mich.* 34 *Car.* 2.

Eſſex ſſ. CArolus Secundus Dei Gratia Angliæ Scotiæ Franciæ & Hiberniæ Rex Fidei Defenſor, &c. Cuſtod. pacis noſtræ ac Juſticiariis noſtris ad diverſ. felonias tranſgreſſiones & alia malefacta in Comitatu noſtro Eſſex perpetrat. audiend. & terminand. Aſſignat. & cuilibet veſtrum ſalut. Volentes certis de Cauſis omnes & ſingulos ordines verſus quendam Johannem Eve concernent. manutenent. cujuſdam Spurii per ipſum gigni ſuppoſit. per vos ſeu aliquos veſtrum nuper fact. ut eſt dict. coram nobis per vos mitti vobis & cuilibet veſtrum mandamus quod omnes & ſingulos ordines præd. cum omnibus eos tangentibus adeo plene & intigre prout coram vobis ſeu aliquibus veſtrum nuper fact. fuerunt & penes vos jam reſident quocumq; nomine idem Johan. nuncupetur in eiſdem coram nobis ſub ſigillis veſtris aut unius veſtrum a die Sancti Michaelis in tres Septimanas ubicunque tunc fuerimus in Anglia mittatis ſeu unus veſtrum mittat una cum hoc breve Ut ulterius inde fieri faciam. quod de jure & ſecundum conſuetudinem regni noſtri Angliæ fore viderimus faciend'; Teſte Franciſco Pemberton apud Weſtm: 5 Julii Anno Regni 34.

Memorand. quod ad generalem quarterialem ſeſſionem pacis Domini Regis tent. pro. Com. prædict. apud Chelmeſford in eodem Com. die Martis prox. poſt feſtum Sancti Michaelis exiſtent. 3°. Die Octobris Anno Regni Domini noſtri Caroli Secundi Dei Gratia Angliæ, Scotiæ Franciæ & Hiberniæ Regis Fidei Defenſor', &c. 34. coram Chriſtophero Duce Albemarle Richardo Barret Arm. B. C. & D. E. & aliis ſociis Juſticiariis dict. Domini Regis ad pacem in Com. prædict. conſervand.

ſervand. necnon ad diverſ. felonias tranſgreſſiones & alia malefacta in eodem Com. perpetrat. audiend. & terminand. Aſſignat. Alexandrus Preſcot & Johannes Tendering duo Juſticiarii ad pacem in Com. prædict. conſervand. aſſignat', &c. per manus ſuas proprias deliberaverunt hic in Cur. quendam ordinem per eos fact. unde in brevi huic Schedul. annexat. ſit mencio & ſequitur in hiis verbis ſequentibus.

Eſſex ſſ. The Order of Alexander Preſcot and John Tendering, Eſquires, two of his Majeſty's Juſtices of the Peace for the ſaid County of Eſſex, one being of the Quorum, and next inhabiting unto the Pariſh of Springfield in the ſaid County, made the 25th Day of Auguſt, 1682. for the Relief of the ſaid Pariſh, and for the keeping of a Baſtard Female Child, begotten of the Body of Jane Taylor, ſingle Woman, and born in the ſaid Pariſh of Springfield on the 22d of this Inſtant Auguſt, and left to the Charge of the ſaid Pariſh: Foraſmuch as it appeareth unto us by the Oaths of Martha Goldſmith, Mary the Wife of John Bragg, and Jane, the Wife of Joſeph Stoakes, on the 25th of Auguſt aforeſaid; That John Eve of Springfield aforeſaid, is the Father of the ſaid Female Baſtard Child, and no other Man hath had the carnal Knowledge of her Body; we do therefore adjudge and declare the ſaid John Eve of Springfield aforeſaid, to be the reputed Father of the ſaid Baſtard Female Child, and do order him the ſaid John Eve, to pay Weekly from the Birth of the ſaid Child, the Sum of 2 s. 6 d. unto the Overſeers of the Poor of the ſaid Pariſh of Springfield, for the Time being, or one of them, for the Maintenance of the ſaid Baſtard Female Child, unleſs the ſaid John Eve ſhall otherwiſe diſcharge the ſaid Pariſh of ſuch Burden as may accrew thereunto, by Reaſon of ſuch Baſtard Child. And we further order the ſaid John Eve to pay the Sum of 40 s. towards the extraordinary Charges of the Lying in of the ſaid Jane Taylor. And laſtly, We order the ſaid John Eve, do immediately put in ſufficient Surety for the due Performance of this our Order: Given under our Hands and Seals, &c.

This Order J moved to quaſh.

1. Becauſe it doth not ſay the two Juſtices were the next, but only one of them. *Vide ante* Caſe 111.

Court. That is well enough, here 'tis ſo, next inhabiting ſhall refer to both the Juſtices.

2. Becauſe it doth not ſay how long the Payment ſhall be, and in Style 184. an Order was quaſhed for this; but the Court was of Opinion 'twas well enough, for 'tis till he ſhall diſcharge the Pariſh, which is well enough.

3. Becauſe there is a Sum ordered beſides the Weekly Payment.

Court. That is well enough, and has been ruled often and often, that the reputed Father ought to pay the extraordinary Charges.

4. Here is Security ordered to be given for the Performance of this Order, whereas in 2 Bulſt. 342. Smith's Caſe, M. 6. Car. 1. B. R. per Cur', the Recognizance ought to be in the Diſjunctive, viz. to perform the Order, or to appear at the next Quarter-Seſſions to abide the Order there. Sur 18 Eliz. cap. 3. Sect. 2. N. 5. for the binding him to perform the Order is to exclude him from the Benefit of his Appeal to the Quarter-Seſſions: And of this Opinion was all the Court. Then Mr. Juſtice Jones ſaid, we will quaſh that Part and confirm the other Part, as we well may.

(265.) Smith *verſus* Batterton.

TReſpaſs for throwing down and ſpoiling certain Stands of the Plaintiff in a Fair, and Verdict pro Quer', and Damages to 5 s. and upon Motion to have full Coſts it was held, That the Plaintiff ſhould have his full Coſts, for that it was a Chattle and out of the Statute; and if it had been annexed to the Freehold, yet, if carried away, it would be likewiſe out of the Act; and in ſuch Caſe where it doth appear in the Record, the poſtea need not to be marked.

Full Coſts.

(266.) *Company of Stationers verſus* Lee *& al'.*

IN Chancery it was moved for an Injunction to ſtay the ſelling of ſome Books imported from Holland, &c. and urged that they had quietly enjoyed the ſole

Injunction againſt ſelling Books imported.

ſole printing of theſe Books from the firſt of King James till very lately, and that all particular Members of the Company have diſtinct Shares and Benefit in the printing of them, according to the Stock they put in, by Virtue of a By-Law of the Company; ſo the Trade or Gain is not reſtrained to a few: By the ſame By-Law above 200 l. per Annum is always applied for the ſupporting of poor Widows and Orphans of the ſame Company; and they are at 2 or 300 l. per Annum Charge in looking after the Preſs for the Service of the Government; beſides, it would be of dangerous Conſequence, that the Hollanders and other Foreigners ſhould print our Primers, Pſalters, Almanacks and ſinging Pſalms, for they may and actually do abuſe them, being at no Charge for Correcting, and printing in a worſe Character and Paper, and will underſell the Engliſh, and deſtroy our Manufacture.

Then they moved againſt a Trial of the Validity of their Patent for theſe Reaſons, It appears by the Recital of King James ſet forth in the Bill, that the ſole printing of Primers and Pſalters was in Grant before that Time by Patent to John and William May, for their Lives; then by Queen Elizabeth to Benjamin Alley in Reverſion for thirty Years, which was purchaſed by the Plaintiffs; then the ſaid Patent of 1 Jac. was granted to the Plaintiff, afterwards his Patent was ſurrendred, and the Patent renewed in 13 Jac. The King hath always had and exerciſed his Prerogative in the printing of theſe and ſome other Books, 1 Mariæ there was granted to Cowood, the printing of Statutes and Proclamations, wherein was recited a former Grant; we have here a Copy thereof: 1 Eliz. the like Patent to Jugg and Cowood for ſole printing of them, and likewiſe Bibles: The ſole printing of Law-Books was granted by Hen. 8. to Tottel, and enjoyed: All theſe Patents have been renewed and continued down ever ſince, and Multitudes of Men have purchaſed under them.

The King is Head of the Church and hath a particular Prerogative in Eccleſiaſtical Affairs, and therefore in printing of Primers, &c. he hath a particular Prerogative in reſtraining and licenſing Prognoſti-

cations of all ſorts; and were it otherwiſe it would be of dangerous Conſequence to the Government.

In the Statute 21 Jac. 3. againſt illegal and miſchievous Monopolies, 'tis particularly declared, that this Statute ſhould not extend to Patents for ſole Printing.

In the Caſe of Darcy and Allen about Monopolies, which was 24 Eliz. Moor 673. Noy the Patents for Printing, which were the ſame as now, were admitted good. By the 14th of this King 'tis enacted, That no Perſon ſhall imprint or import any Book or Books, which any other Perſon by Force or Virtue of any Letters Patents, or Entry in the Stationers Book had Right and Privilege ſolely to print: Although this Statute be expired, yet it ſeems to amount to a Judgment, that ſome Perſons by Letters Patents had a Right and Privilege ſolely to imprint ſome Books.

Since this Statute there was a Conteſt between Mr. Titon and divers other Booksellers, and Collonel Streater Patentee of the Law-Books, about the printing of Croke's Reports; and in an Action brought there was a ſudden Judgment againſt Collonel Streater in B. R. But upon a Writ of Error in Parliament, and hearing of Counſel this Judgment was reverſed, and the Patent adjudged good.

Hill. 23 & 24 Car. 2. between Mayo and Hill, an Action tam quam was brought for the Penalties of the Act of 14 Car. 2. ſetting forth, that the now Plaintiff by Virtue of the new Letters Patents, was Proprietor of the Copy-Right of the Engliſh Bibles and Pſalms, and that the Defendant had, &c. And upon Trial before the Lord Hale, it was found for the Plaintiff by the Direction of the Lord Hale, who thereupon declared the Patent had been always held legal. Mod. Rep. 256.

Mich. 27 Car. 2. The Company of Stationers brought an Information in C. B. againſt one Seymour, for the Penalties of the Act of 14 Car. 2. for Printing and Vending of Almanacks; ſetting forth, That by Virtue of the Letters Patents in 13 Jac. they were entitled to the ſole printing of Almanacks, and a Special Verdict found thereupon: And Judgment pro Quer'.

Now by all theſe Judgments ſo affirmed, it appears the reſpective Letters Patents gave a Right to the Patentees, elſe no Judgment could have been given for them.

So upon the Statute 14 Car. 2. which gives the Penalties to thoſe who have a Right by Force and Virtue of Letters Patents. Paſch. 32 Car. 2. The Company brought an Action of the Caſe againſt Marlow, ſetting forth their Patent of 13 Jac. And that Marlow had printed and ſold Almanacks, which was tried before the Lord Keeper, then Chief Juſtice of the Common Pleas; and a Verdict pro Quer.

There is objected the Statute 35 Hen. 8. cap. 15. reciting that by an Act of Richard the Third, All Strangers might import and ſell Books: And that by the ſaid Act of 35 Hen. 8. 'tis enacted, That none ſhall buy to ſell again any imported Books ready bouud, otherwiſe then in Groſs, and not by Retail, whence they infer it is lawful to import any Books in Sheets.

Anſwer, That Statute of Richard the Second is not in print: Quære, If it be perpetual. But however, it extends only to Strangers, and it will not take away the King's Prerogative, the King being not named in the Act; and as for that of Hen. 8. it cannot be of greater Force for that very Reaſon: Beſides the Statute is only prohibitory, and doth not inlarge but reſtrain the Liberty of the Subject: The Judgments in the Houſe of Lords, and other Courts where theſe Statutes were objected, prove that they do not take away the King's Prerogative. If the Words of the Statute did import a general Liberty for all ſorts of Books, the Defendants might inſiſt to import any ſeditious or heretical Books, which by Law they cannot do; ſo that the Liberty of importing Books muſt be reſtrained to ſuch as are not contrary to the King's Prerogative and the Weal publick. And an Injunction was granted.

Dominus

(267.) *Dominus Rex verſus* Pilkinton, Shute *& al'.*

Riot. INformation for a Riot at Guild-Hall, and now the Cauſe being called, the Defendants offered a Challenge, viz. on the Behalf of my Lord Grey's being a Defendant, and being a Peer, that there was never Challenge. a Knight returned of the Jury as there ought to be, and it was put in Latin, in Parchment, and read by the Clerk, and received by my Lord Saunders, for that he was of Opinion, that to have Knights of the Jury was the Privilege of a Peer in a Criminal as well as in a Civil Cauſe; as is 1 Leon. 7. and ſeveral other Authorities, and the Caſe in Dyer ſays, 'tis ſuch a Privilege as he cannot waive, for if he be Plaintiff the Defendant may challenge the Array for this Default. And the Attorney General here could not enter a non proſequi as to him: For here he has no Day, nor is it the Record that is here, but only a Tranſcript ſent hither for the particular Purpoſe of a Trial: And the Judge here hath nothing to do but to record the Verdict, or to receive a Plea puis darreine Continuance, nor can a Non proſ. be entred as to my Lord Grey, for that the Venire is joint, and the Iſſue is ſo too.

(268.) Rich *verſus* Player.

London Sheriffs Challenged. *Vide* 1 *Vent.* 366. *Poſt*, 283, 285. INdebitatus Aſſumpſit for an 100 l. the Defendant challenges the Array, for that the Venire was directed to Sir Dudley North, unum Vicecom. London, on a Suggeſtion that the Plaintiff was the other Sheriff, whereas it was alledged for the Defendant, that the Office was but one intire Thing, though exerciſeable by two; but the Challenge was ſaved to them by allowing a Bill of Exceptions: The Caſe was on an Ordinance of the Common-Council; if a Freeman be choſen Sheriff, and upon Refuſal be fined, that the next younger Sheriff that holds ſhall have an 100 l. of his Fine. Mr. Box was choſen and fined, and paid 400 l. to the Chamberlain, Rich was after-

wards choſen younger Sheriff, and by the Order of the Court of Aldermen upon his Petition was to have 100 l. thereof, which being demanded of the Chamberlain was refuſed, and thereupon the Action was brought, and a Verdict pro Quer', the Defendant inſiſting upon the Challenge, and therefore made no Defence. *Vide poſt,*

Dominus Rex verſus Mayor and Commonalty of the City of London. *Entred* Mich. 33 Car. 2. Inter Recorda Regis. (269.)

London. Quo Warranto.

QUO Warranto for claiming (inter alia) to be a Corporation, and after a Special Plea of ſeveral Acts of Parliament, and Charters, ſome Forfeitures were aſſigned, then a Rejoinder, Surrejoinder, &c. and Demurrer. See the Pleadings, *&c.* in the Caſe of the *Quo Warranto* againſt the City of *London.*

Mr. Sollicitor Finch argued pro Rege, We ſhall firſt conſider ſome preparative Queſtions, which ſome at the Bar have made ſo, otherwiſe I ſhould not.

1. Whether any Corporation can be forfeited at all? Now no Corporation hath any other Foundation or Subſiſtence than other Franchiſes, and there is a ſecret Truſt that they be not abuſed, and otherwiſe there would be a great Miſchief: The King is the Head and Original of all Corporations and Franchiſes, Keilway, 138. A Preſcription to be a Corporation ſuppoſes it to be derived from the Crown; there is no Rule more certain, then that a Franchiſe may be forfeited, 18 Edw. 2. Quo warranto 2 Inſt. 233. and the Mirror of Juſtice, cap. 5. Sect. 4. there cited, an Abuſer of Murage is a Forfeiture thereof, and that by the Common Law, for the Statute of Weſtm. 1. c. 31. is but an Affirmance of the Common Law, only it adds a further Puniſhment (viz.) to be grievouſly amerced for an Abuſer, 8 Hen. 4. 18. Abbot of St. Alban's Franchiſe of having a Gaol was ſeized into the King's Hands for an Abuſer thereof, 20 Edw. 4. 6. By Pigot, If the Conuſance of Pleas be granted, and he doth otherwiſe then he ought, he ſhall loſe his Franchiſe, 10 Hen. 4. 1. Non-Uſer or Abuſer is a Forfeiture

feiture of an Office. Fitzh. Abr. Tit. Coron. 233. 'tis ſaid, That a Biſhop's Temporalities and Franchiſes may be forfeited; Thus far 'tis plain that Franchiſes miſuſed may be forfeited, although they are enjoyed by a Corporation, and in a corporate Capacity; unleſs ſome will ſay a Corporation cannot forfeit the Franchiſe of being a Corporation, which certainly may be done as well as a Gaoler forfeit his Office of being a Gaoler: Suppoſe a Corporation ſhould under the Common Seal authorize a Rebellion, would not this be a Forfeiture? In 21 Edw. 4. 'tis ſaid, A Corporation cannot commit a Battery, or do a perſonal Wrong, and true, but yet they may do a corporate Act which may be unwarrantable, yea illegal; a Corporation may be ſurrendred, and that which may be ſurrendred may be forfeited. 12 Edw. 3. Rot. clauſ. Membran. 36. 12 Edw. 3. Rot. clauſ. Membran. 5. Paſch. 9 Edw. 1. Rot. 95. In Lincoln's Inn Library, the Lord Hale's Collection of Adjudicata of Edw. 1. fol. 28. there was a Judgment quod libertas de Sandwich forisfacta ſit, and by him marked in the Margin, Et eorum Judicium videtur extendere to the Cinque Ports; and theſe are confirmed by Act of Parliament as well as the City of London: All Quo Warranto's hitherto have ended in Submiſſion, 5 Edw. 4. 6. If a Corporation ſhould neglect to come in during the Eyre, or into the King's Court, it is a Forfeiture, which being ſo; 'tis ſtrange that Oppreſſions, though outragiouſly committed by Corporations ſhould not be ſo. Earl of Glouceſter *v.* the Earl of Hereford, Hill. 20 Edw. 1. fol. 6, 7. Ryley's Parliamentaria placita 83, 86. 21 Edw. 3. Rot. Clauſ. Membr. 17.

Secondly, Whether the City of London be in any other Plight than other Corporations? And I think it the ſame; this depends on their Plea and the Statutes mentioned therein. 4 Inſt. 253. mentions the Statute of Richard 2. likewiſe 1. Magna Charta is no more a Confirmation to them than to any other, for 'tis & omnes aliæ Libertates, and the Lord Coke and the Mirror ſay, They ſhall have all them which they have not forfeited by any Abuſer. 2 Inſt. 20. As for the other Acts it is plain that 25 Edw. 1. 2 Part of the Patent-Roll, Membr. 14. the City was forfeited. 26 Edw. 1. Rot. Pat. Membr. 6. he reſtored their Liberties and their

City to them to hold during his Pleasure; he cited 14 Edw. 2. Membr. 21. 2 Part Patent Rot. 16 Edw. 2. 20 Edw. 2. Pat. Rot. It was restored by the Grace of the King, but never by due Course of Law: As to the Act of 1 Edw. 3. which they set forth, I know no such Act, there is no such printed; nor are there any Parliament-Rolls till long after that (viz.) 4 Edw. 3. he cited 5 Edw. 3. Rot. Clauſ. Membr. 14. As to 7 R. 2. though my Lord Coke in 4 Inſt. 253. saith 'tis a Statute, and cites several Books in the Margent, yet never one proves it, or tends thereto; he saith Rot. Parliam. 7 Rich. 3. Mem. 37. whereas that is only a Prayer of the Commons, that a Patent to that Purpose be granted to the City of London, and the King saith Le Roy veult, but there was never such a Patent granted; and if there was, it can be interpreted only to extend to past Forfeitures, not to future ones: And in 16 Rich. 2. Rot. Pat. Membr. 22. per debitum Legis proceſſum they were seized; by which it appears, that notwithstanding their pretended Statute they were De facto forfeited. In 2 Rich. 2. Parliam. Rot. 126, 131. a Petition from the City was presented in Parliament, that they might not be forfeitable, and the Answer was Le Roy aviſera: Which argues they had no such before; and they pray likewise that which was never before or since prayed, (viz.) That they might interpret their own Charters, and 'twas denied.

The third Quære is, Whether the Act of the Mayor and Common-Council may be termed the Act of the Whole; all By-Laws are Corporate Acts, and made by the Whole, and yet they are made by the Common-Council; and when for their Purpose are defended as good, and so they have been allowed in the King's Courts; they have pleaded that they have Time out of Mind a Common-Council: It is an inſeparable Incident to Corporations to make By-Laws, and a Power to make them is implied in the very being of a Corporation; and therefore a Miſuſer of that is a Miſuſer or Forfeiture of the Whole. 22 Aſſiſ. pl. 34. When divers Franchiſes are dependant one on another, the Miſuſer of one of these is a Forfeiture of the Whole. Corporation of Maidenhead's Case, Palmer 76, 77, 78. Toll is incident to a Market; and Abuſer of the Toll is a Forfeiture of the Market.

The fourth Quære is, Whether the Acts done by this Corporation, alledged in our Replication, and confessed in their Rejoinder, be a Forfeiture? First, As to the making of the By-Law, and levying Money in Pursuance thereof; And now what Right have they to such Tolls? And this as they have pleaded is none at all; a Prescription to Toll, and doth not say what in certain is void; and so is a Grant from the King of such uncertain Toll, Palm. 79. for no Man can pretend to Tax his Fellow Subject, nor is this which they pretend to a Toll, for a Toll is to be paid by the Buyer, but this is to be paid by the Market-People, the Sellers; yet I agree there must be a Custom for Stallage, but that must be certain, as is 9 Hen. 6. 45. pl. 28. expressly in the Point: But supposing it a good Prescription, then our Traverse of their Prescription is good, and they ought to have taken Issue thereon; whereas they have offered an Issue to Toll uncertain, and have not reduced it to a Certainty by their By-Law: When the King hath granted a Market, he can never after grant Toll, because 'twas once a Free Market; and when once a Market is in the City, that being with a Custom for a Sum certain, they can never raise it, but may lessen it; so that the Question will be, Whether raising and levying of Money be a Forfeiture? 'Tis a Breach of Trust, and an Oppression to the People; the Offence lies in usurping a Power to make a By-Law for the levying of Money, that's the Misuser: In the Case of Ship-money, 'twas not the Quantity, but the manner of levying it without Act of Parliament, which was the Matter complained of: And if this Corporation may go thus far, who knows where they may end? As to the Petition, the presenting and printing it is the Offence which was done by them as a Corporation; 'tis taking upon them to censure the King and his Government, 'tis a scandalizing of him: There was Collonel King and Lake's Case in the Lord Hale's Time in this Court; the printing any Man's Case while pending is an Offence, because 'tis as it were an Appeal to the People; if the Fact be done, the Law says maliciously, and with an ill Intention: They confess the Fact, and then traverse the Malice, which cannot be; this would have

been an Offence in a private Person, and have incurred the Penalty of Imprisonment during the King's Pleasure; he cited Harrison's Case in 1 Cro. 362. for it, who was sentenced so, and likewise with a grievous Fine for speaking Words of Justice Hutton in relation to a Judgment of his about Ship-money; much more criminal is it to charge the King with Misgovernment: And on the whole Matter he prayed Judgment pro Rege.

See Mr. *Hampden's* Case, *pag.* 237, 238.

Sir George Treby argued econtra. 1. A Corporation cannot be forfeited, 'tis a meer Capacity, 1 Inst. 250. In Brooks's Abr. his Title is Corporations and Capacities: Now he never uses two Words in his Titles but when they are synominous, Hob. 210. In one Case, and in but one Case in the World is it called a Franchise, and that is in Tit. Quo Warranto in Coke's Entries, pl. 1. Noy calls it a Franchise, for (says he) 'twas called so in that Plea: They never die, 1 Inst. 4. 'Tis invisible, immortal, and hath no Soul; so is 2 Bulst. 233. Tipling *v.* Rexal. No Subpœna lies against them, because they have no Consciences, they cannot speak nor appear in Person, but by Attorney; and this was the Opinion of Manwood, Chief Baron. Grot. de Jure belli lib. 2. cap. 9. Cities are immortal: That a Corporation should be dissolved was never adjudged nor questioned, or attempted before; Now in 1 Inst. 13. a Corporation is said to be dissolved, but 'tis not properly a Dissolving, but rather a taking away of the Subject in which it doth subsist: In Rolle's 1 Abr. 514. Tit. Corporation, there is this Quære, How it may be dissolved? And no Answer; It cannot by the Judgment of the Court in a Quo Warranto, but by Death of all its Members; and in Littleton, Sect. 108. 'tis reckoned a good Argument that no such Action lies, insomuch that it was never seen or heard of: And in a Quo Warranto a Disclaimer binds the Successors, 1 Inst. 103. A Corporation in a Town is more protected than another's Lordship or Dignity, it cannot be forfeited because 'tis personal; it cannot be surrendred as was agreed by the Lords in the Earl of Purbeck's Case: Earl of Oxford's Case in Jones 100, 101. a Corporation cannot be surrendred; the Surrenders in the Time of H. 8. were not good, and therefore needed Acts of Parliament for them: Dean and

Chapter of Norwich's Caſe, 3 Rep. 75. that is, though a Corporation ſurrenders, yet the Corporation remains; in Fulcher and Heyward's Caſe in Jones 166. and in Palmer 499, 501. Worthley *v.* Adams, Plowd. 194. only the Land paſſes by the Surrender, and the Corporation is not named there. 2 Roll. Rep. 101. ſeems to the contrary, the Deanry of Wells is ſaid to be ſurrendred, Dyer 373. Walrond *v.* Pollard. A Corporation is before it hath Lands, and continues after all its Lands are evicted. In Rolle's 2 Abr. 185. it's ſaid, the Lands came to the King by the Statute of Diſſolutions; and truly in Dyer 282. Inter Archiepiſcopum Dublin and Brierton; it is reſolved by five Judges, That the Corporation and Chapter of St. Patrick, was by the Gift and Surrender of the Dean and Chapter, lawfully diſſolved and determined; and that alſo abſque conſenſu Archiepiſcopi; which cannot be Law, for it can never be without the Leave of the Biſhop. My Lord Coke argues in 1 Leon. 124. that the Surrender was by Act of Parliament, otherwiſe it had not been good; Rot. Parl. 8 Rich. 2. Membr. 11. 4 Inſt. 228. was a Quo Warranto brought and Submiſſion, &c. See it at large in Davis's Rep. 1. but then paſſing that, ſome Things may be ſurrenderable and yet not forfeitable, as an Annuity is. Eurſon's Caſe, Dyer 2. old N. bre. 161, 162. 2 Edw. 3. 28, 29. all the Seizures were but till Fine and Ranſom; and in the Interim the King put upon them a Cuſtos. A Corporation is not a Liberty that may be ſeized, the King may ſeize the Mayor and put in a Cuſtos, but he cannot ſeize a Thing which is not ſeizable: During all theſe Times the Corporation was in Statu quo, and were ſued and did ſue, and their Courts continued open and free as before and ſince: If they had not ſued a Replevin (ſaid) within a Year and a Day, they had ceaſed to have been a Corporation: 'Tis a meer Perſonalty that cannot be ſeized, Lane's Rep. 58. 1 Roll. Abr. 195. As this Action is brought there can be no Judgment, 'tis brought againſt us as a Corporation for uſurping the Franchiſe of being a Corporation; that in Palmer's Rep. was brought againſt particular Men by Name, and ſo is that in Dublin's Caſe, Palm. 1. 2 Roll. 113, 115, 125. The Writ here ſuppoſes there is no Corporation, and yet calls them ſo:

Hale's Common-place Book, 168. 7. Tit. Quo Warranto Coke's Entries, 501. there the Judgment was quod in Miſericordia: If the King miſconceive his Action the Writ may abate, Plowd. 85. If it be a Forfeiture it muſt relate to the Time of the Toll taken, and all the Acts we have done ſince are void: Forisfecerunt is a new Word in a Quo Warranto, in all Judgments in Quo Warranto's, there is and muſt be a Fine, And who ſhall be fined here? It is as if an Action ſhould be brought againſt Husband and Wife; and in the Replication the Plaintiff ſhould alledge a Divorce, firſt to own them a Corporation, and then deny them to be one is repugnant: In the Caſe of the King v. Bradwell, 18 Car. 2. B. R. a Quo Warranto for uſurping to be a Company of Fidlers; but 'twas by Name: There was that againſt the Bermuda's Company, but they never appeared: As to the Acts of Pichage and Stallage, they are ſuch uncertain Things as cannot be reduced to a Certainty. In Coke's Entries, 536, pl. 4. there is a general Pleading without any Certainty, and yet more might be ſaid of that Pleading of a Water-Bailiff, than this for Stallage, 1 Roll. Abr. Tit. Preſcription, Letter H. fol. 266. Palmer's Rep. 542. thoſe in London may preſcribe againſt Acts of Parliament, but other Places cannot; the Courts here have taken Notice of the Courts of Record in London, Spinkle and Tenant's Caſe, 1 Roll. Rep. 106: and ſo is 1 Leon. 284. pl. 384. the ſame Caſe in 4 Leon. 182. pl. 284. Stallage is paid only for ſtanding, and ſo there is quid pro quo: Lord Cobham's Caſe, 1 Leon, 218. 2 Roll. Abr. 123. Letter B. 265. Toll thorough may be preſcribed to in Conſideration of repairing the King's Way; ſo is Hill and Hawke's Caſe, 1 Roll. Rep. 44. We provide Stalls and Standing, and we pay Taxes, for the Soil is ours: By ſeveral Books they that have Standings only pay no Taxes, and ſo is 2 Roll. Rep. 238. where Thomas Hellidge was ſued in the Spiritual Court for a Rate towards Reparation of the Church, and becauſe he had only a Standing a Prohibition was granted, for he only came thither on Market-Days: And by Chamberlain, for a Man that takes his Lodging for a Week in a Town, he ſhall not be charged to the Repairs of the Church; by 2 Inſt. 58. the ſole and true Meaſure of Toll is the not hin-

dring

dring of Trade, and I am ſure ours doth not, for no Market is more filled, nor is there any Place where the People have better Gain. The Duty or Tax for Hallage of Goods at Blackwell-Hall in the Chamberlain of London's Caſe, 5 Rep. 62. is much the ſame with this; every Shop in London is a Market, you cannot judge it unreaſonable: And if reaſonable what Miſchief is there to any one? The Conſiderations are meritorious and equivalent thereto; an unreaſonable By-Law is no Cauſe of Forfeiture, 'tis void & quaſi non fact. Hob. 211. here is no Compulſion of Dureſs or Impriſonment: If a Levying of Money were a Forfeiture, then we have forfeited our Charter continually for ſome hundreds of Years, the Majus & Minus work nothing; if this be a Forfeiture, 'tis only of the Market, nay, I ſay 'tis only a Forfeiture of the Toll; a Denizon forfeits only his Denizonſhip by, &c. though that be Δῶρον Βασιλικον. Weſtm. 2. cap. 30, 31. The Seizure ſhall be only till they redeem by making Fine and Ranſom, Palm. 82. Old N. B. 161. the being of a Corporation is ſo far from being in Danger, that in Sir Julius Ceſar's Caſe in 1 Leon. 106. Coke's Entries, 525. as to the Petition that is lawful; and ſo is Wrenham's Caſe in Hob. 220. and Hare and Miller, 163. the Petition contains the ſame Words in Senſe and Subſtance as thoſe ſpoke by the Lords and Commons, which we ſet forth in our Plea: In the Lord Hollis's Caſe theſe Words ea intentione are exploded. In Cro. Car. A Corporation cannot do any Thing againſt the Peace; Admit the taking of Toll were Robbery, what then? 21 Edw. 4. 14. cited by Mr. Sollicitor. By the Statute of 19 Hen. 7. cap. 7. 'tis moſt plain, for if this making ill By-Laws were a Forfeiture of their being a Corporation, to what Purpoſe then was there an Act of Parliament to make it a Forfeiture of 20 l.? The Common-Council are not the Whole, for that is a Thing collateral to the Corporation; as is Warren's Caſe, 2 Cro. 540. he being an Alderman, and one of the Counſel of Coventry, he ſues a Mandamus; they return; They had a Cuſtom to chooſe a Common-Council, and to remove them ad libitum; And per Cur'. There is a Difference between an Alderman and a Common-Council-Man, they cannot remove a Freeman nor an Alderman

without Cauſe, but to be one of the Common-Council is a Thing collateral to the Corporation, and a Cuſtom to remove ſuch may be good; and the Court granted a Writ of Reſtitution to reſtore him to his Aldermanſhip, but denied it as to the other: The ſame Caſe is reported in 2 Roll. Rep. 112. and there held as he reports it, that the Office of one of the Common-Council, is only to give his Aſſiſtance for the good of the City. There's Eſtwick's Caſe, Style 32. where it ſeems to be for Matter of Advice. Vide 2 Roll. Rep. 246. a Common-Council is meerly for Counſel, and all the other Power they have is by Cuſtom, and then you ſhall no more know what is pleaded, an ill By-Law is void, and if any Man be aggrieved thereby an Action lies thereon. A Cuſtom ſhall never be conſtrued to do a Wrong; although they have the Uſe of the Common Seal in many Caſes, that is not material; for the Court of Aldermen have it in ſeveral Caſes, Common-Council Men are choſen by Unfree-men, by all that are Houſe-keepers, &c. all the Truſt they have is to deſtroy, not to maintain their Liberties; there is no Crime charged that doth relate to it as a Corporation; what is pretended is only an Incroachment of Property, And what's this to the Corporation?

Lord Saunders. Can your Corporation do any corporate Act? According to your Notion never was one corporate Act done by them; certainly whatſoever the Common-Council does binds the Whole; otherwiſe 'tis impoſſible for you to do any corporate Act, for you never do, nor never can convene all the Citizens; your Power of making By-Laws is annexed to you as a Corporation, and not as Lords of the Market. Adjournatur, to be argued again the firſt Friday in the next Term.

In Eaſter Term Mr. Attorney General argued it pro Rege, but then I was not preſent.

The next Day Mr. Pollexfen pro Defendente, There is not one Precedent, Judgment or Opinion, that any one Corporation was ever forfeited for any Miſdemeanor.

1. Quære, If this Information being brought againſt the Corporation as ſuch, to know by what Authority

Authority they claim to be a Corporation, be good? It ought to be brought either against their particular Persons by Name, or Inhabitants of a Hill, and then some Persons appear and plead by Name; and my Reasons for it are these: First, The Writ supposes him a Body politick, otherwise there is no Defendant in Court; 'tis not enough that there be a Person only in Supposition. Suppose an Information or Action against Husband and Wife, this supposes them to be such; now if it happen by any of the Pleadings to appear of the Plaintiff's own shewing that they are not so, the Writ shall abate. 2. The very Information supposes that they had a Being precedent to that wherewith they charge them; Persons not in esse cannot usurp or do any Act; 'tis true, particular Persons may take upon them to be a Corporation; Usurpation is always taken in an unlawful Sense, 1 Inst. 277. Then 3. From the Judgment that must be given in this Case, when brought against particular Persons, the Judgment destroys and damns their being a Corporation, with a Fine to the King for their Offence past: In this Case there cannot be any Fine to the King, for the Corporation is to be dissolved by the Judgment: The Precedents cited in this Case, and in Number 12. are all (except two) Non pros. & Discontinuances; that of Barkingsted in Hertfordshire the Judgment is by Default; that of New Malton in Yorkshire, Trin. 6 Jac. Rot. 3. the Judgment is quod Libertates & Franchesiæ præd. in manus Domini Regis Capiantur; and that the Mayor and Bailiffs shall be taken pro Fine, which I do not at all understand; that there ought to be particular Persons named, there are these Books, Coke's Entries, 527. Palmer's Rep. 1. Quo Warranto v. Cusack & al'. Roll. 2 Rep. 113, 115, 455. Palm. 80, 81. Lord Hale's Common-Place Book in Lincoln's-Inn Library is expressly so, fol. 168. being a particular Nota on the Report of Cusack's Case: Mr. Attorney would have it, that this is brought against particular Persons under that Name, but that cannot be intended. 1 Leon. 153. Hob. 211. the Writ shews it self brought against the Corporation; if it be brought against particular Persons under another Name, then they appear by par-

ticular Name; as in Case it be against Inhabitants of a Place, this is plain against the Corporation, they appear by Warrant of Attorney under the Common Seal: Supposing this Information well brought, then we are to consider the Replication, there's an Issue tendred on the Prescription, that they have not been Time out of Mind a Corporation, and then they plead over a Forfeiture for levying of Money; this is an ill Replication, for it contains an Issue that 'tis no Corporation, and two Causes of Forfeiture also. There's no Instance in the World of such a Replication, that there should be an Issue to the Fact, and a Pleading over to other Matters, either of which strikes to the Whole; I cannot find any such sort of Pleading, 'tis true, the King's Attorney may waive his own Issue, but it must be the same Term. Plowd. 85, 236. 13 Edw. 4. 18. King and Bagshaw. 2 Cro. 347, 397. By the 9 H. 4. 6. the King shall be bound by one Issue and cannot offer one, and then waive it, and offer another; the Assignment of two Forfeitures is ill, for by the first Act the Corporation is gone, which was six or seven Years since and then it could not commit another Act of Forfeiture; here is a Forfeiture (if any) ipso facto: But Mr. Attorney was pleased to say that 'tis no Forfeiture till some Record or Judgment be thereof: Then he admits we are not yet a determined Corporation; and if we are yet a Corporation, we cannot be said to have usurped, &c. Then whether the Facts alledged in the Rejoinder be sufficient to excuse and answer what is alledged in the Replication? Mr. Attorney hath neither denied or confessed in his Surrejoinder, what we have alledged in our Rejoinder: I do agree for a Lord of a Market to prescribe to have a Toll uncertain, and as often as Occasion requires to ascertain it, would be an ill Prescription; but this in London is good: The By-Law in the Chamberlain of London's Case, 5 Rep. if it had been in any other City, I doubt if it would have been good; so here, as in that of the City of London's Case, 8 Rep. we have averred them to be reasonable Tolls, but 'tis objected that we have not set forth what they are, so as the Court might judge if reasonable or not: In London they

have a Power to change their Markets both as to Time and Place.

'Tis objected as if the Statutes we have alledged were not Acts of Parliament, 1 Edw. 3. not in print, nor the Roll to be found: Private Acts are generally not printed; besides, though they are not Rolls we have the very Act it self under the Great Seal of King Edw. 3. the Way then was to send them to Sheriffs of Counties to have them proclaimed; and afterwards they were inrolled in the general Courts in Westminster, and this is inrolled Trin. 1 Edw. 3. Rot. 61, 62. in the Exchequer. Jones 103. There were various Forms of penning Statutes in ancient Times; Prince's Case, 8 Rep. 18. and anciently they were in Form of Grants, 1 Inst. 527, 639. sometimes in Form of Articles, and sometimes in Form of Petitions, 7 Rich. 2. Numb. 17. Objected that it wants the Assent of the Lords; it appears to be in Parliament, it is on the Parliament-Rolls. Selden's Mare claus. 249. in the Prince's Case, 8 Rep. that Act there doth not mention the Commons Assent, and yet it is always agreed to be an Act of Parliament. Besides, in the City Books, Tit. 169. is an Entry of it, and the Proclamation thereof is in open Court, 7 H. 6. 1. 4 Inst. 250. Jones 240. 5 Rep. 63. 8 Rep. 126. Then suppose this By-Law ill, 'tis then void and cannot be a Forfeiture: a Feoffment without Livery or insufficient Livery, which is all one, made by Tenant for Life or Years, being a void Feoffment is no Forfeiture. Dyer, 577. The Receipt of Money not due is but Extortion, and punishable as such, and the Party hath his Action, the Law construing it to be wrongfully taken, to be received to the Owner's Use: A private Person in this Case could only forfeit the Toll of Market, and be liable to repay the Money so taken and received.

Mr. Attorney by his Demurrer hath confessed that the Petition was presented in the Manner, and for the Reasons we have alledged, it being sufficiently and substantially pleaded: and I hear nothing alledged to the contrary. Now suppose a Man in the Plague-Time had a Suit depending in Westminster-Hall, whereon his All depended, and the Term had

been adjourned, and he had preferred a Petition with such a Clause therein, that the Current of Justice in his Case had received an Interruption: Though the Adjournment were good, convenient and necessary, would this have been an Offence? Besides, these are not Acts of the Corporation, the Common-Council are but Part of the Corporation constituted to a particular Purpose; you cannot take Notice of any other Power they have, than what appears in the Pleadings; they cannot forfeit any more than they can surrender or grant; they are by Custom, not by Charter, and their Power and Authority reaches only to what their Usage hath been; and they have not used or accustomed to forfeit: I suppose they are founded upon some By-Law which is lost; How therefore can we suppose they have any Authority to forfeit and ruin the Body? All their Power is for the Benefit and Advancement of the Principal. Lastly, Whether these Acts shall forfeit a Corporation? I think it as great a Point as if Magna Charta were at Stake: All the Corporations in England, both Ecclesiastical and Civil, may then be forfeited; and three Parts in five of the House of Commons are Citizens and Burgesses, and consequently one of the three Estates of the Realm, for the most Part depends thereon; I shall endeavour to Answer the Reasons they go on, and the first Reason is, That if it were otherwise. Corporations might act extravagantly, and have no adequate Punishment: I answer, there is no Offence but the Actors will be punishable in their private Capacities, and if 'twere (as they would have it) then those Parts of the Corporation which do not concur to the Fact, must be punished for another's Fault; which would be contrary to all natural Justice. 2. They object, the general Rule of Law, that an Abuser of a Franchise is a Forfeiture thereof. I answer, That they shall by an Abuser thereof forfeit the particular Franchise abused, and no other but what is dependant on, and incident to it. Bro. Franchise, 34. 22 Assise. 34. 9 Rep. 96. 2 Inst. 43. And if their Rule were true, the Abbot of St. Alban's should have forfeited not only his Gaol, but his very Abbacy; I agree that the Forfeiture of an Incident may forfeit the Principal: If a Man misuses

Pie-powder Court, or Toll, he shall forfeit the very Fair or Market. 3. They object, a Corporation is a Franchise, and commences by Grant, and is surrenderable and forfeitable as a Franchise. I answer and agree, that a Franchise is a large Word and may include it; but this is like the Privilege of being a Natural Person: I think that no true Position, That what is grantable may be surrendred, and what may be surrendred is forfeitable; there is a vast Difference between this and other Franchises: Franchises of other Natures are Estates and Inheritances grantable and transferrable over to others; they either carry some Profit from the King or from the Subject: In it self this is nothing but a Personalty and meer Capacity, this was never such a Franchise as they talk of. 2 Inst. 278, 28, 282. In all the Eyres that ever have been, there is never a Claim of a Corporation, whereas all other Franchises are, for their Services; as that of Pasch. 9 Edw. 1. Rot. 25. in Scacc. John Dennis Mayor of Sandwich, and three others were impleaded, and Judgment quod Communitas de Sandwich amittat Libertatem suam. 6 Edw. 2. Rot. Claus. Membr. 5. 4 Inst. 228. Town of Cambridge, that and many more were cited, was in Parliament: All these Precedents are above three hundred Years old, except that of 2 Rich. 2. which was two hundred and ninety Years ago, and never followed with any Practice or Authority since; they were very troublesome Times, and full of great Commotions and Disorders, and therefore are not of such Weight: In all the Books of the Reports of those Times, there is nothing printed of those Seizures, which makes me think them rather illegal and disorderly than fit Precedents: And those brought on Magna Charta, and all the other Statutes in Affirmance of the Liberty of the Subject, 1 Hen. 4. c. 5. 4 Hen. 4. cap. 1. 7 Hen. 4. cap. 1. 3 Hen. 5. cap. 1. 2 H. 5. cap. 1. 2 Hen. 6. cap. 1. to secure the People against the Irregularities of those Times, seems their first Care: And in all those Times when these Seizures were, the Corporations still were in being and not determined, did do corporate Acts, and enjoyed their Privilege still, only a Custos instead of a Mayor, and sometimes a Mayor of the King's Appointment instead of the old one; the Custos took the Oath of Mayor

and ſate in Court; a Writ of Right was brought, and they defended it, they made Leaſes, they were ſued and did ſue, ſo that the Corporations were not determined or diſſolved by thoſe Seizures; and all thoſe Corporations which they ſay were ſo ſeized and forfeited, do plead themſelves Corporations by Preſcriptions, which cannot poſſibly be were it as they ſay, as London or Briſtol, Glouceſter, Cambridge and Sandwich: Is the Corporation diſſolved ipſo facto, or only upon Judgment? In the Treaſurer's Remembrancer's Office in the Exchequer, Baga de Quo Warranto in itinere North'ton and Bedford, 4 Edw. 4. Rot. 2. Quo Warranto againſt William Bedford, for hanging Men for Felonies committed out of the Juriſdiction, the Judgment was only, that their Privilege of Infangthief ſhould be ſeized with the Offices of theſe that miſcarried themſelves in that Matter; I ſhall not diſpute but that a Seizure and a Forfeiture were all one and the ſame Thing; whether it be ſurrenderable is not much to the Purpoſe, and if they inſiſt on it they depend on a very doubtful Argument, and therefore I ſhall not much diſpute it, only thus far; it ſeems not; ſince thoſe that are Members of a Corporation do take an Oath to preſerve the Liberties of the Corporations, and are Members not only for themſelves, but are intruſted for others; and whatever they do contrary to their Oath, and againſt the Good of the Corporation, is a Forfeiture of their Freemanſhip, and a Cauſe of their Diſfranchiſement, as is James Bagge's Caſe, 11 Rep. which ſtrongly argues they cannot ſurrender it: The Taking of a new Charter of a Market is a Surrender of the old. 14 Hen. 6. 12. But a Corporation's Taking of a new Charter is no Surrender of the former: A Body politick is but a Perſon created by Law in Reſemblance of a Natural Perſon, to have a Capacity to ſue and be ſued, to take, hold and enjoy to particular Ends and Purpoſes. 1 Inſt. 11, 66. Jones 190. F. N. B. 12, 13. By a Judgment againſt them, all Debts owing to them will be gone, their Lands will revert to the Heirs of the Donor, and ſo all the cuſtomary Shares of a Freeman's Eſtate; all the Acts of Parliament relating to them will be as it were expired, for they relate only to the Corporation. 1 Inſt. 102.

Lord

Lord Chief Justice Saunders. If a Corporation be not dissolvable, then you oust the King of his Quo Warranto; and you likewise set up so many independent Commonwealths as there are Corporations in the Kingdom. Cur' advisare vult.

In Trinity Term following, Tuesday June 12. Mr. Attorney prayed Judgment pro Rege: Then Mr. Justice Jones (the Lord Saunders being sick) said, This Case hath been solemnly and elaborately argued on both Sides, and all said that could be on either Part: In the Argument of this Case there were many Book-Cases, Precedents, Records and Authorities cited; all the Book-Cases I have looked into and considered them, all the Records and Precedents I have seen, either attested Copies, or the Records themselves, and several Times have we met and had Conferences about this Matter, and we have waited on my Lord Saunders during his Sickness often; and that very lately, and for my Part I have had as mature and serious Consideration of this Cause as possibly, and I suppose my Brothers have done so too: And upon Deliberation we are all unanimously of Opinion.

First, As to the great preliminary Point, Whether a Corporation aggregate, such as the City of London is, may be forfeited or seized into the King's Hands? We all think it may upon a Breach of that Trust reposed in them for the good Government of the King's People: As to a Seizure 'tis plainly implied in the Statute of 28 Edw. 3. cap. 10. That enacts, That on the first Offence the City of *London* shall forfeit 1000 Marks, on the second 2000, and for the third, the Liberty and Franchise of the City of *London* shall be taken into the King's Hands; which plainly argues that there may be a Seizure of the Corporation: And as to a Forfeiture, the Act of Oblivion proves it, where, in 12 Car. 2. cap. 11. Sect. 5. All Bodies corporate, Cities, Boroughs, &c. are pardoned and acquitted of all Forfeitures, &c. and if the Law should be otherwise, 'twould erect so many independent Republicks, as are now Corporations in England; which of how mischievous Consequence it would be to the King and Kingdom, every one may easily imagine.

Secondly, We are of Opinion, that the assuming a Power to make By-Laws for the levying of Money, as they have done, is a great Oppression to the People, and consequently a Breach of that Trust reposed in them for the Welfare of the King's Subjects, and consequently a just Cause of Forfeiture.

Thirdly, We are of Opinion, that the Petition mentioned in the Pleading is so scandalous to the King and his Government, and so tending to beget in the People an Hatred of their Soveraign, that 'tis a just Cause of Forfeiture.

Fourthly, That these Acts alledged are corporate Acts, being sufficiently alledged in the Replication, and not sufficiently answered in the Rejoinder.

Fifthly, That the Excuse mentioned in the Rejoinder is frivolous and insufficient.

Lastly, That the Information is well founded, and upon this whole Record 'tis the Judgment of this Court, and this Court doth award, That the Liberty and Franchises of the City of London be seized into the King's Hands.

Raymond. To prevent ill Surmises concerning this Matter, I must declare that I am of the same Opinion in all Particulars.

Wythens. I am so likewise; and this was the Lord Saunders's Opinion in all the several Points.

Then Mr. Attorney General moved that Judgment may not be entred up till the King's Pleasure be known concerning the same.

Court. Let a Rule be entred accordingly.

And in the long Vacation following Judgment was entred; and the Lord Mayor and Aldermen constituted a-new by the King's Commission.

Dominus Rex versus Cane. Per Indict. Mich. 34 Car. 2. 141. Inter Recorda Regis. (270.)

Devon. ff. MEmorandum quod ad generalem quarteriam Sessionem pacis Domini Regis tent. apud Castrum Exon. in & pro Com. Devon. præd. decimo die Januarii Anno regni Domini Caroli Secundi Dei Gratia Angliæ, Indictment for erecting a Cottage, &c.

Angliæ, Scotiæ, Franciæ & Hiberniæ Regis, Fidei Defenſoris, &c. triceſimo tertio coram Johanne Bear A. B. C. D. E. F. ac aliis ſociis ſuis Juſticiariis Dict. Domini Regis ad pacem in Com. prædict. conſervand. necnon ad diverſ. felonias tranſgreſſiones & alia maleſacta in eodem Com. perpetrat. audiend. & terminand aſſignat. ſuper ſacr'um duodecim Jurat. probor. & legalium Homin. Com. prædict. impanellat. jurat. & onerat. ad inquirend. pro dicto Domino Rege & Corpore Com. præd. præſentat. exiſtit quod Thomas Cane Jun. de Aſhburton in Com. prædict. lignar. primo die Decembris Anno Regni dict. Domini Regis triceſimo tertio vi & armis, &c. apud Aſhburton præd. in Com. prædict. apud quendam locum infra eandem Parochiam communiter vocat. the Cleaves fecit erexit & edificavit, & fieri erigi & edificari cauſavit quoddam cottagium pro habitatione quod quidem Cottagium eodem primo die Novembris Anno ſupradict. non habuit nec adhuc habet quatuor acras terræ ad minus computand. ſecund. Statut. aut ordination. de terris menſurand. eidem Cottagio aſſignat. cum eodem Cottagio continue occupand. & manurand. tam diu quam idem Cottagium inhabitat. fuit, Et Juratores prædict ulterius dicunt quod præfat. Thomas Cane Cottagium prædict. ſic per eum ut præfertur fact. edificat. & erect. aut fieri edificari & erigi cauſat. apud Aſhburton præd. in Com. prædict. vi & armis, &c. illicite & voluntarie ſuſtinuit manutenuit & continuavit a præd. primo die Decembris Anno præd. per ſpacium unius menſis integri & amplius extunc proxime ſequent. in manifeſtum contempt. dict. Domini Regis contra formam Statut. in hujuſmodi Caſu edit. & proviſ. necnon contra pacem dict. Domini Regis nunc Coron. & dignitat. ſuas, &c.

On this Indictment for Erecting and Continuance of a Cottage, I moved it might be quaſhed for theſe Exceptions:

1. 'Tis ſaid not to have four Acres aſſigned to it the firſt of November, which is a Month before the Erection was; for that is laid to be the firſt of December, a Month after; for this it was quaſhed: Other Exceptions there were to it which were not moved. As,

2. It's ſaid to be at a certain Place infra eandem parochiam, and names no Parish before.

3. It does not ſay the Erection was contra formam Statut. but only the Continuance is ſo concluded to be.

4. It doth not say the Cottage was the Defendant's, and perhaps he might be only a Bricklayer or Carpenter, and built it for another, and so not within this Act of 31 Eliz. cap. 7. against Cottages and Inmates.

5. It does not say 'twas pro habitatione hominum; perhaps it is only a Cow-house or Dog-kennel, and so not within the Statute: Sed Quære of these Exceptions.

Speake *versus* Richards. (271.)

Under-Sheriff.

AN Action held to lie against an Under-Sheriff for Money levied on a Fieri facias, as Money received to the Plaintiff's Use; and that before the Writ returned, and so ruled in this Case; as likewise in a Case of one Verdon of Norfolk.

Anonymus. (272.)

Bail.

IF three Men bring an Action, and the Defendant puts in Bail at the Suit of four, they cannot declare against him; but if he had put in Bail at the Suit of one, that one might have declared against him. Nota, sed Quære.

Case of Vacating Fines in C. B. (273.)

Infancy, &c.

IN the Common Pleas they will set aside a Fine levied by an Infant (during his Life and Infancy) upon Motion, as null and void, and without any Writ of Error; as they will do a Judgment irregularly obtained by Trick or Surprize, and punish the Commissioners besides, if it were taken by Dedimus; and this they will do by Inspection and Examination of Witnesses in Court; but if he be affirmed to be of Age, they will order a Trial by a feigned Action If he were an Infant or no? but then the Complaint must be made to the Court before he comes of Age, and then it matters not if after the Motion (and so if after

after a Writ of Error) he arrives of Age, this will not prejudice him; for that an Inſpection is at the firſt on the Motion made (or the Writ of Error brought) So the Court did this Term ſet aſide a Fine levied by an Infant, it being found by a Jury that he was within Age; as the Lord Pemberton told me: So if the next Heir, or any Relation come and inform the Court that the Party was a Feme-covert, and levied a Fine without her Husband, they will ſet it aſide as void: In Caſe a Fine be taken by Dedimus, before they allow the Fine, they ſwear the Commiſſioners, If it were the right Party? And whether of Age? And if a Feme covert, whether duly examined?

(274.) Anonymus.

Summoners. IN real Actions there ought to be real Summoners, and two of them; and if there be not ſuch, tho' the Sheriff gave Notice to the Party, the Court will ſet aſide the Judgment upon Motion, without any Writ of Diſceit; as was done in Searle and Long's Caſe, in Mod. Rep.

1 *Mod.* 248.

(275.) Anonymus.

Marriage-Portion. IN Cancell. If an Husband comes to ſue there for his Wife's Portion, upon the Prayer of the Wife's Friends and Relations, they will force him to ſecure the ſame, part for the Wife, and part for the Children; for ſay they, If you will have Equity, you muſt do Equity, and they may qualify their own Decrees; but they will never force him if he comes not there as Complainant, as if he ſues at Law, &c.

(276.) Anonymus.

Alimony. IN the late Times they ſued for Alimony in Chancery; and the Judges were then of Opinion, that there being no Spiritual Courts, nor Civil Law, the Chancery had the Juriſdiction in thoſe Days; but

now we have Courts-Christian, the Chancery will allow of Demurrers to such Bills for Alimony.

If a Wife pawns her Cloaths for Money, and afterwards borrows Money to redeem them, the Husband is not chargeable unless he were consenting, or unless the first Sum came to his Use. See the Case of *Manby* and *Scot*, 1 *Mod. &c.*

Anonymus. (277.)

FReight is the Mother of Wages, and wheresoever Freight is due, Wages is so: If a Ship be lost before it come to a delivering Port, no Freight nor Wages is due; if lost afterwards 'tis due to the last delivering Port: Advance-Money paid before, if in Part of Freight, and named so in the Charter-Party, although the Ship be lost before it come to a delivering Port, yet Wages are due according to the Proportion of the Freight paid before; for the Freighters cannot have their Money: And this was ruled by my Lord Saunders, on Evidence in a Trial at Guild-Hall. Freight. *Ante* Case 159.

This Vacation Sir *William Dolben* was put out, and Sir *Francis Wythens* made Judge in his Room, and the first Day of *Easter* Term was made Serjeant, and gave Rings with this Motto, *Regi lex placuit:* And I had the Honour of delivering them to all the Judges in Court, and to all the great Officers at Court. The same Day in the Afternoon he was sworn at the Lord Keeper's House, and two Days after came into Court; where I had the Privilege of the Motion without the Bar, *&c.* (278.)

DE

Termino Paſchæ,

35 Car. 2. B. R.

(279.)

Mew *verſus* Ruſſel.

Warranty of Wines.

ACTION ſur le Caſe on a Warranty of Goods ſold to be merchandizable, thus declares, Quod cum the Plaintiff Barganizaſſet & emiſſet of the Defendant, ſo many Hogſheads of Claret-Wine at ſuch a Price; the Defendant in Conſideratione inde warrantizabat & affirmabat adtunc & ibidem ea eſſe bona, &c.

Mr. Pollexfen moved in Arreſt of Judgment, for that the Warranty here is ſubſequent to the Contract, and in Conſideration of the Contract, whereas it ought to be in the Contract and Parcel thereof: Now this is but a voluntary Promiſe afterwards; he cited Pape and Lewin's Caſe, 2 Cro. 630. for that the Defendant bargained to ſell to the Plaintiff a Mare, and that the Defendant knowing her to be lame, ſold him the ſaid Mare, and therein falſly deceived the ſaid Plaintiff: Ruled that the Declaration was not good, becauſe he doth not ſay Warrantizando vendidit; for if the Warranty was not at the Time of the Sale, the Action is not maintainable; and here though it be ſaid to be adtunc, yet it plainly appears to be ſubſequent by the Words in Conſideratione inde.

Curia. Lord Saunders. The Adtunc proves it to be all at the ſame Time, and the Exception is very nice; if it had been poſtea, perhaps it had been ſomewhat more

dubious: Then ſuppoſe the Words in Conſideratione inde had been omitted, and then it ſeems well enough; however, let it ſtay till it be moved on the other Side.

In Trinity Term following Mr. Holt moved for Judgment, here being a general Iſſue pleaded, and a Verdict for the Plaintiff; he agreed the Warranty ought to be at the ſame Time or naught, and the uſual Form is Warrantizando vendidit; but ſaid 'twas all at one Time here, for 'tis adtunc & ibidem, which now after a Verdict ought to be intended at the ſame Time; and the Money paid is always the Conſideration of the Warranty: And all the Court thought it well enough, and Judgment was given pro Quer'. See Howlet's Caſe, Latch 150.

Jackſon *verſus* Hall. (280.)

CAſe for Words, Thou art a pocky Raſcal, with an innuendo, the French Pox; and an Averment, that in common Intendment the Words are ſo underſtood; Held not actionable; otherwiſe if the Averment had been of ſuch Intendment in a particular Place, as Welſh Words, and Healer of Felons in the Weſt Country: Judgment ſtayed. Words.

Taylor *verſus* Ames. (281.)

PRohibition prayed to a Libel in Court-Chriſtian for Diſtribution of an Inteſtate's Eſtate: A. having two Sons and a Daughter, one of the Sons dies inteſtate, the Father renounces; the other Son takes out Letters of Adminiſtration, the Siſter ſues for a Diſtribution: Urged for her, that ſhe ſhould have Diſtribution, for that by the Father's Refuſal 'tis as if there were no Father in the Caſe, and then the Son and Daughter are in equal Line to the Brother: Argued on the contrary, becauſe the Father is next of Kin alone, and although on his Refuſal the Right of Adminiſtration ſhall go to the next of Kin after him, yet the Right of Diſtribution doth not go beyond Diſtribution.

beyond the firſt next of Kin in being at the Inteſtate's Death. Adjournatur.

(282.) Caldicot *verſus* Smith.

Diſtribution. PRohibition prayed to a Suit in the Spiritual Court for a Diſtribution; on that Clauſe of the Statute which ſays, That there ſhall be Repreſentatives of Collaterals only to Brothers and Siſters Children; And the Quære was, If it ſhould be intended of Brothers and Siſters Children of the Party inteſtate, or of the Adminiſtrator? And it was now held here, that it ſhould be only of the former; and a Prohibition accordingly granted.

(283.) Rich *verſus* Player. *Vide ſupra.*

London Sheriffs challenged. *Ante* Caſe 268. MR. Williams now moves in Arreſt of Judgment, on that Exception on which the Challenge was proved at the Trial: 'Tis not good, for in Auditor Curle's Caſe, 11 Rep. 'tis reſolved, that they are but one Officer, and if one of them dies, the other can execute nothing till a new one be choſen; and he cited 31 Aſſiſ. pl. 20.

Serjeant Jefferyes econtra. 'Tis true, in Middleſex they are but one Sheriff, but in London they are two, the Writs are Vicecomiti Midd. and tibi præcipimus; in London 'tis Vicecomitib. & vobis, which Difference being always obſerved is certainly grounded on ſome Reaſon; there are Precedents expreſly to the Point. In Norwich, Hill. 8 Hen. 8. in Com. Banco, Rot. 303. In London, Trin. 18 Eliz. Rot. 511. Com. Banco, and in Brownlowe's Brevia Judicial. fol. 396. is the very ſame Precedent with ours: There was the late Caſe of Sheriff Bethel againſt Harvey, where 'twas agreed good ſo: The Caſe of Coroners is agreed ſo in the Books, that if one or three of them be challenged off, yet the fourth may execute the Writ; and one Coroner may do an Act alone in the Name of the Whole, and ſet the Names of the others thereto: As the Coroners are a joint miniſterial Officer, and in judicial Acts ſeveral Officers, ſo the Sheriffs are likewiſe, and

they have their ſeveral Compters and Courts. Adjournatur.

But afterwards Judgment was for the Plaintiff.

Ward *verſus* Lawrence. (284.)

Privilege.

Defendant being arreſted upon a Writ out of the Common Pleas, brings his Writ of Privilege, as Clerk of the Crown-Office; but he being only a Clerk to Mr. Philip Ward, who is a Clerk of the Office, and not being himſelf an immediate Clerk of the Office, I moved the Court for a Superſedeas to the Writ of Privilege, and 'twas granted accordingly: The Court agreeing him not to be privileged; as an Attorney's Clerk is not.

Dominus Rex verſus ſeveral Aldermen of *Worceſter*. (285.)

Challenge in a *Quo Warranto*. *Vide poſt.* See 1 *Vent.* 366.

Raym. 485, 486.

Quo Warranto againſt them, &c. Upon the Trial at the Bar the Defendants challenged ſeveral Jurors for not having 40 l. per Annum, and agreed by the Court, that a Freeman in a Corporation being of Subſtance may be a Juryman, though he have no Freehold in the City: The Practice always hath been ſo, for otherwiſe there would be a Failure of Juſtice in many Corporations, becauſe in many of them there are not Freeholders enough to make a Panel; and the Court ſent the puiſne Judge to the Common Pleas to know their Opinion herein, who agreed with this Court, and the Challenge was accordingly over-ruled.

Dominus Rex verſus Smith & *al'*. (286.)

Bill of Exceptions. *Vide ante* Caſe 127.

Reſolved per Cur' in this Caſe, That a Bill of Exceptions lies not in this Court upon a Trial at the Bar; for the Words are, He ſhall have Remedy Coram Domino Rege, which extends not to themſelves to overrule their own Judgment; and therefore extends only to Niſi prius and inferior Courts: 'Tis true, in the Caſe

Caſe of Enfield and Hill in this Court on a Trial at the Bar, a Canterbury Cauſe upon a Mandamus, there was one ſealed, but at the Trial there were only two Judges preſent, Rainsford and Jones, but Jones doubted then, although if they determined the Matter, then they could not proceed, he therefore did ſubmit to the Lord Chief Juſtice: And afterwards 'twas ſo ſtrongly doubted that they never proceeded to get any Determination to this Day. See Weſtm. 2. c. 31. 2 Inſt. 427, 428. It ſeems to lie at the Seſſions or Sheriff's Court, and being made Part of the Record, &c. Held likewiſe in this Caſe, That if the Sheriff be indifferent and dies, and another be made Sheriff who is challengeable; there may be a Suggeſtion thereof upon the Roll; and ſo the Writ directed to the Coroner, and that although there were a Writ regularly directed to the Sheriff at firſt, and a non miſit breve: If ſeveral Perſons be Defendants, and Iſſue is joined as to ſeveral, and this goes to Trial, if the Sheriff be a Defendant, though not one of them that joined Iſſue, yet the Venire ought not to be to him: In this Caſe the Information was againſt ſeveral; ten of them plead to Iſſue, and a Venire facias to the Sheriff, and a non miſit inde breve; then the other Defendants plead to Iſſue, whereof the Sheriff is one; then a Suggeſtion is made upon the Roll thereof, and thereupon a Venire is awarded to the Coroner: And held good, and that it ſhould be ſo; for if the Sheriff had returned the Venire, it might have been challenged off at the Trial: And Judgment was given upon this againſt them pro Rege.

Vide ante Rex verſus Player.

(287.) Machell *verſus Sir* William Temple.

Power of Revocation.

EJectment, Trial at the Bar, there was given in Evidence a Deed of Settlement, with Power to revoke by any Deed, ſealed and delivered in, &c. or by his laſt Will and Teſtament; the Party makes his Will, and publiſhes it in the Preſence of three Witneſſes, and he being ſick, and ſo great a Company in the Room, that the Noiſe thereof diſturbed him; he deſires them to go into the next Room to ſet

their Names; which they did accordingly: Hereupon aroſe two Queſtions, one of which was, If this were a good Will within the Statute lately made againſt Frauds and Perjuries, that Statute requiring that the Witneſſes ſhould ſign it in the Preſence of the Teſtator? And the Court and Counſel agreed on a Special Verdict, but the Jury being obſtinate after twice or thrice ſent out, would find for the Plaintiff, who was Heir at Law; although there was a Doubt in the Law, ſaying they were all of Opinion 'twas no good Will, and thereupon the Poll was demanded, that they might all of them ſeverally give their Verdict, which they all accordingly did pro Quer'.

Notand. The firſt Jury that ever refuſed a Special Verdict on a Point in Law, they all incurring the Danger of an Attaint. But ſee Vaugh. 145, 150, 152, 153.

Dominus Rex verſus Keller. (288.)

Appren tices.

INformation againſt the Defendant for immoderate beating one Brothwaite, that was his Apprentice by Indenture; and on the Trial before the Lord Saunders at Guild-Hall, held, That the Juſtices of the Peace might by the 43 of Eliz. diſcharge an Apprentice from his Maſter, & econtra; and ſaid, that it was ſo reſolved by the Lord Hale, and that the Information lay; and the Defendant was convicted.

Dominus Rex verſus Duhammel. (289.)

Apprentices.

MOtion to quaſh an Order of Seſſions made on the Petition of William Eaton, an Indenture-Apprentice to the Defendant, with whom there was given 10 l. and a Suit of Cloaths, for the Diſcharge of the ſaid Apprentice from his Maſter and Indentures, and for the Return of the 10 l. (upon the account of immoderate Beating and not providing neceſſary Meat and Drink) and for the Delivery up of

his Indenture to be cancelled, and of his wearing Apparel.

First Exception taken was, That they had not Power unleſs by the Statute of Labourers, and of Apprentices bound out by the Pariſh; but 'twas reſolved that they had Power by 43 Eliz.

Then 2dly excepted, That they had no Power to order a Return of the Money: But held that they had Power to make an Order concerning it, as an Incident inſeparable to the other; and the Order was confirmed.

(290.) *Dominus Rex verſus* Chiſtleton *Pariſh in* Wilts. Per Record. Paſch. 35. Car. 2. Regis, inter placita Coron.

Poor Settlements. *Vide poſt*, Caſe 441, 443.

Wilts. ſſ. AD generalem Seſſion. pacis Dom. Regis tent. apud Marleborough in & pro eodem Comitat. die Martis ſcilicet tertio Die Octobris Anno Regni Domini noſtri Caroli Secundi Dei Gratia Angliæ, Scotiæ, Franciæ & Hiberniæ, Regis Fidei Defenſor', &c. Triceſimo quarto coram Jacobo Long Baronet, Gilbert Talbot Milit. Johanne Talbot Milit. & aliis ſociis ſuis Juſticiariis dict. Domini Regis ad pacem in Com. præd. conſervand. necnon ad diverſ. felonias tranſgreſſiones & alia malefacta in eodem Comitatu perpetrat. audiend. & terminand. aſſignat', &c.

Order of Seſſions. Upon Complaint made unto this Court by the Overſeers of the Poor, and other the Inhabitants of the Pariſh of Wroughton in this County, That John Robbins, a poor Inhabitant of the Pariſh of Chiſtleton, in this ſame County, hath lately intruded himſelf with his Wife and Family into the Pariſh of Wroughton: This Court upon hearing of Counſel and Witneſſes, and what could be alledged on either Side, doth order and adjudge the ſaid John Robbins to be a ſettled Inhabitant of Chiſtleton aforeſaid; and the Overſeers of the Poor of the ſame Pariſh are hereby ordered to receive him the ſaid John Robbins, with his Family into their ſaid Pariſh of Chiſtleton, and provide for them as their Poor according to Law; and the Inhabitants of the Pariſh of Wroughton aforeſaid, are hereby diſcharged of and from the ſaid

John Robbins, or his ſaid Family, or any Thing relating thereunto.

This Order I moved to quaſh.

1. For that the Juſtices of the Peace have no Power to make an Order of this Nature; the Power of a Juſtice of the Peace is either by the Common Law, or by his Commiſſion, or elſe by ſome particular Statute; it muſt be agreed that Vagabonds, Labourers, Beggars and Baſtard-Children, &c. are within their Authority, and perhaps to adjudge their Habitations, and order their Removal to the Place of their Birth or former Abode; but that is not our Caſe: By the Common Law, and before Queen Elizabeth's Time, there was no Proviſion at all made for the Poors Maintenance, unleſs in ſome particular Cities and Boroughs, as London, &c. where by Cuſtom the major Part were wont by a kind of By-Law to conclude the reſt into a Rate; but the general Suſtenance of the Poor in ancient Time, was by charitable and voluntary Contributions of religious and other well-diſpoſed Perſons; and for the moſt Part they were Appurtenances, or rather Incumbrances, to the religious Houſes, as the Abbeys, Monaſteries and Nunneries; and in our Law-Books we find this Reaſon given, why the Revenue of the Church ſhould be encouraged and ſupported, viz. For the Maintenance of Charity and Hoſpitality: And for any Thing I can obſerve, 'twas the ſole Proviſion for the Poor in thoſe Days; nay, by the 12th of Rich. 2. cap. 6. 'twas enacted, That in every Licence of Appropriation of any Pariſh-Church, it ſhould be expreſly contained, that the Diocеſan of the Place upon the Appropriation of ſuch Churches, ſhould ordain a convenient Sum of Money to be paid yearly of the Fruits and Profits of the ſame Churches, by thoſe that would have the ſaid Churches in proper Uſe, and by their Succeſſors, to be diſtributed among the poor Pariſhioners of the ſaid Pariſh, in Aid of their Living and Suſtenance; every Word of which Act is an Argument that the Poor were reckoned God's, and the Church-Men their Overſeers; as if the Law-makers feared, that when thoſe Lands were got into Laymens Poſſeſſions, Charity would wax cold, they therefore made this

Proviſion: Now their Commiſſion gives them no ſuch Power in this reſpect, unleſs Poverty be a Crime, and to be hungry a Breach of the Peace, Juſtices of the Peace were created by 1 Edw. 3. c. 15. but firſt named ſo by 36 Edw. 3. cap. 12. and before, and at that Time there were conſervatores pacis (and ſuch are all Conſtables) Now Dalton tells us, pag. 22. That a Juſtice of Peace muſt proceed by the Preſcript of his Commiſſion and Statute-Law; and in Truth he hath no Authority but by one of theſe two, not a Word in their Commiſſion inclines to give any ſuch Power as this: Beſides, their very Style and Denomination ſhews it, that their Office is for another Intent; 'tis true, there are ſeveral Things within their Juriſdiction which cannot properly be reckoned within their Commiſſion, but then 'tis given by ſome particular Statute, for their Office originally and properly is quite to another Purpoſe, viz. The Examination and Puniſhment of Offences; ſo that what Power they had was not founded in the Nature of their Office, and then 'tis no more than a particular Power given by Statute to J. S. which being temporary, is gone by the Expiration of the Time that Act was to endure for.

As for the 14th of this King, that being temporary and the Time expired, their Power is gone too: If we conſider the Nature of a temporary Act. 'twill appear that there was no Power before nor after ſuch Act; its being temporary implies that 'twas a new Proviſion; for I know not one temporary Act of Parliament that is in Affirmance of the Common Law, but they are all introductive of a new Law; and all thoſe Acts that are in the Book of Law ſaid to be affirmative of the Common Law, are perpetual; For why do our Law-makers make an Act temporary? 'Tis becauſe it being a new Proviſion, or new Remedy; therefore they make it to laſt but for a Time, becauſe they know not what Inconveniences may happen upon the Change of the Law, or Introduction of a Novelty; if the Event be good they can continue it at Pleaſure; if it prove inconvenient, 'tis but a little Time and it will expire of Courſe. And 'tis further obſervable, that all theſe temporary Acts are to expire at the End of the Seſ-

ſion of Parliament, and none of them expire at a Day certain, or the firſt Day of a Seſſion of Parliament; and the Reaſon ſeems palpable; becauſe if upon ſuch a Time's Experience it appear good and convenient, they can continue it that Seſſion, and that without any Intermiſſion of Time: Now if this had been thought convenient 'twould have been continued if it had been declaratory of an ancient Power lodged in the Juſtices of the Peace, they would have made it perpetual and not temporary, in order to try by Practiſe if convenient for the Weal-publick: So that it ſeems plain they had no ſuch Power before the Act, and they never uſed it before; for although upon the Diſſolutions of Abbeys and Monaſteries, the Number and Clamours of the Poor reached Laymens Ears, and made 43 Eliz. neceſſary, yet that gives no ſuch Power, for 'tis a quite different Thing to ſign Rates, and to remove and change Mens Dwelling.

In 2 Bulſt. 347. Villa de Kimmalton v. Ville de Layſtas in Com. Hereford, the Juſtices of the Peace at their Seſſions ordered a Man and his Family from one Pariſh to another, on the Account of being a poor Inhabitant, and ordered the Place of his former Abode to receive him; and there 'twas reſolved by Juſtice Whitlock, That they had no ſuch Power to make ſuch an Order, unleſs he had been impotent, and ſo within the 43 Eliz. or actually chargeable to the Pariſh, otherwiſe he might provide himſelf where he could get an Houſe.

At the Summer-Aſſizes at Cambridge, 1692. Juſtice Harvey reſolved, that the Juſtices of the Peace were not to meddle either with the removing or ſettling any poor Inhabitants, but only of wandring Rogues. Dalton, 97, 98. cap. 40. No Man is to be put out of the Town where he dwells, nor to be ſent to the Place of Birth or laſt Habitation, but a Vagrant Rogue. Lamb. 107, 207. and Dalton 95. cap. 40. tells us, That he who ſhall bring any Poor to any Town, which are burdenſome to the Town, may be raiſed in his Rates towards the Relief of the Poor of the ſaid Pariſh; which argues they were not removeable.

But

Curia. But the Court were of Opinion that by 43 Eliz. they had Power, for the Settlement of Inhabitants, as an Incident to the good Management of the Powers of the ſaid Act of 43 Eliz. And although the 14th of Car. 2. doth expire, yet the Preſcription therein may remain as a Directive to them to judge who ſhall be Inhabitants.

Then I took Exceptions to the Order it ſelf, viz.

1. 'Tis not ſaid he was likely to be chargeable to the Pariſh, and this would have been an Exception during the Force of 14 Car 2.

Curia. But per Cur'. He is ſaid to be a poor Inhabitant, and upon Complaint of the Pariſh, and they would never complain of a rich Pariſhioner.

2. They do not ſay he was an Inhabitant of Wroughton, 'tis, That he lately intruded himſelf; now this Word lately, hath a very large Retroſpect, and may be twenty Years ſince, as we ſay lately deceaſed of one dead ten or twenty Years.

3. They do not ſay how long he had been an Inhabitant of Chiſtleton, or that there was any Reaſon to make ſuch Order.

Curia. Court. This is a Matter incident to their Office upon 43 Eliz. of which they are Judges: And would not quaſh the Order, but confirmed the ſame.

(291.) Grey *verſus* Munford.

Words. PRohibition prayed to a Suit in Court-Chriſtian, for theſe Words ſpoken to the Defendant: Thou art a Cuckold; for which Munford's Wife libels there, as an implicite calling of her Whore and Adultereſs, alledging Munford to have no other Wife; and a Prohibition was denied upon Debate by the whole Court.

Moore *verſus* Shutter. (292.)

CAſe for a malicious Proſecution of an Information in Mr. Aſtrey's Name, for ill Words and a Battery, and an Acquittal by Verdict; after Verdict pro Quer', 'twas moved in Arreſt of Judgment that the Action lies not, becauſe it was not an Indictment but an Information; and ruled it doth lie, and Judgment was for the Plaintiff by the whole Court.

Malicious Proſecution. *Vide ante* Caſe 122, 139, 245. *Poſt*, 435.

Garret *verſus* Shelſon. (293.)

CAſe for Words, Thou art a pitiful idle Raſcal, and not worth a Groat: Held actionable, being ſpoken of a Weaver, and alledged that he got his Living by buying and ſelling; becauſe the Words amount to as much as calling a Man a Bankrupt: And Judgment pro Quer'. Drake and Hill's Caſe in Sid. 424, 425. is the ſame Opinion.

Words. *Nelſon's Lutw.* 334. *Ante* Caſe 136, 280.

Gourney *verſus* Fletcher. *Entred* Trin. 34 Car. 2. B. R. Rot. 252. (294)

Fort. NB. I. 6.

ERror on a Judgment in Ireland in Caſe, declaring quod cum cepit & vi & armis detinuit quædam bona, &c. per quod perdidit venditionem: Held that the quod cum was naught, though in Caſe, becauſe the Point of the Action was the Taking and Detainer, and the per quod was only Damage; and ſo there was no direct Affirmation, and conſequently naught: And the Judgment was reverſed.

Declaration in Caſe. *Quod cum Vide ante* Caſe 17. & *poſt* Caſe 413.

Vernon

(295.) Vernon *verſus* Boverie.

Payment by Bill, *&c.*

ACTION ſur le Caſe for Money received to the Plaintiff's Uſe, and for Wares ſold, the Caſe was this: The Plaintiff having by his Factor ſold Goods to the Defendant, the Factor comes to the Defendant for his Money, who tells him he would give him a Note on his Banker, (viz. the Temples who broke, which occaſioned the Diſpute) and accordingly he writes a Receipt in Mr. Boverie's Book of Receipts, who tells him his Man ſhould go with him, and he does go; and the Bankers aſk him If he would have Money or Notes? He ſays he muſt pay it away, and thereupon takes two Notes, payable to the Perſons he was to pay it to, and receives of the Banker 7 s. Overplus, and within three Hours after the Banker breaks.

The Queſtion was, If the Merchant were ſtill liable?

And reſolved by the Lord Pemberton on the Trial of this Cauſe at Niſi prius, (all this Matter being diſcloſed on Evidence) that he was not liable.

'Twas agreed, That if the Banker had refuſed to pay him, the Merchant had been chargeable ſtill, notwithſtanding the Receipt given in the Merchant's Books: But here the Plaintiff had accepted the Banker for his Debtor, by receiving Part of the Money, and taking Notes in his Friend's Name; and ſo there was a Negotiation of this Matter, which diſcharged the Merchant Boverie; and ſo the Plaintiff became nonſuit. Shower pro Quer'.

(296.) Cookſey *verſus* Boverie.

INdebitatus Aſſumpſit for Wares ſold; the Caſe was: That the Plaintiff coming for his Money, gave a Receipt in the Defendant's Book, he ſaying, that at the Exchange he ſhould have his Money, or a Note from the Defendant's Bankers the Temples, accordingly Boverie's Man gets a Note from the Temples, and on the Exchange delivers it to the Plaintiff, who

goes to the Temples with this Note, and they having a Bill on the Plaintiff for a ſmall Sum, that Bill was delivered up, and ſo much Money endorſed on the Back of the Bill as paid: Held by the Lord Chief Juſtice Pemberton, That in this Caſe the Merchant was not chargeable, the Plaintiff having accepted the Banker for his Debtor, by diſcounting ſo much Money: And the Plaintiff in this Caſe was likewiſe nonſuit, I being of Counſel with the Plaintiff.

Note, In both theſe Caſes 'tis proved that the Plaintiffs might have had their Money of the Banker, although really they never received the Whole. The Temples breaking about one a Clock on Shrove-Tueſday.

Dominus Rex verſus Buckeridge. (297.)

MRs. Buckeridge being convicted of Forgery on a Trial here at the Bar, Mr. Serjeant Maynard having a Diſpenſation, came hither and offered Exceptions in Arreſt of Judgment, but was denied to be heard per tout le Court, unleſs his Client were preſent. Forgery.

Then he urged, that as Amicus Cur', he might inform them of an Error in the Proceedings, to prevent their giving a falſe Judgment at any Time; although he could not move in Mitigation of the Fine without his Client's Preſence; but the Court ſaid, That the Party ought to be preſent in both Caſes. *Amicus Curiæ.*

Dominus Rex verſus Hurſt. (298.)

HUrſt an Attorney of Canterbury, was indicted on 23 Eliz. for twenty Pounds a Month for not coming to Church: He pleads that he was a Proteſtant and not a Papiſt: Ruled by the Court on ſolemn Debate, that theſe Statutes extended to all Perſons of any Perſwaſion whatſoever; and held good, tho' he were an Inhabitant in Canterbury and the Indictment in Kent, for that an Indictment of ſuch a negative Offence, might be found any where in England. Nonconformity. Negative Offences.

(299.) Harwood & Ux' *verſus* Manlove. *C. B.*

Eſcape. *Vide ante*, Caſe 10. *infra* Caſe 300. & *poſt*, Caſe 391. *Nelſon's Lutw.* 26, 182, 402. 1 *Salk.* 272, 273, 347.

THIS was an Action of the Caſe for an Eſcape againſt the Warden of the Fleet, and upon Evidence before the Lord Pemberton, it appeared that the Debtor had from the Lord Keeper an Habeas Corpus, (which they call a Day-Writ) returnable three or four Days after its Teſte, and that though the Party were in Execution upon a Judgment in the Common Pleas, and that by Vertue of that Writ the Party went out to the Wine-Licence-Office, and not to any Inns of Court or Chancery, nor was he ever carried to the Lord Keeper's at all, and this was in Vacation-Time.

Chancery. Reſolved by the Lord Pemberton, That this Day-Writ is an Habeas Corpus out of Chancery, which they may ſend at any Time in Vacation as well as in Term; and ſo by Virtue of the King's Writ, the Party was brought out of the Priſon-Houſe, and well, that's juſtifiable; then all that Day ſo long as there's a Keeper with him he was in Cuſtody ſtill, and being returned at Night to the Priſon-houſe it's well enough, 'tis not an Eſcape, though he was not at the Lord Keeper's that's not to us; let the Chancery examine the Contempt in not obeying the Writ, by bringing the Priſoner's Body to their Court, and thereupon his Directions to the Jury were, If all that Day he were under the Cuſtody of a Baſton or Keeper.

And it being ſo left to the Jury, they found for the Defendant, with whom I was of Counſel.

(300.) Cooling *verſus* Glover.

Eſcape. *Vide ſupra.* & *poſt*, Caſe 391.

ACTION ſur le Caſe for an Eſcape permitted of the Lord Purbeck, *alias* Villers, It was tried before Mr. Juſtice Raymond and Mr. Juſtice Wythens, at Weſtminſter; Lord Saunders being ſick, and afterwards dying this ſame Term, the Records were altered and made Niſi prius Raymond & Wythens venerint and ſealed a-new.

The Evidence in this Cauſe was, that the Lord Purbeck ſuch a Day being in Execution at the Plaintiff's Suit, 10 Feb. did eſcape, and was abroad at the Play-houſe, and at Kenſington, and it happened, that that Day was in Term-time, and there was a Day-Rule for his coming abroad, and that he returned at Night as uſual: 'Twas held by thoſe two Judges that this was an Eſcape, for the Day-Rule is only Quod Mareſc. ducat ad barram; and though now they go about Town any where, yet the End of it originally was only for their coming to Weſtminſter about their proper Buſineſs, and not to go any where: then by Favour 'twas allowed they might go to any Inns of Court or Chancery, to ſpeak with Counſel and Attorney about their Concerns and Suits; but the letting them go abroad for their Pleaſure under Colour of this Day-Rule would be an Eſcape.

However, upon the Credibility of the Witneſſes 'twas left to the Jury, If the Lord Purbeck were at Kenſington that Day; and they found for the Defendant, conſidering the Hardſhip on the Defendant Glover, of 1123 l. Debt; whereas Purbeck being that Night, and yet in Cuſtody, and the principal Witneſs, viz. the Hackney Coachman who pretended he carried the Lord Purbeck to Kenſington, having been kept up cloſe in the Savoy by Cooling for five Days to make a Witneſs of him. Verdict for the Defendant Glover, with whom I was of Counſel.

Lampen *verſus Sir* Edward Deering *& al'*. (301.)

LAtitat is ſued out of this Court againſt the Defendants, being Commiſſioners of the Treaſury; thereupon Sir John May, the puiſne Baron of the Exchequer came into this Court, and ſhewed the red Book, which is an ancient Book, and reckoned a Record in their Court; wherein 'twas ſaid the Treaſurer ſhould have the Privilege of being ſued only in that Court; and on Motion it was read, and the Patent produced in Court under the Great Seal of England, which conſtitutes the Defendants, &c. and grants them the Office of Treaſurer of England, and thereon they demanded their Privilege might be allowed; Commiſſioners of the Treaſury's Privilege.

lowed; and after ſome Debate it was granted, the Court grounding it on a Record then before them.

Mr. Pollexfen urged that there ought to have been a Writ of Privilege brought, and the Sheriff would have returned ſomewhat of it, &c. but the Court ſaid there was a Record before them to judge upon: And accordingly 'twas allowed.

(302.) *Vide* 2 *Jo.* 208. *Poſt*, Caſe 308.

Verdon *verſus* Deaele *& al'*. *Entred* Hill. 33 & 34 Car. 2. Rot. 487.

TReſpaſs for falſe Impriſonment, the Defendants juſtified by Virtue of a Warrant from the Houſe of Commons; the Plaintiff replies, That at the Time of the Taking the Parliament was prorogued; and the Defendants rejoin and ſay, they had no Notice, and the Plaintiff ſays they had Notice, and thereon Iſſue is joined, and a Trial had at the Bar.

Iſſue. Notice.

Reſolved per Cur'. That whereſoever no Man is bound to give Notice, every Man is bound to take Notice; but yet reaſonable Time for Notice is required, nor are any Perſons required to take Notice where 'tis impoſſible to do ſo.

But on the Evidence here it appeared, that for three or four of the ſix Days the Defendants were told all along the Road, that the Parliament was prorogued by Perſons of good Credit; and the Jury gave 460 l. Damages pro Quer'.

(303.)

Weld *verſus* Chamberlaine.

Marriage. See 3 *Lev.* 376. & Stat. 1 *W. & M. cap.* 18.

ON a Trial before the Lord Pemberton, on an Iſſue of Marriage or no Marriage; the Evidence appeared to be this, That a Man having taken Orders according to the Church of England in former Times, and ejected in 1663. did contract them in theſe Words: I *A. B.* take thee *B. C.* for my eſpouſed, betrothed, wedded Wife, and will be thy eſpouſed, betrothed and wedded Husband until Death: The Parſon ſpeaking theſe Words, the Man repeating them after him, and the

Woman the like mutatis mutandis; and no Ring according to the Common-Prayer Book: But a Cohabitation as Man and Wife for ten Years afterwards.

Lord Pemberton did incline it as a good Marriage, there being Words of Contract de præſenti repeated after a Parſon in Orders; but upon Importunity of Counſel a Caſe was to be made thereof.

Hartup *verſus* Wardlove. (304)

Indebitatus Aſſumpſit.

ON a Trial: Held by Mr. Juſtice Jones, that an Indebitatus Aſſumpſit lies not againſt a Man where he hath received Money of the Plaintiff to lay out to a particular Uſe, and he hath laid out Part thereof accordingly; for then he ought to be called to Account for the ſame by Action of Account; but if none were laid out, there an Indebitatus Aſſumpſit lies to recover back the Money again; ſo if it were expended to another Purpoſe, for there the Sum is certain, and may be demanded as a Debt.

This was at *Guild-Hall* in my Lord *Saunders*'s Abſence by Sickneſs.

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Termino Trin.
35 Car. 2. B. R.

(305.) Traheere *qui tam, &c. verſus* Pearce.

Foreſtallers, &c.

DEBT for the Penalty for foreſtalling a Market, reciting the Act of 5 & 6 of Edw. 6. cap. 14. which was temporary, and then made perpetual by 13 Eliz. cap. 25. in theſe Words, An Act made 23 January; whereas in Truth 'twas the 30th of January, and the Roll being the 30th, the Queſtion was, If it ſhould be revived, being ſo miſnamed in the Act of Reviver? In Raſtal 'tis ſaid to be the 24th of January, in Keb. 'tis ſaid to be the 23. whereas the Roll ſaith the 30th, and the Act of 13 Eliz. recites and revives it as made the 23d of January.

Statute revived.

'Twas held by Jones, Raymond and Wythens, (Lord Saunders being ſick) that 'twas revived, the Title being right, and it being a beneficial Law, and no other Law againſt Regrators and Foreſtallers but that; and the Intent of the Law-makers being to revive it, they would not conſtrue it void.

(306.) *Raym.* 488, 489, &c.

Sands *verſus* Exton.

Admiralty.

SUggeſtion for a Prohibition was in this Cauſe allowed to be amended, and then moved again; whereon it appeared, that at the Inſtance of the King's Advocate in the Admiralty (upon a Warrant

of the King and Council for the Purpoſe) there was an Order to ſtay the Plaintiff's Ship till they gave Caution, not to go to ſuch and ſuch Places as are mentioned in the East-India Company's Charter, they being Infidel Countreys: And 'twas held by the Court, that a profert hic in Cur' is not neceſſary in a Suggeſtion; and ruled alſo, that there being no Libel or Suit in the Admiralty, there lay no Prohibition; for 'twas no Point of Jurisdiction: If they ſtop a Ship by Order and illegally, an Action lies; and what they had done is not in Execution of any Sentence, for there's no Suit depending; 'twas only in Purſuance of the King's Warrant, and a Prohibition was denied, tamen Quære; for in Caſe of a Probate of a Will, or granting Letters of Adminiſtration, many Times there's no Suit depending, no Libel or Citation.

Duke of Buckingham *verſus* Outlaw. (307.)

SCandal. Magnat. Motion to change the Venue upon the common Affidavit. Doubted per Cur', It hath been done on account of Intereſt and Unindifferency in a County, but not on the comm on Affidavit. Adjournatur. Venue changed. *Ante* Caſe 96, 200, 244.

Verdon *verſus* Deacle *& al'*. (308.)

Vide ante N°. 183.

THE Plaintiff having got a Verdict and Judgment as afore, Caſu 302. a Writ of Error is brought and allowed, and Bail put in, and Notice thereof to the Plaintiff; however, he took out Execution on his Judgment, and levied Money, &c. Now Motion was made to the Court for Reſtitution. Error. Execution.

'Twas held per Cur', That the Writ of Error is well enough brought, being a Writ of Error in an Action of Treſpaſs, Aſſault, &c. Impriſonment, tho' the Action was only of Treſpaſs and Aſſault, becauſe the Plaintiff had alledged in the Body of his Declaration an Impriſonment; and that 'twas well enough, though the Defendants themſelves had not given any Recognizance but only Bail: For though the 16th of Bail.

Car. 2. be, That no Writ of Error or *Superſedeas* thereon, ſhall be a Stay of Proceedings, unleſs Bail be put in according to the Statute of King *James*, (which is, That the Party ſhall put in Recognizance with ſufficient Sureties) the Practice being always only to put in Bail.

And Mr. Juſtice Raymond ſaid it had been ſo ſettled in this Court upon Debate; but it ſeems by the Practiſers, that the Defendant himſelf ought to give Recognizance in Caſe of an Ejectione firmæ.

In the principal Caſe Reſtitution was awarded.

(309.) *Dominus Rex verſus* Bynon.

Falſe Preſentment.

INdictment, for that the Defendant being returned, &c. ſworn one of the Grand Jury for the County of —— did make a Preſentment without the Aſſent of his Fellows, and delivered it among other Preſentments, in Form thus, We Preſent, &c. Held an Offence, though not ſaid in the Name of his Fellows, and denied to be quaſhed upon that Exception.

(310.) Howard *verſus* Richardſon. *Entred* Paſch. ult. Rot. 529, 530.

ERror on a Judgment in Com. Banco, Common Error aſſigned.

Variance.

Mr. Pollexfen ore tenus aſſigns for Error a Variance between the Original recited and the Declaration; (viz.) in the Original Property 10 s. in the Declaration Property 15 s. and ſo a Difference in the Value, which is naught.

Mr. Holt. That ought to have been aſſigned for Error upon Record, and then we might have had a Certiorari.

Mr. Pollexfen. That cannot be, 'tis true; that if an Error had been aſſigned in any Part of the Proceedings not recited, Diminution might be alledged, and thereupon a Certiorari ſhould go; but here you are concluded, for you have recited it ſo and ſo, which is wrong; indeed no Original is helped by the Statute, but a naughty one is not helped by any of the Statutes of Jeofails, except it be Matter of Form,

which reaches only to a Fault committed by the Clerk, in a Matter which his Client could not inform him in: But this is a Thing which the Clerk could not know but by the Party's Information, viz. The Value of the Goods. *Vide 6 Mod.* 264, 269, 270, *&c.*

Court. This is a Matter purely of Form, and want of Form is helped by the Statute after Verdict: Now that it is only Form and is not Substance, appears plainly, because 'tis no way material to the Purpose, and the same might have been omitted, it being Case: Judgment affirmed unless better Cause, &c.

Knightley *versus* Marrow. *Entred* Trin. 34 Car. 2. Rot. 472. (311.)

ERror on a Judgment in Com. Banco in Case for Words, A Priest gave him the Eucharist, and being sick he received from him extream Unction, and by Innuendo's applying it to the popish Usage: And says him to be a Justice of Peace, and Deputy-Lieutenant of the County, and at that Time standing for Election of Knight of the Shire to serve in Parliament. Words.

Mr. Pollexfen pro Quer' en breve de Error. The Word Priest cannot with an Innuendo be intended popish Priest, for in it self it intends and means a Priest according to the Church of England; for in our Statutes, and in our Liturgy and Books of Consecration of Bishops, Priests and Deacons, &c. and the Eucharist signifies the Sacrament of the Lord's Supper; and for extreme Unction it's not prohibited: 'Tis said in the thirty-nine Articles of our Church, to be a Sacramental, but no Sacrament; and there are two Places of Scripture from which weak Men may be induced to think it lawful: Our Church no where censures it, but only denies it to be a Sacrament. *Innuendo.* Priest.

Then supposing it to be an ill Thing, yet that will not make it actionable; a Papist signifies one that holds the Pope's Supremacy, and denies the King's, and therefore actionable; no Words about Religion were actionable, till certain Laws inflicted Penalties on certain Opinions; nor now can they be action-

able any further than the Penalties reach the Matter or Crime charged in the Words. Sir John Tasborough's Case, 2 Roll. Rep. 43. 1 Abr. 56. the same Case.

Mr. William Finch. These Words do sufficiently describe a Papist, and a By-stander would understand by the same nothing else; and suppose a Man were indicted for being a Priest, this would be full Evidence to convict him; and upon Proof of his officiating as a Priest, his taking Orders should be presumed.

'Twas agreed by all, That if several Words are laid to be spoken at one Time, and some of them are actionable, and others not so, though entire Damages are given, yet it shall be well enough, for they shall be intended to be given for those Words that are actionable; but if the Words are laid to be spoken at several Times, though all in one Day, as that such a Day, Year and Place he said thus: — Et postea scilicet eisdem die Anno & Loco he said — and intire Damages are given, if any of the Words are not actionable, 'tis naught.

But as to the principal Case, Adjournatur.

(312.) Pepys *versus* Wyne. *Entred* Hill. ult. Rot. 229.

Declaration, how it relates.

CAse for scandalous Words, laid to be spoken the 28th of January, ult. and the Declaration is of Hillary Term generally, without any Special Memorandum of the Time of filing the Declaration.

Mr. Thompson in Arrest of Judgment. It appears by the Record they had no Cause of Action at the Time of the Commencement of the Action, the Declaration being generally of Hillary Term, which is the first Day of the Term; Quære; Cur' dubitavit. Some say a Special Memorandum ought to be made thereof as to the Time, others say not: Some say the Action commences from the filing of the Bail in Case it be by Bill, but in Case of Original it's to be accounted from the Day of suing it, which is a particular certain Day; but Bail is now filed generally of such a Term, and no Day specified as formerly.

In Michaelmas Term following Mr. Holt moved it again, that the Proceedings here is by way of Bill, and no Special Entry of the filing of the Bill, it muſt then be before the Cauſe of Action commenced, for that it ſhall be intended to be a Bill of the firſt Day of the Term.

Mr. Bonython. 'Tis well enough, and ſo was it ruled in Manne and Adam's Caſe in Sid. 432. and in Proger's Caſe ibidem; and in Bateman and Porter's Caſe in my Lord Saunders's Time; and in Dobſon *v.* Bell, Trin. 28 Car. 2. and it hath been ruled good, both on Evidence and on Motions in Arreſt of Judgment.

But Mr. Holt urged it could not be good without a Special Entry as to the Day in the Memorandum, and cited a Caſe here in Trin. 27 Car. 2. (entred in this Court Mich. 26 Car. 2. Rot. 1591.) Hutchinſon qui tam, &c. *v.* Thomas. 'Tis in 3 Keb. 426. Information of that Term generally: Defendant pleads, That before the exhibiting of that Information there was another exhibited (viz.) the 23 of October, and held an ill Plea: Wythens held it ill in the principal Caſe, but the Lord Jefferyes, and the two other Judges held it well enough; and accordingly Judgment was pro Quer'.

Copleſtone *verſus* Copleſtone. (313)

Andamus was prayed by Mr. Wallop to the Eccleſiaſtical Court, for to grant Letters of Adminiſtration to Sir John Copleſtone, of the Goods of his Son Pawlet Copleſtone, his Siſter ſuing there for it; and granted per Cur', for that the Father ſhall be Adminiſtrator to his Son before the Siſter. Adminiſtration to the Father.

Eaton *verſus* Sherwin. (314)

Caſe upon a Special Promiſe for Tithes for ſix Years; on a Motion in Arreſt of Judgment 'twas held good, though ſuch an Agreement be not a good Leaſe, nor doth any Intereſt paſs by the ſame in the Tithes; yet 'tis good to ground an Aſſumpſit, and the Action lies. Judgment pro Quer'.

(315.) Croſſe *verſus* Lenthall.

Eſcape. ACTION againſt the Defendant, as Superior, and having the Inheritance of the Office of Marſhal, for an Eſcape ſuffered by Cooling the late Marſhal, being inſolvent.

Non reſpondeat Superior. Mr. Medlicot moves, That the Defendant being under the Controul of this Court, having an Office here, might bring his Deeds into Court to ſhew his Title.

But denied per Cur': For in Caſe of a Vacancy, and a new Marſhal be offered to be ſworn by a Grant from any Perſon, we demand to ſee his Title, that a wrong Officer may not be ſworn; and then the Grant is inrolled: So that it doth appear by that Record who hath the Inheritance, and you know that; but there's no Reaſon why we ſhould force him to ſhew his Title only to ſubject himſelf to an Action; and you know, that if any one have an Eſtate for Life in the Office, he who hath the Inheritance is not chargeable; the Superior then ſhall not anſwer for the ſame: Take your Courſe.

(316.) Straker *verſus* Baynes.

PRohibition was prayed, and a Rule for it niſi, &c. and all Things to ſtay in the Interim: And the Rule made abſolute for a Prohibition the laſt Hillary Term, and a Prohibition then went: Reſolved that the ſix Months for the Suggeſtion, ſhall be reckoned only from the Time of the iſſuing of the Prohibition, and no longer; the Suggeſtion ought to be entred in the Office, or elſe a Conſultation ſhall go.

Tueſday being the 19th of *June*, about ten a Clock in the Forenoon, the Lord *Saunders* died at his Houſe at *Parſon's-Green*..

Stopford *verſus* Haughton. *Entred* Paſch. 34 Car. 2. Rot. 532. (317.)

IN Arreſt of Judgment. Mr. Holt took Exception that the Sheriff had returned a Panel of twelve only; and held well enough, for the Statute of Weſtm. 2. ſays, The Sheriff ſhall return no more than twenty-four; and does not ſay he ſhall not return leſs; and before that Statute the Number was indefinite and not aſcertained. Sankell *v.* Stocker, 1 Cro. 223. and the ſame in Jones 245. was cited. Jurors.

Butler *verſus* Gorſt. *Entred* Paſch. ult. Rot. 145. (318.)

THE Defendant pleads quoad Executionem as to his Perſon, that he was diſcharged by the Act for Relief of the poor Priſoners, and ſays not he was a Priſoner the 29th of May, but only ſix Months before; held naught: Beſides, he doth not ſay at whoſe Suit: Alſo held naught, and Judgment pro Quer'. Poor Priſoners.

Copping *verſus* Slaymaker. *Entred* Hill. ult. 847. (319.) *Vide ante* 2 *Jo.* 229.

COvenant. And on a fault in the Declaration there's Judgment Quod quer' nil capiat per Billam; then another Action is brought, and the former Judgment pleaded in Bar, and cited Fenne's Caſe, 6 Rep. Dyer 371. Mod. Rep. 207. On the other Side was cited Ingram and Bray (in 3 Keb. 785.) *v.* Trevill. Adjournatur.

Hayman *verſus* Chope. (320.)

IN ejectione firmæ, the Party ought to enter into a Recognizance himſelf, for to proſecute his Writ of Error with Effect; without which it ſeems the Writ of Error and Superſedeas ſhall be no Stay of Proceeding, but Execution may be ſued notwithſtanding by 16 & 17 Car. 2. and ſo ruled in the Caſe of Cole and Leviſton in this Court, and the Caſe of Forteſcue and Abbot:

Abbot: In this Caſe the Plaintiff in the Writ of Error is the Tenant of the Land, and therefore the Tenant is ſuppoſed to be ſufficient Security; and therefore his Recognizance is enough without Bail, but the Practice hath been otherwiſe, that Bail only hath been given, and no Recognizance by the Party, becauſe of the Inconvenience of the Party's coming to Town.

Mr. Tremayne prayed Time till the next Aſſizes for the Plaintiff in the Error, to give ſuch Recognizance before the Judge; and ſaid 'twas ſo done upon Motion in Forteſcue and Abbot's Caſe.

(321.)

Anonymus.

IN Treſpas when a Defendant hath pleaded a Title, a Replication de injuria ſua propria abſque tali Cauſa is ill.

Bail. A Scire facias lies againſt the Executor of Bail, as well as againſt the Bail themſelves.

Oyer. By the Courſe of the King's Bench, 'tis ſaid a Man may crave Oyer of a Deed after Imparlance as it's ſaid, but not in the Common Pleas: Quære.

Imparlance. The Reaſon why upon a Special Capias in Com. Banco, the Defendant ſhall be forced to plead the ſame Term without the Benefit of an Imparlance is, becauſe the whole Caſe is ſet forth in the Writ, unleſs it be Time and Place; and an Imparlance is only to enable the Party the better to inform himſelf of the Cauſe of Action, in order to his Defence, which he is ſufficiently informed of by the Special Capias, and ſo needs not an Imparlance.

(322.)

Dominus Rex verſus Lord Ruſſel.

Treaſon. Challenge. DEfendant tried at the Old-Baily for High Treaſon, and upon his Trial he challenged a Juror in London for not having a Freehold: And reſolved by the Lord Pemberton and the other ten Judges then preſent, that want of Freehold was no Challenge in a Trial for Treaſon, much leſs in a Corporation. See

the Trial in Print, with the Arguments of the Counſel, and Opinions of the Judges in the Point, *&c.*

This Vacation Sir *Thomas Robinſon*, one of the Prothonotaries died, and the Lord *Pemberton* had the Sale of the Place, and was afterwards put out; and Mr. Juſtice *Jones* ſworn Chief Juſtice of the Common Pleas in his Room; and Sir *George Jefferyes* Lord Chief Juſtice in *Saunders*'s Place; and *Holloway* and *Walcot* were made Judges of the King's Bench.

DE

Termino Mich.

35 Car. 2. B. R.

Dominus Rex verſus Gibbons. (323.)

THE Defendant was committed by one of the Secretaries, for Treaſon, to the Gatehouſe, and at the Michaelmas Seſſions at the Old-Baily, I offered to make his Prayer for him (according to the 31 Car. 2. of Habeas Corpus) to be tried or bailed; but ruled by the Lord Jefferyes, that the Gatehouſe is not a Priſon within their Juriſdiction; though the Words of the Act are. At the next Seſſions of *Oyer* and *Terminer*, or general Gaol-delivery; and they then ſate at the Old-Baily as Commiſſioners of Oyer and Terminer, and the Words of the Statute are in *Habeas Corpus.* Gatehouſe.

in the Disjunctive, but yet resolved that none are there within the Benefit of it but those in Newgate; although the Judges at the Old Baily have a Kalendar of the Prisoners in the Gatehouse.

Resolved in the Lord Shaftsbury's Case the same of the Tower. (Sed hoc, nec Lex nec Ratio probat.)

(324.) *Dominus Rex versus Mayor of* Southmolton.

Mandamus to admit an Appeal.

MAndamus was prayed by Mr. Pollexfen, to the Mayor of the Town of Southmolton in Devon, for to admit an Appeal to the Sessions there, from a Conviction for a Conventicle, made before a Justice of the Peace of the Corporation: And the Question was, To whom the Appeal should be, to the Sessions of the Town, or of the County?

'Twas held it shall be to the Town; for the Statute saith, The Certificate of the Conviction shall be to the Sessions of the County or Place, i. e. if by a Corporation-Justice, then to the Sessions of the Place; if by a County-Justice, then to the Sessions of the County: Now though the Words which give the Appeal are general, yet they shall be construed as the rest of the Act will bear; 'twould be idle to have the Certificate of the Conviction to the Sessions of the Place, and the Appeal to the County-Sessions; and though in some Places the Appeal will be to the same Magistrate who made the Conviction, by Reason of the Fewness of the Number of Justices in some Towns; yet 'tis not to be presumed, that they who serve their King and Country for nothing will do otherwise than Right; and the first Conviction is purely the Opinion of the Justice, but the Appeal is tried by the Jury.

Of which Opinion were all the Court, and a Mandamus was granted.

(325.) Neale & Ux' *versus* Mallard.

Words.

CAse for scandalous Words spoken of the Plaintiff's Wife, (viz.) I have lain with her and pockified her. Held actionable.

Sir John Auſtin *verſus* Culpepper. (326.)

CAſe wherein the Plaintiff declares, That whereas there was a Cauſe depending in the Court of Chancery between the ſaid Parties, and Witneſſes ſworn and examined on the Behalf of the Plaintiff; the Defendant to ſcandalize the Plaintiff, did forge and counterfeit an Order of the ſaid Court of Chancery, that Sir John Auſtin ſhould ſtand committed, unleſs Cauſe, &c. and this did cauſe to be written and publiſhed as an Order of the ſaid Court; and afterwards (viz.) the ſame Day, did make the Picture, or Repreſentation of a Pillory, and under the ſame did write theſe Words, For Sir *John Auſtin* and his ſuborned, forſworn Witneſſes, *&c.* Forging an Order of Chancery, and libelling.

Mr. Pollexfen moves in Arreſt of Judgment. This Declaration conſiſts of two Parts (viz.) the Forgery of the Order, and the Figure with the Words Underwritten, and the Damages are intire; now if either of them be not actionable, the Plaintiff ought not to have Judgment; as ſuppoſe a Man ſhould bring an Action for malicious Proſecution of a Crime, and for Words imputing the ſame Crime, and Damages given intirely; if the Words happen not to be actionable, 'twill be naught; then for the Words themſelves if they had been ſpoken, they had not been actionable; for to call a Man Forſworn is not actionable, unleſs it do appear that 'twas in a Court of Juſtice: Now the Forgery it ſelf is not actionable, for he lays no Damage or Trouble accrewed to him thereby.

Mr. Holt econtra. 'Tis all but one complicated Act, and the Action is for Libelling him in that manner: Now ſuppoſing the Words themſelves were not actionable, yet being publiſhed by way of Libel they are ſo: There was the Caſe of Collonel King *v.* Lake, before my Lord Hale, where the Action was for printing a Petition, which he delivered to ſeveral Members of the Houſe of Commons (having a Complaint there againſt him) containing ſcandalous Matter concerning him, as that he was diſhoneſt and unjuſt, and had abuſed him; and yet none of theſe Words Libel.

printed would have born an Action if ſpoken; yet the Action was held to lie, and Judgment affirmed upon a Writ of Error; and an Action lies for a Libel as well as an Indictment; and a Libel may be either per Scripta or per Signa: And here was the Caſe of Mingey and Moodie, where an Action was brought for Riding Skimmington (as 'tis called.)

Per Curiam. It is but one complicated Act, and an Action lies for ſcandalizing a Man by writing thoſe Words, which will not being ſpoken bear an Action: Here was the Cauſe of Sir William Bolton *v.* Deane, for carrying a Fellow about with Horns, and bowing at his Door, &c.

Et per tont le Court. Judgment pro Quer'.

(327.) Atkins *verſus* Tankard.

Sheriff's Return.

CAſe againſt the Sheriff of Kent, quod cum a Fieri facias was directed and delivered to him at the Plaintiff's Suit againſt J. S. that he to defraud the Plaintiff of his juſt Debt falſo & militioſe retornavit quod fieri fecit ad 40 l. and that he had no more, &c. Ubi revera he had to the Value of the Debt. After Verdict pro Quer'.

Mr. Holt took Exceptions in Arreſt of Judgment, for that 'twas Retornavit apud Maidſton in Kent, whereas 'tis no Return but here in Court in Middleſex. Per Cur', held good enough, for the Plaintiff hath his Election to bring his Action either here or there, and the Court is there although the Return be of Record only here: And Judgment was pro Quer'.

Election.

(328.) *Mayor of* London, *by Commiſſion.*

THis being *Monday* the 29th of *October*, Sir *Henry Tulſe*, with the new Recorder Sir *Thomas Jenner*, came into the *Exchequer*, where was read a Writ directed to the Chief Baron and others, to ſwear Sir *Henry Tulſe* Mayor of the City of *London*, *in manibus noſtris modo exiſtentem vigore Judicii ſuper Quo Warranto in Curia noſtra coram nobis nuper reddit.* with Letters Patents thereunto annexed, conſtituting him Mayor of the City, *habend. Officium illud quam diu nobis placuerit*;

London.

cuerit; and he took the Oath of Mayor there, and the Corporation-Oaths, *&c.* Then he came to the King's Bench, and there the Recorder read a Warrant of Attorney written in Parchment: *Civitas London ff. Major Civitat. præd. conſtituti & in loco ſuo ponit Willielmum Liveſay Attornatum ſuum ad omnes & omnimodas actiones ſectas & Querelas pro eadam Civitate proſequend. & defendend*, and then prayed it might be filed; whereas it was formerly *Major Communitas & Cives Civitat. præd. ponunt loco ſuo, &c.*

Parkhurſt *verſus* Shefton. (329.)

TRover and Converſion de uno pari nittarum Anglice a Suit of Knots; after Verdict 'twas moved in Arreſt of Judgment that 'twas too uncertain; and of that Opinion was Mr. Juſtice Wythens, but my Lord Jefferyes, Holloway and Walcot, thought it as good as duodecim ovibus & agnis, which hath been held good enough: And ſo Judgment was given pro Quer'. Trover *Nittarum.* 1 *Mod.* 46. *Vide* 1 *Keb.* 390. 3 *Keb.* 253.

Mallowne *verſus* Fitzgerard. *Entred* Mich. Ult. 260. (330.) *S. C.* 3 *Mod.* 28.

WRit of Error out of Ireland, on a Judgment in Ejectment: Special Verdict, finding John Fitzgerard ſeized in Fee of the Lands in Queſtion, makes a Settlement of them on himſelf for Life, on Katherine his Daughter, and the Heirs of her Body lawfully begotten; and in default of ſuch Iſſue on Letitia, and the Heirs of her Body lawfully begotten, Remainder on his own right Heirs; with a Proviſo, That if Katherine marry without the Conſent of three of his five Truſtees, or a Man not named Fitzgerard, or a worthy Gentleman that ſhall not immediately aſſume or take upon him the Name of Fitzgerard, &c. That Katherine was Heir at Law; that at fourteen Years of Age had Notice per diverſas perſonas of her not marrying without the Conſent of the Truſtees, or three of them; that at fifteen ſhe married one Villers, not of the Name of Fitzgerard, and that he did not immediately aſſume the Name of Fitzgerard, & ſi, &c. An Intail *ſub modo.* See 2 *Saund.*

Mr. Holt for the Plaintiff in Error argued: The Quære's there were five, I shall make but three.

Notice. First, Whether Notice be necessary? And I hold 'tis not.

1. Because the Father hath not made Notice to be necessary; he who had the Fee-simple might dispose of it over to another; and here when the Daughter claims by the Provision of the Father, and not of the Law, she must take it in such Form, and with such Provision as the Father gives it: As for the Case of the Mayor of London *v.* Alford, 1 Cro. 576. that was a Condition, and to defeat an Estate; but this is a Limitation, and by way of Use, and always favoured.

2. By the same Means, and for the same Reason that she must take Notice of what Estate she had, she must take Notice of the Limitations and Qualifications of such Estate. Dyer 192. pl. 23. The collateral Limitation she is bound to take Notice of, as well as of the Natural Limitation of her dying without Issue.

3. No Person is appointed to give Notice, and consequently she is bound to take Notice, 4 Rep. 80. Guilet *v.* Sans. 1 Cro. 391.

Then 4thly, The Defendant's Wife hath the same Means to come to the Knowledge of this, as the in Remainder, that is to take Advantage of it. 2 Cro. 422. Holmes *v.* Twist, Hob. 51. Jones 207. Jacob *v.* Cooke.

The first Objection is, The Case in 2 Cro. 56. Curtis *v.* Wolvaston.

I answer, That Case is not like to this, the Condition there is to pay a Legacy, which is a Thing payable only on Demand; but if it had been a Sum in Gross, he had been bound to pay it without Demand: Vide Slaning's Case, Poph. 104.

2d Objection, Francis's Case, 8 Rep.

I answer, There's a great deal of Difference between this and that, there was a Proviso, if he did not disturb the Executors, there he did not know by that Deed who were his Executors; besides, that Resolution is collateral to the Point in Judgment, which was upon the Pleading that there was no special Act of Disturbance alledged, but only Words; and

and as to this I muſt put the Caſe of Williams and Fry, which ſee in Mod. Rep. in Siderfin, and in Keble. *Raym.* 236. 1 *Mod.* 86, 87, 300, &c. 2 *Keb.* 756.

Some will ſay, that in Francis's Caſe the Settlement is made on the Heir at Law, as in our Caſe, but in Fry and Porter's Caſe 'tis otherwiſe: But that is not the Reaſon given in Francis's Caſe, 1 Roll. Rep. 470. Peck *v.* Ingram. There's a Privity between the Heir and Anceſtor, and certainly Privity will ſignify nothing if the Heir ſhall not take Notice of the Anceſtor's Acts. Spring *v.* Lady Ceſar. Jones 389. 1 Roll. Rep. 469. Winch 109.

Then ſuppoſing Notice neceſſary, here is ſufficient; ſhe was told ſhe muſt marry with ſuch a one's Conſent, and one of ſuch a Name, elſe her Eſtate would be loſt: 'Tis true, no Perſon concerned did tell her of it, but Notice any way is ſufficient; a Report is enough, ſhe was acquainted with the Penalty; but I conceive no Notice neceſſary in the Caſe.

Mr. Herbert econtra. This Proviſo is in Reſtraint of Marriage, which by the Civil Law, and the Wiſdom of moſt Nations is reckoned void. Dyer 343, 115.

'Twas his Mind Notice ſhould be given: Conditions are private Laws, and all Laws derive their Juſtice from this, that they are known. 1 Inſt. 226.

There are but three Caſes where Notice is not neceſſary. 1. Either in Caſes of Conditions precedent, there Want of Notice will not excuſe. 2. Where the Things that Notice is required of be of a publick Nature. 3. Where the Party impoſes the Thing on himſelf: Our Caſe comes within neither of thoſe; here the Feoffees or Truſtees, might and ought to have given Notice: The Notice that is found is per perſonas diverſas, and not ſaid who they were; nor that the Names of the Truſtees were told her. 1 *Sid.* 36. 2 *Sid.* 115.

The true Queſtion here is, Whether there be not a Difference between one that is Heir at Law, and a Stranger in this Caſe? For a Stranger cannot take but he muſt be ſuppoſed Conuſant of the Conveyance by which he takes, and conſequently of the Conditions and Limitations annexed to his Eſtate; but the Heir at Law only inquires if his Anceſtor were ſeized, and if he be dead, knowing that then of Courſe it deſcends to him as Heir, and is not ſuppoſed to take Notice

Notice of any Eſtate by Deed, and therefore Notice ſeems neceſſary to him.

(331.) —— *verſus* ——

London. CAſe on the general Iſſue, tried before the Lord Jefferyes at Guild-Hall, wherein the Plaintiff declares as Leſſee from the City of London, by the Name of Mayor, Commonalty and Citizens of London, for a certain Toll due at Fleet-Ditch, upon the Act of rebuilding the City of London.

Toll.

Challenge to the Array. Mr. Serjeant Maynard makes a Challenge to the Array, for that the Panel was made by Peter Daniel and Samuel Daſhwood, who were Freemen of the ſaid City, and ſo Parties to the Suit.

Mr. Holt prayed the Challenge might be quaſhed, for that the Sheriffs were now by Patent as other Sheriffs, and not Freemen of the ſaid City; and the Panel was made by them the 23d of October laſt, ſince the Judgment in the Quo Warranto.

Lord Chief Juſtice ſaid, Brother Maynard, you muſt prove them Freemen, I think them no more Freemen than every Body elſe, for I hold the Corporation abſolutely diſcharged by the late Judgment in the King's Bench; ſo he over-ruled the Challenge.

Afterwards the Plaintiff offered in Evidence the printed Statute for rebuilding the City, but diſallowed by the Lord Chief Juſtice, for that 'tis no general Law no more than primo Eliz. about Biſhops, Parſons, &c. Beſides, an Act may be general in ſome Parts, and particular in others; and it can never be reckoned general in this particular, whereby it veſts a Toll in the Mayor, Commonalty and Citizens of London; and for that of Party-Walls, it hath been read in Evidence on ſuch Actions, but never when Exception was taken thereunto: 'Tis true, ſometimes they have brought general Indebitatus's for Money laid out on Party-Walls, but moſt Times they declare on the Statute.

See 1 *Sid.* 356.

And at laſt a Juror was withdrawn by Conſent.

Dominus Rex verſus Waters. (332.)

Information for uſing a Trade, *&c.*

See of Indictments for this. *Ante* Caſe 141, 218.

PLacita coram Domino Rege apud Weſtm. de Termino Sanctæ Trin. Anno Regni Domini noſtri Caroli Secundi nunc Regis Angliæ, &c. 35 Int. Placita Regis.

Berks ſſ. Memorand. quod Samuel Aſtry Arm. Coron. & Attornat. Domini Regis in Cur. ipſius Regis coram ipſo Rege qui pro eodem Domino Rege in hæc parte ſequitur in propria perſona ſua venit hic in Cur. Dict. Domini Regis coram ipſo Rege tunc & ibidem & exhib. quandam informationem verſus Willielmum Waters de Maidenhead in Comit. Berks Yeoman, quæ quidem informatio ſequitur in hæc verba.

Memorand. quod Samuel Aſtrey Arm. Coron. & Attornat. Domini Regis in Cur. ipſius Regis coram ipſo Rege qui pro eodem Domino Rege in hac parte ſequitur in propria perſona ſua venit hic in Cur. dict. Domini Regis coram ipſo Rege apud Weſtm. Die martis prox. poſt quinque ſeptimanas Paſch. iſto eodem Termino & pro eodem Domino Rege dat. Cur. hic intelligi & informari quod Willielmus Waters de Maidenhead in Com. Berks Yeoman qui 12°. Januarii Anno Regni Domino Eliz. nuper Reginæ Angliæ, &c. legitime non uſus fuit nec exercuit aliquam artem myſterium ſine manualem occupationem infra hoc Regnum Angliæ vel Dominior. Walliæ, poſtea ſcilicet primo Die Decembris Anno Regni Domini noſtri Caroli Secundi Dei Gratia Angliæ Scotiæ Franciæ & Hiberniæ Regis Fidei Defenſor', &c. 33°, & continue poſtea uſque diem exhibitionis hujus informationis ſcilicet per ſpacium quinque menſium integror. & amplius vi & armis, &c. apud Maidenhead prædict. in Com. præd. illicite injuſte & pro lucro ſuo proprio erexit Anglice hath ſet up uſus fuit & exercuit artem & myſterium ſive manual. occupationem mercator. Anglice of a Mercer exiſtent. art. myſter. ſive manual. occupation. uſitat. & occupat. infra hoc regnum dict. 12°. Die Jan. anno Regni dict. Dominæ Elizabethæ nuper Reginæ Angliæ, &c. quinto ſupradict. in qua quidem Arte myſterio ſive manual. occupation. mercator. præd. idem Willielmus non educatus fuit ut apprenticius per ſpacium ſeptem annor. contra formam Statut. in hujuſmodi Caſu edit. & proviſ. ac contra pacem dict. Domini Regis nunc Coron. & dignitatem ſuas, &c. unde idem Coronator & Attornatus dict. Domini Regis pro eodem Domino Rege petit adviſamentum curiæ hic in præmiſſis ac debit. legis proceſſus verſus præfat. Willielmum Waters in hac

hac parte fieri ad reſpondend. dict. Domino Rege de & in præmiſſis, &c. per quod præceptum fuit Vicecom. præd. quod non omittat, &c. quin venire faciat eum ad reſpondend', &c. Et modo ſcilicet die Veneris prox. poſt craſtinum Sanctæ Trinitat. iſto eodem Termino coram Domino Rege apud Weſtm. venit præd. Willielmus Waters per Robert Selyard Attornat. ſuum, & habit. auditu informationis prædict. dicit quod ipſe idem Willielmus non eſt inde Culpabilis, & de hoc ponit ſe ſuper patriam, Et Samuel Aſtrey Arm. Coronat. & Attornat. Domini Regis in Cur. ipſius Regis coram ipſo Rege qui pro eodem Domino Rege in hac parte ſequitur ſimiliter, &c.

Ideo veniat inde Jur. coram dicto Domino Rege a die Sanctæ Trinitatis in tres ſeptimanas ubicunque, &c. Et qui nec, &c. ad recogn. &c. quia tam, &c. idem dies dat. eſt tam præfat. Samueli Aſtrey Arm. qui ſequitur, &c. quam præfat. Willielmo Waters, &c. ad quas quidem tres ſeptimanas Sanctæ Trinitatis coram dicto Domino Rege apud Weſtm. veniunt tam præfat. Samuel Aſtrey Arm. qui ſequitur, &c. quam præd. Willielmus Waters per Attornatum ſuum præd. Et vicecomes retorn. nomina duodecim Jurator. quorum nulli, &c. Ideo præceptum eſt Vicecomiti quod non omittat, &c. quin diſtringat eos per omnes terras, &c. Et quod de exit', &c. Et quod habeat corpora eorum coram dicto Domino Rege a die Sancti Michaelis in tres Septimanas ubicunque, &c. vel coram Juſticiariis dict. Domini Regis ad Aſſizas in Com. Berks capiend. aſſignat. ſi prius die martis ſeptimo die Auguſti apud Abingdon in Com. Berks præd. per formam Statut', &c. ven. pro defectu Jur', &c. Ideo Vicecom. habeat corpora, &c. ad Recogn. in forma præd. Idem dies datus eſt tam præfat. Samueli Aſtrey Arm. qui ſequitur, &c. quam præd. Willielmo Waters, &c.

On this Information there being a Verdict againſt the Defendant for the five Months,

Mr. Banniſter moved in Arreſt of Judgment, and the Exception he took was, That the Offence ought not to be proſecuted here, but before Juſtices of Oyer and Terminer, or Peace, or Seſſions, according to the 31 of Eliz. cap. 5. and for that did urge the Caſe of Kenne and Drake, about the Trade of a Spurrier, in 2 Cro. 85. where the Opinion of the Court ſeemed ſo; and the Caſe of Shoyle *v.* Taylor. 2 Cro. 178. that it lay only in Middleſex where the Offence was committed; and the Caſe of Daviſon *v.* Barber, in Hob. 183, 184. and the Caſe of Nevil *v.* Wood, in Hob. 327. and

in the Caſe of Sir Clement Clarke, and Foley, in my Lord Hale's Time in this Court, where 'twas adjudged, that ſuch Suit would not lie here, for the Party ought not to be drawn out of his County to anſwer ſuch an Offence as this.

I being of Counſel for the King in this Cauſe, anſwered to that of Kenne and Drake, 2 Cro. 85. That there was only an Opinion of two or three Judges upon firſt opening, and they ſaid they would adviſe, and there was a Curia adviſare vult, and the ſame Caſe is afterwards cited in 2 Cro. 178. by the Name of Bean and Drage, in this very Court, and there ſaid to have been adjudged for the Plaintiff.

As for the Caſe of Shoyle and Taylor, Mr. Banniſter wilfully miſtook it, for it was expreſly adjudged that it did lie, and that Judgment was afterwards affirmed upon a Writ of Error; and that Caſe is ſo far from anſwering the End he cited it for, that it is directly againſt him; there 'tis reſolved that there's no Difference between other Counties and this of Middleſex; and ſurely it cannot be pretended that the Court of Exchequer hath the Power of Seſſions here in Middleſex, as this Court hath; and therefore as to them Middleſex is all one with another County, and if they can hold a Plea of this Matter in Middleſex, they may in any County, for they are neither Oyer and Terminer, nor Peace nor Seſſions, which are named in 31 Eliz. And if they may, ſure this Court may, which is the only proper Court for Suits on Penal Laws; and in that Caſe there's a good Reaſon given for their Judgment, which will hold in this, viz. that in 31 Eliz. there are no negative Words in it, and then being an Affirmative it ſhall not take away the Juriſdiction of this Court, which a precedent Law gave it; as this of the 5th of the Queen doth by this Clauſe, To be recovered by Bill, Plaint or Information in any of the King's Courts of Record.

Then for Daviſon and Barber, Hob. 185. that's barely an Opinion of the Lord Hobart, who was often ſingular in his Opinion, and there's no Judgment in the Caſe.

And for Nevill and Wood's Caſe, that was in the Common Pleas, and this Matter pleaded, yet I don't find any Judgment there neither; and if there were,

were, it cannot be Law; for that Debt will lie here above can be no great Queſtion, nor ever was it; ſo it can never be intended that the Statute of 31 Eliz. ever deſigned to give the Juſtices of the Peace a new Jurisdiction, viz. to have Conuſans of Pleas of Debt; and ſo that not being ſueable below, muſt certainly be ſo here or no where.

Then for Sir Clement Clark's Caſe, it was an Information upon this Statute, and about ſome Ironworks; it was tried at the Bar, and Mr. Foley found Not guilty, it being a qui tam, and 200 l. Coſts given, which occaſioned the bringing of a Writ of Error; but there was never any Judgment given therein to this very Day.

Caſes for me there are enough. 2 Bulſt. 186. inter Dominum Regem & Allen v. Foley. Information entred Mich. 11 Jac. B. R. int. Record. Regis Rot. 23. which certainly muſt be intended the Crown-Office: Now that was the Caſe of a common Informer pro lucro ſuo privato, and yet no ſuch Doubt made, though there were many other Queſtions in the Caſe much debated. This Statute, if it hath any Effect to take away the Jurisdiction of Weſtminſter-Hall in this Matter, muſt reach to all Actions as well as Informations, for the Words of the Statute are, All Suits, &c.

In Hodges's Caſe in Style 383. there was a Judgment given in Newberry, and afterwards reverſed on a Writ of Error brought here in this Court; and by Rolle reſolved, The Action ought to be brought in ſome of the King's Courts here.

In Miller's Caſe, 2 Cro. 538. 'tis adjudged, that the Information ought to be here above in London, and reverſed for this Cauſe; here the King's Attorney General is preſent to acknowledge or deny, as Occaſion requires.

Wade qui tam, &c. v. Ripton in Sid. 303. An Action here, the Fact in Cumberland, and a Special Demurrer for that very Cauſe; and the Demurrer over-ruled; and held it lies here.

Barnaby and Goodall's Caſe, 3 Cro. 737. Error of a Judgment in Bury, on an Information on this Statute, and reverſed, becauſe (ſays the Book) Informations on Penal Laws ought to be brought here in

Weſtminſter-Hall; and there is cited the Caſe of Gregory and Blaſhford to be ſo adjudged, which Caſe is in 6 Rep. 19. this was in 42 Eliz. after the making of the Act.

Then there is in 1 Jones 193. the Reſolution of the Judges on the Statute of 21 Jac. concerning Penal Laws, which is to the ſame Effect with that of 31 Eliz. and rather larger, and there expounded thus, That if a Penal Law give Liberty to ſue for the Penalty by Information, Debt, Plaint, &c. in any Court of Record, i. e. in any of the Courts at Weſtminſter; and upon thoſe Laws Informations may be ſued here, and are not reſtrained by the ſaid Statute; for no Information by a common Informer can be brought before Juſtices of Peace, Juſtices of Aſſize, or Juſtices of Oyer and Terminer.

In Sid. 359. there's the Caſe of the King *v.* Moſely, Information in this Court for erecting a Cottage; and 'twas moved to be quaſhed, becauſe it lies not in this Court; for that the 31 Eliz. directs, That the Offences there expreſſed ſhall be puniſhed by Juſtices of Aſſiſe, Juſtices of Peace in their Seſſions, Lords of Leets, and no others.

Twiſden. It hath been held upon this and other Penal Statutes that have ſuch Words, and no others; or, that it ſhall be inquired of in ſuch Courts and not elſewhere; that notwithſtanding ſuch Words the Attorney General may ſue in this Court if he will, and therefore the Statute of 21 Jac. of Limitation of Actions upon Penal Statutes, names the Attorney General, that he alſo might be bound. Barneſley *v.* Hughes, in Lord Kelynge's Time held to the ſame Effect.

And for this Statute of 31 Eliz. I urged, that here 'tis not ſaid the Suit ſhall not be in any other Court than thoſe named; but 'tis, not in any other County, and the Cauſe is not drawn out of the County, for it was tried at Abingdon in Berks.

Then here was lately a Cauſe between the King and Maſon. Trin. 28 Car. 2. In the Crown-Office, an Information for uſing the Trade of a Glover in London, he paid his Fine in Eaſter Term following, as appears by Rule of the Court, made Die Sabbati in Octabis Purificationis beatæ Mariæ Virginis 29 Car. 2.

Whereupon my Lord Chief Juſtice Jefferyes ordered Mr. Banniſter and my ſelf to bring Notes of the Caſes cited, and they would conſider of it, and about the latter End of the Term the Lord Chief Juſtice Jefferyes delivered the Judgment of the Court, that they were all unanimouſly of Opinion, that the Information lay here; the Trial not being drawn out of the County, the Statute not ſaying that it ſhall not be in any other Court, but only, not in any other County; and though there were ſome Caſes and Authorities which had denied it, yet the much major Part were for it, and ſo we had our Judgment againſt the Defendant.

There were ſome other Exceptions which I had prepared to ſpeak to; as that a Mercer was not within the Statute; but this can be no Doubt, for 'tis well known to be a Trade, and of them there's a Company incorporate in London; it was a Trade at the Time of this Act, and in this very Act 'tis taken Notice of as a Trade or Myſtery; in the Clauſe that reſtrains them from taking Apprentices, other than ſuch whoſe Parents can diſpend 40 s. per Annum of Freehold; it is the 27th Section, It ſhall not be lawful for any Perſon uſing or exerciſing the Myſteries or Crafts of Mercer, Draper, Goldſmith, &c. So is it there reckoned a Myſtery and Craft, and the 31ſt Section, on which our Information is grounded ſaith, Any Art, Myſtery or manual Occupation; ſo that one Part of the Act explains the other, and if a Goldſmith be within it, or any Trade whatſoever, this is ſo alſo.

2dly, The End of the Statute was for Maintenance of Skill in all Trades, which certainly is for the Weal-publick; and Statutes beneficial to the Kingdom ſhall have a liberal Conſtruction, as in Heydon's Caſe. 3 Rep. 7, 8. This Act is no ſuch Monopoly or Novelty as is pretended; as if this were an abſolute Incroachment on the Subjects Liberty of Trade, which the Law (ſay they) did univerſally allow to all Men at Pleaſure, for at the Common Law Trading was not ſo free as to be uſed by any Man, and as many Trades as he pleaſes, for as Nature hath given Man an Inclination and Fitneſs to one Trade more than another, ſo God Almighty hath ordained to every Man one Vocation, which properly is his Calling,

and to be intended by him: And of this Opinion was Sir James Lee, Chief Justice, Doddridge and Haughton, in the Case of the Bricklayers in 2 Roll. Rep. 391. and that no Kingdom could subsist without Distinction of Trades, and one Man could not use two; and there they cite a notable Record of Henry the Fourth's Time, when Gascoigne sate Chief Justice here, where a Vintner was indicted and fined for selling Victuals; nor is this the first Act about Trade, I mean the Restraint of Trade, for by 37 Edw. 3. cap. 6. Rastal fol. 16. It was provided, that Artificers and Handy-crafts-People should hold them to their own Mystery; the Reason of which Provision was, That each might have more Skill in that one, and the rest of the King's Subjects be the better provided for, which Act was certainly in Affirmance of the Common Law; so that our Law hath always taken care of Trade, that each particular Trade might be managed by skilful Hands, and the Common People not cheated or imposed upon; and our Act is to the same End, and therefore cannot with any tolerable Pretence be thought inconvenient; for were every one at large to use any Trade, none would spend Apprenticeships in them, Youth would be idle and corrupt, and Trade fall to Decay; and therefore this Act ought to have a favourable and benign Interpretation, for to extend it as far as possible to encourage Education in honest Trades.

In 2 Bulst. 187. is an Anonymus Case, cited to be in Pasch. 41 Eliz. C. B. where a Woollen-Draper is resolved within it, which is the same for Cloth as a Mercer is for Silks and Stuffs. In Hill. 31 & 32 Car. 2. B. R. the King versus Bishop, a Salesman at Oxford, a Mercer was then agreed to be within it, but the great Doubt was, If a Salesman were a Mercer or no? A Baker is adjudged within it, and so is a Brewer, Rex *v.* Freedland, 1 Cro. 499. And a Barber, 2 Cro. 178. Shaw *v.* Tyler; and of late Time a Coachmaker, which is a new Trade, and not in being at the Time of making this Act; in short, this very Trade of a Mercer is expressly adjudged within this Statute of 5 Eliz. in a Cause inter Dominum Regem & Cellers in Sid. 367.

Another

Anglice. Another Exception I thought might be moved, that mercatoris ſignifies a Merchant, and ſo the Anglice being another Thing makes it naught, eſpecially it being a Suit on a Penal Law, wherein nothing is to be helped by Intendment, or by any of the Statutes of Jeofails.

Anſwer, This is good enough, for Mercator is a general Word for a Buyer, or one that buys and ſells; and then with an Anglice 'tis rendred more particular: In Calvin's Lexicon Juridicum, verbo Mercator it is ſaid to be Is qui res mobiles lucri faciendi negotiandiq; cauſa eo animo comparat & rurſus diſtrahit & vendit, which is the exact Deſcription of a Mercer; and again he ſays, Mercatores dicuntur qui mercibus negotiantur, and in the Country every Shop-keeper is ſtyled a Merchant: In Gouldman's Engliſh Dictionary, verbo Mercer, we find Mercator Latine for it, and for Mercery the proper Latin Word is mercatura; and the Anglice is ſurely good where the Latin hath a colourable Signification of that ſame Thing, and ſo too quoddam inſtrument. ferreum Anglice a Gridiron, is good, Ellis and Yarrow, Sid. 60. An Indictment for uſing the Art and Myſtery Plumarii, Anglice an Upholſter, which is much worſe than ours, and held good; when this Exception was taken to it, King and Cellars, Sid. 367.

Another Exception which I thought on was, 'tis 'artem myſterium ſine manualem occupationem, and doth not ſay which.

Anſwer, This very Objection is over-ruled in Sid. 368. and there ſaid, That all the Forms are ſo, and ſo they have been ever ſince, and ſo is the Information in Brownl. 1 Part 136. for the Trade of a Cutler, and by the way that was an Information here in the Crown-Office for a Fact in Somerſet: So Smart *v.* Marlow, Brown's Entries, 1 Part 232. 'tis artem myſterium & manualem occupationem; and for a Fact in Buckinghamſhire there's another Precedent in Thompſon's Pleadings, p. 90. and there 'tis artem ſive myſterium.

Another Exception, 'Tis ſaid five Months, & amplius, and there's Penalty but a certain full Month.

Anſwer, This very Exception is over-ruled in Sid. 368.

Another Exception, That 'tis an Information of Easter Term, and so the first Day, and consequently brought within the five Monthes.

Answer, There's a special Memorandum entred of its Exhibition, viz. Die Martis proxim. post quinque septimanas Paschæ, and that's well enough; and after a Verdict you'd intend it five Monthes, nothing appearing to the contrary; but none of these Exceptions were observed.

Dominus Rex versus Peirce. (333.)

INformation for erecting and continuing a Soap-boilery in Woodstreet, to the Annoyance of the Neighbourhood; tried before the Lord Chief Justice Jefferyes at Guild-Hall: And held by him, that though such a Trade were honest, and might be lawfully used, yet if by its Stench it be an Annoyance to the Neighbours, 'tis a Nusance, and the Defendant was found guilty (notand. quod fuit ex prosecutione Jenner Recordatoris) And in this Case was remembred the Case of a Calendar-Man here in London, in Breadstreat, who was convicted before my Lord Hale on such an Information, for that the Noise of it disturbed the Neighbours, and shaked the adjacent Houses; and the Case of the King and Jordan for a Brewhouse on Ludgate-Hill, about a Year and a Half since, and he was forced to prostrate the same, and direct it to another Use; for that such Trades ought not to be in the principal Parts of the City, but in the Out-Skirts.

Soap-boilery.

A Nusance.

So a Brewhouse, &c.

Jackson *versus* Rogers. (334.)

ACTION sur le Case, for that whereas the Defendant is a Common Carrier from London to Lymington & abinde retorsum, and setting it forth as the Custom of England, that he is bound to carry Goods, and that the Plaintiff brought him such a Pack, he refused to carry them, though offered his Hire; and held by the Lord Jefferyes, that the Action is maintainable, as well as it is against an Inn-keeper for refusing

Common Carrier. *Vide ante* Case 67, 108.

refuſing Gueſt, or a Smith on the Road who refuſes to ſhoe my Horſe, being tendred Satisfaction for the ſame. Note, That it was alledged and proved that he had Conbenience to carry the ſame; and the Plaintiff had a Verdict.

(335.) Hudſon *verſus* Cooke.

Courts inferior. *Poſt*, Caſe 360.

CAſe for ſuing in an inferior Court without any Cauſe of Action within the Jurisdiction, held good, and Judgment pro Quer'. And 2dly, although he did not ſay ſciens, yet good enough, Cooper *v.* Cooper, 18 Car. 2. in Scacc. coram Hale, held good, for that in inferior Courts they hold to Bail in all Actions, &c.

(336.) Lane *verſus* Hawkins. *Entred* Mich. ult. Rot. 473, 475.

Deviſe. *Poſt*, Caſe 367.

EJectment. Special Verdict, finds a Man deviſed Lands by ſeveral Parcels to ſeveral; and alſo ſeveral perſonal Legacies, and after ſays, Item, I give all other my Eſtate whatſoever, to my dear Wife, whom I make my Executrix; If this would paſs a Reverſion in Fee was the Queſtion? And there was cited Hob. 95. Style 293. and the Caſe of Wilſon and Robinſon, 25 Car. 2. in Mod. Rep. 100. by Hals and Wylde, all his Eſtate paſſes a Fee, for that is all his Intereſt; otherwiſe if 'twere all his Land. Adjournatur. Vide infra caſu 367.

(337.) Manneton *verſus* Trevilian. *Entred* Paſch. ult. 24.

Common Appendant.

REplevin for ſix Cows; Defendant avows for Damage Feaſant, Plaintiff replies a Seiſin of certain Lands, and a Right to Common of Paſture for Beaſts levant and couchant on thoſe Lands; and that thoſe ſix Cows being his Cattle, and levant and couchant there, he put them in, &c. Defendant rejoins with an abſque hoc, that thoſe were the proper Cattle of the Plaintiff levant and couchant on thoſe his Lands; Demurrer thereto.

Cattle levant. 1 *Saund.* 27, 222, 346. 2 *Saund.* 325, 227. 1 *Mod.* 63.

Mr. Holt.

Mr. Holt. The Property thereto is not traverſable, it may be pleaded, but it cannot be traverſed, becauſe 'tis admitted by the Avowry; and beſides, the Levancy is ill traverſed too. Nelſon's Lutw. 500, 501. Property.

Mr. Pollexfen. The Levancy is not the ſole Meaſure of the Common, but there muſt be a Property alſo. Roll's 1 Abr. 307, 308. So that the Right could not be tried without that Traverſe; a Man cannot have Common for Beaſts in which he hath not a general or a ſpecial Property: And the Court held the Traverſe good, and Judgment was for the Avowant. *Nelſon's Lutw.* 37, 38. *Yelv.* 36. 2 *Cro.* 46. 2 *Lev.* 20.

Well *verſus* Thompſon. (338.)

ACTION on the Caſe, for that in Conſideration the Plaintiff would deliver the Defendant's Cattle out of the Pound, he promiſed to pay him, or ſave him harmleſs, &c. and avers that pro deliberatione inde an Action was brought againſt him, and a Recovery: Now 'twas moved in Arreſt of Judgment, that the Conſideration was naught, becauſe for doing an ill Thing, viz. the Delivery out of Pound of Cattle duly impounded; but over-ruled becauſe not a malum in ſe: Then another Exception was taken, becauſe the Plaintiff had not expreſly averred in his Declaration that he had delivered the Cattle, only that an Action was brought againſt him and a Recovery. Cur'. Held that was not ſufficient, though after a Verdict, for that it was the ſubſtantial Part, and the Ground of the Action. Judgment ſtayed. *Aſſumpſit* ill for want of Averment. See 1 *Lev.* 3, 20, 70, 87, 164, 293. 2 *Lev.* 23. *Nelſon's Lutw.* 79, 119.

Hinton *verſus* Roffee. *Entred* Trin. ult. Rot. 1182. (339.)

DEbt on a Bond, Defendant pleads quod Corrupte agreatum fuit, that Intereſt ſhould be paid for it above the Rate of Six per Cent. Plaintiff demurs: And held good, for that the Plea doth not ſhew what Intereſt, nor that the Bond was for the very Money, but only by Intendment, to wit, ſuper agreamento præd. the Bond was given, and doth not ſay expreſly pro eadem pecunia: Judgment pro Quer', For that they would not eaſily avoid a Bond, and the corrupt Agreement ought *S. C.* 3 *Mod.* 35. Uſury. *Nelſon's Lutw.* 84, 140, 141.

ought to be ſpecially and particularly ſet forth, and the quantum of Intereſt, otherwiſe the Plaintiff can never tell what to anſwer. Judgment pro Quer'.

(340.) *Dominus Rex verſus* Enoch Woodward. Per Indict. Mich. 35 Car. 2. B. R. Inter Recorda Regis *filed* nu.

Nonconformity. *Vide ante*, Caſe 145, 215, 216. *Nelſon's Lutw.* 63, 64.

THE Defendant was committed by two Juſtices of Norfolk, on the 17th Car. 2. (the Oxford-Act) againſt diſſenting Miniſters living within five Miles of a Corporation, upon Oath made of his being an Inhabitant within the City of Norwich, being bailed in the Vacation-Time by Mr. Baron Atkins, upon an Habeas Corpus; and the firſt Day of this Term I moved that his Recognizance might be diſcharged, for that the Warrant of Commitment which here appears on the Return of the Habeas Corpus was naught, it not appearing that he had been formerly a Parſon, Vicar, or other beneficed Parſon, or had been a Teacher, but only that he was an Inhabitant, and ſo he is not within the Words, or intended Proviſion of that Statute, which was made againſt the Reſidency of ſuch Perſons within Corporations; which by their Teaching might ſeduce and debauch the King's liege Subjects from their Duty to their Sovereign and the Church; and of this Opinion was all the Court, and the Defendant diſcharged upon my Motion.

(341.) *Dominus Rex verſus* Weaver.

Alias Certiorari.

AN Order concerning Money given and collected for the Repair of a Bridge, a Certiorari went, but through the Attorney's Careleſsneſs it was not delivered in Time, and ſo a Procedendo went; and thereupon I moved for a Certiorari non obſtante a Procedendo prius habit. & conceſſ. in hac parte. In the Book called the Theſaurus brevium, there are ſeveral Precedents of an alias certiorari to remove an Indictment upon an inſufficient Return to the firſt, and this is

no more, and in the Office are ſeveral of this kind.

Court. 'Twas your own Fault not to deliver the firſt, and if you ſlept on the firſt, we will not help you.

Workman *qui tam, &c. verſus* Gillard & *Ux'*. (342.)

ACTION of Debt on the 23d of Eliz. for 20 l. a Month for not coming to Church; on the Trial the Defendant was found guilty for three Months; afterwards, viz. the firſt Day of Michaelmas Term I moved the Court, That we having conformed, our Plea might be received; and we might have Leave to enter it on Record. But as it fell out the Biſhop's Certificate was of the Husband's Conformity, and the Action was for the Wife's not coming to Church; then I moved for a Fortnight's Time, and my Client would conform here in Town, which ſhe did, and we got a Certificate of the Parſon and Church-wardens of her Conformity; and an Affidavit likewiſe of the Truth of the Fact, viz. of her receiving the Sacrament, which Plea was ingroſſed as follows, viz.

Debt for Nonconformity. *Vide ante* Caſe 237.

Poſtea ſcilicet die Martis prox. poſt Craſtin. Purificationis beatæ Mariæ Virginis iſto eodem Termino veniunt hic in Cur' præd. Johannes Gillard & Magdalen. Ux. ejus in propriis perſonis ſuis & dicunt quod Judicium ſuper veredictum in actione præd. obtent. verſus eoſdem Johannem & Magdalen. reddi non debet, quia dicunt quod tertio die Februarii ult. præterit. eadem Magdalena uxor præd. Johannis apud Parochiam Sanctæ Mariæ le Savoy in Comitatu Middleſex conformavit ſemetipſam in cauſis religionis ſecundum uſum Eccleſiæ Anglicanæ & adtunc & ibidem perſonaliter acceſſit ad præd. Eccleſiam Parochialem Sanctæ Mariæ le Savoy in Com. Midd. præd. & reverenter & debite divinum Servicium & Sermon. Anglice Sermons, tunc & ibidem audivit & recepit Sacramentum Cœnæ Domini & ſubmiſit ſemetipſam erga præfat. Dominum Regem in debita ſua obedientia & devenit obediens legibus & ordinationibus Eccleſiæ Anglican. prout per certificationem ſub manu Reverendiſſimi in Chriſto patris Henrici permiſſione divina Epiſcopi London. & cum ſigillo ſuo authentico ſigillat. curia hic prolat. & oſtenſ. liquet (cujus quidem certificationis tenor ſequitur in hæc verba.

Plea of Conformity.

Certificate of Conformity.

ſſ. These are to certify whom it may concern, That having received a Certificate under the Hands of Lawrence Pocock, Curate of the Savoy-Pariſh in the Strand, in the County of Middleſex, and Dioceſs of London, and of Stephen Palmer, and Randolph Croſſe, Church-wardens of the ſaid Pariſh, bearing Date the fourth Day of this Inſtant February; that John Gillard and Magdalen his Wife, Inhabitants of Bromfield in the County of Somerſet, (heretofore Diſſenters from the publick Service of the Church of England) do now conform to the Liturgy thereof, by duly frequenting the ſame at the Time of Divine Service and Sermon, and ſoberly and gravely behave themſelves there as penitent Converts; and that the third of February Inſtant, the ſaid Magdalen Gillard, did in the ſaid Savoy Church receive the bleſſed Sacrament of the Lord's Supper, at the Hands of the ſaid Mr. Lawrence Pocock, according to the Liturgy of the Church of England: And being very well aſſured of the Integrity of the ſaid Mr. Pocock, I do verily believe the ſaid Certificate to be true in every Particular: In witneſs whereof I have hereunto ſet my Hand and Seal the 4th Day of February, in the Year of our Lord God 1683.

Et iidem Johannes Gillard & Magdalena uxor ejus ulterius dicunt quod poſt ſubmiſſionem & conformitatem ſuas præd. in forma prædict. fact. eadem Magdalena in ſua conformitate & debita obedientia continue poſtea ſecundum leges & Statut. hujus Regni Angliæ Regiæ Majeſtati prædict. continuavit & adhuc remanet & ſic remanere & continuare intendit quæ omnia & ſingula præfat. Johannes & Magdalen. parati ſunt verificare prout Cur', &c. unde pet. judicium & quod ipſi iidem Johannes & Magdalen. de actione præd. necnon ab omni proceſſu ſuperinde per Cur. hic dimittantur. Bartho. Shower.

Which Plea in Hillary Term following, I prayed might be received, but the Counſel for the Plaintiff oppoſed it, ſaying it was not allowable in an Action, but the Court thought it a good Plea; however made us pay the Plaintiff his Coſts, ſaying 'twas their Indulgence that gave us Leave to conform here, we ought to have done it in our own Dioceſs; ſo at laſt we paid him his Coſts, and our Plea was received, and we entred it on the Roll, and there was an end of the Suit.

Fountain *verſus* Guavers. *Entred* Trin. ult. 378. (343.)

COvenant on an Indenture of a Grant of a Rent-charge to the Plaintiff, with a Proviſo for Entry into the Lands till Satisfaction, &c. Defendant pleads that the Plaintiff entred and was poſſeſſed, &c. Plaintiff demurs. Covenant.

Mr. Holt pro Quer'. He ought to have pleaded a Diſſeiſin, or at leaſt an Expulſion; he cited Coulter's Caſe, 5 Rep. 30. a bare Entry will not ſuſpend the Rent-charge, for it might be by Conſent, Dorrel *v.* Andrews. 1 Roll. Abr. 138. Bridgm. 55. Lloid *v.* Bethel. Plowd. 233. Lord Berkley's Caſe, Latch 134. cited Obiter, a Caſe between Cook and Cook; they plead it to avoid a Debt, and therefore ought to be ſtrict. Palm. 150. Perhaps they'll ſay 'twas a rightful Entry; that cannot be, for we had diſtreined, which hinders us from entring; we took our Election. 3 Rep. Pennant's Caſe: Beſides, by the very Deed we could not enter without Demand on the 30th Day, which is not ſhewn, and ſo our Entry could not be lawful.

Mr. Pawlet econtra. He cited Sir Edward Peyſton's Caſe verſus Pemberton, in Cro. Car. he ſhall never be admitted to come and ſay that he entred wrongfully; when we come and ſet forth the Grant and the Entry, and that Rent was arrear, and that they entred Virtute Conceſſionis; all the requiſite Circumſtances ſhall be intended, for they lie in their Conuſance: Beſides, the Covenant is ſolvere the ſaid Rent, that ſhall not be intended to Heirs and Executors, quod ipſe ſolvet is the ſame, which cannot reach further therefore than his Life: The infinitive Mood is always ſingular or plural according to the Word that goes before; as Petrum promiſiſſe ſolvere, reſolve it into the potential or ſubjunctive Mood with a quod or ut, and it muſt be quod ſolvet; 'tis ſo here, he covenants to pay; as to the Words, for himſelf, his Heirs, &c. they do oblige them, and have their Office to make good what Cook did undertake to do in his Life-time. Dyer 114, 354. Cro. Eliz. 473. Hide *v.* the Dean and Chapter of Windſor. 5 Rep. 24. Roll. 1 Abr. 521. Beſides,

ſides, in the Declaration it ſays, the Executors nec alia perſona poſſeſſionat. ſolverunt; he ought to have ſaid nec hæredes aut aſſigaati,

Mr. Juſtice Wythens. As to the laſt Queſtion Mr. Pawlet, we muſt meaſure the Lien of this Covenant by the Eſtate in the Rent, and Expoſition ſhall be made of Deeds ſometimes contrary to grammatical Conſtruction, &c. Adjournatur.

Co. Litt. 219. b.

D E

Termino Hill.

35 & 36 Car. 2. B. R.

(344.)

Dominus Rex verſus Coney & Obrian.

Pardon. See 1 *Lev.* 8, 120, 121. 2 *Mod.* 53.

THE Defendants having been convicted and attainted of Murder at the Old Baily the laſt Seſſions, came here to plead their Pardon, which had not the Word Murdrum in it, but only feloniam & interfectionem, and doubted by the Court if it were good; and after two or three Days Conſideration the Pardon was allowed.

And ſo had been ſeveral in this Court, and one or two on ſolemn Debate, and for eight or ten Years paſt the Word Murdrum hath been generally omitted; and with a non obſtante, the Statute of Rich. 2. it hath been held good; and ſo was it in this Caſe.

2

Baber

Baber *verſus* Edwards & Woodall, *Bail for* Overton. (345.)

DEfendant was arreſted in an Action of 200 l. and Bail is put in thereto, then the Plaintiff delivers two Declarations, one for 200 l. and another for 500 l. and upon Motion the Queſtion was, If the Bail ſhould be liable to any more than the Action they were Bail in.

Bail not liable for more than the firſt Action. *Vide ante* Caſe 183.

And reſolved by the Court, that they ſhould be bound no further; and that 'twas unreaſonable, and 'twould be miſchievous to the Bail when they think they are only bound in one Action, to have ſeveral Declarations delivered by the By to charge them: In the Caſe of Habeas Corpus's they have lately adjudged them bound only for thoſe Cauſes removed from below, &c.

But now Quære, If a Man be arreſted in one Action of 200 l. and the Plaintiff afterwards declare in the ſame Action to 500 l. and recover by Verdict 500 l. Shall the Bail be liable only for 200 l. or for the 500 l.?

In the Common Pleas they take the Bail's Recognizance in a Sum certain to anſwer the Condempnat. or render the Defendant's Body to Priſon.

Memorandum, That notwithſtanding this new Rule the Principal ſtands liable to all Declarations by the By as formerly.

Dominus Rex verſus Earl of Danby. (346.)

THE Defendant having been a long Time in the Tower, by Commitment of the Lord's Houſe, grounded on an Impeachment of the Commons for Treaſon, was brought hither again on his Habeas Corpus, as he had been ſeveral Times before, and refuſed to be bailed: Now

Habeas Corpus.

Mr. Wallop moves for him; the Superiority of the Lords cannot hinder, I am ſure here and there the Proceed-

Proceedings are all coram Rege, the Judgments here and there are the King's Judgments.

This Court hath a double Jurisdiction.

1. A primary direct Jurisdiction.

2. A secondary Jurisdiction to correct the Errors and Defects of others, and when the first is wanting the other may be had: Habetur ex obliquo quod non habetur in directo: He cited 2 Inst. 83, 23. and Keilway 106. and Coke's Comment. on the 12th Chap. of Magna Charta, where he saith, Placita Curiæ superioris non sequentur Curiam Inferiorem, unless there be a Failure of Justice, which there must be here unless your Lordships do relieve him; he cited 2 Cro. 356, 543. Lamb. Archaion. 119. 2 Inst. 408.

Mr. Pollexfen of the same Side, First taking my Lord Danby's Pardon out of the Case, Whether or no his being impeached and the Parliament dissolved, he may not be bailed.

1. This is a judicial Proceeding in Parliament, and not relating to their Legislative Power; now during no Parliament this is the supreme Court in being for the Defence of the King's Prerogative; and by the Dissolution of the Parliament all the judicial Proceedings there are discontinued, and the inferior Courts are let into their Jurisdiction. 1 Hen. 7. 19. the Book says, If the Parliament be dissolved, the Proceedings are discharged: He cited 2 Cro. 341. Latch 57. Noy 76. 'tis true, there have been some Orders of the Lord's House since to the contrary, but that cannot make any Alteration of the Law; and the Practice is so, though Proceedings in inferior Courts are superseded during their Session, yet upon a Dissolution they proceed here below: And so is the Law and so is the Practice, and this is so in Cases originally beginning there; if any Persons are committed upon Complaints there, when the Parliament is dissolved they have always been discharged: The Case of Fitzharris did go much further, and if that Impeachment did not hinder this Court from trying, sure this will not hinder from bailing: You bail here though you cannot try here, though the Facts are triable other where, as for Murders or Felonies committed in Ireland, or on the High Sea: This Court hath the general Care of the King's Prerogative and the Subjects

jects Liberty. 1 Inſt. 289. till within ſeven Years, there was never any ſuch Queſtion: The Lord Shafts-bury's Caſe was when the Parliament was ſitting, and only adjourned; Lord Stafford's Caſe was upon a Prorogation to a Day certain: Beſides, we have a Pardon to this very Impeachment, which is certainly good, Cotton's Records, 138. 11 Rich. 2. cap. 3. Raſtal's old Statutes, 51 Edw. 3. Remembr. 19. Parliam. Roll. pardoned though impeached, 21 Rich. 2. 2 Part Membr. 13, 17. Parliament-Roll. In 4 Car. 1. Doctor Mainwaring was impeached and yet pardoned. In 13 Edw. 3. 'tis deſired there that no Pardon ſhould be without Conſent of Parliament. 7 Rich. 2. Pleſſington's Caſe, 8 Hen. 4. 2 Inſt. 187. 4 Inſt. 71. The Cauſe we inſiſt on of his being bailed, ariſes from the Parliament (viz.) the Diſſolution; for during the Seſſion we had no Colour to deſire it, for then we might be brought to anſwer, but now we cannot: In Ruſhworth 607. as to the Order of the Houſe of Lords of the 9th of March, 1679. that is, That all Impeachments ſhall ſtand *in Statu quo*; not that all Impeachments and Commitments ſhall. 2 Cro. 381. Impeachment and Commitment are not ſo nearly link'd, the one is not an Incident to the other; for this Lord was impeached, and not committed till the next Parliament; and ſo was my Lord Scroggs's Impeachment, and yet not committed at all: The Commitment is not till he be diſcharged by this Houſe, but till he be diſcharged by due Courſe of Law. This Court hath Juriſdiction of the Cauſe originally. Paſch. 16 Car. 2. in this Court, Pritchard's Caſe, committed by the Houſe of Lords, and on a Prorogation diſcharged: Okey, Bankes and Corbet were attainted in Parliament, and brought over from beyond the Seas, the Parliament was prorogued, the Record was removed by Certiorari to the Chancery, and from thence by Mittimus hither; and upon this Execution awarded, &c. During the Seſſion there could not be any Proceeding; yet in the Abſence of this Parliament an Authority was delegated upon this Court: At laſt per tout le Court he was bailed to appear at the Lord's Bar the firſt Day of the then next Parliament; and the next Day my Lord Bellaſyſe, Lord Powis, and Lord Arundell were alſo bailed.

Memorandum, That at the next Parliament, which was in 1 Jac. 2. they appeared and were diſcharged; and 'twas noted in the Lords Houſe, that a Prorogation diſcontinued all Proceedings there.

(347.)

Hoare *verſus* Clement.

Admiralty Juriſdiction. 6 *Mod.* 11, 25, 79. 1 *Lev.* 243, 267. 1 *Salk.* 31, 33, 34, 424.

THE Defendant libels in the Admiralty againſt a Ship, and one Harris the Maſter of her, and Smith her late Owner, and Hoar my Client, the Plaintiff now Owner, for Sails and other Neceſſaries found to the Ship in 1681.

The Plaintiff ſuggeſts the Statute of Rich. 2. and that the Materials, Work done, and Contract made, and every Thing contained in the Libel were done on Land, and not ſuper altum mare; and that in July laſt, after the Time ſpecified in the Libel, the Plaintiff bought the Ship cum omni apparatu for a conſiderable Sum of Money at Land; this Suggeſtion I drew, and thereupon moved for a Prohibition, for though the Sails were for the Ship, and done about it, yet they were not abſolutely neceſſary, nor was it in a Voyage; ſo that the Libel is not for any ſuppoſed Hypothecation by the Maſter in a Time and Caſe of urgent Neceſſity: Beſides, we bought her upon Land with all her Furniture, and the Defendant hath his Action at Law upon his Contract, and for his Wares ſold: And in 2 Cro. 514. is an expreſs Caſe, Violet *v.* Blague, a Ship lying at Anchor is not within the Admiral's Juriſdiction: Here was the Caſe of Meuxin and Penſilminian, about laſt Term was twelve-Months, in which my Lord Jefferyes was then of Counſel, and a Prohibition was granted after ſeveral Debates upon this very Suggeſtion: In Leigh and Burleigh's Caſe, Owen 102. is a Caſe much like this, A Maſter of a Ship buys Sails, Cloths and other Things, and they were delivered to him a-board his Ship that was in the Thames, and a Prohibition granted, becauſe Corpus com. Beſides it appears here, and that by their own Libel, that the Ship was in a Port, and that we had bought her ſince; and this Caſe is expreſly within the Words of the Reſolution of the Admiral Juriſdiction in Cro. Car. 216. 'tis in the old

1 *Salk.* 34, 35.

Edition, but not in the laſt; and 'tis in Hugh's Abr. that a Prohibition ought to go: The Caſe was, that Sails and other Goods were delivered on board in a Port; then the Owner ſells her with the Furniture, and the old Owner and the Maſter run away, and they would ſaddle the Buyer with theſe Things in the Admiralty; whereas no Action lies at Law for the ſame.

Mr. Jones on the other Side would have had us put in Bail here for the Defendants in the Admiralty, I offered it for our ſelves, for we had nothing to do with any other Perſon, we had bought the Ship and paid for her; at length a Prohibition was granted as to the Ship and my Client Hoare, *&c.*

Dominus Rex verſus Snead. Per Indict. Mich. 35 Car. 2. B. R. Inter placita Regis num. 68. (348.)

Indictment for cheating, *&c.*

Midd. ſſ. MEmorand. quod ad generalem quarterialem Seſſionem pacis Domini Regis tent. pro. com. Midd. apud Hicks's-Hall in St. John's Street in Com. præd. die lunæ ſcilicet 9 Julii Anno 35. coram Willielmo Comite Craven Willielmo Smith Bart. &c. per Sacrament. Willielmi Cocker A. B. C. D. &c. proborum & legalium homin. com. præd. adtunc & ibid. jurat. & onerat. ad inquirend. pro dicto Domino Rege & corpore com. præd. præſentat. exiſtit modo & forma prout patet in quodam indictament. huic ſchedul. annex'; Juratores pro Domino Rege ſuper Sacrament. ſuum præſentant,

That whereas the 14th of Feb. 31 Car. 2. Greenhill Dudley was intruſted by Chriſtopher Truſſe, and Clement Heddington, with divers Quantities of Timber, the ſame as a Factor for their beſt Advantage to ſell and diſpoſe; and that the ſaid Dudley authorized Snead by a certain Inſtrument in writing to ſell them for the Uſe aforeſaid, and received an Inventory with a Bond to render a true Account; and the ſaid Dudley delivered the ſaid Writing to one Chauſe, to be carried to an unknown Perſon for the Uſe of the ſaid Truſſe and Heddington; and the ſaid Snead and Chauſe being Perſons of ill Fame, and intending to deceive Truſſe and Heddington of the ſaid Timber, he the ſaid Henry Chauſe delivered the ſaid Writings to the ſaid Snead;

whereby a true Account of the ſaid Timber could not be had, to the Damages of the ſaid Dudley, Truſſe and Heddington, and contra pacem, &c.

See 5 *Co.* 72, 73. & *Paſch.* 2 *W.* & *M.*; *B. R. Paine* verſus *Partridge.*

I moved to quaſh this Indictment, the Matter thereof being a Ground for an Action of the Caſe and no more; for at this Rate all Actions may be turned into Indictments; this concerns only the Intereſt of a particular Perſon, and for a private Wrong an Indictment lies not; no more does it for a Nuſance to an Horſeway, unleſs it be an Highway; as is Madox's Caſe, 3 Cro. 63. This is meerly a Breach of Truſt, which properly belongs to the Chancery Juriſdiction (and in Roll's 2 Abr. 75. Tit. Indictment. the firſt Caſe is much like this, for an Apprentice getting a ſingle Woman with Child abſconds, and a Warrant is ſued againſt him, and J. S. knowing of the Warrant, receives and comforts him, ſo that he could not be apprehended, and adjudged not puniſhable, it not being a Warrant for Treaſon or Felony: As well as this any Carrier may be indicted for loſing the Goods wherewith he is intruſted: Suppoſe a Factor having received a Bill of Lading of Goods, ſhould deliver the ſame to the Maſter of the Ship, whereby the Maſter becomes leſs chargeable with the Goods, and the Owners happen to loſe them, yet I hope this will be no Offence, becauſe a Truſt repoſed in the Party, and he is no Officer, nor does it any way concern the Republick; even in Caſe of a Deceit an Indictment will not lie where the Perſon injured repoſed a Confidence in the Party by intruſting him: So it is for Goods of the Party's own Delivery; if I ſell them this will not be an Offence, for the Law takes no care to puniſh a Man for the Breach of a Truſt repoſed by the Party, and not by the Law, and there's a vaſt Difference between this and a Cheat in Trade; for the Publick is concerned in the Male-adminiſtration of Trades and Handicrafts; a Devaſtavit in an Executor, may with more Colour be puniſhed as a Crime than this; and the like of Guardians Miſbehaviour, becauſe there's a Confidence repoſed in them by the Law: Nay, a Man may be puniſhed for ſpending Money borrowed, per quod he diſables himſelf to repay his juſt Debts,

for he is not intrusted by the Law in this Case, to re-deliver these Writings. 'Tis the Duty of every Artificer or Tradesman (antecedent to his being employed by a particular Person) to use his Art duly and justly as he ought, but 'tis not my Duty (antecedently to my undertaking) to do as J. S. orders, impowers or intrusts me to do: Deceitfully to help and aid a Debtor in absconding, or avoiding the Payment of a true Debt, whereby the Creditor is hindred or cheated of his Debt will not be a Crime indictable; to make an Offence there must be a Breach of some Duty which I am obliged to, as the Preservation of the Peace, Maintenance of Trade, or Safety of Travelling, or the like: Besides, the Owner's Consent purges the Offence; as if he deliver me a Horse with his own Hands, I am not indictable of a Trespass if I kill him. Suppose two Men having a Controversy about the Property of Goods, should deliver them to me to keep safe till an Arbitration ended, or a Wager determined, and I deliver them to him that hath not the Right, and this with a Confederacy between him and me to the Damage of the other, an Action will certainly lie against me, but scarce an Indictment, which is very near our Case. But the Court thinking it a Fraud would not quash it, but ordered us to try it that the Fact might appear.

See 6 *Mod.* 42, 61, 105, 301, 302. 1 *Salk.* 286, 379.

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DE

Termino Paſchæ,

36 Car. 2. B. R.

(349.)

Day *verſus* Wyman.

Infant appears by Attorney. See 2 *Inſt.* 390. 1 *Rol. Abr.* 747. *pl.* 13. 3 *Cro.* 42, 541, *&c.* *Nelſon's Lutw.* 111, 113, 302.

ERror on a Judgment in Com. Banco, Defendant in the Action aſſigns for Error, that he was within Age, and appeared by Attorney and concludes, Et hoc paratus eſt verificare prout Cur', &c. Plaintiff replies In nullo eſt erratum.

Mr. Powis for the Plaintiff in the Action argued, that the Error is ill concluded, for 'tis an Error in Fact, and ſo triable per pais and not by the Court as a Demurrer or the like is; and cites Car and Barker's Caſe, 2 Cro. 250. the ſame Exception, and Yelv. 58. King *v.* Goſper and Shire, and Sid. 429 Hancock and Prout and Hill *v.* Boomer, Trin. 30 Car. 2. B. R. Rot. 952.

Mr. Pollexfen econtra. That In nullo eſt erratum hath help'd it, and the Court inclined ſo too. Sed Adjournatur.

(350.)

Blackway *verſus* Betton.

Coſts.

ADminiſtrator brings an Action of Trover for a Converſion in his own Time, and is nonſuit, the Defendant ſhall have Coſts: Ruled ſo by the whole Court, and ſo adjudged in 1 Cro. 219. Latch 120.

Dominus Rex verſus Strang. Per Indictament. de Termino Paſch. 36 Car. 2. Rot. int. placit. Rot. num. 93. (351.)

Devon. ff. MEmorand. quod ad generalem quarterialem Seſſionem pacis Domini Regis tent. apud Caſtrum Exon in & pro Com. Devon. præd. 15° Die Januarii anno Regni Domini Caroli Secundi Dei Gratia Angliæ Scotiæ Franciæ & Hiberniæ Regis Fidei Defenſor. &c. 35° coram Johanne Beare Johanne Quick Gilberto Yard & Hugone Stafford Arm. & aliis Sociis ſuis Juſticiariis dicti Domini Regis ad pacem in Com. præd. conſervand. necnon ad diverſ. felonias tranſgr. & alia malefact. in eodem Com. perpetrat. audiend. & terminand. aſſignat. ſuper ſacramentum duodecim Jurator. proborum & legalium homin. Com. præd. impanellat. jurat. & onerat. ad inquirend. pro dicto Domino Rege & corpore Com. præd. præſentat. exiſtit quod Walterus Strang Sen. de Civitat. Exon. in Com. ejuſdem Civitat. Helliar. 10 die Decembris anno Regni, &c. 35 vi & armis, &c. apud paroch. Sancti Leonardi infra Com. Devon. præd. quoddam Cottagium ibid. præantea illicite erect. pro habitatione a præd. 10 die Decembris anno præd. per ſpacium unius anni integri extunc proxime ſequent. illicite manutenuit & continuavit in manifeſt. contempt. dict. Domini Regis nunc contra formam Statut. in hujuſmodi caſu edit. & proviſ. necnon contra pacem dict. Domini Regis nunc Coronam & dignitat. ſuas.

Indictment for erecting a Cottage, &c. *Vide ante* Caſe 270.

I moved for the quaſhing this Indictment, becauſe it doth not ſay there were not four Acres of Land aſſigned thereto, which if there were, 'tis no Offence within the Statute againſt Inmates and Cottages; and for this Exception it was quaſhed upon my Motion.

Another Exception I had fatal thereto, which is, that 'tis for Continuance of a Cottage unlawfully erected by the Space of one Year, from the 10th of December, 35 Car. 2. and the Indictment is taken the 15th of January in that Year.

Quære, If in thoſe Indictments for Continuance of Cottages, they ought not to ſay they were inhabited during the Time they are continued; for it ſeems prima facie that ſuch Continuance is no Offence, unleſs

leſs the Cottage be inhabited, on this Reaſon, be-
Stat. 31 El. c. 7. 1 Salk. 169. cauſe by the Statute the four Acres of Land are to be aſſigned to be occupied therewith ſo long as it ſhall be inhabited; and therefore if never inhabited, there needs not four Acres, nor can four Acres be occupied therewith, unleſs it be inhabited; an Houſe built not for Habitation, but for another Uſe, as a Granary or the like, is not a Cottage within this Law, but if afterwards uſed for Habitation, it becomes ſuch, and the Continuance is an Offence, therefore econtra if not inhabited the Continuance can be no Offence; for by it, unleſs inhabited, there's no Damage to the Publick, nor ſeems it within the Intention of the Statute, which by its Proviſion againſt Inmates, ſeems deſigned to prevent Increaſe of poor Families, &c. If it ſhould be otherwiſe than a Cottage once erected for Habitation, though afterwards converted to another Uſe, yet it's Continuance would be an Offence, which ſeems an Hardſhip: Conſider of this, for on firſt Thoughts there's ſome Semblance of Reaſon of it.

(352.) Vaſper & Ux' *verſus* Eaſt.

Windſor Court. Poſt, Caſe 362. THE Defendants having an Action of Treſpaſs for an Aſſault brought againſt them in Windſor Court, and bringing an Habeas corpus thereon, delivered it in open Court; but Mr. Staples the Steward there took Exceptions thereto, and refuſed to allow it, which becauſe it ſhews the Title of the Conſtable of Windſor, I have here tranſcribed the ſame, viz.

Carolus Secundus Dei Gratia Angliæ Scotiæ Franciæ & Hiberniæ Rex Fidei Defenſor. &c. Henrico Comiti Arundel Domino Mowbray Conſtabular. honor. & caſtr. Domini Regis de Windſor. in Com. Berks cuſtod. totius Foreſtæ ibid. ſeu ejus locum tenent. vel deputat. ſalutem. Præcipimus tibi quod
Habeas Corpus. corpora Jacobi Eaſt & M. Uxor. ejus & Johannis Edmunds in Priſona noſtra ſub cuſtod. tua ut dicitur ſub ſalvo & ſecuro conductu una cum die & cauſa captionis & detentionis ſuæ quocunque nomine iidem Jacobus & M. Uxor. ejus & Johannes cenſeantur in eadem habeas coram nobis apud Weſtm. die Martis proxim. poſt Octab. Purificat. beatæ Mariæ Virginis ad faciend. & recipiend. ea omnia & ſingula quæ Curia noſtra

coram nobis de eo adtunc & ibid. conſideraverit in hac parte, Et habeas ibi tunc hoc breve Teſte Georgio Jefferyes Mil. apud Weſtm. Viceſimo die Novembris anno Regni noſtri triceſimo quinto. Henley. Thacker.

The Exceptions he took were,

1. The Wife's Name was not inſerted.

2. Lord Jefferyes was not ſtyled Baronet, and thereupon although he took the Fee for Allowance, yet he returned not the Writ, but went on to try the Cauſe, and 30 l. Damages were given for a paltry Battery: Upon an Affidavit of all which, I moved for an Attachment againſt the Steward, and had it granted, unleſs he paid us our Coſts, occaſioned by not returning the Writ, and return it in two Days, which at laſt he did.

As to the Exceptions 'tis well enough, being Uxor, which is a ſufficient Addition, and he ought to have returned the Cauſes where Eaſt was concerned; and as to the Title of the Chief Juſtice 'twas never added at all formerly in the Teſte of Writs, but only the Name, and now 'tis as often omitted as uſed, and wholly immaterial.

Governor and Company of Taylors *in* Exon. *verſus* Clarke. De Term. Sancti Hillarii annis Regni Domini Caroli Secund. nunc Regis Angliæ, &c. 35 & 36. Rot. 761. (353.)

Debt on Bond in reſtraint of Trade.

Civit. Exon. ſſ. MEmorand. quod alias ſcilicet Termino Sancti Michaelis anno Regni Domini Caroli Secundi nunc Regis Angliæ, &c. 33. coram Domino Rege venerunt Gubernatores & Gardiani Fraternitatis ſciſſor. infra Civitat. Exon per Johannem Etheridge Attornat. ſuum & protulerunt hic in Cur' dict. Domini Regis tunc ibidem quandam billam ſuam verſus Thomam Clarke de Civit. Exon. Taylor alias dict. Thomam Clarke de Tiverton in Com. Devon. Taylor in cuſtod. Mar', &c. de placito debiti & ſunt Pleg. de proſequend. ſcilicet Johannes Doe & Richardus Roe quæ quidem billa ſequitur in hæc verba. ſſ. Civit. Exon. ſſ. Gubernat. & Gardiani Fraternitatis Sciſſor. infra Civitat. Exon. queruntur de Thoma Clarke de Civitat. Exon Taylor alias dict. Thoma Clarke de Tiverton in Com. Devon Taylor in cuſtod. Mar. Mareſc. Domini Regis coram ipſo Rege exiſtente

de placito quod reddat eis quadragint. libr. legalis monet. Angliæ quas eis debet & injuſte detinet pro eo viz. quod cum præd. Thomas decimo ſeptimo die Octobris anno regni Domini Caroli ſecundi nunc Regis Angliæ, &c. Triceſimo primo apud Civitat. Exon præd. in Com. Civitat. præd. per nomen Thomæ Clarke de Tiverton in Com. Devon Taylor per quoddam ſcriptum ſuum obligator. ſigillo ipſius Thomæ ſigillat. Curiæq; dict. Domini Regis nunc hic oſtenſ. cujus dat. eſt eiſdem die & anno cognovit ſe teneri & firmit. obligari præfatis Gubernatori & Gardianis Fraternitat. præd. in præd. quadragint. libris ſolvend. eiſdem Gubernatori & Gardian. Fraternitat. præd. cum inde requiſit. eſſet, præd. tamen Thomas licet ſæpius requiſit. &c. præd. quadragint. libr. præfat. Gubernatori & Guardianis Fraternitat. præd. nondum ſolvit ſed ill. eis hucuſque ſolvere omnino contradixit & adhuc contradicit ad dampnum ipſorum Gubernatoris & Guardianor. Fraternitat. præd. triginta librar. Et inde producunt ſectam, &c. Et modo ad hunc diem ſcilicet diem Mercurii proxime poſt Octab. Sancti Hillarii iſto eodem Termino uſque quem diem præd. præfat. Thomas habuit licentiam ad billam præd. interloquend. & tunc ad reſpondend', &c. coram Domino Rege ven. tam præfat. Gubernator & Gardiani Fraternitatis præd. per Attorn. ſuum præd. quam præd. Thomas Clarke per Willielmum Turbit Attorn. ſuum, Et idem Thomas Defend. vim & injur. quando, &c. & petit auditum ſcripti obligator. præd. & ei legitur in hæc verba. ff Noverint Univerſi per præſentes me Thomam Clarke de Tiverton in Com. Devon Taylor teneri & firmit. obligari Gubernatori & Gardianis Fraternitatis ſciſſor. infra Civit. Exon in quadraginta libris legalis monet. Angliæ ſolvend. iiſdem Gubernatori & Guardianis ſeu eorum alicui, vel eorum certo attornat. Succeſſor. ſeu aſſignat. ſuis, ad quam quidem ſolutionem bene & fidelit. faciend. obligo me hæredes Executores & Adminiſtrat. meos firmit. per præſentes ſigillo meo. ſigillat. dat. decimo ſeptimo die Octobris anno Regni Domini noſtri Caroli Secundi nunc Regis Angliæ 31. Annoq; Domini 1679. petit etiam auditum Conditionis ejuſdem ſcripti obligator', & ei legitur in hæc verba.

ff The Condition of this Obligation is ſuch, That if the above bounden Thomas Clarke, his Executors or Adminiſtrators, ſhall and do well and truly pay, or cauſe to be paid, unto the Maſter or Wardens of the Fraternity above-named, their Succeſſors and Aſſigns, the Sum of twenty Pounds of lawful Money of England, within one Month next after the ſaid

Thomas Clarke ſhall ſet up, uſe or exerciſe, directly or indirectly, in any manner of wiſe, to and for his own proper Uſe, Gain and Advantage, the Art, Trade, or Occupation of a Taylor, or keep any Cutting-board, or make any manner of Garments whatſoever within the City of Exon, or County of the ſame City, other than his own wearing Apparel, or as an hired Journeyman with a Freeman of the ſaid Fraternity; and alſo if the ſaid Thomas Clarke, ſhall and do leave his Habitation and Dwelling within the City and County of Exon, and depart from thence elſewhere to live and reſide, without returning to the ſaid City and County again to live and inhabit, within forty Days next after Notice to him given by the Beadle of the ſame Fraternity for the Time being; then this Obligation to be void, or elſe to remain and be in Force and Vertue.

Quibus lectis & auditis idem Thomas dicit quod ipſe de debito præd. virtut. ſcript. præd. onerari non debet quia dicit quod ante confectionem ſcripti præd. ſcil. 16. die Octobris anno 31. ſuprad. apud Civit. Exon præd. Gubernator & Gardiani Fraternitat. Sciſſor. infra Civit. Exon præd. clamantes & indebite prætendentes ſe fore corpus politicum & incorporat. pretextu literarum Patent. Dominæ Elizabethæ nuper Reginæ Angliæ Magiſtro & Guardian. & Societat. ſciſſor. ejuſdem Civitat. confect. quodque nulla perſona non exiſtens liber Anglice free ac membrum ejuſdem incorporationis fraternitatis ſciſſor. debuit uti pro ſuo proprio lucro proficuo aut advantagio arte myſterio facultate ſive manual. occupatione ſciſſoris aut conſuere veſtimentum aut alias res hujuſmodi artem tangent. infra eandem Civitat. Exon aut Com. ejuſdem Civitat. licet hujuſmodi perſona in eadem arte optime inſtruct. educat. & expert. fuit ac reſidens & Inhabitans infra eandem Civitat. & Com. ejuſdem Civitat. ſed quod ipſi iidem Gubernator & Guardiani ac liberi homines ejuſdem Fraternitat. ſciſſor. tantum & nulli alii eadem arte myſterio & facultate in eadem Civitate & Com. ejuſdem Civit. uti & exercere debuerunt, ubi revera iidem Gubernator & Guardiani Fraternitat. ſciſſor. hujuſmodi libertat. privileg. & Franchef. infra eand. Civit. vel Com. ejuſd. Civit. de Jure non habuerunt nec gaviſi fuerunt, nec iidem Gubernatores & Guardiani fraternitat. ſciſſor. ad impediend. reſtringend. & deprivand. præd. Thomam Clarke in ſcripto præd. ſuperius nominat. colore præmiſſ. ab occupatione uſu & exercitio artis

myſterii & facultatis ſuæ ſciſſoris in eadem Civitat. Exon & Com. ejuſdem Civitat. (in qua quidem arte præd. Thomas adtunc & ibid. fuit bene & ſufficient. inſtruct. educat. & maxime expert.) ac a libertate ſua in hæc parte reſtringend. & deprivand. ac ipſum Thomam ab eadem Civitat. habitation. & familia ſua ibid. ad libitum ipſorum Gubernator. & Guardian. ejuſdem Fraternitat. detrudend. & expellend. præd. decimo ſexto die Octobris anno ſupradict. apud Civitat. Exon. præd. præd. Thomam Clarke adtunc & ibidem nimis gravaminibus & injuriis affecerunt, & ipſum in uſu & exercitio artis ſciſſoris qua ipſe Thomas adtunc & ibidem utebatur & legitime exercuit adtunc & ibid. diſturbaverunt & impediverunt ac præd. negotia præd. Thomæ adtunc & ibid. infect. remanſerunt quouſque præd. Thomas Clarke ad redimendam vexationem in hæc parte & pro liberatione ſua abinde eiſdem Gubernator. & Guardian. Fraternitat. ſciſſor. præd. ſcript. præd. cum conditione præd. contra legem terræ hujus regni Angliæ exiſtent. facere ſe conceſſit, qua quidem occaſione & non alia præd. Thomas Clarke præd. decimo ſeptimo die Octob. anno regni dict. Domini Regis nunc triceſimo primo ſuprad. apud Civitat. Exon præd. in Com. ejuſdem Civitat. præd. ſcript. præd. cum conditione præd. præd. Gubernator. & Guardianis Fraternitat. ſciſſor. præd. fecit & ſigillavit, ac iidem Gubernator & Guardiani Fraternitat. ſciſſor. præd. indebite & contra legem terræ hujus regni Angliæ ac ad impediend. reſtringend. & deprivand. præd. Thomam Clarke ab exercitio uſu & occupatione in eadem Civitat. præd. artis myſterii & facultatis ſciſſor. indebite & contra legem hujus regni Angliæ præd. ſcript. colore præmiſſor. & colore officii ſui præd. de præd. Thoma Clarke adtunc & ibidem exegerunt habuerunt & receperunt, ſicque ſcript. præd. cum conditione præd. in forma præd. & ex cauſa præd. ut prefertur capt. & exact. ratione præmiſſor. vacuum & nullius vigoris in lege devenit & exiſtit & hoc idem Thomas paratus eſt verificare unde petit Judic. ſi ipſe idem Thomas de debito præd. virtute ſcripti præd. onerari debeat.

John Tremayne.

Et præd. Gubernator & Guardiani Fraternitat. ſciſſorum præd. dicunt quod ipſi per aliqua per præd. Thomam Clarke ſuperius placitando allegat. ab actione ſua habend. præcludi non debent, quia dicunt quod præd. Thomas decimo ſeptimo die Octobris anno triceſimo primo ſuprad. apud Civitatem Exon præd. in Com. ejuſdem Civitatis ſcriptum obligatorium

præd. ſigillavit & ut factum ſuum deliberavit modo & forma prout præd. Gubernator & Guardiani Fraternitat. præd. ſuperius verſus eum narraverunt, Et hoc parat. ſunt verificare unde petunt Judicium & debitum ſuum præd. unacum dampnis ſuis occaſione detentionis debiti illius ſibi adjudicari, &c.

Francis Pemberton.

Et præd. Thomas dicit. quod placitum præd. per ipſos Gubernator. & Guardian. fraternitat. ſciſſor. ſuperius replicando placitat. materiaque in eadem content. minus ſufficient. in lege exiſt. ad ipſos Gubernator. & Gardian. Fraternitatis ſciſſor. præd. actionem ſuam præd. verſus eum habend. manutenend. ad quod quidem placitum ipſe idem Thomas neceſſe non habet nec per legem terræ tenetur aliquo modo reſpondere & hoc paratus eſt verificare, unde pro defectu ſufficien. replicationis in hac parte idem Thomas petit Judic. & quod præfat. Gubernator & Gardian. ſciſſor. ab actione ſua præd. verſus eum habend. præcludantur, &c.

John Trenayne.

Et præd. Gubernator & Gardian. Fraternitat. ſciſſor. dicunt quod placitum prædict. ſuperius replicando placitat. materiaque in eodem content bon. & ſufficien. in lege exiſtunt ad ipſos præd. Gubernatorem & Gardian. Fraternitat. ſciſſor. actionem ſuam præd. verſus præfat. Thomam habend. manutenend. quod quidem placitum ipſi iidem Gubernator & Gardiani Fraternitat. ſciſſorum parati ſunt verificare & probare prout Cur', &c. Et quia præd. Thomas ad placitum illud non reſpond. nec ill. hucuſq; aliqualit. dedicit (ut prius) per. Judic. & debitum ſuum præd. unacum dampnis ſuis occaſione detentionis debiti ill. ſibi adjudicari, &c. ſed quia Cur. Dom. Regis nunc hic de Judicio ſuo de & ſuper præmiſſis reddend. nondum adviſatur dies inde dat. eſt partibus præd. coram Dom. Rege apud Weſtm. uſque diem Mercur. proxim. poſt, &c. De judicio ſuo de & ſuper præmiſſis audiend. & quia Cur. dict. Domini Regis nunc hic inde nondum adviſatur Dies inde Dat. eſt, &c.

Debt upon a Bond for 40 l. brought by the Company of Taylors in Exon, againſt Clarke, who craves Oyer of the Condition, which is, that if he pay 20 l. within a Month after he ſhall uſe the Trade of a Taylor in Exon, otherwiſe than as a Journeyman, and if he leave the Town on forty Days Notice, then

the

the Obligation to be void; he pleads that the Plaintiffs pretending to be a Corporation, and to have the ſole Uſe of that Trade there, excluſive of all others not free of their Company, did trouble and vex him in the lawful Uſe of his Trade of a Taylor, in which he had been bred and was skilled; till he gave that Bond for his Eaſe and Deliverance, and that the ſaid Bond was given on that Occaſion, and not any other; and that the Plaintiffs took it to reſtrain and deprive him of his ſaid Trade, which Bond ſo taken indebite & contra legem, vacuum & nullius vigoris devenit & exiſtit: Plaintiff replies, That 'twas delivered modo & forma as they have declared; Defendant demurs.

Mr. Tremayne argued the Bond was void, being in Reſtraint of Trade, and urged the ſaying of Hull in Hen. 5. and Cleigate and Batchelour's Caſe, and ſeveral others, which, becauſe they are anſwered in the Argument made on the other Side, I ſhall not recite.

I argued for the Plaintiffs to this Effect, viz. That this Bond is good; for firſt, a Bond, though with a Condition reſtraining Trade, is not void, if only from a particular Place: It muſt be agreed, That if the Condition be ſuch as either binds the Obligor to do ſome unlawful Act to excuſe himſelf from the Penalty, or defends the Obligee in doing an ill Thing; in either of theſe Caſes both the Condition and the Obligation will be void; but my Lord Coke, 1 Inſt. 206. ſaith, it muſt be a malum in ſe, which is in it ſelf naturally unlawful, and cannot by any Law be made lawful, and all the Bonds that are adjudged void at Common Law for their Conditions Sake are ſuch, (Bonds to Sheriffs and upon uſurious Contracts are void by Statute-Law) they are all to do ſuch unlawful Acts as occaſion a manifeſt Prejudice to the Publick, or a plain Injury to ſome third Perſon; now our Caſe comes within neither of theſe, for the Exerciſe of a Trade in a particular Place is at moſt but a Privilege or Liberty which the Common Law gave to every Man that had Skill to uſe it; and ſince 2 Eliz. to all that have ſerved ſeven Years Apprenticeſhips, they being then preſumed to have Skill.

No Man is bound to uſe his Trade in a particular Place, nor is any Man puniſhable for not doing ſo, and whatſoever he may lawfully forbear that he may oblige himſelf againſt; for the Matter of the Condition being antecedently lawful, how a voluntary Obligation ſhould make it otherwiſe ſeems ſtrange. Quilibet remunciare poteſt juri pro ſe introducto, is a certain Rule, and infallibly true in all Caſes, except where a third Perſon is wronged, or the Publick prejudiced by ſuch Act, neither of which is in our Caſe; the former is no way concerned herein, nor the latter, as our Caſe is; 'tis true, Trade in general is pro bono publico, but whether the Defendant be a Taylor at Exon or Tiverton is no matter: Every Man is bound to work (that hath no other Means of Livelihood) and ſince 5 Eliz. in the Trade he was bred in as an Apprentice becauſe he can uſe no other; therefore a Reſtraint of all Trades would be void, and ſo a Reſtraint of one Trade from all Places in the Nation, becauſe the Publick would be prejudiced, becauſe a Trader would be loſt: for that Perſon perhaps either ought not, or ſkills not how to uſe any other; but otherwiſe if from one Place only, becauſe the Kingdom may be as well ſerved by him in another Place as in that one.

It being a Right or Privilege, and not a Duty (beneficium not officium) to uſe his Trade in Exon may be waived or relinquiſhed; and 'tis a Rule applicable to this Caſe, Modus & conventio vicunt legem: Many Things are good by Conſent which are not by Compulſion; and therefore By-Laws many Times bind thoſe that are Parties to the making of them, as Members of a Corporation and the like, which no ways oblige Strangers; and therefore a By-Law that none but thoſe of their Company ſhall uſe that Trade may be void, becauſe it takes away this Right or Liberty of Trade, and againſt their Wills; and this is the true Reaſon of the many Caſes concerning the Invalidity of ſuch By-Laws, and particularly of the Taylor of Ipſwich's Caſe. 11 Rep. 53. and in 1 Roll. Abr. 16. this very Reaſon is alledged, and the Difference aſſigned between a Man's own Engagement, and a Conſtraint by By-Laws not to uſe his Trade in a particular Place: So in the Caſe of

Joliff

Joliff and Broad, which I ſhall make more uſe of preſently; and this is the true Reaſon of the Preſcriptions and Cuſtoms for the ſole Uſe of a Trade in a particular Place, excluſive of others, as ſole Baking of Bread, Grinding of Corn, &c. (Sir George Farmer's Caſe, cited in 8 Rep. 125.) becauſe ſuppoſed to have in its Original a reaſonable Commencement by Conſent and Agreement.

Not to plough a Man's Ground, ſome of the Year-Books ſay, would be a void Covenant or Obligation; and yet if a Leſſee for Years of a Farm, ſhould covenant not to plough his Land the laſt Year of his Term, this doubtleſs would bind him, and is very uſual, and yet Husbandry is certainly as much for the publick Good of the Kingdom, as any particular Trade, whether that of a Taylor or any other; ſo that by an Obligation or Contract a Man may lay a partial Reſtraint on himſelf: Our Law takes Notice in many Caſes of a Difference between a total and a partial Reſtraint of Perſons from Things that are really pro bono; and therefore when a Man gives or deviſes any Intereſt, with a Condition not to marry, the Donee ſhall have the full Benefit of the Gift, as if no ſuch Condition were annexed thereto; but yet a Condition not to marry any of ſuch a Town would be good: In Reaſon there is and muſt be a Difference between a total and a partial Reſtraint of a Man's Trade: One Reaſon why a total Reſtraint is againſt Law is, Becauſe the Man is thereby tempted, nay, under ſome Neceſſity of Idleneſs, and ſo the Kingdom would loſe the Benefit of his Labour: But what need he be idle who has all England to work in ſave ten Acres of Ground called Exeter? Nay, How can it be termed a Reſtraint when he has Liberty for it throughout the whole Nation, any where ſave one Town?

A Man may by Articles, by Covenant, or by Bond, oblige himſelf to abide and trade in a particular Place, and if he may be obliged to that, then ſurely econtra; for that Engagement to Reſidence and Trade in one Place is an implicit Reſtraint as to all other, and 'tis more like an Impriſonment than any Thing, and yet 'tis frequently done upon Marriages in particular Families of another Place, different from

that the Party was born in: And for Trades, it is common and uſual for Merchants, Factors and Mariners, going in the East-India Company's Service, to bind themſelves, not to trade there upon their own Account; and yet never queſtioned but ſuch Articles and Bonds are obligatory, becauſe reſtrictive only to a Particular, and yet Merchandizing is for the Weal-publick, as much as a manual Occupation.

Here in the Caſe of the East-India Company and Sands in the Admiralty, it was not doubted but if Sands had given Bond or Caution not to trade at the East-Indies, it would have been obligatory; nay, it was agreed, otherwiſe there would never have been ſo much Diſpute about the ſtaying his Ship till ſuch Bonds given, if they would have been of no Force when given.

A Mariner may doubtleſs oblige himſelf not to go any Voyages to particular Places; Commiſſioners of the Cuſtom-Houſe are obliged not to merchandize, and yet ſeveral of them have been educated Merchants.

Here in London what more ordinary than Covenants in Leaſes, and Bonds for Performance of them; that the Leſſee his Executors, Adminiſtrators nor Aſſigns, &c. ſhall not uſe ſuch and ſuch a Trade in their Houſes, and yet never pretended to be againſt the Law; and though in ſuch Caſe the particular Leſſee be not of the Trade ſpecified in the Covenant, yet his Executors or Aſſigns may be ſo; and there is no Danger of the Covenant's being broke, unleſs it be by one of that particular Trade.

The true Reaſon of the Opinions that Bonds which oblige to an abſolute Forbearance of Trade are void, is, becauſe it deprives a Man of his way of Living, which Reaſon fails in this Caſe, becauſe 'tis only to Exeter, and no other Place, and he has every where elſe beſides left him to get a Livelihood in.

But beſides, the Reaſon of the Thing, Authorities are not wanting, and expreſs ones too; the Caſe of Joliff and Broad. 2 Roll. Rep. 201. in Noy 98. and in 1 Jones 13. in 2 Cro. 569. in Roll. Abr. 1 Part 16. 'Tis ſo notable a Caſe that all the Reporters of that Age take Notice of it; it is an Action of the Caſe on a Promiſe to pay an hundred Pounds on the Uſe of

Trade, and directly adjudged, that an Aſſumpſit will lie on a Promiſe not to uſe a Man's Trade in a particular Town, but a general Promiſe not to uſe it at all is void; and the Reaſon given for the Judgment is this very Difference; and as the Caſe is in Rolle's Rep. the Lord Mountague ſays, That a Tradeſman may bind himſelf not to trade or dwell in Fleetſtreet, but Cheapſide; and they all agree to it, and that's certainly the ſame as to this Purpoſe with two diſtinct Towns, and there they ſay 'tis no Reſtraint againſt Law, becauſe he hath ſtill Liberty to inhabit and trade in any other Place within the Kingdom; and this Judgment in C. B. was afterwards affirmed on ſolemn Argument again in the King's Bench; 'tis true this was an Aſſumpſit, and ours is a Bond, but I hope to evince them to be the ſame preſently; the Reaſon given for this Judgment in Jones's Reports is, becauſe with a Man's own Conſent he may part with his Right of Trading in any particular Place, volenti non fit injuria; and as it is reported in Noy, the Reaſon given is, becauſe reſtrained from one Place only, otherwiſe if it had been a general Reſtraint ſaith that Book; all which Reaſons of that Judgment reach our Caſe.

Another ſuch Caſe in every Particular is that of Bragg and Tanner in Palmer's Rep. 172. 'tis Caſe on an Aſſumpſit, wherein the Plaintiff having bought the Defendant's Shop and Goods in Newgate-Market, the Defendant in Conſideration thereof promiſed, That if he ever after uſed that Trade in Newgate-Market, he would pay to the Plaintiff 100 l. And this was adjudged a good Aſſumpſit.

Another like Caſe is that of Prugnel and Goffe in Aleyn's Rep. 67. and in Style, 11. 'tis an Aſſumpſit, That in Caſe the Plaintiff would marry the Defendant's Daughter, the Defendant promiſed ſhe would aſſign over her Shop and Goods in Baſingſtoke to the Plaintiff, and not exerciſe her Trade in that Place: And for that ſhe ſtill uſed the Trade there, 'twas adjudged for the Plaintiff in C. B. and that Judgment affirmed on a Writ of Error in this Court.

And in that Caſe of Prugnel and Goffe, my Lord Rolle aſſigns this very Difference, and ſays, That though the Conſideration be never ſo good, yet if the Reſtraint

ſtraint be general throughout England, either Bond or an Aſſumpſit would be void: Otherwiſe if ſuch Reſtraint be only particular, as here, which argues there is no Difference between an Aſſumpſit and a Bond, as I ſhall prove preſently, and I hope very plain.

Another like Caſe there is in March's Rep. 77. Caſe 121. where a Contract being between two Mercers, That the one ſhould buy of the other all his Mercery Wares, and take his Shop of him; the other in Conſideration thereof promiſed not to ſet up his Trade in the ſame Town, and adjudged a good Aſſumpſit in B. R.

Now becauſe ſome Opinions ſeem to make a Difference between a Bond and a Promiſe; as to this Purpoſe, my Lord, there can be nothing pretended to diſtinguiſh them, but either the Conſideration or the Obligation.

1. The Conſideration can never make any Variance, for firſt, we are in a Court of Law, where every Bond hath a good Conſideration as ſtrongly implied as an Aſſumpſit muſt have one expreſſed; beſides, a good Conſideration can never make an ill Promiſe good, where the Matter of the Promiſe is ſo, and this is adjudged in Onely's Caſe, Dyer 355. Every Debt implies a Promiſe, and in facto is a good Conſideration: and therefore is it that an Aſſumpſit lies upon an Indebitat: Nay, an Aſſumpſit will lie on the Conſideration of a Man's being indebted by Bond, and there's no one Caſe in the World where at the Common Law a Bond is void becauſe of the Illegality of the Condition, but an Aſſumpſit to do that unlawful Thing would be void too, though the Conſideration be never ſo good; and if we put the particular Caſes commonly inſtanced in, 'twill plainly appear; as to kill J. S. beat J. N. not to go to Church, and ſo of all the other.

2. The Lien or obligatory Nature of the one, and the other are the ſame in Kind, though not in Degree; a Parol Contract and an Obligation are of the ſame Nature, only one by Deed, the other not, and there's no other Difference; the Penalty can't alter the Caſe, ſave a little more effectually to oblige to the Performance: Nay, a Promiſe to pay ſo much Mo-

ney on doing or not doing ſuch a Thing is the ſame, and ſo are the Caſes I have cited; and ours is nothing but ſuch a Promiſe under Seal and in Writing; ſo that I cannot imagine but whereſoever the Condition of a Bond is againſt Law, and void, a Covenant or Promiſe for the ſame Matter muſt be ſo too; & econtra: And now it being agreed that ſuch a Promiſe is good, as it muſt be on this multitude of Evidence, our Bond muſt be ſo too; yea, yours ſeems ſtranger, for in a ſingle Promiſe the Aſſumpſit is directly and expreſly binding not to uſe his Trade, and here the direct and expreſs, and immediate Obligation is only to pay 40 l. and the Condition is in Nature ſubſequent to the Obligation, and comes by way of Defeaſance for the Obligor's Benefit, and not for ours; I confeſs I have never a Caſe in a Bond but one, which is Barrow and Wood, March 191. Caſe 238. and there the better Opinion is for the Plaintiff, though there be no Judgment but only an Adjournatur, and therefore I ſuppoſe the Defendant compounded the Matter.

There's one Thing more which will go a great way in this Caſe perhaps, a Taylor's Trade is doubtleſs within 5 Eliz. and they have not pleaded he had been ſeven Years Apprentice to that Trade; ſo by that Law 'tis unlawful for him to uſe that Trade; now it cannot be deemed to be againſt the Laws of this Kingdom of England, for a Man to oblige himſelf not to do that which the Law had before forbid under a Penalty; and to avoid a Bond you will never intend he was ſo, whatſoever you would to make a Bond good, nay, I hope you'll rather intend the contrary.

As to what hath been urged on the other Side, the ſtrongeſt Objection that hath been made is this, That if a Man may under a Penalty reſtrain himſelf from one Place, he may from twenty, and ſo from every where.

I anſwer, That's no Conſequence, a Man is not obliged to uſe his Trade in any particular Town, but ſomewhere he muſt; and the Commonweal is not concerned where it is, ſo that it be ſome-where; and the Reaſon of a total [illegible] being againſt Law is, as I ſaid before, [illegible] the

I [illegible]

Kingdom loſes an Artificer, or an Handicraft's Man; not ſo here.

For the Books there's no Semblance of Law againſt it till 2 Hen. 5. 5. and that's the Ground of all the Scruples ever ſince, and that it was the ſingle Opinion of Hull, who ſwore per Dieu he would commit the Plaintiff were he preſent; but that Caſe was of a general Reſtraint as to all Places, and yet in that very Caſe Iſſue was afterwards joined If he had uſed the Craft of a Dyer within the Time expreſſed in the Condition? which plainly ſhews that if he had uſed it, it had been forfeited: Then there's the Caſe of a Blackſmith of Southmyms, 2 Leon. 210. there it is ſaid ſuch Bond was void, but that's an extrajudicial Opinion, for it was not the Point in Judgment then before them; for the Matter then was only upon an Habeas Corpus brought by ſuch an Obligee, committed by a Lawyer, Juſtice of the Peace; who having read this Caſe of 2 Hen. 5. 5. did what Hull ſwore he would have done, and committed the poor Man; but the then Court of Common Pleas thought fit to reprimand the Juſtice, and diſcharged the Priſoner: The ſame Caſe is in Moor 142. But

Then there's another Caſe in Moor, 115. an Anonymus Caſe, which I can find no where elſe, 'tis very briefly and odly reported as if by Hearſay, for it ſays only, that a Maſter takes an Obligation of his Apprentice not to uſe his Trade, &c. and held no Action was maintainable on it, but ſays not why or wherefore; ſo that it might be for Duzels or Infancy, or any other Cauſe for ought appears in that Caſe.

Then there's the Caſe of Colgate or Cleigate *v.* Batchelor, which is in 2 Cro. 872. and in Owen 143. which ſeems the ſtrongeſt of them all, the Condition being, That if he ſhall not uſe the Trade of an Haberdaſher, as Servant, Apprentice, or Maſter in Kent, Canterbury or Rocheſter; whether this Caſe be Law I muſt ſubmit to your Lordſhips on what I have ſaid before, and in the very Caſe there are ſeveral very odd Circumſtances.

1. 'Tis againſt his being an Apprentice, which to debar Youth from is a Breach of the Duty owing to the Weal publick.

2. 'Tis

2. 'Tis a Reſtraint from ſeveral Places.

3. It appears by the very Caſe he had not been an Apprentice, for otherwiſe 'tis idle to oblige him not to be.

4. 'Tis no Compulſion on the Party, but a Bond of the Father's not to breed his Son; ſo that either 'tis not Law, or elſe if it be, it comes not near our Caſe. But

2. Suppoſing a Bond in Reſtraint of Trade to be void, yet ours is ſomewhat different, it being a pure Debt of 20 l. which he hath bound himſelf in the Sum of 40 l. to pay in a Month after the ſetting up his Trade in Exeter; and this is every Day done, and no more againſt Law than Bonds to pay Money on the Day of Marriage, or Birth of a Child; it denotes only the Time of Payment.

3. Suppoſing ours ſhould be conſtrued in Reſtraint of Trade, that Part of the Condition only which concerns it ſhall be void, there being another Part of the Condition lawful, the Bond ſtands good; for he ought to perform that; and ſurely 'tis as lawful for a Man to remove and change the Place of his Abode, and to oblige himſelf to do ſo, as to go to Rome, or the like; and the Defendant having given no Anſwer to this Part of the Condition, the Plaintiff ought to have his Judgment, Norton *v.* Symms, Hob. 14. Moor 856. Upon all which I prayed Judgment pro Quer', principally on the firſt Point, for that the Condition reaching only to a particular Place, it would not vacate the Bond as a total Reſtraint might; and of this Opinion was the whole Court upon the firſt Argument, for this Reaſon, that a Man might part with his own Privilege by his own Conſent, where 'tis no way to the Prejudice of the Publick, as in this Caſe 'tis not, for he may uſe his Trade any where elſe; and my Lord Chief Juſtice Jefferyes inſiſted much on the common Practiſe of Covenants of this Nature in London, and we had a Rule for Judgment, unleſs better Cauſe before the End of the Term. But

The laſt Day of the Term (Mr. Juſtice Holloway being there alone) Mr. Tremayne moved to ſtay Judgment on another Exception, viz. Becauſe we had not ſet forth a Breach of the Condition of the Bond in

our Replication, and ſo there was no Cauſe of Action appeared on the whole Record; and therefore we ought not to have our Judgment: In anſwer to which I urged that their Plea had confeſſed it, they having pleaded that the Bond was void, and ſo they were not obliged to pay it; beſides, the firſt Fault was in their Bar, and our Count was good: However Mr. Juſtice Holloway ſaying nothing to the Exception, told me it could do no Harm to ſtay Judgment till next Term, and accordingly the Rule for Judgment was inlarged to the firſt Day of the next Term.

The firſt Day of Trinity Term Mr. Pollexfen moved for the Defendant on the ſame Exception that Tremayne ſtarted laſt Term, and inſiſted on this, that we ought to have demurred, or ſhewn a Breach in our Replication, and cited the Caſe of an Award in Hob. 199. where the Defendant pleading nul Award, the Plaintiff replies and ſets forth an Award, and held naught, becauſe he did not lay any Breach: And ſo on the whole Record no Cauſe of Action appeared to the Court; and cited likewiſe Heyman and Gerard's Caſe, Mich. 19 Car. 2. ſuch a like Caſe, and Tremayne repeated the ſame Things, adding likewiſe a Citation of Mr. Bonham's Caſe, but to what Purpoſe I know not. 8 Co. 107, &c.

To which Exception (being afore prepared) I anſwered thus,

That the Bar being ill the Plaintiff ought to have Judgment be the Replication never ſo idle, and that for theſe two Reaſons, or rather Differences, which would anſwer all that hath been ſaid or can be urged on the other Side.

1. Whereſoever the Bar is ill in Subſtance, and the Matter contained in it (were it well pleaded) is inſufficient to preclude the Plaintiff from his Action, there, though the Replication be naught, yet Judgment ought to be for the Plaintiff.

'Tis true, in Mr. Bonham's Caſe in 8 Rep. 120. 'tis there reſolved, That where by the Plaintiff's Replication it appears the Plaintiff hath no Cauſe of Action, there he ſhall not have Judgment, though the Bar be ill; but when the Bar is inſufficient in Matter, or amounts to a Confeſſion of the Point of Action, and

and the Plaintiff replies and ſhews the Truth of the Matter to inforce his Caſe; and in Judgment of Law ſuch Replication be immaterial and idle, yet the Plaintiff ſhall have his Judgment, for when the Count wants Subſtance no Bar can make it good; ſo where the Bar wants Subſtance, it cannot be made good by a faulty Replication.

So is Dr. Bonham's Caſe, and the ſame Reſolution is in Meriel Treſham's Caſe, 9 Rep. 110. where 'tis adjudged, that if the Bar be inſufficient in Matter, and the Count be good, although the Replication be ſuperfluous, provided it contains no Matter which impugns or deſtroys the Plaintiff's Action, though immaterial, yet the Plaintiff ſhall have his Judgment; and ſo is Turner's Caſe, 8 Rep. 133.

2. Whereſoever the Bar contains Matter collateral to, or dehors the Condition in Avoidance of the whole Action, or whereſoever any ſpecial, ſingle, particular Thing is pleaded, though it be ſpecified in the Condition, in theſe two Caſes, we need not make an Aſſignment of any Breach of the Condition in our Replication; for any Matter pleaded that would avoid the Bond, or tends to avoid it ab initio, if ſuch Bar be ill, the Plaintiff ought to have his Judgment be his Replication what it will; becauſe all ſuch kind of Pleas do by Implication agree a Non-performance of the Condition.

For ſuppoſe a Man ſhould plead Durefs, and not rightly, and the Plaintiff replies to that ſingle Matter of Durefs as he ought, he need not aſſign a Breach of the Condition, for the very Plea being perfectly a collateral Matter is quaſi a Confeſſion of the Point of Action; for no Man ſhall be intended to have performed the Condition of a Bond, which he ſays was extorted from him by Durefs.

So in our Caſe, How can it be imagined the Defendant hath performed this Condition when he himſelf conceives it void and of no Force in Law? Nay, every Man in pleading is preſumed to make the beſt of his own Caſe; and ſure could he have done it with Truth, he would have pleaded a Performance.

The Reaſon they inſiſt on is, That there ought to appear to the Court Cauſe of Action.

I anſwer, Suppoſe Durels pleaded to Debt on a Bond, and the Plaintiff replies in Maintenance of his Count with a Traverſe of the Durels, and Iſſue is joined on this, and it be found for the Plaintiff, Shall not he have Judgment? Yes certainly, and yet no Breach aſſigned.

But here it may be ſaid, there's no Oyer craved of the Condition, or becauſe 'tis ſingle.

I anſwer, Durels may be pleaded after Oyer of the Condition, and then it does all appear to the Court; but I'll put a Caſe where Oyer muſt be of the Condition, as in Caſe the Statute of Uſury be pleaded, and the Plaintiff replies; he needs not, nor ever does he aſſign a Breach in his Replication, becauſe the very Plea imports a Non-performance.

Of all the Sheriffs Bonds where the Statute hath been pleaded to them, never was a Breach aſſigned in the Replication; the ſame of Raſures, Interlineations, or other ſpecial non eſt factum pleaded, ſo of Infancy or the like, or a Releaſe pleaded.

So if a Special ſingle Matter be pleaded, as no Demand, no Notice, or the like; the Caſe of Griffith and Spencer, in Cro. Eliz. 320. Debt on a Bond brought in the Common Pleas, Oyer craved of the Condition, which was to pay 100 l. After Notice of the Plaintiff's Return to England from Conſtantinople; the Defendant pleads no Notice; and the Plaintiff replies Notice in ſuch a Manner, &c. Hereon at laſt there's a Judgment in the Common Pleas for the Plaintiff, the Defendant bringing a Writ of Error here in this Court, inſiſts upon this very Matter for Error, that no Cauſe of Action appeared, no Breach being aſſigned of the Non-payment, and Judgment affirmed on this very Difference; it being a ſingle, ſpecial collateral Matter pleaded, which was a kind of Admiſſion that the Money was not paid.

There are but two Caſes that can be pretended to go otherwiſe, and thoſe are Bonds for Performance of Awards, and the like for Covenants; as Waters and Bridge, 2 Cro. 640. Barret *v.* Fletcher, ibid. 221. That was in Caſe of a Bond of Submiſſion, the Reaſon there aſſigned for ſuch Exception was, Becauſe the Pleas in Bar were to the Matter in the Condition; as no Award, Performance of Covenants, and the like,

which Pleas cannot be well avoided without ſetting forth the whole Matter, and aſſigning a particular Breach; otherwiſe where they plead a particular collateral Matter, as Outlawry, or the like, which muſt be anſwered; or any other ſpecial Matter, there no Breach need be aſſigned; but when the Defendant's Plea is in the Generalty, the Plaintiff ought to ſhew his Cauſe and a Breach.

In Jeffry and Guy's Caſe, Yelv. 78. Debt on a Bond for Performance of Covenants in a Leaſe: Defendant pleads an Eviction by the Entry of a Stranger having a prior Title: The Plaintiff in his Replication traverſeth the Entry of the Stranger, &c. Non-aſſignment of a Breach was afterwards aſſigned for Error, becauſe the Defendant pleading a Special Matter diſabled the Plaintiff from aſſigning a Breach, for of Neceſſity he ought to anſwer the Special Matter alledged in the Bar; and another like Caſe in Yelv. 24. Bayly *v.* Taylor, and the ſame Rule for the ſame Reaſon,

'Tis ruled likewiſe, That whereſoever the Replication is not to intitle the Plaintiff to his Action, but only to avoid the Bar, which Bar is ill; there Judgment ſhall be for the Plaintiff, though the Replication be ſuperfluous, or otherwiſe naughty; and ſo 'tis adjudged in the Caſe of Gewen *v.* Roll & Ux', Executrix of one Noble, 2 Cro. 133. Debt on a Bond of 1000 Marks; the Defendant pleads a Statute with a Defeazance for Performance of Covenants, which Bar is ill, becauſe it doth not ſay the Statute was forfeited; the Plaintiff doth not demur, but replies a Fraud, and that ill too; ſo here was both Bar and Replication ill, and this Exception taken becauſe no Breach aſſigned in the Non-payment of 1000 Marks, and after divers Motions Judgment was given for the Plaintiff for this very Reaſon.

1 *Lev.* 226. As to the Caſe of Heyman and Gerard in Lord Saunders's Reports, 1 Part 102. in Sid. Rep. 340. and in 2 Keb. 258, 275. Lord Saunders, though of Counſel with the Defendant, was of Opinion againſt the Exception, beſides, there's no Judgment in the Cauſe, for the Suit was ended by Reference.

As to that Caſe of Hob. 199. there's a Plea in the Generalty, viz. nul agard fait; and as for the Caſe of Norton and Simmes, in Hob. 14. and Moor 856. (which is a much more pertinent Caſe, and more pregnant of the Objection than any cited by Tremayne on the other Side) the Plea was Performance generally, which though an ill Plea, ſome of the Covenants being negative; yet 'twas in the Generalty, and not collateral, nor any ſingle ſpecial Matter, and ſo contradicts not either of the Differences I have aſſigned.

As for Hamond and Dodd, 1 Cro. Car. 3. the Bar is adjudged good, being certain to a common Intent, and ſo nothing to the Purpoſe: As for Ridgeway's Caſe, 3 Rep. 52. Debt on an Eſcape, the Reaſon why Judgment is there for the Defendant was, Becauſe on the Plaintiff's own ſhewing in his Replication it appeared he had no Cauſe of Action, that there was no Eſcape; for the Defendant pleading a freſh Purſuit and a Recaption, the Plaintiff replies and denies not the freſh Purſuit, but pleads that the Party was out of his Sight; which might be, and yet the Plaintiff excuſable from an Eſcape.

And as the Caſe is reported in Poph. 41, 42. the Reaſon is given becauſe it was ill in Form only, of which after a Replication made (there being no Demurrer to it) the Plaintiff ſhall take no Advantage, and then the firſt Fault is in the Replication; and where the Bar is inſufficient in Subſtance, and the Matter or Cauſe of Action alledged in the Count is not ſufficiently avoided by the Bar, Judgment ſhall be for the Plaintiff; and in that Caſe the Matter pleaded in Bar, if it had been well pleaded, would have been a good Bar, viz. Freſh Purſuit, and ſo the Fault was only in Form, and by Conſequence help'd by the Replication; but had it been an ill Bar in Subſtance 'twould be otherwiſe; and all the Caſes they have or can cite, are either in the Generalty or good in Subſtance, or to the Matter of the Condition as nul tiel award, Performance of Covenants or Award, they are all good in Subſtance, and ſo not within either of my three Differences which I inſiſt on: As

1. Whereſoever the Matter pleaded in Bar is collateral to, or dehors the Condition of the Bond, there needs no Aſſignment of a Breach; and though we do not demur, but make a ſuperfluous idle Replication, we ought to have Judgment if ſuch Bar be ill.

2. Whereſoever the Bar is inſufficient in Subſtance or Matter to exclude the Plaintiff of his Action: Or

3. Whereſoever the Plea in Bar is to, and of ſome ſpecial ſingle particular Matter, though it be contained in the Condition, if it be ill, 'tis with the Plaintiff, though he doth neither demur nor aſſign a Breach, but makes an idle Replication.

And therefore I pray Judgment for the Plaintiff. And

Curiæ. The Court were all of Opinion for the Plaintiff, for that the Matter pleaded in Bar is meerly idle and collateral, and admits a Non-performance as much as a Releaſe.

Lord Chief Juſtice put this Caſe to Mr. Pollexfen, Suppoſe a Defendant ſhould plead to Debt on a Bond, that the Plaintiff diſcharged him of that, and ſhews not how, and the Plaintiff replies ſome Matter immaterial, Shall not he have Judgment becauſe he hath not aſſigned a Breach?

And Judgment was given for the Plaintiff by the whole Court (Wythens abſente) Pollexfen and Tremayne pro Defendente, Shower pro Quer'.

However Tremayne not being ſatisfied, his Client brought a Writ of Error, though as to the laſt Point all the Bar thought there was nothing in it; (and as to the firſt Point I think not much.)

Afterwards in the Exchequer Chamber I argued it again, and there the Court were of Opinion with my Client as to the laſt Point, viz. That the Replication was well enough without alledging a Breach, becauſe the Plea admitted and ſuppoſed a Non-performance.

But as to the firſt they held the Bond void, being a Reſtraint of Trade, and held the Difference between a Bond and Aſſumpſit, becauſe of the Conſideration, without any regard to the Conſideration implied in Law, upon ſealing and executing of the Bond; and ſo the Judgment was reverſed.

DE

Termino Trin.

36 Car. 2. B. R.

Anonymus. (354.)

NOtand. An Action was brought againſt two Executors, one appears and pleads no Aſſets, and found againſt him: Judgment againſt both, with Coſts only againſt him that did appear and plead. Quære if good.

Mayor of Berwick's *Caſe.* (355.)

BErwick upon Tweed is not within any County, have no Sheriffs, the Mayor there makes, executes and returns all Proceſs; and generally their Suits there are commenced and ended in their own Courts; but in a Cauſe of Land there, if commenced here, there's a Suggeſtion made on the Roll, that bre' Domini Regis ibi non currit; as 'tis in Wales: And on this Reaſon an Attachment could not be granted againſt the Mayor, becauſe no Sheriff to execute it; but a Tipſtaff was ſent. *Berwick.* Courts inferior.

Dominus Rex verſus Cheſter *Civit.* (356.)

IN a Quo Warranto againſt them, and the like againſt the City of York: 'Twas held, That if the Corporation appear not thereto, Judgment ſhall be entred Corporation.

entred for a Seizure quouſque, &c. and if in the mean Time they come not in and replevy their Corporation, and appear; then the Term after a Judgment final ſhall be given againſt them: And in that Caſe of Cheſter 'twas adjudged, that it is not a good Appearance, unleſs the Warrant of Attorney be made under the Corporation Seal.

(357.) East-India *Company verſus* Sands. *Entred* Trin. 36 Car. 2. B. R. Rot. 126.

Corporation Monopoly.

ACTION ſur le Caſe, ſetting forth quod cum Car. 2. by his Letters Patents dated 3 April. 13. Anno regni ſui did give them the ſole Liberty of Trade to the East-Indies, and prohibiting all others, unleſs by their Licence; by Virtue of which they then were, and yet are a Body politick, and have had great Commerce with the Infidels there, then and yet Pagans and Enemies, not Chriſtians nor Subjects, to the great Honour of the Kingdom, the Increaſe of the King's Revenue, and of the National Intereſt; and have expended great Sums of Money thereabouts; and that ſuch Trade cannot be maintained but by a Corporation; prædict. tamen Thomas Sands, a Subject of England, and not a Member of their Company, nor the Son of a Member, nor an Apprentice, Servant or Factor of a Member, nor aſſigned by them; knowing the Premiſſes, and deſigning to damage, prejudice and impoveriſh the Company, unjuſtly and againſt the Letters Patents aforeſaid, into the East-Indies (tali die & anno) divers Merchandizes on ſuch a Ship did tranſport, and others did import thence hither, viz. at Ratcliffe in the County of Middleſex, without the Licence, and againſt the Will of the ſaid Company, to their Grievance and Impoveriſhment, and againſt the Form of the ſaid Letters Patents ad dampn' 1000 l.

The Defendant venit & defendit vim & injuriam quando, &c. craves Oyer of the Letters Patents (and they are ſet forth at large) quibus lectis & auditis dicit quod action. non, quia Proteſtando that the ſaid Letters Patents are inſufficient to found an Action, proteſtandoque etiam that they never had ſuch Commerce as

is there ſet forth; and proteſting that the ſame Trade there might as well be maintained there by other Merchant-Traders as by them, and as much to the Increaſe of the King's Revenue, pro placito dicit, that by 15 Edw. 3. 'tis ordained quod Maria forent aperta pro omnibus mercatoribus ad tranſeundum cum Merchandiſis ſuis ubicunque eis placeret; and that by Virtue of that Statute, and according to the Common Law of this Realm, he did trade as is declared above, prout ei bene licuit, the ſaid Letters Patents, or any Reſtrictions or Prohibitions in them to the contrary in any wiſe notwithſtanding: Et hoc paratus eſt verificare unde petit jud. ſi, &c. Plaintiff demurs, Defendant rejoins.

Mr. Sollicitor Finch pro Quer'. Whether this Patent prohibiting Trade to others be good, is the firſt general Queſtion: No Subject hath a Right or Liberty to trade with Infidels, or to go thither without the King's Leave; no ſuch Trade in general could be had without Treaties and Leagues, and therefore not without the King's Licence: All Right to trade depends upon the Good-Will of the Foreign Prince there: The King may reſtrain it by a total Prohibition of Trade with that Nation, he may reſtrain a Man by a ne exeat regno: If a Foreign Prince with whom the King is in League ſhould reſtrain Trade; no Man can trade there in Breach of the King's League; and whatſoever the King may reſtrain in general, ſure he may prohibit ſub conditione: There can be no ſuch Right to trade with Infidels, for they are always treated as Enemies, and ſo accounted in Law; a Pagan ſhall not have an Action though he be beaten. Calvin's Caſe, 7 Rep. 1 Inſt. 32. They are Enemies in reſpect of their Properties. See Rot. finium 50 Hen. 5. Membr. 5. (See Pryn's Pamphlet of his Jews remitter) the marrying of a Jew was anciently reckoned Felony. 3 Inſt. 89. Michlebourne's Caſe, 2 Brownl. Lord Coke ſays the King may prohibit Trading with Infidels: Beſides, either the firſt Patent for this Trade was a Monopoly, or this is none; for they are the ſame, and when for a new Trade 'tis agreed to be none; now the Law hath not determined how long ſuch Trade may be incloſed: The Trade of this Nation anciently was only Wool, Woolfells and

and Leather, and the old Laws concerning Trade relate to them only: Then the next Point is only this, Whether the Action will lie if it be a bare Licence or an Interest? I think it an Interest. For

1. They are at great Charges to maintain the Trade.

2. They are taxed for their Interest as such in Acts of Parliament, viz. 20 s. for every 100 l. Share in the Stock; we see the common Case of a Fair, which in some sort is but a Licence, and yet an Action lies.

Mr. Holt argued it too, but I heard him not.

Mr. Attorney General pro Quer' in Michaelmas Term following argued to this Effect: If these Letters Patents be binding, I shall not contend nor argue, but that the King may, notwithstanding these Letters Patents, licence others to trade there likewise: First consider how Trade was at the Common Law; Trade is either Inland or Foreign, Inland Trade consists of Manufacture or Merchandize; for the first any Man may at the Common Law use it how and when he pleases, so as he does not annoy his Neighbours, and the King's Prerogative is not concerned: As for Merchandize generally speaking, a Man might buy and sell as he pleased, but first at Common Law no Man could ingross one Commodity.

2. This was restrained to particular Places, 3 Inst. 196. Then

3. No Assemblies could be had for Trade without the King's Licence; though some Fairs and Markets are by Prescription, yet their Original is from the Crown, and these Licences for Trading in Assemblies, as in Fairs and Markets cannot be resumed without some Forfeiture, and in these all the King's Subjects have an Interest; and the Lord of a Market cannot prohibit them; and in these the Publick is concerned to prevent Cheats and punish Disorders, and therefore a Court of Justice is incident to such Fairs.

4. There was another Restriction of Foreign bought and Foreign sold, which prevailed in several Cities, Towns and Sea-ports, 9 Edw. 3. cap. 1. 9 Edw. 4. N° 30. not printed. 8 Rep. 128. So that the Managery

of the principal Part of Inland Trade in Markets and Fairs was under the King and his Influence.

Secondly, As to Foreign Trade, the Common Law takes Notice but of two sorts of Foreigners, Friends and Enemies, and that must be tried by the Leagues of Peace and War, which are, or ought to be inrolled in Chancery: Although there be no actual War, yet if there be no League, they may take up Arms and fight one another, for they are in Statu belli: At Common Law no Man had a Right to trade with Strangers, Bodin. de Republ. lib. 1. cap. 7. The Laws of Commerce are contained in the Leagues of Princes and People; all Strangers that came hither came under safe Conduct, and the King might have prohibited them: Magna Charta cap. 30. which is a general safe Conduct to Strangers, and hath a Restriction nisi sit publice prohibitum: Coke argues, that before that Time the King did prohibit them: But he interprets this to be a Prohibition in Parliament, which is a Construction as without Authority, so against all Precedent; the King may order them to depart the Realm, 2 Inst. 57. Rolle's Prerog. 180. The King may prohibit Strangers from coming hither, he may prohibit his Subjects from going thither, 27 Edw. 3. Noted and notable Merchants were certainly meant Merchants of the Staple, 1 Eliz. cap. 13. Merchants Adventurers and Merchants of the Staple; then as the King may prohibit his Subjects from going beyond Sea, so he might recall them when he pleased, Dyer 128, 276, 375. 3 Inst. 179. 1 Leon. 9. Hill. 24 Edw. 3. Scacc. Tres. Rot. 13. Knowles and Luce, Pasch. 22 Eliz. Moor 109. from all which 'tis evident, that at Common Law no Man hath a Right to trade abroad; there were also cited F. N. B. 85. M. 1 Eliz. Dyer 165. Mich. 12 & 13 Eliz. 296. Grot. de jure belli. 3. 9 Hen. 4. fol. 4. pl. 15. 3 Cro. 3. The Law vests the sole Power of making Leagues in the King alone, and never was a League made for a free universal unlimited Trade, Pasch. 26 Eliz. 4 Inst. 153. In all Leagues the municipal Laws of each Realm are excepted: The Rules of the Common Law have no Cognizance of such Foreign Matters, as foreign Trade being meerly Foreign and there transacted. Dyer 176. And

it hath appointed no Rules for the Managery thereof, but hath left it to the King.

The Foundations of Foreign Trade are two.

1. The King's Leagues.

2. The King's Grant either singly or in Parliament.

First, If a League be broken, let the Subjects Right be what it will, it is gone, for upon Breach of the League they become as Enemies; and these Leagues may be limited as to Time and Place, as was the League between the King of England and the Duke of Burgundy, against Flanders and the Low Countries, 21 Edw. 3. Roll. Tit. Prerog. 174. 13 Edw. 4. num. 2.

Secondly, The other Foundation is Royal Licences, as the King may at the Common Law prohibit his Subjects to go beyond the Seas, so he may licence them, Reg. 193. he may Licence alien Enemies who were prohibited by the Common Law, as by his Letters of Safe Conduct, 20 Edw. 4. fol. 6. pl. 6. Moor 434. The Staples which were the publick Marts, were settled all by the King alone, though afterwards settled and confirmed by Act of Parliament, 27 Edw. 3. cap. 1. Wool, Woolfels, Leather and Lead were the Staple Commodities; the King had undoubted Right to give Licence of Trade to other Places then where the Staple was fixed; the Men of Berwick and Newcastle had such Licences, but afterwards they being found inconvenient were removed. 2 Rich. 3. 12. 1 Hen. 5. num. 15. 15 Hen. 6. c. 13. 5 Edw. 4. 33, 34. Hale's Common-place Book, Tit. Monopoly, numb. 3. Shave & al' Hill. 3. & Pasch. 4. Jac. Rot.

'Tis most plain, that the Foreign Trade and its Managery was governed by the Prerogative in all Cases where no Act of Parliament hath interposed; and in all these ancient Times the Foreign Trade was managed by the King's Charters to Foreigners. 11 Edw. 3. Rot. Claus. 2 Part. Membr. 35. several English obtained Licence to fish in the Sea with Vessels of 30 Tun; and this was within the Narrow Seas, 3 Hen. 5. Rolle's Abr. Tit. Prerog. 170. 8 Eliz. a private Statute: Then there are Royal Licences by Act of Parliament, but there are far more Laws for Restraint of Trade by English, then there are for open Trade; there was never a Statute yet that gave Liberty of

Trade to all Nations: He urged, that the ſeveral ſpecial Statutes for Liberty of Foreign Trade to particular Nations, or of particular Commodities, are all introductive of a new Law; all the Acts of Parliament which do found Licences to trade, do ſuppoſe Leagues, for they create no Liberty in Time of War. When the King hath given a Liberty or Licence, he cannot afterwards make a general Prohibition to all People, becauſe there was an Intereſt paſſed; nor can he licence all People whatſoever, for that would repeal the former; therefore the Canary Patent was void, becauſe expreſly againſt a former Patent: Theſe Indians are alien Infidels, and they are Enemies, whether trading with them be within 25 Edw. 3. I ſhall leave them to conſider, 1 Inſt. 2. An alien Enemy dies ſeized, on Office found the King ſhall have the Land, and not the Lord by Eſcheat; he cited 7 Edw. 4. fol. 17. and 36 Hen. 8. Bro. Property, 28. 22 Edw. 4. 45. An alien Enemy here before the War began, his Goods cannot be ſeized by any Subject, but belong to the King, but if he come here with his Goods after the War proclaimed, any Man may ſeize them, ac deveniunt captoris bona: But as to the Jews, they are here by an implied Licence, but on a Proclamation of Baniſhment 'tis like a Determination of Letters of Safe Conduct to an alien Enemy, who was here by Virtue of ſuch Letters before, &c. There's no League between us and the Great Mogul, or any of them; and by this Charter the Eaſt-India Company have Power to make War and Peace with them in Defence of their Trade: As to the Objection of its being void, as in ingroſſing Foreign Merchandize, and ſo a Monopoly; that 'tis not within the Statute of Monopolies muſt be agreed; and I think there's as little Pretence why the ingroſſing of Foreign Merchandize by a Merchant-Adventurer, at the Common Law, ſhould be unlawful, 38 Edw. 3. cap. 3. Reſolution of all the Judges of England, Mich. 29 & 30 Eliz. was ſo. 3 Inſt. 96. Tit. Ingroſſing. 21 Edw. 3. num. 27. 12 Rep. 10, 11.

Then ſecondly, Whether the Action will lie? And I conceive it depends on the other Point, becauſe if it be a Right and a Man be injured in it, this Action properly lies.

Objection, 'Tis not alledged the Defendant had no Licence from the King; I anſwer, 'Tis expreſly ſet forth, that the Company have the ſole Trading there, and the Court cannot intend that he hath any other Licence than what he pleads, which is only the Statute.

Objection, The Plaintiffs have not ſhewn any ſpecial Damage: I anſwer, That needs not in any Caſe where the Action is founded on the Right where a Man hath the ſole Right; 'tis otherwiſe in Caſe of Right aprender.

Objection, The Action is grounded only on the excluſive Words, which cannot give an Action; to that he cited 11 Rep. 88. Rolle's Abr. 96, 196, 106. num. 6. And the next Day Mr. Pollexfen argued pro Def. and the next Term the Court argued it ſeverally, and did all conclude with the Plaintiffs; but I heard them not: Judgment pro Quer'.

(358.) Loveday *verſus* Young.

Adminiſtratrix. Abatement.

DEbt on a Bond againſt the Defendant, as Executrix of the laſt Will of John Young, deceaſed: The Defendant before Imparlance pleads in Abatement, that ſhe was Adminiſtratrix, and not Executrix, and that ſhe ought to have been named ſo in the Bill, Et hoc parata eſt verificare unde petit Judicium quod billa caſſetur: The Plaintiff doth demur, becauſe ſhe had not traverſed, that ſhe had not adminiſtred as Executor.

Mr. Powys for the Defendant urged, That the Plea is good enough, becauſe ſuch Traverſe is not neceſſary, for the Adminiſtration ſubſequent purges the Tort, ſo Thompſon's Precedents, Tit. Debt. fol. 221. num. 240. this pleaded in Abatement. Raſtall's Entries, fol. 805. num. 2. in Point, that it may be pleaded in Abatement; and need not ſhew the Letters of Adminiſtration, Vide 2 Cro. 15. Robinſon's Caſe; where 'twas pleaded in Abatement. Sid. 301. the Caſe of Courtney *v.* Phelps, nothing is traverſable but that which is directly and poſitively affirmed in the Declaration; but this is only the Style of the Defendant given him by the Declaration: A Traverſe in

this Case perhaps would have been ill, for then it would be concluded that she is Executrix of the last Will, whereas she is Executrix de son tort only; and no Will in the Case, and therefore we ought to leave the Matter at large, whereon the Plaintiff may reply that she is Executrix, and traverse the dying Intestate, as it is in Rastal's Entries, fol. 305. num. 2. old Edition, but fol. 324. Num. 2. B. Side in the New Edition; or else the Plaintiff may reply, that she is Executrix de son tort, as in Stubbs and Rightway's Case, 3 Cro. 102. and in Keble and Obalston's Case, Hob. 49. encounter le Precedent en Thompson, 221. and so Trin. 26 Car. 2. Burnet v. Paget. B. R. Rot. 882. Case against the Executor for the Promise of the Testator, who pleads in Abatement, That the Party died intestate, and that Letters of Administration were committed to him the Defendant, Et hoc, &c. Unde ex quo non Nominatur, &c. petit Jud. de billa, in which Case Mr. Girdler was pro Quer': A Traverse in the Case would be naught, because 'twould tie up the Plaintiff to prove the Defendant Executor Ult. volunt. whereas possibly he is Executor de son tort; and so was it adjudged in Trin. 18 Car. 2. B. R. Baker v. Pope, which is in a private Report of Mr. Christopher Bard.

Pemberton was pro Quer', Debt against an Executor, the Defendant pleads in Abatement Letters of Administration, with an absque hoc, that he was Executor, &c. And per Cur', the Traverse was ill, for he ought to have relied on the Letters of Administration only, without saying more, Williamson v. Norwich Hob. 1652. B. R. Rot. 1667. Executor de son tort after Action commenced against him takes out Letters of Administration, he may retain and plead it, but he shall not abate the Writ.

Per Cur', It seems such a Traverse would be naught, but doubtless 'tis good without it: Judgment pro Quer'.

Anonymus. (359.)

Foreign Attachment.

FOreign Attachment lies not of any Thing that sounds meerly in Damages, as Covenant, or the like; it lies not really of a Debt contracted out of the

the Jurisdiction; and in Brown's Case there was pleaded a Custom in Exeter for Foreign Attachments of any Debt, and do not say accrewing within the City; naught, and so adjudged by the Lord Hale: Upon that Exception taken thereto by Sir Francis Pemberton, on a Writ of Error out of the Common Pleas; the Debt of a Corporation not attachable, because there ought to be three Capias's, and a Non est inventus returned, &c. Bill of Middlesex prevents an Attachment as much as an Original, because 'tis in Lieu of one, and 'tis the Foundation of the Suit; and if laid to be Secundum Consuetud. Cur', 'twill be a Bar.

If Money be attached and paid thereon, and afterwards the original Creditor sues for the same, and the Attachment happens to be ill pleaded, or otherwise avoided, the Party must pay the Money over again, and hath no Remedy neither in Law nor Equity.

(360.) Anonymus.

Courts inferior, *&c. Ante* Case 335.

INferior Courts if Suit be there without Cause, an Action lies, but not for a causeless Suit in the Courts at Westminster: And False Imprisonment lies for one taken by Process out of the inferior Court, if the Cause arose not within their Jurisdiction: Also a Sheriff on Action of Escape shall take Advantage of the Causes arising out of the Jurisdiction.

But suppose A. sues in an inferior Court in London, for Pasturage of Cattle in Essex (which is plainly a Cause out of the Jurisdiction) and he recovers a Verdict thereon; and afterwards he brings another Action above for the same Cause, and the Defendant pleads in Bar the Proceedings below, and the Plaintiff replies that the Cause arose out of the Jurisdiction: Is this Replication good? Can the Plaintiff take Advantage hereof himself? Quære.

Siddens *verſus* Johnſon. Intr. Hill. 35 & 36 Car. 2. B. R. Rot. 10. (361.)

London ſſ. Franciſcus Johnſon nuper de Iſlington in Com. Midd. Gen. attachiat. fuit per corpus ſuum ad reſpondend. Annæ Siddens Vid. quæ fuit Uxor' Thomæ Siddens de morte præd. Thomæ Siddens quondam viri ſui unde eum appellat, & ſunt Pleg. de proſequend. ſcilicet Robertus Gravey de paroch. Chriſtchurch London *Butcher*, & Thomas Evetts de parochia Chriſtchurch præd. *Victualler*, Et unde eadem Anna per Johannem Browning Attorn. ſuum juxtá formam Stat. in hujuſmodi caſu edit. & provis. inſtanter appellat præd. Franciſcum Johnſon de eo quòd præd. Thomas Siddens fuit in pace Dei & Domini Regis nunc apud paroch. Sancti Sepulchri in Warda de Farringdon extra London præd. die Martis ſcilicet Viceſimo quinto die Decembris anno regni dict. Domini Regis nunc 35. circa primam horam in mane ejuſdem diei ibi venit præd. Franciſcus Johnſon felonice ut felo dict. Domini Regis nunc ex malitia ſua præcogitat. & inſultu præmeditat. contra pacem dict. Domini Regis Coronam & dignitatem ſuas die & hora præd. anno 35. ſuprad. apud parochiam & Ward præd. & præd. Franciſcus Johnſon adtunc & ibidem cum quodam gladio pretii duodecim denarior. quem ipſe Franciſcus tenuit in dextra manu ſua ipſum Thomam Siddens præd. in latere ſuo ſiniſtro uſque ad cor ſuum adtunc & ibidem felonice percuſſit & dedit ei plagam mortalem de qua quidem plaga mortali idem Thomas Siddens adtunc & ibid. incontinenter obiit, & ſic præd. Franciſcus Johnſon præfat. Thomam Siddens adtunc & ibid. felonice interfecit & murdravit & quam cito idem Franciſcus feloniam præd. fecerit fugit dictaque Anna ipſum recenter inſecuta fuit quouſque, &c. & ſi præd Franciſcus feloniam præd. velit dedicere præfat. Anna parata eſt verſus eum probare prout Curia, &c.

Appeal of Murder. *Vide ante* Caſe 144, 168. *& poſt*, 469, 474.

Et præd. Franciſcus Johnſon in propria perſona ſua venit & defendit vim & injuriam quando, &c, & omnem feloniam & murdrum & quicquid, &c. Et petit auditum brevis de appello præd. & retorn. ejuſdem brevis & ei leguntur in hæc verba ſſ.

Carolus Secundus Dei Gratia Angliæ Scotiæ Franciæ & Hiberniæ Rex Fidei Defenſor, &c. Vicecom. London ſalutem

Quia

Quia Anna Siddens vidua Uxor Thomæ Siddens fecerit nos ſecurum de clamore ſuo proſequendo per Robertum Gravey de parochia Chriſtchurch London *Butcher*, & Thomam Evetts de paroch. Chriſtchurch London *Victualler* Ideo Vobis præcipimus quod attachiatis Franciſcum Johnſon de Iſlington in Com. Midd. generoſ. per corpus ſuum ſecundum legem & Conſuetud. regni noſtri Angliæ ita quod eum habeatis coram nobis in Craſtin. Purificationis beatæ Mariæ ubicunque tunc fuerimus in Anglia ad reſpondend. præfat. Annæ de morte præd. Thomæ Siddens quondam viri ſui unde eum appellat. & habeatis ibi tunc hoc breve T. meipſo apud Weſtm. decimo octavo die Januarii anno regni noſtri triceſimo quinto Shelbery Virtute iſtius brevis nobis direct. cepimus corpus infranominat. Franciſci Johnſon cujus quidem corpus coram Domino infraſcript. ad diem & locum infranominat. paratum habemus Reſponſio Petri Danielis Ar. & Samuelis Daſhwood Arm. Vic.

Quibus lectis & auditis idem Franciſcus Johnſon dicit quod prædict. Anna Siddens appellum ſuum prædict. de morte prædict. Thomæ verſus eum habere ſeu manutenere non debet quia dicit quod alias ſcilicet ad deliberationem gaolæ Domini Regis de Newgate tent. pro Civitat. Lond. apud *Juſtice-Hall* in le Old-baily London in parochia Sancti Sepulchri in Warda de Farringdon extra London præd. die mercurii ſcilicet decimo ſexto die Januarii anno regni Domini noſtri Caroli Secundi Dei Gratia Angliæ Scotiæ Franciæ & Hiberniæ Regis Fidei Defenſoris, &c. 35. coram Henrico Tulſe milite majore Civitat. London Georgio Jefferyes milite & Baron. Capitali Juſticiario dict. Domini Regis ad placita coram ipſo Rege tenend. aſſign. Thoma Jones mil. Capitali Juſticiario dict. Domini Regis de Banco Franciſco Wythens milit. uno Juſticiar. dict. Domini Regis ad placita coram ipſo Rege tenend. aſſign. Richardo Holloway milit. alio Juſticiario dict. Domini Regis ad placita coram ipſo Rege tenend. aſſign. Willielmo Pritchard milit. uno Aldermannorum Civitat. London & Thoma Jenner milite un. de Conſilio Domini Regis erudit. in lege ac Recordatore ejuſdem Civitat. ac aliis Sociis ſuis Juſticiariis dict. Domini Regis ad gaolam ſuam de Newgate de Priſonariis in ea exiſtentibus deliberand. aſſignat. Edwardus Smith gen. Coronator Civitat. London per manus ſuas proprias deliberavit in Curia deliberationis gaolæ dict. Domini Regis præd. quandam Inquiſitionem coram eo adtunc nuper capt. ſuper viſum corporis præd. Thomæ Siddens in Curia ill. gaolæ deliberationis de Recordo terminand', &c. quæ quidem

Inquiſitio ſequitur in hæc verba ſſ. London ſſ. Inquiſitio Indentata capt. pro ſereniſſimo Domino Rege apud parochiam Sancti Sepulchri in Warda de Farringdon extra London præd. die Martis ſcilicet 25 die Decembris anno Regni Domini noſtri Caroli Secundi Dei Gratia Angliæ Scotiæ Franciæ & Hiberniæ Regis Fidei Defenſor', &c. 35. coram Edwardo Smith gen. Coronat. Civitat. London ſuper viſum corporis cujuſdam Thomæ Siddens adtunc & ibid. mortui jacentis per Sacramentum Johannis Bele Thomæ Savage T. S. J. D. J. S. G. W. W. D. T. S. T. C. R. D. T. N. W. T. E. E. R. S. J. M. W. J. R. P. & A. B. proborum & legalium hominum Civitat. London præd. qui adtunc & ibid. jurat. & onerat. exiſtent. ad inquirend. pro dicto Domino Rege quando ubi qualiter & quomodo præd. Thomas Siddens ad mortem ſuam devenit dicunt ſuper Sacramentum ſuum quod quidam Franciſcus Johnſon nuper de London gen. Arthur Graham nuper de London gen. & Richardus Graham nuper de London gen. Deum præ oculis ſuis non habentes ſed inſtigatione Diabolica moti & ſeducti dicto 25 die Decembris anno 35 ſuprad. circa primam horam in nocte ejuſdem diei vi & armis, &c. apud London videlicet in paroch. & Warda præd. in & ſuper præfat. Thomam Siddens in pace Dei & dict. Domini Regis adtunc & ibid. exiſtentem felonice voluntarie & ex maliciis ſuis præcogitatis inſultum fecerunt, & quod præd. Franciſcus Johnſon adtunc & ibid. cum quodam gladio Anglice *a Sword* de ferro & chalybe confect. valoris quinque ſolidorum, quem ipſe idem Franciſcus Johnſon in manu ſua dextra adtunc & ibid. extractum habuit & tenuit præfat. Thomam Siddens in & ſuper ſiniſtram partem ventris ipſius Thomæ Siddens paulo ſupra umbilicum Anglice *the Navel*, ipſius Thomæ Siddens adtunc & ibid. violenter felonice voluntarie & ex malitia ſua præcogitata percuſſit & inforavit dans eidem Thomæ Siddens adtunc & ibid. cum gladio præd. in & ſuper præd. ſiniſtram partem ventris ipſius Thomæ Siddens paulo ſuper umbilicum Anglice *the Navel*, ejuſdem Thomæ Siddens unum vulnus mortale latitudinis dimid. unius pollicis & profunditat. trium pollicium de quo quidem vulnere mortali præfat. Thomas Siddens adtunc & ibid. inſtanter obiit, ac quod præd. Arthur Graham & Ricardus Graham adtunc ſcilicet 25 die Decembris anno 35 ſuprad. tempore feloniæ & murdri præd. per præd. Franciſcum Johnſon in forma præd. felonice voluntarie & ex malitia ſua præcogitat. fact. & perpetrat. apud paroch. & Ward. præd. felonice voluntarie & ex malitiis ſuis præcogitatis fuerunt & uterque eorum fuit præſens abettans aſſiſtens auxilians con-

fortans & manutenens præfat. Franciſcum Johnſon ad feloniam & murdrum præd. in forma præd. felonice voluntarie & ex malitia ſua præcogitat. ad comittend. & perpetrand. & ſic Juratores præd. ſuper ſacr'um ſuum præd. dicunt quod præd. Franciſcus Johnſon Arthur Graham & Richardus Graham præfat. Thomam Siddens dicto 25 die Decembris anno ſuprad. apud paroch. & Ward præd. modo & forma præd. felonice voluntarie & ex malitiis ſuis præcogitatis interfecerunt & murdraverunt contra pacem dict. Domini Regis nunc Coron. & dignitat. ſuas, &c. Et Juratores præd. ulterius dicunt ſuper ſacr'um ſuum quod præd. Franciſcus Johnſon Arthurus Graham & Richardus Graham tempore feloniæ & murdri præd. per ipſos Franciſcum Arthurum & Richardum in forma præd. felonice voluntarie & ex malitiis ſuis præcogitatis fact. & perpetrat. ſeu unquam poſtea hucuſque non habuerunt nec eorum aliquis habuit nec adhuc habent ſeu habet aliqua bona ſeu catalla terras ſive tenementa infra Civitat. London præd. ſeu alibi ad notitiam eorund. Jurator. In cujus Rei teſtimonium tam præfat. Coronator quam Juratores præd. huic Inquiſitioni ſigilla ſua appoſuerunt die anno & loco ſuprad. Edward Smith Coron.

Et quod ad præd. deliberationem gaolæ dict. Domini Regis de Newgate tent. pro. Civitat. London præd. apud *Juſtice-Hall* præd. in paroch. & Warda præd. dicto die Mercurii ſcilicet 16. die Januarii anno 25. ſuprad. coram præfat. Juſticiariis venit præd. Franciſcus Johnſon ſub cuſtodia Petri Daniel Arm. & Samuelis Daſhwood Arm. Vic. Com. Civitat. London præd. in quorum cuſtodia præantea ex cauſa præd. commiſſus fuit, & ſtatim præd. Franciſcus Johnſon ad barram ibid. duct. per præfat. Vicecom. ac de præmiſſis ei ſuperius per inquiſitionem præd. impoſitis allocutus qualiter ſe vellet inde acquietari, idem Franciſcus tunc dixit quod ipſe in nullo fuit inde culpabilis & inde de bono & malo tunc poſuit ſe ſuper patriam Et Willielmus Wagſtaffe Arm. Communis Clericus Civitat. London qui pro dicto Domino Rege in ea parte ſequebatur ſimilit', &c. Et Juratores Juræ illius per præfat. Vicecom. in ea parte retornat. & impanellat. ſcilicet J. N. B. M. E. A. J. N. K. S. L. L. T. M. M. W. A. B. D. R. & L. H. exact. venerunt qui ad veritat. de & ſuper præmiſſis dicend. electi triat. & jurat. tunc dixerunt ſuper ſacr'um ſuum quod præd. Franciſcus Johnſon non fuit culpabilis de murdro præd. in Inquiſitione præd. ſpecificat. ei impoſit. prout idem Franciſcus placitando allegavit, ſed iidem Juratores ſuper ſacr'um ſuum præd. ulterius tunc dixerunt quod præd. Franciſcus Johnſon

fuit culpabilis de felonia & homicidio tantum pro felonice interficiend. præfat. Thomam Siddens in inquiſitione præd. nominat. ei per inquiſitionem præd. impoſit. modo & forma prout per inquiſitionem præd. verſus eum ſupponebatur, quodque præd. Franciſcus Johnſon tempore feloniæ & homicidii præd. per ipſum Franciſcum Johnſon in forma præd. commiſſ. & perpetrat. ſeu unquam poſtea non habuit aliqua bona ſeu catalla terras ſive tenementa infra Civitat. London ſeu alibi ad notit. eorundem jurator. prout per record. inde in ſuis pleno robore & effectu modo exiſten. & inter record. ejuſdem gaolæ deliberationis coram Juſticiariis gaolæ deliberationis de Newgate pro Civitat. London apud London. præd. remanent. int. alia plenius apparet, Et idem Franciſcus Johnſon ulterius dicit quod nullum judicium de & ſuper præmiſſis adhuc reddit, exiſtit & quod ipſe idem Franciſcus Johnſon tunc fuit & eſt Clericus & adtunc & ibid. ad eandem gaolæ deliberationem coram Juſticiariis ultime prænominat. paratus fuit legere ut Clericus ſi Curia illa eum ad librum ſuum in ea parte admittere vellet & adhuc in barram alicujus judicii mortis ſuper convictionem homicidii præd. paratus eſt legere ut Clericus, Et hoc paratus eſt verificare, unde petit judicium ſi præd. Anna Siddens appellum ſuum præd. verſus eum de morte præd. Thomæ Siddens habere ſeu manutenere debeat, &c. Cum hoc quod præd. idem Franciſcus Johnſon verificare vult quod ipſe idem Franciſcus Johnſon modo appellat. & præd. Franciſcus Johnſon ſuperius in inquiſitione nominat. in forma præd. convict. ſunt una eademque perſona & non alia neque diverſa & quod præd. Thomas Siddens de cujus morte ipſe idem Franciſcus Johnſon modo appellatus exiſtit & præd. Thomas Siddens in Inquiſitione præd. nominat. & pro cujus morte idem Franciſcus Johnſon in forma præd. convict. exiſtit ſunt una & eadem perſona & non alia neque diverſa, Et quod præd. plaga de qua in appello præd. ſupponitur ipſum Thomam Siddens obiiſſe & præd. plaga de qua in Inquiſitione præd. ſupponitur ipſum Thomam Siddens mortuum fuiſſe ſunt una & eadem plaga mortalis & non alia neque diverſa, Et petit de præmiſſis allocationem, &c. Et quoad feloniam & murdrum præd. idem Franciſcus Johnſon dicit quod ipſe in nullo eſt inde culpabilis, & inde de bono & malo ponit ſe ſuper patriam, &c.

William Hall.

Et præfat. Anna ſimiliter, &c. & præd. Anna Siddens quoad placitum præd. præd. Franciſci Johnſon de convictione præd.

modo & forma præd. ſuperius placitando placitat. dicit quod ipſa Anna per aliqua per præd. Franciſcum Johnſon inde ſuperius placitando allegat. ab appello ſuo præd. verſus præd. Franciſcum Johnſon modo & forma præd. inde in barram appelli præd. ſuperius placitando placitat. materiaque in eodem content. minus ſufficient. in lege exiſtunt, ad quod quidem placitum eadem Anna Siddens neceſſe non habet nec per legem terræ aliqualit. reſpondere tenetur unde pro defectu ſufficient. reſponſionis in hac parte eadem Anna Siddens petit Judic. & execution. verſus eundem Franciſcum Johnſon de & ſuper præmiſſis fieri, &c.

Bartho. Shower.

Et præd. Franciſcus Johnſon quoad placitum ipſius Franciſci de convictione præd. ſuperius placitat. dicit quod placitum illud modo & forma præd. ſuperius placitat. materiaque in eodem content. bona & ſufficien. in lege exiſtunt ad præd. Annam Siddens ab appello ſuo præd. verſus ipſum Franciſcum Johnſon habend. præcludend. & ad appellum illud penitus evacuand, quod quidem placitum materiamque in eodem content. idem Franciſcus Johnſon paratus eſt verificare & probare prout Cur', &c Et quia præd. Anna Siddens ad placitum ill. non reſpondit nec ill. hucuſque aliqualit. dedicit Idem Franciſcus Johnſon ut prius petit Judic. & quod præd. Anna Siddens ab appello ſuo præd. verſus ipſum Franciſcum Johnſon habend. præcludatur, &c. Et quia Cur. dict. Domini Regis hic de Judic. ſuo de & ſuper præmiſſ. reddend. nondum adviſatur dies inde dat. eſt partibus præd. coram dicto Domino Rege a die Paſchæ in quindecim dies ubicunque, &c. de Judicio ſuo de & ſuper præmiſſ. audiend', &c. eo quod Cur. dict. Domini Regis hic nondum, &c. Et quoad triand. Exit. præd. inter partes præd. junctum ceſſet inde proceſſus quouſque præd. materia in Judicium Curiæ in forma præd. placitat. aliquo modo legitime terminetur, &c. Et ſuper hoc venit Richardus Filkins de paroch. Sancti Martini in Campis in Com. Midd. gen. Martin. Bond de eadem paroch. & Com. præd. Mercator Johannes Baley de eadem paroch. & Com. præd. Poulterer Richardus Thomas de eadem paroch. & Com. præd. Coquus in propriis perſonis ſuis & manuceperunt habend. corpus præd. Franciſci Johnſon coram dicto Domino Rege ad eundem Terminum & ſic de die in diem quouſque, &c. quilibet manucaptor. præd. corpus pro corpore, &c.

An Appeal of Murder was brought by Siddens, as Widow for the Death of her late Husband, against the Defendant Johnson, who craving Oyer of the Writ and its Return, pleads a Conviction of Manslaughter, and that no Judgment was given thereon; that he then was and is a Clerk, and then and there was ready to read as a Clerk, if the Court there would then have admitted him to his Book in that Behalf; and yet in Bar of any Judgment is ready to read, with a paratus est verificare prout Cur', &c. and prays Judgment if the Plaintiff ought to have her said Appeal, with an Averment of the Identity of the Person supposed murdred; and of the Defendant, and of the Wounds, and prays Allowance, &c. and pleads over Not guilty, &c. To the Not guilty Issue is joined, to the Plea of the Conviction the Appellant demurs and the Defendant joins.

Appeal of Murder. *Ante* Case 168. See *Keilynge's* Reports, 89 to 109.

Showers for the Apellant argued:

That the Defendant's Plea is naught.

1. That since, and by the Statute of 3 Hen. 7. cap. 1. 'tis no good Bar.

2. Suppose our Case be casus omissus; and out of that Statute, 'tis no good Plea at Common Law.

1. As to the Statute, Before that Time a Felon could not be tried till the Year and Day were out, at least the Usage was so, and that the Statute it self declares in the 11th Section, where the Grievance and Mischief is recited, viz. That afore that Time no Felony was to be determined till after the Year and Day at the King's Suit, for saving the Party's Suit, and that during such Time the Felon usually compounded with the Appellant, and the Offence became forgotten, and the Criminal went unpunished; therefore 'twas ordained, that the Felon might be arraigned and tried upon the Indictment within the Year; however with this Provision on which our present Question ariseth, That if it fortune that Felons, Murderers, and Accessories, or any of them, be acquitted, or the Principal attainted, the Wife or next Heir to him so slain, may have their Appeal against the Persons so acquitted, or against the Persons so attainted, if they be alive, and that his Benefit of Clergy thereof before be not had.

Now

Now we are within the plain Intention of the Act, for if we might have our Appeal against him that is attainted, and hath not had his Clergy, then certainly against him that is neither attainted, nor had his Clergy; and that Law which gives us the greater, will never surely exclude us from the less.

It is manifest here was an Advantage designed to the Appellant (this Act likewise giving an Allowance for an Attorney in this Action for the Appellant) the Words may have the like Advantage as if no such Attainder or Acquittal had been; 'tis not said as at Common Law before the Statute, but as if no such Trial were or had been had; whence it may be inferred the Design of the Law-makers was, That no Proceeding whatsoever on the Indictment should be a Bar, unless Benefit of Clergy were had.

Also here's the Word attainted, which includes and implies a Conviction, that shall not be intended only of a Person who hath Judgment of Death, but extends to any Person convict by Verdict; for one attainted is a Person convicted and somewhat more, Et omne majus continet in se minus, and if an Appeal be given against a Person attainted, then certainly against one that is only found guilty.

Besides, attainted and convicted, though really different are yet frequently used as synonymous Terms, and the one oftentimes made use of when the other is meant and intended; and that in Acts of Parliament, as in 25 Edw. 3. cap. 2. is this Expression, attainted by Verdict, which is no more than to say convict by Verdict: And in 1 & 2 P. & M. cap. 10. 'tis said, being thereof lawfully convict or attainted, shall be deemed, judged and sentenced as Traitors; and 'tis so taken in the French, estre attaint & nayem en aucun case, that is, to be cast in any Case, and so 'tis used in Westm. 1. cap. 37. where 'tis said, If a Man be attainted by Disseisin *per recognisance* of Assise of *Novel Disseisin*; and in common Parlance, a Person found guilty by a Verdict is said to be attainted of Felony; and Acts of Parliament do frequently speak ut vulgus; and the rather should it be so construed here, because the Word Attainted is used in Opposition to the Word Acquittal, which in that Place must be understood to be by Verdict.

And methinks it would ſeem ſtrange, that this Clauſe ſhould inable one to bring an Appeal againſt a Perſon acquitted on a fair Trial by the Judgment of twelve Men, and in the Eye of the Law is deemed innocent, and not againſt one who by two Juries is found to be a Felon?

But perhaps it may be objected, that this being a Penal Law, your Lordſhip will not by any equitable Conſtruction extend it further then the very Letter; but with Submiſſion this Statute is no ſuch, it neither creates a new Offence, nor inflicts any new or greater Puniſhment, and is meerly directory for the better Execution of former Laws, and the true Reaſon of the Objection in any Caſe is, becauſe no Man ſhould be puniſhed for any Matter which he was ignorant, if 'twere an Offence or no; and therefore nothing to be adjudged within ſuch Penal Law, but what was plainly expreſſed in the very Words; but our Caſe is not ſo.

Beſides, ſuch a Conſtruction is no Novelty even in thoſe Laws that are ſtrictly and literally Penal; for a Penal Law may and ought to be extended by Equity to advance the Remedy, and ſuppreſs the Miſchief; the Miſchief in our Caſe was the Impunity of Criminals: The Remedies by this Law are two.

1. The Proceeding on Indictments within the Year.

2. The Action of Appeal notwithſtanding ſuch Suit on Indictment: there's 25 Edw. 3. killing one's Maſter is adjudged Treaſon, and yet in 19 H. 6. 47. and ever ſince to this very Day, for a Servant to kill his or her Miſtreſs is adjudged within it by Conſtruction.

By 5 H. 6. cap. 12. 'tis ordained, That if any Record, or any Part of it, be wilfully ſtolen, raſed, altered, or avoided, whereby any Judgment is reverſed, it ſhall be deemed Felony: And in 2 Rich. 3. fol. 19. an Action of Debt was brought againſt J. B. whereas in Truth his Name was N. B. and Proceſs continued to Outlawry, and the Original and three Capias's were raſed and altered, and made N. B. and the Roll altered accordingly; this was adjudged Felony within the Statute by all the Juſtices, though the Outlawry was hereby made good.

Alſo

Also my Lord Coke tells us in his 4 Rep. 46. that this very Clause in this very Statute hath received such an equitable Construction; and that in the Case of one Agnes Gainsford, that where the Act says, the Wife or Heir of him so slain shall have their Appeal, yet the Heir of a Woman murdred shall have an Appeal against a Person acquitted on an Indictment of the same Murder; though by the Letter of this Law no Appeal be given of the Death of a Woman.

Now if your Lordship shall be of Opinion, that a Conviction is within this Statute, as well as an Attainder by Judgment of Death, then the Defendant's Plea is naught, for he not having had the Benefit of Clergy, he is not within the Exception of this Clause, for his Plea is only, that he was and is a Clerk, and paratus legere, which is not sufficient, as I humbly hope to prove presently.

2. Supposing this to be casus omissus, and out of the Statute, then the Question is barely this, If the Conviction of a Clerk of Manslaughter, who hath not had the Benefit of his Clergy allowed, nor so much as prayed, if it be a sufficient Bar to an Appeal of Murder?

1. The Conviction alone is no Bar, it must be agreed, that an Appeal had the precedence, though I will not say but the King might have proceeded on an Indictment, being found, even within the Year, in Case no Appeal were brought; but yet in Case an Appeal were brought though at any Time, though even at the Trial of such Indictment, after the Jury were summoned, and did appear, there all Proceedings on the Indictment ought to stay till the Party should be arraigned on the Appeal, otherwise the Appellant would be defeated of his or her Suit; and accordingly is the Book express, M. 31 H. 6. fol. 11. and so is Staundf. pl. cor. lib. 2. cap. 36. fol. 107. So that, my Lord, the Party's Action was preferred; and upon this Reason, because if such Felony were determined on the Indictment, either by Acquittal or Attainder, the Appellant would be barred, for auter foits attaint, or auterfoits acquit were good Pleas in Bar.

the Reaſon of the former was, Becauſe the Law had its utmoſt End, he could but forfeit his Life and Eſtate; and this was done by the Attainder, he was put extra legem, not only as to himſelf but as to others; for he having received Judgment of Death, was reckoned mortuus in lege; and to kill a dead Man were idle, Lex nil facit fruſtra, ſo that he could not be called to anſwer, neither at the Suit of the King, nor of any Appellant, for that ſame or any other Felony before committed: Nay, if he were attainted by Outlawry, he could not be arraigned for any other Felony till that Outlawry were reverſed; which Reaſon fails in our Caſe, for here's no Attainder.

But an Auterfoits convict was never, nor is it now any Plea in Diſcharge of any other Felony; and the Practice every Day before your Lordſhip at the Old-Baily is accordingly, that Highway-Men and Murderers after Conviction for one Offence, are arraigned and tried for others the ſame Seſſions, and at laſt receive one Judgment of Death upon them all; and if Auterfoits convict be no Plea in Diſcharge of another Felony (as Auterfoits attaint is) then 'tis no Bar to an Appeal for the ſame Felony; the Reaſon holds alike in both, becauſe the firſt Suit is not determined.

The Reaſon why an Acquittal was a Bar at the Common Law is, becauſe he is found innocent, and an innocent Man ſhall not be put twice in Jeopardy of his Life; but here's a Felon, and ſo agreed by his own Plea; he comes within neither of the Reaſons of an Attainder or an Acquittal being a Bar; for the firſt, there's no Forfeiture accrued to the King of his Life; for the ſecond, he cannot pretend to the Privilege of Innocence, and ſo not to be put twice in Jeopardy of his Life, ſo that he hath anſwered the Law neither way.

If the King's Suit were determined, then I muſt agree it would have been a good Bar, but this is no more than an Indictment depending; and ſurely an Indictment and Arraignment thereon cannot be pretended to be any Bar.

2dly, This Conviction, which, with the other Matter alledged of being a Clerk, is no Bar; and the paratus fuit legere will no ways help him.

To make no more Questions than needs, I'll agree Allowance of Clergy would have been a Bar in this Case, for it comes in Lieu of an Attainder, and is a Determination of the King's Suit; and since the Statute of Queen Elizabeth, which takes away Purgation, the Law hath its End in its proceeding against such Offender, upon his having had the Benefit of his Clergy allowed; for there's a ne plus ultra: But that this Benefit must be prayed by the Party, and allowed by the Court before he shall have any Advantage of it; I shall humbly endeavour to prove by these following Arguments, drawn,

1. From its Nature and Original.
2. From the Form of Entries in such Cases.
3. From the Effect of this Privilege in other Cases.

1. For its Original and Nature, when the Usage began is not material; its Original seems to be founded on somewhat in the Canon Law that pretended to exempt Clergymen from all temporal Jurisdictions; but this never prevailed in England, whatsoever it did or doth in other Countries, the Clericks here being always tried and punished by the secular Authority, whensoever they had committed any civil Crimes, the Ecclesiastical Courts here never having Power to examine or punish any Offences of such Nature, as Murder, Theft, Robbery, &c. However by the Common Law it was allowed as a Privilege to learned Men in Reverence to Knowledge, for to save the Life of a learned Sinner, and such other Persons as by their Ability to read might in probability be capable of publick Service in the Kingdom; and so is it described in Lord Hob. 288. so that as it was claimed by some Churchmen in all Cases, and as it has been, and now is allowed by our Laws in some Cases, take it both ways 'tis a Privilege, and so is it termed in all the Books that do mention it, which being a Privilege, its very being so implies, that it must be demanded either by the Ordinary or the Party himself.

Of old in ancient Time it was demandable before Conviction, and at that Time if a Man said he was a Clerk, and demanded the Privilege of Clergy as such, and afterwards relinquish'd that Plea, and pleaded Not guilty, and was convicted, he should be

hanged, and should not again pray it; and such are the Words of the Book, 12 Assi. 15.

And the same Reason holds for demanding it now, since it hath been adjudged not grantable till after Verdict, which was for two Reasons.

1. To retain a Jurisdiction over the Clergy, which they endeavoured to disannul by pretending themselves absolutely exempt, and so challenging the Prisoner at first.

2. Another Reason was, that the King might not lose the Forfeiture of their Goods and Chattels, which arose by their Conviction, and by Consequence that they might not go utterly unpunished; and why it should not be necessary to be demanded now as well as then there's no Reason.

'Tis a Privilege, the Fruit whereof is the saving of the Offender's Life, and so it seems like a private Pardon, which must be pleaded, or otherwise the Court ex officio is not bound to take Notice thereof for the Party's Advantage; or at most it can be compared to a general Act of Oblivion, in which divers Crimes and divers Offenders are excepted, which must be pleaded, that it may appear to the Court that the Party is not within the Exception.

And besides this, all the Acts of Parliament which oust Men of their Clergy in particular Cases say, he shall not be admitted to the Benefit of his Clergy, which supposes a Prayer or Demand in the very Word Admission.

Now there are two Reasons more especially why Clergy should be demanded, otherwise no Advantage should be taken.

1. That the Court may judge if he were not antecedently rendered uncapable of being admitted to his Book, as Conviction of Heresy, apparent Infidelity, Judaism, or the like; all which are Impediments and Incapacities of this Privilege, as is Poulter's Case, 11 Rep. 29. which Case names them and many more.

2. That the Court may judge if he be a Clerk, if he can read, if he may any way be useful to the Kingdom; of all which the Court is judge, and not the Ordinary as has been pretended in old Time, and so is 9 Edw. 4. 28. and the same Case abridged in

Bro. Tit. Clergy, 7. where 'tis adjudged, That if the Ordinary challenge him, and says he reads, when in the Judgment of the Court he doth not read, the Ordinary shall be fined and the Felon hanged, and he must be able to read audibly and truly, and barely by spelling to pick out a Word is not sufficient.

So that the Nature of the Thing requires it should be demanded, and the Practise is always so in all Courts and with all Persons, even Peers of the Realm; and so did the late Earl of Pembroke, who before the Lord High Steward was found guilty of Manslaughter, he prayed the Benefit of his Peerage, according to the Statute which discharges Peers on such Conviction, as Commoners when they read and were burnt in the Hand.

And for an express Authority there's Searle and William's Case, Hob. 289. 'tis laid down as one of the three Things to be observed in giving and taking of Clergy at the Common Law, that the Court is not to render it ex officio, but the Party is to demand it as being a Favour, and a remitting of the Rigour of the Law; those are the very Words of the Book.

2. The Forms of the Entry in such Case prove it; in 11 Rep. 35. Alexander Poulter's Case, 'tis said, That upon Conference had with several Clerks of Assise, and upon View of sundry Records, it appears they make an Entry petit librum, & tradito ei libro legit ut Clericus, or else 'tis petiit beneficium Clericale, and so are all the Entries when they come to be made into Records; and so is it in Dyer 214. Stone's Case, 'tis & petit librum, & tradito ei libro legit, &c. and so is Foxley's Case, 5 Rep. 110. and before the Statute of 5 Eliz. c. 4. there was a formal Judgment entred quod tradatur, or talis commissus est ordinario, &c. all which proves it must be demanded, as Oyer of any Deed or Record in pleading, where 'tis petit auditum, &c. and the manner of Entries proves the Law as much as any Thing, &c.

3. And in other Cases, and to all Intents and Purposes, which are the Fruit and Effect of this Privilege, it must be demanded and allowed; as that if the Principal be a Clerk and convicted, the Accessory is not discharged till it be demanded and allowed; and so is the 26 Assise, 27 H. 7. fol. 1. the Principal

taking the Book the Accessory is discharged, and not before; and so is Dyer's Case, 4 Rep. 43. and Goffe and Byby's Case in the same Book, as also in 3 Cro. 541.

And as to the Accessory, so also to the Principal, Auterfoits convict, and Allowance of Clergy after the Statute of 25 Edw. 3. cap. 5. had been a Bar to an Arraignment of any other Felony before the Statute of 8 Eliz. cap. 4. and thereby after Purgation, and by 18 Eliz. cap. 7. after burning in the Hand, which makes him answerable for all other Felonies.

Now will any Man say that such a Plea as this, at that Time would have been a Bar to an Indictment for another Felony? If not, why should it be so in this Case?

I'll agree burning in the Hand not to be material, but only a collateral and exemplary Punishment inflicted by 4 H. 7. cap. 13. and perhaps Murder and Manslaughter may be all one as to this Point, Clergy being formerly allowable in the one as well as in the other; but yet in both it must be demanded by the Party and allowed by the Court.

Now my Lord, if the Nature of the Thing be such that it must be demanded, or no Advantage can be taken of it for the saving the Offender's Life on that Indictment, no more will it on this Suit; for vigilantibus non dormientibus, &c. he did not what was incumbent on him, he might have prayed his Clergy though not called upon to receive Judgment; the Court were not bound to tender the Book ex officio, and were it not demandable till he was called upon to receive Judgment, yet in this Matter that will not help him, for all that results from it is, that we were before Hand with him with our Appeal, which did as it ought surcease all further Proceedings on the Indictment; as it ought, I say, for so was the Case I cited before of Staundf. pl. coron. 107.

My Lord Bridgman was of that Opinion in the Case of one Tothil, Yardley and others, who all at Maidstone Assizes in Kent, were indicted for the Murder of one Sampson, and convicted of Manslaughter, he was so far from reckoning that Conviction alone to have been a Bar to an Appeal, that on the Widow's bringing an Appeal he surceased all further Proceedings on the Indictment, and never called the Men to receive

receive Judgment, and the Parties were tried afterwards at this Bar for the same Murder upon the Appeal, which if they had thought a Bar would certainly have been pleaded; this is in Sid. 216, 324.

Here was likewise the Case of Sir Philip Lloyd in this Court, Hill. 33 & 34 Car. 2. who having been convict of Manslaughter appeared here, and an Appeal being brought was denied by the whole Court the Opportunity of praying his Clergy until he had been arraigned on the Appeal; forasmuch as they were apprised that Allowance of Clergy would have been a Bar, but a bare Conviction of Manslaughter was not; and had the Law been thought otherwise, his Counsel would have pleaded that Plea; but instead of that he compounds the Cause, and the Appellant became nonsuit, and then his Clergy was prayed and allowed, and the burning being pardoned he was discharged.

And in this very Case, and one Scarlet's Case at the Old-Baily, your Lordship and my Lord Jones, with the rest of the Judges then present, did upon bringing Appeals surcease all further Proceedings on the Indictments, although the Parties were convicted of Manslaughter.

There's a Case or two that seems to thwart what I have here offered, which I shall answer, viz.

1st Objection. Burgh *v.* Holcroft in 4 Rep. 45. 3 Inst. 131. 2 Leon. 16 or 83. 1 And. 68. where an Indictment of Manslaughter within the Verge and Confession of the Fact, and Prayer of Clergy, and resolved a Bar to an Appeal of Murder.

Answer. Whether that be Law I must submit to your Lordship's Judgment, for as the Case is in 1 And. 68. 'tis agreed, that a Conviction of Murder, the Judgment being respited and not given thereon, is no Bar to an Appeal; for otherwise the Intent of the Statute would be absolutely avoided; and here's no more in our Case, and our Case comes not up to that of Holcroft. for as the Entry is in Coke's Entries, 55. there he pleads his Conviction, & quod idem Thomas Holcroft adtunc & ibid. dixit quod ipse fuit Clericus & petiit beneficium Clericale in hac parte sibi allocari, and then there's a Curia advisare vult, &c. so that Holcroft had demanded his Clergy, and pleads this, upon which

Iſſue might have been taken, he did all he could to have it allowed; in our Caſe he only ſays paratus fuit legere, which is idle, for it amounts no more to a Prayer of Clergy than a paratus fuit recipere does to a perſonal Demand when neceſſary; beſides, that's agreeable to the other of the Lord Hobard's Rules, that Clergy ought to be allowed where prayed, and grantable.

2d. Objection, The Caſe of Wrote and Wigges, 4 Rep. 45.

Anſwer, That goes further than Holcroft's Caſe, for he there pleads quod petiit beneficium Clericale & tradito ei libro legit ut Clericus prout patet per Record. inde, &c. there's a Demand and a Trial of his Clerkſhip, and an Entry upon Record of his Ability to read: But ours is an Allegation uncertain, and at moſt but preſumptive, he ſays 'tis paratus fuit legere ſi Cur. ill. ad librum vellet ipſum admittere, which can never be tried whether the Court would admit him, unleſs he had prayed it.

3d Objection, There's another Caſe in 4 Rep. 44. Brooks's Caſe, one was convicted on an Appeal of Robbery, and the Appellant dies before Judgment, that's adjudged a Bar to an Indictment.

Anſwer, But there 'tis not adjudged a Bar as an Auterfoits convict, but as an Acquittal, which on an Appeal is a Bar to an Indictment, though not econtra; and as the Caſe is in 2 Leon. 83. there 'tis moved by Egerton, that he might be arraigned on the Declaration again as for the Queen; but the Court was of Opinion that the Act of God by the Death of the Appellant had delivered him; but the better Opinion there was, that the Defendant ſhould be arraigned on the whole Record, and the Party ſhould plead Auterfoits acquit, and that would be the ſureſt way, and as an Acquittal 'twould be a good Plea; and ſo my Lord Coke ſeems to miſtake in ſaying Auterfoits convict, whereas it ſhould be Auterfoits acquit; and then beſides, there's a vaſt Difference between a Proceeding on an Appeal and upon an Indictment, for its being a Bar to an Indictment, there's more Reaſon than there is for that of an Appeal; for in the Appeal the King is intereſted and the Appellant both, on an Indictment

dictment not ſo, and therefore the King may proceed upon an Appeal upon the Death of the Appellant, which is one main Reaſon why Appeals had the Precedence, becauſe upon them the Party might be afterwards arraigned at the King's Suit by Indictment.

Beſides, there's a vaſt Difference between an Appeal of Murder and an Appeal of Robbery, for pending an Appeal of Murder Proceedings on any Indictment were ſtayed, becauſe otherwiſe the Year and Day might be run out, but never ſo in Caſe of Robbery, becauſe an Appeal thereof might be brought at any Time, even twenty Years after the Fact; and ſo is it in Doylie's Caſe, 2 Leon. 16.

Then I took ſome Exceptions to their Plea: As,

1. They ought to have concluded their Plea, Et petit judicium ſi præd. Franciſcus iterum de eadem morte de qua ſemel convictus fuit, reſpondere compelli debeat, and not as they have done, ſi appell', &c.

2. To the Inquiſition, and if that be naught, it muſt be agreed their Plea is naught, for it is not ſaid when the Murder was committed; or rather 'tis laid to be at an impoſſible Time, viz. 25 die Decembris prima hora in nocte ejuſdem diei; and when that was I cannot tell.

3. I am ſure they fail in this, he does not ſay he was a Priſoner in Newgate, and if not ſo he was not within the Conuſance of the Gaol-delivery; 'tis only ſaid he was in the Sheriff's Cuſtody, and that he might be and in the Compter, or the Sheriff's Houſe; and this was allowed Error in Miſtreſs Celliar's Caſe in this Court.

4. They ſay the Inquiſition was taken by the Coroner of London, and that ſuper viſum corporis, and do not ſay in what County; they ſay in the Parish of St. Sepulchre's, in the Ward of Farringdon without London, but that is only a Deſcription of the Ward, and do not ſay in, infra, de, or ejuſdem Civitatis; they ſay London in the Margin, but there's no Reference thereto: Now no Indictment can be aided by Intendment, ſo that the Defendant could not be hanged on the Suit, and my Client hopes he ſhall on this, wherefore I pray the Judgment for the Appellant.

Holt pro Defendente.

He argued, That at Common Law where a bare Conviction was a Bar, an Auterfoits convict was always reckoned a good Plea, and this Statute comes and takes away such Pleas, unless in Case of Clergy, &c. and that the Design of the Statute was to oust Appeals in all such Cases where Benefit of Clergy lay; and here the Party did what he could, 'twas not his Time to pray it till called upon by the Court to receive Judgment, then he is to pray his Clergy, which is the Cause he sheweth why Judgment of Death should not pass against him; and so are the Entries super quo, &c. and he insisted on Holcroft's Case, 4 Rep. 45. and so he prayed Judgment for the Defendant.

Court. 'Tis a Point of Difficulty and Novelty, and yet of great Consequence, and fit to be argued again, and so no Opinion delivered.

But afterwards in the Case of Goring and Deering, by eleven Judges at Serjeant's-Inn, there was Judgment pro Quer' upon the same Plea, and by all held ill, and that the Appeal lay, it being brought before Clergy allowed.

See now the Case of Armstrong and Lisle, in Kelynge's Reports, pag. 89 to 108. Coulra: —

DE

Termino Mich.

36 Car. 2. B. R.

(362.) Halter *verſus* Whitfield *& al'.*

Courts inferior.

IN a Cauſe commenced in an inferior Court, if Iſſue be not joined within ſix Months after Appearance, the Cauſe ought not to be removed by Habeas Corpus, a Special Return being made thereof by Virtue of the Statute; and this was agreed by the Court on Debate in this Cauſe, a Complaint being made againſt Mr. Staples, the Steward of Windſor. Vide ante Caſe 352.

(363.) Dyke *verſus* Mercer. *Entred* Trin. Ult. Rot. 514.

Two bound, Judgment, *&c.* againſt one. *Fieri facias.*

DEbt on a Bond, the Caſe was, That two Men are bound in a Bond to J. S. the Defendant pleads that his Co-obligor was ſued to Judgment, and thereupon a Fieri facias, and that the Money was levied by the Sheriff: The Plaintiff demurs.

Mr. Trindar pro Quer. argued, That 'twas not a good Plea, there being no Satisfaction, and inſiſted much on the Caſes of one of the Obligors being in Execution ad ſatisfaciend. that that was no Plea for the other Obligor; he cited Bro. Tit. Execution, 132, 145. Rolle's 1 Abr. Tit. Execution, 196. and ſaid, that perhaps the Sheriff may prove inſolvent, or may be robbed of the Money, and the Plaintiff be never ſatisfied;

tisfied: And Judgment was given for the Plaintiff per totam Curiam, that the Plea was naught, and a Difference taken between where a Scire facias or Debt is brought on the Judgment againſt the Party himſelf, for there ſuch Plea may be good, for he ſhall not pay twice; but a Co-obligor can plead nothing but Satisfaction actually made of the Debt: See and peruſe the Caſes of Rookes *v.* Wilmore, Savil Rep. 122. 3 Cro. 238, 390. 4 Leon. 150. 1 Cro. 75. Hob. 89. 2 Bulſt. 97, 5 Rep. 86.

Dannet *verſus* Collingdell. (365.)

TReſpaſs for taking and carrying away averia ipſius quer. viz. unum equum, &c. necnon unum Galerum Anglice one Hat; after Verdict Mr. Holt moves in Arreſt of Judgment, that as to the Hat there's no Property laid in the Plaintiff; and Judgment was ſtayed.

Declaration no Propetty in part. *Nelſon's Lutw.* 485, 486. 2 *Lev.* 20, 156.

Lock *verſus* Crayton. (366.)

IN Action of Account Iſſue was joined on plene Computavit, but the Jurata and diſtringas were de placito Debiti, and held naught, for that is the only Warrant for the Judge to try it.

Variance.

Lane *verſus* Hawkins. (367.)

EJectment on a Deviſe, viz. All other my Eſtate of what Nature ſoever I give to my Wife *Joan*, whom I make my Executrix to pay my Debts and Legacies therewith.

'Twas argued, that this could not paſs a Fee from the Caſe of Wilkinſon and Merryland, in 1 Cro. 449. which Caſe is differently reported from 1 Rolle's Abr. 834. and Crook's Report is according to the Roll: Wherein 'twas adjudged, that the Word Eſtate paſſes only an Eſtate for Life.

Mr. Pollexſen econtra. The Words are comprehenſive enough to paſs the Copyhold Inheritance, and

Deviſe. *Vide ante*, Caſe 336, 35, 71, 116. 1 *Lev.* 130.

the Reaſon given in that Caſe is, becauſe the Word Eſtate comes in the midſt of Perſonalties, as Goods and Chattles; beſides, there it is whereof I am poſſeſſed, which reaches only to Goods or Terms for Years, and not to Lands of which a Man is ſaid to be ſeized, Rolle's Abr. 834. Johnſon and Finner, and in the Caſe of Wilſon and Robinſon, 1 Mod. Rep. 100. the Words, All my Tenant-Right Eſtate paſſed a Fee: So the Caſe of
1 *Lev.* 130. Bowman and Millbankes in this Court Where the
1 *Sid.* 191. Words were, I give all to my Mother: Becauſe that was ſo general and uncertain, they adjudged it reached not the Land, but Twiſden thought otherwiſe even in that Caſe: Here was the Caſe of Reeve and Winnington, I hear that my Couſin *John* is inquiring after my Death, but it ſhall be in vain, therefore I give all my Eſtate to my Wife; and held it did extend to Lands, and carried a Fee. Vide ſupra, Caſe 336. Beſides, here was in our Caſe a Surrender to the Uſe of his laſt Will, which ſhews his Intention, and if this be not good the Land will go to his Heir contrary to his Intention and expreſs Declaration; and Judgment was pro Def. that the Inheritance paſſed.

(368.) Pinfold *verſus* Kide.

Courts Eccleſiaſtical. DEbt on a Bond with Condition parare mandatis Eccleſiæ; where on a Special Pleading and Demurrer there were two Queſtions.

1. Whether the Eccleſiaſtical Courts in England ought to be held in the King's Name? And as to that Mr. Pollexfen urged 100 Years Uſage, and the Opinion of all the Judges in England in King James's Time, and cited 2 Inſt. 685. 12 Rep. 7.

Then ſecondly, If ſuch Bond be good? He cited F. N. B. 63. That they might take Caution, which is the ſame with Bail, Security or Pledge; and in Minſhaw's Dictionary, Caution is put for Security or Pledge; and they may take a Pledge, &c. Cozme's Apology, p. 12, 13. 'tis ſaid, that Caution is taken out of the Civil Law, and the Judge is not bound to take the Cautio Juratoria without ſome other Security, as Pledge, or the like, unleſs he that ſwears cannot give the other; though the Book doth not uſe the

Word Surety, but only Cautio pignoratoria, but he says afterwards with Surety: Surety is meant Obligation with Sureties, as in the Writ de securitate pacis; they cannot take Recognizances but they may take Bonds; and so do the Court of Admiralty take Bonds, which they call Stipulations, 3 Cro. 685. 19 Hen. 6. 1. Pane *v.* Evans, Trin. 25 Car. 2. The Court of Admiralty may and do take Bonds in Lieu of Bail, and shall not be prohibited. Greenwood *v.* Baker, Godb. 260. the prohibiting of Bonds for Distribution was upon the account of the Matter or Condition of them, not for the Form or Bond it self: All Courts, unless they have some Way or Means of putting Justice in Execution are in vain: If they deny this they must allow us some other way, there's no more harm in making these Bonds to the Judge or Officer, than in Bail-Bonds to the Sheriff.

Mr. Rotheram pro Def. He waived the first Point, and insisted only that the Bond is void from Regist. 66, 67. Lambard's Saxon Law, 183. The Bond or Caution ought to be in the King's Name, it is a publick Security; the Cases Mr. Pollexfen urged of Bail-Bonds to the Sheriffs and Gaolers, are but private Securities against Escapes; here Dr. Pinfold may release this Bond, and if he dies it will go to his Executors; and he cited the Opinion of Fleming Chief Justice, Pasch. 9 Jac. 1 Bulst. 122. and the Case of the Bishop of Exeter against Star, in B. R. Trin. 25 Car. 2. Rot. 925. or 975. 'tis in 3 Keb. 219, 285. where the Lord Hale and the rest of the Court adjudged such Bond void; ruling that it ought to be in the King's Name.

Lord Chief Justice Jefferyes. Bonds to the Sheriffs are for the more ready Compliance with the Methods of Justice; and the Practise for these 100 Years in most of the Ecclesiastical Courts in England, hath been so; they are the King's Courts, if they may take a Pledge they may meddle with a temporal Thing: And if they are trusted with a Pledge, why not with a Bond? And 'twould be strange to construe a Bond void for the sake of a Condition, which is legal: Judgment pro Quer'.

Edwards

(369.) Edwards *verſus* Roades. *Entred* Trin. 35 Car. 2. Rot. 1092.

Bail render in Diſcharge.

IN Suit againſt the Bail, who plead that the Defendant rendred himſelf in Execution in Diſcharge of his Bail, and do not ſay prout patet per Recordum, Latch 149. Jones 138. Hob. 116. By ſome the Difference is where a Man renders himſelf, and the Court commits him, 'tis Matter of Record: But where he renders himſelf without a Commitment, then it is Matter not of Record but pais, Moor 188. By ſome all Renders ought to be upon Record, as a comperuit ad diem, Moor 888. Moyle's Entries, 42. Hob. 210. a Render may be in exoneration. manucaptor. and yet not in Execution; and ſo was this Caſe at the Bar.

Mr. Darnel and Mr. Gooding were Counſel in the Cauſe.

(370.) Stocker & Ux' *verſus* Edwards. *Entred* Paſch. ult. Rot. 120.

Copyhold.

EJectment. Caſe was, Surrender of a Copyhold-Tenement to the Uſe of himſelf for Life, and after to the Uſe of John his youngeſt Son, and the Heirs of his Body, if he attain to the Age of eighteen Years; and if he die before he attain to that Age without Iſſue male, then to his right Heirs: The

Remainder.

Queſtion was, If this was a contingent Remainder, or if it ſhould attach immediately upon the Death of Tenant for Life? And held that it attach'd immediately, becauſe of the Intention of the Party; and held to be the ſame with Sir Julius Cæſar's Caſe, in Jones 389.

Randal *verſus* Breeſe. *Entred* Paſch. 34 Car. 2. B. R. Rot. 609.

(371.)

Debt for Rent.

WRit of Error on a Judgment in Com. Banco, where Debt was brought for Rent reſerved on a Leaſe of Copy and Freehold Lands, and the Defendant pleaded in Bar, that he was evicted out of all the ſaid Lands ante, &c. and the Plaintiff replies, That another Perſon was ſeized of the Freehold, and traverſes the Seiſin which was allegged by the Defendant in his Plea of Eviction: Upon this an Iſſue is joined, and found pro Quer', and a general Judgment given pro Quer'.

And the Error aſſigned by Mr. Pollexfen was, That here did appear a Title to the Plaintiff but for half the Rent, for it ought to be apportioned; and the Plaintiff in his Replication hath anſwered only as to Part, the Defendant hath alledged all that was neceſſary for him to alledge; the Plaintiff ought particularly to ſet forth how much; and cited Pollet's Caſe in 1 Brownl. 186. in Replevin, and Ewer *v.* Moyle, 3 Cro. 711, 771. and Smith *v.* Malines, in 2 Cro. 160.

Mr. Holt econtra. The Judgment is well given, for the Apportionment ought to have come of the Defendant's Part: If the Defendant make one intire Bar, and we falſify it in any one Part, the Whole is avoided, as if for Part it had been ill pleaded: To plead in Bar to the whole Rent cannot be a Plea of an Apportionment; for in that Caſe the Defendant ought to come and ſet forth the Value of the particular Lands evicted, and ſo of the other Lands: He cited the Caſe of Hodgskin *v.* Thornborough, adjudged Mich. 27 Car. 2. in B. R. and entred Paſch. 27 Car. 2. Rot. 514. 'tis in 3 Keb. 500, 541. where the Caſe was, A. lets his Houſe in London to J. S. for 40 l. per Annum Rent for twenty Years, and afterwards takes a Re-demiſe for a leſſer Term of the Stable, and held no Suſpenſion of the Rent, contrary to the Caſe of Rawlins in 4 Rep. and there the Lord Hale put this Caſe of a Landlord of a Houſe in London, who leaſes it to a Tradeſman, who lets Lodgings, and afterwards the Landlord rents

rents one of the Chambers for a Year: If this should be a Suspension? No surely, nor so much as an Apportionment.

Then he argued strongly from the Authorities which Mr. Pollexfen had cited of Replevins and Avowries, That the Apportionment ought to come of the Defendant's Part: These Cases proving plainly that it ought to come on the Part of the Plaintiff in the Replevin in his Replication, and the Avowant need not set it forth; he is only to make a Demand of his whole Rent, and the Defendant in an Action of Debt is the same with the Plaintiff in a Replevin; then he argued, that if it were a Fault, that it was help'd by the Statute of Jeofails, in 32 H. 8. there being a Verdict for the Plaintiff; and he cited 3 Cro. 227.

Curiæ. Court. Where the Plea in Bar is intire, and Part is falsified by the Verdict, the Plaintiff ought to have his Judgment general: It could not be otherwise done on the Plaintiff's Part, for he demands 20 l. in his Declaration, and 'twould have been a Departure in him to require but 10 l. in his Replication, as he must if he had set forth the several Values and the Apportionment: And the Lord Chief Justice remembred the Case of Jefferyes *v.* Day, in Debt against Executors, who pleaded several Judgments, and the Plaintiff replied Fraud in one, and found so, and there held the Verdict was for the Plaintiff: So this is found pro Quer'; and the same were if one of the Judgments were ill pleaded, Edgecombe *v.* Dee, in Vaughan's Rep. Judgment affirmed per tout le Court.

(372.)

Dominus Rex versus Vicaries.

Quaker. INdictment against him (being a Quaker in Bristol) on 35 Eliz. and not guilty pleaded, and Verdict against him, that he should be committed for three Months without Bail or Mainprize, according to the Tenor of the Act: Writ of Error brought, and Mr. Pollexfen assigned these two Errors,

1. The Statute that creates this Offence doth not give the Quarter-Sessions any Power over this Matter, this is an Offence whereby his Liberty and Estate is subject to a Forfeiture; 'tis none of those Offences

of not coming to Church, or going to Conventicles, of which they have Jurisdiction, and no Statute giving them Power they can have none; so that it is all coram non Judice; and the Court inclined that they had no Authority, but would not deliver any Opinion. For,

2. The Indictment was, That the 30th of December he was of the Age of sixteen Years & amplius, and did abstain from going to Church per spacium unius Mensis ante tunc tempus elapsi. which is naught, for the Offence is, If any one being of the Age of sixteen Years, shall obstinately abstain from, &c. So that it must be after he is of the Age of sixteen Years; which Exception the whole Court allowed as fatal, and the Judgment was reversed.

Pidgeon *versus* Pitts. (373.)

Executor.

DEbt on a Bond, whereon the Case was thus, The Obligor makes the Obligee his Executor, and dies; the Executor dies and leaves the Plaintiff his Executor, who brings Debt on this Bond against the Defendant as Heir of the Obligor; and per tout le Court held good, for the Debt is not extinguished, but only superseded as to the Executor; and Judgment was given pro Quer'. See Dorchester and Nebb's Case, in 2 Cro. and the same in Jones. And Fryer and Gildridge's Case, Hob.

Poole *Un' Attorn' versus* Archer. *Entred* Trin. ult. Rot. 730. (374.)

Covenant to repair.

COvenant on the common Covenant for Reparations, &c. in the Lease of an House in St. Clement's Parish, Breach assigned that the House fell to the Ground such a Day; Defendant pleads, That true, the House was burned down by Casualty such a Day, and that the Plaintiff entred the next Day and evicted him, and adhuc extratenet, unde he could not repair it: Plaintiff demurs.

Mr. Neld pro Quer', He took divers Exceptions to their Plea, as, that they did not say, that he entred without Cause, have not traversed the Fall to be for want of Repairs; the Question is, Whether an Action lies on a Fire happening without allowing Time to repair it? He cited Dyer 35, 324. and the Case of Cornwallis v. Hamond. Latch 226, and Palmer 416.

Another Exception he took was, Because it saith a Messuage burn'd down, and yet he pleads an Entry in Messuagium præd.

Mr. Holt as to that Exception answered, There's not so much Certainty required in Pleading as there is in Writs; 'tis said he entred into the Thing demised: As to the other, the Action is for not repairing; the Allegations of Things before their Time need not be traversed, although they afterwards become material: The Question will be, Whether an House being casually burnt down be a Breach of Covenant of it self, though the House be rebuilt? I conceive not, and an Entry before is a good Plea in Bar, for we could not rebuild it, he entring the next Day. Rolle, Tit. Condition, 427, 428. Covenant not to do Waste; permissive Waste is no Breach of the Covenant, if by a Stranger, though it be within the Statute of Gloucester: In rebuilding the Honesty of the Agreement is performed; now their Entry suspends the Action, if it be such a Covenant as goes along with the Land and is not collateral; there's the same Reason for a Covenant as for a Condition. Spencer's Case, 5 Rep. 16. The Covenant goes with the Land, that is for Reparations; as a Covenant to build on the Land, Moor, 402.

Court. Here was Coke and Forth's Case, a Construction of Waste by Improvement: First the House falling down, there's an Action surely attach'd; and if Debt be brought for half a Year's Rent, and you come and plead an Eviction before the half Year was out, this will not avoid the Quarter's Rent, because for that the Action was attach'd.

Mr. Pollexfen. Suppose a Lease of an House for twenty-one Years, and the House is burn'd down the Day before the Lease expires, Shall not the Covenant be broken? Yet it cannot be rebuilt within the Term, for his Interest is determined and gone: All

the Court inclined that the Action was attached, and the Entry therefore could not be a Suſpenſion, and the next Term Judgment was given pro Quer'. See Style 255, 265.

Rockelley *verſus* Goldolphin. *Entred* Mich 34 Car. 2. B. R. Rot. 211.

(375.) *S. C. Raym.* 483, 484.

DEbt on a Bond againſt the Defendant as Adminiſtrator, durante minore Ætate, &c. who pleads, That the Teſtator ſealed a Bond to A. B. of 6000 l. Penalty, with Condition to pay 3000 l. to his Wife, if ſhe ſurvived him, within ſix Months after his Deceaſe; and that ſhe was Wife and Adminiſtratrix, and that ſhe had Aſſets to 1000 l. & non ultra, and that theſe Aſſets ſhe retained in Satisfaction of the ſaid Debt, & petit judicium, &c. and Plaintiff demurs.

Adminiſtrator. *duran. minoritat.*

Mr. Pollexfen pro Quer' argued the Plea naught, becauſe the Bond was not to her, the Debt or Duty was not to her, but to A. and B. and after Breach of the Condition the Forfeiture did belong to them.

Mr. Holt econtra. And he inſiſted much upon this, that the Bond was to her Uſe, and they were but Truſtees for her, and by the Condition the Money was payable to her ſelf, and cited 2 Edw. 4. 2, 3. Then he diſtinguiſhed between this Caſe where the Condition makes it payable to her, and where 'tis payable to the Obligee, though in Truſt for her, for the Reaſon of Retainer is not upon the Account of the Extinguiſhment of the Debt, but upon this Account, that the Money was to be paid to the ſame Party, and cited 1 Cro. 362. 1 Roll. Abr. 525. ſhe cannot pay Money to her ſelf; and if the Obligee ſhould bring an Action againſt her, ſhe might plead that ſhe had ſo much Money in her Hands of the Teſtator's, What muſt ſhe tell it over with one Hand, and pay it with the ſame to the other? If there had been another Executor, and he had paid it to her, that would have been a Performance of the Condition, and a Diſcharge of the Debt, And why ſhould it not be ſo here when the Law makes a Payment? He cited Hob. 10. 1 Cro. 372. 12 Hen. 4. 25, 35. 21, 31. Fitzh. Tit. Bar, 188. An Executor may retain where he never ſhould

have an Action; as where he pays any of the Teſtator's Debts with his own Money, Dyer 2. Moor 2. and 1 And. 24. The Obligee muſt bring an Action againſt her, becauſe ſhe did not pay her ſelf, which is odd; and if ſo that ſhe cannot retain, 'twould be a very great Miſchief, for it forfeits the Penalty, and ſo doubles the Charge upon the Teſtator's Eſtate; And what if ſhe ſays I am paid? And ſo ſhe ſays here, ſhe could not plead it better.

The Court inclined all for the Defendant, except Juſtice Holloway, who cited a Caſe of Sir Benjamin Bathurſt's in the Common Pleas, that was the ſame with this, and the contrary Opinion held there: So Quære, for ſome at the Bar denied the Caſe to be as this was, but that there the Money in the Condition was payable to the Truſtees, which is different. Adjournat'.

(376.) Court & Ux' *verſus* Weſt. *Entred* Trin. Ult. Rot. 353.

Adminiſtrator. Adminiſtration.

DEbt on a Penal Bill, brought as Adminiſtratrix of the Rights, Goods and Chattels of J. S. who died inteſtate; (ut dicitur) then alledges that Letters of Adminiſtration were committed to him by, &c.

Exception taken thereto, becauſe of the ut dicitur, which was ſaid to make it uncertain, whether the Party died inteſtate; for the Plaintiff hath no Cauſe of Action, no Right of Action but as Adminiſtrator; and therefore he ought poſitively to intitle himſelf thereto, which he is not, unleſs J. S. died inteſtate; 'tis true, in Caſe of the Defendant being an Adminiſtrator, the Plaintiff may only ſay Adminiſtratore J. S. qui obiit inteſtat. ut dicitur, becauſe there he cannot know it certainly.

But the Court ſeemed to be of Opinion 'twas well enough, for without that Word 'tis right, and then they would intend that he died inteſtate; otherwiſe the Court-Chriſtian would not have granted Letters of Adminiſtration: Beſides, ſuppoſing that there be a Will, the Letters of Adminiſtration ſtand good till the Will appear to be proved. Ruled that Ulterius moveatur.

Friend *verſus* Bowchier. *Entred* Trin. 34 Car. 2. B. R. Rot. 920. (377.)

EJectment. Deviſe to Dorothy Hopkins, and after her Deceaſe to the firſt, ſecond, third, &c. Sons ſucceſſively, and the Heirs males of their Bodies. In Witneſs whereof, &c. Deviſe in Tail.

Then a Memorandum endorſed, That the within named Dorothy ſhall not alien the Lands from the Heirs males of her Body, but upon Default of ſuch Iſſue it ſhall remain over.

Queſtion was, If ſhe ſhould have a Tail or only for Life? Tail.

And argued, that it ſhould be a Tail, for though the Limitation of the Eſtate be full and expreſs to the Heirs of the Body of the Sons of Dorothy Hopkins, yet they are Words that admit a Limitation, and in a Will an Eſtate may be limited by Implication, 35. Aſſiſe 14. Subſequent Words may reſtrain, and limit and declare, and explain the precedent ones. Altham's Caſe, 8 Rep. 138. If he had given it to one and his Heirs, provided that if he die without Iſſue male, this would have created an Eſtate-Tail.

Mr. Giles Eyre argued econtra. That it is but an Eſtate for Life, and cited 1 Cro. 368. 2 Leon. 226. Higham's Caſe, Roll. 2. Rep. 21. If this Clauſe gives any Thing 'twould give her a Power to alien inſtead of reſtraining her; his Meaning was not to alter the Eſtates, but to prevent the Alienation if he could; the Intent governs the Words, and not the Words the Intent, Dyer 357, 375. He cited Atkins and Atkins's Caſe, in 3 Cro. 248. Moor 593. Tuck and Frencham's Caſe, Moor 113, & 124. Claxton *v.* Glazier, Dyer 330.

The Court inclined that ſhe had an Eſtate-Tail, and that the Teſtator intended an Eſtate-Tail to her, otherwiſe he would never have thought ſhe had any Power to alien. Adjournatur.

Browne

(378.) **Browne *verſus* Walker.**

Admiralty. PRohibition prayed to the Court of Admiralty by the Plaintiff, who had libelled againſt the Defendant there, and the Cauſe had had a whole Year's Tranſaction, on a Suggeſtion that the Suit there (which was his own) was on the King's Letters Patents, the Conſtruction whereof belong to the Common Law Judges, and the ſame made at Land, &c.

And a Prohibition was denied per tout le Court, although that Mr. Holt offered to cite the Caſe of Worts *v.* Clyſton, in 2 Cro. 350, 351. where was a Suit in the Spiritual Court for Tithes, by Virtue of a Leaſe from the Vicar for three Years, and the Defendant claimed to be diſcharged by a former Leaſe and Compoſition by Deed; and the Court held, That the Plaintiff himſelf might have a Prohibition to ſtay Proceedings there, for they are not to meddle with the Trial of Leaſes or real Contracts; although they have Juriſdiction of the original Cauſe, viz. Tithes, & non refert, if the Plaintiff himſelf prays the Prohibition to ſtay his own Suit; for if this Court hath Knowledge by any Means, that the Spiritual Court meddles with any Temporal Trials, they ought to grant a Prohibition; the ſame Caſe is in Roll. Tit. Prohibition, 306.

But the Court denied a Prohibition without hearing his Authorities, for that his Client had commenced the Suit himſelf; and now when he finds the Court inclined againſt him, then a Prohibition muſt be had to ſtay all, and the Defendant ſhall have no Coſts for all his Trouble and Charge there; and ſo would it be if a Man ſhould bring an Action in the Sheriffs Court in London, for a Cauſe ariſing at Exeter, and go on till he ſee if he can get his Suit there; if not, then for a Prohibition.

Lord Chief Juſtice. Surely we will never grant a Prohibition in ſuch a Caſe to ſtay your own Suit.

Tamen Quære, For it ſeems that if any Perſon as Amicus Curiæ ſhould inform the Court of any Uſurpation of a new Juriſdiction by the Eccleſiaſtical Court,

Amicus Curiæ.

or in any inferior Court, that in such Case a Prohibition is grantable.

Palmer *versus* Allicock. Mich. 35 Car. 2. B. R. (379) Rot. 239.

PRohibition. A Man dies intestate, leaving no Wife, but only one Child, (viz. a Son) who hath Letters of Administration to the Father; the Child dies intestate, and the next of Kin to the Child takes out Letters of Administration de bonis non of the Father; the next of Kin to the Father sues to repeal these Letters, &c. Administration. *Vide post*, Case 430. *Carter's* Reports, 125, 126, *&c.*

Mr. Rowe argued pro Def. against the Prohibition, that the Father's next of Kin ought to have it; he urged that the Statute of Wills in Hen. 8. reaches not to Childrens Children, and cited Sir George Curzon's Case, 6 Rep. 16. Dyer 253, 286. The fairest Equity in Construction is to bring an equal Mischief within the same equal Remedy; Distribution was questioned, 19 Car. 2. Hughes and Hughes in Com. Banco, just before the Act of Distribution was made, and the Statute is only to authorize and legitimate such Bonds, Slawney's Case, Hob. 83. Tucker's Case, Hob. 191. Fetherbye's Case, 1 Cro. 63. Administration hath been carried to the next of Kin, though there hath been a residuary Legatee, Denne's Case, 1 Cro. 114. Hatley 105. Jones 225. a residuary Legatee is look'd upon as hæres Institutus; this Case of a sole Child is not within the Statute, nor within the Mischief. Distribution. *Car.* 125, to 136.

Where a Feme covert dies, leaving a Husband, he shall have the Estate, so shall the Parents of their own Child; so the Child of its Parent, and here the Child is interested accordingly, and so the Law left as 'twas found.

The Case of Newton and Burnel in Scacc. A sole Child took a Mortgage in Fee, which in Equity is but a Chattle, this was in the Name of the Son and another Person, the Jointenant releases to the Son, but the Equity being in the Father, it being his Money, the Mortgage was decreed to go to the Father's Administrators; here by this Act the Property

is

is not ſo veſted, but he may waive it or alter it; ſuch ſole Child ought to have the Reſiduum. 2 Roll. Rep. 158. Hutton, 109.

Mr. Pollexfen. The Child hath ſuch an Intereſt as a Deviſee of reſiduum bonor. which ſhall go to his next of Kin, and the Statute gives it to him as much; there's no Property veſted in him ſo as to bring Trover for it without Letters of Adminiſtration, but he hath a Right to have Letters of Adminiſtration excluſive of any other.

In the Caſe of Denne there was not a reſiduary Legatee, he had but a ſpecifick Legacy, and part of the Goods deviſed to him; but where he is full and plenary reſiduary Legatee 'tis otherwiſe; and the Reaſon of it is, becauſe it is unreaſonable that one ſhould have the Eſtate, and another ſhould have the Adminiſtration: Now this Act comes and ſupplies a Deviſe, and gives the ſame Intereſt that a Deviſe would, which carries it to his Adminiſtrator.

Curia. Court. It is no Queſtion but that in Caſe of one Child, 'tis within the Law as much as where there are ſeveral Children; the End of the Law was, that all ſhould ſhould have it as well as one, and one as well as all; there's no more a veſting here than there was in the one Child at Common Law.

Pollexfen. Suppoſe there had been two Children and one dies, his Adminiſtrator ſhall have but one Part; before this Statute, if a Father had but one Child, and he died, the Adminiſtration ſhould be granted to the next of Kin to the Father de bonis non of the Father, and the Child's Wife, Children, Executor or Adminiſtrator ſhould have nothing; but now ſince the Act the Intereſt goes to the Executor or Adminiſtrator of ſuch Party.

Judge Wythens. There are no Words of veſting, but only that Security ſhall be given, &c. the Act ſignifies, and is to be intended as no Increaſer of Property in any Perſon that had Property before the Statute, but to diſtribute it amongſt thoſe who had no Property before.

Mr. Pollexfen. If a Father dies inteſtate leaving three Children, all the Children die before Adminiſtration, ſhall it go to the Executors or Adminiſtrators of ſuch Children?

Wythens. I do not ſee that this Act alters the Adminiſtration at all, but only directs a Diſtribution.

In Hillary Term following Mr. Pollexfen argued it again. In Caſe of dying inteſtate, the Infants have an Intereſt veſted by the Statute; I do not mean a Property in any particular Part of the Goods, but ſuch an Intereſt as a Legatee hath that dies after the Teſtator's Death, and before Delivery of the Goods, and ſuch as any one hath to a Choſe in Action: At the Common Law there was no Wife or Child that had any Right or Intereſt in the Inteſtate's Eſtate, but the Ordinary was the ſole Maſter thereof to diſtribute it in pios uſus; and perhaps the Wife and Children might come in under that Name; 2 Inſt. 398. Plowd. 277. but no otherwiſe: Then the 39th of Edw. 3. gave only an Action to the Adminiſtrator, but then the Statute of Henry 8. left it in the Wife and next of Kin by Virtue of the Adminiſtration, Hob. 193. 1 Cro. 62, 202. But notwithſtanding all theſe there were many Inconveniences before the Act of Diſtribution; as that the Wife carried away all, and the Children were all barred; ſo if the eldeſt Son being of Age had got it: But this Act hath provided a juſt, good and ſufficient Remedy for theſe Miſchiefs, by Diſtribution of the Inteſtates Eſtates.

The Statute of Hen. 8. ſettled the Adminiſtration, but left the Eſtate unſettled, only it went with the Adminiſtration; but by this Act of Diſtribution all the Eſtate is ſettled, go the Adminiſtration whither it will. Till 12 Jac. Slawney's Caſe, Hob. 83. there were no Prohibitions to ſtay Suits for Diſtribution; the Intention and Meaning of this Act was to avoid that Miſchief; the Title ſhews it an Act for the Diſtribution or Settlement of the Inteſtates Eſtates; this Act doth in Effect make the Inteſtate's Will for him: 'Tis probable that the Cuſtom of London guided, as a Precedent for it. A Freeman in the City of London dies, leaving a Wife and Child, the Wife dies, her Third ſhall go to the Executor or Adminiſtrator; ſo if the Child die and leave an Executor, the Child's Part ſhall go to the Executor, but not to the Adminiſtrator of ſuch Child; for if there be no Executor it ſhall go to make up and increaſe the Orpha- Orphanage.

nage-Money of the other Children: So that if an Intereſt be veſted, in Caſe there be a Wife and ſeveral Children, the next Queſtion will be, If an Intereſt be veſted when there's but one Child? The Objection is, there's no need of that, becauſe the Act of Hen. 8. gave the Adminiſtration to ſuch ſole Child, and conſequently the whole Eſtate, and ſo there's no need of any Proviſion by the Act of Diſtribution for this Caſe which was provided for before: The Title of the Act is general, and the Scope of the Act is general, and relates to Inteſtates Eſtates; the Spiritual Court have no Rules of Diſtribution that gave any Right to the Wife or Children; but the Ordinary made Diſtribution in pios uſus, and therefore this being a remedial Law, ought to have the largeſt Conſtruction to include as much as poſſible: Then ſuppoſing there be an Infant who hath an Intereſt veſted, Whether the Adminiſtration ſhall go to the next of Kin to the Infant, or to the next of Kin to the Father? Whereſoever the whole Eſtate ſhall go the Adminiſtration ſhall go; as if a Wife dies, the Husband ſhall have the Adminiſtration, though this be not mentioned within the Statute of Henry 8. or this Law: And the Reaſon is, becauſe the Marriage gave him a kind of Intereſt in the Eſtate of the Wife, and the Children ſhall have nothing to do therein. Ognell's Caſe, 4 Rep. 51. Rowe's Caſe, 1 Cro. 106. The next Caſe is that of an Executor, reſiduary Legatee dying before Probate of the Will, the Adminiſtration goes to the next of Kin to him, and not to the Teſtator's next of Kin, becauſe the former are to have the Benefit, or loſe by the good or ill Adminiſtration of the Eſtate.

Lord Chief Juſtice. The Son is quaſi an Executor here in Intereſt.

Wythens. Here are no Words of veſting in the Act, 'tis only that the Ordinary ſhall take Bonds for Diſtribution, ſo that before Diſtribution there's no Intereſt veſted in any by this Act. Adjournat'.

Dominus Rex verſus Roſſewell. (380.)

THE Defendant was indicted for High Treaſon for Words ſpoken in a Sermon at a Conventicle in Surrey, and being tried here at the Bar was convicted, and being brought up to receive Judgment, he offered in Stay of Judgment, that the Indictment was for Treaſon, in Compaſſing and Imagining the King's Death; and that in order to perfect and accompliſh his ſaid wicked and treaſonable Intentions, he ſpoke theſe Words: If we ſtand to our Principles we ſhall beat our Enemies, *innuendo dictum dominum Regem*, without ſaying that he ſpoke of the King: We have had two wicked Kings, *&c.* You flock to the King under the pretence of Healing the Evil, but 'tis we only that by our Prayers, *&c.* Treaſonable Words. 3 *Mod.* 52, 53.

And the Court conceiving ſome Weight in the Objection, did aſſign him Counſel, viz. Mr. Wallop and Mr. Pollexfen.

Mr. Wallop. The Words as they ſtand in themſelves, and diſcharged of the Innuendo's, and in bare ſpeaking, do not bear any treaſonable Intention: Now if the Words ex vi Termini import not a treaſonable Intent, an Innuendo cannot make them ſo; no Innuendo can warrantably be inſerted to explain the Meaning of Words, unleſs there hath been ſome Diſcourſe of the Perſon before, to whom the Words may be referred by an Innuendo or Explication; and populos ligeos dict. domini Regis innuendo is naught, becauſe the People of England were never named before. 4 Rep. 17. James's Caſe. The Office of an Innuendo is to expreſs and deſign the ſame Perſon, which was named before. Hob. 45. 2 Cro. 126. An Innuendo cannot give an original Certainty: Before the laſt Words there's no Mention made of Enemies to any Body; and in this fatal Place to put ſuch a weighty Matter of Fact as his Intention upon an Innuendo is very hard: In dubiis & generalibus benignior ſententia ſemper præferenda eſt. *Innuendo.* *Vide Cro. El.* 497. *Hob.* 2, 3, 45, 468. *Hut.* 65. *All.* 32, 92. *Hetl.* 174. *Yelv.* 21. 1 *Sid.* 52. 2 *Salk.* 513. 1 *Vent.* 337.

Mr. Pollexfen. Though the Statute of 25 Edw. 3. ſays, That Treaſon ſhall be declared by an Overt-Act, yet I think Words may be an Overt-Act, and what thoſe

Words are or must be is the Question? Pyne's Case, 1 Cro. 125. As the first Branch in 13 Car. 2. shews what is Treason, so doth the second Branch shew what is not so, by imposing other Penalties: First, these Words, of flocking to the King to be cured of the Evil, they do not come up to this Crime; the next Words are these, We have had two wicked Kings together; then come to the last Words, & si ipsi ad fundamentalia permanerent, &c. If these Words do not relate to our King and Government, they are not Treason; and if these second Words do not express what Reges are meant, then they cannot be a Subject to which the latter Words may refer: Et si ipsi must refer to the next Antecedent, viz. Reges; there's nothing in the Sentence that mentions him or his People, and there's no Mention of any Person else but the King, & ipsi, i. e. ipsi Reges, and if he had meant himself he would have said, If we stand to our Principles.

Enemies is a Word of very general Signification, and may extend to abundance of Things; and to help this out by an Innuendo would be strange: A Man is to be punished for his own Words, and the Skill of the Clerk is not to alter their Meaning; it must be sensible Words that affect an Auditory. Rolle's Abr. 84. Tit. Case for Words, there are a great Number of Cases to prove that Innuendo is not an Averment, and will not supply Words that are uncertain.

Uncertainty may be saved two ways, as by a colloquium Precedent, which must be proved, but I never knew that any Body went about to prove an Innuendo; or else an Averment will do, as in saying thy Landlord, 'tis averrable that the Plaintiff was his Landlord at the Time; but now here in this Case is no such Averment.

Mr. Attorney General. 'Tis direct and positive that they flock to the King to be cured of the Evil, and that he cannot do it, that is particularly said to be spoken of the King without an Innuendo, then the Innuendo, meaning the said King, may well refer the latter Words to the former; to say they were spoken of the King will not do, unless 'twere said that they were spoken to excite a Rebellion.

There's

There's a great Diſparity between Actions of the Caſe and Indictments, Fleetwood *v.* Curley, Hob. 267. There's but one King and one Government; 'tis found that he ſpoke theſe Words on purpoſe to deſtroy the King and diſturb his Government.

If a Man ſhould in a publick Aſſembly declare the King is a wicked Prince and deſigns to bring in Popery, this is Treaſon without the laſt Words: The Precedents are all ſo. 33 H. 8. R. 17. Indictment againſt my Lord Grey, for ſaying, That the King's Grace ſhould be driven out of the Realm, and the Prince would never ſucceed in it. Lord Cobham's Caſe, 12 Jac. there 'tis, 'Twill never be good Days till the King, *&c.* and the Caſe of Williams the 14th or 17th of Jac. Rot. 40. for printing Balaam's Aſs, a treaſonable Book. Collonel Sidney's Caſe here lately, and Pitts's Caſe at Salop, 31 Car. 2. for ſaying, If the King ſhould ſuffer the Papiſts, if the King's Throat were not cut within a Twelvemonth he would be hanged: In none of theſe Caſes were there any Averments, nor could we lay it better; for if we had alledged it ſo we muſt have proved it, and we could prove only the Words.

Lord Chief Juſtice. As for the Precedents, in every one of them the King is named, and in that of Williams's Caſe, the Book was dedicated to the King, and I'll tell you, if you had laid it that he ſpoke thoſe Words of the King, and you had proved only the Words, I would have left it to the Jury, if they believed he ſpoke the Words of the King.

And the Court inclined for the Priſoner, but took Time to conſider of it; but he was afterwards pardoned, and in Hillary Term his Pardon was allowed. Tamen Quære le ley, for the Strength of the Priſoner's Defence on his Trial, as to the Fact charged, was thought the beſt of his Caſe.

Cudmore *verſus* Lome. (381.)

Inferior Courts Juriſdiction.

WRit of Error to reverſe a Judgment given in Exeter Court, after a Verdict upon Non aſſumpſit pleaded; the Exception I took was, That the Defendant was ſaid to be indebted at Exeter, within the Juriſdiction of the Court, for divers Wares and Merchandizes

Vide Nelſon's Lutw. 292, to 297. *Ante* Caſe 246. *& poſt*, Caſe 430.

chandizes ſold and delivered by the Plaintiff to the Defendant, and a quantum meruit for Work done, and an inſimul computaſſet, &c. and doth not ſay the Work was done, or the Goods ſold and delivered at Exeter; and held naught, though 'twere laid Indebitatus apud Exeter; and this hath been allowed for Error in abundance of Caſes. See 1 Lev. 50, 69, 96, 104, 153, 156, 208, &c.

But Mr. Juſtice Wythens ſaid, That were it to be adjudged de novo, he would intend it ſold there; however, there being ſuch a Multitude of Precedents, the Judgment was reverſed upon my Motion, and methinks there's a great deal of Reaſon for it, for a Man is indebted whereſoever he comes; but yet in inferior Courts to intitle them to a Juriſdiction, the Debt ought to ariſe within the ſame, and ſo it ought to appear. Entred Hill. 55 & 36 Car. 2. Rot. 1073.

(382.)

Cotton *verſus* Hawkins.

Judgments: Inferior Courts.

WRit of Error to reverſe a Judgment given in the Court of Burton upon Trent in Staffordſhire, in an Action of the Caſe for Words, brought by Hawkins, ſpoken of him in reſpect to his Profeſſion as an Attorney, and I being of Counſel with the Plaintiff in the Writ of Error, aſſigned this Error, viz.

That it was not ſaid in the Judgment per Cur', nor were there any Words uſed to ſupply it, neither per ſeneſchallum, nor ſo much as ad eandem Curiam; ſo that for ought appears it might be an Award for Recovery by the Jury.

Inferior Courts ought to keep to the ſtrict Form of Judgments, therefore conceſſum inſtead of Conſideratum is Error in a Judgment in any Borough, or other inferior Court, as Hill. 21 Jac. B. R. in Horne and Warden's Caſe, Latch 83. Fuller *v.* Righton. 1 Bulſt. 125. Robin and Sambeth's Caſe, 3 Bulſt. 92, 93. Slocomb's Caſe, in Trin. 11 Car. 1. B. R. in 1 Cro. 319. and ſeveral other Caſes are there of Judgments in ſuch Courts reverſed here, for not obſerving the due Form of Entry, as recuperaret inſtead of recuperet, Strowd *v.* Blundel, Rolle, Error, 711.

'Tis

'Tis true, in ſuperior Courts conceſſum, or adjudicatum eſt may ſuffice, becauſe the Practice and Courſe of the Courts at Weſtminſter is the Law of theſe Courts; and in Coke's Reports in the Pleadings, there you may find ſeveral Judgments with Ideo conceſſum eſt by the Courts here above: Nay, this very Omiſſion of per Curiam is no Error in a ſuperior Court, as the Common Pleas, where they never ſay any more than Ideo conſideratum eſt, and it ſhall be intended to be by the Court.

But otherwiſe in Caſe of inferior Jurisdictions, as 'twas reſolved Trin. 15 Car. 2. in this Court, in the Caſe of Smith *v.* Smith, held expreſly to be Error in an inferior Court, 'tis in 1 Sid. 141. and in the ſame Book, 143. there's this Note, When 'tis in an inferior Court it ought to be conſideratum eſt per Curiam, otherwiſe 'tis erroneous. See Paſch. 15 Car. 1. Meade and Axe, Writ of Error brought on a Judgment in Caſe for Words as this is, and reverſed for this Error, becauſe the Judgment was conſideratum eſt, and the Words per Cur' omitted, March's Rep. 15. Caſe 37. again in the ſame Book, fol. 7. Caſe 16. is an Anonymus Caſe of a Writ of Error to reverſe a Judgment in Debt upon an Arbitrement, and the Error aſſigned was in the Entry of the Judgment, it being conſideratum eſt, and per Cur' left out; it is March's Reports, fol. 7. Caſe 16.

In this Court it hath been allowed Error in the awarding of a Venire facias to omit per Curiam, it was ſo ruled in the Lord Rainsford's Time; much more is it neceſſary in the Judgment, which is properly actus Curiæ: Stubs and Manley, Mich 1649. in this Court; the Caſe is reported in Style, 165. Debt on an Obligation in the Court at Owſebridge in the County of York, Writ of Error brought here, and the common Error aſſigned; and Serjeant Rolle then Chief Juſtice upon Oyer of the Record, took this Exception, That it was Ideo præceptum eſt Vicecom. and doth not ſay per Cur', and the Judgment was reverſed. And in Rolle's Abr. 772. are ſeveral of this Nature.

And upon this Exception we had a Rule for Judgment of Reverſal, niſi better Cauſe before the End of the Term.

But

Vide cont. *Hay* verſus *Adams.* 2 *Saund.* 291, 292.

But afterwards the laſt Day of the Term they came and moved to quaſh our Writ of Error, for that the Record was not removed; the Record being and the Court held coram W. S. ſeneſchallo, and our Writ of Error was directed to the Steward and Bailiff, and recited coram nobis, ſo that 'tis not the ſame Judgment; if the Courts had been before them both, though one returned it, yet 'twould be well enough, but being before one only 'tis naught; and the Writ of Error was quaſhed.

(383.)

Howſon *verſus* Denham.

Covenant.

WRit of Error brought in the Exchequer-Chamber upon an Indictment given in Action of Covenant by nihil dicit in B. R. and the general Error aſſigned.

The Error they aſſigned ore tenus when they came to argue it, was in ſetting forth of the Breach, which was on a Covenant upon Aſſignment of Debts, not to do any Act or Thing whereby the Plaintiff ſhould be hindred from his receiving the ſaid Debts;

Breach.

and the Breach was aſſigned thus, quod relaxavit cuidam J. S. ſummam, &c. and doth not ſay how; ſo that it cannot by any Means appear to the Court if ſuch Releaſe were ſufficient to diſcharge the Debt; for he ought to have ſet forth the Deed if 'twere by Deed, &c. and Mr. Bonython cited the Caſe in Yelv. 30. between Chantflower and Preſtly, where Breach was aſſigned in Covenant, that he was diſturbed in the Enjoyment of a Copperaſs, and Error aſſigned is, that he did not ſhew by whom he was diſturbed, or that he was legitimo modo diſturbed; for though he need not ſet forth the particular ſpecial Title by which he was diſturbed, yet he ought to ſhew ſuch a Diſturbance as may appear to have been unlawful; if a Diſcharge be pleaded, he ought to ſhew how it is, for if it be not ſufficient 'tis no Diſcharge, and the Sufficiency is Matter in Law, and therefore muſt be ſeen and judged by the Court, and ſo is 22 Edw. 4. fol. 40. cited in Hob. 269.

I being of Counſel with the Defendant in the Writ of Error, argued it was well enough; that relaxavit

was ſufficient, that it ought to be intended an effectual Releaſe, and we have laid per quod we could not recover the ſaid Debt; beſides, it being a Tranſaction between third Perſons, we are no Party thereto; the Releaſe is in a Debtor's Hands, and we have no Means to come by it, and to ſay it was by Deed would be unadviſable in us, for perhaps 'twas a parol Releaſe, which will be good to diſcharge a Debt by ſimple Contract; and for any Thing that appears here, it was ſuch a Debt, and Releaſe was the ſtrongeſt Word we could uſe.

And for the Authorities cited, they are anſwered by themſelves; that in Yelv. 30. the Covenant was for Enjoyment without lawful Diſturbance, and the Exception there allowed was, That he had not ſaid that he was lawfully diſturbed; and for that in Hob. 'twas a Caſe of Tithes, which are payable de Jure, and of common Right, and he that will plead a Diſcharge from them, ought to ſet forth how; but ours is a different Caſe; but we have ſaid relaxavit, which is more than the Word exoneravit, and yet that hath been allowed ſufficient; and ſo was it in the King's Bench Court. Hill. 31 & 32 Car. 2. in the Caſe of Prideux and Rawlins, and held not erroneous, though it did not ſet forth how, and the Judgment affirmed being upon a Writ of Error out of an inferior Court.

Then I cited the Caſe in 1 Cro. 382. Langden v. Stokes, Aſſumpſit on a valuable Conſideration, to go ſuch a Voyage in ſuch a Ship before Auguſt following, and alledges a Breach in not going the Voyage: The Defendant pleaded, that before any Breach the Plaintiff at the, &c. the 4th of April exoneravit eum of the ſaid Promiſe; to which the Plaintiff demurred, and Rolle argued, that this pleading a Diſcharge, without ſhewing how, was not good, and cited the Book Mr. Bonython mentioned of 22 Edw. 4. 40. quod indempnem conſervavit or exoneravit is no Plea.

But Maynard for the Defendant argued to the contrary, That forasmuch as this was an Action grounded upon a Promiſe by Words, it may be diſcharged by Words before the Breach thereof; and therefore exoneravit generally is a good Plea; and he cited 3 Hen. 6. 36. And of this Opinion was all the Court:

And Richardſon ſaid he knew it had been ſo reſolved divers Times; and the Rule was remembred, Eodem modo quo oritur, eodem modo diſſolvitur; wherefore it was adjudged pro Def. quod querens nil capiat per billam.

Alſo that very Caſe is agreed for Law in Edwards and Weekes's Caſe, 1 Mod. Rep. 262. where the Difference is made between a Diſcharge or Releaſe before Breach and after; but in both of theſe Caſes agreed, that the Plea of exoneravit generally is a good Plea, becauſe it might be releaſed by Parol, and ſo may a Debt upon a ſingle Contract, as our Caſe is.

But Mr. Juſtice Levinz doubted, ſaying, That true it was, we need not produce the Deed of Releaſe in pleading, where it was to a third Perſon, and we claim not under him, nor have any Means to come by it; but we muſt ſay whether 'twas by Deed or no, or how, and that we have the ſame Means to come to the Knowledge thereof, as of the Matter it ſelf, viz. that ſuch a Debt was releaſed; beſides, here (ſaid he) you do not ſo much as ſay the Debt was diſcharged by it, for there might be a Releaſe given which might be of none Effect.

To that I anſwered, That we had ſaid he did releaſe to one J. S. ſo much Money owing and due to, &c. which is as much as ſaying he did abſolutely acquit and diſcharge him, and ours is much ſtronger than if we had ſaid fecit quandam relaxationem.

But however the Court adjourned the Matter to another Term.

(384.) *Rex verſus* Clarke.

INdictment for a Forcible Entry upon Felton, a Tenant for Term of Years under Mr. Gower, removed by Certiorari hither, and I being of Counſel with Mr. Gower, moved for Reſtitution according to the Statute; thereupon Mr. Pollexfen moved for Clarke, that the Indictment was naught, and ſo being erroneous, we ought not to have Reſtitution; and the Exception he took was, That 'twas ſaid adtunc & adhuc tenentis, which could not be after Expulſion.

But afterwards we moving it again at another Day when the Lord Chief Juſtice was abſent, Juſtice Wythens was of Opinion that was no Exception; for notwithſtanding the forcing away and Expulſion, Felton continued Tenant to Gower, and yet they pretending a Title, and we offering to accept a Declaration, and try the Title in Ejectment, 'twas ordered, that if they were nonſuit, or a Verdict paſs againſt them, or if they did not try the Cauſe within the Term, we ſhould have Reſtitution, and accordingly they not trying the Cauſe, we had a Reſtitution and recovered our Poſſeſſion.

However as to the Exception, ſee Rex *v.* Skei & al' in 2 Bulſt. 121. where 'twas diſſeiſivit J. S. de, &c. adtunc & adhuc libero tenemento ſuo exiſtente, which if 'twere adhuc liberum tenement. ſuum, there could be no Diſſeiſin, and by Conſequence a Repugnancy; and therefore the Indictment held naught; but in our Caſe 'tis an Indictment, not for the Diſſeiſin of a Freeholder, but for the Expulſion of a Tenant for Years by the Statute of King James, and he may be (expelled or) evicted by a Stranger, and yet continue Tenant to his Landlord. Ideo Quære.

Nota inde, That if ſuch an Indictment be naught, no Reſtitution ought to be, though the force be found; nay, the Indictment, if faulty, ſhall be quaſhed upon Motion after Reſtitution granted; and in ſuch Caſe a Reſtitution ſhall be awarded.

DE

Termino Hill.

36 & 37 Car: 2. B. R.

(385.) *Dominus Rex verſus* Oates.

Perjury. THE Defendant being indicted for Perjury at the Old-Baily, and there pleaded to Iſſue; the Indictment was removed by Certiorari, and he forced to plead again de novo, becauſe, as they ſay, their Proceedings below are diſcontinued by the bringing of a Certiorari; for that there can be no Continuance made from an inferior to a ſuperior Court.

But it ſeems needleſs, and done only pro majori cautela, for the Whole is removed, the Iſſue as well as the Indictment.

He was afterwards tried at the Bar, and convicted of Perjury on two ſeveral Indictments.

(386.) Powle *verſus* Trumball.

S. C. 3 Mod. 56.

Dilapidations. PRohibition prayed to a Suit for Dilapidations ſuffered before the Act of Oblivion: Held that they cannot proceed criminally there, for the Puniſhment is pardoned; and if they do, a Prohibition ſhall go; but they may proceed there to make Satisfaction to the Party, for that is not pardoned, and a Prohibition was denied.

Ambroſe *verſus* Rowe. *Entred* Mich. Ult. 504. (387.)

INdebitatus for proſecuting Suits as an Attorney for B. at the Requeſt of the Defendant; and upon Motion in Arreſt of Judgment held good, and Sands and Trevilian's Caſe, in 1 Cro. 107, 193. denied to be Law; for that though ſoliciting in another's Cauſe will not raiſe a Contract from J. S. yet an expreſs Promiſe from J. S. to pay for the Sollicitations of J. N's Cauſe, will make it a Debt: As if I build an Houſe of J. S. at the requeſt of J. N. and J. N. promiſes to pay me, Debt will lie; ſo in Caſe of a Surgeon's Cure, and there's no Difference between thoſe Caſes and this: 'Tis true, 'twill not raiſe a Promiſe, but an expreſs Promiſe will well ground an Action. Attorney on Requeſt of another.

And Lord Chief Juſtice ſaid, That he thought Rolle's Argument in that Caſe of Sands and Trevilian not to be anſwered.

Dorrington *verſus* Edwin *& al'*. *Entred* Mich. ult. Rot. 277. (388.)

REplevin in London by Plaint, Pledges there found, and on Breve de proſequendo & Return. habendo; the Record is removed by Certiorari, and a Sci. Fa. ſued here againſt the Pledges. Pledges in Replevin. *Poſt* Caſe 448. 3 *Mod.* 56, 57.

Mr. Pollexfen argued, That the Record is no more removed then an Habeas Corpus, which is to remove the Body cum Cauſa, 2 Inſt. 340. and the Bail below are not chargeable here in ſuch Caſe, and therefore the Pledges in Replevin are in the ſame Caſe; and that the Statute of Weſtm. 2. does not extend to Replevin by Plaint.

Mr. Holt econtra argued, That where the Record is removed Pledges are thereupon ad proſequend. & return. habend. and therefore we may have a Scire facias here now, ſince the Plaint and all is removed, 39 Edw. 3. 28. 'tis true, when it comes hither by a Recordare, the Plaint is not removed, but the Command of the Writ

Writ is to make a Record and return it: The Reaſon of the Book of 29 Edw. 3. 28. is, becauſe the Pledges appear not upon Record but only by Surmiſe, and thereupon ſhall not have Execution upon it againſt the Pledges; but here the Pledges and Plaint are all apparent.

Pollexfen. The Plaint and Pledges are removed there, Raſtal's Entries, 570. 1 Cro. 594, 436.

Mr. Holt. 3 Hen. 6. 3. a. Pledges at Common Law are good here after Removal, and the Record here is removed by the Plaintiff in the Replevin. Adjournat'. Vide poſt, Caſe 448.

Bail. Quære, If Bail in an inferior Court, as the Marſhalſea, &c. be not liable after Judgment affirmed here upon a Writ of Error?

(389.) De la Courtier *verſus* Bellamy. *Entred* Mich. ult. Rot. 664.

Foreign Bill of Exchange. *Poſt*, Caſe 400, 404, 426, 462, 473. ACTION ſur le Caſe on a Bill of Exchange from Parts beyond the Seas, payable at double Uſance from the Date thereof; Cuſtom alledged accordingly, and the Fact was alledged to be, That the Party beyond the Sea drew ſuch a Bill ſuch a Day, and the ſame was afterwards preſented to, and accepted by the Defendant.

And Exception was taken, That the Date of the Bill was not ſet forth: And per tot. Cur' held, 'twas well enough, and they would intend it dated at the Time of Drawing it. Judgment pro Quer'.

(390.) Alleway *verſus* Rowden. *Entred* Mich. ult. 509. *or* Rot. 519.

ERror on a Judgment in Ireland in Ejectment there, the Declaration was upon a Demiſe from the Lady Conway, and a Verdict and Judgment there pro Quer'.

Demurrer to a Challenge to the Array. The Error aſſigned by Mr. Pollexfen was, That on the Trial there was a Demurrer to the Challenge to the Array; whereas there ought to have been Iſſue

joined and tried; the Defendant there challenged the Array, for that the Lady Conway being a Countess there, was the Lessor of the Plaintiff; and that Ejectment ws brought to try her Title, and she did bear the Costs of the Suit, and prosecuted the same; and that the Sheriff had made that Array, nullo milite in eodem existent. retornato: And this, he said, was a good Challenge, and for that cited Moor 895. Eyre *v.* Banister, where Consanguinity in the Lessor of the Plaintiff was allowed a good Challenge in Ejectment.

And after much Debate by Mr. Pollexfen and Mr. Holt pro Quer' in breve d'Error; and Mr. Attorney, Mr. Sollicitor, and Mr. Serjeant Pemberton pro Def. the Court resolved.

1. That a Defendant might take Advantage of, *Curia.* two Knights not being returned as well as the Plaintiff, notwithstanding the Opinion in Dyer.

2. That it might be in Ejectment as well as any other Action; for now a-Days we take Notice of the Plaintiff's Lessor, as solely, virtually and really Plaintiff, and the other is but nominal: And it appears upon Record to be the Lady Conway's Demise.

But 3dly, They held that the Demurrer was well enough, for they generally saying nullo milite retornato was not good, for the Venire was tam milites quam alios, and the Sheriff had returned two Men Knights, and if they were not such you ought to have said that the two Men were not really Knights, and so you might have tried it; but now here are two returned, and that's well enough.

Then another Exception was taken, That the Lease was made after the Bill filed, which was of Michaelmas Term generally, that is the first Day, and the Demise was the 30th of October.

But answered per Mr. Serjeant Pemberton, That that is a Mistake, for the Term begins not till the 6th of November.

And the Judgment was affirmed.

Cole

(391.) Cole *verſus* Daniel *& al'*. *Entred* Mich. Ult. Rot. 124.

Action for an Eſcape. *Vide ante*, Caſe 10, 299, 300. 2 *Lev.* 158. 1 *Vent.* 314. *Nelſon's Lutw.* 26, 182, 402.

ACTION againſt the Sheriffs for ſuffering one to eſcape that was in the Compter, upon a Plaint there levied, and ſays, That whereas ſuch a one was indebted to him, &c. he being in their Cuſtody by Virtue of the ſaid Plaint, they ſuffered him to eſcape.

Mr. Pollexfen took Exceptions, That there were no Continuances entred, no Proceedings from the Entry of the Plaint to the Time of the Eſcape.

Continuances.

Another Exception was, That they had not ſaid that the Cauſe of Action aroſe within the Juriſdiction.

Juriſdiction.

Vide 1 *Lev.* 50, 69, 96, 105, 137, 156. 1 *Sid.* 85. 6 *Mod.* 224.

Et per Curiam. As to the firſt Exception, In London we never uſe it as 'tis done in other inferior Courts.

And to the ſecond, Upon Evidence, 'tis true, we make them prove it within the Jurisdiction, but 'tis well enough if it doth not appear to the contrary. Judgment pro Quer'.

(392.) Browne *verſus* Evans. *Entred* Hill. Ult. Rot. 123.

ERror on a Judgment in a Quod ei deforceat at the Grand Seſſions in Wales: Error aſſigned, in that there was neither Appearance nor Grand Cape: Held Error, and the Judgment reverſed, though there were three Summons.

Grand Cape.

Then an Exception was moved to the Writ of Error, for that 'twas directed to the Juſtices, and the Judgment was before two of them, (viz. Manley and Bugbie) and one of them only returned it, but the Record was right before both, though certified but by one; and all the Court thought it well enough. See Cotton and Hawkins's Caſe ſupra, Caſe 375. And the Judgment was reverſed.

Upon *Friday*, *February* 6. about ten in the Morning, King *Charles* the Second died at *Whitehall*, the Courts ſitting, upon News whereof they all roſe: The next Morning all the Judges had their Patents renewed, and they were all ſworn at my Lord Keeper's; and on *Saturday* they ſate and heard a few Motions, the King's Counſel coming without the Bar till they had their Patents renewed. (393.)

And upon the Demiſe of the King all Proceedings in Crown-Cauſes were diſcontinued, and nothing remained but the Indictment or Information; and accordingly ſeveral now pleaded *De novo*; but reſolved, Where Judgment is ſigned and entred, *Quod capiatur*, *&c.* though no Fine ſet or Sentence given, yet it ſtands. See 7 *Rep.* 29, 30. See 1 *Cro. Farington's* Caſe.

DE

Termino Paſchæ,

1 Jac. 2. B. R.

Croſſe *verſus* Young. *Entred* Hill. Ult. Rot. 150. (394.)

DEBT ſur Obligat. pur 60 l. Defendant craves Oyer of the Condition, which is for Performance of Covenants in a certain Indenture; and for Plea ſays, That the Indenture was, &c. (and ſo ſets forth the Whole) and the Covenant on the Defendant's (the Leſſor's) Part, viz. Covenants. *Vide poſt*, Caſe 427.

That the Plaintiff, his Heirs and Aſſigns for ever, ſhould and might have, hold, uſe, occupy, poſſeſs and enjoy the ſaid Premiſſes, without the lawful Let, Impediment, Hindrance, Interruption or Diſturbance of him the ſaid Defendant, his Heirs or Aſſigns, or any other Perſon or Perſons lawfully claiming, or to claim, by, from, or under him, them, or either of them, &c. and pleads Performance generally.

The Plaintiff replies, proteſting that the Defendant hath not obſerved and performed, &c. & pro placito dicit quod poſt confection. Indentur. præd. & ante exhibitionem billæ præd. viz. 1 Martii, 36 Car. 1. the ſaid Defendant claiming legale jus & titulum ad & in trigint. virgatas terræ Anglice Land-Yards, parcell. præd. clauſi, &c. ſub quodam Richardo Brodrippe abſque aliquo Jure titulo vel authoritate adinde ab eodem quer. in eaſdem trigint. virgatas terræ in & ſuper poſſeſſion. ipſius quer. inde intravit, ac ipſum quer' a poſſeſſione & occupatione inde adtunc ejecit & amovit ac ipſum querentem ſic inde expulſ. & amot. a poſſeſſione ſua inde extratenuit & adhuc extratenet contra form. & effect. Indentur. præd. per quod idem querens præd. trigint. virgatas, &c. habere tenere & gaudere non potuit, nec adhuc poteſt ſecund. formam & effect. Indentur. præd. Et hoc paratus eſt verificare, &c. unde, &c.

Breach by Entry, &c.

Defendant rejoins, That he did not enter on any Part of the Premiſſes, &c. & de hoc ponit ſe ſuper patriam. Iſſue is joined thereupon, and tried the laſt Aſſizes; and Verdict for the Plaintiff.

Mr. Keene moved in Arreſt of Judgment, That here the Breach is not well aſſigned, for that the Plaintiff hath not ſet forth a Title in the Defendant, and by Conſequence his Entry was tortious, and he a Treſpaſſor, and ſo no Covenant will lie, the Covenant being for quiet Enjoyment, free from all lawful Interruptions; and the Breach aſſigned is only clamans titulum & jus legale ſub Johanne, &c. and cited a Caſe in Roll. Abr. Tit. Condition, to that Purpoſe.

Breach.

Afterwards I moved for Judgment, for that this was the Entry and Eviction of the Covenantor himſelf, and not a Breach aſſigned upon the Act of a Stranger, in which Caſe we ought to be more preciſe and particular than in the other; here's nothing can be pretended to make any colourable Objection but the Word lawful; for were it omitted, all the

Books do then agree, that a tortious Entry by the Leſſor himſelf will be a Breach of the Covenant for Enjoyment, though otherwiſe in the Caſe of a Stranger, becauſe againſt him another Action lies, viz. Treſpaſs, he being the Wrong-doer; and in the Caſe of a Stranger the Plaintiff is as privy to his Title as the Defendant; and therefore if he will found an Action thereon 'tis incumbent upon him to ſet forth the Title.

And I urged the Caſe of Tiſdale *v.* Eſſex, in Moor 861. the Covenant was for Enjoyment, Breach aſſigned in the Entry of a Stranger, without ſhewing a good Title; and there 'tis reſolved expreſly, That where the Breach is aſſigned in the Entry of a Stranger, there the Plaintiff ought to ſhew a Title in the Stranger; otherwiſe where the Breach is alledged in the Entry of the Leſſor himſelf.

But here the Lord Chief Juſtice interrupted me and ſaid, That it was a Difference conſtantly allowed, and againſt the Party himſelf, they would not conſider the Word lawful, nor drive the Plaintiff to his Action of Treſpaſs; when by the general implied Covenant in Law he had engaged no way to avoid his own Deed, either by a rightful or tortious Entry, and ſo we had Judgment pro Quer.

For whom I intended to have further urged the Caſe of Core, in 1 Roll. Abr. Tit. Condition, 430. and in 3 Cro. 544. Covenant for quiet Enjoyment, and afterwards the Leſſor enters tortiouſly, yet held to be a good Breach of Covenant, for the Intent was, he ſhould enjoy it without any Interruption of the Leſſor himſelf, and without any rightful Interruption of any other Perſon; and the Reaſon why in Caſe of a Stranger's Entry the Title muſt be ſhewn is, becauſe there the Plaintiff is as privy to the Title as the Defendant is, they are both alike Strangers thereto, and 'twould be hard to puniſh the Innocent and paſs by the Wrong-doer; but here the Defendant himſelf is the very Doer, and for the Title he entred by 'tis only known to himſelf, we are not privy to it, and therefore not incumbent on us to ſhow it.

Now that even a tortious Entry of the Covenantor himſelf will be a Breach of Covenant for quiet Enjoyment, is plain from the Books I have cited, and

alſo from F. N. B. 145. b. If the Leſſor leaſe a Term by Deed-Poll, if the Leſſor ouſt the Leſſee, he ſhall have a Writ of Covenant upon this Deed, though he hath no Indenture of it; but if a Stranger who hath no Right doth ouſt the Leſſee, he ſhall have no Writ of Covenant againſt the Leſſor, becauſe he hath another Remedy by Action againſt the immediate Wrong-doer; but if a Stranger enter by an older Title, then he ſhall have Covenant againſt the Leſſor himſelf, becauſe he hath no Remedy beſides; and 20 Hen. 7. 12. is expreſs, that if the Leſſor do eject his Leſſee, Covenant will lie be the Right how it will.

There's the Caſe of Cave *v.* Brookesby, in Jones Rep. 360. where the Defendant leaſed Lands to the Plaintiff, and did covenant that they were free from lawful Incumbrances, and that they were and ſhould continue of the Value of ſo much per Annum, to the Leſſee during the Term; the Leſſor enters on the Leſſee and ouſts him, and the Leſſee brings Covenant, and adjudged that it lies; for when the Leſſor enters they cannot continue of that Value, for that the Leſſor hath the Profits; but if a Stranger without a Title had entred, 'twould have been otherwiſe; and this is the very Difference of the Book.

'Tis but of late Years that it hath been adjudged no Breach, Caſe of a Stranger's Entry, &c. for Catesby and Mountford's Caſe, in 5 Eliz. Dyer 328. and 3 Leon. 43. 'tis adjudged, that a tortious Entry of a Stranger was a Breach of a Covenant againſt Interruptions and for quiet Enjoyment; but ſince that here it hath been adjudged otherwiſe in Caſe of Strangers, but never yet came ſo far as to be ruled ſo in Caſe of Entry and Eviction by the Leſſor.

That a Covenant againſt a particular Perſon by expreſs Name. will be a Defence againſt ſuch Perſon's Entry, whether by Right or Wrong, all the Books do agree; and ſo is 2 Edw. 4. 18. and Foſter *v.* Mapes, Cro. Eliz. 212. now the Covenant in Law is againſt himſelf by expreſs Name, and then the Word lawful can no way alter the Caſe, for as it is in Vaughan's Rep. in the Caſe of Huys and Bickerſtaff, 120, 121. 'tis reſolved, that if the Word were omitted in ſuch Covenant, it muſt notwithſtanding be ſo intended; and that when a Man covenants for En-

joyment

joyment without Interruption, it muſt be meant not againſt the tortious Acts of Strangers, but only againſt their rightful Entries; and if a Stranger enters Covenant will not lie, unleſs he had a Right, becauſe there's another Remedy againſt the immediate Treſpaſſor; ſo that 'tis the ſame Thing as if 'twere out of the Caſe; for 'tis no more than the Law would have implied, and ſuppoſing that Word out of the Caſe, then 'tis moſt plain that a tortious Entry of the Leſſor will be a Breach of the Covenant without the Word lawful in it, and conſequently there's no Reaſon why it ſhould not be a Breach when 'tis ſo expreſſed, it being no more than the Law would otherwiſe have implied.

But beſides this, Entry and Eviction by the Defendant himſelf here is ſurely a Breach of the Covenant in Law, implied in the Words give and grant, which is a general Covenant againſt all Perſons.

I confeſs that the particular Covenant (as in the Caſe of Nokes in 4 Rep.) will reſtrain and qualify ſuch general Covenant, as to Strangers and other Perſons, and their Acts; but as to the Leſſor himſelf it remains the ſame as 'twas before: By the Covenant in Law, he hath engaged we ſhall enjoy it againſt himſelf, and without the lawful Entry or Interruption of any Stranger; but becauſe that's againſt all Men, therefore comes the particular Covenant, and explains it only to extend to thoſe who claim by, from, or under him, but what concerns the Act of the Leſſor continues the ſame, and is not qualified by the particular Covenant; and in that Caſe of Nokes, 4 Rep. 80. 'tis reſolved, that the Plaintiff hath his Election to ſue either upon the Covenant in Law, or upon the expreſs Covenant; now upon the firſt a wrongful Entry of the Leſſor himſelf would be a Breach; and upon the expreſs Covenant, when general without the Word lawful, a tortious Entry of the Leſſor would be a Breach, and our Covenant is no more than that.

Covenants as well as Deeds are to be expounded, ut eis magis valeat quam pereat intentio partium, and moſt for the Advantage of the Party with whom the Covenant is made, and againſt the Covenantor; and the Office of expreſs Covenants is to aſſiſt further and ſup-

port the Grant, and is as the Lord Hob. calls it (in his Reports, 25. Earl of Clanrickard's Caſe) a Wall or Muniment about the Grant, and ſhall therefore never be conſtrued to impugn or contradict it, or to leave the Leſſor a greater Liberty to avoid his own Deed by his own wrongful Acts, more than he had before: The general Covenant is not reſtrained or qualified by the expreſs Covenant, as to the Matter or Subſtance, but only as to the Extent of it, what Perſons ſhall be bound thereby; but here an Enjoyment of the Land without Eviction by the Leſſor himſelf, is the very principal Subſtance of the Agreement; that is the very Purport of the Conveyance, and therefore cannot be qualified by an after Covenant; for if it be, ſuch after Covenant will be contrary to the Words of the Grant, which import a Defence and Warranty againſt the Leſſor himſelf moſt expreſly.

And in ſome Caſes 'tis adjudged, that an expreſs Covenant ſhall not reſtrain the Covenant in Law, as is the Caſe of Proctor and Johnſon, Yelv. 175. and in 1 Bulſt. 2. where the expreſs Covenant was for quiet Enjoyment, notwithſtanding any Act done by him, or any claiming under him: Breach aſſigned was, That A. did give this Land to the Defendant and J. S. jointly, and that J. S. the other Jointenant, had in his Life-time conveyed his Moiety to J. N. who had entred, &c. and ruled a good Breach; and that the general Covenant was not reſtrained by the expreſs one, becauſe contrary to the general Intendment of their Agreement and Undertaking, which was to convey the whole Land: Now in our Caſe the original and firſt Agreement is for Enjoyment againſt the Leſſor himſelf; for the main Body of the Deed is nothing but an Agreement that the Leſſor ſhall quit the Poſſeſſion of his Land, and that the Leſſee ſhall enjoy it without being evicted by the Leſſor; therefore is it that the Deed is made, this is the prime Intendment of the Indenture; and to reſtrain this now by a qualified Covenant as to the Leſſor himſelf, is as much a Contradiction of the Words of the Grant, as an Exception of one Acre out of ten Acres before demiſed.

But ſuppoſing that it muſt be a lawful Title that he muſt enter by to break this Covenant, here it is; we have ſaid that he ipſe præd. defendens clamans legale jus & titulum ſub quodam Johanne Goodrippe did enter and evict us, and yet holds us out contrary to his Indenture, per quod we could not enjoy the ſame according to the Tenor thereof; we could ſay no more, his Title lies in his own Notice not in ours; and now I hope 'twill be intended, we have ſaid that he entred, and that he entred without any Title or Authority derived by or from us; ſo that that Objection is gone, which was the true Reaſon of all the Caſes wherein the Title is adjudged neceſſary to be ſhewn, viz. becauſe for ought appeared it might be by Title under the Plaintiff; and this was the true Reaſon of the Caſe of Hanſaker and Kirby, in 2 Cro. 315. and of Wotton and Heele in Sid. 466. and in Mod. Rep. 66, and 269. but here's no Room for ſuch Preſumption in our Caſe, for we have ſaid that 'twas without any Authority or Title derived from or under us.

Beſides, in all Caſes of Breaches of Covenants by the Leſſor himſelf, they are all alledged generally, and not one otherwiſe, Salmon v. Bradſhaw, 9 Rep. 60. and the ſame in 2 Cro. 304. Where was Covenant of having lawful Right to, &c. Breach alledged that he had not, &c. & ſic infregit, &c. and upon Writ of Error moved, That he ought to have ſhewn what Perſon had the Right and Eſtate, that ſo it might appear to the Court whether the Defendant had, &c. but held well enough, for that it concerned the Defendant himſelf, and that it lay more properly in the Notice of the Leſſor, than of the Plaintiff, who is a Stranger to the Defendant's Title. Then

There's the Caſe of Muſcot and Ballet, 2 Cro. 369. Breach aſſigned that he was not ſeized in Fee generally, and ſhews not what Eſtate, or that any other was ſeized, and held good: And here we have ſaid all we can, all that we can be preſumed privy to, we ſay 'twas without any Title under the Plaintiff. And

Now it muſt be intended a lawful Title, becauſe ſaid to be contrary to the Indenture; and beſides, that's admitted by the Pleading, for they come and ſay they did not enter, and ſo waive the other Matter,

ter, and there's a Verdict for us; after which to maintain the Action, you will I hope intend it a rightful Title, if ſuch be needful.

We have alſo ſaid, that by Reaſon of this Eviction, we could not and cannot enjoy the Premiſſes according to the Deed, and the Jury have found it ſo: That's the Caſe of Gill *v.* Glaſſe in Yelv. 227. and in 2 Cro. 312. Debt for Rent upon a Leaſe, the Defendant (the Leaſe not being by Indenture) pleads that the Plaintiff nihil habuit in tenementis, &c. Plaintiff replies, that he had a good and ſufficient Eſtate, &c. Iſſue thereupon. Verdict pro Quer', Error aſſigned that the Plaintiff ought to have ſhewn that he had a ſufficient Eſtate, and what, to which the Court agreed, but ſaid that 'twas aided by the Verdict, for though the Replication and Iſſue were ill, yet there being an Iſſue tried, it ought now to end the Matter, the Iſſue being upon a material Point, Whether he entred and evicted us or no? And the Verdict in our Caſe finds this true, that he entred contrary to the Form of the Indenture, and therefore that's ſupplied by this Verdict.

A Verdict will ſupply many an Omiſſion, as Reynolds and Buckle's Caſe in Hob. 326. Debt for Rent, Defendant pleads, that before any Rent due, the Plaintiff entred upon him, but did not ſay he did expel or hold him out; and ſo Iſſue was taken upon Non intravit, and found for the Defendant, and he had Judgment for him though his Plea were inſufficient, yet the Verdict had ſupplied it.

Now both theſe laſt Caſes are much like to ours: And for the Caſes urged on the other Side, they are Breaches aſſigned upon the Entries of Strangers, which come not near our Caſe, and ſuch where the Evictor might, for ought appears, derive a Title from the Plaintiff himſelf; and all the Reaſons which govern thoſe Caſes are wanting in ours, as that the Plaintiff knows the Title of the Ejector as well as the Defendant, and that the innocent would be puniſhed for the Wrong of a third Perſon; here 'tis his own Act, and he himſelf is the Wrong-doer, and if by Wrong, or if by Title, 'tis his own, and the Plaintiff not privy to it; and ſo for the other Reaſon,

that

that there would be a double Remedy againſt two perſons, they all fail in our Caſe.

This I had prepared to urge, but was prevented by a ready Judgment for the Plaintiff by the whole Court.

Raymond *& al' verſus* Barber. *Entred* Hill. ult. Rot. 339. (395)

DEbt on a Bond brought by the Plaintiffs as Sheriffs of London, wherein the Plaintiffs declare as one Sheriff; and upon a Bond made eidem Vicecomiti: Demurrer to the Declaration; upon Debate, held naught by the whole Court, for that in London they are two Sheriffs; whereas in Middleſex they are but one; and Judgment was given pro Def. And although it was moved ſtrongly that they might amend, yet refuſed by the Court, it being an old Bail-Bond, and the principal Plaintiff and Defendant in the original Action had been in Chancery for ſome Years. *London* Sheriffs.

Hawes *verſus* Randal. (396.)

TRover de ſeptem parcell. panni Lintei Anglice ſeven Pieces of Linen Cloth: Naught, becauſe not certain how many Yards, and a Piece is not a known Quantity. See contra, Graves *v.* Drake, in Style 199. and Leving *v.* Gamble. Ibid. 102. Declaration uncertain.

Trinity Vacation,

1 Jac. 2. B. R.

(397.) IN *Trinity* Term *Monmouth*'s Rebellion in the *Weſt* prevented much Buſineſs; in the Vacation following by Reaſon of that Rebellion, there was no Aſſizes held in the *Weſtern* Circuit; but afterwards five Judges went as Commiſſioners of *Oyer* and *Terminer*, and Gaol-delivery, and 351 of the Rebels were executed, *&c.*

In this Vacation the Lord Keeper *North* died, and ſo did Mr. Juſtice *Walcot*, and my Lord *Jefferyes* had the Great Seal delivered to him by the Name of Chancellor, and Sir *Edward Herbert* was made Lord Chief Juſtice in his Place; and Sir *Edward Lutwyche* Chief Juſtice of *C. B.* in his Place; and Sir *Robert Wright* Judge in his Place; and Sir *Edward Nevil* puiſne Baron in his Place. In this Vacation alſo died Sir *John Churchill*, Maſter of the Rolls, and in his Place ſucceeded Sir *John Trevor*.

(398.) In this Vacation the Duke of *Monmouth* was executed at *Tower-Hill* by the King's Warrant, being attainted of High Treaſon by Act of Parliament.

At *Michaelmas* Seſſions at the *Old-Baily*, was Alderman *Corniſh* tried and convicted, and attainted of High Treaſon, one of his Accuſers being *Richard Goodenough*, his late Under-Sheriff.

And on the firſt Day of *Michaelmas* Term, being the 23d of *October*, and *Friday*, Mr. *Corniſh* was executed in *Cheapſide*, between *Kingſtreet* and *Soaper-Lane*.

DE

Termino Mich.

1 Jac. 2. B. R.

Newton *verſus* Stubbs. (399.)

ACTION ſur le Caſe for Words ſpoken of the Plaintiff, being a Juſtice of Peace, That he by Virtue of the Commiſſion did worry Men out of their Eſtates: Then at another Time he ſpoke theſe falſe and ſcandalous Words, laying them in Latin; then that at another Time poſtea dixit retulit & publicavit hæc falſa ſcandaloſa verba ad effectum ſequentem, &c. a general Verdict and Damages intirely aſſeſſed. Words. Laid in *Latin.*

Mr. Trinder moves in Arreſt of Judgment, that here are Words laid to be ſpoken in Latin, and no Averment that the Auditors to whom they were ſpoken did underſtand Latin, as there ought to be; and cited for that 1 Roll. Abr. 74. the Caſe of Jones *v.* Dawkes, where 'twas adjudged, that if a Man ſpeak certain ſcandalous Words of me, in the Preſence of Men who do not underſtand Latin, no Action lies, becauſe 'tis no Diſcredit to me, albeit 'twas averred that the Auditors underſtood Linguam Romanam, for that may be Italian, which is now the Roman Language; the ſame in 3 Cro. 496. and the like of Welſh Words, in the Caſe of Price and Jenkins, 3 Cro. 865.

But to this it was anſwered by Mr. Powel, Counſel pro Quer', and by the Court, That of late it hath been adjudged good; and 'tis now common to lay the Words in Latin, in Informations for Libels, and for ſeditious

ſeditious Words, and it's not ſaid theſe Latin Words, but theſe Words following, which are laid in Latin: Beſides, thoſe who prove the Words muſt underſtand Latin, elſe they could not prove the Words; then as that Caſe cited is in Croke (as I have peruſed it) the Judgment there was arreſted for want of a ſufficient Certainty that the Words were ſpoken of the Plaintiff. Then

Mr. Trinder urged another Exception, That they are laid ad effectum ſequentem which is too uncertain; for hereby 'twill lie in the Power of a Witneſs to ſwear the Import or Senſe of Words, which will be of dangerous Conſequence; and for this he cited Cro. 857. Garford & Ux' *v.* Clarke & Ux', Caſe for that the Defendant's Wife ſpoke of the Plaintiff's Wife quædam falſa & ſcandaloſa verba quorum tenor ſequitur in hæc verba: Held not good on a Motion in Arreſt of Judgment, becauſe not an expreſs Allegation, that ſhe ſpake the ſame Words.

Unto this Mr. Powel anſwered, That in the Scandal. Magnat. brought by his now Majeſty, when Duke of York, *v.* Pilkington, it was ſo alledged, but the Court and Bar ſaid they believed it was not ſo there in that Caſe; and the Caſe of Ford *v.* Teague in this Court, about four or five Years ſince; Caſe for preferring a ſcandalous Petition tenor cujus ſequitur in hæc verba, and well enough; it was the Saltaſh Cauſe, &c. But the Court took a Difference between this and that, for there tenor ſignifies the ſame Thing, and the Petition is ſet forth at large; but here ad effectum makes nothing, but he ſpoke the Senſe of the Words mentioned in the Declaration: And Judgment was accordingly pro. Def. quod querens nil capiat per Billam.

Ante Caſe 244.

But Quære, If the principal Caſe was not well enough after a Verdict, the ad effectum being but Surpluſage, for 'tis ſaid hæc falſa & ſcandaloſa verba ad effectum ſequent', ſo that 'tis ſufficiently certain, by ſaying hæc, &c. and the other Words, as idle, ought to be rejected; had it been quædam verba ad effect. ſequent. it had been undoubtedly ill, but however after much Debate, Judgment was pro Def. in Michaelmas Term following, it having been after moved.

Note, As to that Caſe of Dux Ebor. *v.* Pilkington, the Declaration is not as Mr. Powel alledged, but hæc Scandaloſa verba ſequent'.

Hillman *verſus* Law. *Entred* Trin Ult. Rot. 549. (400.)

ACTION ſur le Caſe on a Bill of Exchange, brought against the Acceptor by the Plaintiff, as Adminiſtrator to the Party to whom the Bill was payable, on the Cuſtom of Merchants; and Breach aſſigned, præd. tamen the Defendant ad vel poſt præd. Diem, the Day of Payment, non ſolvit nec aliqualiter pro eiſdem hucuſque contentavit; Demurrer to the Declaration, becauſe did not ſay non ſolvit at or before the Day, and a Payment before the Day is a Payment at the Day: But held good per Cur', becauſe ſaid hucuſque non, &c. Judgment pro Quer'. Bill of Exchange. *Ante* Caſe 389.

Atkinſon *verſus* Newton. (401.)

THE Plaintiff brings a Scire facias as Adminiſtrator of J. S. againſt the Defendant as Executor of J. N. on a Judgment here recovered by the Plaintiff's Inteſtate againſt the Defendant's Teſtator, and alledges Adminiſtration to be committed to him by the Archbiſhop of York; the Defendant pleads plene Adminiſtravit; and Verdict pro Quer'. Adminiſtration.

Mr. Girdler moved in Arreſt of Judgment, That upon the Record it ſelf it appears the Plaintiff hath no Title, becauſe it appears thereon that the Inteſtate had bona Notabilia in another Dioceſs (viz.) a Judgment here in Middleſex; ſo that the Adminiſtration being granted by an inferior Dioceſs 'tis void, whereas had it been granted by the Archbiſhop of Canterbury, the bona notabilia only in one Dioceſs, 'twould then be only voidable, becauſe he is the Superior; but here 'tis void, and though it be after Verdict, yet here it appears upon Record that he had bona Notabilia in Midd. and non conſtat that he had any at all in York, and he cited the Caſe of Byron and Byron, in 3 Cro. 472. *Bona Notab.*

Ordered

Ordered to be moved again, and afterwards when moved again, the Court said they had judged it well enough before, and would hear no more; and therefore Judgment pro Quer'. Tamen quære.

(402.) Baxter *versus* Pells.

TRespas for taking and keeping Cattle, quousque he paid so much Money & quindecim solidos, &c. The Defendant pleads a Rent arrear, and a Distress for the same, and so justifies, and the Plaintiff demurs; and upon arguing it divers Exceptions were taken to the Plea: As

First, That he saith in quodam Clauso eidem præd. Messuagio pertinent'. Now Land cannot belong to an House; and cited Hill and Grange's Case, in Plowden's Com. A Close cannot be appendant to a Messuage.

2. The Defendant hath not shewn that there was any Attornment, and then he being a Grantee cannot distrain.

3. The Defendant doth not shew that they were the Plaintiff's own Cattle, and if they were a Stranger's, that they ought to be levant and couchant, otherwise they cannot be distrained; and so is Doctor and Student, 15. Bro. Tit. Distress, 49. 22 Edw. 4.

Then 4thly, As to the Money demanded: They say so much Rent Arrear, and 15 s. pro rationabilibus expensis; they ought to have shewn how reasonable, and how laid out, that so the Court may judge if reasonable; and to have laid a Venue where laid out, and for what; and so is Yelv. 49, 50. 1 Cro. 486. the same Law is in Case of Necessaries.

Mr. Northey econtra. We have alledged the Rent to be issuing out of the Close, and the saying that the Close is appendant is nothing but idle.

2. For the Attornment, 'tis not necessary to alledge any, for we say it was conveyed to us by force of the Statute of Uses, and then Attornment is not necessary.

3. As to the Levancy and Couchancy, we say they were his Cattle, and he was in Possession.

4. As to the rationabilibus Expenſis, all that is Surpluſage, for we needed not to have made any Anſwer thereto, for the Action is not brought of that, 'tis only in the quouſque ſolverit, &c. Judgment for the Defendant.

James *verſus* Trollop. (403.)

ERror on a Judgment in Com. Banco, on a Declaration in a Prohibition, ſuggeſting a Compoſition before Time of Memory, and that the ſame had been obſerved ever ſince, &c. I have not ſeen the Pleadings, but the Exceptions Mr. Trinder took were theſe, viz. Tithes *in prender.*

That no Layman can be intitled to Tithes in prender, but only by way of Retainer, 3 Cro. 599. That the Grant was in the Year 1125. ſo that your Deed is pleaded to be in Time before the Memory of Man, of which no Iſſue can be taken, nor ever can it be tried, and that Time of Memory begins from the beginning of Richard the Second, and therefore 'tis not pleadable, Litt. Sect. 1 Edw. 4. 6. 14 Hen. 7. 1. Abbot of Strata Marcella's Caſe, Coke's Rep. Bro. Preſcription 22. 44 Edw. 3. 5. 5 Aſſiſ. 5. 8 Edw. 4. 13, 14. Paſch. 1678. Hoskins and Owen's Caſe. Bowley *v.* Atkins in Hill. 18, 19 Car. 2. B. R. Rot. 586.

Another Exception was, Suppoſing that theſe Tithes were well veſted by the Grant, yet they did enter and revest again in the Parſon, by the Counſel of Lateran, Anno 1215. or elſe by the Diſſolution of Monaſteries.

They have not ſhewn that the Biſhop was Party to the Compoſition or Grant, Biſhop of Winchester's Caſe, 2 Rep. 2 Inſt. 490, 491, 655. Regiſt. 38. Selden's Hiſtor. decim. 302. 2 Roll. Abr. 265. Trin. 26 Car. 2. Rot. 461, 471. Wilkinſon *v.* Richardſon; and 2 Roll. Abr. 306. Tit. Prohibition, Num. 20. this is between Spiritual Perſons, 3 Cro. 307. & Moor 907. I could not well hear his Argument, but theſe Authorities he did cite.

Mr. Holt *contra*. The general Queſtion is, Whether this Compoſition as pleaded, be good to ſupport this Prohibition?

And

And as to the first Exception argued, That the Deed makes no Composition, because it contains no Words of Grant in it, and there needs it not, for the ancient way was Composition, and Agreement of rendring quid pro Quo.

2. That 'tis not said to be Part of the Demesns of the Manors; I think it is said so, 'tis alledged to be the Demesne, and in Possession, and then I hold it to be Part of the Manors; it must be Demesne, for it cannot otherwise be intended, for the Tenancies are not Part of the Manors. Mountjoy's Case, 5 Rep.

3. 'Tis true, a Layman is not capable of Tithes in prender; but I think a Layman is capable of paying and taking a Modus in Lieu of Tithes.

4. As for the Counsel of Lateran, I never knew it pleaded in my Life; some say that Tithes were payable of Right before, but how an Ecclesiastical Constitution can institute and create a Temporal Right is somewhat strange; besides, if this created the Parson's Right, 'twould destroy all the Prescriptions and Modus's in the Nation.

5. The Concurrence of the Bishop: That was not necessary in this Case, for he had nothing to do with a Priory which hath an absolute Estate, which a Patron hath not.

As to that of the Dissolution of, &c. that may as well argue away our Lands which we had on this Composition, as our Tithes: And as to the Rent, 'tis neither out of the Lands nor out of the Tithes; 'tis a Composition, and that is a sufficient Answer, but this is well here; we might have prescribed generally, that Time out of Mind 5 s. was paid Annually in Lieu of Tithes; then the setting this forth so specially is well enough.

Whatsoever may have a reasonable Commencement may be good by way of Prescription; a Modus may be good, payable to another Person capable of Tithes, as well as to the Party himself, for he may have Tithes in Kind, and by the same Reason he may have a Modus: He cited 3 Cro. 317. 1 Cro. 317. Litt. 62. The alledging it in this special Manner is a good way of pleading: See Westm. 1. cap. 39. A Writ of Right was to be brought on a Deed.

If this Act hath set up this way of Pleading, why may not I in pleading pursue the Statute? As we have pleaded a Deed from before Time of Memory, so we have pleaded an Usage from thence, which is Time out of Mind; suppose that we had said, that a long Time before 1 Rich. 1. and ever since, we had paid, &c. that would have been good, because in pursuance of the Statute: 'Tis most true, we are not to plead a Deed before Time of Memory, and so to rely on the Deed, as to say Virtute of the Deed we had been discharged of, &c. but when we come and plead the Usage that we rely on, the Design of the Statute was not to take away Right in Possession, but to prevent the setting up old dormant Titles by Deeds where the Possession hath been otherwise: Suppose an ancient Charter before the Time of Richard the First, for Felons Goods, that cannot be pleaded; but suppose a Confirmation since, then the Charter with the Confirmation may be pleaded; or suppose an Allowance in Eyre since: He cited F. N. B. 91. k. 8 Edw. 4. 13, 14. and so he prayed the Judgment might be affirmed.

Court. The sole Objection against this Prescription is, because it shews the Reason of the Prescription; if they had relied on the Deed it might be otherwise; the Council of Lateran can affect nothing in this Matter, &c. Judgment Affirmat.

Claxton *versus* Swift. *Entred* Hill. Ult. Rot. 1163. (404.)

CAse on the Custom of Merchants on a Bill of Exchange brought by the Plaintiff, being the last Indorsee, against the Defendant as the last Indorsor, who pleads that the Plaintiff hath sued and recovered against the original Drawer, which Judgment is in force; the Plaintiff demurs.

Bill of Exchange. *Vide post*, Case 426, 462. *Ante* Case 389, 400.

Mr. Thompson pro Quer' argued, First, The Plaintiff hath his Election to sue the Drawer or the Indorsor, and is not concluded till Satisfaction; besides, we have laid another Custom than that against the Drawer, so as they are distinct; in the Suit which they have pleaded, there was likewise an Indebitatus Assumpsit and intire Damages given, so that it can

be no Anſwer to ours; 'tis a Recovery for more, and conſequently not for the ſame Thing.

Mr. Pollexfen econtra. It is the ſame Bill of Exchange, and the Indebitatus cannot hurt, for this would have been a good Plea for the ſame Party; then as to the Objection of its being another Cuſtom, 'tis true, they are ſeveral Cuſtoms, but yet ſurely a Satisfaction by one of them would be a Bar.

And as to the Merits, 'tis true, he hath his Election, but by thus bringing his Action he hath made his Election, he ſhall not now go back to the others, for that would deprive ſome of them of their Remedies; this is not a joint Action, nor can it be brought againſt them all.

Suppoſe a Treſpaſs be done by ſeveral, and the Party injured bring an Action againſt one of them, and recovers Judgment againſt that one, it ſounding in Damages, he cannot afterwards bring an Action againſt any other of them, Brown *v.* Wotton, in 2 Cro. 73. Yelv. 75. in Trover for a piece of Plate: Suppoſe A. owes Money to C. and delivers Money to B. for to pay unto C. and the Money is not paid, C. brings his Action againſt A. and recovers this Money, he ſhall never bring his Action againſt B. becauſe he hath determined his Election.

Lord Chief Juſtice Herbert ſaid, That Satisfaction ſeems to be the Thing that makes the Difference.

Wythens. Election is to chooſe one or the other, and not every one of them ſucceſſively: Now tranſit in Rem judicatam. Adjournat'. Vide infra Mich. 2 Jac. 2. Caſe 462.

(405.) Burdet *verſus* Procter. *Entred* Hill. Ult. Rot. 190.

Apprentice. ERror. Covenant on an Apprentice's Indenture, to find Meat, Drink, Waſhing, Lodging and other Neceſſaries: Breach aſſigned in the direct Negative, that he did not find Meat, Drink, Waſhing, Lodging & al. Neceſſar. per ſpacium, &c. the Defendant demurs; Alledged that the Breach was too large, and this very Breach hath been held naught, being too general,

Covenant. 2 Cro. 486. and that the Rule, where the Covenant is general,

general, the Breach might be ſo too, as in 2 Cro. 304, 369. 1 Cro. 914. Noy 50. reaches not this Caſe, for all thoſe Caſes are of Covenants for to enjoy; there it lies not in the Party's Knowledge.

Lord Chief Juſtice. The pleading of all Neceſſaries is well enough, for to particularize them would be infinite, and here's a Judgment in the Common Pleas, Judgment affirmed. Vide infra, the like Caſe inter Plomer and Plaiſted, which I argued.

Roberts *verſus* Holt. (406.)

CAſe, declaring on the Cuſtom of Merchants, That if a Merchant in Ireland doth conſign Goods to a Merchant in London, and the Maſter ſign a Bill of Lading, that the Merchant here ſhall be liable for Freight; and held a good Cuſtom. Merchants. Freight.

Pawling *verſus* Ludlow. (407.)

DEbt on a Bail-Bond given upon an Arreſt in an inferior Court; the Defendant pleads, that before the Day of Appearance mentioned in the Condition, he was rendred to the Gaoler there, and there continued till a Superſedeas came: The Plaintiff demurs. See Roll. Tit. Bail. 1 Abr. and 3 Bulſt. 191. Bail-Bond.

Court. The Plea is good; for ſuppoſe no Bail-Bond had been given at all, and then he had lain in Priſon: You had as much the Fruit of your Suit as upon the Bail; you had the Body, and might have brought him up hither: Why may he not render him to the Officer in diſcharge of the Bond before the Day of Appearance as in Caſe of a Recognizance? Judgment pro. Def.

Gawen *verſus* Surby. *Entred* Trin. 35 Car. 2. Rot. 1118. (408.)

TReſpaſs of a Battery, &c. Defendant after an Imparlance ſalvo, &c. pleads an Outlawry: Plaintiff demurs; and Judgment pro Quer', and after Outlawry in Abatement.

after Plea of Non cul. and Verdict and Judgment pro Quer'. Judgment was affirmed on a Writ of Error in Cam. Scacc. where for the Writ of Error 'twas argued,

Not after Imparlance.

That the Bill was of Hillary Term, and the Imparlance till Trinity Term, and the Defendant hath taken upon him a full Defence by a Defendit vim & injur. quando, &c. And after such Defence he cannot plead in Abatement. 8 Hen. 6. 3. Thomson's liber plac. 8, 9. He cannot plead an Outlawry in Abatement after Imparlance, and Day given to another Term, 35 Hen. 6. 36, 37. 22 Edw. 4. 36.

Objection. But this is a Special Imparlance.

Answered. He cannot after a Special Imparlance. 22 H. 6. 7. By the Salvo is only intended such Exceptions as the Law gives to the Writ, not Privilege of Chancery, &c. The Words of the Salvo are, Salvo sibi omnimodis Exceptionibus ad billam præd. habuit Licentiam interloquendi ad eandem & tunc ad respondend', &c. All that this contains is Exceptions to the Bill.

Outlawry in the Plaintiff is not an Exception to the Bill, nor an Answer to the Bill, but to keep himself from answering, and that is contrary to the Words of the Salvo, for thereby he is to answer to the Bill. Bro. Estoppel 24. After Imparlance a Man is estopped to plead Outlawry in Disability. See Herne 3. Utlagary. Herne 6. Villenage.

1. Here he admits the Jurisdiction of the Court, and that there is such a Person who sues, and after such an Imparlance he cannot plead no such Person as the Plaintiff; for that is admitted, and such Plea ought to be before Imparlance, per Bryan, 16 Edw. 4. 4. Bro. continu. 75. 3 Leon. 205. Markham and Pitts's Case: The Salvo, &c. is only to the Form or Matter of the Writ or Count; as another Action pending, Variance, Jointenancy, Coparcenary, Tender and Refusal, &c.

2. Also at the Day of the Imparlance ended by the Quando, &c. he admits him of Ability again; for Disability, or Nonability, is the same with Non-entity, or no such Person in rerum natura; 'tis as a Civil Death, &c.

It would be strange after an Imparlance to plead Nul tiel personne, so would it be as strange after having admit-

admitted him of Ability by the Quando, &c. for this is a full Defence, and hath taken upon him to answer. Bro. Defence, 12. 35 Hen. 6. 12. Transgr. He who pleads to the Person shall defend the Tort and Force, but not the Damage, &c. vim & injur. but shall not say quando, &c. & sic vide (says that Book) He that pleads to the Person shall not make a full Defence. Bro. Defence, 21. 20 Edw. 3. 36. Transl. The Defendant defends the Force and Injury, and demands Judgment if he shall be answered, because he was his Villein; and shews how, &c. & sic inde that he shall not make a full Defence when he pleads to the Person, &c. and shall not say these Words, Quando, &c. for that goes to the Damages, and is a full Defence, and agrees with the Text of Littleton, Sect. 195. viz. That he shall not make full Defence, but only defend the Force and Injury, and demand Judgment if he shall be answered. In Bro. Defence, 29. Villenage is pleaded, there's only a Defence of the Force and Injury, and Demand of Judgment if he shall be answered: So Finch's Law, 435. lib. 4. cap. de contin. After Special Imparlance he shall plead to the Writ or Count, and not to the Jurisdiction or Person.

For Precedents, Vide Rastal's Entr. 252. p. 7. An Ejectment venit & defendit vim & injur', &c. & dicit quod querens est alien. Coke 159. en Debt Defendant venit & dicit quod, and pleads the Outlawry in Disability. Herne 3. Venit & dicit quod, &c. Herne 6. venit & dicit, and four several Number-Rolls there cited.

Mr. Girdler having thus argued, Mr. Powys contended that the Defendant vim & injur', &c. implied a Quando; and 'twas all one, and cited Rastal 368. pl. 1. en formedon quod querens est monachus, and there injur. quando, &c. and the like, 482. and the like 663. Brownl. 1 Part 15. 5.

But the Court insisted that Quando did make a full Defence, and then the Plea was too late; and Judgment affirmed. Full Defence.

Dawling

(409.) Dawling *verſus* Wenman.

Slander. CAſe ſur Slander, That whereas the Plaintiff was a pious, juſt, &c. the Defendant did to ſcandalize him, make a falſe and ſcandalous Affidavit in Chancery, in which were many falſe and ſcandalous Words, &c. And that afterwards tali Die Anno & loco, ex ulterior. mal. ſpoke other falſe, ſcandalous, &c. and Verdict pro Quer', and intire Damages given; and on Motion the Judgment was arreſted, becauſe an Action will not lie for a falſe Oath in Chancery, &c. Et Judgment pro Def. See Hutt. 11. 2 Cro.

(410.) Blanchard *verſus* Dyer.

Debt by Tenant in Common. DEbt for Rent brought by the Plaintiff (being a Tenant in Common with J. S. of the Lands demiſed) for a Moiety of the Rent: And held it did not lie, according to Littleton's Text, Sect. 316. becauſe 'tis in the Perſonalty: So held by the whole Court upon Debate on Motion in Arreſt of Judgment.

(411.) Machbeth *verſus* Cobb. *Entred* Mich. ult. Rot. 48.

Releaſe on Condition. ACTION of Debt, Defendant pleads one of the common Letters of Licence, under the Hand and Seal of the Plaintiff, whereby he gives the Defendant Liberty for three Months, and covenants, That if he ſhould ſue or moleſt him in that Time, the Defendant ſhould be acquitted of the Debt; and that he did ſue him, &c. Plaintiff demurs: The Quære was, If this ſhould amount to a Releaſe.

And held by the Court, That it being under Seal, and the Plaintiff's own Agreement, it was not barely a Covenant, but a Releaſe upon Condition; and accordingly Judic. pro Def.

Maſon *verſus* Smith. (412.)

PRohibition prayed to the Eccleſiaſtical Court there for Simony, it being in order to Deprivation. Adjournat'. Vide infra.

Simony. *Ante* Caſe 159.

Dennis *verſus* Eſhley. (413.)

Fort. M.B. 1. 62.

REplevin. Motion in Arreſt of Judgment, for that there was in the Declaration no expreſs Averment of the Taking, but only by a Quod cum, which in Treſpaſs is naught; though in Caſe or Debt it be well enough. Ordered to ſtay till moved on the other Side.

Quod cum. Vide ante Caſe 294. *contra.*

Blanch *verſus* Gabard. (414.)

ON a Special Iſſue after Verdict 'twas held naught, for the Defendant to ſay non Devaſtavit ad valor. as the Plaintiff had alledged; becauſe he did not ſay nec aliquam inde parcel. for if Part were waſted the Plaintiff ſhall recover ſo much, as well as on a Plene Adminiſtravit, if Aſſets be found to Part of the Debt. See 3 Cro. 83, 84. Dyer 115.

Non Devaſtavit ad valor. ill.

Dominus Rex verſus Sparkes. (415.)

Devon. ſſ. DOminus Rex mandavit Cuſtodibus Pacis ſuæ in Com. Devon. ac Juſticiariis ſuis ad diverſ. felon. tranſgreſſion. & al. malefacta in eodem com. perpetrat. audiend. & terminand. aſſignat. breve ſuum clauſum in hæc verba ſſ. Devon. ſſ. Carolus Secundus Dei Gratia Angliæ Scotiæ Franciæ & Hiberniæ Rex Fidei Defenſor, &c. Cuſtodibus pacis ſuæ in Com. Devon. ac Juſticiariis ſuis ad diverſ. felon. tranſgreſſion. & al. malefacta in eodem Com. perpetrat. audiend. & terminand. aſſignat. & eorum cuilibet ſalutem Quia in Recordo & proceſſu conviction Richardi Sparke

Error on Indictment, for uſing other Prayers than in the Liturgy, *&c.*

Sparke de Northleigh in Com. Devon. Cler. pro quibuſdam tranſgreſſion. & contempt. contra formam Statut. pro Uniformitat. commun. precation. & ſervit. in Eccleſia & pro adminiſtration. ſacrament. edit. unde indictatus eſt & ſuperinde per quandam Juratam patriæ capt. coram nobis convict. eſt ut dicitur Error intervenit manifeſtus ad grave dampnum ipſius Richardi ſicut ex querela ſua accepimus Nos errorem ſi quis fuit modo debito corrigi & eidem Richardo plenam & celerem Juſtitiam fieri volentes in hac parte vob. mandamus quod ſi judicium inde redditum ſit tunc record. & proceſſ. præd. cum omnibus ea tangen. nobis ſub ſigillis veſtris vel unius veſtrum diſtincte & aperte mittatis & hoc breve ita quod ea habeamus a die Sancti Martini in quindecim dies ubicunque tunc fuerimus in Anglia ut inſpect. Record. & proceſſ. præd. ulterius inde pro errore illo corrigend. fieri faciamus quod de Jure & ſecundum legem & conſuetud. regni noſtri Angliæ fuerit faciend. Teſte meipſo apud Weſtm. 11 Novemb. anno regni noſtri 36. Which being returned and diſcontinued by the Demiſe of the King (as was conceived) a Writ of Error coram nobis was brought, the Record was: Memorand. quod ad generalem quarterialem Seſſion. pacis Domini Regis tent. apud Caſtrum Exon. in & pro Com. præd. decimo quinto die Julii anno regni Domini Caroli Secundi Dei Gratia Angliæ Scotiæ Franciæ & Hiberniæ Regis Fidei Defenſor', &c. triceſimo ſexto coram Johanne Beare Johanne Northcote Johanne Quick & Hugone Stafford Arm. ac aliis ſociis ſuis Juſtic. dict. Domini Regis ad pacem in Com. præd. conſervand. necnon ad diverſ. felon. tranſgreſſ. & al malefact. in eodem Com. perpetrat. audiend. & terminand. aſſignat. per Sacrament. duodecim Jurator. proborum & legal. homin. Com. præd. jurat. & onerat. ad inquirend. pro dicto Domino Rege & corpore Com. præd. exiſtit præſentat. quod Richardus Sparke de Northleigh in Com. præd. Clericus exiſtens Rector miniſter ſive Vicarius Eccleſiæ parochialis de Northleigh præd. in Com. præd. & veram examinat. in eadem par. aſſumens decimo tertio die Julii anno regni Domini noſtri Caroli Secundi Dei Gratia Angliæ Scotiæ Franciæ & Hiberniæ Regis Fidei Defenſor', &c. 36. ac diverſis aliis diebus & vicibus apud Northleigh præd. in Com. præd. machinans & intendens derogare & deprivare convenient. & neceſſar. ordin. ritus & modum Anglice the meet order, manner and fashion commun. & apertæ precationis appunctuat. habend. & tenend. in omnibus Eccleſiis parochial. & capellis infra hoc regnum Angliæ ſpecificat. in quodam

libro intitulat. The Book of Common-Prayer and Adminiſtration of the Sacraments eodem decimo tertio die Julii anno ſuprad. exiſtent. die dominico ac diverſis aliis diebus dominicis præantea in tempore divini ſervitii ante meridiem ejuſdem diei ac alior. eorundem dominicor. dierum præd. in Eccleſia parochiali de Northleigh præd. habit. adtunc & ibid. vi & armis, &c. voluntarie & illicite quaſdam alias preces quam commun. precat. præd. in eodem libro intitulat. The Book of Common-Prayer ut prefertur ac alio modo quam per eundem appunctuat. fuit palam publice voluntarie & illicite dixit habuit & repetivit & uſus fuit ſeparalibus ligeis dicti Domini Regis adtunc & ibidem præſentibus in contempt. dicti Domini Regis nunc in malum exemplum omnium alior. ſubditor. dict. Domini Regis in hujuſmodi caſu delinquent. contra formam Statut. in hujuſmodi caſu edit. & proviſ. ac contra pacem dict. Domini Regis nunc Coron. & dignitat. ſuas, &c. Super quo præcept. fuit Vicecom. Com. præd. per eandem Cur. quod non omitteret, &c. quin venire faceret eundem Richardum Sparke ad reſpondend', &c. poſteaq; ſcilicet præd. decimo quinto die Julii anno 36. ſuprad. coram præfat. Juſticiar. venit Richard. Sparke in propria perſona ſua & habito auditu Indictament. præd. dixit quod ipſe non eſt inde culpabilis Et de hoc pon. ſe ſuper patriam, & Hugo Vaughan Arm. adtunc & ibid. exiſtens Clericus pacis Com. præd. qui pro Domino Rege ſequitur in hac parte ſimiliter Ideo ven. inde Jurat. coram Juſticiariis dict. Domini Regis ad pacem in Com. præd. conſervand. ac ad diverſ. felon. tranſgreſſ. & al' malefacta in eodem Com. perpetrat. audiend. & terminand. aſſign. ad general. quarterial. ſeſſion. pacis Dom. Regis tent. apud Caſtrum Exon. in & pro Com. præd. die Martis poſt feſtum Sancti Michaelis Archangeli tunc proxim. futur. exiſten. ſeptimo die Octobris Anno regni dict. Domini Regis nunc triceſimo ſuprad. Et qui, &c. ad recogn', &c. quia tam, &c. Idem dies datus eſt tam præfat. Hugoni Vaughan qui ſequitur, &c. quam præfat. Richardo Sparke Ad quam quidem general. quarterial. Seſſion. pacis Domini Regis tent. apud Caſtrum Exon. in & pro Com. præd. ſeptimo die Octobris Anno regni dict. domini Regis nunc 36. ſuprad. coram Johanne Beare Johanne Northcote Johanne Quick, and Hugone Stafford ac al. Sociis ſuis Juſticiariis dict. Domini Regis ad pacem in Com. præd. conſervand. ac ad diverſ. felon', &c. venit tam præfat. Hugo Vaughan qui ſequitur, &c. quam præfat. Richardus Sparke in propria perſona ſua & Juratores Jurat. præd. per Johannem Kelland. Arm. Vicecom. Com. præd.

ad hoc retornat. impanellat. & exact. viz. W. L. &c. probi & legales homines Com. præd. ſimilit. venerunt qui ad veritat. de præmiſſis dicend. electi triat. & jurat. dicunt ſuper ſacr'um ſuum quod præd. Richardus Sparke culpabilis eſt de tranſgreſ. & contempt. præd. in indictament. præd. ſuperius ſpecificat. modo & forma prout per Indictament. præd. ſuperius verſus eum ſupponitur ſuper quo viſis & per Cur. hic plenius intellectis omnibus & ſingulis præmiſſis conſideratum eſt quod præd. Richardus Sparke forisfac. & deb. & ſolv. dicto Dom. Regi pro tranſgr. & contempt. præd. centum marcas Et ſi præd. Richardus Sparke ſummam cent. marcar. per ipſum in forma præd. Domino Regi forisfact. non ſolvet prout ſolvi debeat quod tunc præd. R. S. non ſolvens præd. ſummam cent. marcar. in forma præd. capiatur ad ſatisfaciend. dicto Domino Regi de fine ſuo prædict. occaſione tranſgreſ. & contempt. prædict', &c.

Error to reverſe a Judgment given at the Quarter-Seſſions of the Peace, held for the County of Devon, for the Payment of 100 Marks Fine againſt the Defendant, being there convicted by Verdict on an Indictment, for that being Miniſter or Curate of ſuch a Place, he did on the Lord's Day uſe other Prayers than according to the Book of Common-Prayer, &c. ſeveral Errors were aſſigned upon Record, As that the Juſtices of Peace had no Cognizance of the Offence, &c.

But the Errors inſiſted upon by Mr. Pollexfen and my ſelf, of Counſel for R. S. were theſe.

1. That the Juſtices of the Peace had no Juriſdiction of this Crime, it being a new Offence created by Statute, and none but Juſtices of Oyer and Terminer, or Judges of Aſſize, could examine and puniſh theſe Offences; as by 1 Eliz. cap. 2. Sect. 17.

To which it was anſwered, That they had a Power given them by 23 Eliz. cap. 1.

Then another Error was alledged in the Judgment, That if on the Statute of Edw. 6. the firſt Offence is Forfeiture of the beſt Benefice, and Impriſonment for ſix Months, if on 1 Eliz. 'tis the like, but in no ſort fineable; which was agreed.

But Mr. Coryton for the Proſecutor urged, That this was an Offence againſt the 14th of Car. 2. where there is a general Prohibition, not to uſe any other Form, and then a Fine may be ſet.

To that we answered, This Indictment could not be made good upon that Law, because it doth not set forth what the Prayers were we did use, so that non constat to the Court, though it might to the Jury, that they were different from the Book of Common Prayer.

Which Objection the Lord Herbert and Holloway took, saying it might be a Prayer before Sermon, and yet he might use the Common Prayer (and so in Truth the Fact was) and therefore they held it no Offence, unless it had been alledged that he did not read the Common Prayer.

But Wythens hæsitavit.

Then I urged, That in Truth they could bring this Indictment within none of the Statutes concerning these Matters, but if they insisted on this of the 14th of Car. 2. then the Statute of Queen Elizabeth, which gave the Justices a Jurisdiction, could not reach this; which as they themselves contend, is an Offence made by a subsequent Law, viz. 14 Car. 2. which Coryton not being ready to answer, Justice Wythens said, Let it be reversed for that, and (says the Lord Herbert) for the other too: And so we had Judgment reversed.

Stat. 23 *El.* c. 1. *Vide* 1 *Leon.* 241. 2 *Leon.* 5.

Note, This was a malicious Prosecution, for it was only a Prayer in the Pulpit, and the Common Prayer was constantly read, and it had a Fate accordingly; for no Doubt if it had been an Offence within this Act of Uniformity, the Justices would have had Conusance of it; for by the 24th Section, all Statutes concerning the former Book of Queen Eliz. are enacted to be in Force as to this Book now used: This Prosecution alarmed most of the Clergy, but the Lord Chief Justice's Opinion gave them Satisfaction; which in Truth was founded on a great deal of Reason.

But in Truth the Design of the Act of Uniformity in that Prohibition, was to make a Deprivation, &c. and not a temporal Offence, or subject the Party to an Indictment.

(416.) Rous & Ux' *verſus* White. *In Cancell.*

Jointenancy of a Chattle, equitable.

IN Chancery the Caſe was, A. and B. take a Leaſe from Chriſt's-Church-Hoſpital, to them two for a long Term of Years; and by Articles between them it was agreed, That there ſhould be no Advantage taken of Survivorſhip, but that whoſoever died firſt, his Executor, Adminiſtrator or Aſſignee, ſhould have and enjoy the Intereſt of the Party ſo dying; then B. by Will deviſeth her Moiety to C. and D. her two Daughters, paying 25 l. per Annum to J. S. out of the Profits, each 12 l. 10 s.

Upon a Demurrer before the Lord Keeper North I argued.

That a Jointenancy may be of a Chattel, and that this creates one, for they come to it by one and the ſame joint Means and Title; and therefore C. dying, D. ought to have the whole Moiety by Survivorſhip: The Deviſe here is the Original of both their Intereſts, the Eſtate of both is the ſame; and if in a Deed it would be no great Queſtion, and in a Deviſe it muſt be ſo too, unleſs there were Words of Severalty, or the Teſtator had ſome way or other declared his Intention that they ſhould take and hold by Moieties, of which here's none; no Words divided, or to be divided; or the like: And the Words Paying 25 l. yearly out of it, alters not the Caſe, for that is an Incumbrance on the Whole, and the ſubſequent Words, Each 12 l. 10 s. are only explanatory of the former, and will make no Difference; for 'tis no more than declarative of what's implied in the former Words, on which the Law would have directed the ſame Thing, viz. That each ſhould bear her Portion or Share; 'tis no Declaration of the Teſtator's Intention how they ſhould take, but barely directs how that annual Sum ſhould be paid; and the Party to whom the ſame is payable, ſhould have the Whole out of the Houſes, though one had releaſed or aſſigned to her Companion; and the Houſes would ſtand chargeable with the whole 25 l. as an Incumbrance on them into whoſe Hands ſoever they come, whether Aſſignee or Survivor; it not being a perſonal

Survivorſhip.

Charge, Condition, or Penalty on the Deviſees, but laid upon the Houſes, and to be and iſſue out of the Rents, Iſſues and Profits of the Term.

And ſuppoſing it only an equitable Intereſt in Elizabeth White, the Mother and Teſtatrix, and ſhe deviſes it thus; that will not alter the Caſe, but Survivorſhip ſhall take Place there as well as in a Caſe at Law: Survivorſhip is not ſo unconſcionable a Thing as to be excluded out of all equitable Eſtates, for the Benefit thereof is equal to both, and the Contingency is alike, and ſhe might have ſurvived my Client, as well as my Client might and hath ſurvived her; ſo that there is no Hardſhip in the Caſe on any pretence of Inequality: Survivorſhip is a Title allowed even in Debts, and Contracts, and Obligations and Recognizances.

If they had been Joint Purchaſers for a valuable Conſideration, paid by them Share and Share alike, there had been more Colour of Equity, becauſe by the Caſualty the Executor would have loſt both the Intereſt of the Term and the Money too, which otherwiſe would have come to the perſonal Eſtate, and have been Aſſets to have paid Debts; but here are no Debts pretended, and all is gratis given to them by the free Good-will of the Teſtatrix, and they muſt take it in ſuch Manner as the Law directs upon ſuch a Will; and it cannot be thought that ſhe deſigned any otherwiſe; for if the Intention had been to have given ſeveral Moieties, it would have been ſo expreſſed, for ſhe knew the Difference between a Jointenancy and a Tenancy in Common; ſhe was conuſant of the Right of Survivorſhip, as is apparent by the Wording of the Will, for ſhe there recites her Power to diſpoſe of her Intereſt, although but a Jointenant, which was by an original Agreement at the Time of the Purchaſe of the Leaſe from the Hoſpital; and if ſhe had intended her Legatees ſhould have had the ſame Power, ſhe would have ſaid ſo.

On the other Side 'twas inſiſted, That in equitable Eſtates Survivorſhip ought not to be allowed, it being againſt all Equity, that one ſhould go away with the Whole.

To

To which Lord North replied, He knew no Inequality in the Thing, nor any Reason against it; but however, would not declare any Opinion therein of a ſudden, and therefore would reſerve the Benefit thereof to the Hearing; but the Caſe was afterwards compounded.

(417.) Venners *verſus* Allen.

Words.

Rogue and Raſcal. Subornation.

PRohibition. The Defendant libelled againſt my Client in the Court-Chriſtian, for Defamation by theſe Words, You are a Rogue and a Raſcal, and have hired Fellows to ſwear falſe: I moved for a Prohibition, for that, firſt, they are Words of Heat and Paſſion, and therefore a Prohibition ought to go upon that Account: And ſecondly, If they ſhould not be deemed Words of Anger, but adviſed and malicious, then they ought not to have Conuſance of them, becauſe they do import an Offence againſt a Statute-Law; and where no Suit lies for the Principal in their Court, there no Libel can be for Defamation in the Charge of ſuch an Offence: And we had a Prohibition.

(418.) *Dominus Rex verſus* Ford.

Aſſault, &c. *Vide ante* Caſe 104.

INdictment at the Quarter-Seſſions in Com. Devon. for an Aſſault, and taking away a Hand-Gun, and being removed hither by Certiorari, I moved to quaſh it: Becauſe

Firſt, In the Caption it was in the 36th of Car. and did not ſay primi vel ſecundi, and ſo it might be before the Offence; and being ſaid King Charles, without any Addition, it ſhould rather be intended King Charles the Firſt, ratione præcedentiæ.

2. After the Juratores ſuper ſacr'um ſuum præd. it wanted the Word præſentant, and ſo was naught.

And upon that Account was quaſhed.

Dominus Rex verſus Foot & al'. (419.)

Deer-killing, &c. *Vide* Caſe 435.

INdictment for breaking and entring a Park, and for hunting and killing Fallow Deer of the Price of 40 s. de bonis & catallis præd. Richardi Strode, I moved to quaſh it.

1. Becauſe it concluded contra formam Statut. and therefore naught, becauſe there was no Statute againſt breaking the Park, but only againſt Chaſing, Hunting and Killing, &c.

2. It was ſaid a Deer de bonis & catallis, &c. which could not be unleſs tame.

But without any Anſwer to my Exceptions the Court refuſed to quaſh it, and bid us to plead or demur.

Dominus Rex verſus Inhabitants of *Limehouſe*. (420.)

Preſentment for not repairing.

PResentment at a Court-Leet, for not repairing a certain pair of Stairs leading to the Thames, and I moved to quaſh it.

1. Becauſe it ſaid Radney Stairs in Limehouſe, præd. in Com. præd. and Limehouſe is never named before.

2. The Amerciament is of 20 l. upon the Inhabitants of the Hamlet aforeſaid, whereas there was no Hamlet before mentioned; nor is Limehouſe any where ſo ſtyled in the whole Preſentment, and it might be meant White-Chapel, where the Court was held as well as Limehouſe.

2. The Year of the King when the Preſentment was is in Figures.

4. It ſays it was taken apud par. de White-Chappel in Com. ac infra maner. præd. and ſo doth not ſay in what County, and perhaps the Manor extends into two Counties.

But however, the Court would not quaſh it, becauſe 'twas for not repairing the Highway.

Dominus

(421.) *Dominus Rex verſus* Salter.

Conſpiracy not Indictable. *Vide ante*, Caſe 1.

INdictment againſt the Defendant at the Seſſions for the County of Devon, for that he being an evil Man, &c. and conſpiring to aggrieve one Land, pretended he had broke his Arm, and accordingly counterfeited the ſame; and upon that Pretence refuſed to ſeek his Living by any Labour, and exhibited a Complaint againſt him to the Juſtices of the Peace, &c. And it was quaſhed upon my Motion, as a Matter not indictable.

(422.) Porter *verſus* Culmer. *Entred* Paſch. 36 Car. 2. Rot. 353.

Falſe *Latin* in a Bond. 2 *Lev.* 166. 2 *Roll. Abr.* 146, 147. *Nelſon's Lutw.* 128.

DEbt on a Bond in Quinquigint. libris, the Condition was, If the Plaintiff ſhould quietly and ſafely enjoy, &c. The Queſtion was, If this were a good Bond, the Plaintiff having declared in Debt for 500 l.? Argued that it was well enough, according to Walter and Piggot's Caſe, Hob. 116. where the Bond was Septuagint. & Quinquagint. librar. and the Demand was Septingent. & Quinquagint. libras. And Judgment pro Quer'; and held no Variance, though there was nothing pleaded by the Party, or found by the Jury, that it was meant for 700 l. Fitzhughes's Caſe, Hob. 19. The Bond was Octigint. libras, inſtead of Octogint. Held naught: and yet Parker and Kenedye's Caſe, ibid. Seſſant. libris good: Parry *v.* Dale, in Quinquigint. libris, held good by moſt of the Judges, Hob. 119. Yelv. 95. Upon a Writ of Error, though in the King's Bench, Judgment was pro Def. 2 Cro. 146.

Lord Chief Juſtice. That which made me doubt was, Becauſe the Condition was collateral, for I always took a Difference between where the Condition is collateral, and where it is for Payment of Money; for in the laſt Place we are guided by the Sum in the Condition, to know what was meant by the Parties to be the penal Sum; according to

common Uſage, about double the Principal Money payable; but where the Condition is to do a collateral Act, there non conſtat at all, what was the Party's Intention.

To which Thompſon anſwered, That Caſe in Parry and Dale, was on Condition to have the Moiety of a Leaſe.

Court inclined it to be well enough. Sed adjournat. prox. Term.

DE

Termino Hill.

1 & 2 Jac. 2. B. R.

City of Norwich *verſus* Johnſon. *Entred* Hill. 35 & 36 Car. 2. Rot. 63. (423.)

ERROR on a Judgment in Com. Banco, in Waſte brought againſt the Defendant there, as an Executor de ſon tort: And held that it lies, and Judgment affirmed. Waſte againſt an Executor *de ſon tort.*

I did not hear the Caſe ſtated, but the Reaſons of the Court of King's Bench in pronouncing the Judgment were, becauſe there may be an Executor de ſon tort of a Term, as is reſolved in Moor 126. num. 273. Kenmick *v.* Burges, though a Difference be taken between a Term in Reverſion and in Poſſeſſion; and then it being a Term for Years, the Reverſioner knows not where to go but to the Occupant; and

though he doth recover the Place wasted, yet that is no Prejudice to the Creditors, because it is a Devastavit in the Defendant; and if there happen to be a rightful Executor or Administrator, he shall recover against the Executor de son tort, but he cannot get the Land from the Reversioner again; besides, he entring of his own Wrong after the Death of the Lessee, makes himself chargeable, and shall never be admitted to take any Advantage of such his own Wrong, as otherwise it would be.

As to the Objection of its being a Disseisin by his Entry, that is surely at the Election of the Lord or the Reversioner.

It was likewise objected, That his Estate was tortious, and consequently could have nothing but a Fee gained by such his Entry; and consequently could not be within the Statute of Glouceſter, that he could not gain any particular Estate for Life or Years, but by some Grant, or Colour of some Grant, but all tortious Estates are Fee-simple.

However, for the Reasons above Judgment was affirmed.

(424.) 3 *Mod.* 94.

Dominus Rex versus Plowright.

Hearth-Money. *Certiorari.*

ORder of Justice concerning Hearth-Money not final, but that a Certiorari lies to remove it hither, and granted accordingly on Mr. Attorney General's Motion; and on the Return of the Order it appeared to be in Discharge of the Owner of a Cottage under 10 s. yearly Rent, no Land thereto annexed, let to a poor Woman, who by the Act was discharged from the Payment of it.

Mr. Attorney General moved to quash the Order, because by the Words of the Statute the Owner ought to pay the Duty, the Words being, and let the same, which same refers only to the Lessor, &c.

Mr. Pollexfen econtra. I agree it hath been resolved in this Court after much Debate, That for Houses standing empty the Owner should pay the Duty, he being deemed an Occupier within this Law: But here the Owner cannot be an Occupier, for that there is another Occupier who is expressly mentioned, and

and undoubtedly discharged of Payment by the Exception of the Statute, and he shall not pay: Now to make the Occupier pay is to make the Poor pay in Consequence, or otherwise it will make the Owners prostrate all the Cottages, and so the Poor will want the Places for Habitation; this is stretching a little too far in Aggrievance of the Poor.

Mr. Justice Wythens. Suppose a poor Man not worth 10 l. in the World, hath such a Cottage of the yearly Value of 5 s. and he lets it to such a poor Person as is within the Qualifications of the Exception, Would you have the Owner pay the Duty in that Case?

And per Cur', You have got a good Step in having a Certiorari, but this ought to be considered, &c. Adjournat'. See the Order quashed. 3 Mod. 96.

Vallet *versus* French. *Entred* Mich. Ult. Rot. 376. (425.)

ON a Writ of Error coram nobis 'twas resolved, That in the second Term after, the Court cannot reverse their own Errors without a Writ of Error, &c. Vide F. N. B. 21. Dyer 95. Yelv. 57.

Agreed, That where an Administrator brings a Scire facias on a Judgment recovered by himself, he need not come with a profert hic in Cur. Literas, &c. but where he brings it on a Judgment recovered by his Testator he must. *Profert hic, &c.*

Burman *versus* Puckle. *Entred* Mich. Ult. Rot. 625. (426.)

CAse on a Bill of Exchange founded on the Custom of Merchants; alledging, that if a Bill by a Merchant or Trader be indorsed, payable to a Merchant or Bearer, then, &c. and doth not aver the Plaintiff to be a Merchant or Trader: And held naught upon a Demurrer. Bill of Exchange. *Ante* Case 389, 400, 404, 426, 462.

(427.) Lancaſhire *verſus* Glover.

Covenants. *Ante* Caſe 394.

DEbt on a Bond for Performance of Covenants contained in an Indenture, &c. Performance pleaded generally: Replication aſſigns a Breach upon that Covenant, that he had good and rightful Power and Authority to, &c. in the direct negative quod non habuit bon. & legal', &c. Demurrer thereto, becauſe we had not alledged what Title he had, nor who had the Title; and as in aſſigning a Breach of Covenant for quiet Enjoyment by the Entry of a Stranger, you ought to ſhew by what Title, and how, &c. ſo here.

But per Cur' held well enough: The very ſame being allowed on a Writ of Error in Salmon and Bradſhaw's Caſe, 2 Cro. 304. The ſame in 9 Rep. 60. upon ſolemn Debate, and the pleading of it in Coke's Entries, 116, 117. and Judgment affirmed; the Breach being according to the Covenant is well enough: And the Caſe of Hancock *v.* Field, 2 Cro. 170. which is ſtronger than this here in our Caſe.

The Defendant ought in his Reſoinder to come and ſet forth what Right he hath, and then 'tis Time enough for us to deny that, or ſhew the Right in another Perſon: The like Caſe verbatim is Maſcot *v.* Ballet, 2 Cro. 369. and the Caſe of Burdet *v.* Proctor in B. R. is much ſtronger, by Reaſon of thoſe uncertain Words & al' neceſſar. and that Caſe of Bradſhaw, 9 Rep. hath always been allowed and agreed ſound Law.

(428.) Hill *verſus* Harris.

Modus for Tithes.

PRohibition on a Suggeſtion of a Modus laid by way of Cuſtom, for a Groat to be paid for every Hogſhead of Cyder, or 2 s. per Annum in Lieu of all Tithes, of all Grain and Fruit in any ſuch Orchard growing: And another Cuſtom of the Parſon's having the ſole milking and Milk of all our milch Kine, for ſo many Weeks after Midſummer, and ſo many Weeks after Michaelmas, in Lieu of all Tithes of Milk: And

we ſuggeſted the Statute of Improvement as to Part: Upon this Suggeſtion I prayed a Prohibition to a Libel in the Court-Chriſtian, for Tithes quoad hoc; And upon Debate it was granted. Prohibition to Part.

Mr. Pollexfen ex adverſo.

I argued that a Prohibition may be quoad part, is every Day's Practice, and ſo is Luſh and Webb's Caſe in Sid. 251. And there's another Caſe there cited to have been ſo adjudged the Term precedent; and as to the laſt Part nothing can be ſaid, but we muſt have a Prohibition quoad the Part, and nothing was ſaid againſt it.

And as to the firſt I argued, That it muſt be agreed, that if the Soil of an Orchard be ſown with any kind of Grain, Tithes ſhall be paid of the Fruit-Trees and the Grain both; and ſo is 2 Inſt. 65. a. becauſe they are of ſeveral Natures and Kinds, but yet this Modus is good; this is different from what is by Law due of Common Right, and 'tis that which can never turn to a non decimando, but is as perdurable as the Claim of Tithes: It is certain enough, we fix it in a certain Tenement, and this is as certain as any modus whatſoever that is in Lieu of any particular Grain, becauſe that may be ſown ſometimes in one Place, ſometimes in another; or that of the Shoulder of a Deer, or two Shillings, in Cowper's Caſe, Hob. 40. and agreed to be good if the Park be continuing, though never a Deer be killed in the Year; or that of Mr. Grant's, of ſo much per Pound for Rent of Houſes in St. Martin's le Grand, 11 Rep. Hob. 12. which may ſometimes be higher, and ſometimes lower; 'tis as certain as a Common to be taken this Year in one Acre, and the next Year in another Acre, unto which a Preſcription may be made; and ſo may a Man have ſuch a moveable Inheritance, as one of two Manors changeably every Year, 1 Inſt. 4. So that the Objection of the Uncertainty here cannot have much Weight: A modus may be for a Garden or Orchard, which ſhall ceaſe when converted into Arable; and if a Penny may be paid for the Fruit and Herbs, Two-pence may be paid both for Fruit and Grain, Reynold's Caſe, Winch 2. By 13 Rep. 14. it appears in all Modus's, that no Reſpect is to be given to the Value of what is yielded in Satisfaction of Tithes,

Tithes: If a Modus be for Hay in Black-Acre, and the Party ſows the ſame with Corn ſeven Years together, that doth not deſtroy the Modus, but whenſoever it ſhall be made into Hay, the Modus ſhall be in Force. Brown's Caſe, Trin. 10 Jac. 1. Godb. 194. And the ſame is cited in 1 Roll. 121. So if a Preſcription be for a modus of an Orchard or Garden, and it ceaſes to be ſuch, the Modus ſhall ceaſe and Tithes be paid in Kind; but if it afterwards be reſtored to an Orchard or Garden again, the Modus ſhall be paid; This is agreed in 1 Roll. 121. the Caſe of Cooper and Andrews; the ſame in Hob. 40. from whence it may be inferred, That if ſo the Preſcription is good enough in any Orchard, becauſe if it ceaſes, the Tithe in Kind is to be paid in any Orchard, that is, ſo long as it doth continue ſuch, Grain growing in hujuſmodi pomario is, ſo long as it is pomar.

We had a Prohibition, and ordered to declare thereon, and upon it Iſſue was taken.

Anlaby *verſus* Welborne.

(429.)
2 *Jo.* 194.

Treſpaſs. *Continuando. Vide infra, & poſt,* Caſe 458.

TReſpaſs for entring and breaking a Cloſe called Round-Garth, &c. with a Tranſgr. præd. quoad conculcation. & conſumption. præd. pedibus ambulando & depaſturat. & conculcation. &c. cum averiis necnon proſtration. conculcat. & conſumption. acervorum hordei & piſar. præd. cum averiis præd. a præd. 25 die Martii to the 2d Feb. prox. ſequent', necnon for entring and breaking the Cloſe called Round-Garth, 29 Sept. the ſame Year, and throwing down and deſtroying an heap of Beans cum averiis tranſgr. præd. quoad proſtrat. & conſumption. acervi illius, cum averiis continuando a præd. 29 Sept. ad 2 Feb. ſequent. necnon for breaking and entring two other Cloſes called Round-End and Little Cloſe ac herbam ſuam & pratum ſcilicet decem acras prati ad valentiam 40 s. in clauſis præd. tunc nuper creſcent. &c. & al' herb. ſuam & prat. &c.

The Exceptions I took were, firſt to the Continuando, and as to that ſome Books are, that a Continuando may be of breaking a Cloſe or Houſe, as F. N. B. 91. l. Bro. Tit. Treſpaſs, 227. and 1 Brownl. 223, 224. But there are Opinions that it cannot be, though a Man

goes every Day, yet every ſuch Entry is a new Breach of the Cloſe, and a Continuando cannot couple ſeveral and diſtinct ſingle Acts; and ſo is the Book of 2 R. 3. 15. and ſo is 20 Hen. 7. 2, 3. pl. 7. breaking an Houſe (there ſaid) that it cannot be alledged with a Continuando, no more than taking a Horſe and detaining it ten Days, and the taking cannot be continued; the like of cutting down ten Trees: And yet 'tis agreed by all, that as to Cattle a Depaſture may be continued, becauſe of the common Preſumption, that they may continue there for the Time alledged.

Continuando. Vide 1 *Sid.* 319, 379. 1 *Lev.* 210. 1 *Vent.* 363. *Yelv.* 126. 6 *Mod.* 38. 2 *Jo.* 194. 1 *Sid.* 224, 249.

I confeſs ſome tranſient Acts have been alledged with a Continuando, and yet allowed good, as in the Caſe of 21 Hen. 6. 43. abridged in Bro. Tit. Treſpaſs, 149. A Continuando in the taking away four Loads of Barley, and the Caſe of Litchford *v.* Elliot, in Sid. 224, 249. the ſame in 1 Keb. 786, and 894. Treſpaſs for breaking a Cloſe, and throwing ten Logs there; laid with a Continuando tranſgr. præd. and allowed good after Verdict, and the Caſe of Butler *v.* Hodges, in Sid. 319. The ſame in 2 Keb. 173, 203, 215. Treſpaſs for entring and taking, and carrying away 500 Loads of Barley; a Continuando laid and held good, and the Caſe of Pane *v.* Browne, Sid. 379. Treſpaſs by a Man and Beaſt, with a Continuando held good, the Caſe of Horrel *v.* Reynolds, Paſch. 30 Car. 2. Here in this Court about the Oyſters, a Continuando, and held good; and the Caſe of Clayton *v.* Gillam & al. an Eſſex Cauſe. Paſch. 34. Moved in Arreſt of Judgment by Mr. Juſtice Wythens, a clauſum fregit, and digging up Stakes, Continuando held good.

But notwithſtanding all theſe Caſes, it ſeems unreaſonable that a Treſpaſs ſhould be laid in treading down Graſs by a meer pedibus ambulando, with a Continuando for Half a Year together, becauſe the Act of Man is tranſient, and every Man that lives is preſumed to eat and drink, and ſleep, and to retire to ſome Manſion-Houſe for ſo doing; and on the other Hand, Cattle are preſumed levant and couchant both Day and Night: And all thoſe Caſes except that of Butler and Hodges, are with a Continuando tranſgr. præd. generally; and they are reſolved ſo on that very Reaſon of this Difference (which hath been an allowed Difference) between a Contin. tranſgr. præd. generally,

and where the Particulars are enumerated; for in the former after a Verdict, the Continuando shall be referred to that of which there may be a Continuance.

And Mr. Justice Twisden was of Opinion against every one of those Judgments, and the Reason of Butler and Hodges's Case was, because the Quality of the Thing shews it might be of long Continuance, for 500 Loads of Barley could not be carried away by one Man in one Day; but in our Case it is quite otherwise, a Trespass pedibus ambulando may be all in one Day to this Value.

Besides, 'Tis not presumable that a Man should walk, &c. pedibus ambulando continuando for half a Year, and consequently it must be by new Entries, which are distinct Acts, and cannot be coupled: In Trespass a Man may lay several Torts and several Trespasses done at several Times, and in several Places, as Buckmere's Case, 8 Rep. 87. and therefore 'tis not necessary to couple them with a Continuando. In Hoskins and Jenning's Case, Trin. 19 Car. 1. Roll. 2 Abr. Tit. Trespass, 445. 'tis resolved, That cutting and carrying away ten Trees could not be with a Continuando: I confess in the Earl of Manchester's Case, v. Vale, Mich. 18 Car. 2. Saund. 1 Rep. 24. is transgr. pedibus ambulando, laid with a Continuando where no Exception was taken to it, and therefore no Authority against us.

As to that of throwing down the Stack of Beans, that can never be good according to that Difference which is most expressly agreed: So in 1 Sid. 319. that where the Particulars enumerated in the Continuando will not admit of such a Continuance, 'tis Error. (In Rastal's Entries, 661. is a Continuando of a pedibus, &c.) But supposing the Continuando well enough, as the Court there held it, yet here is an express Repugnancy; for the Defendant is supposed in the first Count, to be on the Land committing a Trespass pedibus ambulando for a Year together; and yet in the second he makes a new Entry vi & armis into the same Close in the Interim, which cannot be, for he was there all the while: Now here Damages are given for both.

Then as to the third Count of clauſum fregit & herbam ſuam & pratum viz. decem acras prati ad valenc', &c. in clauſis præd. adtunc & ibid. creſcen. depaſtus fuit, &c. This edere pratum is ſurely naught, for pratum cannot ſignify Hay, or Graſs ready to be mown, for that is expreſſed under the Word herbam; the ſole and proper Senſe of pratum is a Meadow, and the Soil is demandable by that Name; and if a Man ſhould grant thus herbam ſuam & pratum viz. decem acras prati in clauſo vocat. Little Cloſe exiſten. the very Land would undoubtedly paſs: An Ejectment lies de decem acris prati, as is the Book of Entries, 243. and 'tis ſet before Paſture and Wood-ground; they have not help'd it ſo much as by an Anglice.

This is not after a Verdict, for to the third Count we have pleaded a Special Plea, and they have demurred: It's true, this is not a Præcipe or Ejectment, where the Thing demanded ought certainly and properly to be ſet forth, yet in this Action they muſt expreſs a Thing poſſible; and he might as well have ſaid decem acras terræ, and that would ſurely have been naught: It cannot be Surpluſage, becauſe a Value is ſet upon it; if it did ſignify Hay or any Thing elſe beſides the Soil, then he lays no Property in it; he doth not ſay ſuum, and therefore naught, the Cloſe may be his, and the Herbage another's. See Brook *v.* Brook. Sid. 184. Whiteman *v.* Hawkins. 3 Bulſt. 303. Tranſ. quare clauſum fregit & tres taſſas Anglice Sheafs tritici did take then and there being, after a Verdict held naught; becauſe not ſaid ſuum, as quare fœnum ſuum cepit. Purſel *v.* Bradley, Yelv. 36. Tranſgr. for taking Goods necnon equam valoris, &c. and doth not ſay ſuam.

Obſerve as to this of Property, it is eaſily anſwered, becauſe the Cloſe is alledged to be his, and then the Graſs growing there ſhall be intended his likewiſe: And the Caſes I have mentioned are of Things either ſeveral or ſevered from the Soil.

But on that of edere pratum we had Judgment for the Defendant.

Note, As to the Objection of the Repugnancy 'twas over-ruled, being after a Verdict. Quære ration.

(430.) Luxon *verſus* Corbin.

Courts inferior.

ERror to reverſe a Judgment given in the Borough Court of Taviſtock in Devon, in Caſe on ſeveral Promiſes: The Errors I inſiſted on were,

1. That the Venire facias is returnable at an uncertain Time, as at a Court to be adjourned, &c. A Venire returnable at the ſame Court it is awarded, is naught. Morgan *v.* Boddington. 1 Abr. 789. A Court cannot be adjourned till it comes.

2dly, The Venue is laid apud Taviſtock infra Juriſdiction. &c. and the Venire is awarded de vicineto Burgi de Taviſtock; I agree the Caſes of Plymouth and Lyme, where the Venire was de vicinet. de Lyme & de viſn. de Plymouth, there you might well intend them the ſame; but here the Vicinage of the Borough may be out of the Juriſdiction; the Borough of Taviſtock could not be intended to be the ſame with Taviſtock; for that rather ſeems to be ſome Place within the Borough: In the Caſe of Lyme and Plymouth, they are ſaid to be ancient Boroughs and ſecundum conſuetud'; here is no ſuch Thing appears, this is a new Court; the Statute of Jeofails of the late King reaches not to inferior Courts; the Statute of King James I. is only, where more or fewer Places are named, provided there be one right one.

Viſne.

Ante Caſe 246, 381. 1 *Sid.* 65. *Raym.* 75. 1 *Lev.* 50, 69, 96, 105, 137, 156. 2 *Lev.* 87. 1 *Saund.* 74. 1 *Mod.* 32. 2 *Mod.* 131.

3dly, The Declaration is an Indebitat. for Money lent, and doth not ſay where the Money was lent, it hath not ibid. this hath always been allowed as Error; and ſo was Cudmore and Somes's Caſe in this Court, and Ramſey *v.* Atkinſon, 1 Sid. 65.

And for this Fault Judgment was reverſed. Entred Hill. 1 & 2 Jac. 2. Rot. 818. Hill. 35 & 36 Car. 2. Rot. 1073.

In this Vacation was Sir *Edward Nevil* removed from being puiſne Baron of the Exchequer, and Sir *Thomas Jenner*, Recorder of *London*, placed in his Room; and Sir *John Holt* made Recorder in his Room by Letters Patents; and under him was I Deputy-Recorder, and kept the Seſſions often.

DE

Termino Paſchæ,

1 Jac. 2. B. R.

—— *verſus* ——

(431.)

IN Chancery 'twas held and declared by the Lord Jefferyes, That if a Freeman of London dying, leaving a Wife and Grand-Children, That the Grand-Children in ſuch Caſe ſhall not have the Benefit of the Cuſtom of an Orphanage Part, but the Wife ſhall have a Moiety, as if no Child at all; and this upon the Report of the Recorder. *London* Orphanage.

Birth *verſus* Maypowder.

(432.)

ON a Special Report coming to be heard before my Lord Chancellor, 'twas held by him, That an Attachment iſſuing in the late King's Time (for not anſwering) and executed in this King's Time was regular, being as a Civil Proceſs for not anſwering; tamen Quære, for I being of Counſel pro Defendente, was doubtful thereof, it being a Proceſs of Contempt.

(433.) *Dominus Rex verſus* Eades.

Information for commending a Book. *Vide* 5 *Mod.*

DR. Eades the Defendant, was tried at the Bar on an Information for commending a Book, in which were ſeveral ſeditious Sentences and Clauſes. &c. and convicted: Moved in Arreſt of Judgment, that here was not a ſufficient Charge upon him, for that it was not averred that he either read, or knew theſe Sentences to be therein. Vaux's Caſe, 4 Rep. was cited. 1 Sid. 242. Sir John Aſhley's Caſe, 3 Cro.

Another Exception was taken, That amongſt the Continuances there was a Dies datus to Sir Samuel Aſtrey, Clerk of the Crown; whereas the Information was in Mr. Attorney's Name, and he had joined Iſſue; and therefore prædicto Samueli Aſtrey could not be good, he not being named before: 'Twas anſwered, That the King was always preſent, and any one might proſecute for the King.

But afterwards in another Term, all Exceptions were waived, and upon the Defendant's Submiſſion he was fined 100 l.

(434.) *Dominus Rex verſus* Ivyes.

Alehouſe.

INdictment for keeping an Alehouſe without Licence cont. formam Stat. removed hither by Certiorari.

Mr. Pollexfen moved to quaſh it, as an Offence not indictable. the Statute of Edw. 6. giving the Juſtices Power to commit on Nonpayment of, &c. At Common Law no Licence was neceſſary; and ſo held by all the Judges.

Vide Hutt. 100. 11 Rep. 64, 59. 7 Rep. 37. Caſtle's Caſe. 2 Cro. 648. Rex *v.* Baker, Mich. 24 Car. 2. Information for Wagons. Plowd. 206. and quaſhed.

Radney *verſus* Strode & *al.* *Entred* Paſch. Ult. Rot. 209. (435.) 3 *Mod.* 101.

ACTION of the Caſe againſt the Defendants and others, for maliciouſly charging him with High Treaſon, and proſecuting him for the ſame, &c. Not Guilty pleaded, and Jury find them Guilty, and aſſeſs Damages as to one of the Defendants 50 l. and as to the other Defendant Strode, to 1000 l. the Plaintiff enters a Nolle proſequi as to the 50 l. Caſe for a malicious Proſecution. *Vide ante* Caſe 122, 139, 245, 292.

And for the Defendant Strode, 'twas moved in Arreſt of Judgment, That the Jury cannot thus ſever Damages, for that 'tis laid to be a joint Treſpaſs, and the Jury have found them Guilty modo & forma as alledged, but ſever the Damages, which they cannot thus do; and therefore that the Verdict is repugnant and inconſiſtent; for they find that he ſuſtained but 50 l. Damage, by Reaſon of the Treſpaſs, and conſequently could not ſuſtain 1000 l.

And Sir John Holt inſiſted, that a Non proſ. could not help it, for there's no Caſe where a Non proſ. can be entred where the Pleas are joint, but 'tis rather a Diſcharge to both. Hob. 70. Parker *v.* Sir John Lawrence & al': Held that Non proſ. as to one, releaſes all if before Judgment, and Sir John Heydon's Caſe, 11 Rep. 5. is expreſs, That where they plead Non Cul. and the Jury find them guilty at one Time, as the Plaintiff ſuppoſes the Jury cannot ſever the Damages; and where one comes in and pleads, and is found guilty, he ſhall be charged with the firſt Damages. *Non proſ.* for one Defendant, no Diſcharge of the other.

Alſo the Counſel for the Defendant further urged the Caſe of Auſtin *v.* Wilward & al. 3 Cro. 860. Battery againſt two, and ſeveral Damages; and held naught though on ſeveral Iſſues, becauſe the Treſpaſs is joint, unleſs one had been found guilty in Part, and the other of the Whole; and the Caſe of Putt *v.* Royſton in this Court was cited; and the Caſe of Green *v.* Charnock and others, in 3 Cro. 762. Treſpaſs againſt two; and held the Non proſ. was a Releaſe to both: And the Caſe of Coke's Entry, 650, 676. And they urged the Caſe of Player *v.* Warne, 1 Cro. 54. held on a general

general Guilty found, ſeveral Damages were naught, otherwiſe where they were found ſeverally Guilty, one as to Part, and another as to another Part, Style 124, 128. Mich. 11 Hen. 7. 27. They all inſiſted, that when they pleaded jointly, and a general Verdict finds them guilty generally, that there Damages could not be ſevered.

Mr. Pollexfen econtra. That the Nolle proſequi is no Releaſe, 'tis but a Declaration not to ſue; and cited the Caſe of Sampſon *v.* Cranfield. 1 Bulſt. 157. Battery againſt two, and Verdict pro Quer', and Damages aſſeſſed ſeverally, ſo much againſt one, and ſo much againſt another; and held good; a Caſe the ſame with ours: Every Treſpaſs is joint and ſeveral both, and Not guilty is the ſeveral Plea of them all, for one may be found guilty, and the other not, and therefore there's no Difference where the Plea is joint and where ſeveral: Heydon's Caſe is expreſs, that there's no Difference where the Pleas are joint and where ſeveral: therefore the Damages here taxed generally are well enough. Raſtal's Entries, 677. Battery againſt four, one Jury aſſeſs ſeveral Damages. Welſh *v.* Biſhop, in 1 Cro. 239, 243. Rolle's Abr. 2. Tit. Judgment, 100. Battery againſt two; one pleads Not Guilty, the other pleads ſon Aſſault, and one Jury try both the Iſſues and aſſeſs ſeveral Damages, and a Judgment againſt one only; and well. Trebarfoot *v.* Greenway in this Court, Falſe Impriſonment, the one demurs, the other pleads, and ſeveral Damages, and a Non proſ. againſt one, and Judgment againſt the other. Vide Roll. Abr. Tit. Error, 784, 785.

In Michaelmas Term following, after ſeveral Debates, Wythens, Holloway and Wright, gave Rule pro Judgment pro Quer', Lord Chief Juſtice abſent; then he coming the next Day and doubting, 'twas adjourned to Trinity Term, and afterwards Judgment was given for the Plaintiff.

Dominus Rex verſus Williams. (436.)

INformation for publiſhing an infamous Libel, called Dangerfield's Narrative; Defendant pleads, That by the Law and Cuſtoms of England, the Speakers of the Houſe of Commons have ſigned and publiſhed the Acts of the Houſe, &c. Libel. *Vide poſt*, Caſe 454.

Mr. Attorney General demurs.

Mr. Jones was beginning to argue, and took ſome Exceptions, as that he doth not aver the Libel in the Information, and that in the Plea to be the ſame.

Lord Chief Juſtice. We will not in ſuch a Caſe debate the Formality of ſuch an idle inſignificant Plea: Let us hear what they have to ſay for it.

Mr. Pollexfen began, The Court of Parliament, &c.

Lord Chief Juſtice. Court do you call it? Can the Order of the Houſe of Commons juſtify the ſcandalous, infamous, flagitious Libel?

Mr. Pollexfen then ſaid, I have no more to ſay, &c.

Lord Chief Juſtice. Let Judgment be entred for the King.

And afterwards Mr. Williams was fined 10000 l. and upon Payment of 8000 l. of it, Satisfaction was acknowledged upon Record.

In this Term Mr. *Finch* was removed, and Mr. *Powys* Knighted, and made the King's Sollicitor General; Lord *Mountague* removed, and Sir *Edward Atkins* made Chief Baron; alſo *Heath* and *Milton* were made Barons. (437.)

In the Common Pleas Lord *Jones* was removed, and Sir *Edward Bedingfield* made Lord Chief Juſtice in his Room, and *Levinz* removed, and Sir *Edward Lutwyche* placed in his Room.

Alſo Sir *Job Charleton* was made Chief Juſtice of *Cheſter*, and had a Patent given him for Precedency as he was a Judge, and to wear a Judge's Robe at *Cheſter*, and *Powel* placed in his Room; and Sir *Creſwel Levinz* came to the Bar again, as alſo Mr. *Finch*, *&c.*

Dominus

(438.) *Dominus Rex verſus* Neck.

Forgery. *Vide ante* Caſe 2.

INdictment for Forgery, after a Verdict I moved in Arreſt of Judgment: For

1. It was ſaid he forged a Bond per quod J. S. obligaſſet ſeipſum in, &c. ad ſolvend', &c. which was repugnant, becauſe if he did oblige himſelf, it could not be forged; and if it were forged, he could not be obliged; ſed non allocatur, becauſe that was only to be intended, purporting that he had obliged himſelf.

2dly, It was, he did forge quoddam ſcript. continen. ſcript. obligat. per quod, &c. Now here it is no expreſs Allegation that he did forge the Obligation, but the Obligation might be recited in it, or contained in a Letter which he counterfeited.

Court. That's a Wheel in a Wheel, and can never be made good. Vide le Caſe del Roy *v.* Ring, 1 Keb. 803, 849. Judgment was ſtayed.

(439.) Plomer *verſus* Plaiſted.

Apprentice brings Covenant on his Indenture.

COvenant brought on an Apprentice's Indenture, for not teaching him his Trade, and not finding him in Meat, Drink, Waſhing and Lodging, & al. neceſſar. Demurrer to the Declaration, and ſhews for Cauſe according to the Statute, That al. neceſſar. is uncertain, and that the Plaintiff had not ſet forth what thoſe Neceſſaries were for an Apprentice, according to the Cuſtom of the City of London.

Mr. Hall urged 'twas naught, and they had ſhewn it for Cauſe of Demurrer, which was not done in any of the Caſes adjudged.

I anſwered, That that made no Difference, and here al. neceſſar. is well enough, it being a Breach aſſigned according to the expreſs Words of the Covenant, and the Covenant being general, the Breach is well enough alledged in the Generality; and ſo are abundance of Caſes, and ſo it was ſettled here upon

Debate the laſt Term, in the Caſe of Burdet and Proctor, which was a Writ of Error upon a Judgment in the Common Pleas, and both in that Court; and in this reſolved well enough, though the Caſe of 2 Cro. 486. was urged to the contrary; and your Lordſhip's then Opinion was, That to ſet forth all the Neceſſaries, and to particularize them, would be infinite, and a Jury can beſt determine of Neceſſaries; and the Judgment was affirmed, and upon that very Authority I drew this Declaration.

Beſides, The Books are full of the like Caſes, where the Covenant is general, the Breach aſſigned may be ſo too: I confeſs the Caſe of Mills and Aſtell, 2 Cro. 486. is againſt me, but againſt that Caſe are a great many Authorities: Salmon *v.* Bradſhaw, 9 Rep. 60. 2 Cro. 304. Covenant, that he had lawful Right and Eſtate to let, &c. Breach aſſigned, that he had not lawful Right and Eſtate to let, &c. & ſic infregit convention', &c. And the Court held good, the Covenant being general, the general Breach good; and affirmed on a Writ of Error.

And a ſtronger Caſe than that, Hancock *v.* Field & al. 2 Cro. 170, 171. and 2 Roll. 407. where was a Covenant for Reparations during the Term, and to leave the ſame well repaired at the End of the Term; and Breach aſſigned in not leaving the Houſe well repaired at the End of the Term, and ſhews not in what Point it was not well repaired; ſo as the Defendant might give a particular Anſwer thereto; for that in Declaration in Covenant 'tis ſufficient to aſſign the Breach as general as the Covenant, and there was no Verdict in that Caſe, but 'twas on a Demurrer.

So Symmes *v.* Smith. 1 Cro. 176. Jones 218. Covenant to permit the Plaintiff to enjoy the Lands, and to take the Rents, Iſſues and Profits: Breach, That ſhe did not ſuffer him to enjoy the ſaid Lands, but had received the Rents, Iſſues and Profits of them her ſelf, from the making of the Indenture: Upon Demurrer to the Declaration, and ſhewing for Cauſe, that the Plaintiff did not ſet forth what Rents, Iſſues and Profits; and held well enough, becauſe the Breach may be aſſigned as general as

the Covenant is. The Caſe in that Book, 299. is not the ſame, but another Caſe, for there Judgment was ſtayed.

So the Caſe of Cryps *v.* Sir Henry Baynton, 3 Bulſt. 31. Caſe ſur aſſumpſit, That J. S. being a friend of the Defendant's, coming to the Plaintiff's Houſe, fell ſick; the Defendant in Conſideration that the Plaintiff would provide for him ſuch Neceſſaries as he ſhould want, he would bene & fidelit. ſolvere proinde; the Plaintiff ſhews that he lay there two Months, and that he provided him Neceſſaries, amounting to, &c. And held good without ſhewing what Neceſſaries, to avoid Multiplicity of Reckonings: So a Phyſician in Aſſumpſit for a Cure, need not ſet forth all his Neceſſaries.

Whereupon by the whole Court we had Judgment pro Quer'.

There was another Exception not moved, as the per quod teſtat. exiſtit, but that has been held good enough. Stevenſon *v.* Stevenſon, Sid. 375, 376.

D E

DE

Termino Trin.

2 Jac. 2. B. R.

Godden *verſus* Hales. *Entred* Paſch. Ult. Rot. 180. (440.)
Bulſtrode *Att. pro Quer'*.

DEBT for 500 l. upon the Statute of 25 Car. 2. for accepting and exerciſing the Office of Collonel, &c. not having taken the Oaths, and ſubſcribed the Declaration; and ſet forth an Indictment and Conviction for the ſame, per quod Actio accrevit: The Defendant pleads in Bar, That after his Admiſſion, and before three Monthys expired, the King by his Letters Patents had pardoned, releaſed, and diſpenſed with the ſaid Oaths, &c. Plaintiff demurs. Officer refuſing the Oaths. *Vide ante* Caſe 51.

Mr. Northey pro Quer', argued, That this Diſpenſation ought to have been pleaded to the Indictment, that now it came too late; that by the Conviction the Action accrues to the Informer; that if a Man will not plead a Pardon, no Advantage can be taken of it afterwards; that now by this Plea the Indictment and Conviction is admitted. He cited Bro. Tit. Charter de pardon 15. He that pleads a Pardon muſt plead it before he plead Not Guilty; here he had a Day to plead it, Marſhal's Caſe, 3 Cro. 4. 1 Roll. Abr. 306.

Lord Chief Juſtice. Come to the Point and argue that.

Mr. Northey, Then the Diſpenſation is meerly void. 4 Hen. 7. 11, 12. it is ſhewn in what Caſes the

King may diſpenſe, as with a malum prohibited by Statute, but not where others are prejudiced by ſuch Diſpenſation; as if a Man be bound in a Recognizance to keep the Peace, the King cannot releaſe that Duty, becauſe of the Prejudice that may thereby accrew to others; and yet when it is forfeited he may: The King cannot diſpenſe with an Act of Parliament that is of publick Concern, becauſe of the Intereſt which every Subject hath therein. 4 Inſt. 135. Where-ever an Act of Parliament inflicts a Diſability, the King cannot diſpenſe therewith, as the 31 Eliz. cap. 6. concerning Simony, neither the King's Pardon after, nor his Diſpenſation before, can take away the Diſability. 1 Inſt. 120. 3 Inſt. 104, 124. 2 Cro. 385. Hob. 75. Moor. Car. 1299. So as to the 5 & 6 Edw. 6. concerning Sale of Offices, 1 Inſt. 234. 2 Cro. 386. 3 Inſt. 125. That the King cannot controul an Act of Parliament that diſables a Man: If the King ſhould licence a Man to ſell an Office, ſuch Licence would be void. Thomas *v.* Sorrel, Vaughan, 354.

This Act impoſes a Condition on his Capacity to hold; nay, upon his taking the Office there's an Incapacity attached, which could not be remedied but by taking the Oaths; he is diſabled to enjoy, he is only to hold but three Months, unleſs he take the Oaths: 'Tis agreed, that the King cannot diſpenſe with the Statute of 7 Jac. 1. 6. This Prerogative was never made uſe of ſince the Statute was made, tho' at the Time of making of it, many Perſons of Worth loſt their Places, by Reaſon whereof the late King loſt their good Services.

As to the Caſe of 2 Hen. 7. 6, 7. concerning the Office of Sheriffs, with a non obſtante, there never was any Judgment in it; and the Juſtices and Serjeants, and Attorney agreed to ſtudy it well, and ſaid, What they had there ſaid ſhall be reckoned for nothing, and declared they would not be bound by it: 'Tis the ſingle Opinion therefore of Coke, and in Bro. Tit. Pat. 45, 109. 'tis ſaid, That the Matter was left at large and not adjudged.

But admitting that Caſe, yet it differs from this; the Statute there was purely reſtrictive of the King as to his Power of Commanding, that the King ſhould not grant; ſo that the King may command

notwithſtanding: But this Statute is only directive to the Subject how to qualify himſelf: He cited Sir John Reed's Caſe, Sheriff of Hertfordſhire, Hill. 27 & 28 Car. 2.

And he farther urged, That in that Caſe of the Sheriff the Diſpenſation is in the Patent that grants the Office; ſo that it is before the Incapacity is attached, but here it comes afterwards, and too late.

Sir Thomas Powys econtra. No Man was by the Common Law incapacitated, but he had ſome way or other to remove that Diſability: He urged that the King's Prerogative was, and is as much the Law of England, as any Statute. 7 Rep. 36. Vaughan 347. 1 H. 5. Rot. Roll. Abr. Tit. Prerog. Ruſhworth, 1 Part 572.

Serjeant Glanvil. This Power of Diſpenſation is not a Notion of this Age, that the Difference of malum in ſe, and malum prohibitum hath always been allowed, that a Law made pro bono publico is not to be diſpenſed with; but that where an Act of Parliament prohibits a Thing, that was lawful before, under a Penalty, which is not to the Damage of particular Perſons, the King may diſpenſe with; what is pro bono publico complicat. the King is Judge of, and may diſpenſe with; otherwiſe of what is pro bono ſingulor. populi. Dyer 53. Vaughan 353. Statutes of Mortmain diſpenſed with. F. N. B. 22. ad quod dampnum: This here is not a Malum in ſe; 'twas lawful before; this is not to the Damage of particular Perſons, but that 'tis of publick Concern in the general; and in ſuch Caſes there's a Neceſſity for this Power of diſpenſing.

That there's a great Diſtinction between the Laws of Property and thoſe of Government; this is a Law of Government, which was made not to reſtrain the King's Power, but to guard the Government againſt Danger; and when the King is ſenſible there is no Danger, the Reaſon of the Law ceaſeth: That Murder may be pardoned with a non obſtante. Theſe are Incidents inſeparable from the Crown. Fitzh. Coron. 139. No Diſability can deprive the King of the Service he may command: He cited Sir Walter Raleigh's Caſe, 2 Cro. 3 Inſt. 136. 12 Rep. 19. Plowd. 492, 522, 592. Calvin's Caſe confirms that Opinion of 2 Hen. 7. 6.

Lord

Lord Chief Juſtice took Time to conſider of it, and ſpake with the other Judges, and three or four Days after, declared that he and all the Judges (except *Nota.* Street and Powel, who doubted) were of Opinion, That the Kings of England were abſolute Soveraigns; that the Laws were the King's Laws; that the King had a Power to diſpenſe with any of the Laws of Government as he ſaw Neceſſity for it; that he was ſole Judge of that Neceſſity; that no Act of Parliament could take away that Power; that this was ſuch a Law; that the Caſe of Sheriffs in Hen. 7. was Law, and always taken as Law; and that it was a much ſtronger Caſe than this; and therefore gave Judgment pro Def.

(441.) **Salmon *verſus* Bullock.**

TRespaſs, for that the Defendant ſuch a Day Domum ſuam fregit & intravit, and then and there beat his Servant per quod ſervitium amiſit; held well enough upon Debate, though thus joined.

(442.) *Vide* 1 *Show.* 101. **Bolon *verſus* Sandford & al'.**

CAſe, wherein the Plaintiff had declared, That whereas the 10th of May, 1685. the Plaintiff had at London delivered and laden on Board the Ship, called the Company's Adventure of Exon. whereof the Defendants were then and there Owners (in which ſaid Ship the Goods and Wares of Perſons requiring the Carriage thereof, were commonly carried and tranſported for reaſonable Freight and Salary) diverſe Goods and Wares of the ſaid Plaintiff, viz. &c. ad valene. centum librar. in good Order and well conditioned, to be ſafely tranſported for the Plaintiff from London aforeſaid, to the Port of Topiſham in the County of Devon, in the ſaid Ship (the Danger of the Seas excepted) for a reaſonable Freight and Salary by the Plaintiff to the Defendants, for ſuch Carriage thereof, to be paid; and the ſaid Defendants the ſame Goods and Wares of the Plaintiff's in

in the ſaid Ship under their Cuſtody, for the Cauſe aforeſaid, then and there had and received, and them to tranſport and carry in Form aforeſaid, did undertake: Nevertheleſs the Defendants not regarding their Duty in this Behalf, fraudulently intending to injure the ſaid Plaintiff, not hindred by the Dangers of the Seas, but the ſaid Ship arrived ſafe in the Port of Topiſham aforeſaid; the ſaid Goods and Wares in ſuch good Order and Condition as they were at the Time of the Delivery and Lading thereof on the aforeſaid Ship, to the ſaid Plaintiff did not deliver; but the ſame Goods, &c. ſo improvidently and negligently did place, carry and keep in the ſaid Ship in the ſaid Voyage, that by the Default of the Defendants and their Servants, &c. the ſaid Goods by the Sea-water coming into the ſaid Ship were ſpoiled and dampnified.

Upon Not guilty pleaded, the Cauſe being tried before the Lord Herbert, we inſiſted for the Defendant,

That though this Ship uſually carried Goods between London and Exon, yet the Action ought to be brought againſt the Maſter, for he received the Goods, and ought to be anſwerable for them; and the Maſter of the Ship is no Defendant, nor ſo much as joined.

Beſides, if the Action doth lie, all the Owners ought to be joined, and there were ſeveral others not named. Morſe and Sluce's Caſe was cited.

Alſo we that are the Defendants never ſpoke with the Plaintiff, or made any ſpecial Undertaking; and that no Bill of Lading was given by the Maſter: And that a common Carrier hath his Remedy againſt the Hundred, but here is none.

And I put this Caſe; Suppoſe an Houſe be burnt by the Neglect of a Tenant, and other Houſes are burnt by the Means thereof, ſurely the Landlord ſhall not be anſwerable, for the Wrong is perſonal, the Tenant tam improvide cuſtodivit ign', here the Form is the ſame.

But the Lord Chief Juſtice ſeemed of Opinion that we were liable, but that the Maſter ought to be joined, or at leaſt all the Owners.

Whereupon a Special Verdict was found.

Attorney

(443.) *Attorney General verſus* Capell *& al'.*

IN Scaccar. per breve in ligulo brevium de Termino S. Hillar. anno primo finient. & ſecundo incipient. R. Regis Jac. 2.

Extents in Aid.

220.

Extent, reciting that Moore and Thomas by Bond, became indebted to the King the 29th of September, 1 Jac. 2. in 1000 l. and that by Inquiſition taken the 23d of December, it is found that John White, and Benjamin Mercer, were indebted to the ſaid Thomas in 450 l. And thereupon it is commanded, that Inquiry be made of White and Mercer's Eſtate, on the 23d of December, teſte the 24 Decemb. returnable 23 Jan. ſequent. Inquiſition found, That the 23d of December they had eighty Barrels of Anchovies; whereupon the Defendants come in and plead, That long before White and Mercer were Bankrupts, and that Commiſſions iſſued out againſt them, and the 2d of Feb. the Commiſſioners made an Aſſignment of thoſe Barrels of Anchovies; the Attorney General demurs.

The Queſtion is, If the Extent was good, the Party being a Bankrupt before?

I argued, That at the Time of the Bankrupcy committed, the Creditors, viz. Moore and Thomas, are intitled but to their ratable Part, and then afterwards the King ſhall have but what he hath a Title to; in Caſe the Creditor be Debtor to the King before, then he was a Creditor for, and intitled to his whole Part, and the King ſhould have the Benefit of the Whole; and no Act of Bankrupcy ſhall afterwards ouſt the King of his Remedy for his Debt, he not being bound by any of the Statutes of Bankrupcy, ſhall not be in the leaſt prejudiced by them: But here Moore and Thomas were not indebted to the King at the Time of the Bankrupcy. (By which White and Mercer became as dead in Law, and could not do any Act.)

Now the King's Right to this Remedy commences but from the firſt Debt to the King, and therefore as to the Quantity the King can have but the Right of his Debtor, though as to the manner of Execution he hath a Prerogative; Nemo enim plus Juris poteſt tranſ-

ferre

ferre quam habet: Poteſtas derivativa non major quam primitiva. At the ſame Rate they may after an Aſſignment become Debtors to the King, and ſo make an Extent in Aid the ſame with an Extent original.

And now ſuppoſe White and Mercer had after an Act of Bankrupcy, and become Bankrupts, contracted a Debt to the King, &c. By the Party's becoming a Bankrupt, every Man that was Creditor to him becomes intitled to his Share; and all that Time, the Condition and Intereſt of every Creditor is fixed, and cannot be bettered by any Act of his or the Bankrupt's.

Now there was no Debt of Record to the King before that: And in the Caſe of an Executor, if after the Death of the Teſtator a Creditor by Bond aſſigns to the King, the Executor may pay a Judgment before it, becauſe 'twas not a Debt of Record to the King at the Time of the Teſtator's Death; and ſo reſolved, Trin. 18 Jac. 1. in Scacc. Roll. 2 Abr. Tit. Prerogative 159. Here is the ſame Reaſon.

But 'twas anſwered, That if the Extent comes before the Aſſignment, it ſhall and muſt be preferred.

See the like Caſe, 20 Car. 2. 80. in Scacc. as to Executors, &c. Edward Lewis indebted to the King by Bond, 3 Mar. 19. Car. 2. Extent on that Bond, dated 21 March, Inquiſition finds Lewis poſſeſſed, 15 April, and then Captain Handbury pleads his Title, That Lewis, the 5th of March, became a Bankrupt; that the 5th of March a Commiſſion iſſued, that the 6th of March the Commiſſioners found that Lewis was a Bankrupt before the Date of the Commiſſion; that the 12th of March, the Goods in Queſtion were ſeized by Warrant from the Commiſſioners; that the 21ſt of March the Commiſſioners of Bankrupt aſſigned to the Creditors, and thereby they became poſſeſſed: To this Plea the Attorney General demurs generally, and Judgment is given for the King; and although the Goods were actually in Cuſtod. legis, yet becauſe the Extent came before the Property was veſted by an Aſſignment, 'twas held a good Extent.

Extents have been held good that have been made upon Goods actually levied by Vertue of a Fieri facias,

and in the Sheriff's Cuſtody, the Extent coming before a Bill of Sale made, ſo as the Property was not altered. Nota.

(444.) Tuckey *verſus* Flower.

Words. *B. Harden's* Whore.

ACTION ſur le Caſe for Words, She is *Ben Harden's* common Whore, he hath lain with her ſeveral Times in the Wheat-Barn at *Aſhton*; by which Words ſeveral that courted her in Marriage did forbear, &c. Verdict pro Quer' on a Trial before my Lord Herbert, and 50 l. Damages.

I afterwards moved, that theſe Words were not actionable, for that they were Words which imported only a Spiritual Offence, and for which the Party could be puniſhed only there, and conſequently a Libel proper there for Defamation. Vaughan and Scandiſh's Caſe, Palmer's Reports, 298. Thou art a Whore, a Baſtard-bearing Whore, and *Thomas Hall's* Whore, and thou didſt play the Whore with him at ſuch a Gate; Words the ſame, or rather ſtronger than theſe, there Place and Perſon is mentioned, as in ours, yet held not actionable, becauſe not alledged that ſhe had loſt her Marriage, or ſuſtained a temporal Prejudice; but, Thou hadſt a Baſtard by him, is actionable, becauſe of the Statute of 7 Jac. 1. which orders her to Bridewell: So that the Words themſelves will not bear an Action; and a World of Caſes there are in Rolle & al' to that Purpoſe.

And then this Allegation of Damage is too general, that it ſignifies nothing; for firſt, 'tis ſuch as no Anſwer can be given to it, nor can we tell what to prepare for our Defence: Beſides, in common Experience on the Trial in ſuch Caſe as this, the Plaintiff is never put to prove that general Allegation of Damage; and if ſhe ſhould, we could never be ready to anſwer it: And in all the Caſes where theſe Words have been held actionable, a particular Damage hath been expreſſed, as in Davies and Gardiner, 4 Rep. 16. There was a Grocer that got her with Child, there's a ſpecial Damage laid on a Communication of Marriage between the Father of the Plaintiff, and one

Elcock by Name, a Man of Subſtance. Dame Morriſon *verſus* Cade, 2 Cro. 162. Asket had the Uſe of her Body, (meaning carnal Copulation) and alledged there, that the Earl of Kent and others had Communication with her, &c. And there are many Caſes where this general Allegation was held naught, as that of divers Perſons, &c. the ſame with ours as to Special Damage: and held naught in Norman and Symond's Caſe, 1 Roll. Abr. 36. pl. 12.

So in the Caſe of Wethered and Brookebome, Trin. 30 Car. 2. Words of a Dancing-Miſtreſs (Sir John Holt was of Counſel in it) 'Twas held, that a general Allegation is not good: There was the Caſe of Geatley *v.* Minues, in Com. Banco, a Cauſe tried before my Lord Norrh, Words of a Taylor, He is a ſhuffling cheating Fellow, and that thereby he loſt divers Cuſtomers; but the Words held not actionable, becauſe he hath loſt divers Cuſtomers, and doth not ſay whom, &c. And the Judgment was arreſted, and we were forced to bring a new Action, and to particularize ſeveral Cuſtomers by Name: This hath been an allowed Difference taken there every Day, and upon the Confidence of the Difference we made no Defence at the Trial of this Caſe.

Lord Herbert. Although you have cited Abundance of Caſes, and thoſe direct, yet it cannot enter into my Reaſon, but that theſe Words carry Damage in them, they import a great Scandal; and perhaps upon the Report of ſuch Words no Suitor ever comes to her, Is not this Ground for an Action? Here's a great Injury done and no Relief, unleſs ſhe can name a Suitor; perhaps theſe very Words prevented her from having any: And what a poor Reparation is a Libel in Court-Chriſtian for Defamation? Shall our Law be ſo defective as not to give a Remedy? I muſt ſatisfy my own Reaſon, I think as they are laid, they are and ought to be actionable.

Wythens. This general Allegation of Damage hath always been diſallowed, and the Words themſelves without more are not actionable.

Holloway and Wright ad idem, and ſo we had Judgment quod querens nil capiat per billam.

DE

Termino Mich.

2 Jac. 2. B. R.

(445.) *Dominus Rex verſus* Browne, Corbet, *& al'.*

Habeas Corpus. Commitment by the King.

DEfendants appeared on an Habeas Corpus: Corbet being an Attorney, had at Browne's Suit arreſted a Soldier without Leave, and was committed to a Meſſenger's Cuſtody thereupon, and now diſcharged, becauſe the Warrant was under the King's own Hand, without Seal, or the Hand of any Secretary or Officer of State, or Juſtice.

(446.) Seamour *& al' verſus* Paſhley.

Avowry for Rent. *Vide ante,* Caſe 243. * *Que Eſtate.* 2 *Salk.* 562. 5 *Mod.* 150, 151. 1 *Lev.* 190. 1 *Sid.* 298. 1 *Mod.* 231. 2 *Mod.* 143, 144. *Nelſon's Lutw.* 29. *Ante* Caſe 196.

REplevin. Avowry of a Diſtreſs for Rent, alledging a Poſſeſſion for a certain Term of Years.

Sir John Holt. In Debt for Rent 'tis well enough, but not in Avowry; becauſe in Avowry we muſt traverſe ſome particular Point; in Caſe of the Action of Debt we can plead the general Iſſue; therefore here you ought to ſhew the Beginning of the Eſtate. Scavage *v.* Hawkins, 1 Cro. 571. Jones 453. A * Que Eſtate cannot be of a Term for Years, 1 Inſt. 121. A Difference is taken in that Caſe of Cro. between Debt and Avowry, for this laſt ſavours of the Realty.

Mr. Pollexfen. There's no Difference, and if it be good in the one, it is good in the other; for both are

only Remedies for Rent; 'tis true, in a Formedon or real Action; here 'tis an Action only between Lessor and Lessee; and this is between Lessor and Lessee, as that Case of Debt is, and as Scavage's Case is in Jones's Rep. there's no such Difference taken.

The Court held it all one, and well enough. Judgment for the Avowant.

Britton *versus* Buckworth. (447.)

DEbt on a Bond in Com. Banco, against an Administrator, who wasts Goods and dies intestate, leaving Goods to the Value of 500 l. and Debts of his own to that Value; a Scire facias is brought upon the new Statute against his Administrator, and he pleads Payment of that 500 l. for Debts on simple Contracts of his Intestate; and held good, and Judgment pro Def. because the Wasting is the Charge, and that is of no higher a Nature, and by that Statute he is to be in the same Case with his Intestate, and he might have paid his own Debts therewith. *Scire facias* against an Administrator.

Dorrington *versus* Edwin. *Vide supra* Case 388. (448.)

REplevin removed by Certiorari, and for not proceeding a Scire facias was sued against the Pledges below: Now argued again, and Judgment pro Quer', that the Scire facias well lies. See 21 Hen. 6. 50. 9 H. 6. 58. 4 Ben. 6. 2. and Rastal's Entries, 569.

Haughton *versus* Rugby. (449.)

UPon Motion to set aside an Execution, and to have Restitution of Goods levied, and a Report of the Secondaries to the Court; it was held, That a Fieri facias delivered to the Sheriff, and executed after the Defendant's Death, though it did bear Teste before, is good, notwithstanding the Statutes against Frauds *Fieri facias* executed after the Defendant's Death.

frauds and Perjuries; for that was intended only for the Benefit of Purchasors and Strangers, and not of the Party or his Executors. Per tout le Court, Sir John Holt, and Tremayne Counsel in the Motion.

(450.) Palmer *versus* Allicock. *Vide supra, p.* 272.

Administration. *Ante* Case 379. *Vide* Case 170.

PRohibition often argued, about the Case of one Son's dying intestate under Age, to whom Administration belongs, whether to the other Sons as next of Kin, or to the Mother? And a Consultation was granted.

Note, The Reason of three Judges was, Because they had a Jurisdiction; and of another, because no Interest vested: Tamen Quære, for it seems if they proceed contrary to the Statute, they ought to be prohibited; and it seems an Interest is clearly vested by the Act of Distribution, and so hath it been held in Chancery and Exchequer all along.

(451.) *Dominus Rex versus* Baspoole.

Perjury. *Ante* Case 155. *Vide ante* Case 1, & 155.

INformation for Perjury assigned in certain Depositions taken in Chancery, in a Suit there depending by Commission to examine Witnesses at Norwich; and upon Trial here at the Bar, the Prosecutor produced a Copy of the Depositions examined in Chancery, and swore to be a true Copy; whereupon I being of Counsel with the Defendant, urged, that they ought to prove him sworn, and that he swore such Things, for this was but a Copy of what was returned into Chancery by Commissioners, that are neither Officers nor upon Oath; this I urged the rather, because my Lord Herbert had ruled it necessary in Case of an Affidavit, and would not allow of a Copy of an Affidavit filed, to be Evidence in Case of Perjury: And my Lord Herbert now taking the Objection, 'twas long debated, and a Difference alledged between an Answer sworn before a Master in Chancery who was a sworn Officer; and the

Court was divided, Lord Chief Juſtice and Holloway with the Objection, and Wythens and Wright of the other Side: So the Court being divided the Copies were not admitted as Evidence; the Commiſſioners who took the Depoſitions being all living, and might have been ſubpœna'd hither; and thereupon the Defendant was found Not guilty, without entring on the Merits of the Cauſe.

Accourt *verſus* Swift & *al'*. *Entred* Paſch 1 Jac. 1. Rot. 209. (452.)

ERror on a Judgment in Ireland, in Caſe on a joint Aſſumpſit againſt ſeveral, (viz.) A. B. and C. A. ſet Judgment go by Default, B. pleads quod ipſe non aſſumpſit modo & forma prout, &c. and C. likewiſe quod ipſe non aſſumpſit modo & forma prout, &c. The Iſſues are found for B. and C. Iſſue on *Non aſſumpſit modo, &c.*

Mr. Pollexfen pro Quer'. The Pleading is naught, for that they are charged with a joint Promiſe, and therefore for one of them to ſay quod ipſe non, &c. is no Anſwer, but it ought to be quod ipſi non aſſumpſerunt, &c. unleſs you'll conſtrue Non aſſumpſit to be Non aſſumpſerunt, and ipſe to be ipſi.

Sir John Holt econtra. Modo & forma reſtrains it to the Declaration well enough. See 1 Sid. 76. 7 H. 6. 33. Legar *v.* Randal, Hill. 24 & 25 Car. 2. Adjournat.

Warwick *verſus* Skinner & *al.* (453.)

PRohibition prayed to a Libel in Court-Chriſtian for Defamation, by theſe Words ſpoken to the Husband of the Wife; She is a drunken Jade, a cheating Jade, and a ſtinking Jade: Suggeſting in the Libel that Jade ſignified Whore. Inſiſted by Mr. Powel, upon the Caſe of Pugh *v.* Jefferyes, 1 Cro. 456. 2 Roll. 297. Welſh Jade, and Welſh Rogue; that as there, ſo here, it was of an uncertain Senſe, and needed an Averment of its particular Signification in the Place where ſpoken. Words. Drunken Jade.

Mr. Pollexfen econtra. The Word Jade is the ſame with old Whore, as an over-ridden Horſe is called Jade, and

and they are malitious Words ſpoken to the Huſband concerning his Wife. Prohibition denied per Cur' upon Debate, becauſe the Words were malicious: Sed quære vim rationis, for an Averment ſeems neceſſary, &c. And Mr. Powel informed me, that the next Day they had a Prohibition granted in the Common Pleas.

(454.) *Dominus Rex verſus* Johnſon.

Libel. *Vide ante* 436.

THE Defendant (who was the Author of Julian the Apoſtate) being now again convicted on a Trial at the Bar, for publiſhing another ſeditious Libel, intituled, An Addreſs to the Army, he took ſeveral Exceptions thereto; As that the Information was inter al' and the Whole was recited except Finis; But that was over-ruled, and the Jury had now found it ſo; and if any Advantage could be taken upon that, it muſt be upon the Trial: He excepted that there was no Averment, that there was an Army in England; but that was over-ruled likewiſe; and his Behaviour being very inſolent, he was ſentenced to the Pillory three Days, and to be whip'd from Newgate to Tyburn; and becauſe the Puniſhment was thought infamous, therefore Direction was given for Care to be taken that he ſhould be degraded before he ſuffered that Puniſhment: And accordingly the Record and Mr. Johnſon both, were brought before the Right Reverend Fathers in God, the Lord Biſhop of Durham, the Lord Biſhop of Rocheſter, and the Lord Biſhop of Peterborough, (Commiſſioners appointed by his Majeſty to exerciſe all manner of Eccleſiaſtical Juriſdiction within the Dioceſs of London, during the Suſpenſion of the Lord Biſhop of London) who with ſeveral of the moſt eminent Divines of the City, met in the Chapter-Houſe of St. Paul's, where the ſaid Mr. Johnſon according to the Eccleſiaſtical Laws, in a full Court, received Sentence of Degradation, and was degraded and deveſted accordingly, and delivered over as a meer Lay Perſon into the Hands of the ſecular Officer, to undergo the Puniſhments above-mentioned.

Dominus Rex verſus Drake.

The Record of a Conviction for hunting Deer, returned by Certiorari. (455.)

Devon. ff. MEmorand. quod quarto die Auguſti anno regni Domini noſtri Jacobi ſecundi Dei Gratia Angliæ Scotiæ Franciæ & Hiberniæ Regis, Fidei Defenſ. &c. primo, Johannes Sheffield de Plympton beatæ Mariæ in Com. Devon. gen. apud Olleton in eodem Com. venit coram nobis Richardo Hillerſden & Thoma Hele Arm. duobus Juſticiar. dict. Domini Regis ad pacem in Com. præd. conſervand', ac ad diverſ. felon. tranſgr. & al. malefacta in eodem Com. perpetrat. audiend. & terminand. aſſignat. & præſtitit Sacrament. ſuum corporale coram nobis (eodem Johanne Sheffield adtunc exiſten. credibili teſte in hac parte) quod Willielmus Drake de Ivybridge in Com. Devon. præd. Arm. & Henricus Crymes de Buckland Monochor. in eodem Com. gen. quarto die Julii anno primo ſuprad. vi & armis, &c. parcum Richardi Strode Arm. in quo Damæ adtunc & diu antea ac continue poſtea hucuſq; cuſtodit. fuerunt ſcituat. & jacen. infra paroch. de Plympton beatæ Mariæ in Com. præd. abſque conſenſu præfat. Richardi Strode Arm. adtunc exiſten. veri proprietor. (Anglice Owner) ejuſdem parci aut alicujus al. perſon. adtunc habent. cuſtod. (Anglice being intruſted with the Cuſtody) ejuſdem parci illicite fregerunt & intraverunt & adtunc & ibid. unam damam fulvam (Anglice one fallow-Deer) in eodem parco exiſten. depaſcent. cum quibuſdam canibus venaticis ſuis illicite ſtertat. fuerunt & fugaverunt (Anglice courſed) contra formam Statut. in hujuſmodi caſu edit. & proviſ. Ideo conſiderat. eſt per nos præd. Richardum Hillerſden & Thom. Hele Juſticiar. ut præfertur. exiſten. quod præfat. Willielmus Drake & Henricus Crymes de præmiſſis impoſit. ſuper teſtimon. præd. convict. ſunt. ac quod quilibet eorum præfat. Willielmi Drake & Henrici Crymes ſeparaliter forisfaciat ſummam viginti librar. pro offenſa præd. unam medietat. præd. earund. ſummar. præfat. Johanni Sheffield exiſten. informatori & al. medietat. præfat. Richardo Strode Arm. exiſtent. proprietar. (Anglice Owner) damæ præd. ſolvend. ſecundum formam Statut. præd. In cujus

Conviction of Deer-hunting, &c. *Vide ante* Caſe 419.

rei teſtimonium nos præfat. Richardus Hillerſden & Thomas Hele huic recordo manus & ſigilla noſtra reſpective appoſuimus die anno & loco prius ſupraſcript.

I moved to quaſh this Conviction upon theſe Exceptions.

1. Here two Juſtices upon a ſingle Oath have convicted a Man for breaking and entring a Park, and courſing a Deer, and impoſed 20 l. Penalty for it: Now there's no Statute againſt breaking the Park; the Offence by 13 Car. 2. cap. 10. is Courſing, &c. and the Penalty they have impoſed is pro offenſa præd. generally.

2. They have not ſaid that we did Courſe without their Conſent, but only that we did break the Park without their Conſent; now we might break the Park without their Conſent, and have their Conſent to Hunt notwithſtanding: Thoſe Words, without Conſent, can never go to the Whole, for 'tis not placed in the Beginning nor in the End, but only in the firſt Clauſe, deſcribing the Manner how, juſt before the Adverb illicite; then comes the other Clauſe, & unam damam illicite fugaverunt.

3. Several Penalties for one Courſing, whereas the Deſign of the Statute by the Dividend of the Penalty, ſeems to be only to give a Satisfaction for the Deer ſpoiled.

4. The Statute requires the Oath of one or more credible Witneſſes: Now here's none but the Informer to whom the Moiety of the Penalty is given, whereas by Law he cannot be a Witneſs becauſe a Party; no more in this Caſe than in any Civil Action, or in a Qui tam upon any Penal Statute; and the Owner of the Park may be a Witneſs as well as the Informer; which will not be pretended: Beſides, the Statute requires a credible Witneſs, which ſurely he cannot be, that is to have a Benefit by the Conviction, that is a Party intereſted. In the Caſe of an Information upon the Statute of Uſury, the Parties to the uſurious Contract ſhall not be admitted Witneſſes, becauſe they are teſtes in propria cauſa, 12 Rep. 68. 1 Inſt. 6. and ſo was it adjudged in Smith's Caſe, Trin. 8 Jac. 1. and that Caſe was much ſtronger, for there was another Informer, and ſo he was not a Party, but only was to have a Benefit on ſuch

Conviction, by the Statute's avoiding his Bond or Security.

Upon an Indictment of Perjury on the 5th of Eliz. he againſt whom the Verdict was given ſhall not be a Witneſs, becauſe that afterwards he by Action ſhall recover 20 l. and ſo it was adjudged in the Caſe of one Bacon indicted for Perjury, 'tis in Rolle's 2 Abr. 685. and the Reaſon of it ſeems good, becauſe he is a Party concerned in Intereſt in the Effect of ſuch Proceeding.

In our Caſe it appears he is the only Witneſs, and by the ſame Record it appears he hath 20 l. for ſuch Teſtimony: Beſides, this Statute gives no part of the Penalty to the King, ſo that he is not concerned in Intereſt; all is given to the Informer and Owner, and to allow them to be Witneſſes in this Caſe, which is quaſi their own, is ſomewhat hard, for they cannot be ſuppoſed indifferent, much leſs credible Witneſſes in that Behalf.

But all theſe Exceptions were diſallowed.

To the firſt 'twas anſwered, The Offence was Hunting the Deer.

2. The abſque conſenſu went to the Whole.

3. By the Words of the Statute, every ſeveral Perſon forfeits 20 l. a-piece.

But to the Fourth the Court ſtuck a little.

And my Lord Herbert declared it unreaſonable it ſhould be ſo, but here was a particular Law which made the Offence, and creates a particular Form of Proceeding.

Juſtice Wythens. The two Juſtices of the Peace are ſole Judges of the Credibility of the Witneſſes.

And ſo he and Holloway, and Wright, all four ſeriatim and ſeparatim delivered their Opinions that 'twas well enough.

Et ſic non allocatur.

Jennings *verſus* Hawkey. *Entred* Trin. ult. Rot. 121. (456.)

DEbt on a Bond brought againſt the Defendant as Executor: Moved in Arreſt of Judgment, that 'twas in the Debet and Detinet, and therefore naught; but becauſe the Declaration on the File was right, being

Amendment of the Plea. *Vide poſt*, Caſe 459. 3 *Mod.* 114.

being in the Detinet only, and the Declaration delivered was right, and the Transcript sent down to be tried was right, although the Roll made up here were naught; yet held it should be amended, it being agreed for a Rule, That the Plea-Roll shall be amended by the File at any Time.

Then another Exception was moved, That this was tried at Chester by Mittimus, which being a County-Palatine, ought not to be as this Declaration is laid. Adjournatur quoad hoc usque prox. Terminum. See 12 Rep. 114. Hutt. 59. 4 Inst. 213.

(457.) Harman *versus* Harman. *Entred* Trin. 1. Rot. 181.
3 *Mod.* 115.

Executor pays Debts on Contract before Bonds.
1 *Mod.* 175.
2 *And.* 159.
Vaugh. 94.

DEbt on a Bond against the Defendant as Executor; who pleads Payment of a Debt on a simple Contract before Notice: Plaintiff demurs.

Mr. Porter argued, that it would be a mischievous Inconvenience, if a dormant Bond, of which there is no sort of Notice, might oblige them seven Years after all the Assets are paid upon Debts, though of an inferior Nature; between Debts of an equal Nature there's no need of Notice: Judgment on Debt on a simple Contract, though obtained against the Executor, may be pleaded in Bar to Bonds: He cited 2 And. 157. and shewed what an unreasonable Thing it is to force an Executor to stand out a Suit to answer Costs de bonis propriis, when he knows the Debt demanded on a simple Contract is really due, and he hath Assets, and no Notice whatsoever of any Debts of an higher Nature. Vaughan 94. and 1 Mod. Rep. 174, 175. In Brooking and Jenning's Case, Vaughan, Atkins and Ellis were of Opinion, That Debts upon simple Contracts may be paid before Bonds, unless the Executors have timely Notice given of such Bonds.

Court. It seems reasonable, but the Difference usually taken hath been, where the Payment of simple Contracts is voluntary, and where compulsive. Adjournat'.

Aldridge *verſus* Drake. *Entred* Paſch. Ult. Rot. 163.

(458.)
S. C. 3 *Mod.* 110, 111.

TReſpaſs for an Aſſault and Battery, and falſe Impriſonment for thirteen Years; the Statute of Limitations pleaded generally; the Plaintiff replies within ſix Years before, &c. Verdict general pro Quer', and 60 l. Damages given.

Treſpaſs continued thirteen Years. *Vide ante* Caſe 429, *&c. ibid.*

Moved in Arreſt of Judgment, That the Verdict is incoherent with the Plaintiff's Replication, for that is within ſix Years, and the Verdict finds him guilty of all the thirteen Years in the Declaration.

Sir John Holt. An Action may be brought at any Time within ſix Years after his Impriſonment, by the Proviſo in the Statute: Beſides, every Day is a new Impriſonment and a new Treſpaſs; and you'll intend the Verdict to be only for the ſix Years, and the Time is not material otherwiſe. Saunders *v.* Edwards, 1 Sid. 95. 1 Cro. 139. And per Court held well enough. Judic. pro Quer'.

1 *Sid.* 95. *Raym.* 61. 1 *Keb.* 389.

Hodges *verſus* Nicholas.

(459.)

CAſe, Judgment by Default; Writ of Enquiry and Judgment, &c. After Error brought.

Sir John Holt moved to amend an Omiſſion in the Return of the Writ of Inquiry (viz.) virtute brevis & per Sacramentum, becauſe the Return was right; but in making up the Record the Clerk had omitted thoſe Words; and if the Omiſſion were in the moſt material Thing, it ought to be amended, the Clerk having a good Record to guide him and he miſtaking it: It is but the Clerk's Omiſſion, and amendable, the Writ of Inquiry upon the File being right.

Amendment. *Vide ante* Caſe 456.

Mr. Serjeant Levinz oppoſed the Amendment, and laboured it very hard, it being a Matter of Subſtance and not of Form, and cited Latch 203. Palmer's Rep. 123. Jones 199.

Of Subſtance.

But

Miſtake of he Clerk.

But per Cur'. It being only a Miſtake of the Clerk, though it be material, yet 'tis amendable, and that without Coſts, it being after the Suit is ended here.

(460.)

Stampe *verſus* Kinſey.

Execution.

UPon a Demurrer it appearing on the Pleading, that an Execution was levied before the Judgment was ſigned, though after the firſt Day of the Term to which the Judgment related, and after the Teſte of the Fieri facias, yet held naught.

(461.)

Dominus Rex verſus Oſmond.

Poors Settlements. *Poſt* Caſe 463.

THE Defendant an Inhabitant of Edgeworth in Com. Midd. having a Wife and Children, and very poor, and yet purchaſed a Copyhold of about 15 s. per Annum in Stanmore magn. in eodem Com. coſt 15 l. And a Monty after comes with his Family there to live upon the ſame, and is returned by the two next Juſtices to Edgeworth; and upon an Appeal to the Quarter-Seſſions they order him back to Stanmore, upon this Suppoſition, That every Man may live upon his own Soil, and is not to be removed.

This Order is returned into this Court by Certiorari, and the Order of Seſſions quaſhed; the Court being of Opinion, That unleſs he have or do rent 10 l. per Annum, though he have 20 or 40 s. per Annum Freehold of his own, yet if he be chargeable to the Pariſh, he may be removed by the Statute.

(462.)

Claxton *verſus* Swift.

Bill of Exchange. *Vide ante* Caſe 389, 400, 404, 426. *Poſt*, Caſe 473.

CAſe on the Cuſtom of Merchants, againſt the Defendant as Indorſer of a Bill of Exchange; the Defendant pleads a Recovery by the Plaintiff againſt the Drawer: The Plaintiff demurs.

See this Case argued by Mr. Pollexsen and Mr. Thomson, Ante Case 404.

This Term I argued for the Plaintiff, That this Matter which the Defendant hath pleaded is no Bar, for that I think is the only Question, for I know of no Exception taken to the Plaintiff's Declaration; and then supposing both the Declaration and Plea to be true, as in Fact they are, and now must be taken: So the sole Question is, Whether their Plea be any Answer to our Charge?

First to consider the Declaration, 'tis founded upon a Special Promise or Contract, which the Law supposes and raises by Virtue of the Custom of Merchants upon the Fact which we have alledged.

The Custom of Merchants is, That whatsoever Merchant or other trading Person shall indorse, or superscribe any Note or Bill of Exchange; and by such Indorsement direct the Acceptor of such Bill to pay its Contents to another; that he thereby becomes chargeable to pay that Sum himself, in Case the Indorsee do not otherwise receive it.

The Fact we alledge is this, That a Bill was drawn and directed to be paid to the Defendant; that he by Indorsements ordered its Contents to be paid to my Client the Plaintiff.

Now upon this Custom and this Fact, now I say, the Construction of Law upon this whole Matter is, That the Indorsor, the Defendant, hath promised to pay the Sum to my Client in Case the Acceptor do not; and this is our Charge, that in Consideration of this Custom and this Fact, the Defendant assumed, &c. the Law says this is a good Consideration; and it says further, That if we prove the Consideration, viz. the Custom and the Fact corresponding thereto, we need not prove any actual Promise; but the Law and your Lordship will suppose one.

So that here is an Assumpsit in Law created by his indorsing the Bill unto us; and it was sub conditione, that if the Bill was not paid, that then he would pay us; and so is the Custom laid to be, and we have averred that the Money was not paid; and this Allegation must be agreed to be necessary in every Declaration of this kind; and had it been omitted, they would undoubtedly have demurred to our Declaration:

tion: For it is as necessary here to say the Money was not paid, as 'tis in a Scire facias against the Bail, to say the Plaintiff is not satisfied of his Debt and Damages.

To this our Charge they come and answer thus, You have sued the Drawer, and recovered a Judgment against him, and he hath not paid you, therefore I will not pay you; the Drawer was bound to pay you as well as I, if the Acceptor did not, therefore I shall not pay you neither.

Now my Lord, there is no Plea can be a good Bar to any Action, but what is in Reason a good Answer to, or Evasion of the Matter charged in the Declaration; and I humbly conceive this is no sort of Answer to our Charge.

We charge him upon a proper, several and respective Contract, Promise or Agreement of his own, and here's nothing of Election in this Case, as I hope to evince presently; no more of Election than in Case of two Obligors on a joint and several Bond.

This of the Defendant's is a several Contract in Law, different from that of the Drawer's, he was the original Debtor; the Indorsor is as a fidejussor, a Security, who by Implication, by Construction of Law, and by Virtue of the Custom of Merchants, undertakes to pay this Money to my Client, in Case the Drawer who was the first Debtor, nor his Servant to whom the Bill was directed, did not pay it.

And the more Indorsors there are, the stronger is the Bill always esteemed upon the Exchange (if before the Day of Payment) and of greater real Worth is it in it self, because more Men are bound to the Payment of it.

It's true, it hath been held in this Court in Browne and London's Case, (in Mod. Rep. 3 Keb.) that Debt or an Indebitatus will not lie against an Acceptor or Indorsor; but the chief Reason there was, because the Exchequer had ruled it so before, and they would not contradict their Judgments for Uniformity's Sake; and the Reason of Law given was, Because the Drawer was the original Debtor, and the others but collateral; and therefore they said the Special Matter ought to be set forth, as we have done in our Declaration.

But that doth not deny, nay, it rather doth affirm the Cases of the Drawer and Indorser to be different; 'tis true, 'tis the same Sum, the same Bill, but yet the Promises which the Law implies are several.

Now my Lord, I would observe to your Lordship, the natural Reason why the Indorser is chargeable; and that is, because he is supposed to have received the Value or other Consideration from me, why he assigns me this Bill; and it hath been ruled often, that Value received is implied in every Bill and Indorsement, as much as when they were written in totidem verbis.

Now the Law doth suppose (and that's the Supposition which first grounded this sort of Contract or Engagement in the Civil Law, and amongst Merchants here) that if at the Time of the making this Indorsement, my Client should have asked the Defendant, But what if this Bill be not paid? He would have answered, The Drawer is a good Man: But what if the Drawer should fail? He would have answered, Then I will pay you: All this is as strongly implied as if it had been written in express Words.

So that our Case is no more than this, Hughes, he promises, That if the Acceptor do not pay the Bill he will; and the Defendant he promises, That if the Bill be not paid he will; for we must still alledge a minime solut. existen. as I said before.

They are several Assumpsits upon several Foundations; and a Promise by Parol, or a Promise implied in the Law, is the same with an Engagement by Bond, as to this Purpose; and a Judgment against one is no more a Bar against suing the other in Case of Promise, than 'tis in Case of a Bond; both the Actions are founded upon a Contract, the one express, the other implied: Our Action doth at the least result ex quasi contractu, and non assumpsit is the general Issue to it.

And there is nothing can discharge the Defendant of this his Undertaking, but either Payment at the Day by the Acceptor, or Satisfaction afterwards by some Body; for he hath undertaken to see it paid: Nothing less than that can be any Bar: As 'tis necessary for us to alledge a Non-payment to make him

chargeable; so 'tis necessary for him to alledge a Payment or Satisfaction to discharge himself; and he does not deny his Assumpsit, but admits it by his Plea.

Now it's agreed, that in Case of two Obligors, Judgment against one is not pleadable in Bar by the other, nothing less than Satisfaction will discharge the Debt; an Execution against one without Satisfaction will not discharge the other; and so is the Case of Blomfield *v.* Usewick, 5 Rep. 86. Moor 459. 3 Cro. 478. Whitacre's Case, 1 Cro. 75. It is resolved there, that nothing but a satisfactory or valuable Execution was a Bar, though there the Defendant be but one, the Sum the same, the Writing the same; but because the Undertaking is several, 'tis therefore so held there, it being for a Debt; and by Judgment against one the Nature of the Debt is not altered or changed as to the other.

Now the same Reason will hold here in our Case, here's no Satisfaction pleaded, nor so much as an Execution; by the Plaintiff's Judgment against Hughes, the Nature of the Defendant's Promise or Contract is not changed, but his Assumpsit to see us paid, this Debt still continues; and the Money owing upon the Bill remains still due.

This is a Debt by Law, and Interest is always given upon these Bills of Exchange: In Slade's Case, 4 Rep. 94. 'tis resolved so; for a Plaintiff in an Action of the Case on an Assumpsit shall recover Damages, not only for the Special Loss which he had, if any such there were, but also for the intire Debt; these are the Words of the Book.

Our Action is not founded upon any Tort, our Declaration hath no general Issue but Non assumpsit, and that was the Plea pleaded in the Action they have set forth.

Here's nothing of an Election in the Case, for both the Drawer and Indorser, and Acceptor, are all chargeable on their several Promises: Can it be pretended this Plea would be good in the Mouth of the Acceptor, whose Undertaking is distinct, and upon quite another Account than that of the Drawer? And this of the Defendant is as several and distinct as that: It cannot be pretended that here's such an E-

lection as in the Case of two Remedies for Rent, as Annuity or Distress; for then the very first Act would determine our Election; then our bare suing of Hughes would be pleadable in Bar, which no Man will affirm; then the Judgment without Satisfaction can be no Bar; for, as I said before, it alters not the Defendant's Undertaking.

As to Browne and Wotton, 2 Cro. 73. Yelv. 67. and Moor 762. where Trover was brought for Goods, and the Defendant pleaded that he had brought his Action for the same Goods against another, and had recovered, and had the Defendant in Execution, held a good Bar: Now that Case if it must be agreed for Law, yet it doth not affect ours.

For first, There was an Execution pleaded, which is the End of the Law.

2. That was an Action founded upon a Tort, and ours is an Action of Right.

3. There the Action being founded on a Wrong, the Damages were uncertain, till the Plaintiff had Judgment, and reduced it to a Certainty.

Besides, By that Recovery in Trover of Damages, the Property of the Goods was changed and vested in that Defendant against whom the Plaintiff recovered, and the Plaintiff could not seize them again.

And before that Time it was made a Question, Whether Judgment and Execution with a Satisfaction be pleadable by one Trespassor? And held, that with a Satisfaction 'twas a good Bar, but without it not so; and so held in Morton's Case, 3 Cro. 30. See Bro. Tit. Judgment, 98.

And the Reason of Littleton's Text, Sect. 376. why a Release to one Trespassor shall be a Bar for others is, because the Release acknowledges the Plaintiff to be satisfied for the Wrong; Et unica tantum erit satisfactio.

And it was never pretended till that Case of Cro. Jac. that a bare Judgment should be a Bar.

But my Lord, In all the Books where that Case is reported, there's this Difference taken between Trover and Trespass, and Debt and Case, the one founded on a Tort, the other on a Right; in the one the Damages are uncertain, in the other the Sum in

Demand is certain: These are the very Words of the Book in Moor's Reports.

Now ours is not such an Action for Damages as Trespass; 'tis true, ours is for Damages, ratione non performationis, but the Assumpsit is for a particular Sum; our Demand is for a Duty certain, whereon Interest is due, and usually given by way of Damage; and Case and Debt are much of a Nature; and Case on Indebitatus and an Action of Debt may be pleaded in Bar to each other; and so is Slade's Case, 4 Rep. and till I am satisfied of my Duty, no Proceeding against one can discharge the other; and it was never pretended that Judgment on one Man's Promise, can discharge another of his Promise, though the Sum be the same.

Indeed in Trespass by the Judgment against one, the uncertain Damage is reduced to a Certainty, and changed into another Nature, from an Action for a Wrong, to an Action of Right; and he shall never resort back to demand the Uncertainty again; but that in our Case 'tis otherwise it must be agreed to me.

If two Men do by Writing covenant severally, and not jointly, each for himself, and not one for another, that J. S. shall pay me 20 l. such a Day, I believe it will not be contended, but that if the Money be not paid I may sue either, and yet Judgment against one shall not be pleadable by the other; and the Reason is because their Ingagements are several, they are the same here by Construction of Law; and yet this is an Action sounding in Damages, but results not ex maleficio but ex contractu, and so doth ours.

In F. N. B. 135. there are these Words, A Man may sue divers Writs of Warranty des charters vers. divers homes, if he hath divers Warranties against them, and he shall recover severally against them; and the Reason is, because the Ingagements are several, though the Lands are the same; and so in our Case they are several Undertakings or Promises, though for the same Thing.

'Tis true, these Actions are not of any long standing, so as to have many Book-Cases concerning them: For by the Statute of 5 Rich. 2. cap. 2. none could draw Bills, or return Money beyond the Seas, with-

out Leave or Licence firſt obtained of the King; but at this Day it ſeems otherwiſe by its common Practiſe, through the Indulgence of our Kings. Reg. origin. fol. 194.

The Neceſſity of Trade and Commerce, and the Uſefulneſs and Convenience of transferring Money by Bills of Exchange, hath introduced the ſame, and the Civil Law allowing them in other Nations, hath occaſioned their Approbation here; and amongſt them the Rule is, Ubi literæ excambii non habuerunt effectum, duret prima obligatio; and I think the ſame Rule ought to hold with us.

This and every Indorſement is as a new Bill of Exchange, and hath all the Requiſites and Parties that a Bill hath, as Pray pay, &c. and a Man that hath a Bill indorſed, hath as it were two Bills for the ſame Sum: And it is moſt true, this Action is not joint, and cannot be brought both againſt the Drawer and Indorſer, for that the Aſſumptions are at ſeveral Times, and upon diſtinct Conſiderations.

The great Objection is, That we have here inverted the Courſe, and deprived ſome of them of their Remedies, if we ſhould be admitted to reſort back to the Indorſer; I humbly conceive not, for that our Judgment againſt Hughes will not be pleadable againſt the Defendant, if he ſues him after he hath paid us; for nothing but Satisfaction can excuſe any of them againſt us, or any other: and a Satisfaction will be a good Ground for an Audita Querela, as in the Caſe of the two Obligors; we have rather purſued the right Method in ſuing the firſt Obligor, the Drawer, the original Debtor, and not finding Satisfaction from him, we reſort to the Defendant, who is likewiſe chargeable, as I hope we may in this Action. Objection. *Reſp.*

And for the Matter of Election, I would deſire to know of them on the other Side, When will they ſay is our Election determined? If at any Time ſurely it muſt be at the firſt Suit, but that will be more difficult to be determined; why by the Judgment; that alters nothing, 'twas a Duty before, it founded them in Debt, and ſo it doth now; no real Difference as to this Matter can be alledged, between this and the

Caſe

Case of two Obligors; had there been a Satisfaction given to the Plaintiff for this Duty, there would be an End.

But that which I humbly insist on is, that here's a Duty certain, 'tis an Action on the Right, and not on the Tort, and springs ex contractu, not ex maleficio; 'tis at least quasi contractus; and that the Agreements of the Drawer and of the Indorser, are divers and distinct Facts, and express Agreements; and that these Assumpsits which by Construction of Law are raised upon these Facts and Agreements, are several and distinct, and are not to be compared to that Case of Trespass and Trover, for there they might be joined, here they cannot: Wherefore I do humbly hope, that till Satisfaction, you will not exclude us from our Remedy against any of those that are chargeable to the Payment of it: And therefore do pray Judgment for the Plaintiff.

Consider the Effect of every Indorsement, it doth two Things.

1. It doth assign and transfer the Indorser's Right of Action against the Drawer unto the Indorsee.

2. It creates an Assignment from the Indorsor, that the Indorsee shall be satisfied: Now in common Sense, Can our recovering against the Drawer without a Satisfaction discharge that Engagement?

Suppose A. draws a Bill payable to C. for 20 l. directed to me, and another draws another Bill for the same Sum, payable to C. directed to me, and each says the other's Bill not being paid; Would a Recovery against one without Satisfaction be a Bar for the other? These are as several Bills of Exchange.

Suppose a Man hath Goods to sell, and A. comes to him and says, That in Consideration you will sell these Goods to B. I will see you paid; and I do accordingly sell them to B. and afterwards sue him for those Goods, and recover a Judgment; Will this Recovery without Satisfaction excuse A. who assumed to see me paid? Or suppose two Men do severally promise so to me, and I sue either, &c.?

The Forms of Pleading in these Cases shew the Necessity of Satisfaction to make a good Bar, for that in all such Actions 'tis necessary to aver Non-payment.

Objected by Sir John Holt, That if we had brought our Action firſt againſt the Indorſer, they we might afterwards have brought an Action againſt the firſt Drawer, but that now we cannot, becauſe we have already ſaddled him with a Judgment.

Reſp. I ſay the Drawer is ſtill liable to be ſued by you, if you pay us, for he ſhall never take Advantage of his own Wrong, and 'twas his own fault not to pay, and then he might have had the Advantage of ſuch Payment; and a Man may have two Judgments againſt him for one and the ſame Thing, and be liable to them both, through his own Default; as in Caſe of an Executor who hath 20 l. Aſſets, and he be ſued by two Obligors at one Time, and plead plen. Admin', &c. both ſhall have Judgment for that 20 l. Aſſets, and 'tis his own Fault, for he might have paid it to one on the firſt Suit, or confeſſed a Judgment to one, and have pleaded that to the other.

See 3 Cro. 503. Middlemore and Goodale, 33 Hen. 6. 22. cited by Sir John Holt.

Lord Chief Juſtice being abſent, Holloway and Wright were pro Def. and Wythens coming in while they were delivering of their Opinions concurred, and ſo Judgment was given here for the Defendant, but afterwards reverſed in Scacc.

Dominus Rex verſus Bond.

Seſſions Order. Poor's Settlement. *Ante* Caſe 461.

ORder made at the Quarter-Seſſions pro Com. Surrey, againſt the Defendant, for removing him and his Family (being poor) to Clapham Pariſh, the Place of his laſt Settlement, unleſs he gave Security to ſave Mitcham Pariſh harmleſs; the Order being removed by Certiorari, I moved to quaſh it, becauſe by 14 Car. 2. (now revived) any two Juſtices near may remove, &c. And then there's a Proviſo, That if aggrieved we might appeal to the Quarter-Seſſions: Now here per ſaltum they go to the Seſſions, and make a concluſive Order upon us, whereby we are ouſted of our Appeal, which Benefit the very Statute gave us; this is therefore naught, as well

well as in the Caſe of Baſtard-Children, which hath been adjudged naught; and the Proviſion in that Caſe is in the ſame Method as here, by the two next Juſtices, and on Appeal by the Seſſions: And held that the Seſſions could not originally make any Order in it.

And 'twas quaſhed on my Motion per Cur'.

DE
Termino Hill.

2 & 3 Jac. 2. B. R.

(464.) Iſted *verſus* Clarke.

Miſnomer. DEBT on a Bond, Declaration againſt Sir Robert Clarke, on a Bond, naming him John, and ſigned Robert. Non eſt fact. pleaded, Verdict, that the Defendant Sir Robert ſealed and delivered. Judic. pro Quer', mes reverſe fuit in Cam. Scacc. Sed quære rationem.

(465.) *Dominus Rex verſus Major. & Com. del* Glouceſter.

To reſtore a Town-Clerk. MAndamus to reſtore Mr. John Powel of the Inner-Temple, to the Office of Town-Clerk there; it was moved to ſet aſide a Return made thereto (on Mr. Powel's Behalf) becauſe made by the Mayor and

ſix of the Aldermen, and their Hands were ſet to it, whereas it was urged, it ought to be under the Common Seal, according to the Reſolution in the Caſe of Cheſter: Nay, it was affirmed, that the Mayor's own Seal of Mayoralty, or the Statute-Seal for Statutes before him acknowledged, were not ſufficient.

But urged on the other Side, That you cannot aver againſt the Return, being made by the Head of the Corporation; quære de cet Point car apres fuit agree, & il fuit reſtore, Monſieur Price de Lincoln's-Inn conſentient, come jeo fui informe.

Kingſton *verſus* Herbert. (466.)

MOtion to ſet aſide a Judgment of Reverſal of a Common Recovery by this Court on Writ of Error brought here, becauſe there was no Scire facias to the Tertenants. *Scire facias* to Tertenants.

'Twas ſtrongly debated, and of all Hands agreed to be very inconvenient, that it ſhould not be to the Tertenants, becauſe otherwiſe a Purchaſor might be deprived of his Aſſurance, without Notice; there was urged 28 Edw. 3. 20. pl. 70. Dyer 320, 321. That the Tertenant cannot be Party to the Writ of Error, that they had a Record exemplified of the Reverſal; that the Reverſal was long ſince, viz. in 35 Car. 2. That the want of ſuch Scire facias, was either Error in Fact, or on Record; that in Truth it was diſcretionary in the Court if they would award it, that none could be made Parties to the Writ of Error, but thoſe that were Parties to the Action.

The Court upon this Motion was of Opinion, That awarding it to the Tertenants was not ex Neceſſitate, but diſcretionary.

Lord Peterborough *verſus* Williams. (467.)

SCandalum Magnatum on the Statute of Rich. 2. for publiſhing Dangerfield's Narrative: He pleads the ſame Plea as he did to the Information in the King's Name; but a Demurrer being thereto, it was argued *Scandalum Magnatum.*

that the Declaration was ill, and there was nothing of Slander in it upon the Plaintiff, for they had averred none, but only ſet forth the whole Pamphlet with an in quo quidem libello diverſa falſa & ſcandaloſa continentur, and mention none in particular, which Mr. Pollexfen urged to be naught; and the Court doubted it.

But the general Opinion of the Bar was, That ſuch their Doubt was not on the Point, but in favour to the Defendant, to gain him Time for a Compromiſe; (it being thought that he had paid ſufficient before for that Offence) for the manner of Declaring ſeems good, and if upon the Whole it appear to the Court there was any Matter ſcandalous, the Action lies, if otherwiſe not: And it was afterwards agreed as I was informed.

Note, In a Scandalum Magnatum no Coſts are to be given the Plaintiff, though a Verdict be for him.

(468.) Self *verſus* Kennicot.

Foreign Attachment pleaded.

DEbt on a Bond; the Defendant pleads, That the Plaintiff being indebted unto J. S. he made an Attachment of the ſaid Money in his Hands; the Plaintiff demurs; two Exceptions are taken, becauſe,

1. It doth not appear that the Debt aroſe within the Juriſdiction.

2. That the Attachment pleaded was made before the Money was payable by the Bond.

It was anſwered as to the firſt, That there's a great Difference where a Man is Plaintiff in an Action, and the Defendant here who was a third Perſon, who is no ways privy, and could not alledge that he that is Plaintiff here was a Defendant below; and the Precedents are all without it, as may be ſeen in Coke's Entries, Tit. Debt.

And as to the other Matter, it is Debitum in præſenti, though ſolvend. in futuro; and it may be attached before it is payable, though it cannot be condemned till after; there was cited 1 Sid. 327. and 2 Keb. 202. Halſe *v.* Walker, 1 Roll. Abr. 553. Pell's Caſe, Cro. Eliz. 101.

Vide Mallum *v.* Herne, Mich. 19 Car. 2. B. R. an Attachment in London of a Debt in Midd. good.

Goring *verſus* Deering. (469.)

APpeal of Murder, Defendant pleads a Conviction of Manſlaughter, and that he was able and ready to read, Demurrer: See this Caſe at large, 3 Mod. 156, 157. Et Vide ſupra, the Caſe of Siddens and Johnſon.

Manſlaughter pleaded. *Ante* Caſe 361.

Glynne *verſus* Nichols. (470.)

CAſe for diverting of a Water-courſe in per & trans Meſſuag. Defendant pleads Not guilty, Verdict pro Quer': It was now excepted in Arreſt of Judgment, That he doth not ſay for what Uſe, whether Family, Cattle or Field; and if it was not uſeful when it run, it cannot be actionable to divert it.

Water-courſe diverted. *Vide ante* Caſe 21, 196, 242, 255.

Perkins *verſus* Titus. (471.)

ERror on a Judgment in the Common Pleas, where they held it a good Cuſtom to pay for a Fine upon Admittance tantam denarior. ſummam, quant. terræ vel Tenement. illa valerent per Ann. tempore talis Admiſſionis & non amplius.

Copyhold Fine on Admiſſion.

Mr. Pollexfen argued thus, I know not what it means, it is altogether uncertain, whether the Year before that in which the Admiſſion was, or the Year after, or that very Year in which, or Communibus Annis, or what it ſhould be worth to be let at for twenty-one Years, ſeven Years, or one Year; theſe may all be different, here's an abſolute Uncertainty, and therefore the Cuſtom cannot be good; it may be they are ſown with Corn, or be Copſes, &c. a Cuſtom ought to be in it ſelf certain, Davis's Rep. 33, 73. Suppoſe a Man ſhould preſcribe to have for Toll the Value of a Pint of Wheat, 'twould be uncertain, no Man would tell what to make of it, Page's Caſe, 2 Cro. 611, 671. Biſhop of Bath's Caſe, 6 Rep. 35.

Then 'tis Admiſſus foret, which cannot refer to Time paſt, but only to what is to come.

And then here's a Cuſtom alledged, That they that ſhall be admitted ought to pay the Fine, but 'tis not ſhewn that any who have been admitted at any Time ever paid it; whereas a Cuſtom is upon Times and Acts paſt, as 22 Edw. 4. 8. quod bene liceret, and not ſaid uſi fuer. Held ill.

Mr. Serjeant Levinz econtra. If it may be reduced to a Certainty 'tis well enough, and that may be ſo here: If it be at the Will of the Lord they have no Meaſure to compute it but by the Value, for the Books ſay two Years for a Death, and an Year an Half for an Alienation; as the Land improves the Fine improves: And the Reaſon of this was founded on that Care which the Law hath of preſerving the Lord's Intereſts, &c. (More was ſaid, which I could not hear.)

And afterwards on another Argument the Judgment was affirmed, and held, that the Cuſtom was reaſonable and certain enough.

(472.) Pitt *verſus* Dockwra.

Amendment.

DEbt on a Bond of Submiſſion to an Award, Judgment pro Quer', Error brought in the Exchequer-Chamber, where I inſiſted,

That the Roll was Eaſter, 1 Jac. 2. the Memorandum of a Bill coram Carolo nuper Rege, which declares on a Bond dated 5 Nov. 36. dict. Caroli, and the Imparlance is to Eaſter Term, ante quem diem dictus Carolus obiit, ſo here is a Declaration of Hill. 36. nuper Regis of a Fact done tempore nuper Regis.

Whereupon they moved the Court of King's Bench for to amend the Record that was here, in order to have the Tranſcript amended in the Exchequer-Chamber, and 'twas ordered accordingly.

Tho' I urged, that what is Matter of Fact is not amendable, for that perhaps it may be true, as 'tis alledged; and all this proceeds from the Inſtruction of the Party, and the Fact in Truth was as they have declared; and it appearing they have commenced their

their Action before there was Cauſe for it, they cannot have Judgment though after Verdict, it being of their own ſhewing.

See Williams and Bentkley's Caſe, in Moor 598. Dr. Bonham's Caſe, and Turner's Caſe.

DE

Termino Paſchæ,

3 Jac. 2. B. R.

Evans *verſus* Crambington. (473.)

Bill of Exchange. *Ante* Caſe 389, 400, 404, 426, 462.

CASE upon a Bill of Exchange, declares that the Defendant drew a Bill directed to one Ryder, payable to one Price or Order, for the Uſe of one Calvert, that this Bill was (the 14th) indorſed to the Plaintiff, that it had been accepted by Ryder, but not paid, whereby the Defendant became chargeable: The Defendant pleads that Price was to have received it for the Uſe of one Calvert, who was indebted to A. who was indebted to the King, that thereon there was an Extent.

Thompſon pro Quer. took two Exceptions, That Price was the Perſon to whom the Bill was payable in Law, that Calvert had no Title in Law to the Money, that therefore the Money could not be extended as his; that this was a Bill negotiated, that this Plea did but amount to the general Iſſue, for 'tis no

no Anſwer to the Action, but only to the Conſideration.

Sir Thomas Powys pro Def. Their Declaration is naught, viz. On a Cuſtom, that any Perſon having a Bill, and then indorſing it, &c. and doth not ſay he was a Merchant; and to ſay Secundum Conſuetud. Mercator. will not help it, that the true Property was in Calvert. 3 Rep. 26. 2 Cro. 687. Adjournat'.

Benſon *verſus* Offley *& al'*.

(474.) *S. C. 3 Mod.* 121.

Appeal of Murder. *Vide ante*, Caſe 144, 168, 469.

APpeal againſt two, A. as giving the Stroke, and then B. as præſens auxilians & abettans, and ſo they murdered him; the Verdict finds that B. gave the Stroke, and A. was abetting: Argued to be well enough on the Caſe in Plowd. 98. where in Caſe of Indictment 'tis held well enough.

Econtra it was urged, That in every Count or Declaration the Demand muſt be certain; the Appeal is againſt three, here's a Verdict that finds that Offley did not ſtrike the Stroke as is alledged in the Declaration.

Per Cur'. You can ſay nothing againſt this, but what may be ſaid againſt an Indictment; here they are found Guilty of the Fact: At laſt Judgment was given pro Quer' niſi cauſa, &c.

At another Day it was argued that the Trial was wrong, the Blow being in one County, and the Death in another, the Trial ought to have been by a Jury of both Counties, and not in the County where the Death was: Cited 3 Hen. 7. 12. 4 Hen. 7. 18. 2 Edw. 6. cap. 24. will not reach this Caſe, there is nothing in this Statute that directs the Trial otherwiſe then as the Common Law doth order in this Caſe. 3 Inſt. 24, 25, 26, 34. Adjournatur.

Dominus

2

Dominus Rex verſus William Dale.

(75.)
S. C. 3 Mod. 124, 125.

THE Defendant being a Soldier, convict and attainted at Reading Aſſizes laſt of Felony, in leaving the King's Service, was brought up by Habeas Corpus hither, and the Record removed by Certiorari, and Mr. Attorney moved to have a Rule for the Execution of him at Plymouth, which Lord Herbert doubted; and thereupon ſpoke ſome paſſionate Words to Burton.

Felony in a Soldier to leave the Service.

And note, the next Day he was removed to the Common Pleas, and Lord Chief Juſtice Wright removed hither.

On Tueſday after a Rule was made by Wright, Holloway and Powel, for the Soldier's Execution at Plymouth, on the 16th of May following; and for ſo doing were cited theſe Precedents, as I had them from Sir Samuel Aſtrey.

Conviction in one County, Execution in another, *Quare.*

34 H. 8. Rot. 11. George Potter, and others, convict and attainted of Robbery in B. R. by a Writ of Execution, the Marſhal was commanded to deliver their Bodies to the Sheriff of Kent, who was ordered to hang them in Chains on Shuter's-Hill.

43 Eliz. Comes Eſſex, Southampton and Rutland, tried before the Lord Buckhurſt, Lord High Steward, on an Indictment in London, had Judgment to be executed at Tyburn in Middleſex.

1 Jac. 1. The Lord Cobham indicted in Middleſex for Treaſon, was tried before my Lord Elleſmere at Wincheſter, and had Judgment to be executed at Wincheſter.

Mich. 16 Jac. 1. Sir Walter Raleigh, who was attainted of Treaſon, 1 Jac. 1. before Commiſſioners at Wincheſter, the Record of Attainder being certified into the King's Bench, he was brought to the Bar, and Execution was awarded to be done in Middleſex, and he was executed accordingly.

Cro. Jac. 495.

Mich. 5 Car. 1. Cox being attainted at the Seſſions of the Peace at St. Albans, for Horſe-ſtealing, the Attainder removed by Certiorari, and his Body brought by Habeas Corpus into the King's Bench, where Execution

Cro. Car. 176.

cution was awarded to be done upon him by the Marſhal, who executed him in Surrey.

7 Car. The Lord Awdley tried before my Lord Coventry for Sodomy, upon an Indictment in Wilts, had Judgment to be hanged in Middleſex at Tyburn.

By the Statute of 1 Edw. 6. New Juſtices of Gaol-Delivery may give Judgment upon Perſons reprieved by former Juſtices.

Trin. 25 Car. 2. John Browne, convict of forcible marrying an Heireſs, was attainted in Middleſex, and executed in Surrey.

Hawley, (who with Alborough and others, had robbed the Dutch Mail in Eſſex about a Year ſince, of 6000 l. in Gold, belonging to ſome London Jews) was tried at this Bar by an Eſſex Jury, and was executed at Tyburn.

Note, Upon this Occaſion Sir Francis Wythens was removed from being a Judge, &c. and the next Day came to Weſtminſter-Hall, and practiſed as a Serjeant.

(476.)

Hill & al' verſus Shiſh.

INdebitatus Aſſumpſit for 20 l. Non aſſumpſit pleaded, Special Verdict before the Lord Chief Juſtice at Guild-Hall, where the Jury find,

Bankrupts. *Vide ante* Caſe 236, 261.

That Benjamin Hinton was a Goldſmith, and a Trader as ſuch in the City of London, for divers Years before 10 Jan. 34 Car. 2. that therein he contracted divers Debts, to the Value of 50000 l. That he was indebted by Bond to one Capel in 400 l. that a Capias was ſued thereon out of the Common Pleas, teſted the 12th of Feb. 35 Car. 2. returnable quindena Paſ. that after the Teſte, and before the Return, he was arreſted thereon, and Special Bail filed: That the 26th of Feb. he was again arreſted, that Sir John Moore became Bail for him, and gave a general Security for him in all Actions; that thoſe Debts were not paid in ſix Months; that the 3d of March, Hinton paid to the Defendant 20 l. Then they find the Statute of 21 Jac. 1. cap. 19. prout, and then they find the Aſſignment by the Commiſſioners to the Plaintiff, & ſi, &c.

The ſole Queſtion in this Verdict is, If Benjamin Hinton the Banker, were a Bankrupt at the Time of the receiving the 20 l. viz. the 3d of March 35 Car. 2.? For if he were ſo, then the Bankrupt had no Capacity of paying this Money to the Defendant after an Act of Bankrupcy committed by him: For that by thoſe Statutes he had no Power to diſpoſe of any Part of his Eſtate, but it was all come within the Proviſion and Care of the Law, and as it were in cuſtodia legis for the Benefit of all his Creditors, ratably and equally, according to their ſeveral and reſpective Debts; and it being ſo received, it continued Part of this Bankrupt's Eſtate, and was well aſſigned by the Commiſſioners unto the Plaintiffs; and of this there can be no Queſtion, nor has there been any ſince the Caſe of Smith & al' v. Milles, 2 Rep. 26.

So that the only Point debatable is, Whether here be ſufficient Matter found to make Hinton a Bankrupt on the 3d of March?

First, Here can be no Doubt but that he was a Perſon capable of being ſo, 'tis found he was a Goldſmith and Trader as ſuch, for divers Years before the Times mentioned in the Verdict, that he ſought his Livelihood by buying and ſelling in that Trade, that he was indebted to 50000 l. and the Jury might have found it twice that Sum, and truly too: I agree all this makes him no Bankrupt.

But then the Matter which makes the Queſtion is this; he was arreſted at ſeveral Mens Suits, for ſeveral Sums above 100 l. and he neither pays nor compounds the ſame in ſix Months: If this with the other Matter found ſhall make him a Bankrupt from the Time of ſuch his Arreſt, is the Doubt; for if he be a Bankrupt from that Time, then he was ſo on the 3d of March.

Now that he ſhall be ſo, we have the expreſs Words of the Statute, which the Jury have found, 21 Jac. 1. cap. 19. That if any take a Protection, or prefer a Bill or Petition to compel his Creditors to accept a Compoſition, or to give a further Day of Payment; or being arreſted for 100 l. then due, ſhall not pay or compound the ſame in ſix Months; or ſhall lie in Priſon for Debt two Months or more; or ſhall eſcape upon common or hired Bail, being impriſoned for Debt; he ſhall be deemed and adjudged a Bankrupt to all

Intents and Purpoſes: So that to do either of theſe five Things makes him a Bankrupt: Then comes the Clauſe that works the Relation, and thereby in the ſaid Caſes of Arreſt, or lying in Priſon for ſuch Debt and Debts, or getting forth by common or hired Bail, the Bankrupcy is to commence from the Time of ſuch firſt Arreſt.

Now by the former Clauſe or Paragraph of the Statute, there are five Acts of Bankrupcy made, which were not ſo before, viz.

1. Taking a Protection.
2. Preferring a Petition or Bill for Compoſition.
3. Being arreſted for Debt, and not paying it in ſix Months.
4. Lying in Priſon two Months for Debt.
5. Eſcaping upon common or hired Bail.

And in the three laſt of theſe Caſes, the Law hath by the other Clauſe provided, that they ſhall be Bankrupts from the firſt Arreſt, viz. in the ſaid Caſes of Arreſt, or lying in Priſon, or eſcaping upon common or hired Bail, from the Time of his or her ſaid firſt Arreſt.

Now my Lord, that it muſt be ſo, I ſhall endeavour to prove it by arguing in ſhort theſe three Things.

1. That we are within the expreſs and direct Letter of this Law, and that the Words of the Statute are with us.

2. That this was the Intent of the Makers of this Statute, that it ſhould, &c.

3. That it will break and overthrow almoſt all the Rules of the Law, for the Interpretation of Statutes, to make that ſtrained, forced and unnatural Conſtruction, which they of the other Side would have, and for which they can aſſign not one Reaſon in the Law.

Now I would firſt obſerve, that prima facie the Conſtruction is with the Plaintiff, and this is the Senſe of the Collectors and Abridgers of the Law, as Sheppard, &c. and all the ſcribling Tribe, they lay it down as a Common Place Learning, That if a Man become a Bankrupt by Arreſt or Impriſonment, he ſhall be ſo from the firſt Arreſt, by this Statute of 21 Jac. 1. I urge this, only to ſhew that this is the

firſt and moſt obvious Conſtruction which the Words afford.

But 2dly, In the ſaid Caſes of Arreſt, or lying in Priſon, or eſcaping on common or hired Bail; that Caſe of Arreſt muſt be referred to that of Arreſt and Non-payment in ſix Months; the Caſe of lying in Priſon, to that of lying in Priſon two Months or more for Debt; the Caſe of Eſcape on common or hired Bail, to that which is before enacted to make a Man a Bankrupt by doing ſo: And this conciſe way of Expreſſion, is ſurely as ſignificant as if the three Particulars had been repeated again at large, or expreſſed in theſe Words, viz.

If a Man be arreſted for a juſt Debt of 100 l. and pay it not in ſix Months, he ſhall be a Bankrupt from the firſt Arreſt; if a Man lie in Priſon two Months, he ſhall be a Bankrupt from the firſt Arreſt; if a Man eſcape on common or hired Bail, he ſhall be a Bankrupt from the firſt Arreſt; this would ſurely have made it plain, and with Submiſſion, it is as plain in this ſhort conciſe explanatory Clauſe: And in the ſaid Caſes of Arreſt, &c.

This certainly is the real meaning of the Words, and no other tolerable Senſe can be put upon them without a very great Strain; and the moſt curſory, as well as the moſt conſidering Reader, will think ſo upon reading that Statute.

In the ſaid Caſe of Arreſt, there's one Relation to the foregoing Clauſe; in lying in Priſon, there's another Relation; or getting out on common or hired Bail, there's a third; and as 'tis in our printed Statute-Book, there can really be no great Doubt made of it.

And though I muſt confeſs, on the Parliament-Rolls, there are no Comma's, Points or Colons; yet I think we need not the Help of thoſe diſtinguiſhing Marks in this Caſe, to ſhew the Senſe of thoſe Words; for 'tis not ſaid Caſes of Arreſt and lying in Priſon, as they of the other Side would have it; the firſt diſjunctive (or) plainly diſtinguiſhes the Caſe of Arreſt from that of lying in Priſon, as the next (or) diſtinguiſhes it from that of eſcaping on common or hired Bail.

And theſe three Particulars are expreſſed in the moſt ſignificant Words uſed before, becauſe the Arreſt in the firſt Caſe is the Act of Bankrupcy; in the ſecond Caſe the lying in Priſon, and in the third Caſe the Eſcape, is the Act of Bankrupcy.

And theſe three Inſtances ſtand on different Circumſtances, and make three diſtinct Caſes: In the firſt, an Arreſt without Impriſonment makes a Bankrupt, with ſix Months Non-payment: In the ſecond an Impriſonment for two Months makes the Bankrupcy: In the third, the Eſcape at any Time after Impriſonment on common or hired Bail.

Now theſe three are all in ſhort, repeated in the rational Clauſe, where 'tis ſaid, Caſes of Arreſt, lying in Priſon, or Eſcape, &c. And I would fain know how theſe three Particulars could be expreſſed in more pertinent and ſignificant Terms in ſhort, than this is.

But my Lord, I think 'twill be needleſs to inſiſt any longer on this Matter, for I ſuppoſe it will be agreed to me, that we are within the Letter, though they ſay we are not within the Meaning of the Law, by Reaſon of ſome pretended Inconvenience, which they ſay will enſue, if the literal Conſtruction be allowed. Now therefore to ſhew,

2dly, That we are within the Intent and Meaning of this Law.

And here I would humbly obſerve to your Lordſhip, That we are now in the Caſe of a Bankrupt, which in our Law, is preſumed a Cheat, according to the Preſumption in the Civil Law, Eſt decoctor, ergo fraudator; and this appears by the Preambles of the ſeveral Statutes againſt Bankrupts, which ſhew the Meaning as well as the final Cauſe of a Statute, and therefore are ſaid by Coke, to be a good Key for the right Underſtanding of a Law.

That of the 34th of Hen. 8. cap. 4. is, That divers and ſundry Perſons, craftily and ſubtilly obtaining into their Hands great Subſtance of other Mens, not minding to pay or reſtore unto their Creditors, but at their own Wills and Pleaſures, do conſume ſuch Subſtance obtained by Credit, according to their own Pleaſures, againſt all Equity and good Conſcience.

The 13th of Eliz. cap. 7. recites the Increaſe of Bankrupts into great and exceſſive Numbers.

The 1 Jac. 1. cap. 15. recites Frauds and Deceits to increaſe amongſt thoſe that live by buying and ſelling, to the Hindrance of Traffick and Commerce, and to the general Hurt of the Kingdom, by ſuch as become Bankrupts.

And the 21ſt of Jac. 1. upon which this Queſtion depends, mentions the Increaſe of Bankrupts, and the Inventions of Frauds and Deceits, for the avoiding and deluding of the good Laws in that Behalf, then already made, and the Remedies by them provided.

Now I would upon theſe Preambles offer to your Lordſhip.

1. That Bankrupts were always thought and deemed by our Law-makers, to be crafty, fraudulent and deceitful Perſons, and therefore their Acts ought all to be taken in malam partem.

2. That the Miſchief intended to be remedied by thoſe Laws are the Cheats, Knaveries and Frauds of ſuch Bankrupts.

3. That the Remedy intended and provided by theſe Laws, is to make their Eſtates liable to the Payment of their Debts equally to all their Creditors, from the Time of their becoming Bankrupts; and in order thereto, to take it out of the Bankrupts Power to convey away, or diſpoſe of any Part of their Eſtates from their Creditors, by any Act after the Bankrupcy, or to prefer any one Creditor before another, but that all his Debts ſhould be equally paid.

And it is obſervable, That in each general Act, the Deſcription of a Bankrupt is inlarged, which ſhews that the ſame were grounded on Experience, and made purely of Neceſſity; ſo that if the Letter of the Law were with them, and we were within the equitable, though fartheſt Reach of the Meaning of any of theſe Laws, your Lordſhip would help us by ſuch Conſtruction as ſhould advance the Remedy, and ſuppreſs the Miſchief, and ſuch as ſhould relieve the Creditors of ſuch Bankrupts.

Beſides,

Beſides, it ſeems moſt plain, that this was the Intention of the Makers of this Law, that a Man arreſted for 100 l. and not paying it in ſix Months, ſhould be deemed a Bankrupt from the firſt Arreſt; we have their Words for it, which ſurely were deſigned to ſhew their Meaning.

But beſides that, it ſeems worthy of your Lordſhip's Obſervation, that of all theſe five Inſtances of Bankrupcy made by this Law, the three laſt, and no more, needed an Explanation, from what Time a Perſon under theſe Circumſtances ſhould be deemed a Bankrupt.

The firſt two are ſingle, tranſient, inſtantaneous Acts, as taking a Protection, or preferring a Petition, theſe two needed no Explanation; for if they are Bankrupts, it muſt be from the Act done: But the laſt three Caſes I have named are complicated Acts, Things of Time, Continuance and Duration; and therefore our Law-makers declare from what Time they ſhould relate, and the Party be deemed Bankrupts.

Now it would be very odd to imagine, that five new Inſtances of Bankrupcy ſhould be made, and three of them needed an Explication, they ſhould yet explain but two of theſe three.

Beſides, if it ſhould be otherwiſe, the Inconveniences would be infinite, and ſuch an Opportunity put into the Bankrupt's Hands, of cheating all Mankind that have ever truſted him; which was certainly the Intention of theſe Laws to prevent.

For ſuppoſe a Perſon indebted in 20000 l. and in truth not worth above ten, which being all Abroad, ſome of his Creditors happen to arreſt him for their juſt Debts, and he not able to pay, knowing his own Condition, and contriving how to get in his Eſtate, and to defraud his Creditors, he acquaints a Friend with his Condition, and prevails with him to become his Bail for the Sum he is arreſted for, and then he obtains ſix Months Time to poſſeſs, conceal, ſecure and diſpoſe of his Eſtate; and then he is ready to diſcharge his Bail by Satisfaction, or rendring himſelf to Priſon, as it ſhall ſute beſt with his Convenience, and ſo cheat all the reſt of his Creditors:

And though his Creditors ſhould certainly know his Deſign, yet it would be impoſſible for them in the mean Time to prevent his making away his Eſtate; if they arreſt him there is Bail, and he hath ſix Months Time to play his Tricks, and there's no way to prevent it but by the literal, and I think intended Proviſion of this Law, in making him a Bankrupt from the firſt Arreſt.

And this is not a foreign Suppoſition, but hath been of late the common Practice of moſt trading Perſons in a failing Condition; Thomſon, Temple and Hinde, as well as Hinton, have played the ſame Game, and cheated their Creditors by this Device; and this is the very Fact of the Caſe at Bar, and it is almoſt found ſo.

For here the Jury have found that Hinton was indebted in 50000 l. and amongſt others to the Perſons named in the Verdict, and arreſted at their Suits for thoſe Debts; that Sir John Moore became his Bail, and further, that Sir John Moore gave a general Note under his Hand, ordering himſelf Bail in all Actions, the which of it ſelf looks and carries the Face of Fraudulent; and the Generality of it ſeems a Demonſtration of Fraud, for no Man would be Bail in all Cauſes, but for ſome particular Deſign; and the Jury have alſo found, that Hinton was 50000 l. in Debt at this Time; a Caſe that in all its Circumſtances as it is on this Verdict, was never before.

So that my Lord, On this Verdict you cannot ſuppoſe Hinton at this Time able, or viſibly able to have paid his Debts; but this Contrivance of his, with his friendly Bail, hath enabled him to cheat all the reſt of his Creditors, except Sir John Moore, who was ſatisfied his Debt, but no Man elſe; which is a great Inconvenience, and never to be avoided, if the Words of this Statute ſhould be ſtrained to any other than their literal and real Meaning.

And this being a Miſchief intended to be remedied, as any other that can be mentioned or aſſigned within this Law, I hope there is no Reaſon for any other Conſtruction, eſpecially ſince,

3ly, The Rules of Law are with us too; this is undoubtedly a remedial Law, and therefore to be extended

tended by Equity, and not reſtrained as Penal Laws, which are ſo conſtrued in Favour of Life or Liberty. Heydon's Caſe, 3 Rep. This Law hath been conſtrued ſeveral Times by Equity for the Relief of Creditors, but never againſt the Letter and Creditors both; and if any Conſtruction can be made more beneficial for the Creditors one than another, your Lordſhip will admit that Conſtruction as founded on the beſt of Rules, that of Suum cuique tribuere, of giving to every Man his own; and upon that Foundation ſtand all theſe Laws againſt Bankrupts, and ſo it is reſolved in March 34.

Beſides, no Conſtruction is to be allowed of an Act of Parliament, that will make any Clauſe, Sentence, or Word void, when another Conſtruction will make it all ſignificant together; all the Parts, Clauſes and Words of a Statute, ought if poſſible to have ſome Meaning: Now here in this Caſe the Word Arreſt will be void, if you judge it otherwiſe than I hope; for then the bare Words, Lying in Priſon, will do it.

This is an Act of Explanation, and this very Clauſe is explanatory, and therefore admits not ſo eaſily of any Intendment or equitable Conſtruction, but ought to be conſtrued according to the Words; for there ought not to be an Explanation upon an Explanation to prevent Infinity of Doubting; and therefore I hope you will not reſtrain it. 1 Cro. 34. Style 467. Umpton and Hide's Caſe, Dyer 150. Butler and Baker's Caſe, 3 Rep. and 1 And.

Beſides my Lord, when a Law by expreſs Proviſion enacts how Conſtruction ſhall be made, ſuch Clauſe ſo directive of Conſtruction is of the ſame Force, and hath the ſame Authority as any other Clauſe in ſuch Law: It's moſt true, your Lordſhip have a Liberty of interpreting a Law, according to the particular Exigence of the Caſe in Queſtion; but when the ſame Law directs how ſuch Interpretation ſhall be made, then I am ſure your Lordſhip will be ſo far influenced by that Direction, as not eaſily to make any other Conſtruction, without ſome great, important, and unanſwerable Reaſon to the contrary, none of which can be ſhewn in this Caſe.

Now

Now here this Statute directs an Interpretation beneficial in Favour of Creditors, and ſtrict upon the Bankrupt and his Acts, ſuch as the Payment of Money, or Conveyance of his Eſtate, or the like: Now my Lord, either this Caſe is plain or doubtful; if plain, then I am ſure by the Words 'tis with us; if doubtful in Conſtruction, then the Law directs ſuch Conſtruction in Favour of my Clients who are Creditors.

Beſides, ſuppoſing this Conſtruction agreeable to the Intent, then ſure I am 'tis a Rule, That no Statute ſhall be reſtrained againſt the Letter and Intent both, be the Conſequence never ſo inconvenient; for that overthrows and abſolutely ſubverts the Uſe and Deſign of ſuch Law. Corbet's Caſe, 2 And. 249. And 'tis the Parliament that muſt remedy ſuch Inconveniencies, not this Court.

I might ſpend a great deal of your Lordſhip's Time, in citing abundance of Caſes where Statutes ſhall be reſtrained, and where extended; but I think it needleſs to trouble your Lordſhip with any, ſince that in Queſtion is undoubtedly a remedial Law; and the Cheats of Bankrupts were the Miſchiefs intended to be remedied, and here's one that I have named which cannot be help'd but by the Aid of this Statute, and therefore ought to be conſtrued within the Intent, eſpecially ſince there is no great, or any conſiderable Reaſon given to the contrary: For the only material

Objection is, The Inconvenience in Caſe this Conſtruction be allowed, which they ſay is great, (but not ſo great as is pretended) As that if a trading Perſon be arreſted and bailed, and a third Perſon knows nothing of it, intruſts him or deals with him, that if ſuch a Perſon ſhould be a Bankrupt from the firſt Arreſt, that then every Perſon ſo dealing with him, would be forced to return the Goods, and yet loſe the Money he paid for them, which they ſay would be ſo great a Miſchief, that it would diſcourage Trade.

Anſwer, To this I ſay, the ſame Thing may happen in many Caſes every Day, where I buy Goods of a Man that hath no Property; but beſides, moſt

of theſe are provided for by 1 Jac. 1. cap. 15. being within the Equity of that Proviſo, that no Debtor of the Bankrupt be indangered for the Payment of his Debt truly and bona fide to any ſuch Bankrupt, before ſuch Time, that he ſhall know that he is become a Bankrupt, i. e. all Perſons paying Money to, or buying Goods of a Bankrupt, being to be received within the Equity of that Proviſo, if they know him not to be ſuch.

As to the Objection for ſuch Lands of a Trader, I anſwer, That miſchief doth not immediately concern Trade, for he that purchaſeth Lands of a Goldſmith, may be ſaid to have Notice, or at leaſt a Suſpicion of his intended Bankrupcy; and he deals not with him in that Matter as a Trader, but as a Landholder, and buys the Land at his Peril, ſubject to all ſuch Incumbrances as Lands are liable to, which are innumerable; Ideo caveat Emptor.

Now on the one Hand, by an equitable Conſtruction of the Law, according to that Proviſo in the Caſes mentioned, all or moſt of the Miſchiefs ſuppoſed to ariſe by adjudging any Perſon a Bankrupt from the Time of his firſt Arreſt, though he put in Bail, will be accommodated.

On the other Hand, 'tis impoſſible to prevent a Bankrupt from gaining Time to get in his Eſtate and to defraud his Creditors, without adjudging him a Bankrupt from the Time of his firſt Arreſt.

But were the Conſequence worſe than is pretended, here's an Act of Parliament, to which every Man's Conſent is ſuppoſed to be given, as well to come as preſent; and ſo it can do no Injury, as is ſaid in Hob. 256. And there are hundreds of Rules in the Law, which may bring as great Hardſhip upon ſome Men, as poſſibly can be pretended in this Caſe, and yet are allowed; as the Statute of Inrolment of Deeds, which by Relation avoids mean Acts done in the ſix Months, &c. that which I contend for is no more.

I could muſter up a great many Caſes where a Man ſhall part with that which he hath once lawfully obtained; as when he purchaſes of the King's Accountant; ſo where he ſhall pay again that which

he hath already paid; as when he pays Rent to a Feme covert, though he knows her not to be ſuch. Dutton and Tracy's Caſe, 2 Cro.

But beſides all theſe, there are ſeveral other Acts of Bankrupcy which are agreed and allowed to be ſuch, and yet for ſome Time after, the Bankrupt may continue his Trade, and ſeem in good Credit, he may keep his Shop, and walk the Exchange notwithſtanding; as for Inſtance, he may conceal himſelf to avoid the Payment of a particular Sum, his Servants may deny him at Home, and pretend him gone into the Country, and yet he may trade in his Shop; after this, ſome Time before his Condition be known, he may make a fraudulent Conveyance of his Eſtate to defraud his Creditors; this will make him a Bankrupt, and yet he may poſſibly trade with Credit for ſome Months, till his Eſtate be diſcovered.

In Heylor and Hall's Caſe, Palm. 325. 'tis reſolved, That if a Trader in Debt conceal himſelf in his Houſe for a Day, or an Hour, for to delay or to defraud his Creditors, this makes him a Bankrupt within the Statute, and yet his other Correſpondents may no more know of that than of this.

And in Bludworth's Caſe, 1 Sid. 115. Glynne ſaid, That once a Bankrupt and ever a Bankrupt.

In all theſe Caſes the Miſchief to ſome is as great, and may be greater than can be pretended in judging him a Bankrupt from the firſt Arreſt, even when he puts in Bail, eſpecially in the manner as this Verdict hath found it.

All the Inconveniences and Miſchiefs which they can pretend may enſue on this Conſtruction, will enſue on theirs; for after the ſix Months he may as well as before trade and traffick, and none of his Correſpondents know it, but he that arreſted him, and he would no more truſt him before than after, for otherwiſe he would not have arreſted him, but as to others it may be the ſame Thing; and notwithſtanding that Inconvenience, they agree him a Bankrupt after the ſix Months.

Objection. The Caſe of Duncomb and Walter. Vide ante, Caſe 269.

Solved. This Queſtion was never argued in Weſtminſter-Hall but in that one Caſe, and that was on Staley the Goldſmith's Bankrupcy; but as I remember, I'll not be poſitive, the main Point there was, concerning an Executor's Right to an Action before Probate; and the Reaſon of that Judgment was chiefly, becauſe the Arreſt of the Party Bankrupt was at the Suit of the Executor, before he had proved his Teſtator's Will; and that ſo found on a Special Verdict: And as to the other Point, my Lord North was, as I am informed, of Opinion clearly with the Plaintiff; but however that be, that's but one ſingle Caſe, and the Inconvenience of it is manifeſt ſince, in the frequent Cheats of Bankrupts in this Particular.

Beſides, every Caſe ſtands on its own Bottom, and hath its own Circumſtances; here 'tis found ſo that it cannot but be preſumed, that the Bail was ex intentione ad defraudand': Hinton was indebted in 55000 l. which Staley was not; of which moſt Men muſt be conuſant; here are a great many Arreſts (there was but one) theſe are Things of a publick Notice (whereas Notice of an Original may be privately given) and therefore not the ſame Reaſon for our Lawmakers to make a relational Bankrupcy in the one as in the other: Here is a general, univerſal and indefinite Order for being Bail to all Actions, (which was not there) here's no finding that he was in viſible Credit on the third of March, and why ſhould it be ſo preſumed I know not, ſince in Law as well as Philoſophy, De non entibus & non apparentibus eadem eſt ratio.

So that whatſoever Hardſhip it may be on ſome, it can be none on the Defendant, Hinton being under theſe ill Circumſtances at this Time, and theſe notorious ones too; Things that in their own Nature needed no particular Notice; here's a Banker in London indebted 55000 l. arreſted by Writ out of the King's Bench, arreſted by Writ out of the Common Pleas; arreſted on Plaints levied in the Sheriffs Court: And all this upon Bonds for Money lent and unpaid, and in the ſame Place where the Defendant lives.

There's as much Reaſon to ſay the ſecond Particular (where 'tis ſaid, or eſcape) ſhould be copulative as in our Caſe; and then the Bankrupcy from the Arreſt ſhall be but in one Caſe, and in the ſaid Caſe of Arreſt and lying in Priſon, and eſcaping on common or hired Bail, and in no other Caſe whatſoever.

So that none ſhall be a Bankrupt from the firſt Arreſt, but he that eſcapes upon common or hired Bail; and when the Statute ſaith three Caſes, it muſt be meant only one Caſe; there's as much Reaſon for that as for the other Conſtruction.

'Tis true, here's no Fraud nor Purpoſe of being a Bankrupt found; nor is there need of any ſuch finding, for that we ſay the Act of Parliament makes him ſuch ab initio.

'Tis true, Argumentum ab inconvenienti is ſtrong, but not concluſive, eſpecially againſt the expreſs Letter of the Law; and when a Miſchief may be, nay, actually is on the other Side.

All Statutes made againſt Fraud, ſhall have a favourable Expoſition in order to help the Party, as Twyne's Caſe, 2 Rep. 80.

Mr. Thompſon argued econtra, from the Inconveniences, and the Caſe of Staley.

And Lord Chief Juſtice Wright, and the reſt delivered their Opinions for the Defendant, without having that due Conſideration of the Caſe as it deſerved, as I thought. Ideo mihi reſtat dubitandum.

Dominus Rex verſus Sellers. (477.)

Indictment for refuſing to be of the Wardmote Inqueſt.

INdictment at the general Quarter-Seſſions held at Guild-Hall for the City of London, quod Mich. Sellers nuper de Paroch. S. Butolphi extra Aldgate in Warda de Portſoaken infra Civit. de Lond. præd. coquus 21 Die Dec. 2 Jac. 2. ac diu antea ac ſemper poſtea uſque diem caption. hujus inquiſition. fuit inhabit. & reſidens in Paroch. & Ward. præd. quodq; idem Mich. dicto 21° die Dec. anno ſuprad. in Cur. de le Wardmote tunc tent. pro Warda præd. infra Paroch. & Ward. præd. legitime & debito modo fuit electus in officium unius Jurat.

Jurat. Cur. de le Wardmote præd. Anglice, **one of the Wardmote-Inqueſt** pro Warda præd. pro uno anno prox. ſequen. ad inquirend. & præſentand. ſeparal. offenſ. adtunc commiſſ. & committend. infra Ward. præd. pro bono publico unde præd. M. S. poſtea ſcil. dict. 21 die Dec. anno ſuprad. apud Par. & Ward. præd. habuit noticiam præd. tamen M. S. debit. officium ſuum in hac parte parvi pendens ſed machinans & intendens debitam execution. officii ſui præd. quantum in ſe fuit totaliter impedire & retardare a præd. 21 die Dec. anno ſuprad. uſque diem captionis hujus inquiſitionis apud Par. & Ward. ſuprad. officium unius Jurator. Cur. de le Wardmote præd. ſuper ſe ſuſcipere & exequi voluntarie obſtinate & contemptuoſe penitus recuſavit & denegavit contra debit. ſuum præd. in mal. exemplum omnium alior. in tali conſimili caſu delinquentium ac contra pacem dict. Domini Regis nunc coron. & dignitat. ſuam, &c.

Removal by *Certiorari.*

Which Indictment being removed into this Court by Certiorari, **the Defendant pleaded, That** dictus Dominus Rex nunc per literas ſuas patentes ſub magno ſigillo Angliæ ſigillat. geren. dat. apud. Weſtm. in Com. Midd. 7° Die Maii anno 1° recitand. quod magiſter gubernatores & communitas myſterii coquorum Civitat. London præd. ſurſum reddiderunt eis ſuas Poteſtates franchef. libertates privileg. ac authoritat. de vel concernen. election. nomination. conſtitution. exiſten. vel appunctuat. alicujus perſonæ ſive perſonar. in ſeparal. officium Magiſtr. Guardian. aſſiſten. ſive Cleri ſocietat. præd. quam quidem ſurſumredditionem idem Dominus Rex acceptaſſet int. al. de gra. ſua ſpecial. certa ſcientia & mero motu ſuis conceſſit præd. Magiſtro vel Gubernatoribus & Commun. myſterii Coquor. Civitat. London. præd. quod ipſi & omnes homines ejuſdem Myſterii dict. Civitat. forent jure & nomine unum corpus & una communitas perpetua, & quod iidem Magiſtri & Gubernatores & communitas haberent perpet. Succeſſion. & unum commune ſigill. ad ſerviend. negotiis ejuſdem Communitat. in perpetuum, & poteſtatem frangendi alterandi & mutandi idem, &c. Et ulterius quod nec præd. Magiſtri vel Gubernatores & communitas ejuſdem Myſterii Coquor. nec Succeſſores ſui nec aliquis eorundem per aliqua media extunc in poſterum infra Civitat. London vel ſuburb. Anglice **Suburbs** ejuſdem Summoniti vel poſiti eſſent ſuper aliqua negotia jurat. inquiſition. attinct. vel ad recognition. capiend. aſſignat. coram Major. & Vicecom. vel Coronator. dict. Civitat. pro tempore exiſten. nec ſummoniti eſſent per

Plea. The King's Grant not to be put on any Inqueſt.

aliquem officiarium vel officiarios vel miniſtros licet hujuſmodi jurat. ſive inquiſitio ſummonit. eſſet virtute alicujus brevis ſive brevium dict. Domini Regis hæredum vel Succeſſor. ſuorum ſed quod ipſi Magiſtri ſive Gubernatores & communitas myſterii præd. & ſucceſſores ſui & quilibet eorum verſus dict. Dominum Regem hæredes & Succeſſores ſuos & verſus Major. & Vicecom. dict. Civitat. pro tempore exiſten. & omnes officiarios & miniſtros quoſcunque acquietarentur & exonerarentur prout per eaſdem litteras Paten. hic in Cur. prolat. & Cur. hic nunc oſtenſ. plenius int. al. liquet & apparet; Idemque M. S. ulterius dicit quod idem M. præd. 21° die Dec. anno ſecundo ſuprad. in Indictament. præd. ſuperius mentionat. & per duos menſes ante tunc ult. elapſos fuit coquus infra Civitat. London præd. & membrum & liber homo Anglice **Freeman** de Societat. coquorum præd. exiſtens in eandem Societat. debito modo diu antea admiſſus & continue poſtea hucuſque fuit & adtunc eſt membrum & liber homo Societat. præd. apud London præd. in Par. & Warda præd. quodque præd. 21 die Decembris anno ſecundo ſuprad. & abinde hucuſque fuerunt ſufficientes homines reſidentes & inhabitantes in Warda præd. ultra & præter coquos Societat. præd. ibidem reſident. habiles ad exercend. officium Jurator. Cur. de le Wardmote præd. pro Warda præd. pro anno tunc proxim. ſequen. in indictament. præd. mentionat. Et hoc parat. eſt verificare unde petit Judic. ſi ipſe idem M. S. ulterius occaſione præmiſſ. impeti ſeu inquietari debet & quod ipſe de præmiſſis per Cur. hic dimittatur. **And to this there's a Demurrer.**

'Twas argued by Mr. Serjeant Holt, **That this Grant will not create an Exemption from being a Juror in Criminal Cales where the King is a Party, becauſe it wants the Clauſe,** licet nos vel Coronam noſtram tangent, **and cited for that,** 42 Aſſiz. pl. 5. Mag. Ch. cap. 35. 2 Inſt. 130.

That of the Coroner cannot include it, for that he hath other Inqueſts beſides that of criminal ones ſuper viſum corporis; **as in Cale of a Challenge to the Sheriff, and then he is to return the** Venire.

As to the Words of Diſcharge againſt the King, that may be of Iſſues only.

Beſides, we ought to have pleaded his Exemption when he was charged at the Wardmote.

Econtra. **I argued that here were Words ſufficient, for 'tis** licet ſummonit. eſſet virtute al', &c. **and that they ſhould**

ſhould be diſcharged againſt the King, 'tis plainly implied in all criminal Cauſes; and we have pleaded that there was a ſufficient Number beſides, Roll. Abr. Tit. Prerogat. 198. 3 Edw. 1. Rot. Clauſo. Grant, That J. S. ſhall be free from Summons before Juſtices itinerant. 8 Edw. 1. Rot. pat. mem. 4. ſhall be diſcharged of all Summons before Juſtices itinerant, is intended as well for Common Pleas, as placita Foreſtæ, tho' prima facie it extends only to placita Foreſtæ; and if in that Caſe it was ſo conſtrued, why not generally here?

Nay, they cannot contend it to be a void Grant if Words enough to import it, and Jurors ſufficient beſides to diſcharge the Office.

But whatever our Plea be, their Indictment is naught, for it is not ſaid when the Duty is to be performed, nor whether any Thing be to be done therein, between the twenty-firſt of December, and the taking of the Indictment; it doth not ſay the Oath was tendred to him; and though perhaps an Indictment may lie before the Year be expired, yet then there muſt be ſome Part of the Duty to be performed neglected, and ſhewn to be ſo; it doth not ſay that he was preſent at any Court, or that he was ſummoned to be at any Court.

And upon this we had Judgment pro Def. quia indictament fuit minus ſuffic. in lege.

Wherefore there was afterwards another Indictment framed by Mr. Pollexfen's Advice, viz. Quod infra Wardam de Portſoaken infra Civitat. London eſt & a tempore cujus contrarii memoria hominum non exiſt. fuit quædam Cur. viſus Franci plegii ſive Wardmot. Anglice Wardmote quolibet anno in & ſuper feſtum Sancti Thomæ Apoſtoli coram Aldermanno Wardæ præd. pro tempore exiſten. tent. & tenend. in qua quidem Cur. ſecundum Conſuetud. infra Ward. præd. per totum tempus præd. uſitat. & approbat. viz. apud Parochiam Sancti Butolphi extra Aldgate infra Civitat. & Ward. præd. inhabitant. & reſident. pro tempore exiſten. infra Ward. præd. tenentur ratione reſidentiæ ſuæ comparere & ſectam ſuam facere & quando adinde elect. ſervire ſuper Jurat. Anglice Inqueſt in Cur. præd. ſecundum conſuetud. per totum tempus præd. viz. apud Paroch. præd. uſitat. jurat. & onerat. ad præſentand. ea quæ in Cur. præd. ſunt præſentabil.

quodque M. S. nuper de præd. Paroch. Sancti Buttolphi extra Aldgate in Warda de Portſoaken præd. coquus 21° die Dec. anno, &c. Secundo ac diu antea & ſemper poſtea uſque diem captionis hujus Inquiſitionis fuit Inhabitans & reſidens in Par. & Warda præd. quodque ad Cur. viſus Franci pleg. ſive Wardmoti tent. pro Warda præd. dicto 21° die Dec. anno nunc ſecundo ſuprad. exiſten. feſto Sancti Thomæ Apoſtoli infra Par. Sancti Buttolphi extra Aldgate in Warda præd. coram Jacobo Smith Mil. tunc Aldermanno Wardæ præd. idem M. S. exiſten. debito modo electus, viz. apud Paroch. prædict. unus Jurator. Cur. viſ. Franci Pleg. ſive Wardmoti præd. Anglice, one of the Wardmote Inqueſt, pro Warda præd. ad inquirend. & præſentand. ſeparal. offenſ. commiſſ. & committend. infra Wardam præd. pro bono publico quæ Juriſdictioni Cur. viſus Franci Pleg. pertinent inquiri & præſentari unde præd. M. S. poſtea ſcilicet eodem 21° die Dec. apud Par. & Ward. præd. habuit notic. & ad eandem Cur. adtunc & ibidem fuit præſens, præd. tamen M. S. debitum ſuum in hac parte parvi pendens, ſed machinans & intendens negot. dict. Cur. præd. quantum in ſe fuit totalit. impedire & retardare præd. 21° Die Dec. anno ſuprad. apud Par. & Wardam præd. recipere Sacrament. unius Jurator. Cur. viſus Franci Pleg. ſive Wardmot. præd. voluntarie obſtinate & contemptuoſe penitus recuſavit & denegavit contra debit. ſuum præd. in malum exemplum omnium alior. in conſimili caſu delinquentium, ac contra pacem dicti Domini Regis Coron. & dignit. ſuas, &c.

And upon the finding of the Indictment, the Defendant ſubmitted, contrary to the Perſwaſion of the Company; and ſo this Matter was never judicially determined.

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