REPORTS

OF

CASES

Adjudged in the

Court of King's Bench,

From the Thirty-third Year of King *Charles* the Second, to the Ninth Year of King *William* the Third.

WITH SOME

Arguments in SPECIAL CASES.

By *ROBERT SKINNER*, late of the *Inner Temple*, Esq;.

Published by his Son MATHEW SKINNER, Serjeant at Law.

In the *SAVOY*:

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To the Right Honourable

Sir *Robert Eyre*, Knt.

Chief Juſtice of his Majeſty's Court of *Common Pleas*.

My Lord,

By offering this Volume of Reports to your Lordſhip's Patronage, I beg Leave to call to your Remembrance a Perſon whom You honoured with your Friendſhip when living; One whoſe near Relation to my ſelf forbids me to attempt his Character; But your Lordſhip, with my Lords the Judges, having given a publick and an honourable Teſtimony of his Learning and Judgment, this is the faireſt Monument which can be raiſed to his Memory, and their Lordſhip's Name, will be to ſucceeding Ages the moſt laſting Inſcription.

The greater Part of theſe Reports are Caſes Adjudged in the Court of King's Bench, whilſt the Lord Chief Juſtice *Holt* preſided, and your Lordſhip's Father, and your near Relation Sir *Giles Eyre*, were Judges in that Court; Names

 which

which will always be had in the highest Veneration amongst the Professors of the Law; and your Lordship will judge of the Faithfulness of these Reports, by comparing them with that valuable Collection of Cases in Your own Possession, which were taken during that Period of Time: By this Test, and your Lordship's Judgment they desire to be tried; if they merit your Approbation, that will be the Stamp which can give them Credit, and 'tis thus they may come to be Authorities in the Courts of Law.

The Author of the following Reports did not live to enjoy the reasonable Expectation of his Labours; But he lived to see that early Prospect which your Lordship then gave of your future Greatness; He observed those Qualifications which have since so eminently distinguished your Lordship in the Service of the Publick; those Seeds of Virtue and Learning are since happily grown up and flourish, We see your Lordship adorned with every Grace and good Quality, and with the general Approbation advanced to one of the Highest Places of Judicature; and as true Merit will ever endeavour to be productive of it self, we find your Lordship by a natural Disposition drawing Merit out of Obscurity, and by encouraging Men of Learning, You point out to us, the only Path which led You to your own Advancement.

From ſuch Beginnings you ſoon became an Ornament to the Bar, and having there diſcharged with Reputation one of the moſt important Civil Offices, it was for You an eaſy Step to the Bench; And if we attend to your Lordſhip from your firſt Advance to the Bench, You there diſplayed ſuch Strength of Reaſon, ſuch Compaſs of Knowledge and Clearneſs of Judgment, that we muſt lament the Inobſervancy of thoſe Times, which did not ſooner call your Lordſhip to preſide in a Court of Juſtice; at Length Juſtice is done to Merit, and your Lordſhip is now ſeated in the Court of Common Pleas, where your great Candour in Judgment, and Accuracy in Diſtinction, together with your comprehenſive Knowledge in the Law, appear in the moſt proper Light; they give a general Satisfaction to all who apply to You for Redreſs, and reflect Honour upon the Royal Hand who placed You in that Chief Seat of Juſtice.

Through theſe ſeveral Degrees of Honour, your Lordſhip has conducted your ſelf with the greateſt Prudence and Courage, as well as with the ſtricteſt Juſtice and Integrity, though there have been Times, and Exigencies of Affairs, which might have baffled the wiſeſt Counſels, and broken the beſt formed Reſolutions; but your Lordſhip by a rare Feliciry has enjoyed the Royal Favour in three ſucceeding Reigns,

in

in each of which there was an equal Diſpoſition to reward the Services of ſo faithful and able a Servant.

No further Addition to your Lordſhip's Happineſs can be wiſhed, beſide the long Continuance of it; And that You may always enjoy the Eſteem of Good Men, that You may continue to be the Patron of Learning and Merit, and that the Profeſſors of the Law may flouriſh under Your Influence and Direction, is the Wiſh of Many, and of no One more, than of

Your Lordſhip's

Devoted humble Servant

Math. Skinner.

THE

THE TABLE OF THE Names of the Cases.

A.

AMias *and* Chaplain *Page* 63
Sir John Austin *verſ.* *Col.* Culpepper 123
Sir Thomas Armſtrong's *Caſe* 195
Ambroſe *and* Roſe 217
The Caſe of St. Nicholas's *Pariſh in* Abingdon 620
The Attorney General *verſ.* *Sir* James Butler 644
Armſtrong *and* Liſle 670

B.

LORD Brunker *and Sir* Robert Atkins *Page* 2, 14
Benſon *and* Strode 8
Serjeant Buckby's *Caſe* 23
Bettiſon *and* Elways 36
Col. Birch *and* Lingen 46
Bolton *and* Throgmorton 55
Bevingſay *and* Raſtal 66
Barns *and* Barns 67
Banaton *and* Morris 82
Bird *and* Harriſon 85
Brown *and* Booking 115
Brown *and* Blunden 121

Barrow *and* Gameach *Page* 130
Buckeridge's *Case* 159
Bradwell *and* Carter 189
Bold *and* Broking 213
Boskellet *and* Godolphin 214
The Case of Banbury *Town* 258
Blackstone *and* Stone. 269
Boulston *and* Sandiford 278
Baker *and* Lane 315
Bartlet *and* Viner 322
The Earl of Banbury's *Case* 336, 517
Du Bardele *and* Reynell *and his* Wife 327
Barnet *and* Tompkyns 348
Benifton *and* Huffey 385, 562
Benfon *and* Scot 406
Baker *and* Duncomb 549
Brook *and* Ellis 571
Barlow *and* Vowell 586
Broom's *Case* 600
The Bankers *Case* 601
Breton *and* Cole 617
Barney *and* Hardiftey 633
Blurton *and* Toon 639
Briat *and* Gyll 639
Blichley *and* Fry 666
Bacon *and* Dubarry 679
Brown *and* Borlace 684

C.

COckman *and* Farrer 13
Collet *and* Co'let 37
Cole *and* Ireland 41
Clerke *and* Serle 67
Cater's *Case* 80
Curfon *verf. the* African Company *Page* 84
Crefwick's *Case* 93
Coppin *and* Steymaker 120
Carnock's *Case* 140
Coney *and* Obryan 157
The Countefs of Conway's *Case* 229
Chippindale's *Case* 230
Clofe *and* Waterfon 233
Claxton *and* Swift 255
Cothurn *verf.* England *and* Birch 289
Chrifty *and* Wilcox 318
The Company of Cutlers *in* Yorkfhire *againft* Ruflin 363, 367
The Cafe of the Certiorari's *in* Chancery 419
Crump *and* Holford 445, 566
Cheefeborough *and* Linton 551
Curry *and* Stevenfon 555
Crosby's *Case* 578
Cambridge Univerfity *and* Price 665

D.

DAVY *and* Tiack's *Case* 1
Duncomb *and Sir* John Walter 22, 87
The Lord of Danby's *Case* 56, 162
Dockwray's *Case* 80
Earl of Darby's *Case* 95
Dod *and* Jenkenfon 160
Dean *and* Tracey 161
Durdant *and* Burchet 205

Dolby

Dolby *and* Harris *Page* 243
Dorrington *and* Edwin 244
Du Costa *and* Cole 272
Davis *and* Speed 351
Sir Mirmaduke Dayrell *and* Glascock 413
Dixon *and* Smalley *Ibid.*
Dalby *and* Champernoon 635
Dockwray *and* Dickenson 640

E.

ELliot *and* Besey 49
Eaton *and* Sherwin 113
The East-India Company *versus* Sandys 132
Idem 165
Idem 197
Idem 223
Evans *and* Cramlington 264
Eldersey *and* Thompson 310

F.

SIR Alexand. Frazier's *Case* 4, 138, 177
Freem *and* Dane 33
Foot *and* Rastall 48, 57
Fountain *and* Guavers 146
Friend *and* Boucher 240
Framcam *and* Foster 326
Fanshaw's *Case* *Page* 327
Fuller's *Case* 402
Fletcher *and* Ingram 635

G.

GRaves *and* Maddison 38
Ld. Grey's *Case* 61, 76, 81
Griffith's *Case* 110
Lord Grandison *and Countess of* Dover 155
Glover *and* Cope 296, 305
Gilmore *and* Harris 324
Geary *and* Connop. 333
Dutchess of Grafton *versus* Holt 354
Grandvill *and* Dighton 388
George *and* Lawly 392
Griffin *and* Harrison 397
Gale *and* Till 400
Goodright *and* Cornish 408
Greenwood *and* Piggon 591
Lady Gerrard's *Case* 592
Gilbert *and* Berkeley 648
Gipps *and* Wollicot 677

H.

HOLMS *and* Meriell 17
Herring *and* Brown 35, 52, 71, 184

Hughes *and* Cornelius *Page* 59
Hubloun's *Case* 65
Hudson's *Case* 79
Du Hamel's *Case* 108
Hudson *and* Cook 131
Hodges *and* Nicholas 253
Houghton *and* Rushby 257
Hinton's *Case* 270
Hannam *and* Woodford 300
Hodges *and* Steward 346
Harding *and* Salkeld 365
Hall *and* Cupper 391
Hillman *and* Uncles *Ibid.*
Hebbert *and* Corsthorp 409
Heeding *and* Davis *Ibid.*
Hill *and* Lewis 410
Hicks *and* Woodson 560
Sir James Herbert's *Case* 595
Hallet *and* Birt 674

I.

JAmes *and* Trollop 51, 239
Jeffreys *and* Williams 162
Johnson *and* Cotton 275
Jackson *and* Savage 316
Jones *and* Ashurst 357
Jerman *and* Orchard 528
Johnson *and* Ley 589

K.

KIngdom *and* Jones 6
The King *and* Vaughan 11
The King *and* Wade *Page* 12
——— *and* All-Soul's *College* *Ibid.*
O-Kerney's *Case* 16
The King *and* Ripley 45
——— *and* Wildmore 47
——— *and Lord* Stafford 52, 116
Kaines *and Sir* Robert Knightley 54
The King *and the City of* Worcester 91, 101, 105
——— *vers.* Hurst 99
——— *v. Parish of St.* Martins 115
——— *v.* Tolney 116
——— *v.* Pilkinton *and* Shute 117
——— *v.* Aaron Smith 124
——— *v. City of* Chester 154
——— *v.* Barns 176
Kingston *and* Booth 228
Knight *and* Greenvill 260
The King *v. the Inhabitants of* Stanmore 268
The King *and the City of* London 293, 310
——— *and* Tucker 338, 360, 425, 442
——— *v.* Ching 343
Knight *and* Keech 344
The King *v. St.* John's *College in* Cambridge 359, 368, 393, 546
——— *v. Inhabitants of* Derby 370
King *& ux' v.* Tebbart 387
The King *v.* Rachel Taylor 403
——— *and* Buggs 421
——— *and* Kemp 446, 580
——— *v.* Lammas 562
——— *v.* Trowbridge 564
——— *v.* Larwood 574

Key

Key *and* Briggs *Page* 582
The King *and* Haynes 583
——— *v.* Kendal *and* Row 596
——— *and* Betterton 629
——— *v.* Cowper 637
——— *v.* Margaret Webster 642
Knight *and* Hopper 647
The King *v. Bishop of* Chester 651
Keat's *Case* 666
The King *v.* Bernard 669
——— *v.* Owen *Ibid.*
——— *v.* Green 670
——— *v.* Town *of* Chesterfield 671
——— *v. Sir* Thomas Culpepper 673
——— *v.* Bowerbank 676
——— *v. Lord* Mohun 683
——— *v.* Harris 684

L.

LEnthal's *Case* 113
Lemon *and* Blackwell 191
Luton *and* Bigg 276, 291
Lee *v. Dr.* Oxendine 290
Lewis *and* Preston 303
Lamb *and* Archer 340
Lane *and* Tenoe 362
Leonard *and* Beech 366
Sir Wilfred Lawson *and* Story 555
St. Leiger *and* Pope 572
Lamb *and* Mills 587

M.

MOrgan *and* Vaughan *Page* 10
Mullineaux's *Case* 61
Marriot *and* Knightley 98, 111
Moor *and* Russell 104
Mattoon *and* Fitzgerard 125, 179
Molliton *and* Trevilian 137
Mason *and* Good 232
Mason *and* Welland 238, 242
Adriel Mill's *Case* 299
Middleton *and* Swain 339
Morley *and* Vivian 340
Masters *and* Marriot 347
Morton *and* Withens 348
Marwood *and* Fenwick 427
Masters *and* Lewis 516
Moor *and* Parker 558
Middleton *and* Fowler 629
Mitchel *and* Meese 649

N.

NASH *and* Ashton 42
Lord North *and* Grey *v.* Elliot 102
Naben *and* Miccock 183
Neath *and* Reenes 386
Andrew Newport's *Case* 423, 431
Newton *and* Richardson 565
Netherton *and* Jessop 569

Ni-

Nichols *and* Shepherd *Page* 620
The Case of the Parish of Newington-Butts 643

O.

DR. Owen *and Dr.* Stainoe 45

P.

PAuling *and* Hardy 2, 62
Pim *and* Elliot 3
Prattle *and* King 5
Philpot *and* Walcote 24
Percival *and* Crisp 41
Papilion *and* Dubois 64
Palms *and* Heblethwait 65, 175
Powell *and* Weeks 83
Lady Pye *and Duke of* Norfolk 85
Parkhurst *and* Sheerston 142
Pool *and* Archer 210
Palmer *and* Alicock 212, 218
Price *and* Warren 266
Earl of Pembroke *and* Woldridge 273
Price *and* Child 281
Parker *and* Harris 307
Peice *and* Welden 323
Pinchurst *and* Bellwood 343
Prigg *and* Adams 350, 366, 407
Peter *and* Compton *Page* 353
Pope *and* Hayman 363
The Company of Poulterers *Case* 365
Prickman *and* Tripp 389
Pearson *and* Garret 398
Philips *and* Bury 447

Q.

QUARN *and* Roe 387

R.

RIDER *and* Fowles 21
Roe *and* Marshall 34
Roe *and* Clarges 68, 86, 88
Rich *v. Sir Thomas* Player 104
Risley *and* Temple 106
St. Rumbald's *Parish* 258
Reeves *and* Pepper 362
Robinson *and* Watkins 371
Reeve *and* Long 430
Rolston *and* Main 561
Rowley *and* Raphson 590
Reynolds *and* Kening 634

S. Sco-

S.

SCotell *and* Skelton *Page* 36
Lord Shaftsbury *and* Cradock 40
——— *and* Graham 43
Smith *and Sir* William Langham 60
Lady Viscountess Stafford *and* Lewellin 77
Sandys *and* East-India Company 91
Smith *and* Betterton 100
Stifestead *and* Barns 107
Dr. Sand's *Case* 121
The Case of South-Molton 122
Somner *and* Gibbon 144
Sydney's *Case* 145
Speak *and* Pedley 158
Sedgewick *and* Gofton 161
Sandys *v.* Custom-house Officers 174
Lady Scroop *vers.* Lady Car 205
Dr. Sherlock's *Case* 216
Company of Stationers *and* Parker 233
Symons *and* Cudmore 284, 317
Earl of Salisbury *and* Bennet 285
Speak *and* Kent 299
Steward *and* Hodges 332
Sands *v.* Child *and* Linch 334
Smith *and* Kemp 342
Somers *and* House 364
Smith *and* Wood 390
Saunders *and* Johnson 401
Stevens *and* Squire 582
Sanders *v.* ——— 586
Parish of St. Swithin *v. St.* Mary Bothaw *in* London *Page* 588, 616
Stroud *and* Birt 621
Steyner *and the Burgesses of* Droitwich 623
Swinstead *and* Liddal 664

T.

TRevisa's *Case* 100
Taylor *and* Haynes 103
Titus *and* Perkins 247
Thomas *and* Howell 301, 319
Tucker *and* Hodges 303
Thompson *& ux. vers.* Trevanion 402
Tomkyns *and* Barnet 411
Talbot *and* Tipper 427
Tyley *and* Seed 649
Turbervill *and* Stamp 681

V.

VILLA *and* Dimock 370
Sir Richard Verney's *Case* 432

W. Wat-

The Table of the Names of the Cases.

W.

WAtkinson *and* Murgatroy *Page* 37
Wedgewood *and* Bayley 39
Warren *and* Verdon 48
Weſtern *and* Wildy 59, 152
Walker *and* Hammerſley 90
William's *Caſe* 217
County of Worceſter *verſ. Town of* Eveſholm 254
Whitehall *and* Squire 274
Woodward *and* Hamerſly 313
Wharton *and* Liſle 341, 356
Williams *and* Steadman 345
Waples *and* Baſſet 399
Wentworth *and* Broadwater *Page* 413
Wilſon *and* Law 443, 549, 551
Waltham *and* Sparks 556
Wilſon *and* Field 624
Wilſon *and* Powell 641
Webb *and* Plumſted 647
Worrall *and* Holder 672
Woodyeer *and* Greſham 682

Y.

DUKE *of* York *and* Pilkington 70
Yaxley's *Caſe.* 396

ERRATA ſic corrigas.

PAGE 6. *line* 30. *read* ſeverally. P. 15. *l.* 3. *read* Conſort. P. 17. *l.* 17. *read* Plea. P. 28. *l.* 10. *read* Ann Pitt. *l.* 36. *read* diſſeiſed. P. 33. *l.* 14. *read* Fair. l. 21. *read* non. P. 36. *l.* 12. *read* this. P. 39. *l.* 9. *read* 5000 l. *l.* 13. *read* prays that. P. 42. *l.* 13. *read* throwing Logs. P. 53. *l.* 11. *read* till. *l.* 28. *read* J. W. *and* E. W. *l.* 33. *read* Deed. P. 62. *l.* 20. *read* ſaid. P. 82. *l.* 30. *read* part. P. 85. *l.* 16. *read* Subpœna. P. 86. *l.* 16. *read* Ne unques. P. 88. *l.* 26. *read* not. P. 94. *l.* 18. *read* thus. P. 95. *l.* 1. *read* Raym. 260. P. 96. *l.* 16. *read* 34. P. 97. *l.* 25. *read* his. P. 99. *l.* 16. *read* Mere. P. 103. *l.* 10. *read* 22, 23. P. 108. *l.* 26. *read* to be. P. 110. *l.* 8. *read* him. P. 119. *l.* 17. *read* Demandant. P. 120. *l.* 11. *read* a bare Demurrer. P. 132. *l.* 1. *read* the Caſe put puis 165. P. 144. *l.* 32. *read* Paſch. P. 168. *l.* 41. *for* no, *read* a. P. 178. *l.* 8. *read* ignorabant. P. 184. *l.* 32. *read* without. P. 185. *l.* 13. *read* next Moment the Party. P. 187. *l.* 14. *read* not. P. 189. *l.* 12. *read* Holt the firſt. P. 190. *l.* 6. *dele* not. *l.* 29. *read* to be. P. 205. *l.* 38. *read* enable. P. 209. *l.* 7. *read* he denied. P. 210. *l.* 32. *read* the Action. P. 211. *l.* 9. *read* firſt. P. 214. *l.* 25. *read* on the Caſe. P. 226. *l.* 29. *read* politique. P. 229. *l.* 33. *dele* affirmed. P. 233. *l.* 18. *read* Rule. P. 235. *l.* 40. *read* agreed. P. 246. *l.* 12. *read* Plaintiff. *l.* 13. *read* Defendant. P. 261. *l.* 43. *read* one. P. 272. *l.* 8. *read* per cent. P. 274. *l.* 32. *read* Executor. P. 281. *l.* 12. *read* than. P. 292. *l.* 4. *read* not. P. 300. *l.* 9. *read* no. P. 303. *l.* 33. *read* for Rent. P. 307. *l.* 32. *read* poſſeſſed. P. 325. *l.* 33. *read* Heneage. P. 352. *l.* 1. *read* He. *l.* 4. *read* but. *l.* 11. *read* of. P. 379. *l.* 34. *read* and. P. 388. *l.* 10. *dele* (;) P. 390. *l.* 16. *dele* though. P. 391. *l.* 34. *read* her. P. 395. *l.* 23. *read* not. P. 396. *l.* 24. *read* named. P. 410. *l.* 6. *read* the Defendant. *and for* J. D. *read* the Plaintiff. *l.* 11. *dele* the. P. 414. *l.* 10. *read* and. P. 417. *l.* 23. *dele* as. P. 436. *l.* 24. *read* Weight. P. 449. *l.* 24. *read* expelled. P. 470. *l.* 28. *read* is. P. 484. *l.* 42. *dele* if. P. 492. *l.* 21. *read* in. *l.* 34. *read* nor. P. 517. *l.* 16. *read* Indictment. P. 534. *l.* 11. *read* Grantor. P. 596. *l.* 34. *read* excepted. P. 622. *l.* 5. *read* put a. P. 633. *l.* 19. *read* before. P. 658. *l.* 22. *read* not.

Term. Mich.

33 Car. 2. R. B.

Davy *and* Tiack's *Case.*

1. ONE bought Lands of B. and had Possession, and the Evidences delivered him, which he carried to Tiack for Advice: Tiack pretends the Covenants were too general, but after buys the Land himself. Davy, who was the first Purchaser, moved that Tiack might redeliver to him the Writings he had of him, and put him in the same Posture he was. And Parry's Case, Mich. 21 Car. 2. R. B. was cited to be, that one had carried Writings to one Parry a Scrivener, and among them was a Deed which mainly concerned the House he lived in; he redelivered all the other Writings; but as to that, he said, he held his House by it, &c. but the Court, he being one over whom they had a Power as a Maker of Deeds, &c. would not let him keep what he was intrusted with in the Way of his Profession, but made him put the Party in the same Condition he was at first; and that then he might recover the Deed by Law; so likewise was it done in Doble's Case; of the like Nature in Chief Justice Hale's Time.

Lord Brounker *and Sir* Robert Atkyns : Puis.

2. IN Ejectione firmæ between Lord Brounker and Sir Robert Atkyns, for the Mastership of the Hospital of St. Catherine's, which is a Corporation consisting of the Master, Brethren, and Sisters ; and in this Case it was said, that where there is a Common Seal put to a Deed, that is Title enough of it self without Witness to prove it, or that the major Part of the College be agreed ; and if it be said that it was put to by the Hand of a Stranger, that shall be proved on the Side that says so. Sir Robert Atkyns moved that they might declare by the Name of Lord Brounker, Master, &c. for that if they should declare by the Name of Master, Brethren, &c. generally, and he should confess Lease, Entry and Ouster, he should be tricked for Confession of Lease by the Master, shall be intended the lawful Master ; wherefore by Consent they declared by Name of Lord Brounker, Master, &c. and took out a new Original, and Sir Robert Atkyns confessed Lease, Entry and Ouster : And 'twas said in this Case, that where the Cause is by Original, 'tis a Favour of the Court whether they shall have an Imparlance or not. And after, Term. Trin. 35 Car. 2. R. B. an Exception was taken by Pollexfen for not naming the Dean by Name, but only generally in Pleading. 1 Inst. 3. and other Books cited ; but it seemed to be held well enough, for that upon non convenit or non concessit, it will so appear well enough.

Paulin *and* Hardy.

In Replevin.

3. TEnant in Tail, Remainder to Joan Cock in Tail, Remainder over, &c. Tenant in Tail makes a Lease for two Lives, not warranted by the Statute, and dies without Issue, the Reversion in Fee descends to Joan Cock the next in Remainder ; she makes a Lease for Ninety-nine Years, to commence after the Determination of the Estate for Lives. Lessees for Life surrender upon

Condition to Joan Cock and Nicholas Cock; and a Precipe is brought against Joan Cock and Nicholas Cock a Stranger, and a Recovery with single Voucher had to the Use of Joan Cock and her Heirs; and after the Condition is broken, and the Lessees enter, Joan Cock grants the Reversion. Lessees for Life die, and Defendant avows for the Rent reserved upon the Lease for Ninety-nine Years, as claiming under the Grantee of the Reversion.

They agreed it was a Discontinuance, and a tortious Reversion in Fee, out of which the Lease was made; but if by Surrender this tortious Reversion being gone, the Lease should be so too, was the Doubt of the Case. Saunders took it to be, as if he had made a Lease having no Estate, and after purchased, it should be a Lease by Estoppel: And Pemberton Chief Justice held it to be by Estoppel, though an Interest past at present, the Lessor having a wrongful Estate. Holden in this Case that Lease for Ninety-nine Years should not have bound the Issue in Tail; but now by suffering a Recovery it doth bind the Heirs; holden likewise that the Precipe being against the true Tenant, though a Stranger be joined, yet well enough, and every Day's Experience: And Pollexfen said, if Tenant in Tail discontinue for Life, and grant the tortious Reversion to a Stranger, and Tenant for Life surrender to the Stranger, that now Tenant in Tail is seised again in Tail. It was stirred in this Case, whether Joan Cock by accepting the Surrender was remitted: Puis. M. 34 Car. 2. 31.

Pim *and* Elliot.

4. CONdition of a Bond was, that after Arrival of a Ship from such and such Places, that A. should pay ten Pounds and twelve Pence per Month for every Pound for every Month; and if the said Ship be driven back, stay'd or hindred by Distress of Weather, or Leakage, so that she return not, then upon Payment of ten Pounds, Condition to be void. Defendant pleads, that by Reason of the Perils of the Sea, the said Ship was drowned in the Sea: The Question was, whether this was an Hindrance within the Words of the Condition, and holden it was: But Pemberton said, that if they had

been taken by the Turks, or perished any other Ways then by Leakage or Distress of Weather, and that had been set forth in Pleading, it would not have been within the Condition. Judgment for the Plaintiff.

Sir Alexander Frasier's *Case in Chancery.*

5. THE King granted the Custody, Tuition, Government, &c. of the Body of an Ideot, and the Care, Disposition, &c. of the Profits of his Lands to Sir Alexander Frasier, his Executors, Administrators, or Assigns, during the Ideocy, &c.

Q. If his Executors or Assigns shall have it?

Argued, That if you consider the Person 'tis grantable, be it Prisoner in War, Villain, &c. So likewise the Estate, that here the King hath not a Freehold, but only a Chattel in the Lands; and that the Trust is coupled with an Interest, which the King hath granted wholly out of him. His Interest is during the Ideocy, which he hath granted during the Ideocy, that this Case differs nothing from a Wardship, which the King might grant over to another; and that shall be a Chattel in him, and go to his Executors: They say here is no Skill required, but only to provide Necessaries for the Ideot and his Family, and to repair his Houses, &c. and that the better your Ideot is provided for, the longer he will live; and so the well performing the Duty is the Interest of him who is to perform it. And Wallop said, that though by a Grant of the Care, &c. in general Words, it should not go to Assigns; yet when Assigns are named it shall, and cited 11 E. 4. 1. and the Case of Squib and Coming adjudged in the Exchequer for a Teller's Place there, pursuant to 11 E. 4. So here; Sollicitor Finch argued econtra, After taking the Differences between Ideot and Lunaticks as to the Property, he said as to the Care and Protection which the King had over them, they were alike; and said, that if the King granted a Lunatick to one and his Executors, no one would question but it determined with the Death of the Grantee; and he said in this Case of an Ideot, that the Land should not go to Executors, &c. and the Custody be determined as to the Body; but that it should be concomitant with the Body.

Lord Chancellor told them, that here they rely'd upon the Parity between a Wardship and an Ideocy, which this Case did not bear; for that the King had the Wardship of the Heir as Part of his Seigniory, and a Fruit and Service reserved on the Tenure; and that the King might grant the Wardship of the Heir of J. S. cum in manibus nostris venerit; not so of an Ideocy, which the King had by Reason of his Prerogative, in so high a Degree, that peradventure he cannot put it so far out of his Reach, but he may at any Time recall it; and therefore questioned, if Grant of an Ideot during his Ideocy were good; but that the King might avoid it, for the King hath this jure protectionis Regiæ, and the Profits of the Land as a Consequent to inable him to perform this royal Trust; and he says, that since the Time of the Statute de prærogativa Regis, there never was a Patent with the Words Executors, &c. in it; but however, he said the Inquisition here found, was, that the Party had been an Ideot per Octo An. jam ultimè elapsos, which is plainly repugnant, for no one can be an Ideot, but a natavitate, and that is the Reason it shall be try'd by Inspection, for that it may be discerned, but so cannot Lunacy, &c. See Beverley's Case, 4 Rep. 126, &c.

Prattle *and* King.

6. A possessed of a Term for Years, makes an Under-Lease for Part of the Years, reserving a Rent, and makes his Executor, and dies; his Executor brings an Action for the Rent in the debet & detinet, and after Verdict 'twas moved in Arrest of Judgment, per Holt; that it should have been in the Detinet, for that the Rent is incident to the Reversion, and that he hath the Reversion as Executor; and therefore the Action shall be intended to be brought as Executor, and so ought to be in the Detinet; but the Court said, of such Things as lie in manual Occupation, or whereof manual Occupation hath been had, as Goods, &c. the Executor is not bound to name himself Executor; and then it will be good in the Debet & Detinet; but for a Chose in Action, it shall always be in the Detinet, for that 'till it be recovered, 'tis not Assets; and for this he shall always name himself Execu-

Executor; but a Lease for Years is Assets in the Hands of the Executor for the whole Lease at first; therefore he need not name himself Executor; but if he doth name himself Executor, he must then say detinet only: Therefore Judgment for the Plaintiff nisi. Vid. 6 E. 4. 1.

Kingdom *and* Jones: Puis.

2 Jones 150. Raym. 459.

7. A Writ of Error was brought upon a Judgment in C. B. where the Case was, The King demised his Revenue of the Kingdom of Ireland to Jones, Kingdom, and seven or eight for five Years, for which they were, &c. And among the Farmers it was covenanted and agreed, that each of them should have 150 l. Quarterly to accrew due to him, which he should not take out of their Stock; but it should be as Money lent to the Stock, for which he should receive Interest at the Rate of ten Pounds per Cent. until the End of the five Years, and then to be paid each one pro rata portione, and the Surplusage to be divided; and if any die within the five Years, then that One hundred and fifty Pounds, &c. and Interest to be paid to his Executors; and the remaining Money (if any) not to go to the Executors. They further covenanted, that none shall assign his Interest without the Consent of Four: Kingdom lived till within a Month of five Years expired, and then, with Consent of Four, assigns his Interest to Lem, Kingdom and Dawson within a Month of the five Years Expiration, and dy'd; and if his Assignees shall have an Interest in the Whole, or his Executors have only the One hundred and fifty Pounds Quarterly to be paid, and Interest for it, was the first Point: The second Point was, if where (as here they did) several covenant separatim & respectim & non conjunctim, nor one for another, but every one for himself, doth covenant, agreavit, &c. An Action of Covenant being brought by one against the Rest jointly; if this be well brought: In this Case it was not covenanted that Payment shall be made to the Assignee. 1 Point per Pollexfen.

If a Lease for Years be made reserving a Rent, and Arrearages incur, and then he in Reversion grants the Rent and all Arrears; can the Lessee in an Action of Debt for the Arrears plead, you have granted the Arrears?

If A. covenants to pay One hundred Pounds in five Years, Covenantee cannot plead (Action being brought for Breach of Covenant) that you have assigned it to J. S. Suppose a Covenant to pay ten Pounds to such a Person as J. S. shall appoint.

'Tis a Chose in Action, and a personal Thing; and therefore he held it not assignable.

Maynard held, that Part was assignable, and Part not, that the Arrears incurred were not assignable, that the Lease to come was; he said, there was an Agreement implied that they should assign, for by saying they shall not assign without Leave of Four, is pregnant that by Leave of Four they shall assign; if that be the Sense, then Assignee shall be in the Stead of Assignor, and shall bear the Profit and Loss, &c. He says, if there be four Jointenants, and they covenant that Survivorship shall not hold, yet it shall hold.

It was stirr'd, whether Executors did not lie liable to the first Covenant to the King; and it seems they do for all, to the Time of the Assignment; and the Assignee may afterwards, if the Assignment be good. And Maynard called this a conventual Assignee; and said further, that if the Assignee had an Equity, that in this Case Equity should be no Exile to the Courts of Common Law; for if A. should covenant that he would not assign either in Law or Equity, here Common Law Court shall take Notice what is Equity.

He said, that if one that had a Share in East-India Company should assign it to another, that hereby the Interest is not immediately transferred; but by way of Covenant, that he shall sue in his Name, the Party may recover it; and he is likewise here an equitable Assignee: Puis.

Anonymus.

8. Pollexfen moved for a Prohibition, and suggests how that within such a Parish there is a Custom, how that the Inhabitants of such and such antient Tenements have sat in the first Seat of such an Isle, and how that the Bishop removed them, and gave Licence to others to sit there; and for that they went to try the Custom

stom in the Spiritual Court, he prayed Prohibition, for that it is an idle Custom; and that where Courts held Plea for an idle Custom, they shall be prohibited: And cited the Case of Topsall and Ferrers, Hob. 175. but 'twas denied, and Chief Justice Pemberton said, that here besides Custom the Court hath Conusance of the Matter, Placing and Displacing being in the Ordinary: So that if the Custom were out of the Case, yet they might proceed; but in Topsall's Case, they proceeded only upon the Custom; which being a vain unreasonable Custom, they were prohibited.

Beneson *and* Strode.

En Ejectment Sur Special Verdict.

Pollexf. 615. 2 Jones 189.

9. THE Case in Effect was, Lord of a Copyhold Manor grants an Estate for Life to A. Remainder of the same Land to B. to commence after the Death, Surrender, Forfeiture, or other Determination of the Estate of A. A. is attainted of Felony, and pardoned; the Lord enters not for the Forfeiture. B. enters, and if his Entry was lawful, or not, is the Question: In this Case, the King's Pardon wrought nothing, for the King cannot have a Copyhold Estate by Forfeiture, for the Baseness of the Estate, &c. Finch, Solicitor for the Plaintiff, agreed, That Copyhold Estate is not forfeited by Commission of Felony, without a Custom; he said, he might agree to that, for Conviction of Felony is not a Forfeiture without a Custom; then he consider'd the Words Death, Surrender, or other Determination; he said, that here was a Forfeiture; he said, that for this Forfeiture, the Lord could not enter, for that he had granted away his Right; that the Person attainted could not have it, for that he was a dead Person in Law, and could take nothing but for the King; he said likewise, that by Forfeiture Copyhold is extinguished, and so determined. And put the Case, Copyholder for Life, Remainder as here, takes a Lease for Years, that is an Extinguishment of the Copyhold Estate, and a Determination of it; so that he in Reversion shall enter: He said, that true it is, for a Forfeiture the Lord shall enter, and not he in Remainder, as it is holden

Winch 27.

holden in Podger's Case; but that is where 'tis to begin after the Death of the first Tenant for Life. He cited Leon. 1. 3 Inst. 19, 21. 2 Inst. 37. Moor 238. 1 Bulstr. 13, 14.

Saunders. First consider what Manner of Forfeiture this is, and he said twas in the Nature of a Royal Forfeiture, in respect of Tenure only; and said, that if there were Lord and Tenant, and Tenant is attainted of Felony; that living the Tenant, nothing vests in the Lord, before Entry, or in the King (if holden of him) before Office found; but if the Party be executed then for Necessity, the Law casts the Freehold upon the Lord or King, without Entry or Office: He said, that now by Custom, Copyhold Estates have many Qualities incident to Estates of Inheritance at Common Law, and are governed by the Rules of Discents at Common Law; and that therefore there shall be a possessio fratris of them; and so here the Estate before Entry shall not vest in the Lord; and it is in the Lord's Will, whether he will enter, and take Benefit of the Forfeiture, or not; for it may be, the Services are as available as the Land; and that therefore the Lord might avow for the Services of his Copyholder in R. B. if he will, and is not bound to enter; and for this cited 8 E. 2. Tit. Avowry. He says, if the Lord had entered, then the Copyholder in Reversion might have entered, not for the Forfeiture, but for that the Estate is determin'd and merg'd in the Lord's Hands.

Chief Justice Pemberton held, That the Entry of the Lord seemed not material, but that the Estate should be in him, presently without Seizure; and that Seizure was in Nature of an Habere facias possessionem at Common Law: And Dolbin said, if Copyholder commit Waste, the Lord may make a Lease before Entry, which Saunders did not much oppose: And so Pemberton said he might bring an Action of Trespass; and peradventure no Entry needful to maintain an Action for mean Profits. Curia advisare vult. a Cro. 301.

Morgan *and* Vaughan.

2 Jones 170. Raym. 456.

10. TEnant in a Writ of Dower, being an Infant, appeared by Attorney; and after Judgment against him, brought a Writ of Error, and assigned this for Error, how that he being an Infant within the Age of One and Twenty, viz. quatuordecim annor', & non amplius, at Abergavenny in the County of Monmouth appeared by Attorney, whereas he should have appeared by Guardian; and this Writ of Error bore Teste within less than seven Years afterwards; and in this Writ of Error, the Plaintiff appeared likewise by Attorney: So that the Questions were,

1. If of his own Shewing, this Writ of Error were not ill brought, he appearing here too by Attorney; whereas if he were but Fourteen before, he cannot be One and Twenty now. And Pollexfen argued, That he should not go from that he had acknowledged upon the Record; he agreed here, the viz. was not traversable; but yet said, that when Surplusage contrariant or repugnant to the Matter precedent is alledged, that then it shall hurt; and cited a Case, where one declares that A. being of the Age of Sixteen became bound, &c. that here the Plaintiff shall not go from this, though it had not been material to have laid it so.

2. He said that the Trial was ill, for the Trial was at Abergavenny, and that the Land lay in another County; and the Writ of Dower was brought in London, and that the Trial ought to have been where the Land lay.

Holt. 1. To the first Point said, That the viz. was not material or traversable, and that therefore the Party should not be estopped; and that here the Substance was, whether the Party was infra ætatem or not.

2. He said, that where Right of Land depends upon Infancy, there Trial of Infancy shall be where the Land lies; but where it doth not, where Commorancy; and if no Commorancy, where the Writ is brought; for there he shall be intended commorant. But the Chief Justice as to this Point held, that in all Cases where the Party pleads that he was within Age at B. and alledges a Place,

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that there the Trial may be well enough where 'tis alledged; where no Place is alledged, there in personal Actions where the Writ is brought; and in real Actions where the Right of the Land depends upon Infancy, there the Trial is to be where the Land lies; and if not, where the Action is brought.

1. And as to the first Point they seem'd to hold the viz. not material; and Dolbin cited, Dyer 289. and they said, if one recites a Writ bearing Date in Term, viz. such a Day, which is out of Term, yet it will not hurt; and after per totam Curiam these Points were so holden, and the Judgment reversed nisi; and upon Saturday they shewed new Errors, and so it went over to the next Term. It was said, that the Record was before two Justices of the Grand Sessions in Wales, and that it was returned but by one, and not shewn that the other is dead; but 'twas answered, that they are Justices by Patent, and that the Record was as much before the one as the other; and therefore well enough.

The King *against* Vaughan.

11. RESolved that a Refusal of the Oath of Supremacy by 3 Jac. 4. incurs a Premunire, if it be tendred by Justices of Assise and Gaol-delivery, though it hath not been tendered by the Bishop: It was likewise held, that though in the Indictment it doth not appear that it was by a Justice of Gaol-delivery; yet afterwards it appearing in the Placita, it was well enough; and therefore this being upon a Writ of Error, the Judgment was affirmed: This was moved again Hill. Term following, and held ut supra; and afterwards P. 34 Car. 2. the Court continued in that Opinion, though Jones seemed to dissent; and the King had his Judgment, though Saunders took Exception; for that the Judgment was, that the Oath being tendered to him, he recusavit sacramentum, omitting præstare, which is the Word of the Act, and in all Precedents; but yet not allowed, for if it had been recusavit only, it had been well. Wherefore, &c.

Anonymus.

12. IN Trover Defendant pleads, that Plaintiff at the Time of the Action brought had nothing nisi simul cum the Defendant; it was moved that this amounted but to the general Issue; but it was holden a good Plea in Abatement, for that an Action of Trover doth not lie by one Tenant in Common against another.

The King *and* Wade.

2 Jones 105. 13. WADE was fined One hundred Pounds for Barretry, which was levied by levari fac. and Sir Thomas Culpeper moved, how that he was Farmer of the Dutchy of Lancaster, and had all Fines, &c. granted; and that the Patent was acknowledged by the Attorney in the Exchequer, and therefore prayed that he might have this Fine; the Court said, that he must plead his Patent there, before they could take Notice of it; and that if they should pay this Fine to him, the Clerk of the Crown, who is accountable unto the Exchequer, would have nothing to shew; and therefore said, he would do well to get an Order out of the Exchequer. And Dolbin said, how that the Archbishop of Canterbury claimed such Fines in Croydon; and how that Chief Justice Hide would not allow them, till the Patent was pleaded, and acknowledged in that Court.

The King *and* All Souls *College in* Oxon.

2 Jones 174. 14. THE College of All Souls return, how that they were founded by H. 6. at the Request of Henry Chichley, Archbishop of Canterbury, and return the Statutes of their College; and that by them the Archbishop of Canterbury for the Time being, is to be their Visitor, and by their Statutes to determine all Grievances, and Turning out of Fellows; and how that W. is Archbishop of Canterbury, &c.

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To this Pollexfen takes two Exceptions; First, they shew that the Archbishop is to determine about Turning out of Fellows; but hereby he hath no Power to admit, and to determine concerning them, before he is a Fellow, for till then he is not visitable, nor within the Society; but to this the Court said, that by being Visitor he hath Power eo nomine to determine all Matters that come as Grievances before him, (unless he be particularly tied up by the Statute) and that if he can put one out, and deprive him of his Freehold, à fortiori he may determine concerning his Admission; and they held further, how that there was no Appeal from the Visitor to any other, or to any before him; but that he is a Judge of their own Constituting, and that he hath a Power arbitrary, insomuch, that if he will not meddle at all, or not do them Justice, when he doth meddle, that yet they must submit.

2. It appears W. was Archbishop at the Time of the Return; but it doth not appear that he was at the Time of the Refusal; but this too was not allowed, for so a Visitor should not be able to determine a Grievance in his Predecessor's Time; but having shewed that there is a Visitor, it is well enough. And in determining this Case, Dr. Patrick's Case, Dr. Withrington's Case, Dr. Robert's Case, Dr. Appleford's Case, were all remembered and allowed for Law; and a peremptory Mandamus denied after several Arguments.

Cockman *and* Farrer.

15. Tenant for Life, Remainder in Tail, Remainder in Fee; Tenant in Tail levies a Fine, and the Heir of him in Remainder in Fee forty Years after brings a Writ of Error; and assigned for Error, that the Writ of Covenant bore Teste after the Death of the Conusor, which was admitted for Error; but if this Fine with Proclamations were not a Bar to the Writ of Error, five Years being past, was the Question. Treby for the Plaintiff in the Writ of Error: A Writ of Error is a Commission for the Judges to inspect the Fine, and see if there be Error in it, or not; now for this Fine to be pleaded in Bar of this Writ is absurd, and against a plain Maxim in Law, non adduci potest exceptio ejusdem rei cujus peti-

2 Jones 181. Raym 461.

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tur dissolutio; therefore if an Heir bring a Writ of Error to reverse the Attainder of his Ancestor, though the Attainder hath corrupted the Blood, so that he can have no Heir; yet this Attainder cannot be pleaded in Disability: So likewise if a Person be outlawed in a personal Action, this Outlawry cannot be pleaded in Disability of his Person. He held, that an erroneous Fine binds 'till 'tis reversed, and that he that hath Title to reverse a Fine by Error, hath not thereby directly Title to the Land; for that if it descend to him, it works no Remitter, which they agreed. Owen 21. He took a Difference where there is a Common Recovery or Judgment precedent, and then a Fine and Proclamation, that this will be a Bar to reverse the Judgment, &c. and likewise all the Court held, that if there had been a subsequent Fine, that it would have barred this Writ of Error to reverse the Fine precedent; and they held likewise, that a Fine being levied of antient Demesne, that it shall not be pleaded in Bar to a Writ of Disceit by the Lord upon the abovesaid Varim. And the Court said in C. B. where a Fine is levied in another's Name, or any other Thing, whereby it appears never to have been a lawful Fine, they set them aside every Day, though after five Years. Judgment was given here for the Reversal: Cited per Holt Chief Justice. P. 5 W. & M. R. B.

Lord Brounker *and Sir* Robert Atkyns; *antea.*

2 Jones 176 ~~169~~. 16. IN this Case, these Things were resolved per totam Curiam, in the Charter of Foundation of St. Catharine's Hospital, by Eleanor, Queen Dowager of Henry III. there was this Clause, reservantes nobis & Reginis Angliæ nobis succedentibus jus advocationis, & Patronatus, &c. The Case depending upon this Clause mainly proved this: Henr. Maria, Queen Dowager of Car. 1. granted the Mastership of St. Catharine's to George Montague, April 30, 1661. Catharine Queen Consort, granted the Mastership of St. Catharine's to Sir Robert Atkyns in 1671. George Montague dies July 1681. and in August following, the Queen grants it to Lord Brounker: Hereupon the Question was, whether the Grant of Hen. Maria, Queen Dowager, (upon the Words of the Charter

ter of Foundation) was good to George Montague as a Grant, or only as a personal Appointment, to determine when there should be a Queen Dowager, for Sir Robert much insisted, that the Queen Dowger's Interest ceased, when ever there was a Queen Consort; which if so, then the Hospital was not full of Montague, at the Time of Sir Robert's Grant; and so this Grant was good. Next if this Point should be against him, he contended, that it was a lay Hospital, and grantable in Reversion. As to the first, the Court held clearly, that the Interest and Power of disposing of the Hospital, being vested in a Queen Consort, doth not determine by her becoming Dowager, there being no Words in the Patent that give such a Direction; and therefore being general, it shall be for Life, and the Law will not allow in Construction such a desultory Kind of Inheritance; but if it had been so specially limited, being an Hereditament newly treated, perhaps it might be otherwise: They held further, that she remains a Queen after the Death of the King, and hath always her Privilege allowed her in the Exchequer; but Pemberton said, peradventure a Countess ought to be named in a Writ Comitissa Dotissa, otherwise it would be an Abatement: As to the second, they held likewise, that it was no Office grantable in Reversion, (though it was admitted a Lay Hospital) and although they strongly argued this Point might be found specially, the Court would not. In this Case, the Nonsuit against Robert Atkyns in a former Trial between him and Montague the late Master, was given in Evidence, though the Counsel objected that the Master comes not in Privity, and that there was more given in Evidence here, than in the former Trial. But Pemberton Chief Justice said, that a Successor comes in under his Predecessor, and is like to an Heir and Ancestor. Speed's Chronicle was given in Evidence to prove the Death of Isabel Queen Dowager to E. 2. and though Maynard seemed to oppose it, and Dolbin said it was done by Consent; yet the Chief Justice said, he knew not what better Proof they could have. And Wallop said, that in the Lord's House, it was admitted by them for good Evidence in the Lord Bridgwater's Case.

O Kear-

O Kearny's *Case*.

2 Jones 180. 17. O Kearney being outlawed for High Treason, was brought to the Bar, and demanded what he had to say, why Execution should not be awarded against him; he said, (having at the first held up his Hand) he had a Writ of Error, and prayed it might be allowed; which being read, the Court ordered him to assign his Errors, which he did in propria persona ore tenus. The Error he assigned was, that he was out of England at the Time of the Exigent awarded; then he prayed Counsel to maintain his Error, and 'twas granted; and so he was remanded. Afterwards the Jury being at Bar, they were charged to enquire of the Issue between the King and the Prisoner; who assigned for Error, that he was out of England, from the Beginning of December till November following; and upon this, Issue was joined, and the Jury charged to enquire whether he was beyond Sea, or in England, at the Time of the Exigent awarded; and the Process, and the several Exactions of him were read. O Kearney by four or five Witnesses, which were sworn upon this collateral Issue, proved, that he was at Paris from the Beginning of December to July following, the Quinto exactus being the 2d of June, returnable two Days after: It was objected, that he had not proved all the Time in Issue; but the Court said, he having proved he was out of England at the Time of the Exigent, that is the Substance, and the other immaterial; wherefore he was remanded after the Issue found for him, and ordered to be brought the next Day, when they would reverse the Attainder; the next Day he being at the Bar, the Court reversed his Outlawry, and presently arraigned him upon the Indictment. V. 1 Cr. 365. 2. Cr. 464.

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18. IN an Action of Debt the Plaintiff declares, that whereas A. B. was arrested, by Virtue of a Plaint in the Poultry Counter, that the Defendant by Specialty promised that A. B. should put in Bail, by such a Day; and if he did not, that then the Defendants would pay to the Plaintiff what should be due from A. B. to him the Plaintiff; and avers, that there was due from A. B. 250 l. that A. B. had not put in Bail, nor had the Defendant paid the said 250 l. aut aliquem inde denarium: Here the Defendant may either plead nil debet, or take Issue upon the Averment, that A. B. did not owe the Plaintiff 250 l. for though it be true, that where the Defendant is charged in a Sum certain by Specialty, that there he shall not plead nil debet; yet when there is no Sum in certain, but that this is to be made appear by Averment, 'tis otherwise, and an Action of Debt lies in this and the like Cases; but the Replication in such Case ought to be, that he owes not the 250 l. aut aliquem inde denarium. 2 Jones 184.

† Holms *and* Meniell.

19. JUdgment was given this Term, in the Case between Holms and Meniell, which was, Tenant in Fee, having two Daughters, devises his Lands in Question to his two Daughters and their Heirs, equally to be divided between them; and if they die without Issue, then all his Land to remain over to his Nephew Francis Meniell. One of the Daughters dies without Issue; and if Francis the Nephew shall have this Moiety, or that it shall be to the Sister, was the Question: This Question was argued by Williams and Holt; Finch and Pollexfen having argued it before. He observed, first, by the Words them two and their Heirs, it being in a Will, they were Tenants in Common of an Estate in Fee. Secondly, And if they died without Issue, Remainder, &c. these Words by Implication make it an Estate-tail; which having such Effect, shall never have a double Implication to raise cross Remainders. He said, they were distinct E- 2 Jones 172. Raym. 452.

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states, and had likewise distinct Determinations, and that 'tis the Nature of a Remainder to fall in Possession, as each several Estate whereon it depends, determineth. He seemed to take it clear, that if the Devise had been to the two Daughters ut supra, Remainder to his Son and Heir apparent, that he should have entered presently upon the Death of one without Issue; so if it had been to two Strangers ut supra, Remainder over (the Court did not admit it to be so clear). He allowed not the Difference where the Demise is to two, and where to three. He mentioned a Case between Cumner and Coswell, where one seised of two Manors, Dale and Sale, gave one to A. in Tail, another to R. in Tail; and if they die without Issue, Remainder to W. one died without Issue; the Moiety was adjudged to him in Remainder, as he had it of Sir Simon Degge. He cited Moor 124. Rolle, Estate 839. Dyer 171, 303, 330. 2 Cr. 56. Rolle, Remainder 416.

Holt. 'Tis an Estate-tail by Implication, for the Benefit of them in Remainder; and therefore, if the Demise had been to J. S. when my two Daughters die without Issue, he should not have entered till both were dead without Issue: For here the Law making an Estate-tail by Implication, that the Will of the Devisor may take Effect, having satisfied that, shall never take more than of Necessity from the Daughters; and put the Case cited in Altham's Case, 8th Report, where if Lands are given to a Man, and the Heirs of his Body, habendum to him and his Heirs, 'tis an Estate-tail, and a Fee expectant; if to him and his Heirs, habendum to him and the Heirs of his Body, 'tis an Estate-tail, &c.

Trinity-Term it was argued, by Maynard and Saunders: Maynard went generally upon no Estate by Implication, where an express Estate is given; (this the Court denied) and that they would not by Construction make an Intention of the Party, where there were not Words to enforce it.

1. Saunders for the Daughters, endeavoured to prove that the Intent of the Devisor was, that Francis should not take, till both were dead, and for that the Words are plain; (and if they die without Issue, then all my Lands to remain) one being dead without Issue, no Man can say they are dead without Issue; and all my Lands shew, that he meant when he should take, he should take all: And there-

fore he must have the Moiety of the surviving Sister, or stay till she die without Issue too; and that he should do so, was the Intent of the Testator, who in the first Place meant to provide for his own Children his two Daughters, and their Heirs, whereby they held an Estate in Fee as Tenants in Common; and if one had dy'd without Issue, the other would have been her Heir, had the Will gone no further. The other Words, and if they die without Issue, making that which was a Fee-simple to become a Fee-Tail by Implication, being a Thing only for the Benefit of him in Remainder, shall never carry more than a bare Remainder. And therefore M. 30. Car. 2. R. B. Cane and James, one gave Lands to A. and his Heirs; and if A. die without Heirs of his Body, that his Sister should have 600 l. Adjudged an Estate in Fee. Secondly, This being his Intent, it stands with the Rules of Law; for that he says, that if he had devised in Terms of Art, no Man would have denied but it had been good. Now the Law will by Construction supply those Words of Art, in Favour of the Testator, who is by it intended inops Consilii; and he say'd, that was the Reason of the Construction in Matthew Manning's Case, for clearly, if one gives a Lease for Years to one for his Life, the Remainder to another; the first hath all the Estate, and the second can have nothing; but for that, if the Testator had given the Lease to him in Remainder, after the Death of the first Devisee; that yet during the Life of the first Devisee, he might have given the Lease to whom he would, till the first Devisee died; therefore they construed it good by way of executory Devise. He said, there might be cross Remainders, where two, not where three; and mentioned the Opinion of Dodderidge, 2 Rolls, 281. in Gilbert and Wittie's Case. He remembred what Chief Justice Hale said, in an Argument upon Sir Peter Vanlore's Settlement, that where the Question was upon a Limitation of an Use, that in such a Case that would not be good, because the Party may have Counsel; but in Case of a Will otherwise. Thirdly, He urged, that those Cases which were cited on the other Side, are all for the upholding the Intent of the Party.

The Court was unanimously of Opinion, that Judgment should be entred for the Sister against Francis Meniel; for Pemberton Chief Justice said, that being a Devise it

shall be governed by the Intention of the Parties; whether there were legal Words or not, here is a plain Intention, and such as Nature and Prudence would direct: So that to construe it so as to give the Land from the the Testator's own Child, to one more remote, were to construe against Nature; besides, the Words are not satisfy'd, unless it be so taken, if they die without Issue, which cannot be satisfied by One's Dying without Issue, and all his Lands: So that he intended that Francis should take all, when he did take; he agrees, that in a Grant it would have been otherwise, scil. that the Plaintiff might have entred after the Death of one without Issue; for in a Grant, the Words are regarded rather than the Intention of the Parties; he said, that 4 Leon. 14. is a Case in Point. He said, that Hale's Opinion accorded with this Judgment; and he likewise approved the Difference taken by Dodderidge in Gilbert and Wittie's Case.

Anonymus.

20. A Parishioner was to be buried in the Chancel, and the Grave made, but the Parson came and filled it up; when the Corps came, the Sexton went to open it again: The Parson came and took the Spade out of the Sexton's Hand, and struck him over the Head that he bled. Snell an Attorney of R. B. restrained the Parson, who fell upon Snell, and after sued him at the Assise. Snell pleaded Sur son Assault, and found for him; afterwards the Parson sued him in the Spiritual Court, where Snell pleads the like Plea, which they refused; whereupon he prayed a Prohibition; none was granted for want of an Affidavit of the Refusal of the Plea, for the Court would not believe they would refuse such a Plea.

Rider *and* Fowles, *in* C. B.

21. IN Trover for a 120 l. on a special Verdict, the Case was, that one Portman was a Trader, and that he stood upon his Privilege of Parliament, as being the King's Servant, and upon that was discharged from an Arrest; and that he suffered himself to be outlawed, having Notice of the Exigent. Then he bound his Son Apprentice to the Defendant, giving 120 l. with him; after that, the Monies were assigned to the Plaintiff by the Commissioners. W. Baldwin pro Quer. made two Points. First, If any Act done by Portman to make him a Bankrupt. Secondly, If the Assignment is good; for the first, by the Statute 21 Jac. a Protection makes One a Bankrupt, other than One protected by Parliament, that is a menial Servant; and if a Trader keeps Shop, and gets himself protected in the Roll of the King's Servants, at mean and inconsiderable Wages; it makes him no menial Servant, as in the Case of Sir Robert Viner, who was the King's Jeweller, and a Trader; and adjudged to have no Privilege, (which the Chief Justice said was adjudged clear otherwise). Secondly, It is not found by the Verdict that he was the King's Servant. Second Point, if a Bankrupt, then if the 120 l. paid to Fowles, after he became a Bankrupt, is assignable by the Statute of 21 Jac. He claims under Portman, after he became a Bankrupt, and it is assigned, as paid, after he became a Bankrupt; and so it is Part of his Estate by 21 Jac. If a Payment be upon a Bond or Mortgage after he became a Bankrupt, yet the Money is assignable, a fortiori a voluntary Payment. He sells Lands after he hath done a Bankruptcy; yet the Lands may be sold by the Commissioners, and the Monies paid; for these Lands may be assigned for his Debts; (per North Chief Justice, that Chancery would interpose to recover the Monies. Vide Stile 288.) A Provision for Wife and Children, is a Provision for himself, and so voluntary.

Maynard Contra.

1. Protection of the King's Servants in Parliament, is not within the Statute; and it is found he was arrested, and delivered by Privilege of Parliament as the King's Ser-

Servant. 2. The putting out an Apprentice by a Bankrupt, is as Necessaries for his Wife and Children; and he likened it to the Case of an Infant, where his Contract for Necessaries binds him, and Education of Youth is necessary, and ought to be encouraged: Per touts Justices, The first Point, being the King's Servant, and so under the Protection of Parliament, excuses Bankruptcy; per North Chief Justice and Windham, The Payment of the 120 l. is not a Provision: Charlton and Levinz dubitaverunt. Adjornatur Term. Pasch. Adjudicatur pro Def.

Duncomb *and Sir* John Walter *in* C. B.

22. IN Debt against Defendants by the Plaintiff, upon Assignment of Commissioners of Bankrupt of a 1000 l. upon the Bankruptcy of one Staly; the Jury find a special Verdict, that one Elizabeth Cook had Money in Staly's Hands; she dies, and her Executors arrest Staly the 6th Day of November, before they had proved her Will; to which Suit Staly put in Bail. Staly paid Sir John Walter 1000 l. the 18th Day of November, and the 20th Day of November, Staly delivered himself up a Prisoner in the King's Bench, and was turned over by a Judge, in Discharge of his Bail; and that the Executors of Elizabeth Cook proved the Will the 18th Day of November: And that if this Payment to Sir John Walter was good, or that the Act of Bankruptcy, which was the Delivery of himself up to Prison, shall have Relation to the Arrest when he found Bail, which was the 6th Day of November, was the Question. Maynard pro Quer.

First, To what Time the Bankruptcy shall have Relation; and he held to the Time of the Arrest.

For the Second, The Arrest was not void, though the Will was not proved.

To the First, he likened it to a Bargain and Sale; when inrolled, it hath Relation to the Delivery, and to Sellinger's Case, 4 H. 7. where an Act of Attainder is repealed; yet he that enters upon the Lands, upon the Title of Attainder, before the Repeal, is a Trespasser after the Repeal. The Statute saith not, paying or compounding within six Months, it is unless he pay or compound within six Months; he took a Difference between

Relation at Common Law and Statute Law; which Charlton denied. Walcot pro Def.

He was not a Bankrupt, when this Money was paid; to be arrested is no Crime, except to procure himself to be arrested; he lay not in Prison upon this Arrest, but got good Bail; per Levinz Justice, the Want of the Probate makes it only an illegal Arrest, though it may be good between the Parties, if proved before the Declaration. Per North Chief Justice, the Act of Bankruptcy shall have Relation to the first Arrest, or else he may get a Creditor to bail him, and then pay him; and so cheat the Rest of his Creditors by this Arrest. Per Windham and Charlton, the Bankruptcy shall have Relation only to the Imprisonment. North, Windham and Charlton held for the Defendant in the second Point. Judgment pro Defendente.

Serjeant Buckby's *Case in* C. B.

23. MEmorandum: That Mr. Osborne by his Will devised his Lands in Norrell, alias Northill, in Com. Bedford, to Elizabeth Osborne in Fee, she being then an Infant, and married to one Hutchenson, a Broker without Temple-Bar; and Serjeant Buckby fearing, that she might levy a Fine during her Infancy; in Michaelmas Term 1680. he entered a Caveat in the King's Silver Office, and the Officer was every Term paid for the Continuance of it; Serjeant Buckby being Heir at Law, and Elizabeth having then no Children; yet in Trinity Term 1681. she levied a Fine; and Serjeant Buckby moved the Court by Mr. Serjeant Walcot, and Serjeant Bigland, to vacate the Fine; and a Rule was granted to bring in the Chirographer, the Clerk of the King's Silver, the Commissioners, and the Man and his Wife; it appeared in the Præcipe and Dedimus, that the Fine was only Norrell, and a Blank, which was presumed was a Rasure for the alias Northill; the Fine was taken before one Sir William Gardiner and John Doe, in the Term-Time in London; and there was an Attachment granted against them; and the Court inspected

ſpected the Wife, and ſhe was not ſeventeen Years of Age; and there were likewiſe Witneſſes produced to prove her Age; and upon the Motion to have the Fine vacated, theſe Precedents were produced; Hill. 3 Jac. Rot. 65. Inter Thomam Cheek Quer. & Georgium Reynell & Etheldredam Uxor' ejus Doforc. de Tenement. in Com. Northamp. and it was wrote in the Margent of the King's Silver, that Intratio hujus Finis vacua eſt per regulam Curiæ, quia probatum fuit per Sacramentum diverſarum perſonarum in Curia hic examinat. quod Etheldred. ux. Geo. Reynell Mil. in fine nominat' eſt infra ætat. vigint. & unius annor. & quod non perveniet ad plenam ætatem ſuam, uſq. viceſimum quintum diem Aug. An. Dom. 1606. Hill. 4 Jac. Rot. 70. Inter Quer. & Robert' Pierpont & Gertrude Ux. ejus Deforc. de terris in Com Derby, &c. Hic Finis vacatur per Regulam Curiæ, quia Gertrude Ux. Rob. Pierpont in Fine nominat. eſt infra ætat. vigint. & unius Annor. ideo per regulam Curiæ vacatur; Prima Proclamatio fuit facta 12°. die Febr. Proclamat. ceſſer. per Mandatum & Ordinem Curiæ, ut patet in Rot. Curiæ.

Paſch. 9 Jac. Rot. 99. Inter Will. Shepherd Quer. & Will. Wilkinſon & Ann. ux. ejuſ. Deforc. de terris in Com. Kent. Finis vacat. per Curiam quia conſtabat Curiæ quod Anna Wilkinſon in Fine iſto nominat. fuit infra ætat. decem & octo Annor. tempore intrationis Finis iſtius, ideo intratio vacat. per Curiam.

In this Caſe it was ordered, that the Fine ſhould be void to Elizabeth, and that ſhe ſhould not ſuffer a Fine till Hill. Term 1685. and that the Exemplification ſhould remain in the Chirographer's Hands.

Robinſon. Mich. 33 Car. 2. Inter Richardum Boyer Quer. & Willielmum Hutchens alias Hutchenſon & Eliz. uxorem ejus Deforc. de tenement. cum pertin' in Norrill & alibi in Com. Bedford. de Fine levat. 28 Nov. ſuper lectionem Regular. 23 & 25 diebus inſtant. Nov. & ſuper audit. conſil. ex utraque parte, & de eo quod ſuper ſeparalibus ſacramentis & certificationibus de ætate prædict' Eliz. in Curia hic product. & inſpectione ejuſdem Eliz.

in eadem Curia, hic ſatis conſtat quod eadem Eliz. tempore cognitionis finis prædict. fuit & adhuc exiſtit infra ætatem vigint. & unius annor. Ideo conſideratum eſt quod Finis prædict' quoad prædict' Eliz. evacuetur, & pro nullo habeatur & teneretur; & quod exemplificatio Finis illius hic in Curia prolat. deliberetur Chirographo hujus Curiæ per ipſum cuſtodiend. & ulterius Ordinatum eſt, quod nullus alius Finis de tenement. prædict. cum pertin. aut de aliqua inde parcell. ex cognitione prædict. Eliz. recipiatur aut intretur per Cleric. Argent. Regis, aut per aliquem alium Officiar. Cleric. ſive Miniſtrum hujus Curiæ, neque aliquid in poſterum fiat pro reception. alicujus talis Finis per prædict. Eliz. cognit. ſive cognoſcend. ante terminum Sti. Hillar. 1685. & Cur. aliter ordinaverit; Quodque fiat Breve Domini Regis de Attachiamento verſ. Will. Gardiner Mil. & Johan. Doe Gen. Commiſſionar. ad capt. finis prædict. & Hen. Ogden Attornat. Quer. juxta ultimam regulam hic inde fact. per Curiam. Exiſtente Serjeant Maynard, & Croke pro Defendente; Mr. Serj. Walcot & Bigland pro Quer. Coates.

Philpot

Philpot *and* Walcot, *in* C. B.

24. ACtion sur Case where the Defendant promised the Plaintiff Marriage; the Jury find the Promise, but that it was not in Writing.

Per Stroud, It is not within the Statute; for the Statute saith upon an Agreement in Consideration of a Marriage, and that is intended of an Agreement for the Marriage Portion; and this is an Agreement of the Marriage it self. Secondly, It is found by the Verdict, that he made an actual Promise.

Bigland. It is within the Words of the Act; for it is upon a Consideration of Marriage, which the Statute requires to be put into Writing. Secondly, It is within the Mischief of the Act.

Per Charlton: If that a Declaration on a Collateral Promise doth not set it forth to be in Writing, it may be demurred to; per Bigland, The Statute of Limitation may be given in Evidence, as well as pleaded; which he affirmed to me he had known Hale to rule, though we all agreed, it was best to plead it. Windham, Charlton and Levinz held it within the Statute; and that it might be demurred to, but it was adjourned; North being absent.

v. Holt *and* Holland, *in* C. B.

25. IN a Quare Impedit, the Question was, if the Plaintiff should have Costs; and it was ruled, if a Quare Impedit by Common Law, no Costs; if by Statute, Costs: And if the Church is full of the Defendant by Institution, then it is a Quare Impedit within the Statute; if not, it is at Common Law. Cook's Entries 508, 509.

Term. Hill.

33 & 34 Car. 2. R. B.

Kingdom *and* Jones; *devant.*

1. THE Suit was between the Wife of Kingdom Administratrix, for the Arrears, scil. 150 l. Quarterly, before the Assignment; and the other Farmers would have it, that she should not recover, for that the Words of the Covenant are, 150 l. is to be paid by Survivors to the Executors, &c. of the Party deceased; but here is no Survivor or Party deceased. The Court here seemed upon the whole Case, to hold that the Arrears could not pass by Assignment, being merely a Chose in Action; but that the Administratrix of Kingdom should recover. Wherefore they ordered the Judgment in C. B. to be reversed, and Judgment to be entered for the Plaintiff, nisi.

Percival *and* Crisp; puis.

2. THE Point in this Case, was, whether or no (the Custom of the City of London giving the Wife a third Part, and the Children another third Part) the Administratrix of the Dead's Part is compellable by 22 & 23 Car. 2. cap. 10. to make Distribution. Treby Recorder argued that she is.

He first said Administrator hath not his Title by Custom, but by Law, that it is a Name of Office, not designatio personæ; that if he dies, the Goods go not to his Executors or Administrators, as those of the Wife, &c. will, who have a Title by Custom; but Administration will be granted de bonis non; if Administrator hath his Title per Custom, then if a Citizen make a Will and no Executor, and devise Legacies, Administrator is not bound to pay them. He says, the Words of the Act are not to prejudice the Custom of the City of London, and would have the Custom to extend but to two Parts; and for the Third, to leave it to the Disposition of the Law. He shewed, how that the third Part of the Citizens Estates (this Custom extending to many Places) was of as great Consideration, as those of many Counties.

'Twas agreed, if a Citizen die, and have neither Wife, nor Child, that 'tis within the Statute; but whether the Custom extends to Disposing of the whole Estate of a Citizen, or but two Parts, and leaves the Rest to the Law, may admit of Dispute; that Administrators were by Statute, which is within Time of Memory; and so the Custom could not extend to them, was over-ruled upon the Reason of Snelling's Case.

Thusfeild *and* Jones, Master *and* Wardens *of the Company of* Waxchandlers.

3. THusfeild and Jones, &c. were cited in the Spiritual Court, by the Names of Baptism and their Sirnames, with the Addition of Master and Wardens of the Company of Waxchandlers; and this was for not paying a Rate set upon the Hall for their Company, for Reparation of their Parish Church; upon this they moved for a Prohibition, and shewed for Cause that they were cited by their Sirnames and Names of Baptism, so sued in their natural Capacity, when it should be in their politick Capacity; but the Court said, there was no other Way of citing them than this; they could not cite the Body Politick; and therefore, unless by this Way, they had no Remedy: And 'twas not like a Distringas at Common Law, by which they may take Lands or Goods of

the Company; but if the Company had neither Land nor Goods, there was no Way to make them appear; but here they said they were cited by their proper Names, but in their politick Capacity; but if they stood out, then they must lie by the Heels in their natural Capacity; and so the Prohibition denied.

Pit *and* Moor.

4. LAnds in the Manor of Grimley, in the County of Worcester, are demisable by Copy for one Life in Possession, and others in Reversion. The Bishop of Worcester, of whom the Manor is holden, demises it to one Pit for Life; and to one Thornborough and two others, after him in Reversion. One Corbet enters, and disseises the Lord of the Manor; and Thornborough, living Anne Pit, surrenders to the Lord; Disseisee enters, Anne Pit dies, Thornborough leases to the Plaintiff; and if this be good, or not, was the Question upon a special Verdict in C. B. and there adjudged for the Plaintiff unâ voce; and after Error was brought in R. B. and Pollexfen for the Plaintiff in Writ of Error argued.

1. That there may be a Disseisor of a Manor; and for that cites Litt. Sect. 587. but he said, that in this Case for the Meanes of their Estate, the Attornment of the Copyholders not requisite; but by holding of Courts, and their resorting to them, and making and taking Surrenders, it will be a sufficient Disseisin. He says it will be admitted, a Disseisor may take a Surrender as an Instrument; and why not in his own Right, the Party surrendering not being disabled to make it. 1 Report 140. 4 Report 24. Disseisor hath as great an Estate, as a Grantee, though not so just; and therefore equal as to taking Surrenders. If Copyholder be not disabled to surrender to the Use of a Stranger, why should he to the Lord's Use? and if he surrender to the Lord's Use, the Estate is merged; by what Reason or Equity then shall it revive contrary to the Party's own Surrender? He put the Case, where Lessee for Years is ousted, and he in Reversion disabled; and Lessee for Years releases to the Disseisor, that the Term is extinct, and that he in Reversion may enter.

Maynard for Defendant in the Writ of Error argued, That the Question was not, whether Thornborough should have it contrary to his own Surrender, but whether it was ever surrendered: he insisted that Anne Pit still continuing in Possession, that as to this Land, Corbet was no Disseisor; for she continuing her Estate, the Reversion upon it continued the same; and then no Surrender can be made, but to him immediately in Remainder or Reversion; and cited the Case between Edys and Knatchlull 41 Eliz. which was Tenant for Years, Remainder for Life, Remainder to a Stranger in Fee; he in Remainder infeoffs Tenants for Years, and makes Livery; and if the Fee passed, was the Question; and resolved it did not; by Way of Feoffment it could not, for that Livery could not work, the Tenant for Years continuing in Possession; by Way of Surrender first of the Estate for Years, it could not, because of the mean Remainder, and by Way of Grant it could not, because there could be no Attornment.

Beneson *and* Strode; *devant.*

5. THIS Term the Court gave Judgment in this Case; and the whole Court held, that the Entry of him in Remainder was good; for by the Attainder of the Copyholder his Estate is forfeited at Common Law, and he a Person disabled to hold it; the Lord cannot hold it against his own Grant, and that therefore he in Remainder shall enter: They held, that the King having pardoned the Copyholder, availed him not, for he could hold nothing he had before the Attainder; and therefore, if a Surrender were made into his Hands (where the Custom is to surrender into the Hands of Copyholders) the Surrender would be ill; they held, that a Presentment in the Court is not necessary, that being only to inform the Lord: They held that if in the third Resolution of Podger's Case, the Estate had been to begin upon a Forfeiture, it would commence presently; and said, that if a Lord having Bona & Catella Felonum makes a Lease for Years; and after makes another Lease to commence after Determination, Forfeiture, &c. of the first; and the Lessee had been attainted of Felony, that here the second Term would

would commence; but if the Lord had not had the Felon's Goods it would not; because that then the first Estate falling to a Stranger, and not extinguishing in the Freehold, would have Continuance. Wherefore, &c. 1 Bulst. 13.

Perry *and* Bowyer.

Jones 196. 6. THIS Term, the Case between Perry and Bowyer was argued by Holt for the Plaintiff, and Saunders for the Defendant; and Holt argued,

That Inrollment is necessary; and where the Law requires Inrollments, that in all Cases it shall relate. Before 27 H. 8. Inrollment was necessary but in two Cases, first of the King, second of Recognizances; in both which Cases there shall be Relation.

If there shall be Relation by Common Law, why not by Act of Parliament? A Recognizance taken before a Judge out of Court, and in Vacation, shall relate; and cited Hob. 195, 222. 2 Inst. 674. 2 And. 160. Afterwards P. 34 Car. 2. they declared their Opinions that Sale by Commissioners, if of Lands, ought to be by Deed enrolled, and is void if otherwise; and that this depends upon the different Penning of the Statute from that of Inrollment; they held likewise, that here shall be no Relation.

Saunders went upon the Words of 13 Eliz. that Commissioners have Power to sell by Deed indented, and inrolled; so that the Inrollment is necessary, being a Part of their Authority, which is not compleat without it; that here needs no Relation from the Inrollment to the Sealing of the Deed, for it shall relate higher, viz. from the Bankrupt's first Becoming a Bankrupt. The Statute says by Deed inrolled, but appoints no Time; so Inrollment may be seven Years after; which if it should relate, would be full of Inconvenience. As to the Case of the King, he says the Interest passeth presently, and that the Laches of the King's Officer shall not hurt him. He says, Judgments, Recognizances, &c. are judicial Acts in Court, and shall relate in Favour of Clerks, who tho' they pass in Term-Time, enter them up in Vacation. He considered whom the Bargainee should be in from; and it seem'd to him he should be in the Post by the Statute.

Bettison

Bettison *and* Elways; puis.

7. BAron and Feme Tenants in Special Tail, of the Provision of the Husband, have Issue; the Baron dies, the Issue levies a Fine to a Stranger; the Feme leases for sixty Years, and dies: The Question was, whether the Estate-tail being barred, but not spent, this Lease for sixty Years shall be good against the Conusee. Wallop argued it would not, for though he admitted it no Discontinuance or Bar within 11 H. 7. yet it was an Alienation within the Intent and Equity of that Statute; he thought it would bind the Issue, if it had been an Estate-tail out of the Statute; he cited 3 Rep. 50. 2 Leon. 168. 2 Car. 692. Jones 60. Br. 27. but took no Difference between a simple Demise by Deed for a hundred Years, and a Demise by Fine sur concessit, with Render for a hundred Years; and said, that neither did the Judges in Crocker and Kelsey's Case, 2 Cr. 692. The Justices said the Resolution of Crocker and Kelsey's Case went very far; and perhaps, if to be adjudged at this Day, it would be contrary. Saunders argued, that it was no Lease within the 11 H. 7. to give any Entry to the Issue in Tail, because neither Bar nor Discontinuance; then he differenced it from a Lease made by Tenant for Life, which is absolutely determined by his Death; but a Lease by Tenant in Tail (as Feme continues, the Fine notwithstanding) is but voidable, and may be made good at the Election of the Issue; which Election his Assignee hath not; and relied mainly upon the Authority of Crocker and Kelsey's Case, 2 Cr. 692. And cited Br. Acceptance, 13, 14. 21 H. 7. 38. 3 Rep. 64.

The

The King *and* Leaver.

8. LEaver had Judgment given against him upon an Indictment of Barretry in the County Palatine of Lancaster, taken before Justices of the Peace, and removed before the Justices ad placita tenend' by Certiorari; and hereupon a Writ of Error brought, which recited a Conviction, &c. before A. and B. Justices of Oyer and Termer, and Gaol-delivery, nec non ad alia, &c. which was holden to be an ill Writ, and the Record not removed; for Justices of Gaol-delivery and Oyer and Terminer cannot hold Plea, but of Indictments taken before themselves, and cannot send mandatory Writs; but the Justices ad placita tenend' infra Comitat' Palat' Lancast' sitting by Patent may, and did: By Virtue whereof the Record was before them in that Capacity, which the Writ of Error mentions not; and therefore ill.

Walborough *and* Saltingstone.

9. PLaintiff declares that he had taken out of R. B. a Latitat ac etiam billæ for 119 l. against one Ware; and that this was delivered to the Defendant, who took Ware; and thereupon the Plaintiff sued an Habeas Corpus, and that Defendant returned that he had taken Ware upon, &c. at the Plaintiff's Suit for 19 l. upon which Ware put in but common Bail, whereby, &c. hereupon a special Verdict was found, how that the Plaintiff 21 Jan. took out a Latitat, &c. Teste 28 November, &c. And if this were the same Writ, and sufficient, &c. holden, that the Finding of the Jury shall not prejudice the Party; and that the Course of the Court being to take out Writs in Vacation, Teste the Term before, that the Judges will take Notice of that: And said, how that if he had pleaded it, as taken out 21 January, Teste the 28 of November, it would have been unquestionably good; and that it should be so now, the Course being known. Judgment pro Quer. nisi.

Ano-

Anonymus.

10. TRespass and false Imprisonment for arresting, and detaining the Plaintiff till he paid 30 l. Defendant pleads that the Town of Newcastle is an antient Town, wherein the Mayor and Aldermen Time immemorial, &c. had a Fair; to which a Court of Pipowders to be held before the Mayor was incident, and that in the said Court, by Reason of a certain Contract in the said Fair by the Plaintiff, with a taliter process. fuit, and so justifies by Reason of Process from the said Court. Exception taken first, for that the Court is said to be holden before the Mayor; and it ought to be before the Steward, unless by Custom, quod concessum fuit. Secondly, for that 'tis said he was charged by Reason of a Contract or Agreement in the same Affair, but doth not say concerning any Thing bought or sold, or arising within the Fair; and it might be for Land or other Matters, and so not triable, quod concessum fuit: Then Exception was taken to the Declaration of the Plaintiff, which was queritur quare cum for pro eo quod; and as to the first Trespass, that they seemed to think ill; but being followed, nec non the Plaintiff imprisonavit, &c. they took nec not to begin a new Complaint, so good enough. And said, they could not distinguish this Case from the Case of the Marshalsea, where they are bound to take Notice whether the Parties be of the Hostle, or not; so hereby they ought to take Notice, whether it arise infra Jurisdictionem Curiæ or not; and here it not appearing that it did, the Officer is punishable.

Freem *and* Dane.

11. PLaintiff brought an Action of the Case, and declared, how that he was seised of three Seats, in such a Part of the Church, belonging to an antient Messuage, and that the Defendant disturbed him, &c. Exception taken, first, for that he shews not that he hath repaired these Seats, held a good Exception; and that he ought as well to shew it in an Action sur Case, as

upon a Prohibition. Secondly, For that he prescribes that he was seised of three Seats appertaining to an House, whereas he ought to say of an House to which the Seats were appertaining; and it was said in this Case, that the Freehold of a Seat may be in one, tho' all the Church besides be in the Parson; because Churches are of Lay Foundation, and the Patron might at first except it; but this shall not be intended, unless specially shewn.

Roe *and* Marshall.

12. COvenant to pay for the better Support and Maintenance of his Wife 200 l. within two Years next after he shall be required, to such Persons as she shall by Deed sealed and delivered in Presence of three Witnesses, assign and appoint. She doth appoint 200 l. to be paid to A. and dies before Notice to the Covenantor; after her Death they give Notice, he pays it not: The Question was, whether this being for her Support and Maintenance, the Notice ought not to be in her Life-time; per Curiam it need not.

Term. Pasch.

34 Car. 2. R. B.

X Herring *and* Brown.

1. UPON a special Verdict the Case was, One seised of Lands in Fee made a Feoffment to the Use of himself for Life, Remainder to another in Tail, &c. with a Power of Revocation by Deed sealed before two Witnesses, or by Will sealed by one Witness. Tenant for Life levies a Fine, and after by Deed declares, that the Use of the Fine is to him and his Heirs; and whether by levying the Fine, the Power of Revocation be not extinguished, so that the Declaration by Deed comes too late, was the main Question. And here in this Case, was a Case between Wixon and Vincent. Trin. 26 Car. 2. R. B. Rot. 960. much insisted on; which was, that A. made a Feoffment to the Use of B. and the Heirs of his Body, with Power to revoke by Deed; and he covenanted to levy a Fine, and after the Fine was levied to other Uses: This was una voce adjudged a Revocation; and yet by the Covenant there was no Revocation, nor the Fine was no Deed; but it was all looked on as one Act; puis.

Bettison *and* Elways; *devant.*

2. THIS Case was argued again this Term by Holt for the Plaintiff, that it is a void Lease, and within the Stat. of H. 7. or void by the Death of the Feme; for he said the Intent of the Statute was to put such Feme into the Condition of Tenant for Life, so that her Acts could not be more prejudicial to them in Reversion, then the Acts of a bare Tenant for Life, &c. and cited the Books ut supra per Wallop. Pollexfen said, that it was not the Design of the Statute to put the Feme into the State of a bare Tenant for Life, but that the Lease was voidable only at the Election of the Issue. He said, that his Lease was not within the Mischief the Statute intended the providing for; because the Issue, if for his Benefit, might make good the Lease by Acceptance; if for his Disadvantage he might avoid it by his Entry, which here he could not; because he had parted with his Estate, and they in Remainder could not, because the Time is not yet come, and it would have been void against them in Remainder before the Statute; and he relied upon the Case of Crocker and Kelly, &c. in Mich. Term last; Ordered Judgment for Defendant, nisi. In this Case the Court said, that no Lease though for 500 Years, created by a Feme Jointress, by Deed is a Forfeiture, because the Heir might avoid it, ut Trevor dixit, quod ego non memini.

Scobell *and* Skelton.

3. IN an Action sur Case, for throwing Dirt, &c. into a Fountain; he declares that he was seised of a Messuage or Tenement, and that he and all, &c. by himself or Servants had fetched Water, &c. Exception taken that Messuage or Tenement is uncertain, and so by himself or Servants, but not allowed; but the Judgment was arrested for not shewing how seised; for unless he was seised in Fee, he could not prescribe. Moved again by Tremain, and the Court held their former Opinion.

Collet *and* Collet.

4. COllet moved for a Prohibition to the Court of —— and suggested that upon the Marriage of her Father and Mother, certain Lands were settled upon them for their Lives, Remainder to the first and second Son in Tail, Remainder to their Daughters in Tail; and how that they had three Daughters, and no Son, and that the Spiritual Court ex officio proceeded against them for an incestuous Marriage, viz. for marrying the Sister of his former Wife, which the Father and Mother confessed; wherefore they in the Spiritual Court were proceeding to a Divorce, whereby the Plaintiff would be bastardised, and so disinherited of her Remainder in Tail, wherefore she came & pro interesse suo prayed a Prohibition; but the Court said, this was not sufficient Matter of Suggestion, for here they held not Plea of the Temporal Inheritance directly, but consequentially; for which if they should be prohibited, they would have nothing left; but the Court ordered them to suggest, that this was a Contrivance between the Father and the Mother to disinherit their Daughters, and so they might bring that Point into Examination: Afterwards it was moved again, and the Court advised them to try whether the Father was ever married to his Wife's Sister, or not, in a feigned Issue; which the Counsel seeming to refuse, they gave them Time to shew Cause; wherefore a Prohibition should not go, till Mich. Term; and all Things to stay in the mean Time. Jones 213.

Watkinson *and* Murgatroy.

5. WAllop moved for a Prohibition to the Consistory at York, where they proceeded against the Uncle for marrying his Brother's Daughter, and insisted that it was out of the Levitical Degrees; and cited the Authority of Episcopius, &c. and urged my Lord Vaughan, that the Temporal Courts in such Cases had sent Prohibitions; but after this was twice moved, the Court denied 2 Jones 191.

nied granting a Prohibition; and said, that it was a Cause of their Conusance; and that if there were Cause, they might sue to the King for a Commission of Delegates.

Graves *and* Maddison.

6. UPON a Marriage Settlement, the Opinion of the Court was desired upon this Clause: It is further agreed, and the true Intent and Meaning of the Parties, is, that the State and Term of forty Years, (which was limited after an especial Tail Male to the Husband and Wife) is limited upon Trust and Confidence, that the said Trustees shall out of the Issues and Profits of the Lands pay; if (no Issue Male living) if one Daughter 5000 l. if two or more 6000 l. to be divided Share and Share alike among the Daughters; and if any of them die, to the surviving. The Husband and Wife have Issue two Daughters, the Wife dies, and then one of the Daughters dies, being seven Years old; the Question was, whether the surviving Daughter should have 5000 l. or 6000. Pollexfen argued, that she should have but 5000 l. for that this Money was to vest in her as a certain Interest, not till after the Death of the Father, (though it was to be paid at the Day of Marriage, or Age of One and twenty Years;) and that in the mean Time it was ambulatory, because the Term was not to commence till after his Death, and the Money was to be raised out of the Issues and Profits of the Land; and he asked, if the Daughter had died, living her Father, and being Twenty-one at her Death, shall it go to her Executors? and the Court told him it should; and said, that where the Father is to pay in such a Settlement at the Day of Marriage or Twenty one Years, that if she attain Twenty-one Years, and does not marry, yet he must pay the Portion, or else the Trustees may go into Chancery, and they will decree them the Estate to raise the Portion. And though it be said, hereby Children will be encouraged to disobey, and marry without Parents Consent; the same Objection may be made of the Sons; but this is the Intention of the Parties, and so by Experience it appears every Day. And

And the Chief Justice remembred the Case of Stowell in Chancery, who was to give, if one Daughter, 10000 l. if two Daughters, 12000 l. if three Daughters 20000 l. he had three Daughters, and one dy'd; and the Question was, if the two shall have 12000 l. or 20000 l. and decreed that they should have 20000 l. And so here in the principal Case they gave their Opinion, scil. Chief Justice Raymond and Dolbin. Jones seemed econtra, that the Daughter should have but 6000 l.

Wedgewood *and* Bayly.

7. WRIT of Error upon a Judgment in C. B. in Trover, where after Verdict one of the Plaintiffs comes and suggests that his Fellow is dead, and that prays he as Survivor may have Judgment, and hadit there; but the Court here, scil. Pemberton Chief Justice, Jones, Raymond, and Dolbin were of Opinion that the Judgment should be reversed mainly upon the Reason in Read and Redman's Case, 10 Rep. 134. Hutton 37. Hob. 287. 2 Cr. 19. were cited; and the Cases in 3 Cr. 145, 574, 625. and 2 Cr. 556. answered, 2 Bulst. 262. not allowed; but thought by Pemberton that Cook's Opinion there, was mistaken by the Reporter, and so it was reversed. Raym. 463.

Anonymus.

8. IN Covenant Plaintiff declares, that whereas he was by Agreement to have seven Parts of the Grains, in eight Parts to be divided, which Defendant being a Brewer should make, for so long Time, shewing it, that the Defendant had mixed Hops among his Malt, and assigns this for Breach of Covenant, (the Plaintiff buying the Grains to give warm to his Cows, which being mixed with Hops they would not eat:) It was moved twice in Arrest of Judgment, that Covenant did not lie in this Case, but Action sur Case; for that he performed his Covenant, and delivered him the Grains, as they were when they became Grains; but the Court held it a Breach of

of Covenant, and said, that this Delivery was not according to the Intention of the Parties, and the Manner of the Covenant. And said, if one covenant to leave all the Timber upon the Ground at the Expiration of a Term, and after cut it down, 'tis a Breach of Covenant, though he carry it not away; but if a Stranger cut it down, 'tis no Breach of Covenant. So if Covenant be to deliver an Horse, and the Defendant poison and then deliver him, Covenant lies.

Lord Shaftesbury *and* Craddock.

9. Action of Scandalum Magnatum for Words in London, and the Venire was laid there by my Lord Shaftesbury; upon which the Defendant moved, that by Reason of the great Interest of my Lord in London, he could not have an indifferent Trial; and hereupon filed several Affidavits, that my Lord's Counsel might have Time to answer them; and at the Day appointed, these Affidavits were read, and they were the Affidavits of several Persons of Credit, who swore they believed by Reason of my Lord, &c. there could not be an indifferent Trial; whereupon after Counsel had very much laboured the Matter on both Sides, the Court declared that the Laying of the Venire in transitory Actions was discretionary; and upon Precedents brought by Serjeant Jefferies, as Lord Salisbury's Case in Hale's Time, &c. where Words were laid by my Lord in one County; yet the Court altered it to another, which they likewise did here; ruled that my Lord might have his Election to lay it in any other County in England; but not in London or Middlesex; puis Lord Shaftesbury and Graham.

Cole *and* Ireland.

10. THIS Case having been often argued, was now argued by Pollexfen for the Plaintiff, and Saunders for the Defendant: And the Question was no more than this, whether after the Statute of 2 E. 3. 12. and 14 E. 3. 9. the King might lease Hundreds for Life or Years, or sever them from the Counties, which were not out of the Crown, in Fee, at the Time of those Statutes. And the Court after great Deliberation were of Opinion, that by those Acts, Hundreds are annexed to the Counties, and that Letters Patent of them afterwards have been, and are void; wherefore they gave Judgment for the Plaintiff against Ireland the Patentee. According to the Opinion of Coke, 1 Roll 119. 4 Inst. 267. and according to a Resolution of the Exchequer 19 June 1675. in the Case of the same Ireland and Buckbery. Jones. Pollexfen. Raymond.

Percival *and* Crisp; *devant.*

11. THIS Case was argued by Pollexfen for the Plaintiff, and Holt for the Defendant. And the Recorder put this Case, Suppose one dies, having an Estate of 900 l. the Wife hath 300 l. if three Children they have 100 l. a-piece, and then she shall have the other 300 l. in her own Right, as Administratrix, which is unreasonable: In this Case 'twas holden, the Heir shall come in for his Devidend, though Lands descend; for a Descent is no Advancement, and he need not put them in Hotchpot; adjornatur: It was adjudged (as this Case was) for the Plaintiff, for 'twas admitted upon Pleading, that the Custom of London for dividing intestates Estates, was otherwise than by that Statute; but whether in a like Case otherwise pleaded they would have given such Judgment, Quære, though the Court said no such Thing; but afterwards Pemberton and Jones said, that they gave their Judgment upon the Merits of the Cause, by Reason of the Proviso, and not for Mis-pleading, which might have been amended. Decreed afterwards in Chancery, that the Administrator's Part was within the Jones.

Custom, and not liable to a Distribution upon the Statute; and they relied upon this Opinion in R. B. Trin. 35 Car. 2. a Prohibition was granted; where in a like Case they sued in the Spiritual Court for a Distribution. But now see the Stat. of 1 Jac. 2.

Clayton *and* Gillam.

12. TRespass for digging up Posts, breaking his Close, and carrying away the Posts, &c. continuand' after a Verdict, that Continuand' for carrying away is ill; but being after a Verdict, the Court said that it shall be referred to that Part of the Trespass, that may have Continuance; but if it were upon a Demurrer, it would be otherwise. See the Case of Letchford and Elliot. Mich. 16 Car. 2. R. B. which was for Throwings, Logs, and other Trespasses continuando. Sid. 224, 319. 1 Vent. 363. Jones 194.

Nash *and* Ashton.

Jones 195. 13. DEBT upon an Obligation for Performance of Covenants in an Indenture, wherein two Husbands being seised in Right of their Wives as Coparceners, they and their Wives make a Feoffment, and covenant that they are able and may grant the Lands; and covenant to make further Assurance, if requested within seven Years. The Defendant's Wife was within Age at the Time of the Feoffment, and dies within seven Years, leaving Issue a Son, (but not found that she was at Age at the Time of her Death or not). First it was assigned for Breach that the Wife dying, and leaving a Son an Infant, here is an Impossibility of further Assurance within seven Years, so a Breach; but the Court did not allow of this, for if she was above 21 at the Time of her Death, then they took it to be no Breach. Second Breach assigned was, that they were not able, nor could grant, &c. at the Time, nor any one of them (as the Words were, they or some one of them) could make a Feoffment, for the Wives were within Age; therefore they could not; and the Husbands could not grant in Fee, being seised but in Right of their Wives; which the Court agreed.

Anonymus.

14. THE Honor of Pontfract is within the County of York, but holden of the Dutchy of Lancaster. J. S. claims to execute Process within the Town of Pontfract, and brought his English Bill in the Chancery Court of Lancaster, against the late Sheriff of York and his Bailiff, to account for Fees received in the Town of Pontfract, for executing Process within the Town of Pontfract. Upon this Pollexfen moved for a Prohibition, First, That this is suable at Law, and here is no Matter of Equity. Secondly, For that the Town is out of the County Palatine's Jurisdiction, and the Sheriff, &c. live out of it; so not suable there; whereupon the Court ordered that Cause be shewn, wherefore the Prohibition should not go.

Lord Shaftesbury *and* Grayham.

15. LORD Shaftesbury brought Action of Conspiracy against Grayham, for conspiring to take away his Life, perswading one Wilkinson to swear against him a Design of taking away the King's Life, and subvert the Government, &c. Whereupon Grayham swore that if any such Conspiracy was, it was in the County of Surry, and not in London; and two of the Witnesses swore that they durst not go into London to give Evidence, having been barbarously used in the late Indictment at the Old Baily, &c. And another swore that Grayham the Defendant is a Solicitor in the Quo Warranto against the City of London, &c. Five others swore prout as in the Case of Cradock; the Counsel of the Lord Shaftesbury moved, that this Action was local, and founded upon the preferring of the Indictment, which was in Middlesex; and that therefore as in all local Actions, the Court could not remove it, &c.

Pemberton said, that the Rule which governs them is, that there be equal Trials, and that therefore, though in Debt upon a Bond upon the Common Affidavit, they

alter not the Venue; yet if Potency, or any other reasonable Cause be sworn to them, they do alter it; nay in such Cases which are merely local, and the Venire cannot be altered, they will upon good Reason make them try it upon a feigned Action, (if no Consent, they will grant Imparlance;) and Dolbin remembred the Case of Lord Gerrard of Bromley, and Spencer in the Exchequer, when Hale was Chief Baron; who upon Affidavit that Lord Gerrard and his Ancestors had lived long in Lancashire, and kept great Hospitality, and bid every Body welcome, &c. And that Spencer was a Southern Gentleman, and lately come into Lancashire: Hale did not suffer them to proceed upon their Ejectment in Lancashire, but made them try it in five feigned Actions by a Jury of Hartfordshire. Pemberton said further, that this Action is in it self transitory, being but in Nature of an Action upon the Case; that the Conspiracy was the Cause of Action, and that the Preferring the Indictment but in Aggravation of Damages, and not actionable without the Conspiracy preceding; that being transitory, they might alter it in Case of a Peer, as well as in others; and that it was not like Debt upon a Record which is local, and they cannot alter it; but if one give a Record in Evidence, 'tis not local. They allowed the Rule of Bulwer's Case, that where Cause of Action arises in two Counties, Plaintiff hath Election to lay it in which he will; that is, it shall not be Error, let him lay it in which he will; but that shall not preclude the Court; but for Cause in some Cases they may alter it. The Court una voce altered it to Surry, giving him Leave for Reason shewn, to lay it in any other County. Sid. 185.

The

The King *and* Ripley.

16. SIR Francis Withins moved for a Melius inquirendum upon an Inquest of felo de se, for that he was not compos, &c. yet found felo de se; but that did not sufficiently appear: Then they moved, that the Lord of the Manor used Art in obtaining the Verdict; whereupon the Court gave this Direction, that Administration should be taken out, and the Administrators come into Court, and pray a Certiorari; and upon the Return shew, that they are grieved by it, and so traverse the Inquisition before the Coroner; for they held that it might be traversed, and so of Presentments in Leets. Jones 198.

Dr. Owen *and Dr.* Stainoe.

17. DR. Owen moved for a Mandamus to be admitted a Prebendary in the Church of St. David's, and set forth a Custom that they used to chuse a Supernumerary (all the Places being full), who upon the Death of the next Prebendary is admitted; and says, that he was chose a Supernumerary in the Year 1658. and that A. B. died, and (that Dr. Stainoe was admitted) and prays a Mandamus that he might be admitted; but the Court would grant none, but held the Custom to be void and foolish, for that there cannot be an Election but into a void Place; ('tis true in many Places they do chuse a Person, and so it may be an Election inceptive), who afterwards they admit upon a Death; but this binds them not so, but that upon the Person's Altering his Manners, &c. they may elect and admit another, especially where the Electors are the Patrons, and the Persons to admit. Jones 199.

Col.

Col. Birch *and* Lingen.

18. DEBT upon a Bond, and a Non est factum pleaded; and hereupon a Venire facias to cause the Parties to come before his Highness the Lord Protector in the Upper Bench Westminster blank Day, & idem dies given to the other Party, they come above twenty Years after, and move the Court it may be amended, and say it was a Judgment but of Trin. Term last; and the Court made a Rule, that it be amended. If this had been after the Oxford Act, no Question tis amendable; but whether amendable before, is the Question; and these Books were cited, that it was not amendable 3 Cr. 320, 1 Cr. 236. 3 Cr. 489, 553, 619. 2 Cr. 211, 325, 529. Moor 710. Stile 339. Pemberton Chief Justice seemed to think it amendable, and to be but the Default of the Clerk, and so it may be holpen by the Statute of H. 6. But Jones and Dolbin took it to be the Award of the Court, and not the Default of the Clerk; and said, that it did not appear, that any Day was given, or a Day out of Term; but if the Court had awarded Die veneris post, &c. and the Clerk had entered Die Quereris, and so an insensible Day, it had been amendable. Dolbin and Jones seemed to think that in this Case, it being in the same Term, though it were not amendable, and so Error, yet they may alter it. Chief Justice doubted, if it were after Judgment entered upon Record; but Dolbin cited a Case where 'twas done after Part of the Judgment executed; Moor 186. Sid. 104. 'Twas holden by the greater Opinion, that this was not amendable by the Clerk, without Order of the Court; but if done by him (if according to Law) they could not alter it, but they could punish him.

The

The King *and* Willmore.

19. IN an Information against Willmore for spiriting a Boy, and carrying him into Jamaica. Pemberton Chief Justice declared the Law to be against him; it not being lawful to take a Child under Age, though he pretend to have no Friend, &c. and carry him away; for that the Parish might have bound him out, and he may have a Master; if not, he ought to be bound by a Justice of the Peace, and for a reasonable Time. Vide Whitlock's Mem. 140. and Plad. de M. Bignion. 9 Pleydoir 232, 233.

Term.

Term. Trin.

34 Car. 2. R. B.

Warren *and* Verdun.

Jones. 1. WARREN brought an Appeal against Verdun, and prayed to do it by Attorney; and a Warrant of Attorney being produced, the Court demanded them to prove it; whereupon the Plaintiff was called and examined, if she made A. B. her Attorney; and upon her saying so, it was enough; and then the Counsel for the Plaintiff recited the Appeal, and then the Counsel for the Defendant pleaded, and joined Issue; and afterwards the Secondary arraigned the Defendant, who held up his Hand, and pleaded Not guilty.

Foot *against* Rastall.

Raym. 472. 2. PLaintiff declared in an Action of Trover for certain Goods; Defendant pleads in Bar, that the Plaintiff had brought Trespass vi & armis for the same Goods against the Defendant; and that the Defendant had a Verdict, and Judgment, and avers it to be the same Cause of Action, &c. Judgment si actionem predictam manutenere debet; whereupon the Plaintiff demurs. Maynard for the Plaintiff said, that where the Party being barred in one Action, shall be barred in another, is intended in an Action of the same Concernment, as a Bar to

 one

one Trespass is a Bar in another, for the same Taking; but a Bar in Trespass is not a Bar in Detinue; or a Bar in Trover is not a Bar in Account. An Infant delivers Goods with his own Hands, given by him to another, if he brings Trespass he will be barred; but he may afterwards bring Trover, and shall not; so if I deliver a Bag of Gold to J. S. and after bring Trespass, and am barred, shall I not bring Trover, or shall I be without my Remedy for my Money. And Maynard said that the Plea was ill in Form, the Defendant concluding Judgment Si actio, &c. whereas it being an Estoppel, he ought to have relied upon the Record of the Estoppel; but the Court said as to that the Conclusion was well enough, it referred them to the Judgment of the Court upon the whole Plea Si actionem predict'.

Holt on the other Side cited Hudson's Case in 4 Rep. and Noy 58. but the Court said that in a Mayhem a Trespass was necessarily supposed, not so of a Trespass in Trover, for that Trover would lie where Trespass would not. And Pemberton said there would be a Difference, where a Recovery in a Trespass was pleaded in Bar; for that it shall be intended, the Party was recompenced, and where a Bar in Trespass is pleaded in Bar: Put of till next Term; puis.

t Elliot *and* Besey.

3. ERror upon a Judgment in C. B. in Trespass and false Imprisonment; wherein the Plaintiff declared, &c. the Defendant pleaded that he was a Gaoler of the Liberty, &c. and that A. B. Bailiff of the Liberty, took the Plaintiff by Virtue of a Warrant, &c. and delivered him to the Defendant, and that he as Gaoler took and detained him, quæ est eadem, &c. Plaintiff replies, that he detained him, &c. absque hoc, that he took him within the Liberty; whereupon the Defendant demurs, and in C. B. adjudged against him; whereupon Error was brought, and Saunders for the Plaintiff in Error said, the Case is this, the Defendant is Keeper of a Gaol within a Liberty, the Bailiff of the Liberty arrests one out of the Liberty, and brings him into it, and delivers him unto the Gaoler who receives him, knowing Jones 214. Raym. 467.

nothing of the Arrest without the Liberty; this shall not be false Imprisonment in the Gaoler, for he was not Party to the Wrong, or privy to any Covin, and the Law shall never punish one not guilty of a wrongful Act, or Intent; therefore, though it was false Imprisonment in the Bailiff, in the Gaoler 'twas not: One may be guilty of false Imprisonment, and another not, though he detain the Person arrested, as if one takes a Man in a foreign County, and bring him to the Sheriff, who hath a Writ against him, and the Sheriff takes him; this is no false Imprisonment in the Sheriff. A Constable arrests one without Cause, who resists; the Constable calls A. to aid him, who doth so: A. is not punishable, because he did it in Assistance of a known Officer, and might have been punishable if he had refused it; besides, though he was arrested out of the Liberty, yet he was lawfully in Execution, when they brought him unto the Liberty; and if they had suffered him to depart, it had been an Escape; and if the Gaoler had refused him, it had been an Escape; then to punish the Gaoler if he refuses him, for an Escape, and for false Imprisonment if he receives him, is unreasonable. And though their main Reason in C. B. was, for that the Bailiff of a Liberty, and the Gaoler were but one Officer, yet 'tis plain that is a Mistake, as was said here by the Court; and they said that in this Case the Gaoler should be punished, for doing but his Duty, and yet be without any Remedy; 'twas said by the Court, that in this Case, though Notice had been given to the Gaoler, yet 'twere not material: Upon this the Court pronounced their Reversal, nisi.

Maynard on the other Side said, the Day following, That the Declaration was for false Imprisonment quousque finem, &c. and that as to the Quousque, the Defendant had not answered, and therefore the Judgment should be affirmed; and cited 19 H. 6. 35. and 1 Roll 265. and whereas he would have it, that if the Bailiff had not Authority to take him, the Gaoler had not to receive him, &c. The Court said, that the Gaoler was here a distinct Officer, from the Bailiff or Steward; and where he said the Gaoler may have Action sur Case against Bailiff, the Court doubted it; so they did, when he said, if the Gaoler keep one imprisoned for not paying unreasonable Fees, that now the Imprisonment becomes false

ab initio. And Maynard cited this Case in C. B. One brought Action sur Debt upon a Bond, in Evil Court, and laid it infra Jurisdictionem: The Plaintiff had Verdict, Judgment, and Execution, and the Defendant taken in Execution, and after escaped. In Debt upon this Escape against the Gaoler, he pleaded that the Bond was not sealed, &c. infra Jurisdictionem, &c. and Judgment for the Defendant: The Court of King's Bench seemed not to allow one to except to a Jurisdiction, he hath so long acknowledged after Execution executed; but yet Quære, for Roll, Court 545. hath a Case so adjudged.

James *and* Trollop.

4. ERror in a Prohibition; wherein Suggestion was, that the Prior of, &c. was seised of a Portion of Tithes in, &c. and of the Manor of &c. simul & semel; and that in the Reign of H. 1. he granted the Manor to W. Fitz. Herbert in these Words, Dedit W. Filio Herberti Norburiam in feodo; and afterwards, pro decimis Dominii & duabus carucatis terræ, he should pay to the Prior 5 s. per Ann. and that the Family of the Fitz Herberts had ever since held the Lordship discharged of Tithes, paying 5 s. per Ann. to the Prior and his Successors until, &c. and since to the King, &c. Pollexfen said, that it is not shewn that the Land whereof the Parson demands Tithes, was Parcel of the Demesne of the Manor: That this is a Deed before Time of Memory, and therefore not pleadable, having not been allowed in Eyre, nor can be good by Usage in Pais; and for this cited Roll, Prescription 268. 4, 5. and 9 Rep. 28. That it cannot be a Modus, because it was not given in Satisfaction to him, that should have had the Tithes; and for this cited Roll, Dism 649. he said this Case contradicts not Piggot and Herns Case. Saunders on the other Side said, that here was sufficient shewn for a Prohibition, for that 'tis shewn that the Prior was seised of the Manor, and of all the Tithes, &c. and that the Close where, is Parcel of the Manor, and was granted, as to Non-allowance in Eyre: He said, that was only intended of Grants of Franchises and Liberties by the King, not of private Deeds for Inheritances. As to its not appearing to be Part of the Demesne, the

Court said, that then the Lord might have enfeoffed another to hold of himself, and so it might have been Part of the Demesne, when the Prior granted it, and be afterwards granted and held of the Manor; and as to the Modus not being good, because not paid to the Parson, the Court said it might be well enough, paid as a Modus to one who hath a Portion of Tithes; and that then he hath quid pro quo. Cur. advisare vult; puis.

The King, *and the Lord* Stafford; puis.

5. AN Information was brought against the Lord Stafford for converting Wood Land into Arable and Pasture: Exception taken, for that it is not shewn in the Information that the Land was set apart, and used for Wood Land according to the Words of 35 H. 8. 17. but not allowed, being said boscos, &c. and said, that for cutting down of Timber, which grows sparsim, and turning it into Arable, no Information upon this Statute lies: Moved to quash it; but the Court said they would not, it being an Information.

Herring *and* Brown; *devant, and puis.*

6. THIS Case was argued again this Term, and Williams for the Plaintiff observed, First, That Powers of Revocation are taken favourably. Secondly, that though there be no Word of Revocation, yet if a subsequent Estate be limited, which is inconsistent with the former, that the Law shall adjudge it a Revocation, that the Case is the stronger; for that the Use is declared to be, to the Use of Sir J. W. and his Heirs, and to no other Use or Intent. That the Statute of 27 El. makes a Deed with Power of Revocation, as a fraudulent Deed: That as this Conveyance was voluntary, so 'twas to disinherit the Heir at Law. He said, that arguing that the Fine was an Extinguishment of the Power, and that then it could not be revived, is fallacious, being à benè conjunctis ad male divisa: That this Fine was the Means J. W. intended to execute the Power of Revocation by, then for the Court to make that destroy the Power,

Power, would be a hard Construction. He said, that the Fine was levied in Trin. Term. and the Declaration of Uses, within five Days after, which shews the Intent of the Parties; and that therefore it would be as one Conveyance: And said, that it would be of ill Consequence to adjudge it otherwise, and to the Shaking of many Men's Inheritances; that nothing was more common than to declare the Uses after; that it was the Intent and Agreement of the Parties before, that the Court was to regard, which would be good, though never put in Writing after, which was done only for the Sake of Posterity. He cited Hob. 312. Downam's Case, 9 Rep. and as reported by And. 2 Rep. 75. and the Case of Wixon and Garret 26. Car. 2. Trin. 960. he allowed Albany and Digg's Case, 1 Rep.

Saunders said, the Case was, J. W. and R. C. were Tenants in Common in Fee of, &c. J. W. covenants in 1640. to stand seised to the Use of himself for Life, with divers Remainders over, the last Remainder to the right Heirs of M. W. afterwards in 1655. J. W. and R. C. levy a Fine of, &c. which by the Verdict is found to be to the Intent to make Partitions; and likewise to be to the Use of J. W. in Fee, and afterwards by Deed; they declare the Use of the Fine to be to J. W. and his Heirs. And whether by this Fine the old Power of Revocation be not extinguished, so that the Declaration comes too late, is the general Question between the Daughter of M. W. and J. W. Son and Heir of E. W. &c.

He said, there was a Time, when there was no Declaration of Uses, and that then the Fine was a Forfeiture of the Estate of J. W. which gave them in Remainder an Interest, and Right to enter, and that then the Fine coming after would not be good; for that 'tis said in 9 Rep. 11. that such subsequent Declaration would be good, when no other certain and compleat Declaration, or Limitation of any other Use, either at the Time, or before the Recovery is made, or Interest mean be vested; which says he, is pregnant, that if an Interest mean (as here) be vested, it will not be good; and hereupon he differenced this Case from that of Wixon and Garret, that being a Declaration before the Fine, and this after. He said, that in this Case, if they might declare Uses, after the

the Fine, and that this Declaration should relate, by the same Reason that they might do it six Days after a Fine, they might do it six Years, which he said could not be, for that the Law suffers not a Relation to destroy the Estate of a third Person, and would not especially a Relation that is indefinite; and that he took to be the Reason of their Judgment the last Term, in the Case between Perry and Bowyer; devant.

Kaines *and Sir* Robert Knightly.

7. THE Case upon Evidence was, A Policy of Assurance was drawn from Archangel to Legorn, and Assumpsit being brought upon it, the Defendant said, that the Agreement before the Subscription was, that the Adventure should begin, but from the Downs; but this Agreement was not put into Writing. This Policy is but a mere parol Agreement, and so may be altered or discharged by Agreement by Parol; but without it be put in Writing, it shall be taken that the Policy speaks the Minds of the Parties; for Policies are Things well known, and go as far as Trade goes; and to suffer them to be defeated by Agreements not appearing, is to lessen their Credit, and to make them of no Value, which yet are countenanced by two several Acts of Parliament. That the Party may as well say, he is to have ten Guineas Premium, though the Policy says but three; as to say he assured but from such a Place, scil. the Downs, when the Policy says it was from Archangel. The Custom of Merchants ought to be proved by those that have had frequent Experience, and have known Cases so ruled. 'Twas allowed, that if a Ship was laden at Aleppo, and come to Messina, that she may be insured; the Adventure is to begin from Messina; but then it must be so express'd, nay it need not be express'd that she was laden at Aleppo, (though the Opinion of some Merchants was so) as Pemberton Chief Justice said; but if the Insurance was of Goods laden at Aleppo, and they were indeed laden at Messina, it might make a Difference. Pemberton said, that Policies were sacred Things, and that a Merchant should no more be allowed to go from what he had subscribed in them, then he that subscribes a

Bill of Exchange, payable at such a Day, shall be allowed to go from it, and say it was agreed to be upon a Condition, &c. when it may be that the Bill had been negotiated; for though neither of them are Specialties, yet they are of great Credit, and much for the Support, Conveniency, and Advantage of Trade; and the Jury found contrary to the Direction of the Court: And afterwards in Mich. Term. there was another Trial at Bar, and a Verdict according to Direction for the Plaintiff. Afterwards an Action upon the Case was brought, for telling him that the Ship was in the Downs, when in Truth she was not, &c.

Bolton *and* Throgmorton.

8. THE Plaintiff declared in Trespass, for taking and breaking so many Dozen of Spectacles, &c. the Defendant pleads that the City of London is an antient City, that therein is and hath been an antient Custom, That if any make and expose to Sale ill and unserviceable Goods, that the chief Officers of the Company have used to seise them, and carry them to the Guild-Hall, and empanel a Jury; and if they find them ill and unserviceable, to break them, and shew that the Plaintiff is one of the Company of Spectacle Makers, and that the Defendants are Master-Traders, and chief Officers of the Company; and that the Goods made by the Plaintiff, and taken ut supra, were unserviceable.

Pollexfen excepted, First, 'Tis pleaded an antient Custom Time out of Mind, &c. but not shewn that they have been a Company Time out of Mind. Secondly, He pleads that the Master and Wardens have used to seise, &c. but shews not who is Master and who are Wardens, as they ought; as in Case of a Dean and Chapter, for 'tis traversable. Thirdly, The Custom not good, for there 'tis laid that the Goods are to be carried to Guild-Hall, and a Jury impanelled, &c. but no Notice given to the Party; and that it is against Reason to condemn the Party's Goods, and not give him Notice, and hear him. To which Saunders answered, First, That the Company do not prescribe Time out of Mind; but 'tis laid by Way of Custom in the City, that it doth not appear, but

but they have been a Company Time out of Mind: That formerly the Apothecaries were Part of the Grocers Company; and in the Time of King James they were erected into a Corporation. That antiently the head Officers of the Grocers Company could search, and if they found any ill Drugs, they threw them away; but now the head Officers of the Apothecaries Company did and might do it, (which was granted). Secondly, he said the Pleading was, that the head Officers might do it, and that was to be traversed, and not that the Master and Wardens, &c. Thirdly, That the Custom was good enough, though the Party had no Notice, for 'twas but an Enquest of Office by which the Party is not concluded, but may bring his Action if his Goods were merchandizable: Upon the Whole, the Court took the Custom to be good, and reasonable; and the Judgment was for the Defendant, nisi.

My Lord of Danby's *Case.*

9. THE Earl of Danby having been twice before in Court, upon his Habeas Corpus, came again this Term, and made a very long Harangue; but the Court would not bail him, his Case being the same with my Lord Stafford's and the Earl of Tyrone's, scil. he was committed by the Lords House, and there was an Impeachment by the Commons pending in the Lords House against him; but it was taken clearly by the Court, that where the Party is committed by an Order of the Lords House, as in Pritchard's Case, remembred by Raymond Justice, 17 Car. 2. that upon a Prorogation he may be bailed: And so Pemberton Chief Justice said 'twas his Case, he was committed by the Commons; he said the King was willing to bail him, and so were the Lords; but he was fain to lie, till the King prorogued the Parliament; and then he came out, and he said, that if one be detained after a Prorogation, an Action of false Imprisonment lies; moreover 'twas said, that no Man could come into that Court and demand to be bailed de jure in Case of High Treason; nay that in Murder, sometimes they take Bail, and sometimes refuse it.

Term.

Term. Mich.

34 Car. 2. R. B.

Foot *and* Rastall; *devant.*

1. THIS Case was argued again by Saunders for the Plaintiff, and Pollexfen for the Defendant. Raym. 472.

And Saunders said, that a Recovery in Trespass is a Bar in Detinue, Account, or Trover, for the Plaintiff hath Damages given to the Value of the Thing taken, and thereby the Property is gone; but if Damages are given, not for the Value, but for a collateral Respect, as for misusing, &c. there Bar in Trespass is no Bar in Trover; and for this he cited 1 Cr. 35. but in this Case the Jury find for the Defendant. And so no Property is altered, for the Party may, notwithstanding he is barred in the Action, seise the Goods if he can come at them, quod fuit concessum per totam Cur. as a Release of all Actions doth not hinder the Party from seising the Goods, if he can have them; and he cited 3 Cr. 667, 668.

Pollexfen argued for the Defendant, and made two Questions. First, If Trespass had been brought, if it had not been a Bar? and he took it, that they of the other Side could not deny but it was. Secondly, If it be a Bar in Trespass, why it should not in Trover? for he said that Trespass and Trover are of like Nature, and considered the Form of the Counts in both Actions; he cited Br. Action sur Case 110, 12 E. 4. 13. Litt. Sect. 71. 1 Inst. 57. 6 Rep. 7. where 'tis resolved, That a Bar

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in any Action Real or Personal, by Judgment upon Demurrer, Verdict, or Confession, is a Bar to that Action, or any Action of like Nature for ever; which the Court held to be good Law: But Chief Justice Pemberton said, it was to be understood, when it doth appear judicially to the Court, that the Evidence in one Action would maintain the other; otherwise he said, that the Court shall intend, that he hath mistaken his Action. Pollexfen cited the Case between Turbervill and Savage in C. B. Turbervill brought Trespass of Assault and Battery in R. B. Defendant pleads Sur son assault demesn, and found for the Plaintiff; and then the Defendant brought Trespass of Assault and Battery against Plaintiff in C. B. and Plaintiff in R. B. pleaded this Verdict and Judgment in Bar, and the Court would not suffer this Action to proceed; but upon the whole Matter, the Court was of Opinion, that it was no Bar in the principal Case; for the Property of the Plaintiff is not barred by Judgment for the Defendant, but that he may seise them if he can happe them: Then the Property not being barred, and he demanding them of the Defendant, and he denying them, this is a Conversion; for though a Denial is not such a Conversion, as the Court will judge a Conversion, yet 'tis such a Conversion, as the Jury always judges a Conversion; and the Court directs them so to do. And it not appearing here that the Evidence in Trespass would maintain the Trover, or vice versâ, the Court shall intend that the Party hath only mistaken his Action, which finally to bar, would be hard: Wherefore, &c. Judgment, nisi.

Saunders in this Case, cited a Case; That if there be two Obligees, and Debt is brought against one, and he plead non est factum, and found for the Defendant, an Action may be brought against the other; but if he plead Condition performed, and found for him, 'tis otherwise.

Hughes

Hughes *and* Cornelius.

2. THE Case between Hughes and Cornelius was, a Ship was Dutch built, and after made an English Ship, the Master was Dutch, some of the Seamen English, and two Dutch: There being War between France and Holland, the French seise the Ship, as a Dutch Ship, and condemn her as a Dutch Ship in the Court of Admiralty in France; she is there sold, and after coming into England, the first Owner seises her, and the other brings Trover, and a special Verdict was found; but the Court would not suffer it to be argued, but ordered Judgment to be entered for the Plaintiff; for they said, that Sentences in Courts of Admiralty ought to bind generally according to Jus Gentium; and that if we did not observe the Sentences given abroad, they would not observe Ours, which would be a general Inconvenience; and if the Merchant in this Case had received Wrong, he ought to apply to the Admiralty and Council, this being a Matter of Government; and that the King if he saw Cause would send to his Ambassador Leiger in France, who would take Care that Right should be done; and that if Right be not done, then the King would grant Letters of Marque and Reprisal; and in this Case they remembred Cottington's Case. Raym. 473.

Western *and* Wildy; puis.

3. A Ship was to sail, whither the East-India Company should order. A. lent upon Bottomry 500 l. to be paid if the Ship went to Bantam, or else to China or Formosa, and returned thence to London within 20 Months 520 l. if ut supra, and returned within 24 Months 600 l. and if she did not return within 36 Months, and it was not proved that she was cast away, then to be paid 710 l. the Ship went from London to Bantam, but returned not directly from thence to London, but went to Surat: She returned not within 20 Months, or 24 Months, but was cast away within 36 Months; and for not paying 710 l. Action was brought upon the Bond,

being for Performance of this Agreement. Pemberton in this Case demanded of the Counsel, what they would require, for they could not have 520 l. because the Ship returned not within 20 Months, nor 600 l. because she returned not within 24 Months; neither could they demand 710 l. because she was cast away within 36 Months; and also it might be the Intention of the Parties, that she should be cast away in her Voyage from London to Bantam, or China or Formosa, and so back, or else the Money to be paid; yet according to this Agreement, they took the Deviation not material.

Smith *and Sir* William Langham.

4. SMITH qui tam, &c. against Sir William Langham for not convicting several Persons for being at a Conventicle; they set forth the Statute, &c. and that Twenty and more of the Age of Sixteen, were at a Conventicle; and that the Plaintiff and J. S. came to Sir William Langham, and brought the Names of eight of them, who were present at the Conventicle, viz. A. B. C. &c. and desired Warrants for apprehending them, &c. and Sir William Langham refused, &c. Pollexfen took three Exceptions, First, To the pleading of the Statute, which was over-ruled. Secondly, For that it was not shewn that the eight Persons named, were above sixteen Years of Age, and saying there were twenty, and more, above the Age of Sixteen; there may be so, and yet these Eight may be under; but the Court seemed to hold, that when they say there were Twenty, and more, of the Age of Sixteen, this shall be taken that all of them were of the Age of Sixteen; but yet they gave Time to look further into it. Third Exception was, for that it is shewn in the Information, that A. and B. informed, and that A. only sues for the Penalty, and they do not shew that B. is dead, so against them of their own Shewing; but it was answered, that the Statute gives the Penalty to the Informer, though a Stranger, and not to him that went to the Justice; so any one might sue, as well as Smith. Another Exception was taken, for tis said he informed that they were at a Conventicle; but 'tis not positively alledged, that they were there; and though after

ter a Verdict, yet upon a penal Law the Court would not intend it; but however they gave Judgment, because he refused to administer an Oath, which he is bound and required to do by 22 Car. 2. 1. though not bound to convict them upon that Oath, unless he see Reason.

Mullineux's *Case*.

5. MUllineux was taken upon a Supplicavit out of Chancery, and brought before Jones Justice of R. B. by Habeas Corpus, and bound by Recognisance by him to appear the first Day of this Term, which he did; and being in Court, Maynard moved that the Articles sworn in Chancery might be read here, and that they would bind him here; which the Court refused, for that they have no Record before them, and the Record in Chancery is not duly transmitted hither; but if the Witnesses that swore to the first Articles had been here, and swore to them in Court, they would have done it, otherwise not; and this was at two several Motions, by Maynard; to the Contrary the Opinion of the Court.

Lord Grey's *Case*; puis.

6. AN homine replegiando issued to my Lord Grey to bring in the Body of Dame Henrietta Berkley; he appeared at the Return of the Writ, and prayed his Appearance might be recorded; and said by his Counsel, that he could not tell what he was to do, that he was ready to plead, &c. but the Counsel of the other Side, after praying that the Return might be filed, which was an Elongata est, desired my Lord might be committed, which was opposed by my Lord's Counsel; for that he came in upon Process, that he doth not justify, as for his Ward, or his Villein; but that he is ready to plead Non cepit, or to traverse the Return of the Sheriff; and they compared this Case to a Replevin, wherein if the Party comes, and pleads Non cepit, no Withernam shall go; so here my Lord is ready to plead Non cepit: But the Comparison was not allowed, for in Replevin the Writ is for Cattle only; but here for the Body of the Party, that

that the Liberty of a Man is favoured next to his Life; the Court said my Lord could plead nothing, till he brought in the Body, for that there was no Person till then, with whom he might plead; and though they offered Mainucaptors, and urged very much, that my Lord ought not to be taken coming in upon Process, and no Capias in Withernam being out; yet the Court committed him, and said that it appearing to them, by the Return that my Lord had eloigned the Body; and so he is guilty of a Contempt and an Offence; and they having him in Court, may commit him, and need grant no Capias in Withernam; and so he was committed. Pollexfen said, that if he should be allowed presently to plead, till he had brought in the Body, that then the Writ of homine replegiando would fall to the Ground; for this being a Writ to set the Party speedily at Liberty, he would be forced to lie by it, till the Plea was determined, which would be inconvenient; and 'twas said again in this Case, that they would not suffer or accept of a special Return, as was before in Wilmore's Case.

Pauling *and* Hardy; *devant.*

7. THIS Case was argued by Holt; he said, that by the Surrender Joan Cock was remitted, and that the Condition did not hinder; and as to the Rule, that when a Person of full Age, takes an Estate into which he could not enter, that there is no Remitter, is to be intended, where the Estate hath Continuance; but here the Estate for Life by Surrender is merged, and the Condition could not hinder its merging; then being merged, and determined, the Discontinuance is so; and by Consequence Joan Cock is seised again in Tail, and the Reversion out of which the Lease for Years was created, and to which the Rent is incident, being gone, the Rent is gone too; for two Things are requisite to make a Rent incident to a Reversion, Privity, and the same Right of Estate; as in Case of two Jointenants, and one makes a Lease for Years, and dies, the Survivor shall not have Rent for Want of Privity; and that here, by the Estate that caused the Discontinuance being merged, Joan Cock is not seised in the same Right of Estate; so the Reversion being gone, the

Rent is gone too; the Præcipe's being brought against a Stranger, and Joan Cock, he took not material. And he cited in his Argument these Books, 1 Inst. 333. Moor 94. Dyer 74. 3 Rep. 5. The Counsel of the other Side being not ready, Day was given, it being in their own Delay.

He also took Exception to the Doubleness of Pleading, for that the Words in the Deed are sufficient to pass the Reversion by several Means, and they had pleaded them generally without shewing any Election; and for this he cited Dyer 74. according to which it was holden in R. B. Trin. 14. Cr. 2. Afterwards in Hillary-Term it was argued again, and the Court held plainly, that Joan Cock was not remitted, by accepting the Surrender; as likewise she being Tenant to the Præcipe, the Recovery did not bind the Estate-tail, not being thereof seised, at the Time of the Recovery, but of a defeasible Fee; but if she had come in as Voucher, it had barred; as to the Pleading they said they would do what they could to make it good; but the Doubleness thereof being shewn for Cause of Demurrer, made it the greater Doubt; Curia advisare vult. Afterwards Holt said they should not insist upon the Matter of Law, but only the Doubleness of the Plea; this was argued again; and 9 H. 6. 22. Sid. 86. Palmer 62. were cited, to prove the Pleading not double; and the Court seemed to hold it not double: Adjudged for the Avowant. 2 Vent. 269.

Amias *and* Chaplein.

8. THE Case on the Pleadings to an Avowry was thus: A. seised of the Place where, &c. and other Lands, granted to the Plaintiff 20 l. per Ann. in Fee out of the other Lands, with Clause of Distress, and after sold the Lands charged to the Defendant; and to free them from this Incumbrance, granted a Rent of 20 l. per Ann. out of the Place where, &c. to commence from the Time that a Distress for the 20 l. should be taken in the Lands charged, and shews how that at such a Day, a Distress was taken; and therefore, &c. in Bar of the Avowry they come and traverse absque hoc, that any

any Distress was taken for Rent arrear, &c. to this they demur specially, for that it is a complicated Traverse, whereas it should be a Point single, and that riens arrere, &c. and of this Opinion was the Court; and ordered Judgment nisi they replead, and pay Costs.

Papilion *and* Dubois.

9. DAY being given to the Mayor and Aldermen of London, to shew Cause why a Mandamus should not go to the Mayor and Aldermen to swear Papilion and Dubois Sheriffs. The Recorder said that the Aldermen as to this Purpose were but a particular Rank of Men, and that it did not belong to them to swear them; neither did it belong to the Mayor alone, but that there was a Court in London, called the Court of the Lord Mayor and Aldermen; and that the Writ ought to be directed to the Court of the Mayor and Aldermen, for that otherwise the Mayor and two Aldermen might make a Return, and be within the Words of the Writ, whereas there cannot be a Court without the Mayor and twelve Aldermen; and he remembred the Case of Rye, where a Mandamus went to the Jurats to swear a Mayor; Part of them returned one Cause, and Part another. The Court were doubtful how it should be directed, and took Time to consider: Though Pemberton Chief Justice was of Opinion, that it could not be directed to them as a Court, it being no judicial Matter, but only to them as Mayor and Aldermen; yet the Custom of London is to swear their Sheriffs in the Court of Mayor and Aldermen, and no where else.

Palms *and* Heblethwait.

10. THIS was an Action of the Case, wherein a special Verdict was found, that the Plaintiff was seised of a Stream running through his Land; and that about 60 Years since, he had erected a Water-Mill upon his own Freehold; and likewise it was found, how that the Defendant was seised of an antient Dam upon the same Stream above the Plaintiff's Mill; and how that the Defendant had pulled down the said Dam, and thereby diverted the Stream from the Plaintiff's Mill; whereupon the Plaintiff commences this Action. Pollexfen argued for the Plaintiff, and cited Palmer 290. and 1 Cr. 575. and took that to be a clear Case, that the Stream being the Plaintiff's, the Defendant could not divert it; and so held the Court, that an Action had lain for diverting a Stream, though no Mill had been erected; and that therefore it need not be shewn to be an antient Mill, as it must where he prescribes to have a Watercourse, where the Water is not his own; as the Court said was the Meaning of Lutterell's Case, 4 Rep. 80. for there prescribing to the Watercourse, he ought to shew that they were antient Mills; but here he need not: So the Court seemed wholly for the Plaintiff, for here the Stream is his own; so there needs no Prescription. Vide puis.

Hubloun's *Case*.

11. IN Replevin the Defendant claims Property, and says, that the Goods are his, absque hoc, that they are the Plaintiff's; the Plaintiff replies, that they are his, absque hoc, that they are the Defendant's, & hoc petit quod inquiratur per patriam; this was taken to be an immaterial Issue, and a Repleader or a new Trial awarded; for that upon this Issue, the Property cannot be try'd; for the Plaintiff ought to prove them to be his, and not the Defendant to be his; for if they be a Stranger's, and not the Plaintiff's, the Plaintiff hath no Right to take them.

Bevingsay *and* Ralston

1 Vent. 365. 12. THE Plaintiff declares in Assumpsit, for that the Defendant promised to deliver to him, &c. Pot-ashes, and hath not; and further declares, that at the Time the Defendant knowing the said Pot-ashes to be naught, warranted the said Pot-ashes to be good, and vendible, wherefore, &c. upon which the Defendant demurs, because that these being as it were two Declarations, and of different Natures, the one in Assumpsit, the other in Deceit, and requiring several Pleas, the Plaintiff cannot join them in one Action; the Court said that one cannot join Trespass and Assumpsit in one Action, or Trover and Assumpsit in one Action, or Desceit and Assumpsit in one Action, for that they are of several Natures, one grounded upon a Right, the others upon Torts; and likewise that they have several Processes in them, as in one Summons, and Distress in the other, Summons, and Attatchment, &c. And it was holden that if one declares, how that he lent his Horse for so many Days to the Defendant, and that the Defendant promised to pay him therefore 20 s. and adds another Declaration, how that in that Time he abused his Horse, and so he is damnified; that this is not good upon a Demurrer, though it may be good after a Verdict, as in 1 Brownl. 8. Pemberton Chief Justice said, the Reason why they cannot be joined in one Action is not, because they require several Pleas; but because of the several Processes, for one may join a Mutuatus and Debt upon a Bond in one Action; and yet they are to be answered with several Pleas, but here in the principal Case, the Court took Time to be advised, for the Warranty here is in Nature of a Contract, as well as the Assumpsit; and such an Action, as if the Party had dy'd, yet it would charge his Executors; and if in this Case upon Evidence it could not be proved that the Party was sciens that the Pot-ashes were ill, yet the Plaintiff should have a Verdict; and that so it had been ruled in a Demurrer upon Evidence. And Pemberton Chief Justice cited a Case which was in C. B. where Action of Trover and upon the Case were joined; and the Court stopped the Action, and

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made the Attorney pay Costs; and afterwards in this Case, the Plaintiff struck out that Part grounded upon the Warranty. Sid. 245. 1 Vent. 223.

Barns *and* Barns.

13. IN a Writ of Execution, the Sheriff returned that the Plaintiff brought his Action in the Sheriff's Court in London, against the Defendant and his Wife as a Feme sole Merchant, and had a Verdict; and how that by Custom in the City of London, the Lord Mayor is Chancellor, and may call Causes before him out of the Sheriff's Court, and rule them according to Equity; and shews how that the Lord Mayor had called this Cause before him, and ordered the Plaintiff should have Judgment, and that the Defendant should pay Costs within 14 Days; and how that she should pay the Debt by 50 s. quarterly, or else that Execution should go; and that this was the Reason why he could not make Execution: The Court held the Return sufficient, and the Custom reasonable, though it had of late been abused.

Clerk *and* Serle.

14. THIS was in an Action of Debt for the Charges of a Party-Wall; wherein the Plaintiff sets forth the Statute 19 Car. 2. for rebuilding the City of London; but omits to say, that the Party-Wall was within the City of London; therefore adjudged ill upon a Demurrer, and holden in this Case, that he may have an Action of Debt; and that the going before the Aldermen, &c. is when they cannot agree of the Value. So likewise Tr. 35. C. 2. 'twas holden the Party may have Election, for that there be no negative Words in the Act; and another Exception was taken, that it was not said that the Defendant had built upon the Plaintiff's Party-Wall; yet held good enough.

Roe *and* Clarges.

15. THIS was in a Writ of Error upon a Judgment in C. B. where the Plaintiff declared in an Action sur Case for Words; for that whereas he was a Deputy-Lieutenant of the County of —— and a Justice of the Peace, and a privy Counsellor of the Kingdom of Ireland, and so had been, &c. And whereas he stood to be a Burgess in Parliament for the Borough of —— the Defendant said of him these Words, he is a Papist, he is a Papist, ad damnum; Verdict and Judgment for the Plaintiff in C. B. upon many Arguments per totam Cur. and now this Term argued by Holt for the Plaintiff in the Writ of Error. First, He consider'd the Words by themselves, without the Relation to the Party being an Officer; and so consider'd, he took them not to be actionable, being spoken of a common Person; for he takes it for a Ground, that Words are not actionable, unless they bring a Man within Danger of Punishment or Loss or Forfeiture of Office; and for that cited Roll, Action sur Case 65. Placito 7mo. and compares it to the Case of calling one Witch, which is not actionable 13 Rep. 59. he said the Law hath not defined a Papist, but hath appointed Punishment for such as do certain Acts, as abstaining from Church, &c. He that holds Transubstantiation, Adoration of Images, &c. the Law doth not say he is a Papist, but the Church that he is a Heretick, and to call a Man a Heretick is not actionable; and he takes it, that to call one Recusant is more slanderous, then to call one Papist.

Next he considers the Words, as they stand in Relation to the Person, and so he takes them not to be actionable. First, For that here was no Colloquium of him, as he was a Justice of the Peace, Deputy-Lieutenant, or privy Counsellor, and therefore cannot affect him as such; and for this he cited Hutton 51, 55. That to say of an Attorney, thou art a cousening Knave, and get'st thy Living by Extortion, is not actionable, not having Colloquium of him, as of an Attorney; further it doth not appear, that these Offices were of Advantage and Profit to him; and therefore not actionable. And for this he cited Ma-

for Peale's Case, of whom one said there being a Colloquium concerning Justices of the Peace, that he wondered the King would make him a Justice of Peace, being an Ass, a Coxcomb, and a Beetle-headed Justice; and these Words were adjudged not actionable, being a Justice of Peace, is an Officer who reaps no Profit or Advantage; further he saith, that it doth not appear that by Reason of the Speaking of these Words the Plaintiff was in Danger of being put out of any of these Offices, or put to any Charge to clear and defend himself from the Imputation; and for this cited 2 Roll 43. and Action sur Case 56. As to the 3 Cr. 191. he took the Reason of the Resolution there to be, for a particular Relation to him as an Officer of Trust about the Queen's Person. As to the Circumstance of the Times, it being immediately upon the Discovery of the horrid Plot of the Papists, &c. he takes it that is not material, for the Rules of Law ought to be certain and stable, and the Law not to be altered by Accidents; therefore he prayed that the Judgment might be reversed.

Bonithan, to the contrary; and first he said, that he did not much insist, whether calling a common Person Papist be actionable or not, though he did not yield that Point, for he said that now a Papist is defined by the Law, and is a Name so odious, that the Statute 13 Car. 2. hath made it very penal to say the King is a Papist; and by being a Popish Recusant Convict, one is liable to many Penalties: Now to say one is a Papist, or to say one is a Popish Recusant Convict is in nothing different, as to call one Traitor or Felon, or to call one Traitor Convict, or Felon Convict, and that they must be convicted before they are Felons, or Traitors; but this the Court did not allow, but that there is a great Difference to say one is a Papist, and a Popish Recusant Convict, for that this is made an Offence by the Statute; and allowed not of the Comparison of a Traitor or a Felon, and a Traitor Convict, for that they are Offenders by Common Law, and their Offences mala in se. But however, he said, that these Words being spoken of a Deputy-Lieutenant, are actionable; for that they incapacitate him for executing that Office; and cited several Trusts which are reposed in Deputy-Lieutenants by Statute made

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in this King's Time, as of disarming Persons they shall judge dangerous, &c. Then he cited several Cases, wherein Words spoke of a Justice of Peace, which do not touch him in his Office, yet are actionable; which spoke of another Person would not be so, as 2 Cr. 56. Yelv. 57. Moor 141, 401. Roll, Action sur Case, 75. 2. Cr. 240, 90, 202, 484. 3 Cr. 883, 313, 268, 621. 1 Leon. 335. though many, if not all of these Cases are for Words which concern the Office of a Justice of Peace: He took no Notice of the Circumstance of the Times, but prayed the Judgment given before una voce might be affirmed; the Court gave Day till next Term for another Argument; puis.

The Duke *of* York *and* Pilkington.

16. HIS Royal Highness brought a Scandalum magnatum against Pilkington, and he was holden to Bail for 1000 l. It was the Opinion of Pemberton Chief Justice, that the Bail is liable to the Condemnation, for that by taking Bail below, but for 1000 l. is intended the Bail shall not swear themselves worth more than 1000 l. and though the Bail below to the Sheriff be in a Sum certain, yet when he puts in Bail above, the Bail is general, and they are Bail to the Action, and must answer the Condemnation; and so said the Secondary likewise, and that Bail there is always general, and not in a Sum certain, unless upon an Original. And in this Case the Court denied a Trial at Bar two Terms sooner than by the ordinary Course it could come in, and said never such a Thing was granted; but afterwards it appearing, that they had entred into a Rule by Consent, a Trial was granted.

Herring *and* Brown; *devant* and *puis*.

17. THIS Case was argued again by Winnington for the Plaintiff, and Pollexfen for the Defendant: Winnington said, that having been often spoke to, and being a long special Verdict he would put it as a Case, A. seised in Fee, makes a voluntary Conveyance of an undivided Moiety of a Manor to the Use of himself for Life, then to first, second, &c. Son in Tail, Remainder to Sir Maurice Williams in Tail, Remainder to his own right Heirs; with a Proviso that it shall be lawful by Deed, sealed in the Presence of two Witnesses, to revoke these Uses, and to limit new ones. After this, A. levies a Fine, and a Week after the Fine levied, by Deed declares that the Intent of the Parties at the Time of levying the Fine was, and now is, that the Fine shall be to the Use of A. and his Heirs, and to no other Use, Intent, or Purpose whatsoever; and whether this Fine hath extinguished the Power of Revocation, so that the Declaration of Uses comes too late, is the Question. If in this Case, the Deed of Declaration had been first, and then the Fine, he doubts not but it had been a good Execution of the Power of Revocation, tho' there had been no Notice taken of the Power of Revocation; he takes it, that here the Fine and the Deed are to be considered jointly, as one Conveyance; for if you consider them apart, you destroy the Intent of the Parties; but if together, their Intent is supported. He divides what he shall say into four Heads, First, He considers the Persons between whom this Question is. Secondly, That Revocations are favoured in Law. Thirdly, That the Fine doth not extinguish the Power. Fourthly, Answers Objections. First, This is between the right Heirs of A. who was seised in Fee, and made this voluntary Conveyance, and of Sir Maurice Williams who is a Stranger, and had only a Remainder limited to him, because he was of his Name; that here in this Case the Court will consider it, as if the Party himself was yet living; and therefore the Court, by a Construction in Law, to make the Party guilty of a Forfeiture, to let in a Stranger, by

by Vertue of an Act which the Party intended as a lawful Execution of his Power, would be a hard and rigorous Construction.

Secondly, He considers that Powers of Revocation are favoured in Law, and for that he put the Case in 1 Inst. 273. 1 Rep. 173, 174. and that there are many other Cases, for since the 27 H. 8. 10. of Uses they are advantagious in the settling Estates in Families; and as they are useful, the Law doth expound them favourably. He remembred a Case cited often upon Occasion by my Lord Chief Justice Hale, which was my Lady Hasting's Case, where one limited an Estate to the Use of himself for Life, with Remainders over, &c. with a Power to make a Jointure, and then covenants to stand seised to the Use of his Wife for her Jointure, though it was holden, that he could not in this Case make and raise an Estate for Life to her for her Jointure; yet it should be a good Execution of his Power, according to the Intent, and that the Jointure was good. Thirdly, He holds that the Power is not extinguished by the Fine, for the Law will not suffer the Construction of Deeds to be by Fractions, and divided, where the Intention was that they should be intire, &c. And for that he cited 2 Rep. 35. Popham 95. where if the Party had made his Election, to take one Acre by Bargain and Sale, he shall not take the Residue, or any Part by Conveyance at Common Law. He said, that where an Act is not compleat, there indeed the Law shall construe what is already done to be void, as in Case of a Devise to one and his Heirs upon Condition, and the Devise is wrote to him and his Heirs; but before the Words upon Condition are wrote, the Devisor dies, this is a void Devise, 3 Rep. 31. and he put a stronger Case out of Hughes's Abridgment, where a Devise was to one for Life, Remainder to another in Fee; the Devise for Life was wrote, but before that in Remainder was wrote, the Devisor dies: It was adjudged that the Devise for Life was void, for that the Law regards not Fractions of Estates, but shall adjudge upon entire Acts and compleat; so in this Case, the Law shall take the Fine, and the Deed of Uses, as one compleat and intire Conveyance, and adjudge upon them as such together, and not separately; and upon this Ground he cited 19 H. 8. 12.

3 5 Rep.

5 Rep. 79. 1 Rep. 99. Now having shewn, that they ought not to be taken by Fractions, he endeavours to shew that they ought to be taken together. In some Cases the Law will find an Intention, though the Parties have expressed none; and for that he cited And. 164. 2 Rep. 57. He likewise cited 2 Rep. 70. Crumwell's Case, and Moor 471. as likewise the Case of Wixon and Garrat. Trin. 26 Car. 2. Rot. 960. and said, that my Lord Chief Justice Hale said, in that Case, That all Things are not to be done in an Instant; but that some Things are to be done of Record, and some by Matter in Fait; but that when these are all done, then being in Order to fulfil the Intention of the Parties, which was entire, the Law shall adjudge upon them as one entire Act; he cited the 1 Cr. 472. and Jones 392. He answered the Objection upon Dig's Case, for that the Power of Revocation there was extinguished, because it was to be by Deed inrolled, and the Deed was not inrolled before the Fine, &c. and prayed Judgment for the Plaintiff.

Pollexfen agrees to the Learning of Revocations, and that they ought to be favoured in Law, and that a contrary Conveyance may revoke a former, if it hath such Qualifications of Sealing and Witnesses, as are required by the former, though the Power of Revocation be not recited; but is there in this Case any such contrary Conveyance? no surely; for this Deed is no Conveyance or Part of a Conveyance, but a bare Recital which shall conclude the Parties to say there were other Uses; but it creates not the Uses, or can they be created after a Fine, for they are raised by the Fine, and at the Time of the Fine, for a Deed of Declaration after is not good; for the Use is the Intent and Meaning of the Parties, which may be expressed by Parol, and be averred by Parol; so that this subsequent Deed is not a Conveyance, or a Part of a Conveyance, or can make any Alteration, as if before the Fine, there was a parol Agreement, with, or without Writing; shall this subsequent Deed make any Alteration? no surely; then if the Intent and Use is declared before, then this subsequent Deed cannot alter it; and if it is not declared before, it is then declared, for the Law declares it; and a subsequent Deed cannot declare an Use, for the Fine is compleat, and the Use

must rise by it, and cannot be declared by Matter ex post facto, for 'tis no more than a Recital; and as if he had said, whereas I have levied a Fine to the Use of my self, and my Heirs, I do declare the Use to be to me and my Heirs. This Fine hath destroyed the Power of Revocation; suppose after the Fine levied, and before the Sealing this Deed, he had made an express Revocation; it will be adjudged, that the Fine hath extinguished it, and that it could not be good; and shall the Fine disable him to make an express Revocation, and yet shall this subsequent Deed inable him to make an implicite one? Then he argued the Inconvenience, if this should be allowed; for suppose he in Remainder had entered for a Forfeiture, as the Fine here is a Forfeiture, if he had gone to Counsel and shewed him his Title, and had asked his Counsel, may I settle this? you may settle; may I sell? yes, you may sell; for here was Tenant for Life, with Power of Revocation; he hath not revoked, but he hath levied a Fine, which extinguishes his Power of Revocation, and is a Forfeiture; whereupon he settles in Consideration of Marriage, or sells upon a valuable Consideration; now shall this subsequent Declaration come, and defeat all this? that would be very hard; and yet all this may happen, for there is no Time appointed in which he is to make this subsequent Declaration, but may do it forty Years after, as Dyer 136. one did declare the Use of a Recovery four Years after. He agrees the Cases, put out of Cromwell's Case, &c. that Acts between Parties shall have a favourable Construction to support their Intentions; but this is in the Case of a Stranger, and they can put him no Case, where such Construction hath been made in Case of a Stranger, as Defendant in this Case is, being no Party to the Fine, or Deed, and in no Case shall there be a Relation, but between the same Parties, and never in Prejudice to a third Person: As 1 Inst. 132. 3 Rep. 28, 29. for here he in Remainder hath a Right to enter for a Forfeiture, and if so, no Act done by the Party which commits the Forfeiture shall purge the Forfeiture; and for this he cites the Case between Templer and Bortinglass; which was, Tenant for Life suffers a Common Recovery, and after reverses it by Writ of Error, so that now he was Tenant

Tenant for Life again; yet the Forfeiture remains. So 1 Inst. 202. Tenant for Life makes a Feoffment in Fee, upon Condition, and enters for the Condition broken, the Estate is reduced, the Forfeiture is not purged; and applies these Cases to the present Case. As to the Case between Wixon and Garrat, 'tis not like our Case, for there was a Deed leading the Uses of the Fine precedent, which operates nothing till the Fine comes, and then the Fine executes according to the Deed, and so the Intent of the Parties declared, at the Time of the Fine; in that Case the Deed was Part of the Conveyance, for it raises the Use of the Fine; ours not: There the Fine executes the Use, and no Power is destroyed or altered; but in our Case it is destroyed. And in the Case between Wixon and Garrat Notice was taken, that there might be a Difference between a Deed precedent, and a Deed subsequent: As to their Saying 'tis all but one Conveyance, he inquires what they mean, or whether it be more than a Flourish, for the Fine is of it self a perfect and sufficient Conveyance, and executed before.

The Cases which they put, are upon two Bottoms, First, Where to the Perfection of a Conveyance, two Things are requisite, as to a Feoffment, Livery; to a Grant, Attornment; in these Cases the Law shall look upon them executed at one and the same Time, or else they are several Acts between the same Parties, which affect not a Stranger. As to the Discourse of taking Conveyances, and construing them by Fractions, this is no Conveyance, or Part of a Conveyance; and so he answered them not. As to the second Point, which Winnington spoke not to, 'tis thus: Tenant in Common settles ut supra, and after makes Partition, and declares one Part to the Use of him and his Heirs, and the other Part to the Use of the other and his Heirs, if a Writ of Partition had been brought by Cary, the other Tenant in Common, against A. it had been good, and bound him in Remainder, though by Deed, if the Partition had been fair and equal; and the Partition in this Case is not by Writ, so not within the Statute H. 8. Tenants in Common might make Partition, (but it must be by Deed) at Common Law; and for that he cited Br. Partition 4, 12, 27. and Roll, Partition 255. 1 Inst. 166, 171. Dyer 35.

Lord Grey's *Case*; *devant*, *and puis*.

18. MAynard came into Court, and prayed that my Lord Grey being committed upon the Return of an Eloignment, upon an homine replegiando, might be admitted to Mainprise according to Law; and cited many Cases, where the Party being in Custody came and gaged Deliverance in Absence of the Plaintiff, and was admitted to Mainprise; and cited besides the Records (which I have not taken) 12 E. 4. 4. Rastall's Entries 403. Holt to the same Intent, and that the Return of the Sheriff might be sufficient for the Court to commit, as for a Contempt, but not to conclude the Party as to the Merits of the Cause; and would have it that the Sheriff's Return is traversable, which the Court denied, as in Cases of Devastavit returned upon a Fieri facias, the Party cannot traverse, but is put to his Action sur Case, which is the Way the Law allows to remedy the Party upon a false Return; and here in this Case, if my Lord convicts the Sheriff upon a false Return, they would then help him. The Court said there might be Pleading when the Party is not in Court, as if the Sheriff return that he claims him as his Ward or Villein, there he shall come in, and plead upon this, for that the Court hath a Return to go upon: Nay, if in this Case my Lord would come in, and confess the Taking, and gage Deliverance, they might let him to Mainprise; but Pemberton said, he thought there was no Case where the Party did not confess the Taking, and claim as his Villein or Ward, or as committed by the Justice of Forest, &c. That they let him to Mainprise, but they took Time to consider. Holt cited F. N. B. 74. Keilw. 71. 13 H. 7. 17. 5 H. 7. 3. Rastal's Entries 402. Maynard said, that if the Sheriff should die, the Party in this Case would be remediless; but afterwards upon the Lady's coming into Court, and declaring that she was under no Force or Confinement, my Lord Grey was admitted to Mainprise. V. Designye's Case, Maynard 474.

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Lady

Lady Viscountess Stafford *and* Llewellin.

19. EARL of Arundel being seised in Fee, covenants to levy a Fine to the Use of himself and his Countess for their Lives, then to Sir William Howard for his Life, Remainder to William Earl of Newcastle and William Pierpoint, &c. and their Heirs in Trust, to settle the Premisses upon Sir William Howard for his Life, with Power to lease ut infra; and then upon any Wife that he shall marry for Life for her Jointure, and then to the first Son of Sir William Howard, and so to the Tenth, then to the Heirs of his Body, and the Remainder over to the Earl of Arundel, with Power to Sir William Howard to make Leases for twenty-one Years at the improved Rent; this was in the Year 1636. In the Year following Sir William Howard marries the Lady Baroness Stafford; in the Year 1654. their eldest Son now living was born; in the Year 1656. the Earl and Countess of Arundel are dead; in the Year 1667. the Earl of Newcastle, then Duke of Newcastle, did settle by Lease and Release the Jointure of the Lady Viscountess Stafford; Sir William Howard, then Viscount Stafford, having an Estate for Life, conveyed to him ut supra, William Viscount Stafford makes Leases for Years, for Life, and for three Lives, taking great Fines, and reserving small Rents. He is attainted of Treason, and dies, and between his Lady, and the Lessees, was a Trial at Bar, where it appeared that many of the Lessees had surrendered to Lord Stafford, the Leases granted by the Earl of Arundel, according to a Power he reserved; which Surrenders the Court held did not pass the Estate, being made to Lord Viscount Stafford, who had not the legal Estate in him, but only a Trust; and in this Case, being very foul, and a great Fraud in my Lord Stafford, they said that they would presume that my Lord had some Conveyance from the Trustees to inable him to make such Leases, and the rather for that it was offered as Proof; that this had been the Opinion of my Lord Chief Justice Pemberton (as he is now) and Serjeant Maynard, that my Lord might make these Leases; and that therefore they

they would presume there was a further Deed from the Trustees, to impower him, which is concealed. And Farrar's Case was cited in the Common Pleas, where Farrar made a Title from the Black Prince, which could not be out of him but by an Act of Parliament; but yet, for that the Possession had gone otherwise ever since, the Court presumed that there had been such an Act of Parliament, tho' not now to be found; so the Court here was ready to recommend it to the Jury as a strong Presumption, that here was a Deed to impower my Lord, it being in the Case of poor Tenants, from whom my Lord had raised 20000 l. in such a filthy unjust Manner; but by Consent a Juror was withdrawn, and the Matter referred to the two first Men of the Jury, who were to compprise it in a summary Way; and the Jury was paid between them, &c. 'Twas said further in this Case, that if the Trustees had so conveyed to my Lord Stafford, to give Power to make Leases, ut supra before a Son born, that it was no Breach of Trust; for that nothing was more common then, where an Estate is limited to Husband and Wife for Life, Remainder to Trustees for preserving contingent Uses, then to the first, second, &c. Son, for the Trustees to convey to Tenants for Life, there being no Child, nor Likelihood of Children; and if it be for the good of the Family, that this was never accounted a Breach of Trust: And in this Case Pemberton Chief Justice said, that my Lord Stafford might have cut off this Estate, before the Nativity of a Son, having an Estate in Tail in him; and when it was urged by Saunders that it was an Estate-tail in Trust, and so could not be cut off, my Lord Chief Justice Pemberton said, that sure Mr. Saunders thought the Court wanted Brains; but he said he knew what he said.

Hudson's *Case*.

20. IN a Trial at Bar concerning Hudson's Will, the Point was, whether a Will, or no Will; and upon the Evidence, two of the Witnesses to the Will swore, that Hudson did not publish it as his Will, but that A. B. guided Hudson's Hand, and Hudson made his Mark, but said nothing; nor was he capable. On the other Side it was proved how that Hudson had made two former Wills, and in them had divided his Land, in the like Manner as by this Will, and how that he dy'd of a Consumption, and was sensible to the last; and how that three Days after making his last Will, he was sensible, and able to discourse, and so continued till within six Days of his Death; hereupon it was plain to the Court, that the Witnesses had been dealt with: To which the Counsel of the other Side urged, that if the Witnesses were not to be believed, then there would not be three Witnesses to the Will; and so no Will within the Statute of Frauds and Perjuries. To which Pemberton Chief Justice answered, that if there were three Witnesses to a Will, whereof one was to his own Knowledge a Thief, or Person not credible; yet the Words of the Statute being satisfy'd, and he having collateral Proof to fortify the Will, he would direct a Jury to find it a good Will; and as to this Case he said, that it is not probable, that a Person in his Senses (as they here are not able to disprove him to be) would suffer another to guide his Hand to a Writing, and not say any thing; and that therefore they took it, he did publish it, and remembred Digg's Case in C. B. where the Scrivener wrote the Will, and two others were Witnesses; the Scrivener swore the Testator was Compos, the two other swore he was not Compos; the Court stopped these two till the Verdict was brought in, which found the Will a good Will, and then committed the two Witnesses to the Fleet for that, if this was suffered, it would be in any Man's Power to destroy another's Will; so likewise did the Court of R. B. here, commit the Witnesses, and took Security of the Plaintiff, to prosecute them for Perjury.

Ca-

Cator's *Case*.

21. CATOR was taken within five Miles of a Corporation, which sends Burgesses to Parliament, and was committed for refusing to take the Declaration of Assent and Consent, he being (indeed) a Presbyterian Parson; whereupon he brought an Habeas Corpus, and this Cause was returned, &c. and Exception taken, for that it is not shewn in the Return, that he had preached since the Act of Oblivion, and if not, that he is not within the Statute 17 Car. 2. but upon reading the Statute three of the Justices were of Opinion, that any Person in pretended Orders, or pretending to have Orders, was within the Statute; and so the Exception not good. Pemberton Chief Justice hesitated; then Exception was taken, that the Judgment of the Sessions is ill, being it is ordered that he be committed, which is not peremptory, and absolute but only a Thing futurely to be done, whereas it ought to be in Words de præsenti, as in R. B. ideo comittitur; to which the Court did not deliver their Opinion, but they discharged him, for that his Commitment was from a wrong Time, scil. from the Refusal, when it should be from the Time of his Conviction.

Dockray's *Case*.

22. Dockray had set up a Project of his own for dispersing Letters, to and from the several Places within the Bills of Mortality, and the Cities of London and Westminster, and had settled Offices in every Street, to receive Letters, and convey them to the general Office, and from thence they were dispersed to the respective Places of their Direction, and this to be within the Bills of Mortality; for though in Fact he had gone further, yet he insisted not upon any Thing to be lawful, but only the Sending of Letters from one Street to another, within the same City, or Town; and this his Counsel took to be within the Exception of the Sta-

tute of 12 Car. 2. cap. 35. First they moved, that where the general Postmaster had not settled an Office, that in such Case any Man might. To this the Court said, that where a Post-Road went through any County, that in such Case the Post-Office was sufficiently settled for that County, and that it was not lawful for any one to erect a general Post-Office within that County; but that any Person or Town might erect a Post, to convey their own Letters from their own Town, to the great Post; and to carry them from the Post back again, and that this was within the Exception of the Act; likewise they took it, that if the general Postmaster should neglect to erect any Post-Office in any Part of his Majesty's Kingdom, as in Wales, &c. That the Inhabitants for their own Conveniency, or any Person for their Conveniency might erect it; but where a Post-Office is erected, there no Person may employ any Foot-Post, or Messenger with Speed, as a general Officer, to receive and disperse Letters; and that in London, and the several Places within the Bills of Mortality, there were Persons appointed for this Purpose. The Counsel of the Defendant would have had it, that it was no more than carrying or sending a Letter by a Porter, from Gray's Inn, to the Temple; and that this was lawful, and that any one might imploy as many Porters as he pleased; and that here Dockray had imployed (it may be) 100 Porters, and therefore they desired it might be specially found; yet the Court would not agree to it, but over-ruled them, and directed the Jury to find for the Plaintiff; wherefore, &c. And in this Case, the Court said, that Higlers carrying Letters from Highgate to London, and back again, &c. had been adjudged within the Penalty of this Act.

Lord Gray's *Case; devant.*

23. AN Information was brought against my Lord Grey for conspiring the Ruin and Destruction of my Lady Henrietta Berkley, and seducing her to leave her Father's House, and to live with my Lord Grey after a dishonest and scandalous Manner; and for soliciting her to unlawful Love, she being a Virgin of 18 Years of

Age, and under the Education and Instruction of her Father, &c. The Counsel for the King challenged a Juror, and then they of the other Side challenged Touts paravails; the King's Counsel required them to shew their Cause of Challenge, which they likewise demanded of the King's Counsel; but the Court ruled that the King's Time is not to shew Cause till all the Panel is perused, but that the King must shew his Cause before the Jurors be drawn; and in this Cause the Lady Henrietta Berkley was sworn as Evidence, and gave her Evidence in Behalf of my Lord Grey.

Banaton *and* Morris.

24. THE Defendant and another were Bail for J. S. in an Action brought against him by Trevisa, who recovers and brings a Scire facias against the Bail jointly, and had Judgment in the Scire facias; one of the Bail dies, and after Trevisa dies, his Executor brings a Scire facias against Morris the Survivor of the Bail, to which he demurred. Holt; two are Bail, and the Plaintiff brings a Scire facias against them both; now hereby is the Election of the Plaintiff, to make the Recognizance joint or several at his Will, determined: And he compared it to the Case of an Obligation, and being a personal Lien, it should survive, &c. But Saunders answered, that by the Scire facias nothing is recovered, 'tis merely a Thing relative; and now this Scire facias was to revive the first Recognizance, and need not take Notice of the Judgment in the Scire facias; and that therefore the Plaintiff here had the like Election as Trevisa had. Jones Justice asked him what if Execution had been for the Plaintiff, he said then he must shew it, and pray Execution for the Residue: Adjornatur.

Powell *and* Weeks.

25. DEBT was brought upon the 17 Car. 2. against Weeks, for coming within five Miles of a Corporation; the Defendant pleads that he was summoned before two Justices of the Peace, and for not taking the Oaths he was by them committed, and so took it, that he had Election to refuse the Oaths, and go to Prison, or pay forty Pounds; but the Court held, that he should pay the forty Pounds, and that if he was before the Justices, and refused the Oaths, as a further Punishment he should go to Prison. And it was holden by Pemberton Chief Justice, that in this Case he could not traverse his Preaching in a Conventicle, that not being the Offence, for which, &c. but his Coming within five Miles of a Corporation, but that he might take Benefit of it upon a Nil debet; but the Declaration was ill in this, for that where the Forfeiture is divided in three Parts, one to the King, one to the Informer, and one to the Poor of the Parish, here they had not mentioned any Parish; wherefore Judgment was for Defendant.

Heneage Earl of Nottingham, Lord Chancellor of England, dying in the Vacation, North Chief Justice of the Common Pleas was removed into Chancery, with the Title of Lord Keeper. And Pemberton Chief Justice of the King's Bench, went into the Common Pleas; and Saunders was made Chief Justice of the King's Bench.

Term. Hill.

35 Car. 2. R. B.

Curson *and the* African Company *in* Chancery.

1. CURSON brought a Bill against the African Company, and set forth, that he (in the Name of Sir R. Foch, who declared it a Trust) lent the African Company 3000 l. which they obliged themselves to pay under their Common Seal; that after 1800 l. was paid, and that Obligation cancelled, and a new one with a Penalty for 1800 l. Residue, entred into under their Common Seal to Sir R. Foch, and a new Declaration of Trust sealed by him to Curson the same Day, and wrote by the Clerk of the Company; and how that afterwards by Agreement between that Company, and the new African Company, the old one conveyed all their Forts and Effects to the Value of 34000 l. to the new Company, for the Payment of the Debts due by the old Company; that they had paid to the Value of 29000 l. and out of the Residue still remaining in their Hands, the Complainant desired to be satisfied. Part of the Counsel for Curson would have it a Trust; and so this Company bound to pay the Complainant, and the making the old Company Parties to the Bill not necessary: Others would have it no Trust, but that the new Company owing the old Company 5000 l. upon the Agreement, that it should be liable to the Creditors of the old Company, by way of Attachment, which in Equity may be against a Company; but it was objected by the Counsel for the Company, that then the old Company ought to be Parties to the Bill, and the

Court to decree that the old Company should discharge this upon Payment of it to Curson; the others would have it, that the Equity ought to be against them that have the Effects; and that this Company having the Effects, should be liable. Lord Keeper said, if an Executor convey over all the Estate, and go to the Indies, or elsewhere not to be found, that the Estate shall be liable to satisfy the Creditors, but this shall be after he hath stood out all Process; but the Decree was by Consent, that the Company should pay out of the 5000 l. 40 l. per Cent. (the Proportion paid to the other Creditors) and Interest from the Time of the former Devidend, and the Costs to be allowed out of the Interest, the old Company not being made Parties to the Bill; and said in this Case, that Process against a Company is by Distringas, not Subœpna; and if they have no Effects, there is no Way to compel them to appear.

Lady Pye *against Duke of* Norfolk.

2. LADY Pye Executrix to her Husband, found a Statute of 2500 l. against the Duke of Norfolk, &c. upon her stirring in it, a Deed of Covenant was shewn for the Delivery of the Statute up to her Counsel, and afterwards shewn in Court; however she proceeded, and brought in a cross Bill, and put them to as much Trouble as she could. Upon the Hearing, it appeared that the Statute was satisfied, and ordered to be vacated, not assigned; and she ordered to pay Costs, not as to oblige her Person, but out of the Estate.

Bird *and* Harrison.

3. BIRD brought a Writ of Error against Harrison, upon a Judgment in a Scire facias in C. B. where the Case was, Judgment was given against a Testator, who dies, and makes Bird Executor, against whom a Fieri facias is taken out, and nulla bona returned; upon which a Scire facias and Enquiry, and returned that divers

vers Goods of the Testators came to his Hands, and that he diversa bona Testatoris disposuit, elongavit, & ad propium usum convertit. Bird now appearing, and never having appeared before, but suffering Judgment to pass by Default, comes and pleads, that he was never Executor, or administred as Executor, and traverses absque hoc, that he bona Testatoris disposuit, &c. whereupon Issue was joined, and found against Bird, and Judgment; and now assigned for Error, that the Issue was ill, for that he might convert and dispose bona Testatoris; and yet Judgment ought not to be given, that Execution should be de bonis propriis, as he might come to the Goods, by Sale in Market-overt, &c. and that this Conversion would not be any Hindrance of the Execution; but the Court said, in this Case, he beginning and pleading nunque Executor, durst not abide thereby, but went over to the Conversion, which shall be intended a Conversion, as Executor, according to the Point of the Inquiry and Return; being that he (as Executor) having converted; &c. and he coming and traversing the Conversion, this shall be intended the Conversion intended in the Return, it being found against him; wherefore affirmatur.

Anonymus.

4. I will not venture my self with her (being spoke of a Midwife licensed) she is a Whore, and will kill me, and bury me in the Garden as she did her Bastard; for which Words a Suit was in the Ecclesiastical Court, and Prohibition prayed; and upon Cause shewn, denied, the Court taking them not to be actionable at Common Law.

Duncomb *and* Walter.

5. STALY a Goldsmith was indebted to David Walter 1000 l. and also indebted to Clerk and others in several Sums of Money; Clerk makes Duncomb Executor, and dies. Duncomb upon the 6th of November 1678. arrests Staly by a Bill of Middlesex for 600 l. to which Staly puts in good Bail; after November the 18th, Staly pays Walter his Money, and likewise upon the same 18th of November, Duncomb proves the Will, the Bill of Middlesex not being yet returned, or returnable. Afterwards November 20, 1678. Staly renders himself in Discharge of his Bail, and the Debt for which he is arrested remains not paid, or compounded by the Space of two Years; and if Staly shall be said to be a Bankrupt from November the 6th, upon which Day he was first arrested, whereby the Money paid Walter will be liable to the Assignment of the Commissioners of Bankrupt, or from the Time of rendring himself in Discharge of his Bail; or from what Time he shall commence to be a Bankrupt, was the Doubt with the Jury upon a Special Verdict? and referred to the Court. And in the Common Pleas the Court gave Judgment for Walter unanimously, that the Money was not liable to an Assignment, nor Staly a Bankrupt from the 6th of November; whereupon a Writ of Error was brought in R. B. and this assigned for Error: For the Plaintiff in the Writ of Error they insisted upon several Clauses in the Statutes of Bankrupts, and shewed that this Case was within the Letter of those Clauses; and as to the not proving the Will, at the Time of the Action brought, he cited Roll, Executors 917. which was admitted Law by Saunders Chief Justice, and the Counsel on the other Side. And he said further, that if by putting in Bail in this Case, he should not be within the Statute, Creditors would be in an ill Case, for then he might go and convey his Estate leigerment, and after come and render himself in Discharge of his Bail. As to the Objection that it must be a due Debt, he said, 'that it is due to the Executor presently, though he cannot bring an Action, for

1 Vent. Raymond.

for that the Executor hath his Interest, by the Act of the Party, by Testament, and therefore may release before Probate; and this is the true Difference between an Executor and Administrator, who hath his Interest by Act of Law, and can do nothing till Letters of Administration are granted. Walcot on the other Side said, that the Arrest makes him no Bankrupt, and that 'tis no Offence to owe Money, but the Offence provided against by the Statute, is causing himself to be arrested, and putting in common or ordinary Bail, &c. how that here was good, and sufficient Bail: He said that this special Verdict was founded upon the second Paragraph of 21 Jac. and insisted that here they must make two Relations, and that this would work an Injury to a third Person, which a Relation would not do, &c. but the Court seemed to say, that here would be no Relation; but that the Words of the Statute were, that he should be a Bankrupt from the Time of his Arrest, &c. Advisare vult. It was afterwards argued, Trin. 36 Car. 2. R. B. and the Judgment of C. B. was affirmed una voce; and said that Relation to make a Man a Bankrupt ought to be upon an actual lying in Prison, and not upon putting in Bail only, after which a Person remains publick, and whereof a Man cannot take Notice, but upon lying in Prison, one hath Warning; they held likewise the Arrest by Executor before Probate was tortious, and shall be an Arrest within the Statute.

Roe *and* Clarges; *devant.*

'm. 6. THIS Term Winnington for the Plaintiff in the Writ of Error, took the same Method with the former, and made two Points, First, Whether if these Words were actionable, being spoken of a Common Person. Secondly, If of the Plaintiff as being Deputy Lieutenant, &c. First, He insisted that a Papist is not defined by any Law, (which the Court denied) then that being a Papist is in it self no Offence; and that he hath not seen any indicted for being a Papist only, but for not coming to a Church, or refusing such and such Oaths, which one that is a Papist may not refuse.

2 He

He cited 27 H. 8. 14. and other Books before cited, and took the Rules for Action sur Case expressed in Hob. 8. that where they immediately concern one in his Office or Calling, as to say of a Judge, that he is a corrupt Man, or of a Bishop he is a Papist: Then for the other Point, he observed that here was no special Damage laid, and that his Offices were no Offices of Profit; and said that these Words don't affect him immediately in his Office, &c. and prayed the Judgment might be reversed. Godb. 147.

North on the other Side said, that Words which do not lay the Party open to corporal Punishment, or Forfeiture of Goods, of Land, or Loss of Life; yet if they are such as deprive him of the Benefit of the Conversation of his Neighbours and Friends, and render him odious and unfit for Society, they will bear an Action; as to say one was laid of the Pox; or to say of an Attorney he hath the Falling Sickness, or is an Ambidexter; these Words import in themselves no ill, but that applied to a Person under a particular Character, they are actionable. He said a Papist is sufficiently defined by several Acts of Parliament, and instanced in that which makes it so penal to say of the King, he is a Papist: He said that Papist and Popish Recusant is all one, and that the Name came first up when H. 8. took on him the Supremacy, that they who were against the King's Supremacy, and for the Pope, were called Papists, in Distinction from the other Popish Recusants; He said that it ought to be more penal to call one Papist, for that hereby raising a common Fame, he might be indicted and convicted by Proclamation, without being called to answer; which way of Proceeding is allowed in no other Case. As to the Times, he said that they would not alter the Law; but he said the Signification of Words might alter, and those Words become actionable, which formerly were not; which likewise Saunders Chief Justice allowed, and that he had seen in a Bible, Paul a Knave of Jesus Christ, where St. Paul is called a Knave; whereas if one should call an Attorney so, he would bring an Action. Then North said, that if they were not actionable of a common Person, yet being spoke of a Deputy Lieutenant they are so, and cited several Cases where Words spoke of common Persons are not action-

able; yet being spoke of a Justice of Peace, are so, and so of an High Sheriff, and yet he hoped no one would say the Office of an High Sheriff is an Office of Profit; but he said, that by being a Papist he is utterly incapable of any Office or Post, and that this is an Office of great Trust and Honour; wherefore he prayed that the Judgment might be affirmed. The Judges seemed to be all of Opinion to affirm the Judgment, but took Time; he cited the Cases of Ambidexter and Falling Sickness, to shew that Words ought not to be taken in their radical Sense, but according to such a Sense as they are usually accepted in, and understood by the Hearers, &c. and afterwards the Judgment in C. B. was affirmed una voce.

Walker *and* Hamersly *in* C. B.

7. UPON a long special Verdict the Question came to be this, whether or no a Sale of an Advowson with a Covenant to present such a Person as the Bargainee shall nominate, be a simoniacal Contract, the Church at that Time being full of an Incumbent by Usurpation, and a Quare Impedit then pendant to remove him, and by which he is afterwards removed. The Court seemed clearly to hold that it was Simony, for that the Presentation by Usurpation being avoided, the Church shall be now said void from the Death of the last Incumbent, and so pleaded, without taking Notice of the Usurpation, which was a mere Nullity, and the Judgment is an Estoppel, for all Men, to say the Church is full; and if the Church should be said to be full upon an Usurpation, that this would be a Means to elude the Statute, for then 'tis but getting one to usurp, and the Patron may sell the next Avoidance to whom he pleases; and then bring a Quare Impedit, and remove the Usurpation, and so the Grantee come in: This Case had likewise something of Champerty in it; but that the Counsel answered, that it was by Decree in Chancery, that this Bargain and Assignment was ordered; the Court seemed clear ut supra; however the Counsel desired another Argument, which the Court granted upon consenting not to bring a Writ of Error; and after upon another Argument

gument next Term by Maynard for the Plaintiff, and Baldwin for the Defendant, Judgment was given una voce for the Plaintiff.

The King *against City of* Worcester; puis.

8. AN Information in the Nature of a Quo Warranto was brought against several Persons of the City of Worcester, and the Jury being at Bar a Challenge was taken, for that the Jury was returned by the Coroners, whereas it should be by the Sheriff; as also that it was but by one Coroner, when it should be by both, and it was indorsed as by both; but the Reason was, for that the Sheriff was one of the Parties against whom the Scire facias in Nature of a Quo Warranto was brought; they that took the Challenge said, there were several Offences for which the Parties were to answer, and so several Actions in their Nature; and that though as to the Sheriff himself, Process ought to go to the Coroner; yet as to others, the Sheriff ought to return it. Saunders Chief Justice and the Court seemed to think otherwise, but a Bill of Exceptions was filed; and then a Challenge was taken to the Polls, for that they had no Freehold; and as to this the Court seemed to doubt, it being in a City, which was a County within it self, and sent to C. B. to know their Opinion, which was, that it was no Challenge, for that their Experience had always been to the Contrary; and that hereby sometimes might happen a Failure of Justice. 1 Vent. 7. Raymond.

Sandys *and the* East-India Company.

9. SAndys having laden a Ship, and made Tender of his Entries at the Custom-house, and given out that he intended for the East-Indies; upon Complaint hereof to the King in Counsel, he ordered his Advocate in the Admiralty to arrest the said Ship, and detain her till Security was given, not to go and trade within any Part of the Countries, contained in the Patent granted to the East-India Company. The Ship was accordingly arrested, and Sandys refused to give Security, but prayed Raymond.

a Prohibition in R. B. and Day being given to shew Cause why a Prohibition should not go, Finch Solicitor said, this was not between the Company and Sandys, but between the King and Sandys, and that the Arrest was made by the King's Order, and the Complaint of the Company. He considered first, If there had been Cause to arrest this Ship. Secondly, If they had proceeded in a right Method; he said there was Cause sufficient, for that he designing to go and trade with Infidels, the King might restrain him, for that it might be of ill Consequence for the Kingdom, and for the Company now managing a Trade of great Advantage to the Publick. If Mr. Sandys should go, and commit Outrages and Injuries, as was done formerly by the same Ship, the Kings and Princes in the Indies would exact Satisfaction of the Company; further he said, that if any Person intended to carry a Ship laden with Goods to the King's Enemies, that the King might lay a Restraint upon her. That these are Infidels, and Enemies, and that therefore 'tis not lawful for the King's Subjects without his Licence to trade with them; and therefore there is Cause sufficient to stop the Ship. Likewise that this is the proper Way, and that which hath been always practised; for though the King might grant a Ne exeat regno, and so stop some particular Persons, yet that this would not be an effectual Means, for that if a Ne exeat regno be granted against one Captain and his Crew, another, and so a third, &c. may be clapt on Board, &c. that therefore the most effectual Way was to arrest the Ship, which would prevent all. He did acknowledge that the Admiralty had not Jurisdiction of Causes infra Corpus Comitat', unless in Cases of Mayhem or Death, &c. as is expressed in Statute R. 2. but that in this Case the Question was rather on the King's Prerogative, for if the King may stop, then doubtless the Admiralty may arrest. They on the other Side insisted that the Ship had never been at Sea, that she was taken infra Corpus Comitat', that the Trading which was to be the Offence (if one) was to be upon Land beyond the Sea, and not within their Jurisdiction; and the Letters Patents whereby the East-India Company were enabled to trade, were triable and determinable at Law; that this was a Matter clearly between Party and Party, and that the King's

Prerogative was not in Debate, and adhered to, and insisted upon their Suggestion, that the Matter arose infra Corpus Comitat', & non super altum mare; and that this was their Case, and would not allow the King's Prerogative to be the Question, but only Matter of Jurisdiction. Saunders Chief Justice said, that their Suggestion did not bring the Matter in Question, for the Question was, whether this was an Admiralty Cause, or not; for if so, the being transacted infra Corpus Comitat' was not material; for that a Person might be taken up by Execution out of the Admiralty, upon Sentence there in any County of England: He said, that in many Cases the King might arrest Ships, as for his Service in War, or upon Reasons of State lay an Embargo upon them, which was always done by the Admiralty Court; and that no Court in Westminster-Hall could do it, as he knew, and would be glad to be informed how they could do it; he said, 'tis possible a Sheriff might do an Execution upon a Ship riding in the River, but he saw not by what Writ at Common Law, she could be arrested or stayed; that nothing was more frequent than for the Admiralty to arrest Ships riding in the River, that it was done every Day for Mariners Wages, and other Maritime Causes; but however it was a Cause of great Moment, and they would take Time to advise. Saunders cited 2 Brownlow 296. Michelborn's Case; afterwards all the Judges of England were of Opinion, there should go no Prohibition in this Cause, for that they had not set forth in their Suggestion, that any Suit was depending between the East-India Company, and Sandys in the Admiralty Court.

Creswick's *Case*.

10. CReswick brought an Information upon W. 2. for pulling down nocanter, so many Perch of Walling and Pales, and cutting down twenty Trees, &c. and had Process according to the Statute; whereupon three several Inhabitants of three several Towns came in, and plead that they are Inhabitants of such and such Towns (which were the adjacent Villages) and Tenants to Sir John Norton of the Manor of, &c. and how

how that Sir John and all they whose Estates, &c. have Time out of Mind had Common for them and their Tenants, Inhabitants of the said Villages, in the Place where, and shewed how that they did pull down so much that they might come at their Common tempore diurno; absque hoc, that it was noctanter; the other replies, that 'tis his several Freehold.

Exception was taken, for that they come and say, they are Inhabitants of, &c. and plead for themselves, and the Rest of the Inhabitants, and shew not by what Authority they plead for them, and that Judgment must here be given against all the Inhabitants. Answered, that if they were not lawful Parties to the Record, no Judgment could be given upon the Demurrer; and that this would be as ill for the one Side, as the other. Another Exception was taken, that the Traverse was too straight, for he ought to say, absque hoc that he pull'd down so much, aut aliquam inde partem; for if upon Issue joined, the Party should not prove that he had pulled down to a Foot, as much as is contained in the Issue, it would be against him. Holt would have put a Difference between a general Issue, and a special Issue, as in Debt upon Nil debet, he ought to say Non debet the Sum in Demand, nec aliquam inde partem; so upon Null wast fait; but upon a special Issue, he need not; and put the Case in Dyer 115. Saunders said this was not good Pleading, but that having justified in Part, they should say, quoad the other 90 Acres for the Purpose, they are not guilty: But the Court said there was a Fault, for that the Writ was taken out 16 November, and the Offences were said to be committed before the 20 of November eodem Anno; so here is not that Time given to the Mills to indict the Offenders, as by 2 Inst. 476. is allowed, which is a Year and a Day; and that therefore it is ill. Also the Inquisition is for cutting down Trees, for which the Statute provides no Remedy, and the Damages are intire, and therefore ill; wherefore Curia advisare vult. &c. this was upon a Demurrer; afterwards a new Distringas was awarded, and the Court did not think a Year and a Day of Necessity in this Case; yet a reasonable Time the Mills ought to have.

3

The

The Earl of Derby's *Case.*

11. THIS Case was argued again this Term, by Pemberton Chief Justice of the Common Pleas, who made two Questions, First, Upon the Statute of 4 H. 7. whether any Tenant in Tail, could bar his Issue by Force of that Statute. Secondly, Admitting he might, whether this Manor being of the Gift of the Crown, and so protected by 34 H. 8. be so enlarged, that it might be barred by Fine, or so altered by quarto Jac. that it may be barred. The Statute of H. 7. is general, without mentioning Estates-tail; but 32 H. 8. bars Estates-tail expressly; but there is a Proviso that it shall not bar Estates tailed by Act of Parliament. He holds that 4 H. 7. doth bar Estates-tail, the Words whereof are the same, Fine to be a final End, and to conclude as well Parties as Strangers, within which Words all Men are comprised; but the Issue in Tail is within the Word Privy, for there is a Privity of Blood and of Estate between Issue in Tail and his Ancestor; for Issue must make his Title by his Ancestor; and cited the 2 Inst. 516. and Hob. 333. Dyer 3. But the Doubt upon the 4 H. 7. doth not arise from the Word Privy, but it arises upon the third Salvo. He said that the Penning was doubtful, but the general Opinion of the Books was, that it was a Bar, that he knew of no Judgment against him, and that it had been unquestioned for many Years, and therefore that he looked upon it as a Point settled; and the rather, since 32 H. 8. for that now 'tis not like to be in Debate; but he takes it not to be material to this Case, which depends chiefly upon the Statute of 4 Jac. whether or no that Statute hath set the Estate at Liberty from 34 H. 8. He takes Estates mentioned, and new moulded in that Act, to be new Estates, for that otherwise Persons taking Estates by that Act, might forfeit for Treason the whole Estate; whereas 'tis plain, they cannot forfeit to bar them in Remainder; likewise that those mentioned in the Act take by Purchase, and now they must bring a Formedon in Remainder, whereas if it was the old Estate it must be in Descender; but tho' he takes them to be new Estates,

yet

yet he holds that the Fine by Earl Charles doth not bar, but the Estate is preserved by 34 H. 8. and takes it that a Fine is within 34 H. 8. according to the 1 Inst. 372. and
6 Rep. 55. 8 Rep. 78. and tho' Hob. 333. calls it an oblique Strain, yet that Opinion hath hitherto obtained, and it had been of little Purpose to hinder him to bar his Issue by a Common Recovery, if he had been at Liberty to do it by a Fine; 'tis true only Recoveries were mentioned, because they were the common Assurance then in Use; and 'twas a Doubt, if Fines would bar where the Reversion was in the Crown, being excepted by 32 H. 8. and not plain by 4 H. 7. therefore they put in general Words other Thing or Things, that if any other Thing was used, it should be within the Act; the Intent whereof was to prevent the Alienation of such Tenant. Then he urged the Designs of the King in making 24 H. 8. and the Advantage of the Crown primarily, and secondarily of the Donees, &c. which Intention of the King's would be of little Avail, if the Tenant in Tail might alien. Though they are new Estates by 4 Jac. yet the Reversion remains in the Crown, and is not removed nor removeable by any Act, which the Donee can do; that the Power of restraining the Donee to alien, is wholly for the King's Advantage, and annexed in Privity to his Reversion, and independant upon the Estate given; for if the King should alien his Reversion, his Power to restrain was gone, and would not revive, though his Reversion was reconveyed; but if Donee alienedd, and took back an Estate again, yet the King's Power to restrain was not stirred. And to the Objection of Baron Gregory, that the restraining Power of the King was gone, for want of Privity. He said, that Privity was not requisite, as appeared by the common Case, where Donee of the Crown made Leases for two, or three Lives, which are good; or where Gift is made in Tail, Remainder in Tail, Reversion being in the Crown, here is no Privity, yet the King's restraining Power continues. He said, he could not look upon the Estates in 4 Jac. as a new Gift, and that no one will say, but that the Earl of Derby had the Manor of the Gift of the Crown, for King James did not intend to pass away any Right, but only assented to the Act for confirming an Award, made for the Quiet and

Peace of the Family, and which by their own Consent was of Force only within the Family, and which could not stand, unless confirmed by Act of Parliament; therefore as this Award could not, nor could any other Act which the Family of Derby could possibly do, remove the King's Reversion, or alter his Power of restraining; so the Act that was purely for confirming this Award shall not extend to it, but it stands still in the same Plight as it was before; and that an Act of Parliament between particular Persons, shall not bind Strangers, he cited 8 Rep. 138. and 21 H. 7. 1. therefore here, the King joining but to give his royal Stamp, and Confirmation to this Award, to construe this to bar him of a real and valuable Advantage, would be very hard. And as to the Question who shall be Donor, he said, when an Estate is created by Act of Parliament, no Body is said to be Donor, unless the whole Nation; but here in a Formedon he may set out the King to be Donor, like as when one brings a Formedon for Lands, he had upon a Recovery in Value: Upon the whole Matter he takes it, that this being an Estate created by the Crown, the Reversion remains in the Crown, notwithstanding the Alterations made by the Statute of 4 Jac. and is still within the Protection of 34 H. 8. and therefore the Fine of Earl Charles is no Bar to this Issue; and so Judgment ought to be entered for the Plaintiff. He said, he was ordered to deliver the Lord Keeper's Opinion, which was, that it was a new Estate by 4 Jac. yet within the Protection of 34 H. 8. and that howsoever 4 H. 7. was at the making thereof, as to barring or not barring an Estate-tail; yet when 32 H. 8. comes and declares upon 4 H. 7. now all Fines are good from 4 H. 7. to bar Estates-tail.

Anonymus.

12. FOUR Justices at a private Sessions had discharged an Apprentice, and after at a General Sessions the Justices finding the Mistake, set that Order aside; and now they come into the King's Bench, and move to have the Order at the General Sessions set aside, for that the first Order was according to Law; but the Court denied it, and said that an Apprentice could not be discharged but by General Sessions, according to 5 El.

Marriot *and* Knightly; *puis.*

13. THIS was a Writ of Error upon a Judgment in C. B. upon an Action upon the Case, for Words wherein Knightly declared, that he being a Justice of the Peace, and a Deputy Lieutenant, the Defendant spoke of him these Words, he standing at that Time for Knight of the Shire, viz. I have heard that a Maid of Sir John Knightly's, when he was last Sick, looked through the Key-hole, and saw a Priest administer to him the Eucharist and extreme Unction: Upon not Guilty pleaded, he had a Verdict, and Damages to a 1000 l. and Judgment in C. B. upon which this Writ was brought. And Holt for the Plaintiff in the Writ of Error, takes the Words not to be actionable, for that they subject the Plaintiff to no Penalty within any Statute; and when he mentions those concerning bringing in of Bulls, Agnus Dei and hearing Mass, he said, that extreme Unction is no Part of the Mass, nor prohibited by our Laws Temporal or Ecclesiastical, only declared by Articles of the Church, not to be a Sacrament, and so is Penance, and that it is in it self no more unlawful, than is Penance; and for anointing with Oil he cited James v. 14. and that using it doth not necessarily conclude him a Papist. He cited 1 Brownl. 12. 4 Rep. 16. 2 Cr. 243. 2 Roll 43. 3 Cr. 191. Serjeant Jefferies on the other Side cited 1 El. and 27 El. 2 Car. 300. Roll 50, 46, 86, 69.

The

The King *and* Hurst.

14. IN the Cause between the King and Hurst, it was holden by the Court, that 23 El. extended to all Sorts of Recusants, Protestant, as well as Popish; and Jones said, that in 22 El. a Proclamation issued to put the Laws in Execution against Famelists and Separatists. And Dolbin said, that in the Beginning of Charles the First's Time, all the Judges of England held, that Protestant Recusants were within 23 El. And Saunders Chief Justice said, that Courts could not take Notice of the Ground of their Recusancy, but must punish them for not coming to Church; but the Cause why they did not, could not be looked into. And in this Case it was holden likewise, that let the Party be indicted in a wrong County, yet he shall have no Advantage of it, or for any other Cause avoid the Indictment, but only by Conformity; but Ouster le main is a good Plea. And afterwards a like Case was moved by Wallop and Williams, and very much pressed by them, that they might speak to it; but the Court would by no Means let it be made so much as a Question; and Jones told Wallop that this was the first Time any Counsel had been so bold, as to offer an Argument to the contrary; this Case of Hurst was then remembred.

Anonymus.

15. IN Action of Trespass for taking away his Dogs; the Defendant pleads that the King was seised of his Forest of Waltham in jure Coronæ, and that A. B. was an Officer, &c. within the said Forest, &c. that several Deer had been killed by Persons unknown; wherefore A. B. grants a Warrant to search for dead Venison, and for Dogs, commanding to bring the Dogs to him, &c. that the Defendant was Constable, and had the Warrant directed to him, &c. Exception was taken, because 'tis not shewn by the Defendant, that the Plaintiff is not a Person uncapable to keep Dogs, but not allowed; for that Forests are excepted by the Statute 22 & 23

Car. 2. cap. 25. and by Forest Law, none can keep a Dog within the Forest, that is not expeditated; wherefore upon Demurrer adjudged for the Defendant.

Trevisa's *Case*.

16. JUdgment was had in a Scire facias against two, being Bail, and one dies; yet the Scire facias may be brought against the Survivor, being upon a Recognizance; but otherwise of a Judgment in Debt upon an Obligation, for there it is made joint: Quære hereof, the Court taking Time to advise. Afterwards in Trin. 35 Car. 2. it was moved again, and 'another Exception taken, for that the Condition of the Recognizance being, that the Principal shall pay the Money, or render himself; 'twas assigned for Breach, that he had not rendered himself, which was ill; for however the Money might be paid, and so the Condition not broken; which the Court held to be a good Exception; wherefore it was adjudged for the Defendant; and in this Cause Jones said, there would be a Difference between an Obligation, and a Recognizance. Sid. 340. 20 H. 7. 3.

Smyth *and* Betterton.

17. ACtion of Trespass was brought for pulling down a Stall, and small Damages given; and 'twas moved, that the Party might have full Costs, this not being within the Statute of 22 & 23 Car. 2. cap. 9 for that the Statute extends to petit Trespasses, such as fouling his Grass, or small involuntary Trespasses, but not to wilful Wrongs, wherein the Title of Freehold cannot come in Question; as entring into his Close, and driving away a Cow, hath been adjudged not within the Statute; so carrying away Stones. So if one shall wilfully hurt another's Horse, &c. of Value; so in the principal Case the Court ordered the Party full Costs; and Saunders Chief Justice said, that a Stall is no Part of the Freehold.

Anonymus.

18. A Citizen of Bristol had a Country House, and frequently received the Sacrament in the Parish Church in the Country; likewise he received it frequently at the Cathedral Church in Bristol, but not in his own Parish Church in Bristol, for which Cause he was cited into the Ecclesiastical Court, and admonished; and afterwards for not obeying, and receiving in his Parish Church according to the Monition, he was excommunicated, tho' one of the Surrogates of the Court, but the Sunday before, had with his own Hand given him the Sacrament; and though he there pleaded this, and likewise his Receiving in the Country at his own Parish there, they would not allow it; upon this Matter appearing to the Court, a Prohibition was awarded.

The King *and the City of* Worcester; *devant and puis.*

19. Afterwards the Counsel for the City of Worcester came with their Bill of Exceptions; First, For that the Venire being awarded to the Coroners, it was returned as by both, when in Truth but one of them returned it; and therefore they challenged the Array, and likewise they challenged the Polls, for want of Freehold. Upon reading the Bill of Exceptions in Court, they named the particular Justices by Name, coram Edmundo Saunders milite, &c. which was altered and made, coram Justiciariis prædict'; likewise it was, that they recusaverunt their Challenge, which was amended, and put in; that they over-ruled their Challenge. And Saunders Chief Justice said, that if a Challenge be taken, and the other Side demur, and it be debated, and the Judge over-rule it, it is entered upon the original Record; and if at Nisi prius it appears upon the Postea what the Judge hath done; but if the Judge over-ruled the Challenge upon Debate, without a Demurrer, then 'tis proper for a Bill of Exceptions. Hutton 24.

Lord

Lord North *and* Grey *against* Elliot.

20. IN a Scandalum magnatum, the Plaintiff made a Suggestion upon the Roll, that insomuch as a Brother of the Defendant's was one of the Sheriffs of London, that therefore the Coroners might return the Jury; the Plaintiff said he would confide in the Indifferency of the Sheriff; but the Court said, the Suggestion being upon the Roll, and not denied, the Coroner must return the Jury. Vide Rich vers. Sir Thomas Player.

Dolbin Justice was removed from his Place in *R. B.* and *Withins* of the *Middle-Temple* came up in his Room, being created a Serjeant the first Day of this Term, and gave Rings with this Inscription: *Lex regi placuit.*

Term. Pasch.

35 Car. 2. R. B.

Tayler *and* Haynes.

1. THE Father had a Son and two Daughters, one of the Daughter dies, the Father intending to let the Son have the whole Advantage of the Intestate's Estate, renounces the Administration, and it is granted to the Son; the other Daughter comes into the Spiritual Court, and sues for a Distribution upon the Act; whereupon Pollexfen moved for a Prohibition in Trin. Term following. Holt shewed Cause why a Prohibition should not go, and said that 25 Car. 2. was made in Pursuance of 31 H. 8. and upon the Statute of H. 8. the Ordinary upon the Father's Renouncing could not commit to a Stranger, but must have committed to the next of Kin; and that now this Statute causes a Distribution to those who have an equal Right to the Administration, which the Daughters in this Case have.

Pollexfen on the other Side said, in this Case there could be no Distribution, unless the Act gave it; and he said what the Act gives, is at the Time of the Death of the Party, and that none shall have Distribution, but who is that Time, scil. at the Death of the Intestate intitled to it: He said, that here his Renouncing gave no Right, and that if he come and sue afterwards in the Spiritual Court, that this will not bar him; if the Father had dy'd before Administration taken out, his Executor or Administrator should have it. Jones said, that the main

main Intent of 25 Car. 2. was to hinder the Ordinary from letting whom he pleased run away with the whole Estate; a Prohibition ordered, with Design to argue it upon a Demurrer.

Moor *and* Russell.

2. POllexfen moved in Arrest of Judgment upon this Declaration; which was, that whereas the Plaintiff had bargained and bought of the Defendant sixteen Hogsheads of Wine, &c. that the Defendant in Consideratione inde adtunc & ibidem did warrant the Wine to be good, and merchandizable: Now he said that this Warranty is after the Contract, and said the Consideration being executed, is not good; whereas the Warranty ought to be contained in the Contract, and be a Part of it; and cited 2 Cr. 630. Pope and Levinz's Case. But the Court seemed to think it too nice, and that here being adtunc & ibidem it shall be intended all at an Instant; and that it would be well enough, if in Consideratione inde had been out; however they stay'd it, till 'twas moved on the other Side; and being moved on the other Side the next Term, the Plaintiff had his Judgment by the Opinion of Raymond and Withins, Jones hæsitante.

Rich *against Sir* Thomas Player.

3. RICH brought an Action against Sir Tho. Player for 100 l. the Plaintiff being one of the Sheriffs of London, surmised it on the Roll, and prayed Process to the other Sheriff, which was granted accordingly; and at the Trial was no Defence. But Williams moved in Arrest of Judgment, that the Venire facias was, and ought to have been returned by the Coroner, for that both Sheriffs make but one Officer; and Pollexfen cited 11 Rep. 4. and 14 H. 4. 35. On the other Side Jefferies cited many Precedents, as Hill. 8 H. 8. Rot. 308. C. B. Trin. 18 Eliz. R. 511. B. in London. Brownl. Brevia Judicialia 396. And a Case which he himself moved in the Common Pleas, between Harvy and Bethel when he was

Sheriff; and then the Prothonotaries said, it was their constant Practice, where one Sheriff was Party in Interest, that the Venire facias goes to the other. Saunders Chief Justice said, that they judicially take Notice, how many Sheriffs are in each County, be it a County at large, or a County of a City: And Jefferies said, that if a Writ issue out of this Court to the Sheriff of London, 'tis Vicecomitibus; if to the Sheriff of Middlesex, 'tis Vicecomiti. If a Plaint be levied in a Counter in London, and a Habeas Corpus is brought, 'tis returned by that Sheriff in whose Counter the Party is in Custody, and he only is to answer if he escape; but a further Day was given to bring in more Precedents.

The King *and the City of* Worcester.

4. THIS Term the King's Attorney moved for Judgment against the City of Worcester, and the Counsel on the other Side moved in Arrest of Judgment, that here the Venire facias was once awarded to the Sheriff, and after a Surmise is upon the Roll, that the Sheriff is one of the Defendants, and therefore Process went to the Coroners, which they said ought not to be, but the King should thereof have the Advantage by way of Challenge; but the Court said, that where Process hath been awarded to the Sheriff, and after one of the Defendants is made Sheriff, that Process ought to go to the Coroners, for that now the Sheriff is a Party not indifferent. And Sawyer the Attorney put this Case, if an Action be brought against J. S. and Process is awarded to the Sheriff; and after J. S. is made Sheriff, shall not Process now upon a Surmise entered, &c. be awarded to the Coroners? And in this Case Saunders said he very much doubted whether a Bill of Exception lay in R. B. and though Enfeild and Hill's Case was cited, Jones said, that Case was, when there was but two Judges in Court, viz. Rainsford Chief Justice, and himself, and they differed, and therefore a Bill of Exception was allowed; but he said in a Trial at Bar afterwards, it was strongly doubted: They further urged in this Case that the Information was several, though but one Roll, and that the Offence was so; and that therefore although as to the

Sheriff, the Venire ought to go to the Coroners; yet as to the Rest, the Sheriff ought to return it, and especially as to Eight, against whom the Venire facias was granted long before this last Venire; to which the Court answered, that those Eight pleaded to issue long before the others, and then the Sheriff was not one of the Defendants. But Saunders Chief Justice said, that if Eight only plead to Issue, and the Venire is awarded to the Sheriff; if after it fall out that the Sheriff is a Defendant, the Venire shall go to the Coroner, tho' the Sheriff hath not yet pleaded; and as to the several Venires they over-ruled it. And the Chief Justice put the Case, that the Sheriff and another were joint Obligees in a Bond, and one pleads Non est factum, and the other Conditions performed, and Process is awarded to the Coroners, and Issues tried, upon one Venire it shall be good; and the Court commanded Judgment to be entered, and they refused in this Case the Counsel to argue, whether want of Freehold be a Challenge to the Polls, having by Opinion likewise of the Justices of C. B. overruled it upon the Trial.

Risley *and* Temple.

5. THE Case in Effect was thus, John Risley Tenant for Ninety-nine Years, if he so long live, Remainder to Trustees during the Life of the Tenant for Years, to preserve the contingent Remainders; Remainder to first, second, &c. Son of Tenant for Years to be begotten in Tail, Remainder to Heirs Male of the Body of Tenant for Years; Remainder to Thomas Risley Brother to John, and to the Heirs Males of his Body; and this Estate was created by Thomas Risley, Father to John and Thomas. John having no Issue, the Trustees convey the Freehold to him, and he levies a Fine, and after suffers a Recovery, which was to the Use of himself, and his Heirs, and devises the Land to Temple, &c. in Trust for, &c. and dies, Thomas being his Brother and Heir; in this Case it seemed to be the Opinion of the Court, that the Remainder of Thomas was barred by the collateral Warranty descended upon him; this Case went further upon the Devise, and there-

upon a special Verdict was found; upon which the Point was but thus, The Testator lying sick in Bed, makes his Will, signs, seals, and publishes it in the Presence of the Witnesses; but being tired, orders them to go and subscribe their Names in another Room; they go into another Room out of the Sight and Presence of the Testator, and subscribe their Names, and then return, and own their Names to the Testator; and he looks upon the Will, and says they have done well; and if this shall be a good Devise within the Statute of Frauds and Perjuries is the Point. Quære here, if the Warranty be not gone, upon John's having by the Recovery an Estate in Fee again, or else so turned into the Post upon the Recovery, that no Voucher can be, &c. this was a Trial at Bar in R. B.

Stisestead *and* Barney *in Chancery.*

6. BArney's Father being sick, one Tiseson sold Barney as many Goods as were worth 400 l. for which Barney entered into a Judgment of 1600 l. defeasanced, for the Payment of 800 l. within forty Days after his Father's Death. Barney's Father dies within a Year after this Judgment entered into, and a Bill in Chancery is brought to relieve Barney against this Judgment, 'twas brought before Finch Lord Chancellor, and he decreed that Barney should pay 400 l. and the Interest from the Time of the Sale; and afterwards upon a Rehearing before North Lord Keeper, this Decree was confirmed, for Barney's Father being then sick, 'twas looked upon to be a Cheat; and if it should be allowed, it would be like the Case of lending 30 l. to receive 33 l. if the Son of the Obligee be living June 1, &c. and 5 Rep. 70. And then they may tie it upon the Life of one condemned to be hanged, and so evade the Statute: So here the Father being likely to die, it was looked on little better than a Cheat; but if the Father had been in perfect Health, though he had dy'd quickly after, yet they would not have relieved him; for by the same Reason, that if the Father had lived thirty Years, he should have continued without his Money or Interest, by the same Reason he shall have it if he die sooner; and no Reason to relieve on one

side, and not to relieve on the other; but here the Father being sick and likely to die, 'twas the main Reason of the Decree.

Du Hamell's *Case*.

7. ONE being Apprentice to Du Hamell, upon Complaint was discharged by Order of Sessions for Default of the Master; and Du Hamell was ordered to restore Part of the Money, and deliver up the Indentures; this Order being looked on as extraordinary, it was moved to be quashed. But Saunders Chief Justice said, that the Justices might well discharge the Apprentice by 5 El. and that ordering Part of the Money to be returned, and Indentures to be delivered, was a Power incident; and he cited a Case where Part of the Money was returned, though the Apprentice was discharged thro' Default of the Apprentice; and here 'tis the Master's Default.

The King *and* Worrall.

8. IN an Information it was set forth, that for forty Years and more it had been the Custom of Dyers to woad their Cloth to the fourth Stall; and that the Defendant to the Intent to cousen the King's Subjects, and to bring the English Manufacture into Discrepute abroad, had dy'd and sold Cloths Madder Blacks, which were woaded but to the third Stall. And further it contained, that he had put to them the Company's Seal, and marked them with the Red Rose, which was a Mark that whoever sees knows the Cloth ought, and is indeed good and lawful, &c. of clapping to the Company's Seal and Mark of the Red Rose, the Defendant is found Not guilty, but of woading, &c. to the third Stall, he is found guilty; and whether Judgment shall be given against him was the Question.

Treby for the King moved, that this was a Cheat, and a Deceit to the King's People, and a general Injury to the whole Kingdom; for that hereby the English Cloth lost its Esteem in Foreign Parts, and said it ought to

be punished by the same or greater Reason, than playing with false Dice, or cheating at Cards, which were Wrongs, for which an Action of the Case would lie; and likewise 'twas indictable, and cited 2 Car. 497. and so the Case of the Gloucestershire Clothier 2 Roll 28. And said, that this was not like to the Case where one sells a Horse having but three Legs, or being blind, for these were open and manifest Imperfections; but here the Cloth looks as well, as if it had been truly dy'd, and its Fault was not to be discovered but till afterwards, when it was too late. And he cited the Case of Pargiter, which was tried at the Bar, where for having sold an Inkhorn mix'd with base Metal for Sterling, an Information was exhibited against him, as for an Offence at Common Law; and in that Case the Court was of Opinion, that if he sell such Metal, though but for a reasonable Price, yet 'tis an Offence, and no such Metal ought to be made: And there Pargiter had not put any Mark, no more than the Defendant here; but the Court took it, that no Judgment ought to be against the Defendant, for he having not put to the Company's Seal and Mark of the Red Rose, there was no Deceit to the Publick; and the Crime no greater, than if a Painter should not put Oil enough in his Colours. As to Pargiter's Case 'twas not like this, for making of such mixed Metals is a Thing defended by Law; then 'twas noted that they say, there hath been a Custom forty Years, which will not make a Custom. To which Treby answered 'twas forty Years and more, and so it might be Time out of Mind; and like to the Case, where 'tis said a Chapel of Ease had Church-wardens and Overseers belonging to it in H. 6. Time; yet it might be longer; but after some Debate, the Court was of Opinion no Judgment ought to be against the Defendant.

Term.

Term. Trin.

35 Car. 2. R. B.

Griffith's *Case.*

1. ONE Griffith, a Man of a mean Fortune, had married a Woman, who was one of two Coparceners to 600 l. per Ann. upon Suggestion by the Friends of the Wife of Lunacy, &c. the Woman was in Court, and being thought sensible enough, the Friends moved that the Estate might be so settled that she might not be wrought on by her Husband to give it him from her Children by her, or which she might have by any after taken Husband, which the Court thought fit to order; and it was left to Mr. Pollexfen to see such a Settlement made; and in this Case the Court remembred the Case of Sir Edward Graves. The Settlement was to be to the Husband and Wife, and the longer Liver of them; then to the Issue between them, &c. with a Power in Case of Failure of Issue for the Wife to dispose.

Anonymus.

2. UPON an Information for buying live Cattle, and selling them again, not having kept them five Weeks, grounded upon 5 & 6 Ed. 6. 14. the first Information failed, for that being grounded upon the Statute made at a Parliament held by Prorogation upon the 23 Jan. according to a printed Book; whereas by the Roll it is the 30 Jan. so no such Statute; which being

ing the Ground of their Information and being false, the Information failed, and another was brought and a Verdict against the Defendant; and now 'twas moved that there was no such Statute in Force, for that in the 13 Eliz. cap. 25. which continues the Statute of 5 & 6 Ed. 6. it is said likewise to be held 23 Jan. which being mistaken, there is no such Statute, and so no Continuance; but the Court would not allow it. For this being an antient Statute of continued Use, and general Good, and no other Statute as to this Purpose in Being, the Intent of the Makers is plain; and at this Time of Day they will not admit of such an Opinion. Then it was offered that they have not pleaded 13 El. which is the Act that gives the 5 & 6 E. 6. its Vigor and Force; but the Court said they need not, for 'tis now as if it had never been discontinued.

The Case of Marriot *and Sir* John Knightley; *devant.*

3. THIS Case was argued again this Term by Pollexfen for the Plaintiff in the Writ of Error, and by William Finch for the Defendant; he said that the Words were in Effect but thus, The Priest gave Sir John Knightley the Eucharist, and extreme Unction; he said that by the Word Priest, was intended a Priest of the Church of England, (i. e.) one that hath the Administration of Things sacred, and so is he stiled in the Liturgy: So the Eucharist is a Thing lawful and commendable to take; so that thus far the Words are innocent. Now then the Words Extreme Unction must be that whereupon they must adjudge these Words actionable, if they are actionable: He said, 'tis true it is made a Sacrament by them of the Church of Rome, and for that cited Concil. Trident. 330. But that the Church of England in the Articles of 1562. owns but two Sacraments, yet condems not the other; and therefore though in our Church extreme Unction be not held as a Sacrament, yet it may be of it self good and lawful, and for which some Men may have Reason to deduce from the Scriptures good Reasons, and instanced in that of St. Mark xvi. 18. and St. James cited before by Holt: Therefore the

the Use of such a Thing as this cannot make a Man a Papist, which is a Name not of so much Distinction in Matters of Religion as of Government, for he is a Papist that acknowledges the Supremacy of the Pope, in Matters Ecclesiastical; so then the Saying he had extreme Unction administred to him, is not as much as if he had called him Papist. He said, that in the Case of Roe and Clarges 'tis true, the Calling of a Justice of the Peace Papist, is adjudged actionable, for that it was a Disabling him to execute his Office, and laying him open to many Penalties; but at Common Law such Words were not punishable in our Court, as Heretick, &c. 4 Rep. 17, 20. and that now they are no further so, than as they are made Crimes by Statute, but this is not made one by any Statute; 'tis true Words not actionable are become so, if any Loss happen, as to the Cases cited, where Words spoken of a Justice of Peace are actionable, which are not so, if spoken of another Person; he says all these Cases are where they charge upon him a Misfeasance in his Office, as Bribery, &c. but to say a Thing of a Justice of Peace, which if true, he ought not to be a Justice of Peace, will not be actionable; as to say of a Justice of Peace, he hath not 40 l. per Ann. &c. So he remembred the Case of calling one Buffled-headed Justice; but to lay Bribery upon a Justice of the Peace, is actionable.

Finch on the other Side argued, that it is the Sense of the Words, and not the Words themselves, that makes them actionable; that no body could otherwise intend these Words, than that they meant he is a Papist; that upon an Indictment for being a Papist, this given in Evidence would be sufficient to convict him. There were these Words found likewise, that the Servant Maid, &c. ut supra, saw a Popish Priest administer to him the Eucharist and Extreme Unction, which seemed to be actionable; but being laid to be spoke at several Times, and intire Damages being given, if the first Words are not actionable, the Judgment ought to be reversed; Curia vult advisare. Afterwards the Court held the Words actionable, and affirmed the Judgment; for Extreme Unction tho' formerly used by the Apostles, is now disapproved of by our Church, and used in no Christian Church, but that of Rome, and the Words are a Description of a

Papist, and worse than if he had called him Papist, for that here is an Act done which shews him one, and the other might be a Word of Heat; and in this Case it was allowed, that if it were Popish Priest, &c. it were actionable.

Eaton *and* Sherwin.

4. ACtion sur Case was brought, wherein the Plaintiff declared, that the Defendant in Consideration, that the Plaintiff had agreed with the Defendant for six Years; that he would permit and suffer him to take the Tithes of Corn and Hay within such a Parish, that the Defendant did agree to pay him in Consideration thereof 100 l. scil. 50 l. Half-yearly; and for Non-payment of 50 l. was this Action brought, and a Verdict for the Plaintiff. And afterwards Thomson moved in Arrest of Judgment, that Tithes being Things that lie in Grant, cannot pass by this parol Agreement; in Case of Retainer it may be well enough for a Year, but not here. Pollexfen on the other Side said, tho' 'tis true it would not be good as a Lease, but yet here was sufficient Cause of Action arising from the mutual Promise of the Parties, and so the Court held; for tho' 'tis true no Interest passes by such an Agreement, yet he having according to the Agreement suffered him to take the Tithes, an Action lies for the Money upon the other's Agreement; wherefore the Plaintiff was to have Judgment nisi. And Jones Justice cited the Case of Hawkes and Brayfield, 2 Cr. 137. Hob. 176. and held that by way of Retainer it will be good but for a Year.

Lenthal's *Case*.

5. ACtion was brought against Lenthal upon an Escape suffered by Cooling, who had a particular Estate in the Office of Marshal of the King's Bench, and at the Trial the Plaintiff was Nonsuit, for the Estate of Lenthal's own Shewing was not in him; wherefore a Motion was made in Court, that Mr. Lenthal might bring in his Deeds, and make it appear in whom the

Estate was, and a Day given to shew Cause: And at the Day Pollexfen said, it would be very hard in such a Case as this, where he is to answer upon a penal Law for the Default of an Inferior, that Mr. Lenthal may have mortgaged his Office, and so have not the Deeds, or there might be a Flaw in the Deeds, and yet he may have just Right to the Office; and this would be to betray them to an Enemy. The Court seemed to think it hard in such a Case as this; but if Mr. Lenthal was to put in an Officer, they might make him shew his Title. And Jones Justice said in this Case, that he that hath an Estate for Life in this Office, is the Officer against whom the Forfeiture shall run; and 'twas said that it ought to be of Record in the Court who is the Officer, that the Parties grieved may know against whom to bring their Action; but as for bringing in the Deeds the Court could not order it; but said they might go into Chancery.

Anonymus.

6. A Popish Recusant Convict did conform, and after came not to Church; whereupon an Information was brought, which did not set forth his Conviction, and therefore it was holden ill; but upon not Guilty he need not give in Evidence that he is convicted; and 2 Cr. 365. was cited, and allowed, but not pertinent to this Case.

Anonymus.

7. A poor Boy had been put out an Apprentice by the Justices, and after three Years Service it did plainly appear that he was a natural Ideot, and not capable of learning his Trade; hereupon the Justices discharged the Master of him, and sent him back again to the Parish by an Order of Sessions, which Order was moved to be quashed; but the Court refused it, and said it was a good Order, it being hard the Master should keep one who could do him no Service, and the Parish in the mean Time go free. And here the Resolution of Byne's Case was remembred, which is that the Justices cannot compel any to take a poor Boy Apprentice.

Brown *against* Booking.

8. THE Plaintiff declared in Action sur Case for disturbing his Cattle, and lays no Title but only in using their Common in such a Close, but lays no Title, and Judgment by Nil dicit; and afterwards upon a Writ of Error Exception was taken, for that he lays no Title, which he ought in this Case, where he claims an Interest and a Charge in the Soil of a Stranger, especially here, being upon a Nihil dicit, or upon a Demurrer; after a Verdict, 'tis true it will be well enough, for it shall be presumed, the Judge upon the Trial made them shew their Title. Pollexfen on the other Side said, that this Action being upon the Possession is well enough, and compared it to a Way, to a Case of Lights, to a Water-Course, &c. and cited Cases where such Actions had been brought; and cited 1 Cr. 575. the Case of Sands and Trefusis, where an Action for stopping the Water-Course without laying a Title, was held good upon a Demurrer; he cited 2 Cr. 121. 1 Cr. 325, 499, 575. 2 Cr. 673.

The King *and the Parish of St.* Mary's.

9. INdictment against the Inhabitants of St. Mary's in Warwick, for not repairing an Highway, and Judgment against them, upon a Verdict before Mr. Justice Hutton and Croke, in the Time of C. 1. and now a Writ of Error brought and assigned; First, That this was taken before a Justice of Gaol-delivery, who has no Power to take it, but only to deliver the Gaol; and that it ought to be before Justices of Oyer and Terminer. Secondly, It was said that de jure the Parish ought to repair, and that the Defendant was not to be charged, unless some Cause be shewn, as by Tenure, &c. but in Case of a Parish a general Prescription will serve. 21 E. 4. 28. 2 Inst. 700.

The King *and my Lord* Strafford; *devant.*

10. THIS Case was moved again, and Exception taken to the Information, for that in shewing it to be two Furlongs from the House, they have not shewn where the House is, nor in what Parish; and therefore quashed.

Anonymus.

11. UPON the Statute of Discharge of poor Prisoners, it was holden that Justices may discharge against all to whom Notice is given; but where a List of Creditors is, wherein the Name of one Creditor is omitted, and they discharge him against all named in that List; he is not discharged against this Creditor, tho' Notice was given to him.

The King *and* Tolney.

12. AN Information for a Riot committed at Rye; the Question was, whether the Defendant was legally elected Mayor, and that depended upon this; there were four who had given their Vote for the Defendant, that had been put out upon the Act for regulating Corporations; and if they were incapacitated to vote according to the Custom of that Place, was the Dispute. Now the Custom of the Town of Rye is thus: There is a Mayor, Jurats, and Freemen, the Mayor is chosen by the major Number of Freemen; but if they be equally divided, then by the Jurats. These Freemen chuse the Freemen, and not the Mayor or Jurats, only the Mayor hath the Prerogative to chuse one Freeman, who is called the Mayor's Freeman. These Freemen must join in the Making of all By-Laws, nor can an Assembly (as they call it) be holden without them, all the Inhabitants of Rye are free there, and pay no Toll; but the Freemen so called only, chuse the Mayor and Burgesses of Parliament, and assent to By-Laws; so that tho' they are called

Freemen, yet they are Common Council-Men in their Nature; and this Privilege they have by Election or Descent, for all the Sons of Freemen are Freemen. Now the Question upon Evidence upon this Trial was, whether this Privilege of being a Freeman, is such an Interest or Trust for Government, as is within the Statute of Car. 2. for regulating Corporations, and ruled in a former Trial; and likewise upon this, that it was not; but that such Persons as have not taken the Oaths, &c. prescribed by that Act may however vote.

The King, *and* Pilkington *and* Shute, *&c.*

13. AN Information was brought against the Defendants for a Riot in holding an Assembly, and continuing a Poll for the Sheriff, &c. After my Lord Mayor had adjourned the Court, three of the Defendants appeared in Trin. Term, and pleaded Not guilty, and Issue was joined; and then comes the King's Attorney, and enters a Suggestion upon the Roll. That whereas two of the Defendants, viz. Pilkington and Shute were Sheriffs; yet the King's Attorney prays that the Venire be awarded Vicecom' pred'; a Continuance is enter'd as to these three to Mich. Term; and then comes in the others, and plead Not guilty, and Issue joined; the Return of the Venire was, quod Vicecomes non misit breve; wherefore a Venire was awarded with a Sicut alias against all the Defendants, with a Habeas Corpus and Distringas; and upon this by Nisi prius a Verdict was found against all the Defendants. And now it was moved in Arrest of Judgment, that the Information was against several Persons; three whereof only appeared in Trin. Term, and Continuances entered for them three, but for the Rest no Continuances were entered; and that therefore this was a plain Discontinuance upon the Roll, and being in a criminal Matter, it is not holpen by any Statute. Secondly, That this Suggestion of Mr. Attorney's is a frivolous Suggestion, for that here the Defendants being Sheriffs, were to summon a Jury, which is to be in a manner Judges in their own Case, and to be sure will be partial to themselves; and that the Law is otherwise, and that the Consent of the Parties will not alter the Law; and

and for that Hob. 5. was cited the Case of Crow and Edwards. Thirdly, That here the Venire is ill upon which the Action is try'd, for the first Venire being against three only, the Venire sicut alias must have Reference to that, which being against three, this must be but against three too; or if not with Reference to the other, then is it an Alias venire without an Original; and so nought either Way. Fourthly, That here no Judgment ought to be given, for upon the whole Face of the Information no Riot doth appear; for where upon a lawful Meeting Acts of Violence do ensue, that can be no Riot, but so many Trespasses in particular Persons; as if a Number of Men should meet at an Election, or in a Market, or in a Leet, and fall together by the Ears, these would be many Trespasses and Batteries, but no Riot.

As to the First, It appeared to be the constant Practice on the Crown-Side to enter Continuances only for them which appear; and after when the Rest appear to enter Continuances for them, and not till they appear, that all the Precedents are so; and that the Course of the Court is the Law of the Court.

As to the Second, they say 'tis only Matter of Challenge, which was introduced for the Benefit and Advantage of the Party; so that if the Sheriff was related to one of the Parties, the other upon suggesting it, before or at the Trial, might have a more indifferent Person to return the Jury; but that yet he might waive this Challenge, or release it, after he had taken it; and that so might Mr. Attorney here. For tho' Mr. Attorney's Consent cannot bind the King, as to Matter of Law, yet it will as to Matter of Fact, unless the Court see it to the King's Prejudice, and then they may stop it; but if they do not, as in this Case, it is no Error; that the Consent of Parties cannot alter the Law, as is said in Hob. 5. is true; yet if in that Case the Consent of the Parties had appeared upon Record, there had been no Error; and so it is said 1 Roll 28. in the Case of Crow and Edwards. So likewise was it holden in a Case in R. B. out of Ireland, in Ejectment of Lands in one County, try'd by a Jury of another, by Assent of Parties entered on Record.

As

As to the Third, The Words Sicut alias, is to shew that there hath been another Venire awarded, but refer not this to it; but that it is a Venire of it self, and a Trial against the Parties may be had upon it; and that the Course is, where an Information is against Twenty, to take a Venire facias against so many as first appear, and try them; and if more appear to take out another Venire, &c.

As to the Fourth, They denied the Law to be so, and that it was a new broached Opinion, and without Countenance of Authority, and Reason, and may open the Way to most extravagant Actions; as to its being said, a Sheriff cannot do an Act to himself, it is plain by the Case of Dyer; but this is no Act to himself, but rather for himself, and that the Sheriff may do an Act for himself, was yielded on the other Side: For if he be demanded, he may summon the Tenant to the Præcipe; wherefore the Court was of Opinion Judgment ought to be given for the King.

Anonymus.

14. Action sur Case was brought, wherein the Plaintiff declared, that whereas she was a Virgin of good Name and Fame, and sought to for Marriage by J. S. that the Defendant pretending himself to be a single Person, made Love to her, and married her, when in Truth he was married to another Woman, &c. whereby she became of less Credit, and lost, &c. After a Verdict for the Plaintiff, it was moved that an Action did not lie in this Case; but the Court was of a contrary Opinion; wherefore Judgment nisi, and in this Case, Latch. 144. was cited. Jones 147. V. Yelv. 99. Sid. 375. Stile 346.

Coppin

Coppin *and* Steymaker.

Jones 229. 15. THE Plaintiff declared in an Action of Covenant, that whereas the Defendant had covenanted and agreed with the Plaintiff not to release to J. S. without the Plaintiff's Consent, that notwithstanding he had released to him; and this Declaration being ill, Judgment was for the Defendant; and after the Plaintiff brought another Action, and the Defendant pleaded this in Bar: And upon a Demurrer, the Counsel for the Defendant urged 6 Rep. 7. and Dyer and the Counsel for the other Side cited the Mod. Rep. 207. The Court took a Difference between a Bar and Demurrer to the Declaration, and a Judgment upon a Demurrer to the Plea, or upon a Verdict or Confession; for in the Case of a Demurrer to the Declaration, the Right was never try'd, wherefore, &c. The Reason why the first Declaration is nought, is, because he says the Defendant released to J. S. and saith not without the Plaintiff's Consent, and so for ought appears it was with it; and then 'tis no Breach of Covenant. Yet Pollexfen cited a Case wherein he was Counsel, 'twas a Replevin wherein the Defendant avowed, and there was a Demurrer to the Avowry, &c. And after a new Replevin was brought, and this Judgment pleaded in Bar, and they could never get over it; and yet he said an Avowry is like to a Declaration.

Anonymus.

16. THE Principal was in Execution, and a Comititur entered; and after a Sci. fa. was brought, and two Nichils returned against the Bail, and Judgment upon the Scire facias; and now they come and move to set it aside; but the Court would not, it being the Act of the Court, and the Party should have come and pleaded it upon the Scire facias.

Brown *and* Blunden.

17. COvenant in a Lease to repair, &c. prædimissa from the Time of the Lease to the Determination thereof, and so well kept in Repair shall give up at the End of Term, not saying from Time to Time; afterwards the Lessee builds a Malt-House, and if the Covenant shall extend to it was the Question, and holden that it should in this Case, for it is a continuing Covenant; and though the House had no actual, yet it had a potential Being at the Time of the Lease; Judgment nisi.

Dr. Sand's *Case.*

18. DR. Sands, a residentiary Prebendary of the Church of Wells, brought a Suit in the Spiritual Court for Dilapidations, against the Executors of Dr. Pierce his Predecessor; and they on the other Side came, and shewed that in that Church there are eight residentiary Prebendaries, to which, for to encourage them to Residence, there are eight Houses belonging; that to each Prebend there is an House belonging, but not any House in certain, the Bishop having the Privilege of appointing what House he thinks fit to each Prebendary, but he must appoint one. They hence infer'd, that this House goes not in Succession, nor is it Part of the Corps of the Prebend, for that he is Prebendary, and hath one House allotted him, and so was Dr. Sands; and afterwards upon the Death of a Senior Prebendary, another House. But Jones Justice answered, it is true here are eight Houses belonging to eight residentiary Prebendaries, whereof each Prebendary de jure is to have one; that no one House is ascertained to any particular Prebend, or is Parcel of any particular Prebend, but ought to be assigned to some particular Prebend; and when the Bishop doth so assign by Virtue of his Power, and not by Virtue of any Estate he had in him, then it is Part of the Prebend, and shall be liable to a Suit for Dilapidations; wherefore there ought to be no Prohibition.

Term. Mich.

35 Car. 2. R. B.

SANDERS late Lord Chief Justice dying in the later End of last Term, and *Raymond* a Justice of the same Bench dying soon after the Term; and *Jones* going down to be Chief Justice of *C. B.* in the Room of Sir *Francis Pemberton*; *Jefferies* was constituted Chief Justice of *R. B.* in the Room of *Sanders*; *Holloway* a Justice in *R. B.* in *Raymond*'s Place, and *Wallcot* in the Room of *Jones*.

The Case of Southmoulton.

1. TWO are convicted for being at a Conventicle in a Corporation, and upon this Conviction an Appeal to the next Quarter-Sessions holden within and for the Corporation; and the Doubt was, whether this Appeal ought to be to the next Quarter-Sessions within the Corporation, or to the Quarter-Sessions of the County at large. And upon this the Recorder adjourned the Court, to know the Opinion of the Court of King's Bench therein; and upon considering the Statute of 22 Car. 2. c. 1. they were unanimously of Opinion, that the Appeal ought to be to the Quarter-Sessions of the Corporation, for the Words are, That the Record and Conviction shall be certified by, *&c.* at the next Quarter-Sessions of the Peace for the County or Place where the Offence was committed; which being so, 'tis natural that the Appeal shall be

to the same County or Place, where the Certificate is returned; and the Act saying County or Place intends the Return of the Certificate shall be to the next Quarter-Sessions of the County, where the Conviction is of a Conventicle in a County; and to the next Quarter-Sessions of the Place, where the Conviction is of a Conventicle within a Place, that holds Quarter-Sessions. And the Certificate being returnable thither, the Appeal shall be so too, that the Act may quadrare with it self; and though it was objected, that by this Means the same Persons which convicted, may be Judges likewise upon the Appeal, as in Corporations where the Mayor, it may be, and one Alderman are Justices; 'twas said that upon the Appeal the Trial is by Jury, and tho' possibly such a Case might fall out, yet they would not intend any Partiality, or Favour in the Justices.

Sir John Austin *against Col.* Culpeper.

2. There being a Suit in Chancery between these Parties, wherein several Witnesses were examined, Col. Culpeper forges an Order of Chancery, wherein were several defamatory Expressions against the Plaintiff; and at the End of it he draws a Form of a Pillory, and subscribes against it, for Sir John Austin and his forsworn Witnesses by him suborned; and this he delivers to the Plaintiff's Clerk in Court, and publishes it; whereupon the Plaintiff brought his Action sur Case, and had a Verdict and 500 l. Damages: And it was moved in Arrest of Judgment by Pollexfen, that by the Forging of the Order and defamatory Expressions, the Plaintiff had no Cause of Action for that, though in it self an ill Thing; yet the Party being not prejudiced in his Reputation, for several defamatory Expressions fix no particular Defamation, the Plaintiff shall not have his Action; and then if no Action lies for forging the Order, though it be admitted an Action does lie for making the Pillory, the Damage being intire, no Judgment shall be given. As where an Action is brought for Words, and for a malicious Prosecution, and the Words prove not actionable; if intire Damages are given, no Judgment shall be had. And as to the second Part, he said, that

'tis an Offence, wherefore an Indictment lies; but it is not actionable, for here is nothing certain forsworn, but what may have another Intendment, 4 Rep. 15. And he said if the Words will not bear an Action, the Representation will not; for that thereby 'tis not necessarily implied, that the Parties are perjured, but only as some may infer, for he that forswears himself extrajudicially, may deserve Shame, and Reproach, and for setting up Horns, &c. Indictment lies; and the Court said an Action lies likewise. And the Court likewise said, that the Forging of the Order was but Inducement, and that the Order and the Libel were one complicated Act, and that an Action will lie. And the Case of Col. King and Lake was cited, which was in the Exchequer, and affirmed in a Writ of Error, where the Plaintiff brought an Action for defaming him, and saying of him he is an unjust Man, &c. this being in a Petition printed and published; and the Plaintiff had Judgment because he published the Petition before the Delivery of it, which is the Difference between the Case in the Exchequer, and the Case in Sid. 414. He said, to say a Man is excommunicated is not actionable; but if a Parson pronounce Sentence of Excommunication against a Person not excommunicated, Action lies; and cited Roll, Action sur Case 37. And 'twas said, that to say of any Body that he is a dishonest Man is not actionable, but to publish so, or put it up upon Posts, is actionable; so the Plaintiff had his Judgment by the unanimous Opinion of the Court.

The King *against* Aaron Smith.

3. THIS Term Aaron Smith was brought into Court, being formerly convicted in a Trial at Bar for delivering to Stephen College, being upon his Trial at Oxford for High Treason, a Paper of Instructions, full of scandalous Reflections upon the King and Government, as that they might as well have hanged him at Tyburn, as he came by, as brought him thither, only to murder him in a little more Formality; for which the Court gave Judgment, that he should pay a Fine of 500 l. stand upon the Pillory twice, and be of the good Behaviour for a Twelve-Month, and stand committed till he pay it.

Mattoon *and* Fitz-Gerard.

4. THIS was a Writ of Error out of Ireland upon a Judgment there, on a special Verdict; upon which the Case appeared to be thus, John Fitz-gerard being seised in Fee by Lease and Release, conveys to A. B. C. and their Heirs, to the Use of himself and the Heirs Male of his Body begotten; and for Default of such Issue, to the Use of his only Daughter and Heir Catharine Fitz-gerard, and the Heirs of her Body begotten, and then to his Sister Letitia in like Manner (and so to others) provided that Catharine do marry with the Consent of his three Trustees (naming them) to some worthy Person of the Family of Fitz-gerard, or some Person who shall immediately take upon him the Name of Fitz-gerard; and if she do not, that then the Lord Offory, &c. and his Trustees to appoint her a competent Portion out of his Estate, and her Estate to cease, and go to Letitia, Sister to John Fitz-gerard, with a Proviso that the Heirs of the Body of Letitia, and every other Person to whom any Use is thereby limited, or shall come, shall take upon them the Name of Fitz-gerard. John Fitz-gerard dies, having no Issue but Catharine, then an Infant of two Years old; at fourteen Years old, Catharine is acquainted (but not by any Person interested or appointed by the Trustees, but only as a common Fame) that she must marry one of the Family of Fitz-gerard, or one that shall immediately take upon him the Name of Fitz-gerard; and that she must marry with the Consent of, &c. or else that she will lose her Estate, and that it will go to her Aunt Letitia. At Sixteen she marries one Villiers, who did not immediately take upon him the Name of Fitz-gerard; whereupon Letitia entered, and married the Lessor of the Plaintiff Franklyn, who did not for Twelve Months after Marriage take upon him the Name of Fitz-gerard; whereupon Fitz-gerard re-entered, and upon that an Ejectment was brought, and adjudged in Ireland for the Defendant; upon which here in England a Writ of Error was brought, and Holt for the Plaintiff in the Writ of Error said, he should make three Points.

First,

First, Whether it be necessary for Catharine to have Notice given her or not?

Secondly, Supposing Notice necessary, if she had not sufficient Notice.

Thirdly, If it be necessary for the Lessor of the Plaintiff to take upon him immediately the Name of Fitzgerard?

First, Notice is not necessary; but her Estate shall cease, Because

First, Her Father who might dispose of his Estate as he pleased, hath not made Notice necessary; and therefore she ought to take Notice at her Peril, and cited 1 Cr. 576.

Secondly, By the same Reason she takes Notice she hath an Estate; by the same Reason she must take Notice how she hath it, as if she be to set out her Title in bringing an Action, or any Action brought against her; and cited Dyer 192.

Thirdly, The Law hath not appointed who shall give Notice, and then she must take Notice at her Peril; and cited 4 Rep. Corbett's Case, 1 Cr. 391.

Fourthly, The Defendant's Wife Catharine hath the same Means to come by Notice, as Letitia hath; and cited 2 Cr. 432. Hob. 51. Jones 207.

Objections against him he says, are, 2 Cr. 56. which he says is for Payment of a Legacy, which ex natura rei, is not payable till a Demand; but it were otherwise if a Sum in Gross. Popham 104. and 8 Rep. 92. he says, was the Ground of the Resolution in Ireland; but he endeavoured to difference this Case from the Case of Frances, 8 Rep. 92. for there the Proviso was, if he disturbed the Executors, which is a Matter dehors, and the Resolution in that Case, that Notice ought to be given, is not necessary to the Judgment, for Judgment ought there to be given for a Defect in Pleading, scil. for saying he disturbed, &c. but laying no Act of Disturbance, &c. But the Case which he doth oppose to Frances's Case, is the Case of Fry and Porter, entered Mich. 22 Car. 2. Rot. 392. R. B. where by Hale Chief Justice and the whole Court it was holden, that no Notice is requisite. Some he said would distinguish Fry and Porter's Case from Frances's Case, because in Frances's Case it is to the Heir at Law, and so he must have had it however; but not so

in Fry and Porter's Case; but there is no such Reason given in Frances's Case. As to Mallorie's Case in the 5 Rep. it comes not near the Reason of our Case, because a Person not concerned shall not be bound to take Notice of another's Acts, that therefore a Person that is concerned shall not; he cited Dyer 334. He said that an Heir at Law, ought rather than another to take Notice of the Acts of his Ancestor, for there is a Privity between them; and if Debt was brought against her upon an Obligation of her Ancestor, she might shelter herself under this Estate (he speaks now if it were upon a valuable Consideration, so as not to be fraudulent;) and cited Jones 380. Winch. 109. before the Statute of Marlebridge, where the Heir comes in as a Purchaser of an Estate from his Ancestor, he was not in Ward; and now in an Action against him, the Parol shall demur for his Nonage, &c.

Secondly, If Notice be necessary 'tis well given, she is to do two Things; First, Not marry without Consent of Trustees; and this she was told: So likewise that Secondly, She ought to marry one of the Name of Fitz-gerard, or who should immediately take the Name upon him; and if she do not, her Aunt Letitia shall have her Estate, and she to lose it; but indeed this Notice was not by one concerned.

Thirdly, 'Tis only required, that the Issue of Letitia shall take that Name, but not the Husband, for no Use is limitted to him; and for these Reasons he prayed that the Judgment might be reversed. Herbert econtra considered, First, The Nature of this Condition. Secondly, If Notice be necessary. Thirdly, If so, 'tis not well given. First, 'Tis a Condition for destroying an Estate, which is odious in Law, and likewise in Restraint of Marriage, which is a void Condition by the Civil Law, which is the Wisdom of the greatest Part of Mankind. The Difference between a Condition and Limitation is, that a Limitation is not in the Party himself who hath the Estate, but a Condition is annexed to the Estate, and is compulsory; he denied that this was a Condition, but rather would compound this Matter, and call it a conditional Limitation. Secondly, Notice he said was necessary, there are three Things of an equal Construction,

struction, viz. a Testament, a Limitation of an Use, and an Act of Parliament; and he said he scarcely knew any Rule applicable to one, which did not serve for all. He said upon Construction of an Act of Parliament, the Way is to resort to the Law-makers, or propound if such a Question was put to them, and then to consider what Answer they would make, and so strike out the Sense of the Act. He said that here we are in the Case of an Use, and of a Condition, which is, as to the Parties, in Nature of a private Law; and that therefore, if John Fitz-gerard had been asked, what do you intend your Daughter shall lose her Estate if she marry another than a Fitz-gerard, or who shall take upon him the Name of Fitz-gerard, unless she have Notice of this Restraint? He would have rather been full of Indignation at the Absurdity of the Question, than seemed to own any such Intent; so that although here no Intent of John Fitz-gerard appears, that she shall have Notice; yet Construction of Law will supply the Intent. He saith he knows only three Cases, where Notice is not requisite. First, In Case of a Condition precedent. Secondly, Where the Thing that the Party is bound to take Notice of is of a publick Nature, as the Death of an Incumbent. Thirdly, In Case where the Party takes it upon himself; and this he says is the Reason of the Difference between a Condition in an Obligation, and a Feoffment, for that in Case of an Obligation, the Obligor takes it upon himself.

He saith that there is a great Difference between Fry and Porter's Case, and Frances's Case, and that the main Reason of the Opinion in Fry and Porter's Case that Notice was not necessary, was, because 'twas in the Case of a Purchaser; for by the same Reason she could take Notice that she had an Estate, by the same Reason she could take Notice upon what Terms; but in Case of an Heir at Law, he is in by Course of Law, and thinks himself secure, and therefore Notice shall be requisite. Thirdly, This Notice is not well given, for it ought to be certain, and by a Person certain; and for that cited Green's Case, 6 Rep. And the Notice that is here found to be given is not good, being per diversas personas, not naming any; and it may be incertain

Rumour or common Fame. He said, that the Verdict is faulty, and upon which, as this Case is, they cannot give Judgment, for a Verdict is in Nature of the Premisses, and Judgment in the Nature of the Conclusion; and tho' it be true in Words, yet no Judgment can be given, for 'tis found that she married without the Consent of Trustees, which may be true; and yet she hath committed no Offence, for the Trustees may be dead, and then she ought to have the Consent of their Heirs; or they may have no Heirs, and then she needs no Consent. So likewise 'tis found, that she married Villers, who immediately after Marriage did not take upon him the Name of Fitz-gerard: Now the Words of the Proviso are, shall immediately, which may as properly be before Marriage as after. Fourthly, He saith that Franklyn is as much bound to take the Name of Fitz-gerard as the Husband of Catharine, for otherwise, he should disinherit his own Daughter, to preserve the Estate in the Name, and yet be frustrated in his Intent; which was, that every one to whom any of the Uses should come, should take that Name upon them; and if Letitia and her Husband should not, some Persons to whom the Estate comes, take not upon them the Name; and if they do not, their Children are not bound to do it, so they seem as expressly obliged as the other; wherefore he prayed the Judgment might be affirmed.

He insisted upon the Rule, Quod nostrum est, sine defectu vel facto nostro amitti non debet, and insisted that without Notice here was no Default; and that Laws not promulged are as if they were still in the Breast of the Law giver, &c. He said that the Rule, that when no Body is bound to give Notice, that the Party is bound to take Notice, is an absurd one; puis.

Barrow *and* Gameach.

5. ONE seised of Blackacre devises it to his younger Son in Fee. Item, I give and bequeath to my dearly beloved Wife Frances Gameach all my Freehold Lands in D. to have and to hold during her natural Life. Item, I give to her for Life the Lands which I hold of G. T. Item, I give to her all the Lands that I purchased of J. S. to have and to hold during her Life. Item, I give, grant, and bequeath my said Lands to Edward Gameach my Son, and his Heirs for ever; and upon a special Verdict found at the Grand Sessions at Glamorgan, the Question was, whether by this Devise the Lands purchased of J. S. only passed to Edward Gameach, or whether the Lands in D. and S. passed likewise; and adjudged there, that all the Lands passed to Ed. Gameach after Frances Gameach's Decease; and upon this Judgment a Writ of Error was brought, and Pollexfen for the Plaintiff in the Writ of Error argued, that only the last mentioned Lands purchased of J. S. do pass. He said the Case that comes the nearest this Case, is the Case of Spirt and Bence, 1 Cr. 368. and after applying this Case he said, that in the principal Case it did appear, that the Testator understood the Effect of the Words well enough, for he limits the first Estate to his Son, and his Heirs, and after he limits the Estates to his Wife during her natural Life, and then comes, Item, I give my said Lands, not all my said Lands to my Son Edward: So that it seems the Testator knew well enough the Force of these Words, and intended they should carry only the last mentioned Estate; wherefore, &c. Powell econtra. He conceives not only the Lands purchased of J. S. pass, but all the other. He says the Word (said) refers not proximo antecedenti, but to the Whole; and for that cited 1 Inst. 20. where an Estate to A. for Life, Remainder to B. in Tail, Remainder to C. in forma prædicta; the Remainder to C. is void for Incertainty, for that prædict' goes to the Whole, otherwise had it been formâ eadem. He cited Roll, Estate 839. and Roll, Parolls 351. He said that all pass to the Son for this Reason, because he shews particularly where the Lands

lie which he gives to the Wife, as the Lands he purchased of J. S. the Lands he holds of G. T. &c. but when he devises to his Son, he says generally my Lands: Now if he had intended but a Part of them, he would have said The last mentioned Lands, or The Lands lying in such a Place, &c. He said it will be granted him, that if the Words had been All my said Lands, then the Word All would have carried the Whole; and he saith indefinitum equipollet universali, is a Rule in Law, as well as Logick. He cited 2 Leon. 190. and prayed that the Judgment might be affirmed; to which the Court inclined, and afterwards the Judgment was affirmed una voce.

Hudson *and* Cook.

6. BUCKBY Serjeant moved in this Case, wherein the Plaintiff had brought an Action sur Case against the Defendant, for causing him to be arrested for a Cause in an Inferior Court, which arose without their Jurisdiction of that Court: He moved this Cause before, and cited a Case lately adjudged in C. B. in the Lord Keeper North's Time, and moved again in Lord Chief Justice Pemberton's Time; and another adjudged in the Exchequer in Chief Baron Hale's Time, where the Plaintiff in like Actions had Judgment; and said that in Inferior Courts they hold them to special Bail in Actions of Trespass upon the Case, &c. and hold Executors to special Bail, and that they accept no Bail but what live within the Jurisdiction of the Court; so that a Man may have very good Bail, and yet lie by it, which Jefferies Chief Justice affirmed, and said that himself moved that Cause in C. B. after Pemberton came upon the Bench, and that it was so adjudged, and therefore in this Case the Plaintiff likewise had his Judgment; but they held that no Action would lie against the Officer that arrested him, being for a Cause the Court had Jurisdiction of; nor would a Writ of Error lie in such Case, for 'tis to go against the Record, which says it to be infra Jurisdictionem. 1 Vent. 369.

The East-India Company *and* Sandys; *puis.*

7. I heard not the Beginning of Holt's Argument, but I find he made two Points:

First, Whether the Letters Patent granted to the East-India Company be good.

Secondly, If good, whether it enables them to bring this Action.

He cited the Preamble of 3 Jac. cap. 6. whereby it appears, that the King had incorporated divers Merchants to trade into the Dominions of Spain, &c. whereby none but themselves, and such as they shall think fit, shall take Benefit of the said Charter, he said nothing less than an Act of Parliament could invalidate these Letters Patents; but therein they do not condemn them as unlawful, which certainly they would have done, if the Parliament had judged them against Law.

Then he cited many Precedents of Letters Patents granted by Queen Elizabeth, &c. of sole Trade to some particular Persons, exclusive to others, as into China, &c. And for Authorities of Law, he cited 2 Brownl. 296. Moor 673. and in the 14 Car. 2. cap. 24. the East-India Company, &c. are said to be of great Advantage to the Publick, so far was the Parliament from thinking them a Monopoly or Grievance; so he concludes that the King's Grant exclusively is good; and admitting it good; then Secondly, This Patent is a good Ground for this Action, for 'tis a Franchise wherein they have an Inheritance. As if the King grant a Return of Writs, or a Fair to one, and another intermedle, Action sur Case lies; and for this he cited 22 H. 6. 24. 11 H. 4. 47. He saith the Company hath a Trust in them, and have been at great Charge, and so prays their Judgment for the Plaintiff.

Treby on the other Side.

Here is an Action brought by the East-India Company against Sandys, wherein they declare that the King incorporated them, &c. with a Penalty that he that shall trade to any Part within their Patent, shall forfeit his Goods and Ship, one Moiety to the King, and the other Moiety

to the Company; and further be imprisoned at the King's Will, and to give Security that for the Future he shall not so trade: To which the Defendant hath pleaded 18 E. 3. Stat. 1. cap. 3. upon which there is a Demurrer, he made the same Points Holt did.

To the First, Whether these Letters Patents are good, or void.

First, They are good to make them a Corporation, and they may apply to themselves all Benefits of Trade, if they will, but yet not so as to obstruct the Trade of others of the King's Subjects. He said that these kind of Patents have not escaped the Observance of learned Men; and cited 2 Inst. 540. 1 Roll 226.

He acknowledges the King's Prerogative great in Matters of War and Peace, but so limited as not to hurt any of his Subjects. He agrees the Description of a Monopoly in the Statute 21 Jac. and the 3 Inst. to be just Descriptions; and says that if he can make out the Trade to the East-Indies a lawful Trade, then this is a Monopoly within that Description. Generally Merchandise is always lawful and commendable for the comfortable Living of Mankind, and furnishing our Country with the Fruit and Blessings which another Country hath, and it wants; and that this is lawful for every Man to employ himself about, and ought to be as free as Air; and that whereas Mr. Holt had cited Grotius de Jure Pacis & belli, he would cite him a whole Book of the same Author, viz. his Mare liberum; wherein he endeavours to prove that Trade ought to be free.

If this be a lawful Trade, and the Defendant is restrained using it, then these Patents are a Monopoly, 11 Rep. 53. 86. are the main Grounds why one cannot be restrained his lawful Trade; and 1 Roll 4. no Mechanick or Merchant can be hindred but by Act of Parliament, a Charter to hinder Trade at Sea, is void; a Patent that only a hundred Persons shall trade, is not good. 'Tis not lawful for any Man to bind himself not to trade. 2 H. 7. 6. 11 Rep. 53. 2 Leon. 210. Moor 242. Bond not to go out of one's House void, so would a Bond not to navigate to the East-Indies; and if in such Cases the Subject cannot restrain himself, the King cannot much more; if the King cannot alter the Property of the Subject in a Penny, he cannot deprive him of the

Means

Means he acquired it by. 3 Inst. 182. saith, these Patents have always been without Law, though never without Friends, 11 Rep. 88. Peche's Case, 2 Inst. 61. H. 8. granted to the College of Physicians that they should have the licensing such as should practice Physick, &c. and that none, but such as are licensed by them, should practice, &c. yet this was not thought good without an Act of Parliament. The Patent for the sole printing of Law Books came in Question in the Year 1668. and was referred to all the Judges of England; who upon great Debate, and many specious Reasons urged, as that Printing was a late Invention, was in Nature of a Proclamation, that it had always been under the Care and Power of the Government, that the King makes the Judges who give those Rules, and therefore ought to have in his Power the Publishing of them; yet the Judges did certify that those Persons that have acquired Copies of Law Books, might lawfully print them; (but afterwards in the House of Lords, I think this Matter was otherwise settled, sed quære). He thinks this Point strongly fortified, by Magna Charta cap. 30. that this was made for Merchant Strangers he confesses, for Englishmen had the Liberty before; but yet he shews that Merchants Strangers could not be hindred nisi publice prohibiti, which says the Comment ought to be by Act of Parliament, 2 Inst. 57. He cited these several Statutes 2 E. 3. cap. 9. 9 E. 3. Stat. 1. cap. 1. 14 E. 3. Stat. 2. cap. 2. 18 E. 3. Stat. 1. cap. 3. is pleaded. 25 E. 4. Stat. 4. cap. 2. 38 E. 3. cap. 2. these Statutes provide for a Freedom of Trade, 27 H. 6. cap. 1. 4 E. 4. cap. 5. 3 E. 4. 4. 26 H. 8. 10. a Power is given to H. 8. during Life to license or prohibit the Exportation of home-bred Commodities, or Importation of Foreign Commodities; which that King would never have accepted, if he could otherwise have done it, without an Act of Parliament, being a Prince that insisted upon his Prerogative, as much as any of his Progenitors, 35 El. cap. 7. the two last Paragraphs, and 1 Jac. 25.

'Tis objected, that this is a Trade with Infidels, and so unlawful without License; for that they are perpetui inimici, and cite Calv. Case, 17 Reg. 182.

3 'Tis

'Tis true, 'tis there said they are perpetui inimici; but if that be meant of a spiritual Warfare, 'tis as much against the Patent, as against us, for the King cannot by his Patent dispense with the Canon of Scripture. There is a strange Opinion in 12 H. 8. 4. that a Pagan cannot have an Action of Battery. 'Tis fanatical to think the Trade to the East-Indies unlawful; and if by Enemies are meant actual Warfare, 'tis plain not to be true, for that there are many Leagues between our King and Pagans, &c. 2 Brownl. 346. is cited; and this is all the Authority he hath, and therein the Record said to have been seen by Sir Edward Cook, he wishes he could have seen it too; however it was but one Record, and that not backed with any Practice since; he considers the Reason there, that the King putting special Confidence in the Party, gave him License; but this License here extends to the present Members, and their Heirs, when of 21 Years of Age, and their Apprentices, and all whom they shall license; he says, 'tis not owned that they were Infidels.

Objected, That Trade cannot be managed but by a Corporation, which is a Contradiction in it self, for then the Defendant could not be guilty.

Objected, The Subject may be restrained from Trade, because the King hath Power of War and Peace; he cited 12 H. 7. cap. 6. Roll, Prerogative 214.

Objected, That a Foreign Trade may be prejudicial to the Kingdom, as Irish Cattle, and French Commodities, which are declared to be a Nusance.

But that extraordinary Word was used, that the King might not dispense with their Coming in, but the inserting thereof was the Cunning of some Country Gentlemen of the trading Counties. Nothing more common than to put in Clauses of an extraordinary Nature in such Patents, and give a Reason for it, because they deal with People under a greater Restraint than themselves; and hereby they shew the Greatness of the King's Power. He cited the Case of Horn and Ivy, wherein it was adjudged against the Canary Company, which is a Case in Point.

Objected, That in 43 Eliz. the Parliament called in other Patents, but not this, and that Silence of the House

House of Commons is taken for an Opinion. He answered, that 'tis usual for the House to proceed upon those Things that are before them as Grievances, and not to mention other Matters; and this was at that Time no Grievance. As to the Saving in 21 Jac. it exempts them from the Penalties inflicted by that Statute, but leaves them, as to their Force and Vigor, as they were at Common Law; and for this cited Jones 231. The 17 Car. 1. cap. 21. the Statute of Navigation in this King's Time, 22 & 23 Car. 2. cap. 11. takes no Notice of this Company. The best Foundation this Patent could have, is that of a new Discovery, and this might be the Reason of their Patent for Years in Queen Elizabeth's Time; but this Company bears Date 13 Car. 2. only, and they do not plead any Trade that they have discovered.

Objected, That the King may restrain his Subjects by a Ne exeat regnum.

He answered, at Common Law every Man might freely go out of the Realm at his Pleasure, and that the Statute of R. 2. excepted Merchants; and yet now by the Statute Jac. that Statute is repealed; that the Ne exeat regnum is a Writ applied to particular Persons, and at first chiefly used in Matters of State; and but in late Time applied to Courts of Justice, to hinder such as would avoid it; and that it ought not to be granted without Oath.

Second Point, Admit the Patent good, yet the Action is not maintainable; because the King gives Licence, how can this intitle the Plaintiff to an Action? if a Commodity be prohibited Importation, under a Penalty, and the King give License to import it; if another imports it without License, this intitles not the other to an Action, the Instance of Fairs and Markets doth not quadrare, for there is an Interest. Here is damnum absque injuria, and no more than if where there is an antient School, I come and set up a new School, the other is not therefore intitled to an Action, though it may be he is much damnified by it; and yet there he hath an Interest, and may have a Freehold perhaps in the School; neither have they in their Action followed their Charter, which gives one Part of the Penalty to the King.

5 He

He concluded, that there is a natural Necessity laid upon a Man to labour, and thereby it becomes a Duty in him, which the King cannot prohibit, but ought to preserve and incourage; that the King cannot lay a Penny Imposition, much less hinder the Means of obtaining a Livelihood, that 'tis against the Common Law and Statutes declaratory thereof; that this Patent is without Precedent, and therefore he hoped that it shall have no Encouragement, and prayed their Judgment for the Defendant.

Molliton *and* Trevilian.

8. A Replevin was brought for three hundred Head of Cattle, viz. so many Oxen, so many Steers, &c. the Defendant makes Conusance as Bailiff to J. S. and justifies for Damage-feasant. The Plaintiff replies, that J. D. and all whose, &c. he hath in such a Messuage, and forty Acres of Land, Time out of Mind have had Common, &c. and shews he had a Lease from J. D. and so put in the Cattle to use his Common; to which the Defendant rejoins and justifies ut supra, absque hoc, that they were the Cattle of the Plaintiff levant and couchant upon, &c. To this Traverse there was a Demurrer by the Plaintiff, for that the Traverse is immaterial, for it ought to have been, absque hoc, that they were levant and couchant, for that is the Measure of the Common; and now having added absque hoc, that they were the Cattle of the Plaintiff, is to make that a Matter in Issue, which is not to the Matter in Question; like the Case upon an usurious Contract pleaded such a Day, the other comes and traverses the Day, so makes the Day a Part of the Issue, which was holden nought. 1 Cr. 501.

Pollexfen for the Traverse, for that it comprehends the whole Matter; and that it could not well be otherwise, for not only the Levancy and Couchancy is the Measure of this Common, but the Property of the Party likewise; for if they be levant and couchant, and yet be a Stranger's Cattle agisted into the forty Acres; or if they be the Party's Cattle levant and couchant upon some other Land, and not upon the forty Acres; in either

ther of these Cases they ought not to use the Common, for a Man cannot use his Common with the Cattle of a Stranger, or with his own Cattle levant and couchant upon any other Land, than that to which he hath Common Appurtenant; it is true, if a Man borrows Cattle to compester his Land, they may be put upon the Common, for that he hath a special Property in them, and so are said his Cattle; for this he cited F. N. B. 180. and Roll, Common 402. and of this Opinion was the Court; wherefore Judgment was given for the Defendant.

Frasier *and* Progers.

9. TRespass was brought against the Defendant, for entering into the Land of one Bridget Denny, wherein the Plaintiff sets forth an Inquisition; wherein in it was found that Bridget Denny then was, and for 8 Years last past, had been an Ideot per visitationem Dei, non gaudent' lucidis intervallis, &c. and further set forth, that the King such a Year, &c. granted to Sir Alexander Frasier and his Executors custodiam, dispositionem, &c. during the Ideocy; and that Sir Alexander Frasier made the Plaintiff (his Wife) Executrix, and dy'd, &c. the Defendant comes and shews that after, scil. such a Year, an Office was found, which did find Bridget Denny was an Ideot à nativitate per visitationem, &c. and that after this Office the King granted Custodiam, dispositionem, &c. to the Defendant at Will; by Vertue whereof, &c. to which the Plaintiff demurred. Pollexfen for the Plaintiff did grant, that where a Man becomes a Lunatick, that the King hath not an Interest, but can only commit the Lands of such Person to the Care of another, and that such Committee is accountable to the Lunatick, if ever he recovers, and to his Executors if he dies, and that by the Death of such Committee, the Grant is determined; and on the other Side he said, it might be granted to him, that where one is a Lunatick à nativitate, that the King hath an Interest, and shall receive the Profits of his Lands to his own Use, or grant them to another; and that such Grantee shall receive them, and is not liable to an Account, but only to maintain the

Ideot and his Family out of them; and that this Difference is warranted by these Books, Moor 4. 1 And. 23. Dyer 25. 4 Rep. 127. Stamford Prorogat. 34. As to the King's having the Profits of an Ideot's Lands to his own Use, and so it becomes an Interest in the King, he thinks they agree it on both Sides; so that the Question between them is, whether or not a Grant of such an Interest, or a Commitment of it, to one and his Executors during the Ideocy, be good or not, or that it ought to be at Will only. They on the other Side would compare it to an Office, which goes not to Executors according to Sir George Reynell's Case, 9 Rep. 97. and he said that he could compare it to nothing better than a Guardianship in Chivalry, which does go to Executors; where a Man is outlawed, the King may lease his Lands during the Outlawry; and this shall go to the Executors of the Lessee. That the King hath the Lands of an Ideot, as he hath those Things the Property whereof is in no Man; for here the Ideot though he breathes, yet as to the Using and Possessing, &c. he is incapable, and such Things the King may grant, as Waifs, Strays, &c. He says that Ideots by the Statute of H. 8. are within the Government of the Court of Wards, as Wards that had Lands in Chivalry were; and that after the Death of such Ideot, his Heir ought to have his Lands out of the King's Hands by Livery, as a Ward at his full Age ought; and that the Ideot himself sues not Livery, because he will never be at Age: Here he cited Stanf. Prærog. 35. and prayed Judgment for the Plaintiff.

Holt for the Defendant said, that he should not so much insist whether the King could grant the Custody, &c. of an Ideot during his Ideocy, so that it should go to his Executors; but he said that the Office which was found for the King in the Year, &c. upon which the Grant was made to Sir Alexander Frasier, was void, and no Title found for the King, and so the Grant to Sir Alexander void; or if a Title found, it was but that Bridget Denny was a Lunatick, and so determined by Sir Alexander's Death. He said that the Writ was to inquire whether Bridget Denny was Ideota à Nativitate, vel non, si non, tunc a quo tempore: Now they find in the first Office that she was then an Ideot, and had been for eight

Years, which is no more than that she is a Lunatick, which was not their Commission to inquire of; and so the Office void, not being according to the Writ; but admit the Office good, yet it finds the King's Title but to a Lunatick, and then the King is deceived in his Grant; for he grants an Ideot, when his Title is but to a Lunatick, and so the Grant void; and so concluded for the Defendant.

Pollexfen said, he expected not that he would insist upon this; however he thought the King was well intitled to an Ideot by the first Office, for finding her an Ideot non gaudens lucidis intervallis, would have been good, though per Spatium 8 Ann. had been omitted; and that shall not vitiate it, for perhaps she was but eight Years old; he said the Office was but the Finding of the Lay Gents, and ought to be taken favourably, not strictly as in Pleading, especially in the Case of the King, it being such an Office as this, which was merely for Information; for the Interest was vested in the King before: And he cited 5 Rep. 56. that an Office having Matter and Substance, though it be mistaken, is good; the Court inclined to Pollexfen; Adjornatur; puis.

Carnock's *Case*.

10. A Man having a Copyhold for Life to him and his Wife, Remainder to the right Heirs of the Husband, Remainder to the Use of Husband and Wife for Life, Remainder to the Use of his last Will; and 'tis found by special Verdict, that he made his Will, and therein gave such Land to his Wife for Life, Remainder to A. and his Heirs, who was Heir at Law to the Devisor; and in another Place other Land in like Manner. And then comes the Clause upon which the Question arises, and all other my Estate, of what Nature soever, I give to my dearly beloved Wife; and if this shall carry the Fee-simple of the Copyhold to the Wife, was the Question, or only an Estate for Life; the Jury likewise finding, that the Husband dy'd possessed of a considerable Estate not devised, above Debts and Legacies. Thomson argued, that it should be only an Estate for Life; he said where the Husband dy'd possessed of nothing above Debts, &c.

2 that

that the Word Estate would extend to carry a Copyhold, but where the Word Estate might be otherwise satisfied, it would not; and that if the Copyhold did pass it was but for Life: And put the Difference where he devises all his Estate, there nothing passes but for Life; but where 'tis all my Estate in such Lands, a Fee passeth; he cited Stile 293. Dod on the other Side said, that all is a general Word, and goes to the Whole, and that Estate extends to the Value of a Man, in Goods and Lands: As when we say such a Man hath a great Estate, we understand it to mean all that he is possessed of in Goods and Lands, and that a Will ought to be taken according to common Acceptance. He cited Hob. 65. and the Case of Wilson and Robinson, Mod. Rep. 100. tho' not cited as a Case in that Book; & adjornatur; puis.

Anonymus.

11. THE Plaintiff declared in Action sur Case, for that whereas the Cattle of the Defendant were impounded by A. B. that the Defendant promised the Plaintiff, that if he would deliver them out of the Pound, that he would save him harmless from A. B. and then sets forth that A. B. brought a Parco fracto pro deliberatione of the Cattle, and recovered so much, &c. and that the Defendant licet sæpius requisitus had not saved him harmless, per quod, &c. and Verdict for the Plaintiff; and moved in Arrest of Judgment by Fuller, First, That the Consideration being to do a Tort is against Law. Secondly, That he hath not here averred that he did deliver them; the first the Court seemed not to allow, but for the second Cause after it had been several Times stirred, Judgment was arrested: For they held the Delivery of the Cattle to be a material traversable Point, and not holpen by the Verdict; and though he says he was sued in a Parco fracto pro deliberatione, so he might be, and yet not have delivered the Cattle.

Parkhurst

Parkhurst *and* Sheerston.

12. TRover and Conversion among other Things de uno Symbolo, Anglice, a Cornelian Ring, de uno pari Vittarum Anglice, a Suit of Knots; and moved in Arrest of Judgment after a Verdict for the Plaintiff that the Declaration was ill for Incertainty, for a Suit of Knots may be 3 Yards or 30, &c. but after several Times being spoken to, the Plaintiff had Judgment, Sid. 445. Stile 360, 361, 370. and the Difference is between Trover and Replevin, for in Replevin this would be nought. Mod. Rep. 290.

In Chancery.

13. THERE hath been generally practised in most Copyhold Manors, that upon the Mortgage of a Copyhold, the Mortgagor surrenders into the Hands of two customary Tenants to the Use of the Mortgagee, upon Condition to be void, if the Money be paid at such a Day: Now to avoid the Fine to the Lord, the usual Way is not to present the Surrender at the next Court, but after the Court is over, to make a new Surrender into the Hands of two customary Tenants, ut supra, and so from Time to Time, as often as any Court shall be holden, which Non-presentment is at Law a Forfeiture; and to be relieved against this Forfeiture was a Bill exhibited, which North Lord Keeper denied to help; but left them to the Common Law.

Anonymus *in* Chancery.

14. LEtters did pass between A. and B. concerning the Marriage of A.'s Son to B.'s Daughter; in one of the Letters, B. did promise if A. would marry his Son to B.'s Daughter, to give with her to A.'s Son 1500 l. worth of Land; which A. utterly refused, and wrote, that he would no further trouble him about that

Affair,

Affair, till he was in a Condition to give 1500 l. in ready Money. Afterwards B. by Letter offers to make his Daughter worth 1500 l. in present Money, and to give her 500 l. more at his Death, if she please him, and promises by Word of Mouth that he will do it, and wishes that the Blessing of God may never light upon him, or his, if he doth not give 1500 l. down, &c. A.'s Son marries the Daughter, and brings a Bill against B. for the Money; and the Question was, whether this was within the Statute of Frauds and Perjuries, for 'twas objected that the Letters were by Way of Proposal, and that the Treaty was at an End, by A.'s Saying he would trouble himself no more, &c. But my Lord Keeper North decreed it a good Promise within the Statute; and in my Lord Chancellor Finch's Time, there was a Feoffment made, and the Feoffee promised to make a Defeasance; which Promise was by Parol, and not in Writing, yet decreed a good Promise within that Statute.

Anonymus *in* Chancery.

15. ONE acknowledges a Recognizance, the Conusee makes his Executor and dies; the Executor, before an Extent, assigns the Recognizance to J. S. who pays the Money to the Executor; the Executor dies, and Administration de bonis non is committed to the next of Kin to the first Testator, who sues for this Recognizance; but Lord Keeper said, it was like the Case where the Testator is indebted to A. and B. was indebted by Bond to the Testator; and then the Executor assigns B.'s Bond in Satisfaction of the Debt owing to A. that here the Administrator de bonis non shall never recover upon this Bond, no more shall he in the principal Case upon the Recognizance.

Sommers

Sommers *and* Gibbon.

16. THIS Case came into R. B. upon a Writ of Error upon a Judgment in C. B. where upon a special Verdict the Case was no more then this, J. M. having a Son and four Daughters, being seised of Lands in Fee, and of a long Term, devises all his Estate in D. where the Freehold lies; and likewise in S. where the Term is, to his Son and his Heirs; and if he dies without Issue unmarried, then to his four Daughters; and if he marries and dies without Issue then living, and having a Wife; then after the Death of such Wife, likewise to his four Daughters.

Holt for the Plaintiff in the Writ of Error made two Points, First, Whether hereby an Estate in Tail of the Freehold Lands passed to the Son, and a Remainder to the four Daughters; or whether the Estate to the Son was a Fee, and it came to the Daughters by Way of executory Devise; and that it was a Fee to the Son, and good to the Daughters by Way of executory Devise. He cited 2 Cr. 590. Roll, Estate 835, 836. and this Point was yielded by the Counsel on the other Side.

But to the second Point, If this Remainder of the Term was good to the four Daughters, he argued that it was; and cited Dyer 74, 358. Com. 590. 2 Cr. 460. and said that the Reason of the Resolution in Child and Bayly's Case was, for the Repugnancy; for having first devised it to the Devisee and his Assigns; this was opposed by the Counsel on the other Side, and Child and Bayly's Case relied on; as likewise Roll, Devise 611. Leventhorpe and Ashley's Case, Time was given for further Argument. Holt cited Com. 590. and Low and Windham's Case, pag. 22 Car. 2. which is reported in the Mod. Rep. 50.

Sydney's *Case*.

17. IN an Indictment of High Treason against Mr. Sydney for compassing the Death of the King, &c. being demanded by the Court, whether guilty or not guilty, he offered a Plea; the Court told him, they would receive his Plea if he put it in as such, but bid him do it at his Peril; for he thereby acknowledged the Matter of Fact, and that if Mr. Attorney should demur to his Plea, and they over-rule it, they must give Judgment upon it. Upon this he desired Time to consider, which the Court did not allow, but he was twice more demanded whether he was guilty or not guilty: Upon not Pleading the Court told him, that in Case of High Treason, if he did not plead, the Indictment was taken pro confesso, and not like to Cases of Felony; and therefore, that in Case the King's Counsel should desire it, they would proceed to Sentence, upon which at last he pleaded Not guilty: After which he desired Counsel, and the Court required him to shew a Point of Law certain, to which he would have Counsel; and then he desired a Copy of the Indictment, which was denied him; but upon his Desire it was twice read to him. Afterwards he desired a Copy of a Part of his Indictment, scil. that Part wherein the Libel is recited; but the Court to that required Mr. Attorney's Consent, for tho' Syd. 85. was cited where Sir H. Vane had a Copy of Part of the Indictment allowed him; it was answered, that was when he had assigned a Point in Law; to which he desired Counsel, and then desired a Copy of that Part upon which the Point arose, which was but reasonable, that they might the better provide themselves; but here was no Point of Law started, but 'twas to mere Matter of Fact that he demanded a Copy of Part; wherefore it was denied him, upon Mr. Attorney's Refusing to consent. Afterwards upon his Trial it was holden, that a Design to levy War, is compassing the Death of the King, and so High Treason, tho' no War levied; that writing of a treasonable Book is Treason, though the Book be not published; as in the Case of 2 Roll, 89.

for writing a Libel called Balaam's Ass, and that one Witness with a Concurrence of Circumstances is sufficient Proof in Case of Treason; and so said by Jefferies Chief Justice to have been the Opinion of all the Judges, upon a Case put lately to them, as if one should come, and swear that J. S. said he would stab the King with a Dagger; and another swear he bought a Dagger of him, though he knew not to what Purpose; yet this concurrent Circumstance is a sufficient Proof, for in other Treasons, as Clipping and Coining, &c. one Witness is sufficient; so in all Cases of Felony. And the Judges said, that in Sir Henry Vane's Case, they would not allow the Indictment to be read to him in Latin.

Fountain *and* Guavers.

18. JOHN Cook seised of Lands in Fee, grants a Rent in Fee to Fountain, and covenants for him, his Heirs and Executors, to pay, &c. with Clause of Distress; and there is a Proviso, that if that the Rent be arrear by so many Days, it shall be lawful for the Grantee to enter, and hold the Lands, till he be satisfied of the Arrearages, the Rent was arrear in the Time of the Grantor, for which he entered after the Death of the Grantor, and held it for so long Time; and for Rent due after the Death of the Grantor, he brought Covenant against the Executors, who demand Oyer, and then pleads there was Rent in arrear, and that the Plaintiff did distrain; and that the Defendant brought a Replevin, and that the Rent being behind by so many Days, the Plaintiff did enter, and was possessed; to which the Plaintiff demurred, for they intend by Entry for Arrearages, that 'tis a Suspension of the Rent accruing in that Time; so that Covenant could not be brought.

But Holt argued econtra.

For he doth suppose, that pleading of an Entry is not sufficient to make a Suspension of a Rent, without shewing Expulsion of the Tenant; and for that cited Latch. 154. Palmer 150.

They on the other Side think the Entry well enough pleaded, and cited 1 Cr. 101. and for Construction of the

Words,

Words, Covenant for him, his Heirs, and Executors, to pay, (i. e.) Pay shall go only to the Covenantor; that is, the Covenantor shall pay, and his Heirs shall have Effect, so as to be liable to the Arrearages incurred in his Life-time; and his Executors after, &c. quod durum videbatur to the Court: Adjornatur.

In Chancery.

19. ONE did devise to his Neice 500 l. when she attains to the Age of twenty-one Years, or shall marry, which shall first happen, to be paid her with Interest; the Niece dies before twenty-one, or Marriage, and her Administrator before such Time as the twenty-one Years was expired sued for the Interest; and upon a Bill of Review, this came before North Lord Keeper; and the Question was, whether this was a present Interest vested in the Legatee, or only a conditional Devise. Maynard argued that it was a Conditional Devise, and takes the old Difference where one devises 500 l. when Devisee attains twenty-one Years, or marries, and where it is a Devise to A. B. to be paid when he attaints twenty-one, or marries, upon the first Case, 'tis a conditional Devise, and no Interest vests; but it goes back to the Executor, &c. if the Legatee dies before twenty-one, or Marriage. But in the second Case, there is a present Interest, only solvend' in futuro, he would have this Case to be the same with the first of these Cases; and that the Words To be paid with Interest alter not, for his Intent is, that if she live till such a Time, &c. then the 500 l. shall be paid with Interest, and shall not be intended that the Interest shall go to her present Maintenance, for in the Will there was 2000 l. given the Father, and the Father was to maintain the Daughter; and this was only as an Addition to her Fortune, if she should live to such Age, or marry; and to this Opinion North Lord Keeper inclined.

Finch Solicitor on the other Side insisted, that to be paid with Interest, must be intended Interest for her present Maintenance, for that otherwise the Testator might have computed what it would have come to all that

Time, and given her as much as the Principal and Interest would have amounted to; but he intended it otherwise; and they put the Case, that one should give so much when A. B. came to twenty-one, for Payment of the Debts of the Devisor, it should be taken as if the Words had been when A. B. should have come to twenty-one: They said in this Case, that if the Words had been 500 l. to be paid with Interest when she comes to twenty-one, there it had been a present Interest, and that there is no Difference where it is to be paid with Interest when she comes to twenty-one, and where it is when she comes to twenty-one to be paid with Interest; and therefore he and Pemberton and Keck did insist it was a present Interest, according as my Lord Chancellor Finch decreed it; but my Lord Keeper by Consent went to a new Hearing of the Cause upon Proofs, without Prejudice to the Matter in Law, that thereby he might see better the Intent of the Party, &c. afterwards he decreed that it was an Interest vested, and that the Party should have Interest.

Anonymus *in* Chancery.

20. THE Party gives in an Account of Debtor and Creditor, and sets down so much received, and so much paid; which being taken as true, a Release is given. North Lord Keeper thought it reasonable to relieve against such a Release, and let them in to disprove the Articles of the Account; and North said in this Case, that a Release obtained as soon as ever the Heir came of Age, by the Guardian, should never by him be thought a Trick, but that it was the proper Time; but Finch said it had been otherwise held.

Anonymus *in* Chancery.

21. A Bill was brought against a Man who had bought Goods of a Person, really a Bankrupt, who in his Answer sets forth that he bought them for a full and valuable Consideration, not knowing that he was a Bankrupt; but sets not out what the Consideration was, nor the Time when, and refuses to do it. The Court ordered, that he should set out what the Consideration was, or otherwise he would make himself the Judge; but they would not compel him to shew the Time when, for fear it should over-reach, and be within the Time after an Act of Bankruptcy committed; tho' North seemed to hold, that upon a Contract where there is quid pro quo, an Act of Bankruptcy shall not over-reach; and cited Fowl's Case at Temple-Bar, which was in C. B. upon a special Verdict.

Anonymus *in* Chancery.

22. Where a Factor smuggles Foreign Customs, and yet sets them down to his Master, as paid upon Account; the Chancery would not relieve, for that the Factor ventured his Life, and so it was ruled by Hide Lord Chancellor in the Case of Vandervaldy and Barry; but North Lord Keeper said, he was not satisfied of it, for that he ventured his Master's Goods, as well as his own Life.

In the Exchequer.

23. AN Information was brought upon the 13 Car. 2. cap. 10. against the Defendant, as being within the penal Branch of that Statute, scil. 19 Art. wherein upon Evidence, the Case was, the King lets out the Collection of Hearth-Money to A. B. and C. for five Years, paying him 162000 l. per Ann. and grants to them for their Pains in the Managery thereof 26000 l. per Ann. and then it is further provided, that if the Sum so collected

leaed shall amount to more than 188000 l. per Ann. that then the said A. B. and C. are to account into the Exchequer. After the King comes and grants the Collection of this Surplusage to the Defendant, rendring a Rent; and if this second Patent was within the penal Branch of that Statute was the Question upon Evidence; and holden upon being argued by the Counsel on both Sides, that it was not within the penal Part of that Statute, and so the Barons delivered their Opinions seriatim; for that this being an additional Revenue given to the King, his Heirs and Successors, without any particular Trust, or Direction, the King may dispose thereof so far forth as he is not fettered by this Act; that 'tis true in many Cases Money by Parliament hath been designed for particular Ases, as that for building of Ships, &c. but here is no such Appointment; what then are the Clogs of this Act of Parliament? why there are two Branches in it, viz. 13 & 19. quæ vide; now 'tis plain, the Meaning of these Branches are, that this Revenue shall not be charged with free voluntary Donations, subtilly obtained; that was the Jealousy of the Parliament, it being at a Time when there were many hungry People, expecting Rewards, after late Wars, or others in the Court, &c.) but it never was the Design to hinder the King to let out the Revenue to Farm; and therefore Atkins said, that plainly the King might lease out this Duty, and that the Patent for collecting it for five Years was a Lease. For restraining the King to grant a Pension, or any other Sum of Money out of the Revenue, restrains not a Leasing of the Revenues it self; as a Proviso that Lessee for Years shall not charge or incumber the Land, restrains him not from making a Lease of it, as was said by Holt; and that therefore the first Patent was good; why then if that be so, where is the Reason that the second should not be good likewise? for in the First no more of the Revenue was let than should amount to 188000 l. the Rest was not let, because for that there was to be an Account; why then by the same Reason that the King could make a Lease to them at first, of as much as should not exceed 188000 l. not being let before; so all above 188000 l. not being let before, the King may make a Lease of it: And tho' Pollexfen urged, that the King could not make any Lease; for if so, why then, as well

for fifty Years as five, nay for five hundred, and as well for a thousand Pounds Rent as 162000. for magis & minus cannot vary the Law. 'Twas answered, that if the Intent of the Parliament had been to hinder the King from alienating the Revenue at all, it might have been done in a few Words, as to say it should not be let to farm, which would have put an End to this Dispute; but 'tis plain, that Gift, Grant, or Pension, were intended of voluntary Gifts, or Pensions; and that in the 13th Branch the Word Pension is only used, and the 19th Branch hath Relation to it; and it was said by Sawyer Attorney, that if the King being apprised of the Value, let a Thing for Years, &c. worth 500 l. per Ann. reserving only 5 l. per Ann. that this is not a Letting to Farm, but a Gift; wherefore they were of Opinion that the Information was not warranted by that Statute.

Term.

Term. Hill.

35 & 36 Car. 2. R. B.

Western *and* Wildy.

1. DEBT upon an Obligation for Performance of Covenants in an Indenture, wherein it was recited, that such a Ship was in the Service of the East-India Company, and to observe such Orders and Directions as they should give, or their Factors; and that she was designed for a Voyage from London to Bantam, and from thence to China or Formosa. The Plaintiff lent 500 l. upon the Hull of the said Ship, and the Defendant covenanted to pay, if the Ship went from London to Bantam, and returned from thence directly to London within 12 Months, 550 l. if from London to Bantam, and from thence to China or Formosa, and returned to London within 24 Months 650 l. and if she returned not within 24 Months, then to pay 5 l. per Month above 650 l. till 36 Months; and if she return not within 36 Months, then to pay 710 l. unless it can be proved by Wildy that the Ship returned not, but was lost within 36 Months. The Ship went from London to Bantam, and from thence to Surat, and other Parts, and so returned to Bantam; and in her Voyage from Bantam to London was lost within 36 Months, and the Plaintiff hereupon brought Debt upon the Obligation; and this was the Fact after long and intricate Pleading, which appeared upon a Demurrer; and Pollexfen for the Defendant said there are two Questions.

First,

First, Whether the Plaintiff shall have any Thing, or not.

Second, If any of these Sums, how much?

He said that in this Case the Plaintiff shall have nothing, for here is no Breach of Covenant, for the Ship did not go from hence to Bantam, and so return to London, so that he should have the first Sum mentioned; neither did she go from Bantam to China, &c. so that he might have the second Sum; neither could he have the third Sum, for that Wildy proved the Ship lost within 36 Months. He said the Recital could not make any Agreement to bind the Parties, and that the Mentioning those two Places, was not to tie them up from going to any other, but was a kind of a loose negligent Recital; for it recites that the Ship was to observe the Orders and Directions of the East-India Company, and Factors; and by the Length of Time it appears, that they did not intend to keep them, only to Bantam or China, but the Time was the main Thing; he was willing to run the Adventure for so long Time; for if he had intended only a Voyage to Bantam, &c. there would have been Covenants that she should not deviate, &c. which there are not; and then he said, that if the Plaintiff was to have any Thing, yet not 710 l. for if the Defendant proved, that she was cast away within 36 Months, then he could not have it, and he hath so done; and he cannot have 550 l. for that she did not return from Bantam to London, &c. so prays Judgment for the Defendant.

Maynard for the Plaintiff insisted, that here was an Adventure upon this Ship in the Voyages expressed, and in no other; and that if the Ship returned, then they were to have their Money, which Return was to be from one of those Voyages, and not from any Part of the World. Now what is the Reason that this Ship returned not from one of those Voyages? why because she deviated, and went to Surat and other Places, so that they having carry'd her out of the Voyage, she could not return from it; and besides the Party was not to lose his Money, though she never returned; for if she had been cast away after the 36 Months, or if not proved that she was cast away, the Money is due. The Court

inclined that by Reason of the Deviation, the Party was well intitled to his Money, &c. but advisare vult; and afterwards Mich. 36 Car. 2. R. B. adjudged accordingly.

The King *and the City of* Chester.

2. A Quo Warranto being brought against the Mayor and Citizens of Chester, there was a Warrant of Attorney under the Mayor's Seal to appear; and Powis came and desired it might be examined, whether this was a good and regular Appearance, for that it ought to be under the Corporation Seal. Williams said, there were three Seals, one the Sign Manual of the Mayor, and the other a Seal for Exemplifications, &c. and the third a Seal for Leases and Grants, and those Things which bound the Corporation in Point of Interest; and that this last Seal was in the Custody of the Mayor for the Time being, so many of the Aldermen, and the Recorder, and that the other two were in the Mayor's Custody; he said that the Course was, to admit Corporations to appear though there were no Seal, and that he had seen forty Precedents of it; and cited Coke's Entries, Tit. Quo Warranto. The Case of the Town of Denbigh, that a Corporation might use what Seal they please, and 'tis an Incident to a Corporation.

The Attorney General said, that they could not appear, or do any Act but under their Corporation Seal; and some Acts under that Seal are not good, unless that Seal be duly and regularly put to it; and therefore if the Mayor alone, or one or two Aldermen, should put the Corporation Seal to a Lease, it would not be good; and so it hath been adjudged in the Case of an Abbot; however in this Case it was referred to be examined.

Lord

Lord Grandison *and Countess of* Dover.

3. LORD Grandison declared upon a Prohibition against the Countess of Dover, wherein the Case was thus: Lord Grandison being Grandfather to Miles Henningham, and his Sister, was indebted 800 l. to the said Miles. Miles dies; his Sister being an Infant of 14 Years old, is intitled to Administration; Administration durante minore ætate of the Sister, and in her Right ad usum & commodum of the Sister is granted by the Spiritual Court to the Countess of Dover, who is great Grandmother to the Sister; and then my Lord Grandison sues in the Spiritual Court to repeal this Administration, and have it granted to him; and upon this the Countess prayed a Prohibition; and it was granted; and then Lord Grandison pro consultatione habenda, declared ut supra, and Holt for my Lord Grandison.

First, Administrator durante minore ætate, is not within the Statute H. 8. but is a Trust reposed in the Ecclesiastical Court, and executed in Right of the Infant, and intended his Administration, he not being able to execute it himself.

Secondly, He admits, that if it was an Endeavour totally to set aside the Administration, and take away the Infant's Right; then there was Reason for a Prohibition, but here the Right of the Infant is admitted; to that the Question is only, who is the fittest Person to be intrusted for him; and if by Surprise the Court hath intrusted one, and after they know another fitter, 'tis in their Power.

In this Case they have gone according to our Law, for the Lord Grandison is Guardian in Socage, (suppose it Land) so that they have pursued our Law.

Before the Statute of E. 3. there was no Administrator durante minore ætate, but in Case where an Infant was made Executor; but now there is an Administrator durante minoritate, where an Infant is Administrator, as well as where he is Executor.

If Administrator durante minoritate recover in an Action of Debt; and then the Executor comes of Age, he shall sue Execution. Roll, Executor 888. 1 Cr. 227.

Williams econtra: The Question is, whether the Prerogative Court having granted Administration in Right of the Infant, can now alter it; he takes it, that in this Case Propinquity makes no Difference, for they having once granted it, they have executed their Authority, and have nothing more to do in it.

Administrator durante minoritate hath no Power over this Estate, but is only in the Nature of Curator, or Attorney; he can only sell bona peritura as a Bailiff may.

He agrees, that at Common Law there was no Administrator durante minoritate, but in Case of an Infant Executor; then at Common Law who had the Power over such Estates? why in Hensloe's Case, in 9 Rep. 'tis said, that the King had, and he was used to grant Letters Ad colligend' bona defunct', which was in Nature of a Commission; and to dispose for the Good of the Soul of the Intestate, as for the Payment of his Debts, and Funeral Charges, and then to his Wife, and Children, &c. But that antiently the Ordinary had no Medling therein, but that of late they have arrogated such Authority to themselves; and cited Dyer 255. and Com. 200. Greisbrook's Case; and this was the Common Law till Statute E. 3. which he saith doth not alter the Common Law, but the King may grant still. After this Statute till that of H. 8. the Ordinary may grant at his Pleasure to whom he would; but this Statute saith, it shall be to the next of Kin, but that is but an Authority, which being once executed, they have done; and here they have executed their Power, and no Law enables them to meddle again. As to the Pursuing of our Law it is but an analogical Argument, if so, but that is rather against Mr. Holt, than for him; for no Man can be Guardian in Socage, to whom the Land can by Possibility come; and here in this Case, 'tis plain my Lord Grandison is indebted to us 800 l. so he prays that the Prohibition may stand, and no Consultation go; Cur' advisar' vult, but inclined that the Prohibition shall stand; after it was argued again by Ling for the Prohibition, and Pollexfen against it; the Court of the same Opinion, and denied that the Ordinary without Cause could repeal an Administration before the Statute of H. 8.

Coney *and* Obryan.

4. CONEY and Obrian being attainted of Felony and Murder, for killing Foster and Terret, and apposed, wherefore Sentence of Death pronounced against them, should not be executed according to Law, pleaded the King's Pardon; which being read, the Court doubted the Validity thereof, for want of the Word Murdrum. And after at another Day, being at the Bar, they desired Mr. Holt might be assigned of Counsel for them, who was, and argued that the Pardon was good. He said that they had been convicted, and attainted for Murder; and that being at the Bar, and demanded what they could say, why Judgment should not be executed according to Law; they had pleaded their Majesties Pardon, which the Court thought not sufficient; with Submission he thought it a very good Pardon. The King pardons mortem, feloniam, homicidium felonicum, interfectionem, necem, occisionem of such and such, naming them, and that whether the Party was rettatus vel non rettatus, convictus, condemnatus, adjudicatus vel non, &c. so that here the King's Intention was to pardon the Death of killing the Parties, be the Offence Murder, or Manslaughter, or what it will, being Felony; he saith that before 13 R. 2. the Word Felony would have pardoned Murder, and that here is a Non obstante to that Statute; that the King's Pardon ought to be taken in a benign Sense, and cited the 3 Inst. 233. 1 H. 7. 13. he observed the Penning of the Statute of 13 R. 2. which was not to hinder the King's Mercy, but his Misinformation; he cited Standford 102, 103. 12 Rep. 18. Moor 745. and that the Precedents have been so ever since. The Chief Justice said, that he had put it to all the Judges of England, and that it was unanimously their Opinion, that the Pardon is good; wherefore it was allowed.

Speak

Speak *and* Pedley *in* Chancery.

5. SPEAK being an Infant, a Treaty of Marriage was had for him by his Mother, and the Father of —— Windham an Infant, and Articles of Marriage sealed; wherein it was agreed, that Speak at full Age should settle Lands of the Value of 700 l. per Ann. upon the Daughter of Windham; the Marriage takes Effect, the Portion paid, and Speak at full Age, the Daughter being still within Age, takes a Survey of his Estate, and gives in to the Father, Blackacre at 500 l. per Ann. Whiteacre at 100 l. per Ann. and Swanacre at 100 l. per Ann. which is accepted by the Father, and the Settlement made, and accepted by the Father, the Daughter still a minor; and in the Settlement 'tis said to be in Pursuance and Performance of the Articles. Speak dies, the Lands settled prove to be of the Value but of 500 l. per Ann. and the Wife brings her Bill against the Heir to make it up 700 l. per Ann. and my Lord Keeper North decreed that it should be so, being upon Articles in Writing sealed; but if it had been only a parol Agreement, then no Relief; or if at the Time of the Settlement the Lands had been of 700 l. per Ann. Value, and by Accident had gone less, then no Relief; but here being a solemn Agreement and Settlement made in the Minority of the Wife, this is a Fraud, and shall not prejudice her; but if it had been a parol Agreement for 700 l. per Ann. and but 500 l. per Ann. settled, they could not have relieved her; and further in this Case Speak was indebted to his Mother, for Arrearages of an Annuity of 500 l. per Ann. 3000 l. and makes her his Executrix, and by Will devises as much Land as is worth 20000 l. and devises his Jewels to his Wife; the Question before North Lord Keeper was, whether the Mother being Executrix may retain the Jewels towards Payment of the Debt, or else whether the Debt shall be included in the 20000 l. worth of Land, the personal Estate not being sufficient to pay the Debt; and my Lord Keeper held that in as much as the personal Estate was not sufficient, that the Land shall go in

4 Discharge

Discharge of the Debt, and the Specifick Legacy shall not be lost; but if there were not enough besides the Legacy to pay the Debt, then that she might retain.

Anonymus *in* Chancery.

6. ONE that could read, made an Agreement for a Lease for twenty-one Years, the Lessor himself drew the Lease but for one Year, and read it for twenty-one Years; and after the Expiration of a Year, ejected the Lessee, and he brought a Bill in Chancery to be relieved, upon all this Matter, which was in Proof; but 'twas dismissed with Costs, for it was within the Statute of Frauds and Perjuries, &c. and being able to read, it was his own Folly; otherwise if he had been unlettered.

Buckeridge's *Case*.

7. BUckeridge was convicted of Forgery, and sentenced to be put on the Pillory; and then obtains the King's Pardon; they at whose Suit move for a Rule to set her on the Pillory; the Court ordered her to shew Cause; and Finch Solicitor came, and shewed in her Behalf, that she had the King's Pardon, and prayed a Discharge of the Rule; this was before she appeared upon the Rule. The Court said they could not take Notice judicially of it, but in Regard Mr. Solicitor affirmed he had a Warrant for her Pardon by him; they bore so great a Respect to the King's Warrant, that when she came up, they would give her Time to shew Cause, why she should not be set upon the Pillory, &c.

Dod

Dod *and* Jenkinson.

8. THE Plaintiff having bought a Quantity of Wines of the Defendant, he covenanted to save him harmless against Brown and others; and hereupon he brought an Action in C. B. and upon pleading there was a Demurrer, and adjudged for the Plaintiff; and upon that a Writ of Error brought, and Holt for the Plaintiff in the Writ of Error argued.

First, That the Covenant being against Brown and others, 'tis general, and being a general Covenant there must be Notice; but if it had been against a Person certain, then Notice not requisite; and put the Case of a Warrantia Cartæ, where the Defendant may plead he had no Notice. Hob. 26.

Secondly, The Declaration is ill, for that he sheweth not that Brown had a Title, and so Breach of Covenant not well assigned; and for this cited 4 Rep. 80. 2 Cr. 315. Sid. 466. 9 H. 6. 42.

Thirdly, Shews not, what Action was brought, or who was Party to it.

Pollexfen econtra: The Covenant is express to save harmless against Brown and others, so that others being in, they would have it as bad, as if Brown had been out; but sure this is a particular Covenant, wherein no Notice is requisite; besides in this Case 'twas impossible to give Notice, for how could he tell that Brown would arrest him; 'tis the Defendant must see according to his Undertaking that Brown do not arrest him; and put the Case in Hobart of selling his Corn for so much, as any one should give; there the Nature of the Thing requiring Notice, it ought to be given as to the Cases on the other Side, put by Mr. Holt; he agrees with them, but they are all concerning Lands, and so of the Warrantia Cartæ; but suppose one makes a Feoffment with Warranty of Land, wherein J. S. hath a Term for Years, and J. S. enters and ousts the Feoffee, he shall bring a Writ of Covenant upon the Warranty, and yet no Notice requisite. He distinguished between a Covenant to save harmless for enjoying Lands and Goods; in the

first Case there ought to be a Disturbance upon Title, but in the other any Disturbance is sufficient; therefore if B. had brought an Action, and had been non-suited, yet it had been a Breach of Covenant; so if he had brought an Action and dy'd, yet it had been a Breach, and yet his Title could not appear; wherefore Judgment was affirmed nisi.

Dean *and* Tracey.

9. COvenant upon a Charter-Party for Freight, dated the 10th of February; then comes an Act of Parliament, and says, that all French Goods imported after the 9th of March following, shall be forfeited, and prohibits the Importing of them; and this Agreement was for the Freight of French Goods, and this was pleaded in Bar; to which the Plaintiff demurred, and the Court inclined for the Plaintiff, not being a Thing that was malum in se. And Pollexfen put this Case, suppose a Man that is Tenant for Life, hire another to cut down Trees, or pull down his House, which is a Thing against an Act of Parliament, yet he shall recover the Wages agreed for; the Court seemed strongly for the Plaintiff; sed quære.

Sedgwich *and* Gofton.

10. TEnant for Years hath Judgment in Ejectment, and the Term incurs, then he brings a Scire facias quare executionem habere not debet of the Land, and his Damages and Costs, and a Demurrer to the Sci. fa. and the Court held the Scire facias ill, for though he may have a Scire facias for Damages and Costs, yet this being for the Term likewise, which was incurred, 'twas ill, and a new Scire facias ought to be; afterwards in the next Term it was argued by Holt that the Scire facias was good for the Damages, but not allowed; a new Scire facias was granted.

Jefferies *and* Williams.

11. SAntell was indebted to the King, Williams was bound for Santell, and paid the Money; Santell became a Bankrupt, and the King's Debt is satisfied afterwards; then Williams prays in Aid, and an Extent is had, and by Order of the Exchequer, the Money levied upon the Extent paid to Williams; and if Williams shall detain this Money against the Rest of the Creditors was the Question: Holt said, the Extent was before the Bankruptcy, and then being a Prerogative Case it is good; nay, if it were after an Act of Bankruptcy, it would for the King over-reach the Bankruptcy, and be good against the Creditors; he cited Dyer 96. but the Court was of Opinion against him, and gave Judgment for the Plaintiff upon a special Verdict.

Lord Danby's *Case.*

12. THings chiefly insisted on by the Counsel, and Judges in my Lord Danby's Case. Wallop, That this was a Case of great Necessity, and if there should be no Relief here, there would be a Failure of Justice, which rather than the Law will suffer, it will allow Things to be done contrary to the express Words of an Act of Parliament; and cited the 2 Inst. 25.

That Bayling would not affect the Impeachment, but only modify the Confinement, for they should not deliver him out of Custody, but only lengthen his Chain; for his Bail, if they please, may keep him, and confine him; that all Imprisonment is either in Custodiam, or in pœnam; where 'tis the former, this Court may give Ease by Bailment; but in so doing they determine not de re, but de modo rei, or de modo modi, that this Court is the Supreme Court of ordinary Judicature, to which no Subject can come but he finds Relief, and that Curia regis ne deficeret in Justitia exhibenda. The King being the Fountain of Justice, no one shall come to this Fountain and die for Thirst; he cited the Cases where the Court hath bailed in Case of extreme old Age, though

the Party was in Execution; and so of a Woman near her Time of Travel, which Cases are in the 1 Inst.

Pollexfen insisted, that it was a Case judicially in the House of Lords; and then by Dissolution of Parliament the Proceeding is determined, like Cases of Writs of Error out of the King's Bench. Holt cited the Case of Okey and Baxter, who were attainted by Act of Parliament, and the Records of Parliament removed by Certiorari in Chancery, thence by Mittimus into R. B. where the Parties were apposed, wherefore they should not be executed, and were executed accordingly; And after by the unanimous Opinion of the Court, the Lord Danby was bailed.

For First, Treason cannot be committed, but against the King.

Secondly, That the Court has Power to bail in all Cases of Treason. Zachary Crofton's Case, the Opinion of the Judges, in the Lords House 1678.

Thirdly, That when the Lords House is sitting, the Power of this Court is suspended, as to Persons and Causes before them; but when the Lords House is dissolved, their original Power resorts back to this Court.

Fourthly, This Court may bail, in Cases where they cannot try the Party bailed, as Persons taken here, for Offences committed in Ireland, are bailed here, to appear in Ireland, though they cannot be try'd here; so any Lord of Parliament committed for High Treason by a Justice of Peace, or Secretary of State, may be bailed in R. B. tho' he cannot be try'd there.

Fifthly, For a Man committed of High Treason to be bailed by Law, and yet no Court in Being that hath Power to bail him, is an Absurdity.

Sixthly, That in Cases of Writs of Error depending in Parliament, upon a long Prorogation, they cease to be a Supersedeas, but the Party may have Execution in R. B. and if it be so, but where the Property is concerned, it ought much more to be so, where the Liberty is concerned, which is so much dearer; that in one Case or the other, the Parliament when it meets may go on; and if they reverse the Judgment, the Party will be restored to all that he had lost, and so they may proceed to the Trial of my Lord Danby, &c.

As to the Power of the King's pardoning Treason, though the Person was impeached by the Commons in England in the Lords House, many Records were cited by the Lord Danby; and Pollexfen, and Jefferies Chief Justice cited Elsing of Parliaments, and insisted that the Habeas Corpus Act shews the Intent of the Parliament, and their Sentiments in such Cases.

Term.

Term. Pasch.

36 Car. 2. R. B.

Anonymus.

1. JUdgment by Default in C. B. and a Misericordia entered for a Capiatur, upon which a Writ of Error was brought, and this assigned for Error; after which they came into R. B. and prayed to amend; and the Court granted it, tho' after a Writ of Error brought, for that they would amend in such a Case in C. B. and it was said per Withens Just. that he had known it often so done.

East-India Company *and* Sandys; *devant and puis.*

2. THE Company brought an Action sur Case against Sandys, whereon they declare, that the King, &c. did, by his Letters Patents dated, &c. constitute and make them a Corporation, &c. by Name, &c. and granted to them the sole Trade of Buying and Selling, &c. within such a Tract of Land, viz. &c. for them, their Servants, Agents and Assignes, and that no other should trade thither, &c. and then shew, how that Sandys had sent such a Ship, &c. and lay it to their Damage of 1000 l. &c.

The Defendant prays Oyer of the Letters Patents, which being entered in hæc verba, he pleads the Statute of 18 E. 3. to which the Defendant demurs.

Finch Solicitor, for the Plaintiff argued.

First, Whether the Letters Patents be good.

Secondly, Whether the Action be maintainable.

First, If the Letters Patents be good, therein he considers, if good by the King's Power at Common Law.

Secondly, Whether that Power is restrained by any Act of Parliament.

The Letters Patents are good at Common Law.

First, Because there could be no Trade with Infidels, but by Treaty, which must be by the King, or his Licence.

Secondly, No Trade, but by Permission of Foreign Princes.

Thirdly, That Trade might be restrained by the King here.

Fourthly, Though all Merchants are at Liberty to go out of the Kingdom without Licence, yet the King may restrain them by Ne exeat regno, without shewing Cause; and that Cause is not traversable.

Fifthly, If Foreign Princes restrain to particular Places, and Persons, no Subject hath Right; 3 Jac. opens Trade to Spain, &c. which shews before it was shut, yet he doth not affirm that the Subject hath no Right to Trade. But 'tis urged, if the King can restrain this Man by a Ne exeat regno, he may another, and a third, and so every body; and so if he may restrain from trading in this Place, he may from others, &c. So all trade in general; if this were allowed as an Objection, it might be urged against any Authority the King hath, which would be unreasonable; for that his Power in these Cases is attended with a Trust, which we must not suppose he will abuse. But this is not the Question, but only how far, he may restrain, or licence. If the Law had not been clear that the King might have licensed, and restrained, &c. this had not now come in Debate, for no one would have been at the Expence to settle as they have done in the East-Indies; and he said further, that the Turkey Company and all other trading Companies depend upon this Point. He said the Subject hath no Right to trade with Infidels, because they are looked on as Enemies, not in a Spiritual Sense only, but a Temporal, and were so to be treated, and are so accounted in Law; and for this cited 7 Rep. 17. 12 H. 8. 4. and

 said

said further, that Alien Enemy can sue no Action Real, Personal or Mixt, and that these are perpetui inimici; but he said obiter, that where Coke 1 Inst. saith that a Feme Alien shall not be endowed, that he had seen a Parliament Roll, wherein it was resolved in the Lords House, that a Feme Alien should be endowed. Then he cited several Records, to shew how the Kings had treated the Jews here, confining them to particular Places, and sometimes releasing their Debts, as if J. S. was indebted to a Jew, the King would release the Debt to J. S. and though they were born here, yet they remained still in the Condition of Alien Enemies; and the main Reason hereof was, that the King's Subjects might not be perverted in Religion by them, or over-reached. He shewed further out of Rolls by him cited, that the King hath constituted by Commission particular Justices for them, and to proceed in particular Methods. Roll, Pat. 13 E. 1. num. 7. the King pardons a Subject for dealing with a Jew, 3 Inst. 89. marrying with a Jew Felony, by the antient Laws of the Land; and cited 2 Brownl. Michelborn's Case; and upon like Ground it is, that no Dealing or Converse is to be with an excommunicated Person: If the Law so enables the King to provide for his Subjects against the Enemies of the Faith, &c. when they come into a Christian Country, à fortiori should he provide for them going into an Infidel's Country. He said the King's Power is as free and unlimited in making Leagues, as the Subjects Right to trade; and yet the King cannot make a League mutui auxilii with Infidels; other Leagues it may be he may.

This is enough to clear it from a Monopoly; and further if the Law had so thought it, then it would not have been excepted in 21 Jac. wherein is a Proviso for all Companies, &c.

He saith either the first Patent was a Monopoly, or this is not, but the first was not; ergo, &c. the first was not, because a new Invention, and no Statute limits it to a Time, as it doth other Things, and the Law doth incourage this Company, by declaring that Traders in it should not be reckoned as Bankrupts; and another Act by taxing 20 s. for every 100 l. Then he considers the Necessity of managing the Trade after such Manner, which is

is a Consideration fitter for a Merchant, or a Statesman, than a Lawyer.

Secondly, He considers whether this Prerogative be abridged by any Statute: He saith no, and deduces down the Reasons of making the Statute of 18 E. 1. for their chief Trade antiently consisted in Wool and Woolfells, and Leather, and that this was with neighbouring Nations only, and that restrained to certain Places only, and that the King had always a great Power over Trade, as to confine it to certain Places, which were the Staples here, and abroad; but at that Time we had no Trade with Infidels, so that the Remedy of those Laws was not intended for them, or to be extended to them.

He lays down the Reasons of making that Law, and said the Words, may go where they pleased, are to be intended, they are not bound to go to the Staples as formerly; as to the other Statute, the Reasons of making them appearing in them, they answer themselves.

Secondly, Whether an Action lies for this Company.

First, They are at great Charges to support it, therefore ought to profit by it. Secondly, They are taken Notice of by Acts of Parliament, and made to pay, &c. Thirdly, He compared it to the Case of a new Invention, &c. so prayed Judgment for the Plaintiff.

Pollexfen made two Points, First, Whether the Letters Patent are good, Secondly, Whether the Action is maintainable.

He doth not deny but that the King may restrain any of his Subjects from going out of the Realm, because he hath an Interest in the Person of his Subject, and may have Occasion for his Service.

Secondly, The King may restrain all his Subjects from any Trade with any particular Country, or City, as in Times of War, or Plague, or other particular Reasons.

But though this he may do, yet there can no Inference be made, that therefore he may restrain some of his Subjects, and give Liberty to others; further he said, that when they on the other Side lay down these Positions, they make no Distinction between Infidel and Christian Countries.

He said that when you argue from 3 Jac. that it opens Trade, which was shut before; that they then argue, that the King hath Power to restrain Trade with a Christian Country.

By Common Law he said that Trade is free, and for that cited 3 Inst. 81. F. B. 65. 1 Roll 4. that the Common Law is as much against Monopoly, as Ingrossing, and that they differ only, that a Monopoly is by Patent from the King, the other is by the Act of the Subject between Party and Party; but that the Mischiefs are the same from both, and there is the same Law against both. Moor 673. 11 Rep. 84. the sole Trade of any Thing, is ingrossing ex rei natura, for whosoever hath the sole Trade of Buying and Selling, hath ingrossed that Trade; and whosoever hath the sole Trade to any Country, hath the sole Trade of Buying and Selling of the Produce of that Country, at his own Price, which is an Engrossing.

This Grant is against the old Statutes of the Kingdom, 2 E. 3. and the Statute of 18 E. 3. (which is pleaded) and the Statutes of 2 R. 2. cap. 1. and 11 R. 2. cap. 7. which confirm the other two; and these Statutes being penned short, and in general Words, as the Way then was, are to be taken in Favour of Trade; and for the publick Benefit, and the Words, That Grants by the King shall be void, shew, that such Grants then were, and have always been granted, by one means or other, the King being deceived; and in 2 Inst. 63. Coke saith, that all Monopolies are against the Freedom of Magna Charta, and the other Acts.

They say this is true, if it were a Monopoly, but we are not a Monopoly. Then he proved, 'tis a Monopoly, 1. From the Description of a Monopoly in 3 Inst. 181. compared with this Charter; if it be possible to exempt them out of the Letter of this Description, then he confessed their Case is stronger than he hoped it is; but he thinks 'tis impossible. By this Patent they have granted to them the sole Buying and Selling, wherein Merchandize consists; the sole Using is another Part of the Act, you have the sole Using; so that you are within those Words, and you are within the later Words, quod vide.

All Evils attending Monopolies are in this Case, the first Evil is Inhansing the Price, mentioned in 11 Rep. 88. nothing is plainer than that they have had the Setting of their own Price, and for a Man to come to such a Contempt of Riches, as not to get what he can, when he hath it in his own Power, is such a Virtue, as is not ordinarily met with in Mankind. The second Evil is mentioned in 3 Inst. 181. the third Evil is the Oppression of the People, and any Body that knows their Dealing will be satisfied hereof. F. N. B. says, ita quod patria non magis solito oneretur.

They say on the other Side, that 'tis not granted for Advantage, but good Government, and there have been such Grants to the Turkey-Company, &c. but let me mind you what the Books say, 2 Inst. 540. 11 Rep. 88. He cited Horn and Ivie's Case, Mich. 20 Car. 2. R. B. Rot. 403. which was a Grant in this Nature to the Canary Company; but it was soon condemned in this Court, and afterwards in Parliament.

As to other Companies, suppose them all such as this, 'tis no Argument that they are legal, for 'tis well known that in all Ages, there have been such Grants, wherein the King hath been deceived; but if any of them had ever had any judicial Allowance, it was something. Monopolies have been in the best of Times, in 43 El. cap. 1. there is a Proviso, that that Act extend not to make them good; but since there has been no judicial Allowance, 'twill be no Argument whether they be good or bad; and since there have been none, he appeals to the Practice for it, that others than those of the Company, have always traded to Barbary, Turkey, &c.

He thinks the Grants to the Russian Company, &c. are alike to this, but they have never used them, as they do these; and then he put the different Way of managing the Trade in other Companies, and in this Company. In other Companies every individual Trades, and any may come in for little Money, &c. here in this, only the Company is a joint Stock; and herein he was very large and aggravating; so that though other Companies should be good, yet this is nothing to you, for they differ, &c. Having shewn the Difference, then he came to 21 Jac. and recited the enacting Part of the Statute, and then the Proviso.

5 That

That the East-India Company is within the enacting Part, and that he needs not stand upon the Word Monopoly, for the Act having the Words, sole Buying, Selling, and Using, and they having it within their Charter, they are within the Words of the Act, and refers himself to the Words of the Charter, to be compared with the Words of the Act: Are all Bodies uncapable of sole Buying; you have sole Buying, &c. and if you are contrary to the enacting Part, you must be saved by the Proviso.

He saith the Proviso extends not to any Letters Patents made after the Act, but only to those before; but that Liberties, &c. shall continue as they were before the Making, &c. which shews what is within the Proviso, and governs the whole Proviso.

The next Proviso is, Patents granted or to be granted, which shews the former Proviso did not extend to those hereafter to be granted: But suppose this not a sufficient Answer, yet the Proviso extends but to Privileges for well ordering of Trade; but not to sole Trade, for the same Exception is to Manufactures, 11 Rep. 54. they made a By-Law, &c. which seemed to a good End; yet so jealous were the Judges, that they would use it to the Oppression of young Men, that they judged it void; and that Ordinances for the good Government of Trade, seem to be preserved by this Proviso, and not for the sole Management, and this seems the Sense of the Proviso, and the Sense they would have is the most repugnant to the Act that can be, &c. and shews how, &c.

And if a Proviso be contradictory, 'tis void, 1 Rep. 46. Com. 563. But they endeavour to answer it thus:

The Proviso is, that it shall not extend to Charters for ordering of Trade, but they shall be as before; and if good before, they are so still. This is but the same Thing in other Words, for the Conclusion of the Proviso extends but to these Charters, excepted in the first Part of the Proviso.

Then they say this is with an Infidel Country, and that differs the Case; and to prove it, cite Michelburn's Case, and put the Words of that Case: He says, it was only an occasional Discourse not pertinent to the Debate before the Court, and that Brownlow was a Book

printed in the late Times, and not licensed. The next he considered was Calvin's Case, and the Cases there cited, which he endeavoured to evade; and said, that to hold that we are in a perpetual State of War with Infidels, might be a Doctrine as contrary to Religion as any, taking away the chief Opportunity of converting them, and rendring us Enemies to much the greatest Part of Mankind.

If they are Enemies they may be spoiled, where-ever you find them; any Man may kill them. 7 E. 4. 13. 7 H. 7. 15.

To the Rolls cited by Mr. Solicitor, he did not much deny them, and said that Kings had made Use of the Jews like Spunges, and had squeezed them, being a scattered People without any Government to protect them, and cited 2 Inst. 99, 507. and that he did not differ with him about the Fact, but the Use of it; for if the King may take away what belongs to a Jew, so may a Subject; if they are Alien Enemies, all their Contracts and Bargains are void: How could they then be guilty of Usury, and Oppression on the Subjects? it were impossible if they were to be treated as Alien Enemies, so that hereby he hopes the Reasons of those Records urged, are rather for him, than against him, and that they were handled as other Aliens.

The Act of Navigation shews Infidels have the same Liberty of Trade as Christians without Distinction, and expressly names the Ottoman Empire.

The Act of Tonage and Poundage, and Book of Rates, have made no Distinction, so that the Distinction was not thought of till now.

Do we treat the Jews after this Manner at this Day? if the Law be so, this may be; he cited 2 Cr. 469. and said that in that Case it had been useful and necessary to have urged, that the Contract was with an Infidel, yet nothing there said of it.

None of the Statutes cited have made such Distinction; and yet when some of the later were made, there was Trade with Infidels; so that there is no Foundation for these Distinctions, but these occasional Sayings: But be that Point of Trading with or without License as it will, it will not be sufficient to ground this Licence upon, for it is a Licence in Perpetuity.

He said he had looked over the Books concerning the King's Power in Impositions, Lane 24. 2 Bulst. 63. and recited the Reasons of those Cases.

Supposing Licences have been granted to go into Infidel Countries, so there have been to go into Christian Countries; so that to this Point, the old Law, and the Statute Law are against them, and the Distinction is too weak to bear so great a Point as this, and the Argument upon 3 Jac. may be drawn to exclude from Trade with Christian Countries.

As to the second Point, Whether if the Patent be good, this Action is maintainable; you say the Defendant not being a Member, Servant, or Assignee, traded to Places within that Patent, and brought Goods into England, &c.

You have not laid, whether or not he had a Licence from the King, nor shewn any Loss or Damage that you have; that by his Trading there, Commodities of that County were not left for you, or that you came Home empty; and if you did, yet it is not enough for you to ground an Action upon, for it is the first Time that an Action was brought for hindring another's Profit, that being damnum sine injuria.

A Commoner cannot bring an Action unless damnified; so is Robert Mary's Case; so that is the Cause of Action; holden 11 Rep. 88. 1 Roll, 106. that if the Patent was good, yet the Action would not lie; and if that would not, this will not.

Another Reason is, because the Restraint is not absolute, but sub modo. The Patent is, that no one shall trade but upon the Penalty of Forfeiture of Ship and Goods, one Half to the Company, the other to the King; so that was the Patent as strong as an Act of Parliament, yet you must take the Remedy the Law gives you, 7 Rep. 37. 2 Rep. 59. wherefore he prayed Judgment for the Defendant.

Ano-

Anonymus.

3. IF a Will contain Lands to the Value of 100000 l. yet the Ecclesiastical Court may cite them to bring in the Original to be proved per Testes, and this Court ought not to prohibit them; but if they will not after Proof deliver back the Original, then this Court will intermeddle, and a Proof of the Will cannot be by Copy; for if the Original be burnt, or lost, &c. a Copy of their Registry hath been often given in Evidence, but a Copy of a Copy cannot; per Jefferies Chief Justice.

Sandys *against the* Custom-House Officers.

4. IN Action sur Case by Sandys, against the Officers of the Custom-House, for refusing to clear his Ship, and redeliver his Cockets; the Question upon Evidence was, if the Owners of Goods aboard might be sworn as Evidence to prove him Master, &c. urged that they might, as well as one Mariner to prove Wages due to another; but answered, that there the Contracts are several, and said that one Commoner cannot be Evidence to the Right of Common in an Action brought by another, and thereto answered that the Right is intire, and that he swears a Title to himself; and so here they are all concerned in one Bottom, and in one Adventure, and therefore could not be sworn; and of that Opinion was the Court; but for that Sandys had laid himself to be sole Proprietor of the Ship and Tackle, &c. and the Witness swore at the Time of the Action brought, that he was equally concerned in every Thing, but long since had sold his Interest, so that now he was not one Farthing concerned in the Consequence of the Cause; yet the Court held, that he was no competent Witness, and that for the other Reason the Plaintiff should be nonsuit, and so he was.

Palms *and* Hebletwhait; *devant.*

5. PALMS brought an Action sur Case against Hebletwhait, and declares that he the 1st of August such a Year, was seised in Fee of two Acres of Land in the Parish of Old Malton, Com. Ebor to, upon and beyond which Land the River Derwent did use to run, and that the Defendant 1 August, &c. a great Part of a certain antient Dam, &c. to which Count there was a Demurrer, and to another Count, a special Verdict, which found, that the River Derwent run through the Parishes of Old Malton and Norton, both in Com. Ebor; they find that sixty Years ago, the Plaintiff had a Mill upon his Land, and that he hath now lately built another Mill, six Yards lower than the Place where the antient Mill stood; they find that the Defendant had an antient Dam higher on the same Stream, but in the Parish of Norton, and that the Defendant such a Time, &c. did pull down his Dam, and thereby diverted a great Part of the Stream, &c.

The Case in short is but this; A. hath two Acres of Land, to which an antient Water runneth, upon which he builds a new Mill. B. hath an antient Dam upon the same Stream, which he pulls down, whereby a great Part of the Stream running to the Mill of A. is diverted; if A. may have an Action for this?

Thompson for the Defendant argued:

That the Prescription set forth is void, for 'tis of the Nature of the Land it self, 3 Cr. 791. Noy 20. then he said, he had the Water pro usu & commodo, and sets not forth what Use or Profit, for it may be for watering his Cattle, or flowing his Ground, or other special Use; so that by pulling down the Dam, nothing is done in Prejudice to that Right, though there may not be sufficient to drive the Mill; and this it was the Court at this Time seemed most to incline to. Against the Plaintiff he cited several Books, and endeavoured to answer the Reasons of the other Side. Pollexfen went upon the Right the Owner hath in the Soil, and to the Water upon the Soil; and said it was lawful for a Man to use his own after what Manner he pleased, so as not hurting

ing his Neighbour; and that he having lawfully erected a Mill upon his own Soil, the Diverting Part of the Water-course is an Injury which ought to be repaired in Damages; and that here in this Case no Prescription is necessary: He said that the Defendant could no more stop the Water, than where I have a Way over several Mens Land to my Land, and then I build my Land into Tenements, they could stop my Way; for that their Land is charged with the Way, so here, &c. but the Court seemed to incline econtra, for that he having not set forth that he was to have Water for his Mill, but only pro usu & commodo, there may be a sufficient Water left pro usu & commodo, the pulling down of the Dam notwithstanding, and yet not enough to drive his Mill. Cur' adv. vult.

The King *and* Barnes.

6. THE Defendant was excommunicated for not going and hearing Divine Service at his Parish Church, and not receiving the Sacrament at his Parish Church; and upon the Return of the Significavit, and this expressed for Cause, he comes and says Exonerari debet, &c. and pleads the Statute of 5 Eliz. And now Pollexfen moved that this is not for any Cause expressed in the Statute, for that thereby he is not tied to the Parish Church in the one Case, or the other, and therefore prayed to be discharged of the Penalties in that Statute; for he insisted not that the Excommunication should be discharged.

To which Sawyer, Attorney General, replied.

That 1 Eliz. orders, that the Resort be to the Parish Church, &c. and the Statute of 5 Eliz. is to be intended of such Church, as the Party was obliged by Law to frequent, which was the Parish Church, &c. and besides, Churchwardens can present only for their not coming to their Parish Church, for how can they know, whether he goes to any other Church; but in Case the Party had pleaded in the Ecclesiastical Court, that he had gone to any other Church, then by Statute of Jac. they ought to acquit him, as to the Penalties; and Jefferies was likewise of Opinion, that he might have pleaded it in R. B.

and if the Attorney had demurred, it would have been against him; but as 'tis, Judgment was given for the King. Then Pollexfen took another Exception, which was, that by the Statute there ought to be an Addition, as is required by Stat. H. 5. and that here the Parties were named A. B. Merchant, C. D. Gent. E. T. Yeoman de paroch' de D. which says he, goes only to the last, and so not well; but this was likewise disallowed.

Frasier *and* Progers.

7. SIR Edw. Herbert argued this Term for the Plaintiff, and endeavoured to make out three Things.

First, That the King was well intitled to the Office.

Secondly, That such an Interest will go to the Executors.

Thirdly, If the two first Points should be against him, yet that the Defendant hath no Title, for that his Letters Patent are void. 'Tis objected, that finding her Ideota naturalis & sic continuaverat per Spatium 8 Annor. is ill, because this doth not prove her an Ideot à Nativitate.

In answering which, he considers what the Law would be, if the Office had found her an Ideot from such a Time only, and takes it the Law would be the same; and says that the three Differences taken in Beverley's Case are, of an Ideot or Fool natural, of a Non compos by the Act and Visitation of God, and of a Lunatick, which he says are not warranted by the Statute de Prærogativa Regis, and that there is in Law no Ground of Difference between an Ideot, and one Non compos; but the sole Difference is between an Ideot and a Lunatick; and the Reason of it is, for that the Lunatick injoying lucida intervalla, which is a temporary Cure, the Law sees a Possibility, that as he is cured, and then relapses, so he may be cured, and not relapse, which is a Ground of Difference in this Case, but none in the other; but this Jefferies Chief Justice did not seem much to approve. And Herbert said that this Point might be left out of the Case, for that the Office is well enough, and that the Words à Nativitate are not necessary; if the Office had found her fatua naturalis, it had been enough.

If the Office be uncertain, yet it will not be void, but the best shall be taken for the King: But where the Office is so uncertain, that no Title appears, there a Melius inquirendum, but where a Title appears for the King, but 'tis not found in what Degree, there the best shall be taken for the King; and yet before the Statute of Ed. 6. if Office had found, de quo, vel de quibus, tenementa prædicta tenentur, yet it should have been for the King, and be intended to be holden of him; he cited Dyer 155, 162, 306.

The Second Question is, If the Interest passes to the Executors; this he said was not much insisted on, nay rather yielded by Holt, for 'tis not a bare Trust, but a Trust coupled with an Interest, or rather an Interest with a Trust incident to it; and the Objection that the King knows the Committee, but knows not who may be his Executor, is the same in the Case of an Executor of an Executor; and that an Executor of an Executor hath the Disposal and ordering of the Estate of the first Testator, for as he reposed a Confidence in the first Executor; for the Management of his Estate; so did he in him for chusing a fit Person to order it after his Death.

But Thirdly he said, That the Defendant's Letters Patents are void, for that between the Return of the Office and the Grant of Letters Patents, are but 15 Days; and 18 H. 6. enacts, that there should be a Month, for that in the mean Time the Parties might come and tender a Traverse; and in this Case two Traverses might have been taken, one by the Ideot, that she was not an Ideot, and the other by any Person having a Title to the Land; wherefore, &c.

Malloon *and* Fitz-gerard; *devant.*

8. THIS Case having been argued the Day before by Sawyer Attorney, whose Argument I could not hear; the next Day it was argued by Pollexfen for the Defendant.

The Points he made were two, which arise from the Provisoes in the Settlement.

First Proviso is, that Catharine shall marry by the Consent of the Trustees, to one that shall take upon him the Name of Fitz-gerard, or else her Estate determine, and go to Letitia, &c. ut supra.

The Questions were two.

First, Whether Catharine hath lost her Estate by marrying one that took not upon him the Name of Fitz-gerard.

Secondly, If Catharine hath lost her Estate, yet whether Letitia hath not likewise lost hers, by marrying Franklyn, who took not on him the Name of Fitz-gerard. It must be agreed, that we are Heir, and must have the Land, unless by this Deed we have forfeited it.

Secondly, Whether we have Title or not, yet unless you have Title, we ought to hold it.

What you argue against us, that we are bound to take Notice at our Peril of the Condition, and that by not taking the Name we have broken it, affects you as well as us; and if we are bound, you are so too; and you have broken the Condition as well as we, by your not taking upon you the Name, &c. for you are within the Proviso as well as we, which is, that the Heirs of the Body of Letitia, and every other Person to whom at any Time any Estate shall come by Virtue of any Use hereby limited shall, &c.

Say you, the Heirs of Letitia are the first that are bound to take upon them; but the Answer is, that you are other Persons than the Heirs of Letitia, and therefore you are within the Words of the Proviso; and I cannot apprehend any Reason why the Father should oblige Catharine and her Husband, and Letitia and her Husband should not be obliged; for 'tis not probable he

would clog his Daughter more than his Sister, with the Preservation of his Name; so that by the same Argument we ought to do it, you ought.

To the Title of the Defendant, they say,

First, That Default of Notice excuses not in Case of Forfeiture; for the Father hath not provided that Notice should be given; and if he had intended it, he would have done it.

Answer. This is said upon a Supposition, that the Law would not have made a Forfeiture without Notice, for if it was a Forfeiture without Notice, then it had been needless to have ordered, that Notice shall be given; so that to argue from hence the Law, it must be agreed 'tis no Forfeiture without Notice.

Secondly, That as you take Notice of the Estate you have, so you must of the Qualities and Terms you have your Estate upon.

Answer. If this was not in the Case of an Heir he agrees it, for taking as an Heir she ought to have Notice; but as a Purchaser, as he takes Notice of the Estate, so ought he upon what Terms he hath it.

Objection. That wheresoever Notice is requisite, the Law appoints a Person to give it; but here no Person is appointed to give Notice, so infer no Notice is requisite.

Answer. Denies the Supposition; and cited Topham's Case, who detained one after the Dissolution of Parliament as he heard, by incertain Rumour, and Discourse; yet shall be excused, though no Person was bound to give him Notice: So in the Common Case of one keeping a Dog used to kill Sheep, he shall not be liable, till Notice given; yet no one bound to give him Notice.

Next he considered the Authorities urged on the other Side.

As to the Cases of Notice in Contracts, they come not to this Case; but the Point as to Notice is, whether a Condition, or conditional Limitation, shall determine the Estate without particular Notice thereof given.

He said that Corbet's Case in the 4 Rep. comes not to this Case, and put that Case, &c. But where the

Condition is for the Benefit of an Heir, to defeat the Estate of another, there the Heir must take Notice at his Peril to perform it, if he will have Advantage of it; and cited 8 Rep. 90. 1 Inst. 218. Conditio beneficialis quæ Statum construit, benignè secundum verborum intentionem est interpretanda; odiosa quæ Statum destruit strictè secundum verborum proprietatem est accipienda.

He cited and put the Case of Cæsar and Spring, Jones 389. Winch. 109. and Roll, Condition 415. which are all but one Case; but come not to this Case. The Case that comes nighest to this Case, is that of 1 Cr. 576. wherein three Things are adjudged, First, Because there being a Possibility after a Possibility; ergo, &c. Secondly, Because there was a Fine and Non-claim. Thirdly, No Notice necessary, because no one appointed to give Notice. As to the first and third Points, the Book says the Court was not agreed, so that is no Authority; or if any, it is against you, for that was a Remainder, and so he in Remainder bound to take Notice, &c.

For the Case of Fry and Porter, the Authority thereof is great, and we submit to it; but it comes not to our Case, because there the Devise is to one who was not Heir, but we are Heir; there the Devisee could have no Title, but by the Will; but we have a Title in this Case, without the Conveyance, which you would destroy by the Conveyance: We are in as Heir without the Conveyance, and in a better Condition than with it; and that where one is to forfeit an Estate, Notice ought to be upon a Devise; he cited Palmer 164. 2 Cr. 56, 617.

Frances's Case is not avoided by saying two Points were adjudged, but that one was sufficient to ground the Judgment upon, and therefore the other not of Weight; but this would take away the Authority of all Cases, where more than one Point is resolved.

This Case of Frances meets with our Case in every Point, and they were no more bound to give Notice than in this, so that it is a full Authority; and in Fry and Porter's Case, by the Name of Fry and Williams, (which see Pollexf. 10, 11, 12.) All the Judges did agree that Point of Frances's Case; so that Frances's Case stands not only upon its own Authority, but upon the Authority of the Judges, in Fry and William's Case. Hale Chief Justice

Justice said he should make no Doubt of it, if it had been an Heir at Law; but say they, you had Notice.

Whether we had Notice or not stands upon the Verdict, which he recited; now that shall be sufficient Notice which shall inform the Party what to do, so as to be able to perform what he is required to do.

In this Case she was told she must marry with the Consent of Trustees; but this was not by any Person certain, but only general Discourse; neither was she told who were the Trustees, so as to find them out to have their Consent.

Upon the Whole he thinks they have the Authority of these two Cases for them; and that as they have a good Title by Law, so he hopes it is a better in Equity, for that they are Heir, and have been guilty of no Default, whereby the Estate should be taken from them; so prays that the Judgment may be affirmed.

Cur' advisar' vult. And afterwards the Court was unanimously of an Opinion that the Judgment ought to be affirmed; and said they could not distinguish this Case from Frances's Case.

In Chancery.

9. A. B. hath three Nieces; one of them takes husband, A. B. devises a Legacy to the Husband and Wife, and the other Nieces equally; the Question in Chancery was, whether here should be three Parts or four; urged that being Tenants in Common, there should be four Parts, as likewise that so it should be adjudged by the Civil Law; and that in Chancery they govern Legacies by the Rule of the Civil Law, unless where it directly contradicts the Common Law; but it was ruled by North Lord Keeper that there should be but three Parts, and that Husband and Wife should take but as one Person according to the Rule of the Common Law; and the rather, for that the Legacy here was given in Respect of the Wife, and not of the Husband also.

2

Term.

Term. Trin.

36 Car. 2. C. B.

Naben *and* Miecock.

1. THE Plaintiff brought an Action sur Case for these Words, Thou art a Clipper, and thy Neck shall pay for it; upon a Motion in Arrest of Judgment, Jones Chief Justice, Levinz and Charlton were of Opinion, that the Words were actionable; for though Clipper is general, and may be intended a Clipper of Wool, Cloth, &c. yet the following Words per Jones and Charlton shew it to be intended of Clipping, for which he shall be hanged, and that thy Neck shall pay for it, implies as much. Levinz held, that whether thy Neck shall pay for it, implies as much as thou shall be hanged, or not, or only that he shall be set in the Pillory; yet that it was a Scandal, and actionable: And he said, he was for incouraging Actions for Words, and for taking Words in their natural, genuine and usual Sense, and common Understanding, and not according to the witty Constructions of Lawyers, but according to the Apprehension of By-Standers, &c. and Words are the rather to be made actionable, for that à verbis ad verbera is usual, and Men will right themselves by Force, when they cannot be righted by Law; not yet that every idle Word will bear an Action, as Son of a Whore, Rascal, &c. and the Reason thereof is, for that the By-Standers see them to be Words of Heat, and so the Cause is visible; but when such Things are laid to one's Charge, whereof a By-Stander cannot know whe-

whether he is guilty, or not; and yet are maliciously said when he is not guilty, these ought to be incouraged: And a Case lately adjudged between Walker and Beavour was cited, where the Words were, Thou art a Clipper, and shalt be hanged; which were adjudged to be actionable.

+ Herring *and* Brown; *devant.*

2. THIS Case was argued this Term by Finch Solicitor for the Plaintiff, and Pemberton for the Defendant. I did not hear the first Part of the Solicitor's Argument; but he made a Difference between a Forfeiture committed by Tenant for Life only, and between an Act committed by him who is Tenant for Life with Power of Revocation; for the Reason of Forfeiture in Tenant for Life, by making a Feoffment, &c. is his Presumption in doing an Act, in Disaffirmance of the Reversion; and therefore if he join the Mise upon the mere Right, though the Plaintiff do not recover, yet 'tis a Forfeiture; but in our Case the Estate for Life was accompanied with a Power of Revocation, so that he was Owner of the Land, and the Act that he doth, is in Pursuance of his Ownership; wherefore to construe that to be a Forfeiture would be extream hard, and especially when the Declaration of the Uses comes, which shall be taken as one Conveyance, &c.

Pemberton. It is agreed that the Fine alone without the Deed, nor the Deed without the Fine, could not have executed this Power; but that which is contended for, is, that they shall be taken together, & quæ non prosunt singula, juncta juvant, for that in the Eye of the Law they are but one Conveyance. Till the Deed of Declaration came, the Estate passed by the Fine alone, for a Fine of it self is sufficient to pass an Estate, with the Assistance of any other Conveyance; and so it appears by the Pleading of a Fine, which is, Quidam finis se levavit; and since the Statute of Uses, it vests immediately; if no Consideration, then to the Use of the Conusor; if a Consideration, then to the Use of the Conusee: And for the Quickness and Vigour of the Operation of a Fine, he cited 4 Rep. 71.

He asked the Reason, why a Quid juris clamat lies not, since the Statute of Uses when a Fine is levied to an Use? why, because of the Quickness of its Operation, and its Vesting.

He likewise asked, why a Bargain and Sale cannot be to an Use, but for the same Reason? and these he says are sufficient Grounds to warrant him to conclude that the Estate vests immediately by the Fine: If it should expect, after levying the Fine, how long should it expect? for a Week; why not for two? why not for two Months? why not for two Years? if till a Deed of Declaration, how if there should be no Deed? It seems plain that the next in Remainder might have pleaded the Fine was to his Use, and therefore I hope I have Ground enough to say the Estate passed before the Indenture, if not, in whom shall it be in the mean Time, not in the Conusee, he is only an Instrument, and the Statute executes all out of him, there being no Consideration; therefore it must be in the Conusor. The next Question is, if the Power of Revocation be destroy'd: He said, that a Power of Revocation coupled with an Estate, is such an Hereditament, as is destroy'd by a Fine, or a Feoffment, for Livery is of so high a Nature, that it extinguishes the Power and all Claims in him that makes it, 1 Rep. 111.

Suppose in this Case at Bar, Sir John Williams and Cary had joined in a Feoffment, as in Albany's Case; will any Man say this had not destroyed his Power, as much as that did in Albany's Case? Will a Feoffment do it; And will not a Fine; And if the Power had been destroyed by a Feoffment, will a subsequent Deed revive it again.

But 'tis objected, That if the Intention of the Parties shall appear to have been, that the Conusor intended to have his Land again, having a Power over it, then your Lordship will over-look all mean Circumstances. Answered. Is there any Thing here that is not in Christopher Digg's Case, yet there it would not, he had Power over the Land, and intended to have it again, yet could not.

If it be so, that the Estate is altered by the Fine alone, without any Deed, and the Power of Revocation gone, then there was no Revocation at all, and the Fine

wrought a Forfeiture; and if the Remainder-man had entered, shall the Declaration purge the Forfeiture.

Objection by Williams, that 'tis not found that the Fine was levied to extinguish the Power.

Answer. 'Tis true, but when an Act is done which amounts to an Extinguishment, shall the Court inquire what was the Intention; that would be hard; what Intention doth appear in Albany's Case, or Digg's Case?

That which is the great Objection is,

That though these of themselves would not make a Declaration, yet together they have all the Circumstances required to make a Revocation, and so it amounts to a Revocation; and for that Gibbon and Lee and Scoop's Cases are cited, &c. which he agreed to be good Law.

But he put this Difference, where an Act is wholly imperfect of it self, but is to receive its Perfection from a subsequent Act; there of Necessity they must be taken as one intire Conveyance, as Covenant to suffer a Recovery, or levy a Fine; when it is done, it is but one Conveyance; so is a Covenant for further Assurance, and Assurance after made.

And there is no Incongruity, that an imperfect Thing should wait for its Perfection from a subsequent Act, for nothing passes in the mean Time; and so is Seymor's Case, 10 Rep.

But where the first Act is of sufficient Ability to pass an Estate; the Law will not expect a future Act, though to some collateral Purposes it would pass it stronger; as in Seymor's Case likewise.

He acknowledged that where many Acts are done, some former, and some later, and all sufficient; that between the Parties they are good as in Cromwell's Case, and shall be deemed as one Conveyance.

But as to a Stranger's Interest, when it comes to be material by which Deed it passes, or if by any, the Courts have considered them apart for Advantage of a Stranger; as in Hind's Case, 4 Rep. and the like was in the Case of Seymor when it came to be considered; as to the Remainder, it was considered by which of the Deeds it passed; the Case will be so here. If you had Mr. John Cary and Sir John Williams here, you would take them as one Conveyance; but when you have a

Stranger you will take them apart. 'Tis but a Fiction in Law, which will not work a Wrong to a third Person; as to Dowman's Case, he said that without Doubt when the Parties have been so improvident as to levy a Fine without declaring an Use, that the Deed after will be a Signification of the Intent of the Parties at the Time of levying the Fine, and they will be estopped to say the contrary; but yet he saith that Book says there may be an Averment against such Declaration.

He thinks he may grant the Authorities on the other Side, and as to Wixson and Garret's Case it differs from this; for in that Case there could nothing pass by the Deed before the Fine, &c. but here it may before the Deed, and why it should is a Riddle; 'tis true the Court hath generally Regard to the Intention of the Parties as in Bredon's Case; but here is the Interest of a third Person to be devested, and shall the Intention here ever come in Issue? it cannot; therefore it must be wholly insignificant; the Case stands single of it self, and is not like any other Case; wherefore he prays Judgment, &c. Cur. advisar. vult; and afterwards adjudged that the Power of Revocation was extinct according to the Argument of Pollexfen and Pemberton; but this Judgment was reversed in this Point in the Exchequer-Chamber. Hill. 3 & 4 Jac. 2. per six Judges against two.

Anonymus.

3. ONE seised of an House in Fee, rented a Barn and Stable of Parker, which was in the Occupation of Parker, together with another House, and this he was Tenant to for 11 Years; and then he bought the Barn and Stable, and occupied it with his antient House, and then he purchases Parker's House. After this he makes his Will, and devises to his Wife the Messuage where he then dwelt, and the Yards, Gardens, and Outhouses, with all Appurtenances thereunto belonging for Life, and after to his Son. And then he further gives to his Wife all that Messuage or Tenement, which he purchased of Parker, with the Gardens and other Appurtenances, as they are situate in B. in the Tenure and

Occupation of A. B. C. &c. for her Life, and after to his Daughter; and the Question upon a special Verdict was, which of them should have the Barn and Stable.

Holt argued that the Barn and Stable passed as Part of the House in Possession, because it is now become Part of the House; for if one hath an House, and purchase Land to it, and makes it a Garden, and lays it to his House, tho' it were not originally belonging to his House, it is now become Part of his Messuage, being occupied together with it, by one that had a permament Estate in the Land, 2 Cr. 121, 122. and the Using it and Enjoying it together is a sufficient Reputation to make it pass for Part of the House, and all People will take it as Part. 6 Rep. 65. 1 Cr. 308. Sid. 190.

His Intent was that the Barn and Stable should pass with the House to his Son, for in this Part of his Will, he saith and all Outhouses, so that though Messuage in Strictness of Law will carry Yards, Backsides, Orchards, Barns, Stables, &c. yet he added Outhouses to make his Intention plain; and when he devises the other House, he omits to say Outhouses, but says in the Tenure or Occupation of A. B. &c. and the Barn and Stable were not then in the Tenure of A. B. &c. wherefore he prayed Judgment for the Plaintiff; 'twas argued for the Defendant by Pollexfen; but the Court clearly of Opinion against him, and adjudged for the Plaintiff upon a special Verdict.

Anonymus.

4. ERror assigned upon a Judgment in an inferior Court in Ireland, and Judgment reversed; for that they declared by Bill in Custodia Mareschalli, &c. and the Court would not allow it to be argued.

Bradwell

Bradwell *and* Carter.

5. THIS was a Writ of Error out of C. B. upon a Judgment there, upon a special Verdict, wherein the Case was thus: Sir James Bags became Accomptant to King Charles I. and after acknowledged a Recognizance, and then his Lands are extended at the King's Suit, and after the King grants the Extent to A. B. and his Heirs; and afterwards the Act of Oblivion is made, and then is there a Suit in the Exchequer, and upon Confession of the Attorney, Judgment there is given, that the Extent be discharged; whereupon the Conusee enters; and if his Entry be lawful is the Question.

First Question here is, If the Debt be barred by the Act of Parliament?

Secondly, If it be so, being granted to a third Person before the Act of Oblivion came.

Thirdly, How far the Judgment in the Exchequer affects it.

He saith that the Act hath discharged this Debt, and that arises from 5, 7, and 10 Paragraphs of this Act; which see; he cited the 2 R. 3. 8. 11 H. 7. 10. Hill. 15 & 16 Car. 2. Rot. 684. Lock and Hethrington; which see, Sid. 264.

An Extent makes no Alteration, for it remains a Debt still; and if the Debt be released, the Extent falls.

The great Doubt is upon the 10th Paragraph, and the Exception therein, but he would have it explained by 13 Car. 2. cap. 3. But whether the Grant over hath prevented it, or not, yet he takes the Grant it self to be void; for the King granting to A. B. and his Heirs, not taking Notice of his Debt or Extent, he is deceived; and being deceived in Fact or in Law, his Grant is void. 1 Rep. 53. Hob. 230.

If the Grant of the Extent be void, then 'tis barred by the Act, if good, though it be granted over, it remains a Debt still; for the Debt is one Thing, and the Extent is another; for a common Person may grant Land extended, but not the Debt, because 'tis a Chose in Action: Suppose there were general Words which would carry the Debt, yet being Matter of Prerogative, if

it ought to be particularly expressed. Com. 336. Hob. 143, 144. Then the granting the Lands over will not be any Hindrance, but the King may bar the Debt. 1 Cr. 214. Jones 238.

Thirdly, Supposing it not gone, yet the Extent is not discharged by the Judgment, which so long as in Force, your Lordship will take so much Notice of it, as not to controvert it.

Pollexfen speaks first to the Judgment in the Exchequer, which he thinks affects not this Case; but the Confession of the Attorney leaves it upon the same Foot as it was, that is, it remains intire to be considered whether pardoned by the Act of Oblivion, or not; the Confession of the Attorney notwithstanding.

He said he would not controvert, whether the King's Grant be good or not, or whether if he grants the Extent, that yet he may not pardon the Debt, but takes them to be as Mr. Holt says.

But the Point is, Whether the Debt or Extent upon it be pardoned or not by the Act of Parliament.

Tho' it be true that the Title of the Plantiff be precedent to the Extent in the Exchequer, yet J. B. became Accomptant to the King long before the Recognizance acknowledged.

If any Thing in the Act discharge the Debt, it must be the Clauses mentioned by Mr. Holt, and then the next Question will be upon Construction of those Clauses; and he saith, that they shall not be taken according to the general Words; but Sum or Sums of Money shall be taken of like Nature, with Penalties or Forfeitures, which must be meant in Relation to the Writs, it being the Intent of that Act to bury in Oblivion all Things relating to the Rebellion; so that Penalties and Forfeitures must be meant of Penalties and Forfeitures incurred by Reason of the Rebellion and Acts, Intrusions and Offences committed in that Time, and not to Debts due to the King preceding, no more than if the King had pawned Jewels before the War, and then this Act had come; it shall not be intended to be meant of Debts or Sums due to the King upon such Accounts. The Case of Lock and Hetherington held a long Debate, and Windham Justice was against the Resolution to the last; and if it was a Question then, whether a Debt due to one Felo de se,

and forfeited during the War, were pardoned, it would be much more here, when there is a Debt due to the King before the War; and in the Case of Lock it was within the Words Forfeiture, &c. 1 Cr. 349.

But suppose the general Words should comprehend it, yet he takes it, that the Exception doth except it, and thereof the Words are, &c.

Though this go further, and be an Account stated, yet the Account being excepted, all Things depending upon it are excepted; and for this he cited 6 Rep. 13. But say they that is not a general Clause, but goes to such a Time. The Question is, whether that Exception to 30 Jan. 1642. goes but to a later Clause, by the Interposition of the Words, or, &c. It is a Clause by it self, and the Subject Matter shews it, for Sequestrations began about that Time; so that upon the whole Matter he prays that Judgment may be affirmed; and it was affirmed.

Lemon *and* Blackwell.

6. ERror upon a Judgment in C. B. in Replevin, where the Case was, John Canon seised of the Manor of Blackden, which 19 Jan. consisted of Services, demesn, and fifty Copyhold Tenements, did grant to Rolt the Moiety of twenty of them, &c. and afterwards 4 Cr. 1. did confirm his former Grant, and granted the Moiety of the Manor. Rolt's Estate came to M. Canon's Estate to N. and they hold a Court, and join in a Grant of the Copyholds; and whether this be a good Grant, is the Question. Pollexfen for the Plaintiff below, and in the Writ of Error: He said that in C. B. it was never argued for his Client, but either through the Negligence of the Attorney, or for some other Cause, Judgment was had against him, without any Argument or Defence; so that it comes before the Court ut res integra.

Nothing can hinder this from being a good Grant, but the Grants which have been of the Manor.

He premised first, how the Manor stood before any Grant.

'Twas

'Twas a compleat Manor before the Grant to Rolt; while it was such a Manor, it had two Courts, First, A Court of Freeholders, wherein they are Judges. Secondly, A Copyhold Court, 1 Inst. 58. The Manor being thus, by the Grant of a Moiety of twenty Copyholds, the Freehold Part of the Manor is not touched, but only a Moiety of twenty Copyholds; which being all that was granted, what Effect hath it? why after the Grant, a Copyhold Court might be held for twenty Tenements; and as to the other Thirty they remain as they were before; but as to the Moiety of twenty Tenements, they might come and keep Courts alone, and grant Moieties.

Suppose the intire Interest of twenty Copyholds had been granted, then they might have held Courts, 4 Rep. 26, 27. and the Difference is between one Tenement being granted, and more; for if more than one be granted, then the Grantee may hold Courts, and make Admittances, this being for the Benefit of the Tenants, 4 Rep. 27. 3 Cr. 102, 661. and for all that which is said by Mr. Just. Crook, 3 Cr. 102. yet Melwick's Case is good in Law; so that if it had been of twenty Copyholds, it had been good, but this is of a Moiety: Suppose it had been of a Moiety of all, then they had been Tenants in Common, and might have joined in keeping Courts; if so, why not when a Moiety of Twenty is granted. Holt econtra.

The Question is, If all these Lands are Part of the Manor of Blackden, for 'tis agreed Part is: The Moiety of them is actually severed from the Manor, for the Freehold of Copyholds is Part of the Demesne of the Manor, and so is the Pleading.

If one grant away any Part of the Demesne in Fee, they are severed from the Manor, and can never be Part of it again, 6 Rep. 65. though it be but for an Instant.

Then the Question will be, Whether the Manor can be devided? it cannot, 6 Rep. 65. by Act of the Party; and the Reason will be the same of Freehold and Copyhold, for a Manor must be Time out of Mind, and cannot be created at this Day.

He admits if all the Copyholds had been granted, that it is a Copyhold Manor; but denies that it is so, when but Part is granted; 3 Cr. 442. is a Case in Point.

As to the Case concerning Dower, 'tis different, for she is in by Act of Law; and if she was endowed of the third Part of a Freehold Manor, she shall have a special Court-baron. Cur. advisare vult, but inclined pro Quer.

Anonymus.

7. A Citizen and Freeman of London seised of Lands and Tenements, and a personal Estate; and being on his Death-bed, by Will nuncupative did declare as followeth: I hear that J. R. (who was Heir at Law) is inquiring after my Death, and therefore I am resolved to give him nothing but what my Father gave him by his Will; I give all my Estate to my Wife; this was found special, and the Questions were, Holt pro Quer.

First, What passed by this Devise, whether his Lands, or Tenements, or only his personal Estate? Secondly, If the Lands pass, then for what Interest, scil. whether an Estate for Life, or in Fee?

He gave all his Estate to his Wife: Now this is by a nuncupative Will, so that 'tis not supported by the Statute of H. 8. but meerly by the Custom; then whether when he says all my Estate, this shall extend to all real and personal, is the Question; he thinks not.

All my Estate, is a good Word at Common Law, to pass the personal Estate; then your Lordship will not construe it upon the Custom, there being no apparent Intent to convey by the Custom; and otherwise the Words will have a double Construction, both upon the Common Law and the Custom; he cited the Case of Bowman and Milbank; now reported by Sid. 191.

But supposing in this Case the House should pass, the next Question is, what Estate? and he conceived no more passed than an Estate for Life. For the Words Estate in a Will hath two Constructions, sometimes for the Land it self, without Respect to the Quality of his

Estate, as whether he hath it for Life, or in Fee, &c. sometimes it is taken for the Quality of his Estate, as an Estate in Fee, &c. and therefore it would be hard to disinherit an Heir, without an apparent Intent, 1 Cr. 447, 449. Roll, Estate 834. Germain vers. Germain, and said that Case was ruled by Reason of the Word Paying.

Pollexfen said that a Will nuncupative being inrolled by Virtue of the Custom, is all one as a witten Will.

The Words in this Case shew the Meaning of the Testator to be, that a Fee should pass; for first he saith negatively, I bear, &c. which is a full Declaration that J. R. who is his Heir shall have nothing; and then affirmatively, I give all my Estate to my Wife.

The Word Estate doth comprehend all that a Man hath Property or Ownership in, and is divided into real and personal; if it had been all my real Estate, then that only had passed; if it had been all my personal Estate, only that had passed, but all his Estate comprehends both Real and Personal; as a Release of Actions Real goes to no more, so of Actions Personal; but a Release of all Manner of Actions extends to all Actions Real and Personal.

Estate sometimes contains the Substance of the Land, and sometimes the Quantity of the Estate; so that in legal and common Parlance, it carries the Quantity and Substance.

This being the Sense of the Word Estate, and it carrying with it all the Estate, which he had in the Land, 'tis as much as if he had devised the Fee-simple, he having a Fee, 1 Cr. 447, 449. the Reason of that Case is best seen in Roll, 415, 11. as to the Case of Germain, Roll, Estate 834. Stile 297. the Words paying my Debts and Legacies make not the Word Estate carry more than it would do otherwise, but may make it a Fee, &c. if it do pass; he cited the Case of Wilson and Robinson, Mod. Rep. 100. where one devised all his Lands, Right and Estate; this passed a Fee by the Opinion of the Court, though it was not adjudged by Reason of a Fault in the special Verdict. And in the Case of Bowman and Milbank, Twisden was of Opinion that his Lands passed; but the other Justices against him, for that all had not any Substantive, to which it did relate, but might be all

his Money, all his Goods, &c. or any Thing else: The Court inclined pro defendente. In the Case of Carter and Horner, Pasch. 4 W. & M. Northey affirmed this Case to be adjudged, that all passed to the Wife in Fee, and that it was so enjoyed accordingly, ex sua certa scientia.

Sir Thomas Armstrong's *Case.*

8. SIR Thomas Armstrong being outlawed for High Treason, was brought to the Bar of R. B. and there apposed, wherefore Execution should not be awarded; he answered he was out of the Realm at the Time of the Exigent, &c. and prayed Counsel, which the Court denied, and said they could not take Notice of it; then he desired the Statute 5 & 6 Ed. 6. c. 11. might be read, which was done; and then he said the Year was expired, and prayed a Trial; but the Court told him he had not yielded himself to the Chief Justice within the Year, so was not within the Proviso; he answered that of late he was confined, and could not, and that he might have yielded himself if he had been at Liberty; but the Court over-ruled him, and made a Rule for his Execution, on Friday following, no Judgment being given in Court. This seems to be a Case of the first Instance, & durus sermo.

Anonymus.

9. ACtion sur Case sur Assumpsit, the Defendant pleads Non assumpsit; and upon Evidence gave the Statute of Gaming in Evidence, and allowed by Jefferies Chief Justice; otherwise it seems, if it had been Debt upon a Bond, &c. then it ought to be pleaded.

Anonymus.

10. ACtion sur Case upon mutual Promises upon Marriage; the Counsel for the Defendant offered, that it was within the Statute of Frauds and Perjuries; but ruled econtra by Jefferies Chief Justice; so of an Assumpsit upon a Wager.

Anonymus.

11. A promises B. that when A. receives 100 l. which C. owes A. that he will pay B. 20 l. Indeditatus assumpsit lies not; otherwise if the Money had been originally the Money of B.

Term. Mich.

36 Car. 2. R. B.

The East-India Company *and* Sandys.

1. SAwyer Attorney General for the Plaintiffs.

This is an Action sur Case brought by the Plaintiff against the Defendant, and comes here upon Demurrer by the Plaintiff to the Defendant's Plea of the Statute of E. 3.

He put it as a Case, and said it was no more than this.

The King by Patent dated in May, Anno 13. of his Reign, reciting the Statute of Queen Eliz. grants to the Company the sole Trade within such a Precinct, exclusive to the rest of his Subjects; and if this Patent for a sole Trade in the East-Indies with a Prohibition to others, be good or not, is the first Question.

The Second Question is, If the Patent be good, yet whether the Action lies.

He shall not maintain that the King by these Letters Patents is bound from licensing others to trade; (the Judges held plainly the King is not bound, but may grant Licence to others) but that others not licensed are bound.

The Matter relating to Foreign Trade with Infidels, doth not oblige him to enter into Consideration of other Foreign Trade; but the Arguments of the other Side have made it necessary.

All

All Trade is { Inland or Foreign } { Manufacture, as by Husbandmen, and other Artificers. Merchandize.

Husbandmen, Artificers, and such like, may exercise what and how many Trades they please, so it be without Annoyance to others.

But Inland Merchandize lies under several Restraints at Common Law, as of Ingrossing; and was confined to certain Places, as Cities and Towns.

No Assembly for Buying or Selling could be without Licence; all Markets and Fairs are derived from the Crown, and depend upon it, and may be forfeited to it.

The Inland Trader might sell in private Shops, but could not hold Assemblies for Trades without Licence. These Licences when granted cannot be repealed without Cause of Forfeiture; and he takes the Law to be the same, where a Fair, &c. is erected, and where granted to a Subject, for all Subjects have Right to trade there.

The Reason of the Law herein is to preserve the publick Peace, to prevent Frauds and Abuse, and Oppression of the People; and therefore of common Right a Court of Pipowders is incident to them, for Correction of such Abuses.

He said there was another Restriction of Inland Merchandize, by Custom of Foreign bought and Foreign sold.

By a Record in H. III.'s Time, it appears that the Abbot of, &c. in Lincolnshire, under the Colour of selling the Fruits and Profits of their Demesne, bought and sold several other Things not arising thereon; upon this a Prohibition went to him not to exercise Merchandize, whereby it appears that at Common Law the King did restrain in some Cases the Exercise of Inland Merchandize.

Secondly, He viewed Foreign Trade.

At Common Law there are two Sort of Foreigners, Alien Amy, and Alien Enemy, neither can there be any other Foreigner; if Question arise, if one be Alien Amy, or Alien Enemy, it is to be tried by the Leagues, which are, or should be of Record in Chancery. 9 Rep. 37.

As to Trade with Alien Friends, it may be fit to discourse how far one Nation is bound to trade with another, and cited Bodin de Rep. lib. 1. cap. 7. and cap. 6.

'tis lawful to forbid a Foreigner to enter the Borders, and to force him out, though no War on Foot; and this may be done least the Manners of Subjects be corrupted, or in Times of Pestilence, &c. and he saith this is no more than what the Common Law spoke, and that before the Statute of Magna Charta, all Merchants Strangers did come in with safe Conduits hither, and that the Statute is a general safe Conduit; and the Construction which Coke makes, that the Prohibition ought to be by Parliament, is contrary to all Authority (and without any) as appears by the 23 of H. 8. Dors. Rot. Clause, 24 H. 3. Dors. and there have been like Proclamations in all King's Reigns to command Foreigners to depart.

This might further appear by several Statutes for Maintenance of safe Conduits. 20 H. 6. cap. 11. Holden in Horn and Ivy's Case, the King might by Common Law inhibit his Subjects from trading with Foreigners; so from going beyond Sea. Rot. Clause 7 E. 2. Rot. Clause 41 E. 3. Membran. 24. Writs were sent to maritime Towns to take Care of Subjects going abroad, except, &c. so that before the Statute R. 2. it was penal to go beyond Sea.

By that Statute three Persons are excepted. First, Lords. Secondly, True and notable Merchants. Thirdly, Soldiers; but yet this Statute gives them no Liberty they had not before, but only exempts them from the Penalty, &c. before that Statute Lords might have been prohibited; as for Soldiers 'tis plain they could not without the King's Leave, and ever since that Statute Lords have not taken a Passport, but a Licence under the Privy Seal or Signet: As for Merchants, they were the Merchants of the Staple, made and provided for by the Statute-staple, and sworn to observe the Laws of the Staple.

Two Sorts of Merchants were originally taken Notice of, viz. Adventurers, and of the Staple, these Merchants of the Staple were only bound to take Passports; but they were restrained from all Places but the Staple. H. 24 E. 3. Rot. 35. in Thesauro; there is an Information against several for not returning upon the King's Command from Rome. Moor 109.

Hence

Hence 'tis plain the Common Law did not give the Subject a Right to Foreign Trade, for no Man can have a full Right to that which another can hinder him from.

He saith F. B. 85. is to be intended only, that if one at Common Law went beyond Sea for Merchandize, or Travel, or other Cause, he shall not be punished for it; so all that the common Law gave, was a mere Impunity; and this is Fitzherbert's Meaning; and this was the Opinion of the Judges his Cotemporaries; and in Dyer 165, 296. 'tis not put upon the Right, but upon the Permission, so that it was no Offence till the Prohibition, and then all that the Common Law imports, is but a Permission, and that no more for Trade than for any other Cause. This Permission of the Common Law is of the least Sort, and no more than a bare Impunity, and is like that Liberty which one Subject hath to go to the House of another, 'tis an Excuse for Trespass, till a Prohibition: Though the Common Law did not prohibit the going Abroad, it did discountinance it. 3 Cr. 3. Baron and Feme go Abroad without Licence, and have Issue, the Issue is an Alien, and shall not inherit; and the Reason of the Law herein is, lest the King who is bound to defend the Realm be disabled, through the Want of the Aid of his Subjects.

Besides those Prerogatives of the King for the Defence of the Realm, the Law vests the sole Power of making Leagues in the King, which is the first Step to Trade, and no League was ever made for an indefinite and universal Trade, but some Things are excepted, as Salt into France, &c.

The Rules of Common Law are not adapted to determine of Foreign Trade, neither can Foreigners have Conusance of our Municipal Laws; and upon this Reason the Statute 27 E. 3. provides the Staple shall be governed according to the Law of Merchants, and not by the Common Law; and the Common Law hath made no Provision for Foreign Trade, but left it to the King to be ordered for the best Advantage.

The Foundation of all Foreign Trade, is first Leagues, secondly Acts of Parliament: Of Leagues he hath said somewhat before, and let the Subjects Right to trade

be what it will, 'tis punishable to trade contrary to the League, for Subjects are bound by the League, and Trade shall be managed as two Kings agree. 21 E. 3. num. 20. 22 E. 3. num. 13. Roll, Prerogative 174, &c. shews the Dependance all Trade hath upon Leagues between Princes.

Another Foundation of Foreign Trade are Royal Licences.

As the King may prohibit going beyond Sea, so that he may give Licence, is not to be doubted. Letters of safe Conduct put an Alien Enemy in the same State as an Alien Amy. Staples at first were settled by the King, they were after fortified by Acts of Parliament; yet the King might give Licence to trade in other Places, and the Staple cannot be settled in the Dominion of a Foreign Prince, but by Agreement between the Kings; and as to those in the King's Foreign Dominions, they cannot be but by the King. By the Constitution of the Staple Merchants were not only licensed but obliged to go to certain Places. 2 H. 6. cap. 4. 8 H. 6. 17. Staple Commodities comprehend the greatest Part of the Native Commodities of this Realm; so that hence it appears the Trade of the greatest Part of our Native Commodities were restrained to certain Places.

As to the Statute pleaded, it hath lost its Force by subsequent Statutes, for by the 27 E. 3. English, Welch, and Irish are prohibited; so that it appears that the Mare liberum of E. 3. became Mare clausum again. This appears by the 1 H. 5. Numb. 1. the Commons pray the Merchants may export to any Place, and import to any Place; they insist not on it as a Right, but pray it as an Act of Grace. Vide Hale's Com. Place, &c. Tit. Monopolies.

He saith the Reason why Merchant Adventurers to Russia were settled by Act of Parliament, was, because there was some Dispute if the King could make a Forfeiture, and at length holden he could not. A settled regulated Company hath been adjudged by the Parliament to be for the Good of the Kingdom.

After the Taking of Calais, both the Queen and the Merchants were at a Loss: Likewise the King might prohibit Foreign Trade upon the Account of Reprisals; but if he hath licensed to singular Persons, he doubts if it can be forfeited, it passing an Interest. But the Sta-

tute 3 Jac. opens Trade to Spain, &c. upon this Statute he made several Observations.

First upon the Title, which is an Act to enable all his Majesty's Subjects; so that 'tis introductory of a new Law, and so (saith he) are all Statutes relating to Foreign Trade, and not one of them declaratory of the antient Law.

Secondly, The Words are, Shall and may be lawful from henceforth; so that it is penned as an Act giving a Liberty from that Time not declaring a former Right.

Thirdly, It gives free Liberty to trade, as amply and freely as at any Time since the Beginning of the Reign of that King.

Queen Elizabeth having granted to the Merchants of Exeter to be a Company, and to trade solely within the Dominion of the French King; it was conceived that this Act of 3 Jac. had dissolved that Corporation, and deprived them of their Privileges, and thereupon was an Act of Parliament made in 4 Jac. whereby that Charter is declared not to be impeached by 3 Jac. and that Company is therein said to be for the Advantage of the Realm, whereby it appears, the whole Parliament have adjudged a Charter of the same Nature with that to the East-India Company, of Advantage to the whole Realm.

The Fishers of Ireland paid always Composition-Fish, for Liberty to go and fish there.

As to what is said, 1 Roll 5. that the King cannot restrain Trade by Sea, is true, for this was said long after 3 Jac. which opened Trade to Spain, &c. He said this Company was erected in 43 El. and hath been in quiet Possession of that Trade ever since, till of late; that their Patent was renewed by King James, and confirmed by this King.

As to Royal Licences by Statute,

First, He observes there are more Laws to restrain Foreign Trade by Englishmen, than by any others.

Secondly, Never any Statute was made, giving a general Trade to Englishmen, but those that have been, are particular, the only Semblance of one, is that which is pleaded, and that he hath shewn to be of no Force; and all those Statutes that have been made are introductive of a new Law, and none declaratory.

Thirdly, All Statutes giving Liberty of Trade, suppose the Foundation which is Leagues, for no Act gives it.

Where the King hath granted a Licence to trade by Act of Parliament, he cannot revoke it.

Where an Act generally prohibits any Thing, a general Licence is void, for that would be to repeal the Act.

'Twas upon this Ground that the Patent to the Canary Company was adjudged void, for it was against 3 Jac. which opens the Trade to Spain, Portugal, &c. So in Bate's Case, the Patent was against other Patents to the City of London, and against Acts of Parliament.

As to trade with an Alien Enemy, the Common Law is express, and at open War with them. Pasch. 13 E. 2. Rot. 13. in Thesaurar. An Indictment against Three for trading into——&c. they plead a Licence; but not being from the King, it was void.

They on the other Side object not against this, but only distinguish Alien Infidels, from Alien Enemies.

The Rules of Law, whereupon Jews were proceeded against, are as plainly laid down in our Books, as any other Rules for determining Property.

Whilst they were here, many were endenised, others born here, and had great real, and personal Estates, yet were they banished, as perpetual Enemies. What became of their Estates? the Law adjudged them to the King, as in Case of Alien Amy, or Alien Enemy.

The Controversies arising afterwards were not between the King and the Jews, but between the King and other of his Subjects.

The Prior of B. was indebted to a Jew 100 l. the Jew after Banishment met the Archbishop of Canterbury, and desires him to procure the Prior to pay his Money, which the Archbishop prevailed with him to do; and for this the Archbishop was fined in Parliament to the King.

The Lords petition the King for Arrearages of Rent-Service due from banished Jews, but not one Word of an Escheat of the Land to them, for the Lands of an Alien escheat to the King, 1 Inst. 2. Denization nor Birth could make them inheritable; and the Reason of the Law was,

least the Kingdom should be over-run with Jews, there being no other Remedy to keep them out.

He said that 7 E. 4. 13, 14. is good Law, but misunderstood, and misapplied, for it must be understood of Alien Enemies coming hither after War proclaimed; but Alien Amy being here, and then becoming Alien Enemy, his Goods cannot be seised by any Person; and this appears by Magna Charta it self, and by Brook, Property 38. where this Difference is taken.

He saith there is no League between the King and the Indians, and that a League Mutui auxilii, between a Christian King and an Infidel cannot be. 4 Inst. 155.

So that all that is in the Case is, the Company hath a Licence to trade, the Defendant hath none; the Taylors of Ipswich Case comes not to this.

Neither is there any Authority pleaded to give a Licence: So that now

The Question is, Whether ingrossing Foreign Commodities by a Foreign Merchant, be a Monopoly, and he will make it plain it is not; and the Common Law doth not provide against it.

Ingrossing was prohibited by 27 E. 3. but that Law was repealed. In 39 & 40 Eliz. resolved by all the Justices that any Merchant Subject or Stranger, bringing Victuals or Merchandize within the Realm, may sell them in Gross; so that 'tis lawful to sell them in Gross within the Realm, and the Buying them is a Matter arising without the Realm, whereof the Common Law hath no Conusance. He saith 'tis no Monopoly within 21 Jac. for that extends to sole Buying, Selling, &c. of any Thing within this Realm; and this is not any Thing within the Realm, so not within the Purview of that Law. As to the second Point,

An Action well lies. First, Though no special Damage be alledged.

Secondly, Because 'tis an Interest, and like a Patent for a new Invention, which if any other uses, the Patentee may have an Action; and the Difference is between a Patent importing a Grant of an Interest, and a Patent importing only a Dispensation; so prayed Judgment for the Plaintiff. Cur. advisare vult.

Lady Scroop *against Lady* Carr.

2. UPON a Trial at Bar, the Plaintiff made Title by an Act of Parliament 16 & 17 Car. 2. the Defendant's Defence was upon a Proviso in that Act, which saved all Rights to the King and Estates before 1639. made with Power of Revocation by Sir Robert Carr the Father, and then not actually revoked. The Defendant would have set up a Settlement made before that Time, and proved it sealed and delivered before that Time; and to prove that it was not actually revoked by Sir Robert Carr, offered an Abstract of the Deed, and a Case made upon it, with an Opinion all under the Hand of Mr. Justice Ellis, with the Depositions of Mr. Justice Ellis in Chancery, in a Case between Sir Robert Carr, the Son, and his Mother, wherein it appears to be a Deed in Force, after Sir Robert Carr's Death, though now cancelled and cut in Pieces; yet the Court refused it as Evidence, and would not allow the Deed to be read.

Durdant *and* Burchet.

3. UPON a special Verdict the Case was, Lands are devised to *J. H.* and his Heirs, during the Life of *R. B.* in Trust that *R. B.* may take the Profits, and from and after his Death to the Heirs Male of the Body of *R. B.* now living, and to such Heirs Males or Females, as he shall hereafter happen to have of his Body.

R. B. had Issue one only Son George a Minor, J. H. and R. B. alien by Fine and Feoffment, and the Lessor of the Plaintiff claims under the Infant.

Pollexfen pro Quer. The Question is, If Heirs Males of the Body of R. B. now living, be such a Description of George as to inable him to take a present Estate, then 'tis for the Plaintiff; if not, 'tis for the Defendant. 3 Cr. 453.

The Question hath been debated in a former Case in this Court, between James and Richardson, and adjudged a sufficient Description by three Judges against one; but this

this was afterwards reversed in the Exchequer, after which a Writ of Error was brought in Parliament; but upon the Dissolution of Parliament, nothing done.

That the Words are a sufficient Description, First, It appears by the Will, that R. B. the Father was to take no Estate, because he devises to J. H. in Trust, &c. during the Life of the Father; and then he disposes of the rest of the Estate after the Death of the Father by a distinct Devise; ut supra.

In the Will are two Sorts of Heirs; Heirs Males as now living; and Heirs Males or Females, which he shall happen to have.

First, That the Son in the Life of the Father is called Heir, in common Appellation, I think will not be denied; when the first Son is born, 'tis said an Heir is born; the Law it self calls him Heir, as in a Writ of Ravishment of Ward. Ratcliff's Case, 3 Rep. Though 'tis true that in a general Sense, non est hæres viventis, as to all Purposes, yet there is in some Cases. The Use I make of this, is to signify that Heir is a proper Word, for Heir Apparent; so then in a Will, Heirs Males is a proper Description of George who was his Son and Heir Apparent.

Suppose the Words had been Heir Apparent, it had been so full a Description, as no one could have doubted.

Now living, are the Words which make this a strong Case, and must describe a Person then in Being.

'Twas objected in the former Case, that if it had been Heir Male, it had been clear; but these Words are plural.

Answered. That alters not, for these are as full a Description as those would have been.

The Word Heirs hath two Senses; one a Description of the Person who shall take; the other a Limitation of the Estate.

As in the ordinary Case of a Lease for Life, Remainder to the right Heirs of J. S. or the Heirs Males of the Body of J. S. these Words both denominate the Person, and limit the Estate.

Heirs is nomen collectivum, and 'tis all one to say Heirs of J. S. as to say Heir of J. S. and Heirs of that Heir, for every particular Heir is in the Loins of his Ancestor, and Parcel of him. Roll, Parolls 253.

There-

Therefore where an Estate is limited to the Heirs of J. S. his Heir shall take, though he be but one.

This shews that these Words are a sufficient Description of the Person, and in a Will there needs not such precise Description of the Person as in a Grant; and for this cited Cheyny's Case, 5 Rep. Wills have that favourable Construction, as in some Cases an Implication shall give both Person and Estate, as in Case of a Devise, to Son and Heir, after the Death of the Wife of the Devisor.

Devise to a Stock or Family shall be intended the principal Person, Hob. 32, 33. this he mentions to shew how great a Latitude is given to Descriptions in a Will; so that there is a fuller Description in this Case, than in the Cases put. In a Will Heirs and Issue are of the same Sense, so taken in the Case of King and Melling; and so in Roll, Estate 837.

If so be that Heirs and Issue are of the same Sense, what would it be if the Word Issue was in this Will instead of Heirs Males; then it would be to the Issue Male of R. B. now living; would any Man doubt but that this was a full Description of the Person meant? In the Arguments formerly it was objected by Maynard that this should be an Estate-tail in R. B. though Pemberton and Saunders would have it a contingent Remainder.

For per Maynard, the Estate to J. Higden and his Heirs, during the Life of R. B. in Trust, &c. is but an Use, and executed by the Statute in R. B. and if so, then within the Common Case of an Estate for Life, being limited to one, with Remainder to his right Heirs, all is vested in him; but this cannot be.

For though it be so, where an Estate limited in this Manner is executed one Way, and by the same Conveyance, yet it will not be so here; for that would be to take Part of the Estate by Operation of the Statute of Uses, and the other by Operation of the Common Law. If the Word only had been in the Case of King and Melling, he doubted if all would have vested in Bernard, or if the Judgment would have been reversed.

Saunders and Pemberton contended to have it a contingent Remainder.

They

They said the Words are no Description of a Person certain, but if R. B. should suffer the Estate to continue, then after his Death George, &c. might take, otherwise not.

There is no Reason to make it a contingent Remainder, unless want of Description, for contingent Remainders are not favoured, nor raised but upon Necessity, when a Person is not in Esse.

If so, then if it appears by the Words, or Intent of the Will, that George was the Person meant, you will not make it a contingent Remainder.

If it may have a Construction either one Way or the other, you will construe it so, as to mean a Person in Esse, and not so as to mean no Body: So that upon the Whole, he thinks the Intent of the Testator is plain; and if it may be taken one Way or the other, you will give it where Reason will give it; and so prays Judgment, &c.

Maynard pro Defendente.

Mr. Pollexfen slides over the main Objection, which by his Favour he cannot answer; for if it had been Heir it might be well, but being Heirs in the plural Number any Person then in Being, or which may be born afterwards, is within that Word, for Heirs comprehend every one of the Family, for that they may be such.

A Will speaks not till the Death of the Party, and now living shall be intended at the Time of the Death of the Testator.

Every Will stands upon its own Foundation, and must be construed according to its Circumstances, &c.

The Law doth not regard Common Parlance, so as to make him take as Heir by a Devise, who is so called in common Parlance, as in the common Case of a Devise to one for Life; Remainder to the Heirs Males of J. S. he must be both Heir, and Heir Male, that takes this Remainder, and the Son of a Daughter who is Heir, shall not take within those Words; yet in common Parlance if it be asked, who is Heir to such an one, Answer will be made, that the Son is.

To what is said, that Issue and Heir, &c. are all one,

He answers, That if Devise be to the Issues of J. S. who hath several Children, they all take jointly; but if

to the Heirs Males of J. S. and he hath several Sons, yet but one takes.

Any Person then in Being, and capable to take, is within the Words now living, &c.

If so, then no Estate vested in George but the Remainder is contingent, and may be barred by a Fine, and denied the Assertion that there is no contingent Remainder, but where the Person is contingent.

As to his Opinion of its being an Estate-tail executed in Robert the Father, he saith that wherever the Estate is in one, and Profit and Benefit in another, tis executed by the Statute of Uses; and in this Case the Words in Trust ought to have been to the Use. Then there being an Estate for Life in the Ancestor, and afterwards a Limitation to the Heirs Males, &c. 'tis within the common Rule.

He said this was an Use executed by the Statute, for if Lands be devised to one in Fee, in Trust that another shall take the Profits, 'tis an Use; and what Inconvenience is there that it should operate Part by Common Law, and Part by Statute Law?

If you limit to J. S. and his Heirs, during the Life of J. D. in Trust for J. D. to take the Profits, 'tis executed by the Statute.

Heirs Males take not in any Person certain, but all that may be Heirs Males, and so of Heirs Females; wherefore, &c.

Chief Justice asked Maynard if the Devise had been ut supra, and Robert had died without Issue, his Wife enseint with a Son, whether that Son should take within the Words Heirs Males, &c. now living; Maynard yielded he should not. And the Chief Justice yielded that by the Word Issues all should take jointly; not so by the Words Heirs Males. Cur. advisare vult.

There was a Writ of Error brought in Parliament 1 Jac. 2. in the Case between James and Richardson, and the Judgment in the King's Bench affirmed ut audivi, for I was not present.

Pool *and* Archer.

4. LEssee for Years of an House leaseth to another, who covenants to repair, sustain, maintain, and uphold; and the Lessee brings an Action of Covenant, and assigns Breach for not Repairing.

The Defendant pleads, that the 1st of May a Fire did happen, whereby the House was casually burnt, and that the Plaintiff the 2d of May entered, and held him out, and still doth; to which the Plaintiff demurs.

First, The Plea is contradictory, for if the House was burnt down, the other could not enter, and hold him out, like to the Case 1 Cr. 325. and after 'tis burnt down, 'tis no longer an House but a Toft.

Secondly, It appears that the Plaintiff was a wrong Doer, and therefore the Defendant ought to have laid the Entry to be by Wrong; and though it be said vi & armis, yet this Entry might be by Right, as in Case of a forcible Entry upon the Statute; and if the Defendant will excuse himself by a wrong Act, he must make it appear, and it shall not be intended.

As to the Substance.

First, He yielded that the general Covenant to sustain an House, &c. undertakes against all Accidents whatever.

Secondly, He yielded that Burning should be intended by Negligence, not by Lightning; for if by Lightning, it should be so pleaded.

Thirdly, A Tortious Entry is not to be pleaded in Bar of an Action vested.

As in Debt for Rent upon a Lease for Years due at our Lady-day, an Entry after our Lady-day shall not be pleaded in Bar. In this Case if the House had been repaired, yet Action lies, for the Meaning was to uphold, &c. in the same Plight it was at the Time of the Demise, which by its being burnt down, it was not. And though the Words repair, sustain, uphold, &c. are put together, yet they are several Covenants, and several Actions may be brought upon them.

If the House fall there is an Action vested, and tho' it be rebuilded, yet it will lie. Dyer 324. The Words were the same, and the Case the same. Latch. 277. Palm. 417. A Coppholder suffered a House to fall, and repaired it, yet held to be a Forfeiture, and it is not like to waste at Common Law; for there if it be repaired before the Jury hath View, 'tis well enough; prays Judgment pro Quer.

Holt econtra.

As to the Exception, 'tis no Repugnancy, for though strictly taken 'tis a Tort, yet there is no such Nicety in Pleading, as in Writs; but if it appears, that he entered into the Thing demised, 'tis enough; as to the second Matter it ought to come on the other Side.

The Point in Law is, Lessee covenants to repair, uphold, &c. the House is burnt without wilful Act, and the Lessee within convenient Time rebuilds. If this be a Breach of Covenant, he conceives Rebuilding within a convenient Time, a good Plea in Bar.

There is a Difference between this Case and Waste, yet if one covenants not to do Waste, Waste by a Stranger is no Waste. Baspool *vers.* Long. Roll, Condition 428.

If it be no Waste within this Covenant; Quære, what is the Meaning of the Covenant?

If no Waste, if repaired in convenient Time; Quære, if the Action be suspended? There is a Difference between Collateral Covenants and those that go with the Land, the first may not be suspended, the second may, like to a Condition, 5 Rep. Spencer's Case.

Suppose in this Case the Lessee had redemised for Part of the Years, and then the House had been burnt, shall not the Action be suspended? If so, is it not the same in Case of a Wrong?

He said that no Books were express in Point, but all take that Difference. Moor 402. Stile 165. Collins and Seymour.

The Chief Justice and the Court inclined for the Plaintiff, the Action being attached; but said if the House was rebuilt, the Jury would give but small Damages.

Palmer *and* Alicock; *puis.*

5. Declaration in a Prohibition, wherein the Case was.

One dies Intestate, having only one Child, and no Wife living, the Child dies an Infant; and whether Administration shall be committed to the next of Kin to the Child, or to the next of Kin to the Father, is the Question.

And this depends on the Statute of Car. 2. for better settling Intestates Estates; and the Question is, whether here being no Wife, and only one Child, it be within that Statute, and the Benefit thereof; the Question depends more particularly upon the Words in the 7th Sect. of this Act; and he saith this Case will be clearly within that Sect. if you take the Word Distribute, to be the same as the Word Give, and the Word Children, to be the same as the Word Child or Children.

For they on the other Side would have it that Distribute must be intended of more than one; and so this Case not within the Meaning of that Statute, as it was not within the Mischief.

But the 5th and 6th Sect. make out that this must be the Sense of these Words.

Sect. the 6th, where there are no Children, then the Wife must have one Moiety, &c. the next of Kin of Testator the other; this must be intended or Child, otherwise if but one, the Law takes from it the Father's Estate, and leaves it nothing, but gives all to another which could never be the Meaning.

Then if the Word Distribute have the Sense Tribuere to give, where one; and Distribuere where more, we are within the Act.

'Tis said we are out of the Remedy, because out of the Mischief.

Answer. That this is a vesting Act, and gives an Interest; and there is a great Difference between Right of Administration, and Interest in the Estate; and so no Way comparable.

Where there is Right of Administration only, he may die before he can get it, he may be incapable, as a Recusant, or several other Ways; may be a Daughter, and then she will not be so well preferred in Marriage, if it be a Right only of Administration, and not an Interest, for she may die before the Debts be got in, or the Securities changed, or perhaps People will not change the Securities.

But if it be an Interest vested, then it goes to the Husband or her next of Kin, and not to an Administrator de bonis non, but is like the Case of a residuary Devise to an Executor.

The Court seemed clearly of the same Opinion, but there was no Argument on the other Side; afterwards it was argued on the other Side.

Memorandum. The Chief Justice said in this Case that this Act of 22 & 23 Car. 2. c. 10. was made in Imitation of the Custom of London.

Bold *and* Broking.

6. Action sur Case for disturbing of his Common, and Judgment per Default in C. B. and Writ of Error in R. B.

Tremain pro Quer. in Error assigned that the Plaintiff hath laid no Title either by Grant or Prescription, which he that claims an Interest in another Man's Soil should; neither doth he shew what kind of Common, and therefore incertain, for there may be several Sorts of Common.

There is a Difference between a Charge and Easements; in the second you need shew no Title; in the first you must shew a particular Title, and in Matters of Discharge you need shew no Title; but this is by Way of Charge, and therefore he should say he is seised in Fee, &c. as in Mary's and Crogat's Case.

The Case of St. John and Moody in Hale's Time was Action sur Case for disturbing him of a Way, and said only that he was seised of such a Close, to which he had a Way, &c. and Verdict and Judgment pro Quer. but this was after a Verdict; but in that Case 'twas said, that unless upon Evidence the Plaintiff had made out a Title,

Title, the Judge would have directed the Jury to find against him; and it would have been otherwise upon a Demurrer.

In the Case of Matthews and Boughton, H. 24. 25 Car. Rot. 595. R B. the Plaintiff brought Action sur Case, and set forth he was possessed of a Messuage, and that he had Right to enter into the Land adjoining to repair, &c. non culp. pleaded, and Verdict pro Quer. Moved in Arrest of Judgment, because he had not shewn any Title, and Judgment arrested. In the Case of Scobel and Skelton, p. 34. Car. 2. R. B. Action sur Case for stopping a Water-course, and no Title laid, &c. the Court was of Opinion 'twas ill, and the Judgment was arrested; wherefore he prays the Judgment may be reversed.

Pollexfen: It doth not appear in the Declaration that 'tis the Defendant's Land, but he says he was seised of a Messuage and certain Land from such a Time to such a Time, and that he by all that Time had, and ought to enjoy Common of Pasture in such a Close, to his Messuage and Land belonging; and that the Defendant intending to deprive him of his Common, the Plaintiff's Sheep did drive out of the said Close, and lock up the Gates; so that it doth not appear to be the Defendant's Land; if you are to justify for Common you must shew a Title, but in Trespass you need not.

He saith there is a great Difficulty in setting forth a Title right, though he have a Title; therefore it is the safest Way to declare upon the Possession, as in the Case of Dent and Oliver, 2 Cr. The Court in this Case took it not to be the Defendant's Land; and in this Case if Judgment be affirmed, 'tis upon that Ground.

Boskellet *and* Godolphin.

7. TEstator is bound to A. in a Bond of —— to the Use of his Wife, Condition for Payment of 3000 l. to B. his Wife, after his Death, and dies; Administration during the Minority of —— is committed to the Wife; and in Action against her the Question was, whether she might retain or not upon a Demurrer.

Pollexfen that she cannot.

He

He agrees that an Executor may retain for a Debt of equal Nature; but this is not a Debt due to her, but to her Trustees, nor in her Power to discharge, but remains due to them; and if they should bring an Action against her, she hath nothing to plead at Law; yet she was not without Means to come by the Money; for if she had confessed a Judgment to her own Trustees, she might have pleaded that Judgment in Bar; he prayed Judgment for the Plaintiff. Holt: Mr. Pollexfen objects, the Bond not being to her, she is no Creditor; I answer, it appears 'tis for the Benefit and Advantage of her, and to be paid to her; and the Difference is where a Bond is conditioned to be paid to J. S. and where it is to the Use of J. S. where it is conditioned to be paid to J. S. there it is the same as if J. S. were the Obligee; 2 E. 4. 2, 3. he cites this to shew, that the Bond being to the Benefit of the Wife, she is not as a mere Stranger, but in the same Condition as if the Bond were to her; the Reason of a Retainer is, because the Money is payable to the Party that hath Assets to pay; and he cited the 1 Cr. 363. Roll, Executors 925.

If it had been a good Plea in the Administratrix that she had paid it to her Trustees (as Pollexfen agreed it would) why should she not retain, for to pay it with one Hand, and receive it with the other, is too nice? Besides Retainer is not the Act of the Party, but of the Law. Hob. 10. 12 H. 4. 21. Fitz. Barr. 188. where the Question was, if he might waive a Retainer, and held he could not; nay Executor may retain where he never could have an Action, as where he makes Payment out of his own Goods. Dyer 2. Moor 2. And. 24. so prays Judgment pro Defendente.

Pollexfen granted in this Case that plene Administravit had been good, though you cannot plead a Bond to protest the Estate against another Bond; and since Hale's Time, the Pleading hath always been that benè & verum est, that such a Judgment was, but that only so much is due, and that the rest is kept on Foot by Covin, &c. Adjournat. afterwards in Hillary Term 36, 37. Car. 2. Judgment pro Defendente nisi.

Dr.

Dr. Sherlock's *Case.*

8. UPON Statute 22 & 23 Car. 2. cap. 15. for uniting of Parishes in London, and Payment of Tithes. The Question between Dr. Sherlock, and the Parishes of St. George Botolph-Lane, and St. Botolph Billinsgate was, whether a several Rate made upon each Parish apart, after the Rate they paid before the Fire, which upon an Appeal was afterwards confirmed by the Lord Mayor; or a joint Rate made upon both Parishes together, by the Lord Keeper and two Barons, were the better, and pursuant to the Direction of the Act; and upon a Replevin this came into the Court of C. B. and insisted on by Lutwich for the Parish, that the Words of the Statute are respective Parishes, and respectively, and that must be taken singly; but the Court said, respective Parishes must be intended, respective united Parishes: And that the last Appeal is to my Lord Mayor, where particular Parties are over-rated, or in such Cases where the Cause comes regularly according to the Direction of the Act before him, and not where he acts contrarily, then what he does is a mere Nullity; and as if he had had no Power at all, for in any Case if he refuses to proceed or proceeds inverso ordine, my Lord Keeper may take Care, otherwise the Words in the Act would be vain.

Suppose the Rate of a whole Parish should be laid upon one Man, and the Lord Mayor confirm it, that the last Appeal in that Case would be to the Lord Keeper. Per Curiam.

Term.

Term. Hill.

36 & 37 Car. 2. R. B.

William's *Case.*

1. WILLIAMS having put in a Plea to the Information against him, which Sawyer Attorney General demurred to; he prayed that Williams might join in Demurrer precisely, it being a Plea to the Jurisdiction of the Court, which he said the Party pleading should be ready to maintain, and that it was so done in the Case of Hollis, Elliot, &c. 1 Car. but 'twas answered that they were in Custodia, so ought to answer precisely, which Williams is not; and the Court would make no Rule, but said that they would give two Rules for joining in Demurrer, as they do for Pleading, and then a Peremptory; after which if they did not join, they would go to Judgment.

Ambrose *and* Roe.

2. INdebitatus Assumpsit for —— for Fees as Attorney in such and such Suits, & diversis aliis operibus, &c. moved in Arrest of Judgment, that diversis operibus was too general, over-ruled, and that pro opere had been held good; and then he moved that the Action lay not, for that the Retainer by the Defendant was for the Plaintiff to be Attorney for a third Person, and for that cited 1 Cr. 193. the Court did not over-rule the Book, but took this Difference, that where one retains an Attorney

for A. and promises him his Fees, Indebitatus assumpsit lies against the Person retaining, upon this express Promise; but where there is no express Promise, the Law will not create one; but yet if the Attorney in an Action sur Case declare for so much due pro opere, and give his Soliciting, &c. in Evidence, 'twill be good; per Cur'; Adjornat. and next Day after, considering, 1 Car. 193. they were of Opinion, the Plaintiff ought to have his Judgment, and said that the Cases put by Serj. Roll, in the Case of Sands and Trevilian, are not answered, and seemed to question the Authority of that Case. If one declare in Indebitatus assumpsit for so much laid out to his Use; and it appears in Evidence to be laid out upon Retainer per Defendentem, to sollicite for J. S. it will be well enough upon a Promise by the Defendant to pay.

Palmer *and* Alicock; *devant.*

3. THIS Case was argued again by Pollexfen. He made three Questions.

First, Whether, when there were more Children than one, an Interest vests by the Act for settling Intestates Estates, till actual Distribution made?

By Interest he means not a Property in any particular Part of the Intestate's Estates, but only a Right to have and sue for such Part as shall remain after Debts and Legacies paid, like to a Chose in Action; and such an Interest he takes it doth vest before Distribution.

If one covenants that A. B. and C. shall have what remains of his Estate after his Debts and Legacies paid; and A. B. and C. die before the Covenantor, this will go to their Executors, as other Choses in Action, such an Interest, as every Legatee hath, or residuary Legatee; who if he die before Debts and Legacies paid, his Wife and Children will have a Right to such Part as he should have had, if he had lived; and such is the Interest I contend for.

They on the other Side will have it, that if the Party die before Distribution, his Executor shall have nothing.

'Tis necessary for understanding the true Sense of this Act, to know how it stood at Common Law.

At Common Law the Ordinary had the Disposal of Intestates Estates, and though perhaps he might after Funeral Expences, &c. paid, distribute the Estate amongst the Wife and Children; yet this was discretionary, and the Wife and Children had no Interest in the Administration; the Statute of E. 3. gives the Wife no Right to sue or demand Administration; all it doth is to inable the Administrator to sue; the 21 H. 8. orders the Administration to the Wife or the next of Kin; this is the first Act that gives the Wife a Share or Interest in the Testator's Estate, but that is as Administratrix. Hob. 191. 1 Cr. 62, 202. But though the Statute went so far as to devest the Ordinary, and give it the Wife, yet there remained many Mischiefs; for there being no Distribution, he that obtained Administration went away with all; so that if one was of Age, and the rest under Age, and if by Surprise a Stranger obtained Administration, he barred them all; or if he to whom it belonged was beyond Sea, and another got Administration, he was stript of all, this being the Mischief. This Act hath made and provided a just and reasonable Remedy, by taking away the Cause of the Evil, (i. e.) the Administrators having the whole Estate, and disposing of the Estate; and this the Title of the Act shews to be the Meaning of it, being intitled an Act, &c. for Settling, &c. The Body of the Act appoints who shall have it, and the Words are pursuant; so that whereas in the Bonds for Distribution before the Act, (for after 21 H. 8. till the 12 of Jac. they did de facto distribute) the Words in the Bond were to distribute as the Ordinary should think fit; now they are to distribute as the Act shall direct.

This Act in Effect makes the Testator's Will, and imitates the Mind of the Intestate, who is presumed to have the greatest Care of his Wife and Children; and therefore he being supposed to be surprised with Death, the Law doth that he is supposed to have been willing to do, and gives his Estate among them; for whom he is supposed to have laboured and taken Pains in his Lifetime.

'Tis most probable the Custom of London might be the Guide to the Makers of this Act, whereby no Property is given to the Wife or Children, in such a Share or Interest; but if the Wife dies, it was never doubted, but her Share goes to her Executor or Administrator; and if one of the Children die, making an Executor, it goes to his Executor; but if he dies without Executor, it survives to the other Orphans; by Jefferies Chief Justice; and by him, if a Citizen die, having a Wife and a Child, and Administration is committed to the Child, whereby he hath one third Part as Administrator, and one third Part as a customary Part; if the Child die, one Part goes to his Administrator, the other third Part to the Administrator de bonis non. And by the Wife's Part going to her Executor or Administrator, it appears to be an Interest vested; and then this Act doth as much vest an Interest before Distribution, as any of these customary Parts are vested before Distribution.

If there be an Interest, a great Benefit arises, which otherwise would not, for it is as much as a Debt which is to be paid in futuro; so that if they marry, 'tis a Preferment; for if they marry, the Husband will be sure of it, and so more beneficial to them, whereas by Administration only, they have only a Right to recover; so that if they die before the Securities are altered, or the Debts recovered, they go to the Administrator of the Father; so it is in the Case of the Wife; so in Cases of younger Children, whereupon they will be under great Disadvantages, Men being afraid to trust them for their Education, or for raising Sums to place them Abroad, which will not be, if the Act have the other Construction: If it be so that where there are more, an Interest shall vest: The Second Question is, whether, if but one, an Interest shall vest, which stands upon this Clause, quod vide.

The Reasons on the other Side are,

First, There is no Need of it; First, Because only one Child; and the 21 H. 8. did give it to him. Secondly, The Words of the Act are, Distribute. Thirdly, The Words of the Act are to be construed according to that Law; scil. the Ecclesiastical Law though 'tis true that this will fall short of that Benefit which will ensue, if he hath

the Estate it self; for if he hath but a Right to administer, no Executor or Administrator shall have it; but if a Right to the Estate it self, 'tis present Preferment; ut supra.

The Difference between Right of Administring, and of the Estate is great; First, He hath nothing before Administration, which may occasion great Suits to obtain Administration, or he may be beyond Sea, and another may get it, and so he be cheated; but by this Act the Bond will be his Security, let who will get the Administration; and if he die before he get Administration tis lost, which in the other Case it is not; so that the Child will be upon many Disadvantages, which he will not be if he be within this Act; so that there is great Reason to comprehend him within, and not leave him upon 21 H. 8.

Second Reason is upon the Words of the Act; First, Distribute, for where but one, no Distribution. Secondly, The Word Child.

To this he answered, That the Word Child comprehends Children, and Distribute is as Tribuere, and the Title is general, Intestates Estates, (i. e.) all Intestates Estates; therefore unless they are settled within this Act, where there are but one Child or a Wife, &c. they are left unsettled; and the Words of the Bond are to deliver to such and such Person and Persons, as by this Act are directed, which shews one Person to be within the Meaning of the Act. Suppose a Wife, and one Child, that Child will take, if there the Word Children in Sect. comprehend one Child, why may it not in this Case so Sect. 6.? for if the Words are stuck close to, the next of Kin must have all, and that Child nothing; and this Clause supposing next of Kin should not comprehend one only, would be fruitless. And in Case no Child, then to the next of Kin, which shews, that Child is as much as if many Children.

Thirdly, It shall be construed according to the Ecclesiastical Law; and if but one Child, that Child shall be left out.

Answers. First, All Acts of Parliament shall be construed according to our Law.

Secondly,

Secondly, They have no Law which gives the Wife or Children any Right to sue for any Part of the Intestate's Estate; and 21 H. 8. gives them no Right to the Estate, so that for what he perceives they had no Law whereby they could claim any Thing, as 4 Inst. 336. which shews there was no Right to any particular Part, but at Discretion.

This is a remedial Law, and to be expounded largely; and therefore where the next of Kin, or Wife, or Child, is but one, they shall be within it, and not left to the Uncertainty they were under before.

If you take it to be an Interest, then in this Case who shall have Administration? why it shall go where the Estate goes, (i. e.) to the Executor or Administrator, if the Child, &c. die; for where the Estate goes, the Administration ought, that he may be able to sue and recover, and that the Husband shall be Administrator to the Wife is grounded upon this Reason; for the Law having given him the Property of the Estate of his Wife by the Intermarriage, he shall be Administrator to sue for it; and in that Case if there be Children, they have no Interest within this Act, or 21 H. 8. for the Husband hath it, 4 Rep. 5. 1 Cr. 106. and it is according to Reason, and all Equity, that he should have the Managements of the Estate, who is to have the Benefit, and the same Reason that gives it to a residuary Legatee gives it here; and this Act is as much as if he had said, I give all my Estate to him; so prays the Prohibition may stand.

Jefferies, Chief Justice, Suppose before this Act one makes his Will, and makes J. S. Executor, he had such an Interest by the Will, that he might release; yet if he dies, it will not go to his next of Kin, but to the next of Kin of the Testator; so in this Case the Act had an Eye to the Intestate, and was intended for his Benefit; that if he had more Children than one, he should not run away with all, and the rest starve.

And though Distribution and Children may be so taken, yet it is harsh Language; and if no Children, then to the next of Kin, (i. e.) if there be any Child, it shall not go to the next of Kin.

As to the Advantage by having it an Interest vested, he said there were many Disadvantages likewise, as if being an Infant he marry a Slut, &c.

He said that the Ordinary had a Power of Distribution before this Statute, (i. e.) where he granted Administration to the Wife and all the Children; but where he had granted it to one, there having executed his Power, he could not alter it, or compel Distribution.

As to the Bonds they signify little, for they take J. N. and J. S. at this Day; yet there is a kind of Interest at this Day, for they admit none of the Children to be Evidence, which before they might.

Withins Justice demands what Words are there in the Act to vest an Interest? Shall it be taken that the inabling them to take a Bond vests an Interest? He sees no Reason that any Words should vest an Interest to go to Executors.

And in the Case of the Husband, if he dies before Administration, it shall not go to his Executor; but to the next of Kin to the Wife.

This Statute heals the Inconveniences at Common Law, and makes the Testator's Will; and if the Child dies before Administration, makes it a second Time, and gives the Estate as 'tis presumed the Father would, if he had disposed it, (i. e.) to his next of Kin. Cur' advisare vult.

East-India Company *and* Sandys; *devant.*

4. THIS Term the Judges delivered their Opinions seriatim in this great Case: Walcot was but short, and his Reasons being included in those of Holloway, &c. who spoke after, I have omitted them to avoid Repetition.

Holloway said, all might be reduced to one single Point, which was, whether the Charter granting a sole Trade to this Company exclusive to all other, be good.

That this was a great Point both in Regard of the King's Prerogative, and the People's Liberty.

He divided all Trade, ut supra was done per Sawyer Attorney General.

Foreign Trade with Christians hath been opened by several Acts of Parliament; and at Common Law 'twas an inherent Prerogative in the Crown, that none should trade

trade with Foreigners without the King's Licence; and the King having this Prerogative at Common Law, an Act of Parliament is necessary to devest him of it, which none hath done but to some particular Places.

Michelborne's Case cited by those that argued for the Company, hath not in any Sort been answered by the other Side.

This is a Trade not to be carried on but by a Company, and none can erect a Company but the King.

The King hath the sole Power of this Trade, as of War and Peace; and by declaring a War, he may determine a publick Trade, though settled by Act of Parliament.

No Parliament ever looked on this as a Monopoly; nay so far from it, as in the 14 Car. 2. cap. 24. this Company, &c. are said to be an Advantage to the Publick, and that Act was made; that the Persons of this Company, &c. should not be discouraged in those honourable Endeavours for promoting publick Undertakings; then how can this be a Monopoly?

It never hath been questioned as such by Parliament, though they have looked narrowly into the King's Prerogative, even to the questioning some Things that were his undoubted Right; and concludes pro Quer.

Withins: Here are two Points,

First, Whether Letters Patents giving a sole Trade to a Company, exclusive to others, be good.

Secondly, Whether in Case if they be good, an Action lies.

He thinks there is but one Question, and that the Action will lie or not, as the Company hath an Interest or not; for if they have an Interest by these Letters Patents, then the Action will unquestionably lie.

The Case depending solely on Foreign Trade with Infidels, he shall apply to that, and not meddle with Inland Trade.

'Tis a great Point as to the King's Prerogative, and the People's Liberty.

First, He takes it, that by the Common Law the King had a Prerogative to restrain all his Subjects from going beyond Sea, as F. B. 85. 'tis true F. B. says, every Subject may go out of the Realm to merchandize, &c. but

 that

that is to be understood, he shall not be punished for so doing; but the King may prohibit him, as appears by the same Book; and that three Ways, (i. e.) by the Great Seal, the Privy Seal, or Signet, or by Proclamation; and though in Dyer 165. cited by Mr. Williams 'tis said, that before R. 2. Subjects may go beyond Sea; yet 'tis there agreed, the King may prohibit, and a Quære is made, if a going over without a Licence be not a Contempt, though there was no Prohibition; afterwards in the same Book 296. 'tis holden such Departure before express Prohibition is no Contempt, but all the Books say when there is a Prohibition, then it is a Contempt.

As none may go against, or without the King's Licence; so if they are gone, the King may recal them, as appears by Dyer 375.

'Tis objected the King may prohibit some particular Persons by Writ; but he cannot prohibit all his Subjects.

Answered. There are several Ways of prohibiting by Writ, which is directed to particular Persons, and by Proclamation, which is general.

And all the King's Subjects are bound to take Notice of the King's Great Seal, and Privy Seal.

Secondly, The King hath the controlling Power over all Trade with Infidels, he may say over all Foreign Trade in general: He saith Michelborn's Case goes further than Fitz-herbert's N. B. and he hath not heard any Authority offered against Michelborn's Case, as to Trade with Infidels; and the Opinion in that Case seems to be given upon such a Question as this; so that 'tis the Judgment of the Court in a like Case, for who was then Chief Justice delivered it, and none of the Court opposed it.

The Prerogative of making Leagues is in the King, and he may make them as he pleases; then it would be hard the Law should give the King a Power to make Leagues, and yet the Subjects should have a Right to do such Things to break it.

But though the Subjects may not trade with Infidels, yet the King may license them, or trade himself; as the Jews were prohibited Commerce with the Nations, yet Solomon traded with Hiram King of Tyre for Gold.

The several Licences and Petitions cited and shewn by the Plaintiff's Counsel, though they prove no Right in the Crown, yet are Evidences of it; for that to what Purpose should there be so many Licences from the Crown, and Petitions from the Commons to the King for Liberty to trade, unless the King had such a Right; therefore unless where the Parliament hath opened it, the King hath Power to control all Foreign Trade, especially with Infidels.

Objection. But though the King had such Right, yet now the prohibiting Part of the Patent is void by the Statute of 2 E. 3. which is pleaded; and the inabling Part of the Patent is void by the Statute of Monopolies.

Answer. As to the First, That Statute relates not to this Trade.

First, Because no such Trade then in Being; so that the Parliament could have no Regard to it, unless by Prophesy; neither could they know whether it would prove hurtful or beneficial to the Kingdom; but take the Act at the largest, yet you must take it to relate to the Subject Matter, which was for Wool; so that the Words, shall be open, may be taken free from Customs, and to have no other Impositions upon them.

As to the Second, Whether a Monopoly. He says a Monopoly is no immoral Act, but only against the politick Part of our Law; which if it happen to be of Advantage to the Publick as this Trade is, then it ceases also to be against the prohibiting Part of the Law, and so not within the Law of Monopolies.

The Company hath been in Possession of this Trade near one hundred Years, and that Possession will in Time give a Right; and cited Grotius de jure pacis, &c. and concludes pro Quer.

Jefferies Chief Justice delivered his Opinion more at large, but agreed with his Brethren; and so Judgment was given pro Quer.

Anonymus.

5. UPON Evidence at a Trial at Bar, Jefferies Chief Justice said, it had been ruled, that if one makes his Will, and signs it, and declares it to be his Will, in the Presence of one Witness only; and this was before the Act of Frauds and Perjuries, there, though he die afterwards, this is not within the Meaning of that Act; and he seemed to hold that a Will wrote all by the Testator's own Hand, and declared in the Presence of three credible Witnesses, would be within the Intention of that Act, though not signed by him, (according to the Words of the Act) in the Presence of three credible Witnesses.

Pollexfen said in this Case, that if the Testator sign the Will above, in another Room, and then come down, and declare it to be his Will in the Presence of three Witnesses, and they subscribed in his Presence, it will be one Question; and that if they subscribe it in his Presence, and then he afterwards, they being gone, sign it, that will be another Question.

One makes his Will, signs it, and declares it in the Presence of three Witnesses, and then makes a Feoffment in Fee, or does other Act which amounts to a Revocation, and then new publishes his Will in the Presence of one or two Witnesses; this may be good enough. Quære.

Anonymus.

6. A Motion was made for not returning Money for the Marshalsea and maimed Soldiers, that an Attachment might go against the Sheriff of the County; which the Court granted, and said that unless he returned it, they would take the first substantial Person of the County that they met with into Withernam for it; which they might do, it being in the Case of the Poor.

Kingston *and* Booth.

7. IN an Action of Trespass for Assault, Battery, and Wounding, tried at the Bar; these Points were ruled by three of the Justices, viz. Withins, Holloway, and Walcot, absente Cap. Justic.

First, If one enter upon Land, whereof I am in legal Possession, and I desire him to go off my Land, and he refuse it, then after this, I may use Violence and thrust him off; but I cannot wound him, or knock him on the Head.

Secondly, If I command my Servant to do what is lawful, and he misbehave himself, or do more, I shall not answer for my Servant, but my Servant for himself, for that it was his own Act; otherwise it was in the Power of every Servant to subject his Master to what Actions or Penalties he pleased.

Thirdly, If I command my Servant to do a lawful Act, as in this Case, to pull down a little wooden House (wherein the Plaintiff was and would not come out, and which was carried upon Wheels into the Land to trick the Defendant out of Possession) and bid them take Care they hurt not the Plaintiff; if in this Doing my Servants wound the Plaintiff, in Trespass of Assault and Wounding brought against me, I may plead Not guilty, and give this in Evidence, for that I was not guilty of the Wounding; and the Pulling down the House was a lawful Act.

The

The Countess of Conway's *Case.*

8. EJectment was brought upon the Demise of the Countess of Conway, and Challenge was taken to the Array, because two Knights are not returned, and Oyer prayed of the Venire, and demurred thereto, because they ought to try the Challenge.

Sawyer Attorney, That this is good upon Demurrer for two Reasons; First, The Challenge is, quia nullo milite in eodem panello existente returnat', where there ought to be an Averment, that such a one, and such a one is not a Knight.

Secondly, It does not appear in the Venire that the Countess is concerned, and where a Peer is Lessor of the Plaintiff, no Knight ought to be returned, for the Venire is the Direction to the Sheriff; and therefore if a Peer declare by the Name of Esquire, he shall not take Exception, because no Knight is returned. Dyer 318.

Finch Solicitor General. When a Peer is Plaintiff, it is for his Dignity, that a Knight is returned, and this Privilege is by the Common Law, which he cannot waive, otherwise if it was by Statute; and though a Peer may be concerned in the Event of a Cause, as if he have the Reversion upon an Estate for Life, and an Action is brought against the Tenant for Life; yet it is no Cause of Challenge, if a Knight be not returned.

The Court seemed to be of Opinion, that there may be such Challenge, where a Peer is Lessor of the Plaintiff, because they take Notice, that he is the Party concerned; and they grant Attachments against the Lessors, where the Plaintiff does not pay the Costs, &c. but the Challenge is not good, for it ought to be that J. S. and J. N. returned upon the Pannel are not Knights, and then it might have been tried; but as it is now, no Trial may be; Judgment affirmed, nisi.

Ano-

Anonymus *in* Chancery.

9. FOUR joint Owners in a Ship; three will navigate the Ship, the fourth will not; the Course is to go into the Admiralty, and there give Security to answer for the Ship if she be lost, and then they shall be discharged against the other.

If one dislike the Voyage, and doth not expresly prohibit navigating the Ship, and the Ship go the Voyage, and is lost, in such Case he shall not be answered his Part; but if the Ship return, he shall have an Account, for what is earned, and it shall be intended a Voyage with his Consent, without an express Prohibition proved. As if four Tenants in Common of Land, one or more stock the Land, and manage it, the rest shall have an Account of the Profits; but if a Loss come, as if the Sheep, &c. die, they shall bear a Part: Per North Lord Keeper.

Chippindale's *Case*.

10. ONE got a Bastard-Child upon the Body of J. S. and died; and then the Woman is delivered, and declares the Party dead, to be the Father; and the Justices adjudge him so accordingly, and order his Goods towards the Maintenance of the Child; this last Part of the Order is void, the other good.

This Term the *King demised*; he sickned upon *Candlemas-day in the Morning*, being *Monday* the *second Day* of *February*, and dy'd upon *Friday* the *sixth Day* of *February* 1684. in the 37th Year of his Reign; and at *Three* in the Afternoon the *same Day* the *Duke of York* was proclaimed *King*.

Upon the *Friday Morning* the *Judges* sat a While, and then rose, and after the *King's Demise*, and in the Afternoon of the *same Day*, the *Judges* had *new Patents*; and upon the *Saturday Morning* they were sworn at the *Lord Keeper's*, and then came to *Westminster*, and so there was *no Discontinuance*.

Post

Post Terminum Sanct. Hill. March 24. The *Commissioners* for Claims at the *Coronation of Jac.* 2. sat in the *Painted Chamber*, their *Commission* was *Oyer and Determiner*, as the *High Steward* used to do; the *Petitions* and *Claims* were in *Law French*, and *recorded* and *entered* up in *Latin* upon *Rolls* kept in *Chancery*: The *Commission* was under the *Great Seal* in *Latin*, and directed to the *Lord Keeper*, *Lord Treasurer*, *Lord President*, *Lord Privy Seal*, and to *several Great Lords*, and to the two *Chief Justices*.

Term.

Term. Pasch.

1 Jac. 2. R. B.

Mason *and* Good, *at the* Rolls.

1. THE Case was this, Dr. Good had taken Securities in his own Name in Trust for Thomas Cook, for divers Sums of Money, and makes Good his Executor, and dies. Thomas Cook assigns the said Money, and all Bonds taken in Good's Name in Trust for him, to Mason, and then dies Intestate. Richard Cook Administrator to Thomas, assigns his Letters of Administration to Mason, and then Richard dies Intestate. Anne Daughter of Richard, and Wife to Good the Defendant, takes Letters of Administration of the Goods of Thomas Cook, unadministered by Richard her Father: Mason prefers a Bill against Good as Executor to Good the Trustee; Good the Executor claims in Right of his Wife; holden upon a Plea and Demurrer in Chancery, by North Lord Keeper, that the Interest of Richard well passed by the Assignment of his Letters of Administration to Mason; and so likewise holden at the Hearing before the Master of the Rolls; and so decreed.

Close *and* Waterson.

2. POllexsen moved to discharge a Rule for a Prohibition. The Case was thus, There was a Suit in the Court of the Archbishop of York, and the Cause arose within a Peculiar, within the Archbishoprick of York; but the Party lived within the Diocese of Chester. They that obtained the Prohibition would have it that the Suit should be in the Diocese where the Party inhabiteth, and so the Cause follow the Person. Pollexsen would have it that at Common Law a Man might be sued out of the Diocese; but Statute H. 8. restrains Citations out of the Diocese, for Vexation of the King's Subject; but where the Bishop, &c. is Party, there 29 H. 8. c. 9. doth not extend; and in this Case the Dean and Chapter of York, whose the Peculiar is, is concerned, and therefore 'tis not within the Statute 23 H. 8. and 'tis more natural the Person should follow the Cause of Action, than the Cause the Person; wherefore, &c. and a Rule was made to discharge the Cause of Action.

Company *of* Stationers *and* Parker.

3. IN an Action against Parker brought by the Company of Stationers, he pleads the Letters Patents of King Charles I. which grant to the University of Oxon to print Omnes & omnimodos Libros, which are not prohibited to be printed; and afterwards that he did by another Charter grant to them Power to print tam Libros content. in Charta to the Stationers of London, quam alios non prohibit'.

Pollexsen made it three Questions.

First, If the Patent to the Company be good.

Secondly, If good, if the King by his subsequent Charter had given Power to the University to print notwithstanding.

Thirdly, If good, if this Action lies.

That Printing is a Thing of publick Use, is apparent, and Matters of Law and Religion ought and always was under the immediate Care and Government

of the King; for it is a Conveyance by which Men communicate their Notions in the most publick Manner, and with the most lasting Impression; and therefore if they are good, this is a Means to spread them, and to give them a more diffusive Influence; and if they are bad Notions, this is likewise a Method to spread the Mischief wider. It was an Act invented in the Time of H. 6. and by his Care brought over hither, and he granted the sole Printing of some Books to Tothill.

The Statute of Monopolies has a Proviso, that it shall not extend to Letters Patents granted to Companies; and the Act of Printing made in the Time of King Car. 2. Sect. 22, 23. has a Proviso for the Privilege of Printing, granted by the King or his Progenitors. Moor 673.

Dodd said, that a Grant for the sole Printing of Law is good; and in this Court, Mich. 22 Car. 2. Rot. 237. was a Case between Roper and Streater; Roper had bought of the Executors of Mr. Justice Crook the third Part of his Reports; Streater had a Grant from the King, and printed upon Roper, upon which he brought an Action of Debt upon the Statute of 14 Car. 2. Streater pleaded the King's Grant, upon which Roper demurred, and adjudged for the Plaintiff; but it was after reversed in Parliament. And the Case of the Company of Stationers and Seymour, where an Action was brought by the Company against Seymour for printing of an Almanack, and found upon a special Verdict, that it was a Copy of Gadbury's Almanack, and that the Feasts in it were the same which were in the Common Prayer, and that Seymour had a Patent from the King; but adjudged against him; for the sole Printing was granted to the Company before. It is true these Actions were brought upon the Statute of 14 Car. 2. which is expired; but that Statute did not give a Right but only an Action of Debt, so it is no Objection to say, that this Action is the same, as those Actions were, which were brought upon that Statute; for the Right of Printing Law Books and Almanacks rests upon the Grant, and the Act by the Words assign, &c. admits that it is a Right and Interest, and not only a Privilege: And in this Court, Hill. 35 Car. 2. was the Case between the Company of Stationers and Wright, where the Company brought an Action sur Case upon this Patent, and shewed the Clause

which prohibited Printing or Importing by others, and quod the Defendant imported Psalm-Books; the Defendant pleaded the Statute of 25 H. 8. adjudged for the Plaintiff.

The Second Question, If the subsequent Grant avoided the first, or gave Authority to the University to print, contrary to the Charter of the Company.

That it is a Right or Interest he had proved before, and Seymour's Case is an Authority; and for the Patents of the 8th and 11th Car. 1. the last is but a Confirmation, for if they are two Grants, then the Plea is double. The Words of the Patent are general, of Books not prohibited, though contrary to the Patents of other Persons, which Words are not to be taken in that Sense as to extend to all Books whatsoever, but to Books, of which no one had obtained the sole Interest to print; for the University being a Place of Learning, it was granted to them to print Books for their Use there, and not to come to London for them; and the Act of Parliament is a Comment upon this Charter, for when it comes to the Clause relating to the University, the Words are, Quod vide, which explains the Charter, for in making these Charters the King did not intend the University to be Booksellers, but gave them Power to print for their own Convenience; and the Case of Seymour shews, that the King's later Licence did not give a Power.

Objection. That if the Charter is good, the Price of Books will be enhanced; but the Statute of 25 H. 8. provides against this Mischief.

The Words of the Charter to the Company are, Potestat. authoritat. privilegium & licentiam omnes & omnimodos libros Psalmorum, &c. prohibiting alios, which is tantamount to the sole Printing, tho' solam is not within the Charter; and this was objected in the Cases cited and over-ruled; and therefore he prayed Judgment for the Plaintiff.

As for the third Point there is no Doubt in that, if they have an Interest, &c.

Holt econtra: He argued the first Point, that the King might grant, &c. but the only Question is, if the King by the Charter of King James is so restrained, that he could not grant such Liberty to others; and as to this

he said, that the Words did not vest the sole Interest, either taken single, or together; and compared it to the Case of a Grant de separal. piscariâ, & liberâ piscariâ, the one is a Liberty, the other an Interest. He agreed that the King had Power to grant the Printing of Books concerning Religion or Law, and admits it to be an Interest, but not a sole Interest; and that the Words of the Prohibition do not amount to a Grant.

There are two Kinds of Prohibition; the First which prohibits a Thing which was unlawful before, as in the Case of Waste in Churches; 11 Rep. 49. The Second, which makes a Thing, which was lawful before, to be unlawful, as to depart the Realm after a Prohibition.

Where a Grant may have a reasonable Construction before, it shall not be carried further by Implication, as Davis 55. and the Case here is stronger than the Case in Davis, for here it is a Prerogative of Power, which is more strongly annexed to the Person of the King; and there it is only a Prerogative of Interest; this Prohibition being an Act of Government determines with the Death of the King, Latch. 115. and Palmer 422. and Latch. 58. and if the King has prohibited he may also enlarge, for he cannot prohibit himself; so prayed Judgment for the Defendant.

The Court enclined for the Defendant, and said, that if it was not for Seymour's Case, which they thought a hard Case, they would have given Judgment upon this Argument, for they had in effect declared their Opinions upon this Point in their Resolution in the Case of the East-India Company; but in Regard of Seymour's Case, they would have another Argument; and they said, that this is a Prerogative of Power, which the King could not grant so, but that he might resume it; but otherwise it is of a Grant of an Interest; ideo Curia advisare vult.

Term.

Term. Mich.

1 Jac. 2. R. B.

THIS Term began with the Swearing *George* Lord *Jefferies*, Baron of *Wem*, formerly Chief Justice of the King's Bench, Lord Chancellor, in the Place of *North* Lord Keeper, who died this Vacation; and Sir *John Trevor*, Speaker of the House of Commons, Master of the Rolls, in the Place of Sir *John Churchill*, who died likewise this Vacation; and of Sir *Edward Herbert*, one of the King's Counsel, Chief Justice of the King's Bench, in the Place of *George* Lord *Jefferies*; also *Walcot* a Judge in *R. B.* died; and Serjeant *Nevil* was made a Baron of the Exchequer, in the Room of *Wright*, who went into *R. B.*

Anonymus.

1. AN Administrator pleaded plene administravit; and upon Issue found for the Plaintiff, and moved in Arrest of Judgment, that Administration was committed by the Archbishop of York, where the Intestate had bona notabilia in London, and that this appeared within the Record; Curia, if this was upon a Demurrer, they would have taken Notice of it; but now the Case being tried, and the Honesty of it against the Defendant, they would not; ideo Judgment, nisi.

Anony-

Anonymus.

2. A Jointure is made to a Feme, of Houses in London, which are burnt down; Baron and Feme to the Intent to raise a long Term for building them again, levy a Fine upon an Agreement, that the Feme shall have her Jointure out of the reserved Rent of the Houses: Ruled that this Fine had not destroyed her Jointure, but only enured to a particular Purpose to raise this Term, and that she shall have the Rent; and that it shall not be subject to the Debts or Charges made since her Jointure.

Mason *and* Welland.

3. THIS was an Action sur Case, in which the Plaintiff declared that in Consideration that he would permit the Defendant to occupy Land of the Plaintiff's for one Year, that he would give him for it, as much as it was worth; Non assumpsit pleaded, and a Verdict for the Plaintiff; and now moved in Arrest of Judgment, that an Action does not lie.

Thompson argued that an Action does not, because it is in the Realty; and cited 3 Cr. 242, 786, 859. 2 Cr. 668. 1 Cr. 414, 415. Jones 364.

Pollexfen argued that the Action did lie, and said, that if I contract to give for my Lodging, or for such a Chamber, as much as it is worth; that this is a good Contract, and if so, then an Action lies upon it, and he could not have an Action of Debt, because incertain, (which Justice Withens denied, and said that an Action of Debt would lie upon a Quantum meruit, averring that he deserved so much, as a Taylor for making Cloaths,) so that he ought to have an Action sur Case, or no other Action; the Court inclined that it did not lie; sed adjornatur; puis.

James *and* Trollop; *devant.*

4. THIS Case was again spoke to by Trindar for the Plaintiff in the Writ of Error, and it was insisted on by him, that this Deed was before Time of Memory, and therefore not pleadable; that the Seisin of the Prior was likewise before Time of Memory, and so not issuable, nor triable by a Jury; that a Lay Person was not capable of Tithes en prender, and that the Council of Lateran had restored all Tithes to the proper Pastors.

Holt econtra: That where a Deed before Time of Memory is supported by Usage after, such Deed is pleadable and good; but that the Books which say, Deeds before Time of Memory shall not be pleaded, are to be intended Deeds of such Liberties and Franchises, as cannot be claimed or supported by Usage in pais: As if one claim Goods of Felo de se by Deed before Time of Memory, he cannot shew his Deed and say Virtute cujus, &c. but must shew an antient Confirmation, or a Claim and Allowance in Eire; so in this Case if they had pleaded the Deed, and relied upon it, Virtute cujus, &c. it had been naught; but when they shew the Deed, and likewise an Usage to support it, 'tis sufficient. As to the Juries not trying a Seisin, or Thing before Time of Memory, he said, they do it in Trial of all Prescriptions. As to Lay Persons not being capable of Tithes en prender, be it so; but sure they were capable of Tithes by Retainer, upon a Composition, and that this was no more than a Modus paying so much; and for the Council of Lateran, if it should have any Influence upon this Case, it would destroy all the Modus's in England; and so he prayed that the Judgment might be affirmed.

Herbert Chief Justice said, that all Prescriptions are founded upon a Supposition in Law, that at the first there was a Grant, though now not to be produced; and though it falls out in this Case, that the Grant is produced, shall that make the Case the worse? by no Means. And as to its being before Time of Memory, he approved the Difference taken by Holt, that where a Deed before

before Time of Memory of a Thing which may be claimed by Usage, is by Usage supported, such Deed may be pleaded, &c. Withens concurred as to the Substance of the Pleading; but whether it be not informal, he would consider; and so Curia advisare vult.

Friend *and* Bouchier.

5 UPON a special Verdict the Case was, A. seised of Lands in Fee, had Issue Dorothy his Daughter, married to Richard Hopkyns; and 9 Car. 1. he made his Will, by which he devised his Land to Dorothy for her Life; and after her Decease, to her first Son, and the Heirs of his Body, &c. so to her second Son, &c. and to the other Sons of Dorothy, and the Heirs of their Bodies; and after to Richard Nelson for Life, and then to his first Son, and the Heirs of his Body; and so to the Second, and the other Sons of Nelson in eadem forma; and for Default of such Issue, to one Elizabeth Jones in Fee; and after his Will finished, and before the Publication of it he added this Clause.

Memorandum. The Intent and Meaning of the Testator is, that *Dorothy* shall not alien the Lands given to her, but that they shall be to her Heirs Males, and for want of such Issue to *Nelson*, &c.

Dorothy had Issue Richard, and dy'd; Richard had Issue Henry, and dy'd; Henry died without Issue Male, having a Daughter, Wife to the Defendant; upon whom Elizabeth Jones entered, and made a Lease to the Plaintiff; & si super totam materiam, &c.

Pollexfen for the Plaintiff said, that it was not the Intent of the Testator to take more Regard to the Daughters of the Son of his own Daughters, than to the Daughters of his own Daughter; and so the Intent of the Memorandum was to restrain the Tail general, which was express and apparent in the Body of the Will, to an Estate in Tail-Male; for if his Design was that a Female should have had it, he would have limited it to the Daughters of his own Daughter, who were more near to him, than the Daughters of the Son of his Daughter: And he compared this Case to Altham's

Case in the 8th Report, which was a Gift to one and his Heirs, Habendum to him, and the Heirs of his Body; the Generality of the Gift in the Premisses, is restrained and lessened by the Habendum; and besides he said, that the Words of the Memorandum are plain, that such was his Intent, for he said, that his Intent and Meaning was, that Dorothy should not have Power to alien; quo minus the Lands shall come to her Heirs Males, and for want of such Issue to Nelson, where the Words such Issue ought to be understood Heirs Males, and to be all one ut si fuerunt, and for want of Heirs Males, &c. and he said, that if the Words were, That she shall not alien, *&c.* but that the Lands shall come to the Heirs Males of her Body; and for want of Heirs Males of her Body, then to *Nelson*, &c. it would have been clear; and he prayed Judgment for the Plaintiff.

Williams for the Defendant. And he considered what was the Intent of the Testator, and he said that it was plainly expressed in the Will; and where it is expressed in the Will, there shall be no Estate raised by Implication, and the Estates in this Will are as plainly and artificially expressed as can be; and to make any contrary Construction, would be to oppose the Rules for Construction of Wills, and to oppose the Intent of the Testator in this Will, and the Intent of the Will it self. He said that the Rule is, that the Intent shall be observed, but not beyond the Words, or contrary to them; and he said, if it be necessary to make such Construction upon this Clause, it may be extended so as to give an Estate-tail to Dorothy; and if this shall be the Meaning, then this Clause will overthrow the Will, and be contradictory to it self; for where he says that his Intent was, that she shall not have Power to alien, she shall have Power if it be an Estate-tail in Dorothy, and she may bar her Issue by Fine, and the Remainder by Recovery; but the true Meaning of the Clause was, to add a Restriction to Dorothy, which the Testator thought, that she had not before by the Law; he cited Dyer 171. 1 Leon. 147.

Herbert Chief Justice said, that in his Judgment this was a plain Case, and that the Intent was but to add a Clause of Restriction, which, as the Testator thought, he had not done before; and it is not like to the Case

of Altham, for it is the Office of the Habendum to restrain the Generality of the Premisses; and there the Words are in the very Act of limiting the Estate; but here they were at another Time, when his Thoughts were not employed about limiting an Estate, but providing that she to whom the Estate was given, should not defraud the Gift; and where the Words are, That his Intent and Meaning was, that she should not alien, *&c.* but that they shall be to her Heirs Males, (i. e.) Heirs Males according to the Intent and Meaning of his Will; and of such Opinion was the whole Court, and gave Judgment for the Defendant.

Herbert Chief Justice asked Pollexfen how it would have been if the Words in Altham's Case had been in a Clause by it self, by way of Recital, which more resembles this Case, than the Case of Altham as it now is.

Mason *and* Welland; *devant.*

6. THIS Case was moved again, and the Court said, that they had perused the Books, and that those cited by Thompson are all, where a Rent in certain is reserved, and there the Law, where the Thing savours of the Realty, will not permit an Action quite personal to be brought, but will restrain the Party to his proper Action, without confounding of them; but here if this Action does not lie, the Party shall be without Remedy, which the Law will not permit, for an Action of Debt does not lie because it is incertain; and so there can be no Distress, because there is no Rent; wherefore this Action is well brought, and Judgment was given for the Plaintiff unâ voce.

Dolby

Dolby *and* Harris.

7. AN Action of Debt was brought upon a Bond made Guardianis & superviſoribus Pauperum Adderbury; the Defendant pleaded, that there were other Churchwardens not named; the Plaintiff replied that there were not, and upon this there was a Demurrer; and it was moved by Pollexfen, that the Defendant might anſwer over; but Blencow on the other Side ſaid, that the Bond was made Guardianis Eccleſiæ Paroch. Adderbury &c. and no Perſon named, ſo incertain, for it ought to ſhew who were Churchwardens; but it was anſwered that it was well enough, for it is a Deſcription, as to the Biſhop of London; but then it was moved, that it was Guardian' Eccles' de Adderbury per nomen Guardianorum, &c. And Guardiani cannot be the Deſcription of a ſingle Perſon; and of this Opinion was the Court; ſo by Conſent the Bond being made to ſave the Pariſh harmleſs from a poor Man, the Defendant pleaded Non fuerunt damnificati.

Anonymus.

8. THE Policy of Aſſurance run until the Ship ſhall have ended, and be diſcharged of her Voyage; Arrival at the Port to which ſhe was bound is not a Diſcharge till ſhe is unladed; Per totam Curiam upon a Demurrer.

Dorrington *and* Edwin.

9. A Replevin by Plaint was sued in the Sheriff's Court of London, and Pledges there found de retorno habend' si, &c. this Plaint was removed according to their Custom into the Mayor's Court, and after into the King's Bench by Certiorari, and there Oyer of the Certiorari being demanded, the Party declared in R. B. and upon this a Return awarded, and upon an Elongat. returned, a Scire facias went against the Pledges in the Sheriff's Court of London; and upon this was a Demurrer.

The Question was, Whether this Case being removed by Certiorari, the Pledges in the inferior Court are discharged; or whether they remain liable to be charged by this Scire facias.

Pollexfen argued, that they are discharged, and instanced in the Case of a Corpus cum causa; there they declare here de novo, and the Proceedings in the inferior Court are ended, and the Bail there not answerable here, but Bail de novo put in; but said he, some would distinguish between a Certiorari and an Habeas Corpus, but the true Difference is between a Replevin by Plaint, and a Replevin by Writ; where it is by Writ, the Pledges appear at the Court, where by Plaint they do not; and where they do not appear at the Court, they are not chargeable; he cited 1 Cr. 446. 2 Inst. 340. 2 H. 6. 2, 3. and upon a Pone or Recordare nothing is removed but the Plea, the which being by Plaint, no Pledges appear, and therefore they are not liable; and besides this is the first Case where-ever a Replevin was removed by Certiorari; but admitting that they should be liable, yet a Scire facias shall not issue, till the Sheriff return upon the Pluries quod averia elongata sunt; and in this Case he had returned upon the Retorn. habend. which is before the Time that the Scire facias lies; F. B. 74. F. and for this Cause he prayed their Judgment.

Holt econtra. He said that this Scire facias is founded upon the Statute of West. 2. cap. 2. for the Cases of Habeas Corpus he admitted them, for they declare here de

novo, and the Bail in the inferior Court are discharged; and the Reason is, because the Person of the Party being removed hither, the inferior Court had lost their Jurisdiction over him; and not having Jurisdiction over the Person, they cannot proceed in the Cause, and no more is removed than the Person and the Cause; the Plea, &c. are not removed; but by a Certiorari the Record cum omnibus ea tangent' is removed, and by it the Pledges also are removed, and they may be removed, be it depending by Writ or without Writ, 2 Inst. 339. he cited Rastal's Ent. 1 Sid. 155. 1 Cr. 446. and he said that if by the Removal of the Plea by Certiorari the Pledges are discharged, the Party may discharge his own Pledges, for it may be removed as well at the Suit of the one Party as the other. And as to the Objection, that there was no Alias and Pluries returned upon the Retorn. habend. and so the Scire facias too soon; he said, that it would be in vain to have an Alias & Pluries retorn. habend. where upon the first Writ an Elongat. is returned, and compared it to the Case of Bail, when a Non est inventus is returned, &c. so prayed their Judgment for the Plaintiff. Withens said, that there is a great deal of Difference between a Certiorari and an Habeas Corpus; but Curia advisare vult. After in Mich. Term this Case was argued by H. Finch, and he said that this was a new Case, and that by the Certiorari the Party is out of Court, and had not a Day given to him, as he had upon a Recordare, and is not demandable, nor can be nonsuit; and if the Principal be not in Court, the Pledges cannot be; and though 'tis said in the Writ, Dicite A. B. quod sit in R. B. tali die prosequi si voluerit, he cannot by his voluntary Prosecution bring in his Pledges, who were out of the Court before, and the Course is where a Cause comes here by Certiorari, to declare de novo; for the Certiorari only removes, and foreclose the Court below.

Williams argued econtra to the same Intent ut supra, and said that the Pledges are here removed, and have demanded Oyer of the Certiorari and Return; and upon a Demurrer Judgment is given that there shall be a Return; and upon an Elongavit returned by the Sheriff, a Scire facias is brought against the Pledges, in which

Action

Action they ought to be charged, as long as the Judgment of the Retorn. habend. remains in Force; and if this be erroneous, the Pledges cannot take Advantage of it in this Action; [to which Finch said that this is petitio principii, for if the Pledges are not in Court, then there is a Judgment, where they are not Parties in Court.] But Holt said, that they are Parties to this Record, and have demanded Oyer; and by Demurrer confessed, that they were Pledges here, &c.

The Court were inclined to be of Opinion, that the Pledges are not discharged, for the Mischief which might ensue; for then the Defendant might bring a Certiorari, and the Plaintiff would lose his Pledges; and on the other Side they doubted whether the Principal be in Court, but at his Pleasure, and that he is not demandable, and cannot be nonsuited; and therefore advis. vult.

After it was adjudged that the Pledges are not discharged.

Term. Hill.

1 & 2 Jac. 2. R. B.

—— *and* Close.

1. AN Ejectment was brought, and Recovery had upon it; and after the Lessor brought an Action of Trespass for the mean Profits, and the Lessee released the Action: But the Court set aside the Release, and said, that the Lessee is a Person in Trust, and set up by the Practice of the Court, and is in the Nature of an Officer of the Court, and shall be within the Power and Control of the Court; and therefore the Money which was in the Sheriff's Hand was ruled to be delivered.

Titus *and* Perkins *in* C. B.

2. IN Replevin the Defendant avowed for Damage-feasant; the Plaintiff in Bar of the Avowry pleads that it is a Copyhold, &c. and that there is a Custom, &c. quod quælibet persona, &c. quæ admissa fuit, &c. to a Copyhold, solveret, & usi & consuevuerunt solvere to the Lord for a Fine, tantam denariorum summam quantam terræ valebant per annum tempore admissionis prædict. & sur ceo Demurrer.

Pemberton for the Defendant: The short Question is, if this be a good Custom to maintain a Fine certain or not; and he argued that it is not a good Custom, he said that he had always taken it, that in Copyholds the Fine

Fine is either certain, or at the Will of the Lord; and if it be not certain, then it is at Will: Of a Fine certain there can be no Ambiguity or Dispute between the Lord and Tenant; but this Fine is quite incertain, for the Land may be of more Value at one Time than another, and he had never known a Custom for such a Fine, and so it is a Case without Precedent; for the general Way is, so much for a Messuage, or so much per Acre, or so many Years Quit Rent; but so much as the Land is worth per Annum tempore admissionis, he had never known; in Willow's Case, Cook's select Cases 1. It seems to be granted, that if the Fine be such that there may be a Difference between the Lord and Tenants; this is a Fine incertain: Such Custom is inconvenient, for the Lord is bound to admit; and if he assess but Twelve-pence more than the Value, he shall be barred; for he shall not recover more than he demands, and the Value is so incertain ut nil amplius, for who shall set the Value? the Lord? he does not know the Value, but he is bound to admit, though he does not know what Fine to set. If an Award be made, that he shall pay so much as such Land is worth, [as here] it is void, which Jones Chief Justice agreed; but if I make a Lease reserving so much Rent as J. S. shall name, it is good, per Jones Chief Justice; to which Pemberton agreed; and he said that the annual Value tempore admissionis may be a good Method for a Judge to determine the Reasonableness of a Fine; but it is unreasonable to put the Lord upon such a nice Demand, for he might miss the Assessing of a just Fine, and then he shall lose his Fine: Suppose [for it ought to be a Fine annui valoris of the Land tempore admissionis] that there be Underwood, and the Copyholder cuts it after the Death of his Father, then the Land is not worth so much, how shall the Fine be? to which the Chief Justice said it shall be in like Manner, as if Land be sown with Corn; and after the Death of the Father the Corn is cut, the Land is not worth so much; yet the Fine shall be assessed secundum annualem valorem, by Estimation tempore admissionis.

In 2 Bulst. 32, 33. Allen *versus* Abraham; there was a Custom to take two Years Rent, and allowed to be good, for there the Rolls of the Court are the Guide, and shew

 what

what was the Rent; but in our Case, the Court-Rolls cannot be a Guide, for they cannot shew the annual Value, which is uncertain.

To which the Chief Justice said, that in this there is not more Incertainty, than in other Cases of Customs for Fines, where two Year's Value in Case of a Purchase, had been adjudged to be reasonable, and a Year and Half in Case of a Descent; [quære del ceo vide 13 Rep. 3.] and if the Lord demand more than he ought, he may make his Demand de novo, for the Judge in Case of a greater Demand than is due, ought not to adjudge as much as is due to the Lord, and bar him for the Residue, but ought to adjudge against him for the Whole; and that his Entry was tortious if he had entered, and put him to a new Demand.

Lutwich for the Plaintiff. First, That it is a good Custom. Secondly, If the Custom be not good, yet there is no Forfeiture; for upon the whole Matter it appears to the Court, that there was a probable Cause to dispute the Fine. Thirdly, That there ought to be a Demand.

Curia: Apply your self to the Custom only.

He agreed that convenient Certainty ought to be in all Customs, but certum est quod certum reddi potest. Pemberton insisted, that the Lord will lose his Fine, if he does not demand exactly the Fine due, which he denied; for in this Case where the Fine is not incertain, the Tenant ought to tender the Fine; and for this he cited the Case of Dalton and Hamond. Mich. 42 Eliz. Cr. 779. R. B. and we have made a Tender as is confessed by the Demurrer. A Custom that the Tenants of a Manor ought to chuse out of themselves a Bedel, to collect the Rents and Amercements of the Manor; and that if the Bedel prove not sufficient, that the Tenants shall answer them to the Lord, is a good Custom. Roll, Customs 559, 560. 11 H. 4. 2. In London and Exeter there is a Custom, that if a Horse being in an Inn, eat as much as he is worth, the Host may sell him, as is agreed in 1 Bulst. 207. and Moor 876.

A rationabili parte bonorum does not lie without Custom, as it is held in 2 Inst. 33. [but he said that there are Variety of Opinions, Brook, rationabili parte 6. Litt. Rep. 324.] and there the Certainty of the Child's

Part depends, upon the Certainty of the Debts and Funeral Expences; the which if they cannot agree, the Court may settle them upon an Action brought; and in our Case the Certainty of the Value is agreed, for on both Sides it is agreed to be 28 l. per Ann. and he concluded with Page's Case, 2 Cr. 671. as an Authority in Point.

Jones Chief Justice said, that the Custom is the principal Thing; and he did not doubt but that it is a good Custom, and reducible to a sufficient Certainty.

Charlton agreed and said, that it is common in Assurances to limit an Estate to the Father for Life, with Power to make Leases, reserving a Moiety of the annual Value; and what is, the annual Value may be more easily agreed, than what is a reasonable Fine, because that is reasonable to one, which is not reasonable to another.

Levinz agreed and said, that this Question had been inclusively resolved forty Times, scil. in all Cases where two Years Value had been adjudged reasonable; and said that he did not see any Difficulty in assessing the Fine, for the Lord might have the Value enquired by the Homage; and if the true Value was not assessed in that Case, the Party might have taken Issue. And he said that for another Cause it is against the Defendant, for it is not de communi jure, that if the Tenant refuse to pay the Fine, that he forfeits his Estate; for in some Places the Lord shall seise tantum quousque, &c. and therefore here he ought to alledge a Custom that he shall forfeit for a Refusal.

Street agreed and said, that if the Fine assessed be unreasonable, the Lord ought to re-assess it, and the Tenant ought to pay at his Peril upon a reasonable Time given; and cited the Case of Gardiner and Norman, Mich. 19 Jac. R. B. Cr. 617. which he said was a hard Judgment.

Adjudged for the Plaintiff per totam Curiam.

Upon this a Writ of Error was brought in R. B. and there argued by Pollexfen for the Plaintiff in Error; and he said, that he could not comprehend the Sense of such a Custom; either the annual Value tempore admissionis shall be taken from the Year precedent, or subsequent, and the Year in which he is admitted; or how shall it be understood; for it may be sown with Corn;

it may be Coppices which are cut but at certain Times, or Houses out of Repair, nothing is more uncertain tha the annual Value, and a Custom ought to be certain, (and he cited Davis 37. Godbolt 14. Roll, Custom 565.) and no Issue may be taken upon it; and he supposed, that a Man prescribed for the Value of a Pint of Corn to be taken for Toll; this would be ill, because incertain what the one should give, or the other take, and so of a Modus decimandi; he said that a Custom to have the Value of the Rent is good; and for this cited Page's Case, 2 Cr. 671. but the Value of the Land is not good. As in the Bishop of Bath's Case, 6 Rep. 35. where one having a Rent of 20 s. issuing out of Blackacre, and grants it till 20 l. be raised, he shall have it for twenty Years; otherwise where Land of the Value of 20 l. per Ann. is granted, which Case he put to shew, that the annual Value is so uncertain, that no Issue can be taken upon it, and therefore there can be no Foundation for the Custom; and he said also that the Custom is ill alledged, because it is said quod quælibet persona vel quælibet personæ quæ admissa foret vel admissæ forent usi fuerunt & consueverunt to pay, &c. which he said is not good, for it is a Thing to be done in futuro, such who shall be admitted, where a Custom ought to be founded upon an Usage precedent; and cited the Case of 21 E. 4. where one prescribed that he might turn his Plough; and the Case in Godbolt 14. devisare poterit, which are not good Prescriptions.

Levinz argued econtra, and went upon the Reasons urged in C. B. to which the Justices seemed to agree; but for the Manner of laying this Custom, Curia advisare vult.

The first Day of *Easter* Term, *Bedingfield* sat as Chief Justice of the Common Pleas, and Baron *Atkins* as Chief Baron; *Jones* Chief Justice, and *Mountague* Chief Baron, being removed the Day before; also Justice *Charlton* being removed again to *Chester*, Serjeant *Lutwich* was made a Judge of the Common Pleas; also Baron *Nevil* was removed, and Serjeant *Heath* made a Baron; *Milton* was also made a Baron of the Exchequer, and *Powel* a Justice of the Common Pleas.

Alſo there were ten Serjeants ſworn, three of the Inner Temple, *viz. Milton*, *Philips*, and *Geers*; but *Philips* had the Precedence, for he had a Warrant to be King's Serjeant; Of Gray's Inn, *Holt* who was King's Serjeant, *Rawlinſon*, *Hutchins* and *Powel*; Of Lincoln's Inn, *Hodges*; and of the Middle Temple, *Killingworth* and *Tate*; and the *Friday* after they were made Serjeants, and made their Feaſt, and gave Rings *Quorum inſcriptio fuit*, *Deus*, *Rex*, *Lex*.

Term. Mich.

2 Jac. 2. R. B.

Hodges *and* Nicholas.

1. JUdgment in Covenant in R. B. and a Writ of Error brought, and general Errors assigned; and after they moved to amend in R. B. and the Thing which they would amend was, because that in the Entry upon the Roll of the Writ of Enquiry of Damages per Sacramentum duodecim proborum & legalium hominum, was omitted, and also it is not said virtute brevis; and this was the Matter to be amended, which was opposed by Serjeant Levinz; and he said that the Statutes of Jeofails did not extend to it, because it was upon a Demurrer, and they have Effect only after a Verdict. He admitted that there were Amendments at Common Law, but that was only in the same Term, and by the King in another Term; and that the Statute of 8 H. 6. of Amendments has a Distinction between Mistakes in Matters of Fact, and Matters of Law; and that in some Cases there may be an Amendment where the Fact was mistaken by the Ignorance of the Clerk, but not where there is a Mistake by his Nescience of the Law, and he said that this is a plain Error in the Law; and he cited 22 E. 4. pl. 1. Latch. 203. Jones 199. and Palmer 123. upon which Case he principally relied.

On the other Part it was insisted by Holt and Pollexfen, that the Writ of Enquiry was well executed, and well returned; and being so, though there be an Oversight

sight in the Clerk in transcribing it, it is amendable, and that it is a common Thing to amend the Record, where the Paper-Book in the Office is right made up; and Holt cited 1 Cr. 144. and a Case in this Court, upon a Writ of Error out of Newcastle, where it appeared that there were but eleven Jurors, but insomuch that the Record and Transcript were Twelve, it was amended; and Pollexfen said, that as to the Cases put, they were Writs, Declarations or Pleas; and he said that where Judgment had been given against Executors de bonis propriis in C. B. it had been amended after a Writ of Error brought, and made de bonis testatoris; and after it had been amended here also.

The Court said, that where the Right had been tried, and all the Proceedings upon the Record right, it would be hard to reverse a Judgment, for a Mistake in Transcribing, which appears to be but vitium scriptoris; and so they ruled, that it shall be amended; nisi.

County of Worcester *and Town of* Evesholm.

2. AN Order was made at the General Sessions of the Peace for the County of Worcester, for a Rate for repairing of Knightford-bridge, which was a common publick Bridge Time out of Mind, &c. and repaired by all the County, which Rate was assessed and paid by all the County, except the Corporation of Evesholm, which brought a Certiorari, and by it removed the Order into R. B. and now moved two Exceptions against the Order, the one that Corporations are not to be taxed with the County, but exempted, and taxable by themselves, by the Statute of 22 H. 8. cap. 5. which impowers Justices of Peace to meddle with Bridges: The other Exception was, that the Rate was not well made, because they did not send for the Constables, &c. to assess the Rate pursuant to the Act; for the first Exception the Court seemed to be of Opinion, scil. Wythens and Wright, Chief Justice Herbert being absent, that Corporations are ratable with the County, (Holloway doubted) but they seemed to be of Opinion that they had not pursued the Manner of rating prescribed by the Act; but because that

that this was a Piece of Obstinacy in the Corporation, they gave another Day to speak to it.

λ Claxton *and* Swift.

3. THE Plaintiff brought an Action for Case against the Defendant, and declared upon the Endorsement of a Bill of Exchange; the Defendant pleads, that the Plaintiff had brought his Action against Hughes the Drawer, and had Judgment against him; and upon this the Plaintiff demurred.

And it was argued, that this is not a Plea in Bar of this Action, because it does not answer or avoid the Charge of the Declaration, which is, that he had endorsed this Bill to the Plaintiff, and by it made himself subject to the Payment, if the Drawer did not pay it; and it is laid in the Declaration that the Money is not paid, and then though there is a Recovery, yet this is not a Bar to the Plaintiff, for this Endorsement is as a new Bill, and a new Contract, and is a several Contract from the Drawer's Contract, and of a different Nature, and there ought to be a Recovery upon it by a different Action; for upon the Indorsement only an Action upon the Case lies upon the special Custom of Merchants, but against the Drawer an Indebitatus assumpsit lies upon the Debt created by the Law; and so the Contract being several, and of a several Nature, a Recovery upon one, is not a Bar without Satisfaction, no more than in the Case of a Bond; for though this Contract is not of a Nature so high as a Bond, yet it is of the same Nature, for the one is verbal, and the other a verbal Contract put into Writing, and turned into a Deed; and if the Deliverer when he parts with his Money will demand, if the Person upon whom the Bill is drawn will not pay, what then? the Drawer and natural Equity will answer, that the Drawer will; and in this Case the Indorser is in the Nature of a Drawer, and is regarded as a Drawer, for if there are good Indorsers, it is not usual to regard the Drawer, because they are all liable till the Bill is paid; and as to the Case of Brown and Wooton. Trin. 30 Jac. R. B. Cr. 73. Yelv. 67. and Moor

Moor 762. it was said, that there the Case was founded upon a Tort, and Damages only to be recovered; which after having been reduced to a Certainty by a Judgment, are of another Nature, and become a Duty certain, for which there is no Remedy, but an Action of Debt, or Execution upon the Judgment; but here the Action is grounded upon a Debt, which was always certain; and he said, that if one comes with J. S. to a Draper, and say to him, that if he will sell Cloth to J. S. and if he does not pay the Draper, that he will himself; and after the Draper bring an Action against J. S. and recover a Judgment, and after bring an Action against the other, and he pleads this Judgment in Bar of it, this will not be a good Plea (quod fuit concessum per Holt Recorder on the other Side,) there not being Satisfaction: So in the principal Case there not being Satisfaction, and the Course of all Declarations being, that the Money was not satisfied, this makes this Part to be material; to which the Party ought to answer, the which he has not done by this Plea; and so the Plea not good; for which, &c.

Holt econtra. The Case is, Hughes draws a Bill of Exchange upon Pardoe, payable to Swift, who endorses it to Allen, who endorses it to Claxton; Claxton brings his Action against Hughes, and had Judgment, and after he brought this Action against the Defendant, who pleads ut supra; and he said that it is a good Plea, for he said that Claxton might at first have brought his Action against Allen, and then Allen might have charged Swift, and he might have charged Hughes in Respect of his Charge; but when he brought his Action against Hughes, he has waved his Liberty of suing Allen and Swift, and cannot sue them after; for if he might sue Swift after, then Swift might sue Hughes, and so Hughes shall be doubly charged, which is against all Reason; and he said that though this is as a new Bill by the Indorsement, yet it has a Dependance upon the other Bill, and compared it to a Warranty. A. enfeoffs B. with Warranty to him, his Heirs and Assigns; and B. enfeoffs C. with Warranty, and C. is impleaded and vouches A. as Assignee of B. and recovers, he has waived his Warranty against B. and never shall vouch B. and he said this is not a new

2 Case,

Case, that where one is liable to the Actions of two Persons, that by one Action brought by one of them, he shall not be liable to the other, as in the Case of Middlemore and Goodale. Trin. 15 Car. R. B. Cr. 503. Where the Feoffor covenants for him and his Heirs, with the Feoffee, his Heirs and Assigns, to make further Assurance; the Feoffee assigns over, and the Assignee brings an Action of Covenant, and then the Feoffee releases. Adjudged, that the bringing of an Action had attached an Interest in the Person of the Assignee, and the Covenantee could not release: So in the Case of a Disseisin of Tenant by Statute Merchant or Elegit, they might have an Assise, tho' they have not a Frank Tenement,) and so might the Tenant of the Frank Tenement; but if one recovers, the other shall be barred; per Moyl, 33 H. 6. 22. and he said that the Plaintiff might have sued either of them at first; but by bringing of an Action his Election is determined, and he cannot have Resort to the others.

Of such Opinion was Holloway and Wright, cæteris absentibus; but after Withens came into Court, and agreed; and because this Cause had been depending in Court a long Time, and had been argued before, they ruled the Plea to be good.

Houghton *and* Rushby.

4. UPON a Motion for Restitution of Goods taken upon a Fieri facias, the Case was, a Fieri facias was brought, the Party died, and the Writ was delivered after his Death to the Sheriff, and the Goods were executed in the Hands of his Executors, who now moved for Restitution, because the Party was dead before the Writ delivered to the Sheriff; and so the Property not bound by the Act of Frauds and Perjuries.

But the Court was of Opinion, that the Act did not design to aid the Party, but a Purchaser in Market-overt, and left the Party as he was at Common Law, when such Execution was good: And Treby from the Bar said, that it was said in Parliament, when this Act was made, that the Mischief was great; that in long Vacations, when Goods have been sold in a Market-overt, or taken upon a Distress, and a Fieri facias tested the last Term

should come and over-reach them; and for this Mischief they intended to provide a Remedy, and not for the Party himself; and of such Opinion were Withens, Holloway, and Wright, absente Herbert Chief Justice. And of the same Opinion was Holt Chief Justice and all the Court. Term. Pasch. 3 W. & M. in the Case of Dr. Walter Needham, who died April 6. about 10 in the Morning; and the Writ was not sealed till 12 of the same Day, &c.

St. Rumbald's *Parish Case.*

5. A Parish in Colchester being surcharged with Poor, the Justices made an Order, that two other Parishes in Colchester should pay to the Relief of the Poor within this Parish, scil. the one 5 s. per Week, and the other 8 s. per Week, and that the Overseers should collect it; and the Order being removed by Certiorari, Alibone moved to quash it, because not pursuant to the Direction of 43 Eliz. which says others of other Parishes; so that it ought to be assessed by the Justices upon particular Persons, and not generally [and so it may be done, and it has been admitted it might so be done this Term before; and also a Case remembred in Pemberton's Time, when it was so ruled.]

But the Court seemed to be of Opinion that it was well enough, and according to the right Course; and that the Justices are only to assess the Quantum, and then the Rate is to be made by the Overseers of the Poor of the Parish; and such was the Opinion of the Court.

The Case of the Borough of Banbury *and the adjacent Towns.*

6. There are four adjacent Towns within the Parish of Banbury, and there is an Overseer within each Town, and an Overseer also within the Borough; they all join in one Account, and there is but one Rate made for all the Parish, but the Overseers of each particular Town, collect and pay the Money within such Town; one who is Tenant of Lands in one of these

Towns lives in the Borough, and is assessed by the Overseer of the Borough for the Lands within the Town, and paid to the Overseers of the Borough; and the like is done in the other Towns; so that the Overseers of the Borough had a Surplusage for the Poor within the Borough, and the Overseers of the Towns wanted Money for the Relief of the Poor within the Towns, though the Poor within the Towns were less than those within the Borough; and upon this the Justices ordered, that there should be a Distribution made; and this Order with others being removed, it was moved to be quashed by North and Levinz; but confirmed; and though the Statute of 14 Car. 2. was cited, and this Case urged to be within that Statute, it was not agreed to be within that Statute; but vide the Statute.

Memorandum. It was cited by Holt Recorder, to be ruled in the Case of a Parish in Cambridge. Mich. 32 Car. 2. R. B. after having been diverse Times argued by Pemberton and Pollexfen, that the Justices might tax particular Persons of another Parish, where the proper Parish is overburthened; for the Words of the Statute are others of other Parishes; and this Case was allowed to be so by the Court.

Term. Hill.

2 & 3 Jac. 2. R. B.

Knight *and* Greenvil.

1. IN Ejectment a special Verdict was found; in which the Case was, Thomas Lewis seised of the Lands in Question in Fee, acknowledged a Statute Merchant to Knight, and after acknowledged a Recognizance in the Nature of a Statute staple to Gerard; and after acknowledged another Recognizance of the same Nature to Burroughs and Sir Gervas Elways; Burroughs and Elways extend, and had a Liberate; and after Knight extends, and has a Liberate, and then Gerard extends and has a Liberate: Knight and Gerard assign to Edward Lewis; and Thomas Lewis being in Possession, levied a Fine with Proclamations to Sir John Lewis, who being seised in Fee, devised the Lands in Question to Edward Lewis, [who had Possession of the Lands by Virtue of the Assignment of Knight and Gerard] and to his Heirs Males, Remainder to the Daughters of Thomas Lewis: And Edward Lewis being so seised, levied a Fine with Proclamations, and died without Issue Male; and Mary and Elizabeth are the Daughters and Heirs to Thomas Lewis, and also Heirs to Edward Lewis; five Years pass; and after the Wife of the Defendant, being Executrix of the Survivor of Elways and Burroughs, took Administration de bonis non to Gerard, and acknowledged Satisfaction upon Record to the Statute made to Gerard; and upon this the Defendant entered, upon whom the Plaintiffs, having married the

one Mary, and the other Elizabeth, the Daughters and Heirs of Thomas Lewis, and Heirs of Edward brought their Ejectments, & si, &c.

This Case was argued in the Trinity Term before by Trevor for the Plaintiff, and by Bonithan for the Defendant; and in this Term by Sommers for the Plaintiff, and Holt for the Defendant; and Sommers made five Points.

First, If the Fine levied by Thomas Lewis, he being in Possession devested the Estate of the Conusees, and put them to a Right; and he said, that the Fine devested their Estates, and operated as a Feoffment, for they had an Estate by the Liberate before their Entry, and presently might enter before Possession delivered to them by the Sheriff. Butler and Wallis's Case. Pasch. 38 Eliz. R. B. Cr. 463. so in the Case of the Mayor and Commonalty of London, 1 Cr. 575. their Estate was barred by the Fine, though they never entred; and so in Saffin's Case, 5 Rep. 123. And Tenants by Statute-merchant are within the Statute of Fines, and all the Estates are barred, as well as the first, or the two first, for the Sheriff had made Execution upon all, and so they are estopped to say, that they had not a present Right, and having a present Right they are barred; as if a Man seised in Fee, make a Lease for Years, scil. 20 Years, and the same Day make a Lease by Indenture for 30 Years, the one and the other are concluded to say the contrary; but that the Lessor had the Land in Possession to pass it: Smith and Stapleton's Case, Com. 433, 434. and in the Case of Bracebridge and Cork, Com. 421. but if the Estoppel is out of the Case, it is to be agreed, that this is but a chattel Interest, though it is said, that they are seised, as of a Frank Tenement; and that the last Conusees have an Interest in Nature of a Reversion, by Act and Operation of Law, and an Attornment is not requisite, no more than in Sir Moyl Finch's Case, 6 Rep. 68. and so their Interest barred; and this is settled in Margaret Podger's Case, 9 Rep. 106. that tho' he in Reversion upon a Lease for Years, Estate for Life, or Copyhold, may not enter to take the Profits; they may enter to make Claim, as well to save their Inheritance, as the particular Interests of the Tenants, which the Conusees here have not done, being privies in Estate; and he said, that where a Party has a

Right

Right only; but he has two Remedies which accrue to him at several Times, if a Fine and five Years pass, and bar him of the one Remedy, he shall not have the other; and for this cited Jones 211. the Case of Savil and Clerk; and the same Case is reported in Cr. Car. 111. but the Case of Laund and Tucker cited in Fermer's Case, and reported in Cr. Eliz. 254. is ruled upon another Reason, for there the Party had a double Title, the one upon the Forfeiture, the other an Entry after the Expiration of the Term; and the Law will not compel the Party to take Advantage of a Forfeiture against his Will, and make him liable to the Charges of the particular Tenant. And they in Reversion here might enter to make Claim, though they could not take the Profits, as a Man may in many Cases, which he put. Com. 360. 1 Inst. 250. Com. 374.

And there are but three Cases against him, of which he acknowledged the first is the Case of Laund and Tucker before-mentioned, the which he had answered. The second is the Case of Whaley and Tancred. 1 Vent. 241. but he said that Case differed from this, for there he in Remainder might have said partes finis nihil habuerunt. The third Case was ruled upon a Trial at Bar; A. Lessee for ninety-nine Years, Remainder to B. for Life, Remainder to C. in Fee; B. levied a Fine, and living B. the Lease determined, and ruled that C. might enter notwithstanding the five Years; for A. continued the Possession, which amounted to a continual Claim by C. and so ruled upon this Reason.

The second Point, Admitting that they are not barred by the Fine of Thomas; whether the Interest of the two Statutes is not drowned by the Devise to Edward, who was possessed of them? and he said that it is a Rule taken in Wiscot's Case, 2 Rep. 60. where the Inheritance comes to the particular Estate, be it by the Act of God, the Law, or the Party, the particular Estate is drowned; but it is objected, that this cannot be here, for the Interest of Burroughs and Elways is intermediate, which prevents the Merger; but he said that this Interest is put to a Right, and so cannot prevent a Merger; or if it be but a future Interest, it cannot prevent a Merger, as in the Com. 72. Ross and Pope's Case.

The third Point is, Whether the Fine of Edward be not a Bar of the third Statute to Burroughs and Elways? Suppose the two Statutes were not extinguished by the Accession of the Inheritance in Edward, they are gone by the Fine levied by him, for an intire Interest passed by it, as it is ruled in Roll, Estate and then Burroughs had a present Right which is barred. He said that it might be objected, that this is a private Thing, and that there ought to be Notice; but he said that no Man is bound to give Notice, and so the Party ought to take Notice; and he cited Corbet's Case, 4 Rep. and 1 Cr. the Mayor of London and Alford's Case; and 1 Cr. 391. the Case of Gymlet and Sands.

The fourth Point, Admitting Burroughs not to be barred by the Fine of Thomas Lewis, yet he is barred by the Fine of Edward; and this he proved by Tucker and Laund's Case.

The fifth Point is, Whether a new five Years accrued after Satisfaction acknowledged; and he said that there did not, for the Interest was gone before, and barred by the Fine; and the Acknowledgment of Satisfaction, cannot determine an Interest which was ended before.

Holt on the other Side said, that he would endeavour to maintain two Things: The one that Knight's Statute is extinct, and Gerard's in esse; but this is by their Coming both into the same Hand, and not by the Fine of Thomas Lewis. The other, admitting that Knight's Statute be barred by the Fine; yet Gerard's is not barred by the Fine of Thomas or Edward, but a new five Years accrued, upon the Acknowledgment of Satisfaction.

As to the first he said, when Knight's Statute is extended, and also Gerrard's, and both assigned to Edward, he is solely possessed by Virtue of the Statute to Gerard; it will be admitted, that Knight had such an Estate, which he might surrender, and that Gerard's Extent is of a Reversion, and capable of a Surrender; and for this cited Corbet's Case, Dyer 280. and when the second Statute is extended, it is of a Reversion, and after being in the same Hand it is an Extinguishment of the first; 2 Cr. 424. Farrington and Garraway, 4 Rep. 66. and where a Surrender may be made, and both Estates come into one and the same Hand; this amounts to a Surrender, 1 Inst. 41, 42. 3 Cr. 502. Popham 30. for no

Man

Man can have an Estate in Possession and Reversion also, without an intermediate Estate in some other; and as to Gerard's Estate, the Fine of Thomas does not operate upon it, for as to that, the Case is no more, than if one in Reversion upon an Estate for Years levy a Fine; this does not turn the Estate for Years to a Right, and by Consequence does not operate upon it; but if it was a Feoffment, and a Fine after, Perchance it would be otherwise; [Thomas was in Possession, and so the Fine did operate as a Feoffment] and Noy 23. Archbold and Cook were cited by him, and Margaret Podger's Case as to this Point; and he cited the Marquess of Winchester's Case. Trin. 20 Car. 2. R. R. Rot. 504.

As to the second Thing, He said if Knight's Statute is drowned, Gerard's is not; but the intermediate Estate of Burroughs and Elways prevents it; and if this is in esse, then after Satisfaction acknowledged, a new five Years accrued, for Acknowledgment of Satisfaction is as natural a Way to determine a Statute, as Effluxion of Time or Death, to determine an Estate for Years, or for Life, &c. Judgment pro Defendente.

Evans *and* Cramlington.

2. IN an Action sur Case upon the Custom of Merchants in Bills of Exchange, upon the Pleadings the Case was; Calvert an Exciseman pays 500 l. to the Defendant, and has his Bill of Exchange upon Ridler, [which is accepted by him] payable to Price or his Order, for the Use of Calvert; the Bill was made the 9th of November, and was assigned by Price to the Plaintiff Evans for Value received, the 14th of November; and upon the 25th an Extent was made of the Money in the Hands of the Defendant; and after upon Refusal of Paymment by Ridler, Evans brought this Action; and the Defendant pleaded this Matter, upon which there was a special Demurrer, and it was shewn for Cause, that this amounts to a general Issue; and as to the Matter in Law,

Thompson argued, that the Bill being made to Price or Order, the legal Interest is in Price, and but an Equity in Calvert; and Custom having made these Bills [which in their Nature are but Choses in Action] assignable,

able, and Price having assigned to the Plaintiff for a valuable Consideration, the legal Interest is transferred to the Plaintiff, and the Defendant ought to pay it to him; and Calvert ought to have his Remedy in Equity.

Powis Sollicitor General econtra. And he said, that the Declaration is not good; and so be the Plea good or bad, Judgment ought to be against them; for he said that the Custom is laid generally, not confined to Place, or Persons, and so is the Common Law, and therefore ill as a Custom, and also ill, because a Thing laid as the Common Law, which is against the Common Law, is certainly ill; and they have said that the Custom is, that if a Merchant or another Man draw a Bill upon a Merchant or another Man having Commerce, which is too general; and also Commerce is a Word of too large Signification, and may comprehend Pedlers, or they who sell Corn, &c. and he cited the Case of Burman and Buckle, which was a Goldsmith's Note, upon which the Custom was laid generally, and therefore adjudged ill; and of such Opinion Herbert Chief Justice seemed to be.

And as to the Matter in Law, Powis said, that the legal Interest was in Calvert; for it being said in the Bill to his Use, he had the Interest, as if Money be delivered to A. to the Use of B. B. might have an Action, and A. had nothing but the Custody; and as to the Word, Order, that signifies nothing but an Authority, which he could not execute to vest an Interest in the Plaintiff; and præsertim the Plaintiff having Notice of the Interest which Calvert had in the Money, it being said in the Bill to his Use, and compared it to a Sale in Market-overt of Goods tortiously taken, to one having Notice of the Tort, which does not alter the Property; and also to a Feoffment by Feoffees before the Statute of Uses, to one having Notice of the Use, he shall be seised to the first Use; but otherwise it is of one not having Notice.

As to the Plea amounting to the general Issue, he said, that the Plaintiff having charged the Defendant in an especial Manner, he ought especially to plead to it; and could not plead Non assumpsit.

Curia advisare vult.

Price *and* Warren.

3. UPON a special Verdict the Case was, Price was seised of two Messuages in Fee after the Death of his Brother, and had Issue two Sons, Richard his elder Son, and Nicholas his younger Son, and four Daughters, Elizabeth, Margaret, Oliffe and Anne, and made his Will in Writing, and devised his two Messuages to Nicholas his younger Son, and he to have 30 l. per Ann. for his Maintenance for ten Years after the Death of his Grandfather, and the Residue of the Profits to be applied for raising Portions for his Daughters; and if Nicholas die, then he gives the Estate that Nicholas had to his four Daughters, Share and Share alike; and then further says, and if it shall please God all my Sons and Daughters die without Issue, then he devises it to his Sister and her Heirs, &c. the Devisor dies, the Grandfather dies, and after Nicholas enters and dies without Issue; the four Daughters enter and are seised, and the one takes Husband, and has Issue and dies, and the Husband claims to be Tenant by the Curtesy; & si, this is such an Estate in the Daughters, of which there may be a Tenancy by the Curtesy, was the Question.

It was agreed, that Nicholas had but an Estate for Life, and that the Words, Share and Share alike, made the Daughters Tenants in Common for Life; and that the Word Estate here carried no Interest, but is only a Description of the Land, &c. But the Question was, whether they should have Estates-tail by Implication upon the last Clause of the Will; and it was argued by Pollexfen, and afterwards by Tremain, that it could not be for the Incertainty which of the Issue shall take first; and the Case of Tayler and Sayer, Cr. Eliz. 742. is full in this Point; and also that in this Case there ought to be cross Remainders by Implication, which could not be by the Rule of Gilbert and Witty's Case, 2 Cr. 655. and of Holms and Merriel's Case; and the other Cases of cross Remainders.

Holt argued, that it was an Estate-tail; and he observed first, that there was no Limitation when the Estate

to the Daughters shall determine: And secondly that it was said, that it shall not remain over, till their Death without Issue; and he said, that here the Daughters having an Estate which shall not determine till their Death without Issue, is a Remainder in Tail to Richard; and after his Death a Remainder in Fee according to the Devise, and so the Will subsists in all its Parts; and the Intent observed, which cannot be if this Construction be not made; for if there be no Estate-tail in the Daughters, there will be a Fee in Richard, and the Remainder devised to the Sister of the Devisor will be void; and he said that Richard might well take an Estate-tail here by Implication; and for this he cited Moor 127. the Case of Newton and Bernardine, where Richard had an Estate-tail by Implication by the Words; and if Richard die before he hath Issue, though no Estate given to him, neither was he Heir at Law; and he cited 2 Brownl. Robinson's Case; and for the cross Remainders he said he did not see any Reason why they might not be, and that in Clatch's Case in Dyer, they were resolved good; and that this Case had been affirmed for Law in Hobart, and other Books; and for the Case of Gilbert and Witty it was ruled upon another Reason, for there were several Devises of several Houses, and they were taken distributivè reddendo singula singulis.

The Court econtra. And Herbert Chief Justice said, that they would favour Wills in their Exposition as far as they could; but where they are so incertain, that the Intention may not be collected, they ought to fall for their Incertainty; and he said that here the Testator might have several Intents, for he might intend that the Daughters should have but for Life, and then that the Sons should have it; and upon their Death without Issue, that the Daughters should have it; or he might intend that the Sons might have an Estate-tail, after an Estate-tail in the Daughters; or that after the Death of the Daughters, that it shall descend to the Sons in Fee; and if they die without Issue, to the Issue of the Daughters; and if his Sons and Daughters die without Issue, that he might limit a Fee after to his Sister, though there was a Fee before he might so intend; and therefore he said it was quite incertain

what he intended, and therefore that this Clause is void for the Incertainty, and that there was no Estate-tail in the Daughters, & per consequens no Tenancy by the Curtesy; and it was so adjudged per totam Curiam.

The King *and the Inhabitants of* Stanmore.

4. AN Order of Quarter-Sessions was removed by Certiorari; upon which the Question was, whether 10 l. per Annum mentioned in 14 Car. 2. for the Settlement of a poor Man, shall be understood 10 l. per Annum of an Estate of Freehold and Inheritance, or 10 l. Rent as a Tenant; and it was urged that it is unreasonable to intend that the Act would remove a Person from his Freehold, though under 10 l. per Annum, and that the Statute ought to be understood of renting 10 l. per Annum; and a Case was cited to be so ruled by North Chief Justice, at the Assizes at Buckingham; and Holloway said, that he had known it to be so adjudged; but Herbert Chief Justice was of another Opinion, and took a Man who bought a Cottage of 20 s. per Annum, of which he had the Inheritance, to be within the Words and Mischief of the Act, if he is like to be chargeable to the Parish, for that is the Thing against which the Statute provides; but where a Man is not like to be chargeable to the Parish, if he will live in a Cottage of 10 s. per Annum, or otherwise under his Condition, he is not within the Meaning of the Act; the other Justices were silent.

Blackstone *and* Stone.

5. A Man seised of Lands in Fee, had Issue a Son by the first Venter, and two Sons by a second Venter, and devises his Lands to his eldest Son and his Heirs; and if he die without Heir, to his two other Sons, the eldest Son died without Issue; and if this was an Estate-tail, or a Fee-simple was the Question upon a special Verdict found; and it was adjudged an Estate-tail; but it was not argued, or defended by the other Side; ideo quære. Vide 1 Cr. 58. Vaughan 270. 1 Roll, 399.

Term.

Term. Trin.

3 Jac. 2. R. B.

Hinton's *Case*.

1. IN the Case of Benjamin Hinton, it was ruled upon a special Verdict in an Indebitatus Assumpsit, that if one is arrested, and puts in Bail, and after does not pay the Money within six Months, that he shall be adjudged a Bankrupt after the six Months only, and that it shall not relate to the Time of the Arrest; and so is the Statute of 21 Jac. cap. 19. to be understood; for it may be that he had Cause to contest the Debt, and the Suit might depend above six Months; and also it would be mischievous to all Persons who deal with them, to make them refund their Money, when the Bankrupt appeared to be a Man creditable and solvent; ideo Judgment per totam Curiam.

Mich. Vacation.

4 Jac. 2.

NOTA: After the Close of the Term in this Vacation, King *James* departed privately from *Whitehall*, and was stop'd in *Kent*, and came back to *Whitehall*; but in two or three Days after he retired to *Rochester*, and then departed secretly beyond Sea; and note the Judges who were in Town acted, and in some Counties a Session of the Peace was held, and also Writs issued, tested the last Day of *Mich. Term*; and the Judges in Town, *viz. Street*, *Stringer*, and *Rotheram* intended the Evening before the Essoin-day, to hold the Essoins; but they were forbid. *Note*, That several held, that the Commissions were determined by the King's Withdrawing, and that the Judges, *&c.* ought not to have acted after. *Vide Rastal's Ent. &c. Reattachment and Resummons* 544. *b.*

Term.

Term. Trin.

1 Will. & Mar. R. B.

Du Costa *and* Cole.

1. THIS was an Action sur Case upon a Bill of Exchange, protested for non Acceptance; in which the Fact was; Cole drew a Bill of Exchange upon Sir Nathan Rowland, and Company in Oporto, for 1000 Mille Rees upon the 6th of August, payable thirty Days after Sight; and upon the 14th of August the King of Portugal had lessened the Value of the Mille Rees 20 l. per Annum, so that it was impossible to have Notice; the Bill was presented for Acceptance, with the Advance of 20 l. per Cent. Rowland was ready to accept and pay at the current Value, but not with the Advance, and therefore there was a Protest for non Acceptance, and an Action was brought against the Drawer; and the Question was, whether the Bill ought to be paid with the Advance, or according to the current Value at the Time the Bill became payable; and ruled by Holt Chief Justice, that here there not being Notice, the Bill ought to be paid according to the antient Value, for the King of Portugal may not alter the Property of a Subject of England; and therefore this Case differs from the Case of Mix'd Monies in Davis's Reports; for there the Alteration was by the King of England, who has such a Prerogative, and this shall bind his own Subjects: In this Case he also held the Protest to be an Evidence primâ facie, that the Bill was not accepted, and sufficient to put the Proof on the other Side.

Term. Pasch.

2 Will. & Mar. R. B.

Earl of Pembroke *and* Woldrige.

1. A Writ of Error was brought by the Earl of Pembroke to reverse a Common Recovery, and a Scire facias moved to be granted against the Tertenants, which was opposed by Treby Attorney General; for though it be usually granted, yet it is in the Discretion of the Court, and not ex debito stricti juris, and the Practice of the Court is so, for otherwise the Writ of Error would be of no Effect; for the Demandant in the Recovery, is but a nominal Person, and has nothing in the Land, and so Judgment that he shall be restored to all that he had lost, signifies nothing; but when the Tertenant is in the Court, the Court has all Parties before them, and the Judgment shall be effectual; so that the Reason of granting a Scire facias in such a Case, is for the Expedition of Justice, and that their Judgment be not illusory: But in this Case a Scire facias is prayed in Delay of Justice; for if it be granted, the Tertenant would plead Infancy, and by it the Parol would demur, and the Party delayed, and therefore the Reason of granting a Scire facias does not hold in this Case; and so the Court not bound to grant a Scire facias in Discretion.

Holt Chief Justice said, that though it be not ex necessitate juris to grant a Scire facias in this Case; yet it had been always practised, and the Practice of the Court is the Law of the Court, from which they could not de-

 part;

part; and though this Case had such Circumstances, which would induce them not to grant a Scire facias, if it was a new Case; yet this being a settled Rule to grant a Scire facias in such Case, the Rule was that the Scire facias shall go; per Holt Chief Justice, and Eyres Justice. Dolbin seemed to be of a contrary Opinion.

Whitehall *and* Squire.

2. A Man put his Horse to Pasturage to J. S. and after died Intestate; J. S. desired J. D. to bury the Owner of the Horse, the which he did, and the Expences of the Funeral amounted to 23 l. and after upon an Account between J. S. and J. D. J. D. accepted the Horse for 10 l. of the 23 l. and J. S. gave him a Bill for the Residue; and after J. S. took Letters of Administration, and brought an Action of Trover for the Horse, and this Matter was found specially; and adjudged for the Defendant by Dolbin and Eyres; Holt Chief Justice econtra.

Dolbin and Eyres said, that there not being any Creditors, and the Funeral being by the Direction of J. S. this makes him Executor de son tort; and it being a lawful Act, though done by an Executor de son tort, it ought to be allowed; but if there were Creditors, peradventure it would be otherwise.

Holt Chief Justice said, that though legal Acts done by an Executor de tort are good, so that he shall not be responsible to Creditors when he has paid all to others upon Specialties, or other Security of a real Nature, yet he is liable to the rightful Administrator to be punished for his tortious Intermedling in an Action of Trover, in which Damages shall be recovered, but not according to the Value of the Goods, because that which he has lawfully paid shall be recouped; and in this Case the Ordering of the Funeral, &c. has made him Administrator de son tort, &c.

Johnson *and* Cotton.

3. Baron and Feme levy a Fine of Land of the Wife's, and the Wife alone declares the Uses; the Assent of the Husband shall not be intended if nothing appears econtra; but the Declaration is void except an express Assent is proved; per Curiam upon Evidence in an Ejectment.

Term. Trin.

2 Will. & Mar. R. B.

Luton *and* Bigg.

1. UPON a special Verdict the Case was found to be, that Bigg was a Freeman of London, and kept an Inn there, and that he bought all the Things which he sold in his Inn, and them there sold and uttered, by which he gained his Living; and they besides found, that he had built a Ship, and had a Share in her, and a Stock there to the Value of 50 l. they found also that he absented from his House, and that upon Petition to the Commissioners of the Great Seal, a Commission of Bankruptcy, &c.

The Question was first, If an Innkeeper within London, be a Trader within the Statute of Bankrupts; and it was argued by Tremain that he was not, for he is in the Nature of a publick Officer for the Reception of Travellers, for he is bound to receive them, and to find Meat, Drink, and Lodging for them; and if he refuses without a reasonable Cause, an Action upon the Case lies against him; he is also bound to sell at a reasonable Price, and may not set the Price; also he has not general Dealings with all Sorts of People as a Trader has, but only with Passengers and Travellers; and therefore if a Friend being there as a Visitor, be robbed, the Innkeeper is not responsible; also other Traders may sell or refuse, and set their own Price upon their Goods, and therefore the Case of an Innkeeper differs from that of other Traders. As to the Second Question, The Building of a Ship does not make him within the Statute,

no more than the Building of an House; and the having a Stock in the Ship to the Value of 50 l. will not make him a Trader, for it is not found that he traded with it; and therefore, &c.

Wi. Williams econtra; for here it is found that he is an Innkeeper, that he bought Hay, Oats, and all Things necessary for his Inn, that he sold all those Things in his Inn, by which he gained his Living; so that here there is found an exact Description of a Man, who gains his Living within the Statute; and therefore he ought to be adjudged a Bankrupt within the Statute: And he said there was a considerable Difference between an Innkeeper in London, and a Man in the Country who rents Land, and also keeps an Inn, he has many Things of his own Growth; and tho' he sells, he does not buy, so he does not gain his Living by Buying and Selling; and the Case of Crisp and Prat was cited by him; Jones 437. where by two Judges against two, that an Innkeeper in the Country is not within the Statutes, &c.

Holt Chief Justice and Eyre inclined, that an Innkeeper is not within the Statutes, upon the Reasons offered by Tremain; but Justice Dolben was of Opinion, that an Innkeeper in London is, &c. Adjornatur; puis.

Term.

Term. Hill.

2 Will. & Mar. R. B.

Boulston *and* Sandiford.

1. ACtion upon the Case, in which the Plaintiff declares against the Defendants as Owners of a Bark, and shews that they constituted J. S. Master, who received such Goods aboard to be carried from London to Topsam, and that the Defendants super se susceperunt to carry, &c. and shews that the Goods were damaged; upon which, &c. upon Not guilty pleaded, the Jury found a special Verdict, scil. that the Defendants were Part-Owners, but that there were other Owners insimul cum the Defendants; and that All the Owners constituted the Master and Mariners, that the Goods of the Plaintiff were delivered to the Master to be carried from London to Topsam, and that they were damaged, &c. & si [the Action not being brought against all the Owners, but only against the Defendants] Judgment shall be given for the Plaintiff was the Question.

Adjudged by Holt Chief Justice, Gregory and Eyres for the Defendants; Justice Dolbin econtra, because it might have been pleaded in Abatement.

Holt Chief Justice: The Action in this Case might have been brought against the Master alone without Question, as in the Case of Morse and Slue, and the Master is in the Nature of an Officer; it might also have been brought against the Owners, because they have a Benefit, scil. the Freight; and if there be a Default in the Ma-

ster, they are chargeable, for the Master is their Servant, and appointed by them. And in this Case, the Defendants are not chargeable in respect of the Ownership, but of the Advantage which they have by the Freight; and therefore where Part of the Owners would imploy the Ship, and the others would not, in such Case the Advantage of the Voyage will belong to them, who fit and imploy the Ship, and not to them who dissented; and if any Damage be to the Lading, the Action shall be only against them who fitted out the Ship, and not against the others; so Ownership is not the Foundation of this Action, but the Trust and Recompence, and the Trust in this Case is as well with the others, as with the Defendants, for the Goods were delivered to the Master, and not to the Defendants, and the Receipt of the Master is the Receipt of the Owners, scil. of all the Owners, who appointed him; and in every Trust there is a Contract implied, and the Trust being in all the Owners, the Contract shall be so also; and therefore he agreed that the Case of a common Carrier did not differ from the present Case; and if this was in the Case of a common Carrier, all the Partners ought to be joined; for they being upon the implied Contract, all Privies to the Contract, they ought to be joined in the Action, & super se susceperunt extends to all; and this not being done, the Defendants may take Advantage of it upon the general Issue: If the Plaintiff had declared, that in Consideration he had promised to pay the Defendants so much, they assumed to carry such Goods, & non assumpsit' pleaded, he did not doubt but that the Defendants might have taken Advantage upon the general Issue, that this Promise was also with A. and B. not named, &c. and that such special Consideration is sufficient to charge a Carrier; he cited 2 Cr. 262. Rogers *versus* Head, and Pasch. 4 Car. R. B. in the Case of Symonds and Darknoll; per Hide Chief Justice, the Delivery makes a Contract, and the not alledging that he was a common Lighter-Man does not hurt, Palmer 523. and per Holt a Carrier is bound to carry as well as an Innkeeper to receive Guests. Also in this the Imployment is joint, and like to the Case of joint Officers, they all make but one Person, and a Breach of Trust by one, is the Breach of all: The Consideration is to be paid to all, and therefore

for all ought to be charged, and the Benefit is the Cause of the Charge, as in 2 Cr. 189. in the Case of Clerk and Gelly, where a Man left his Goods in an Inn, and departed for two or three Days, and in the Interim they are stolen; the Innkeeper shall not answer for them, because he had no Benefit by the Custody of the Goods; but if it were an Horse it would be otherwise: Suppose in this Case the Owners had brought an Action, the Defendant shall take Advantage, that some of the Owners are not named upon the general Issue, and the Case of a joint Bond differs, for there the Deed is several; and if one is dead, there the Declaration against the other alone is good; and upon Non est factum, he shall not have the Advantage, because this is his Deed, and a several Deed; but because the Lien is joint, there if it be pleaded in Abatement, that another sealed the Deed, who is not named, and is yet living, there Judgment shall be against the Plaintiff; but if it was upon a Contract, and Nil debet pleaded, there without Question the Defendant might give in Evidence, that the Contract was between him and A. B. &c. not named, and upon this it would be against the Plaintiff: Suppose in this Case, this had been pleaded in Abatement, how shall it be pleaded, shall it be, that you are Part-Owners, and that others are Owners simul cum? this would not be good, for it may be that you alone employ'd the Ship; shall it be that A. and B. are Owners, and employed the Ship simul cum you? this would not be good without an Absque hoc that you imployed as the Plaintiff has supposed, and would not this have amounted to the general Issue? and is not this another Undertaking? so that he did not see how this shall be pleaded in Abatement. He confessed that 7 H. 4. 8. is that in an Action upon the Case Jointenancy ought to be pleaded in Abatement, which is the only Case that he knew where it ought to be pleaded in a personal Action; but he said that this was a personal Action in regard of a real Charge, scil. for not repairing of a Wall, &c. and in those Days upon Actions for Non-feasance, Not guilty was not pleaded; but they pleaded specially, and traversed any special Point alledged in the Declaration; and Not guilty to such Actions was not pleaded, till after the Time of the Case of Yalding and Tay, Moor 355.

and he cited the Case of Cole and Wilkes, Hutton 121. which was Debt against a joint Lessee for not setting out of Tithes, and held upon a Trial at Bar, that it does not lie; but there it being found that one only occupied the Land, adjudged that the Action well lay: And he said that Not guilty is a good Plea in Debt upon the Statute for not setting out of Tithes, as Moor 914. Champernoon *vers.* Hill. He said that he desired to be of Opinion for the Plaintiff, if he might, but the Law would not permit him; for though it be hard to compel the Plaintiff to take Notice who are the Owners, yet is it not more hard, that if Victuals or any other Thing be delivered to the Use of the Ship, that the Plaintiff will sue the Owners, when without Question he might have sued the Master? and so he concluded for the Defendant.

Price *and* Child.

2. IN an Action on the Case the Plaintiff declared, that he was seised of a Ship, and that he sent and employed it upon a Voyage pro commodo ipsius the Plaintiff, and shewed how, &c. and that the Ship returned, and that the Defendants seised the Ship the first Day of March, &c. & hucusque detinent, per quod the Plaintiff lost the Lucrum & commodum, which he might have made. The Defendants plead Actio non quia they are incorporated, &c. and shew the Charter to the East-India Company, and that they seised the Ship upon Suspicion of Interloping, and upon Suspicion of Piracy, in Assistance of the King's Officers, prætextu of a Process out of the Admiralty, quæ est eadem captio & detentio; and after this by Deed between the Plaintiff and the Defendants, upon the Behalf of the East-India Company, agreatum fuit, that the Plaintiff at his Charge should bring the Ship from Portsmouth, where it was detained usque London, that the Defendants should pay the Custom, and the Goods should be laid in their Warehouse, and should be sold by their Candle, and that the Money should be paid four Fifths to the Plaintiff, and the fifth Part to the Defendants, that the Goods were sold for 36000 l. and the Money paid accordingly. It was also agreed that the Plaintiff should submit to

the Judgment of the Court of Admiralty; and that after all this there shall be a Release of all Actions concerning the Premisses to the East-India Company, and all the Members of it, and they shew, that the Plaintiff released accordingly, and they shew it to be the same Caption, &c. there was also in the Release a Covenant not to sue the Company, or any Member of it, for, or concerning the Premisses, &c. The Plaintiff replied and prayed Oyer of the Agreement, which was entred in hæc verba, and took Protestation, &c. & pro placito said, that the Defendants took the Ship the first of March, which was before the Caption upon the Process in the Admiralty; and that this is the Caption upon which the Action is brought, and concludes, &c. upon which the Defendant demurred.

Pemberton for the Defendant: That the Replication is not good, for here the Novel Assignment is ill, for he ought to have concluded the which est alia captio, than that of which the Defendant pleads; and so no new Assignment: Also it is inconsistent with the Declaration, for it is that the first of March they took & hucusque detinuerunt; and now they would say, that it was prætextu of the Process, for if it was taken the first of March, it could not be after taken prætectu of the Process, therefore it is inconsistent; also there is another Default, for the Replication does not answer the Bar, for the Process out of the Admiralty is but Conveyance to the Bar, for the Bar is that after the Taking, scil. 10 Nov. agreatum fuit, &c. prout, and they rely sur le fait, &c. But he would discharge the Case of the Replication; and if it appears upon the whole Case, that the Plaintiffs have not Cause of Action, that then the Court would give Judgment for the Defendant; and for this cited Hickman's Case, 9 Rep. and Turner's Case, 8 Rep. and he said that here there was a Satisfaction, for the Money was paid; and though it is not pleaded as an Accord, yet if it appears that it was paid in Satisfaction, it ought to be adjudged as an Accord with Satisfaction; and he said that now it appears that by the Agreement (the which is upon Oyer entred in hæc verba, and as if it had been pleaded by the Plaintiffs) that the Goods were sold by the Defendants, and the Money paid to the Plaintiffs in Satisfaction, &c. also in this Case the

Plaintiffs have released to the Company, and to every Member of it, and covenant not to sue, which amounts to a Release to avoid Circuity of Action; and he cited Hickman's Case to this Purpose; and he said that a Member of a Company, is a sufficient Description for the Defendants to take Benefit by this Release, and therefore it extends to them, and also the Matter of the Release extends to them; for it was of all Actions concerning the Premisses, which would extend to the Caption; and he said that Inhabitants of a Town, might take Goods by such Name, and so might a Member of a Corporation; and he prayed Judgment for the Defendants.

Tremain econtra; and he said that the Bar was ill, and the Replication good; the Bar consists of two Parts, first the Agreement, and then the Release; but he said, that they used the Agreement but only as a Conveyance, and did not rely upon it, and therefore it is not material; and for the Release, he said that it did not extend to the Defendants, because a Man in his natural Capacity shall not take Advantage of a Release made to him in his corporate Capacity; and he said that an Inhabitant of a Town is not capable of a Release: But he said, that the Replication is good, for when he declares of a Caption on the first of March, and the Defendant pleads a Caption prætextu of Process out of the Admiralty; and the Plaintiff replies, that the Caption was ut supra, before the Process out of the Admiralty; this being of a Caption in certain, it appears to be another Caption than that the Defendant justifies, and therefore he need not say Alia, as in Trespass quare clausum fregit, the Defendant justifies for using a Way; the Plaintiff may reply, that the Trespass was in the Close out of the Way, and he need not say, that it is alia transgressio, for it appears: So in False Imprisonment, the Defendant justifies by Reason of Process, the Plaintiff may reply, and shew it to be before the Process issued, and need not say that it is alia; to which Pemberton agreed, but said that this is not a Novel Assignment; but Holt Chief Justice seemed against him in this Point, and that it is a Novel Assignment; and therefore Tremain said, he had sufficiently answered and avoided the Bar, and prayed Judgment for the Plaintiff.

Curia advisare vult; but per Holt Chief Justice, the Agreement will not aid, because but Conveyance, and they have not relied upon it; and as to the Release, he doubted if they could take Benefit of it in their natural Capacity.

Symonds *and* Cudmore; *puis.*

3. UPON a special Verdict in Ejectment the Case was such in Effect: The Father Tenant for Life, with Power to make Leases for Twenty-one Years, three Lives, or Ninety-nine Years determinable upon three Lives, Remainder to his Son in Tail, Remainder to the Father and his Heirs; the Father leases for Twenty-one Years, rendring 8 l. per Ann. and dies; the Son being Tenant in Tail, leases to J. S. for Twenty-one Years, to commence after the Determination of the former Term, rendring 10 s. per Ann. and dies during the first Term having Issue; the Issue after the Death of his Father levies a Fine, and declares the Use to himself in Fee; the first Term ended, the second Lessee enters, upon whom the Issue enters, and the Lessee brought the Action; and if it was well brought was the Question.

Agreed first, that the second Lease was not warranted by 32 H. 8. or any Power within the first Settlement; so that the only Question which remains was, if a Lease for Years made by Tenant in Tail to commence in futuro, and the Lessor dies before the Commencement, and the Issue in Tail [there being a Prior Lease in esse, so that he could not enter] levies a Fine to the Use of himself in Fee; if after this Fine he might avoid this future Lease, and enter upon the Tenant, when it commences in Possession was the Question. And

It was argued that the Issue might enter, for this being a future Interest, the Estate-tail came to him entire and compleat, and is in his Hands discharged of this future Interest, as in Case where Tenant in Tail sells the Trees, they are severed in Law, and shall go to the Executors of the Vendee; but if Tenant in Tail dies before actual Severance, they are re-united again, and shall go to the Issue in Tail, and the Vendee has lost them, because the Estate-tail is entire; and the Issue in

Tail in this Case could not enter to avoid this Lease, but the Possession of the Lessee is his Possession, and as an Entry; for these Reasons the future Lease is voidable; and though a Fine be levied, yet this has not deprived the Issue of his Election to avoid it, &c.

It was argued econtra; that Tenant in Tail was Tenant in Fee upon Condition at Common Law, and might post prolem suscitatam alien or charge, &c. that the Statute de donis had not provided for a Stranger, the which, after the Fine levied, the Issue is, but only for the Donor and the Issue; that now this is by the Fine another Estate, not within the Provision of the Statute de donis, and therefore the Issue after the Fine may not avoid the Lease no more than a Feoffee; and though at the Time of the Fine, the Election which the Issue had to avoid or confirm the Lease was in futuro, yet it was barred by the Fine, as well as a future Power of Revocation may [the which Holt Chief Justice agreed], Sid. 260. 1 Inst. 46. Com. 437. 2 Cr. Croker and Kelsey's Case; but the true Difference between this Case, and the Case of Croker and Kelsey, was because it was a future Interest; and the Issue in Tail is seised of an entire Estate, without this Term charged upon him, and he has not any Remedy to avoid this future Interest; and for this Curia advisare vult; depuis.

The Earl of Salisbury *and* Bennet *in Cancell'.*

4. THIS Day the Court gave Judgment in the Case between the Lord Salisbury and Bennet; and the Case was, Simon Bennet having two Daughters, Grace and Frances, by his Will devises to Grace and Frances his Daughters 20000 l. a-piece, to be paid them at their respective Ages of Twenty-five Years, or Days of Marriage, so as such Marriage be not before Sixteen, and so as such Marriage be with the Consent of the Lady *Clifton*, Mrs. *Bennet* his Wife, and one *Lea*, or one of them; and if either of my Daughters shall marry otherwise, then such Daughter shall only have 10000 l. without saying what shall become of the other 10000 l. and then devises the Surplus of his Estate to his two Daughters, after his Debts and Legacies paid; and afterwards

terwards devises that the Surplus of his Estate shall be laid out in the Purchase of Lands, and those Lands settled in such Manner, as he had or should settle his real Estate; and then within two Days settles his real Estate to himself in Tail Male, and then in Aid of his personal Estate, and then in Trust for his two Daughters, &c. Grace marries the Defendant in her Father's Life-time, and there was a Proposal for a Treaty in Marriage for Frances to the now Earl of Salisbury, which had no Effect; but after the Death of the then Earl of Salisbury and Mr. Bennet, the Treaty of Marriage was renewed and took Effect, and the Marriage was had with the Consent of the Mother and Mr. Lea, the Lady Clifton being dead; but this was before Frances had attained the Age of Sixteen; upon this Marriage the Lord Salisbury is paid 10000 l. but the other 10000 l. is (as was contended) forfeited by Reason of the Marriage being had before Sixteen; and if it be forfeited or not, so as no Relief can be in the Case, was the Question; and the Court unanimously decreed that the Earl of Salisbury was to be relieved in this Case; and that the 10000 l. was not forfeit.

Rawlinson said, that Conditions wholly to restrain Marriage are odious, as that a Woman shall not marry, or shall not marry before Sixty, and therefore (as in the Civil Law) are void; but that prudent Restraints imposed by Parents did bind, and that Children that neglect the Observance of them, as in Case of Consent, &c. did it at their own Peril, and ought not to expect Relief here: And therefore he took it to be very plain, that where a Devise of a Portion was upon Condition, that if the Devisee marry with the Consent of A. B he gives her 10000 l. and if she marry without the Consent of A. B. &c. then the Portion to go over to J. S. that if she marry without Consent J. S. shall have it, and there would be no Relief, and so he thinks it would be, if it were to cease and no Devise over; but here in this Case there is a positive Devise of 20000 l. to be paid at the Age of Twenty five or Marriage, so as it is an Interest immediately vested, and to be defeated by a Condition subsequent, which ought to be taken strictly; now how far this Condition shall be extended to defeat this Interest is the Question: So as such Marriage be not before Sixteen,

teen, and so as such Marriage be with the Consent of, &c. this is the Restraint; now the defeating Part is, and if either of my said Daughters marry otherwise, then such Daughter, &c. Now this Part being otherwise, and not sooner and otherwise, otherwise shall be taken to refer to the last Part of the Clause, and to be intended otherwise than without Consent, and so the defeating Part to be tied up to the Consent, which was had, and the Time but a Circumstance; which if he would have had material, he would have expressed it in another Manner, and have said sooner or otherwise. He observed further in this Case, that the personal Estate was sufficient to discharge Debts and Legacies, and put Lady Pawlet's Case, where a Sum is devised to be raised out of Lands for a Daughter's Portion, and the Daughter dies, that there her Executors or Administrators shall not have it; for it being given as a Portion, and to prefer her in Marriage, and she dying so as there can be no Need of it, it shall not be raised; and he said that in this Case it being a testamentary Matter, they ought to observe the Rules of the Civil Law; and that if my Lord had sued in the Ecclesiastical Court, [as he might if they had not granted an Injunction, because the rest of Mr. Bennet's Estate was in Question here before them] he would have recovered the whole 20000 l.

Hutchins seemed to think, that if sooner had been in, that it would not have made an Alteration, for that it was but a Circumstance of Time, but that the Consent was the material Care of Mr. Bennet; and further that Mr. Bennet, after this Will made, entred upon the Treaty for the Marrying of his Daughter, which was a Sort of Dispensation to that Part of his Will; and instanced the Case of the Lord Feversham, who upon the Marriage of a Daughter of Sir George Sonds, late Earl of Feversham, was by Agreement to have 3000 l. per Ann. when the present Lord Feversham settled 2000 l. per Ann. for a Jointure; the Estate in Possession of the Lord Feversham was nothing but Holdenby, which is about 800 l. per Ann. but he had Pensions in Ireland to commence in futuro, which being sold, would amount to what would purchase 2000 l. per Ann. the Marriage took Effect, and afterwards the Lord Feversham was upon Treaty to sell his Pensions, in Order to the Purchasing and Settling the

the 2000 l. per Ann. the then Lord Feversham hearing of it, told him that these Pensions not being in Possession, they would not sell for so much, as when they came into Possession, and so advised him not to part with them yet, and he accordingly forbore, and then his Wife dies, and the then Lord Feversham dies; and the present Lord Feversham prefers his Bill against Mr. Watson, who married the other Sister, and was the Daughter and Heir of Sir George Sonds; and it was decreed in this Court, and afterwards affirmed in the House of Lords, that the Lord Feversham should have an Execution of the first Agreement, and that this was a Dispensation in Sir George Sonds of the Agreement for the Present which should not prejudice the Lord Feversham; so he said in the present Case, this Treaty of Mr. Bennet's for his Daughters Marriage before Sixteen, was in Effect a Dispensation with the Restraint of his Will; and he said it would be the hardest Case imaginable to make this a Forfeiture, for that she married before the Age of Sixteen, for the Time was but a Circumstance, the main Care and Provision of Mr. Bennet was the Consent, which was had, so that she paid a true Observance and Obedience to her Father's Will; the only Fault is, she did it too soon, which he thought in this Case should not hurt her; and instanced in the Duke of Southampton's Case, where it was likewise provided that the Lady should not marry before Fifteen; and yet there was a Marriage at Nine, and after confirmed at the Age of Consent; and he likewise cited the Lord Derby's Case in this Court, to the Point to which Rawlinson cited Lady Pawlet's Case, and said it differed from Lady Pawlet's Case: But he conconcluded that the Lord Salisbury being Plaintiff, and seeking Equity, ought to do Equity, and therefore desired that my Lord would be pleased to consider of a fitting Settlement, suitable to what he had and should receive; and that when the Master had considered of it, they would then make their Decree: But from what Time my Lord should have Interest, whether from his Lady's Age of Sixteen, or from her Marriage or not, was not spoke to by the Court, for that it had not been debated at the Bar, and had not been considered as Part of the Case; and he gave Time to speak to that Part.

Cothurn *verſ.* England *and* Binch.

5. UPON Motion in Arreſt of Judgment, after a Verdict for the Plaintiff in Trover, the Exception taken was, that the Declaration was de una longa menſa cum pluteis & abicis culinariis, Anglice, a long Table with Shelves and Dreſſers, which is uncertain, becauſe it does not ſhew how many Shelves and Dreſſers, and therefore the Jury could not know for what to give Damages; non allocatur, but the Plaintiff had Judgment, for after a Verdict, it ſhall be good, if by any Poſſibility it may be; and here it was ſaid, that the Uſage at Worceſter where the Caſe was, is to make a Table with Back and Shelves, and under it Cupboards, in the Nature of a Dreſſer, for the Keeping of Braſs and Pewter; and the Court ſaid, that it ſhall be intended to be deſcribed and proved to the Jury.

Term. Trin.

3 Will. & Mar. R. B.

Lee *versus Dr.* Oxenden.

1. THE Plaintiff being a Proctor in the Arches, and suspended by the Defendant, prayed a Mandamus for Restitution; and it was returned, that he was admitted a Proctor at Doctors Commons, and took an Oath to observe the Laws and Canons of the Archbishop, &c. and that by Arundel Archbishop of Canterbury it was enacted that no Proctor should commence any Suit without the Advice of an Advocate, and shews that Lee commenced a Suit without Advice; and besides, that he was taxed 10 s. to the Repair of the Hall, and the other publick Buildings of Doctors Commons, which he refused to pay; and for these Reasons he was removed.

And it was argued against the Return, and two Points were made, First, If a Mandamus lay. Secondly, If the Matter returned that the Archbishop is Visitor of the Court of Arches, and has Power to examine and rectify all Abuses there, be sufficient; and as to this the Court seemed clear, that the Archbishop could not examine the Proceedings or Acts of the Arches, as a Visitor, for the Judge of the Court of Arches is his Deputy, and the Judgment is by his Authority, and all that the Dean of the Arches does, is by the Authority of the Archbishop; and then if an Appeal lies to the Archbishop, or if he has an Authority to examine the Acts of the Arches, this would be to appeal from an Act by one Authority, to the same Authority, scil. from the Dean of the Arches, who

has the Authority of the Archbishop, to the Archbishop himself, the which cannot be; and as to the first Point, the Court gave a Day to hear another Argument, tho' they enclined that a Mandamus does not lie, for this is an Office or Imployment of which the Courts of the Common Law could not take Notice, and the Case of the Steward of the City Works reported, 2 Sid. was cited; and it was urged that this was the first Mandamus that ever was granted for a Proctor, and it was hoped that it would be the last: Curia advisare vult.

Luton *and* Bigg; *devant.*

2. THIS Term the Court gave Judgment in this Case, and resolved unâ voce, that an Innkeeper is not such a Person who is described within the Statute of Bankrupts; and also that the Plaintiff having a Share in a Ship, and a Stock there for Trade, it does not make him a Trader within those Statutes; and first, that an Innkeeper is called in the Law Communis Hospitator, the which signifies the Nature of his Office and Imployment, scil. he is a Person who receives Travellers, and provides Lodging and Necessaries for them and their Horses, and Attendants, and employs Servants for this Purpose, and for the Protection of the Travellers lodging in his Inn, and of their Goods; so that he is by this distinguished from other Traders. Secondly, An Innkeeper does not sell by Contract, but delivers his Goods to his Guests as they require; and if he takes an excessive Price he may be indicted, the which other Traders cannot, and he is under the Correction of the Justices; and if he is situated in an inconvenient Place, or misgoverns his Inn, and harbours Persons of ill Fame and Behaviour, he may be suppressed, as Hutton 100. for he is in the Nature of a publick Person, and his House and Occupation a Thing of Necessity, and his Gain does not rise from the Victuals which he sells, but from his Furniture and Attendance, as well as from his Meat and Drink, Hay and Oats; also he is bound to sell for a reasonable Price, the which other Traders are not; and therefore he differs from a Common Trader. Thirdly, It is found that he bought Hay and Oats, and

other Provisions, and uttered them in his Inn; per quod, he gained his Living, so that this is a Trading to a particular Purpose, and in a particular Manner, and makes him a general Trader, and then he will not be within the Statutes, as was adjudged in Sir Thomas Littleton's Case, per Hale Chief Justice, &c. tho' the Counsel of great Learning and Ability were of another Opinion; yet clearly per Hale the Buying of Victuals for the Use of the Navy, though by it he had gained great Credit, and incurred Debts to a great Value; and tho' it was found, that he had usually sold Victuals to others besides the King, when the Navy was sufficiently served; yet because that his Contracting was for a particular Purpose and Design, scil. for the Use and Service of the King, and to be expended in his Fleet; this would not make him within the Statutes of Bankrupts, though sometimes he had sold his Provisions which were Surplusage to others than the King. And upon the Authority of this Judgment, it was also lately adjudged, that a Gunfounder was not within the Statutes of Bankrupts, because this was also for the Service of the King, and delivered to his Use; and one might make a Steward of an Inns of Court, or a Schoolmaster, a Trader within the Statute, as well as an Innkeeper, which no Man ever pretended to do; for a Schoolmaster has considerable Gains, and Buys and Sells all that he spends, and by Reason of his Imployment gains great Credit from his Butcher, his Baker, and his Brewer; also he agrees for his Price, and has Liberty to refuse or take whatever he will, the which an Innkeeper has not, and yet plainly he is not within these Statutes: And as to the Objection, that a Shoemaker is within these Statutes, yet great Part of his Gain is by his Labour, and not by Buying and Selling; it was answered per Holt Chief Justice, that his Labour is in Melioration of his Commodity, and this remains the Thing it was when it was bought, but only made useful, and fit for the Buyer; so that he buys Leather, and sells Leather, and has Profit by it; but the Gain of an Innkeeper differs, and is quite of another Nature. And as to the Difference of an Innkeeper in London, and in the Country, per Holt he did not see any Difference, for though an Innkeeper in the Country be a Farmer, and does not buy his Hay and Oates, yet

he buys Meat and Bread, and other Necessaries, as well as an Innkeeper in London; and he said, if it be well observed, it is resolved in the Case of Crisp and Prat, that an Innkeeper, quatenus an Innkeeper is not a Trader within the Statutes; but there Jones was of Opinion, that because it was found, that he gained his Living by Buying and Selling, that this made him a Trader within the Statutes, for he might be a Trader out of his Inn; and he said, that the Case in Jones is misprinted, and a Word omitted. As to the second Point he said, that the having a Part in a Ship would not make him a Trader, and cited Worstenholm's Case, and the Stock is not material, he not having employed it in Trade; and he said also that the Imploying of a Sum by Way of a Venture in Trade, would not make a Man a Trader; and so by all the Court seriatim it was adjudged for the Plaintiff; and in this Case per Eyres Justice, Inns are within the Statutes of Alehouses. 1 Bulstr. 109.

The King *and the City of* London; *depuis.*

3. SIR James Smith prayed a Mandamus to be restored to the Office of Alderman, in the City of London; and the Return was, that he was an Alderman of London 1 Feb. 1688. in Officium illud debite elect' secundum usum & consuetudinem civitat' præd', and then shew'd the Acts, &c. and that he had not taken the Oath of Allegiance, &c. secundum exigentiam of these Acts, &c. and so his Office void.

Pemberton argued, that the Return was not sufficient, and he considered first the Judgment against the Charter, secondly, the Statute of 1 Will. & Mar. which requires all Persons in Office to take the Oaths; and thirdly, the Stat. of 2 Will. & Mar. which restores the Officers of the City, and confirms their Acts and Proceedings after the Judgment against the City; and he said that it appeared by the Return that Sir James Smith was an Alderman elect' secundum usum & consuetudinem Civitat. the which must of Necessity be understood that he was an Alderman before the Judgment, for that by the Judgment he was ousted of his Office, and had neither jus in re, nec jus ad rem; and then secondly he was not obliged to take

take the Oaths by the Stat. of 1 Will. & Mar. for this does not extend but to those who are in Possession of the Office; and therefore if a Man has one Office in Possession, and another in Reversion, he is not obliged to take the Oaths for the Office in Reversion; for when he is admitted to his Office in Possession, is the Time in which he ought to take the Oaths. Thirdly, He said that this appears by the Stat. of 2 Will. & Mar. which has appointed a Time for those who are restored or continued to take the Oaths, scil. at the next Term. And then he put the Case of Sir James Smith upon all the Points together, scil. he was an Alderman before the Judgment against the City, and by this Judgment he was ousted of this Office, and that the Statute of 1 Will. & Mar. required all Persons in Office to take the Oaths upon a Penalty, &c. and after the Statute of 2 Will. & Mar. restores those who were ousted, and confirms those who were put in, except those who surrendred, or were removed for just Cause; and he said the Exception did not extend to Sir James Smith, for he did not surrender, neither was he removed for just Cause; for he was not obliged to take the Oaths, because he was not in Possession of the Office.

Solicitor General econtra. He said that the Court ought to take all the Matter contained in the Return to be true, and not to take Conusance of any Matter out of the Return; and he said that it appeared by the Return that Sir James Smith was an Alderman the first of February, and that he had not taken the Oaths the first of August following, and so removed for good Cause; he also said, that the Act of 2 Will. & Mar. as to the Reversal of the Judgment was a publick Act, but as to the other Clauses it was not so; but Curia econtra, and that it is a publick Act throughout; and the Court said, that the Rule that all the Matter contained in the Return is to be taken as true, does not hold in this Case; for here the Matter of the Return appears to the Court to be false, for it is said, that he was an Alderman the first of February, debite electus secundum usum & consuetudinem Civitat' præd', the which appeared to them judicially to be false, for he could not be an Alderman secundum usum & consuetudinem Civitatis, when the Judgment was in Force, which had dissolved the Corporation,

ration, and seised all their Liberties: Et per Curiam, if they had returned, that he had been an Alderman the first of February, virtute chartæ Jac. 2. as they might, it may be that this had been better for the City; for then it had appeared, that he was in Possession of the Office for which the Mandamus is brought, though in a later Right, and not in his former and elder Right; and then peradventure the Forfeiture of his Office, of which he was in Possession in Right of the Charter of Jac. 2. had drawn with it the Forfeiture of his Right to his Office of Alderman, by that Charter, which was dissolved by the Judgment: As in the Case of Sheffeild and Ratcliff, where Tenant in Tail, by Discontinuance forfeits not only the Estate which he had in Possession, but also the Right of another Estate-tail, which he had by an elder Title; and therefore per Curiam, the City might have made this better for them, if they had returned Sir James Smith Alderman de facto as he was, virtute chartæ Jac. 2. but this not being in the Case, because not within the Return, the Case rests only upon his Right which was dissolved by the Judgment; and then it would be hard to construe Sir James Smith to have lost his Office, because he did not take the Oaths between the first of February, and the first of August, when he had not the Office, or any Remedy by which he might obtain it, for he could not have any Action or Means to be restored, though the Corporation had a Means to be restored upon a Writ of Error; and therefore this Case will differ from the Case of him who has a Right to an Office, and a Remedy to obtain it; but because the Counsel for the City desired to speak to it again, curia advisare vult.

Term.

Term. Mich.

3 Will. & Mar. R. B.

Glover *and* Cope ; *depuis.*

1. AN Action of Covenant was brought upon a Covenant in a Lease of a Copyhold Tenement; and upon Demurrer to the Plea of the Defendant, the Case was ; A Copyholder in Fee leases for thirty-one Years, according to the Custom of the Manor, and the Lessee covenants to repair the Tenements demised ; the Lessor surrenders to J. S. and the Lessee also assigns to J. D. of which Assignment the Lessor had Notice before he surrendred to J. S. and accepted the Rent from J. D. and after the Assignment to J. D. he suffered the Tenement to be in Decay, upon which J. S. brought Covenant against the first Lessee, and he pleaded the Assignment to J. D. and Notice and Acceptance of the Rent by the Lessor before his Surrender to J. S. upon which the Plaintiff demurred. And

It was argued by Northey that the Action well lay : First, That this Action well lay at Common Law, for in this Case the Copyholder had a Reversion, as is agreed in the Case of Swinnerton and Miller in Hobart ; and by the Surrender of the Reversion the Land passes, and the Rent also as incident to the Reversion, and Debt lies by the Assignee for the Rent according to common Practice and Experience. Secondly, The Surrendree is Assignee to the Lessor, and is in en le per, as is resolved 4 Rep. 27. b. and the Lord is but an Instrument in such Case, scil. where the Surrender is to the Use of another and his Heirs ; and if in such Case he

is an Assignee, then he may maintain such Actions, as an Assignee at Common Law may; and by the Common Law the Assignee of a Reversion may maintain Covenant, for such Covenant which runs along with the Land, as in this Case; and for this he cited Spencer's Case, the Case of an Abbot who covenanted with the Lord of a Manor to find a Chaplain, &c. 5 Rep. 16, 17. and 1 Saund. 238, 239, 240, &c. and 1 Roll, 360. Bret and Cumberland's Case was cited to this Purpose also by Eyres Justice, and by Northey, though here the Lessee had assigned, so that there was no Privity of Estate or Contract between him and the Assignee of the Reversion; yet the Action was maintainable, because a Contract by the Lessee and his Assigns, with the Lessor and his Assigns; so there is an express Undertaking by the Lessee, and not like to a Covenant which is created by Construction of Law, in which Case it shall not extend to him who has not the Estate, but shall go with it; and he said that in Walker's Case, Covenant lay after Acceptance of the Rent from the Assignee of the Term, the which is not maintained upon Privity of Estate or Contract: But if this was not maintainable at Common Law, it is within 32 H. 8. for this is a remedial Law, and according to the Rules in Heydon's Case, 3 Rep. 8. it is to be construed benignè; and also he said that in all Cases of general Statutes, Copyholds shall be within the Statutes, except a Prejudice accrue to the Lord, or there be an Alteration of the Custom, or such Inconvenience which is not in our Case, but rather an Advantage to the Copyholder and the Lord also, by giving a Means to compel the Sustentation of the Copyhold; otherwise if a Lease be once made, the Copyholder would be without Remedy, and his Copyhold would be forfeited for Waste, and he would not have Power to prevent it; and he said that antient Statutes had given Remedy by general Words to Copyholders, and mentioned the Statute of West. 2. of Cui in vita, and 1 Inst. where the Wife is endowed by Custom, she shall have Remedy within the Statute of Merton; and he said, tho' Copyholds are not within the Stat. 32 H. 8. as to Entries for Conditions, yet an Action of Covenant lies; and he mentioned Calli's reading upon the Statute of Sewers, where Copyholds are held to be within the Statute of Sewers to be taxed, but not to be sold; and he said that Copyholds are general and of great Extent,

and it would be mischievous if an Action of Covenant did not lie in such Case; and he cited the Case of Beal and Brasier, 2 Cr. 305. Yelv. 222. and 1 Cr. 24, and 44. and Rowden and Malster's Case; and he said that none of them were settled Resolutions, but only suddain Opinions, and the Reason of them failed, and so by Consequence their Authority; and he said that this Case was the stronger, being in a Lease by Custom; and as Custom warranted the Lease, it ought to warrant all the Incidents to it, as Covenants and Conditions for Re-entry, &c. and he prayed Judgment for the Plaintiff.

Cooper for the Defendant. He did not argue the Case upon the Common Law, but that it was not within the Statute, and said that it was but an Estate at Will in the Eye of the Law, and therefore Covenants and such Incidents did not belong to it; and he said that it was not the Intent of the Statute of 32 H. 8. to extend to Copyholds; and that in the Case of Hill and Grange in the Commentaries, there was a long Debate, if the Statute extended to the Assignees of other Persons than the King, and this was in the Time nearest to the Statute; and he cited the Case of Beal and Brasier, as a Case in Point, and concluded for the Defendant.

Holt Chief Justice at first enclined against the Plaintiff; but after He said that if Copyholders were enabled by Custom to demise, it is reasonable to conclude that they may covenant, and make Conditions for Re-entry, and other Provisions which are commonly in Leases. And Dolben said, that there never was any Resolution in the Case of Plat and Plummer, and in that Case it was there agreed by the Judges, that any of the Points in the Case were never resolved; and therefore the Case at the Bar is entire, and the Point never adjudged: And Holt said, that the Recoverer is an Assignee within the Statute, and yet he comes in en le post; and Eyres said, that in the Case of Bret and Cumberland, 1 Roll, 360. it is resolved in Point, that an Assignee might maintain an Action of Covenant at Common Law. Curia advisare vult; puis.

Adriel Mill's *Case*.

2. UPON a Motion for a Prohibition the Case was, Hill made Mills his Executor, and after Mills became a Bankrupt, and upon this being cited into the Prerogative Court, and there ore tenus examined, if a Commission of Bankruptcy was awarded against him; and he answered, that there was; and the Court there revoked the Probate, and committed Administration, as it was agreed they might, in the Case of Lunacy, or other natural Disability; but in the Case here, the Court was clearly of Opinion, that the Revocation is void, and that the Testator having trusted him, Bankruptcy is not such a Disability, but that he may continue Executor, this non obstante; for the Testator's Estate is not liable to be assigned by Commissioners, but remains subject to the Trusts in the Will; and a Man having made his Executor, and dying, shall never be said to die Intestate, as long as he has an Executor alive, who will intermeddle, and has proved the Will; and therefore tho' after a Sentence and Appeal brought, the Court granted a Prohibition, it being twice moved.

Speak *and* Kent.

3. IN an Indebitatus assumpsit against an Executor, who pleaded three several Judgments; the Plaintiff replied, and made three several Replications, and shews that one was but for such a Sum, and kept on Force by Covin, &c. and to these several Replications, the Defendant made but one Rejoinder; upon which the Plaintiff demurred, because this deprives the Plaintiff of the Benefit which he might have; for now if he would surrejoin, and say, that separalia judicia are kept on Force by Covin, and proves that one only was, and the other not, it would be against him; the which the Court denied, for by Holt Chief Justice in Case of a special Issue, as in this Case, if Part be found for the Plaintiff, it is well enough; for if the Plea of the Defendant is false in Part, it is false in the Whole; and though the Case of

Symons and Warkworth was cited, and other Cases, yet Holt Chief Justice seemed to incline, that the Pleading here was well enough; and Dolben was of the same Opinion; but per Holt Chief Justice, when a Man pleads the general Issue, there all ought to be true, and found for the Defendant, as in Debt, Nil debet, or Non debet the Sum, vel aliquem inde denarium, so upon Null wast fait: But in Debt upon an Obligation with Condition to do Waste, and a Breach assigned in succidend. 40 Ashes, and Issue joined upon it; if the Jury find but Ten, it is against the Defendant; but the Court in the principal Case directed the Parties to wave the Demurrer, and try the Honesty of the Cause upon an Issue, &c.

Hannam *and* Woodford.

4. IN Ejectment upon a special Verdict the Case was, The Conusee of a Statute extended it, and a Liberate returned executed, and Possession given, and after the Conusee assigns; but the Tenant continues always in Possession, and the Conusee never entred actually, but only the Liberate was returned executed; and if this amounted to such Possession, that the Assignment was good; or if the Continuance of the Possession, as before, had put the Estate of the Conusee to a Right; and so the Assignment void, was the Question.

And by Holt Chief Justice, and Eyres clearly, there ought to be an actual Entry and Continuance of the Possession; and Holt said, that the Liberate being returned executed, this is an actual Possession in Law; as the Return of an Habere facias seisinam upon a Recovery, the Parties are estopped to say the contrary; but when he who was in Possession continues it, this amounts to an Ouster, which turns the Estate of the Conusee to a Right; as in the Case of Continual Claim upon a Disseisin, the Estate is revested by the Continual Claim; but if the Disseisor continues in Possession, this amounts to a new Entry and Desseisin, and puts the Estate gained by the Continual Claim to a Right, and so in the present Case; and this differs from the Case of an Assignment of a Lease for Years upon a Mortgage, for there the Mortgagor is quasi Tenant at Will, and his Possession is the

Possession of the Assignee; and this is by Agreement, the Mortgagor paying the Interest; but it is not so here; and therefore, &c.

Thomas *and* Howell; *depuis.*

5. A Writ of Error was brought upon a Judgment in the Grand Sessions in the County of Carmarthen in Wales in Ejectment, where the Case was; Zachary Thomas seised in Fee of the Manors of D. S. and V. and having three Daughters, Jane, Mary, and Sarah, by his last Will devises D. to Jane, and her Heirs for ever; Provided, That she marry my Nephew *Theophilus Thomas*, at or before she attain the Age of twenty-one Years; and this Estate was of the Value of 200 l. per Annum, or more. And if she refuse to marry my said Nephew *Theophilus*, or be married to any other before she attain the Age of Twenty-one; then he devises *D.* to his second Daughter *Mary*, and to her Heirs; and he devises S. to Mary and her Heirs, with the like Limitations, and V. to Sarah and her Heirs; and then he said, Provided, And my Will is, that if neither of my said Daughters shall be married to my said Nephew before their respective Ages of Twenty-one, then I devise the said Estates of *D.* and *S.* to my Wife, and five other Trustees, and they to sell and dispose of the same, and the Monies raised by such Sale, to distribute among his said Daughters, as they shall think them deserving; and it is further found by the Jury, that Theophilus died, being an Infant of twelve Years of Age, Jane the eldest Daughter being then fourteen Years of Age; but that Theophilus never demanded her Consent, or that she ever refused to give it; and then they made a special Conclusion, that if the Entry of the Defendant was lawful, then they found for the Defendant, if not for the Plaintiff, &c. and not according to the usual Way, according to the Issue upon Not guilty pleaded; and Judgment was given for Jane the eldest Daughter, who was Defendant by her Guardian, upon which a Writ of Error was brought.

And

And it was argued by Dobbins for the Plaintiff in the Writ of Error; and the Question in this Case depended principally upon the last Clause, which he said was a distinct Clause of it self, without any Relation to the two precedent Clauses; but upon the two precedent Clauses, he seemed to admit, that the Estate of Jane was not determined, for she did not refuse to marry him, or had married to any other, and so had not forfeited her Estate within the two first Clauses; but this notwithstanding, if this was not determined by the Words of the third Clause was the Question; and he said that it was, and that his Intent was, that if Jane or Mary did not marry his Nephew Theophilus, so that the Estate continued in his Name, that then the Estate and Advantage which he intended for Jane his eldest Daughter should cease, and that his Trustees should make an equal Division amongst all his Daughters, as they should judge fit, for he did not intend any Advantage to Jane, but upon a Supposal, that she would be married to his Nephew, and so the Estate continue in his Name; but if it shall happen that the Estate shall not continue in his Name, that then there shall be an equal Division.

Bonithan econtra. And he said that here is an Estate absolute at first vested in Jane and her Heirs, and that it is plain that it is not determined by the first Proviso, which is annexed to it, for that is become impossible by the Act of God, and so the Estate become absolute; and if it is not determined by the first Proviso, it is not by the Second; for it is found, that Theophilus neither demanded her Consent, or that she refused, or was married before Twenty-one. And as to the Third he said, that the Construction ought to be made upon the whole Will, and then the third Proviso would be tantamount as if it had been; and if neither of my said Daughters shall consent to marry my said Nephew, the which they could not do when he is dead, and therefore the Will of the Testator being taken entire and together, is become impossible to be performed by the Act of God: And he supposed that Theophilus had refused to marry Jane, and had married Mary, what will become of the Estate of Jane? and he insinuated that it would determine according to the Construction, which is maintained on the other Side; but

as to this Holt Chief Justice was of Opinion that Jane would retain her Estate absolutely, for there would be no Fault in her within the two first Provisoes; and the last Proviso is, And if neither of my said Daughters shall be married, &c. and here Mary is married to Theophilus. Curia advisare vult; depuis.

Lewis *and* Preston.

6. IN an Action of Debt upon a Bond, the Defendant demands Oyer of the Condition, &c. and pleads that certain Letters Patents granted to the Plaintiff, and recited in the Condition, Vacuæ devenerunt ante diem solutionis (scil. 13 Dec.) pecuniæ, &c. & adhuc vacuæ existunt; & hoc parat. &c. The Plaintiff replies, that Literæ patentes prædict', &c. à tempore confectionis usque ad levationem querelæ prædict' in pleno robore & vigore existebant & adhuc existunt, & hoc petit quod inquiratur per patriam; upon which the Defendant demurred, because the Plaintiff ought to have concluded, prout patet per Recordum; but per Curiam the Plea is ill, for the Defendant is estopped to say, Quod non fuerunt literæ patentes by the Condition; then when he takes upon him to say, Quod vacuæ devenerunt, he ought to shew how, as to say, by Forfeiture, Breach of Condition, Death of the Patentee, or other Cause; to which the Plaintiff might have made a particular Answer, but as he has pleaded, it is too general, and Judgment was given for the Plaintiff.

Tucker *and* Hodges.

7. IN Replevin the Defendant avows; and the Plaintiff replies in Bar to the Avowry, and says, That King James the First was seised, &c. and granted to Sir Nich. Bacon, who granted to J. S. Que Estate by diverse mean Assignments came to J. D. and he put in his Beasts, &c. upon which Plea it was demurred; because tho' the Plaintiff in Debt might plead a Que Estate in the Defendant generally without shewing how, according to the

Case

Case of Coates and Wade; yet where a Man claims under a Que Estate, there he ought to shew the several Assignments, for in such Case the Defendant may traverse any of the Assignments, as to say, Quod benè & verum est, that Sir Nich. Bacon granted to J. S. who surrendred to the Lessor, and after the Lessor granted to him, absque hoc, that J. S. assigned to J. D. but by such general Pleading of a Que Estate, such Advantage is lost; and in this Case, the Plaintiff ought to shew that he put in his Cattle by the Licence of J. D. and if this be needful, it is also necessary that he derive a Title to him; and though it was objected, that here is an Estate pleaded in a third Person, paramount the Title of the Avowant, therefore the mean Assignments after not necessary to be shewn; the Court was of a contrary Opinion, causâ quâ supra, and gave Judgment for the Avowant. Vide le Case of Stackman and West, Cr. Jac. 673.

Term.

Term. Hill.

3 Will. & Mar. R. B.

Glover *and* Cope; *devant.*

1. THIS Case was argued again by Levinz for the Plaintiff, and he made two Points, First, If the Action be maintainable at Common Law. Secondly, If not, yet that it is within the Statute of 32 H. 8. he said that this Covenant runs with the Reversion, as well as the other runs with the Land, and instanced 42 E. 3. 3. and 9 H. 6. 16. 5 H. 7. 19. and 1 Cr. 137. and also cited the Case of Laugher and Williams, adjudged 25 Car. 2. where the Lessee covenanted with the Lessor his Executors, Administrators and Assigns, (without the Word Heirs,) yet adjudged that an Action of Covenant was maintainable by the Heir, though not named; and he said, if it was not maintainable at Common Law, it is within the Statute of 32 H. 8. and he shewed of what Consideration Copyholds were before this Statute, as appears, Litt. Sect. 77. Keilw. 77. Owen 73. and the Books there cited; and a Copyholder may pray in Aid of the Lord, and he took the Rule in Heydon's Case to expound what Statutes are to be extended to Copyholds, and what not; and he said that the same Parliament included Copyholds within the general Words of the Statute of Maintenance, and therefore they ought to be included within the Statute of Conditions; he said that the Lord is not prejudiced, and that this is a remedial Law, and ought to be taken beneficially; and

as to the Cases of Beal and Brasier cited before, and Rowden and Malster, they were not upon Argument and solemn Debate, but only the one, scil. Beal and Brasier was a sudden Opinion, and the Practice throughout all England is contrary to the Resolution of the Case of Rowden and Malster; and so also was the Opinion of Hale Chief Justice; and the Use now is generally to intail Copyholds, and for Tenant in Tail to commit Forfeitures, and for the Lord to enter and grant over, &c.

Roe econtra. And he said that a Copyhold in its Nature is merely a Tenancy at Will, and that it is not of greater Consideration in Law, 3 Cr. 623. that it is not transferable, but in a particular Manner by Surrender to the Lord; and if he retains it, and does not admit according to the Surrender, the Surrendree has not Remedy by the Law; and if the Surrendree enters before Admittance, he is a Disseisor. And as to the Cases cited, they are all either Actions for Rent, or by the Heir, in which Case without Question they are maintainable, because incident to the Reversion; but here it is merely a collateral Covenant as to the Estate, and a Chose in Action, which is not assignable; and he said that a Copyholder is not in the Per, as 4 Rep. 27. b. but in the Post as Hobart 178. and he said that a Lease for Years of a Copyhold is of another Nature than a Lease for Years at Common Law, for if such Lessee commit a Forfeiture, the Lord shall take Advantage of it, and not the Lessor, otherwise of a Lease at Common Law; also the Copyhold is not that out of which the Lease is derived, but it is derived in a Manner out of the Frank Tenement; and therefore when it is dismembred from the Manor, it may not be granted over any more as a Copyhold; and he compared it to the Case of Chaworth and Philips, Moor 876. where Lessee for twenty Years, leases for ten Years, and surrenders; the Lessor shall not have Advantage of the Condition, &c. because paramount the Estate of the Lessee for ten Years; so here, when the Lessor of the Copyhold surrenders, the Reversion is drowned in the Frank Tenement, and the Assignee as to this Purpose is in paramount. He said that no Statute extends to Copyholds, which touches the Estate of a Copyholder; but Statutes which restrain or punish Torts, as Maintenance, Forgery, &c. being pro bono publico, they extend to

4 them;

them; he said that in this Case, there is neither Privity of Estate, nor Privity of Contract; and therefore it would be hard to charge the Defendant, and against Equity; and therefore, &c.

Curia econtra. For Holt Chief Justice said, though the Assignee be in en le post, he may be within the Statute of 32 H. 8. as the Bargainee or Recoveror is; he said there is not any Prejudice to the Lord, or any other to construe Copyholds to be within the Statute of 32 H. 8. and that this is only regarded in all Constructions of Statutes, scil. if the Lord has a Tenant imposed upon him, or be prejudiced in his Fine, or there be any Alteration of Tenure, &c. the which would not be in this Case, but rather an Advantage to the Lord, by preventing the Ruin and Decay of Copyhold Tenements, and therefore he adjudged for the Plaintiff; and Dolben said as to the Case of Rowden and Malster, 1 Cr. that it is not Law, and that Hale would not permit a special Verdict to be found upon this Point; and said that though Copyholds might be entailed, they might be docked by Surrender. 1 Inst. 60.

Parker *and* Harris.

2. IN an Action of Debt for Rent upon a Demise; and the Plaintiff declared that he the 25th Day of March, &c. demised unum Messuagium super acclivitatem Hampstead-Hill, Habend' for Years; and declares upon another Demise 1 May, &c. of another Parcel of Land, Habend' at Will, reddend' secundum ratam of 18 l. per Ann. and for Rent arrear, &c. the Defendant pleaded that the Plaintiff tempore dimission' particularium nihil habuit in tenementis; the Plaintiff replied, that the Lord Wootton was seised, and demised to him for forty-one Years; and he being so seised the said first Day of May, demised to the Defendant, &c. upon which the Defendant demurred, and adjudged in Communi Banco for the Plaintiff; upon which a Writ of Error was brought.

First, Because super acclivitatem Hamstead-Hill is uncertain, in what Place it is; for it is not a Vill, Hamlet, or Lieu conus, but an Accident, and no more than if he had said, upon the Fertility or Sterility of Hamstead-

Hill; and it does not appear to be Part of the Vill, or within the Vill, or County, as it is all one as if it was De ambulacro, which has been adjudged to be ill; non allocatur, for if a Thing be alledged in ambulacro in such a Forest, the Venue shall be from the Forest, and not de ambulacro; so here super acclivitatem Hamstead-Hill, the Venue shall be from Hamstead-Hill, which may be a Vill or Lieu conus; also if it had not been such Vill, Hamlet, or Lieu conus, the Defendant ought to have pleaded it in Abatement, and not permitted the Plaintiff to proceed. Secondly, The Reservation is ill, because secundum ratam is incertain, for it may be in such a Case that the Plaintiff shall have an Action every Day; to this it was answered by Levinz, that it being a Lease at Will, the Reservation secundum ratam of 18 l. per Ann. is well enough; for if he holds one Year he shall pay 18 l. if he does not hold so long, but the Lessor determines his Will, he shall pay secundum ratam; and to this Opinion Justice Dolben inclined; but Holt Chief Justice dubitabat. Thirdly, The Demise is alledged to be made 25 March Habendum à die datus, and the Action is brought for Rent due ad festum Michaelis, where it is not due till the last Instant; and if the Lessee be ejected upon that Day, the Rent is not due; non allocatur, for ad festum Michaelis, the Tenant being then in Possession, he shall not be intended to be ejected; and if he was, he ought to have pleaded Eviction.

And to the Replication also it was excepted; First, Because he pleads that the Lord Wootton demised to him, &c. without shewing any Title; and for this cited 2 Cr. 312. Gyll and Glass, Yelv. 227. sed non allocatur, for by Holt Chief Justice, he having shewn that he was possessed by Virtue of a Lease from the Lord Wootton, it is well enough, and more than needs; for if he was only Tenant at Will, and demised for Years, and the Defendant pleads as here, the Plaintiff might reply, that he was seised in Fee, and demised; and though it be found that he was not seised in Fee, yet it being found quod aliquid habuit in tenementis, it is found for the Plaintiff, for the Substance is found, scil. aliquid habuit; and this in Effect appears by the said Case of Gyll and Glass; for it was held but a Jeofail, and aided after a Verdict. Secondly, He said that he was possessed the said first Day

of May, by Virtue of the Demise; but he does not say that he was possessed upon the 25th of March, so as to this it is a Discontinuance; for when two Things are comprised in the Writ, and but one in the Declaration, or two in the Declaration, and but one in the Replication, this per Trinder is a Discontinuance; but per Levinz this was Surplusage, and more than needs to be alledged; and it being alledged that before the Demises in the Declaration, the Lord Wootton demised to the Plaintiff, and that he by Virtue of this was possessed the first of May; if he was possessed the 1st of May, he shall be intended to be possessed the 25th of March; and per Levinz, a Replication need not be as certain as a Count or Bar in many Cases; for if there be an Objection in the Bar, and it be sufficiently answered in the Replication, this being good in Substance, though it be not so formal, is well enough; and for this he cited 1 Cr. 138. Hob. 218. and per Holt Chief Justice, though the Replication might have been better, yet it is well enough; and then Levinz said that their Plea is ill, for being two several Demises alledged at two several Days, the Plea that the Plaintiff nihil habuit in tenementis tempore dimissionis particularium is not good; for it is incertain, and it may be, if the Issue be found upon it, that Part was in Possession, and Part not, yet in such Case it shall be found against the Plaintiff for all, [Roll, Trial 703. Winch. 49, 50.] and therefore the Plea is ill, and the Issue upon it would be complicated with two Matters, and therefore there ought to be several Issues joined; it was answered by Trinder, that tempus est nomen collectivum, and shall be taken distributivè reddendo singula singulis; but Holt Chief Justice seemed to be of a different Opinion. Curia advisare vult.

And afterwards this was argued again; and it was objected that the Action was brought for Rent due for half a Year ending at Michaelmas, where it not being reserved upon the four usual Feasts, the half Year ended the 25th Day of September, and this seemed to be a material Objection; also Holt Chief Justice ut supra seemed to think that the Reservation was ill.

Elderfey

Elderſey *and* Thompſon.

3. IN an Action of Debt upon a Bond for 36 l. the Defendant prayed Oyer of the Bond, & ei legitur in hæc verba, Noverint, &c. teneri & obligari in ſex triginta libris, and for this Variance the Defendant demurred; for by Northey ſex triginta libris being two Words, it is ſix Times thirty Pounds; and for this cited 1 Cr. where ter decem libris in two Words was held thrice Ten, ſcil. 30 l. otherwiſe if it was terdecem in one Word; but non allocatur; and adjudged for the Plaintiff.

The King *verſus the City of* London; *devant.*

4. THIS Term the Court gave Judgment in this Caſe ſeriatim; and by Holt Chief Juſtice here is a Mandamus prayed for Sir James Smith, who ſuggeſts that he was an Alderman of London, elect' ſecundum conſuetudinem, &c. upon which it is returned, that he was an Alderman as is ſuggeſted, but that he did not take the Oaths according to the Statute 1 Will. & Mar. by which his Place became void, ſo they could not reſtore him; and this Return has been argued diverſe Times before the true Queſtion was touched; for the Queſtion is, if Sir James Smith continued Alderman after the Judgment in the Quo Warranto, as this Judgment is recited in the Act for Reſtitution of the City of London; for they could not take Notice of any other Judgment in this Caſe, than the Judgment mentioned in the Act, the which is a general Law; and this Act ſays [vide the Words] ſo that by the Words, the Liberty, Franchiſe, &c. being, not of being; for per Holt, if it was of being it had been otherwiſe; for He ſaid a Corporation may be diſſolved, and ſo is his Opinion, [and ſuch was his Opinion in Domo Parium, where ten Judges were econtra;] for he agreed with Serjeant Pemberton, that it is a Body Politick, to which a Truſt is annexed, and Male Adminiſtration of it is Cauſe of Forfeiture, and

it may be dissolved; and for this he cited the Statute of Quo Warranto, where if the Corporation does not appear upon Summons, the Franchise shall be seised into the King's Hand Nomine districtionis; and if it does not come during the Eyre, it was lost and forfeited for ever, 2 Inst. 282. He said that Liberties are of three Kinds, First, Those which are antient Flowers of the Crown, as Felons Goods, &c. the which if they are forfeit, Judgment may be of Ouster or Seisure, for the King may have them again. Secondly, A Thing newly created, the which the King cannot have, as a Corporation, the which if it commits a Forfeiture, and Judgment of Ouster be given, in such Case there needs no Seisure, for to what Purpose shall there be a Seisure by the King, when he may not have it; the same Law of a Judgment of Seisure as forfeited, for this amounts to a Judgment of Ouster [otherwise of a Seisure Quousque. Thirdly, There are Things newly created, as Markets, &c. the which may subsist after Seisure by the King; and in such Case, though Judgment of Ouster be given, there shall be a Seisure for the King. But he said this Case does not depend upon the Judgment as entred on Record, but as recited, the which is, that the Liberty, Franchise and Privilege of the Corporation of the City of *London*, being a Body Politick be, &c. and He said the Franchise, &c. of a Body Politick may be seised or surrendred, and the Body it self remain untouched, as appears in the Bishop of Norwich's Case, and more clearly in the same Case after in Jones, Fulchard, and Haywood's Case; for Franchises, &c. are not essential to a Corporation, but a Privilege pertaining to it; the Essence of a Corporation is to make By-Laws, and govern their Members, &c. the which they may do, though their Franchises are seised, as the Dean and Chapter of Norwich was a Chapter to the Bishop, and therefore remains a Corporation, after their Lands surrendred; otherwise of a Corporation for a particular Purpose, as an Hospital, which by Surrender of their Land had been destroyed, before they were restrained by 13 Eliz. and for this he cited Fitzherbert, Corporation cited in the Bishop of Norwich's Case. He said the Act was not clearly penned, and if Sir James Smith had framed his Case specially, with Recital of

of the Judgment, there are Clauses in the Act which favour him; but this not being the Case, they ought to intend the Return to be true if possible, and nothing appears econtra, by the Act of Parliament, for their Franchise may be forfeited, and the Corporation remain in esse; the Word of being not being in the Act, and therefore no peremptory Mandamus ought to be awarded; per totam Curiam unâ voce.

Term. Pasch.

4 Will. & Mar. R. B.

Woodward *and* Hamersly.

1. UPON a special Verdict, the Question was upon the Statute of 1 Will. & Mar. which appoints all Bishops, &c. to take the Oaths directed by that Act before the first of August, otherwise to be suspended; and if they did not take them within six Months to be accounted from the said first Day of August, then to be deprived ipso facto, &c. A Man presents to the Church of Burton Dasset in the County of Warwick, at the Expiration of six Months, but before the Expiration of six Kalendar Months; so if the six Months in the Statute are to be accounted Kalendar Months, the Church was plena & consulta, &c. if the six Months are to be accounted according to four Weeks to the Month, and Twenty-eight Days to the Month, scil. Lunar Months, then the Church was void by the Statute, because the Incumbent had not taken the Oaths; this Case was argued by Webb of the one Part, and Sir Thomas Powis on the other, and the Cases of Inrollment, and all the Cases upon the Statutes which mention six Months, cited; by which it appears that a Month shall be intended a Lunar Month.

Powis on the other Side insisted upon Catesby's Case in the sixth Report, and the Rule there taken, that where the subject Matter of the Month concerns an Ecclesiastical Person, that the Computation shall be according to their common Understanding, the which is according to the Kalendar, and instanced in the Condition of an Ob-

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ligation to pay Money the first Day of the Term; this shall be understood the first Day in full Term, and not the Essoin-day, which is the first Day in Law; but in such Case the Law will condescend to the common Understanding of the Party; and so here, the Persons concerned being Ecclesiastical, and the Matter so also, the six Months shall be intended according to their Computation by the Kalendar; and he cited the Case of Copley and Collins upon the Statute of E. 6. for Proof of a Suggestion, as a Case in Point; and also the Statute of West. 2. where tempus semestre est tempus sex mensium, and not of half the Year, and yet sex mensium there, is to be understood according to the Kalendar; the which was agreed per Curiam.

But per Holt Chief Justice & Curiam, absente Gregory, Catesby's Case is not to the Purpose, for the Question there was upon a Deprivation, and Lapse; and this was a Matter constituted by the Canon Law, and received by the Common Law, and being received by our Law, it ought to be received according to the Construction of their Law: But in our Case we are upon the Construction of an Act of Parliament, the which ought to be construed according to our Law; and as to Sir Thomas Powis's Argument, scil. that the Matter concerns Ecclesiastical Persons, and so the Construction ought to be according to their Law; Holt Chief Justice said, within the Act, there is another Clause for Fellows of Colleges, the which are not Ecclesiastical Persons, and shall the six Months accounted for them within this Clause be Lunar Months, and by the other Clause Kalendar Months? and so the same Word in the same Act of Parliament be understood in two different Senses; he said no; Curia advisare vult; but they seemed ripe to give Judgment, that the six Months shall be accounted Lunar Months, and not according to the Kalendar; and they doubted, scil. Dolben and Eyres of Copley and Collin's Case; and Holt Chief Justice said, that this Case alone stuck with him, and notwithstanding he inclined fortiter, ut supra.

Baker *and* Lane.

1. UPON a general Demurrer the Case was, the Father seised of a Rent-Charge in Fee, in Consideration of 5 l. and of natural Affection, did give and grant this Rent to his Son; and in Replevin the Defendant avowed, and pleaded this Grant in the Words of the Grant, and shews that there was no Inrollment of the Deed, or Attornment to the Grant, upon which there was a Demurrer; and by Pollexfen Chief Justice of C. B. that he ought to have pleaded it, as a Covenant to stand seised, as it is in Construction of Law, and not ut supra; and the other Justices agreed, that it might have so been pleaded, and that this had been the better Way; but here the Question being upon a general Demurrer, and not upon the Form of Pleading, and the Matter being shewn with all the Circumstances, scil. that there was not any Inrollment or Attornment, that this ought to operate as a Covenant to stand seised of Necessity; and the Court having the Matter shewn to them, ought not to adjudge the Deed to be void, if it may be good in any Manner; and therefore Pollexfen afterwards concurred with the other Justices, and gave Judgment for the Avowant; upon which Error was brought, and it was objected to the Pleading, because not pleaded according to the Operation of the Deed in Law, but according to the Words of the Deed only; and Holt Chief Justice said, if Tenant for Life grant his Estate to him in Reversion, and this be pleaded as a Grant, it is ill Pleading, for it ought to be pleaded as a Surrender, according to the Operation of Law; and every Deed ought to be pleaded according to the Effect which it has in Law, and not according to the Words, for this would be incertain and barbarous Pleading; and He also said, that to plead this as a Covenant to stand seised, is to make the Deed of another Nature, than to plead it as a Grant; for by the Grant the Estate of the Rent passes, and the Grantee is in en le per; but to plead it as a Covenant to stand seised, the Use only passes from the Party, and the Estate is executed out of him by the Statute: Now to plead the Deed generally,

and to leave it to the Court, is to induce Incertainty; and every Man would plead his Deed to the Court, and leave them to make the best of it, where the Party ought to shew his Title certainly to the Court, and make his Election in what Manner he had taken the Estate, or supposed the Deed to operate; to which Levinz of Counsel with the Defendant in the Writ of Error in R. B. said, that Fox's Case in the 8th Report, is pleaded by the Words of Demise, set, and to farm let, (as in the Deed) the which are Words of Common Law Conveyance, yet the Court upon the whole Pleading adjudged it to be a Bargain and Sale, and upon this, and because the Right was with the Avowant, Curia advisare vult; but strongly inclined to reverse the Judgment.

Jackson *and* Savage.

3. Action upon the Case, in which the Plaintiff declared, that the first Day of May, in the first Year of the present King and Queen, he was possessed of a House, from which a Course of Water per & trans the Garden of the Defendant currere debuit, & debet, &c. the Court gave Judgment for the Plaintiff, nisi; but an Exception being taken, because he does not say, that the Water ever ran from the House, or that he was possessed of it, but only that debuit; the Court ordered it to be put into the Paper again, & advisare vult; and after this being a possessory Action, it was ruled to be well enough; and the Case of St. John and Moody was cited. Mich. 27 Car. 2. R. B. Rot. 501.

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Symons

Symonds *and* Cudmore; *devant & puis.*

4. THIS Case was argued again this Term, by Levinz of the one Side, and Shore of the other; and the Court said, they were come to a Resolution as to the first Point, scil. if this future Lease be void or voidable; but supposing it to be void, yet the second Question is, if Tenant in Tail who made this Lease, having also the Reversion in Fee in him, though it be void as to the Estate-tail, if it shall not be good, and issuing out of the Reversion in Fee; and to this Point they directed the Counsel to argue; and Levinz said that no, for the Estate which passes by the Fine is a Fee compounded of the Estates of the Conusor, and so the Estate to himself, and the Heirs Males of his Body, Remainder to his Father, and the Heirs of his Body, Remainder to the right Heirs of the Father; so that as to the avoiding Charges, and other tortious Acts of the Tenant in Tail, the Estates-tail shall be in esse, and not extinct by this Fine; and as to Sir G. Brown's Case in the 3 Rep. he said, that it is said there that the Estate-tail is extinct; but this was not the Resolution of the Case; and he cited 2 Bulstr. 42. Errington's Case econtra; and he cited Capel's Case, and Archer's Case and Chudley's Case in 1 Rep. to the same Purpose.

It was argued econtra, that the Estate-tail is extinguished in this Case, there being an Estate-tail in esse in the Conusor; otherwise where there was only an Estate by Estoppel; and Holt Chief Justice seemed to encline to this Opinion, and cited 1 Cr. 103. Holt and Sambach. Curia advisare vult.

Christy

Christy *and* Wilcox.

5. DEBT for Rent against an Assignee; & nil debet pleaded; upon which they were at Issue, and the Defendants gave in Evidence an Assignment of the Term over before the Rent incurred; it was objected that this was a fraudulent Assignment, and so void; and of this Opinion upon the Trial was North Chief Justice; but after, the Case being in Court upon many Debates, and much Litigation of the Matter, it was ruled that it might be given in Evidence, as it was cited by Pemberton. Pasch. 4 Will. & Mar. in R. B. and not denied per Curiam to have been adjudged between Christy and Wilcox.

Term. Trin.

4 Will. & Mar. R. B.

Thomas *and* Howell; *devant.*

1. THIS Case was seriatim argued by the Justices; and by Eyres and Dolben the Estate to Jane is become absolute, for there is no Default in her, she not having refused; and per Eyres, a general subsequent Clause in a Will shall never be extended further than the first Clause which is special, as in the Case of a Devise to J. S. and the Heirs Males of his Body; and if he die without Heirs of his Body, this shall be intended Heirs Males of his Body; and they said, though Jane had refused, yet there is no Reason to deprive Mary; and here Jane had not refused, and therefore there is no Default; and Dolben said, tho' the Marriage with Theophilus was an Intention, it was not his primary Intention, but that his Lands should go to his Daughters; and because Mary could not consent till Jane had refused, and Jane never refused, and so there was no possible Default in Mary, and the Trustees cannot sell, till both have refused, and therefore they were of Opinion, that the Judgment for Jane, who was the Lessor of the Plaintiff, shall be affirmed. Justice Gregory econtra: And Holt said, that he was not clear with the Opinion of Dolben and Eyres, but it seemed to him that the first Intention of Zachary was, that one of his Daughters, scil. Jane or Mary, who were of a suitable Age [for Sarah was an Infant] shall marry his Nephew Theophilus, for in every Devise he repeats it, scil. in the Devise

Devise to Jane, and in the Devise to Mary, and in the Proviso that if Jane refuses, and in the last Proviso upon which the Question principally arises; so that it seemed to him that the Marrying of Theophilus, and by this the Continuing the Land in the Family, was his primary Intention, and not to prefer his own Daughters according to their Seniority in Age, scil. the greatest Estate to the Eldest, and the second best to the Second, &c. but he said, if his Intention did not take Effect for one of his Daughters marrying Theophilus, and by this the Continuance of the Land in the Name, that then he did not intend any Preference to his Daughters, but then the Lands were to be sold, and the Money to be disposed by the Trustees, &c. but he said, that this Point was not ripe for their Resolution, but that he upon the whole Case was of Opinion, that the Judgment shall be affirmed; for the Clause that says, that if Jane or Mary do not marry Theophilus before their Age of Twenty-one, that then the Trustees may sell, does not give an Interest to the Trustees, till their Age of Twenty-one; and it appears in the special Verdict, that Jane had not attained her Age of Twenty-one, at the Time of the Ejectment brought; for He said, if a Man devises his Land to his Daughter upon Condition that she marry J. S. at, or before her Age of Twenty-one Years; and if she refuse, that then the Land shall be to another, and J. S. dies before her Age of Twenty-one, yet the other may not enter, till the Daughter has accomplished her Age of Twenty-one, and so in the present Case; for the Testator had appointed the Time within which the Condition ought to be performed, [but if no Time had been appointed, it shall be during the Life of the Party] and he having given this Time, he who is to enter for the Condition broken, has brought his Action too soon; and therefore the Judgment for *Jane* ought to be affirmed.

Anonymus.

2. UPON a Motion for a new Trial the Case appeared to be, that the Lord of a Copyhold Manor ought to repair a Common Bridge; and the Custom was, that he might take necessary Timber for this Purpose upon any of the Copyhold Lands, the which he had done, and in Trespass for it by a Copyholder, he would have given this Matter in Evidence, upon Non culp. but it was not allowed, for he ought to have pleaded it, as in Hob. 174, 175. Trespass for felling Trees; the Defendant pleaded Non culp. he cannot maintain this Plea, except the Trees were his actually before he felled them; for if he had but a Liberty to fell, he ought to have pleaded it, and not pleaded Non culp.

Term. Mich.

4 Will. & Mar. R. B.

Bartlet *and* Viner.

1. UPON Motion in Arrest of Judgment, the Case was, in an Action on the Case brought by the Administrator of Bartlet against the Executors of Sir Robert Viner, upon such a Promise made by Sir Robert to the Intestate, scil. If you will procure 15000 l. to be paid into the Exchequer upon the Aid of 12 d. in the Pound, in my Name, or the Name of such Person, as I shall direct, I will give you 600 l. *&c.* Upon the Trial a Verdict was given for the Plaintiff; and Darnell said, that the Action did not lie, because it is Brocage, and against the Statute of Usury; and it being a Promise against Law, it is not obligatory.

But upon Consideration of the Case, the Court seriatim delivered their Opinion, that the Plaintiff ought to have his Judgment, for nothing appears here in the Declaration against Law, for the Borrower does not pay Brocage, nor the Lender receive it; but the Agreement is between two Persons, not concerned but only in the procuring the Money, and this was an Advantage to the Defendant, and might be in many Cases, as if A. is in Debt to B. and cannot pay him, and B. has Occasion for his Money, or mistrusts that he shall lose it; and A. says to B. that he cannot pay him, but if he will procure C. to lend him the Money, that he will pay him; and B. says to C. that if he will lend to A. 100 l. that he will give him 10 l. this is a lawful Agreement, and not within the

Statute, for B. has a Benefit by it, and A. the Borrower does not pay any Thing; but C. the Lender has 10 l. from B. the which he is willing to abate for his own Conveniency; but the Case at the Bar is stronger, for here neither the Borrower pays, nor the Lender receives any Thing, but the Consideration is wholly between Persons not interested in the Money; but if any Thing had appeared against Law in the Declaration, or upon the Pleadings, though it was not prohibited in the Statute, but only a Penalty annexed, the Agreement is void; for tho' the Difference in Hob. 187. Jones *vers.* Jones stands, yet in every Case where a Penalty is annexed to the Doing of such an Act, though it be not prohibited, yet if such a Thing appears upon the Record to be the Consideration, the Agreement is void; for it will be ridiculous to give Judgment that the Plaintiff shall recover such a Thing, the which if he takes, he shall be subject to the Penalty of a Statute; and therefore in every Case, where a Statute inflicts a Penalty for doing such an Act, though the Act be not prohibited, yet the Thing is unlawful, for it cannot be intended that a Statute would inflict a Penalty for a lawful Act; & unâ voce ruled, that the Plaintiff should have his Judgment.

Peirce *and* Welden.

2. UPON Evidence in an Action upon the Case, for Meat, Drink, Washing and Lodging, found for the Wife of the Defendant by the Plaintiff; the Proof was, that the Wife came in a necessitous Case, and said to the Plaintiff, that she was the Wife of the Defendant, and that he had turned her out of his House, and allowed her 50 l. per Ann. but that he would not pay it; upon which Holt Chief Justice was of Opinion, that the Husband is not chargeable, for it being apparent that she did not cohabit with the Husband, she shall not have a Credit to charge him without his Consent; and though it was proved that he had paid another, who had received and tabled her, before the Plaintiff received her; yet the Plaintiff was nonsuit; for Holt Chief Justice said, if a Wife cohabit with her Husband, and by it gain a Credit, though she depart without the Leave of her Husband,

and come to London, and become in Debt, the Husband shall be charged till Notice given of her Elopement, for it shall be intended to be with the Consent of the Husband; but after Notice the Husband shall not be charged without his Consent.

Gilmore *and* Harris.

3. UPON a special Verdict the Case was, Edward Montfort seised in Fee by Lease and Release, settles the Lands in Question, to the Use of himself in Tail Male, Remainder to Simon Mountford in Tail Male, Remainder to Sir Edward Montfort in Tail Male, Remainder to Edward and his Heirs, with Power of Revocation of the Estate made to Simon only, and to limit new Uses, and by Deed the next Day following, reciting that he had limited an Estate to Simon, and his Heirs Males, he revokes the same, and limits it to Simon and his Heirs Males, Provided that he pay 1500 l. to his Executors, and if he fail thereof, that it shall be lawful for *A.* and *B.* *&c.* to enter, and raise the same out of the Rents, Issues and Profits. Edward dies, having Issue one Son, who has Issue a Daughter; Simon dies without Issue, the Brother of Simon is Lessor of the Plaintiff, and adjudged in C. B. after great Consideration by all the Court for the Defendant who was the Daughter, upon which a Writ of Error was brought, and diverse Questions made; First, Whether the Power of Revocation be well executed. Secondly, If well executed, then what Estate Simon had by the new Limitation? and the Court inclined strongly [and once gave Rule for Affirmation of the Judgment; but upon Instance to have another Argument they respited their Judgment] that the Power of Revocation is not well executed, for Simon has not any such Estate as is mentioned in the Revocation, for the Estate mentioned in the Revocation to Simon, and his Heirs Males, is a Fee, which is a different Estate from that which is limited in the Deed of Settlement; and as it was observed by the Counsel, no Relation is to the Settlement to assist it, and explain his Meaning, and therefore the Estate revoked is a different Estate from the Estate revocable; and though it was argued

gued that the Words are descriptive of the Estate to be revoked, and sufficient to revoke it, and that the Estate limited de novo shall be a Fee, so that in the Revocation, Heirs Males in one Part shall be a sufficient Ascertaining his Meaning to revoke an Estate-tail; but in the limiting Part, these shall be only a Limitation of a Fee; the Court was strongly against it, and that of Necessity, if they are sufficient to describe an Estate-tail to be revoked, they should have the same Import in the Limitation, and so quacunque via data shall be an Estate-tail in Simon; and it was demanded per Curiam, if there be a Fee to Simon, out of what Estate it may arise? for it cannot arise out of the Reversion in Fee to Edward; for this was not subject to any Power of Revocation, and therefore it ought to arise out of the Seisin of the Feoffees; and this cannot be in this Case, for there cannot be a base Fee, and an absolute Fee by the Act of the Party simul & semel of the same Land; and therefore if there be not a new Estate-tail, there cannot be a Fee. And, as to what was said, that the Condition was precedent, and so Simon never seised in Fee, [admitting the Limitation to be in Fee] because no Performance of the Condition found, this was rejected, and it was held clearly to be a Chattel Interest in the Trustees to raise the Sum of 1500 l. if Simon did not pay it; and that such an Interest may be limited by Way of Use, as in the Case of a Rent, and that upon Default of Payment, the Grantee may enter and receive the Profits; that this is not a Condition as if it was upon a Conveyance at Common Law, but an Estate which shall arise to A. B. upon such a Contingent. Curia advisare vult.

After it was argued again, Mich. 5 Will. & Mar. per Henry Finch; and he argued that the Estate was sufficiently described, and therefore the Revocation good; and the Word Estate in the Limitation was not to be understood his Interest in the Land, but the Land it self, and that the Limitation of the new Use to Simon and his Heirs was a Fee, &c. but per totam Curiam the Judgment was affirmed, for the sole Intent was to revoke the Estate of Simon, in Order to charge it with 1500 l. and after this Charge let in, that then Simon shall have the same Estate again, which he had before; and Serjeant Wright who was ready to have argued on the other Side,

Side, said, that the Court of Common Pleas held the Revocation to be good, though he had not such an Estate which he mentioned in the Revocation; the Revocation having Reference to a Deed, in which the Estate and Power of Revocation is contained.

Francam *and* Foster.

4. UPON Evidence before Holt Chief Justice in an Action upon the Case, where the Plaintiff had declared upon a Promise made by the Defendant, that if the Plaintiff would endeavour to procure a Marriage between the Defendant and A. S. that the Defendant would give him 50 Guineas; and the Evidence was that if the Plaintiff should procure the Marriage; and ruled that this Evidence does not maintain the Declaration, for by the Declaration the Plaintiff would be entitled to the 50 Guineas, if he endeavoured, tho' another effected the Marriage, but by the Evidence no Money ought to be paid except the Marriage was affected by the Plaintiff; but insomuch that he declared also in an Indebitat. Assumpsit pro cura & labore of the Plaintiff circa negotia of the Defendant; this was held sufficient to support the Action, tho' the Promise was upon the Procuring, for this was Care and Labour circa negotia; and Holt Chief Justice said, if a Man agrees to pay such a Sum at three several Days, here he may not declare for this Sum till the Days are passed; but when the Days are passed, a general Indebitatus Assumpsit lies; and here it was objected, that the Promise was not to be performed within a Twelvemonth, and so void by the Statute of Frauds and Perjuries, non allocatur; for Holt Chief Justice said, though the Promise depends upon a Contingent, the which may not happen in a long Time, yet if the Contingent happen within a Year; the Action shall be maintainable, and is not within the Statute.

Anonymus.

5. UPON Evidence in an Action upon a Charter-Party, the Case was, that J. S. insured for him, and such who should have Goods upon such Ship; and A. B. brought an Action upon this Charter-Party, and made Averment he had Goods upon the Ship, and held good; but per Holt Chief Justice, if the Goods were assured as the Goods of an Hamburgher who was an Ally, and the Goods were the Goods of a Frenchman who was an Enemy; this is a Fraud, and the Assurance is not good.

Fanshaw's *Case*.

6. IN an Indictment of Perjury upon an Answer in Chancery; ruled first, that the Complainant in Chancery is no Witness, pending the Suit. Secondly, That if the Bill be dismissed, he is a Witness. Thirdly, The Bill being taken off the File, it is no Evidence; for it is not a Record after it is taken off the File. Fourthly, Though the Bill taken off the File be no Evidence, yet a Copy of the Bill made, when the Bill was upon the File, was read. Fifthly, There being but the Oath of the Prosecutor, and so Oath against Oath, the Defendant was acquitted.

Term.

Term. Hill.

4 Will. & Mar. R. B.

Symonds *and* Cudmore; *devant.*

1. THIS Term the Court seriatim delivered their Opinion in this Case, which upon a special Verdict in Ejectment was such; Sir Nich. Martin seised in Fee, settles the Lands in Question to the Use of himself for Life, Remainder to William his Son, and Heir in Tail, Remainder to Sir Nicholas in Fee, with Power to make Leases in Possession, not exceeding Twenty-one Years, or three Lives; and Sir Nicholas makes a Lease for Ninety-nine Years, if three Lives shall so long live, and dies; William, the first Lease being in esse, makes a Lease to A. and B. for Ninety-nine Years, to commence after the Determination of the former Lease, and dies, having Issue Nicholas his Son and Heir; and Nicholas before the Commencement of the second Lease levies a Fine to the Use of himself and his Heirs, and after the first Term determines; and if the Issue in Tail might avoid this second Lease after the Fine levied by him, was the Question.

And Eyres Justice said, he could not avoid the Lease, for he said this Lease was not void at first, but only voidable, it being made to commence after the Determination of the first Lease; to which Time the Lessor might have lived, and therefore not like to a Lease for Years to commence after the Death of Tenant in Tail, the which he said is void; but here the Lease is but voidable, for it is derived out of the Estate-tail, and the whole Estate-

tail is charged with it; but when it is to commence after the Death of the Tenant in Tail, it is derived out of the Estate of the Issue, and therefore void; and he said, that in this Case it being voidable, the Issue without Question might have avoided it; but after a Fine the Estate-tail is extinct, and the Conusee in of another Estate, and therefore shall not avoid the Lease, for the Conusee is not within the Statute de Donis, the which provides Remedy for the Issue only, and the Estate-tail is extinct, as if it had never been, and the Fee consolidated in the Conusees, for there cannot be a qualified and an absolute Fee of one and the same Land in one and the same Person, and cited Austin's Case, &c. and that the Estate tail was quite destroyed and extinct; he cited the Case of Johnson and Bellamy, 2 Leon. 36, 37. 3 Rep. Sir G. Brown's Case, and he said that the Lease was derived out of both Estates; and for this cited, 1 Cr. 103. the Case of Holt and Sambach, and the same Case in Hutton; and the Estate-tail being barred and destroyed by the Fine, it is now, as if it had never been, and the Issue though he had Election to make it void, yet cannot transfer his Election; and therefore upon the whole Matter he was of Opinion for the Defendant, and he seemed to question the Authority of the 1 Inst. 46. b.

Gregory Justice agreed, that the Lease was but voidable, for if it had been void, it never could have been made good; but he said the Issue might have made it good; but though the Issue might make it good, another cannot, for such a one is not within the Statute de Donis; and he cited Dalison. 65. a.

And he likewise said, that if Tenant in Tail lease for Years, and die without Issue, then the Lease is become void, and no Acceptance of the Rent, by him in Reversion or Remainder can make it good, for the Estate out of which the Lease was created is determined; and the same Law of a Lease for Years, by Tenant for Life.

Dolben Justice argued to the same Intent; and he said if the Lease be void, it would be for the Plaintiff, for every one may take Advantage of a Thing which is void; but if voidable, then it is for the Defendant; and he said the Lease was not void but voidable, and that the Case in Dyer 51. b. is a stronger Case than ours; and he agreed that the Estate is by the Fine dis-

charged of the Estate-tail, and the Conusee has a Fee consolidated, and cited the Cases before cited to this Purpose; and agreed that Judgment shall be given for the Defendant.

Holt Chief Justice agreed that Judgment shall be given for the Defendant; but he said, if he had been Tenant in Tail in Reversion, without the Fee also in him, who had made this Lease; and after his Issue had levied the Fine; that in such Case the Judgment ought to be given for the Plaintiff, for he said when Tenant in Tail makes a Lease for Years, to commence after a former Lease, and dies before the Commencement of this Lease, this second Lease is void at the Election of the Issue, and the Issue is in of an Estate-tail, not charged to this future Lease, for this future Lease is not to commence, and therefore the whole Estate-tail descends to the Issue, for till the Lessee enters by Force of the Lease, he is not Tenant for Years, or any Estate divided from the Estate-tail, Litt. Sect. 58, 459. but he has only a Right to have the Land, and an Entry is necessary to have an Estate; and when he who leased dies, his Issue is in of a Right paramount the Lease, and therefore he shall not be charged with such a future Interest, but it is void; and as to this Purpose it is the same, as if it was Tenant for Life, Remainder in Tail; and he in Remainder grants it in Fee, and dies, and Tenant for Life dies; this is void as to the Issue, as well as if Tenant in Tail grants a Rent-Charge in Fee, and dies, Litt. 615, 616. but yet this is not so absolutely void, but if the Issue in Tail brings a Formedon, the Grantee if he has a Warranty may plead it, and bar the Issue, if it be with Assets, so that if no Act be done by the Issue it shall be void, but the Issue has an Election to make it void or voidable; and if it be so where Tenant in Tail grants a Remainder or Rent in Fee, à fortiori it shall be where he grants but an Estate for Years, or other future Interest, this shall be taken to be void; but if the Issue accept the Rent, then by such Act he has concluded himself to say that it was void, and so the Estoppel shall bind him; but if the Lessee had entred, and the Issue re-entred, and the Lessee had brought Trespass, he might have shewn the special Matter and avoided the Lease, and so may the Conusee shew that the Ancestor of his Conusor

was seised in Tail, and leased ut supra and died, and that his Son and Heir had levied a Fine to him, &c. for notwithstanding the Opinion of Eyres ut supra, He said, that the same Election which the Issue in Tail had, his Conusee or Feoffee shall have, and that 1 Inst. 46. b. is good Law; and though it be but one Opinion of Counsel in the Case of Smith and Stapleton, yet it was there dogmatically asserted, and Coke is clearly of the same Opinion; and He said that the Fine here does not extinguish the Election, no more than in the Case of Baugh and Blunden, 1 Cr. 302. where it was at the Election of the Party to have a Lease for Years, a Disseisin, or not, and he levied a Fine; this does not extinguish the Election, but the Conusee shall have it, but otherwise if it be an absolute Disseisin, according to Buckler's Case, 2 Rep. and he said no Act here is requisite on the Part of the Issue, or appointed by the Law; and 1 Inst. 218. is, that where a Man would avoid an Estate, if he could enter, he ought to enter; and if he may not enter, he ought to make a Claim; and he said that the Lease here, si contingat, that the Tenant in Tail who made it, dies during the Continuance of the former Lease, is as void as where Tenant in Tail leases for Years to commence after his Death, for now by the Matter subsequent this Lease is to commence after the Death of Tenant in Tail; but he said in both Cases, it is void, or not at the Election of the Issue; and for these Reasons he said, that if the Case had been, that Tenant in Tail made a Lease to commence as here, and died, and his Issue levied a Fine, that the Conusee might avoid the Lease; but insomuch that in our Case the Tenant in Tail Lessor, had also the Reversion in Fee, expectant upon this Estate-tail in him, at the Time of the Lease. He was of Opinion for the Defendant, for by the Fine, the Estate was discharged of the Estate-tail, and the Conusee had a Fee in him, as if Tenant in Tail had died without Issue; and he said, that if there be Tenant for Life, Remainder to J. S. in Fee, and Tenant for Life, and he in Remainder levy a Fine to J. S. in this Case J. S. has an absolute Estate in Fee in him discharged of the Estate for Life, which is merged and extinguished in Fee, and not like to Bredon's Case,

1 Rep. where Tenant for Life, and he in Remainder in Tail levy a Fine to J. S. and after Tenant in Tail dies without Issue, yet the Conusee shall hold during the Life of the Tenant for Life, for he has an Estate made out of their two Interests, and a qualified Fee determinable upon the Death of the one, and from the Death of the other without Issue; and though the one be dead without Issue, yet as long as Tenant for Life is living, his Interest shall continue; but where the absolute Fee is conveyed, there the particular Estate be it for Life, or in Tail, is extinguished; and therefore if Tenant in Tail, and he in Remainder in Fee join in a Fine, the Conusee has an entire Fee, and the Estate-tail extinguished; and he cited the Case of Sir G. Brown, and other Cases, and concluded with the Case of Holt and Sambach, 1 Cr. 103. which is exactly the same with this Case; and he gave Judgment for the Defendant.

Steward *and* Hodges; *puis.*

2. IN an Action on the Case upon a Bill of Exchange made to A. B. or Bearer; A. B. endorses it, and the Endorsee brought an Action, and upon a Demurrer adjudged that it did not lie, for it cannot be endorsed, it not being made to A. B. or order, and the Bearer cannot have an Action upon a Bill of Exchange, for he has no Interest as Bearer; but it being paid to the Bearer is a sufficient Payment to discharge the Party, who pays it; but it does not give the Bearer such an Interest that he can maintain an Action; and the Case of Cogs was cited to this Purpose in C. B. and Holt Chief Justice said, that Indebitatus assumpsit does not lie upon a Bill of Exchange; and he cited London's Case to this Purpose.

Geary *and* Connop.

3. AT Guildhall in an Action for Words per quod maritagium amisit; and upon Evidence the Plaintiff proved Part of the Words only, but proved that by Reason of these Words Maritagium amisit; and ruled by Holt Chief Justice to be well enough, for it is sufficient if the Plaintiff proves the Loss of Marriage by reason of any Words in the Declaration.

Term.

Term. Pasch.

5 Will. & Mar. R. B.

Sands *vers.* Child *and* Lynch.

1. A Writ of Error was brought upon a Judgment in an Action upon the Case upon the Stat. R. 2. for a Prosecution in the Court of Admiralty, &c. and a special Verdict was found, in which the Case was, that Sands the Plaintiff among others had freighted a Ship for a Voyage to Maderas, and from thence to the East-Indies, to a Place within the Patent granted to the East-India Company; and upon this the Defendants complained to the King and Council, and upon this there is a Prosecution in the Admiral Court, at the Instance of the Defendants in Behalf of the Company, and there the Ship is put under an Embargo, and detained till the Plaintiff would give Security, not to go to any Place within the Patent to the East-India Company. They found Child to be President of the Company, and Lynch a Solicitor or Attorney for the Company; and that Sands by Reason of this Prosecution had lost his Voyage, to his Damage of 20000 l. and Judgment in C. B. was given for the Plaintiff; upon which a Writ of Error ut supra was brought in R. B. and the general and great Question is, if upon this whole Matter any Cause of Action upon the Statute of Rich. 2. appears here against the Defendants.

Tremain for the Plaintiffs in the Writ of Error insisted, that the Prosecution in the Court of Admiralty was by the Order of the King in Council, and the Embargo warrantable by Law; and that this Prosecution is

not any of the Things within the Intent of the Statute of R. 2. which was to prevent the Court of the Admiral to hold Plea of Things done upon the Land, and of which the King's Court had Jurisdiction as appears by the Petitions upon which the Statutes were made; but here the Trading with Infidels, and the going to a Country of Enemies, is a Thing of which the King by his Prerogative has the sole Power, and the Prosecution and Embargo were by the Order of the King, and it was not the Intent of the Statute to give a Forfeiture to the King for a Prosecution made by his Order; and he cited the Case of Michelbourne in 2 Brownl. and 7 Rep. Calvin's Case, where it is said that Infidels are perpetual Enemies, &c. and he said that the Suit ought to be against the Company, and not against the Defendants, who act on the Behalf of the Company; also that the other Freighters ought to have joined in the Action, and not Sands only, &c. and he also said that the Case had been moved in R. B. and no Prohibition to the Court of the Admiral could be obtained; and therefore the Prosecution seemed to be legal.

Levinz on the other Side insisted, that the Action was well brought by Sands alone, for it is a several Tort, and not like to the Case of Boulston and Sandford. Hill. 2 Will. & Mar. R. B. (devant) which was in Contract; but here it sounds in Trespass, and therefore they could not join, for the Damage to the one is not the Damage to the other; and he said, Merchants who have Goods jointly, are not Jointenants, but are Tenants in Common, because there is no Survivorship, and they may sever in Actions the one against the other; and for this he cited 2 Cr. 410. and he said each of the Freighters might recover a several Penalty upon the Statute; and cited Dyer 351. upon the Statute of fraudulent Conveyances. And as to the Prosecution by the Order of the King, Rex nemini facit injuriam, and therefore if the King command a Thing against Law, his Command is void, and he who executes it shall be punished; and as to the Embargo he agreed, that the King might in Time of War do it for the publick Service or Safety, and he might also employ the Ships of his Subjects; but this ought to be upon great Emergences, and for the publick Benefit, and not for the private Interest of any Person or Society,

Society, as the Case was here, for Mr. Sands might have sailed to any Place, which was not within the Patent of the Company; and he said that this was a Prosecution within the Intent of the Statute, the which was to prevent the Admiral Court to hold Plea of Things done infra Corpus Comitatus, as all this Proceeding was; and he cited the Cases of Dyer 159, 160. and Hob. 212. and as to the Company he said, that nothing appeared here to be done by the Company, for it is only found to be upon their Behalf, but not by their Command, or by any Warrant of Attorney from the Company; and though the Proctor or Attorney employed by the Defendants be not punishable within the Statute, yet those who employed them are liable to be sued, for it is their Prosecution, and nothing from the Company appears in the Case, though the Defendants would insist to have their Charter found in hæc verba, only to oppress a poor Man; and as to the Trading with Infidels, and their being perpetui inimici, this was laughed at by him; and the Court seemed to agree to it, for how shall they be converted, if Conversation with them is not lawful, &c. Curia advisare vult; puis.

The Earl of Banbary's *Case; puis.*

2. THE Earl of Banbury was indicted of Felony and Murder, for the Death of one Lawson; and he pleaded that King James the First by his Letters Patents created William Knowles, Viscount Wallingford, Earl of Banbury, &c. which William had Issue Edward and Nicholas his Sons, &c. that Edward died, by which the Title, Dignity, &c. of Earl of Banbury descended to Nicholas ut fratri & hæredi of Edward, [without saying that Edward died without Issue] and that Nicholas had Issue the said Earl his Son and Heir, and died, and the Title descended to him, and because that he was not named as Earl of Banbury in the Indictment, he pleaded it in Abatement of the Indictment; to which the King's Attorney replied, and shewed the Proceedings in the House of Peers, &c. upon which a Demurrer was drawn, but no Joinder in Demurrer. And the Case being so, it was moved for the Earl, that they might amend his

2 Plea,

Plea; for being indicted, and this removed into R. B. he pleaded the Matter supra in Abatement of the Indictment, &c. and now it was observed, that he did not plead in this Plea, that he was an Earl tempore inquisitionis capt. and therefore the Indictment good; though he could not be tried per pais, for he might be an Earl by Descent or Creation after, and therefore 'tis no Plea in Abatement of the Indictment, if he was not an Earl tempore inquisitionis capt. they also moved that he might shew that Edward died without Issue; for though many Formedons are ut supra, yet they desired Leave to amend this also. Dolben and Eyres inclined that they might amend, but the Attorney insisted econtra; to which Holt Chief Justice said, that this would be but Circuity, for if they ruled him to plead to the Indictment, and he be apposed, he might plead it then; Curia advisare vult. &c. and it being moved again, Dolben and Eyres ruled that the Plea shall be amended, and the Case of the Attorney General, and the Trinity Company in Sid. 58. and other Cases cited; but Holt Chief Justice econtra, for here the Plea is in Parchment, and a Record, and they have not Authority to amend a Record; but in the other Cases the Plea is in Paper, and but a Warrant by the which a Record is made; they also admitted him to Bail; puis.

Du Bardele *and* Reynel *and his* Wife.

3. AN Homine replegiando was brought against the Defendants for the Wife of the Plaintiff, and Elongat. returned; the Defendants before the Return appear and enter a Plea with the Filacer of Non ceperunt, but upon a Mistake a Capias in Withernam was awarded; upon which the Court was moved for a Supersedeas, the which was awarded, for the Party might appear at the Return of the Replegiare, and plead ut supra; and then no Withernam ought to be awarded, and the Return of the Elongat. shall not prejudice; for the Sheriff cannot return Non cepit, for this would be against the Supposal of the Writ, but he ought to return the Body, or such Matter which consists with the Writ; but the Party is at Liberty to traverse the Supposal of the Writ,

and try the Matter, and this Case does not differ from a Replevin for Cattle, and F. N. B. is express, ut supra; and here the Party having appeared and pleaded before the Elongat. returned, shall not be put to find Bail, no more than to gage Deliverance in a Replevin.

+ *The* King *and* Tucker; *puis.*

4. A Writ of Error upon a Judgment in High Treason, First, Because there being diverse indicted together, and being allocuti, it was not said separatim, as it ought to be, for their Pleas might be several the one may plead Auterfoits acquit, another a Pardon, a third Non culp. and many Precedents, as of the Regicides, of Green, Berry and Hill, the Earls of Essex and Southampton, Ashton and Grayham, &c. were cited, where the Entry is separatim allocut. non allocatur, for tho' these Precedents are so, yet many Precedents are otherwise; and though Dolben said it ought to be so, yet Holt Chief Justice said, they are separatim allocut. scil. secundum subjectam materiam, their Offences being several. Another Exception was taken to the Judgment, the which was, Quod corpora eorum & cujusque eorum in quatuor partes dividantur; and it is not said, Quod corpus utriusque in quatuor partes divid. and so here their two Bodies are to be divided into four Parts only, where the Law ordains that each of their Bodies be divided into four Parts, and this in majorem terrorem & exemplum; also it is not said, that their Secrets shall be cut off and burnt in their View, which is another Part of the Judgment, and for these two Exceptions the Judgment was reversed; but after the Court advised further, and so it remained undetermined; puis.

Middleton *and* Swain.

5. SIR Hugh Middleton being seised in Fee of Thirty Shares in the New River, and having a Son by the first Venter, and Anne, Hezekiah, and diverse other Children by a second Venter, by his Will devised to his five Children by the second Venter, five Shares of the said Thirty Shares, scil. to Hezekiah and his Heirs one Share, and to Anne and her Heirs another Share, &c. Provided, That if any of his said younger Children die before they shall have attained his or her Age of Twenty-one, or be married, that then the Share of such Child so dying shall go to the rest of his said younger Children, Share and Share alike. Hezekiah dies unmarried before Twenty-one, and after Anne dies being married; and if the Part which Anne had of Hezekiah's Share shall go to her Issue, or to the Heir at Law, was the Question; upon a special Verdict, upon a feigned Issue, and adjudged in this Case, that the Part of Hezekiah's Share, which was in Anne shall go to the Heir, scil. to her Brother of the same Venter, and whole Blood, and not to the Son and Heir of Sir Hugh Middleton by the first Venter; for the Court said, the Children by this Devise were Tenants in Common by the Words Share and Share alike, the which is tantamount as equally divided between them; and though it was said that he having devised one Share to Hezekiah and his Heirs, by devising the Share of Hezekiah to his other Children, this is as strong as if he had devised it to them and their Heirs; non allocatur, for here Share is to express the Thing which he devised, and not the Quantity of the Estate; and though it might be his Intent was, that they should have it to them and their Heirs, yet they could not collect such Intent out of the Words of the Will; and therefore without sufficient Words, they would not disinherit the Heir, the which in this Case without Question is the eldest Son by the second Venter; and so gave Judgment for the Defendant.

Morley *and* Vivian.

6. IN Debt upon an Obligation, the Defendant pleaded, that the Plaintiff was a Landwaiter in the Custom-House, which is an Office that concerns the King's Revenue; and that it was agreed between them, that the Plaintiff should withdraw himself from the Execution of the said Office, to the Intent that a Deputation might be made to the Defendant; and that therefore the Defendant entred into the said Obligation for the Payment of an annual Sum, &c. & petit judicium si actio, but does not say, & hoc parat. est verificare; and a general Demurrer being joined, an Exception was taken for this Reason; but non allocatur, for though there are some Books that Et hoc parat. est verificare, &c. is Substance, yet the later Authorities are econtra, for the Matter appears so plainly to the Court without such Conclusion, that it is but Form; and so it was ruled.

Lamb *and* Archer.

7. A Man who was possessed of a Term for Years, had Issue Richard his eldest Son, and John his second Son, and devised the Term to Richard and the Heirs of his Body; and if he dies without Issue, living John, then to John and the Heirs of his Body; Richard dies without Issue, living John, and if John shall have it, was the Question upon a special Verdict. And after it was argued by Serjeant Gold of the one Part, and Northey of the other; and it being objected by Northey that there was a Proviso, That if *Richard* died without Issue, living his Mother, that then *John* shall pay 100 l. to *J. S.* that this Proviso did not give any Estate to John, but only made him chargeable with the Payment of the 100 l. with which the Estate of Richard was charged; but the Estate of John would not be so without this Proviso, and therefore the Proviso has an Effect to this Purpose, but to no other; the Court did not regard it, but said this was in Effect the same Case with the Duke of Norfolk's, and seemed to confirm the Opinions in the Duke

of Norfolk's Case; and that here was not any of the Inconveniencies of Perpetuities, for the Estate is not unalienable, but only during one Life, and this upon a Contingency which might determine within a little Time, if the Party dies; and Holt Chief Justice said, that he never saw the Reason of those of Counsel with the Duke of Norfolk, and always was of Opinion that Mr. Charles Howard had a strong Case of it; and so he gave Judgment for those who claimed under John the younger Brother; nisi, &c.

Wharton *and* Lisle; *puis* 356

8. UPON a special Verdict in Trover the Question was, If Tithes of Flax, being sown in the Common Field, are minutæ decimæ, and belong to the Vicar, who was endowed de minutis decimis, or great Tithes, and belong to the Parson; and it seemed to Holt Chief Justice, that they are great Tithes, and belong to the Parson, which are sown in the Common Field, and they are small Tithes which are sown in a Garden or Orchard; and he said, the Place shall determine the Quality of the Tithes, and not the Nature of the Thing, for Beans and Pease in a Garden and Orchard are small Tithes, but in a Common Field are great Tithes; and he cited Hutton, Uvedale and Uvedale's Case; Dolben and Eyres econtra, for they shall be determined, not according to the Place where they grow, but according to the Nature of the Thing, and therefore linum, &c. are according to the Usage of our Realm small Tithes; and so it is said by Linwood who wrote three Hundred Years ago; and Eyres cited Moor 909. ruled there in Bedingfield's Case, that if Land heretofore sown with Corn, be sown with Saffron, they shall be minutæ decimæ; and he said that some Times the Vicar by Endowment shall have Tithes of Things, which are not small Tithes, as of Hay; and therefore it has been ruled at the Assizes, that if a Man sow his Land with Clover, and make his Profit by the Seed, this being a Grain, the Parson shall have Tithe of it; but if he convert it into Hay only, and make his Profit of the Hay, the Vicar being endowed of Tithes of Hay, shall have it as a small Tithe. Curia advisare vult.

Smith

Smith *and* Kemp.

9. TRespass quare clausum fregit & intravit, & liberam piscariam suam piscatus est, & centum Trouts, &c. cepit, &c. and a Verdict was for the Plaintiff, and moved in Arrest of Judgment, that Trespass does not lie; for Liberam piscariam is tantamount to communen piscariam; and then it is like to the Case of Trespass in a Common, upon which a Commoner cannot maintain Trespass, but only an Action upon the Case, as is resolved in Robert Mary's Case, 9 Rep. and that libera piscaria is all one with communis piscaria, 1 Inst. 122. was cited; and two Resolutions in Point, the one cited per Eyres Justice, in which he was of Counsel, in a Case between Upjohn and Dawkins, and another between Peak and Tuke, where the Case was ut supra, and the Plaintiff never could have Judgment. On the other Side it was said, that here the Trespass is alledged in breaking his Close called D. and fishing in liberam piscariam suam ibidem, the which shall be understood his sole and separate Fishery, for nothing appears econtra; Et per Curiam libera piscaria is all one with separalis piscaria, and not with communis piscaria, for libera piscaria implies an Interest, and he might plead to an Action of Trespass for fishing in libera piscaria sua, that it is his Franktenement, the which he could not plead, if it was only in the Nature of a Common; and for this Holt Chief Justice cited 46 E. 3. 11. and in the Register 95. and F. N. B. 88. G. H. there is a Writ of Trespass quare vi & armis liberam piscariam suam piscatus est, and such a Writ is brought 17 E. 4. 6. and therefore the Register and F. N. B. being so, and the old Book of E. 3. agreeing with it, they did not regard the Cases cited, or 1 Inst. but gave Judgment for the Plaintiff; nisi.

The King *versus* Ching.

10. AN Indictment for retaining a Servant without a Testimonial; and it does not shew that he had been in Service before; and therefore quashed. Hetley 164.

Anonymus.

11. ACtion upon the Case upon a Bill of Exchange drawn by J. S. upon J. B. and accepted by him payable to J. D. who endorses it to J. G. who endorses it over, and an Action is brought by the last Endorsee against the first Endorsor; and Holt Chief Justice said that it well lay, for the Indorsement is quasi a new Bill, and a Warranty by the Endorser, that the Bill shall be paid, and the Party has his Liberty to bring his Action against any of the Endorsors, if the Bill be not paid by the Acceptor.

Pinchurst *and* Bellwood.

12. ERror to reverse a Fine brought by Pinchurst, and two others, and the Writ abated; upon which Error brought coram vobis per Pinchurst, and the other as Cousins and Heirs to the Conusor, and the other would not prosecute, the Writ is brought against Bellwood, and two others: Bellwood pleads a Release, upon which Issue joined, the other pleads in Abatement upon which a Demurrer; and the third pleads Non-tenure upon which a Demurrer; and this being argued by Serjeant Pemberton, the Error assigned was, that the Conusor died after the Conusance, and before the Teste of the Writ of Covenant, the which was admitted to be Error. Secondly, It was admitted that the Release of one Coparcener does not bar the other, for their Rights are several. Thirdly, It was admitted, that the Fine may be reversed, as to one Coparcener, and affirmed as to the other, and that there may be Summons and Severance,

rance, but here the Parties having appeared, after Appearance, Summons and Severance does not lie, 29 Ass. 35. 29 E. 3. 37. 3 Cr. 468. but he doubted that as the Pleading is, they could not be admitted to reverse it; but that they had Right, and he hoped, that the Court would admit a Repleader.

Holt Chief Justice said, that one of the Coparceners having pleaded by Covin, they might examine it; and if it be found so, they might set aside the Plea, and cited for this Dyer where a Man caused an Action to be brought against himself to remove himself from the Counter to the Fleet; but the Court seemed enclined to direct a new Writ of Error, and that the erroneous Fine and Non-claim would not be a Bar; but Curia advisare vult.

Knight *and* Keech; *intr.* Mich. 4 Rot. 60.

13. ACtion upon the Case upon an Agreement, in which the Defendant promised to assign all the Profits, which accrued by a Voyage made by a Ship of the first Husband's of the Wife of the Defendant, to the Plaintiff, and Breach assigned, that the Defendant non performavit agreamentum prædict. Issue upon this joined, and a Verdict and Judgment in C. B. for the Plaintiff; and Error upon this brought, because the Breach too general, and incertain, for he does not shew in what he did not perform the Agreement, as he ought to do; as in Covenant to repair, he ought to shew that the House was defective in such and such a Part, and that the Defendant had not repaired it, and to say that he had not repaired generally is not good; non allocatur: For Holt Chief Just. and Eyres Just. said, if this had been upon a Demurrer it would have been good, but it being after a Verdict it is beyond Question; for the Plaintiff would not have had Damages given, if he had not proved a good Breach; and here the Agreement is single, scil. to assign, so the Non-performance is in the Non-assignment; and it being negative, and in the Words of the Agreement, the Judgment was affirmed. 3 H. 6. 8. 9 H. 6. 16.

Williams *and* Steadman.

14. IN an Action of Debt upon a Bond upon Bottomry, &c. the Defendant pleads that the Ship went from London to Barbadoes, sine deviatione, and that after she returned from Barbadoes towards London, and in her Return she was lost in Voyagio prædict. the Plaintiff replies, and shews that the Ship in her Return went from Barbadoes to Jamaica, and that after a Stay there, she returned from Jamaica towards London, and was lost between Jamaica and London, and so shews a Deviation, &c. and the Defendant rejoins and says, that she was pressed into the King's Service, and so compelled to go to Jamaica, the which is the Deviation pleaded by the Plaintiff; absque hoc, that she deviated after the being pressed, &c. upon which the Plaintiff demurred; & per Curiam adjudged for the Plaintiff; for first, the Bar of the Defendant not good, for he pleads, that the Ship went from London to Barbadoes, according to the Condition of the Bond without Deviation; and that in the Return from Barbadoes to London she was lost in the Voyage aforesaid, but does not shew without Deviation, for the Condition is so in express Words, and he ought to shew expressly, that he had performed the Words of the Condition; and though it be said in voyagio prædict. and it cannot be voyagium prædict. if she had deviated, and so it is implied; yet Holt Chief Justice said, that to plead such Matter which would be a Performance of a Condition by Implication, is not sufficient; and for this he cited 3 Cr. 234. Tedcastle's Case: Also in this Case the Rejoinder is ill, for first it is a Departure; for the Matter of the Rejoinder ought to have been pleaded in the Bar, and he ought to have shewn all his Case, that she was in her Return, and was pressed, and carried to Jamaica, and that in her Return from Jamaica she was lost; but when he pleads ut supra, this is not a full Answer to the Replication, for he does not shew, that she did not deviate before, but only answers and shews the Occasion of the Deviation to Jamaica, and the Traverse is too narrow, and does not answer to the whole Replication;

for the Deviation to Jamaica is only an Excuse, and all that which is not excused, ought to be traversed, the which is not here, but only that non deviavit in her Return from Jamaica; and though an immaterial Traverse is aided upon a general Demurrer, yet an insufficient Traverse is not aided; per quod, &c.

Hodges *and* Steward; *devant.*

15. THIS Case was moved again this Term, it being an Action on the Case upon a Bill of Exchange payable to J. S. or Bearer; and a Custom alledged, that such a Bill is assignable, and that the Endorsee might have an Action; and upon a Demurrer, per Curiam, first, a Bill payable to J. S. and Bearer, it is not assignable, for no such Power is given by the Original Bill. Secondly, But here a Custom being alledged, the which is confessed by the Demurrer; the Question is, if it may be assignable by Custom; and Holt Chief Justice seemed to hesitate at it, for if it be drawn payable to J. S. or Bearer, and it be assigned to J. D. who is not the Bearer, to whom shall the Money be paid? so it seems that such a Custom is repugnant. And in this Case it was oftentimes said, that an Indebitatus assumpsit does not lie upon a Bill of Exchange, as it has been ruled in diverse Cases, but against a Drawer for Value received, there it would lie; but this is for the apparent Consideration. Curia advisare vult.

It being moved again at another Day, it was adjudged for the Plaintiff, insomuch that the Custom was alledged, that the Bearer might endorse, and the Endorsee might have an Action; the which being confessed by the Demurrer, the Court shall take it to be so, tho' in Fact there is not such a Custom; this was adjudged, absente Holt Chief Justice.

Masters *and* Marriot.

16. THE Plaintiff declares upon a Colloquium de & concernent. a Horse of the Defendant, and that the Defendant bargained and sold the Horse to the Plaintiff for eight Guineas, & quod tempore barganizationis agreat. fuit, that if the Plaintiff putaret & existimaret the said Horse not to be worth eight Guineas, that then if the Plaintiff deliver the said Horse to R. B. to the Use of the Defendant, that the said R. B. shall pay to the Plaintiff eight Guineas; and if the said R. B. did not pay, that then the Defendant would pay upon Demand; the Plaintiff says he did not esteem the Horse to be worth eight Guineas, and delivered the said Horse to R. B. to the Use of the Defendant, and that the said R. B. had not paid, &c. Non assumpsit pleaded, and a Verdict and Judgment for the Plaintiff in C. B. upon which a Writ of Error was brought, and the Error assigned was, that the Plaintiff alledged that R. B. did not pay, and does not say, that he demanded the eight Guineas of the Defendant, and that he did not pay, for the Agreement is entire, and Payment by R. B. or the Defendant, good; and tho' R. B. has not paid, the Defendant forsitan has paid; also he does not alledge a Request, and the Payment is to be made upon Request; and so the Request is Part of the Agreement, and ought to be specially alledged, & sæpius requisit. not sufficient; and tho' it was objected by Levinz that here by the Redelivery of the Horse, the Plaintiff was entitled to his Money; and so being a Duty, the Action is a sufficient Demand; non allocatur, for the Duty here is made by the Agreement, and it being made by the Agreement, it ought to be demanded according to the Agreement; the which being omitted, it is not aided by the Verdict, according to the Opinion of Holt Chief Justice and Eyres Justice; but Curia advisare vult; and it being moved again the next Term, the Court affirmed the Judgment, and the Chief Justice said, that it was an entire Contract, and by the Redelivery of the Horse, the eight Guineas became a Duty; and being a Duty precedent, a Demand was not necessary.

Barnet *and* Tompkyns.

17. IN an Action of Debt upon a Bond, the Defendant after Oyer pleads the Statute of Usury, and that it was upon an usurious Contract, &c. upon Evidence it appeared, that the Wife of the Plaintiff used to lend Money to be paid by the Week, and that she lent to the Defendant 20 l. to be paid by 20 s. by the Week, and one Shilling and Sixpence by the Week for Interest; and that the Defendant paid the Interest, which amounted to 30 s. when the Money was lent, and that the Wife exacted and received it; and upon this Evidence Holt Chief Justice ruled it to be an usurious Contract by the Husband sufficient to discharge and avoid the Obligation civiliter, tho' not sufficient to charge the Husband criminaliter; and it was found for the Defendant.

Morton *and* Withens.

18. IN an Action upon the Case brought against Sir Francis Withens Serjeant at Law, and heretofore Justice of the King's Bench, for Wares sold and delivered by the Plaintiff, to the Wife of the Defendant; Non assumpsit was pleaded, and upon the Evidence it appeared, that the Goods were Silver Fringes and Lace for a Petticoat and Side-saddle, and that they were all delivered within the Compass of four Months, and that they amounted to 94 l. and that Part of them were delivered to a Carrier for the Wife of the Defendant, by the Order of Mrs. Rider, upon a Letter of the Wife to Mrs. Rider, and that the other Part were delivered upon a Letter of the Wife to the Plaintiff; and that these Laces were worn and used by the Wife, in the View of the Defendant, and that the Wife at that Time lived with the Defendant in the same House; for the Defendant it was insisted that long Time before the Delivery of these Goods, there was a Difference between him and his Wife, and that they for the Space of two

or three Years had not lived together, and that the Wife declared to the Defendant that she would charge him with 500 l. in one Term, and have him in a Gaol in the next, and all this before the Goods were delivered; and that for many Years the Wife had an Allowance for Clothes, scil. 50 l. per Ann. and no Evidence was given that she had any Occasion to have these Clothes, so that they could appear to be necessary; and the same Day another Action was tried for Velvet and Tissues of 3 l. per Yard, to the Value of 80 l. and Treby Chief Justice directed, that if the Jury found the Plaintiff innocent of the Design of the Wife to ruin the Husband, and delivered the Laces, &c. as Goods fit for the Wife; and upon the Credit of the Husband, without Notice of the Difference between them, that the Husband shall be obliged to pay the Plaintiff, for it is Part of his Promise of Marriage to feed and cloth her; and tho' she had an Allowance, this was secret, and of which the Plaintiff had not Notice; but if the Plaintiff had Notice of the Differences between the Husband and Wife, and sold them only to enable the Wife to ruin the Husband, then the Defendant would not be chargeable; and though the Husband be chargeable heretofore, yet after such a solemn Trial, and their Differences made so publick, he held, that the Husband shall not be chargeable; and likewise if the Plaintiff was not privy to their Differences, but delivered these Goods innocently; yet if the Goods were not suitable to the Quality of the Wife, the Defendant should not be chargeable; and if Part be only suitable, he should be charged for that Part only; upon this Direction, the Jury being of Gentlemen, found generally for the Plaintiff for his whole Damages.

Prigge

Prigge *and* Adams; *puis.*

19. IN Trespass of Assault, Battery, and false Imprisonment; the Defendant justified under a Judgment and Execution in the Court of Bristol, as an Officer of the Court; the Plaintiff replies and pleads the Statute of Will. & Mar. for erecting a Court of Conscience for Relief of the poor Inhabitants of Bristol in Actions of Debt, &c. under 40 s. and proceeds and shews that the same Persons who are Judges of the Court of Record, are Judges of the new Court, &c. but he does not shew, that the Judges or Plaintiff there had Notice of the Act, or that the Defendant was an Inhabitant of Bristol; and upon a Demurrer Holt Chief Justice said, tho' it be a private Act of Parliament, of which the Courts here cannot take Notice, without it's being pleaded; yet as to Bristol it is become Lex loci, and all Parties concerned there, ought to take Notice of it, as the By-Laws of a Corporation, they are more private than such an Act of Parliament; but if any Man comes into a Corporation, he ought to take Conusance of their By-Laws at his Peril; and therefore he thought that the Judges of the Court of Record of Bristol ought to take Notice of the Act for erecting the Court of Conscience, for after a Verdict how may it be pleaded? to which it was said, by Suggestion upon the Roll; to which Holt said, and if the Matter be traversed, how shall it be tried? ad quod non fuit responsum; and he said, the Act makes a Nullity of their Proceedings, so that the Defendant might have such an Action against a Plaintiff, who proceeds against the Act; but he held clearly, that as to the Officer, he shall be acquitted; and he cited Turner and Felgate's Case; but insomuch, that it was objected, that it does not appear that the Defendant there was an Inhabitant of Bristol; and though the Plaintiff might take Conusance of the Place of his Contract, yet he might not take Conusance where the Defendant inhabited; for this Curia advisare vult.

Davis *and* Speed; *intr.* Mich. 4 Will. & Mar.

20. UPON a special Verdict the Case was, Horn was seised of the Lands in Right of his Wife; the Husband and Wife join in a Fine, and declare the Uses to the Heirs Male of the Body of the Husband upon the Wife engendred, Remainder to the right Heirs of the Husband; they have Issue a Son who died without Issue, &c. and if the Lessor of the Plaintiff, who was right Heir of the Husband, or the Defendant who was Heir to the Wife, shall have the Land, was the Question; and it was adjudged against the Plaintiff, nisi, &c. for here the Limitation to the right Heirs of the Husband, after the Death of the Husband without Issue, is such a springing Use, which the Law will not allow or expect, according to the Case of Pell and Brown, 2 Cr. 290. but if this had been to the Heirs Male of the Body of the Husband, it might have been good, and the Fee shall result to the Wife in the Interim, and it shall be good as a springing Use to take Effect after the Expiration of two Lives in esse, the which may be good by the Rule of Law; for a Man may make a Feoffment in Fee to the Use of the Heirs Male of his Body, and the Fee shall be in him in the Interim; and tho' by Northey in this Case, such Use might have been good by Way of Covenant, where the Use arises out of the Estate of the Covenantor, and no Transmutation of Possession, as in the Case of Pibus and Mitford; yet per Curiam, it is more difficult in Case of a Covenant, than in the Case of a Feoffment; and the Opinion of Keyling and Twisden in the Case of Snow and Cutler was mentioned by Holt and Dolben; the which was, that the Devise there was good, because the Devisor himself took Notice, that the Wife had an Estate for Life, so it ought of Necessity to operate in futuro.

And this Term Judgment per Curiam was given for the Defendant, for the Limitation to the Use of the Heirs Male of the Body of the Husband, &c. is void; and per Holt Chief Justice, this Case is so ruled in 1 Rep. 135. and also in the Earl of Bedford's Case there, 130. but he

the said if a Lease be made to A. for Life, Remainder to the right Heirs of B. this is a good Remainder; if B. dies before A. because a particular Estate to support it; but if A. dies in the Life of B. the Remainder void, because there is no Person to take it, and no particular Estate to support it: If a Man covenants to stand seised to the Use of J. S. and his Heirs after the Death of J. D. he continues seised in Fee, and no Estate altered during the Life of J. D. and if the Covenantor dies, this shall descend to his Heir; but if he covenants to stand seised to the Use to the Heirs Male of his Body, because that no Descent may be to the Heir after his Death, the Law raises an Estate to him by Implication, and he does not remain seised in Fee during the Life, but his Estate is immediately put into an Estate-tail, according to Pibus and Mitford's Case: But in the Case at Bar, there is an express Limitation to the Party, and therefore there shall be no Use by Implication, and so the Use to the Heirs Male of the Body of the Husband void; and as the first Use is void, so is the Second also; for tho' a Man may limit a future Use upon a Contingent after a Death without Issue, within the Compass of a Life, as in Pell and Brown's Case 290. yet a future Use to take Effect after a Death without Issue generally, is so remote a Possibility, that the Law will not admit of it; and therefore it being here limited after the Death of the Husband without Issue, and there not being any Estate to support it, [for if it had been to the Husband, and the Heirs Males of his Body, Remainder to the right Heirs of the Husband, it had been good without Question] it is a future Use to take Effect upon such a remote Possibility, as the Law will not allow; for which Judgment was given for the Defendant.

Term. Trin.

5 Will. & Mar. R. B.

& Peter *and* Compton.

1. THE Question upon a Trial before Holt Chief Justice at Nisi prius in an Action upon the Case, upon an Agreement, in which the Defendant promised for one Guinea, to give the Plaintiff so many at the Day of his Marriage, was, if such Agreement ought to be in Writing, for the Marriage did not happen within a Year: The Chief Justice advised with all the Judges, and by the great Opinion (for there was Diversity of Opinion, and his own was econtra) where the Agreement is to be performed upon a Contingent, and it does not appear within the Agreement, that it is to be performed after the Year, there a Note in Writing is not necessary, for the Contingent might happen within the Year; but where it appears by the whole Tenour of the Agreement, that it is to be performed after the Year, there a Note is necessary; otherwise not.

Dutchess of Grafton *versus* Holt.

2. THIS was an Assize for the Office of Chief Clerk of the King in R. B. ad irrotuland. Pleas before the King, vacant by the Death of Sir Robert Henley, in which le tenant fuit mise, per Sir John Holt Chief Justice; and upon a Trial at Bar, the Demandant made Title by a Patent granted to Bridgman and his Heirs, during the Lives of Henry Earl of Arlington, Henry Duke of Grafton, and Isabel his Wife, to commence after the Death, &c. of Sir Robert Henley, qui fuit legitimo modo constitute deins le dit Office; the Counsel for the Defendant shewed, that in the Nature of the Thing, this Office is grantable by the Chief Justice, for this Office of inrolling the Pleas of the King in this Court, is an Office which has the Care of making the Writs, and drawing the Records under the Chief Justice; and all Writs of Certiorari are directed to the Chief Justice, and he is to certify them, and therefore he ought to have the Disposal of the Office, in which they are kept; and they produced Records for 250 Years and more, by which it appeared, that the Chief Justice for all that Time had disposed of this Office; and in all the Grants which they had made, there were these Words, Cui de jure pertinet Officium prædict. dare & disponere cuicunque placuerit durante his being Chief Justice; and no Instance can be given, that this Office was ever given by the King, and enjoyed under such a Patent.

On the other Side they shewed a Statute in 15 E. 3. in which it was said, that it belongs to the King to dispose of the Offices of Comptroller, and of Chief Clerk of C. B. and R. B. that this Statute was declaratory of the ancient Law; and that by this Statute the Prescription for the Chief Justice to dispose of this Office being interrupted, the Precedents they produce will not give him a Right against the King; and though the Statute was repealed within two Years after the Making of it, yet the Prescription being interrupted by the Statute, if the Office be not incident to the Office of Chief Justice, to be disposed of, he cannot obtain a Right to it

by Usage; and it is plain that the Office of Chief Clerk in the Court of R. B. is in the Statute aforesaid disposable by the King; and upon this they prayed the Opinion of the Court, before they proceeded to give further Evidence: And the Court demanded, if they had not any further Evidence, and said, that it was not the Practice to move a Point, and demand the Opinion of the Court, but when they have given all their Evidence, then they would give their Opinion; and they were asked by the Court, if they could produce any Instance, that after this Statute, the King had given this Office of Chief Clerk ad irrotuland. &c. but they could not produce any.

On the other Part it was answered, that the Chief Clerk is Sir Samuel Astry, and that the Statute indends him, and not the Office in Question, for he is the Chief Clerk, and has Precedence of the Officer in Question; and the Officer in Question is not Chief Clerk simpliciter, but secundum quid, ad irrotuland. placita coram Nobis, and has fifty or sixty subaltern Clerks, of which he is the Chief, but he is not the Chief Clerk of R. B. to which it was answered, that Sir Samuel Astry is not called Capitalis Clericus, but Coronator Domini Regis, & Attornatus Domini Regis ad prosequend. & defendend' pro Domino Rege, and no Man is called Capitalis Clericus, but the Officer in Question; upon which the Opinion of the Court being demanded, they said, that neither Sir Samuel Astry, nor the Officer in Question are precisely within the Words of the Statute; for Sir Samuel Astry, though he is the Chief Clerk, is not called the Chief Clerk, and the other is not called the Chief Clerk of R. B. but ad irrotulandum, &c. and therefore neither of these Officers being within the Words, they ought to expound the Meaning of these Words by the Usage after the Making of the Statute, and they cannot shew any Precedent where this Office in Question had been given by the King; but the Office which Sir Samuel Astry has, was always after the Statute disposed of by the King, and therefore it shall be taken and intended, that this was the Office meant by the Statute, and therefore they have not made any Title for the Demandant, and he ought to be called; but it was said by the Counsel that it was

more proper for the Jury, and so the Court directed the Jury, and they found for the Tenant, and that the Office of Sir Samuel Astry was the Office intended by the Statute of E. 3. and not the Office of Chief Clerk ad placita irrotuland. upon which the Counsel of the Demandant at another Day offered a Bill of Exceptions, and gave for Reason, that the Exposition of this Statute was a Matter in Law, and that the Court ought to have given their Judgment in it, and not to have sent it to a Jury, and that this was not proper for a Jury; to which the Court answered that they gave their Opinion ut supra, and ruled that the Plaintiff ought to be called, and that then it was said to be more proper for the Jury; and that upon this at their Instance, the Jury was charged, otherwise the Demandant had been called; and therefore they refused the Bill of Exceptions, and said that if they sealed it, they should acknowledge under their Seals, that they had over-ruled their Exception, where they over-ruled nothing, which would be false; and they should be concluded by it, for they should only be called to answer, if those are their Seals; but they should not be admitted to deny any Thing contained in the Bill, and this was the Reason given by them all, scil. Dolben, Gregory and Eyres; but none of them objected, that a Bill of Exceptions did not lie in this Court.

Wharton *and* Lisle; *devant.* 341

3. THIS Case being moved again in the Absence of Holt Chief Justice, it was adjudged by Dolben, Gregory and Eyres clearly, that in this Case, where it was found, that Twenty-six Acres only in a Parish, which consists of 1200, being sown by several Persons with Flax, it was a small Tithe, and they said that minutæ decimæ shall be construed according to the Nature of the Thing, and not of the Place where it is sown; for if a Man converts Arable into Pasture, though the Parson has the Tithe of Grain, yet the Vicar shall have the Tithe of Milk and Cheese; and tho' in some Places the Parson has Tithes of Hops, &c. which is a small Tithe; it was said by Eyres that this was established by

Usage; and as to the Objection which was made, that it shall be a small Tithe when it is sown in small Parcels; and that if a great Quantity of Lands be sown with a Thing which is a small Tithe, that then this shall become a great Tithe, by Reason of its Quantity; the Court answered that this is not in the Case here, for here but twenty-six Acres are found to be sown, when the Parish consists of 1200. and these twenty-six Acres may be sown by forty several Persons, one Man may sow half an Acre, and another a lesser Part, as may be seen, a little Part at the End of a Land in the Common Fields frequently; but when the greater Part of a Parish is sown with Flax, then they would consider, if it shall be great or small Tithes there, or not; but to say that a Thing is small Tithe if sown in an Orchard, and great Tithe if sown in a Common Field, which may be on the other Side of the Hedge, is a strange Opinion; and therefore they thought it more reasonable to hold that to be a small Tithe, which has been so accounted, as Flax has been according to Linwood, (which is the best Author that we have) than to hold it to be great or small, according to the Place where it is sown, or the Quantity, which is so uncertain, that the Law cannot determine what will make a greater Tithe, or what will make a smaller Tithe; and so they gave their Judgment for the Defendant, that it was a small Tithe.

Jones *and* Ashurt.

4. UPON a Trial at Guidhall before Holt Chief Justice, upon Evidence the Case was, an Action of Trover for diverse Goods was brought against the Defendant, being Sheriff of London by the Plaintiff, being the Son of Jones who was executed for Robbery and Burglary; and being in Newgate, and his Goods being seised by the Defendant, he made a Bill of Sale of the Goods mentioned in the Declaration, to the Intent to make Provision for the Plaintiff being his Son; and by Holt Chief Justice the Bill was ruled fraudulent, for though a Sale bonâ fide, and for a valuable Consideration had been good, because the Party had a Property in the

the Goods till Conviction, and ought to be reasonably sustained out of them; yet such a Conveyance as this cannot be intended to any other Purpose than to prevent a Forfeiture, and defraud the King; and Holt Chief Justice said, that there was a Fraud at Common Law, as in such a Case as here; and though this Bill would not be fraudulent against a subsequent voluntary Disposal, per Jones, yet when he is convicted for a Fact before the Sale, this shall relate, and avoid the Sale, and no Countenance ought to be given to such a Contrivance as this, where a Man has gained an Estate to a considerable Value by Robbery; and when he is detected, he would give this to his Posterity; and the Plaintiff was nonsuit.

Term. Mich.

5 Will. & Mar. R. B.

The King *and St.* John's *College in* Cambridge; *puis.*

1. A Mandamus being granted, and directed to the President and Fellows Collegii Sti. Johannis, &c. in Cambridge, reciting that by the Act of 1 Will. & Mar. the President and Fellows ought to take the Oaths of Supremacy and Allegiance, &c. injoined by the Act within such a Time, &c. and that diverse Fellows, scil. A. B. C. &c. had not taken the Oaths, by which their Fellowships became void; but yet they continued and resided within the College, and received the Profits and Benefit of their Fellowships, sicut informamur, &c. upon which the King and Queen commanded them to put these Fellows out of the College, & qualiter hoc breve fuit execut', &c. upon which Pemberton and Levinz of Counsel with the College came and prayed, that the Court would vacate the Writ, quia improvidè, for here is a peremptory Mandamus granted at first, without giving the Party Leave to be heard, or to make a Return, for this is a peremptory Mandamus, without vel causam nobis significes, or si ita est; and to such Mandamus they could not make any Return, but ought to obey the Writ, and put them out, though they had taken Oaths; and therefore they prayed that the Court would not compel them to make a Return to this Writ, for it would be a Contempt to make any Return, nisi they gave Obedience to the Writ; to which it was answered by the Court, that they might make a Return to

to the Writ, and answer to the Suggestions of the Writ well enough, if they be false; and that this is not a peremptory Mandamus having the Words sicut informamur; but Holt Chief Justice said to the Counsel, return the Writ, and when it is of Record before us, then we can judge of it, and the Exception may be saved to you, when the Return is made; but Levinz said, that the Suggestions of the Writ of this Court would not be permited to be traversed, no more than the Return; and the Attorney being in Court, it was moved to him to have a new Writ; the which he did not incline to agree to, but yet the Court took Time to advise.

The King *and* Tucker; *devant.*

2. THIS Case was moved again this Term by Levinz, who endeavoured to evade the Exception taken to the Indictment, because it wants contra allegeantiæ suæ debitum; and he said that though the Conclusion be not in such Form, yet upon the Indictment it sufficiently appears to be contra allegeantiæ suæ debitum; for it is said that he non ponderans debitum allegeantiæ suæ, but moved by the Instigation, &c. proditoriè, &c. so that it is necessarily to be intended to be against his Allegiance; and he cited the Case in Dyer 5. where murdravit was held good, though it is not said ex malitia sua præcogitat. and that the Word murdravit implies it; but per Holt Chief Justice, this Case has been denied, and diverse Indictments have been reversed for such a Fault; and Powis of the same Side with Levinz said, that the Conclusion is an Aggravation of his Crime, and properly inserted for that Reason, but not of Necessity, but like to diverse Clauses in the Beginning of the Indictment, which are inserted by Way of Aggravation; but if they are omitted, he said, they did not vitiate the Indictment; but per Curiam the Clause seems to be of Necessity, and they much relied upon the Opinion in Calvin's Case 6. Hob. 271. and 3 Inst. 11. cited by Pemberton; by which it appeared, that if an Alien come here, and remain, an Indictment of Treason ought not to say naturalem suum dominum, because he was not a natural Subject born; but it ought to conclude contra alle-

geantiæ suæ debitum, because he has Protection here, and a local Allegiance is due from him; but if an Alien come here in an hostile Manner, and never was under the Protection and Obedience of the King, there he cannot be indicted omnino, but ought to be try'd by Martial Law, or Ransom; and Dolben insisted strongly, that such a Conclusion cannot be aided, more than the Want of contra pacem, for which he had known an Hundred Indictments quashed; and yet in such Indictments, the Manner of the Fact is shewn to be Vi & armis, viz. gladiis, baculis, &c. and nothing seemed to stick with Dolben and Eyres Justices, but the Number of Precedents, where this Clause was omitted, as Sir Henry Vane's Case, Lambert's Case, and a Case cited in Sid. 538. and diverse others; but Holt Chief Justice said, if the Law be clear, they ought to judge according to the Law, &c. Curia advisare vult; puis.

Sands *versus* Child; *devant*.

3. IN this Term Holt Chief Justice delivered the Resolution of the Court in this Case, and said, that there not being any Difficulty in the Case, they would not argue it; but they were all of one Opinion, that the Judgment ought to be affirmed, for he said, that tho' the Suit in the Admiralty was not against the Person, yet being there against his Goods, according to the Course of Proceedings there, this is a Suit in the Admiralty within the Statute. Secondly, That though the Defendant be not the Party in Court, yet if he be the Person who moves the Suit, and be the Cause of such Charge and Trouble, an Action lies against him; but the main Difficulty of the Case was, because the Plaintiff was a Tenant in Common of these Goods, and of the Ship with other Persons, and that they being a Thing personal, they ought all to join, and of such Opinion was the whole Court; but He said, that this was but in Abatement, and nothing appears within the Record, which abates the Plaint; and if it had been pleaded, he ought to have averred, Quod tempore captionis, and of the Action brought, the other Tenants in Common, who ought to

 join,

join, were alive; for though they were alive tempore captionis & arrestationis, yet if it does not appear that they were alive at the Time of the Action brought, the Plaintiff alone might have the Action by Survivorship; and therefore the Judgment was affirmed.

Lane *and* Tenoe.

4. PER Holt Chief Justice, in a Plea upon the Acts of Discharge of poor Prisoners; the Act requires, that Notice be given to the Creditors by so many Days, &c. that he intends to take Benefit of the Act, and that he shall be discharged against such Creditors, to whom he gave Notice; but He said that it is not sufficient in his Plea to say, that he had given Notice to the Plaintiff in the Action, in which he pleads such Plea; but he ought according to the Act of Car. 2. to aver that he had given Notice to the Party at whose Suit he was committed, tho' he be not Plaintiff; for this is expressly required by the said Act; le quel nota.

Reeves *and* Pepper.

5. PER Holt Chief Justice, In many Cases, though a Man plead a Thing which may be given in Evidence; yet this shall not amount to a general Issue, as where the Plea goes by Way of Confession and Avoidance, as in Trespass where the Defendant acknowledges the Plaintiff to have a good Cause of Action, unless for the Matter which the Defendant has pleaded in his Plea; in such Case He said such Plea shall not amount to a general Issue; Quod nota.

The Company of Cutlers *in* Yorkshire *versus* Ruslin; *puis.*

6. IN an Action upon a private Act of Parliament, for a Penalty in that Act for retaining an Apprentice against the Act; per Holt Chief Justice & totam Curiam, where the Statute gives a Penalty to the Party grieved to be recovered by Action, Bill, Plaint, &c. this being a Duty to the Party vested before the Action brought, he shall have Costs against the Defendant, because he is put by the Defendant to the Cost and Trouble of a Suit; but in a Tam quam, or other popular Action, where the Duty is not vested, till the Suit or Information brought, there his Interest commencing by the Suit, and not being a Duty vested before, there he shall not have Costs against the Defendant. 10 Rep. Pinfold's Case 115. North and Wingates's Case, 1 Cr. 559.

Pope *and* Hayman.

7. IN an Action against a Sheriff for his Fees; it was objected that this was a Ca. sa. the which was not a Satisfaction, and that the Sheriff was not to have a Fee, but upon a Satisfaction, and the Statute does not give any Fee to the Sheriff, but only permits him to take a Fee not exceeding such a Rate; and if the Sheriff in this Case shall have a Fee upon a Ca. sa. then if two are bound, and Judgment against both, and they are both taken in Execution, and so two Fees to the Sheriff, where the Party has not any Satisfaction; so if a Man be taken in Execution and die, a Fieri facias shall go against the Goods, and upon this the Sheriff shall have a Fee; and if he shall have a Fee upon a Ca. sa. he shall have two Fees in such Case also: But per Curiam the Usage has always been since the Statute of 28 Eliz. to take a Fee upon a Ca. sa. and such a Fee is allowed to the Sheriff for his Trouble, which he had in the Execution; and therefore if there be a second Execution, he ought to have a Fee for that also, for his Trouble, as well as for the first; and per Holt Chief

Justice, an Action would lie for his Fee, for the Law permitting him to take it, makes it a Duty; and it was said, and agreed in this Case, that the Statute in the printed Books is mistaken, for the Roll is Anno Eliz. 28. and the Statute is Anno 29.

Somers *and* House.

8. YOU are a Rogue, and broke open an House at *Oxford*, and your Grandfather was forced to bring over 30 l. to make up the Breach; after a Verdict for the Plaintiff, it was moved in Arrest of Judgment, because Rogue is not actionable; and breaking open the House was but a Trespass, and making up the Breach might be repairing. But the Court seemed econtra, for upon all the Words together, a Man who heard them could not intend other than that he meant a felonious Breaking of the House, for the Breaking as a Trespasser could not make him a Rogue, and though in the old Books the Rule was to take the Words in mitiori sensu, yet per Holt Chief Justice, they would give a Favour to Words, and would give Satisfaction to them, who are hurt in their Reputation, and would take Words in a Common Sense according to the vulgar Intendment of the By-Standers; and the Rule de mitiori sensu is to be understood, where the Words in their natural Import are doubtful, and equally to be understood in the one Sense as well as the other; and after it was adjudged for the Plaintiff; for the Breaking of an House is Felony without Clergy, by the Statute of 1 E. 6. 13 par. 10. and it is in a common Acceptation to be understood of such a Breaking which is Felony.

Harding *and* Salkeld.

9. IN an Action upon the Case against the Defendant for Goods sold; he came and pleaded in Bar, that he was Executor, where the Plaintiff had charged him as Administrator; and upon a Demurrer adjudged for the Plaintiff, for it was but in Abatement; for the Matter is, if he be chargeable or no; and tho' it was said, that this was well pleaded in Bar to the Action, as in Robinson's Case, 5 Rep. 32. and that upon Evidence upon Ne unque Executor, he may give Letters of Administration in Proof, Dyer 305. this was denied per Holt Chief Justice and Eyres, cæteris tacentibus; and Holt said, that this notwithstanding, he shall be charged, but he said it is otherwise of Letters ad colligend. bona defuncti; but where one sues as Executor, the Defendant may plead by Way of Estoppel, that he was Administrator, &c. 5 Rep. 32.

The Company of Poulterers *versus* ——

10. INdictment upon the Statute of E. 6. for Ingrossing, and shews that the Defendant had engrossed trecent. & octagint. aves, *Anglice* Turkeys; an Exception was taken because Aves is uncertain, and the Anglice will not supply it, when there is a proper Latin Word, &c. In Answer to this the Case of Holton and Raworth in Hardress was cited, where Vinum, *Anglice* Canary Wine, was held good; then it was objected that Octagint. is ill and insensible. Curia advisare vult.

Leonard

Leonard *and* Beech.

11. AN Information upon the Statute of 1 Jac. c. 22. because the Defendant allocavit & sigillavit vigint. coria tannat. *Anglice* tanned Skins, not being good and sufficient, and he was convicted of Nineteen; and so given against him in Damages to the Informer; it was moved in Arrest, that the Information being, that he such a Day sigillavit & allocavit so many coria tannata; this ought to be intended but one Act, and one Offence, it not being said, & diversis diebus & vicibus tam antea quam postea; and it being but one Offence, he ought to forfeit but one Penalty, for he might seal them all together, and of such Opinion was Justice Dolben at first; but the Court took Time to advise, and consult the Statute; and after they ruled them to be several Offences, and so several Penalties incurred; and they held the Office of Searcher and Sealer to be but one Office.

Prigge *and* Adams; *puis & devant.* 355 407

12. IN an Action of Trespass and false Imprisonment, the Defendant justified under a Ca. sa. out of the Court of Bristol; the Plaintiff replies, and pleads a private Act of Parliament for erecting of a Court of Conscience in Bristol, and shews that the Defendant had recovered but 5 s. Damages, and 50 s. Costs, and shews that he had arrested the Plaintiff upon this, contrary to the Act; to which the Defendant rejoined, upon which the Plaintiff demurred; and it was argued for the Plaintiff, that here the Act is in the Negative, and therefore the Judgment void; and the Judgment being void, the Process upon it is not warranted; and though Notice is not alledged, yet this being a Law which concerns the Government of Bristol, they who live at Bristol ought to take Notice of it, for it is lex loci as to them; though the Courts here ought not to take Notice of it, without pleading of it, which seemed to be admitted; but the Doubt was, tho' that the Court below ought to take Notice of the Act, which is Lex loci there, yet the Court seemed to

 think,

think, that they ought not to take Notice of Facts within the Act, as that the Defendant there was an Inhabitant of Bristol; and another Doubt was, if the Party ought not to come in before Judgment, and pray the Benefit of the Act, for he might wave the Benefit of it; and upon this a Question was how he may come in, not having a Day in Court; but it seems in such Case, that there ought to be an Entry upon the Roll, that the Defendants prayed the Benefit of the Act, for otherwise this could not appear upon Error; and another Doubt was, if the Judgment in this Case be void, or voidable by Pleading, as in the Case of a Bond upon the Statute of H. 6. to the Sheriff, or of an Utlagary. Curia advisare vult; puis.

Anonymus.

13. THE Devisee of a Reversion brought an Action of Covenant for Arrearages of a Rent incurred after the Death of the Testator against the Defendant, who was Assignee of a Term; the Defendant pleads, that after the Arrearages incurred, and before the Action brought, that the Plaintiff had assigned the Reversion, &c. to which the Plaintiff demurred, and it was adjudged for him, for the Arrearages were a right vested and attached in him before the Assignment; the which he shall not lose by the Assignment.

The Company of Cutlers *vers.* Ruslin; *devant.*

14. THIS Case was moved again for Costs; and it was objected on the other Side, that this being a Thing newly created by the Statute, Costs shall not be given; but where a Statute is additional to an Action given by the Common Law, there the Party shall have Costs, and with this Diversity the Books are reconciled, as Coke said in Pinfold's Case, 10 Rep. and as to North and Musgrave's Case, it was said that Justice Berkeley was econtra, and the Reasons of that Case are not unanimous; and it was said, that the Case here is like to Actions of Debt for treble Damages for Tithes upon the Stat.

Stat. of 2 E. 6. where Costs shall not be given, for there if Judgment be by Default, the Sum demanded shall be recovered, without a Writ of Enquiry, 2 Inst. 289. 1 Roll's Abr. 516, 574, &c. But per Curiam Costs shall be given in this Case, for it being a Duty it is demandable, and Costs shall be given for the Delay, which the Defendant has given the Plaintiff in not paying it upon the Demand; but in the Case of an Information or Action popular, there the Party is not intitled to the Money before the Information, and therefore he cannot demand it; and in many Cases if Costs should not be given, the Statute would not be observed; for who would commence a Suit for a small Penalty, in which he shall be a Looser himself? and they have given Costs in a like Case lately, between Collins and the Mayor and Commonalty of Plimouth; and so they ruled Costs in this Case.

The King *vers. St.* John's *College in* Cambridge; *puis & devant.*

15. AND now the Attorney General, the Solicitor, and Williams came and complained of an Irregularity in the Defendants, for they have made a Return without signing of it; so that it does not appear to be the Return of the College, but it might be sent by the Carrier, and might be made in a Tavern by any Person, as well as those, to whom the Mandamus is directed; for it is directed to John Goar Præsidi, Sociis & Scholaribus Coll. Sti. Johannis Baptistæ, and it ought to be signed and subscribed by John Goar at least, for he is particularly named; and to this the Court inclined, for tho' it was admitted that they need not put their Common Seal to the Return, yet he being particularly named, it is reasonable that he ought to subscribe the Return, by which it might appear to be the Return of the Parties, to whom it was directed; but it was said on the other Side, that so it is in Effect, for it is endorsed upon the Return Responsio Johannis Goar, &c. the Parties to which the Mandamus is directed in the same Words of the Direction; and upon looking upon it the Court were satisfied, and the Motion of the King's Counsel was

thought unnecessary; for the Return being filed, they shall be estopped to say this was not their Return, it being made in their Names; and if any other had made it for them, they might have their Remedy by Action upon the Case.

Yaxley's *Case*.

16. YAxley was committed by the Secretary of State for refusing to answer, if he was a Jesuit, Seminary, or Massing Priest; and it was excepted to the Commitment; First, That the Stat. 35 Eliz. Par. 11. is general, by those who have Authority; and it not being express and certain, it ought to refer to the Stat. 27 Eliz. cap. 2. par. 13. which is that a Justice of Peace may commit him; and therefore those having Authority shall be understood by Reference to those mentioned in this Statute of 27 Eliz. and not to the Secretary of State; and it does not appear here that he was a Justice of the Peace. Secondly, The Warrant is, till he shall be discharged by due Course of Law, where the Statute is that he shall be committed, there to remain without Bail or Mainprise, till he shall make a direct Answer, if he be Jesuit, Seminary, or Massing Priest; and this being a particular Authority ought to be pursued, and diverse Commitments by Commissioners of Bankrupts, &c. have been discharged for this Cause; and tho' it was answered, that till he shall be delivered by due Course of Law, is tantamount as to say, till he has answered, and so has been delivered by due Course of Law; non allocatur; for this is in the Nature of a Conviction, and the Party is in Execution, till Answer made, and therefore he was discharged; but then the Court examined him, if he was a Jesuit, Seminary, or Massing Priest; and he said that he was not asked this Question upon his Commitment, and therefore this was the first Time, that he had answered to this Question; and he made this Answer, That he would make such Answer as he ought upon his Trial, and said that he was not a Jesuit, Seminary, or Massing Priest; and he was dismissed.

The King *verſ. the Inhabitants of* Derby.

17. MOved to quaſh an Indictment againſt diverſe Inhabitants in Derby, for refuſing to meet and make a Rate upon the ſeveral Pariſhes in Derby, to pay the Conſtables Tax; First, Because they are not compellable, but the Statute only ſays, that they may, ſo they have their Election, and no Coertion ſhall be; non allocatur; for may in the Caſe of a publick Officer is tantamount to ſhall; and if he does not do it, he ſhall be puniſhed upon an Information; and tho' he may be commanded by a Writ, this is but in Aggravation of his Contempt. Secondly, This is to be made in Hotchpot, to make a Rate for all the Pariſhes, and this they cannot do, for but only ſome of the Pariſhes are liable, and it may be that they have paid, and nothing is in arrear, and nothing appears to be in arrear at the Time of the Aſſeſſment; non allocatur; for the Rates ſhall be applied ſeverally reddendo ſingula ſingulis; and if they are not ſatisfied, they might demur to the Indictment; but the Court refuſed to quaſh it.

Villa *and* Dimock.

18. AN Action upon the Caſe was brought by an Executor for Work done, and Materials found for the Defendant, by the Teſtator of the Plaintiff; the Defendant pleads that the Father of the Plaintiff, who was the Teſtator, and the Plaintiff were alien Enemies born at ſuch a Place, under the Obedience of Lewis the French King; Judgment ſi actio; to which the Plaintiff demurred; and adjudged for the Plaintiff; for it is not ſhewn that the Teſtator did not die before the War; ſo that the Plaintiff might be Executor, and the Action attach in him before the War; and then being dead before he became an alien Enemy, he might have an Executor; and the Action being en auter droit, it ſhall be maintained.

Robinson *and* Watkins.

19. MAY it please your Lordship. This Case of Robinson and Watkins comes before your Lordship upon a Return to a Habeas Corpus, directed to the Mayor, Aldermen, and Sheriffs of London, commanding them to bring before your Lordship the Body of Philip Watkins, together with the Cause of his Caption and Detainment.

My Lord, the Return sets forth, that the City of London is an antient City, and that within the said City there is and hath been a Custom Time out of Mind, that if any the Customs, in the said City obtained and used, were in any Part hard or defective, or any Things in the said City newly arising, where Remedy before that Time was not ordained, should need Amendment; the Mayor and Aldermen for the Time being, with the Assent of the Commonalty of the said City, may ordain fit Remedy thereunto, as often as it should seem expedient, so as such Ordinance be profitable to their Majesties, for the Profit of the Citizens, and agreeable to Reason.

My Lord, the Return further sets forth, that this Custom, and all other Customs of the City were confirmed by Parliament in the seventh Year of R. 2. and that in a Common Council held according to the Custom of the City, upon the Thirteenth Day of March, in the Thirty-fifth Year of the Reign of King Charles the Second, reciting that by the antient Charters, Customs, Franchises, and Liberties of the said City, the Mayor and Aldermen, with the Assent of the Commonalty, are to make By-Laws for preventing all Things which may arise within the City, tending to the Hurt or Prejudice of the Citizens, or of the People resorting to the City, or to the Trade thereof. And further reciting that E. 3. (inter alia) granted, that if any Custom, in the said City used, proves hard or defective; and so recites the Custom mentioned at first of providing Remedy, to be confirmed by the Charter of Edward the Third. And then further reciting that the Number of Hackney-Coaches driving, standing, or waiting within the City, is greatly increased and become so many, and the Streets and common Pas-

sages of the City are so filled and pestered by the Driving and Standing of such Hackney-Coaches, that the Citizens and People repairing to the City are hindred, and the Trade of the City thereby prejudiced; for the remedying which Inconveniencies, and that Hackney-Coaches, to be employed within the City, may be reduced to a convenient Number; and the Persons driving such Hackney-Coaches may be under some Regulation and Government, agreeable to what hath been already provided concerning Carrs, Carts and Carmen; It was enacted and ordained, That from and after the first Day of May then next ensuing, the Number of Hackney-Coaches, to be used and employed within the City and Liberties thereof, should not exceed 400. And that no Person after the said first Day of May, other than such as shall be licensed according to that Act (except only Stage-Coaches to and from their Inns, and Coaches which shall take up a Fare out of the City, to be carried in or beyond the City, whilst they shall be without Delay or Covin, driving to such Place in or beyond the City) should by himself or his Servants drive for Hire any Hackney-Coach, or stand therewith to be hired within the City of London, or other Liberties thereof. And if any Persons not licensed (except as aforesaid) drive for Hire, or stand, in Order to be hired, with any unlicensed Coach within the City or Liberties thereof, the Person so offending should forfeit forty Shillings for every Offence, to be levied by Distress of the Coach and Horses so driven, or to be recovered by Action of Debt, to be brought in the Name of the Chamberlain of the City for the Time being, in any of their Majesties Courts of Record within the City. And for preventing all Persons, other than shall be licensed by Virtue of the said Act, to drive or stand with Hackney-Coaches for Hire within the Streets, they ordain that 400 Persons shall be licensed, and have a Certificate (yearly to be renewed) from the Mayor and Court of Aldermen, under the Seal of the Office of Mayoralty, and signed by the Town-Clerk, and appoint the Form of the Certificate (in hæc verba), My Lord, it being upon this Part of the By-Law that the Breach alledged in the Return is assigned, to this Part of the By-Law only I shall apply my self in speaking to this Return, and shall not trouble your Lordship in fur-

ther opening of the By-Law; for my Lord I hope it will be sufficient for my Purpose at present, if I can prove this Part of the By-Law, which my Client is supposed to have broken, and to which the Penalty of Forty Shillings, for which he hath been arrested, is particularly annexed, to be void and illegal; for if that be so, then my Lord there will no Cause appear for his Imprisonment upon this Return.

My Lord, the Mayor and Aldermen further set forth in the Return, that before the Issuing the Writ, directed to them, Philip Watkins therein named was taken within the City and imprisoned, by Virtue of an Original in Debt for Forty Shillings brought against him by Leonard Robinson Chamberlain of the City of London; and so they set forth in the Return the Original (in hæc verba). And then they proceed and return, that after the Making of the said Act of Common Council, and after the first Day of May in the Act mentioned, and before the Issuing of the said Original, the said Watkins (not being a Person licensed according to the By-Law to drive a Hackney-Coach) upon the first of June, in the 4th Year of their present Majesties, within the City of London, in the Parish of St. Michael Cornhill, stood with an Hackney-Coach not licensed, in Order to be hired, contrary to the Meaning and Intent of the said Act of Common Council, and that thereby the said Philip Watkins incurred the Penalty of Forty Shillings; for which an Action accrewed to the Plaintiff as Chamberlain of the City, who thereupon took out the said Original returnable in the Mayor's Court of the said City, for the said Penalty of Forty Shillings, and arrested the Defendant for the same; which Action yet depends in the said Court undetermined; and this is set forth upon the Return, as the Cause of the Imprisonment of the said Watkins; and my Lord, I humbly conceive that this is no sufficient Cause for his Arresting and Imprisonment.

My Lord, for maintaining this Return the Mayor, Aldermen, and Sheriffs of London have set forth a Custom, That if any of their Customs heretofore used, prove hard or defective; or if any Thing newly arising within the City, where Remedy was not before provided, should need Amendment; in either of these Cases, the Mayor and Aldermen for the Time being, with the Assent

of

of the Commonalty, may ordain fit Remedy thereunto, so as such Ordinance be profitable to their Majesties, for the Profit of the Citizens, and agreeable to Reason. My Lord, this Custom is likewise set forth in the Case of the City of London in the 8 Rep. and is the Foundation the City always relies upon, for supporting their Acts and Ordinances, when-ever they are brought under Examination here in Westminster Hall. And therefore before I speak directly to the Act of Common Council returned before your Lordship, I shall by your Lordship's Permission consider the Nature and Extent of this Custom, and examine what Remedy the Mayor, Aldermen, and Common Council may ordain by Force thereof; and in what Cases, and upon what Reasons such Remedy will be good and available in London, which would not be good in another City or Corporation.

This Custom of providing Remedy where their Customs prove defective, or where Things newly arising within the City want Amendment, is alledged in the Return to be confirmed in Parliament, in the Time of Richard the Second. And therefore I shall first consider what is wrought by this Confirmation in Parliament; and I humbly conceive by this Confirmation in Parliament, the Mayor, Aldermen, and Common Council of London have no other or greater Authority to bind the Subject to any Act or Ordinance to be made by them, than they had before by their Custom. The Confirmation in Parliament is indeed an Establishment of their Custom, and an implied Consent of the whole Kingdom, that they shall have such a Custom, but gives them no new or further Power; their Power remains the same; it was founded on their Custom; what Remedy they might ordain before their Custom confirmed, such they may ordain after; what they could not ordain before, they cannot ordain after, for their Custom remains the same, it was confirmed only, but not enlarged; as if there be Tenant for Life, and he in the Reversion confirm the Estate of Tenant for Life, habendum his Estate to him and his Heirs, he is but Tenant for Life as he was before; for his Estate being only confirmed, remains the same it was, and is not enlarged by the Confirmation, Litt. S. 524. So my Lord, this Custom which is the Source and Fountain of the Power in the Mayor, Aldermen, and Common Council, to provide Remedy, resting the same

after its being confirmed, as it was before, their Power must remain the same; and likewise I shall in the next Place consider what Remedy they have Power to ordain by Virtue of this Custom. And my Lord, I humbly conceive it to be very plain, that this Remedy can be ordained by nothing of an higher Nature, or more obligatory upon the Subject than a By-Law, which is a private Law made by such who are duly authorized thereunto, for the Conservation of Order and good Government within some particular Place or Jurisdiction. Acts of Common Council in London are nothing more than By-Laws, they are but private Laws, and bind in the Nature of private Laws, and not like Acts of Parliament. The City have a Power indeed to make By-Laws by Custom, confirmed in Parliament; but having no new or greater Power added by the Confirmation, than they have by their Customs, their By-Laws are still made by Virtue of their Custom, and are founded on their Customs, and therefore are not more obligatory in London, than By-Laws founded on a Power by Charter or Prescription in any other Corporation; and therefore an Act of Common Council in London, with the Penalty of Imprisonment, or Forfeiture of Goods and Chattels, will be void; as it is holden in Waggoner's Case, 8 Rep. 127. in like Manner; as if such a By-Law had been made at St. Albans, or elsewhere, which was resolved void in Clerk's Case, in the 5th Rep. 64 a. And my Lord, the Reason why a By-Law with such Penalties is void in London, is the same as that for which the By-Law with the like Penalty is void in St. Albans in Clerk's Case. And that, my Lord, was, that when by the general Law of the Kingdom, no Man is to be imprisoned, or dispossessed of his Goods and Chattels, nisi per legale Judicium parium suorum, vel per legem terræ, a By-Law which is neither legale Judicium, nec per legem terræ, but merely a private Law, cannot ordain that a Man shall be imprisoned or dispossessed of his Goods and Chattels; that would be for Corporations to set up their particular private Laws in Contradiction to the general Law of the Kingdom; that would be against the very Nature and Essence of a By-Law; which though it may be præter the general Law of the Realm, it cannot be contra; and therefore my Lord I humbly conceive that a By-Law cannot

cannot make that to be void, which is good in Law; as if a By-Law should ordain Bonds and Covenants, once duly made and executed, to be void; the Bonds and Covenants will remain good notwithstanding, and the By-Law void; and this was resolved in the Case of Doggerell and Pokes, Moor 411. where Covenant upon an Indenture of Apprenticeship being brought, the Defendant pleaded an Act of Common Council in London, That if any Freeman take to Prentice the Son of an Alien, that the Bond and Covenants should be void; but this was adjudged no Plea, because an Act of Common Council could not make Bonds and Covenants void. My Lord, as a By-Law in London cannot make that void which is good in Law; so what the Law permits as lawful, and leaves the Subject at Liberty to exercise and follow, cannot I humbly conceive be render'd unlawful, or the Subject be restrained from exercising of it by a By-Law.

A private Law made by a particular Authority cannot render that unlawful, which the General Law of the Kingdom allows to be lawful. As at the Common Law every Man might exercise any lawful Trade or Imployment, without serving an Apprenticeship, and so I humbly conceive is the Law at this Day; but in such Cases as the Statute of the 5th of the Queen hath made an Alteration, and therefore a By-Law to restrain any Man from exercising any Trade or Imployment within such a particular Place, which 'tis lawful for him to follow by the General Law of the Kingdom, hath been void in the Taylor of Ipswich's Case, in the 11th Rep. and in the Weaver of Newbury's Case, as is in my Lord Hob. 211. But it may be objected, that although in those Cases the By-Laws for excluding the Subject to follow his lawful Trade and Imployment in Ipswich and Newbury were holden void, that yet in London the Subject is restrained by a By-Law every Day from following his lawful Trade and Imployment; and that such By-Law hath been resolved good; and therefore By-Laws in London are of greater Force and Validity than By-Laws in Ipswich, or other Places. As a By-Law that no Person not being free of the City of London shall keep any Shop, or use any Trade within the City, was resolved a good By-Law to exclude Foreigners, in Waggoner's Case in 8th Rep. and the Practice is according

to that Resolution at this Day. My Lord, in Waggoner's Case there was besides the general Custom mentioned at first, this special Custom returned, that no Person not being free of the City of London, shall by any Colour, Way, or Means whatsoever keep any Shop, or use any Trade within the City; and this Custom was adjudged a good Custom in that Case, to exclude all Men not being free of the City. And my Lord, in that Case the Custom being adjudged good, it is to be taken as Part of the Common Law of England; and therefore Foreigners may be excluded by such a particular Custom, though by a By-Law without such a Custom they cannot; and in such Case the By-Law is but in Affirmance of the Custom, and is operative by the Custom. The Subject is deprived of no Right or Liberty by the By-Law, whereof he was not before deprived by the Custom, which is a Part of the Common Law. But my Lord, if in Waggoner's Case there had been no such special Custom returned, as the Root and Foundation of that By-Law; with Submission, the By-Law to exclude Foreigners in Waggoner's Case, tho' made by the Mayor, Aldermen, and Common Council in London, would have been of no greater Force than those of the Taylor of Ipswich's Case, and Norris and Stape's Case in my Lord Hob. for then the Restraint arising from the By-Law only, such By-Law would have contradicted the General Law of the Realm, which a By-Law cannot, tho' a Custom may, and therefore would have been void, as well as in those Cases of the Taylor of Ipswich, and Norris and Stape's Case. And my Lord, such a Custom of excluding Foreigners is not peculiar to the City of London only. The Archbishop of York prescribes to exclude Foreigners from exercising the Trade of Dying within his Manor of Rippon without his Licence, as appears Reg. 105, 106. And the Corporation of Weavers claim by Custom, that none shall intermeddle in their Art within London and Southwark, but those of their Gild and Fraternity; and such Custom was adjudged good in the Case of the Corporation of Weavers *versus* Brown, Croke, Eliz. 803. And my Lord, I humbly conceive it is no great Question but By-Laws duly made pursuant to those Customs, will be as forcible, and the Subject as much bound and restrained of his Liberty by them, as he is by the Law

in Waggoner's Case. And as to the Case of the Chamberlain of London cited, and much relied on by the other Side, my Lord, if that Case be examined, it will appear that the Mayor, Aldermen, and Common Council did nothing more by that By-Law, than what might have been done by a By-Law in Exeter or Bristol, or any other great Staple for Woollen Cloth; and the Reasons of that Resolution will hold as strong in those Places as in London; for the By-Law in the Chamberlain of London's Case, is not founded on any special Custom peculiar to London, but is made by Force of the general Custom mentioned at first, by which they have Power to make By-Laws; and the Reason why that was resolved a good By-Law was, because it was made for the better Execution of diverse Statutes, ordained for the true making of Woollen Cloth, which is one of the principal Commodities and Manufactures of the Kingdom. But my Lord, such a By-Law as that, being for the better executing the General Law of the Realm, and for Prevention of Fraud and Deceit, would with humble Submission have been as good, if made at Exeter or Bristol, as it is in London, for By-Laws for the better Execution of the Law may be made for that Purpose in the smallest Villages in England; so that I humbly conceive from what I have said, I may deduce this Conclusion. That when there is an antecedent Custom in London, upon which a By-Law there is founded, which is not in another Place; then a By-Law will be good in London, which could not be good in another Place; but when By-Laws in London are founded only on their General Power by Custom to make By-Laws, and are not explanatory, or in Assistance of a particular Custom in London, as the Root and Foundation of such By-Laws; then By-Laws in London can bind the Subjects there in no other Manner or Degree, than they may be bound by By-Laws in other Corporations; for though the City of London be of great Antiquity, and hath many Privileges and Advantages which were mentioned at large to your Lordship by Mr. Recorder; yet my Lord, they have but a subordinate limited Jurisdiction, and By-Laws made there, not founded on any particular Custom, are subject to the same Rule of Law, as those of any other Corporation.

My Lord, it cannot be pretended that any particular Custom in London concerning Hackney-Coachmen, hath proved hard or defective; Hackney-Coaches in London are of late Use, and there can be no Custom concerning them; therefore in speaking to the By-Law now before your Lordship, I shall make only the general Question, Whether or no the By-Law in that Part of it, which I have opened for the Licensing 400 Hackney-Coachmen to drive in the Streets for Hire, and stand there in Order to be hired; and for the punishing and restraining all such as shall stand or drive there for Hire unlicensed, be good and warranted by that Branch of their General Power, by Custom of making By-Laws in Cases newly arising, which want Remedy. And my Lord, I humbly conceive that this By-Law in the restraining Part of it is illegal, and against the Right and Liberty of the Subject. Before I speak to the main Difficulty of this Question, I shall consider two Things, which I suppose upon this Return will not be much controverted. The first is, Whether the Imployment be a lawful Imployment, for if it were not lawful for any Man to be a Hackney-Coachman, this By-Law could not license 400 Hackney-Coachmen; for a By-Law cannot make that lawful which by the General Law of the Kingdom is unlawful. If it be a lawful Imployment, the next Thing I shall consider is, if a By-Law to restrain Hackney-Coachmen generally (supposing that had been the Case) would have been good; and my Lord, I suppose likewise that it will not be much contended, but that such a By-Law would have been void, for such a By-Law would have been directly opposite to the Common Law, which leaves it lawful for any Man to exercise a lawful Imployment; and besides the Taylors of Ipswich, Norris and Stape's Case, which I have mentioned in the Case of Pain and Haughton in Roll, Tit. By-Laws 364. in the Case of the Carmen is full in Point: For there the City had made an Act of Common Council that no Carman within the City should go with his Cart without Licence; and if any doth to the contrary, that he should forfeit 15 s. This was adjudged a void By-Law, because in Restraint of the Liberty of the Trade of a Carman; and I do not see what Difference there could have been in Reason between a By-Law to restrain Carmen generally, and a

By-Law to restrain Hackney-Coachmen. But my Lord, the main Difficulty is still behind, and I suppose that it will be objected that the Hackney-Coaches in themselves may be lawful, and a By-Law to restrain them generally would be void; that yet notwithstanding when they grow into Numbers, and pester the Streets, they become Nusances by their Numbers, and therefore a By-Law to limit their Numbers, in order to prevent a Nusance, is good; and that this was allowed to be done in a like Case, in the Case of the Carts between Jenkins and Player. My Lord, it cannot be denied that a By-Law, made to prevent a Nusance, is good; the By-Law mentioned upon the last Argument made for the preventing the Use of an Hot Press, as dangerous for Fire, was resolved good chiefly upon that Reason, as I humbly conceive; so a By-Law to restrain Butchers and Chandlers from setting up in Cheapside, or such other eminent Parts of the City, may be good, because such Trades are offensive, and may be apt to breed Diseases; and therefore for Fear of Infection, and for the Sake of publick Decorum and Conveniency, such Kind of offensive Trades may be removed, and confined to Places of more Retirement; and this is no more in Effect than may be done by the Lord of the Market, for he may make Orders for the Governing of his Market, and appoint Butchers their Stations in one Place, and other Trades theirs in another; and these Rules and Orders being pro bono publico, will hold good. But my Lord, in these Cases no Man is totally restrained from his lawful Trade or Imployment, and the By-Laws are equal and impartial, every Man fares alike; and when the Law hath made no Distinction, but leaves one Man as free as another, a By-Law in these Cases does not restrain this Freedom to such only as will purchase a Licence, and prohibit and punish all others as Offenders. The Restraint here is only as to a Circumstance of Place, which all Men are ty'd to observe alike, by the Law of the Kingdom; 'tis as free for one Man to be a Hackney-Coachman as another; the Law requires no such Qualification as a Licence, or gives Power to the Mayor, Aldermen, and Common Council of London to grant Licences. Now, my Lord, for a By-Law to impose a Necessity upon the Subject to take a Licence, which the Mayor and Aldermen

men have no where intitled themselves to, and which the Law hath not any where, I humbly conceive, enabled them to grant, or required the Subject to obtain, is for a By-Law to check and controul that Freedom and Liberty, which every Man hath by the Common Law of this Kingdom, for the exercising of a lawful Imployment: Besides, my Lord, this By-Law is to establish rather than prevent a Nusance, for where is it said in Law, that above 400 Hackney-Coaches in London will be a Nusance, and under 400 will not be a Nusance; for ought appears in Law, 400 may be a Nusance as well as 5 or 600 and so may 1, 2, or 300; so that this By-Law is not to prevent a Nusance, but to define that Number to be a Nusance, which by Law is indefinite. Now for the Mayor, Aldermen, and Common Council of London to determine a Nusance to such a particular Number, to be licensed by themselves, and to exclude and punish all such above that Number, as shall drive unlicenced, in such a Case as this, where the Law is wholly undetermined to any Number, is nothing less, I humbly conceive than to assume to themselves a legislative Authority, and to erect their By-Laws into Acts of Parliament; but it may be objected that this might have been urged in Player and Jenkin's Case, in the Case of the Carts; but that notwithstanding a By-Law to restrain them to a certain Number to be licenced, and to punish all such as should drive unlicenced, was ruled good in that Case. My Lord, the Case of the Carts is the great Authority that seems to be relied on, for the Supporting the By-Law of the Hackney-Coachmen, and is mentioned in the Preamble of the By-Law it self. But I humbly conceive upon Examination, the Case of the Carts will appear very different, from this of the Hackney-Coachmen; the Case of the Carts between Jenkins and Player was in this Court; Pasch. 18 Car. 2. upon a Return as this Case is; and upon that Return it was shewn that by the Custom of the City of London, the Mayor and Aldermen have Power to order all the Carts and Carmen within the City; and that there were certain Ordinances made, whereby the Power of ordering Carts was given to Christ's Hospital, and that they made an Order that no one shall use his Cart within the City, without Licence of the said Hospital, and

and that there shall be but 400 Carts used within the City; and if any Person not licenced shall use a Cart, he shall forfeit 40 s. to be recovered at the Suit of the Chamberlain, as in the present Case; and then a Breach is shewn of that By-Law, as is done here; and upon all this Matter appearing in that Return, it was resolved to be a good By-Law; and my Lord, the like had been resolved before in another Case in this Court, in Hill. 14 and 15 Car. 2. between Gavell and Casker, in the Case of the Carts, but the same Answer will serve to both Cases; for, my Lord, in both these Cases, the Mayor and Aldermen intitled themselves by special Custom to the Power of ordering all Carrs and Carmen within the City; and having such a Power by Custom, the By-Laws in both these Cases arose and were growing out of the Custom there set forth, and are founded on those particular Powers by Custom: And the Carts and Carmen being by Custom under the Power of the Mayor and Aldermen to be ordered, 'tis reasonable to believe that the By-Laws and Orders of the Mayor and Aldermen made for the Ordering and Governing of them, should be binding upon them; and that the Carmen being under their Government, should observe their Orders. But my Lord, with humble Submission, these By-Laws for limitting and restraining the Carmen, have not their Force and Operation merely in themselves as By-Laws; but as they stand returned in Conjunction with a Power by a particular Custom in the Mayor and Aldermen, of ordering and governing all Carts and Carmen within the City; for there, my Lord, the By-Laws are only in Aid, and for the better Observation of the Custom, and it is by the Custom the Carmen are originally restrained, and not by the By-Law: If a By-Law singly of it self could have restrained them, the By-Law in the Case of Pain and Haughton, which I mentioned before, Roll, By-Laws 364. would have been resolved good, which was resolved otherwise; the Force and Operation therefore of the By Laws in these Cases of the Carrs and the Carts, is from the Power the Mayor and Aldermen have by Custom of governing and ordering the Carts and Carmen. But in the Case of the Hackney-Coachmen, there neither is or can be such a Power by Custom of governing and order-

ing them, lodged in the Mayor and Aldermen of the City of London; and therefore this By-Law for the Ordering and Governing them, returned before your Lordship, not being supported by such a special Custom, as was in those Cases, but wanting the Foundation which those By-Laws had, I humbly conceive will be wholly different, in Reason from the By-Laws in the Case of the Carrs and Carts; and that the Force and Operation of such a By-Law as ours, is wholly from the By-Law it self. And as the By-Law in the Case of Pain and Haughton, no such Custom of Governing and Ordering the Carmen by the Mayor and Aldermen appearing in that Case, was adjudged void; so likewise in the Case of Player and Jenkins, if such a special Custom had not been there set forth, that By-Law which is relied on for a Pattern for this, would have been void likewise; and of that Opinion was my Lord Chief Justice Hale, in another Case upon that very By-Law of the Carts, in this Court between Player and Brondnax. Hill. 23 and 24 Car. 2. Some Years after the Case of Player and Jenkins, where the By-Law above-mentioned of the Carts being returned, and the Custom of Governing and Ordering them by the Mayor and Aldermen set forth, as was done in the Case of Player and Jenkins, after the Case had been spoke to at the Bar, my Lord Chief Justice declared, that without a Custom the By-Law had been void, but by Custom it might be good. My Lord, I do not see what Difference in Reason there can be between the Case of the Carts, and this of the Hackney-Coaches. The Makers of this By-Law themselves took the Case of the Carts as a Warrant for this of the Coaches; and if the Mayor and Aldermen had, or could have intitled themselves by a Custom to the Governing and Ordering of the Hackney-Coaches, as they did of the Carts, I do not see what Answer could have been given to Jenkins and Player's Case; but their Foundation failing them, and there being no such Custom here, for Ordering and Governing the Hackney-Coachmen by the Mayor and Aldermen of London, as there was in the Case of the Carts; if the By-Law in the Case of the Carts would have been void without such a Custom, according to the Opinion of my Lord Chief Justice Hale, in

in the Case of Player and Brodneaux; by the same Reason in the present Case, there being no such Custom, this By-Law is void.

My Lord, upon the whole Matter the Jurisdiction of the Mayor, Aldermen, and Common Council, is but an inferior limitted Jurisdiction, their By-Laws are but private Laws, and bind in the Nature of private Laws, and cannot stand in Competition with, or derogate from the Common Law of England; their Customs of making By-Laws being confirmed in Parliament, add no new Vigour or Power to them; they cannot make Bonds or Covenants void, which are good in Law; they cannot inflict a Penalty of Imprisonment, or Forfeiture of Goods by a By-Law in London, more than in other Places. The Imployment of an Hackney-Coachmen, I humbly conceive must be taken to be a lawful Imployment upon this Reason; and being so cannot be restrained generally, according to the Taylor of Ipswich's Case, and Pain and Haughton's Case, and restrained to a certain Number; in Order to prevent a Nusance they cannot be, unless it had appeared in Law, what Number will be a Nusance, or the Mayor, Aldermen, and Common Council had intitled themselves to a Power of limitting, and ascertaining such Number by a special Custom, for the sole Ordering and Governing of Hackney-Coaches, as they did in the Case of the Carts; in the Case of the Carts, if no such special Custom had been shewn, that By-Law would have been void by the Opinion of my Lord Chief Justice Hale, in the Case of Player and Brodneaux; and there being no such Custom in this Case of the Hackney-Coachmen set forth, I humbly conceive this By-Law in this restraining Part is void, and so no sufficient Cause shewn upon the Return for the Arresting and Imprisoning my Client; but that his Standing with his Coach unlicenced, in Order to be hired, was lawful, and therefore I humbly pray your Lordship that he may be discharged, and his Cause retained in this Court: Adjornatur; and afterwards the Matter was settled in Parliament, but the City never thought fit to stir further in it.

Beveston *and* Hussey; *puis.*

20. UPON a special Verdict the Case was, John Fouch seised of Gavelkind Lands departible among Brothers, had two Brothers, Thomas and William; Thomas had Issue Henry and Thomas; and this Thomas had Issue two Daughters, who claimed all the Lands in Question; William had Issue Henry, and Henry, had Issue, who claimed a Moiety of the Lands in Question according to the Custom; the Question was upon the Will of John, who devised Part of his Land to William and his Heirs; and as to the Land in Question, he devised it to Henry the Son of Thomas and his Heirs, if he live to Twenty-one Years of Age, and that the Wife of the Devisor shall have the third Part of it, with a Rent out of other Lands; and if Henry die before Twenty-one, then to the next Son of Thomas, if he have any; and if he have no other Son, then to Henry Son of William, and his Heirs; but if Henry and his Wife die, before Henry have lived to Twenty-one, then he devises all his Lands presently to such Persons last named, as shall be his Heir, according as it shall happen: Henry the Son of Thomas died without Issue before Twenty-one, Thomas his Father having Issue Thomas, who had Issue two Daughters; and if Thomas the Brother of Henry, upon the Death of Henry before Twenty-one took a Fee, or if only an Estate for Life, was the Question; if he took a Fee, then the two Daughters of Thomas ought to have the Whole; if he took only an Estate for Life, then the Issue of Henry the Son of William ought to have a Moiety; for William their Grandfather was the Brother of John the Devisor; and Thomas being dead, and the Estate of Henry determined by his Death before Twenty-one, the Estate ought to descend according to the Custom to the Brothers; puis.

Neath *and* Reeves.

21. ERror upon a Judgment in Cur. Pall. where the Plaintiff as Administrator Felicis Bainham counted against the Defendant, that he was indebted to the Plaintiff as Administrator of Felix Bainham in 10 l. pro tant. denarior. sum. ejusd. Quer. as Administrator of Felix Bainham per ipsum Def. ad usum ipsius Quer. as Administrator Felicis Bainham habit. & recept. &c. Non assumpsit pleaded, and a Verdict and Judgment pro Quer. the Error assigned was, that the Plaintiff had declared as Administrator of Felix Bainham, that the Defendant was indebted to him as Administrator of Felix Bainham, &c. ut supra, so this Action is brought in the Right of Felix Bainham, and founded in the Privity of his Estate; and the Money recovered by the Judgment shall be Assets to the Debts of Felix Bainham, for constat de Recordo, that this Recovery was in his Right, and not in his own Right; but the Plaint was general, and no Mention of Feliz Bainham in the Plaint; and therefore it shall be intended to be in his own Right, and so there is a Variance between the Plaint and the Declaration, and therefore this is Error; it was answered, that it was not necessary to name himself Administrator, and it is but Surplusage [Vide 6 E. 4. 1. and 22 E. 4. 11.] for the Money was received after the Death of the Intestate, as if an Administrator bring Trover of a Conversion in his own Time, there is no Need to name himself Administrator; also a Case was cited, Where a Man counted upon several Promises, some made to him in his own Time, some upon Contracts for Goods and Wares sold in the Time of the Testator, and entire Damages were given; and this held to be good, being several Times moved in the Time of Hale Chief Justice; the which the Court doubted; and it was said by Northey who cited the Case, that a Writ of Error was brought in Cam. Scacc. the Court in the principal Case seemed all to think that it was Error; but advisare vult; and after in Hillary Term following, the Judgment was reversed.

King *and* Ux' *versus* Tebbart.

22. TRespass of Assault and Battery; the Defendant pleads sur son assault; the Plaintiff replies, that the Defendant came into his House, and there continued after the Plaintiff had desired him to depart; upon which he commanded his Wife to put him out of the House, quæ molliter manus super the Defendant imposuit, & hoc, &c. but does not say, quæ est eadem transg. and it was said that molliter manus imposuit is a Justification to an Assault only, and not to a Battery; but non allocatur, for to put Hands upon any one against his Will, is a Battery; and so it is well enough as to a Battery, but not as to a Wounding; then it was said, that this is not applied to the Trespass justified in the Bar, as to say, quæ est eadem transgressio; non allocatur, for it being eodem tempore quo, it is well enough without such a Conclusion, for when they agree in the Time, such Conclusion is not necessary; but if they vary, then it is necessary to say, quæ est eadem transgress. 21 H. 7. 39. And if the Battery be outragious, so that a molliter manus imposuit be not true, it ought to be specially shewn, otherwise it shall be a good Justification; and a Traverse in this Case had been ill, the Bar being sufficiently confessed and avoided; and therefore it was adjudged a good Replication.

Quarn *and* Roe.

23. THE Plaintiff declared in Covenant, and the Defendant demurred to the Declaration, because the Plaintiff does not intitle himself to the Action by any Privity of Estate, for a Fine was levied of a Reversion to the Plaintiff and his Heirs, to the Use of the Plaintiff and his Heirs; the which is a Conveyance at Common Law, and therefore an Attornment requisite to make a Privity of Estate; and this not being shewn, the Action does not lie; to which it was answered, That at the Time of the Making the Estate to the Defendant, which was to commence after a Term in esse, this was

a future Interest, and therefore no Attornment necessary, or possible to be made by the Defendant, for he was not in Possession, and therefore his Estate was not severed from the Reversion, at the Time of the Levying of the Fine of the Reversion, the which is sufficiently conveyed by the Fine as to the Estate; so that the Conusee has the Estate, and this shall descend, though Attornment requisite to make a Privity; but in the Case of a Grant of a Reversion, there the Estate does not pass till the Attornment, and therefore a Reversion; as a Reversion cannot be granted omnino by Way of Grant, in such Case; but here it being by Fine it is well enough.

Grandvill *and* Dighton.

24. DEBT upon a Judgment in R. B. the Defendant pleaded in Abatement of the Action, a Writ of Error pending upon this Judgment in Cam. Scacc. to which the Plaintiff demurred, and it was adjudged for the Plaintiff, being argued by Serjeant Levinz for the Plaintiff; and Sid. 236. 4 H. 6. 31. and 18 E. 4. 6. were cited by him to be so resolved; and a Case was cited per Dolben to be adjudged accordingly in the Time of Roll, and after affirmed in Parliament before all the Judges of England, between Limerick and and though it had been stuck at, and Vaughan questioned it, yet it had been oftentimes so ruled: And it was held in the Case of Danvers and Smith in the Exchequer-Chamber, that such Plea is not good in Bar, but good in Abatement; but this Difference was not thought reasonable. And Holt Chief Justice said, if it was not for the Current of Authorities econtra, it seemed hard to him that such an Action lies, for the Writ of Error is a Supersedeas to an Execution, and therefore pari ratione it ought to be a Supersedeas to all the Ways to come at an Execution; and he cited the Case of Read and Bearblock, where a Man pays a Security of an inferior Nature, pending a Writ of Error upon a Judgment on a Security of an higher Nature; this was not a Devastavit, which shews, that the Writ of Error had so totally suspended the Effect of the Judgment, that it shall not have any Regard

or Essence; but this notwithstanding, it was tho' with some Reluctance adjudged by him, and all the Court ut supra.

Prickman *and* Tripp.

25. COUNT in an Action sur Case, quod quidam fluxus Aquæ currere consuevit & debuit usq; quendam fontem, &c. and that the said Well used to overflow, by Reason of the Running of the said Water into it; and that the Water which so overflowed from the said Well, usque the House of the Plaintiff used to run, for the necessary Use of his House, and alledged it in the Count to be an antient House, and to be in his Possession; and then shews, that the Defendant had diverted the Water by digging and making of a Cistern, so that the Water which used to run into the Well, did not run into it, and ratione inde the said Well for such a Time did not overflow; upon Not guilty pleaded, a Verdict was for the Plaintiff; and it was moved in Arrest of Judgment. First, Because no Terminus a quo of the Stream, the which was said was as necessary as in a Way; non allocatur, for it is not necessary, in this Case, he having shewn, that the Stream was used to run to the Well; and he having diverted it, when it was at the Well, this is a Tort, and it is not material from whence it comes; to which it was said at the Bar, that the Terminus was necessary, otherwise the Jury could not know, that there was such a Current, if it be not shewn; but per Curiam, this ought to have been in Proof, but it is not material after a Verdict. Secondly, It is not alledged that it used to run, &c. non allocatur, for consuevit & debuit is sufficient; and for this he cited 1 Cr. 500, 575. Palmer 292. Thirdly, No Act of Diversion is alledged, for it is not sufficient to say, that he had diverted the Current, but he ought to shew such an Act, which was the Cause of the Diversion, which the Court might adjudge a sufficient Cause; non allocatur, for Rastall 441. 3 Leon. 13. such general Allegation suffices, 4 Rep. Lutterell's Case; and after it was adjudged for the Plaintiff, and that the Count was good after a Verdict, though it might have been

been in a better Manner; for it was not alledged, that the Water had used to run from the Well to his House, so certainly as it might have been; but all these Things shall be intended to be proved upon Evidence, and so aided by the Verdict.

Smith *and* Wood.

26. THE Defendant libelled in the Spiritual Court against Smith, for these Words, You are a Rogue, and a Rascal, and a Whoremaster, and the Son of a perjured Affidavit Bitch, upon which the Defendant there moved the Court for a Prohibition. First, Because the Words are Words of Heat and Scolding, and do not concern a spiritual Thing; as if he had called him Schismatick, &c. and they are accoupled with Rogue and Rascal, &c. non allocatur, for Whoremaster is an Offence punishable in the Spiritual Court, and a Scandal as much as to call a Woman Whore; and though it is settled at this Day, that a Prohibition shall not go, where the Suit is for calling a Woman Whore, except it be in London, or any other Place, where a Custom for carting is suggested; and it appears either in the Libel or by Affidavit, that the Words were spoke in London; so it is the same Reason, that for calling him Whoremaster the Suit shall be in the Spiritual Court. Secondly, It was said, that the Words were ut supra, vel eis similia, the which is uncertain, and therefore a Prohibition shall go; non allocatur, for this is the Form in the Spiritual Court, though in our Law such a Declaration would be ill, and the Prohibition was denied per totam Curiam; and the Court said, that they would not encourage defamatory Words.

Hall *and* Cupper.

27. A Man sold to another so many Shares in East-India Stock, if the other approved of his Bargain, and demanded it ore tenus, or by Note in Writing left at the East-India House, before such a Day, and pleads that licet he demanded it ore tenus, and by Note in Writing at the East-India House, the Defendant had not transferred it, &c. upon which the Defendant demurred, and objected that licet the Note in Writing ought to be left at the East-India-House, yet the Demand ore tenus could not be left there; and therefore the Demand ore tenus is not restrained to the East-India House, but ought to be personal, and left at the East-India House, shall be applied to that which might be left there, which is the Demand by Note in Writing; but after being twice moved, it was adjudged for the Plaintiff, the constant Practice being an Exposition of these Words.

Hillman *and* Uncles.

28. TRespass quare clausum fregit, &c. the Defendant pleads, that the Trespass was done by him and Jane Rowland; and that after the said Trespass, it was accorded between the Plaintiff, and the said Jane, that the said Jane shall abate 14 s. due to the said Jane, from Edward Father of the Plaintiff, in Satisfaction of the said Trespass, and avers that the said Jane had abated the said 14 s. &c. and upon this the Plaintiff demurred: First, Because it is a Thing to be done for the Benefit of a third Person, and therefore the Accord not good. Secondly, Because he said, that she had abated the said 14 s. and not shewn how; as to the first Exception the Court was econtra, for it being in Disadvantage of one of the Trespassers, and made at the Request of the Plaintiff, though it be to a third Person, it is well enough; but as to the second Fault, the Court held the Plea to be ill, for he ought to have shewn how she had abated the 14 s. as to say, that the Father of the Plaintiff owed him so much, and had paid him but so much, so that the

the 14 s. be deducted and abated out of it; and to plead that she had abated generally, as it is pleaded here, is incertain and ill, &c. and adjudged accordingly in the following Term.

George *and* Lawley.

29. TRespass for entring of his House, and taking of a Silver Tankard, &c. the Defendant pleads a special Justification, scil. quoad vi & armis nec non totam transgression' prædict. præter intrationem domus prædict. & abscariationem Canther' prædict' non culp. & quoad residuum transgress. prædict. actio non, quia dicit quod diu ante tempus quo, & eodem tempore quo Gulielmus divina providentia Cantuariæ nuper Episcopus, fuit seisit. de manerio de Lambeth cum pertin. in dominico suo ut de feodo in jure Ecclesiæ, ad quod ipse & omnes illi quorum statum, &c. in manerio prædict. cum pertin. habuer. & tempore transgress. fieri supposit' habuit visum francii plegii, & omnia quæ ad visum franci plegii pertinent, tenend. infra præcinct. manerii prædict. quolibet anno intra festum beatæ Mariæ Virginis & festum Sti. Johannis Baptist. coram Senesch. Dni. Maner. prædict. pro tempore existent. à tempore in cujus, &c. & dicit quod ad visum franc. pleg. prædict. Archiepiscopi manerii sui prædict. tent. apud Lambeth die Veneris octavo die Maii anno, &c. and so shews a Presentment of the Plaintiff by the Jury for a Nusance, and an Amercement, and a Warrant to the Defendant to distrain, &c. which was throughout according to the Precedent in Rastall's Entries 606. upon which the Plaintiff demurred, and diverse Exceptions were taken to this Plea; First, Quia totam transgression. prædict. præter, &c. includes the Whole; and then to say, quoad residuum, is double, and to answer that with a special Plea, to which he had pleaded Non cul. before; but to this it was answered, that the Præter is an Exception out of the Totam transgress. and that which comes under the Præter is not included within the Totam Transgress. and there being one Part excluded, and not answered by the Plea of Non culp. this will be a Residuum, and the special Justification will go to it.

I Secondly,

Secondly, It is said, Nuper Episcopus Cant. and after it is said Archiepiscopi prædict. where he was not named Archbishop before; non allocatur, for the Court will take Notice that the Bishoprick of Canterbury is an Archbishoprick, and that he is an Archbishop, and will direct their Writs to him accordingly. Thirdly, It was objected, that the Leet is said to be held apud Lambeth prædict. but it is not alledged to be infra precinct. maner. prædict. and the Court did not seem much to regard this Exception, for it was said that the Leet being alledged to appertain to the Manor of Lambeth prædict. to be held infra præcinct. maner. prædict. and it being alledged to be held at Lambeth prædict. the Court will not intend this to be out of the Precinct of the Manor; but per Holt Chief Justice, he says, that he has a Leet, but he does not shew the Bounds and Limits of his Leet, or over what Persons the Leet has Jurisdiction, as to say de residentibus & inhabitantibus infra Maner. de Lambeth, &c. for the Leet may extend into one Manor, or within four or five Manors; or there may be several Leets within one Manor, and therefore he ought to plead the Bounds of his Leet certainly, and also he does not shew the octavo die Maii to be inter festum Annuntiationis Beatæ Mariæ & Festum Sti. Johannis Baptist. and for these Faults it was adjudged for the Plaintiff: Nota, this was pleaded according to Rastall; but the Court said, that there were as many Faults as Lines; this notwithstanding.

The King *vers. St.* John's *College in* Cambridge; *devant & puis.*

30. THIS Day the Solicitor argued upon the Return of the College to the Mandamus; and he said that here they have returned, that Non constat to them, that the several Persons named in the Mandamus had not taken the Oaths, &c. to which he said, that they being the Persons appointed to administer the Oaths, they have Conusance if they had taken the Oaths or no; and as to that Part of the Return, where they shew, that they have a Visitor; and that by the Statutes of the College, they have Power to expel for these particular

Causes, & non pro aliis; he said, that this went to the Legality of the Writ it self, and to the Power of the Court to grant such a Writ; and when they have heard their Objections to these Points, they would give them an Answer; and as to the Statute of Magna Charta, and of E. 1. and the other Statute mentioned in the Return, he admitted the Statutes to be so; but said, that here the Act had appointed, that if the Party do not such a Thing, that he shall be ipso facto deprived, and so the Manner of proceeding is directed by the Act it self, the which is a Judgment of it self: As in the Case of a Parson who did not read the Articles, he shall be ipso facto deprived, and the Patron may present to the Church, and a Sentence of Deprivation not necessary; and so in this Case the Fellows are ipso facto deprived without the Sentence of the President or Visitor, by the express Words of the Act. Shore argued in Maintenance of the Return, and said, that if the Writ was not a legal Writ of Mandamus, or that if it was a legal Writ, if it was not to be directed to the President and Fellows, but to another Person; or if it was to be directed to them; yet if they have alledged in the Return a sufficient Matter of Excuse, that then the Return will be good, and the Writ shall be quashed; the Writ suggests, that such and such were elected to be Fellows, and then shews the Act of Parliament of 1 Will. & Mar. &c. and then surmises, that the Persons there named had not taken the Oath of Allegiance, &c. according to the said Act; and that this notwithstanding, that the President, &c. permits them to remain, and continue there in the College, and to take the Profits and Benefit of their Fellowships, &c. therefore the Writ commands them to expel and remove the said Persons from the College, & qualiter hoc breve, &c. be executed nobis certificetis; and he said, that they had three Things to alledge in Excuse: First, By Way of Non constat, whether they have taken the Oaths or no, for Nihil notum est judici quod notum non est in judicio; and he said, that by the Act of 1 Will. & Mar. they were to take the Oaths before such Persons, before whom they ought to take them by the Statute of 7 Jac. and this was before the President of the College; and also two Justices of the Peace, of which one shall be of the Quorum, might require them to take the Oaths;

and they might have taken them in Chancery, or here in the King's Bench, and many of them have so done, and therefore Non constat to the President, &c. but that they had taken the Oaths; and if the President, &c. ought to remove them, and they do not, the Visitor is the Person who ought to inquire in this Case of the Neglect, and the Mandamus ought to be directed to him, for he is the Person who ought to punish this Neglect, and this is a Power incident to his Office of Visitor; but that a Mandamus does not lie; for as a Mandamus does not lie to restore a Fellow of a College, who is wrongfully ejected, where there is a Visitor, who may redress it, and to whom it is proper to resort, as has been resolved in Dr. Widdrington's Case, Dr. Patrick's, and Dr. Robert's Case, &c. so à fortiori, a Mandamus does not lie to eject a Fellow, who is wrongfully continued, but the Way is by Complaint or Appeal to the Visitor; and as to the Mandamus in Ryley, pl. parliamentar' that was by the King in Parliament, in Answer to a Petition, and so in the Nature of an Act of Parliament, and that no Mandamus in Ryley was issuing out of this Court: And he said, the Intent of the Act of 1 Will. & Mar. was not to give any Authority to this Court, which was in them by the Stat. of 25 Car. and the other Statutes, but left Things in such plight, as they were upon those Statutes; so that if the Parties concerned would take Advantage of the Vacancy, they might, but it was not the Intent of the Act to compel them, no more than of the Statute of Queen Eliz. to compel a Patron to present a Clerk to a Church vacant for not reading of the Articles; he might present to the Church if he would; but if he did not present, no Mandamus was ever granted to compel him; so here the Master and Fellows might supply the Vacancies, if they would; but if they did not do it, they shall not be compelled, but the Visitor may do it, and therefore the Mandamus ought to be directed to him; for another Reason also; the Mandamus does not lie, for it is against Magna Charta, and the other Statutes mentioned in the Return; for he admitted that they had a tortious Possession, but yet they are in Possession; and they not being Parties, or having a Day in Court, to answer or maintain their Possession upon this Mandamus, they ought to have an Opportunity to come and defend their

Possession, for the Statute of Magna Charta intends all Possessions, tortious as well as legal; and therefore if a Church becomes void, for not reading of the Articles, and the Patron presents, and his Clerk is admitted, instituted and inducted; the first Clerk may not be put out of Possession, but by a legal Course, as by Ejectment, &c. and if he comes in, and proves that he had read the Articles, or gives other sufficient Answer, he shall continue in Possession, and the Institution and Induction of the other is void; and so it was in the Case of Dr. Sancroft Archbishop of Canterbury; he continued in Possession after the Time elapsed for taking the Oaths upon this Statute, upon which an Information of Intrusion was brought, by which he had an Opportunity to come and answer, if he had aliquid to say, and so ought to be done in this Case: And further, the Master and Fellows are not obliged to obey this Mandamus, for they being to remove and expel the Persons named, this is more than is commanded by the Act; for the Act says only, that their Fellowships shall be void, but does not say, that the Master and Fellows should remove and expel them, but it remains at their Will, if they will take Advantage of the Vacancy or no, and it is casus omissus in the Act; and therefore they not being in the Act, they cannot be commanded by a Writ to execute the Act; for the Writ in this Case cannot command more than the Act commands: And as to the Writ, the Writ is ill in Form, it being a peremptory Mandamus; and so he took the Exception, which was made here at first; and prayed that the Writ be quashed.

The Court said, that the Master, &c. could take Notice, that they had taken the Oaths requisite upon their Admission, but would not take Notice that they had not taken the Oaths requisite for their Continuance; so that it is plain, that they would know but what they pleased; but Holt Chief Justice said, this is a publick Act, of which all Men ought to take Notice, and therefore the Master, &c. ought, as a Patron ought to take Notice of a Vacancy upon the Statute of Pluralities; and if he does not, Lapse will incur; but at Common Law, this was at his Election; and he said, this is an Act which executes it self, for it is a Judgment and Declaration of a Vacancy, and by it their Fellowships are void, without

out Sentence declaratory or Amotion: And as to their taking the Oaths before a Justice of Peace, &c. this was not quatenus Fellows, but only by Virtue of the Authority which every Justice has to tender the Oaths to Persons whom they suspect, &c. but quatenus Fellows they ought to take the Oaths in their Colleges, and as it seemeth, not elsewhere; and therefore it was insinuated, that all those who have sworn elsewhere, have mistaken the Intent and Meaning of the Act, and are under Danger of the Law; for he said, that those Fellowships are in the Nature of publick Offices, in which the Government is concerned, and have a publick Trust annexed to them, for the Education of Youth; and therefore they are in Danger of the Penalties of the Statute, of which they ought to take Care. Curia advisare vult; puis.

Griffin *and* Harrison.

31. COvenant by the Assignee of a Term, against the first Lessee, in which he covenants, that the Plaintiff shall enjoy free and clear of all Incumbrances, and saved harmless, and indemnified from all Arrears of Rent, and assigns for Breach that 64 l. Rent was arrear; and that he had desired the Defendant to pay it, and he did not do it; the Defendant pleads that as to 60 l. Part of the said 64 l. that he had left it in the Hands of the Plaintiff, eâ intentione, that the Plaintiff should pay it to the Lessor; and as to the 4 l. Residue of it, that he had paid it himself to the Lessor, &c. to which the Plaintiff demurred, because eâ intentione ad solvend' is incertain, for his Intention is not a Thing issuable; non allocatur; for he might reply Non reliquit modo & forma; and upon this Issue might be joined, and upon this Issue he might give in Evidence any Matter to prove his Intention; and it was excepted to the Declaration, because no Damnification was shewn; for it is not like to a Condition of a Bond broken, for there is a Damage immediately by the Parties being subject to the Penalty; but it is otherwise here, till an Action brought, or Distress

stress taken, or other Damage accrued; and Roll, Tit. Condition, Cooper and Pollard, 433. was cited, which was the same Case in Effect; and another Case lately adjudged upon the same Reason.

Pearson *and* Garret.

32. IN an Action sur Case, the Plaintiff declares, that by a Custom within London, if any Man gives a Bill for the Payment of a Sum of Money, &c. that he shall be bound, &c. and shews a Note in which the Defendant assumed to pay 50 Guineas, when he shall be married to such a Woman, &c. and the Defendant demurred to the Declaration; and the Court seemed to be of Opinion, that the Custom was ill, and not like to a Custom for Bills of Exchange, for there the Custom ought to be precisely alledged to be inter commercium habentes, and this is for the Benefit of Trade; and it was urged, though one of the Parties be not a Merchant; yet the negotiating of the Bill, and indorsing of it, is a Trafficking sufficient within the Custom, as it was held in the Case of Witherley; and though it was urged by Levinz that a Note without Consideration may be good by Custom, as well as a Bond without Consideration is good at Common Law; yet the Court was not of Opinion with the Custom, but disliked it, and after held it to be ill.

Waples *and* Basset.

33. IN an Action sur Case the Plaintiff shews, the Custom of the Parish of D. to be to pay Tithes of Milk in such a Manner, and Tithes of Pigs in such a Manner; and that the Parson of the Parish had used to keep a Bull and a Boar, for the Increase of the Cattle and Swine within the Parish, and shews quod opus fuit of a Bull at such a Day, and that the Parson did not find one, &c. ad damnum ipsius Quer. and the Defendant demurred to the Declaration; and it was objected, that if the Parson be chargeable in this Case, quod fuit vel ratione of a Custom, or a Prescription; for it is a Charge against common Right; and if by Custom this ought to be specially shewn; and it may not be by Prescription, for that which may not commence by Grant to the Parishioners, cannot commence by Prescription, and the Inhabitants of a Parish are not capable of a Grant; and he cited 6 Rep. Gateward's Case; and here no Custom is alledged, for though there is a Custom for Payment of Tithes, yet it is not said quod in consideratione inde the Parson had used & debet to keep a Boar and a Bull, for this might aid him; but here he says only, that the Parson had used & debuit to keep, &c. also he does not alledge any special Damage for Default of the Bull, but only says quod opus fuit, &c. and where such a Default is, and no special Damage to a particular Person, a particular Person may not have an Action, for then every Man might have an Action, as well as such Person, the which Multiplicity of Suits and Vexation the Law will not permit; and for this William's Case, 5 Rep. was cited; and to this the Court strongly inclined.

Gale

Gale *and* Till.

34. UPON a Motion for a Direction to Mr. Ashton to tax Costs, the Case was, Judgment was given against an Executor, who brought a Writ of Error, and the Judgment was affirmed; upon which the Question was, if he shall pay Costs in the Writ of Error, upon the Judgment being affirmed, and ruled per Curiam that he shall not pay Costs; and it is not like to the Case of Trover brought by an Executor, where he shall pay Costs upon a Nonsuit, for there he is not obliged to name himself Executor; but here the Writ of Error is only as Executor; and if the Judgment had been reversed, and Restitution made, the Money, &c. restored, had been Assets, and the Course has always been accordingly, that he shall not pay Costs, the which is the best Exposition of a Statute; and the Court demanded what Difference there was between an Executor not being bound by the Statute of 3 Jac. to find Bail upon a Writ of Error, and to pay Costs; to which it was answered by Northey, that if he shall find Bail, this will be to pay the Condemnation; and though there will be no Reason to compel him to pay the Condemnation out of his own Estate, but it may be reasonable to compel him to pay Costs, for the Vexation and Delay which he has given to the Plaintiff; sed non allocatur, for that which the Executor has done, was according to his Duty, to exonerate himself, and the Estate of the Testator of a Judgment, and there is no Difference between the two Cases of Bail and Costs; and therefore it was ruled after Deliberation taken, and the Question being twice debated, that he shall not pay Costs; and 2 Cr. 361. in the Case of Barret and Winchcomb cited to be ruled accordingly upon a Nonsuit; and Sid. 183.

Saunders *and* Johnson.

35. AN Action of Covenant was brought by the Herald Painters, & pro quolibet & singulis eorum, that they should bring their Work to such a Place, and that there such Work shall be done, and that the Money paid for such Work, when it shall be received, shall be brought to the aforesaid Place, and divided between them, in certain Parts and Proportions; and because one of the Covenantors did not bring his Work to the Place aforesaid there to be worked, the others brought an Action of Covenant against him, and Judgment being by Default, and a Writ of Enquiry of Damages awarded and returned, it was moved in Arrest, because the Covenant is brought jointly, where it was a several Covenant, and therefore ill, according to the Rule of Slingby's Case, 5 Rep. 19. and here the Damages being in the Place of the Profit, which they ought to have for the Work, as such Profit had been several, so their Damages ought to be so likewise; non allocatur, for the Action is founded upon the Work not being brought to the Place appointed for it; and in this Part the Covenant is joint, for they all have an Interest and Right jointly, that the Work shall be brought there in order to be done; and though the Words of the Covenant are several, yet the subsequent Matter and Interest being joint, the Covenant shall be joint also; and therefore the Action here being joint, it is well brought; and after being twice moved, Judgment was given for the Plaintiff.

Fuller's *Case*.

36. IN Replevin, the Defendant avowed and shewed, that A. B. was seised in Fee, and made a long Lease rendring Rent, and conveyed the Reversion to the Plaintiff, and for Rent arrear he distrained; the Plaintiff replies, that A. B. was seised of one Moiety, and C. D. of the other, before this Lease; that C. D. died seised of the one Moiety, and this descended to his Son, and that the Plaintiff had conveyed the other Moiety to J. D. by Lease and Release, and traverses absque hoc, that the Plaintiff was seised in Fee ad aliquod tempus after the said Conveyance, &c. upon which the Avowant demurred, because the Plaintiff made no Title to himself; and the Traverse was ill taken, for he ought to have traversed absque hoc, that A. B. was seised in Fee tempore dimissionis; and of such Opinion was the Court, and adjudged for the Avowant, nisi; yet here the Plaintiff had confessed and avoided the Title made by the Avowant.

Thompson *and* Ux' *versus* Trevanion.

37. RUled upon Evidence, that a Mayhem may be given in Evidence, in an Action of Trespass of Assault, Battery, and Wounding, as an Evidence of Wounding per Holt Chief Justice; and in this Case he also allowed, that what the Wife said immediatè upon the Hurt received, and before that she had Time to devise or contrive any Thing for her own Advantage, might be given in Evidence; Quod nota; this was at Nisi prius in Middlesex for wounding of the Wife of the Plaintiff.

Anonymus.

38. UPON Capture of a Prise, one Part was agreed to belong to the Master, and the other two Parts to the Owners; the Master disposes of one hundred Chests of Lemons to A. B. for to be sold, they being bona peritura, and after brought an Action of Account against A. B. and upon Evidence at Guildhall, a Mariner was allowed to be sworn, though it appeared that he was to have a Share of the third Part of the Master; for per Holt Chief Justice, the Master is accountable to the Mariners for their Share; the which they shall recover of the Master, whether he recovers in this Action or no.

† *The* King *and* Queen *vers.* Rachel Taylor.

39. IN an Indictment of Perjury before Holt Chief Justice at Guildhall, ruled upon Evidence; First, That though the Perjury be assigned in an Affidavit made at Serjeants-Inn; yet it is good if it be in Cheapside, or any other Place within the same County. Secondly, That it ought to be proved, that the Affidavit was read, and used against the Party, for without using it, the bare Making of an Affidavit without producing and using it, will not be sufficient. Thirdly, Though an Affidavit cannot be read in Evidence, yet if the Party who made the Affidavit be sworn and gives Evidence, his own Affidavit may be read against him; and this is allowable to shew, in what he contradicts himself.

Anonymus.

40. IN a Trial at Nisi prius in Westminster, one Saunders an Attorney who had drawn an Indenture of Agreement between a Sheriff and his Under-Sheriff, being produced to prove a corrupt Agreement between them; he was not compelled to discover the Matter of it, though he was not a Counsellor; and per Holt Chief Justice, it seems to be the same Law of a Scrivener; and he cited a Case where upon a Covenant to convey as Counsel shall advise, & Consilium non dedit advisamentum being pleaded, Conveyances made by the Advice of a Scrivener being tendred and refused, was allowed to be good Evidence upon this Issue; for he is a Counsel to a Man, with whom he will advise; if he be instructed and educated in such Way of Practice, otherwise of a Gentleman, Parson, &c.

Anonymus.

41. AT Guildhall in an Action upon the Case upon a Policy, the which warranted that the Ship shall have four Passes, scil. a Pass from the King of England, from the King of France, from the King of Poland, and the States of Holland, and the Goods were to be the Goods of such a Polish Subject on Board the Ship, vocat. the City of Warsaw; an Action upon this Policy being brought, it appeared upon the Evidence, that the Passes bore Date in April or May, and that the Ship to which they applied these Passes then was regnant. & vocat. by another Name; and that she was not named the City of Warsaw before the August following; and therefore these were not good and effectual Passes for this Ship, according to the Guarranty of the Policy, the which intended good Passes, and not elusory vain Passes; and they being a Fraud upon the Subscribers, the Policy shall not bind them: Also another Objection was made, the which was, that the

Passes were for Goods, which belonged to the Subjects of the King of Poland, and so restrained only to them; but the Goods on Board were not of the Subjects of Poland, but of Holland, and therefore not within the Intent of the Policy; it was also insisted, that the Policy being for Goods of such a one without Account, they ought to prove that they had any Goods on Board, or had shipped any Goods by Order of a third Person, though being without Account, they need not prove the Particulars; and that so was the Practice, which was not contradicted per Holt Chief Justice.

Term.

Term. Hill.

5 Will. & Mar. R. B.

Benson *and* Scot.

1. UPON a special Verdict in Ejectment, the Case was, a Copyholder of a Manor, within which was the Custom of Free Bench surrenders his Estate and dies; his Wife enters, and after the Surrender is presented, and the Surrendree admitted; and the sole Question was, if the Admittance of the Surrendree had defeated the Estate of the Wife; and it was argued that it had not by Serjeant Levinz, because her Estate is paramount the Surrender, and commences by her Marriage, and is a perfect and consummate Estate in the Wife, before any Thing is vested in the Surrendree, and so not like to the Cases put, where Relation shall avoid Grants and Estates made after the Surrender, the which he admitted to be so; and as to the Case of Title of Dower avoided by a Bargain and Sale, he said, that there the Bargainor married after the Bargain and Sale, and before the Inrollment; so by the Relation the Wife never had any Title; but if they will put the Case to any Purpose it ought to be, where a Man who is married bargains and sells his Land; in which Case, if the Husband dies after the Sale, and before the Inrollment, the Inrollment within six Months shall not avoid the Dower of the Wife; but it was adjudged for the Plaintiff, scil. that the Relation had defeated the Estate of the Wife, for the Wife ought to take the Estate in such Manner, as she finds it;

 and

and as the Husband might have aliened or extinguished his Copyhold Estate, in which Cases the Wife had lost her Estate; so if he charges it with a Term, she shall hold it charged with the Term; so that the Title of the Wife commences purely upon the Death of the Husband; and she has not any Title in his Life, as a Woman has to her Dower, the which the Husband cannot prevent; and this is in Effect the same Case, with that which is cited in 1 Inst. 59. where there are two Jointenants, and the one surrenders to the Use of his Will, and dies; this takes away the Survivorship, yet the other Jointenant had a Title commenced in the Life of his Companion, which is more strong than this Case; & unâ voce it was adjudged; ut supra.

Prigge *and* Adams; *devant.*

2. AND now this Term the Court gave Judgment in this Case, and ruled that he ought to have pleaded this Matter, and shewn, that he was an Inhabitant, if he would have the Benefit of the Act, for Matter of Record shall not be avoided by a collateral Averment, and here primâ facie it is a good Judgment; but if the Party had pleaded it, and after they had proceeded there, he might have an Action; and as to the Case of Turner and Felgate, there the Judgment was reversed, and so it is as if there had been no Judgment at all, and therefore Trespass lay, but not so here, where for ought that appears, the Judgment was in a Cause which the Court had good Right to try, and the Defendant untitled to the Benefit of the Act; and therefore it was adjudged, ut supra, 2 Inst. 670. the Case of the Outlawries was cited per Holt Chief Justice, as a Case in Point.

Goodright

Goodright *and* Cornish.

3. UPON a special Verdict the Case was, J. S. having two Sons devised the Lands in Question to his eldest Son for fifty Years, if he so long live; and after the Determination of this Estate, to his Heirs Males of his Body; and for Default of such Issue, to the second Son for Life, and after his Decease, to his first Son in Tail, and so further; the eldest Son suffers a Recovery and dies; and the Question was, if the Recovery had barred the second Son; and per Curiam clearly, that it had not, for the eldest Son had not any Franktenement, but is only Tenant for Years, with a contingent Remainder [as Holt Chief Justice said] which was void, not having a particular Estate to support it, so that the Franktenement was vested in the second Son; and though the Fee descends to the Eldest, yet he remains Tenant for Years, and there can be no Merger, for the second Son has the Franktenement; it was argued in this Case, if it was an executory Devise to the Heirs Males of the eldest Son, or a contingent Remainder, for the eldest Son had not any Issue Male; and here Holt Chief Justice cited a Case in Ed. 3.
A. Tenant for Life of B. Remainder to the right Heirs of B. and after A. grants his Estate to B. so that he had the particular Estate of the Franktenement for his own Life, Remainder to his right Heirs; yet the Remainder continued a contingent Remainder. Curia advisare vult.

Hebbert *and* Corsthorp.

4. INdebitatus assumpsit pro opere & labore, and an Exception was taken, because it was not shewn what the Work was, and it might be Work which was not meritorious; non allocatur, for opere & labore is a Matter, which is not a Debt founded upon a Specialty; then it was excepted because the Sum was in Figures, non allocatur, for they were xii Latin Figures, which is well enough, otherwise if they had been 12 English Figures; and it would have been otherwise if they were in Figures in an inferior Court; and therefore it was adjudged for the Plaintiff; this was in a Writ of Enquiry.

Heeding *and* Davis.

5. IN an Action of Debt upon a Bond, the Defendant prays Oyer, &c. and it was for Performance of Articles, by which the Wife of the Defendant and the Defendant agreed to bring such a Sum of Money into the Hands of J. S. which were to be employed to their Use, &c. the Defendant pleads, that after these Articles, the Defendant married his Wife, who was the other Party to these Articles, and so the Articles were discharged by the Marriage, &c. to which the Plaintiff demurred; First, Because he does not shew that he had brought the Money into the Hands of J. S. which was a Thing to be done before the Marriage, and he ought to shew Performance of all before the Marriage; for if the Articles were broke before the Marriage, an Action being attached, he might have an Action, notwithstanding the Articles are released by the Intermarriage, or by a Release in Fact, 3 Cr. 244. Dyer 57. Secondly, Though by the Intermarriage, or a Release, the Articles are discharged, yet the Bond remains in Force; as an Agreement before Marriage that a Woman shall make a Will; this is impossible to be performed, for the Goods are the Husbands, and the Property is in him; but yet if he does not give the Goods, according to the Disposition of the

Wife, his Bond shall be forfeited; and though the Case of Smith and Stafford was cited Hob. 216. yet per Holt Chief Justice, this Case has been shaken.

Hill *and* Lewis.

6. THIS was an Action on the Case upon several Promises, grounded upon a Bill drawn by a Goldsmith payable to J. S. who endorsed it to J. D. who accepted it, and paid by the Order, and on the Account of the Endorsor, 800 l. the Indorsements were about eleven of the Clock, and the Drawer continued solvent, and paid Money all that Day after, and paid Money upon the other Bills to the Indorsee after the same Day; and it was proved, that if he had demanded Payment upon this Bill, that good Payment had been made; and it was said also that the Drawer and the Plaintiff were both Goldsmiths; and that if a Bill be drawn by one Goldsmith, and after accepted by another Goldsmith, that this is entred upon their Books as Cash, because being Bankers, they reckon it as so much in Money; but if a Bill be accepted of another who is not a Goldsmith, though the most substantial Man in London, the Entry is, received so much of such a one by Bill; and therefore it was contended, that this being entred as Cash by their Custom, and accepted as Cash, the Endorsee is discharged; also it was said that it was the Neglect of the Plaintiff, not to receive the Money upon the Bill, when the Drawer was solvent, as he was all the same Day; but he absconded and removed between two and three of the Clock the next Morning: But Holt Chief Justice said, that every Bill is extant, till there has been a Satisfaction upon it, and the Drawer is liable, and so are all the Endorsors; and therefore the Endorsor here is liable, if there be not a Default in the Plaintiff; but if there was a Default in the Plaintiff, so that he might have received the Money in a convenient Time, and neglected it; in such Case the Acceptance of the Bill by the Plaintiff is an Agreement, that Payment shall be made by the Drawer, and the Payment by the Drawer not being made, by his Default, by not demanding of it in convenient Time, in such Case the Indorsor shall be

discharged, and the Loss shall be to the Plaintiff the Acceptor; but without such Default, the Plaintiff having paid so much upon the Credit of the Bill, he ought to have Satisfaction, and a Paper Payment is not any Satisfaction; but what shall be a convenient Time to demand the Money upon a Bill, the Law had not defined it, but he referred that to the Judgment of the Jury, who were Merchants; he said that upon a Foreign Bill there were three Days allowed, but for a Goldsmith's Bill he did not know any definite Time; if after a Foreign Bill be due, the Acceptor becomes insolvent within three Days, the Bill may be protested for Non-payment, but after it is at the Peril of the Drawee; and he also said, that though a Bill payable to J. S. or Bearer, be not indorsable; yet if it be indorsed, the Indorsor shall be charged, for every Indorsement is as a new Bill; and after mature Consideration, the Jury found for the Plaintiff; and the Verdict was taken upon a particular Promise, upon Debate; in which it was held, that if the Evidence goes to all the Promises, the Verdict may be taken upon any of them; but otherwise upon that Promise only which is proved.

Tomkyns *and* Barnet.

7. UPON a Trial at Guildhall in an Indebitatus assumpsit for Money received to the Use of the Plaintiff; the Case was, the Plaintiff was Co-obligor with J. S. to the Defendant, and between J. S. and the Defendant there was an usurious Contract; the Plaintiff paid Part of the Money to the Obligee, and after pleaded the Statute of Usury upon this Bond, and this is adjudged an usurious Bond; upon which he brought this Action for the Money paid before the Bond was proved usurious; and the Question was if the Action lay; and Holt Chief Justice seemed to incline strongly, that it did not lie; for here there was a Payment actually made by the Plaintiff to the Defendant, in Satisfaction of this usurious Contract; and if they will make such Contracts, they ought to be punished, and he was not for encouraging such Kinds of Indebitatus assumpsit's; and though the Case was objected, that if a Man pay Money upon

a Policy of Assurance, supposing a Loss, where there was not any Loss, that in such Case this shall be Money received to the Use of the Payer; he admitted it, because here the Money was paid upon a Mistake; the same Law if it was upon a Fraud in the Receiver; but in the principal Case, he was of Opinion ut supra, and said that he would not encourage these Actions; but that it is like to the Case of Bribes; he who receives it ought to be punished; but he who gives them, ought not to be encouraged by any Way to recover his Money again.

Anonymus.

8. AT a Trial at Nisi prius in Middlesex, a Fine and five Years being given in Evidence upon an Ejectment, in Bar of the Title of the Lessor of the Plaintiff; the Plaintiff shewed, that at the Time of the Fine levied, he was an Infant, and that within three Years, he came to the Lands in Question; and at the Gate of the House said to the Tenant, that he was Heir of the House and Land which he held, and forbad him to pay more Rent to the Defendant; upon which it was demanded, if he entred into the House, when he made the Demand; and it was said that no; upon which it was said, that the Claim at the Gate was not sufficient, the which was agreed; but then it was proved, that he entred the House when he made the Claim, the which being eo instante, it was well enough per Holt Chief Justice, though the Claim was but at the Gate; but after it appeared, that there was a Court before the House, so that though the Claim was at the Gate, yet it was upon the Land, and not in the Street; and therefore it was ruled to be good without Question.

Sir

Sir Marmaduke Dayrell *and* Glascock.

9. AT a Trial at Bar, it was ruled per Holt Chief Justice, that if there are three subscribing Witnesses to a Will, this is sufficient within the Statute of Frauds and Perjuries; though upon the Trial one of them would not swear that he saw the Testator seal and publish his Will; for otherwise it would be in the Power of a third Person to defeat the Will of the deceased; and therefore if it be proved to be his Hand, and that he set it as a Witness to the Will, it is sufficient to satisfy the Statute.

Dixon *and* Smalley.

10. IN a Trial at Nisi prius in Guildhall, it was ruled by Holt Chief Justice, that where the Mayor and Commonalty of London had constituted J. S. their Bailiff to receive their Rents, and to make Demand of them, and to make Entry; upon Evidence in Ejectment, such general Authority is not sufficient to authorize a Bailiff to take Advantage, and make Demand of a Rent accrued due after the Authority given; for it is a new Right attached, and there ought to be a special Authority for this Purpose.

Wentworth *and* Broadwater.

11. UPON a Motion in the Dutchy-Chamber, by Wentworth Bailiff of the Liberty of the Duke of Lancaster in the Savoy, against Broadwater, one of the Officers of their Majesty's Palace-Court, for an Attachment against the said Broadwater, for executing the Process of the Palace-Court within the Liberty of the Savoy.

My Lord, there are two Things that we say for the Officer; First, That he hath not infringed the Liberty of the Bailiff of the Savoy. Secondly, That if he had, yet an Attachment ought not to be granted against him; it

it will appear that the Officer hath not infringed the Liberty of the Bailiff, if we consider what it is that the Bailiff of a Liberty is intitled to by Virtue of his Office, and to whom he is an Officer. And my Lord, I suppose it will not be pretended, that the Bailiff of a Liberty is an immediate Officer to any Court of Justice whatsoever; the Sheriff is the immediate Officer, and not the Bailiff of a Liberty, and all Process shall be directed to the Sheriff, and not to the Bailiff of the Liberty; though in a Case where the Sheriff is a Party in Interest, the Process shall not be directed to the Bailiff of the Liberty, but to the Coroners. Writs of Right Patent are indeed sometimes directed to Bailiffs of the Manor, and other Writs to Bailiffs of Corporations; but I humbly conceive no Writ either Original or Judicial, is to be directed to a Bailiff of a Liberty, for he is no immediate Officer to any Court of Justice, but only a subordinate Officer to the Sheriff, for the Execution of Process within his Liberty, by Force of a Precept from the Sheriff, in like Manner as Bailiffs Errant do in other Places of the County at large; so that although if the Sheriff send his other Bailiffs within the Liberty to execute Process; this will be a Trespass upon the Bailiff of the Liberty, as medling with that, which no one hath a Right to execute but himself; yet what the Bailiff of the Liberty doth execute, must be by Force of an Authority from the Sheriff, and what he executes without an Authority, will with humble Submission be void; and so 'tis holden in Keilway's Rep. 86. and the constant Course in Pleading is, to set forth the Writ directed to the Sheriff, and to shew that the Sheriff Virtute brevis præd' per warrantum suum in scriptis sub sigillo suo sigillat' Ballivo Libert' &c. direct' mandavit eidem Ballivo quod caperet, &c. from whence 'tis plain the Bailiff of a Liberty is purely a subaltern Officer to the Sheriff, and under the Command of the Sheriff; and 'tis the Sheriff who is the Officer to the Courts, which issue the Process, and not the Bailiff of the Liberty, for all Process was originally executed by the Sheriff; and my Lord, if Grants of Returna brevium were to commence at this Day, after the Resolutions in Mitton's Case in the 4th Rep. perhaps they may meet with the same Fate that Grant did; but Time, Enjoyment,

and a Frequency of such Grants, hath put the Validity of them above being disputed; and therefore I do admit (which is the uttermost that I humbly conceive this Grant can import) that all Process directed to the Sheriff to be executed within this Liberty, is to be executed by the Bailiff; & non per alium. But my Lord, though the Bailiff of the Liberty is to execute such Process, & non alius, yet with Submission this hath not altered the Nature of his Office, he remains still an Officer to the Sheriff, and the Sheriff, not the Bailiff of the Liberty, is the Officer to the Courts of Law; and therefore if a Venire facias issue to the Sheriff to return a Jury within a Liberty, and this be delivered to the Bailiff to execute, and the Bailiff return one Panel to the Court, and the Sheriff return another; the Panel returned by the Sheriff shall stand, and not that of the Bailiff of the Liberty; and so it was holden 30 Ass. p. 5. for the Sheriff is the Officer to the Court, and the Bailiff an Officer to the Sheriff, and that too only in such Cases where the Sheriff acts as an Officer himself; for where the Sheriff proceeds judicially as in a Redisseisin, or a Writ of Enquiry of Waste, in such Cases it hath been adjudged that the Sheriff may enter the Franchise, and execute Process by any other Officers, and need not execute it by the Bailiff of the Franchise; and so is 11 H. 4. 82. expressly, where a Writ of Waste being brought, and Default made by the Tenant, a Writ issued to the Sheriff to enquire of the Waste, and he returned Mandat' Ballivo libert' &c. qui mihi nullum dedit responsum; and for this Return the Sheriff was amerced, for in that Case the Sheriff was a Judge, and had Power to enter the Franchise, and need not direct his Process to the Bailiff of the Liberty. My Lord, I might cite many Cases to prove what I have offered, but it is only upon a Motion against Matter suggested in a Petition to your Lordship, and I shall not multiply Instances as might be done, if it were in a Case before the Court for a judicial Determination. My Lord, from this little I have said, I hope it appears that Bailiffs of Liberties are but Officers to the Sheriff, for executing and returning such Process, as are directed to the Sheriff to be executed within such and such particular Liberties, and that too but in Cases where the Sheriff proceeds ministerially, as

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an Officer to the Courts above, and not when he proceeds judicially; so that Bailiffs of Liberties as to their Authority differ nothing from Bailiffs Errant; though my Lord, as to their Interest and Estate in that Authority, it must be acknowledged they do; Bailiffs Errant are dative and removeable by the Sheriff; but Bailiffs of Liberties have a fix'd Interest independent of the Sheriff, and as a Consequence hereof there are some Differences between Bailiffs of Liberties, and Bailiffs Errant; as that if a Bailiff of a Liberty suffer an Escape, make a false Return, or otherwise misdemean himself, an Action shall be brought against him, and not against the Sheriff; for not being put in by the Sheriff, but rather (if I may say so) imposed upon the Sheriff, the Law hath not judged it reasonable the Sheriff should be answerable for his Miscarriages. But my Lord, in the Case of Bailiffs Errant, their Miscarriages are all imputed to the Sheriff, and an Action of Escape lies against the Sheriff for an Escape suffered by his Bailiff; for the Sheriff having trusted him, and placed him in, upon that Account must be responsible for him; and from hence will proceed some few Differences between Bailiffs of Liberties, and Bailiffs Errant: But my Lord, as I said before in the Nature or Extent of their Authority, there is none; they are both subordinate Officers immediately to the Sheriff, for executing Process directed to the Sheriff, by Force of a Warrant from the Sheriff and my Lord, if this be so, it will follow, that where a Process executed within a Liberty is not directed, or indeed directable (as will appear presently) to the Sheriff; that in such Case the Executing such Process within the Liberty, will be no Trespass to the Bailiff; and my Lord, this will be very plain to any one that considers the Case I cited of 11 H. 4. 82. for the Bailiff of the Liberty being an Officer to the Sheriff, and having Return of such Writs, as are directed to the Sheriff as an Officer, and not when the Sheriff proceeds as a Judge, and executing the Process, he doth return, by Virtue of a Precept from the Sheriff, he can have no Right to execute a Process in the second Instance, when the Sheriff never had a Right to execute it in the First. And my Lord, I humbly conceive it will be plain that the

Process of the Palace-Court is not directable to the Sheriff, or to be executed by him; (for my Lord, waving at present the Words of the Patent, by which that Court is to direct their Process, Portatoribus virgarum, by which these Portatores virgarum are constituted proper Officers to that Court:) I would first ask whether the Sheriffs of any of the Counties within the Jurisdiction of the Court, are Officers of the Palace-Court, or owe any Attendance upon that Court. My Lord, if they are not Officers of the Court, or owe any Attendance to it, then my Lord they are not obliged by Law to receive the Process of the Court, or punishable by Fine or Amercement, for any Neglect or Abuse of the Process; for it will be no Offence not to execute what they are not bound to receive; and if the Sheriff is not bound to receive their Process, the Court will be less bound to direct it to him; for it would be a vain Thing for a Court to be obliged to direct their Process to an Officer, over whom they have no coercive Power, to punish the Abuse or Contempt of their Process. But my Lord, if this were not so, and that the Palace-Court might compel the Sheriff to execute their Process (as I humbly conceive they cannot,) yet my Lord the Court is as expressly restrained and tied up by the very Words of the Patent (here in Court) to direct the Process to their proper Officers, Portatoribus virgarum; and the Process being directed to them, and not to the Sheriff, it's impossible it can be executed by the Sheriff, for the Sheriff cannot intermeddle in a Process not directed to him, more than another Man may; and if it is not directed to the Sheriff originally, or executable by him, how shall it come to be returned, or executed by a Bailiff of a Liberty, who is only to execute such Writs as he receives from the Sheriff; and if for the Reasons I have mentioned already, and diverse others that might be added, the Process of that Court cannot be directed or executed by the Sheriff originally, to whom the Process of all superior Courts are generally directed, and who is the proper Officer in Law for that Purpose; there is less Reason to say it shall be directed to a Bailiff of a Liberty, who is not immediate Officer to any Court, and to whom the Process of any Court is never directed.

But my Lord, supposing the Bailiff ought to have the Execution of this Process, and that the Officer ought not to have entred his Liberty; yet my Lord with Submission there is no Cause for an Attachment: My Lord, Broadwater the Officer who is complained against, is no Officer of this Court, nor hath abused any Process of the Court, or is otherwise before the Court, than upon a Suggestion in a Petition against him. And my Lord, the Statute 28 E. 3. c. 3. says, no Man shall be put out of Lands or Tenements, or imprisoned or disinherited but by due Process of Law; and 25 E. 3. c. 4. enacts, that none shall be taken by Petition or Suggestion to the King or his Counsel, unless by Indictment or Presentment of good and lawful People of the Neighbourhood, or by Process by Writ original at Common Law; so that this is an Attempt against the very Letters of these Statutes, and several others that I could cite, and will receive no Countenance from your Lordship; the Officer, if guilty of any Offence, (as I humbly conceive he is not) is at most but guilty of a Trespass against the Bailiff of the Liberty, for which he may have Remedy in the ordinary Method, without putting the Officer to such a Difficulty as this will be upon him; for if he doth not execute the Process of the Court, as he is bound to do by Oath, he will be laid by the Heels at Home; and if he doth, he will be laid by the Heels here. In the Countess of Rutland's Case, in the 6th Rep. where no Capias at all lay; and so likewise in the Countess of Huntingdon's Case, in 28 Car. 2. R. B. the Officer was not punished, à fortiori here, where he had a good Writ, and the Court that granted it, sufficient Jurisdiction. My Lord, I hope this will be sufficient to ward off an Attachment at this Time; and that if the Bailiff of the Liberty be injured, as I humbly conceive he is not, your Lordship will be pleased to leave him to take his Remedy by Action.

The Case of the Certiorari's *in* Chancery.

12. IN the Vacation after Hillary Term, upon a Petition to Sir John Somers, Lord Keeper; the Case was upon a Practice lately crept in, whereby upon Actions brought in the Palace-Court, and other inferior Courts, the Defendant sues out a Certiorari returnable into Chancery, the last Return of the ensuing Term; and this by Mittimus is sent into the King's Bench or Common Pleas the Term following; and by this Means, if a Certiorari be sued in the Beginning of Trinity Vacation, the Party is hung up seven or eight Months before the Certiorari is returned into a Court, where he may proceed in his Action, and then too he cannot go to Trial that Term, if it be in Hillary, or Trinity Term, by which Means he receives almost twelve Months Delay; whereas upon a Habeas Corpus or Certiorari out of the King's Bench or Common Pleas, which are returnable (if in Term-Time) into the Court; if in the Vacation, before a Judge in his Chamber immediate, there is no such Delay; for if the Party comes not at the Return, and puts not in Bail to the original Action, a Procedendo goes of Course; if Bail be put in, then in Michaelmas or Easter Term they may have a Trial that Term; besides, the Certiorari's do not command the Record it self to be certified, but only de tenore Recordi & Processus, and so differ from Certiorari's out of the King's Bench or C. B. which always send for the Record it self; and therefore the Record remaining below, and the Party who either is in Custody, or upon Bail, remaining likewise before the Court below, by good Opinion 'tis thought these Kinds of Certiorari's de tenore Recordi are no Supersedeas, since the Record and the Party remain still before the Court; and there are no Words in the Writ of Certiorari to foreclose the Court; if a Certiorari be granted to remove an Indictment before Justices of the Peace, not only indictamentum præd' cum omnibus idem tangen' is sent for; but a Reason added, Quia coram nobis & non alibi terminari volumus; so if to remove a Civil Action where the Party is attached by his Goods, the Record it self, & Billa origina-

lis & attachiamentum, and the Goods are sent for; and hereupon an Inventory of the Goods is made, and annexed to the Record, and returned to the Court, and such Certiorari's conclude, if in Term-Time, ut ulterius inde fieri faciamus prout de Jure fore viderimus faciend'; if in Vacation-Time the Writ is returnable before a Judge in his Chamber, and concludes ut idem Justiciarius noster fieri faciat in hac parte quod de Jure fore viderit faciend' &c. so that in these Cases not only the Record it self which is the Foundation upon which the Court there ought to proceed, is removed; but the Writ it self contains an Intimation of the Reason of its Removal; that the Subject shall receive Justice, and have Right done him by the King in his Courts above; and therefore 'tis great Reason that in these Cases the Courts below should stay, having nothing before them to proceed upon, and the Cause by the very Words of the Writ being called ad aliud examen; but in these Chancery Certiorari's, neither the Record it self is sent for, nor doth it appear that the Court would or rather could proceed upon it, if it were, which indeed I apprehend to be the Reason of the Form of the Writ de tenore Recordi only; it being said Roll, Certiorari 395. that where the Court which awards the Certiorari cannot hold Plea upon the Record it self, there but the Tenor shall be certified, for that otherwise if the Record it self shall be removed, there will be a Failure of Right afterwards; and upon this Ground, it is, I suppose that Newton 19 H. 6. 19. says, that the Chancery makes not a Certiorari, but to certify the Tenor of a Record, the which cannot be said to be the Record; and in the 2 E. 3. 21. per Scroop 'tis said, that having but the Tenor of the Record before them, they cannot give Judgment, as they may do upon the Record it self, and that was upon the Tenor of the Record of an Assize in Pais, before the Justices removed by Certiorari into Chancery, and from thence sent into the King's Bench by Mittimus, as is done here; from whence it follows, that if the Record it self by the Words de tenore Recordi be not removed, it must remain in the Court below; and being no Supersedeas, they might have proceeded, such Certiorari's notwithstanding; and of that Opinion was Holt Chief Justice; and as I heard likewise Treby Chief Justice of

the Common Pleas; besides, a Certiorari is no proper Writ in Cases where the Party comes in upon Capias, but a Habeas Corpus is the proper Way, but they must be returnable immediate; and therefore this Trick was found out, of which the Keeper was sensible enough, and threatned to lay the Cursitor by the Heels, if any more Certiorari's returnable with such long Returns should issue; and though notwithstanding such Declaration, some few Certiorari's have issued, and a second Petition presented, which caused a second Declaration of the like Nature; at present there is a Stop put. Note, This Case was not spoke to, as to its Merits in Point of Law, the Matter being tender, both as to Jurisdiction and Profit; and the Parties concerned were unwilling to stir up Controversies between the great Courts in Westminster-Hall, though the Counsel for the Petitioner had prepared themselves to have spoke effectually to it, if it had appeared proper, being satisfied from the Cases above cited, and those cited in Allen 17. that the Court below might have proceeded, if they had thought it fit and convenient, as they did not, these Certiorari's notwithstanding; and though it was said by some, that upon Writs of Error, where the Tenour only of the Record is removed, such Writs are a Supersedeas to the Judges, to whom such Writs are directed; and therefore for the same Reason they shall be so here; there seemeth a great Difference between the Cases, for generally Writs of Error remove the Record it self; and call for Tenorem Recordi but in some few special Cases, where if the Record it self came before them, they could not award Execution upon affirming the Judgment, or where (as in Case of a Fine) they have no proper Officer or Chirographer, as they have in the Common Pleas; and therefore in Case of a Writ of Error upon a Judgment in the King's Bench brought in Parliament, though the original Record be carried up by the Chief Justice, yet a Transcript is only left with the House; and upon a Writ of Error in the Exchequer-Chamber, a Transcript only is sent, and the original Record remains in the King's Bench; and so upon a Writ of Error returnable in the King's Bench here upon a Judgment given in the King's Bench in Ireland, the Transcript is only sent, and the original Record remains there; and yet in all these Cases, till the

the Judgment be affirmed, and Execution upon Affirmance of the Judgment shall be awarded upon the original Record; though the original Records remain with the Judges below, they cannot proceed, but are superseded, and therefore the like should be done by these Kinds of Certiorari's: Secondly, Writs of Error in all Cases call the very Act of the Court in Point of Judgment in Question, as well in Cases where the Transcript only goes, as where the Record it self; and the Judgment of the Court being questioned in Point of Law, which is the Capital and supreme Part of their Power, and it standing indifferent in the Judgment of the Law, whether such Judgment be erroneous or not, till the same be examined in a higher Court; the Law which loves not Things to be done in vain, will not allow Execution to be taken upon such questionable Judgment, which for ought appears may be reversed the next Day; and so such Execution set aside, which would be vacuus & inutilis Labor, besides the Charge of the Execution; and therefore a Writ of Error, though it remove not the Record it self, (in which Case it would necessarily be a Supersedeas, the Foundation of their Proceeding below being taken from them) is upon very good Reason in Law a Supersedeas; and in this Respect differs from an Attaint, which is no Supersedeas; for the Verdict being founded upon the Oaths duodecim legalium & proborum hominum, the Law will admit of no Presumption against the Truth of such Verdict, till it be actually set aside by Verdict in Attaint, which is the Reason the Bringing such Attaint only, is in it self no Supersedeas; so tender is the Law of the Reputation of the Subject, as for no Respect to presume him perjured, without manifest Proof upon the Oaths of a double Jury; and so tender of his Liberty and Property, as not to admit the same to be taken from him, upon so slight a Presumption, as the only Suing forth of a Writ of Error is.

Term. Pasch.

6 Will. & Mar. R. B.

Andrew Newport's *Case*.

1. IN this Case, which was upon an Assignment of a Mortgage made by Kendal 1659. and after by diverse mean Assignments vested in Newport, Executor of Secretary Coventry; it was objected, First, That it does not appear that any Money was paid upon the original Mortgage, and therefore it was fraudulent; and it being fraudulent in the Creation, though Secretary Coventry paid a valuable Consideration; yet this will not purge the Fraud, and make it good against the Defendant, who was a Purchasor bonâ fide, and for a valuable Consideration; non allocatur; for Holt Chief Justice said, The first Mortgage was good between the Parties, and being so, when the first Mortgagee assigns for a valuable Consideration, this is all one, as if the first Mortgage had been upon a valuable Consideration, for now the second Mortgagee stands in his Place, and therefore is within the Proviso of the Statute of 27 Eliz. cap. 4. That no Mortgage bonâ fide, and upon good Consideration, shall be impeached by Force of this Act; but it shall stand in such Force, as before the Act made; and if this Proviso does not extend to the Case, to what Case shall it extend? Secondly, It was objected, that the Assignment is not good, it not being upon the Land, nor the Mortgagor a Party, and the Mortgagee never was in Possession; and though the first Assignment be good upon the Presumption, that the Mortgagor was Tenant at Will, and so his Possession the Possession of the

the Mortgagee; yet by the Assignment the Will is determined, and the Mortgagor is not Tenant at Will to the second Assignee; non allocatur; for though he be not Tenant at Will to the second Assignee, yet he is not a Disseisor, but a Tenant at Sufferance; and if no Disseisin is made, then no Right is devested, and no Disseisin can be without a tortious Entry; and here there was no new Entry; and therefore though he was Tenant at Sufferance, yet the Mortgagee [his Estate not being devested, and turned to a Right] might assign; then it was objected, that though the Mortgagee was not by this out of Possession, yet he might be out of Possession in this Case at his Election; and he has made his Election here to be out of Possession, for he has brought an Ejectione firmæ, and by it admits himself to be out of Possession, for the Ejectment complains of a tortious Entry, and an Ouster; and this being a Matter of Record, he is estopped to say econtra; non allocatur; for first per Curiam, an Ejectment as it is in common Practice, is but a feigned Action, to which the Lessor of the Plaintiff, who is the principal Person, is not a Party; and not being a Party, this cannot be given in Evidence, as an Estoppel against him; and therefore he cannot maintain an Action for the mean Profits, without an actual Entry, but the Lessee may; and it has been ruled, that the Bringing of an Ejectment, is not such an Entry or Claim, which shall avoid a Fine and Non-claim for five Years; and as to the Objection upon the Assignment, it was further said by Giles Eyres Justice, that when the Mortgagee for himself, his Executors, Administrators and Assignees covenants with the Mortgagor, that he shall enjoy, and take the Profits till Default of Payment, the Covenant being for his Assigns, this would rule the whole Case, and he shall be presumed Tenant at Will to all the Assigns, as well as to the first Mortgagee; this was ruled upon Evidence at a Trial at Bar in this Case.

The King *and* Tucker; *devant & puis.*

2. THIS Case having depended many Terms in the Court, and once the Reversal pronounced, it was argued this Term by Serjeant Pemberton for the Plaintiff in the Writ of Error; and he insisted first, That the Omission of secreta sua amputentur in the Judgment was erroneous; he said, that it is Part of the Judgment pronounced, and always Part of the Execution, and sometimes with Cruelty, living the Party; and such an Execution cannot be warranted, without being Part of the Judgment; and being Part of the Judgment, and omitted, it vitiates the whole Judgment; for Part of a Judgment being omitted, the Whole is erroneous; and Standford 182. and all the old Books make this Part of the Judgment; and though it is omitted, 3 Inst. 210, 211. yet Coke being Chief Justice, made this Part of the Judgment in Owen's Case, Pas. 13 Jac. R. B. 1 Roll, 186. Secondly, That the Indictment is erroneous, because contra allegiantiæ suæ debitum is omitted; the which is a material Part of an Indictment for Treason; for where no Allegiance, there no Treason can be committed, but a small Allegiance suffices; for if a Man comes here as a Friend, and remains but an Hour, and commits Treason, this is against his Allegiance, scil. such local Allegiance, which is due, for he having a Protection, an Allegiance is due from him, for Allegiance and Protection are Relatives, & mutuo se ponunt & tollunt; but if a Man come here modo guerrino, be he a Friend or Enemy, there he may not be indicted of Treason, because this may not be said contra allegiantiæ suæ debitum; and for this he cited the Case of Perkin Warbeck, put in Calvin's Case, 7 Rep. and Sherley's Case in Dyer 145. the Indictment was contra legiantiæ suæ debitum, where he was not a Subject of the Realm; but this was tempore pacis inter Angliam & Franciam, and he being here, joined with English Rebels; he said, that this is a material Part of the Indictment, and cannot be supplied by other Words, no more than felonice,

burglariter, &c. and therefore Dominum suum naturalem will not supply it, for Dominum suum naturalem may be omitted, and the Indictment remain good; and therefore a Defect of a Thing material cannot be supplied by a Thing which may be omitted, and yet the Indictment remain good; he observed that the Omission of Vi & armis was so material, that before the Statute of 37 H. 8. an Indictment ought to be quashed for it, and an Act of Parliament was necessary to aid it; and he said, that the Omission of contra legiantiæ suæ debitum is more material than of Vi & armis; he insisted upon the Books and Precedents of Indictments, and the Consequence which might ensue by a Variation from them; the which he submitted to the Consideration of the Court, and prayed a Reversal.

Levinz econtra: And as to the first Exception, he cited such a Multitude of Precedents, where it was omitted; and in Regard of such a Number of Precedents where it was omitted, the Court was of Opinion, that it was no Error; and as to the second Objection, he said it is but the Conclusion of the Indictment by way of Aggravation; and the Fact being positively alledged, and appearing to be Treason, the Indictment without such Conclusion is good, especially it being contra naturalem Dominum suum, & contra obedientiam; and he cited Bensted's Case, 1 Cr. 583. Sir Harry Vane and Lambert's Case, and Messenger's Case, &c. where such Conclusion was omitted; & non obstante the Indictment good; and as to Perkin Warbeck's Case, he said, that he never was a Subject; and therefore could not be indicted at all, for his Fact was not Treason, &c. puis.

Marwood *and* Fenwick.

3. THIS was upon a Motion for Execution in Ejectment upon a Lease for fifty Years, if A. B. shall so long live, and a Verdict for the Plaintiff twenty Years ago; and now they moved that he might have an Habere facias possessionem, without Prejudice or Displeasure of the Court; A. B. being yet living, and the Lease not expired; and that they should not be put to a Scire facias, this being for the Land, as it is said in the Case of Okey and Viccars, Sid. 351. Holt Chief Justice said, that he was not in Court when the Case in Siderfin was ruled; but he held that the Statute of West. 2. extends only to personal Actions, and that an Ejectment is a mix'd Action, and in the Realty, as to the Recovery of the Land; and therefore he remitted it to the Party, to take Execution as he should be advised; and he did not agree clearly with Siderfin in the Case above.

Talbot *and* Tipper.

4. IN Ejectment the Case was, Sir John Fortescue seised in Fee, by Lease and Release, settles the Lands in Question, to the Use of himself for Life, and then to Trustees for Ninety-nine Years, if A. B. shall so long live upon such Trusts, &c. as he shall direct, and after to the first Son of J. F. &c. with Power to make Leases, with Fine or without Fine, and rendring such Rents and Services, as he shall think fit; after this he by another Deed declares the Trusts of the Term, and after this he makes a Lease without rendring Rent to Talbot, who was the Lessor of the Plaintiff. To this two Objections were made; First, That he having declared the Trust of the Term for Payment of his Debts, the Estate is bound by it, and he may not execute his Power to make Leases after; non allocatur; for the Term was originally subject to the Power, being contained in the same Deed; and he having executed his Power, the Leases are precedent to the Term, and controul it. Se-

condly, It was objected, that here no Rent was reserved upon the Lease, and some Rent ought to be reserved; and there not being any, his Power is not well executed; non allocatur; for it being to reserve such Rent, as he shall think fit, and he having thought fit to reserve no Rent, this shall not avoid the Execution of the Power, and especially he not having said such yearly Rent; so that a Pepper-Corn reserved, payable forty Years after, had been sufficient; and therefore such Matter should not be regarded as a Cause sufficient to avoid the Lease, where he had made it subject to a Trust to pay the Rents, Issues and Profits, to such Person as he shall direct; and so the Court ruled and directed the Jury to find for the Plaintiff.

The King *and* Buggs.

5. IN an Indictment upon the Statute of 2 Phil. & Mar. cap. 11. for using the Trade of a Dyer and a Weaver, he not being a Clothworker; and a special Verdict was found, in which the Jury found that the Defendant was a Maker of Stuff; and if this was a Clothworker within the Statute, was the Question; it was objected that he was not a Clothworker within the Statute, because Stuff is made by Wool ordered in another Manner; and the Artificers have diverse Denominations, and are of different Companies, and so not within the Letter of the Statute; and not being within the Letter, the Court will not expound them to be within the Intent; and the Case of Hobs and Young was cited to be adjudged here, upon a special Verdict, where it was found that Young not having served as an Apprentice, retained a Master-Workman, and diverse Servants under him, who had served as Apprentices to the Trade of Clothworking, and that he employed them and paid them, and the Profit and Loss was Young's; and though here the Persons employed had all served as Apprentices, so that the Cloths were artificially and well made; yet Young the Principal not having served as an Apprentice, and the Profit and Loss being his, this was adjudged an Using of the Trade of a Clothier contra the Statute of 5 Eliz. according to the Letter of the Act, though it

may be that the Intent of the Act, was well enough fulfilled; and so in the principal Case the Making of Stuff being totally different from Cloth, and the Wool comb'd and order'd in another Manner, a Stuff-maker cannot be within the Letter of the Act; and not being within the Letter, it shall not be adjudged within the Intent, for this would be to render the Law useless; and by the same Reason, that a Stuff-maker shall be within the Intent, when the Words do not warrant it, a Stocking-Weaver may be within the Intent also, and so no Stop put to it.

On the other Side it was said, First, That they are not found to be within the Act; Secondly, The Indictment was not good; and Thirdly, It was coram non judice First, He said, the Clause precedent that, upon which the Indictment is founded, says, That no Woollen Weaver, or one exercising the Feat or Mystery of Weaving, shall hold above two Woollen Looms; and then comes the Clause upon which, &c. That no Person which shall use the Feat or Mystery of a Weaver, and not Cloth-making, shall during the Time, that he shall use the Feat or Mystery of a Weaver, exercise the Mystery of a Dyer, &c. so that the Statute in this Part is general, and not restrained to a Weaver of Woollen or Linen, and Silk, and being general, the Exposition ought to be made by the precedent Clause; the which says, or Woollen Weaver, so that if the Sense be general according to the last Clause, then a Silk-Weaver or Linen-Weaver is within the Act, as well as a Woollen Weaver; but if a Weaver shall be taken to be a Woollen Weaver, according to the precedent Clause, then such Woollen Weaver will comprehend a Stuff-maker, which is compounded of Wool, and so the Defendant will be within the Benefit of the Statute; and therefore quacunque via data, it will be for the Defendant. Secondly, The Indictment is not good, because it is a private Act, and not shewn in the Indiament; and though it be found in the special Verdict, it is not sufficient; the which the Court agreed, if it had been a private Act; but though this concerns a particular Thing, and therefore is private in its Nature, yet the Forfeiture being to the King, and so the King concerned, this has made it a publick Act; and as to the third Objection, that it was coram non judice, it being before

fore Justices of the Peace; the Court held this a strong Objection, and inclined strongly also, that Stuff-making is Cloth-making within the Statute, and Stuffs are within the Act of Alnage, and Stockings also; and any Garments made of Wool seem to be so too. Curia advisare vult.

Reeve *and* Long.

6. ERROR upon a Judgment in Ejectment in C. B. where it was found upon a special Verdict, that John Long being seised of the Lands in Question, devised them to Richard Long, Son and Heir of Henry his Brother for Life, and then to his first Son in Tail Male, and so to all his Sons; and for Default of such Issue, to Thomas, second Brother of the Devisor for his Life, and after to his first Son in Tail Male, and so to his other Sons in the same Manner; and for Default of such Issue, to diverse others in the same Manner; it is found that at the Time of the Will and Death of the Devisor, that Richard was single, and that after he married, and died without Issue, his Wife being enseint; and that six Months after his Death, she was delivered of a Son; and if this Son shall take any Estate, and devest the Estate settled in Thomas, upon the Death of Richard without Issue, was the Question.

It was insisted that it shall be good by way of executory Devise, and much was said of the Intent of the Testator, that the Estate shall go in the Male Line; and the Case of Bates and Ammos in C. B. about 15 Car. 2. was cited, where the Devise was, that A. B. shall take the Issues and Profits for fifteen Years, nisi one of his Cousin Ammos's Daughters marry a Norton, and then to such Daughter and her Heirs; and if none of the Daughters marry a Norton, then to J. S. and his Heirs; this was ruled an executory Devise, and that the Fee was in the Interim in J. S. but when one of the Daughters married a Norton, the Interest of A. B. ceased, and the whole Estate vests in the Daughter, and many other Cases of executory Devises were cited; non allocatur; for first, this is directly contrary to Archer's

Case, 1 Rep. for the particular Estate being determined, before the Contingency happened, the Remainder never could attach, and it is necessarily a Remainder, and not an executory Devise, for it never shall be construed an executory Devise, but for Necessity, where there is not any particular Estate to support it; for where there is a particular Estate sufficient to support it, there it will be a Remainder, and not an executory Devise; and Pemberton said, Two Things are necessary to an executory Devise, first, That it be after a Fee. Secondly, That it be upon a Condition, and it may not be an executory Devise but where these two Things concur; and for this he cited the Case of Purefoy and Rogers, 2 Saund. 380. And the Judgment was affirmed per totam Curiam upon the first Argument, without any Difficulty; and after it was reversed in the House of Peers.

† N. B. Memorandum, In a Trial at Bar in Andrew Newport's Case, devant, p. 423. a Copy of the Book at Doctors Commons was produced in Evidence, to prove such a one to be Executor; it was objected that it was no Evidence, because it was but a Copy of a Copy, and the Book ought to be produced, or the Will with the Probate, or a Copy of the Probate; non allocatur; for per Curiam, it being a Will of Goods, the Act of the Court is the Original, and the Will is proved by the Act of the Court, before that it is under the Seal with the Probate, and so a Copy of the Act of the Court is sufficient; but if it was a Will for Lands, there a Copy would not be sufficient; but they ought to have the Entry, and book it self there; per Holt Chief Justice.

Sir

Sir Richard Verney's *Case in the* House of Peers.

7. SIR Richard Verney having preferred his Petition of Right to the King, for a Writ to be summoned to Parliament, by the Title of Lord Brook as a Baron; this was referred by the King to the House of Peers, and the Title of the Petitioner coming this Day to be argued before the Lords, the Counsel of the Petitioner, scil. Powis and Northey, having argued it before, the Attorney General on the Behalf of the King opened his Case upon the Petition, which was thus. Robert Willoughby was summoned by Writ to Parliament, by the Title of Lord Brook, in the Time of H. 7. he had Issue Robert, who had Issue Edward, who had Issue three Daughters; two of the Daughters died without Issue; Elizabeth was married to Sir Foulk Grevil, and he had Issue Sir Foulk Grevil and Robert; Sir Foulk Grevil had Issue Foulk Grevil and Margaret; Foulk Grevil was created Lord Brook of Beauchamp's Court, with Remainder to Robert Grevil his Cousin, and died without Issue; Margaret was married to Sir Richard Verney, who had Issue Sir Grevil Verney, who had Issue Grevil Verney, and Richard the Petitioner: Grevil had Issue Sir Grevil, who died an Infant, having Issue William, who died an Infant without Issue; upon which the Petitioner preferred his Petition as Heir of Margaret, who was sole Heir to Elizabeth Lady Grevil, who was Heir of Sir Robert Willoughby, summoned by the Title of Lord Brook, in the Time of Hen. 7. by Writ to Parliament; [and the Direction of the Writ was Roberto Willoughby de Brook Chevalier] non constat, if the first Lord Willoughby had sat in Parliament, or no, there not being any Journal of the House of that Time; but Robert his Son, as appeared by the Journals, was summoned by the Title of Lord Brook, in the Time of Hen. 8. and sat by Virtue of this Writ of Summons; and so this being a Barony in Fee, and Margaret being the Heir to this Barony, and the Petitioner Heir at Law to Margaret; this was his Title.

The Attorney did not deny the Title as was alledged in the Petition, scil. that Margaret was Heir at Law to Robert the first Lord Willoughby, and that the Petitioner was Heir at Law to Margaret; but he insisted, that he is not entitled to this Barony; and he said it was to be considered, how the Law was taken in the Time of Hen. 7. as to Baronies by Writ, when this Barony was created; and for the better Understanding of this, he divided Baronies, as Selden has done, into three Periods of Time, scil. from the Time of William the First, vulgarly called the Conqueror, to the Middle of the Reign of King John: Secondly, From the Middle of the Reign of King John, to the Middle of the Reign of Rich. 2. and Thirdly, From the Middle of the Reign of Rich. 2. to this Time. From the Time of Will. 1. till the Reign of King John, Barons were by Tenure, but in the Time of King John they were summoned by Writ; and though it is said by Sir Edward Coke, 1 Inst. 9 & 16. that he who is summoned by Writ has an Inheritance in his Barony; and if there are no Words of Limitation, that this is a Fee; yet he said that this was but his Opinion, and he does not cite any Authority for it, and he is encountred in this Point by Prinn, in his Treatise called, A Plea for the Jurisdiction of the House of Peers; and by Elsing, and a Book said to be wrote by Justice Dodderidge, who agrees with Prinn; and he said that in this Time, sometimes the Father was summoned, and not the Son; and also tho' it was a Barony in Fee, yet the Daughter was not inheritable, but the Heir Male of the Family; and instanced in diverse Cases; and though they were summoned by Writ from the Time of King John, to the Middle of the Reign of Rich. 2. yet their Title was by Tenure, and they were Barons by Tenure, and the Writ was general without any Words of Limitation, in the same Manner as at this Day, where the Writ is sent to Barons created by Patent, the Writ is the same as the old Writs, by which Barons are created, and in the one or the other no Mention is made of any Continuance, but it seems to be only personal; and he said, that if a Barony in Fee be descendible to a Daughter, that then the Husband may be Tenant by the Curtesy, or the King might summon him by Writ, the Words of which would

be the same as here; and if he shall have Issue by any other Wife, this Issue might claim a Barony in Fee, and the Issue of the first Wife likewise, the Consequence of which he submitted to their Consideration, for the Words which summon the Tenant by the Curtesy, would be the same as in other Cases; and therefore he said that the Law would not give the Barony to a Daughter, but it shall descend to the Heir Male, who can do the Service required by the Writ, for the Service required is, to come and consult and advise with the King, which is a personal Service, the which a Woman cannot perform; and therefore the Law will not permit the Barony [which is created to perform such Service] to descend to a Woman, who cannot perform it; and therefore he said that in diverse Cases, where the Barony descended to one Daughter only, yet the Heir Male of a collateral Line had been summoned, and the Daughter though she petitioned, was not admitted to the Title; and for this he instanced in the Case of Edward Nevil, who married Elizabeth, the Daughter of William Baron Latimer, which was a Barony in Fee, and had Issue Elizabeth and John; John died without Issue, Elizabeth was Heir to the Barony, and married to Sir John Willoughby, who had Issue by her Robert Willoughby, who was created Lord Brook; but upon the Death of John Nevil without Issue in 10 Hen. 6. George a collateral Heir was summoned to Parliament; and though in the Time of Hen. 7. Sir Robert Willoughby petitioned for it, yet the Nevils were continually summoned, till Failure of Issue, in Time about 23 Eliz. when it descended to four Daughters, and they are dead without Issue; the second Instance was in the Case of the Barony of Bergavenny, which is a Barony in Fee, and which ought to have descended to Mary, only Daughter and Heir to Henry; but primo Jacobi, Edward of a collateral Line was summoned, and it has continued in this Branch to this Day; the third Instance was in the Case of the Barony of Clifford, which was an antient Barony in Fee: Henry Clifford in the Time of Hen. 8. was created Earl of Cumberland, and had Issue Henry, who died 1560. leaving Issue George and Francis; George died A. D. 1605. leaving Issue Anne his only Daughter and Heir; yet the Barony did not descend to her, but to the Son and

Heir of Francis, and continued in this Branch till Failure of Issue Male; and if it be so in the Case of an only Daughter and Heir, and the Law was taken so to be in the Time before and after the Summons of Sir Robert Willoughby, à fortiori it would be so in the Case of a Descent to many Daughters, as was here; for Edward the Son of Sir Robert Willoughby, second Lord Brook, had Issue three Daughters, and died in the Life of his Father; upon which at the Death of his Father Robert, the Barony, if it descended, ought to descend to the three Daughters of Edward; but this could not be, for all the Daughters are but one Heir to their Ancestor, and each of them is as well entitled, as the other; and therefore it has been always taken in such Case, that the Barony is in the Crown; and so it was ruled in the Case of the Earl of Oxford, reported by Jones, where it is said that the Barony being entire, and indivisible, it may not descend, but is in the Disposal of the King; and in another Place of this Book, it is said, that the King might grant it as he pleased, and the House of Peers agreed with the Judges in this Point, and made their Report accordingly; and he said, that if this descends, and no one can claim it, it is such a Kind of Inheritance, as he had never seen: But it is objected on the other Side, that it is suspended during the Lives of the three Sisters, and when the two are dead without Issue, then it is revived; but he said, when shall it be revived? it has been 170 Years since that any one has claimed it; and if no Time be limited, this will be to admit all the old Titles, that any Man can find since the Time of Will. 1. for except the Lords will limit them, he did not know, what Time there ought to be of Limitation in such a Case; and he said that there was a Time when this might have been claimed, if the Family had thought it to have been a Right in them; for Sir Foulk Grevil, and Foulk Grevil his Son, might have claimed it; but the Son waived it, and excepted of a new Title; and in the Preamble of his Title, it is recited, that he was descended from the antient House of Willoughby and Beauchamp; so he took Notice of his Pedigree, but did not claim this Barony, but was created Baron Brook of Beauchamp, which is a plain Indication, that he did not think it a Right in him, for then

he would have been restored to his more antient Title, which was more eligible; from which he inferred, that it was his Judgment, that he had not any Right to this Barony; and there having been so long an Interval of Time, every Thing shall be presumed against the Right; for if there was any Right, it is to be presumed, that in so great a Length of Time, some of the Ancestors would have claimed it, &c.

Powis and Northey econtra: And Powis said, that all that Mr. Attorney had said in the first Part of his Argument is, that there were Baronies by Tenure, the which is without Dispute; and he also said that without Question there were Barons created by Writ, and where the Father and the Son have been summoned, it had always been taken, that this was a Barony in Fee, according to the Opinion of Coke, and all Precedents, and constant Usage; and he instanced in the Baronies of Abergavenny, Audley, Fitzwater, Morley, Ferrers, North and Grey, Paget and Wharton, which are Baronies in Fee, and derived from Females, and the Lords sit in the House in this Right to this Day; and a great Number there are, which are included in higher Titles, and used and enjoyed at this Day; and therefore the Opinion of Mr. Prinn would not be of Right against Coke, who was the most learned Man in his Profession of his Time, and of great Name and Reputation at this Day, and had been Attorney General, and who ought to be presumed to understand these Matters; and so at this Time the Law is certain and settled without Question in this Point, though heretofore there had been Variety of Practice and Opinions; and therefore, 1 Inst. 165. where there is but an only Daughter, a Barony in Fee descends to her, as well as to a Son; for there is no Incertainty, as there is where there are many Daughters, the which are all but one Heir; and therefore in such Case the Barony, as has been said, is in the Disposition of the King, scil. he may declare, which of the Daughters shall have it, but the King cannot give it to a Stranger out of the Family; but because that the Barony is entire and indivisable, and many Daughters together cannot have it, the King may in such Case declare that one of the Daughters shall have it, or suffer it to remain in Suspence at his Pleasure; and this is all that is meant by the Judges

in the Case of the Earl of Oxford; but when all the Daughters are dead without Issue but one, so that the Incertainty in such Case is taken away, the Suspension ceases, and the Heir of such Daughter ought to enjoy it, without any Declaration of the King, as had been done in the Cases of the Ancestor of the Duke of Bolton, for the Barony of St. John, and for the Barony of Clifford, and ruled accordingly by the Peers in 1691. for the Barony of Ross, for the Barony of Ogle, and for the Barony of Conyers, and the Barony of Vipont; all which had descended to many Daughters; and after the Death of all but one of them, have been enjoyed by the Issue of such Sister, as of Right, without any Declaration from the King; all which Precedents prove, that the Barony which descends upon two or more Daughters, is not extinguished, but only suspended; for if it be extinguished, then there ought to be a new Creation, and Precedency ought to be accordingly; but in these Cases they are in, in their antient Right, and they have had Precedence according to that Right, [and that the Barony is not extinct, Vide 9 Rep. the Case of the Abbot de Strata Marcella, though not cited by the Counsel.] And as to the Non-claim it was said, that by the Common Law, there was not any Time of Limitation, as to Lands; but this is remedied by Statute; but it never was said, that any Statute extended to a Barony, which is a Name of Dignity annexed to the Person, and may not be alienated, surrendred, or extinguished; and therefore if it may not be barred by Fine, or surrendred, his Negligence or Omission cannot hurt him, as a Bishop by his Non-claim may not prejudice his Successor; and also a Barony may not be surrendred by the Acceptance of a new Title, no more than an Office; and as to the Case of the Barony of Latimer he said, that this ought to be presumed to be a Barony by Tenure, and the Land coming to the collateral Heir, the Barony attended it; and as to the Non-claim by the present Family, this was excused by the Interval of Parliaments, in the Time of Charles the First, and by Minorities after. And Northey said, that the Law antiently had not been certain in the Case of many Daughters, for antiently it had been said, that the Eldest shall have it, 4 Inst. 221. Bracton Selden's Title of Honours; but it is settled at this Day, that the

the King may dispose of it to any of them, but without such Declaration it remains suspended: And as to the Acceptance of another Title by Sir Foulk Grevil, he said that this cannot amount to a Surrender, for it is not an Acceptance of the same Thing, also there is no Reversion of this Barony in Fee, in which it might merge; a Barony likewise is a Thing annexed to the Person, and inherent in the Blood, which is made noble, and it cannot be surrendred, barred, granted, or extinguished, otherwise than by Attainder, or Act of Parliament, as it is held in 4 Inst. 355. and in the Lord Ruthen's Case in 1640. and in the Lord Purbeck's Case, 18 June 1678. and as to the Non-claim it had been excused; and therefore he prayed that their Lordships would allow the Title of the Petitioner, and report it to the King in his Favour.

Shore said, that he did not deny, but that a Barony created by Writ is a Fee, which ought to descend in the Case of an only Daughter; that it is not extinguished, or that the Acceptance of a new Title does not amount to a Surrender; but he said, this is an Argument of the Opinion of this Man, that he had not any Right to this Barony, or otherwise he would have assumed his antient Title, and that this turns the Presumption against the Petitioner; he said likewise, that when there has been a Discent to three Daughters, and none of them might claim it, that this is a Suspension, and therefore none of the Daughters, or their Issue might claim it ex debito Justitiæ, but the Petition ought to have been ex gratia.

Upon the Report made by the Lord Keeper of what was offered by his Majesty's Attorney General, and the other Counsel, in Relation to the Petition of Sir Rich. Verney, Knt. claiming the Title of Lord Brook; it was resolved upon the Question, That the Petitioner Sir Rich. Verney hath no Right to a Writ of Summons to Parliament, and a Committee was appointed by the House of Peers, to draw up what shall be reported to his Majesty, upon his Majesty's Reference to that House, upon the Petition of Sir Richard Verney, claiming the Title of Lord Brook; and after frequent Adjournments of their Time of Meeting, the Committee did never meet, and there was not any Thing further done upon this Petition in

that Sessions; and the Reason why the Claim of Sir Richard Verney was not allowed, upon this Petition, seemed to be, because he claimed the Title of Lord Brook, as a Barony in Fee, when Sir Foulk Grevil was created Lord Brook of Beauchamp's Court, by King James the First, to him and the Heirs Males of his Body; which though it might not be a Surrender of the Barony in Fee, yet the Title of Lord Brook is enjoyed by the Male Descendants of Sir Foulk Grevil; and the Lord Brook was heard by his Counsel against this Petition; and therefore in the Beginning of the next Year, Sir Rich. Verney preferred a second Petition to his Majesty, setting forth, that his Ancestor, whose Heir he is, was summoned to Parliament, as a Baron of this Realm, Anno 7. Hen. 7. the Writ being directed Roberto Willoughby de Brook Chevalier; and being also summoned to other ensuing Parliaments, died seised of the said Dignity of a Baron by Writ to him and his Heirs, to whom succeeded Sir Robert Willoughby, Knt. his Son and Heir, who being likewise summoned to Parliament amongst the Peers of this Realm tempore H. 8. sat accordingly, and died seised of the said Dignity to him and his Heirs; whereupon the said Dignity came to Elizabeth Lady Grevil Grandchild, and at Length sole Heir to the said Sir Robert Willoughby, Knt. the second Baron of that Name; and this by several mesne Descents is now come to the Petitioner, as rightful Heir to Margaret Lady Verney his Grandmother, which Margaret Lady Verney was Grandchild, and at Length sole Heir to the aforesaid Elizabeth Lady Grevil. And Jan. 4. 1695. this Petition was by his Majesty referred to the House of Peers, to examine the Petitioner's Claim and Title therein, and to certify how the same shall appear to them with their Opinion thereupon; and after very great Debate, and the Question put, the Petition, and the Order of Reference were read, and it was resolved that the Petitioner shall be heard at the Bar by his Counsel upon this Petition; and Notice was ordered to be given to the King's Counsel, in order that they might be heard at that Time, in Case they see Cause to offer any Matter on his Majesty's Behalf upon the said Petition; and the Heralds were ordered also to attend at the same Time.

Feb.

Feb. 3. 1695. The Petitioner's Counsel were heard, who offering to prove every Particular of Sir Richard Verney's Pedigree to be true, as opened by them; Mr. Solicitor agreed the Pedigree to be as they had stated it, it being signed by the Heralds, who are the proper Officers in that Case; and upon Debate, whether the Pedigree as offered by Sir Richard's Counsel should be proved, it was agreed, that Sir Richard's Pedigree mentioned in his Petition, was truly set forth, it having been formerly made out by Proofs; then it was strongly insisted by the Counsel for the King, that the Petitioner's Case had been already heard and adjudged upon his former Petition, whereby he claimed to have a Writ of Summons to Parliament from the same Ancestor, by the same Pedigree, and under the same Writ of Summons, by which he makes his Claim in this Petition; and that the Judgment upon the former Petition was not, that he had no Right to a Writ of Summons by the Name of Lord Brook, but generally that he had no Right to a Writ of Summons upon his Case, as stated in his Petition; and it was submitted whether a Judgment once given in so solemn a Manner should be reviewed; and admitting the Petitioner's Claim, as now stated, to be different, from the Claim insisted on in the former Petition, then it was urged, that Sir Robert Willoughby the Ancestor, under whom the Petitioner claimed, and his Son and Grandson sat by the Name of Lord Brook, and never by the Name of Lord Willoughby de Brook; and it was argued, that no Peer can claim a Writ by Descent to sit in the House of Peers by any other Name, than that by which the Ancestor under whom he claims, did sit; and therefore it having been adjudged upon the former Petition, that he had no Right to a Writ of Summons, as Lord Brook, which was the Title by which his Ancestors sat, they concluded that he can have no Right at all.

Feb. 13. 1695. After full and deliberate Consideration and Debate, upon what had been offered by the Counsel of the Petitioner, and of what had been objected to the same by the Counsel for the King; upon the Question put it was resolved, That by what had been made appear to the House of Peers, the Petitioner Sir Richard Verney had a Right to a Writ of Summons to Parliament, by the

Name and Title of Willoughby de Brook; and a Committee was appointed to draw up in Writing what shall be reported to his Majesty, upon his Majesty's Reference, which was reported and agreed to by the House of Peers, and presented to his Majesty; and Feb. 27. 1695. Richard Lord Willoughby de Brook sat in Parliament, coming in by Discent, as adjudged to have a Right to a Writ of Summons to a Parliament; the Writ bore Date, Feb. 25. 1695. 8 Gulielmi tertii: multosque per annos, stet fortuna Domus, & avi numerentur avorum.

During the Debate in this Cause, some Matters were moved in Respect to Descents of Baronies by Writ, and Counsel was heard in the Behalf of several Peers, claiming Baronies by Descent, whose Ancestors were called by Writ; and a Day was appointed to consider of the Precedency of such Peers, as shall be summoned by Writs into their Fathers Baronies, and of the Descendants of such Peers; but upon the Day appointed nothing was done touching this Matter; nor was it afterwards resumed during the Sessions; yet upon the Question put, it was resolved, That if a Person summoned to Parliament by Writ, and sitting, die, leaving Issue, two or more Daughters, who all die, one of them only leaving Issue, such Issue has a Right to demand a Summons to Parliament.

Term. Trin.

6 Will. & Mar. R. B.

The King *and* Tucker; *devant.*

1. AND now the Court, scil. Samuel Eyres, Giles Eyres, and Holt Chief Justice gave Judgment seriatim in this Case; and they did not regard any of the Exceptions taken but the two last, scil. the Omission of secreta sua amputentur, & contra allegiantiæ suæ debitum; and as to the First, scil. the Omission of secrata sua amputentur, they held the Judgment good, this notwithstanding, for tho' it be always pronounced, it never is entred as Part of the Judgment, and to reverse the Judgment for this Reason, would be to overthrow the greatest Part of all the Judgments, which have been given in High Treason; but for the other Exception they unâ voce reversed the Judgment; for the Clause contra allegiantiæ suæ debitum, is not by way of Aggravation, but shews how he was guilty proditoriè, scil. contra allegiantiæ suæ debitum, and proditoriè of it self, is not sufficient, for if it be not contra allegiantiæ suæ debitum, it may not be proditoriè; and this Clause cannot be supplied by contra naturalem suum Dominum; for if this Clause was omitted, yet the Indictment would be good; and per Holt Ch. Just. a Thing necessary cannot be supplied by a Thing unnecessary; and he cited, and much relied upon the Case cited in Calvin's Case, the Record of which Case he had seen; the Record and the Indictment was in all Points according to the Common Form; but naturalem Dominam was omitted, and supremam Dominam suam was in; he said, this Conclusion is

not of Necessity; for it is sufficient if it be said in any Part of the Indictment; but it ought to be inserted in some Part; and he said, that as to Lambert and Vane's Case, and the other Cases cited, this Mistake might be caused upon seeing some Indictments framed upon a Statute, which created a particular Treason, which was not Treason before, where this Clause might be omitted; and so by all the Court, the Judgment was reversed.

Wilson *and* Law; *puis.*

2. THIS was a general Demurrer to the Writ and Count in an Appeal of Felony, and several Exceptions were taken: First, Because the Count says, that he being in pace Domini Regis, &c. circa horam primam, &c. the which is incertain, for the Hour ought to be positively alledged, & circa Horam is not any Allegation of an Hour certain, as it ought to be by the Statute of Glocester, cap. 9. 2 Inst. 317. and the Count after says, so he Die, Anno, Hora & Loco supradict. killed him, &c. the which is repugnant when no Hour in certain is alledged before. Secondly, It is said that he wounded him, &c. super superiorem partem ventris proximi ad pectus ejusdem, &c. the which is as uncertain, as Young's Case, 4 Rep. 40. Thirdly, Dans ei, &c. is not a positive Allegation, that he gave him a mortal Stroke; for though it is said percussit, perforavit, &c. yet this might be, and the Party not die of it; non allocatur; for circa Horam seems certain enough, for half an Hour after Twelve, and half an Hour after One, is one Hour, & circa the Hour of One; and as to the second Objection, it seems to be certain, and not like to Young's Case; for there it was circiter pectus usque ad ossa Humeri, the which was much more incertain than here; and as to the third Objection, it is better than if it had been et dedit, for percussit, perforavit, &c. dans, is an express Allegation, and couples all together. Another Exception was taken to the Joinder in Demurrer by Carthew, that this was a general Demurrer to the Writ and Count, and that they in joining in Demurrer, have pleaded first to the Writ, and after to the Count, and so severed in their Demurrer, the which was never seen before; he said also that the Re-

turn of the Writ was ill; for it is attachiari feci eundem, &c. where it ought to be attachiavi; for the Sheriff is expressly commanded by the Writ to do it himself; and it is not an Answer to the Command of the Writ to say, that he has made another do it, and he ought to say Attachiavi in this Case, in like Manner as he ought to return a Cepi to a Capias, and not Capi feci, for an Attachment of the Body, and a Capias does not differ as to this Purpose; and to this the Court seemed to incline, but it is aided by the Appearance; another Exception was taken to the Return, and that was, because he said Corpus præfat. &c. parat. habeo, &c. ubicunque, the which is incertain, and not according to the Form of the Return; for though the Writ be, that he should have the Body in the King's Bench ubicunque, because it is incertain, where the Court shall be at the Day of the Return, yet when the Day is come, he ought to return the Body into Court, which then is in a Place certain, and not to say that he had the Body, ubicunque, &c. the which the Court said was a Blunder, but it is aided by the Appearance; then it was said, that the Venue is mislaid, for this is a Fact in a County; and it being so, the Venue ought to be from a Vill, and not from a Parish as here; for the Common Law does not take Notice of a Parish, Parishes being but lately distinguished, and that by the Ecclesiastical Law; and a Visne never was known to be awarded from a Parish, till within these 100 Years; and the Statute of Gloucester requires, that the Vill be shewn; non allocatur; for first this ought to be pleaded, and shewn that there is not any such Vill, or Lieu conus, &c. and he shall not take Advantage of this upon a Demurrer; the Court did not over-rule the Exceptions, but seemed strongly to incline, that none of them were good; yet they gave a further Day for another Argument; in this Case Morgan and Egerton's Case in 1 Bulst. 69. was cited as an Authority in Point; puis.

Crump *and* Holford; *puis.*

3. UPON a special Verdict, the Statute of 1 Will. & Mar. which ordains, that Vintners should sell for such a Price, and in such Measures, was found, and then a Conviction of the Plaintiff, &c. and upon the whole Verdict, the only Question was in this Case, if the Defendant who was a Constable, and acted in Obedience of a Warrant of a Justice, be chargeable in Trespass, for a Distress taken by him according to the Warrant; and it was argued by Shore, that he was, because the Justice had not an Authority in this Case; for he ought to convict the Offender within a Time certain; and here he did not convict him within this Time, and this appears within the Warrant it self; and this being a special limited Authority, the Constable as well as he takes Notice of the Authority of the Justice; he ought to take Notice of the Bounds of his Authority; otherwise in the Case of a general Jurisdiction; and the Case of the Marshalsea, and the Countess of Rutland were cited to this Purpose; and here he having not duly pursued his Authority, that which he has done is void, & coram non Judice, and then the Officer shall not be excused. On the other Side it was argued, that the Officer is not to dispute the Authority of the Justice, in a Case where he has an Authority, as he has here; and 1 Cr. 94. Hilton's Case was cited to this Purpose, and other Cases, and the Difference taken where it is coram non Judice, and where not: Holt Chief Justice cited the Case of Terry and Hartington in Scaccario; and said that if a Justice of the Peace adjudge that to be an Offence, which is no Offence, the inferior Officer shall answer; as if one be adjudged the putative Father of a Bastard, where after it appears to be born in Matrimony; this is void, & coram non judice, &c. Curia advisare vult; puis.

The

The King *and* Kemp; *puis.*

4. A Scire facias was brought to reverse a Patent, in which the Case was; King Charles the Second, Anno 12. of his Reign, grants the Office of Searcher to Martin, durante beneplacito; and after in the 6th Year of his Reign, reciting the said Grant to Martin, grants the said Office to Fryer, habend. after the Death Surrender or Forfeiture of the Patent to M. to Fryer for his Life; and after in the 26th Year of his Reign, by another Patent, reciting the two former Patents to Martin and Fryer, he grants the Office to William Kemp for Life, habend. after the Determination of the Patent to Martin and Fryer by Death, &c. and further in the same Patent, grants it to Henry Kemp, ut supra; Martin, Fryer, and William Kemp are dead, and a Scire facias is brought to repeal the Patent to Henry; and it was objected by Pemberton, First, That the Patent was void in its Creation, for Martin having but an Estate durante beneplacito, when the King makes a Grant to Fryer, this is a Determination of his Will; and it being so, his Grant to Fryer was void, for the King was deceived in his Grant, for he intended to grant it in Reversion; but the Patent of Martin being determined by the Grant to Fryer, and his Grant being to commence upon the Determination of the Patent to Martin; this ought to commence immediately, and so it is a Grant in Possession; and it being a Grant in Possession, where the King intended only to make a Grant in Reversion, the King is deceived to his Prejudice, and therefore the Patent to Fryer is void; and if it be void to Fryer, by the same Reason the Patent to Kemp would be void also: He said likewise that the Patent is void for another Reason, because here is an Estate of Frank-tenement to commence in futuro, for the Life of the Grantee; the which cannot be by the Rules of Law; for an Estate granted to a Man for his Life, is to be understood all his Life, and shall not be for Part of his Life, for the Law will not permit a Fraction of an Estate for Life; he admitted that the King may make a reversionary Grant, yet he insisted ut supra.

Northey econtra. The Grant to Fryer is no Determination of the Will of the King, when the King has particularly taken Care, that this shall not be a Determination; and he took a Difference mentioned in Chandos's Case, 6 Rep. where the Misprision is for the Benefit of the King, and where to his Prejudice, as it is said supra; and as to the Grant he said that it is good, for in such Case as here, it is but in the Nature of an Appointment to commence in futuro, and no Estate passes in præsenti, as it would, where it is an Office of Inheritance; and therefore all those Grants operate in the Nature of Grants in futuro, and not of present Grants; and though a Franktenement passes, yet in the Case of the King, and also of the Subject, (as in the Cases of Grants by Bishops) these Grants have been allowed to be good; and he prayed Judgment for the Defendant. Curia advisare vult, &c. Dyer 94. is the Case in Point, but not cited. 6 H. 7. 14. Com. 499, 500. puis.

Philips *and* Bury.

5. AN Ejectment was brought against the Defendant by one Robert Philips, who declares upon the Demise of William Painter, Rector of Exeter College, and the Scholars of the same College, of a certain Messuage, called the Rectory-House, situate within the Parish of St. Michael, within the City of Oxford, to hold from Michaelmas, which was in the second Year of their present Majesties, until the End and Expiration of five Years, then next following; that he entred into the Premisses, and was possessed till the Defendant ejected him; to this the Defendant pleads that the said Messuage at the Time of the Action brought, and long before was the Freehold and Soil of the Rector and Scholars of Exeter College mentioned in the Declaration; and that the said Defendant long before, and at the Time of the supposed Ejectment was, and yet is Rector of the said College; and by Reason thereof the Defendant, in Right of the Rector and Scholars of the said College, into the said Messuage, with the Appurtenants, at the Time of the Trespass and Ejectment alledged in the Declaration, did enter; and the said Robert Philips did remove,

move, as he lawfully might, and then takes a Traverse that the said William Painter then was, or is Rector of the said College, called Exeter College, in the Manner and Form the Plaintiff hath alledged. To this the Plaintiff comes and replies, and confesses the said Messuage to be the Freehold and Soil of Exeter College; but says further, that at the Time of the said Trespass and Ejectment, the said William Painter was, and yet is Rector of the said College; whereupon there is Issue joined, and a Trial had before the Justices in the King's Bench; and thereupon a special Verdict is found; they find before the Demise mentioned in the Declaration, the College of Exeter, in the University of Oxon, was, and yet is a Body Politick and incorporate, by the Name of the Rector and Scholars of Exeter College, within the University of Oxford; and that from the Foundation of the said College diverse Laws and Statutes were made for the better Government of the said College; and that by the said Statutes the Bishop of Exeter for the Time being, and no other, was appointed Visitor of the said College, according to the Tenour and Effect of the Statute found in the Verdict; and that the Bishop of Exeter, that now is, at the Time of the Appeal of James Colmer, in the said Verdict afterwards mentioned, was and still is Visitor of the said College, by Virtue of, and according to the Statutes of the said College, and then find the Statutes of the College in hæc verba; They find the Statute for the Election of the Rector, and the Oath required to be taken by the Rector upon his Election, by which Oath among other Things, he swears, the Liberties and Privileges of the Colleges to keep and defend: They further find the Statute for expelling any Scholar Convict of Adultery, &c. before the Rector, Sub-Rector, Dean, and five other of the senior Fellows, or the major Part of them, with the Assent of the Rector. Then they find the Statute whereby the Bishop of Exeter for the Time being, is constituted Visitor; and that it shall be lawful for the said Bishop, and to no other, as often, as by the Rector of the College, and in his Absence, by the Sub-Rector and four others at least of the seven senior Fellows, he shall be requested; and also without any Request de quinquennio in quinquennium semel, to the said College, by himself or his Commissary to come, and

to enquire of all Things contained in the said Statute, and of any other Particulars, and to do all other Things, which be fit and necessary, to the Correction and Amendment of the said College, etiamsi ad deprivationem aut amotionem Rectoris Sub-rectoris, aut alterius cujuscunque, Statutis & ordinationibus id exigentibus, procedere contingat; and then the Statute directs, that the Visitation shall continue but two Days nisi ex causis urgentissimis & rarissimis, and if ought remains unfinished at the End of the Visitation, 'tis to be left in Writing with the Rector, and he is to see it amended according to the Statute, upon the Penalty of Contempt; and then proceeds to the Manner of proceeding by the Visitor at his Visitation, si tamen ad privationem aut inabilitatem Rectoris aut expulsionem Scholaris per Episcopum aut ejus Commissarium agatur, &c.

Then they find the Statute for removing the Rector; and further find that before the Time of the Demise, viz. 6 Octob. in the first Year of their present Majesties, one James Colmer, a Fellow of the said College, was convicted of Incontinency, before the Defendant, then Rector of the said College, the Sub-rector, and Dean, and five other the senior Scholars of the said College, with the Assent of the Rector; and for that Reason excluded the College. They further find, that from this Sentence of Expulsion, the said Colmer appealed to the Visitor, who in February 1689. appointed Dr. Masters his Commissary to hear and determine the said Appeal, and find the Commission in hæc verba; and that upon that Appeal the said Colmer was restored. They further find, that upon the 16th of May following, a Monition from the said Bishop, under his Episcopal Seal, was directed to the said Dr. Bury then Rector, and to the Sub-rector of the said College, requiring them to appear before the said Bishop, or his Commissary, in the Chapel of the said College, upon the 16th of June next following, of which the Rector and Scholars had Notice: They find that upon the said 16th of June, the said Bishop came to the said College, in order to visit the said College, and went to the Chapel of the said College, which he found locked. They find that the said Rector and Scholars in the Court of the said College, offered to deliver to the said Visitor, a Protestation under the College Seal, in which they set forth

as a Reason for not obeying the Citation, the Bishop's having visited in the *February* before by Dr. *Masters*: They find the Visitor refused to accept the said Protestation, and that Francis Webber being sworn, declared upon Oath, that the said Citation was read in the Chapel of the College, before the Coming of the Bishop. They further find, that the Visitor called over the Names of the Rector and Scholars of the said College, and that the Rector and some of the Scholars would not appear; that the Chapel-Door was shut, and that the Porter being called, and not appearing the Visitor departed, nothing more being done; they further find that the Visitor afterwards, (i. e.) the 1st of July 1690. by a certain other Writing sealed with his Seal, cited the said Rector and Scholars by Name, to appear before him in the Common Hall of the said College, upon Thursday the 24th July then next following, whereof the Rector and Scholars had Notice; and did protest by a certain Writing under their Common Seal, against the said intended Visitation, which is found in hæc verba. The Protestation sets forth the Statute de Visitatione, by which the Visitor is to visit de Quinquennio in Quinquennium, and then shews that he visited by his Commissary Dr. Masters in March, and that five Years are not since elapsed, and that they are sworn to preserve the Statutes and Privileges of the College, and so give their Reasons why they cannot submit to this Visitation. They further find, that the Visitor proceeded July the 24th in his Visitation; that Dr. Bury, and diverse of the Scholars being summoned did not appear, wherefore they were pronounced contumacious, and for their Contumacy suspended, George Verman, John Hern, Thomas Lethbridge, Benjamin Arches, and several others. They find the Visitor made an Act of the Proceeding upon the 16th of June; and that upon the 26th of July, the said Visitor by the Consent of four of the senior Fellows of the College then present in the University, and not suspended, deprived the said Rector: They find that four of the assenting Fellows were not four of the seven Seniors, unless by the Expulsion of Dr. Hern, and the Suspension of five others their Seniors. They find, that after the said Sentence William Painter was chose Rector; they further find, that the 1 of June 2 Jac. 2. and always after

2 till

till the Sentence given, Dr. Bury was Rector, and still is, unless the Sentence prevail to the contrary; they find the Lease by William Painter to the Plaintiff, and that he was possessed by Virtue thereof, till the Defendant ejected him; but if upon the whole Matter, the said Place of Rector became void, by the said Deprivation or not, they refer to the Court; and if not, &c. And if Painter or the Defendant be the Rector of Exeter College, was the Question upon the whole Matter referred to the Judgment of the Court upon this special Verdict; and this Case having been many Times argued, the Court this Term gave their Judgment seriatim; and per Samuel Eyres, Giles Eyres, and Gregory, Justices, Judgment ought to be given for the Defendant.

Justice S. Eyre. In this Cause of Philips and Bury, the Record is extreamly long; I will make it as short as I can in opening of it, that the Substance of it may be understood: Philips brings an Ejectione firmæ against Dr. Berry, and this is upon the Demise of Painter as Rector, and the Scholars of Exeter College in Oxon, and it is for the Rector's House of the College; the Defendant pleads specially, that the House in Question is the Freehold of the Rector and Scholars of the College; but he says that he (Dr. Berry) was then Rector of that College; and that in Right of the Rector and Scholars, he did enter into the Messuage in Question, and did eject the Plaintiff, and so holds him out; absque hoc, that the Lessor of the Plaintiff was, at the Time when the Lease in the Declaration mentioned was made, Rector of that College; Et hoc paratus est verificare.

The Plaintiff replies, that the Messuage belongs to the Rector and Scholars; but that the Lessor was Rector, and not the Defendant, at the Time of the Lease; upon which they are at Issue; and so the Point is no more but this, Whether Painter at that Time was Rector of Exeter College or not; and upon this Issue a special Verdict is found.

They first find that Exeter College is, and was one Body politick and corporate, by the Name of the Rector and Scholars, &c. And that by the Foundation of the College, there were Laws and Statutes by which they were to be governed; and then they begin first with the Election of the Rector; the Circumstances of that are

very long; and it is found that Dr. Berry was Rector, and that Painter afterwards, and before the Lease made, supposing the Place void, was elected, concurrentibus iis qui de Jure requiruntur; and so there is no Need of reciting all that Matter.

They find that the Rector is to take an Oath, &c.

They find further, among the Statutes of the College, a Statute, that if any Scholar shall be convicted, &c.

Then they go on and recite the Statute for the perpetual Scholars after the Probation-Year; and they are to take an Oath, the Substance whereof I shall have Occasion to take Notice of by and by; and therefore I would mention it now; it is set forth in hæc verba, &c.

Then they further find, that according to the Statutes of the College, there is a Sort of a Scholar for a Year of Probation, and directs the Election of that Scholar; and that at his Election he shall take an Oath, &c.

Then they further find the Statute for the Visitor, where there is a long Prologue which I shall have Occasion also to make use of by and by, and shall therefore only recite that Part, which appoints the Visitor, and his Authority; It may be lawful for the Lord Bishop of Exeter, &c.

Then they find further his Allowance for his Visitation called Sportula, and that he has Power to visit three Days together.

Then they find further a Provision, that if the Bishop or his Commissary do proceed to Deprivation, &c. then there is set down the Manner of the Removal, which I shall likewise have Occasion to speak to.

Then they find further, that Queen Elizabeth, the 2d of March, in the eighth Year of her Reign, makes this House, which was before a Hall, a College, and a Body Corporate, and confirms the Statutes; and that one Sir William Petre being willing to supply, &c. makes Additions to the Revenues, and the defective Statutes, &c.

Then they find, that before the Time of the Demise, 16 Octob. 1. Will. & Mar. on Colmer was convicted before the Rector and Fellows of Incontinency, and expelled; he appeals to the Bishop, who made out his Commission to Dr. Masters, and the Commissary proceeds to the Execution of that Commission, the 22d of March,

and summoned the Rector and Fellows, from whose Expulsion Colmer appealed; and then they set forth the Answer and Protestation of Dr. Berry and three others, in hæc verba, notwithstanding which Protestation the Commissary pronounced for his own Authority, and required a Copy of the Process against Colmer; and upon Examination, and another Protestation, the Commissary reversed the Rector's Decree, and restored Colmer.

They find further, that the 16th of May, the Bishop issued his Citation to the Rector and Scholars for a General Visitation, to be held the 16th of June, in the Chapel of the College; accordingly the 16th of June, the Bishop comes to the College, and to the Door of the Chapel, which was shut up, and they find the Porter was subject to the Government of the Rector; and the Rector and Scholars then protested against the Bishop's Jurisdiction, insisting upon Dr. Master's Visitation; and that the Bishop was barred from any further Visitation at that Time. This Protestation, as not offered in loco Judiciali, (i. e.) the Chapel, the Bishop refused to receive, but administred an Oath to Webber of the Service of the Citation, called over the Names of the Rector and Fellows, who appeared not; and not being admitted into the Chapel, went away without any Thing else done.

The 21 of July the Bishop summoned a Visitation; 23d July, when the Rector and Scholars made a Protestation against it; the 24th of July, the Bishop proceeded in his Visitation, and made an Act of Court of the Proceedings the 16th of June; the Rector and Scholars protested, which Protestation the Visitor admitted quatenus de Jure, &c. the Visitor admonished the Rector to abide the Visitation; but he withdrew: Ten of the Fellows appeared, and submitted, and the rest refused; the Visitor pronounced the Non-appearers contumacious; and several other Proceedings not material to be mentioned were had, save only that the Visitor exhibited Interrogatories, to discover Matters of Accusation against the Rector or Fellows; in the Afternoon the Rector and Scholars absent were called again, and declared in Contempt, and the Fellows suspended, and adjourned to the 25th, when Dr. Hern's Place was voided as inconsistent with

with his Benefice; and Dr. Berry, with the Consent of four of the seven senior Fellows not suspended, was deprived for Contumacy of his Rectorship.

They find further, that four Fellows that subscribed the Deprivation Sentence, were not four of the seven senior Fellows, unless by the Deprivation of Dr. Hern, and Suspension of the other Fellows, as aforesaid.

That the 25th of Aug. 1690. the Lessor of the Plaintiff, concurrentibus omnibus, &c. was elected Rector of the College, and rightly admitted, if the Office was vacant: That the Defendant was, before and till the said Sentence of Deprivation, Rector of the said College; and if that Sentence be not valid, he is still Rector.

And then they conclude, if the Place were void by the Deprivation of Dr. Berry, then Painter being chose, there is a good Title to him to make the Lease, and consequently they found for the Plaintiff; if it were not, then they found for the Defendant.

And I am of Opinion in this Case, that Judgment ought to be given for the Defendant; and before I enter upon the Consideration of the Particulars of this special Verdict, I shall premise some few Things.

First, We are not upon a Mandamus, in which Case, if it is returned, that there is a Visitor, the Court intends that the Visitor will do Right; and therefore, I shall not take Notice of any of those Cases upon Mandamus's.

In the next Place, I would premise that the Visitor hath no greater Authority or Power than the Founder giveth him; he is the Founder's Creature qua Visitor, and does receive his Being, Power, and Authority from him; and if the Founder gives him Authority in some Things and Cases, and not in others, and qualifies and limits that Power which he gives him, the Visitor cannot exceed that Power and Authority that is given him; qui potest dare, potest disponere.

In the next Place I would take Notice, that this Court hath an Authority, not only to correct Errors in judicial Proceedings, but also to rectify extrajudicial Proceedings, tending to the Oppression of the Subject, as was resolved in James Bagg's Case, 11 Co. And indeed this is every Day's Work in this Court. The Statute

tute of 24 H. 8. cap. 12. which directs how Appeals should be sued in Ecclesiastical Matters, takes Notice that the Laws Temporal, which are for the Trials of Properties of Land, and the Conservation of the People of the Realm, in Amity and Peace without Rapine or Spoil, were and are yet administred, adjudged and executed, by sundry Judges and Ministers of that Part of the Body politick, called the Temporalty; and both Authorities do join together in due Administration of Justice, the one to help the other.

In the next Place here is an Ejectione firmæ brought to try the Title of the Mansion-House of the Rector of the College, where the whole Matter is found specially; and if by what is found, it appears to us that the Visitor has acted extrajudicially, and hath done Wrong in depriving the Rector; certainly we are not now to intend that he hath done Right. There are many Cases that are properly and purely of Ecclesiastical Conusance; but if a Title of Land comes to be tried in the Temporal Court, into which those Matters accidentally fall in, they are to be judged of and tried by that Temporal Court.

As in a Title upon Marriage, if Issue be joined, Marriage or no Marriage, this is to be tried by the Certificate of the Bishop; but if there be a Question upon the Trial of a Title of Land, whether a Person under whom either of the Parties claim, was married to another, or no; the Temporal Court will judge of that Matter without Certificate; as was done in a famous Case in this Court, in my Lord Hale's Time, the Case of my now Lord of Danby's Lady, and Mr. Emerton. But I need not have instanced in any Case, for it is almost every Day's Experience in all the Courts of Westminster-Hall; if any one claims as Heir to his Father, and the Question ariseth, whether his Mother was married to him or not, this Court will try that Matter; and it is every Day's Business, and many Cases there have been to that Purpose; and in truth it would be a great Defect of Justice, and a great Reproach to it, that a Man should be deprived of his Freehold arbitrarily, and have no legal Way of having Right to be done him; and here I cannot but take Notice of what my Lord Dyer

saith

saith in 209. Coveny's Case, who being President of Magdalen College Oxon, made an Appeal to the Crown in Chancery, from a Sentence of Deprivation, by the Bishop of Winton Visitor. It is, says he, a mere temporal Matter, the Party wronged shall have an Assize, or some such Suit at Common Law, by which it is strongly implied there could be no Case, where a Man shall have a Wrong done him in a temporal Matter; but there shall be some Remedy provided for him by the Law: The Wisdom of the Law has not trusted any of the Courts of Justice originally, with the final Determination of Matters of Law, but hath appointed Writs of Error, and Appeals in several Cases: Now that the Law in this Case should put such a Power in the Visitor of a College, that he should do what he pleased, and what ever he doth should be like the Laws of the Medes and Persians, unalterable or unquestionable; and when any such Case is brought before us, there should be no Remedy, seems to me very strange and improbable.

And now I have premised these Things, I shall consider what Powers and Authorities the Visitor of this College hath, and how he hath executed those Powers; I must needs say that these Statutes found in the Verdict as they are very long, are odly penned as to our Understanding at this Day; yet as to so much of them as concerns the Visitor, they seem to me to be very plain and obvious.

First of all, there is a long Prologue, which expresseth the Intention of the Founder, in making the Visitor to this Effect: That Mankind is so prone to Evil, and as we daily see Variety of Times changes the best Things, that it is not in our Power to make such Statutes, which a cunning Man may not violate, by ill Interpretation, or ingesting some thing of Fraud, &c.

The main End and Design was, that the Statutes and Ordinances might be observed, Virtue and Discipline maintained, the Rights and Privileges of the College defended. We now come to the Power of the Visitor, as to the Point in Question; the Statute says, That it may be lawful for the Bishop for the Time being, as often as requested, and without Request à quinquennio ad quinquennium semel by himself or Commissary, to come

to the College; and upon all the Statutes, and other Articles concerning the Good of the College, to interrogate the Rector and Scholars, &c. to punish and correct Offences against the Statutes, even to the Depriving of the Rector or Sub-rector, or the Expulsion of a Scholar, commanding them to obey the Visitor, (Vide the Statute at large) and appoints the Charges of the Visitation to be paid; and after several preliminary Cautions on all Sides upon these Proceedings, the Visitor is to go on to the Removal of the Rector, &c. and enjoin the Scholars to make new Elections, &c.

There are not found in this Verdict, any other Powers or Authorities that the Visitor hath, or in any other Manner, than such as have been recited; hereupon I make these Observations.

First, That the Visitor himself cannot visit the College more than once in five Years, unless he be requested by the College.

Secondly, That the Powers and Authorities of Reforming and Correcting extends only to such Crimes, and Faults and Miscarriages, as are committed against the Statutes and Ordinances of the College: These Words (the Statutes requiring) (according to the Statutes) or (according to the Tenor of the Statutes,) being brought in continually in every Clause. I shall likewise observe,

Thirdly, The great and tender Regard the Founder hath to his Rector, when he is placed in that Office.

First, He names the Crimes for which he shall be removed.

Secondly, He appoints that he should be warned by the Sub-rector, and five of the senior Scholars, before they make their Application to the Bishop.

Thirdly, That all, as they are assisting in giving their Testimony, take an Oath before the Sub-rector, that they do it not out of Hatred, or ill Will, &c.

Fourthly, I observe the Misdemeanour of the Rector must not only be such, as is mentioned in the Statutes, but must be plain and obvious to the Scholars, and notorious and scandalous, that they take Notice of it; and their Testimony must be upon Oath before their Application to the Bishop: Then the Sub-rector, with the Consent of the major Part of the Scholars, is to write to

the Bishop; and if what they alledge be found true, the Rector is to be removed. And I observe also,

Fifthly, That the Founder alloweth to the Rector all just and honest Excuses; that is the Expression.

And now I shall consider whether or no in this Case the Visitor hath kept himself within the Bounds and Limits of this Power; James Colmer, one of the senior Fellows, being found guilty of Incontinency, is expelled the College; he appeals to the Bishop as Visitor, and he issues out his Commission to Dr. Masters, as his Commissary, and thereupon a Visitation is held by the Commissary; I am of Opinion that this Visiting by the Commissary, is a quinquennial Visitation, and I do not see how it can be otherwise. For

First, The Bishop had Power only in two Cases to visit the College; the one when desired by the Rector, and Sub-rector and Scholars; the other, without any Request, and that was to be but once in five Years: Now it is not found, that this Visitation of Dr. Masters was at the Request of the Rector, or Sub-rector and Scholars; nay, it is found, that they do protest against this Visitation, that is so far as concerns the putting of Colmer again into his Place.

Secondly, We ought to intend that whatsoever the Founder directs, the Swearing to observe and keep, he intended should be Part of the Statutes; we will not suppose that the Founder intended the Scholars should forswear themselves, especially when he names Perjury, as one of the Causes of Expulsion.

First, The Oath of the Rector is, that he will be faithful to the College, and preserve their Possessions, Rights and Liberties, to the utmost of his Power.

Secondly, The Oath of the Scholar in Annum Probationis is, not to reveal the Secrets of the College, or make Parties in it; and if he happen to be expelled the College, that he renounce all Appeals, and will so do in Writing, if he shall be desired so to do at his Expulsion. And

Thirdly, The Oath of a perpetual Scholar, is to observe the Statutes of the College, to do or suffer no Damage to the College, to obey his Superiors; and if he be expelled, to renounce all Appeals, &c. so that the

Statutes allow no Appeals to the Visitor for a Scholar deprived. I will suppose, and indeed do not doubt at all, but that the Visitor upon his Visitation, whether it was by Request, or not by Request, might examine this Matter of Colmer; for his Authority reached to interrogate about the State of the College, and all its Members; but still this must be in his Visitation, and there is not a Word in all the Statutes, that gives him Power to hear Appeals, or to examine Miscarriages, otherwise than in a Visitation; so this Execution of Dr. Master's Commission must be a Visitation.

What doth this Visitor do next? the 16th of June in the same Year he comes to visit again, and this is not proved to be done at the Request of the Rector, or Sub-rector, and Fellows; this then is a voluntary Visitation, and within the five Years; and if not a quinquennial Visitation, according to the Statutes, being without Request, whatsoever the Bishop did in it, was extrajudicial, & Coram non Judice; at this Time the Bishop doth a visitatorial Act, in examining Webber the Apparitor about the Citation; there is no Doubt, I think, but that if he comes to interrogate, though he makes no Decree, it is a Visitation, and he himself afterwards enters this as a visitatorial Act.

Then what doth he do next? the 22d of July in the same Year he doth visit again, and this is not found to be at the Request of the Rector, or Sub-rector, and Scholars; and therefore we must intend that the Bishop did it voluntarily; and if it was a voluntary Visitation, then it is a third quinquennial Visitation within six Months; and certainly by the Statutes of the College, if that of the 13th of March, or the other of the 16th of June was a Visitation, this in July must be extrajudicial, and consequently all that was done then must be void.

I cannot but take Notice, that supposing this to have been a Visitation according to the Statutes of the College, the Suspension of the Fellows, and Deprivation of the Rector are not justifiable by the Statute: As to the Scholars, the Statutes appoint, that if the Bishop proceed to the Deprivation of any Scholar, it shall be by the Consent of the Rector, &c. without whose Consent such Expulsion is of no Force, and void; now there is no such Consent found in the Verdict, and yet Dr. Hern

is deprived, and the other Fellows suspended without any Consent; and then for the Deprivation of the Rector, there ought to be the Consent of four of the senior Fellows or Scholars: But it is said, that here is a Suspension of those Fellows, with the Consent of four of the seven senior Scholars, and a Deprivation of the Rector, with the Consent of four who were senior Fellows, upon the Deprivation of Dr. Herne, and the Suspension of the other Fellows before.

Truly for my Part, I make no Doubt at all, but that Suspension doth not make the Scholar no Scholar; for when the Suspension is taken off, they are not chosen again; they are Scholars ab initio.

It seems to me, that if the Visitor was satisfied, he might have made as many Visitations as he would please; yet he might very well have allowed them some Time to consider, whether they would comply without going further: It was the Direction of the Founder that all Things should be done for Charity, and Preservation of the College, as a Nursery for Learning, and not for the Destruction of it.

Now what was this Suspension for? it was for Contumacy, and what was the Contumacy? for not complying with the Visitation of July: It is found, they humbly came to the Bishop with their Reasons, why they could not comply with it as a Visitation, because by their Oaths they were obliged to observe the Statutes, which circumscribed the Visitation to once in five Years. They offer their Reasons in Paper, that five Years are not effluxed since the former Visitation; and they protest not to consent to this Visitation, least any Thing should be done to the Prejudice of the Rights of the College, which they were sworn to maintain: This Protestation is received quatenus de Jure; then they withdraw, and are pronounced contumacious.

I never heard that by the Civil Law a Man was ever suspended for not appearing once, and much less that any one was ever deprived for that, as Dr. Hern's Case is.

And certainly this Paper which was offered to the Bishop was a Matter of Weight; the Matter was true according to the Statutes, and a just Excuse; and it is a very honest Thing to be fearful and tender in Point of

 Oaths;

Oaths; and if it were a Matter that they doubted in Point of Conscience, they ought to have been tenderly dealt with.

And indeed I do not find, as all this Matter is found before, that the Rector doth appear to be guilty of the least Crime; but only on the contrary, as an honest Man should be, he was concerned to preserve the Statutes of the College, and their Constitution; and I doubt not, if the Founder could speak his Mind, he would be of the same Opinion; and yet for this at last the Rector is deprived for no other Contumacy, but not complying with this Visitation; which if not according to the Statutes and Constitution of the College, he was sworn not to comply with it.

An Oath is a sacred Thing, and a Man ought to be tender how he violates it; and certainly it is a Matter of great Consideration, how a Man should be pressed in such a Matter, and especially how he is to be punished for it.

And upon the whole Matter it seems to me, that this last pretended Visitation in July, was in Truth no Visitation within the Statutes of the College, and that the Proceedings therein were illegal and arbitrary, and not warranted by the Statutes; so that I am of Opinion that Dr. Berry is still Rector, and consequently that the Lessor of the Plaintiff is not so; and therefore Judgment ought to be given for the Defendant.

Justice G. Eyre. I shall not mention any Thing of the special Verdict; it hath been already very largely opened in all the Parts of it; but I do think upon this special Verdict, that Judgment ought to be given for the Defendant.

There being many Things and Matters huddled up in this Verdict, which hath been opened by my Brother, and indeed many of them no ways pertinent to the Point of the Question. I shall omit mentioning, or looking into them, but I would say this in General, that though I take it (as I do indeed) that this Visitation in July, at which Time the Defendant was deprived by the Visitor, was a Quinquennial Visitation, notwithstanding the former Commission in February before granted to Dr. Masters, and by him executed in March; yet I am of Opinion this Deprivation of the Defendant, as found by this

this Verdict, is wholly void, and that the Validity of it may be examined in this Civil Action, brought to try the Title to the Rectory-house, and that we as Judges are no Ways bound by it: The Visitor in this Case, though he be made by the Founder a Judge, yet it is evident from the Statutes he is not made an absolute Judge, but constituted under Restrictions and Limitations, which must be pursued, or his Acts are void. For if these ill penned Statutes, as I must call them, do admit of any sensible Construction, the Founder hath given the Visitor no Power to deprive the Rector, without the Consent of four of the seven senior Fellows of the College, sine quorum consensu (says the Statute) irrita erit hujusmodi expulsio & nulla ipso facto: And that this Statute is so to be understood, appears even by the Bishop's Sentence of Deprivation, which in the Verdict is found to be given with the Consent of four senior Scholars, then present and not suspended. And certainly as the Visitor himself expounded the Statute, to require the Consent of the four senior Scholars; so we are to understand it too, and not to reject it as wholly unsensible, nor put any other Construction upon it; it being expressly found in the Verdict, that Power is given to the Bishop for the Time being, not only to interpret and make reasonable Construction of those Statutes and Ordinances of the College, that were made at first by the Founder, but also to make new Statutes; and the Bishop would never have laboured so much to get four consenting Fellows, by suspending the senior Fellows who were against the Visitation, unless he had so construed the Statute, by whose Exposition we are bound.

Besides upon the Face of the whole Statute, it appears the Founder intended the Rector a greater Advantage against Amotion or Deprivation, than the Scholars; for it gives him an Appeal from the Commissary to the Bishop, which none of the Scholars are allowed; shall we then put him in a worse Condition than any of the Scholars are by the Founder's Statutes, to deprive him without any one's Consent, when any of them cannot by the express Letter of the Statute be expelled without the Consent of the Rector, and three senior Fellows? And the Clause following impowering the Commissary, makes it plain that it ought to be so understood;

the Words are, Et insuper si contra Rectorem ad amotionem ab officio per hujusmodi Dom' Episc. Commissar. etiam consentientibus quatuor ex septem. &c. which Words, insuper, & etiam consentientibus quatuor ex septem maximè senioribus are relative to something before, and that can be nothing but the Removal of the Rector, which must have then such a Consent; and the Founder's Statutes are his Doubts which the Court may expound, and ought to do it favourably, as near as possible to his reasonable Intention, and to preserve the Foundation, and so must refer to all the Matters foregoing. As for the Words Privatio, Expulsio, & Amotio, they seem to me to be used in the Statutes as synonymous, though various Words, yet signifying the same Thing; and the Meaning of the whole Statute upon a fair Construction, (reddendo singula singulis) if we will have any Regard to the Meaning, must be, that if the Rector be to be deprived by the Visitor, or his Commissary, for any the Crimes in the Statute enumerated, there must be the Consent of four of the senior Fellows; if a Scholar be expelled, there must be the Consent of the Rector and three Seniors; and by such Exposition, all will stand well together, and not without it.

And as the Statutes seem not to trust the Visitor with the sole Power of expelling, so neither do they with the Manner of it, but expound the Meaning of the Founder; the Words being, Si tamen ad privationem aut inhabilitatem Rectoris aut expulsion' Scholar. alicujus per Episc. aut ejus Commissar. agatur tunc, &c. Vide the Statute at large; so that it is plain from the Words of the Statute, that the Visitor hath no Power to deprive the Rector, till he had notified his Crime to him, and given him an Opportunity to answer, which he hath not done; but expelled him for Crimes not in the Statute.

And that the Founder may thus restrain the Powers of the Visitor is plain; for he that gives a Power and a Jurisdiction newly created, may modify and shape that Power and Jurisdiction as he pleaseth; and it must be expounded as near to this Intention as possible, and executed according to what is plainly expressed, otherwise whatsoever is done will be void, and the Power not pursued.

And

And the Founder having made three of the four senior Scholars necessarily to be consenting, as co-ordinate with the Visitor, before the Expulsion of the Rector, and without whose Consent he was not to be expelled; and having by the Statute given no Power to expell without notifying the Crime to the Person to be expelled, which was not done in this Case, I think the Deprivation void, and the Defendant still continueth Rector.

For the Jury have expressly found that those four Fellows that did consent to the Visitor's Sentence of Deprivation, were not the senior Fellows, unless they became so by the Suspension of the other Fellows, before which I think it is clear they did not; for though they are by the Verdict found to be by the Sentence of the Visitor suspended ab officio & beneficio, yet a Fellow suspended continueth a Fellow still certainly, because that Disability being taken of, he wants no new Admission, but still holds the same Place he had before; and therefore such a Suspension cannot amount to an Amotion, which only can make him cease to be a Fellow; and especially since the Bishop hath not Power to deprive a Fellow without the Consent of the Rector or Rub-rector; and if they still continued Fellows for want of their Consent to the Visitor's Sentence, according to the Statute; this Deprivation is void, the Visitor having exceeded the Statute which gave him no Power to deprive the Rector, without the Consent of the senior Fellows, who gave no Consent.

For all Powers, Authorities, and Jurisdictions, especially such as are newly created, must be executed according to the express Institution, or plain Meaning of him that created them, and according to the Circumstances with which he hath circumscribed them. And so is the Rule in Barwick's Case, Co. 4. 94. and Hoes's Case 91. and many other Cases, which shew what Strictness is requisite in the executing of an Authority; and so is, 1 Inst. 113. a Man devises his Land in Tail, and if the Donee die without Issue, his Sons in Law which were five, to sell it; one dies in his Life-time, the other four sell, and held good, because general. And Dr. Bonham's Case, 8 Co. 118. if three Men are named as Attornies to make Livery; two do it in the Presence of the

Third; it is held good; but not if he had been absent, as the Case is in Dyer 62. 1 Inst. 258. where one doth less than he is impowered to do, or more; all that he doth in Execution of that Power is void.

By all which it appears, that if the Visitor hath not pursued the Power given him by the Statute in this Point, by doing it with the Consent of the senior Fellows, or not having notified the Crime to the Party before Deprivation, and thereby given him an Opportunity to answer; for all these Causes the Deprivation is void.

And for the Objection that was started at the Bar by Sir Thomas Powis, that if the Consent of four senior Fellows was necessary, (which he argued was not) yet he had it; those that consented, being the four senior Fellows that were at that Time in the College, the others being withdrawn; I think that will weigh very little, for it is not found expressly in the Verdict, but that even the first four were present in the University; and indeed it would hardly deserve an Answer, if it had not been an Objection made; for the Jury did expressly find that they who did consent were not before the Visitation any of the four senior Fellows; nor at the Time of the Sentence, unless by the Visitor's Suspension of the others.

And it must be intended in this special Verdict, that they were present in the College, at least in the University, for the Jury find nothing to the contrary; and it is plain they only refer the Matter of Law to the Court upon the Fact found, and not upon what is not found; and therefore all the necessary Circumstances to bring the main intended Point of Law in Question are to be intended, according to the Books, Roll, 2 Abr. 697. Cro. Eliz. 167. Hob. 55. Cro. Jac. 64. Fairchild's Case, which was a Case much stronger than ours.

And I think the Deprivation is void for another Cause that appears in the Verdict, for the Bishop sent a Citation for a Quinquennial Visitation the 16th of June, when he entred into the College, as far as the Chapel-door; but not being permitted to enter into the Chapel for want of the Keys, he did in the Court administer an Oath to the Apparitor to prove the Citation; and not being admitted into the Chapel, he went away; and had this intended Visitation been so concluded by the Bishop, I

should have been far from thinking this a Visitation, or so much as the Beginning of a Visitation.

But it is afterwards found, that he issued out a second Citation for a Visitation the 24th of July; and upon that Day in the Hall he did a visitatorial Act, and calls for the Oath of the Apparitor the 16th of June, and orders it to be registred as an Act; for it seems what was then done, they had made it into an Act; the Words are, Eundem actum pro parte processus hujusmodi negotii visitationis haberi decrevit: And then he adjourns the Visitation till Friday the 25th of July; and on that Day's Meeting he did several visitatorial Acts, particularly suspended the Fellows for a Contumacy in not appearing; and then adjourns till Saturday, and upon that Day deprives the Rector.

So that if this Quinquennial Visitation begun upon the 16th of June by the Act then done, (as it appears it did, and was so intended to do by him, he having as Sir Thomas Powis phrased it, tacked it on to the subsequent Visitation) then the Visitation so begun continuing the 24th, 25th, and 26th of July, upon which Day was the Deprivation of the Rector; all that was done must be void, the Visitor by the Statute having no Power to deprive him, the Visitation being determined.

For the Statute de visitatore doth impower the Visitor to hold his Visitation but for two Days, unless ex causis urgentissimis & rarissimis; and then by any Means it is not to be prorogued or continued beyond three Days, and all that is after done is void; and if the 16th of June be thus tacked on, and was the Beginning of this Visitation, (as I think it was) it needing no formal Adjournment to make it so; for the Statute says the Bishop shall proceed summariè; and having then done several Acts of a Visitor, as taking the Oath for the Citation, and having rejected the Protestation of the College, and registred them, and made Acts of Court of them, which he had no Power to do but as Visitor; the Visitation it self at this Time will be wholly void, the Words of the Statute being, Non excedat ultra duos dies proxime sequentes, aut ex Causis, &c. ultra tres dies, &c. sed lapso, &c. triduo transacto, eo ipso visitatio illa pro terminata & dissoluta habeatur; so that there is no Space or Time left to lengthen it out to another Day; but the Visita-

tion is gone; for when it is once begun, there are but three Days allowed for it at the utmost, and then being held longer contrary to the Statute, all the Acts so done are, by the express Letter of the Statute, irrita & vacua. As where one is impowered by Letters Patents to hold a Court on such a Day, or in such a Manner; and he holds it on another Day, and in another Manner, all that is done on that Day, or in that Manner, is void, & coram non Judice. And the Common Law will not expound the Visitor to have a larger Power or Jurisdiction than the Founder hath given him, or deem him to bear any other Image than the Founder hath put upon him by the Statute; and being constituted by the Party, he differs not from an Arbitrator or Judge, that is created by Act of Parliament for a particular Purpose, whose Authority is bounded within the Limits prescribed by the Instrument that created him, as appears 4 Inst. 267. and whatsoever he doth in Execution of his Authority beyond what, or otherwise than as is prescribed to him in the Power, is void; for Non observatâ formâ infertur adnullatio actus; and I am sure no Man can think a Visitor to be an Officer at the Common Law, or that he can prescribe for his Authority, otherwise than as it is limitted by the Founder.

And if then for the Reasons that I have mentioned, as Expelling the Rector without the Consent of the four senior Fellows, and without notifying to the Rector his Crime, and giving him thereby an Opportunity to answer, and continuing the Visitation four Days; all which are contrary to the Statutes; or by any of those Ways this Deprivation be void, then the Defendant continues Rector still, notwithstanding the Visitor's Sentence.

But to come to another, and truly, I think (abstracted from the Fact which I take to be very plain and clear) the main Point, I am of Opinion the Validity of this Sentence may be examined by the Temporal Courts in a collateral Action; and we are not in giving our Judgments in this Case to be bound by it, and that for these Reasons.

First, Of that which is a void Thing, all Persons may take Advantage of contesting it in a collateral Action, though it have the Sanction and Colour of a judicial Proceeding, as might be instanced in many Cases, as an Appeal brought in C. B. is void, and not voidable

by Error; and the Grant of Letters of Administration by the inferior Ordinary, where there are bona notabilia; and there are many other Cases, as 1 Rep. 76. Com. 281. 19 Ed. 4. 8. 5 Rep. 100. 1 Cr. 549. and it is not the Paper and Wax which makes his Sentence, but the Power which he has to give such Sentence; and though where the Visitor has a Power, there the Sentence shall not be examined here; yet when he has not any Authority, there it shall be examined, as in Davis, Rep. 46, 47. where the Opinion of Lea, does not seem to be Law. Secondly, Of Necessity a Thing of Ecclesiastical Jurisdiction shall be examined in a collateral Action, as Schism, &c. or sufficiency of a Clerk, where he is dead, &c. and in many other Cases; and he said that in this Case also the Sentence is examinable for Necessity, for otherwise the Rector is without Remedy; for he may not have an Assise, he being but one Part of the Body, and not capable to maintain an Assise in his own Name; and he cited 8 Ass. 29. 13 Rep. 70. and 11 Rep. 99. but this not being an Ecclesiastical Corporation, the Sentence is examinable here; but if it be an Ecclesiastical Cause, there their Proceedings are not examinable, for we ought to give Credit to their Sentence, which is warranted by their Law, in Causes of which they have Conusance; and upon this Ground he allowed the Cases in the Books to be good Law, Ken's Case, and the Case in the 4th Rep. Buntingwell's Case, and Cawdry's Case, and Allen and Nash's Case, Jones 393. and Bird and Smith, Moor 781. the which being in Ecclesiastical Cases, and against Ecclesiastical Persons, he admitted the Sentence to be final, and not examinable but by Appeal, or Commission of Review; and he said that Cawdrie's Case was a Sentence grounded upon the Authority of the King at Common Law, to grant a Commission in Cases Ecclesiastical, and not upon the Statute: Also as to the Cases upon Mandamus, Dr. Robert's Case, Appleford's Case, &c. he agreed them to be good Law, but said, that there all the Matter was shewn in the Return, and the Return in those Cases is not controvertible, and there shewing that there is a Visitor, who has Authority to determine, it is final, and the Court bound by it; but here the Matter being found by the Jury, and left to the Judgment of the Court, they ought to adjudge his Sentence to be void,

it not being according to the Statutes; and he did not doubt, but that an Action upon the Case lay against the Visitor in this Case, as well as against a Bishop, who will not assoil the Party, or against an Archdeacon, &c. and he said, Thirdly, That a Man cannot erect a Jurisdiction, which shall not be examined, no more than he can appoint by his Will, that if any Difference arise, that this shall be determined by J. S. and his Determination shall be final; and it would be a greater Yoke and Hardship to subject the Scholars of the University to the arbitrary Will of a Visitor; and therefore he would not incur the Woe pronounced by our Saviour to Lawyers, who lay upon others heavy Burthens, which they would not touch with their Fingers; and so he gave his Judgment for the Defendant.

Justice Gregory. There is a Necessity upon me to be a great deal shorter, in that since this Case came before the Court, I have not had Health enough to take that Pains in looking into it, that otherwise I would have done; and yet I have been as careful as I could to satisfy my own Judgment; and I will briefly give you the Reasons of it.

The special Verdict having been opened at large, I need not repeat it, but shall only mention the Points which I take to be material in the Case. The

First General Question is, Whether Mr. William Painter, the Plaintiff's Lessor, were at the Time of making the Lease, Rector of Exeter College in Oxon; that depends upon another Question.

Secondly, Whether Dr. Bury the former Rector, was at that Time deprived of the Rectorship, by the Sentence of the Bishop of Exeter, Visitor of the College, at his Visitation; for the Jury make the whole Question to arise upon that Deprivation; in the arguing of this Case, there hath arisen another Question, which I shall speak to very freely.

Thirdly, Whether this Court hath Power to examine or judge, whether this Deprivation by the Visitor be lawful or not; or whether the Sentence of the Visitor be so conclusive, that we cannot enter into the Validity of it.

For

For my own Particular, I do in the Main agree with my Brothers, that have argued before me in these Points, that is, I am of Opinion, as this Case is, the whole Matter of Fact being disclosed in this special Verdict, that this Court hath Authority sufficient to examine the Validity of this Sentence of the Visitor, and to judge upon it.

Secondly, That by this Deprivation by the Bishop of Exeter at this Visitation, the Rector's Place is not void, but he continues Rector still. And consequently,

Thirdly, That the Lessor of the Plaintiff hath no Title, and therefore Judgment ought to be given for the Defendant.

I do agree Kenn's Case, 7 Co. to be Law, and the other Cases that have been cited; a Sentence for a Divorce in an Ecclesiastical Court, shall stand good till it be repealed; the Courts of Law will give Credit to the Sentence of a proper Judge in such a proper Cause; for having a general Jurisdiction in matrimonial Causes, without Exception, or Qualification, or Limitation, it is to be presumed that they have done Right; till it appear otherwise by a Reversal of the Sentence; and so is Bunting's Case, 4 Co. And the same Rule reacheth to a Bishop's ordinary Jurisdiction over all the Clergy in his Diocese and Ecclesiastical Corporations; and so the Sentence is final, till it be reversed by Appeal.

But I take it, this Case differs much from that, for here the Bishop is not in his Diocese, nor in this his ordinary general Jurisdiction, but a limited Jurisdiction created by the Statutes of the College made by the Founder; and the Founder of this College hath not left the Visitor at Liberty to visit, and act in his Visitation as he pleaseth, but prescribes him a Method and Rule by which he must walk: The very Statutes do restrain his Power, and they say expressly, Acts done contrary to the Statutes, shall be null and void, particularly expelling the Rector or Scholars, without the Consent of such and such, and continuing the Visitation above three Days, and the like; all which are void and null.

Now it falls out, that contrary to these Rules Dr. Bury was deprived, and that Sentence being thereby

coram non Judice, this Court may examine into it in this Action, otherwise it would be very inconvenient; for if a Man hath a Right, and no Remedy in Law to come at it, it is as if he had no Right at all: The Visitor hath a Power, but it is by private Statutes, and no such general Power as the known Ecclesiastical Courts; and therefore is not this Case to be likened to those.

And in the Case of a Visitor, the Law will not question his Acts done according to his Power, which is the Reason why this Court denied Mandamus's, to restore expelled or deprived Fellows to their Places, because an Appeal lies for them to the Visitor.

But I might observe in this Case, that here was no Room after the first Sentence for an Appeal, nor any whither to have Resort upon an Appeal; and this being disclosed as the whole Matter of Fact, we ought to judge of it as it appears before us.

And I do not take the Case in Dyer to be a single Case, for besides James Bagg's Case in 11 Co. there is that Case that was cited by my Brother that argued last, 8 Ass. pl. 29 & 31. So there is an Instance of a Lay-Corporation upon a Sentence, either as Visitor, or as Patron; and if the Later, it is a much stronger Case.

And then this Court having Jurisdiction over all Courts to correct and redress Enormities, and having likewise Jurisdiction for the Trials of Freeholds, may certainly examine into this Case; for I am of Opinion where any Court is restrained, as to Time, and Place, and Persons, and other particular Circumstances, and they exceed and transgress their Limits; this Court hath Power to interpose, and keep them within their Limits, as the Case that was cited of the Marshalsea in 10 Co. and the other Authorities there mentioned.

As if the Sheriff holds his Turn beyond a Month after Easter, and a Man is indicted at that Turn so held, it is void, because he had not any Power to hold or keep the Court at that Time; so in an Action upon the Case for Words in a Court of Piepowder, because they relate not to the Matters of a Fair, or a Market, and their Jurisdiction is limitted unto such Matters, and if they exceed their Bounds, all is void.

Now

Now I take it in this Case, the Bishop hath not pursued the Power and Authority given him by the Founder, who is limitted and bounded by the Statutes of the College in several Instances.

First, As to the Time, the Statute of Visitation says, that it shall be lawful for him to visit so and so; but he cannot visit oftner than once in five Years, unless requested by the College: I confess I am of Opinion the Coming of Dr. Masters upon the Commission in March, was not a Visitation; I cannot tell how to take it for one, for though the Scholar by his Oath was to make no Appeal, yet the Doctor's Commission was only to hear an Appeal in a particular Case; and he could meddle with nothing else.

Yet Secondly, I am of Opinion that the Bishop's Coming upon the 16th of June was a Visitation, taking all the Circumstances together as they are found; he sends a Citation, or Monition before him, requiring them to appear before him, and submit to his Visitation; then when he comes, he makes publick Proclamation for Appearance, and calls over their Names, and administers an Oath to the Person that served the Citation of the Summons, being duly served. These are Acts not to be done as a private Person, but only as a Visitor; and he might have adjourned the Visitation from the Chapel into the Hall, and there have perfected the Visitation.

If the Steward of a Leet call a Court, and there be nothing done, because of the Non-attendance of those who should serve in the Court; yet it is a Court; he has Power to punish those that neglect to appear, or that refuse to serve, when they do appear.

But if that was not a Visitation, what was the Reason that in July he should call for the Proceedings of that Day, and have them registred as an Act before him? I suppose they do not call extrajudicial Proceedings Acts of Court: It shews that he himself look'd upon it as a Visitation; if then, the Acts done by him the 16th of June, were done as a Visitor, then either it appears, that that was a Visitation of it self, or the first Day of the Visitation in July; and if so, then was Dr. Bury deprived the fourth Day of the Visitation, which by the express Words of the Statute was to last but three

Days; and being extended further, all that was done was null and void.

I say First, Either it was a Visitation of it self, and then the Second is void, being within five Years, and he was not desired to come; and then it is, as that Case of keeping the Turn, or the Steward his Leet, beyond the Time that the Law prescribes for it, which makes all void; or else it is the first Day of a regular Quinquennial Visitation; and then this Deprivation being on the fourth Day, is consequently void; for as hath been frequently observed, the Statute directs that the Visitation shall continue but three Days at most; and the Visitor had no Power to do any visitatorial Act after the third Day ended.

Thirdly, I am of Opinion likewise as to the Manner of depriving the Rector, that the Visitor has gone beyond his Power; for it was never the Meaning of the Founder, as appears by the Statute, that he alone should have the Power to deprive the Rector; and I conceive he could not do it without the Consent of four of the senior Fellows of the College.

Indeed this (as it has been said at the Bar) extends only to the Expulsion of the Fellows, that the Rector or Sub-rector do consent, because it will not be presumed that the Rector will consent to his own Deprivation; but if the whole Clause be taken together, it must be understood, that if the Bishop or his Commissary go about to remove the Rector, he ought to have the Consent of four of the senior Fellows of the College; for certainly the Founder did not take more Care of the Scholars, than he did of the Rector; but if the later Clause be expounded as they would have it, it would put the Rector more under the Power of the Visitor, than the Scholars.

But they say it does not put him more under the Power of the Visitor, but it was intended as a Favour to him; for a Fellow was to have no Appeal from the Commissary to the Bishop, and therefore such Consent was more necessary to his Expulsion; but the Rector might appeal from the Commissary's Sentence to the Bishop, even though the Commissary had the Consent of four senior Fellows. To this I answer,

First, There is nothing said in the Statute where the Bishop doth do it himself, that there shall be an Appeal; so that the Clause being relative, the Consent seems to be implied as to every Deprivation of the Rector.

And then further, the Visitor himself, to whom the Power of explaining of the Statutes, where they are doubtful, is given by the Founder, he hath expounded the Meaning of it to be so; therefore in the very Sentence of Deprivation it is mentioned to be done with the Consent of such and such, being the senior Fellows; but that shews at the same Time that Dr. Bury was not lawfully deprived; for the Jury expressly find, that they were not the four senior Fellows, unless they became so by the Suspension of the others; however, it proves he himself thought such a Consent necessary.

Now I think it will hardly be denied, but that a suspended Fellow is a Fellow still; the Reason is plain, because there is no new Admission requisite upon his Restoration, or the Taking off the Suspension; and so they not being four of the seven senior Fellows, whose Consent was had, it was not such a Consent as the Statute required, and consequently the Act was void.

And that the real senior Fellows were then in the University appears, in that two of them came into the Hall, before the Visitor, with the Rector, when he delivered the Protestation to the Visitor, and they will be presumed to be in the Place of their Residence, the contrary not being found; and it seems so by the very Sentence of their Suspension, for they are suspended for Contumacy; and if they had not been in the University, they could not have been contumacious, and then the Consent of the other Four might have been justified; if they had been absent, what need were there of suspending them, to make Room for the four others? besides that must be intended, or else the Point in the special Verdict would be no Point, if a due Consent was had according to the Statute.

Therefore upon these Grounds I found my Opinion.

First, That this being a Lay-Corporation, and all Matters requisite to bring the Point in Question, being found in the Verdict; this Court may judge whether what is done be right or wrong.

2 Secondly,

Secondly, That the Visitor's Power is restrained by the Statutes; and if he proceeds contrary to what they direct, his Proceedings are void and null.

Thirdly, That the Coming into the College in such a Manner the 16th of June, I conceive that to be a Visitation; and if it were not so of it self, he hath made it Part of that of the 24th of June, by the Act then made; and so it had four Days, when it should have had but three at most.

Fourthly, That the seven senior Fellows that were suspended, still remained Fellows; and those that consented to the Deprivation of the Rector, were not the senior Fellows required by the Statute; and therefore their Consent no way significant to strengthen the Visitor's Sentence. Then consequently,

Fifthly, That the Visitor deprived the Rector by himself and his own Power, contrary to the Statute; and therefore upon the Whole, I think Dr. Bury continues still Rector of the College; and the Lessor of the Plaintiff is not so, and that Judgment ought to be given for the Defendant.

Chief Justice Holt. I will put the Case as short as I can upon the Record; and it is thus, Exeter College in Oxon was founded by William Stapleton, to consist of a Rector and Scholars; by the Statutes and Constitutions of the College, the Bishop of Exeter for the Time being is appointed Visitor, and the Time is set when he shall visit; at the Request of the College, as often as they think requisite; and without such Request, once in five Years ex officio; then it is directed, that in his Visitation, he may proceed to the Deprivation of the Rector, or to the Expulsion of the Scholars; then there is a Qualification of this Power by the particular Words of the Statute, Si tamen, &c. he shall shew to him his Crime; and if he cannot probably make out his Innocence, then he may deprive him, dum tamen ad ejus, &c. there shall be the Consent of four of the seven senior Scholars; then the Statute goes on further, that if the Rector be removed by the Bishop's Commissary, Etiam Consentientibus four of the seven senior Fellows, he may appeal to the Bishop.

Then there is another Statute that doth shew for what Faults and Crimes he shall be deprived, Wasting or Alienation of the Revenues, or Goods of the College, Adultery, and some particular Things; then it shews the Method that shall be taken against him, when they do proceed to Deprivation, that is, within fifteen Days after the Fact committed, he shall by the College be admonished to resign; then they are to apply to the Bishop, and then if so be, he be convicted, the Bishop or his Vicar may proceed to deprive him.

There was one Colmer that was a Scholar, was expelled the College for Incontinency; against this Expulsion he doth appeal to the Bishop in March 1690. upon the Appeal the Bishop grants a particular Commission to Dr. Masters, to examine this Appeal; he goes into the College, and his Proceedings are found in the Verdict, and doth reverse the Sentence of Expulsion, and restores Colmer to his Scholarship.

After this the Bishop appoints a Visitation to be held in the Chapel of the College the 16th Day of June; accordingly then the Bishop comes, the Chapel-Doors are shut, the Rector and Scholars would not open the Door, but protest in the Area against the Visitation; the Visitor calls over the Names, and swears one to prove the Summons, and goes away without doing any Thing more.

After this there is another Visitation appointed in the Hall the 24th of July, at which Time he comes, and divers Protestations against the Visitation are made; but he proceeds, calls over the Names, registers the Act of the 16th of June; and upon several Warnings to appear, Dr. Bury and other of the Fellows refused to submit to the Visitation, and are pronounced contumacious; the Bishop first voided Dr. Hern's Place, and suspended five of the senior Fellows; and afterwards with the Consent of four of the senior unsuspended Fellows, deprives the Rector Dr. Bury, that Sentence of Deprivation being thus given, the College proceeds to a new Election, and do elect Mr. Painter, who doth join in the Lease to the Plaintiff; upon which this Action is brought.

Now the Question is, Whether this Sentence of Deprivation thus given by the Visitor against Dr. Bury, doth make the Rectorship of Exeter College void as to

him; and so consequently gives Title to the Lessor of the Plaintiff.

My Brothers have all given their Opinions that this Sentence of Deprivation is a void Sentence, that Dr. Bury continues Rector, and that the Rectory is not void by the Sentence, and that Judgment ought to be given for the Defendant. I must crave Leave to differ from them in this Case, for I am of Opinion, upon this Verdict, Judgment ought to be given for the Plaintiff; and that this Deprivation by the Visitor, is a good Deprivation to void the Rectory.

The Questions that I make in this Case are but two:

The First, Whether or no by the Constitution of this College, the Bishop of Exeter had Power in this Case to give a Sentence?

The Second is, Supposing he had such a Power, Whether the Justice of this Sentence is examinable in this Court upon this Action?

And I am of Opinion, that the Bishop had Power by the Constitution of the College to give a Sentence; and having that Power, the Justice of that Sentence is not to be examined in a Court of Law upon any Action; concerning the Bishop's Power there have been several Things said, which I would take some Notice of: And the

First Thing is, What Time he hath by the Constitution of the College to make his Visitation; and I do agree he can make his Visitation but once in five Years, unless he be called by the Request of the College; and if he comes uncalled within the five Years, his Visitation would be void; and if he gave then any Sentence, it would be a mere Nullity: But I hold the Visitation the 24th of July a good Visitation; and consequently the Sentence given upon it is good. Two Things are said against it.

First, A Question is made, Whether Dr. Master's Coming in March to examine Colmer's Appeal, upon the Visitor's Commission, were not a Visitation; I think there is no Colour in the World that it should be a Visitation. My Reason is, because it was a Commission upon a particular Complaint, made by a single expelled Fellow, for a particular Wrong and Injury supposed to be done to him; and not a general Thing: Colmer complains, that he

he was expelled without just Cause, and seeks to the Visitor for Redress, they expelling him for Incontinency, whereas he thought himself innocent, and the Visitor sends his Commissary to examine this particular Matter.

Now though a Visitor be restrained by the Constitutions of the College from visiting ex officio but once in five Years, yet as Visitor he hath a standing constant Authority, at all Times to hear the Complaints, and redress the Grievances of the particular Members; that is the proper Office of a Visitor, to relieve and determine all Differences between the Members; and this appears upon Littleton's Case, Sect. 136.

And so it was held in Appleford's Case in this Court, who was expelled upon the like Occasion, as Colmer was; he appealed to the Bishop of Winton, who was Visitor; and he confirmed the Expulsion, and held it to be good upon the Appeal, for it is a standing constant Jurisdiction that the Visitor hath; Visiting is one Act in which he is limitted as to Time; but hearing Appeals, and redressing Grievances is his proper Office and Work.

It is the Case of all the Bishops in England; they can visit by the Law, but once in three Years; but their Courts are always open to hear Complaints, and determine Appeals; so that though the Bishop here can visit but once in five Years, unless called; yet he has a Power and Authority to hear any Difference between the Members, and redress any particular Injury at any Time.

Then the next Thing to be considered is, Whether what was done the 26th of June was a Visitation; now there is no Question but he intended to visit then, and came there to proceed in the Visitation, but they would not let him come into the Chapel, where he had appointed it to be held: It is the strangest Construction then that can be, to construe his Coming there to be a Visitation, or to amount to any such Thing. It appears he did not any Act but called over the Names, and all the Reason in the World he should, to see who it was that hindred him from visiting.

But then they say after this he made an Act, he administred an Oath at that Time; but when he came in July, he made an Act of it; therefore (says my Brother Eyre that sits next me) this is a Tacking the Visitation in June to that of July, and then the Visitation continued

nued much longer than was intended; nay, than it can continue by the Constitution and Statutes of the College, for it is thereby to cease in three Days.

Truly I make a quite other Construction of it; when he was hindred in June, and makes an Act of this at his Visitation in July, that was only in order to his Calling them to account for their Contumacy, as a Fault, and to bring them in Judgment at his Visitation, it is no more than taking an Affidavit of the Service of his Citation.

Ay! But now he hath appointed another Visitation to be held in the Hall; what doth that alter the Case? nothing at all; it was before no Visitation, through their Obstruction, and that was one Thing he would call them to account for, and correct them for their hindring him from performing his Visitation according to Appointment; and it would be the strangest Construction that ever was made, that when he designed his Visitation in the Chapel, but was hindred by their Means, that Impediment should amount to a Visitation; and it would be a strange Escape for them, if they should by their former Contumacy get off from being subject to a true Visitation.

The next Thing to be considered is, what ariseth upon the Construction of the Statute de Privatione, whether there is a Necessity that there should be a Consent of the four senior Fellows, to the Deprivation of the Rector; for if there was such a Necessity, and so directed by the Statutes of the Founder, I must agree this Sentence had been a Nullity.

But as this Statute is framed, I conceive it is not necessary but that the Bishop has a Power to deprive him, though they concur not.

First by the Statutes, the Bishop of Exon. for the Time being, is made the ordinary Visitor of Exeter College; and I take it to be clear, that where any one is Visitor of a College, he has full and ample Power to deprive, and amove any Member of the College quatenus Visitor.

Secondly, There is an express Power given to the Bishop to proceed to the Deprivation of the Rector, or the Expulsion of a Scholar; and this in his Visitation. But now

Thirdly,

Thirdly, Consider these qualifying Words, Whether the Bishop's Power as to the Rector be restrained, to be with the Consent of the four senior Fellows; the Words are, Si tamen, &c. And I would observe it is Deprivatio as to the Rector, and Expulsio as to a Scholar; and though I do agree the Words as to real Sense are synonymous, yet by this Statute they are differently applied: Then it says if the Bishop do proceed, &c. that only relates to the Scholar, because the Word there used, Expulsio, doth only relate to the Removal of a Scholar all along; and it is impossible it should relate to the Rector, for then he must consent to his own Deprivation, for his particular Consent is required and mentioned; and it is impossible to imagine he should so consent: In this Place the Consent of three of the four senior Fellows is not to do, without there be the Consent of the Rector.

But then the subsequent Words are, That if the Rector be deprived by the Bishop's Commissary, although four of the senior Fellows do consent, he may appeal to the Bishop; the Rector hath that Liberty if the Bishop's Commissary deprive him, to appeal to the Visitor himself; but where are there any Words that abridge the Bishop's own Power: The Commissary's Power seems to be abridged by these Words, To have their Consent; and yet that is but by Implication neither; but the Statute hath appointed no Qualification of the Bishop's Power. Here are express Words that he may proceed to the Deprivation of the Rector, not only by the general Words of making him Visitor, but by particular Words for that Purpose in the very Statute; then you must shew some other Words to qualify this Power, and I for my Part can find none; I can find some that qualify the Commissaries, but none that reach the Bishops.

It is objected, That it is very unreasonable to imagine the Founder should give a greater Authority to the Visitor over the Rector, than the Scholars.

The Question is not, What was reasonable, or fit for the Founder to do, but what he has done? Upon View and Perusal of the Statutes, Suppose he doth give the Bishop such an absolute Authority, it is not in our Power to controul it, for our imagined Unreasonableness;

reasonableness; for he had such an Authority and Interest himself in what was of his own Creation, as that he might invest him with any Power over it, that he pleased to give him.

And it is to be supposed if he hath done so, that he had some Reason for doing it, though if he had not, it is not material, his Will is his Reason, in disposing and ordering his own; and it is not enough in our Power to take away this Authority from him, because we think it unreasonable.

Then consider the Rector hath a Benefit that the Scholars have not; for if the Commissary visit the College, and deprive him with the Consent of the four senior Fellows, he may have an Appeal to the Bishop, but the Scholars can have no such Appeal; and it may be the Founder thought fit to trust the Rector with the Bishop alone, as knowing he would take more Care of the Head of the College, than he would of the inferior Members of it.

But after all, I say again, who knows what Reason a Man may have; every Man is Master of his own Charity, to appoint and qualify it as he pleases: Now if so be the Bishop of Exeter be, by the Statute in express Words made Visitor of the College by the Founder; and since he has by express Words given him a Power to proceed to the Deprivation of the Rector, and there are no Words to lessen that Power; I would fain know how we can make such a Construction as to limit this Power to the Consent of four senior Fellows, because it is said he may appeal if the Commissary do it, though they do consent; besides that, as I said, it doth not expressly say, the Commissary shall not deprive him without the Consent, but only he may appeal, though he should do it with their Consent.

So that I think upon these Statutes in this Case, and by these Constitutions of the College, the Bishop being made Visitor, and having Authority to deprive him, without having any Qualification of that Authority, he might proceed to deprive him without the Consent of the four senior Fellows; tho' I do agree, if their Consent had been necessary, the Suspension doth not make them no Fellows, during the Suspension. It is only an Im-

pediment to them from enjoying any Benefit from their Office, but it makes no Vacancy of the Office at all; for if a Minister be suspended during the Suspension the Place is full; and if the Rector had been suspended, the Rectory had been full, and he might have maintained an Assize, and he is as much Rector as before; and then if a suspended Fellow remains a Fellow, then if it were necessary for them to consent, such a Fellow is as much impowered to consent, as ever he was; but I think it was not at all necessary as this Case is.

The next Point is no more than this, Whether or no [supposing the Bishop has an Authority to deprive, and he doth by Sentence deprive him] the Justice of this Sentence be examinable in any of the Courts in Westminster-Hall? That is,

First, Whether the Sufficiency of the Sentence as to the Cause be examinable in the Common Law Courts? And

Secondly, Whether the Truth of that Cause [suppose it be good and sufficient to ground the Sentence, if true,] can be enquired into here?

And I think the Sufficiency of the Sentence is never to be called in Question, nor any Enquiry to be made here into the Reasons or Causes of the Deprivations; if the Sentence be given by him, who is the proper Visitor, created so by the Founder, or by the Law, you shall never enquire into the Validity or Ground of the Sentence; and this will appear, if we consider the Reason of a Visitor, how he comes to be supported by Authority in that Office: And now we are to consider that there are in Law two Sorts of Corporations aggregate of many, such as are for publick Government, and such as are for private Charity; those that are for publick Government of a Town, City, Mystery, or the like, being for publick Advantage, are to be governed according to the Laws of the Land, not supportable by any private Statutes, or Constitutions, but subject to the Laws of England, and to be regulated and reformed by the Justice of Westminster-Hall; of these there is no particular private Founder, and consequently no particular private Visitors; there are no Patrons of these, they only subsist by Vir-

tue of the King's Letters Patents, and are supported by the Methods of Law.

Therefore if a Corporation be made for the publick Government of a Town, or City, and there is no Provision in the Charters how the Succession shall continue, the Law supplieth the Defect of that Constitution, and says, it shall be by Election of Mayor, Aldermen, Common Council, and the like; and so is the Case in 1 Roll, Abridgment 513.

But private and particular Corporations for Charity, founded and endowed by private Persons, are subject to the private Government of those who erect them; and therefore if there be no Visitor appointed by the Founder, I am of Opinion that in all such Cases of Eleemosynary Corporations, the Law doth appoint the Founder and his Heirs to be Visitors; the Founder and his Heirs are Patrons, and not to be guided by the Common known Laws and Rules of the Kingdom; but such Corporations are as to their own Affairs to be governed by the particular Laws and Constitutions assigned them by the Founder.

It was indeed said, the Common Law doth not appoint a Visitation at all; I tell you I am of another Opinion; the Law doth, in Defect of a particular Appointment, make the Founder Visitor; and it is not at his Pleasure whether there shall be a Visitor or not; but if he is silent during his own Time, the Right will descend to his Heirs; and it so appears by the Case in Yelverton 65. and 2 Cro. 60. where it is admitted on all Hands, that the Founder is Patron, and as Founder is Visitor, if no particular Visitor be assigned; and so 8 Ed. 3. 70. and 8 Ass. 29. So that Patronage and Visitation are necessary Consequents one upon another; for this visitatorial Power was not introduced by any Canons or Constitutions Ecclesiastical; (as was said by a learned Gentleman, whom I have in my Eye in his Argument in this Case) it is an Appointment of Law; it ariseth from the Property which the Founder had in the Lands assigned to support the Charity; and as he is the Author of the Charity, the Law gives him and his Heirs a visitatorial Power, that is an Authority to inspect their Actions, and regulate their Behaviour as he pleaseth; for it is not fit the Members that are endowed, and that

have the Charity bestowed upon them, should be left to themselves, but pursue the Intent and Design of him that bestowed it upon them.

Now indeed where the Poor are not incorporated (they who are to have the Charity) but Trustees, according to the Case in 10 Co. there is no visitatorial Power, because the Interest of the Revenue is not vested in them; but where they, that are to enjoy the Benefit of the Charity, are incorporated, there to prevent all perverting of the Charity, there is by Law a visitatorial Power; and it being a Creature of the Founder's own, it is all the Reason in the World, he and his Heirs should have that Power, unless they please to devolve it elsewhere.

In our old Books, Deprived by Patron, and Deprived by Visitor, are all one; for it is a Benefit that naturally springs out of Foundation; and it is in his Power, if he will, to transfer it to another; and when he hath so done, the other will have the same Right and Authority as the Founder himself had.

Now there is no manner of Difference between a College and an Hospital, except only in Degree: An Hospital is for those that are poor and mean, and low and sickly: A College is for another Sort of indigent Persons; but it hath another Intent, to study in, and breed up Persons in the World, that have not otherwise wherewith to do it; but still it is as much within the Reason of an Hospital; and if in an Hospital the Master and Poor are incorporated, it is a College having a Common Seal to act by, although it has not the Name of a College, (which always supposeth a Corporation) because it is of an inferior Degree; and in the one Case and in the other, there must be a Visitor, either the Founder or his Heirs, or one appointed by him, and both are eleemosynary.

A Visitor being then of Necessity created by the Law, (as 8 Ed. 3. 69, 70. every Hospital is visitable, either by the Patron, if a Lay Hospital, or by the Ordinary, if Spiritual,) what is the Visitor to do? he is to judge according to the Statutes and Rules of the College; he may expel; and as it is in the 8 Ass. 29, 30. he may deprive; the only Question there was, who was Visitor; for if it is agreed on all Hands that quatenus Visitor he might deprive; If he be a Visitor as Ordinary, there lieth

an Appeal from his Deprivation; but if as Patron, then there was none; that Deprivation, whether by Right or by Wrong, was to stand good.

But you will say this Man hath no Court; will you conclude a Man by the Sentence of one that hath no Court? It is not, I say, at all material, whether he hath a Court or no; all the Matter is, whether he hath a Jurisdiction; if he hath Jurisdiction, and Conusance of the Matter and the Person, and he gives a Sentence in the Matter, his Sentence must have some Effect to make a Vacancy, be it never so wrong; but there is no Appeal, if the Founder hath not thought fit to direct an Appeal; that an Appeal lieth in the Common Law Courts of the Kingdom, is certainly not so: This is according to the Government settled by the Founder; it is a Constitution of the Person's own, who created it; and therefore if he hath directed all to be under the absolute Power of the Visitor, it must so be; he might have made it so, that the Rector should continue no longer in his Place, than at the absolute despotick Power of the Bishop of Exeter; he has not gone so far but he has left him to the Wisdom, Learning, and Integrity of the Bishop to judge in his Cause; and it is not to be thought but that since the Founder hath such a Confidence in him, he will do any otherwise than he should.

He is a Judge not only in particular by the Founder's Appointment, but he has a general Authority by Law as Visitor; who shall judge him? Shall we summons the Heads of the Colleges in the University to judge whether he has done Right or Wrong? that is not to be done; it would bring the greatest Confusion and Mischief to the University that ever was known.

It is plain by all the Authorities of our Books, and by the Way of Pleading, that it is as I say; if a Sentence of Deprivation be pleaded, you need not shew the Cause; it is not traversable, even in a Visitation, when it is by the visitatorial Power; so is Rastall's Ent. fol. 1. 11 H. 7. 27. and 7 Co. Kenn's Case. Now I would suppose that this Rectory had been a sole College, and not a Corporation aggregate of Rector and Scholars; and Dr. Bury had brought an Assize, and then this Deprivation is pleaded; I would fain know of any one, whether it were not a good Plea, to shew that the Visitor had

pro

pro certis causis, &c. deprived him? without all Question it had been a good Plea, and it had not been traversable; for every Thing that is traversable must be expressed in Certainty; and then if it be a good Plea and not traversable, it is not questionable.

It is strange that pleading a Sentence without a Cause should be good and the Finding of a Sentence in a special Verdict should not be as good, and conclusive to the Party: I thought Things had been more exactly to have been pleaded, than set forth in the Finding of a Jury upon a special Verdict; and if in pleading it is not traversable, the Argument is the strongest that can be, that the Cause is not inquirable into; for if it were, a fairer Opportunity must needs be given for it in Pleading, than upon a special Verdict, which concludes the Parties as to the Fact that is found; now all the Precedents as to Pleading are, that no Cause need to be shewn.

As to the Matter of there being no Appeal from an arbitrary Sentence, 'tis true, the Case is the harder, because the Party is concluded by one Judgment; that does make it the more severe upon the Rector; but it doth not lessen the Validity of the Sentence, nor doth it any Way prove that you shall find out some Way to examine this Matter at Law in a judicial Proceeding.

If the Constitution had been, that if the Visitor doth deprive the Rector, then it should be in his Power to appeal to the Archbishop of Canterbury, it perhaps had been more equitable; but in that Case, if there had been an Appeal, and the Sentence had not been reversed, then the Deprivation had been in Force, every one would say, and irremediable in any Court of Law; and I do not know any Authority of Law that makes out the Sentence to be the weaker, because he is barred of an Appeal.

In that Case of Cawdry and the High Commission-Court, a Sentence of Deprivation was given against him by that Court, and there was no Appeal, the Sentence was found, but no Cause shewn; and so the Cause did not appear; yet it was held to be well enough, tho' there was no Appeal.

How doth my Brother Eyre distinguish this Case from ours here? He says it was by Virtue of the Ecclesiastical

Law; what, is it the Ecclesiastical Law that a Man shall be concluded by one Sentence without an Appeal? No, it is because it was by the High Commission-Court that had Jurisdiction; and yet the Sentence was not the weaker or more traversable, because there was no Appeal.

Now for any Thing I see, all the Reason you can give, why we should enquire and examine into this Matter is, because the Party is concluded without an Appeal; for you will agree, and all must, that if there did lie an Appeal in the Case, it were not examinable.

I would fain have any Body tell me the Difference; it was by the Ecclesiastical Constitution, that these Commissioners have their Power; but that is established by the Law of the Land, and so is this visitatorial Power; the one derives his Authority as much from the Law, as the other does; if then in one Case the Sentence be conclusive, why by the same Reason should it not in the other be so too.

It was so in the Case of Bird and Smith, where a Man was deprived for not conforming to the Canons, a Case certainly very hard; for all the Canons are not certainly according to Law, nor any of them obliging here further than as received, and allowed Time out of Mind.

Now as to the Cases of Coveny and Baggs, I take the Case to be all one as to this Matter, though in two Books; and there being an Error in the first Concoction, it was not to be rectified afterwards; he was deprived by the Visitor, not as Ordinary, but as Visitor; the Question was, whether there could be an Appeal from the Visitor's Sentence to the King; it was held there could be none to the Archbishop, because it was not done as Ordinary, but as Visitor; what then? why, there is this Collection by the Reporter: Ex hoc sequitur, &c.

That is cited in James Bagg's Case, and that was the Ground of the Opinion of my Lord Coke: And he there quotes the Book of Ed. 3. and 8 Ass. for such a Distinction; but if there be an Inspection into the Book, there is no such Difference in the Book at all, the Party is concluded in the one Case, as well as in the other; therefore there is an End of that Opinion, for the Foundation is quite fallen

fallen and taken away. But besides, it is reasonable to suspect that Case not to be Law, when that is impracticable, which it is brought to prove. The Head of a College cannot maintain an Assize for his Office of Headship; he hath not such an Estate as will maintain it. Therefore to give such an Instance as is in Coveny's Case, is to overthrow the Authority of the Case; the Head of such a Body cannot maintain an Assize for his Headship, for he hath no sole Seisin; the whole Body of the College hath an Interest therein; he has not a Title to a Penny of the Revenues in his own Right, till by Consent they are privately divided and distributed; and then too, it is not the Rector's Money, it is Dr. Bury's Money after Division; it is a Notion that cannot be maintained or supported by the Rules of Law, he is indeed the only visible Person of the Body, but has no single Right.

Now in Appleford's Case, the like Argument was urged here in my Lord Hale's Time; and then it was insisted upon that he might have an Assize. No, says my Lord Hale, that is impossible, and I remember very well he did disallow of that Opinion of my Lord Coke.

Truly I know no Difference between this Case and that of a Mandamus; it will not enter into my Head, I must confess, where the Difference lies, in that Case of Appleford, there was a Mandamus that was brought to restore him to his Fellowship; it was returned that by the Statutes of the College for Misdemeanour, they had a Power to turn him out; and that the Bishop of Winchester was Visitor, and that he was turned out pro crimine enormi, and had appealed to the Bishop, who confirmed the Expulsion, and the particular Cause was not at all returned: I know it very well, for I was of Counsel for the College, and we omitted the Cause in the Return for that Reason, because indeed, it was not so true as it should have been. It was insisted, that we ought to shew the Cause of Expulsion in the Return, to bring it within the Compass of the Statutes: It was answered, Here was a local Visitor, who had given a Sentence; and be it right, or be it wrong, the Party is concluded by it, and you must submit to such Laws as the Founder is

pleased to put upon you; and Mr. Appleford was not restored; whether he be yet living or no I cannot tell; but he was kept out all his Days, if he be dead.

I see now nothing but that this is an express Authority to guide us in our Judgment, in this Case; here is a local Visitor hath given a Sentence in this Cause; he has declared the Rector to be ousted, and actually deprived of his Place; when shall we know when a Deprivation is good? If not upon a Mandamus, why in an Ejectment? At this Rate we shall be always out at Sea, and not know when we shall come to Shore; I thought we had been come to some Consistences in our Opinions, since that Case I mentioned; That where there is a Visitor, and he hath Power to proceed to a Deprivation, you shall not examine his Proceedings more than those of any Judge: And I remember, in that my Lord Hale did mention it, and took it for clear Law, that it was as binding as a Judgment in an Assize to bind the Plaintiff. He is made a Judge, and his Person particularly designed by the Founder; but he hath his Authority from the Law, and he is to judge by the Statutes: The Founder hath trusted this particular Matter to his Discretion; and why should we suspect him that he will not do right?

Then for the next Point, it doth not appear there was any Injustice in the Sentence; why then shall we not presume it to be just? We are to give Credence to a Man that exerciseth judicial Power, if he keep within his Jurisdiction: The Law hath Respect not only to Courts of Record, and judicial Proceedings there, but even to all other Proceedings where the Person that gives his Judgment or Sentence hath judicial Authority; and you shew no Fault in the Sentence; the Jury do not so much as find, that the Matter and Ground of it is untrue, or insufficient in Point of Law, or any other Fault.

But then besides it seems to me truly, that the Cause of Deprivation is a good Cause, it being for Contumacy; if the Bishop had Power to visit in June, as I think he had, and was hindred by their shutting the Doors; whereupon he went away without doing any Thing, and came again in July, when he held his Visitation, and they carried themselves contumaciously, and refused to

submit to his Authority; this was contra officii sui debitum; it is reasonable that both Head and Members should submit to the Visitor.

And Contumacy is held a good Cause of Deprivation: It was held a good Cause in Bird and Smith's Case, and in the Case of Allen and Nash, quia fuit refractarius: Now though this is not one of the Cases mentioned in the Statute of Deprivation, yet when the Bishop comes to make a Visitation, and the Members refuse to submit, it is certainly contrary to their Duty; and I do not think their Entring a Protestation against the Visitation, was any Affront; that was surely very lawful; but their Turning their Backs upon the Visitor, not appearing upon Summons, and refusing to be examined, was an Offence, and contrary to what the Statutes do require, for he is to enquire into the State of the College, and each one's particular Behaviour; and if he comes to make such an Inquisition, and the Head and the Members run away, or will not appear to be examined, I know not what can be a good Cause of Deprivation, if that be not.

And as for that Statute which refers to the Causes, for which the Rector should be deprived, it doth not refer to a Deprivation in Time of Visitation; but it sheweth in what Manner the College shall proceed to get the Rector, if guilty of such Offences, removed. They may complain at any Time to the Visitor, when he is not in his Visitation, if he wastes his Revenues, or behaveth himself scandalously, and upon Request will not resign, and they may article against him before the Visitor out of his Visitation; but when he comes to execute his visitatorial Power in the quinquennial Visitation, he is to enquire into all the Affairs of the College; and he is not to proceed in that Case upon the Information of the Fellows, but he may proceed even to Deprivation, where ever he seeth Cause.

And Contumacy, I take it, is a Cause of Forfeiture of his Office; he is subject to the Power of the Visitor by the Statutes of the College; and if he goes about to evade, or contumaciously refuseth to submit to his Power and Authority; it is an Offence against the Duty of his Place, and a good Cause of Deprivation; so that I do hold in this Case.

First, That the Bishop of Exeter hath a visitatorial Power vested in him to deprive the Rector, without the Consent of the senior Fellows.

Secondly, That the Justice of his Sentence is not to be examined into here. And

Thirdly, If it were, and the Cause necessary to be shewn, I think Contumacy is a very good Cause of Deprivation, being an affronting him in his visitatorial Authority; it is an Offence against the Duty of his Place, and a Forfeiture of his Office; though I do believe Dr. Bury did not intend upon this to affront the Bishop, but ignorantia Juris non excusat; if the Law be so, we cannot alter it.

I am far from being such a Judge, as shall lay any intollerable Yoke upon any one's Neck; but I must say, If the Head and Members of a College will receive a Charity with a Yoke tied to it by the Founder, they must bear it; I cannot sever the Charity from the Yoke, if they will have the one, they must submit to the other.

And so my Opinion is, Judgment ought to be given for the Plaintiff; but my Brothers are all of another Opinion; and so I submit to it; the Defendant must have his Judgment.

This Judgment was after reversed in the House of Peers; I was Counsel for the Defendant in the Writ of Error; Dec. 7. 1694.

My LORDS,

I Am of Counsel for Dr. Bury, the Defendant in the Original Action, and likewise Defendant in the Writ of Error, now before your Lordships; the Case hath been opened, as it is upon the Pleadings and the special Verdict; which being very long, and so much of your Lordships Time having been spent already, I shall not enter into it, but come directly to the Questions, which have been made in the Case.

My Lords, The general Question upon this special Verdict is, Whether or no William Painter, Lessor of the Plaintiff, or Dr. Bury the Defendant, is Rector of Exeter College.

'Tis found by the Verdict that Dr. Bury upon the first of June, in the second Year of King James, till the Sentence of Deprivation, and always after, was, and yet is lawful Rector of the said College, unless the Sentence prevail to the contrary; so that upon the Validity or Invalidity of that Sentence, doth the general Question of Rector, or not Rector, depend; if the Defendant have forfeited his Place of Rector, and be duly removed according to the Statutes of the College; then is William Painter Lessor of the Plaintiff, found to be Rector, and Judgment in the King's Bench ought to have been given for the Plaintiff: But if upon the Verdict no Cause of Forfeiture is found, or Dr. Bury is not duly removed; then he continues Rector; and Judgment was well given in the King's Bench for the Defendant.

Before I examine the Validity of this Sentence, I shall beg Leave to consider another Question, which hath been made in the Debate of this Case; and that is, Whether this Sentence of Deprivation given by the Visitor be examinable at all, or not; this with humble Submission, I take to be its Nature, a preliminary Question to the main Point; for I do not see how we can prove the Judgment in the King's Bench, which was grounded on the Sentences being invalid, was well given, unless the Objection be first removed, that the Court of King's Bench had not then, nor your Lordships now, any Power to examine that Sentence at all; for it hath been said the Visitor is made an absolute Judge by the Founder, and intrusted by him, and therefore 'tis not to be suspected, he will do otherwise than right; that this being a Matter within his judicial Authority, his Sentence shall be presumed to be just: That therefore in pleading a Sentence of Deprivation by the Visitor, the Causes need not be shewn, or are they traversable, and therefore are not examinable; and so likewise upon Returns to Writs of Mandamus, the particular Causes need not be set forth, but a general Return is sufficient.

This, my Lords, is the Substance of what they object upon this Point, and to this Purpose many Cases have been cited to your Lordships, where upon Sentences of Deprivation, the Courts of Westminster-Hall would not inquire into the Reasons and Causes of those Sentences;

and where upon Writs of Mandamus, the Courts likewise refused to intermeddle, or examine into their Proceedings, but have remitted the Parties to the Visitor.

And First, My Lords, as to Cawdry's Case, and those other Cases upon Sentence of Deprivation, which these Gentlemen have pleased to mention, I beg Leave to observe; That all those Sentences of Deprivation were given in the High Commission-Court: Now these Commissioners in the High-Commission had a two fold Jurisdiction; the Ecclesiastical by which they had the King's Original Jurisdiction, as supreme Ordinary committed to them; and by Virtue whereof they might proceed according to the Ecclesiastical Laws, to Deprivation or other Ecclesiastical Censures. The other was not an Original Jurisdiction, but created de novo, by the Statute of 1 Eliz. and their Commission founded on that Statute, by which those Commissioners had a Jurisdiction in other Cases, and might proceed in another Manner, than they could by Virtue of their Original Jurisdiction: This will be plain from Cawdry's Case in the 5 Rep. 6, 7. and my Lord Coke's Jurisdiction of Courts, 324. Nash and Allen's Case, Roll, Prerogative 219. and in Bunting and Leppingwell's Case, 4 Rep. 29.

My Lords, the Sentences in every one of those Cases cited on the other Side, were Sentences of Deprivation founded on the King's Original Jurisdiction as supreme Ordinary, for Offences against the Ecclesiastical Laws, and the Proceedings were according to those Laws, and the Deprivation was of an Ecclesiastical Office; so that, my Lords, in all these Cases, the subject Matter, the Sentence, and whole Proceedings were of Ecclesiastical Conusance, and did not belong to the Jurisdiction of the Courts of Law, but ad aliud examen; and therefore the Judges of the Common Law in those Cases, gave that Faith and Credit to the Sentence of an Ecclesiastical Judge, in a Matter properly belonging to his Jurisdiction; and whereof the Judges of the Common Law had no Conusance themselves, as to intend it to be given duly according to the Ecclesiastical Law without further examining into it; and this is given as the Reason for not examining into their Sentence in Cawdry's Case; and so again in Nash and Allen's Case mentioned before; and so again in Bunting and Leppingwell's Case, 4 Rep. 29.

But

But, my Lords, if in these Cases a Sentence had been given against a Lay Person, in such Case the Court was of Opinion, the particular Cause of their Sentence ought to be shewn; and so is Nash and Allen's Case, Roll, Prerogative 219. For my Lords, the Clergy being Members of the same Body, were more immediately subject to their Jurisdiction than the Laity are, who are subject to the Ecclesiastical Jurisdiction in some particular Cases only, in Matters testamentary and matrimonial, and Tithes, and some other Cases, where the Proceedings are pro salute animæ. And therefore not having so general Jurisdiction over the Laity, as they have over the Clergy, if Sentence had been given against Laymen in Cawdry's Case, and those other Cases, the Causes of those Sentences ought to have been shewn, that it might appear that they were for a Matter within their Jurisdiction, as 'tis said in Nash and Allen's Case; and therefore though their Sentence in an Ecclesiastical Matter, against an Ecclesiastical Person, were not examinable; yet where the Person against whom such Sentence was given, was Lay, their Sentence was examinable: And my Lords, if in those Cases such Sentence against a Lay Person would have been examinable; why then, if we are in a Lay Case, and not an Ecclesiastical, those very Cases with humble Submission prove this Sentence to be examinable, and that the Court of King's Bench hath sufficient Jurisdiction for that Purpose? And as to that, I suppose it will scarce be pretended that we are in an Ecclesiastical Case, or to be determined by the Ecclesiastical Laws; Exeter College is not an Ecclesiastical Corporation; Colleges are Lay Corporations, and were so holden in Appleford's Case; and it was given as a Reason in that Case by my Lord Chief Justice Hale, why Colleges are not Ecclesiastical Corporations, because they are not within the Jurisdiction of the Ecclesiastical Courts; their Members have no Admission or Institution from the Ordinary; they are merely private Societies, to be governed by their own Statutes and Orders: As Colleges are Lay Corporations, so their Visitors, quatenus Visitors, are Lay Officers, and have their Authority derived to them by the Common Law, and not by any Canons, or Constitutions Ecclesiastical; Where the Corporation is Ecclesiastical, as Dean and Chapter, Abbot and Convent,

and the like; there indeed the Ordinary is Visitor, and his Authority and Proceedings are by Ecclesiastical Constitutions; but where the Corporation is Lay, there the Founder and his Heirs, and not the Ordinary, are Visitors, as 'tis holden 6 H. 7. 14. and 10 Rep. 31. in the Case of Sutton's Hospital; and the Founder hath his Authority, not by Canons Ecclesiastical, but by the Common Law of the Kingdom; and this Law it is that allows the Founder to delegate his Authority, and constitute another Visitor, as my Lord Bishop of Exeter is in the present Case; but still the Authority of such Visitor is wholly Temporal, and not Ecclesiastical, and the Power of Constituting him is allowed the Founder by the Common Law, and arises from a Temporal Right. As the Visitor in this Case is a Temporal, not an Ecclesiastical Judge; so my Lords, the Statutes of the College by which he is to judge, they are Temporal Laws, being only Rules and Orders for regulating a private Society which is Temporal; and from thence it will follow that Offences against those Rules and Orders will be so too, and not be of Ecclesiastical Conusance; so that the Resolutions in the Cases cited, being in Matters wholly Ecclesiastical; and it being holden by the Court in Nash and Allen's Case, That had those Sentences been given against Lay Persons, they would have been examinable; and our being in the Case of a Lay Person, (for Dr. Bury quatenus Rector of Exeter College, and Head of a Lay Corporation, is to be considered as such) and the Offence (if any) being against the Statutes of the College, which are likewise Temporal, it will be no Manner of Consequence, because the Sentence of an Ecclesiastical Judge, in Matters of Ecclesiastical Conusance, whereof the Temporal Courts have no Jurisdiction, is not examinable in a Temporal Court; that therefore the Temporal Courts shall have no Jurisdiction to examine the Sentence of a Temporal Judge, in such a Case as ours, where the Matter and whole Proceedings are of Temporal Conusance: Besides the Sentences in those Cases, were not only against Ecclesiastical Persons, but were founded upon an original Jurisdiction at Common Law; but if those Sentences had been given merely by their Commission upon the Stat. 1 Eliz. then according to Nash and Allen's Case, their Proceedings would have been examinable,

ble, for then the Cause of such Sentence ought to be shewn to the Court, that it may appear, that the Matter for which such Sentence was given, was within their Jurisdiction; so that there will be a great Difference between a Sentence grounded on an original Jurisdiction, and a Sentence given by Virtue of a particular Authority: Where the Judge that gives the Sentence hath an original Jurisdiction, as in Cawdry's Case, and those other Cases, the Judges of our Law take Notice of such Jurisdiction; and therefore in Pleading 'tis sufficient to shew before whom the Sentence was given, and to plead it generally, as is holden in Ken's Case, cited on the other Side; but where the Proceeding is upon a particular Authority, (as I hope to prove the Visitor's in the present Case is) in such Case the Courts of Law can take no further Notice of such Authority, than as 'tis set forth in Pleading, and the whole Cause of their Proceeding must be shewn, that it may appear to be pursuant to their Authority; and so 'tis holden in Nicholl's Case, Com. 485. and Turner's Case in the 8 Rep. and many other Cases; and therefore if one will plead that J. S. was indicted and arraigned before Justices of the Peace, he ought to say that they were assigned, to enquire, hear, and determine Felonies and Misdemeanours within the said County; for Persons appointed by Commission have not any Power but what is limitted to them by the Commission; but if an Inquisition is pleaded taken before an Escheator, Virtute officii, or before a Steward of a Leet, for any Thing whereof they have Authority; there the Party shall not shew they have Authority, for that the Authority that they have, is known to the Justices by the Law, and appears to the Court judicially: So my Lords, in this Case, the Visitor hath but a limitted Authority; he is found by the Verdict to be Visitor Ordinarius Collegii præd' virtute & secundum tenorem Stat. inferius mentionat': So that this is no original Authority in the Visitor, as it was in the Founder; but the Verdict finds him Visitor by Virtue of the Statutes of the College, and not only so, but according to the Form of the Statutes likewise: Now it would be improper to say, the Founder is Visitor by Virtue of the Statutes; for the Law gives him his Power of Visiting, and not the Statutes of the College; so that the Authority of the Foun-

der to visit, is an Authority by the Common Law like that of an Escheator, or the like, whereof the Courts of Law will judicially take Notice; but the Authority of the Visitor constituted by the Founder is not so, 'tis a derivative Authority, and found expressly by the Verdict to be by Virtue of, and according to the Form of the Statutes of the College; so that the Statutes of the College, both give him, and likewise limit his Authority; and therefore 'tis no general Authority, for he can visit but de quinquennio in quinquennium semel; he can continue his Visitation but three Days at most, and is restrained in many other Cases and Circumstances mentioned in the Statutes of the College; whereby it plainly appears, that the Founder hath not delegated to the Visitor that general Authority, which he had himself by the Common Law, but hath intrusted him only with a particular Authority, bounded and circumscribed by the Statutes of the College; wherefore his Authority being particular, the Judges cannot take Notice judicially what is within his Authority, and what not, or whether he hath duly pursued it, or no; and therefore it ought to be shewn that the Court may examine, whether he hath duly executed his Authority or not, according to the Difference taken in Allen and Nash's Case, so often mentioned. If this be not so, that the Proceedings by Virtue of a particular Authority are examinable, I would beg Leave to ask, how it came to pass, that the Proceedings of the High Commission-Court were examined in any Case whatsoever? 'Tis plain from Cawdry's Case, and the Cases cited on the other Side, that when they proceeded by Virtue of their original Jurisdiction, which was in the King as supreme Ordinary, their Sentence was final; I would beg Leave, I say then, to ask why their Sentence was not final and unexaminable in every Case, as well as in those? If it be said their Sentences were final and unexaminable in every Case, my Lords; Dighton and Holt's Case, 2 Cr. 388. where one committed for refusing the Oath ex officio, was bailed in the Court of King's Bench, and Isabel Peel's Case, 1 Cr. 113. where after Sentence in the High Commission, a Prohibition (upon Suggestion that the Party was pardoned) was granted out of the Common Pleas to stop their Proceedings; and divers other Cases upon Writs of Habeas Corpus, and Prohibitions, granted to the

High Commission-Court, collected together by my Lord Coke, in his Jurisdiction of Courts, 332, 333, 334. are a manifest Proof to the contrary, and that their Sentences were examinable in some Cases: If their Sentences were examinable in some Cases, though not in others, as 'tis plain they were; my Lords, with humble Submission, I say the Reason of that Difference was, either because the Person proceeded against, was a Lay Person, or else because the Ground of their Proceedings was upon their Commission by Virtue of the Statute of 1 Eliz. which not being an original Authority, the Court was not bound to take Notice of it, but they were bound to shew it, according to the Difference taken in Nash and Allen's Case; and if either of these were sufficient Reasons to intitle the Courts in Westminster-Hall to examine the Proceedings and Sentence of the High Commission-Court, in these Cases, à fortiori, both these Reasons concurring in the present Case, will intitle the Court of King's Bench to examine this Sentence, unless the Sentence of the Visitor shall be holden more arbitrary, than those of the High Commission commonly were.

Then my Lords, as to those Cases upon Writs of Mandamus cited by the other Side; with Submission, there is not one of them comes up to the present Case; in most of those Cases, they applied for Relief to the Courts of Law, before they sought for it by Appeal from the Visitor, and their Coming per Saltum to the Common Law Courts, before they had appealed to their proper Visitor; and not being without Remedy, but having Relief by Appeal, was the Reason, the Judges in those Cases would not intermeddle, or anticipate the Visitor's Authority; only indeed Appleford's Case was after an Appeal to the Visitor from a Sentence of Expulsion by the College, and that Sentence confirmed by the Visitor; that being the only Case upon a Sentence by the Visitor, I beg Leave to observe to your Lordships, that was not an original Sentence by the Visitor himself as ours is, but the Visitor's Confirmation of a Sentence given by the College upon an Appeal to him; so that Appleford in that Case had the Benefit of an Appeal, which the Defendant cannot have in this, and was not concluded by the original Sentence, as they would have us here; so that Appleford's Case, though it comes the nearest,

will not be a parallel Case with ours; for where the Party hath his Remedy by appeal, there he shall betake himself to his Appeal, and shall not have an Action, as upon a Deprivation by the Ordinary; and so in Appleford's Case: But where the Party hath no Remedy by Appeal, as if a Lay Patron of an Hospital deprives the Master, there he shall have an Assize, for that very Reason, because he hath no Appeal, as it is expressly holden in James Bagg's Case, 11 Rep. 99. and 13 Rep. 70. (in the 13 Rep. the Book of 8 Ass. is cited) which is our very Case in Point in Effect; and the Reason the Court went upon in Dr. Widdrington's Case, Dr. Patrick's Case, and those other Cases, was, because they were not without Remedy, but had an Appeal which strongly implied, that had they been without Remedy by Appeal, as we are, the Court would have relieved them in those very Cases; and therefore it is no Argument because the Courts of Law would not examine the Proceedings of the College, or anticipate the Judgment of the Visitor, in a Case where the Party might appeal to the Visitor; that therefore they shall not examine an original Sentence by the Visitor, from whence the Party hath no Appeal at all: Besides, my Lords, in Appleford's Case the Return was general, and the Court will not intend any Thing contrary to the Return, but take it to be all true; but if upon that Return the whole Matter had been specially set forth, as it might have been, and it had appeared upon the Sentence, that by the Statute of the College the Consent of three of the seven senior Fellows had been requisite to Appleford's Expulsion, and that he was expelled without such Consent; and this Sentence was confirmed by the Visitor; My Lords, I presume it will scarce be said, that in such Case the Court of King's Bench cannot examine such a Sentence, and relieve the Subject when such a manifest Oppression appears in the very Body of the Return; 'tis the Business and Province of that Court, to correct not only Errors in judicial Proceedings, but other Errors and Misdemeanours in extrajudicial Proceedings likewise, tending to the Breach of the Peace, and the Oppression of the Subject, as is expressly resolved in James Bagg's Case, 11 Rep. 98. And my Lord Chief Justice Keiling in Dr. Patrick's Case said, that if one be put out contrary to the

Statutes of the College, God forbid but that he should have Remedy in the King's Bench; for (says he) Governors and Visitors of Colleges are many Times very arbitrary in their Proceedings.

If this would have been so in Appleford's Case, supposing such Matter had specially appeared in the Return, we say with humble Submission, that is our very Case; and that it appears upon this special Verdict, that the Consent of three of the seven senior Fellows was requisite to the Deprivation of the Rector; and that he was deprived by the Visitor alone, without such Consent. My Lords, If our Case be so, I hope I shall not offend in saying, it is a great Oppression; the Court of King's Bench have thought fit to relieve the Rector against it; and as my Lord Chief Justice Keiling said, God forbid they should not; and I hope your Lordships will be pleased to say so too: Besides, my Lords in other Cases, as well as this, there might the greatest Injustice be done that can be to the Subject, and appear evidently to the Judges, who are intrusted with the Safety and Libetty of the Subject, and yet they can afford him no Relief, if it be as they would have it on the other Side. As for Instance, by the Statutes of the College, a Scholar is to be expelled who is guilty of Homicide; one of the Scholars is guilty of Homicide, who is afterwards pardoned by Act of Parliament: And afterwards the Visitor expels him for this Homicide, as a Breach of the Statutes: The Offence against the Statute of the College is pardoned by Act of Parliament, as well as the publick Offence against the King, his Crown and Dignity; and was so adjudged in Effect in the Case of Searl and Williams, Hob. 288. where a Parson being Convict of Manslaughter, and allowed his Clergy, they proceeded notwithstanding against him in the Ecclesiastical Court upon the Canons, for this Offence, to deprive him of his Benefice. My Lords, in that Case it was adjudged, they could not proceed against him to deprive him upon the Canons; for that the Statute that allows Clergy amounted to a Pardon by Act of Parliament, in Construction of Law, and for that Reason a Prohibition was granted in that Case; and so it would be upon an Appeal of Murder, as is resolved in Holdcroft's Case, 4 Rep. from whence it appears the Offence

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against the Statutes of the College, is as well pardoned as the Offence at Common Law. The Scholar being thus pardoned, I say, is expelled notwithstanding by the Visitor; the Expulsion with humble Submission is manifestly unjust, and the Party under a great Oppression; and all this Matter suggested in a Writ of Mandamus, or otherwise, appears to the Court; yet my Lords, if the Visitor's Sentence be irreversible and unexaminable, the Subject in such a Case shall be deprived of his Livelihood, be expelled and lose the Benefit of a Pardon, though by Act of Parliament, and yet be without any Manner of Relief in the World, which is in Effect to make the Sentence of a Visitor paramount to an Act of Parliament. If it be said that in such a Case, the whole Matter appearing, the Court would relieve, and grant a peremptory Mandamus, if they may examine and relieve in that Case; by the same Reason I humbly conceive they may do it here, where the whole Matter is found specially upon Record before them; so my Lords, the Statute of divers Colleges enjoin them to pray for the Souls of their Founders; but the Laws have taken away those Superstitions: Now if the Visitor may proceed upon the Statute for not praying for the Soul of the Founder, and his Sentence cannot be examined, I must leave it to your Lordships what the Consequence of that may be.

But it hath been said, the Founder hath constituted the Visitor an absolute Judge, and that the Rector and Scholars have accepted his Charity upon these Terms. My Lords, the Rector and Scholars have accepted the Founder's Charity upon the same Terms, and hold it according to the same Laws, by which the Visitor hath his Authority, which are the Statutes of the College; 'tis by them the Defendant desires to be judged, and to hold the Founder's Charity upon no other Terms, than he accepted it. But, my Lords, if the Sentence of the Visitor be above Controul, if there be no Means to distinguish whether the Visitor do right or wrong, keep within the Bounds of his Authority or exceed them, the Rector and Scholars will be so far from holding the Founder's Charity upon the Founder's Terms, which are the Statutes of the College, that the Terms of their holding will be at the Will and Pleasure of the Visitor;

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the Statutes of the College will be but Shadows and an empty Name; and Colleges instead of Places of free and ingenuous Education, as they are often stiled, will be but Societies of Slavery; for whoever is under the despotick Power of another, is in such a State; but 'tis said the College is the Founder's Creature, and he may give it what Shape he pleases. My Lords, Founders, as they are Benefactors to the Publick, have a great Power in forming and disposing their Charity, and may fashion it as suits best with their Designs, but then the Shape they give must be a legal Shape; the Law will not permit them to form or create Monsters: Now a Power of judging without Appeal, an Obligation of proceeding by stated Rules and Laws, without any Possibility of discerning whether their Judgments be according to those Laws or not; nay, a Power of judging contrary to those Laws, (for so we say the Visitor hath done in this Case) is such a Monster, such a Leviathan, as the Laws of the Kingdom will not endure, there is Contagion in the very Example of such an Authority. My Lords, if the Founder and another had bound themselves in a Bond of 10000 l. a-piece, to stand to the final Award and Determination of a third Person; it may be said in this Case, that the Founder hath made this Man his absolute Judge, and his Determination is as final as the Visitor's can be; 'tis the Founder's own Act to be thus bound, and there lies no Appeal. But, my Lords, notwithstanding it shall be tried in an Action whether this Judge have acted according to his Power, whether he hath exceeded the Submission of the Parties or not; if it appear he hath kept within the Submission of the Parties, and pursued his Authority, Judgment would be given according to his Determination; but if the contrary appear, his Sentence will be set aside as a void Matter, and the Parties will not be bound by it. My Lords, if the Founder could not have set up such a Judge over himself, as they would have the Visitor in our Case, I would beg Leave to ask how he comes to do it over another. But, my Lords, should we admit (which there is not I humbly conceive the least Shadow of Reason to do) that the Rector is removable at the Will and Pleasure of the Visitor; yet I hope the Statutes of the College shall not be wholly set aside, but that he shall have an Interest

in his Office observing the Statutes; this surely cannot be denied, and then even in that Case with humble Submission, the Sentence of the Visitor will be examinable; as if there be Lord of a Copyhold Manor, and Tenant by Copy of Court-Roll, at the Will of the Lord, according to the Custom of the Manor; and the Custom is, that the Tenants shall forfeit their Copyhold Estates for Homicide, Incontinency, or such other Crimes as are mentioned in the Statutes of this College; and such Tenant is presented in the Lord's Court for Incontinency, or any other Crime, and adjudged to have forfeited his Estate; and the Lord admits another in his Room. It may be said in this Case, that the Tenant was but Tenant at the Will of the Lord; that he took his Estate upon these Terms; nay, that the Freehold and Inheritance of his Estate remained always in the Lord, and that his Estate was purely an Estate at Will in the Eye of the Law; and that the Lord is an absolute Judge, and no Writ of false Judgment or Error lies, or Appeal; but his Sentence is final, and not examinable; all Things that have been said in our Case, might be said in that. But yet, my Lords notwithstanding, 'tis every Day's Practice to relieve against the Lord in these Cases, and the Tenant in an Action for the Possession, may falsify the Proceedings in the Lord's Court, and examine the whole Matter; and if he can purge himself of the Crime, he shall retain his Estate. 'Tis true, Littleton tells us, Sect. 77. It is said that if such Copyholder be put out by his Lord, that he hath no Remedy but to petition his Lord, and gives the Reason, that otherwi e they would not be Tenants at Will, according to the Custom of the Manor: But, my Lords, the Comment upon Littleton tells us, this was not Littleton's own Opinion; and in that very Section, Littleton cites us the Opinion of Danby and Bryan to the contrary; and so hath the Law been always taken ever since, for by those Judges the Copyhold Tenant is as well an Inheritor of his Copyhold Estate, observing the Custom of the Manor, as he that hath a Freehold at the Common Law; 'tis true, my Lords, before Danby and Bryan declared these Opinions, the Copyhold Tenant was taken to be without Remedy, otherwise than by Petition, as Littleton says; but when once it was declared that he was not

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barely Tenant at Will, but that observing the Custom of the Manor, he had a Right to inherit, as well as he that had a Freehold at Common Law; the Consequence of this Right immediately was, to allow him a Means to examine whether he had observed the Custom of the Manor, or not; and instead of his Petition to be restored, (which the Lord might grant or deny at his Pleasure) the Law allowed him to try whether he had observed the Custom or not, in a collateral Action, and left him no longer in the arbitrary Power of the Lord; and so hath the constant Practice been ever since Ed. 4th's Time; for the Law will not suffer such an Absurdity, that any one should have a Right upon observing such and such Terms; and that he should be deprived of this Right without the Benefit of a legal Examination, whether he hath observed those Terms or not; after it was once declared, he had a Right to his Estate observing the Custom of the Manor, his Remedy was a natural Consequence and Effect in Law of such Right; for want of Remedy and want of Right would have been the same Thing. And surely, my Lords, these Gentlemen will not put the Rector and Scholars in a worse Condition than Tenants at Will, according to the Custom of the Manor, which was taken to be a Tenure in Villenage. I hope, my Lords, the Rector will have a Right to hold his Office, observing the Statutes of the College, as much at least as those Tenants at Will, to hold their Estates according to the Custom of the Manor; and if it were a Consequence in Law from the Copyholder's having such Right, that he should have a Remedy by a legal Examination, to try whether he had observed the Condition of his Tenure or not, ubi est eadem ratio, est idem Jus; and I hope the Rector likewise by the like Consequence, having the same Right to hold his Office of Rector, according to the Statutes of the College, as the Tenant in the other Case to hold his Estate according to the Custom of the Manor, shall enjoy the Benefit of the like Remedy of Examination by a legal Trial, whether he hath observed the Statutes of the College, or not. Nay, my Lords, he hath enjoyed it, he hath the Judgment of the Court of King's Bench, that the Sentence of the Visitor is examinable. If it be examinable, I come in the next Place as briefly as I can, to consider the Sentence it self; and upon

the Exposition of the Statute de Visitatione, will the Validity of this Sentence depend: That Statute having appointed the Bishop of Exeter and his Successors, Visitors, with Power of visiting the College, as often as he shall be requested by the Rector, or in his Absence, by the Sub-rector and four of the seven senior Fellows; and without any Request, once from five Years to five Years, and directed that he shall continue his Visitation but two Days, or upon extraordinary Reasons and Occasions but three at the most; and ordered that if the Rector or Scholars, or any other of the College are accused, he shall not require a Copy of his Accusation, or the Names of his Accusers; the Statute proceeds and hath this Clause, Si tamen ad privationem aut inhabilitatem Rectoris aut expulsionem Scholaris alicujus per Episcopum aut ejus Commissar. agatur, tunc ostendantur ei detecta quibus si non poterit rationabiliter respondere, & sese super objecta purgare, amoveatur sine appellatione, aut ulteriori remedio, dummodo ad ejus expulsionem concurrat consensus Rectoris & trium ex septem Maxime senioribus Scholaribus, tunc in universitate presentibus, sine quorum consensu, irrita sit hujusmodi expulsio & nulla ipso facto.

Upon the Construction of this Clause doth the main Question depend, whether by this Clause the Consent of three of the seven senior Fellows, is necessary to the Privation of the Rector or no. And my Lords, with humble Submission, the Consent of three of the seven senior Fellows ought to concur to the Privation of the Rector, sine quorum consensu irrita est hujusmodi expulsio: The Beginning of this Sentence is in the Disjunctive, Si tamen ad privationem aut inhabilitatem Rectoris, aut expulsionem Scholaris agatur: If the Visitor proceed to the Depriving or Disabling of the Rector, or Expulsion of a Scholar, tunc ostendantur ei detecta; there he is to have a Sight of the Accusation, Ostendantur ei detecta there relates indifferently either to Rector or Scholars, as either the one or the other shall be proceeded against, quibus si non poterit rationabiliter respondere, amoveatur; amoveatur must likewise be indifferently applied to Rector or Scholars, secundum subjectam materiam; if the Proceedings are to remove the Rector, amoveatur Rector; if a Scholar is proceeded against, amoveatur Scholaris, so that amo-

veatur is used indifferently, and signifies, if applied to the Rector, Amotion or Deprivation; if applied to the Scholar, Si ad expulsionem Scholaris agatur, it signifies Expulsion; amoveatur Scholaris is the same as expellatur Scholaris; so that it signifies indifferently either Amotion or Expulsion, as the Case shall fall out; and the subject Matter require. Then come the Words upon which the Doubt arises, Dummodo ad ejus expulsionem concurrat consensus Rectoris & trium è septem Scholaribus maxime senioribus: This Clause, says the other Side, doth not concern the Privation of the Rector, ad ejus expulsionem refers only to Scholaris; for 'tis not said Expulsionem Rectoris, but privationem & inabilitatem Rectoris, & expulsionem Scholaris; so that being said here ad ejus expulsionem, ejus there must refer to Scholaris, and not to Rectoris; and they say further, that if ad ejus expulsionem refer to the Rector, and the Consent of the Rector and three of the seven Seniors is requisite in such Case, that then the Consent of the Rector must concur to his own Privation, which is absurd to imagine; and therefore though the meanest Scholar of the Body may not be expelled by the Visitor, without Consent of the Rector, and three of the seven Seniors; yet the Rector the Head of the whole Body, may be expelled by the Visitor alone, without any Consent. My Lords, in answer hereto first, Privatio, Amotio, & Expulsio, are all synonymous Terms, and signify the same Thing throughout this Statute; and therefore, as I observed before, amoveatur, when referred to Scholaris, signifies the same as expellatur; and if in that Place amoveatur applied to Scholaris, signifies as much as expellatur, as I think with Submission there can be no Question but it doth, by the same Reason shall ad ejus expulsionem in the next Line, being referred to the Rector, signify the same as if it had been ad ejus amotionem; so that in that Place, ad ejus expulsionem may as well be applied to the Rector, as to a Scholar secundum subjectam materiam; but then say they, the Consent of the Rector must concur to his own Expulsion. My Lords, with humble Submission that will not follow, if the same Exposition be made here, as hath been made of the Rest of the Clause; that is, to apply the Words respectively, secundum subjectam materiam; when the Rector is to be de-

priv'd by the Visitor, ad ejus expulsionem concurrat consensus trium è septem maximè senioribus Scholaribus, the Consent of three of the seven Seniors must concur; and when a Scholar is to be expelled, the Consent of the Rector and three of the seven Seniors must concur: This Construction avoids all Absurdity, is consonant to the foregoing Part of this Clause, and makes the Founder to have acted in a prudent and reasonable Manner, and have provided for the Rector with as much Care at least as the meanest Scholar, which he will not have done otherwise; for whereas the meanest Scholar cannot be expelled by the Visitor, without the Consent of the Rector, and three of the seven Seniors, the Rector by their Construction on the other Side, may be expelled by the Visitor alone, without any concurring Consent at all; so that the Rector will be wholly in the Visitor's Power, and expellable at Pleasure. This, my Lords, would be a very hard Construction, and 'tis scarce to be imagined that the Founder ever intended any such Power to the Visitor over the Rector, when he hath not given it him over the meanest Scholar in the College: And if we consider the following Clause, it seems very strongly to imply the contrary, and that runs thus, Et insuper si contra Rectorem ad amotionem ab officio per hujusmodi Domini Epis. Commissarium etiamsi consentientibus quatuor ex septem maximè senioribus supradictis procedatur, non negamus ei omnes exceptiones justas, apud eundem Dominum Episcopum Exoniensem, dummodo ulterius non Appellat; Et insuper here is not the Beginning of a new independant Sentence; but Et in this Place couples, and refers this Clause, to the Clause foregoing; so that the Founder having by the foregoing Clause, ordered, that if the Rector, or any Scholar were accused to the Visitor of a Crime, et non poterit rationabiliter respondere, and could not clear himself, amoveatur sine appellatione, Dummodo ad ejus expulsionem concurrat consensus, &c. Provided that to such Expulsion there is a due Concurrence, Sine quorum consensu irrita sit hujusmodi expulsio, without which Concurrence such Expulsion was to be void. The Founder, I say, having made this Provision in the foregoing Clause, stays not here, but proceeds, Et insuper; and over and above, and besides all that is done already, Si contra Rectorem ad amotionem

ab officio, &c. If the Bishop's Commissary proceed to remove the Rector, tametsi consentientibus, though with a due Concurrence, which must imply a Concurrence necessary by the former Clause, to the Rector's Amotion, tametsi consentientibus, though such Concurrence be had, sine quorum consensu irrita sit hujusmodi expulsio, without which the Amotion was to be void; yet says the Founder, non negamus ei, &c. we allow him an Appeal to the Visitor; so that this is a Clause of Bounty to the Rector insuper, over and above what any of the Scholars have, which certainly implies that the Rector by the former Clause had the same Care taken of him, as the Rest of the College had, or else this Deprivation could not be insuper, over and above; so that upon these two Clauses considered together, it seems to me with Submission, a very strained Exposition, to construe the Rector into a worse Condition than any Scholar, when the Intention of the Founder seems plainly to have been to put him in a better: But by the Construction I have endeavoured, all Absurdities, I hope, are avoided, and the Intention of the Founder will be consonant to it self in both Clauses; the Rector when he is no Party shall concur with the Visitor, and the Rest of the Fellows, to the Expulsion of a Scholar; but when he is a Party, he shall then cease to be Judge and Party too, and then the Visitor with Concurrence of three of the seven Seniors may deprive him. This, my Lords, seems the natural Construction with Submission, and this Construction, as hath been observed, the Visitor himself hath made; he hath adjudged the Consent of three of the seven Seniors necessary to the Rector's Deprivation, and got the Concurrence of three, which he thought to be three of the seven Seniors; but whether they were three of the seven Seniors or no, will be the next Question; 'tis found that six of the seven Seniors were suspended, and that the Rector was deprived by the Consent of three of the seven not suspended. My Lords, If the Consent of three of the seven was requisite, I presume it will not be much insisted on by the other Side, but that this Point is against them; for the suspended Fellows remained Fellows notwithstanding the Suspension, and three of them ought to have consented; but they that consented are found to be not any of the seven Seniors, but three of the seven Se-

niors not suspended; for the Doctors and Bachelors of Divinity, and most mature Part of the College, were all suspended; so that this Deprivation not being with such necessary Concurrence as the Statute requires; and the Visitor, as I hope is proved, not having a sole Power over the Rector, but with a due Concurrence, this Deprivation by the Visitor alone, without such Concurrence will be absolutely void; for the Visitor not being an absolute Judge, but restrained to the Consent of three of the seven Seniors; if such Consent be not had, his Act is void for want of Authority, and the whole Proceeding coram non Judice; and full to this Purpose is the Earl of Leicester's Case, Com. 393, 396. and Hob. 70. Lamb and Williams's Case, where a Writ being directed to the Sheriffs of London, one of them makes the Return; this is no Return at all, but void; for there was no such Authority: So my Lords, there was no Authority committed to the Visitor to deprive the Rector without a due Concurrence; and therefore his Deprivation without such Concurrence is an Act done without Authority, and signifies no more, than if he had been deprived by the Mayor of the Town, or any other Stranger whatsoever. As to the Time when the Rector was deprived, whether it was upon the third Day of the Visitation or the fourth, I shall not take up your Lordships Time in disputing; if a Concurrence was necessary, and such Concurrence not had, be the Deprivation of the Rector sooner, be it later, it will signify nothing.

In the last Place, my Lords, I come to the Cause of the Deprivation, and that is found by the Verdict to be propter Contumaciam, I shall not spend Time in disputing whether Contumacy, not being a Cause of Deprivation mentioned in the Statute, be a sufficient Reason to deprive the Rector, or no. My Lords, be that as it will, I hope to acquit the Rector of Contumacy in this Case: The Statutes of the College, to the Observation of which the Rector is sworn, say, that the Visitor by himself, or his Commissary, may come to visit the College as often as he is requested by the Rector, or in his Absence, by the Sub-rector and four of the seven Seniors; and without Request that he may come and visit once from five Years to five Years. 'Tis found by the Verdict that the Visitor by Dr. Masters his Commissary, not being requested

quested by the Rector, or Sub-rector, in March 1690. comes into the College, and determines an Appeal brought before him by Colmer. In June the first, and afterwards in July the same Year, the Visitor comes to visit the College in Person; the Rector and Scholars conceiving Dr. Masters's Coming to the College in March before, without Request by the Rector or Sub-rector, to be a Visitation, make their Protestation under the College Seal, to the Visitor's Right of visiting in June; and so again in July, and set forth their Reasons in all Terms of Decency and Respect, and shew that Dr. Masters having visited the College in March preceding; and that by the Statutes and Liberties of the College, which they were bound by their Oaths to preserve, the Visitor can visit (unless requested) but de quinquennio in quinquennium semel, and that five Years was not elapsed since Dr. Master's Visitation; that therefore they could not agree to the Visitation in June and July, only because they were bound by their Oaths, to defend the Liberties and Privileges of the College; and having made this Protestation, the Rector and Scholars depart: The delivering the Protestation, that I do not find is pretended was any Contumacy, but departing, and not appearing afterwards is the Contumacy, for which the Rector is deprived. My Lords, with humble Submission, this is no Contumacy: If it was lawful for the Rector and Scholars to make their Protestation, as I think it is not denied, then they were not compellable to do an Act which would destroy that Right their Protestation was made to preserve, as their Staying and Submitting to the Visitation would have done; that would have been protestatio contra factum, and signified nothing: But further, this Proceeding of theirs was grounded on a Matter of Right, which the Rector and Scholars took themselves bound by Oath to preserve: For Dr. Masters having visited in March preceding, this they really and bona fide conceived, and were perswaded, was a Visitation; and if (as there was some Difference in Opinion upon the Resolution of this Case, whether it were a Visitation or no) it were a Visitation, then the Visitor had no Power to visit the College again till five Years were past, and his Coming in June and July was an Invasion of their Rights and Liberties. My Lords, I say this being in

Defence of a Right which was disputable, their insisting on it, I hope, will not be Contumacy; if it had been a plain Case, that Dr. Masters's was no Visitation, and that these Protestations were a mere faint Contrivance of the Rector and Scholars to avoid the Visitor's Authority, I should have little to say. But, my Lords, it being in it self really a dubious Matter, upon the Words of the Statute, whether Dr. Masters's Coming in March, not being requested, was a Visitation or no, and a Question so difficult that there was Difference of Opinion (as I said) in the Court it self, upon the Resolution of the Case; it cannot with humble Submission, being a Matter of Right, which they really and bona fide took themselves obliged by their Oaths to defend, be adjudged Contumacy, though they had been mistaken, as by the Judgment of the King's Bench it appears they were not. My Lords, If there be Lord of a Copyhold Manor, and Tenant, where by the Custom of the Manor, Non-payment of his Fine is a Forfeiture of his Estate; if in such Case the Lord assesses an arbitrary Fine, and appoints a Time and Place for the Payment of it, and the Tenant insists upon it as a Fine certain, and refuses Payment of the arbitrary Fine; in this Case, if he hath forfeited his Estate by this Refusal, it will be the hardest Case in the World; for then a Man should forfeit his Estate for vindicating and insisting on his Right, and therefore such Refusal was adjudged no Forfeiture, in the Case of Wheeler and Honor in the King's Bench. Mich. 13 Car. 2. upon this Difference, that where the Reputation or Imagination bonâ fide, by all or any of the Tenants of the Manor is, that the Fine is certain, and not arbitrary, and an arbitrary Fine is assessed and refused, there tho' upon a Trial, it be found that the Fine is arbitrary; yet such Refusal will be no Forfeiture, for then no Man could try his Right in such a Case, without forfeiting his Estate; but if on the other Side it was known that the Fine was arbitrary, and the Copyholder without any such reasonable Cause or Imagination did refuse to pay it; in that Case such Refusal will be a Forfeiture: So, my Lords, if the Rector in a plain Case had refused submitting to the Visitor, the putting in such a Protestation, and departing, might have been thought a Contrivance to elude and avoid the Visitor's Autho-

Authority; but nothing of that appearing, but on the contrary conceiving really and bonâ fide, that the Rights of the College were invaded, and the Matter being in its own Nature so dubious and disputable, as it appears to have been; and thinking himself bound in Conscience in that Case to defend the Rights and Privileges of the College; the Defence of that Right, in Discharge of his Conscience, I hope will never be thought Contumacy, or Forfeiture of his Office. It is a sufficient Penalty upon the Rector without Forfeiture of his Office, that after having been a Member of this College above half a Century, the greater Part whereof the College hath happily flourished under his Care and Government; that now in his old Age, when he had little more to do in this World but die in Peace, he hath undergone an expensive and vexatious Suit, not only in Defence of those Rights and Liberties he hath been often sworn to preserve, but likewise to prevent being torn himself from that Body, whereof he hath been so long a Member, by a rigorous Prosecution, from whence within the Compass of a few Years, he must fall by the Necessity and Course of Nature. My Lords, the whole Court of King's Bench, in the Resolution of this Case, acquitted the Rector of any intended Contumacy, of any formed Design of eluding the Visitor's Authority; and the Majority of the Court after many Arguments at the Bar, and great Deliberation, have given Judgment for the Rector; they have adjudged that the Defendant Dr. Bury continues Rector of Exeter College; which Judgment, I humbly pray your Lordships to affirm.

This Judgment was reversed by the Lords, without giving any Reasons, or distinguishing the Points made in this Case; and in the Debates of the House, the Bishop of Worcester, Stillingfleet, spoke very earnestly against this Sentence of the Visitor's being examinable, and gave Instances upon all the Cases that had been upon Mandamus's; and then went into foreign Instances, that the Universities abroad are all exempt from the Jurisdiction of the ordinary Courts of Justice; and that ours are so too by their Charters, and those Charters confirmed by Parliament.

Note, It was agreed in this Case, that the Founder, after having made these Statutes, could not himself have given them other Statutes, or new Statutes, unless he had reserved to himself Authority for that Purpose.

It was likewise said, that if the Visitor's Sentence was not examinable, at least as to Circumstances of Time and Place, and such other Requisites by the Statutes; that then he might visit as often as he pleased, and as long as he pleased, and expel the Fellows solely without any Consent, and summon them to Exeter one Week, and to York another; but as I heard, many of the Lords were of Opinion that the Sentence was examinable as to such Circumstances, whatever it was as to the Justice of the Sentence it self.

The great Argument on the other Side was, the Founder's having made the Visitor an absolute Judge sine ulteriori appellatione, and obliged the Rector and Fellows by their Oaths, in case they shall be expelled for a reasonable Cause, not to appeal; and that they come in here by Charity, and reap the Benefit of that, which was not purchased by their Money; and therefore must take it upon the Founder's Terms, which are, that they shall be bound by the Visitor's Sentence without Appeal.

As to this Matter, it seemeth there is not so much of Argument in it; for the Question is not, whether the Founder intended they should be concluded by the Visitor's Sentence, or not; no Question his Intention was, that the secular Power should not intermeddle in any Case with the Members of his Foundation. The Founder was a Bishop, as the greatest Part of the Founders of Colleges were; and the Colleges were founded by them in Times of Popery, when the Clergy in general took themselves to be exempted from the Jurisdiction of the King's Courts; and what Contests and Struglings were upon that Occasion, is obvious in History; so that no Doubt the Statutes of this, and most other Colleges, are compiled, in order to exclude the Inspection of the secular Authority; but the Question is, Whether by the Laws of this Kingdom such an Authority can be lodged in any Man of determining, without any Benefit of Appeal; so as the first Instance, and the last Resort shall be in the same Person, and at the same Moment of Time; for it seemeth, that if even the Visitor himself should find he

had been misled, mistaken, or misinformed; yet he cannot reverse his own Sentence, or restore a Member having once expelled him, Durus Sermo est hic.

The first Day of the following Term, the Attorney General and Serjeant Pemberton came and prayed the Court to give that Judgment now, which should have been given formerly; for that the House of Peers have Power to affirm only, or reverse, they not being able to award Execution; and the Record is now in this Court; and insisted that in all Cases where this Court reverses Judgments upon Error in C. B. they give that Judgment the Court below should have given; and that upon Writs of Error in Cam' Scac. they only reverse or affirm, and that the new Judgment is given below in the King's Bench.

It was answered by Shore, that there is a Difference in the Form of the Writ of Error, in the House of Peers, and in the Exchequer-Chamber; and that tho' the Exchequer-Chamber may have but a limitted Authority, yet that of the Peers is an original Authority; and he said that no Precedents have been shewn of Judgments being given de novo in R. B. upon a Reversal in the Lords House.

The Chief Justice said, that the Exchequer-Chamber would be of the same Nature of the Lords House, being erected in Imitation of that Jurisdiction, and to supply a Defect in Intervals of Parliament, as is said in the Recital of the Act; but he said, as to a Judgment being given de novo below, there would be a Difference, where Judgment is given upon a Demurrer, and where upon a special Verdict; where 'tis upon a Demurrer, the Courts above ought to give a Judgment for the Plaintiff, (if they reverse that for the Defendant) and then it is sent down, and a Writ of Inquiry goes, and upon that the Court below give a final Judgment; but where 'tis upon a Verdict, there if they reverse a Judgment, they ought to give the same Judgment that ought to have been given at first, and that Judgment ought to be sent to the Court below; and thereupon they ought to award Execution, for 'tis not reasonable to expect the Court below should give a Judgment contrary to their first Judgment; he for his Part was always for the Judgment as it ought to be now; but he supposed his Brothers continued of their former Opinion, and therefore 'tis not reasonable they

should give a Judgment against their Opinions; and he said, he remembred the Case of one Robinson and Woolley, a Gloucestershire Case; where upon a Writ of Error in the Exchequer-Chamber upon a Judgment for the Defendant, where it ought to be for the Plaintiff, they remitted the Record without giving any Judgment, the Party could not have Judgment below; and though a Writ of Error was brought in Parliament, yet he never could get Judgment. The Case of Sarsfeild and Witherley was likewise cited; and so was the Case of Faldo and Ridge in Yelv. and of Mulcarry and Eyres. 1 Cr. Car. 368. Time was given to search Precedents; and on Saturday following it was moved again, and the Court was informed that no Precedents could be found, that the House of Lords had given a new Judgment; but Pemberton insisted on it, that there would be a Failure of Justice, if this Court did not give a Judgment, for the House of Lords could not, having only a Transcript before them, and Judgment could not be given upon a Transcript; and he said, that if they did give a Judgment; that Judgment would be certainly good, and no one could impeach it; and the Case of Faldo and Ridge was cited again: It was answered, that there was no Authority for the Court to give a new Judgment for the Plaintiff, tho' the Judgment for the Defendant was reversed; for notwithstanding there might be Reason to reverse the Judgment for the Defendant; yet it might appear to the Court, that the Plaintiff had no Cause of Action, as in Slocomb's Case, Cr. Car. 319. where Error being brought of a Judgment for the Defendant, it was reversed, being Ideo concessum for Ideo consideratum est; yet no new Judgment was given for the Plaintiff, for it appeared to the Court, that the Words were not actionable; and that the Court of Parliament might give a new Judgment, was cited the Case of Noel and Nelson, 2 Saunders 225. where a new Judgment was given; and Holt Chief Justice cited the Case in F. N. B. 19. D. where in false Judgment in ancient Demesne, the Court of Common Pleas held Plea in a Writ of false Judgment, contrary to Dyer 373. and the Book of Assizes 37. Lib. Ass. 4. there cited; but 4 Inst. 270. agrees with F. N. B. and he said, that the Power to examine the Errors, implies a Power to give a new Judgment, as they did in the Case of Green and Cole,

2 Saund. 252. where it was so taken, though there was not any such Precedent; and the Case of Cook and Gerrard, 1 Saund. 180. was also cited; and after this, it being moved again, the Court declared, that they would not give a new Judgment; upon which the Plaintiff resorted to Parliament, and there obtained a new Judgment, upon the Record in Parliament; the which they carried back thither, after having brought it out of Parliament, in order to lodge it in R. B. but it was never brought into the Office.

Masters *and* Lewis.

6. AT Guildhall: An Attachment is made in the Hands of the Archbishop as Ordinary, and A. B. is summoned to come in as Garnishee; and pending the Attachment, and before Condemnation, an Action is brought in R. B. and upon the Trial, this Attachment was given in Evidence; and it was ruled by Holt Chief Justice, that pending the Attachment, if an Action is brought, the Attachment is not Evidence, for no Property is altered till Condemnation; then it was shewn, that the Condemnation was before the Action brought; and to this it was said, that the Attachment in the Hands of the Archbishop, before the Money by him received, is not good; for he is not suable, and cannot have an Action against the Garnishee; and therefore no Attachment can be in the Hands of the Archbishop, for the Ordinary was not chargeable at Common Law, except Assets came to his Hands; and as he had not such Property, as could maintain an Action before Possession, so he was not chargeable by an Action of any other, till Possession; and he cannot be charged by the Custom, because the Statute of West. 2. which makes him chargeable, was made within Time of Memory; Dyer 247. Cook, Ent. 143, 144. 2 Inst. 398. and a Case was cited to be tried at Guildhall. Hill. 28, 29. Car. 2. where one had a Sum of Money in the City of London, and died Intestate, and a Freeman Creditor attached it in the Archbishop's Hands, before Administration was granted; and it was held that the Attachment might be good; but a Will was produced; a Case was made and referred to Holt Chief Justice.

2 *The*

The King *and the Earl of* Banbury; *devant.*

7. THE Earl of Banbury was indicted for the Murder of Charles Lawson, by the Name of Charles Knollys, Esq; and this Indictment was removed into R. B. by Certiorari; and there the Earl came and pleaded, that he ought not to be compelled to answer to this Indictment, because King James I. by his Letters Patents, under the Great Seal of England gerent. dat. &c. & hic in Curia prolat. created William Viscount Wallingford, Earl of Banbury, habend. to him and the Heirs Males of his Body engendred; that the said William had Issue Edward and Nicholas, and died, and the Earldom descended to Edward, who died without Issue; and the Earldom descended to Nicholas, who had Issue Charles the Defendant, and died, by which the said Earldom descended to him; and so he says that he is Earl of Banbury, & petit Judicium, If not being named so in the Writ, he ought to be compelled to answer to it: The Attorney General to this came and replied, that the said Charles Knollys, by the Name of Char. Earl of Banbury, 4 Dec. 4 Will. & Mar. petitioned the Lords Spiritual and Temporal in Parliament, and shewed that he was indicted, &c. and prayed to be tried by his Peers, & super hoc by the said Peers taliter processum fuit, Quod ordinatum, consideratum, & adjudicatum fuit, that the said Charles had not any Right or Title to the Earldom of Banbury, and that his Petition be dismissed; and averred that this was secundum legem & consuetudinem Parliamenti; and so prayed that he shall answer; to this Replication the Earl demurred, and the Attorney General also; and it having depended several Terms, and having been many Times argued, this Term the Court delivered their Judgment seriatim.

And two Questions were made, First, If the Plea be good; and if the Plea be good, the second Question was, if it be avoided by the Replication; and the Court unâ voce ruled the Plea to be a good Plea, and that the Replication had not avoided it; and the Case was excellently well argued by the Court; but because the Argument of Holt Chief Justice was more explicite than the others, and delivered with greater Reason, Courage, and Authority

rity out of our Books, I have for the greater Part put it into Writing; his Words were to this Purpose.

He said, that the Plea of the Defendant contained a Title to this Earldom, first, by Letters Patents, secondly, by Descent: But three Exceptions have been taken to this Plea; First, He does not shew Banbury to be within England. Secondly, He does not aver himself to be unus Parium hujus regni Angliæ. Thirdly, He concludes, & hoc paratus est verificare, without saying per recordum; and the Plea was ruled good, this notwithstanding; but because some of these Exceptions were much relied on by the Counsel for the King, and reported by them to the Court, scil. Whitehall, as Exceptions of Weight, the Chief Justice was the more large in answering of them; and he considered in what an Earldom consisted, and said that de antiquo we had but two Titles of Nobility in England, scil. Earls and Barons, and the Names of Dukes, Marquesses, and Viscounts, were not then in Use, and shewed their Commencement; Selden's Tit. of Honours 621, &c. He said that an Earldom antiently consisted in his Stile or Dignity. Secondly, In his Office. Thirdly, In his Estate, Possessions, or Revenues. First, His Dignity, scil. the Honour and Nobility, which was annexed to his Blood, and inherent in his Person; and this was always acquired by Letters Patents; and never any Earl was created by Writ, and instanced in the Creation of Milo, by Maud the Empress; Selden's Tit. Hon. 536, &c. Secondly, Their Office, and they are Comites non à Comitatu but à regem comitando, being Counsellors to the King, and for the Nature of their eminent Dignity Conciliarii nati; and they ought to be always ready to counsel and assist the King circa ardua Regni; and therefore a Title of Dignity though in Tail, might have been forfeited for Treason, notwithstanding the Statute de Donis, before the Statute of 26 H. 8. as appears in Nevil's Case, 7 Rep. because the Offence is contra Officii sui debitum. Thirdly, His Possessions or Revenue, and these were antiently either Lands or Rents, which were annexed to the Earldom upon the Creation, for the Support of his Honour and Dignity; and if the Rent was but 20 l. per Ann. yet if such an Earl died, he shall pay Relief of 100 l. for he dies seised de integro Comitatu, though all his Lands are gone but such Rent; but

at this Day no Land or Revenue is annexed to the Dignity; but usually a Rent is mentioned in the Patent to be given by the King, ut honorificentius Dignitatem sustineat; and these are the Particulars of which an Earldom consists at this Day; so that though no Possessions are annexed to the Earldom, or the Name of his Dignity be from a Place out of the Realm, as Albemarl, Angus, as in 39 Ed. 3. 35. where one was an English Peer, though the Name of his Dignity was from a Place within Scotland, and the Earldom of Rivers is a good Title of Dignity; and yet no Man can shew any such Place, so that it is not necessary to have any Place, from which he takes his Name, and à fortiori that such Place shall be within England; for at this Day an Earldom consists only in the Dignity, inherent to his Person and Blood, and to his Office, and the Name is only added as a Distinction, in the Place of a Sirname; and it is not of Necessity to have any Place of such Name, or that such a Place be within this Realm; and therefore tho' it is not shewn that Banbury be within England, it is not material, as it was ruled in Umphrevill's Case, supra 39 Ed. 3. 35. Secondly, As to the Objection that he does not aver himself to be unus Parium hujus Regni Angliæ. He answered, That he pleaded the Letters Patents by which William Viscount Wallingford was created Earl of Banbury, under the Great Seal of England; and the Great Seal of England is an Instrument of Government, used within this Realm, and for the Affairs of the Realm; and when a Man is created an Earl under the Great Seal of England, they cannot intend him to be otherwise than an Earl of England, and a Plea ought to be taken according to a Common Intendment, and they never shall search for a foreign Intendment, scil. that he was a Peer of Ireland, &c. for this ought to be shewn; for if in an Act of Parliament, Ireland shall not be bound without express Words, though the Nature and Reason of the Act extends to Ireland; à fortiori, they will not intend a Man created a Peer, under the Great Seal of England, to be an Irish Peer. It was admitted, that a Man might be created a Peer of Ireland, under the Great Seal of England; but this is by a special Prerogative, and always there are special Words in the Patent added, that he shall be Earl, &c. by the Name of Earl of, &c. in regno nostro Hiberniæ; and by Reason of these Words

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so expressly added, he is an Irish Peer, but not without these Words; in the same Manner, as an Act of England does not bind in Ireland, without express Words; and before the Conquest of Ireland, if a Man had been an Earl, under the Great Seal, it could not be pretended, that he shall be an Earl of Ireland; and what Reason can be given that the Conquest of Ireland had altered the Intendment. Thirdly, As to the Conclusion, he said, that it was good, as it is pleaded; but if it had concluded, as the King's Counsel pretend it ought, it would have been ill; for as Holt Chief Justice said, his Title to the Earldom consists of two Things, the Letters Patents by which William Viscount Wallingford was created Earl of Banbury, which are Matter of Record, and the which he has pleaded with an hic in Curia prolat. so that they being in Court, and not being traversable, for they cannot say non concessit to these Letters Patents, or null tiel record; and therefore they being pleaded, and shewn to be in Court, it would be in vain to conclude, with a prout patet per recordum, in order for Trial of them which are in Court, and should be tried by themselves. And it cannot be denied, but the Conclusion is proper upon the other Part of the Plea, scil. the Descent, which is Matter of Fact and traversable; for if A. be the Son of B. is a Matter of Fact, and triable per pais, in the same Manner as Countess or not Countess, where one is a Countess by Marriage is triable per pais, 6 Rep. 33. and where it was objected, that Peer or not Peer, is triable by the Record, and not per pais, as it is said, 6 Rep. 33. and 8 Hen. 6. 9, 10. cited per Holt; this was but a Fancy of the Solicitor General's sprung from his not observing the Difference; for no Man can be a Peer without Matter of Record, for it ought to be either by Letters Patents under the Great Seal, which is the very common Way at this Day, and by which the Patentee is enabled immediate, though he had never sat in Parliament, or by Writ, by which the Party is not enabled, till he had sat in Parliament; and the which is countermandable by Death, or by the King, by a Supersedeas, before the Sitting in Parliament; but in both these Cases his Nobility commences by Matter of Record, and is Matter of Record; and when a Man pleads any such Matter, he ought to shew a Record of it, i. e. shew the

Letters Patents of his Creation, or otherwise shew some Writ on Record, by which he, or his Ancestors under whom he claims, have been created Peers, or summoned and sat in Parliament; for Peerage is not a Matter in pais to be gained by Prescription, no more than Felons Goods, Deodands, &c. but there ought to be some Matter of Record of it, in the same Manner, as there ought to be some Allowance in Eyre, &c. of the others; and in this Sense, Earl or not Earl shall be tried by Record, scil. he ought to shew some Record, by which he or his Ancestors have been enabled, Nobility not being a Matter, which may be gained by Usage in pais; but if he begins and shews his Title by Record as here, and then makes a Descent, in such Case the Descent never was tried by Record; as if a Man claim Privilege, and bring a Writ as Clerk to one of the Cursitors in Chancery, the being a Cursitor, shall not be tried per pais; for it is on Record, and Matter of Record, but that he is not Servant to a Cursitor, shall be traversed, and tried per pais; and the Writs which were shewn in the Register 287. F. N. B. 247, &c. were but Writs of Privilege, the which a Peer might have to exempt him from being sworn in Assizes, or to prevent his being taken by a Capias, &c. the which Writ being grounded upon the Record is a Certificate in such a Case; also in this Case the Defendant does not claim any Privilege as a Peer, but pleads only a Misnosmer, the which is a sufficient Cause to abate the Indictment, 2 Inst. 665, 666. and they have Conusance of this, and abate Actions, &c. for this Cause every Day; and it is no more, than if one plead in Abatement of a Writ brought against him by the Addition of Esquire, that he is a Knight; and if a Man be to plead his Peerage, it is not necessary to have a Writ, or to say, that he is unus Parium regni; but to plead the Letters Patents, or Writ of Summons of his Ancestor, and shew that he sat in Parliament, and derive his Pedigree from such Ancestor; but a Bishop who is seised of his Barony in jure Ecclesiæ, and is not noble in his Blood, he ought to plead that he is unus Parium regni, &c. And as to the Replication, he said, that the Plea being good, the Replication had not avoided or answered it; for the Defendant has made a good Title to the Earldom, the which is not avoided by the Replication;

First, Because the Replication does not shew any Determination in Parliament. Secondly, This is an original Cause. Thirdly, No Judgment is given. Fourthly, They never had the Cause before them. First, This is not any Determination, for it being by the Lords Spiritual and Temporal, this is not a Determination in Parliament, for the Parliament consists of the King, the Lords Spiritual and Temporal, and the Commons; so that the King being a Part of the Parliament, nothing may be done there as a Parliament where the King is excluded; and this Judgment being pleaded, as by the Lords Spiritual and Temporal, without Mention of the King, it is with an Exclusion; for it being by the Lords Spiritual and Temporal only, as it is pleaded, the King of Necessity is excluded; and this is contrary to all the Entries of Judgments in Parliament; for every one knows that the Lords of Parliament have a double Capacity, scil. as an House when they deliberate and consult, and vote in Matters before them, in the Way of Legislature, or Matter of Privilege: And when they proceed as a Court in a judicial Manner for rectifying of the Errors of inferior Courts, and as a Court, all that they do is by the Authority of the King, and the Stile ought to be, coram Rege in Parliamento, or ad Parliamentum, &c. as Ryley's placita Parliamentaria, Cotton's Records, &c. and any such Judgment as this by the Lords Spiritual and Temporal was never seen, and no Precedent of such a Thing can be produced; for the King is the Fountain of Justice, and no Man may proceed in the Administration of it, but in his Name, or under his Authority; and therefore in the King's Bench the Judgments are not, consideratum est per Justiciarios; for if it was so, it would be void, yet the Judgment is actually given by them; but it is consideratum est per Curiam, in which the King is always present, and the Judgment is virtually, and in the Law, his Judgment; so the Lords Spiritual and Temporal give the Judgment; but it is not their Judgment, but the Judgment is per Curiam Parliamenti coram Domino Rege, &c. Secondly, This is an original Cause, of which they have not Conusance, and therefore the Proceedings are coram non Judice, for a Thing is as well out of a Jurisdiction of a Court, where it comes there before its Time, as where it is beneath it; and therefore

if a Cause comes into R. B. by a Writ of false Judgment, and they proceed upon it, their Proceedings are void, & coram non Judice; and if a Writ of Error be brought in Parliament upon a Judgment in C. B. the Proceedings in Parliament would be void; and this has been often so ruled, and very lately in the Case of the Earl of Macclesfield, who having brought an Action of Scandalum magnatum in the Exchequer, he after brought a Writ of Error in Parliament; and the Matter being examined, and the Court ready to give Judgment, it was objected, that the Cause came there per saltum, for there ought to have been a Writ of Error in the Exchequer-Chamber, upon the Statute of 31 Ed. 3. before that they came into Parliament; and upon this the Court heard Counsel, and the Matter was debated; and after Deliberation upon it, the Court desisted: Also they have not Jurisdiction of the original Cause for another Reason, scil. they are the most supreme Court, and imployed circa ardua regni, and they ought not to be troubled with little Causes, but only upon Necessity, where a Failure of Justice is in the inferior Courts; for all Causes generally consist more of Matters of Fact, than of Law, and it is beneath the Dignity of their Lordships, to be troubled with Matters of Fact; this is not that the Law does not deem that their Lordships are able to examine Matters of Fact, but that another Way more fit is appointed to be used in this Case, the which is by a Jury, whom the Law intends to be conusant of the Truth of the Matter; and therefore the Law requires, that they come out of the Neighbourhood, and not only so, but out of the Vill, because vicini vicinorum facta scire præsumuntur; but their Lordships are in a superior Orb, and the Law does not presume, that they are so well informed of these Matters; and therefore if a Writ of Error be brought in Parliament, in which there is an Error in Fact, this shall not be tried in Parliament, but in R. B. and for what Reason? Because the Lords in Parliament cannot try a Matter of Fact; and therefore the Court of R. B. for the Necessity of the Matter, shall reverse their Error in Fact themselves; but if Error in Fact be in C. B. and a Writ of Error be upon this brought in R. B. this Error in Fact shall be reversed in R. B. also the Lords in Parliament are the dernier Resort, and are to redress

the Errors of all other Courts; and therefore a Cause shall not come there in the first Instance, for this would deprive the Party of his Remedy by way of Appeal, or Writ of Error; and it is the Wisdom of this Nation, and as he believed, of all Nations, to give to the Party an Appeal, and not to conclude his Right upon the first Trial. Thirdly, The Lords have not given any Judgment in this Case, for it is only, that he has not a Right to the Earldom of Banbury, the which is but an Opinion and no Judgment; in Courts of Equity, it is true, the Dismission of the Bill, is the Determination of the Cause; but in a Proceeding at Law, if a Court declares, that the Party has not a Right to recover, or says that the Defendant eat inde sine Die; yet this is not a Judgment against the Plaintiff, but such Judgment would be erroneous without saying, Nil capiat per Billam, 2 Cr. 284. and so in a Quo Warranto it is not sufficient to adjudge, that the Party has not a Right to a Thing which he has usurped, but he ought to be concluded from it by a Judgment. Fourthly, the Lords have not any Cause before them; this was only a Petition of the Earl to be tried by his Peers, the which is a Matter of Privilege, of which they have Conusance, but the Right of Earldom never was before them, or submitted to their Judgment: He as Earl of Banbury petitions, (as a Member of the Body of the Peers of England, and being under an Accusation for a Crime) to be tried by his Peers, this Petition asserts him to be an Earl, he does not put that in Question before them, and therefore their Sentence is more than they had before them to determine; he did not demand if he be an Earl, or no; he supposed it by his Petition, and the Title to the Earldom is not brought in Judgment before them; and therefore their adjudicatum est, consideratum est, & ordinatum est, is not founded upon any Matter, submitted to their Conusance, but totally beyond the Demand of the Petition; he demanded to be tried by his Peers, and asserts himself to be a Peer; and they answer, that he has not a Right to the Earldom of Banbury, the which is a Thing out of the Petition, and of which the Lords had not any Jurisdiction; the Earldom of Banbury is an Inheritance, and the Inheritances of the Peers in their Honours, are determinable by the same Law, and in the

same Manner, as those in their Lands; and the Lords have not, or ever had any Right to determine of them, and the Counsel for the King have not produced, and he supposed cannot produce any Instance where the Peers have determined of such a Matter; he admitted that they have determined Matters of Privilege, and Precedency between their Members; but the Right of Inheritance of a Peer, never was determined by the Lords, but is determinable according to the Course of the Common Law, as all other Inheritances are; and the Case of the Lord Willoughby in Jones 96. was upon a Reference by the King; for the Way is for a Peer to sue to the King by a Petition, the which is a Petition of Right; and upon this the King, if the Party submits to his Determination, refers it to the Lords, who examine it, and make their Report to the King, and upon their Report the King makes a Determination; but if the Party does not submit the Matter to the King, or does not abide by his Determination; then the King ought to indorse his Petition with a soit Droit fait, and send it into Chancery; and it being there, a Commission ought to issue to examine the Matter of the Petition; and this being found, then the Attorney General ought either to traverse the Matter, or demur; and if he traverse, it ought to be sent into R. B. and tried there; Standford's Prerog. 72, 73. and he said that in all Cases where the Party has an Injury by the King, he has his Petition of Right; and instanced in a Case of a Petition of Right in the Nature of an Action on the Case, in which the Party complained of Sluces made at Nottingham, by which the Water was diverted, &c. so that the Subject has his Remedy in these Cases by the Common Law of England, in an ordinary Course in the Courts of the King; and they are not determinable before the Lords in Parliament, except when the Party becomes remediless by Default of Justice in the inferior Courts; and the Lords have not one Law to determine the Right of their Inheritance in their Dignities, and another to determine their Inheritance in their Estates; but if the Creation of their Honour be in Question, this ought to be tried by Matter of Record; if the Derivation of this Right be denied, scil. as if such was the Ancestor of such, the which is a Matter of Fact; this shall be tried by a Jury,

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as other Matters of Fact shall; and the King's Counsel have not produced any Precedent of a Determination of a Right of Peerage by the Lords; the which they would have done, he supposed, if there were any such Precedent, and that which never had been done he supposed could not be done; and having spoke upon the four Points which he considered upon the Replication, he proceeded to consider the Allegation, that this Judgment was secundum legem & consuetudinem; and as to this he said, that he did not know any Reason for this Allegation, which the King's Counsel had inserted, if it was not to frighten the Judges; but he said that he did not regard it, for though he had all Respect and Deference for that Honourable Body, yet he sat there to administer Justice according to the Law of the Land, and according to his Oath, and that he ought not to regard any Thing but the Discharge of his Duty; and as to the Law and Custom of Parliament for the Determination of Inheritances, he knew not any but the Common Law of England, the which is the Birthright of every Englishman; and he would be glad to be satisfied by any Man, if there be any such Custom and Law of Parliament, where it is; for a Custom ought to consist in Usage, and he desired to see the Precedents of such Judgments; and as to the Law of Parliament, he did not know of any such Law, and every Law which binds the Subjects of this Realm, ought to be either the Common Law and Usage of the Realm, or Act of Parliament, Nec super eum ibimus, nec super eum mittemus nisi per legale judicium parium suorum, aut per legem terræ; and therefore the Earl of Banbury cannot be ousted of his Dignity but by Attainder, or Act of Parliament, or Judgment in a Scire facias upon his Patent; but if there was any such Law and Custom of Parliament, [the which Mr. Attorney said was inter arcana imperii, which is a strange Notion of a Law, though it may be good in Politicks; and for which the Lords would not thank him, when they considered that the Law which governs the Inheritance of their Dignities is inter arcana, for misera est servitus ubi jus est vagum & incertum,] yet when this comes incidently in Question before them, they ought to adjudge and intermeddle with it, and they adjudge Things of as high a Nature every Day; for they

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construe and expound Acts of Parliament, and adjudge them to be void; they discharge Men committed by Parliament upon a Prorogation, they adjudge of Privilege of Parliament, and instanced in the Case of Sir George Binion, and Sir John Evelin in C. B. where the Question was, if the Filing of an Original during a Session, against a Member, be a Breach of Privilege; and adjudged no Breach; and he said that they did but march in the Steps of their Predecessors, who have adjudged and determined of Matters of as high a Nature as this; and he cited the Case out of an Oxford Manuscript, where upon a Counterplea of Voucher, the Court of C. B. was divided in Opinion; and upon this there was an Order by the Lords, that they should adjudge the Counterplea good; but when this Order came into C. B. Parning Chief Justice refused to give Judgment, but Chard in his Absence took an Opportunity, and gave Judgment, upon which a Writ of Error was brought, and all this Matter shewn in R. B. and that there was an Order by the Lords, &c. but the Court did not regard it, but reversed the Judgment; and he said, that the Journal of the Lords, is not any Record, but Notes and Memorials for the Clerks to perfect and enter the Record, and cited Hobart ; and so the Judgment which they have shewn in their Replication, is not any Judgment or Determination in Parliament; and if it was, yet it is in an original Cause of which they have not Conusance, and of a Matter which was not submitted, or before them for their Determination, and they have not given any Judgment, by which he shall be barred or excluded from his Peerage; and he having made a good Title in his Plea, the which is not answered or avoided by the Replication, it appears that he is a Peer, and ought to be indicted by his proper Name, scil. Charles, Earl of Banbury; and being indicted by the Name of Charles Knollys, Esq; this is a Misnosmer, for which the Indictment ought to be abated; and therefore he ruled, that it be abated.

The other Justices argued to the same Purpose, tho' not so particularly; and it was said, that the Lords are publick Persons, in whom all the Subjects have an Interest; and therefore they cannot alien, or extinguish their Inheritance in their Peerage by a Fine, as was resolved in the

the Case of the Lord Purbeck; for in such Case Peerage would be taken away without the Consent of the King; and the King is the Fountain of Honour, and a Peer may not be deprived of his Peerage, without his Consent; and the Lords can only do that which they can do by Law; and if they exceed their Authority, their Proceedings are void; and of a Thing which is void, every Man may take Advantage; and Cotton's Records, and 4 Inst. 355. were cited, that a Peerage cannot be taken away but by Act of Parliament.

Jerman *and* Orchard; *in Cam. Scacc.*

8. IT is in a Writ of Error upon a Judgment given in the King's Bench, in an Action of transgr' vi & armis, wherein the said Philip Jerman and Sarah his Wife are Plaintiffs, and the said Mary Orchard Defendant; the Plaintiffs declare that the Defendant 1 Septemb. in the Year 1672. with Force and Arms, the Closes and House of the Plaintiffs, in the Parish of Mary Magdalen in Taunton, in the County of Somerset, did break and enter; and the Plaintiffs from their Possession did amove, and their Possession from the said first of September, until the Bill exhibited, scil. the sixth Day of May 1685. did keep and with-hold; by Reason whereof they lost the Profits of the Premisses, which they lay to be to their Damage 100 l.

The Defendant as to the Force and Arms hath pleaded Not guilty; and hereupon Issue is joined.

And as for the Residue of the Trespass, she pleads that the Closes and House, at the Time of the Trespass supposed, were one Cottage, and two Acres of Land in Shuttern near Fleetbridge, in the Parish of Taunton Magdalen; and as to all the Trespass before the first of September 1678. she says that the Bill was exhibited in Easter Term, in the first Year of King James II. and not before; and that she is not guilty of any Trespass within six Years before the Bill exhibited.

And as to the Residue of the Trespass she pleads, that before the Plaintiffs had any Thing in the Premisses, Sir William Portman was thereof seised in Fee; and the 20th of March 1632. demised the Premisses to

John Trowbridge, by the Name of a Cottage, or Barn, and two Acres of Land, habendum for 1000 Years, from the Feast of the Purification next before, by Virtue whereof Trowbridge entered, and was possessed; and that afterwards he assigned all his Estate to one Thomas Nicholas, that Thomas Nicholas 20 April, 15 Car. 2. assigned it to Thomas Nicholas his Son; that Thomas Nicholas his Son 10 Jan. 1694. died Intestate, and Administration of his Goods and Chattels was committed to Thomas the Father; that Thomas Nicholas the Father being so possessed as Administrator the 9th Day of March, 17 Car. 2. per Indenturam hic in Cur' prolat. (reciting the Lease made by Sir William Portman, and reciting that the Indenture, Demise and Estate in the Premisses were vested in the said Thomas Nicholas the Father, and the Assignment to his Son, and the Dying of his Son Intestate, and Administration being granted to Thomas the Father;) the said Thomas the Father for natural Love and Affection to the Defendant Mary his Grand-daughter, granted, assigned, and set over to the said Defendant, her Executors, Administrators, and Assigns, all his Estate in the Premisses, by the Name of a Cottage, Barn, and two Acres of Land, and the said recited Lease, and all Writings and Evidences concerning the Premisses, by Virtue whereof the Defendant entred, and gives Colour for the Plaintiffs to enter; and that the Defendant entered upon them, as she lawfully might.

To this the Plaintiffs come and reply; and as to the Defendant's Plea upon the Statute of Limitations, they demur.

And as to the Residue say, bene & verum est, Sir William Portman made the Lease for 1000 Years to Trowbridge, that Trowbridge assigned to Thomas Nicholas the Father, who assigned to Thomas his Son, who died Intestate, and the Administration of his Estate was granted to Thomas his Father; and they further set forth, that afterwards, scil. the 1st of May 1674. Thomas Nicholas the Father died Intestate; and that the 19th of June 1674. Administration de bonis non of Thomas the Son, was committed to Sarah the Plaintiff, being his Sister; and that they entered by Virtue thereof, and were possessed, till the Defendant entered, and committed the Trespass; absque hoc, that Thomas Nicholas the Father,

ther, granted, assigned, and set over to the Defendant all his Estates in the Premisses modo & forma prout the Defendant hath alledged in her Plea.

The Defendant as to the Demurrer upon the Plea of the Statute of Limitations, joins with the Plaintiffs.

And as to the Residue, she rejoins and pleads that Thomas Nicholas, the Father, granted, assigned, and set over the said Cottage, Barn and Lands, and the said recited Lease, and all Writings and Evidences concerning the Premisses, prout in the Plea; and hereupon Issue is joined, and a Venire facias is awarded, whereupon a Trial is had, and a special Verdict given, where the Jury find, that Thomas Nicholas the Father, was possessed of the Term, as in the Plea is alledged; and they find likewise the Indenture made the 9th of March, 17 Car. 2. in hæc verba; by which the said Thomas Nicholas the Father, reciting as in the Plea is set forth, doth grant, assign, and set over to *Mary* the Defendant, her Executors, Administrators, and Assigns, all the said Cottage, Barn and Lands, and all and singular other the Premisses before recited, together with the said recited Lease, and all Writings and Evidences concerning the Premisses, *habendum* the said Cottage, Barn, and Premisses, immediately after the Death of the said *Thomas Nicholas* the Father, and *Mary* his Wife, for, and during all the Rest and Residue of the said Term of 1000 Years, which shall be then therein to come, and unexpired: And the Jury find likewise the Rest of the Indenture in hæc verba; and conclude, that if upon the whole Matter, the Court shall be of Opinion that Thomas Nicholas the Father did not assign; then they find he did not assign, and assess Damages for the Plaintiffs; and if the Court shall be of Opinion that Thomas Nicholas the Father did assign, then they find he did assign; and then the Plaintiffs come, & gratis cognoscunt se ulterius nolle prosequi, pro aliquibus damnis on the first Issue, or on the Demurrer, Et ulterius prosequi pro damnis illis omnino deadvocant & recusant; Ideo eadem Maria sit inde quiet', & eat inde sine die, as to the Damages upon the first Issue and Demurrer: But as to the Issue, upon which this special Verdict is found, the Court have given Judgment for Jerman and his Wife, who were Plaintiffs in the original Action, upon which Judgment the Defendant hath brought his

Writ of Error before your Lordships, and hath assigned the general Errors. And my Lord, I humbly conceive it is an erroneous Judgment; for if by the Indenture found by the Jury in hæc verba, any Estate in præsenti or futuro did pass to Mary Orchard: Then Thomas Nicholas assignavit, and Judgment ought to have been given for the Defendant: And I conceive with humble Submission, that an Estate either in præsenti, or by Way of future Interest, did pass by that Indenture: To prove this, I shall by your Lordship's Favour consider first this Indenture, as it stands upon the Recitals and Premisses by themselves without the Habendum; and in the next Place, I shall consider the Recitals, Premisses, and Habendum together: And my Lord, I suppose it will not be denied me, that if there are in the Premisses of the Deed, sufficient Words to carry the whole Estate and Interest of Thomas Nicholas to Mary his Grand-daughter, that whole Estate being vested by the Premisses, cannot be destroyed by the Habendum; for an Habendum cannot frustrate a Grant, that was complete before, but will be repugnant, Hob. 171. and 'tis likewise so resolved in Goshawke and Chickell's Case, in Justice Jones's Rep. 205. and in Welden and Elkinton's Case, in the Com. 520. And my Lord, I hope there are sufficient Words in the Premisses of this Deed, which being taken in Construction together with the Recitals, will amount to a compleat Grant of his whole Interest; and as to this Purpose, the Case is no more in Effect than this, Thomas Nicholas by Indenture reciting a Demise from Sir William Portman, to John Trowbridge for 1000 Years, of a Cottage, Barn, and Close; and reciting that the said Lease and Indenture, Term and Estate, is settled and vested in him, and that he is lawfully interested therein; for the Residue of the Term, grants all the said Cottage, Barn, and Lands, and all and singular other the Premisses therein before recited, or mentioned, together with the said recited Lease; and all Writings and Evidences concerning the Premisses, to *Mary* his Grand-daughter, her Executors, Administrators, and Assigns. Here my Lords, the Cottage, Barn and Lands, which are the demised Premisses, are particularly enumerated, and the said recited Lease, and all Writings and Evidences concerning the Premisses are granted likewise by express Words; so that the Lands them-

themselves being particularly mentioned, and the Lease, and all Writings and Evidences concerning those Lands: These Words all and singular other the Premisses herein before recited or mentioned, must refer to the Term and Estate recited and mentioned before, or be totally rejected; it cannot be applied to the Lease it self, for that is granted by express Words, and so are all Writings and Evidences concerning the Premisses; it cannot be applied to the Cottage, Barn and Lands, with the Appurtenances, for they are all likewise expressly granted before; and other the Premisses, with humble Submission, must be something different in Nature and Quality from what was mentioned before, as is resolved in Mildmay's Case, 1 Rep. 177. and in Miller and Manwaring's Case, Cr. Car. 400. And my Lord, these Words, all and singular other the Premisses before recited and mentioned are as operative, and comprehensive Terms as could well have been put in; the Word Premisses of it self is a Word of a very large Signification; in Dive and Manningham's Case in the Com. 67. prærecitata, infra contenta, infra expressa, & præmissa, are holden to be synonymus Terms; and in Lyford's Case, 11 Rep. the Import of the Word Præmissa is considered again; and there Præmissa is taken to signify as much as Prædimissa, or Præconcessa, and to extend to all the Premisses before demised or granted, if in a Lease or Grant; and to Præconfirmata in a Confirmation, as was resolved in the Case of the Earl of Pembroke and Syms, cited in Lyford's Case; and my Lord Hob. in the Earl of Clanrickard's Case, Hob. 276. says, that Præmissa in its full and large Sense, is as much as Præmentionata or Prænominata. My Lord, if the Word Præmissa be of it self of such a large and extensive Meaning, as to take in and comprehend, Prædimissa in a Lease, Præconcessa in a Grant, Præconfirmata in a Confirmation; and if a Deed operate partly as a Grant, and partly as a Confirmation, to signify as much as Præconcessa & præconfirmata, à fortiori in our Case, the Words before recited and mentioned Premisses, will carry such Things as are before recited and mentioned, as the Term and Estate in these Lands were particularly; for 'tis shewn by way of Recital that the Term and Interest of 1000 Years granted to Trowbridge, was vested in the Grantor, and that he was interested therein for the

Remainder of the said Term; so that it is as plainly and fully recited, and set forth, as it can be. And my Lord, it will be no new Construction of the Word Premisses, to make it signify the Term and Interest in the Land, as well as the Land it self, as was resolved in the Case of Onesley and Fisk, reported by my Lord Chief Justice Anderson in his 1 Rep. 236. and abridged by my Lord Chief Justice Hale in his Common Place in Lincoln's Inn Library, Tit. Exposition, plac. 195. My Lord, I shall put the Case as it is in that Abridgment, A. makes a Lease for Forty Years to B. who assigns to C. C. by Indenture grants to D. all his Right and Interest in all the Lands nuper dimiss. per A. to B. and covenants with D. quod præd. præmissa tunc fuer' & continuarent discharged of all former Incumbrances made by C. and that he was lawfully Owner of the said Indenture, Demise, Term and Premisses, whereas in Truth C. before the Assignment had made a Lease of Part of the Premisses to F. and 'twas ruled a Breach of Covenant, for the Word Premisses doth not go only to the Estate, or Term assigned, but to the Land it self, which was incumbred by the precedent Lease; these are the very Words of that Abridgment. And my Lord, if in that Case the Word Præmissa did comprehend the Term and Estate, præmissa, prærecitata, I humbly hope, will do it much more in our Case, where the Term and the Estate are particularly recited and set forth; and there is nothing else to which these Words can be applied, and your Lordship will reject no Part of the Sentence, but let every Word have its due Effect and Use, if it be possible to be done. And my Lord, these Words seem to be put in for that very Purpose immediately after the Lands themselves, to pass the Estate and Interest in the Lands: But, my Lord, if that should be against me, yet I hope that this Deed being taken all together, upon the Premisses and Habendum, it shall operate by Way of Grant of a future Interest, to commence in Possession upon the Death of Thomas Nicholas: And here my Lord, I will by your Lordship's Favour, in the first Place see how this Case would have been, supposing the Words, from and after the Decease of the said Thomas Nicholas, had been left out, and then it would have been no more than this; A Man reciting a Lease for 1000 Years made to J. S. of a Cot-

a Cottage, Barn, and Close, the Term and Interest whereof is vested in himself, for the Residue of the said Term, grants the said Cottage, Barn and Close to another, Habendum the said Cottage, Barn, and Premisses to the Grantee, his Executors, Administrators, or Assigns, for and during all the Rest and Residue of the said Term; and if this had been the Case, I suppose there would have been no manner of Question, but it had been a good Assignment: In the next Place, If your Lordship pleases, we will see what Alterations these Words, from and after the Decease of the Grantee, have made; and my Lord upon these Words the Case is thus, J. S. reciting a Release made in the Year 1632. for the Term of 1000 Years, which is vested in him for the Residue of the said Term, by Indenture bearing Date in the Year 1664. when only Two and Thirty of the 1000 Years were expired, grants the said demised Premisses, Habendum to the Grantee, his Executors, Administrators, and Assigns, from and immediately after the Death of the Grantor, unto the End of the Term, and for and during all the Rest and Residue of the said Term of a Thousand Years, which shall be then therein to come and unexpired. And here, my Lord, I suppose it will be objected that these Words, from and after the Death of the Grantor, have frustrated the whole Deed; so that whereas without these Words, 'tis plain the Grantee had took an Estate for 968 Years; yet the Interposition of these Words, whereby at most the Commencing of this Grant in Possession is deferred but during the Life of the Grantor, hath totally destroyed this Estate, and rendred the whole Deed and Intention of the Parties void, and of no Effect: This is what I suppose will be contended for on the other Side, but I humbly conceive it is very hard Law, and I hope will be so thought by your Lordship. My Lord, I must acknowledge the Cases of Feoffments, Habendum after the Death of the Feoffor, and other like Cases of Freeholds; Habendum after the Death of the Grantor, or after such a Term of Years, as in Buckler's Case in the 2 Rep. where the Habendum makes the whole Deed void, to be Law. But my Lords, the Reason of those Cases will not hold here; a Freehold cannot expect, but must pass in præsenti, when ever the Conveyance by which it is to pass, hath its full Execution, be it by Livery, Attornment,

tornment, or other Ceremony; and therefore a Man cannot make a Lease for Life, to commence after the Death of the Grantor; for if Livery or Attornment be had presently, the Estate will vest presently, if after the Death of the Lessor, it comes too late; for without Livery, or Attornment in the Life of the Lessor and Lessee, Grantor and Grantee, the Lease and Grant are void, Litt. Sect. 66, 551. But a Lease for Years to commence after the Death of the Lessor is unquestionably good; and in the Interim the Lessor continues in Possession, and his Estate in the same Plight it was before, only 'tis charged with a future Interest; if this be so in the Case of Tenant in Fee? why may it not be so as well in the Case of Tenant for Years? and why may not Tenant for Years in such a Case as ours, make a Lease to commence after his Death? as for the Purpose for 500 Years. And my Lord, I humbly conceive that such a Lease will be certainly good, and was resolved so in Locroft's Case, cited in the Rector of Cheddinton's Case, in the 1 Rep. 155. But it will be said, if Tenant for 1000 Years lease for 500. to commence after his Death, that is good; but if he grant the Land, Habendum from and after his Death, for the Residue of his Term, that is void for the Incertainty; 'tis not said for what Incertainty: Is it incertain whether he shall ever take any Thing by the Grant at all or not? or is it incertain, because at the Time of the Grant it is not known, for how many Years he shall take? the first of these, if there were such an Intertainty, might perhaps be a Reason to make void the Grant; the Second with Submission will be none; for though it be incertain at the Time of the Execution of the Grant, for how many Years it is made; yet it will be certain enough at the Time when the Grant is to take Effect in Possession; and it is not of Necessity it should be certain at the Time of the Making of the Grant, as if a Lease be made to J. S. for so many Years as J. N. shall name, that will be good; yet there is no Certainty at the Time of the Executing the Deed. If a Man reciting that J. S. hath a Term for 500 Years in the Manor of Dale, and likewise reciting that he himself hath a Term for 1000 Years in divers Lands in Sale, grants those Lands to commence after his own Decease, Habendum for so many Years as J. S. shall then have in the

Manor

Manor of Dale. My Lords, with humble Submission to your Lordships, I should think such a Lease would be good; and if Tenant for Years may make a Lease for Years, to commence after his Death, as that I think is no Question but he may; and if Tenant for Years may make a Lease to commence after his Death, Habendum for so many Years as J. S. shall then have in the Manor of D. which I humbly offer to your Lordships Consideration if he may not, then by the same Reason as he may make a Lease to commence after his Death, Habendum for so many Years as J. S. shall then have in other Lands, he may make a Lease Habendum for so many Years as shall be to come after his Death in his own Lands; for when the Grantor is dead, and the Lease is to commence in Possession, it may as certainly be known how many Years are to come in the Lands granted, as it can be how many Years J. S. then hath in the Manor of D. Et certum est quod certum reddi potest. But my Lord, it may be further objected, that the Grantor only having a Term for Years in those Lands, and having granted these Lands, Habendum from and after his Death, for the Residue of the Term, he having reserved the Lands to himself for such Time as he shall live, he hath reserved to himself as much or more, than he hath granted; for as 'tis said in Welden and Elkington's Case, in Com. 520. Time for Life is greater than Time for Years; if it had been said, that an Estate for Life is greater than an Estate for Years, it would have been true to many Purposes; for the Freehold coming to the Term, though for 1000 Years, will merge it; but my Lord, here he continues Tenant for Years still, notwithstanding he hath reserved the Lands to himself during his Life; and therefore it is properly said in the Com. Time for Life, not an Estate for Life, is greater than Time for Years. But, my Lord, though it be in that Place a proper Expression, yet I humbly conceive it will be hard to maintain it true in such a Case as ours; for my Lords, it appears to your Lordships upon the Face of the Deed found by the Jury, that at the Time of the Grant, there were above 960 Years of the Term to come; and the Grantor having these Lands for this Term, grants the Lands to the Grantee, his Executors and Administrators; Habendum to him, his Executors and Administrators,

from and after the Decease of the Grantor: It is plain as I put the Case at first, if from and after the Decease of the Grantor had been omitted, all had past; but by these Words, he hath retained the Lands during such Time as himself shall live, perhaps it will be objected that this may be as long as the Lease shall last; and therefore 'tis incertain whether the Grantee shall ever take any Thing by the Grant or not, and therefore 'tis void. My Lord, this Objection contradicts the Course of Nature, and the Experience and Observation of all Mankind, for above these 4000 Years; for since the Floud, where have we heard of a Man that hath out-lived 960 Years? It is said indeed in Br. Tit. Grants 154. and in another Book of his, called Petit, Br. cap. 437. That if a Man be possessed of a Term for 40 Years, and grants so many of them as shall be to come after his Death, that such a Grant hath been holden void for the Incertainty, for the Grantor may live all the Years, and then nothing shall be behind after his Death; and this Case is often cited in our Books, but is no where adjudged that I find; and Br. himself both there, and likewise in the little Book, (where it is fuller put than in his Abridgment) makes a Quære of it: But my Lord, I shall not dispute that Case, it stands upon the Reason there given; the Grantor may live out the 40 Years, so there is at most but a Possibility for the Grantee; and therefore it may be reasonably enough said, the Grant is void, for the Incertainty, whether ever the Grantee shall take any Thing by the Grant or not: But my Lord, as this Case is an Authority to make such a Grant void, because the Grantor may out-live the Term; so my Lord, where there is an apparent Impossibility that the Grantor should out-live the Term, as there is here, the Grant will by the contrary Reason be good; and my Lord, in many Cases the Law makes a Difference between long and short Terms, of which I might give many Instances, were I not afraid I had already spent too much of your Lordship's Time; as Br. Mortmain pl. 39. a Lease for 400 Years to a religious House is Mortmain, for 99 Years is not; so in Crocker and Kelsey's Case, Cr. Jac. 688, 689. if a Feme Jointress upon the 11 H. 7. lease for twenty-one Years 'tis good; if for 500 Years, 'tis an Alienation within that Statute; and the like Difference was taken in the

Common Pleas, Mich. 13 Car. 2. in the Case of Hemmings and Brabanson, where the Case was, the Earl of Meath let the Lands in Question to Underwood, Habendum from Michaelmas next following for 81 Years, if A. should so long live; and from and after the Day of the Death of A. to the same Lessee for Thirty-one Years; the Lessee entred before Michaelmas, and continued in Possession, till after the Lessor entred upon him; and he being out of Possession by Deed sealed off the Lands, assigned his Interest to the Plaintiff, upon whom the Defendant entred, and the Plaintiff brought his Action; there was a special Verdict found, and adjudged for the Plaintiff; in this Case it was objected, that the Term for Thirty-one Years was a contingent Interest upon the Dying of A. within the Eighty-one Years, for he may outlive it; but it was holden by my Lord Chief Justice Bridgman, that if the first Lease was for Thirty Years, or some short Time, if A. lived so long, it were merely contingent, because probably A. might out-live the Term; but being for Eighty-one Years if A. lived so long, that made a Difference; and to this all the Judges agreed: So my Lord in the present Case, if this Grant had been of a small Term, such as in Reason a Man might be supposed to out-live, the Habendum from and after his Decease might make the whole Grant void for that Time; for his Life might be as great as the Time for so few Years; but being so long a Term as this is, I humbly conceive an Interest passes in futuro by the Grant, and that his keeping it for the Time of his Life, cannot be taken for so many Years as the Term shall last, and then the Habendum only shall be taken for a Qualification or Restriction of the Generality of the Premisses, and not a total Frustration of them. Besides, my Lord, as to this Point, we now suppose the Term did not pass by the Premisses of the Deed; and if it did not, then this is a Grant of the Land only, Habendum after his Death, and Roll, in his Abr. Tit. Grants 66. takes the Difference between Granting of the Term and Granting of the Land it self after his Death; if he grant the Term, Habendum after his Death, the Grant is good upon the Premisses, and the Habendum is void; but says the Book, if it had been a Grant of the Land, Habendum after his Death, that had been good, which is expressly

our Case in Point: Besides, with humble Submission, the Words, Term, Estate, and Interest, are not so necessarily required in a Feoffment, or Lease; but that by the Grant of the Thing it self, the Estate of the Grantor passes inclusively together with it; as if a Man seised in Fee of Black Acre, gives Black Acre to J. S. and his Heirs, J. S. hath a Fee in Black Acre, though the Words, and all his Right, Estate, and Interest be not put in, 1 Inst. 7. a. and if by the Gift of Black Acre, to one and his Heirs, the Estate and Inheritance passes from Tenant in Fee, why by the Assignment of Black Acre to one and his Executors, by Tenant for Years, shall not the Term and Estate of Tenant for Years pass? In 1 Leon. 98, 99. 'tis holden by Popham, that if a Man be Tenant by Elegit, or Statute of Lands in D. and not having other Lands there, grants all his Lands in D. the Interest which he hath as Tenant by Elegit or Statute, shall pass by the Word Lands; if it be so there by the general Words, all his Lands, it will be so à fortiori here, where all his said Cottage, Barn, and Lands, are particularly named. In the Case of Edwards and Denton reported by Serjeant Moor, pag. 832. upon a special Verdict, the Case was thus, one seised of the Manor of Catesmarsh in Fee, and of other Lands in Fee in Catesmarsh; and also of a Term for Years in Catesmarsh, conveys the Manor by special Name, and the other Fee-simple Lands by special Name; and then come these general Words, and all other his Lands and Tenements whatsoever in Catesmarsh; and the Question was, whether the Lease for Years passed; and upon this the Court was divided; Justice Croke and Justice Williams were of Opinion, that the Term did not pass; Justice Yelverton and my Lord Chief Justice Fleming held, it did pass; in that Case it was adjudged afterwards, that by those Words the Term did not pass; and the Reason given will prove that in our Case it will pass; for there the Habendum was to the Grantee and his Heirs, and therefore they construed it, that nothing should pass but what the Heir should take; but if the Word Executors had been in there, 'tis plain from that Case the Words, all his Lands and Tenements, had conveyed the Term: In Br. Abridgment, Tit. Grants, pl. 155. it is said, that if a Man grant Omnia terras & tenementa sua in D. a Lease for

Years shall not pass; but in Bracebridge and Cook's Case in the Com. 424. that Case in Br. is denied; and 'tis there resolved that a Grant of all his Lands and Tenements shall make the Interest for Years to pass; and in Hill. 22 & 23 Car. 2. in Scacc. upon a special Verdict there found before my Lord Chief Justice Hale, then Chief Baron, in an Ejectment, between Smith and Touchet; the Case was, Daniel Blagrave reciting an Order in Chancery, dated the 15th of Octob. 12 Car. 2. and an Indenture of Demise of the 23d of November following, made to him by the Mayor and Burgesses of Reading, of a Mansion-house, Meadow, and other Lands there particularly mentioned, lying in such a Parish, grants the said Mansion-house, Meadow, and other the Lands in the said Demise mentioned, and all his Estate, Term and Interest, in and by the said Indenture to him granted; whereas in Truth there was no such Lease by the Mayor and Burgesses, and so no Term, Estate, or Interest granted to him; but forasmuch as he had a Term for Years in the said Mansion-house, and Land particularly named, tho' not by the Indenture recited, and he granted the said Mansion-house, and Land; it was adjudged in that Case, that his Term and Interest in the House and Lands passed by the Grant of the House and Lands themselves, which is a stronger Case than ours, where the Term and Interest is truly recited, and the Parcels plainly and fully described and enumerated; and therefore, I humbly conceive that both by the special Words, of all his said Cottage, Barn, and Lands, and the general Words, all and singular other the Premisses herein before recited or mentioned, the whole Term and Estate is well assigned upon the Premisses of the Deed; and being so, shall not be made void by the Habendum, as is holden by my Lord Hobart, and those other Books I cited before; the Term signifies not only the Limitation of Time, but the Estate and Interest which passes for that Time, as it is said by my Lord Cook, 1 Inst. 45. so that when Tenant for Years hath granted his Term, he hath granted his Estate and Interest for the whole Time that he hath in it, and the Habendum which limits any Estate to himself again, is repugnant and contrary to what he hath done before; but when Tenant for Years grants the Land, this he may limit for Part of the Years, or for all,

or Habendum after his Death, as Roll, Tit. Grants 66. is expressly. My Lord, I hope that both by the Words, all and singular other the Premisses herein before mentioned and recited, and likewise by the Words, all the said Cottage, Barn and Lands, the whole Estate and Interest of Thomas Nicholas, passed by the Premisses of the Deed, and that it was a full and complete Grant to Mary, her Executors and Administrators in præsenti upon the Premisses; and if so, then my Lord it cannot be avoided by the Habendum, though it be a void Habendum, as my Lord Hobart, and those other Books I cited at first are; and my Lord, if the Term shall not pass by the Premisses, then it cannot be said to be granted in the Premisses; and then the Grant is only of the Land, Habendum after his Death, which according to the Difference taken in Roll, Abridg. mentioned before, is good: And my Lord, the rather in such a Case as ours, where it appears upon Record before your Lordship, that at the Time of this Grant, the Grantor had an Estate in the Land for above 960 Years; so that the Words, from and after his Decease, cannot with the least Colour of Reason be said to amount to a Reserving of it to himself, during the whole Term; and then if Time during his Life cannot be an Interest equivalent to 960 Years, an Interest to commence in futuro after his Decease, must pass; and which though incertain, at the Executing of the Assignment, was certain enough when the Time came, that it was to commence in Possession; and it is not of Necessity it should be certain at first; and if such an incertain Interest, to be made certain ex post facto, passed by the Assignment, then the Deed was not void; but Thomas Nicholas assignavit, and the Issue is found for the Defendant; and Judgment ought to have been given accordingly in the Original Action; and being given for the Plaintiff is erroneous; and I humbly pray your Lordship it may be reversed.

Afterwards in Trinity Term following, this Case was argued seriatim by all the Judges, and the Judgment was reversed by the Opinion of Treby Chief Justice, Atkyns Chief Baron, Nevil and Rookby Justices, and Turton and Letchmere Barons, Powell Justice, and Powell Baron, being econtra; and they all delivered their Judgments seriatim, but Atkyns Chief Baron, who was absent; but his Opinion

Opinion was ut supra; and the Case was suddainly resolved in R. B. upon the first Argument, though Eyres Justice then seemed to dissent; for he cited Roll, Title Grants, as an Authority that the Assignment was good; and Holt Chief Justice and Dolben Justice only spoke to the Case, and said that there was nothing in it; but upon the Resolution of the Judges, it appeared to be a Case of Weight, and they all resolved the Assignment to be good upon the Premisses of the Deed, and rejected the Habendum; for the Estate being limited in the Premisses, and the Grant perfect, an Habendum is not necessary, and it shall not make that void, which was perfect before; utile per inutile non vitiatur; and here the Question was, if by the Grant of the Cottage, Barn and Lands, and all and singular other the recited Premisses, together with the said recited Lease, and all Writings and Evidences concerning the Premisses to *Mary* and her Executors, Administrators, and Assigns, the Term, Estate, and Interest passed; and in this the Justices did not agree, for many of them held, that he having recited his Estate and Interest from Sir William Portman, and deduced it to himself, and said that the Estate, Term and Interest of the Premisses was in himself; and then having granted the said Cottage, &c. and all other the recited Premisses; that this passed his Estate, Term and Interest, which he had shewn and recited, as well as if it had been particularly mentioned; and if he had granted his Term to Mary and her Executors, &c. without Question it had passed all, as it is ruled in Goshawk and Chickell's Case, Jones 205. and Cr. Car. 110. and Justice Rookby said, that the Words, the said recited Lease, would carry the Estate and Interest; but Treby Chief Justice seemed to deny it, and doubted also of the Words recited Premisses, and said that they extend but to other Things of the same Nature, with the Cottage, Barn, and Close, and were put in only to supply the Defect, if any of the Things demised were omitted; and he said, that the Words upon which he founded his Judgment were, all the said Cottage, Close, Barn, and two Acres of Land; the which joined with the Recitals of the Deed, are sufficient to pass the whole Estate and Interest of the Term; for though he admitted, that if a Man be seised in Fee of Black Acre, and grant Black Acre to J. S. and his Heirs, that by this his Estate

passes,

passes, and J. S. has a Fee; yet to say, that if Tenant for Years of Black Acre, grants it to J. S. and his Executors, that J. S. has the Term also, will not hold; but with the Recital he said, that it would be an Assignment of the Term and Estate in the Land; and as to what was said by Baron Powell, that the Term is a Thing entire, and cannot be severed; he denied it, and said that without Question, a Man might grant his Term and Estate, Habendum to the Grantee, his Executors and Administrators, for two or more Years; for though the Habendum cannot frustrate the Premisses, yet it may restrain them, as a Grant to J. S. and his Heirs, Habendum to him and his Heirs, during the Life of J. S. is good; but he, and all the other Justices agreed, that by some Words in the Premisses, the Estate of the Term passed to the Grantee; and it being said to him and his Executors, this shews his Intent to be, it should be such an Estate which should go to his Executors, and therefore it could not be an Estate at Will; and the Words, his Assigns shew, that he intended that it might be assigned, the which an Estate at Will cannot; and the Grantor not having limitted or restrained the Term, they ought to construe that the whole Term passed: And Baron Letchmere much insisted upon the Case of Smith and Touchet, Hill. 22 & 23 Car. 2. in Scacc. where before Hale Chief Baron upon a special Verdict, the Case was in an Ejectment, Daniel Blagrave reciting an Order of Chancery, dated Dec. 15. 12 Car. 2. and an Indenture of Demise 23 November following, made to him by the Mayor and Burgesses of Reading, of a Mansion house, Meadow, and other Parcels of Lands, particularly mentioned in the Parish of D. he grants the said Mansion-house, Meadow, and other the Lands in the said Demise mentioned, and all his Estate, Term, and Interest, in and by the said Indenture to him granted, whereas in Truth, there was no such Lease to him by the Mayor and Burgesses, and so no Term, Estate, or Interest granted to him, for the Date was mistaken; yet insomuch that he had a Term for Years in the Premisses, tho' not by the Grant recited, and he grants the Mansion-house and Lands; it was resolved, that the Estate and Interest in the Lands passed by the Grant of the House and Lands them-

themselves; upon which Baron Letchmere much relied, and founded his Resolution; and as to the Objections made by the two Powells, that an Habendum might frustrate the Premisses, or abridge the Premisses; Treby Chief Justice agreed it, where the Premisses are general, there the Habendum might frustrate it, as a Feoffment of Land to J. S. Habendum to J. S. and his Heirs, after the Death of the Feoffor, this is a void Feoffment; but if it was to J. S. and his Heirs, Habendum to J. S. for his Life, there the Feoffment is good upon the Premisses of the Deed, and the Habendum is void and repugnant; and he agreed the Case of Hogg and Cross cited in Buckler's Case, 2 Rep. and in other Books, to be Law; but in those Cases the Premisses were general: And Treby Chief Justice said, the Law is not so curious in the Limitation of a Term, as it is of an Estate of Fee-simple, which carries the whole Inheritance and Estate of the Land, the which cannot be supplied by any Circumlocution, as appears Litt. Sect. 1. but as to a Term for Years, the Interest of it was not of any Regard in the Law antiently; so that he wondered, that there were any Terms at all, for they were subject to the Control of the Tenant of the Franktenement; and if he had suffered a Recovery, it had been destroyed by it, and the Tenant for Years could not falsify till the Statute, as appears by 1 Inst. 42. but after the Statute, a Termor for Years might falsify, and since that Terms for Years have been more frequent in Use; but yet they may be assigned by a general Grant of the Land, without any Words of Limitation at all; and therefore he held, that by a Grant of the Land generally, without the Words, Executors, Administrators and Assigns, the Interest and Estate had passed, as well as upon a Devise, as it is said in Dyer 307. 1 Roll, 371. And Baron Letchmere said, that the very Difference in the Books, upon which the Case here would turn, was, where Tenant for Years grants the Land to another, his Executors, Administrators, and Assigns, from and after the Death of the Grantor, there it being all but one Sentence, the Grant is void; but where it is granted to one, his Executors, Administrators, and Assigns, Habendum to him, his Executors, Administrators, and Assigns, from and after the

Death of the Grantor; there the Grant being perfect without the Habendum, and the Office of the Habendum being only to limit and ascertain the Estate, the which being limited before, the Habendum is unnecessary, and so it shall not render the Premisses void, in which there was a perfect Limitation of an Estate without the Habendum: And so for one Reason or other, the six Judges, scil. Treby, Atkins, Nevil, Rookby, Letchmere and Turton, agreed that the Grant was good upon the Premisses, and a sufficient Assignment to Mary, without the Habendum, and that the Jury have found that T. N. assignavit to the Defendant; and therefore that the Judgment in R. B. ought to have been given for the Defendant; and having been given for the Plaintiff, it was erroneous, and ought to be reversed; but they did not seem to allow, that if the Deed had been imperfect, till the Habendum, that it might operate by Way of executory Grant after the Death of T. N. and his Wife; though Justice Rookby said, that this was not repugnant to natural Reason, if the Rules of Law would warrant it; but Chief Justice Treby totally rejected this Motion, and said, that an Estate for Years, though of many Years, is of less Account in Law, than an Estate for Life; and therefore when a Man reserves to himself the Interest of the Land for his Life, it is in Motion of Law for the whole Interest; and the Law never has received any such Grant of a Term, though it has permitted Devises of a Term in such Manner, as in Matthew Manning's Case, 8 Rep. and other Books; so as to this Point, the Judges [if the Case had rested upon the Habendum] would have affirmed the Judgment; but the Grant being perfect by the Premisses, it was reversed.

The King *and St.* John's *College; devant.*

9. THIS Case was argued again this Term by Thompson Serjeant for the King, and Northey for the College; and Thompson insisted that the Writ was good, and no sufficient Cause shewn in the Return to excuse their not obeying it; and as to the Writ, this was the usual Way for this Court [to whom it belonged to see the Law put in Execution] to put the Law in Execution, and gave several Instances of Mandamus's to Courts and Officers, commanding them to do their Duty; and this Writ is no more, for the Fellows being deprived by the Act of Parliament, this Writ is not to remove them from their Franktenement, as was objected, for they were removed from it before by the Act of Parliament; but to command the Master that he remove them [who are removed from their Fellowships by the Act] from the Society, as Persons who would not submit to the Government, and give that Satisfaction of their Fedelity to the Government, as is required, and therefore not fit for such a Society, the which they would poison with such Principles; and as to what was said on the other Side, that the Master might not know, if they have taken the Oaths or no; he said, that the Act had required it to be done before him in the Hall of the College, and therefore he shall be intended to be conusant of it, &c.

Northey econtra: And he said, that he was not Counsel for the Fellows, neither would he argue in Maintenance of their Obstinacy, he was only to excuse Dr. Gower, and to shew, that as this Writ is framed, he could not give Obedience to it, and the Writ is of a new Impression, and no Precedent can be produced of any such Writ; and the King's Counsel have shewn, that they distrust the Writ, for they have varied it from the first Form, for the Alias adds, vel causam nobis significes; but he objected, First, To the Writ, that it is not a proper Remedy. Secondly, That the Return is a sufficient Excuse: As to the Writ, he said, it had commanded Dr. Gower to do more, than he is commanded by the Law, the which is beyond the Power of this Court to do.

2 Secondly,

Secondly, This commands a Man to be put out of Possession by a Writ, to which he is not made a Party, but by a Proceeding between other Parties; and in this Point it varies from other Mandamus's, the which are directed to the Party, who has done the Wrong suggested in the Writ, and so has a Conusance of the Matter, and may shew his Reason or Excuse; but here the Fellows shall be put out of their Fellowships, without an Opportunity to come and defend themselves, the which was never seen, and it is against natural Justice; for it may be, that they have taken the Oaths in the Sessions, or in some other Place, than in the Hall of the Society; and yet they shall be deprived, if this Writ be obeyed, and shall not have any Time before to shew it, or any Remedy after by Way of Appeal. And as to the Cases of Mandamus's to remove the Lollards, &c. there was an Enquiry by a Jury ordered in the Writ, so that the Chancellor had Means to be informed, Ryley pl. parl. 601. and so in the Writ de Leproso amovendo, the Law takes Care, that the Party be not deprived of his Liberty, without a legal Inquiry; and therefore the Writ in N. B. 254. enjoins, that the Party be viewed by his Neighbours, who are indifferent; and if upon the View he be found Leprous, then he is to be amoved, &c. and as to the Case of a Mandamus to remove a Nusance, he said, that any Man might remove a Nusance without a Mandamus, but this is at his Peril; and as to the Cases cited in 3 Inst. 205. where Ed. 3. caused the Whores to be removed, &c. this was when it appeared by a legal Punishment for a notorious Crime; and as to the Case of Jacob Hall, &c. this was upon a Presentment by the Jury; and though a Case was cited by Noy out of an old Record, where a Bowling Alley was suppressed by the King's Writ, he said, that all the old Writs of Mr. Attorney Noy, would not hold at this Day; for such Writs are against Magna Charta and the Course of the Common Law, and diverse Acts of Parliament, which have provided, that a Man shall not be ousted of his Franchises and Liberties, but upon Indictment, or a legal Writ, to which he might have his Defence, of which the Fellows are deprived by this Proceeding; and therefore the Writ is unwarrantable, and of a dangerous Consequence; but if it be good,

yet the Return contains sufficient Matter to excuse Dr. Gower for not obeying of it, for non constat to Dr. Gower, that the Fellows have not taken the Oaths, for the Statute of Eliz. does not require any Oath to be taken by a Fellow; so as to this Oath, the Governors in the College, have not an Authority to administer it, and they are required to take the Oaths appointed by the Statute of 1 Will. & Mar. before such Persons, where they ought to take the other Oaths; and without Question, they might have taken the Oath appointed by the Statute of Eliz. in the Sessions, or alibi extra the College; and if they ought to have taken them in the College, and have taken them alibi by Mistake, it would be an hard Construction to adjudge them ipso facto deprived, who have complied with the Design of the Law, and only mistook a Circumstance; and this would displace the much greater Part of the Fellows in both the Universities; also this is a Matter proper for a Visitor; and if the Mandamus had been directed to him, he might have summoned the Parties, and caused an Obedience to be made to the Writ, or have heard their Reasons econtra, and the Fellows would have had a Time to be heard, and the Visitor would have been a more proper Person than Dr. Gower; for if the Fellows are deprived by the Act, this is a Wasting and Misapplying of the Charity of the Founder, and the Visitor might compel them to amove those, who have not a Title to this Charity, and to elect others; but Dr. Gower cannot do it; for he is restrained by the Statutes of the College, and the Consent of so many Fellows is necessary to the Amotion of a Fellow by him, so that he is commanded to do a Thing not in his Power to execute; and he has shewn in his Return that there is a Visitor, and this being a Matter within his Power, he had been the proper Person; and therefore the Writ is without Precedent, it being to amove a Person, without making him a Party to the Writ, or giving him Time to make an Answer, or to be heard; and it being final upon him, if he be removed, and there being a more proper Remedy, and a more proper Person, he prayed that the Writ might be quashed.

The Court seemed to agree that the Fellows ought to have been Parties, and for this Cause only they would not grant a peremptory Mandamus; but as to the other Objections, they seemed to think that the Writ was proper enough, for it is the Duty of the Court of King's Bench, to see that the Law be executed, and this is the proper Writ; they said, that the King's Counsel, might have found another Way; but they did not incline to grant a peremptory Mandamus, but rather econtra.

Baker *and* Duncomb.

10. IN Debt upon a penal Statute qui tam, &c. against an Attorney in C. B. the Question was, if he shall have his Privilege or no, and ruled upon Demurrer that he shall have his Privilege in a Debt qui tam, &c. because it is only the Suit of the Party, though in an Information he shall not have his Privilege; and it was said to be the Suit of the Party: First, Because he may be nonsuit, the which he cannot be in an Information. Secondly, He may pray a Tales, without the Warrant of the Attorney General. Thirdly, This shall not be determined by the Demise of the King, Cr. Car. 10. Farington's Case, there adjudged to be merely the Suit of the Party.

Wilson *and* Law; *devant & puis.*

11. THIS Case was after argued by Cooper for the Plaintiff, and he endeavoured to answer the Exceptions, and the Court over-ruled them all but that of attachiari feci; and as to its being aided by the Appearance, to this it was answered, that if the Appellee had appeared, and pleaded without taking Advantage of it, that then the Appearance had aided it; but he having demurred to the Writ and Return, and insisted upon the Insufficiency of it, it would be unreasonable, that when a Man is compelled to appear upon a Writ unduly returned, and he insists and takes Advantage of it, that such

such involuntary Appearance shall deprive him of any Advantage, which he might take to the Writ or Return of it; but it was admitted, that if he had not taken Advantage of it, but had pleaded over, and had omitted it, that then the Appearance had cured this Fault in the Return: An Exception was also taken to the Joinder in Demurrer, which was to the Writ, to the Return, and the Count, and so an entire Demurrer; and the Plaintiff when he comes to join in Demurrer, says, quoad breve & narr. prædict. &c. and after proceeds and says, quia placitum prædict. &c. so that this is a Discontinuance; for he has said nothing as to the Return, and placitum does not include a Demurrer; so he has pleaded only to Part; and no Demurrer being joined as to the Residue, there is a Discontinuance; non allocatur; for it was ruled, that a Demurrer est placitum, as appears in the Form of joining in Demurrer, when there is a Demurrer to the Declaration; and as to Attachiari feci, this is tantamount to Attachiavi, it being in a Case within the County, and not within a Liberty; for when it is within a Liberty, the Return is always Mandavi Ballivo, &c. and there the Return shews, that another has done it, who shall be punished for his Misfeasance, and not the Sheriff; but here the Sheriff is responsible, and this is his Act, tho' done by another; but Curia advisare vult; puis.

Term. Mich.

6 Will. & Mar. R. B.

Cheeseborough *and* Linton.

1. TROVER was brought by an Administrator, and upon Not guilty pleaded, a Verdict was for the Plaintiff; and it was moved in Arrest of Judgment, because Letters of Administration were not shewn to be granted by the Ordinary or his Official, or other Person having Authority from him, but only per A. B. Doctorem per Episcopum Cicestrensem legitime constitutum, i. e. the Bishop had made him a Doctor, but he does not say, that he was Official, or any other Officer of the Bishop, as Archdeacon, &c. non allocatur, for though he had not shewn any Administration at all; yet it is good after a Verdict, as it is ruled, Stile 262. and it was adjudged for the Plaintiff.

Wilson *and* Laws; *devant*.

2. THIS Term the Court gave Judgment upon the Demurrer joined in the Appeal, brought by Wilson against Laws, upon which the Case was, the Appellant counted as Brother and Heir of Edward Wilson, against the Defendant, for the Murder of his Brother, and said, that he killed him apud Paroch. Sti. Egidii in Campis, &c. such a Day, &c. circa horam primam post meridiem ejusdem diei, and shews the Manner of the Murder, dans ei mortalem plagam super anteriorem partem

tem ventris circa pectus in medio corpore, &c. and a Writ was awarded to the Sheriff, quod attachias prædict' Johan. per corpus suum, ita quod corpus ejus habeas coram nobis ubicunque fuerimus in Anglia, &c. at the Day of the Return, the Sheriff returns quod attachiari feci præfat. Johannem virtute brevis mihi direct' cujus Corpus paratum habeo ubicunque, &c. prout mihi interius præcipitur; and after upon this Return, the Appellee is brought into Court, and the Appellant counts against him, &c. upon which the Appellee, as to the Writ and Return demurs, and prays, that they should be abated; and as to the Count he says, that it was also insufficient, and demurs to it, the which is either in Bar or Abatement; the Appellant, as to the Writ and Return replies, and says, that they ought not to be abated, & quoad placitum prædict. quoad narr. prædict. he maintains it to be sufficient, and so severs in his Replication, as the Appellee had done in his Plea; and upon this a Demurrer is joined. And diverse Exceptions were moved at the Bar, some to the Writ and Return, and some to the Count, and some to the Joinder in Demurrer; as to the Writ and Return it was objected, that it is not pursuant to the Writ, which is Attachias, and the Return to it is Attachiari feci, the which is not pursuant, for the Sheriff ought to return, that he had obeyed the Writ, and not to say, that he had caused another to do it; also he might cause him to be attached, and yet not in Execution of the Writ, as if he had caused him to be arrested by Parol; this had not been in Execution of the Writ, [except it was in his own Presence] and in such Case, if he had returned, attachiari feci, this had been false; non allocatur; per Holt Chief Justice, and G. Eyres, and S. Eyres Justices, absente Gregory Justice, for attachiari feci, and attachiavi, are all one; and per Holt Chief Justice, when he says, that this was, virtute brevis mihi direct. it shall be taken to be such an Attachment as was in Execution of the Writ; and though the Precedents are Attachiavi, and Precedents are much to be regarded, if they have not been questioned, (as S. Eyres Justice said) yet the same Thing may be expressed several Ways, and attachiavi and attachiari feci, is all one; and per G. Eyres Justice, the Sheriff is not obliged to execute all Process himself, & qui

per alterum facit per seipsum facit; and per Holt Chief Justice, levari facias, and quod leves, is all one, and so it is in this Case; and as to Ubicunque they were all of an Opinion, that this did not avoid the Return; for it is but Surplusage which will not avoid a Writ in the Case of an Appeal, as was ruled, between Bennet and Preston, where the Words of the Return were, hic tunc corpus parat. habeo, &c. tunc was ruled to be Surplusage, but the Writ was not abated for it; and Holt Chief Justice said, that though it might have been better omitted than inserted, yet it is pursuant to the Words of the Command of the Writ; and it being ubicunque prout mihi interius præcipitur, it is well enough; as in a Scire facias, the Sheriff is commanded to warn A. B. and he returns quod scire feci A. B. without saying præfat. A. B. so it might be another; yet it being prout mihi interius præcipitur, it is well enough, 1 H. 6. 6. And as to the Exceptions to the Count, they were over-ruled unâ voce; for first, as to the Exception, that circa horam primam post meridiem, is incertain, for it has only Relation to another Hour, but it is not the Allegation of a precise Hour, as ought to be by the Statute of Glocester; it was answered, that the Appellant had alledged it with Certainty enough, half an Hour after Twelve, till half an Hour after One, is circa horam primam, and an Hour in Computation of Time; and the Party is obliged to alledge the Hour, but not the Minute, or Quarter of the Hour, in which the Murder was done; and circa horam is held certain enough, 2 Inst. 318. 1 Bulst. 82, 83. And as to the Exception, that the Description of the Wound is incertainly alledged; it was said by the Court, that super superiorem partem ventris circa pectus in medio corpore is as certain, as any Thing can well be described; for Corpus is the Trunk of a Man, and circiter pectus in medio corpore, is an exact Description; and therefore not like to Young's Case, 4 Rep. but it is as certain as need to be: And as to the Exception, that it is not alledged, that he gave him any mortal Stroke, but only by the Word Dans, the which ought to be dedit; non allocatur; for per Holt Chief Justice, Dans is more positive, than Dedit, and he cited many Precedents to this Purpose; and as to the Exception that the Venue is from the Parish of St. Giles's, where by the Statute of Glocester, it

ought to be from a Vill; he said, where a Parish is alledged generally, this shall be intended to be a Vill, and to be the same with the Vill, and not to contain more Vills, except it be specially alledged, [2 Inst. 669] and therefore in this Case, if St. Giles's Parish had contained many Vills, and he had pleaded this in Abatement, it had been good, if it had been true; but if he would have had Advantage of it, it ought to be by Plea in Abatement; and if the Law should be otherwise, they would overthrow many Indictments; for this Exception holds in the Case of an Indictment, as well as in the Case of an Appeal; for the Indictments for Burglary, &c. at the Old Bailey are, that he at the Parish of St. Giles's, &c. and that a Vill and a Parish is all one, and that it is sufficient to alledge a Parish, where a Vill is required, appears by diverse Cases, upon another Act of Parliament, scil. the Statute of Additions, which requires that the Vill be named; yet it being alledged, that he was of such a Parish, suffices; and for this Purpose the long Quinto of Ed. 4. 141. and diverse other Books were cited per Holt, and 2 Inst. 669. and therefore the Alledging it at a Parish, suffices, for the Parish of St. Giles's is a Vill: And as to the Joinder in Demurrer, the Appellant has in this followed the Appellee, for he in his Plea has severed, and demurred to the Writ and Return, and this is in Abatement, and to the Count, and this is either in Bar, or in Abatement; and when he says, placitum prædict. this is a Genus, which contains a Plea, Replication, &c. or a Demurrer; and diverse Books were cited, where a Demurrer is called Placitum; and Holt Chief Justice said, though the Law is nice in Exceptions to Appeals, because the Life of a Man is endangered, yet two Statutes have been made in Favour of Appeals, scil. the Statute of Glocester, cap. 9. and 3 Hen. 7. and it being a legal Suit, it ought to be allowed in a reasonable Manner; and G. Eyres Just. said, that if the Writ and Return had been ill, that the Appearance had aided it, if the Party appears and pleads; but if he appears and takes Exception for a Defect in the Writ and Return, such Defect is not aided by Appearance; but if he pleads over, he waives the Advantage of such Exception; and he was ruled to proceed to Trial, &c.

v. Curry *and* Stevenson.

3. COUNT as Administrator for Money, received to the Use of Baron and Feme, as Administratrix of A. B. &c. the Defendant pleads, Non assumpsit infra sex annos; the Plaintiff replies, and shews that A. B. died such a Year and Day, and that the Defendant received the Money immediately after his Death, which was more than six Years passed; but that Administration was committed such a Year and Day, which was infra sex annos; upon which the Defendant demurred, because a Departure; the Court seemed to incline, that it not being six Years after the Administration, though the Money was received before, yet it would be no Bar within the Statute, according to the Reason of Saffin's Case; but Holt Chief Justice excepted to the Declaration, because it is said received to the Use of Baron and Feme, where the Feme was Administratrix; also he said, that he ought to declare in his own Right, and not as Administrator; for if he orders a Man to receive Money for him, and he does it, this is a Payment to his Use, and not as Administrator; and the same Law it will be, if he after agree to a Payment made without his Order, and the Bringing of the Action is an Agreement; and therefore he ordered them to satisfy him with Precedents; & advisare vult.

Sir Wilfred Lawson *and* Story.

4. IN an Action upon the Case upon a Rescous upon the new Statute of Distresses; the Question was after a Verdict and Judgment for the Plaintiff, if the Costs shall be treble, the Words being, treble Damages and Costs, and ruled without Difficulty, that they shall, according to the Rule in Pinfold's Case, 10 Rep. Damages in such Case being given by the Common Law; and it was ruled that Costs de incremento shall be treble also; and so upon Debate it was ruled in C. B. in the Case of Sandys and Child, affirmed here in a Writ of Error;

and tho' the Case of Roll's, Costs, 517. be that the other is the more sure Way; yet per Holt Chief Justice, Costs de incremento are also double, &c. in all Cases of Officers, &c.

Waltham *and* Sparkes.

5. DEBT upon an Obligation, with Condition to save the Parish of Shalford harmless from John Godion, his Wife and Children; the Defendant pleads Non fuit damnificat'; the Plaintiff replies and shews, that Joseph the Son of John, born at the Time of the Obligation made, his Wife and Children were a Charge to the Parish, for Joseph was impotent; and by the Order of two Justices of the Peace, the Parish was ordered to allow 2 s. per Week to Joseph, for the Maintenance of him and his Family, of which 8 d. was for the Maintenance of Joseph; the Defendants reply, that the Children of Joseph were born after the Obligation made, and that Joseph was able to maintain them himself, &c. and traverses absque hoc, that 8 d. was applied for the Maintenance of Joseph; upon which the Plaintiff demurred, and Exception taken that the Traverse was ill; First, because though 8 d. was not applied to the Maintenance of Joseph; yet if his Wife and Children were chargeable, they are within the Intent of the Condition; for he by the Law of Nature is bound to provide for his Wife and Children, and the Grandchildren are comprised within the Word Children; and therefore the Statute of 32 H. 8. which enables a Man to devise two Parts, for the Preferment of his Wife and Children was cited; and it was said that Grandchildren are within the Intent of that Statute, and a Man might devise two Parts to his Grandchildren, and they also are within the Statute of 43 Eliz. for Provision for the Poor; and many Cases were cited out of Dalton, &c. also it was said, that the Traverse ought to be, that the 8 d. or any Part of it, was not applied to the Maintenance of Joseph; for if but 2 d. is paid for his Maintenance, this is a Charge to the Parish; and he cited Yelv. 225. to which it was answered by Shore, that by the Intent of the Condition, the Children of John only were within the Intent of the

Condition, and not their Children, and so to the tenth Generation; for the Condition is the Words of the Obligee, and shall be taken strictly against him, and the Obligor might see, that John was in a Way to maintain his Wife and Children, and therefore might the more willingly undertake for them; but he could not know what Grandchildren he shall have, and what Courses they would pursue; and he said the Condition extended only to the Children of John then born, and that the Traverse is well enough; for the Obligation is broke, if but a Penny be paid to Joseph, as well, as if all had been paid; but he said, that the Replication is ill, and double, for they said, that Joseph and his Family became chargeable, and that 2 s. was ordered for the Maintenance of him and his Family, of which 8 d. was paid to Joseph, and so they have alledged two Things, and not relied upon either of them; the Court said, that the Breach is well enough assigned, in saying, that 2 s. was ordered for the Maintenance of Joseph and his Family, and the Alledging of the 8 d. to be for the Maintenance of Joseph, was not necessary, and so they have traversed a Thing not materially alledged; and it might be, this was said de industria to draw them out of the Way: And as to the Intent of the Condition, Holt Chief Justice said, that this ought not to be understood, ultra John, his Wife and Children, and ought not to be extended to Grandchildren; but he said, the Children of John, not then born, shall be within the Condition; for the Intent was to secure the Parish from any Damage, by Reason of the Settlement of John; but the grand Doubt was, if the Children of Joseph, during the Life of Joseph, should not be within the Condition, they being by the Law of Nature to be sustained by Joseph, and the Cause of Joseph's being a Charge to the Parish; and therefore during the Life of Joseph, the Parish ought to provide for them, as well as for Joseph; for Eyres Justice said, Joseph having more Children than he could maintain, is impotent, as much as if he had been so by Lameness; and though it was said by Shore, that the Justices have not Power originally to make such an Order, but this ought to be done by a Rate in the Parish, and after signed by the Justices, or made by the Justices in their Sessions; and therefore the Replication is ill; yet per Curiam, this

this is the Practice throughout the Kingdom; Curia advisare vult; afterwards it was adjudged for the Plaintiff.

Moor *and* Parker.

6. IN an Action upon the Case, out of the House of Lords in Parliament, upon which a special Verdict was found; the Case was, George Chute seised in Fee, settles his Estate to the Use of George, his Son and Heir apparent for Life, Remainder to his first Son in Tail-male, and so to the tenth Son, by such a Wife engendred; and after having the Reversion in Fee, recites this Settlement, and devises the Lands, &c. to the first Son of George his Son, &c. according to the Form of the Settlement; and after he says, that his further Will is, That if *George* die without Issue, on the Body of his then Wife, his Daughter *Joanna* shall have 4000 l. and then he proceeds and gives Power to make a Jointure to a second Wife, and devises to the first, and so to the tenth Son of George in Tail-male; and if George die without Issue, then he gives the Lands to his Grand-daughters, and their Heirs, Share and Share alike; and after this the Testator dies, and George being his Son and Heir, after this suffers a Recovery, and the Question upon the special Verdict was, what Estate George the Son had, at the Time of the Recovery, scil. if he was seised in Fee, or in Tail, or for Life: And it was argued by Serjeant Levinz, that he was seised in Tail, for he had an Estate for Life before, of which the Testator took Notice; and if no Devise had been, he not having any Son when the Testator died, he would have had a Fee executed in him; for then upon the Descent of the Reversion, he had been seised in Fee; and therefore when his Father devised ut supra, his Intent appeared to be, that George shall not have a Fee; and if he shall not have a Fee, what Estate shall George have? if not an Estate-tail by Implication; for no Estate is devised to his Grand-daughters, till George's Death without Issue, and there cannot be a Remainder to the Grand-daughters in Contingency, or an executory Devise; for it depends upon a Death without Issue generally, and not within the Compass of

a Life, as Pell and Brown's Case is; and therefore if he does not give an Estate-tail to George by Implication, he gives nothing, and then he would be seised in Fee; and that it is an Estate-tail by Implication; he cited 2 Cr. 290, 415.

Shore econtra: That George had but an Estate for Life, for no Estate shall be by Implication, where the Intention of the Party appears econtra; and here he has limitted his Estate to the Sons by any other Wife in Tail-male, in the same manner, as if it was in a Settlement; so that his Intent appears clear, that George shall not have but an Estate for Life; and as to the Words, That if *George* die without Issue, this shall be such Issue mentioned before; and for this he cited Frencham's Case, in Dyer 171. 1 And. 8. Holt Chief Justice said to Levinz, that admit, that Issue would be an Implication of an Estate to the Heirs of the Body of George, that yet he could not be Tenant in Tail; for tho' it be true, that if an Estate be devised to a Man for Life, and after to his Issue, that this would be a Tail, according to King and Mellun's Case; yet this would not be so, if a Man be Tenant for Life by a Deed, and after he in Reversion devises it to his Heirs of his Body; for this being by several Conveyances, the Estate is not executed; for if a Man is Tenant for the Life of B. Remainder to the Heirs of B. and Tenant for Life grants his Estate to B. B. is not Tenant in Fee, but the Estate to the Heirs of B. is in Remainder, as it was before; and he said, that tho' Issue in a Will is as much as Heirs of his Body, yet sometimes it is a Word of Purchase, as if a Devise be to a Man for Life, and after to his Issue, and to the Heirs of such Issue; in such Case Issue is a Word of Purchase; the same Law of Heir; if a Devise be to a Man for Life, and after to his Heir, this is an Estate in Fee; but if it be, and to the Heirs of such Heir, such there is a contingent Remainder; and on the other Part, he said, that there cannot be a Limitation upon a Death without Issue generally, as Levinz had said; and the Devise to the first Son, &c. being by Way of immediate Devise, and no Person being in esse to take, it would be void; for though according to Snow and Cutler's Case, a Devise to an Infant in ventre sa mere, might be good; yet when it is by Way of immediate

diate Devise, it would be otherwise; and therefore he directed them to consider, if there was any Devise by the Will; and if no Devise was, but that they were void, then George would be seised in Fee.

Hicks *and* Woodson.

7. GOLD, King's Serjeant, moved for a Consultation, after a Verdict in Prohibition, upon a Custom to be discharged of Tithes of barren Cattle, within the Hundred of D. &c. and said such Custom within an Hundred, is not good; tho' it might be, that a Part of a County, as the Weld of Kent, &c. may have such a Custom, as Roll, 654. Tit. Dismes; and he insisted, that if such Custom obtain, the Rector would be starved, for then the Occupiers and Inhabitants, would only feed their Beasts, and never employ them for the Pale, or Plough, from whence the Rector might have Tithes; and though in Roll, Dismes, supra, there is a Case of a Custom for Non decimando, within two Hundreds, yet such Custom within an Hundred is not good, for such Custom within a Parish is not good, and a Parish may contain a whole Hundred, as the Parish of Taunton Dean contains the whole Hundred of Taunton Dean; and such Custom to put it in the Will of a Parish, if the Minister shall have any Tithes or not, is unreasonable: It was answered, that the Custom is found by the Verdict, and so is to be intended, to have been so used Time out of Mind, and yet the Parson has not been starved; and it was said, that though a Man may not prescribe in non decimando, because the Parson has as great Care of his Soul, as of the Rest of the Parish; yet a Weld, or two Hundreds might; and if two Hundreds, for what Reason may not one Hundred? for tho' one or two Men might combine to defraud the Parson, yet such a general Usage, throughout a whole Hundred, or in the greater Part of a County, as a Weld, [and as Holt Chief Justice thought a whole County] cannot be intended to commence upon a Combination, but to be settled by an Usage founded upon some Composition, or other reasonable Cause; and Holt Chief Justice said, that this Case of Tithes is the only Case in which a Man cannot prescribe for a Discharge;

charge; and as to the Case of Mills, he said, that de communi jure Tithes are not to be paid for them; but by Agreement upon the Statute of Articuli Cleri, for old Mills Tithes shall be paid, but not for new, for it is a personal Tithe; and Justice G. Eyres said, that Tithes for barren Cattle are due by Custom, and by the same Reason they may be discharged of Tithes by Custom; but Holt Chief Justice said, that Tithes for barren Cattle are due de communi jure, and 2 s. per Pound is the usual Tithe of common Right, but that there are diverse customary Manners of Tithing for them; and the Custom here was alledged by the Occupiers and Inhabitants; and a Case was cited to have been lately adjudged, that a Custom alledged to be discharged for Wood burnt in his House, is not good, except it be averred, that the House was employed for the Inhabitation of Ploughmen and Husbandmen, by whom the Land yields Decimas uberiores; Curia advisare vult.

Rolston *and* Main.

8. IN Debt upon an Obligation against an Executor, Judgment was by Default; and because the Bond had been a long Time unpaid, it was moved that the Damages might be increased by the Court, under the Notion of Costs, as the Practice was agreed to be used; but Holt Chief Justice said, that the Damages are to be adjudged against the Executor, out of the Estate of the Testator; but Judgment for Costs ought to be out of the Estate of the Testator, Si tantum, si non de bonis propriis, and it would be hard to charge the Executor in Damages, under the Title of Costs for the Time, in which the Bond was elapsed in the Life of the Testator; but he seemed to incline, that it shall be so for the Time in which the Bond was unpaid, after the Death of the Testator; but upon Examination it was said, that the Judgment was entred; and then per Curiam it is too late, and so nothing was done.

The King *and* Lammas.

9. IT was excepted to a Conviction upon the Statute of Will. & Mar. for the Keeping of a Warehouse for low Wines, &c. without giving Notice to the next Officer of the Excise, that it was in English; non allocatur. Secondly, That though in the Information the Defendant is alledged to be a common Distiller; that yet in the Conviction, it does not appear, that he was proved to be a common Distiller, so the Conviction is not of the Whole contained in the Information; and upon Oyer of the Information and Conviction, it did not appear to be proved, that he was a common Distiller; and if he was other than a common Distiller, scil. one who had bought low Wines, &c. of a common Distiller, it is not any Offence within the Statute, the which was agreed; but per Curiam, he is convicted of the said Offence against the Form of the Statute; and therefore it ought to be intended, that he was a common Distiller, otherwise it had not been an Offence; and so it seems to be well enough; but yet advisare vult.

Beviston *and* Hussey; *devant.*

10. UPON a special Verdict in Ejectment the Case was, A Man seised of Land of the Nature of Gavelkind; and having Issue two Brothers, Thomas and William, devised the Lands in Question, to Henry Son of Thomas, if he live till Twenty-one, and then his Wife to have the House, &c. and if Henry die before Twenty-one, then to the next Son of Thomas; and if Thomas had no Son, then to *Henry* the Son of *William*, and his Heirs; and if *Henry* die before Twenty-one, and my Wife be dead, then to the next Heir last named, as it shall fall out; and dies; Henry Son of Thomas died before Twenty-one, and Thomas had a Son named Thomas, who entred and enjoyed the Land 70 Years, had Issue two Daughters, and died; Henry the Son of William had Issue the Lessor of the Plaintiff, and William had Issue John another Son; and upon the Death of Thomas, the

Son of Thomas, the Question was, if the Daughters should have the Whole as Heirs to Thomas; or if the Lessor of the Plaintiff shall have a Moiety of a Moiety, (as it was call'd) as Heir of William, Brother and Heir of the Devisor; for if Thomas had but an Estate for Life, then the Reversion descended to Thomas the Father of Thomas, and Brother of the Devisor, and to William the other Brother; but if Thomas had an Estate in Fee, then the Whole descended to his Daughters the Defendants: And it seemed to be agreed by the Counsel on both Sides, and the Court, that when he devises all his Lands to Henry and his Heirs, if he lives to Twenty-one; and if he dies before Twenty-one, then to any other Son of Thomas; and if Thomas have no Son, then to Henry Son of William and his Heirs; that by this Devise, Thomas Son of Thomas, took an Estate for Life only, according to the Case of Middleton and Swain, adjudged in this Court lately, where a Man devised certain Shares in the New River to diverse of his Children, and their Heirs; and if any of them die, then totam illam partem to others of his Children generally; and it was ruled in this Case, that totam illam partem, without the Limitation of any Estate, carries but an Estate for Life, and so in the principal Case; but the grand Doubt was upon the subsequent Part of the Will: And if *Thomas* have no Son, then to *Henry* Son of *William*, and his Heirs; and by these Words Levinz admitted, that Henry Son of William took nothing, for Thomas had a Son who took, scil. Thomas; and then the Will proceeds and says, That if *Henry* die before Twenty-one, and his Wife be dead, then to my next Heir last named, as it shall fall out; and it was said that Henry here ought to be understood Henry the Son of William; for per Levinz, Henry the Son of Thomas ought to die, before Thomas his Brother had any Thing; so Henry here ought to be Henry the Son of William, and Henry the Son of William being his Heir last mentioned, he shall take a Fee, for Heir is nomen collectivum, and in a Will contains Heirs, and Heirs of the Heir; and upon this Part of the Will the Question depends: But Holt Chief Justice demanded of Levinz, that if the Words, and if *Henry* die before Twenty-one, should be applied to Henry Son of Thomas; and the Words, then to the next Heir

last named, should be construed any other Son of Thomas, if Thomas had another Son, otherwise as it shall fall out to Henry, Son of William, if he shall be next Heir, so that as it shall fall out shall be applied to the Son of Thomas; if he shall have another Son, who shall be next Heir, [for it is not found that their Fathers were living] otherwise to Henry Son of William, if he shall be next Heir; for the Words, as it shall fall out, are considerable; and if it shall be so, that the Words next Heir, should be applied to Thomas, what Estate shall Thomas have? and per Holt Chief Justice, he shall have a Fee, and this seemed to him to be the Meaning and Intention of the Devisor; and if *Henry* die before Twenty-one, to be but a Repetition of that which he had said before; but Curia advisare vult.

The King *versus* Trowbridge.

11. INdictment for erecting a Cottage, &c. pro habitatione, &c. & ulterior. præsentant that he had continued it for four Months, between the 1st of December and such a Day in April, which was three Weeks more than the four Months, and the Beginning of the Indictment was, præsentatum existit, &c. the first Exception was, that ulterior. præsentant is insensible, and no nominative Case to it, so void. Secondly, The Continuance is not alledged for a Time certain, but for four Months between such a Day and such a Day, which contains more than four Months, by three Weeks; so that if he be indicted again for this Time, he may not plead this Indictment; also the Continuance of the Cottage is not alledged to be pro habitatione; and if it be used for a Storehouse, or Granary, or other Use, it is not any Offence, except it be pro habitatione; and here he has concluded contra formam Stat. where he ought to have concluded contra formam Stat. to the Offence of Erecting; and then upon the Offence of Continuing, to have made another Conclusion, for they are several Offences, and several Indictments, and therefore they ought to have several Conclusions: And it seemed that the first Exception was material, for it is incertain, and no Man may know for what Time he is acquitted or convicted; and

it was also said per Holt Chief Justice, that ulterior. præsentant. is a new Indictment, and therefore the Offence of Erecting not well alledged, scil. it is not said to be contra formam Stat. and the general Allegation in Conclusion is not sufficient; but as to the Exception, that the Continuing is not alledged to be pro habitatione, non allocatur; for it shall be intended to be so when the Erection was pro habitatione; and if it was otherwise, it ought to be shewn on the other Side; there was also another Exception, that the Venire was returnable ubicunque; non allocatur; for the Justices are not obliged to hold their Sessions at a Place certain.

Newton *and* Richardson.

12. SCire facias was brought against an Administrator, upon a Judgment against an Executor; he pleads, plene administravit the Day of the Writ purchased; upon which the Plaintiff demurred, for in such Case he ought to plead reins enter mains, at the Time of the Death of the Testator; but if he had joined Issue, this had been a Waiver of the Advantage of it; and Holt Chief Justice cited the Case of Harcourt and Wrenham, Moor 858. and Ordway and Godfry's Case, 3 Cr. 575. and though some Cases in Keble, and the Office of Executors were cited, the Court ruled the Case ut supra, and did not regard the Cases in Keble, but demanded other Authority; and as to the Office of Executors, they said, that this was a good Book; but they did not agree with it in this Point.

Cromp

Cromp *and* Holford; *devant.*

13. IN Trespass for taking of a Silver Tankard from the Plaintiff, and detaining it, till he had paid 45 l. upon Not guilty the Jury found a special Verdict, in which it was found, that the Plaintiff was a Vintner, and that upon a Complaint made of him to Sir Buckley, a Justice of the Peace, that the Plaintiff had sold eighteen Bottles of Wine, in Bottles, and not in Measures of Pewter, according to the Acts of the first, and also of the second of Will. & Mar. he grants his Warrant upon the said Acts, and directs it to the Defendant then being a Constable; the Warrant was dated Aug. 6. and recites, that whereas it appeared to the Justice, that the Plaintiff had sold eighteen Bottles of Wine, upon the 19th of this Instant July, in Bottles and not Measures of Pewter; he required the Constable to go, and demand the said 45 l. of the Plaintiff; and if it was not paid to distrain for it, &c. according to the Statute of the first, and also of the second of Will. & Mar. upon which the Constable went to the House of the Plaintiff, and he not being there, took the Distress ut supra, &c. & si for the Plaintiff, they found for the Plaintiff, &c.

Diverse Exceptions were taken to the Warrant, as First, That the Offence is there said to be the 9th of the Instant July, where the Warrant is dated the 6th of August; so it may not be known what Instant July he meant, and the Conviction ought to be within 30 Days after the Offence committed. Secondly, The Offence by the Warrant appears to be entire, for selling eighteen Bottles, so an entire Sale, which makes but one Offence, and the Penalty is by the first Act 5 l. and by the second Act but 50 s. for every Offence, not for every Bottle; but here the Warrant is to levy 45 l. which is for eighteen Offences, where it appears upon the Face of the Warrant, to be but one Offence. Thirdly, The Warrant is to levy 45 l. for the Forfeiture, and 10 s. for the Costs, the which by the Statute is not to be levied, except the Party be in Custody for Default of Distress,

 which

which was not in this Case; for a Distress ought not to be taken, except the Penalty be not paid upon Demand; and therefore though the Warrant be good, yet the Officer has not pursued it, for it is found, that he came and inquired for the Plaintiff, and he being absent, he demanded it of his Wife; and it not being paid, he distrained, where a Demand being required by a Statute, this ought to be personal, and a Demand from the Wife is not sufficient; and he being absent from his House, once by Accident, when the Officer came to demand it, this will not be such an Absence, that the Demand for Necessity might be well made from his Wife, and Demand and Nonpayment is necessary before the Taking of this Distress ought to be; but it was said, that the greatest Question is, if the Officer in this Case acting in Pursuance of a Warrant, ut supra, be liable to this Action, or no; and Northey, who argued for the Plaintiff said, that where an Officer acts, under a Process issuing out of a Court, which has Jurisdiction of the Matter; there though the Process does not lie, as a Capias against a Peer, or be misawarded, as a Capias in the first Process in an inferior Court, yet the Officer is excused; otherwise where the Court which issues the Process has not Jurisdiction, but the Matter is coram non Judice, for there the Officer is at his Peril to take Notice of the Law, and his Ignorance will not excuse him; so here there being a Defect of Law, in the Face of the Warrant, the Officer ought to take Notice of it; and if he proceeds and mistakes the Law, it is at his Peril, it being a Matter apparent in the Face of the Warrant; but if it be a Mistake of the Justice, not appearing on the Face of the Warrant, but an Omission of some Circumstance, as to take an Oath before the Issuing of the Warrant, &c. in such Case though the Justice be a Trespasser, the Officer shall be excused, for nothing appears in the Face of the Warrant, but that the Warrant was well made, and he ought to execute it; also there is a Difference, where a Justice proceeds upon his general Authority, as Justice, and where he proceeds by Virtue of a particular Power given by a particular Act, as he did in this Case; for in such Case his Office is ministerial only, and he does not proceed judicially, and the Officer in this Case is obliged to take Notice, as well of the Limits

mits of his Authority, as of his Authority it self, it being directed by a general Act, of which all Persons are bound to take Notice, and all that the Justice has done here is ministerial, for he gives no Judgment in the Case; but the Party being convict upon the Oath of two Witnesses, the Act gives the Judgment; also this Act being made upon such a particular Authority, it may be examined in a collateral Proceeding; and for this he cited 8 Rep. Dr. Bonham's Case, 5 Rep. Rook's Case, &c.

Serjeant Pemberton econtra: And he said, that the Question is not, if the Warrant be good or not; but the Question is only, if the Officer shall be punished, admitting the Warrant to be ill; and he said, that the Case of the Marshalsea, as he thought, had settled this Question; for the Difference there he admitted to be Law, scil. where the Court has Jurisdiction, there the Officer is not punishable; but if the Court has not Jurisdiction, there he is punishable, the which he said, is hard enough upon the Officer, to compel him to take Notice, in what Cases a Court has Jurisdiction, and in what not; but he submitted to the Resolution there, and all the Cases since have been resolved upon this Difference; and he cited Roll, 493. Turbervill and Tipper's Case, Roll, Trespass. 560. and the Case of Sir Charles Orby and Hern in C. B. and the Case of Webb and Batchelor, and the Case of Terry and Huntingdon, Hardr. 480. all which Cases go upon the Difference aforesaid: And he answered to the Objections of Northey, and said, that as to the Objection of the Instant July, the Case was, that the Conviction was made in July, and a Blank left for the Date; and it not being required till August, he put in the Date, August; but it is found, that in July, that the Plaintiff such a Day and Year sold ut supra, so it appears, that the Conviction was within the Time required in the Statute; and as to the Justice being ministerial, he said, that certainly he was a Judge, and the Conviction is an Act of his Judgment; and as to what was said, that the Thing being that, which the Justice had Power to do, by a particular Act of Parliament, and that the Officer ought to take Notice of the Act; he said, that great Part of that which the Justices of Peace do, is by particular Acts, and it is hard to compel such inferior Officers, which may be,

 cannot

cannot read, to take Notice, and interpret an Act of Parliament; and as to that which appeared in the Face of the Warrant, he said, it does not appear, but that there are eighteen several Offences, for it is not found, that the eighteen Bottles were sold together; and as to the Demand, he said, that the Penalty was demanded by the Informer; and though he was not at Home, when it was demanded by the Officer, he said, the Officer is not obliged to come and find him, for this would be a great Trouble and Delay; and as to the Costs, he said, that though they are expressed lately, yet he said, if a Distress be taken, the Party shall have such Costs, which he has expended, though there be not an Imprisonment; and he said, that such Officers being necessary, for the Execution of Justice, which is the Life of the Law; and they having nothing but their Labour for their Pains, they ought to be favoured, & eo magis, because they are under the Command of their Superior, and therefore parere necesse est; and in this Case how could the Officer have excused himself? shall he go to the Justice and tell him, that he had granted such a Warrant in such a Case, and that he supposed, that the Justice thought it to be a legal Warrant, but that he was of another Opinion? would this be an Excuse? surely no. Curia advisare vult.

Netherton *and* Jessop.

14. IN Debt the Plaintiff declared, that per quoddam scriptum, &c. being a Deed Poll, testatum est, quod the Defendant cepisset of the Plaintiff, such Lands, pro uno anno, si vita tam diu viveret, ad vigint. & quinque libras solvend' ad duo festa maxime usualia, &c. and counts also upon a Lease Parol [Si J. M. tam diu viveret] for one Year, &c. and avers, that J. M. was the Life intended, and that he was living at the Time, that the Money was due, &c. and Issue taken, that J. M. was not living, and a Verdict for the Plaintiff; and it was moved in Arrest of Judgment; First, Because no Demise alledged, for it is only a Deed sealed by the Defendant, which says, that he cepisset; but it is not said, that the Plaintiff had demised, and this is Debt for Rent; also no Term certain is shewn, for which it was demised; for Si vita tam diu

viveret is wholly incertain for what Life it shall be; and such Averment dehors is not allowable; for this would be to carry the Words in Construction beyond what is warranted by the Deed; also the Count is by a testatum existit, the which is not good in this Case, tho' it be good in Covenant; it was answered, that testatum existit is aided after a Verdict, the which was not denied; and it was said also, that Si vita tam diu viveret is tantamount, as if it was the Life, i. e. the Life by which he held the Estate, and then the Averment is good; that he held the Estate for the Life of J. M. and that many Leases in the West are in such a Manner, if the Life in the Tenements so long shall live; and if it had been so, Holt Chief Justice seemed to admit, that there might be an Averment, if he counted that he was seised for the Life of J. S. and leased it to one for a Year, if the Life in the Tenements so long shall live, and then aver that J. S. was the Life in the Tenements, but vita in the principal Case is wholly incertain; then it was said, that Debt lies upon a Covenant to pay Money at a Time certain; and that here the Defendant, as appears by the Deed, is bound to pay to the Plaintiff so much Money, and he has counted upon the Deed, as the Deed is; and therefore it is good as a Debt upon a Covenant, though not upon the Demise: But to this Holt Chief Justice said, that a Man may not count in the Words of the Deed, but as the Deed is by Operation of Law, as if Tenant for Life, by the Word Dedi grant his Estate to him in Reversion; this ought to be pleaded as a Surrender, as it is by Operation of Law, and not in the Words of the Deed; so here also he said, that they have counted for this as a Rent, and it is a Rent in its Nature, and therefore may not be demanded by Action of Debt upon a Covenant, as for a Sum in Gross: And though it was said, that this was a Lease for one Year certain by the Covenants, though it be not upon the Demise; to this Holt Chief Justice said, that upon the Covenants in Law, no Action lay, if the Term is determined by the Death of Cestuy que vie; for they being annexed to the Estate, determine with the Estate; but if there were any express Covenants, it is otherwise, according to the Difference in Dyer; and Holt Chief Justice was strongly against the

Averment; and though Cheyney's Case was cited and allowed, yet this is not like to Cheyney's Case; and as to the Objection, that the Issue was an immaterial Issue, it was answered, that the Verdict being found for the Plaintiff, and he having a good Declaration, he shall have Judgment according to the Case of solvit ad Diem, pleaded to a single Bill, and found for the Plaintiff, he shall have Judgment; though if in such Case, the Verdict had been for the Defendant, there shall be a Repleader; but per Holt Chief Justice, the Issue here is quite throughout immaterial, and there ought to be a Repleader; and it seemed to him, that the Words in this Case, Si vita tam diu viveret, were odd and insensible, and that he might have declared upon a Demise for a Year certain.

Brook *and* Ellis.

15. ERROR upon a Judgment in C. B. where Judgment was given against Green and his Wife, and Brook and his Wife; and a Scire facias, and Inquiry granted upon a Suggestion, that the Defendants being Executors, had wasted; and the Sheriff returned, that Brook and his Wife devastaverunt; but as to Green and his Wife nothing is said; and upon this Judgment is given against Green and his Wife, de bonis testatoris, and against Brook and his Wife, de bonis testatoris si tantum, si non, de bonis propriis; upon which Error is brought and assigned, that nothing being returned as to Green and his Wife, the Judgment is given without Warrant; and the Writ not being executed according to the Suggestion of it, which is of a joint Devastavit, and the Return being only of a Devastavit by Brook and his Wife, this is a void Return; as a Verdict is void, which finds but Part of the Issue, and says nothing as to the Residue; and though it was objected, that this is a Misreturn aided by the Statute of Jeofails, and 1 Cr. Eyres and Taunton's Case, and other Cases cited to this Purpose, yet the Court seemed econtra, and that there was no Warrant to give Judgment upon this Return against Green and his Wife; and therefore the Judg-

ment against them not good; also per Curiam, there was a Discontinuance, for there is no Continuance entred, from Mich. 4 Jac. to Hill. 1 Will. & Mar. for though the Statute aids the Discontinuance of the Term, and supplies it, yet the Party when the Term is continued by the Statute, ought to enter his Continuances; and for Default of it, the Action is discontinued. Dyer 210. Br. Attachment.

St. Leiger *and* Pope.

16. DEBT upon an Obligation for 107 l. 10 s. and declares that the Defendant by his Obligation, &c. became bound to him, in cent. nummis aureis, vocat. Guineas, attingent. ad valorem 107 l. 10 s. upon Dyer it appeared, that the Condition was upon a Wager, upon playing at Back-Gammon; the Determination of which Wager, was referred to the Groom-Porter, & si the Groom-Porter, &c. there was a Demurrer to the Declaration, and adjudged for the Plaintiff; upon which Error was brought, and it was objected; First, That there is a Variance between the Count and the Obligation, the Demand being of 107 l. 10 s. and the Obligation and Condition, the which is made by the Dyer Part of the Declaration, is but 100 Guineas, the which are not coined but for 20 s. and valuable only at that Rate, at the Mint, and that which they pass for in Traffick above 20 s. is not as they are valued as a Coin in Law, but only by Consent; and therefore the Court ought to accept and judge them only at 20 s. Secondly, It was said, that if this be not a Variance, yet the Defendant having pleaded in Bar of the Action, the Stat. of Gaming, the Plaintiff is barred by this Statute, and the Defendant may in such Case aver against his own Deed, it being a Deed against the Statute, as is usually done in the Case of a Bond against the Statute of Symony, Usury, Sheriffs Bonds, &c. the which was agreed; but said per Curiam, that this seems not to be within the Statute of Gaming, for it was only a Question collateral to the Game, referred to the Judgment of another; and though many Cases upon this Statute were cited; as the Case

of Serjeant Pheasant's Son, said to be adjudged by Hale Chief Justice, which was, That if Men meet, and play, and one loses 80 l. and they desist, and make a new Appointment to meet again two or three Days after, and then he loses 80 l. more, that this is Money lost within the Statute of Gaming, as Money lost at one and the same Meeting; and Holt Chief Justice cited a Case adjudged by Hale, in which he was Counsel, which was, Two Men made a Horse-match between two Horses, to run four Heats for 40 l. a Heat, and the Course for 100 l. and for every Heat a several Bond was given, and the Heats were not to be run together, but one Heat in one Month, and another in another, and the Course at another Time; yet though there were several Bonds, and the Heats to be run at several Times, and no Sum by it self above 100 l. yet being made all at the same Time, this was adjudged to be within the Statute; as to the Variance, Holt Chief Justice said, that where the Thing demanded is current Coin, there the Thing it self ought to be demanded, and not the Value; and the Count ought to be in the Debet & Detinet; but where a Foreign Coin is demanded, there it ought to be in the Detinet, and they may count to the Value; but of the Coin of the Realm they ought to take Notice, what Value it bears, and to that Value it ought to be demanded; as in this Case, 100 nummi aurei, vocat. Guineas, valoris vigint. unius solid. & 4 d. for to this Value they were coined at the Mint, which is their legal Value, and therefore their proper Denomination is 20 Shilling Pieces of Gold, vocat. Guineas; and therefore as it seems, if a Man be indicted for coining Guineas, it would not be good, but it ought to be 20 Shilling Pieces of Gold, vocat. Guineas, and the Case of Fentril and Harris versus Berrow, was cited to be lately adjudged, where the Court held upon an Action on the Case, that they could not judicially take Notice of Guineas to be current at more than 20 s. and that all above is by Consent; Draper and Rastell, Yelv. 80. Rastell's Entries 158. and many other Cases were cited. Curia advisare vult.

Term.

Term. Hill.

6 Will. 3. R. B.

The King *and* Larwood.

1. THIS was an Information, which shews, that the City of Norwich is an ancient City, and that Hen. 4. by his Charter granted, that the Mayor, Aldermen, and Citizens, might elect two to be Sheriffs of the said City, &c. and that after this, Charles II. in the 18th Year of his Reign, by his Charter granted, that the Mayor and Aldermen might elect one Sheriff, and the Citizens might elect another; and then says that the Defendant was elected to be Sheriff of the City, and that he refused to be sworn, or to take this Office upon him, &c. the Defendant pleads the Statute of 13 Car. 2. for regulating of Corporations, &c. with Averment, that he had subscribed the Declaration, and taken the Oaths appointed by the Statute of 1 Will. & Mar. the Attorney replies, that he ought to have taken the Sacrament, &c. the Defendant rejoins, and shews that he is a Protestant Dissenter, and pleads the Statute of 1 Will. & Mar. to which the Attorney demurs; and this Case having been several Times argued at the Bar, the Court gave Judgment, seriatim, scil. S. Eyres Justice for the Defendant, and G. Eyres Justice, and Holt Chief Justice for the Plaintiff; and S. Eyres Justice said, that the Statute of 1 Will. & Mar. is a private Act, the which was agreed by the other two. Secondly, That the said Act

Act not being pleaded in Bar, they could not take Notice of it, though it is mentioned in the Averment. Thirdly, That the Pleading of it in the Rejoinder, is a Departure; all this was agreed to by the others; and then Sam. Eyres Justice said, that First, The Election was not good. Secondly, That the Bar is a good Excuse, and contained sufficient Matter to exempt the Defendant; the Election was not good, because by the Charter of Hen. 4. the Election is vested in the Citizens, and the Defendant was elected by the Mayor and Aldermen; and though this was according to the Charter of Car. 2. yet this Charter cannot devest a Right, which is vested and settled in the Corporation, and all the Citizens by the Charter of Hen 4. and therefore the Right of Election rests in the Citizens, according to the Charter of Hen. 4. and therefore the Election is void. Secondly, Because the Design of the Act was to prevent Men disaffected to the Government to have Offices, and by it such who have not taken the Sacrament are incapable; the which is a Punishment of it self, and therefore the Party shall not be punished again, Nemo bis punitur pro eodem delicto; and where a Statute inflicts a Penalty, the Party shall not be fined; and he cited the Case of the Mayor and Goodmen of Guilford *vers.* Clerk, in Debt upon a By-Law, which inflicted 20 l. Penalty for not accepting the Office of Mayor; and the Defendant pleaded the Statute of 13 Car. 2. &c. and adjudged for the Defendant; the which G. Eyres Justice said was adjudged upon the Statute of 1 Will. & Mar. and S. Eyres Justice denied it, and said, that he had seen the Record. Vide 2 Vent. 247.

G. Eyres Justice econtra, and Holt Chief Justice likewise, and they said, the Intent of the Act of 13 Car. 2. was not to exempt any Man from serving the King, the which he was bound to do by the Common Law, or to give Ease or Favour to Dissenters, but rather to draw them to a Reconciliation with the Church, as a Way to render them capable of Offices in the Government; this was the Design of the Act; and when by the Law, every Man is obliged to obey and serve the King, and also before the Reformation, and at this Day, every Man is likewise obliged to receive the Sacrament once in the

Year

Year ad minimum; if the Plea in this Case is good, a Man shall be excused for not serving the King, which is one Offence, for not receiving the Sacrament within the Year, as he ought by Law, which is another Offence; and so one Offence shall be excused by another, the which it cannot be imagined, that an Act of Parliament ever intended: Also the Law does not admit a Man to disable himself, or to plead that he is Non compos, as Beverley's Case, 4 Rep. but if upon Not guilty, &c. it appears in Evidence, that he is Non compos, it would be otherwise, there the Law will excuse him, but he shall not excuse or disable himself; but it has been objected, Suppose that a Man is disabled by a Judgment against him, may not he excuse himself? and per Holt Chief Justice, in such Case he may, for Judicium redditur in invitum; but if it be such a Judgment, which he might remove himself, as a Sentence of Excommunication, in such Case it would not excuse him; and for this he cited Sir John Read's Case, and he said, that the Design of 13 Car. 2. and of 25 Car. 2. is the same, the one to exclude Dissenters, and the other to exclude Papists; and it never has been thought, that if a Man would not qualify himself, that it was an Excuse within the 25 Car. 2. and Holt Chief Justice said, that there never was any Distinction between Dissenters, till after the Statute of 1 Will. & Mar. for before, the Liturgy being settled by Act of Parliament, it was thought, that nothing was contained in it, but what would be received by all, and those who dissented were called Dissenters generally, without the Distinction of Protestant Dissenters: And they said, that they would not deliver any Opinion upon the Statute of 1 Will. & Mar. but admitting, that this would excuse Protestant Dissenters, yet he ought to have pleaded it in Bar: And as to the second Point, scil. the Election, they said, that the Mayor, Aldermen, and Citizens, having the Election of the Sheriffs in them, they might by Consent alter the Manner of the Election, and their Acceptance of the Charter of Car. 2. and having elected according to the Form prescribed in it, is an Evidence of such Consent; and therefore though the Charter of the King may not alter the Manner vested and settled by the Charter of Hen. 4. yet if they accept such a Charter, and consent to it, and act

in Conformity to it, and acquiesce under it, such Charter is good, and this Submission and Conformity shall be an Evidence of their Consent; and therefore the Election is good; and Holt Chief Justice said, that for thirty Years and more, it had been always the Opinion of Men learned in the Profession, that the Statute of 13 Car. 2. did not exempt Dissenters, and they have always submitted to Fines in London, and Norwich also; and he concluded with Judgment for the King.

Term. Pasch.

7 Will. 3. R. B.

Crosby's *Case*.

1. CROSBY being indicted of High Treason, for designing to dethrone the King, and to incite Lewis the French King to invade this Kingdom; upon Evidence, Aaron Smith being produced to prove a Paper found in the Pocket of the Prisoner, to be his proper Writing, and owned by him to be so; the Prisoner excepted to the Testimony of Smith, because he had been set in the Pillory, and he produced the Record, by which Judgment is given against him, that he shall be set in the Pillory, &c. and the Crime was, for preparing certain Instructions for Stephen Colledge, who was arraigned and tried for High Treason, to be used by him upon his Trial, in which were scandalous and reflecting Expressions, but the Instructions never were delivered; and to this Point the Prisoner desired Counsel, which was granted, and Winnington assigned Counsel for him: It was said by the Counsel for the King, that it is the Crime which makes him infamous, and not the Judgment, and that the Judgment was given for a Crime, which did not deserve any such Judgment, if it was any Crime at all, the Instructions not being delivered; and therefore he has not lost liberam legem: It was answered, that the Judgment being an infamous Judgment, and being in Force, it is not to be objected, that the Judgment was not proportionable to the Crime, till it be reversed; but Holt Chief Justice put them in Mind of the King's Pardon, which he said had

 given

given him a new Credit, as in Case he had been attainted of Felony, or Treason; now he may not be a Witness; but if the King pardon him, he may be a Witness, for now the King has given him a new Credit; and he said, if he be convict of Perjury and pardoned, he may be a Witness, and so he was sworn; but he said, that if the Pardon had not been in the Case, he would not say what had been the Consequence; but S. Eyres Justice said, that he had always thought, that it is the Crime which makes a Man infamous; ideo quære; but Holt Chief Justice was clear, that the Pardon had restored him ad liberam legem, and that he ought to be a Witness;) and Comparison of Hands in this Case was held not to be good Evidence, except the Papers are found in the Custody of the Person; but where in the Custody of another, it is not Evidence.

Anonymus.

2. AT Guildhall in an Action upon the Case, for Money received by the Defendant, for the Use of the Plaintiff, the Evidence was, that the Defendant was Apprentice to the Plaintiff, and this was for Service done in a Ship of the King's, during the Apprenticeship; and the Indentures of Apprenticeship being produced to prove the Defendant Apprentice to the Plaintiff, it was insisted that the Hand of the Defendant ought to be proved; to which Holt Chief Justice agreed, unless the Indenture be enrolled.

Term. Trin.

7 Will. 3. R. B.

The King *and* Kemp; *devant.*

1. JUdgment was given in this Case by Eyres, and Holt Chief Justice, they only being in Court; G. Eyres being dead, and Justice Gregory absent; and Holt Chief Justice said, the Grant in Question depends upon the Validity of the Grant to Fryer, for if this be not good, then the subsequent Grants are not good; for then the King would be deceived in his Grant; for his Intent was only to grant an Office upon the Determination of a prior Grant, and not to grant an Office immediate: And as to what has been objected, that the Grant to Fryer is void, it being to commence upon the Forfeiture or Surrender of M. the which is an impossible Beginning, for M. having but an Estate at Will, he could not surrender it, for an Estate at Will cannot be surrendred, but when the one Party agrees to depart with his Estate, and the other to accept it; this amounts to a Determination of their Wills, but not to a Surrender; and so in the Case of a Forfeiture, an Estate at Will cannot be forfeited, but the Act which would amount to a Forfeiture, amounts also to a Determination of his Will; and so it shall be expounded, and no Advantage shall be taken of it, by Way of Entry or Seisure, as for a Forfeiture; and this was allowed to be so in the Case of a common Person; but per Holt Chief Justice, in the Case of the King, it is otherwise; and he who has an Office at the Will of the King, has it not at the Will

of both Parties, as it is between common Persons, but the Will is the Will of the King, and the Subject cannot determine his Will without the Permission of the King; and therefore though in the Case of a common Person, Tenant at Will cannot surrender, yet Tenant at Will of the King may surrender, and there ought to be a Will of the King declared under the Great Seal, that he accepts his Surrender, otherwise he is finable, if he surceases to execute his Office without such Discharge; and it was so done in the Case of Hide and Hale, Chief Justices of the King's Bench, who actually surrendred their Offices of Chief Justice, and had a Discharge under the Great Seal; and therefore the Office in the Case of the King may be determined by Surrender, and a Grant to commence upon such Determination is good; so also in Case of Forfeiture, the King might take Advantage of an Act which amounts to a Forfeiture by Way of Inquisition, and seise the Office upon such Matter of Record found, without a Determination of his Will; and this for many weighty Reasons, as to prevent the Sollicitation of others for the Office, &c. for he may say, that he would not determine his Will, as long as the Person demeans himself as he ought; but if it be found by Inquisition on Record, that he had forfeited his Office, then he would seise it as forfeit, as he might by the Law; and therefore though he agreed, that a Forfeiture could not be in the Case of an Office at Will of a common Person, yet in the Case of the King there might; but if the Office cannot be determined by Forfeiture or Surrender, yet it would certainly determine by Death; and he did not see any Reason, but that as he might seise the Office, or determine his Will, and grant it during the Life of M. but that a Grant of this Office after the Death of M. would be good; for this being an Office in the Crown to grant, and not being an Office of which any Estate in Fee is in Esse, but newly granted; this may be granted to commence in futuro, and to rise and fall, and to be in esse, and not in esse, as well as a Rent may, which may be so granted without Question; and this is not against any Rule in Law, as it would in Case of Lands or Things, which pass by Livery or Patent, as Barwick's Case, 5 Coke Rep.

Rep. &c. so Judgment was given for the Defendant, that the Patent is good.

Stevens *and* Squire.

2. THE Defendant pleads a Plea of Privilege, as Clerk to one of the Prothonotaries in this Manner; & prædict. Def. dicit, without saying Venit & dicit, or making any Defence, and dicit without venit might be ore tenus, &c. non allocatur, he being in Custodia mar. and before another Day of Continuance; but if it was at another Day of Continuance, after the Day of Appearance, it ought to be venit & dicit; but for the Want of Defence, the Court did not seem to regard it; and in the Case of Keckwith and Wheeley this Term, where the Defendant pleaded his Privilege as an Attorney of C. B. and made no Defence; Holt Chief Justice said, it was a Chip in Porridge; and he said in this Case, that if a Prothonotary, or other who is a Person privileged by Record, plead his Privilege, and bring a Writ of Privilege attesting it, that this is conclusive, and the Plaintiff may not traverse it; but otherwise it is of a Clerk, or Servant to such Person so privileged.

Key *and* Briggs.

3. IN an Action upon the Case against Briggs the Marshal, the Plaintiff declared, that he had commenced an Action against A. B. and that he was committed to the Custody of the Defendant, and that he being Prisonarius in Custodia dict. Defendentis, the Plaintiff obtained a Judgment against him, and that he intending to charge him in Execution, the Defendant suffered him to escape, by which, &c. upon the Evidence to shew him in custodia, they produced and shewed the Return of an Habeas Corpus, in which, inter al', he was returned to be taken ad sect. of the Plaintiff, and to shew the Escape, a Note out of the Marshal's Book lying in the Office, in which the Surname only without any Christian Name was wrote, was shewn; and that the Marshal knew that

he was not in Custody: It was objected, that this being without a Christian Name, it is incertain, and it may be any Person in the World of such a Surname, as well as the Person in Custody at the Suit of the Plaintiff; but the Knowledge of the Marshal that he was in Custody, obviated that Objection; then it was objected, that the Count is, that he Prisonario in Prisona prædict. such a Day existent. the Plaintiff obtained Judgment, and that the Plaintiff intending to charge him, the Defendant permitted him to escape; but the Evidence was of an Escape before the Time of the Judgment; so the Count is of an Escape after Judgment obtained, but the Evidence of an Escape before the Judgment, so it does not maintain the Declaration; non allocatur; for it is all one in Effect; for though after an Escape the Plaintiff cannot charge him in Execution upon the Judgment, yet he might prosecute him to Judgment, as well as if he had remained in actual Custody; and this Action is not brought for an Escape after being charged in Execution, but for an Escape to prevent the Plaintiff charging him; and this is all one, be it before or after Judgment obtained; and Holt Chief Justice cited a Case before Bridgeman Chief Justice, where the Count was of an Escape by Baron and Feme; and the Evidence was of an Escape by one only; yet ruled to be the same Escape.

The King *versus* Haines.

4. THIS was an Information against the Defendant, because that he being elected an Alderman of the City of Worcester, did not take the Oaths at the Time appointed by the Statutes, [which were recited] and that he acted as an Alderman after the Time incurred within which he ought to have taken the Oaths; this upon the Trial appeared to be a warm Prosecution fomented by a Person in the highest Civil Station, upon a private Pique; the Defendant having omitted to take the Sacrament three Days after the Time prescribed by the Act; but upon Notice he received the Sacrament, and intended to take the Oaths [he being a Person in all Points conformable, and who communicated frequently every Year, and had taken the Oaths several Times] at the next Sessions, which were to be held upon the 18th Day of

of January: but the Mayor went to London upon the 18th Day of January, and adjourned the Sessions to the 22d of January; in the Interim the Defendant took the Sacrament, and upon the 15th of January he took the Oaths in a Sessions met de facto, [though not legally held, for want of the Presence of the Mayor or Recorder] so that he might conform to the Direction of the Act, as near as he could; and after, before the 22d of Jan. he being in London, he took the Sacrament here in London, and upon the first Day of the Term, he took the Oaths in the Court of King's Bench; but notwithstanding this and all Sorts of Submissions, which he could make, being offered, he was prosecuted upon an Information; and upon the Trial a Copy of the Book of the Town-Clerk of Worcester, in which he entred the Plaints, and the Stile of the Court, &c. was offered in Evidence to prove, that he sat in Court as a Judge, and heard a Civil Cause after the 18th of January, which was the Day of the Sessions; but this was opposed as no Evidence, the Book not being a Record, but Minutes by which to draw a Record; and if the Book it self was here, it could not be read, à fortiori a Copy; Holt Chief Justice seemed econtra, and said that at Huntingdon before Hale Chief Justice, the Book of a Town-Clerk was read; and if the Book may be read, a Copy of the Book may be read, for in all Cases where the Original is Evidence, the Copy is Evidence; but if the Original be but a Copy, there a Copy of such Original may not be read, as a Book for Probate of a Will of Land; this is but a Copy, and therefore it ought to be produced, and a Copy out of the Book will not suffice; but a Copy of a Probate of a Will, where the Court has Jurisdiction, is good, because the Probate it self in such Case is an Original Act of the Court; but then it was said, that this is a Book, in which every Person makes Entries, and not only the proper Officer; and that if the Entry in this Book shall be Evidence to charge another in a criminal Matter, any Man might be made a Criminal at the Election of another; and this appearing to be so, the Court seemed to incline, that it was not Evidence, and demanded the Opinions of the Justices of the Common Pleas, who concurred that it was not Evidence; the Design of producing this Book was,

ut supra, the which was also opposed, and that the Entry in the Stile of a Court held before A. B. &c. shall not be conclusive, without proving that in Fact A. B. was there; the which was agreed per Curiam, that it was in such Case necessary to produce a Record to prove a Court of Record held, as also to prove in Fact, that the Party was there present, as the Record mentions; but this Objection vanished; for upon hearing of the Stile, it was only Curia, &c. tent. &c. without saying before whom the Court was held, and no Court may be held but before the Mayor, or Recorder, and two Aldermen, and the Stile does not say, that any of them were there; but if it was before the Mayor & Sociis, &c. it was agreed to be good; and for this Reason the Court seemed that there was no Court held, and then no Acting; but when the Counsel for the Defendant opened his Case, they insisted for him that the Information was, that he did not take the Oaths at such a Session, which was the next Session after his Election to his Office, and that he continued to exercise his Office after the Time appointed to take the Oaths; and therefore the Crime in the Information, and also in the Act, is the Acting after the Time in which he ought to have taken the Oaths; and they said, that this is the next Sessions after his Election into his Office; and the next Sessions in this Case, is the whole Time of the Sessions, scil. till the 22d of Jan. to which Time the Sessions was adjourned, and therefore his Acting after the 8th. and before the 22d. is no Forfeiture or Crime, if he has taken the Oaths upon the 22d. the which was agreed to by the Court; as it was also, that if he had neglected to receive the Sacrament till the first Day of the Session, and after he had received it, and took the Oaths upon the 22d of Jan. which is the Day of the Adjournment, that this had been good; but it was said, that he having omitted to receive the Sacrament within the three Months, that he is now disabled to take the Oaths; and therefore he being disabled by his own Neglect, and not having qualified himself within the Time prescribed to take the Oaths, he being disabled to take the Oaths the 8th of Jan. his Acting after shall be a Forfeiture, and the Sessions shall have Relation to the first Day of the Sessions; non allocatur;

for the Session is one Day in Law, though held at several Days, if it be by Adjournment; and as to his Neglect to receive the Sacrament, this is a distinct Offence, not alledged in the Information; but the Offence alledged is [not the Neglect to receive the Sacrament or to take the Oaths but] for Acting after the Time limited in the Act for taking the Oaths, having neglected to take them; of which Acting after the 22d of Jan. no Pretence of Proof was offered, and therefore the Court directed the Jury to find the Defendant Not guilty.

Barlow *and* Vowell.

5. AT Nisi Prius in Middlesex; ruled per Holt Chief Justice, that where a Man makes himself a Party in Interest, after a Plaintiff or Defendant has an Interest in his Testimony, he may not by this deprive the Plaintiff or Defendant of the Benefit of his Testimony; as if a Man be a Witness of a Wager, &c. and after bet, this shall not be a Reason to except against his being sworn to prove the Wager,

Sanders *versus* ——

6. GOODS were taken in Execution in the Possession of Sanders, who had them by Virtue of a Sale from Gulston; upon which Sanders brought an Action, and the Defendant insisted, that the Sale to Sanders was fraudulent against him, he being a Creditor by Judgment; Holt Chief Justice said, that if the Judgment was upon a Point tried, that then he need not to prove the Consideration, but it shall be intended good; but if it be a Judgment by Confession, &c. he ought to prove it to be for a just Debt, otherwise he shall not overthrow the Sale, though it be fraudulent, for it is good against all but Creditors for a just Debt bona fide due.

Term. Mich.

7 Will. 3. R. B.

Lamb *and* Mills.

1. THIS Term the Court gave Judgment in this Case, which was Trespass quare clausum fregit & averia cepit & asportavit; the Defendant came and justified, and pleaded a By-Law, &c. and that he as Bailiff took the Beasts, as a Distress for Breach of the By-Law by the Plaintiff; and upon prolix Pleadings which were drawn upon the Precedent of Tinteney's Case, in 1 Cr. and March, the Plaintiff demurred, and many Exceptions were taken; but in the Resolution of the Court, Holt Chief Justice said, that the Pleadings are ill, because that the Defendant had not shewn a Precept to make the Distress, for he could not do it ex officio, no more than a Sheriff might execute a Judgment of this Court without a Writ; and the Command in this Case is traversable; for this is the Difference between a Justification in Trespass, and an Avowry in Replevin, that the Justification there is in the Right, and therefore not traversable, but in Trespass it is only by way of Excuse; also in Trespass it is sufficient to say, that Præsentatum existit; but in an Avowry he ought to shew, that the Thing was done, as well as Præsentatum existit.

The Parish of St. Swithin *and St.* Mary Bothaw *in* London; *puis.*

2. UPON a Motion for a Prohibition to a Suit in the Ecclesiastical Court, upon a Rate against the Inhabitants of the Parish of St. Mary's, to contribute to the Repair of the Church of St. Swithin, to which Parish the Parish of St. Mary's was united by the Act for Rebuilding of the City of London; it was said by Shower, that though by this Act the Churches are united, and this Church is become the Parish-Church to both Parishes, that yet the Parishes remain distinct, and the Inhabitants of St. Swithin cannot make a Tax to charge the Inhabitants of St. Mary Bothaw; as if in a Market-Town two Churches are united, and one of them is ordered to be pulled down, and the other is the only Church in common to both Parishes; yet this does not unite the Parishes, quod fuit concessum per Holt Chief Justice; but he said, that there may be a Difference between such an Union made by the Patrons and Ordinary, according to their ordinary Power by Law, and an Union as here made by Act of Parliament; for though in the first Case, the Churches are united, yet such Union does not make one the Parish-Church to the other Parish; but they as to this Respect remain as before; but here the Church is become the Parish-Church to both Parishes, and therefore it may be reasonable, that both Parishes should contribute to the Repair of it; and he gave a Day to the other Side, to shew Cause why a Prohibition should not go; puis.

Johnson *and* Ley.

3. UPON a Declaration in Prohibition, and the Pleading to it, upon Demurrer, two Questions were argued; First, Upon the remisit Curiam by the Dean of Salisbury, who had a Peculiar, and he made Letters of Request to the Dean of the Arches; upon which it was objected, that this was per saltum, and that he ought to have made his Request to the immediate Ordinary, and Hob. 16, 186. and Cr. Car. 262, &c. were cited for this Purpose; non allocatur; for though this is true, if it was a Peculiar of an Archdeacon, or any other, subject to the Jurisdiction of the Ordinary, that then the Objections made, and the Cases cited, would hold; but to this Holt Chief Justice said, that there are three Sorts of Peculiars: First, Which is when the Archdeacon, &c. have a Peculiar within the Diocese, and subject to the Jurisdiction of the Ordinary. Secondly, When one has a Peculiar not subject to the Ordinary, but to the Archbishop. And the Third is, When one has a Peculiar, subject neither to the Ordinary nor to the Archbishop, as there are some; and he said, that though the Dean of Sarum is to some Purposes subject to the Jurisdiction of the Bishop, yet as to this Peculiar, it is all one, as if it was in a Stranger; and it is not under the Jurisdiction of the Bishop of Sarum, more than the Bishop of London; and if he had made Request to the Bishop of Sarum, and the Party had been cited upon it, such Citation had been a Citation out of his Diocese within the Statute of 23 H. 8. and it does not appear, that he is within the Jurisdiction of the Bishop of Sarum, and therefore it shall not be intended: But Secondly, the greater Question was, if the Proctors in the Arches might sue for their Fees [in a Suit prosecuted there] in the Arches, or ought to have an Action at Common Law; and it was argued that the Fees are Temporal, and a Duty which shall go to the Executor; and many Books were cited, that the Ecclesiastical Court had their Power by several Statutes, and in none of them any Mention made of Fees; on the other Side, it was argued, that this is a Jurisdiction arising out of the Original Cause, which was

was of their Conusance, and many Canons seemed to establish this Authority: But the Chief Justice seemed to doubt, for he said, if the King erect a new Office, he may not annex a Fee to it, as is resolved in Veal and Prior's Case in Hard. Rep. 351. and if the King cannot, a Canon of the Church cannot; for though the Clergy may be taxed in Convocation by the Clergy, yet they cannot charge the Laity; and therefore at the Beginning the Party could not have any Remedy, but a Quantum meruit for his Labour and Pains; and after such an Action brought, and the Merit of his Service taxed by a Jury at such a reasonable Rate, that which is reasonable at one Time, would be at another; and by this Means an accustomable Fee came to be taken; but yet this did not alter the Nature of the Service, which is Temporal, and is founded upon a Contract and Retainer, which is a Temporal Act; and of such Opinion Justice Rokeby seemed to be, and said, that the Case of Gestlin and Froggat in the Common Pleas cited on both Sides, was a stronger Case for the Ecclesiastical Jurisdiction than this Case; and yet the whole Court was of Opinion, after the Case had been many Times argued upon a Motion for a Prohibition, that a Prohibition ought to go. Curia advisare vult.

Rowley *and* Raphson.

4. IN Debt upon a Judgment in R. B. the Defendant came and pleaded, that after the Judgment a Writ of Error was brought in Cam. Scacc. directed to the Chief Justice of R. B. upon which the Cause was removed before the Judges there, where it yet remains undetermined, and prayed Judgment if he shall be compelled to answer, quousque the Cause be determined there; upon which the Plaintiff demurred; and adjudged that the Defendant answer over, for this is not a Plea either in Bar, or in Abatement; and such a Conclusion quousque is not good, for it is not like to a Plea of Excommunication, for there he is only stopped till the Sentence discharged, and the Party may have a Re-summons, or Re-attachment; but the Law does not give any such Re-

 medy

medy here; and Holt Chief Justice said, that this might be pleaded in Abatement, but not in Bar; for though the Plaintiff has commenced his Action too soon, it is not a Reason why he should be barred, though it may be a Reason why the Suit should be abated; but if a Scire facias in such Case had been brought, quare executionem habere non debet, in such Case, a Writ of Error pending, might be pleaded in Bar of the Execution.

Greenwood *and* Piggon.

5. JOhannes Greenwood, Quer. in placito Transgr. vers. the Defendant Thomas, who came and justified; upon which the Plaintiff replied, and took Issue, Et hoc prædict. Johannes petit quod inquiratur per patriam, Et prædict. Johannes similiter, where it ought to be Thomas; and so as it was objected, no Issue is joined, for the Plaintiff may not join Issue with himself; and upon Search, the Plea-Roll and Nisi Prius Roll were wrong, and so was the Paper Book; and therefore it was objected that it was not amendable; for no Case can be produced where an Amendment was made of such a Misprision, where nothing was right, but mistaken throughout; on the other Side it was said by Northey, that this is within the Statute of H. 6. of Amendments, and so expressly resolved in Blackamore's Case, 8 Rep. 161. and 3 Cr. 435. 2 Cr. 67. and upon this the Court ruled it to be amended, nisi causa, &c. for per Holt Chief Justice, it is a Misprision of the Clerk apparent in the Nature of the Thing; and therefore amendable though mistaken throughout, as well as if the Plea-Roll or Nisi Prius Roll had been right.

Lady

Lady Gerrard's *Case.*

6. IN a Writ of Dower of a Capital Messuage, &c. the Defendant as to Part, came and confessed the Action, Ideo in misericordia; and as to the other Messuage he said, that Sir Thomas Gerrard was seised of this Messuage in Fee, and inhabited there as in his Capital Messuage, and that he was created a Baron of this Realm, and the Defendant derived Title under him, and pleaded further that all his Ancestors since Sir Thomas have lived in this Messuage, as in their Capital Messuage; and said that this Messuage est Caput Baroniæ, and so concludes with a Demand of Judgment, si of this she ought to be endowed, upon which the Demandant demurred; and adjudged in C. B. for the Demandant, Ideo a Misericordia entred again; upon which a Writ of Error was brought; First, Because of a Messuage being Caput Baroniæ a Woman is not indowable, for which 1 Inst. Bracton, Fitzherb. Tit. Dower, &c. were cited, and so was the old Law; and it was insisted that there is the same Reason for the Nobility at this Day, for it is against the Honour of a Nobleman to have his principal Seat divided, and leased to a Farmer, Innkeeper, &c. and therefore it is not a Feodal Privilege annexed to the Realty, but it is a personal Privilege in the Nobility; and if they have several Capital Messuages, the Heir would have Election to make which he would of them the Caput Baroniæ. Secondly, Here are two Misericordia's entred, where there ought to be but one, for no one ought to be twice punished for the same Offence; but it was argued by Serjeant Wright on the other Side, and agreed per Curiam, that here it is not shewn that this House was Caput Baroniæ, or that there was any Barony in Sir Thomas, of which this House might be the Caput, and therefore in this whole Plea no Caput Baroniæ is shewn; for a Man may be a Baron, though he has not an actual Barony, and a Man may have a Barony, and not be a Baron, scil. a Peer of the Realm; as Wright said the Bishops have, and yet they are not Barons, scil. they shall not be tried by their Peers; and here though

Sir Thomas Gerrard was created a Baron; yet he had not any actual Barony annexed to his Title, of which this House might be the Caput; and he said that the Caputs Baroniæ antiently were strong Castles for the Defence of the Realm, and the Law would not permit them to be divided for this Reason; and Holt Chief Justice said, that this could not be Caput Baroniæ, because they have shewn in their Plea, that Sir Thomas Gerrard was seised in Fee of it at the Time of his Creation; and therefore the King could not by his Creation make this a Caput Baroniæ; for a Barony was, when the King upon the Creation gave and annexed Land or Annuity ad onus & gradum sustentand. and for such a Barony Relief shall be paid according to the Rate mentioned in Magna Charta; but it is not shewn that this House was given to Sir Thomas, but the contrary that he was seised of it, and then the King could not give it him. Curia advisare vult.

And after at another Day in this Term, this Case was argued again; and the first Point as to the Caput Baroniæ was in Effect waived; but the second Error that here there were two Misericordia's, scil. one upon the Judgment upon the Render, and the Second upon the Judgment upon the Demurrer, was strongly urged; and it was objected by Shower, that here they ought to have stayed till the last Judgment, and entred but one Misericordia, for according to Beecher's Case, 8 Rep. 61. one Demandant or Tenant shall not be several Times amerced, for one Man shall be but once amerced upon one Original, or shall have but one Capias pro fine, though he plead Non est factum to several Deeds in the same Declaration; but where there are several Defendants, he shall be several Times amerced; and he cited 2 Sanders 296. the Case of the Dean and Chapter of Windsor, as a Case in Point; and he said that it seemed to be admitted in Specot's Case, 5 Rep. 57. that a second Misericordia is erroneous; Northey econtra; for he said, that the Misericordia is for a Thing which rises after the Original sued, scil. it is for the Delay given by the Defendant in not obeying the King's Writ, or for the Trouble which the Party has given the Court and the Country in suing without Cause of Action; and for this a Man may

be as often amerced, as he has delayed the Plaintiff; and he cited Rolls Amercement 213, 776. and Fitzherb. Tit. Judgment, pl. 32. in Point. 2 Leon. 186. 5 Rep. 58.

The Judgment was after affirmed per totam Curiam upon both Points, for the second Amercement was for a new Delay.

Anonymus.

7. IN Replevin the Defendant avowed, and the Plaintiff pleaded in Bar to the Avowry; and after Issue joined, and Notice of Trial, the Plaintiff came into Court, and prayed that he might confess the Avowry with a Relicta verificatione, the which the Court thought to be reasonable, and gave Rule to shew Cause on the other Side; upon which at another Day it was objected, that this being in the Discretion of the Court, the Court would not do it to the Prejudice of the Party; and this would be a Prejudice to the Defendant; for here this being upon a Confession, he could not have Costs upon the Statute of 17 Car. 2. as they might upon a Nonsuit or Demurrer; and likewise it being by Confession, the Plaintiff might have a second Deliverance; for Return irrepleviable shall not be awarded upon the Statute of West. 2. as it is held 34 H. 6. 37. and by this the Defendant shall be without any Fruit of his Distress; for he may bring second Deliverance, and after confess the Avowry, and so in infinitum, and therefore the Court would not admit him to confess the Avowry; then it was moved that they might waive their Plea and Demurrer, in which Case Return irreplevisable ought to be awarded upon the Stat. of West. 2. sed non allocatur: After by Consent he brought the Money into Court.

Sir James Harbert's *Case.*

8. A Distress was taken for a Poors Rate, and a Replevin brought; and upon Not guilty pleaded by the Officer, at the Trial, Evidence being given, and the Jury charged, and ready to give their Verdict, the Plaintiff became Nonsuit, by which the Officer was entitled to treble Costs and Damages, but the Jury departed without assessing them; upon which the Court was moved for a Writ of Enquiry, and after being twice moved, Rule was given for a Writ of Enquiry; for per Holt Chief Justice, If upon a Demurrer upon Evidence, the Jury be discharged, there shall be a Writ of Enquiry; for the Jury does not give any Verdict, and therefore they cannot assess the Damages; and the same Reason holds upon a Nonsuit; but otherwise where they give a Verdict, for there a Defect of assessing Damages shall not be supplied by a Writ of Enquiry; for in such Case the Jury have misdemeaned themselves; for if they had given Damages too high, &c. they might be attainted, and they are bound to give Damages, but in the other Cases it is otherwise; and he cited a Case, where in Detinue the Jury gave a Verdict, but omitted to enquire of the Value of the Goods; and he said that this was supplied by a Writ of Enquiry contrary to Cheyney's Case, 10 Rep. 119. and he said that it was so ruled about 13 or 14 Car. 2. but that he was not satisfied with it.

And at another Day in this Term the Court solemnly declared, that a Writ of Enquiry shall go in this Case; for per Holt Chief Justice the Jury here are discharged from giving their Verdict by the Nonsuit; and therefore if they had given a Verdict for the Damages, this had been but as an Inquest of Office, upon which no Attaint would lie, if the Damages had been excessive; and therefore there is no Default in the Jury, or Damage to the Plaintiff, if this be supplied by a Writ of Enquiry; but where the Jury gives a Verdict, and does not give Damages, there such a Defect shall not be supplied; for if the Jury had given Damages, this was as Part of their Verdict, upon which an Attaint lay, if they are excessive;

and therefore if this shall be supplied by a Writ of Enquiry, which is but an Inquest of Office, if the Damages are excessive, the Party shall be oppressed without the Benefit of an Attaint, and therefore according to Cheyney's Case such Default shall not be supplied by a Writ of Enquiry; and he said that this differs nothing in Reason from a Demurrer upon Evidence, in which Case such a Default had been supplied after by a Writ of Enquiry; 1 Cr. 143. and he cited 1 Roll. 272. Brampton's Case, and 2 Roll, 112. as Cases in Point, he said, that in Case of an Avowry for Rent upon the Statute of Avowries, 17 Car. 2. where the Jury do not inquire of the Value of the Rent arrear, that in such Case this shall not be supplied by a Writ of Enquiry; 1 Sid. 380. but the Reason is, that the Statute says, that such Enquiry shall be by the same Jury, so the different Penning of the Statute makes a different Reason; he also cited the Case of Burton and Robinson, in a Detinue of Charters, where they did not inquire of the Value of the Charters, and that he had heard that there was a Writ of Enquiry granted, but that he was not satisfied with it, for the Reason which is given in Cheyney's Case; but the Omission of the Inquiry of the Value of the Church in a Quare Impedit, he agreed, might be supplied by a Writ of Enquiry.

The King *versus* Kendall *and* Row.

9. THIS was upon a Return to an Habeas Corpus, by which it appeared, that the Prisoners were committed by the Secretary of State, and a Privy Counsellor; and the Cause expressed in the Warrant of Commitment was for High Treason, scil. for being aiding and assisting to Sir James Montgomery, who was charged for High Treason, and in the Custody of a Messenger, to make his Escape; to this Return Shower accepted, First, To the Authority of the Person who commits, scil. the Secretary of State, or a Privy Counsellor; for he said a Secretary of State, qua Talis, may not administer an Oath, and a Man ought not to be committed without Testimony, which ought to be upon Oath; also a Secretary cannot take a Recognizance to prosecute, which is the usual Way, and fit to be observed; and he made the same Objection to a Privy Counsellor;

but he admitted that the Privy Counsel in a Body congregate might commit; and as to the Case 1 Leon. 70, 71. he said that there they amended the Return, and made it to be per Consilium, which shews that they could not rely upon the first Return, by the Secretary; and as to the Resolution of the Justices in 1 And. 297. he said that some of the Things there resolved, are not Law, and the Resolutions there were not judicially upon their Oaths; and that sometimes a Judge had subscribed his Opinion one way, and gave Judgment another, as Justice Croke did in the Case of Ship-Money: Also he said that the Cause is not sufficiently expressed, for he is committed for being assisting to the Escape of Sir James Montgomery being charged for High Treason, without shewing for what Treason Sir James was charged; and he said that there are some Treasons, for the Receiving or Abetting of Persons guilty of which, it is not Treason, and for any Thing which appears to the Court, this Treason might be of such kind; and the Court in a dubious Case ought to intend for the Liberty of the Subject; and he instanced the Return of a Jesuit into England, and the Receiving one who had counterfeited the Great Seal, as Instances of this Kind: It was answered by Trevor Attorney General, that as to the first Exception, it has been the constant Practice for many Years, and instanced a Commitment by Secretary Morrice in 1660. and said that the Warrants of Commitments to the Tower are not duly preserved, and that many of those in the Secretary's Office are in the Custody of Sir Joseph Williamson now in Ireland; but he cited the Case in 1 Leon. 70, 71. and said that the Reason of the Amendment of the Return was not, because they thought that the Secretary had not Power to commit, but that they were not willing to shew the Cause of the Commitment; and as the Law was taken there, where a Man is committed by the Council, there the Cause of his Commitment ought not to be shewn according to the Resolution mentioned in Anderson; but where he is committed by a Privy Counsellor, there it was then taken that the Cause ought to be expressed in the Warrant: And as to the other Exception he said, that the Cause is sufficiently expressed; for it is for being aiding and assisting to Sir James Montgomery in his Escape; and he said

said it is more certain, and an Advantage to the Prisoner, in order to prepare for his Trial, to express the Overt Act of Treason of which he is accused, than to express the Species of Treason, and here the Overt Act is expressed; and he said no Instance could be given, where the Aiding and Abetting of a Traitor is not Treason; where a Man receives a Jesuit, or Counterfeitor of the Great Seal, this is but Misprision; but if he aids him or abets him, this is Treason: And he said that if a Man be in Prison for Treason, and some break the Prison, and inlarge the Prisoners, this is Treason, 1 Cr. 583. 1 Hen. 6. 5. 2 Inst. 590. As to the first Objection, the Court was of Opinion, that a Commitment by the Secretary of State was good; and Holt Chief Justice said, that he never knew it to be questioned but once, since he had sat there, for all his Time Commitments by them have been greatly regarded in the Courts; and as to that which was said by Shower, that no Commitment was antiently by Warrant, but by Writ upon Indictment; he demanded whether the Commission was at Common Law, or erected by Statute; and he said, that it was a Commission at Common Law, and their Authority was to impanel a Jury of Enquiry of Offences committed by those in Prison, and to deliver the Gaol; and if the Jury be to enquire of the Offences of those in Prison, this implies that they were imprisoned before the Indictment: And as to that which was said, that Aiding and Abetting of a Traitor in some Cases, might not be Treason; he demanded, if an Act be made Felony by Statute, and nothing more said, and after a Man counsel and procure another to commit this Fact, shall not he be an Accessary to the Felony by a Consequence in Law, though nothing be mentioned in the Statute of an Accessary? quasi diceret sic; and if it would be so in the Case of an Act made Felony by Statute, for what Reason shall not this be so in Case of Treason, and for what Reason shall not a Man be adjudged a Principal in Treason by such Means, by which he would be an Accessary in Felony? so he did not regard the Books cited per Shower, Dyer 296, &c. the which are upon particular Reasons: But he said the Warrant of Commitment is not certain enough; for it does not express for what Treason Sir James Montgomery was charged; and this is necessary; for the Defendant would be guilty of the same Species

of Treason, as Sir James was; as if he was guilty of levying War, the Defendant would be also guilty of this Species of Treason, and so of the other Kinds; and for this Reason the whole Court agreed, that they should be bailed; and Justice Rookby said, the Commitment by the Secretary is good, for he is a Centinel, who watches for the publick Good, and of such Authority, that he was a Conservator of the Peace at Common Law; and he said, that an Oath is not necessary to a Commitment, for a Constable might commit, yet he cannot administer an Oath; but he said that the Secretary might administer an Oath as incident to his Power to commit, as a Justice of Peace may; and he demanded by what Statute the Power is given to a Justice of Peace to administer an Oath; and Holt Chief Justice and he also gave much Regard to the Resolutions in 1 And. 297. though as to the Expressing the Cause of the Commitment, the Law at this Day is altered; for now by the Act of Habeas Corpus, the Cause ought to be expressed in the Warrant, as well upon a Commitment by the whole Council, as by a Privy Counsellor; also there was an Exception, that the Commitment of Sir James Montgomery to the Custody of a Messenger, was unlawful, and it ought to have been to the County Goal, according to the Statute of 5 Hen. 4. and therefore his Imprisonment being unlawful, his Escape out of such unlawful Custody, was not High Treason: But Holt Chief Justice doubted it; for he demanded if a Man escape out of New Prison, if it be not Felony, if his Crime be Felony; and so it is from the Tower; for though he did not approve of such Commitments, except for a short Time, in order to be examined before he is committed, which is for the Benefit of the Prisoner, for there may be Reason not to commit him to Prison; yet he said that such Commitment to a Messenger, though it be irregular, is not void, and therefore the Escape would be Treason; and Justice Rookby said, they might intend upon this Return, that he escaped from the Messenger, as he was carrying him to Prison: Upon the whole Matter they were admitted to Bail.

Broom's

Broom's *Case*.

10. BROOM was an Inhabitant in the City of London, in an House which was built after the Fire of London, and had been inhabited for thirty Years, and had diverse Lights in it for all this Time, which looked into a void Space of Land, and the Owner of this Land came, and erected Blinds before the Windows; upon which Broom applied himself to the Court of Aldermen, who made an Order that the Blinds should be pulled down and removed, and that Broom should be quiet in the Use and Enjoyment of his Lights; upon which a Motion being made for a Prohibition, and it being granted Nisi, the Recorder and others came for the City to shew Cause why a Prohibition should not be granted; and they insisted, that the Act for Rebuilding of the City was perpetual as to Houses built; and if it was not so, yet that for Lights, Gutters, and other Easements, the Court of Mayor and Aldermen had a Jurisdiction at Common Law; and they said that diverse Paragraphs in the Acts for Rebuilding the City, gave to them a perpetual Jurisdiction, as for Conduits, &c. and the Words are general, and the same in the one Case, as the other; and as to the Jurisdiction at Common Law, they have Officers annually sworn for this Purpose, and Entries of Orders and Decrees of such Kind, as antient as the Time of Ed. 3. But per Curiam, the Authority which the Act gave to the Court of Aldermen was only temporary, and the Design of the Act was, for the Encouragement of the Rebuilding of the City; the which is finished and pursued, and therefore the Design of the Act fulfilled; for they by the Act had a Power not to determine in the Course of a legal Proceeding, but in a summary Way and arbitrarily; and therefore if a Man, who had not Lights in such a Part of his House, or so large, had a Decree to make new Lights, or larger Lights; this by Force of the Act would give him a Right to have them, and he might claim them; and this was by Force of this Act; but after the City is rebuilt, and the Design of the Act pursued, such Authority ceases; and as to their Au-

thority by Prescription explosa fuit ista pretensio: A Prohibition was granted.

The Bankers *Case in Cam. Scacc.*

11. THIS Case was argued this Term by Holt Chief Justice, it having been argued by all the Justices of the Common Pleas and King's Bench before, upon a Writ of Error upon a Judgment in the Court of Exchequer; in which the Case was, that Williamson one of the Defendants in the Writ of Error, came into the Exchequer, and brought in there the Letters Patents of Car. 2. in which he recites that he was indebted to diverse Persons in diverse Sums particularly there mentioned, and that there was such a Deficiency in his Affairs, that he could not pay them, and particularly that he was indebted to Sir Robert Viner 4160000 l. 8 s. 2 d. ob. for the Payment of the Interest of which Sum, he grants for him, his Heirs and Successors 25000 l. per Ann. to be paid out of his Revenue of the Hereditary Excise to Sir Robert Viner in Trust for such Creditors of Sir Robert Viner, who would deliver their Securities, and take Assignments for their Debts; and by the same Letters Patents he directs the Officers of the Exchequer to strike Talleys, and upon the Receipt of the Revenue of the Excise, to pay them immediately after the Sum of 14000 l. in Charge to the Queen, and another Sum to the Duke of York: Proviso, That if the King pay to Sir Robert Viner, &c. their principal Sum, then the Letters Patents to be void: Williamson took an Assignment of 60 l. per Annum, for a Debt due to him by Sir Robert Viner of 1000 l. and delivered his Security, and this Assignment was enrolled; and he brought the Letters Patents and Assignments into the Court of Exchequer, and prayed them to be allowed, and that he might be paid the Arrears of the 60 l. per Annum, and the Annuity of 60 l. per Annum for the Future, by the Commissioners of the Treasury, and the Chamberlain of the Exchequer out of the Treasury, out of the Revenue arising out of that Part of the Excise charged by the Letters Patents; upon which the Attorney General demurred; and it was adjudged for the Complainants,

upon which a Writ of Error is brought; and two Points have been made.

First, If the Grant by the King of these annual Sums be good to charge this Hereditary Revenue. Secondly, If it be good, then the Question is, If the Parties have taken a proper Remedy; and he said, that he would consider Thirdly, if the Entry of the Judgment be good.

First, He said that the Grant is good to charge the Hereditary Revenue in Fee, and to bind his Successors; for the King was seised of this Revenue in Fee, to which Estate a Power to alien or charge is annexed by the Law; that he had such Estate, is without Question, because this Revenue was given in Lieu of Purveyance, and Tenures in Capite, and by Knight's Service, in which the Crown had an Inheritance, and therefore without such an Estate, which he had before, it had not been a Satisfaction. Secondly, The Words of the Act gave to him an Inheritance; and he having an Estate in Fee, it is a fundamental Point of Law, that it may be charged or aliened, for so is Littleton express, Sect. 360. and no Person natural or politick who has a Fee, but may alien it; and it is no Objection, that they are given under a Trust, for every one knows that a Bishop, Dean and Chapter, &c. are Corporations which have their Estates under a Trust, yet they may alien; and though a Parson may not alien by himself, yet he may by the Consent of the Patron and Ordinary; but the Law not having appointed others to consent in the Case of the King, he may alien without any Consent; and to say that he may alien with the Consent of the Estates of the Realm, is all one as to say that he may alien by Act of Parliament, which is to say that he may not alien at all without an Act of Parliament; for to alien by Act of Parliament, is to alien by a new Law made for that Purpose; and he said, that it was not given to the King under a Trust, but it was a Purchase by the King in the Place of an Inheritance heretofore in him, which he had given up for the Advantage of the Subject, and accepted of this as a Satisfaction for his pristine Inheritance; and as to the Objection, that if the King has such a Power to alien the Inheritance of the Crown, that this will be prejudical, and he might infeeble the Realm, and waste the Revenues of the Crown by lavish

and profuse Grants of it; he answered that such a dishonourable Thing ought not to be supposed of the King, to whom the Law attributes so much Power and Dignity; and to restrain the King from such a Power, is absurd, and against the Constitution of the Realm. First, Absurd, because by this he would have less Power than any of his Subjects, or than he himself had, when he was a Subject; and many who have ascended the Throne were Masters of great Estates and Possessions, the which they might have aliened when they were Subjects; but when they came to ascend the Throne, they were seised of these Possessions in jure Coronæ in their politick Capacity, and not in their private Capacity, 7 Rep. 12. Dyer 178. Com. 105, 166, 244. and if they could not be seised but in jure Coronæ, and they could not alien that of which they were seised jure Coronæ, they were under a greater Disability, after their Ascent to the Throne, than when they were Subjects, when the Maxim is, that the Descent of the Crown takes away all Disabilities: Also Secondly, It is contrary to the Constitution; for the Necessity of Affairs might require the King to raise Money, before a Parliament could be convened to give it, in which Case he has not any Way but to borrow; now if the King has not any Power to charge or alien his Revenue, there may be such a Juncture, that the Realm might be destroyed for the Want of it; for tho' the Way which has been often used to extort Loans from the Subject by Privy Seals, &c. is not to be commended or practiced, but condemned; yet he did not see any Harm in the Prince's Borrowing; and in Fact many of our Kings have borrowed, as may be seen in Cotton's Posthuma 175, 176, &c.

Secondly, In all Governments there ought to be a Power of Rewards and Punishments, which are the Supports of every State; Punishments are directed by the Law, but Rewards are arbitrary; and where a Man has done Service to his Country, Pensions for Life are not sufficient; for Men endeavour to ennoble their Families, especially under a Monarchy; Mirroir 2, 3. Selden 538, 839. that before the Statute de Donis, all Honours were granted in Fee, and by this the Nobles were more strongly incited to Actions of Virtue and Honour; and the Law does not admit Infancy in the King, because

that he should not be disabled to reward; as it is said in 7 Rep. 12. and this is also approved on by Act of Parliament, scil. 34 Hen. 8. cap. 20. the Preamble of which Act he recited. Thirdly, There is greater Reason that the King should not be disabled to grant or charge, than there is for a Subject or common Person; for the King has so many Ways to augment his Revenue, as Forfeitures, Escheats, Fines, and other Incomes, that if he could not alien them, and was a frugal Prince, he would possess the greater Part of the Land in a little Time, which would be a great Discouragement to Industry; and if Hen. 8. had been of the Temper of his Father, he by the Dissolution of the Monasteries, and the great Treasures of his Father, would have been Owner of all the Lands in the Realm; it has been said, that Lands which come by Escheat, or Forfeiture might be aliened; but that the antient Inheritance of the Crown, or that which came by Act of Parliament could not; and he said, that the Law did not make any Difference in any Book between the antient Inheritance of the Crown, or Lands settled by Act of Parliament, and Lands which came by Forfeitures or Escheats: He said that it appeared by Domesday Book, that there were Antiqua Dominica, and the Tenants of those Lands were by their Tenure to plow and sow the Lands of the King, and to pay such Rents in Provisions for the King's House; and for this Reason they had diverse Privileges, as not to be sued out of their Manor, not to pay Toll, or to be contributory to the Expences of Knights of the Shire, &c. and these Services and Tenures were an Advantage to the Rest of the Subjects, in Respect that the King being so served, he had not Occasion for Purveyance; and yet these Lands, the antient Inheritance of the Crown, were alienable; and if these Lands were alienable, he demanded what Lands are not alienable? and that they are alienable appears, N. B. 11, 12. for Writs of Right Close are to be directed to the Bailiffs of Subjects; and if the Law has made a Provision by an Original Writ, that Right be done in these Manors being in the Hand of a Subject; this is an Argument that they are alienable; and he did not know any Reason for a Difference between the antient Lands of the Inheritance of the Crown and other Estates which the

King has, which are of an higher Nature, and called the Flowers of the Crown, as Waifs, Strays, &c. 9 Rep. the Abbot of Strata Marcella's Case; also Hundreds might be aliened in Fee, till for several Inconveniencies it was restrained by the Statute of Edw. 3. and the King might erect a County Palatine, and separate it from the immediate Government of the King with a Power to pardon, Treasons, Felonies, &c. till the Statute of 27 H. 8. cap. 24. which reunites these Liberties and Privileges to the Crown.

It is objected that this Revenue is given by Act of Parliament.

He answered, First, Suppose a Fee be given to a Subject by Act of Parliament, he would have the same Powers, as over another Fee purchased from a Subject? and for what Reason shall it not be so in the Case of the King? and if there be not any Reason for a Difference in the Case of the King, and in the Case of a Subject, there is not any Difference: But Secondly, Fee-simple Estates given to the King by Act of Parliament have been actually aliened, though no Power given by the Act to the King to alien; for he has it by Consequence in Law, as in the Case of the Monasteries which are all aliened.

Objection, That this rises out of the Purse of the People.

He answered, Though it be raised out of the Purse of the People, yet it is the Property of the King, and all one as if they never had it, and there is no Difference if you pay to the King or his Alienee, 21 Edw. 3. 47. Prinn upon 4 Inst. 245. Knighton 2684. 2 Inst. 530. Davis 7. 14. of the Grant of the Cocket Custom to the Corporation of Waterford; and there is not any Difference between a Grant of Customs, which rise out of the Purse of the People, and a Grant of the Excise.

Objection, That they are not alienable, because they come in the Place of an Inheritance, which the King could not have aliened, as Tenures in Capite, Purveyance, &c.

Suppose that they were not alienable, yet these Inheritances are now at this Day extinct, and therefore they cannot affect an Inheritance of another Nature newly granted; besides the King, though he may not grant these

these Inheritances to others, yet he may discharge or release them. Moor 833. 1 Roll, 146. 9 Rep. 123. Loe's Case.

But it is said that by the old Law, the antient Revenues of the Crown are not alienable; and for this Britton 87. and Fleta L. 3. c. 6. are cited.

First, The Practice is against these Books; and Secondly, Britton has not any such Opinion, for he is to be understood that the King may not alien the Prerogatives of his Crown, as to grant to another Power of Pardon, &c. which would be to devest himself of Part of his Princely Authority; and as to Fleta, Selden questions if there ever was such a Constitution in his Dissertations upon Fleta 549, 552. but if there was such a Constitution, it never was received in this Realm, and therefore it cannot bind here, 2 Inst. 273. and he said, that no Grant of the King ever was avoided, for want of Power in the King, but in Cases where the King has been deceived, &c. and the several Acts of Resumption which have been made, are so many Proofs that the King had such a Power, and that there was no other Way to avoid the Grant, as 6 Hen. 4. 14. Cotton's Records 439. 1 Rich. 2. 58. Cotton's Records 159. and Fleta in another Place departs from what he had said; and the Length of Time is no Bar, for the Book of Domesday will evince the contrary, and shew that the Lands were the Kings; for this Book is a Record, and a Certiorari lies upon it, and it is the only Record which may be pleaded, it being before Time of Memory; also Bracton is econtra, and the Stat. de Bigamis is a Proof of it, c. 2. that the Grant of the King is good; and Fortescue in his Book de Laudibus Legum Angliæ, where he instructs the Prince in the Nature of this Government; if the Crown be disabled to grant and dispose, he would not have omitted to acquaint his Prince of it.

It is said, that the Fee-Farms have been granted by Act of Parliament; and this was because the Opinion was that the Grant was not good without an Act of Parliament.

The Act of Parliament was not necessary to enable the King to make a Grant of these Rents, but to encourage Purchasers, and to give such Privileges to the Subject, which the King could not transfer without Act of Parliament,

ment, and to cure and supply the Defects of Nonrecital or Misrecital; and the Act it self is an Authority that the King might alien, for the Act declares the Letters Patents good, which were granted before.

But it is said, that if the Excise be alienable, that then the King's Officers would be the Officers of the Subject, which would be absurd and inconvenient.

The Officers may be the Officers of the King, and collect the Duty of the Subject; as in the Case of a Gaol in the Hands of a Subject, he may sue in Chancery for a Commission of Gaol-delivery; in which Case the Justices shall be the Justices of the King, but they shall deliver the Gaol of a Subject; and so in the Case of a Forest in the Hands of a Subject; 1 Inst. 2. 12 Rep. 22. and he said that no Intent appears in the Act to appropriate this Revenue to the Crown, but only Words of Grant to the King and his Heirs; but in the Act for Hearth-Money, there is a Proviso, that the King may not alien.

It is said, that Provision is made to restrain the Treasurer to make a Lease beyond three Years.

This restrains the Treasurer ex officio to lease beyond three Years, but does not restrain the King; for that the Treasurer has such a Power to make a Lease is allowed in Lane's Case 2 Rep. but no Intent to restrain the King appearing, he could not think that he is restrained; as to that Objection to the Grant, that it is of an annual Sum or Rent which issues out of the Thing in Grant, and therefore it is not good; he said that an annual Rent is a proper Word for an Annuity, but if the King grants an Annuity, this does not charge his Person, Fitzherb. Annuity 152. and the Word Pension is not so proper, and it is in the Nature of a Rent-charge, 2 Cr. 78, 79. and it is assignable over, and so in this Case; it is objected that this Grant is made in Satisfaction of a Debt of 4160000 l. the which may not be, for how can this be a Satisfaction for a Debt due to another? the King takes Notice that he was in Debt, and that the Debt was stated at such a Sum, so that the King was not deceived; also it is a Consideration passed, and therefore it shall not avoid the Grant, 10 Rep. St. Saviour's Case, for the Consideration being passed, every Thing shall be intended to be done to make the Grant good, Com. 554.

and

and for these Reasons he concluded that the Grant of the King in this Case was good.

As to the Remedy, he held also that the Patentee and Assignee had taken a proper Remedy; he said that all his Brothers had agreed that here the Assignee, &c. had a legal Right, and therefore there is a legal Remedy, and it is in vain to have the one without the other; and he said, First, That Monstrans de Droit, and Petition of Right were the Remedies in such Case at the Common Law; and the Monstrans de Droit is enlarged by several Statutes, and except in a few Cases a Traverse lies, 4 Rep. 54. 2 Inst. 688. Stamf. Prerogat. 74. but this Case is not within any of the Statutes, but is at Common Law; and the Party in this Case is not put to his Petition of Right, but Monstrans de Droit is his proper Way; a Petition of Right is not necessary, though the Party may admit himself out of Possession, as in the Case of a Tenant in Tail of a Rent, who may have a Formedon, and then a Warranty would bar him, but this is not necessary; so here if the Party will admit himself out of Possession, he might have a Petition of Right. Secondly, A Petition of Right is not necessary, because a Petition of Right is grounded upon a Matter of Fact suggested, upon which a Commission issues to enquire of the Truth of this Suggestion, except the Attorney General confesses the Truth of the Matter suggested, as in a Petition of Dower, 3 Inst. 215. Moor 639. Co. Ent. 462. 9 Hen. 4. 4. but here no Matter of Fact is to be inquired of, but his Title is by Letters Patent which are Matter of Record; it is true that Williamson claims under Sir Robert Viner, but he claims by Deed enrolled directed by the Patent; neither does the Patentee go to destroy the Title of the King; but this is in Affirmance of the King's Title, and in all Cases of a Petition to the King, this is to controvert the Title of the King; the Case might have been so, that a Petition might have been necessary; as if Sir Robert Viner had been attainted before the Assignment inrolled, and after the Grant made, and a Seisure had been made into the King's Hand, the Party ought to go by Way of Petition; for in no Case is the Party put to his Petition, but when he controverts the Title of the King; but here the Annuity is not put to a Right; nothing

is done to turn the Subject's Title to a Right, and therefore there is no Reason to have a Petition; also as a Petition is not necessary, so the Remedy here pursued is proper, scil. a Monstrans de Droit, which is a Remedy at Common Law; Kell. 178. 4 Rep. 55. and if it be demanded when is such Remedy to be pursued, it may be answered when the Title appears upon Record, as suppose an Inquisition found a Title for the King, as also one for the Party, as in the Case of an Alienation in Mortmain by a Disseisor; Sadler's Case 4 Rep. And that a Monstrans de Droit lies in the Exchequer appears in Sheffeild's Case, and is admitted in the Com. 186. Coke's Entr. 205. [though 26 E. 3. does not mention the Exchequer,] for it lies in some Cases there by the Common Law; and at this Day a Monstrans de Droit lies only in Chancery and the Exchequer, except in a special Case.

As to the Authorities which have been cited, he said that Ryly 251. is an Authority for him, and proves first, That the Exchequer might hold Plea in an Annuity of the Grant of the King, secondly, That the Court of Exchequer may compel the Treasurer and Chamberlain to make Payment to the Patentee; but it has been objected against this Case, first, That the Petition was to the King in Parliament, which was the Ground of this Proceeding; secondly, That there was a Liberate upon which the Exchequer might hold Plea; thirdly, That it was not directed to the Barons alone, but to the Treasurer and Barons.

As to the first, he denied that the Proceeding was upon the Petition; there are several Ways of Petition; as a Petition of Right preferable in Parliament, as well as out of Parliament, as Ryley 257. Stanf. Prerog. 72. but the Petition in the Case above was only by way of Complaint, and this appears by the Answer indorsed, which was, go into the Exchequer, and shew your Charter to the Barons, and they will do right; and it is not the Petition which impowers the Barons. As to the second Objection, that there was a Liberate in that Case, but no such Writ here; he answered, that a Liberate is but a Writ of Allowance, which may give Credit, but no Jurisdiction, Registr. 192, 193. and in the old Time when the King's Charters were pleaded, there was a Writ of

Allowance; and now by the Statute of Rich. 2. cap. 9. the Court of Exchequer ought to proceed without such Writs; 4 Inst. 110. As to the third Objection, that the Parliament in that Case directed that a Writ be sued to the Treasurer, and therefore the Barons could not proceed, for they had not a Jurisdiction upon the Treasurer; he answered, that if the Barons have not a Jurisdiction, there is no Jurisdiction, for the Treasurer has none, and these Matters are to be determined before the Barons only; and though Writs are directed to the Treasurer and Barons, yet the Treasurer has not any Jurisdiction, for the Cursitors would not alter their Course, as in the Case upon the Statute of West. 2. of a parte talis; and therefore the Form of the Direction of Writs is no Argument, for it is communis Error, Regist. 137. N. B. 129. b. and if the Treasurer has not Jurisdiction in the Court of Pleas, this Suit is well brought before the Barons, and the Peers take Notice of the Jurisdiction which the Barons have. Ryly 262.

And he said that 9 H. 6. 13. is not a mean Authority; and the Question there was, If the Grant there charged the Person of the Queen, or issued out of the Custom; and such a Grant as this was taken to be good then; and he said that such a Proceeding as here, is not a Stranger to Westminster Hall; but he agreed with what is said in Walker's Case, 3 Rep. 23. that he suspected the Legitimacy of a Case, which never had another Case of Kin to it; and as to this he cited Coke's Ent. 93. where the King grants Fines and Amercements, and to be quit of Toll, &c. and if the King might make such a Grant in the Case of a Liberty, for what Reason may he not do it in the Case of a Rent? Term 25 Car. 2. R. B. Lady Broughton was convicted of Extortion from the Prisoners in the Prison of the Gatehouse at Westminster, and fined, and the Office seised into the Hands of the King, and the Sheriff had the Custody of the Prisoners; the Dean and Chapter of Westminster had the Inheritance, and came and claimed the Prison, and prayed an Amoveas Manus; and upon this the Attorney General came and confessed their Plea; and it was adjudged that the King's Hands be amoved, and the Prisoners were delivered to the Custody of the Dean and Chapter; and this was a Monstrans de Droit, and brought in R. B. because the Record of the Conviction and Seisure

sure were there; so here the Monstrans de Droit is proper in the Exchequer, because the Treasure is here; and this is the usual Court.

It is objected, that the Office of Receipt is distinct from the Court of Exchequer, and that Money issues without the Direction of the Barons, which is as much as to say, that they have nothing to do in this Matter; he answered, that though this in Fact be so, yet he questioned if it be of Right, or no; for the judicial Power is in the Barons, and the Issuing out of Money is as much Part of the Power of the Barons, as the Receipt; and upon the Accounts of the Auditors, it is to be determined by them, if the Treasure be duly issued or not, for the Barons are the supreme Auditors; 4 Inst. Tit. Exchequer, and Gervasius Tilburiensis; but it is said, that the Barons are Auditors for the King's Profit, to bring in his Revenue, that they may adjudge for his Profit, and give Orders to bring his Revenue in, but they cannot issue it out; this is as much as to say, that they may determine for the King, but not against him; but the Barons may determine all Matters concerning the Revenue, and they and the King have a Privilege to sue in this Court, and not the Officers of the Court only, 2 Inst. 550, 551. besides, this Judgment is not an Issuing of the Revenue, but a Determination of a Right; the Revenue is issued under the Great Seal, and by this the Subject gains a Property, the Barons only determine if the Letters Patents bind and are legal; as if Judgment be given upon an Obligation, the Obligor disposes of the Property, the Judgment only determines the Right, but say they, it is incongruous that the Barons should command the Treasurer who is a superior Officer: The Treasurer has Precedency before all the Barons, as the Chief Baron in respect of the other Barons; but he is Subject to the Judgment of the Court; he ought to submit to the King's Writ as well as another.

As to the Cases and Authorities upon which he grounded his Opinion, he relied upon Sir Thomas Wroth's Case, in the Com. 458. as a clear Authority not impeached by any Objection; for though it was objected that this Grant was under the Seal of the Court of Augmentations, the which being united to the Exchequer,

they may proceed there as the Court of Augmentation might have done, and therefore as to this Purpose the Court of Exchequer is as a Court of Augmentation; and the Statute of 1 Queen Mary directs Payments by the Court to which the Court of Augmentations was united, or by any other Court of Revenue; yet he answered and said, first, that this notwithstanding, the Court of Augmentations never was united to the Exchequer, Dyer 216. a. where it appears that the Uniting of the Court of Augmentations to the Exchequer was a void Union; for the Court was dissolved by Letters Patents dated Jan. 23. and united to the Court of Exchequer by Letters Patents dated the next Day after, which was impossible; and therefore the Reason of the Judgment in Sir Thomas Wroth's Case was not because the Court of Exchequer proceeded as a Court of Augmentation, for this Court was not united to the Exchequer; and therefore supposing that the Court of Augmentation had such a Power; yet this Court being dissolved, and gone, the Lands return and are under the Survey and Government of the Exchequer by the Common Law. Secondly, The Act says, That in Default of Payment by the Court of Augmentation, it shall be paid by any other Court of Revenue; the Annuity ought to be paid by the Treasurer of the Court of Augmentation but that Court being gone, the Party has no other Remedy, but the proper and natural Course in the Exchequer; and the Act does not alter the Remedy, but directs the Payment. Thirdly, It does not appear that the Court of Augmentations had any such Power to relieve Grantees of Rent; and if it be so, he demanded how came it to pass, that the Court of Augmentations had such a Way of Proceeding; for nothing of this Nature is in the Act which creats this Court; and therefore he said, that instead of the Court of Exchequer, proceeding as a Court of Augmentations, the Court of Augmentations had proceeded as a Court of Exchequer, and it is made, by the Words of the Act, a Court of Revenue, and the Exchequer discharged of such Things, which they have under their Jurisdiction, but no Method is directed for their Proceedings; they have the Power to proceed by Consequence in Law, and therefore he said all the Precedents in the Court of Augmentations are Precedents for him; and it is in the same Manner as in

other Courts; as in the Court of Wards, and Court of Survey, they proceed as a Court of Exchequer; and it was the constant Course there, that if the Grantee of a Rent came there, and claimed a Rent-charge upon the Land of a Ward to relieve him; and this was an Intermeddling as a Court of Revenue and Exchequer, to sever that which belonged to the King, from that which belonged to a Subject; 2 Cr. 78. yet he did not find where the Court of Wards had any such Authority: Also the Court of Survey proceeds in the same Manner, as before is mentioned, and have given Relief, per 33 Hen. 8. and these new Courts having such an Authority in this Manner to relieve, not by any express Words of the Act, but by Consequence in Law, by the same Reason the Court of Exchequer may proceed in the same Manner; so the Objection to Wroth's Case is answered, and this stands a plain Authority for us: Nevil's Case in the Com. 377. was upon a Grant by another upon Land, which came to the Crown, in which Case no Distress lay, but his Remedy is to come to the Receipt of the Exchequer, which is the Place where the Subject ought to receive and pay; if a Tally be struck, the Exchequer is discharged, and the Party ought to resort to the Person, upon whom the Tally is struck; and therefore in Nevil's Case he ought to come to the Receipt which is the proper Place, and his proper Remedy; and Plowden makes an Observation at the End of the Case, which is a Demonstration that he approved of it.

The Records which have been cited are, Mich. 1 Eliz. in Rem Offic. Rot. 218. Sir Richard Sackvill's Case; this was upon a Sale of a Manor charged with a Rent, and there were Covenants from the King, that the Alienee shall be discharged; Morse's Case, 1 & 2 Phil. & Mar. Trin. rem. Offic. rot. 294. this Precedent is above all Exception, because never entred in the Court of Augmentations. Hill. 1 & 2 Phil. & Mar Trin. Rem. Offic. rot. 104. Trin. 1 Mar. rot. 23. Mich. 1 & 2 Phil. & Mar. rot. 88. Trin. 1 Phil. & Mar. rot. 126, 191, 225.

It may be objected, that a Monstrans de Droit is not proper, because the Parties here intitle themselves by Grants from the Subject; but in all Cases a Grantee may maintain a Monstrans de Droit, where Lands came to the King by Matter of Fact, as upon a Vacancy of a Bishopruck, &c.

&c. and he need not resort to a Petition, because his Title is as high as that of the King; but if the King's Title be by Matter of Record, and the Title of the Party does not appear by Matter of Record, there at Common Law the Party was put to his Petition of Right, but where the King comes to Lands by Act of Law; this is in the Manner as before-mentioned.

It is objected, that diverse of the Precedents were upon Attainders of Treason, and therefore not maintainable; he answered, that they may be maintained in the same Manner as in Nevil's Case; for by 33 Hen. 8. the King is in actual Possession, and this justifies the Proceeding in Nevil's Case, and also the 33 Hen. 8. has a Saving for the Rights of Strangers; and it is as if a special Office had been found, and in such Case he might have his Monstrans de Droit, 3 Rep. 11. if it be demanded what shall be done in the Case of a Conveyance, he answered that there shall be the like Remedy; for he cannot convey more than he has, and his Conveyance cannot put the Rent to a Right; but in the Case of an Office found it is otherwise, for if a Man be attaint of Treason, and be found to be seised of the Land of another, the Person is put out of Possession, and before the Statutes which gave a Traverse, he had no Remedy, but a Petition of Right; for an Office is found upon Oath, and is a judicial Proceeding, where the Party who has a Title, has a sufficient Notice to come and make it appear; but now diverse Statutes have given a Traverse; but the Case in Question is at Common Law.

It is objected, that this Doctrine opposes a fundamental Rule of Law, scil. that Money in the Exchequer never returns, Registr. 193. He said, that there are two Cases, where Money paid into the Exchequer shall not be returned, though the Party has a Right to it, as in the Case of a Judgment reversed upon an Outlawry, and the Case of mesne Profits, and this for good Reason, because first, when the Judgment is reversed in R. B. they cannot send a Writ to the Treasurer and Barons to make Restitution, for this ought to be done upon the Judgment, and the Barons cannot do it, because they have not the Judgment; and when the Monies were paid to the King, he had a Right to receive it, and such is the King's Prerogative, that he shall not be over-reached by a Relation;

tion; for when the Outlawry is reversed, now by Relation the Money was the Property of the Party all the Time, but such Relation does not over-reach the Prerogative of the King; and so in the Case of mesne Profits, at Common Law, there was no Restitution; for the Remedy at Common Law was a Petition of Right, which was a real Action in its Nature, where Damages are not to be recovered; and in such Case the King had not a greater Privilege than a Subject, 7 Ed. 4. 17. 35 H. 6. 2. the King may not be a Disseisor as a Subject may, but by Articuli super Cartas, c. 19. mesne Profits shall be rendred to the Subject, though paid to the Exchequer. Trin. 1 Mar. rem. Offic. rot. 126. Hill. 13 El. rem. Offic rot. 143. Pasch. 2 El. rem. Offic. rot. 145. Mich. 13 Eliz. rot. 347. Pasch. 1 Eliz. rot. 108.

There is another Objection, Suppose the Judgment good, what Execution can we have? He answered, that so many Judgments which have been given, are not to no Purpose; but there are Writs of Execution; and when the Writ is delivered to the Treasurer and Chamberlain, so much Money in their Hands is become the Property of the Subject, and they are discharged for so much to the King, and become Debtors to the Party, 2 Hen. 7. 8. Old Entries, the last Case; and it is the same Case as upon a Fieri facias, upon which Monies are levied by a Sheriff, the Defendant is discharged, and the Sheriff becomes Debtor; and this is a Writ grounded upon a Judgment upon the Right determined, and is an Execution, and Debt would lie upon it.

As to the Judgment he held it to be good, but he had not seen the Letters Patents, and tho' it be objected that the Money is directed to be paid by the Commissioners and Chamberlain of the Treasury, and the Payment is to be made after the Charge of the Management, and the particular Sums payable to the Queen, and the Duke of York, where it ought to be general; he answered, that this must be understood of the Receipt of the Treasury, and that the Things objected are for the Advantage of the King, and therefore cannot be assigned for Error; also the Levying of Tallies might have been spared, but it is Surplusage and not Error, but it would have been better omitted; yet if the Judgment be erroneous, the Remedy however being proper, the Treasurer and Keeper ought to give a new

new Judgment, 21 E. 3. cap. 9. as in the Case of the King and Sainthill, where the Error was as to Costs, and the Judgment for this reversed, and a new Judgment given; and upon Debate upon Error in Parliament, it was resolved that the Error being only in the Judgment of the Barons, the Court here might give a new Judgment.

The Case of the Parish of St. Swithins; *devant.*

12. THIS Case was moved again; and per Curiam a Prohibition shall go; for now the Church of St. Mary Bothaw is taken away, and the Church of St. Swithin, by the express Words of the Act, made the Parish-Church of both Parishes, and in all Respects, as if it had been always the Parish-Church of both Parishes; and then by Consequence in Law, both Parishes ought to contribute to the Repair of it; and it was not the Intent of the Act to discharge the Parish of St. Mary Bothaw from contributing to any Parish-Church, as they would, were they not chargeable to the Repair of this: And Holt Chief Justice cited the Case of Dr. Puller and Dr. Hutchenson, reported in Jones upon a special Verdict in this Court, and after affirmed in Error, where two Churches were united, by the Act for Rebuilding the City, to the Church of St. Mary le Bow; but a Provision was made that the Ministers incumbent before the Fire, should receive their antient Revenue during their Lives, and the Time of their assisting to serve the Cure of St. Mary le Bow; in this Case it was resolved, that their Cures and their Churches were absolutely taken away, and that they were only Stipendiaries; and Holt Chief Justice said, that upon an Union at Common Law, or by the Statute of Hen. 8. though one Church be united to another, yet this does not unite the Parishes, or bind the Parishioners of the Church united, to resort to the Church to which it is united; but it is only an Appropriation of the one Church to the other; so that the Incumbent and his Successors of the other Church shall be Parsons of the Church united; but this notwithstanding, he is bound to celebrate Divine Service,

vice, &c. in the Church united, and the Inhabitants are not bound to resort to the other Church; and therefore the Rule for a Prohibition was discharged.

Breton *and* Cole.

13. IN Trespass, &c. the Defendant pleads, that one Creswick was outlawed, and that there was an Inquisition upon the Outlawry, upon which it was returned, that the Land of Creswick was of the annual Value of 59 l. and that upon this, a Levari facias de exititibus terræ was granted out of the Exchequer, directed to the Sheriff of Gloucestershire; and that the Defendant being with the Sheriff, and the Beasts of the Plaintiff being upon the Land, he said to the Sheriff, execute your Writ, and that by Force of such Writ, he took the Beasts of the Plaintiff being levant and couchant upon the Land, upon which the Plaintiff demurred; and after diverse Exceptions to the Pleading, which were overruled; the Point in Question was, If upon such a Writ of Levari facias to answer to the King de exitibus terræ, the Beasts of a Stranger levant and couchant may be taken and sold; and per Northey, the Beasts of a Stranger are not Issues, for the Intent of the Law where Issues are returned upon a Man is, that he by this Means shall be compelled to appear; now the Taking of the Beasts of another never could inforce the Defendant to appear, and though Issues are returned, yet it is in Supposal of Law a real Distress, which is sometimes given, and the Return of so much in Issues, is that the Value of the Land is so much, and the Land is charged for so much, and the Sheriff also by his Return is bound to levy so much, so that the Issues of the Land is the natural Product of the Land, scil. the Pasturage and Herbage of the Land, without manuring; for the King may not plough and sow the Land. But it was said on the other Side, that in this Case the Land is the Debtor, and the Beasts are not taken but in respect of their being upon the Land; as in the Case of a Distress for Rent, the Beasts of a Stranger may be taken by the same Reason; and if the Herbage be the only Issue or Profit [which Holt Chief Justice said was all one] of the Land, and

the Owner put in Beasts by way of Agistment; if the Beasts of a Stranger may not be taken, the King shall be answered of nothing: And Holt Chief Justice said, that this is a Charge upon the Land for the Value returned; and therefore if there be Tenant for Life, the Reversion in Fee, and Issues are forfeited by the Tenant for Life, this shall bind the Reversion; and he said, that though the Statute of Westm. 2. cap. 39. does not extend to this Case, yet Issues are defined by that Statute, and what are Issues in one Case are Issues in all; and he agreed to the Reason of the Land being Debtor, as in the Case of a Distress for Rent; and Justice Rookby was of the same Opinion; but in respect of the Consequence of the Case, Curia advisare vult.

Afterwards Term. Hill. 9 Will. 3. the Court was of Opinion, that the Beasts of the Plaintiff being found upon the Land, might be taken by the Levari facias: First, Because there is an express Authority and Command to the Sheriff to levy the annual Value of the Lands, and the Beasts being levant and couchant, are the Issues of the Land; and that the Statute of West. 2. cap. 39. is an explanatory Statute; and it is there said, that all the Beasts upon the Land are Issues, omnia mobilia upon the Land are Issues, and it does not restrain them to the Beasts of the Owner of the Land, 2 Inst. 453. Secondly, Because the Land is the Debtor to the King, and if there be not such Remedy, the Pernancy upon the Outlawry would be nothing; and if the Beasts of a Stranger should be exempt, the King would be defeated; and he who takes the whole Profits by Agistment, will likewise defeat the King; for he has no Remedy against the Party by seising the Land, and therefore he has no Remedy but by Levari facias; if a Man outlawed had aliened, and the Feoffee had put in his Beasts, no doubt but his Beasts are Issues, and he takes the Land in the same Plight as the Feoffor had it; for though the Feoffment be good, yet it does not determine the Pernancy, 21 H. 7. 7. and if the Beasts of the Feoffee are Issues, so will the Beasts of a Stranger, Hardr. 101. and Raymond 17. Windsor and Seywell; and the Reason of the Difference in those Cases is, that till Inquisition nothing is in the King; and they cannot be understood to be the Goods of the Person outlawed in the Inquisition, because

cause the Person outlawed cannot have Goods personal, and Chattels real are not in the King before the Inquisition, and to intend them to be the Goods of the Outlaw, is the same as to command the Issues of the Party to be levied of the Goods of the King; and the Plaintiff might in this Case be the Alienee of the Out-law, and then he shall be liable as well as the Feoffee; but supposing a Right in the Plaintiff precedent to the Outlawry, if it is not found in the Inquisition, he cannot plead it in Trespass, but ought to come into the Exchequer, and plead it there by a Monstrans de Droit, and have it allowed, before that he can plead it; for where the Issues are forfeit, the whole Inheritance is charged, for the Land is the Debtor, as if an Officer forfeit Issues for the Neglect of his Duty, this charges the whole Office; and no Levari facias issues but where the Land is Debtor; and in all Cases where the Land is Debtor, the Beasts of a Stranger are as liable as of the Owner, as in the common Case of Rents; and if it be so in the Case of a Subject, why should there be any Difference made in the Case of the King? the Party either has an Interest or no Interest, if he has an Interest, it is under the Outlaw; if he has no Interest, why did he put in his Beasts? the Case of Stafford and Bateman, 2 Roll's Abr. 159. is the only Case which seems to contradict this; but that must be a Mistake of the Printer, for that the Beasts may be taken and not sold is a Contradiction; and therefore the Plea was adjudged good in Substance.

Nichols *and* Shepherd.

14. THIS was upon a Demurrer to a Plea in Abatement, where the Defendant said, that she was baptized by the Name of Mary, and not of Patience, and the Plaintiff demurred, because no Place where she was baptized is mentioned; and also she does not say, that she was so called at the Time of the Bill sued; for where an Act is alledged, there ought to be a Place mentioned, because it is traversable; but if it had been that she was known by such Name only, it might be tried where the Action is brought, because it only concerns the Person; but because the Defendant did not say, that she was called Mary at the Time of the Bill sued, she ought to give the Plaintiff a better Writ.

The Case of the Parish of St. Nicholas *in* Abingdon.

15. AN Order of Justices for settling of a poor Man, being removed into R. B. by Certiorari; the Question upon the Statute of 3 Will. & Mar. was, If he being taxed in the Parish, and not having paid, but dying before Payment, or inhabiting there by the Space of Forty Days; if this was such a Settlement by the Parent, as to intitle the Children; and per Holt Chief Justice, the Words of the Act are tax and pay; and therefore Taxation without Payment is not sufficient.

Stroud *and* Birt.

16. THIS Case was argued by Serjeant Darnel for Defendant in the Original Action, and the Plaintiff in Error; and the Case was, the Plaintiff declares that he was possessed of a Tenement, and a Piece of Land to which he ought to have Common, for his Beasts levant and couchant upon his Tenement in 1000 Acres of Land in Mendipp Forest, and that the Defendant had entred, and made diverse Holes in the Acres, and stored them with Conies, so that he could not enjoy his Common in tam amplo & beneficiali modo as before, &c. the Defendant demurred to the Declaration, and Judgment was given for the Plaintiff in C. B. upon which a Writ of Error was brought, and the Error assigned was, that the Plaintiff had not intitled himself to this Common, but only said possessionat. & habere debuit; and it was said, that the Cases cited on the other Side of Dent and Oliver, Sands and Trefusis, St. John and Moody, &c. were after a Verdict; upon which the Right had been tried, and the other Cases were upon a Seisin alledged, or something more than a bare Possession; and the Case of Palms and Heble twait, which was an Action for diverting a Watercourse, where the Plaintiff declared, that he was seised of an antient Dam in the River Derwent, and that the Defendant pulled it up, so the Plaintiff there shewed in himself a prescriptible Right, and upon the Evidence he ought to shew that he had it Time out of Mind, &c. for if the Defendant can shew a Grant of it to the Plaintiff, he has failed, and shall be nonsuit; as it was ruled in the Case of Dr. Shalmer in an Action on the Case for stopping up his Lights, he counted that they were antient Lights, and the Defendant upon Evidence shewed the Beginning of them by Grant, upon which he was Nonsuit, quod fuit concessum per Curiam; and Holt Chief Justice said, that de antiquo in a Count, is a Prescription; and Darnel said, that this incertain Way of Pleading is disallowed in the old Books; and he cited diverse Cases out of Brook, Tit. Plead. to this Purpose, for there ought to be a certain Title expressed,

pressed, to which the Defendant may answer, and be provided to defend himself; but by this Way he may be surprised at the Trial, and know not how to defend himself; and tho' this Way of Pleading has been allowed of late Times, yet it is Time to stop to it; Northey argued e-contra, and cited Fitzherb. Tit. Br. 674. and divers antient Books, where this Way of Pleading has been held good; and as to the Reason of it, he said, that if it appears that the Defendant is in Possession, in such Case the Plaintiff ought to intitle himself, for he who will intrude and disturb my Possession, ought to shew a good Title to do it; but where the Action is brought against a Tort-feasor, not in Possession, there it is sufficient for the Plaintiff to shew a Possession, and not to shew any other Title, and by this give the Defendant who is a Tort-feasor an Opportunity to dispute his Title; but to shew a Possession generally is sufficient; and if the Defendant will compel the Plaintiff to shew a Title, he may do it by his Plea, and compel him to make Title in his Replication: And as to the Incertainty, upon a Trial he said that a Tort-feasor ought to be always provided to answer for his Act, and there cannot be any such Prejudice as is supposed: And as to the Books he said, that the Case of St. John and Moody was after a Verdict; but the Verdict was not regarded by the Court, and the Reason of the Resolution went upon the same Grounds, as if there never had been a Verdict: But he cited the Cases of Cary the Bailiff of Westminster and Callice, and the same and Baccus, which were in this Court after the Revolution, which were resolved, upon a Demurrer to a Declaration, to be good, tho' nothing more shewn than a bare Possession; he admitted, that if the Plaintiff had claimed Common in the Land of the Defendant, that there ought to be a Title in the Count; but it not appearing that the Defendant was in Possession, but only a Tort-feasor it is well enough, ut supra, &c. Curia advisare vult.

Trin. 8 Will. 3. The Action was adjudged to be well brought upon the Reason and Authority of St. John and Moody's Case; but it would have been otherwise, if it had appeared to be the Land of the Defendant.

Steyner and the Burgesses of Droitwich.

17. UPON a Trial at Bar in this Case, Camden's Britannia was offered in Evidence to prove a Reputation Ninety-two Years ago, that Salt ought to be made only at the three Pits of the Burgesses, and that all others were excluded; and it was said, that the Sayings of antient Persons who are dead, is always allowed, and this amounts to as much as the Saying of an old Man at least; and that Camden was a publick Person, being Historiographer Royal, &c. and that a Grave-Stone had been allowed as Evidence; sed non allocatur; for if one Part of Camden be allowed, another Part ought to be, and if Camden, then another Historian as well as him, and there would not be any Certainty; and though the Heralds Books are allowed to prove a Pedigree, yet this is because they have not better Evidence; and this is their proper Business about which they are employed, and therefore there is some Credit given to them, but they do not deserve much, because they are negligently kept: And though the Chronicles were admitted in the Case of the Lady Ivy and Neal, to discover the Forgery of a Deed, by the Mistake of the Stile of a King; for Philip did not assume the Stile of King of Spain in six Months after the Surrender of Charles the First, scil. till it was confirmed by the Estates; yet it was said that there were other Evidences of it; and the Court said, that an History may be Evidence of the general History of the Realm, but not of a particular Custom; and therefore secundum subjectam materiam it may be good Evidence or not; and Holt Chief Justice said, that old Historians may be good Expositors of the Reason of Laws, though the Lord Coke warns us not to rely upon them for Law; and Holt Chief Justice said that this is but a Copy, and though an old Manuscript, found among the Evidences of a Family, may be Evidence, because an Original; yet a Copy would not, for it is liable to the Mistake of the Transcriber.

Dugdale's

Dugdale's Monasticon was refused as Evidence to prove the Abbey of Fountains of the Order of Cistertians in the Exchequer in this Term, because it might be proved by the Records in the Court of Augmentation; the same Law of Dugdale's Baronage in Percie's Case; le quel jeo observavi.

Wilson *and* Feild.

18. AT Guildhall; Debt for Rent upon a Demise for Years, the Defendant pleads Nil habuit in tenementis, the Plaintiff replies, that he had a good and sufficient Estate to make the Demise to the Defendant modo & forma, &c. scil. that he was seised in his Demesne as of Fee; upon which Issue is joined, and upon Evidence it was objected, that he ought to shew an Estate in Fee; non allocatur; for the Issue is joined upon the good and sufficient Estate to make the Demise; and any Estate is sufficient for this Purpose, out of which the Estate demised may be derived; and all added after the scil. is but Form; but if he had not said, that he had a good and sufficient Estate, but only had said that he was seised in his Demesne as of Fee, then he had been restrained to prove such Estate; per Holt Chief Justice.

Middleton *and* Fowler.

20. AT Guildhall; Trover was brought against an Hackney Coachman, and the Goods were delivered to his Servant, and if this Delivery shall charge the Master is the Question; and per Holt Chief Justice, it shall not charge the Master, for the Party does not pay the Master for it, and therefore he shall not be charged; and this differs from a Coach in a Waggon, for there the Waggoner is paid for the Passenger, and for the Parcel also; but in a Coach the Passengers are allowed 10 or 15 Pounds Weight for their necessary Occasions in their Journey; and if any more be carried for which the Driver is paid, this is by Stealth; but if the Master be paid for it, or agree for it, and there be a Loss, then he shall answer, otherwise not.

The King *and* Betterton.

21. THE Defendant and divers other Persons having erected a Playhouse near Portugal Row in Lincoln's Inn Fields, which by Reason of the Thronging of Coaches, and the Resort of idle and disorderly Persons thither, was a great Nusance to the Inhabitants in the said Row, especially to such as had their Coach-houses adjoining backwards to their Houses; so that they could neither go out with their Coaches, or being abroad could bring their Coaches back into their Coach-houses; hereupon in Trinity Term 7 Will. 3. the Court of King's Bench was moved, on Behalf of the said Inhabitants, for his Majesty's Writ of Prohibition, to be directed to the said Betterton and others, upon the Suggestion following; and Time was given till the first Day of the next Term, to shew Cause why a Prohibition should not go.

Mich. 7 Willi' Tertii Regis.

MEmorandum quod die mercur' prox. post tres Septimanas Sanct. Mich. Anno Regni Domini Willi' Tertii nunc Regis Angliæ, &c. 7° coram Domino Rege apud Westm' ven' Honorabilis Elizabetha Pierpont vid. Domina Catherina Raynsford vid. Humfridus Winch Baronet, Jacobus Montague, Thomas Winford, Johannes Talbot, Robertus Skinner, Robertus Thompson, Simon Harcourt Arm' Inhabitantes de *Portugal Row, situate in Lincoln's Inn Fields*, in paroch' Sanct. Egidii in Campis in Com' Midd', & dant Cur' hic intelligi & informari quod Thomas Betterton nuper de paroch. Sanct. Egidii in Campis præd' Gen. Willielmus Smith nuper de eisdem Gen. Johannes Boman nuper de eisdem Gen. Cave Underhill nuper de eisdem Gen. Thomas Dogget nuper de eisdem Gen. Willielmus Bowen nuper de eisdem Gen. Georgius Bright nuper de eisdem Gen. Edwardus Kennaston nuper de eisdem Gen. Robertus Reading nuper de eisdem Gen. Johannes Pate nuper de eisdem Gen. Hugo Broome nuper de eisdem faber lignar' & Johannes Porter nuper de eisdem faber lignar' 29 Die Aprilis Anno 7 Supradict' quoddam Publicum Theatrum Anglice, *a Common Playhouse*, in dicta paroch. Sanct' Egidii in Campis & in paroch. Sancti Clementis Dacon' in Com' præd' propè & contiguè adjacen' Regiæ altæ viæ in paroch. præd. & prope diversas domus diversor. Honorabilium personar' & alior. ibidem inhabitant' erexer. & preparaver. pro publica action. ludor. scenial. Anglice, *The Acting of Stage-Plays*, & ostension' Spectacular. ludicror. in eodem pro lucro & proficuo suo, & quotidie diebus Dominicis Exceptis abinde hucusque in eodem publice agebant & ostendebant ludos scenial' & spectacula ludicra pro lucro & proficuo suo quibuscunque personis iisdem adesse volentibus & ad action. & ostens. eor'dem in Theatro illo prope Regiam altam viam præd. magnus concursus Populor. cum curris suis & curris alior. pro stipendio supra eos attendant in altam viam regiam indies temporibus action. & ostens. ludor. præd. venerunt & in eodem remanent & ratione concursus præd. alta via regia præd. & platea ibidem valde obstruct' & obstupat' fuer. & adhuc sunt & im-

posterum obstupari & obstrui minat' sunt ad grave & commune nocumentum omnium Ligeorum & subditor. dicti Domini Regis ibidem inhabitan. & residen' Nec non omnium alior. Ligeor. & Subditor. dicti Domini Regis per communes altas regias vias & plateas ibidem circa negotia sua necessar. eunt' redeun. transeun. equitan. & laboran' & contra pacem dicti Domini Regis, & hoc parat. sunt verificare unde petunt Remedium & breve dicti Domini Regis de prohibitione, &c.

The first Day of Mich. Term. Cause was shewn by Mr. Finch and Sir Bartholomew Shore, why a Prohibition should not issue; it was insisted on by Sir B. Shore, that this was no Nusance in it self, but occasionally and accidentally such, by Reason of the Concourse of Coaches; and therefore this not being a constant Nusance no Prohibition ought to go, but the Parties left at their Liberty to proceed in a legal Course to try the Matter, whether a Nusance or not; which the Granting of such a Prohibition would preclude them from doing; and he would have distinguished this from Jacob Hall's Case in the Modern Reports: And it was said by Mr. Finch, that this would be an extraordinary Way of proceeding, to try a criminal Matter by a Prohibition; and though he did admit the Court might grant such a Writ in this Case, as was done in Jacob Hall's, according to the antient Precedents cited by Mr. Noy, of suppressing a Bowling Green; yet in Regard a Grand Jury would be sworn and charged within a few Days, for whose Enquiry this Matter is proper; he hoped his Lordship would not admit of an extraordinary Way of Proceeding: But Sir B. S. would not admit a Prohibition lay in this Case, for that it would be to condemn the Party without hearing him; for if they proceeded to act, the Parties would be taken up upon an Attachment, and yet the Matter never tried, whether a Nusance or not, which the Chief Justice denied; for admitting a Prohibition lay, (to which he seemed to incline) when the Party came in upon the Attachment, there should be a Declaration upon the Prohibition, as in other Cases; to which the Party might plead, and make his Defence, and bring the Matter in Issue; but he demanded of the Inhabitants whether they insisted that Play-houses are Nusances in se, or that

this Playhouse becomes a Nusance to these particular Inhabitants, by the Obstruction of the publick Streets and Passages; ad quod non fuit responsum; but Time was given to put in their Suggestion, and for both Sides to prepare themselves to speak fully to the Matter, whereupon they were with me on both Sides; but I refused being concerned for the Players, being an Inhabitant, and my Name mentioned in the Suggestion; but considering the Matter, I cannot distinguish this from Jacob Hall's Case, or the Case of the Bowling Green, unless that this is a stronger Case than either of those Cases; for Stage-Plays (if not malum in se) as they have been holden to be by many antient Fathers heretofore, and learned Devines at this Day, (the Licentiousness of our Stage especially considered) are certainly as unlawful, as Dancing, or Tumbling, or throwing a Bowl for Exercise; so that neither of these in the Cases cited could be prohibited as Nusances in se, but as occasional and consequential Nusances, which if it is unlawful for any Man to erect or continue, (as being attended with such Consequences it will certainly be) such Unlawfulness will be a sufficient Ground for a Writ of Prohibition; for a Matter is not unlawful, because 'tis prohibited by his Majesty's Writ; but the Court issues his Majesty's Writ upon a Matter contained in a Suggestion, which is antecedently unlawful to the Granting such Writ; as in the common Cases of Prohibitions to Courts, their Proceedings are not unlawful upon granting the Prohibition, but of the same Force as they were before; if they had Cognizance of the Matter before, they will have so still, notwithstanding the Prohibition: The Prohibition is a Sort of a Caution to them to consider the Legality of their Proceedings, but hinders them not from proceeding, though such Proceeding after Prohibition delivered, is at the Peril of a Contempt, if they prove mistaken; but if upon an Attachment for proceeding post prohibitionem regiam, there be a Declaration as there ought, and the Defendant in Pleading can set forth a sufficient Jurisdiction; his Proceeding post prohibitionem regiam will be good in Law, and himself discharged of all Contempt and Costs against the Complainant; and 'tis no Objection to say a criminal Matter, or a Matter of Right will here be tried upon a Prohi-

 bition,

bition, if the Matter prohibited be unlawful, that is a sufficient Ground for the Writ, if the Subject hereupon stands admonished, the Design of the Law is answered; but if he insists upon his Right, it may be tried in this Way of Proceeding; and this is no new Doctrine, the Law being full of Instances of Prohibitions granted in Causes Civil, as well as Criminal; for 'tis the Legality or Illegality of the Matter that determines the King's Writ, to a Writ mandatory or prohibitory, and not its being of a publick or private Nature; though if that were a Ground, the Reason seems to hold strongest for a Prohibition in such a Case as this, which is of a publick Nature upon many Accounts; but as I have said the Legality or Illegality being the Ground, and the executive Power being in the King, what the Law forbids, the King (who is lex loquens) may by his Writ forbid, and in such a Case to say the Law forbids, and the King by his Writ forbids, is all one, such Writ being a Consequence upon a Prohibition in Law; and therefore where Writs are founded upon a Statute (as in the Case of a Ne injuste vexes, which by the greater and better Opinion is founded upon the Statute of Magna Charta, cap. 10.) such Writs are framed, and issue for the Execution of such Statute, be it mandatory or prohibitory, by a Consequence in Law; and so likewise of Matters at the Common Law; for it would be absurd to imagine that the Law should command or prohibit; and yet that the King in whom the Execution of the Law resides (and without which Power in the King, the Law it self is but a dead Letter,) should not; and Writs of Prohibition have issued from Time to Time in various Cases; for besides those aforementioned, and the Writ of Ne injuste vexes, Writs in Waste were frequently granted at Common Law, Writs of Prohibition of Waste to Ecclesiastical Persons have been granted even to the last Ages, as may be seen in Rolls, Tit. Waste 813. and 2 Rolls 111. and the Bishop of Durham's Case cited in Lyford's Case, 11 Rep. and yet these are all in Cases of a Civil Interest, so in Matters of a more publick Nature such Writs have gone; as to the Inhabitants of the Town of Southampton, upon a Surmise that they intended to demolish their Houses, and transplant themselves into

Foreign

Foreign Parts, and the like to the Town of Great Yarmouth, as may be seen 3 Inst. 205. And I question not but upon a narrower Search and Observation, many more Instances might be given of such Writs, both at Common Law, and upon several Statutes: And whereas this was insisted on as an extraordinary Course of Proceeding, and they desired to be left to defend themselves in the ordinary Way of an Indictment (the Design whereof was to obtain a Noli prosequi, and prevent any Conviction at all,) this seems an Act of Favour and Indulgence to the Subject, rather than a Hardship; for as I said, if upon Receipt of the Writ they desist, they cannot be farther proceeded against this Way, but the Law hath its End; whereas an Indictment is solely framed to bring the Party into Judgment, in order to inflict Punishment for Example's sake, so that this Way relishes of the Severity and Rigour of publick Justice; whereas the other resembles more the Indulgence and Compassion of a Father of his Country, who admonishes before he corrects.

Term. Hill.

7 Will. 3. R. B.

Dalby *and* Champernoon.

1. THE Case upon a special Verdict in Ejectment was, Sir Edmund Vowell was seised in Fee of the Lands in Question, and of diverse other Lands in the Counties of Cornwal and Devon; and having Issue two Sons, John and Edmund, upon the Marriage of John he settles Part of his Lands to the Use of John for Life, and after to Elizabeth his intended Wife, and after to John in Tail, and after to John in Fee, and other Lands in the County of Cornwal to John in Fee; and he settles the Lands in Question, which were Vowellscomb, Balserscomb, and Whitcomb, to the Use of himself for Life, then to John for Life, with a Proviso to preserve the contingent Remainders, and then to the First, and all the Sons of John in Tail Male, and in the same Manner to Edmund, Remainder to the right Heirs of John; Sir Edmund dies, and after John [being Sir John] having Issue John, Elizabeth and Margaret, made his Will, and devised all his Lands, Tenements, and Hereditaments to Cary and his Wife in Trust, to allow 50 l. per Ann. a-piece to his two Daughters, and to raise so much for their Portions; and after, in Case his Son died without Issue, he devised all his Lands, &c. except Langston, Lister, and Thavies, to Elizabeth his Daughter in Fee; and he devised Langston, Lister, and Thavies to Margaret in Fee; and then he recites, that whereas he was seised of other Lands,

Lands, &c. and in the End of the Will he takes Notice of a Request of his Father's, that Vowellscomb, &c. being the Lands in Question, should go, for Want of Issue Male of Sir John and Edmund his Brother, to their Cousin John Vowell; and that in Obedience to the Will of his Father, he is desirous, that it be observed, and requests Edmund his Brother to act accordingly, and after dies, and John his Son and Edmund dies without Issue: And Holt Chief Justice who delivered the Resolution of the Court said, that though as to the Lands in Question, Sir John had only a dry Reversion in Fee, yet that by the Words all his Lands, Tenements, and Hereditaments, such Reversion would pass by the Generality of the Words; but though by such general Words, such a dry Reversion would pass; yet when it after appears by the special Words, that such general Words ought not to extend to all his Lands, Tenements, and Hereditaments; there an Exposition ought to be made according to the special Words, according to the Rule in Altham's Case, 8 Rep. for otherwise the special Words would be rejected; and therefore here, the Words Forasmuch as there are other Lands, &c. ought to qualify the Generality of these general Words, and other ought to be referred, not to the Lands before, but ought to be understood of the Words, not mentioned before; and therefore all his Lands ought to be restrained, according to these special Words, and not construed according to the Generality of them, when he said that there are other Lands, which could not be comprised before, for then they could not be others: Also the Lands in Question could not be comprised within these Words for another Reason, for all the Lands which he gave to his Trustees for raising Portions, all these Lands he gave after the Portions raised to the same Trustees to the Use, as to all but Langston, Lister, &c. ut supra, now the Lands in Question cannot pass to the Trustees by this Devise, for Sir John was but Tenant for Life of these Lands, and after his Death they went to John his Son; and therefore he did not intend that more should go to his Daughters, than he could devise to his Trustees; and that he never intended it should be extended to Vowellscomb, &c. is plain, for he in the End of his Will takes Notice of the Request of his Father, and enjoins the Observance of

it from his Brother Edmund, if John his Son dies without Issue; the which declares that he never intended these general Words to extend to these Manors, but that they ought to be continued in the Family; and therefore the Court ought not to expound such general Words against such an Intent, and make him disobedient to the Request of his Father, when he declared his Desire to observe it, and enjoined it to his Brother also; so he concluded that by these general Words the Manors of Vowellscomb, &c. did not pass, but that they descended equally to Elizabeth and Margaret, and gave Judgment accordingly for the Defendant.

Barney *and* Hardisty.

2. A Scire facias was brought to revive a Judgment against the Testator, who died; and an Exception was taken by the Executor, First, Because there ought to be one Sci. fa. against him after the Death of the Testator. Secondly, That here two Sci. facias's issued, both being granted at one and the same Time; and the first within a Day or two, that the second Sci. fa. was returnable; the which as it was said is against the Rule and Reason of the Law, that a Writ shall issue after the Time in which it is returnable; and that the Subject shall not have due Notice, but though he searches and inquires, yet by the Taking of the Writ out, within a Day that the second Scire facias is returnable, all his Care does not avail him; but Execution will go, though he has a Release to plead, or any other Matter, and would appear before the Return of the first Scire facias, or had Goods by which he might be summoned at the Time of the Date of the first Scire facias; yet in all these Cases Nichil shall be returned, though the Party had Goods, or would appear and plead; to which the Court assented; but in regard of the constant Practice, which was to sue both the Scire facias's at once, they seemed to allow this Practice, in regard that there ought to be a full Time between the Date of the second Scire facias, and the Return of it; and in C. B. there is but one Scire facias only, except in the Case of an Executor; and in that Case there ought to be two Scire facias's awarded; in this Case

2 Jones 200. was cited; and Holt Chief Justice said, that he never held the Resolution as to the Testatum there to be Law.

Reynolds *and* Kening, *alias* Kenige.

3. THE Defendant and another were indicted for the Murder of Reynolds, at the Sessions at Exeter, and the other was convicted and attainted, but the Defendant here was acquitted; upon which the Widow brought her Appeal, and the Defendant removed himself hither by Habeas Corpus; and the Plaintiff moved to have an Habeas Corpus to remove the Body of the other who was attainted, the which the Court denied, and it was said that she might arraign her Appeal against the Defendant alone; so nothing was done the last Term, but the Writ of Appeal being returnable the first Day of the last Term, was discontinued, the which being before Appearance, it was not peremptory; and after this the Defendant being in Court, it was moved that he might be discharged, there not being any Thing against him, the Appeal being discontinued; but the Court would not credit it without View of the Roll, and gave a Day to bring in the Roll; at which Day it was prayed that they might proceed against him in Custod. Mareschall. by Bill, which was allowed, and the Appeal arraigned; upon which for the Defendant it was prayed, that they might have a Copy of the Bill, and Count, and Return of the Habeas Corpus; for it was agreed, that it being in the same Term, there ought not to be a Declaration filed according to Pigot's Case, 1 Cr. 532. But yet the Court ordered a Roll to be made, and a Copy of it to be delivered, and gave the Defendant Day to plead; and for the Proceeding in Custod. Mareschall. 3 Cr. 694, 695. Benl. 142.

Fletcher *and* Ingram.

4. IN Replevin the Defendant made Conusance as Bailiff to R. F. and said, that the Place where is within Shenston, and that Shenston is within the Manor of, &c. and shews a Custom for the Jury to elect one of the Reliants to serve the Office of Constable for a Year, and said that they elected such a one to be Constable for the Year insuing, and to take his Oath under a Penalty of 40 s. and at the next Court it was presented, that he did not take the Oath, and for this 40 s. a Distress was taken, &c. the Plaintiff demurred to this Avowry; First, Because the Custom is unreasonable, and therefore void, for it is not like to Greisbie's Case, where it was for the Year ensuing; but here the Custom is general, and therefore incertain, and he might serve it at any Time during his Life, as in the Case of a Condition. Secondly, There is no Person who is compellable to administer the Oath, and he ought not to be fined for that, the which is impossible for him to perform; and in this Case the Steward could not administer the Oath, for his Authority is determined with the Court; and the Justices of Peace being within Time of Memory, cannot administer the Oath by Custom, and therefore there is no Person to administer the Oath. Thirdly, Here is not any Notice, for though it is said, unde idem Defend. statim postea iisdem die & anno adtunc & ibidem notitiam habuit, yet express Notice ought to be alledged; and the Case of the King and Harper the last Term was cited, when an Indictment for refusing the Office of Constable was quashed, because no Notice was alledged; and Prigg's Case in Allen's Reports is agreeable to this: And it was further objected, that here is a Duty laid to be by Custom, and it is not like to a Fine or Amercement; and therefore the Party ought likewise to inable himself by Custom to distrain for it, otherwise no Distress is incident of Common Right: It was adjudged for the Plaintiff, for though as to the Incertainty of the Time, scil. the not saying for the Year next ensuing, the Court did not much regard it,

for the Course is to elect the Constable, and to appoint him to take his Oath within a reasonable Time; and this might be before a Justice of the Peace, for he has the Power of the antient Conservator of the Peace, and the Practice is so throughout England; and if the Court be held a Month after Michaelmas one Year, and within a Fortnight after Michaelmas the next Year, yet he may be said to serve for a Year well enough; but for the Defect of a Custom to distrain, and for want of alledging of Notice, the Court held the Avowry to be ill; for this is a Duty by the Custom, and therefore the Remedy in such a special Manner ought to be by Custom likewise; and there ought to be an express and precise Notice, & statim postea is not sufficient; and Holt Chief Justice cited a Precedent in Winch's Entries, that there ought to be an express Notice; and it was adjudged for the Plaintiff.

Term.

Term. Pasch.

8 Will. 3. R. B.

The King *versus* Cowper, *&c.*

1. AN Information was preferred against the Defendants, which shews that there was an open War between the Kings of England and France by Sea and Land, and had been for many Years; and that during this Time the King of France and his Subjects had been Enemies of the said King and his Subjects; and that the Defendants knowing this, and being Persons averse to the King and his Government, & nequiter intendentes the said Enemies of the King to aid and assist, and the Government here established to subvert, and the King to depose, during the said War, scil. 8vo. die Febr. anno, &c. ad seipsos transportand. from this Realm, scil. from the said Parish, perdela, and within the Dominions of the King of France, scil. in regnum Franciæ, without the Licence of the King, falso, illicite, fraudulenter & secrete machinat. & conat. fuerunt eâ intentione ad hostes & inimicos of the said King, and his Adherents, against the said King now in the said War, proditorie auxiliand. & assistend. & ad illicitas & proditor. intentiones, &c. suas perimplend. postea scil. 8vo. die Feb. quoddam navigium ad ipsos ab hoc regno, &c. in Dominia dicti Regis Gallici, viz. ad prædict. regnum Franciæ transportand. pro magna pecuniæ summa, viz. &c. pro hujusmodi transportatione solvi agreat. conduxer. & conduci & præparari causaverunt & præparaverunt, &c. ac navigium illud

ad littus maris in Paroch. illa scil. postea, &c. parat. & in promptu habuer. ad seipsos in illud eskippand. & in eadem forma prædict. transportand. necnon adtunc usque ad Littus maris ibidem ubi dict. navigium sic fuit parat. ad eos recipiend. & transportand. ad intention. prædict. perficiend. secrete noctanter illicite & fraudulenter accesserunt & venerunt ac seipsos in idem navigium sic eskippare & in eodem conveyare & transportare falso & illicite donec ipsi, &c. in ipso facto in navigium illud ingrediend. deprehensi capti & arrestati fuerunt adtunc & ibid. conat. fuer. & attemptaver. in Contempt. Dom. Reg. nunc, &c. Upon which the Defendants being convicted, it was moved in Arrest of Judgment that this is not any Offence, because the Statute which has made the going into France Treason, does not extend to this Endeavour only, where the Fact is not committed; for the Act having ordained that such a particular Fact shall be adjudged Treason, nothing is a Crime within this Act, which does not come within the Words of it, the which this Attempt does not do; and the Information is not grounded upon this Statute, but at Common Law, and it was not any Offence at Common Law; non allocatur; for the Court said that this borders upon High Treason; and though they did not declare that it was an Offence by Consequence of Law, after the Statute had made the Going into France Treason, yet they held it a great Offence at Common Law, and the Defendants were fined accordingly.

Blurton

ſ Blurton *and* Toon.

2. AT Guildhall, in an Action of Debt upon an Obligation, and Non est factum pleaded, a Witness was sworn who said, that his Hand was subscribed as a Witness, but that he did not see the Obligation sealed and delivered; upon which the Court demanded of him, if he ever set his Hand as a Witness, but where he saw the Sealing and Delivery; and he said that no, but that he never saw it; upon which one was sworn to prove the Hand of the other Witness who was dead, the which was opposed; but Holt Chief Justice said, that a Man shall not lose his Obligation, because they have tampered with his Witness, and he allowed the Plaintiff to prove the Obligation by Comparison of Hands of the other Witness.

ſ Briat *and* Gyll.

3. AT Guildhall, Action upon the Case was brought for Money received to the Use of the Plaintiff; the Defendant would have given in Evidence upon Non assumpsit, that the Money was condemned upon a common Attachment within the City of London; the which was opposed, because the Condemnation was after the Action commenced in the Courts above; to which it was answered, that though it was after the Action commenced, yet it was before Non assumpsit pleaded, and so well enough; non allocatur; for the Difference is, where the Condemnation is before the Action commenced, there the Defendant may plead Non assumpsit, and give the Attachment in Evidence; but where the Condemnation is after the Action commenced, the Defendant ought to plead it.

Dockwray

Dockwray *and* Dickenson.

4. AT Guildhall, in an Action of Trover for a Ship and Cargo, the Envoice and Bill of Loading was given in Evidence; the which was opposed, because though it be Evidence between the Freighter and Master, yet in this Case the Freighter and Master are but as one Person, and it shall not be Evidence against a third Person; non allocatur; for the Bill of Lading is always read in the Case of a Policy to prove Goods on Board, [the which was admitted, but not to prove the Value,] and here though the Certainty of the Value does not appear, yet insomuch that the Goods were proved to be bought, and paid for, by the Plaintiff, and to amount to such a Sum, and that the Envoice and Bill of Loading agreed; and that they were entred as put on Board such a Ship; and that they were carried to the Place where the Ship was taken; and that when the Ship was taken, there were such Goods on Board; and the Master being dead, his Hand to the Bill of Loading was proved, and the Master if he was present might be sworn; and therefore in this Case they might prove his Hand; for these Reasons the Bill of Loading was read; upon the Reading of which it was objected, that the Cargo was shipped by A. and B. and Company, and B. being dead, the Action brought by A. only is ill, because it appears that others have an Interest, who ought to be named; non allocatur; for it does not appear, and this ought to be proved, [but in this Case it seemeth as if it might be presumed] and if there are others, this is a Matter in Abatement, and it ought to be pleaded; and the Difference is, where it is an Action founded upon a Tort, as here, and Not guilty pleaded, and where it is founded upon a Contract; for there it is Non assumpsit, because it is another Contract, but the Party may make a Tort joint and several; and if a Man bring Trover for a Ship, and upon the Evidence it appears, that he has but the 16th Part of it; this is good, and the Interest of the others may be given in Evidence in Mitigation of Damages.

Wilson *and* Powell.

5. AT Guildhall, Trespass was laid with a Continuando from such a Day, till such a Day, the Party is not obliged upon Evidence to prove the precise Time alledged in the Continuando; but he ought to prove a Trespass at some Time, within the Time alledged in the Continuando; but if he will waive the Continuando, and give the single Trespass in Evidence, he may.

Term. Trin.

8 Will. 3. R. B.

The King *versus* Margaret Webster.

1. IN the Exchequer, upon a Super, the Question upon the Statute for imposing the Tax of 4 s. in the Pound arose upon the Clause in one of the first Acts, for taxing the Shares in the Company of the New River Water, which ordains that the Shares in this Company should be taxed in the County, where the Owners inhabit; and in the principal Case, the Defendant inhabited in one County, and was taxed in another, and therefore she refused to pay; and the Court was clear that she ought to pay, for there is an Interest vested in the King by the Act; and if the Remedy for collecting it, or the Method for assessing it prove impracticable, the Duty being vested in the King, this shall be levied by the Aid and Assistance of this Court; and it was adjudged accordingly; but insomuch that there was 1800 l. and more returned upon the Super, the Court declared, that the Defendant shall not be charged for the Whole, but only for her own Proportion.

The Case of the Parish of Newington Butts.

2. UPON the Statute of the 2d Will. & Mar. for the Paving and Cleansing of the Streets; the Question between the Inhabitants within this Parish was, if that Part of them which inhabited within the Country out of the Paving, should be contributory to the Rates and Assessments for the Paving; for by the Paving the Inhabitants receive the more immediate Benefit and Advantage in their Trade, of which the Farmers and Inhabitants do not partake; but per totam Curiam, all the Inhabitants within the Parish ought to contribute; for the Words of the Act are general, and where the Law does not distinguish, the Court ought not; and though the Inhabitants upon the Pavement have a Benefit more immediately than the others, yet they have a Charge also, scil. the Repair of the Pavement, to which the Inhabitants out of the Pavement are not liable; also the Act directs that the Churchwardens, Overseers, and others Inhabitants ought to meet, and make Rates and Assessments for defraying the Charge of the Scavenger; and by the Word Inhabitants, those who live out of the Pavement may meet, and make Rates to charge those upon the Pavement; and it is not reasonable, that the Word Inhabitants shall have a general Interpretation in one Place, and be restrained to Part of the Inhabitants, who inhabit upon the Pavement only, in the other; for which they resolved, that the Order of the Justices, which charged all the Inhabitants generally to the Scavengers Rate, be confirmed.

The Attorney General *versus Sir* James Butler *in Cancell.*

3. AT a Sitting after Trinity Term before Sir John Sommers Lord Keeper, the Case upon the Bill and Plea was; The Attorney General at the Relation of R. G. and B. W. Clerks, Brethren, and Susanna D. &c. Sisters, &c. belonging to the Hospital or Free Chapel of St. Katherine's sets forth, that this Hospital was founded by Queen Eleanor, &c. and that there have been diverse good Rules and Orders made for the Government of this Hospital, and a certain Allowance for the Brothers and Sisters appointed; that the Master ought to be a Doctor of the Civil Law, that their Revenues are much encreased, and that their Allowances ought to be so too; then they set forth several Acts of the Master in renewing Leases, and breaking up Chests, &c. without the Consent of the Brothers, and suspending of the Brothers; and they pray that they may be quieted, settled, and relieved in the Premisses.

Sir James Butler the Master pleads [confessing the Foundation and Orders] that the Queens of England are Patrons and Visitors of this Hospital; and so shews that it being once vested in a Queen-Consort, who after becomes Dowager, it remains still in the Dowager, and goes not over to a Consort; but where there is no Queen, the Kings have visited, and so insists that the Chancery hath no Jurisdiction, but that the Visitation belongs to the Queen-Dowager.

The Case was argued by Pemberton, Rawlinson, Powis and Jekel in Maintenance of the Plea, upon the Reason and Authority of Widdrington's Case, Appleford's Case, and Exeter College Case, that the Founder, or whom he appoints, is Visitor eo nomine, and that the Courts of Law have nothing to do, and instanced in a Visitation on the Queen's Account by Bridgeman, when he was Keeper; and Powis cited N. B. 42. 8 Ed. 3. 70. 8 Ass. 29, 31. and among the Records in the Tower 1 Ed. 3. pars prima. 8 Membr. 8. there was a Visitation of this Hospital at the Instance of the Queen by Commission directed to the Judges, and several Persons of great

Note, that they should visit the Hospital, which they did, and suspended the Master, and gave an Account hereof to the Queen, who afterwards actually deprived him; he brought his Assize in R. B. upon which a Supersedeas issued from the King to the Judges of R. B. that they look into the Charter of Queen Eleanor; and if it appears that the Visitation belongs to the Queen, that then they proceed no further in the King's Bench, upon which the Rule was, Ideo dictum est, &c. quod sequatur coram Domina Regina & concilio ejus; but where there is no Queen, there the Visitation devolves to the King, as in the Time of Rich. 2. Anno 1377. there was a Commission to visit from the King; but it appeared by this Commission, that if there had been a Queen Dowager or Consort, it had not belonged to the King; eo quod Hospitium prædict. in manus prædict. &c. per mortem prædict. Reginæ pervenerit; and Bridgeman made a Report of all that he had done, to the Queen.

It was argued econtra, by Trevor Attorney General, Vernon, &c. that the Question is, if the Court of Chancery has Authority to enquire of the Abuses of this Hospital, and to have an Answer to the Abuses set forth in the Bill; for though the Patronage is settled in the Queens of England by the Charter of Foundation, there is not any Clause which settles the Visitation, so that it is only by Consequence and Construction of Law, that they say that the Queen is Visitor; but he said this is a Royal Foundation, and it being so, unless an express Visitor be appointed, the Right is in the Crown; here the Patronage is reserved to the Queens, but no Mention of the Visitation, so this is left to the Law; and as to the Visitation by Bridgeman, in his Citation he positively asserts his Right to visit as Chancellor; and in the Time of Ed. 3. there is a Record which says that it belongs to the Chancellor ratione officii, and the Record does not take Notice that there was no Queen at this Time; the Record was in Time 23 E. 3. The Bill here is to have an Account from the Master, and charges him to have defrauded the Brothers, &c. of that which belongs to them; and if it were no more than a Bill of Discovery, certainly it would be proper; for if a Visitor were appointed by the Queen, he cannot examine upon Oath; and therefore if it were a Bill only to inable another

Court

Court to give Relief, he ought to have answered, But we insist the Chancellor is Visitor de Jure; and if so, he may execute that Power by Bill in this Court, or otherwise: But at least this is in the Nature of a Bill of a Discovery of what he hath received, that he may be accountable, whether your Lordship will make any Visitation in it or not; and if this Plea stand, we cannot come at it any where else, and therefore such a Bill is proper, where the Matter is determinable at Law; but we insist upon it that there is no Visitor appointed by the Charter, that this is a Charter of Royal Foundation; and my Lord Keeper Bridgeman did assert his own Power, and in 25 E. 3. I believe there was a Queen in Being: And by Vernon, Supposing the Court have not Authority to make a final Determination, yet the Complainants being intitled to a Share of the Rents and Profits by the Charter, and the Master being but one of Four, and having received the Whole, he ought to answer if it were only in Order to our Redress in another Place; but we think we are very proper in this Court; for it will not be said, but that before 43 El. there have been Informations in this Court, for Mismanagement of Charity; that Statute makes particular Provision indeed, that where a Visitor is appointed, the Commissioners, that were to act under that Act, were not to intermeddle; but we insist here, there is no special Visitor appointed by the Founder; for being appointed Patrons, doth not infer they are Visitors; but however that be, we are properly here for a Discovery of the Rents and Profits.

Pemberton said, that the Queens being made Patrons, they have the same Power as the Founder; and where the Patronage descends to the Heir, he has the Power of a Founder eo nomine as Patron, for the Patronage draws all Things with it: As to Bridgeman's Rep. it begins, May it please your most excellent Majesty, and so it may begin to her Majesty; and that Record mentioned in the Time of Rich. 2. is an Inspeximus of the Record in the Time of Ed. 3. an. regni 25.

The Keeper: I shall not give any Opinion now, but take it according to the Bishop of Exeter's Case, which went the furthest that any Case went, that where once a Visitor hath given Judgment, no Court can meddle in it;

Here perhaps there is nothing to do with the Judgment of the Visitor, but adminicularly to assist it; here is no Pretence of removing Sir James Butler from being Master, nor controverting any Part of the Mismanagement of the Hospital: Advisare vult.

Webb *and* Plumsted.

4. AT Nisi prius at Westminster, An Action was brought for Money received to the Use of the Plaintiff; upon the Evidence it appeared to be Money secretly deposited by the Wife, and a Note taken for it in the Name of a third Person; and after the Death of the Wife the Action was brought by the Husband; and in this Case it was proved, that the Wife said, that she had received the Money deposited, again; and an Exception was taken that this is not Evidence; non allocatur; for the Matter being transacted by the Wife, and the Case depending only upon this Transaction, that which the Wife said, is Evidence.

Knight *and* Hopper.

5. AT Guildhall: In an Action upon the Case upon mutual Agreements the Evidence was a Note, in the Nature of a Bill of Parcels, to this Purpose; Bought by Anne Knight of —— Hopper 100 Pieces of Muslins at 40 s. per Piece, to be fetched away by 10 Pieces at a Time, and paid for as taken away: First, It was held in this Case per Holt Chief Justice, that the Pieces being marked and sealed, the Property is altered immediately, and that they remained only as a Security for the Money. Secondly, That if they are not taken away upon Request in a reasonable Time, that the Party might have an Action for his Money, but yet he may not sell the Goods. Thirdly, It being objected, that insomuch there was not any Promise to deliver the Goods, and the Plaintiff having counted upon such a Promise, that he had failed; it was answered, that the Agreement being to pay 20 l. when

when 10 Pieces were taken away, and so for every 10 Pieces; that this implies a Promise to deliver them, the which seems to be Reason; but a Promise was proved to this Purpose, and so a Verdict was for the Plaintiff.

Gilbert *and* Berkeley.

6. AT Guildhall: Upon Evidence the Case was, A Man had an Horse in an Inn, and came thither, and directed, that the Innkeeper should not give him any more Food, for he would not be responsible for it; and the Question was, if for the Food, after this Direction, given by the Innkeeper, to the Horse, he who brought the Horse thither, shall be charged, or not; and Holt Chief Justice at first enclined, that this is a Discharge, and that the Horse [though he might be retained by the Innkeeper yet] is but in the Nature of a Distress; and it being in the Custody of the Innkeeper in his Inn, this is a Pound Covert, and the Horse ought to be afterwards found and maintained at the Peril of the Innkeeper; but after mutatâ opinione, he directed that this was not a Discharge, for then any Innkeeper might be deceived, and it is the Lessening of the Security of an Innkeeper, who may detain, and by the Custom of London sell the Horse for his keeping.

Tyley *and* Seed.

7. AT Guildhall: In Ejectment for a Messuage in London, it was objected against the Title of the Plaintiff, that this was a Messuage above 40 s. per Ann. Rent, and that the Custom of the City is, that there ought to be Warning given for the Space of half a Year, where the Messuage is of such a Rent, and by the Space of a Quarter of a Year, where it is under such a Rent; and an antient Book in French was produced, in which such Custom was registred; the which was allowed to prove the Custom; but the Question was, if this Custom gave the Party an Interest, or only intitled him to an Action, if he be ousted within the Time, as in the common Cases of Leases for Years, or at Will, with Agreement for a Quarter's Warning; if the Party depart without Warning, an Action of Debt does not lie for the Rent, but an Action on the Case founded upon the Agreement; and though Holt Chief Justice said, that he had heard that North Chief Justice had ruled upon Evidence, that the Custom gave an Interest; and it was objected, that if it did not give an Interest, it was not of any Benefit to a Citizen, who ought to have a reasonable Time to remove his Effects; yet the Chief Justice inclined econtra, and it was reserved for his Consideration.

Mitchel *and* Meese.

8. AT Guildhall: Upon plene administravit the Question was, if the Defendant shall be allowed the Payment of a Quarter's Rent accrued due within four or five Days after the Death of the Intestate, he having received all the Profit of the Land till within such a small Time; it was objected, that this was not a Debt due tempore vitæ of the Intestate; and therefore it not being his Debt, it ought not to be allowed to be paid out of his Estate; on the other Side it was said, that it will be hard that an Executor or Administrator shall pay a Rent out of his own Estate, when the Intestate, &c.

had received all the Profits, except for two or three Days; and Holt Chief Justice seemed to incline, that if this was a Term continuing after the Death of the Intestate, that the Administrator shall be allowed for the Rent; otherwise if it be determined by his Death; and in this Case there was another Question; for the Action was brought upon a Note, which was assigned to J. S. and this was objected upon the Trial; but per Curiam by the Plea the Right of the Action is admitted, and the Property of the Note in another may not now be objected; otherwise if he had pleaded Non assumpsit; then it was objected, that this might be given in Evidence for Mitigation of Damages; but the Court ordered the Assignment of the Note to the Defendant, and a Verdict for the Sum comprised in the Note was given for the Plaintiff.

Term. Mich.

8 Will. 3. R. B.

The King *and the Bishop of* Chester, *&c.*

1. A Writ of Error was brought upon a Judgment in a Qu. Imp. in C. B. where the King declares that Q. El. was seised of the Advowson of the Church of D. ut de uno grosso, and presented J. S. and died; and that this descended to King James, and that he being seised and dead, this descended to King Charles I. who presented Wickham; and that after Peirce, the Father of one of the Defendants, presented upon the King by Usurpation, and died; and that by the Demise of Car. 1. the Advowson descended to Car. 2. and he presented Samwell, and so derived Title from him to the present King; that the Church is void by the Death of Samways, and it belongs to the King to present, and the Defendants have disturbed him, &c. the Bishop claims nothing but as Ordinary; the Defendant Peirce comes and pleads quod bene & verum est, that King Char. 1. was seised modo & forma, and presented; and after being so seised, he by Letters Patents reciting the Grant of the Advowson to Sir William Theekstone in Fee, and that the Father of Peirce, by Usurpation upon Sir William Theekstone, presented Metcalf; and that after Sir William Theekstone released to Peirce and his Heirs, that Peirce died, and the Advowson descended to the Defendant as his Son and Heir; and that the Church became void, and King Char. 2. presented Samwell by Lapse, who died, and so it belongs to the Defendant to present, absque hoc, that Car. 1. died seised of the said

Advowson modo & forma, &c. and the other Defendant pleaded the same Plea by way of Excuse; to this the Attorney General came, and prayed Oyer of the Letters Patents, & habuit; and they are entred in hæc verba, dated 19 July, 14 Car. 1. and they recite a Grant of the Manor of Bedel Ashton to the Earl of Warwick in Fee, and all Advowsons to it appendant, and that the Manor and all Advowsons are legally vested in Sir William Theekstone; and that he, by Virtue of the said Letters Patents, claimed to hold to him and his Heirs, and ratified and confirmed them to him and his Heirs; and then the King further recites, that he had presented Wilson by Lapse, and after presented Wickham pleno jure; upon which Sir William Theekstone had brought a Quare Impedit against Wickham, which yet depends undiscussed, as Wickham informed him; and that it was agreed between them, that Wickham shall remain in Possession, and that Sir William Theekstone and his Heirs shall present in futuro, and that Wickham would procure the King to grant his Letters Patents to this Effect; the King being willing that Sir William Theekstone should have the Effect of this Agreement, and enjoy the Advowson according to the Intent of the Letters Patents of Queen Eliz. any Defect or Defects non obstant. without any Prejudice by his Presentation of Wickham; ulterius igitur, &c. The King grants to Sir Will. Theekstone the said Advowson in Fee, &c. and upon the Entry of these Letters Patents the Attorney General demurred, because the Inducement to the Traverse was insufficient.

The main Point of this Case is, If the Letters Patents made 19 July, 14 Car. 1. be good or not; and per Pemberton who argued for the Plaintiff in Error, these Letters Patents are good in themselves; but if they are not good in themselves, they are good as they stand upon the Pleadings; it was agreed in this Case on all Hands, that the Plea of the Defendant was good, till the Oyer of the Letters Patents, and the Entry of them in hæc verba, for they have declared that King Char. 1. presented Wickham, so they admit the Seisin of Char. 1. but that after he granted to Sir William Theekstone in Fee, and derived a Title under him; and as to the Presentment of Char. 2. of Samwell, this was by Lapse; but the Letters Patents being entred

in hæc verba, the Objection arises, that the Letters Patents are void, and so the Advowson remains in Char. 1. and descends to the King that now is, and so the Traverse not well induced; and they fortify their Objection in this Manner; that it appears that Char. 1. apprehended this Advowson had passed by the Letters Patents of Queen Eliz. who granted this as Appendant, where it was in Gross, and so she was deceived, and her Grant void; and this Grant being void, the Letters Patents of Char. 1. founded upon them are void also: He said, that this seemed a far fetched Objection to make the Letters Patents of Char. 1. void upon an Objection in Letters Patents made 11 Eliz. which was more than 120 Years since; and he said, if the Letters Patents of Queen Eliz. are void, the second Letters Patents are not; but they on the other Side fortify their Objection with this Position, that where the King is deceived in his Grant, the Grant is void, the which he said he would not controvert, yet every Misapprehension of the King would not frustrate his Grant; it is objected that it is granted as Appendant, where it was in Gross; but he said it is not in Gross by any Thing which appears in the Pleadings; for though it is said in the Count that the Queen was seised as de uno Grosso, [yet she had granted it as appendant] this is not material, and the Court ought not to regard it, because it is Surplusage, and nugatory, and the Attorney does not rely upon it, but proceeds and shews another Title for his Majesty, scil. that the King presented Wilson, and that after Char. 1. presented Wickham, and he might have begun with either of them; and it would have been a good Title to the King, and he need not to have resorted to the Seisin of Queen Eliz. for it is not issuable or traversable; for the King had a Title without it, the which if they could not answer, they ought to lose their Advowson; it is said that Surplusage does not hurt him who pleads it, à fortiori it does not hurt him against whom it is pleaded; and the Allegation of the Attorney, that the Queen was seised ut de uno Grosso not being traversable or issuable, he may do it without Danger, and the Defendant has not any Way to put this in Trial; but the Attorney might have joined Issue upon the Dying seised of Ch. 1. and so the whole Matter would have come in Question;

and

and because that he would not, and the Defendant had not any Way to try this Matter, the Allegation is Surplusage and nugatory, of which the Court ought not to take Notice, and by which the Defendants shall not be prejudiced or estopped, and for this he cited 11 H. 4. 39. Sir John Arundel's Case in a Formedon, where though he counted upon a Gift by Fine, yet this was held not traversable, because Surplusage, of which the Court ought not to take Notice, 14 Hen. 4. 31, 32. 1 Rep. 42. but it is objected, that they have confessed the Seisin of the Queen ut de uno Grosso; he answered, that they have not confessed it, they have confessed the Seisin in Car. 1. but this is not a Confession that it was in the Queen; they ought to confess the Seisin of Car. 1. because they claim under him; and it does not appear upon the Record, that the Queen was seised of it as appendant, and so no Ground for the Court to conclude it to be appendant; and Car. 1. was seised of it in Gross, for the Manor never was in him, and the Court ought not to conclude it to be appendant without plain and certain Evidence: But Secondly, Though it was in Gross, and not appendant in the Queen, yet the Grant by the Letters Patents of Car. 1. to Sir William Theekstone is good; for there was no false Suggestion of the Party to frustrate the Grant, but the King has mistaken the Law; the King is truly informed by the Recital in the Letters Patents of all that the Queen had granted; and upon this he ratified all which passed; but it is not said that the Church passed in particular, but only that the King had granted the Manor with all the Advowsons appendant; and if the Advowson was appendant this passes; and if the King infers that this passes, where it does not pass, this was his own Collection, and not the Misinformation of the Party; and the Letters Patents recite further, that the King had presented Wickham, and that Sir William Theekstone, to recover his Right, had brought a Quare Impedit, and that there was an Agreement between Wickham and Theekstone, that Wickham should continue Incumbent, and that he should procure a Grant from King Char. 1. by which the Advowson shall remain to Sir William Theekstone and his Heirs, as the King was informed by Wickham; so that all this Suggestion comes on the Part of Wickham; and upon this

the King by Letters Patents reciting all this, and declaring that he is desirous that his Presentment of Wickham should not hurt Sir William Theekstone, he grants to him the Advowson in Fee; and further, that he and his Heirs shall hold and enjoy it, aliquo defectu vel aliquibus defectibus in the Letters of Queen Eliz. non obstant. if this Clause had been substantive of it self, it is admitted, that the Advowson would pass by it; and the Objection that the King is mistaken, would not prevent the Passing, it being his own Collection; for tho' he thought that the Advowson passed by the Letters Patents of the Queen when they did not pass, yet this not being a false Suggestion of the Party, but the King's Mispision of the Law, this would not avoid the Letters Patents, 6 Rep. 55. the Recital in this Case is the Information of Sir William Theekstone, but all after is the Information of Wickham, and it is true; also this is more strong than in the Case of the Lord Chandos, for the Grant there is voluntary; but here upon a Composition; in which Sir William Theekstone desisted from the Recovery of his Right, and permitted one to enjoy the Living, who was presented by the King without Right; the King here intended to grant it aliquo defectu in the Letters Patents of the Queen non obstant. so that his Intent being to grant it, his Grant shall not be avoided by a strained Construction; 8 Rep. 66. and so, first, the Court ought not to take Notice of the Allegation as de uno grosso, it not being material, issuable, or traversable, but Surplusage and nugatory: Secondly, If they might take Notice of it, and that Car. 1. was deceived, yet there was no false Suggestion of the Party, but the Mispision was the King's in his own Collection; and it would be dangerous after an Enjoyment above 120 Years under those Letters Patents, to admit a supposed Mispision upon such an Allegation; the which the Attorney would not draw in Issue, but declined it, and would not rely upon it for his Majesty, and therefore no Weight ought to be laid upon it, but it ought to be, as if it had not been alledged; and therefore he prayed that the Judgment in C. B. be reversed, and that Judgment in this Court be given for his Clients.

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On the other Side it was argued, that the Letters Patents of the Queen were void, because she was deceived in her Grant, for she grants the Manor with all Advowsons to it appertaining, where no Advowson appertained to it, but it was in Gross; and it was insisted on as a Foundation, that if the Queen had an Advowson in Gross, and grants it as appendant, that she was deceived in her Grant, and the Letters Patents were void, Moor 45. Hob. 323. and the Letters Patents of the Queen being void, those of Car. 1. are grounded upon them, and are but a Confirmation of them, and are not independent of themselves, but the Right supposed to be in Sir William Theekstone, is the Ground of these Letters Patents, and this Right is recited in these Letters Patents; and it is false of the Party's own Knowledge; and a Matter of Fact false in the Knowledge of the Party himself, will avoid the King's Grant, 6 Rep. 55. 10 Rep. 101. And the Recital is false, because Sir William Theekstone claims virtute Literarum Patentium, where nothing passed, therefore it ought to be colore; and though it is not said, that the Advowson was granted, but only that he claimed; yet where a Claim is the Foundation of a Grant, the Claim ought to have a Verity in Law for its Foundation, for every Claim ought to be intended a legal Claim, 11 Rep. 89, 90. Secondly, The Suggestion is false, which is that Car. 1. presented Wilson by Lapse, where King James presented him; and though the other Part be true, yet if there are several Considerations of the King's Grant, and one is false, this vitiates the whole Grant, Roll's Prerogative 189. Hob. 226. Lanc. 108. N. B. 58. 1 Cr. 191. 21 Ed. 3. 59. 3 Leon. 229. but it is said, that there is no false Suggestion on the Part of Sir William Theekstone; but if there is any, it is by Wickham; but be the false Suggestion ex parte Wickham, or of any other, if it be false, the Grant is void; for where the King is deceived, this is the Cause of avoiding his Grant, and it is not to be regarded, if it came by the false Suggestion of the Party, or of a Stranger; Hob. 223. 2 Rep. 9. but say they, admitting that it be not a Grant for the false Suggestion, yet it may enure as a Confirmation; he admitted, that if it be an independent Grant, that it

would pass the Advowson; but it cannot be so understood, for it is grounded upon the Recitals, and connected and coupled with the precedent Sentences, Nos igitur, &c. which is not the Beginning of an independent Sentence; It was also insisted that there is a Variance between their Title in the Pleadings, and Letters Patents, for they intitle themselves by a Grant by Letters Patents to Sir William Theekstone, where the Letters Patents were made to William Theekstone, Esq; the which cannot be the same Person, so they have not truly intitled themselves; but there is a Variance between their Title in the Pleadings, and the Letters Patents, for William Theekstone, Esq; and Sir William Theekstone cannot be the same Person; and for this he cited 21 Ed. 4. 72. Stile 153. 2 Inst. 594. 7 Hen. 4. 7. Hutton 41. Hob. 327. 1 Cr. 392.

Holt Chief Justice seemed to think that they have given the King an Advantage, by granting Oyer of the Letters Patents, which they need not; for the King may not traverse the Inducement to a Traverse, more than a Subject; and though it is said in the old Books, that the King may traverse the Inducement, this is to be understood upon an Office found, for heretofore the Subject could not traverse the King's Title found by Office, without inducing his Traverse with a Title on his Part, in which Case the King might traverse the Inducement of the Subject's Title, but in no other, and so are the Books to be understood; but if the Traverse be ill, there the King may traverse the Inducement, and so may a Subject; and Holt Chief Justice did not approve the Traverse in this Case, but said, that the better Traverse had been, absque hoc, that Car. 1. præsentavit Wickham; for they have answered the Dying seised by pleading the Grant; and in the Case of a Quare Impedit, the Seisin is not traversable, but the Presentment; also he was not satisfied but that they might have traversed the Seisin of the Queen [the which Pemberton seemed to deny, because they would leave the Titles of Car. 1 & 2. without Answer] but he was of Opinion, that it had been surer to have taken the Seisin of the Queen by Protestation, [to which Pemberton said that this would not do, for they could not have taken the Title by Protestation] for he is not satisfied but they are concluded to

say, that the Queen was not seised de uno grosso as this Case is upon the Pleadings; Curia advisare vult.

Afterwards in Hillary Term, 9 Will. 3. the Judges gave their Opinions, scil. Justice Eyres and Turton that the Judgment be affirmed; Holt Chief Justice, and Justice Rokeby econtra.

Justice Eyres and Turton said, That if there had been no Protulit or Oyer of the Letters Patents, as there need not have been, the Plea of the Defendant had been good, 3 Cr. 217. for the Defendant having alledged that Car. 1. was seised and granted to Sir William Theekstone, the Traverse of the Dying seised of Car. 1. had been good: But upon the Pleading, it ought to be intended that Queen Eliz. was seised in Gross, because it is so shewn in the Count, and not denied on the other Side, and therefore it shall be taken as admitted, and not only admitted, but confessed by a Bene & verum est, &c. and it ought to be intended to be in Gross before the Grant to the Earl of Warwick, otherwise it had passed to him; and to suppose it to be appendant is against the Confession upon the Record; and if it did not pass by the Grant of Queen Eliz. it could not pass by the Letters Patents of Car. 1. for consider it as ushered in with all these Recitals, the Intent is certainly, that he shall have the same Estate as the Earl of Warwick had by the Letters Patents of Queen Eliz. and it cannot be taken to be a substantive Clause because of Igitur, which is a relative Word, 2 Br. 132. and if it be a substantive Clause all the Recitals will be vain and insignificant, and the Grant might as well commence there; but they said that the Variance between the Pleading and the Letters Patents is irreconcilable, for tunc Armigero & postea Militi cannot be intended to be the same Person, for tunc cannot have Relation to any Time, but of the Letters Patents; and a Man cannot be Knt. and Esq; at the same Time, for the Name of Esq; is drowned, and he ought to be named Knt. 7 Hen. 4. 7. 14 Hen. 6. 15. 8 Edw. 4. 23. a. 4 Hen. 6. 1. Br. Grants 50. 2 Inst. 594. Hutton 41. Litt. 181, 223. and Knt. cannot be omitted in any Suit or Grant, 2 Rolls, Abr. 43. Dyer 150.

Justice Rokeby said, That he would not dispute many Things which had been urged, and agreed that they ought to be watchful to preserve the Rights of the Crown; and that when it appears judicially that the King is deceived by the false Recital or Misinformation of the Party, the Grant is void; but the single Question he made was, if the Grant of Car. 1. be sufficient, and he held that it was; and though it be objected that Car. 1. was deceived, because he was informed that the Advowson was appendant and not in Gross, and now it is apparent that it is in Gross; he said that the King's Grant ought to be taken in such a Sense as is agreeable to his Honour, 6 Rep. Sir John Molyn's Case, and the several Recitals, Confirmations, Declarations, and the last Grant in these Letters Patents being compared together, it is plain that the King took it to be a Defect in the Grant to the Earl of Warwick, and that he would supply it; for the King intended first to remove the Wrong which he had done by his Presentation; secondly, he intended to make a Grant to Sir William Theekstone, otherwise a Confirmation would have been sufficient, and ex uberiori gratia would not have been necessary; and the Letters Patents are drawn with great Caution and Circumspection to shew the Intent of the King; and as to the Objection of Variance between the Pleading and the Letters Patents, tunc Armigero & postea Militi, he said nothing appears, that they were two Persons; and though the Addition is changed, the Person is not changed, but it rather is a Confirmation that it is one Person; and as to the Case of Ewer and Strickland, Latch. 161. the Addition there is but an accumulative Reason, and not the main Reason.

Holt Chief Justice said, That he differed from the Judgment given in C. B. for the Advowson was there taken to be in Gross when the Grant was made to the Earl of Warwick; and by this King Car. 1. was deceived, who had no Intent to make a Grant, but to restore the Wrong done by Wickham; and he said he did not agree that it is admitted to be in Gross, when the Grant was made to the Earl of Warwick; and it does not appear in the Pleadings; but if it did appear so, yet that the Grant of Car. 1. is good; first, It is shewn that Queen Eliz. was seised of this Advowson in Gross,

12 Feb. in the twelfth Year of her Reign, and that she then presented Timms prout by the Inrollment of the Presentation remaining upon Record, &c. and from this Seisin of the Queen's, a Title is derived to Car. 1. and though it is suggested ut supra, and it is admitted ut supra, yet it is not admitted that Queen Eliz. was seised in Feb. in the twelfth Year of her Reign, for the Time of Seisin in a Quare Impedit is immaterial, and Seisin generally in the Time of Peace, in the Reign of such a King being alledged, it is sufficient, 1 Inst. 303. and it not being material, the not denying of it, is no Admission, for Non-denial is only an Admission of Things which are materially alledged; and it is the constant Course to alledge Seisin generally; and it would be hard that such an immaterial Thing, which the Party may not deny, should conclude him: Suppose the Presentation ut supra had been traversed, and upon the Trial it had appeared that Queen Eliz. had presented him in the 43d Year of her Reign, it had been good; for if in Trespass, which requires a Time, yet the Party is at Liberty to prove another Day, à fortiori he may in a Case where a Time is not necessary; and here it may be that the Advowson might be appendant in the 12th Year of her Reign, and became in Gross after; for there was Time sufficient in this Reign for an Usurpation to be suffered, after the Time of the Grant to the Earl of Warwick; and when Pleas are alledged out of Time, no Regard ought to be had to them; Hob. 71. 2 Leon. 99. and he said the Inrollment of the Presentation is pleaded with an Intent to make the Presentation Matter of Record, and triable as a Matter of Record; but this Pleading of the Inrollment is not good without producing the Letters Patents; and as to the Grant from Car. 1. the Defendant could not plead it in any other Manner, and it is well pleaded without any Reference to the Grant of Queen Eliz. and it need not be averred that it was appendant, for upon Oyer every Thing shall be intended to make the Grant good, if nothing appears to the contrary, 2 Cr. 679. and there was no need for the Defendant to say that it was appendant at the Time of the Grant to the Earl of Warwick, when he was not mentioned before, for it might be appendant then, and in Gross after: He said,

if the Advowson was not appendant at the Time of the Grant of Queen Eliz. yet that it passed by the Grant of Car. 1. though it is objected by my Brother Turton that the King is deceived, and that there are diverse false Suggestions; it is not suggested in the Recitals, that the Advowson was appendant, or that it passed by the Letters Patents of Queen Eliz. and though it is said that he claimed, this does not import a legal Claim; as suppose a Man claims an Advowson by a void Patent, and the King having presented, says, don't remove my Clerk, and I will put you in quiet Possession for the Future, the which seems to be the Intent here; for Wickham durst not venture upon the King's Title, and therefore the Intent of the Letters Patents seem to be to this same Purpose; but it is objected that he brought a Quare Impedit to recover suam donationem; this does not imply that it is his, but it is only alledged to be so by the Description in the Writ; but admitting in the Patent of Car. 1. that the Grant of Queen Eliz. be void; if it be void, yet he said that de futuro Sir William Theekstone and his Heirs shall have the Advowson, for the King does not stop at his Usurpation; then he admitted it would be void; but he proceeds, that notwithstanding any Defect of the Queen's Grant, if it was not a good Title, he would make it one; and the King's Letters Patents have been carried further than this, as where the King intended only to confirm, yet his Letters Patents have amounted to a new Grant; as in 8 Rep. 166. where necnon Manerium & Castrum prædict. passed an Estate in præsenti, though it was void as a Confirmation, which is a very strong Case; it appears therefore that the King thought that the Letters Patents of Q. El. were defective, and his Intention therefore was to pass this Advowson; but says my Brother Turton, the King's Intention is a qualified Intention, scil. according to the Letters Patents; I say a legal Intention is not necessary in the King, but only a moral Intent; every Manor consists of Demesnes and Services, and a Fine sur Grant and Render of the Services, destroys the Manor, yet it remains a Manor in Reputation, 6 Rep. 63. so a little Thing will make an Appendancy: A Man seised of a Manor to which an Advowson is appendant, mortgages it in Fee, with an Exception of the Advowson, and the Money is repaid; this

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is a Ground to make it appendant in Reputation, though it cannot be appendant again in Law; and so in this Case it may be appendant in Reputation, and it may pass by the Meaning of the Letters Patents, for there are the Words Advowsons, which shews that the Intention was that it should pass; and to justify this be said, that it appears by Coke's Entries 477. in Title Quare Impedit, that this Advowson was appendant; for Digby who was then Tenant in Tail of this Manor was attainted of Treason before the Church became void; and where Tenant in Tail of a Manor, to which an Advowson is appendant commits Treason, and an Avoidance is before the Attainder, and after he is attainted; this makes the Advowson appendant again, for the Estate-tail is merged; so Tenant for Life of a Manor to which an Advowson is appendant, and he in Reversion usurps, though the Advowson be in Gross, during the Life of Tenant for Life, it is appendant again after his Death; Hob. 223. and so though it was in Gross, yet it might be appendant again, and therefore the truest Way to try the Merits of the Cause had been to traverse the Dying seised of Car. 1. and not to lay Traps and Snares to catch Mens Inheritances.

And as to the Objection, that the King presented Wilson pleno jure, which is a Mistake; yet he said, tho' there be a Mistake, notwithstanding if the Intent of the King was to make the Grant non obstant. the Mistake, it would be good; and here there was such Intent to grant non obstant. this Mistake, and to determine a Controversy; and if he had it not as a Grant, Sir William Theekstone would be in a worse Case than he was before, for the Meaning was, if Sir William Theekstone had a Right, he shall hold it; if he had not a Right, the King would give it him; for says Sir William Theekstone, I will not leave my Right under the Earl of Warwick, and yet I will have the Grant of the King; and if this be not so, Sir William Theekstone made a sorry Bargain, for he could not have been worse if he had miscarried in his Quare Impedit, but he might have recovered; and therefore this being a Composition, it ought to be taken for the King's Honour, and not to entangle a Man; also there is a good Consideration for the King to grant, though Sir William Theekstone had not a Right, for

void Letters Patents surrendred, are yet a good Consideration, 1 Rep. Alton-Woods Case, 6 Rep. 55. because of the Intention, so that every Deceit or Mistake in Patents do not vitiate them. 1 Roll's 32. 2 Rolls 60. Dickson's Case.

And he said, that Letters Patents shall never be avoided upon Oyer, for by adjudging the Grant of Car. 1. void, it would not only determine that, but also the Grant of Queen Eliz. the which is not before the Court; for tho' it is recited, yet it is not before the Court; and this never was done in any Case, where the Letters Patents are not in Court; and though they be not recited, yet the Letters Patents of the Queen might have Words which would pass an Advowson in Gross; as if the Words had been aut existentia ei Feoda, and these Words may be in, and the Advowson in Gross might pass, 1 Mod. 195. The King vers. Francis Clerk, where the King grants the Manor, with the Appurtenances, and the Advowson by Name, which lately did belong to the Archbishop of Canterbury, and to the Abbot, &c. and the Archbishop never had it, though it was so recited, yet the King's Grant was adjudged good; for the Intention of the King is plain, and there cannot be more comprehensive Words than in this Patent; but it is objected by my Brother Turton that the general Words of the Patent should be construed with Relation to the Recitals, which is so sometimes, as when the King designs a Profit to himself, as in a Grant of concealed Lands, and not to diminish his Revenue; but if there are Words to shew his Intent, non obstant. that they are not concealed, there the Patent would be good, Hardr. 231. therefore he concluded this Point, that the Grant of Car. 1. was good; First, Because the Patent of Queen Eliz. was not before the Court. Secondly, If it appeared to be in Gross when the Grant was made to the Earl of Warwick, yet the Advowson passed by the Patent of King Car. 1.

As to the Variance between the Pleadings and the Letters Patents, he said he thought it an unlucky Slip, and tending nothing to the Merits of the Cause, but it comes out of the Mouth of the Parties; and he cannot take by a Grant made Willielmo Theekstone tunc armigero being postea militi, for non constat de persona in the Grant, and the Name of Esq; is swallowed up in the

the Name of Knight; but it may be objected, that a Name of Dignity may be supported by Reputation, as the eldest Son of an Earl or Marquess; but this may be good because there is a Foundation, for in Heraldry they have a Precedence, which is a Ground to acquire such Title; and the old Conveyancers would not so stile them, and at this Day eldest Son is added; and therefore in this Case non constat de persona in the Letters Patents, and to say so in the Plea is not sufficient.

The Judgment was affirmed.

Swinstead *and* Liddal.

2. IN Assault, Battery, and false Imprisonment, the Plaintiff counted of a Detainer, quousque he paid 10 s. the Defendant justifies under a Command of the Court of Conscience in London, and pleads that the Plaintiff was summoned to appear 1 Nov. and that the Process was continued till the 30th of Nov. and that then there was an Order to take him, and carry him to the Counter, and that he virtute ordinis prædict. arrested him and detained him till he paid 11 s. and 10 d. It was objected, First, That the Summons is 1 Novemb. and no Continuance of it shewn till 30 Novemb. and therefore no Ground for the Order of 30 Novemb. to take him; non allocatur; for they might upon Default of Appearance order him to appear at another Day; and this is the usual Continuance in all Courts there. Secondly, The Order was pleaded to be to detain him, till he had paid, where it ought to be to carry him to the Counter, and not to detain him till Payment. Thirdly, The Action is, that he detained him till he paid 10 s. and he justifies and says, that he took him, and that he paid 11 s. and 10 d. before that he carried him to the Counter; so the Justification contains a greater Sum, than that which is mentioned in the Count, and therefore it is not a Justification of the Imprisonment alledged; to the second Objection it was said, that he detained him virtute Ordinis prædict. and therefore it shall be intended to be in the Counter; and as to the third Objection, the Quousque is not traversable; and in this Case it suffices if he can justify the Imprisonment; the which he may do, if it be

for 10 s. or 11 s. and 10 d. for the Sum is not material; and per Holt Chief Justice, if the Plaintiff would take Advantage, he ought to shew, that he had paid the 10 s. and that the Plaintiff after detained him, for otherwise the Quousque is but in Aggravation of Damages, and ought not to be answered, Moor 704, 705, also tho' it should be a Variance, the Conclusion quæ est eadem transgressio aids it, 3 Cr. 667. 2 Sand. 5. Sid. 462. Curia advisare vult, 1 Roll, 265. a Case in Point as to the Imprisonment; but as to the Detainer it seems ill, for he ought to have carried him to the Counter, and Payment to the Officer or Sheriff would not be good; unless upon a Fi. fa. and then Payment to the Sheriff would be good.

The University of Cambridge *and* Price.

3. UPON a Motion for a Prohibition to the University of Cambridge, in a Suit there in the Vice-Chancellor's Court for keeping a Tavern; it was said, that the Charter of the University [tho' it be enacted, it is not confirmed] and it does not extend to sue there, for the Penalty of an Act of Parliament; but this Suit ought to be in the King's Courts, and a Recovery or Judgment there is not pleadable in Bar in the Courts here.

After in Hill Term, 9 Will. 3. there having been a Prohibition granted to the University, in a Proceeding against Price for keeping a Tavern, and a Prohibition executed; it was now moved for a Supersedeas to the Prohibition, or a Consultation; but the Court said, that they ought to declare, and plead their Privilege, as was done in Fletcher's Case in the Exchequer; for it being a Case not yet resolved, they would have their Privilege shewn; but when it has been pleaded, then they would take Notice of it upon a Motion; and it being said, that they had not declared, the Court said, that they ought to appear, and demand a Declaration; and the Rule was given, that they declare in a Week.

Blichley *and* Fry.

4. TRespass for entring his Close, and cutting and carrying away his Corn; upon Not guilty pleaded, the Defendant is found guilty of all the Trespass, but carrying away the Corn, and as to this he is found Not guilty; and it was moved to have full Costs, because otherwise a Man might come and destroy Fruit-Trees and Flowers in a Garden, and do Damage to a great Value; yet upon Trespass brought, the Defendant would not insist upon any Right, but plead Not guilty, and the Plaintiff shall have Costs only according to the Damage; and the Act did not intend such wilful Trespasses, but only casual Trespasses, as the Riding over a Close in Hunting, &c. and several Cases were cited, wherein such designed and voluntary Trespasses, though nothing be carried away, yet full Costs were given; but notwithstanding all that was said, the Court seemed strongly to incline econtra; and advisare vult; but the Court agreed, that if he had carried it away, tho' not out of the Premisses, full Costs should have been given.

Keat's *Case*.

5. THERE were two Indictments preferred against Keat, the one for Murder at Common Law, the other upon the Statute of Stabbing; and upon these Indictments two special Verdicts were found to the same Effect, scil. they found, that Keat was a Gentleman, and that Wells the Party killed was his Servant, scil. his Gardiner, and that Keat having an Intent to turn him away, sent to Wells to bring his Key, Wells being then in the Kitchen; and it was said to Keat that Wells refused to bring the Key, upon which Keat fetched his Sword, and went into the Kitchen, and expostulated with Wells; and Wells said to him, that he might have the Key if he would; and then Keat struck Wells with his Sword, and Wells having a Sneed in his Hand, struck at Keat with the Sneed; but the Sneed caught in the Spit-rack, and did not hurt Keat; and after this

Wells followed Keat from the Chimney towards the Kitchen Door, and punched him with the Sneed several Times, and then Keat thrust him with his Sword and killed him; this Case was argued upon these two special Verdicts found before Holt Chief Justice, and two Questions were made.

First, If it be Murder or Manslaughter at Common Law. Secondly, If not Murder at Common Law, if it be Manslaughter within the Statute of Stabbing, and by this the Party toled of his Clergy: It was objected, that the Verdict had not ascertained the Fact, but that it might be intended that the Striking by Wells and by Keat was all at the same Time, and that the Court ought to take it, as it is found, and not to intend the one Way or the other, and here no Priority of Fact is alledged; but Holt Chief Justice said, that the Relation of the Matter found by the Verdict is certain enough, as it happen'd and succeeded the one Part to the other, in Point of Law; but if the Verdict had not ascertained it sufficiently, that then for this Imperfection, a Venire facias de novo ought to issue, and a new Trial and Verdict ought to be had, for there cannot be an Amendment of a special Verdict found of a Felony; and as to the Point in Law, Holt Chief Justice was clear, that this was Murder at Common Law, and the Denial of the Key no sufficient Provocation to extenuate this Act to Manslaughter; and he said, that where the Law adjudges an Act to be Murder, this is for the Cruelty of the Fact; and though after this Wells punched him, yet there not being a just Cause for the first Stroke, if he had killed him at the first Stroke, it would have been Murder, and so it would though the other punched him, and then he is killed; and he said, that if a Man assault another, and the other turn again and beat him who made the first Assault, so that he is forced to the Wall, and there kills the other in his own Defence, yet it is Murder; and he said, that if the Servant had not been killed, but had survived this Quarrel, and had brought an Action of Trespass against his Master for the Beating, would the Denial of the Key in this Case have been a good Justification for striking him with his Sword in such a Manner? quasi diceret non; and he cited the

Case in Keiling 89. Grey's Case, where a Smith struck his Apprentice with a Bar of Iron, and it was adjudged Murder; for though Parents and Masters have a Power of Correction, this ought to be with such fitting Instruments, which are proper for Correction; but if they correct with a Sword, Club, or other such Instrument, from which Death might probably ensue, this would be Murder; and as to Turner's Case who killed his Foot-Boy with a Clog, this was such a light thin Thing, that when it was produced, it was a Wonder to every one, that such a Misadventure could ensue from so slight a Cause: But as to the other Point, if it be within the Statute of Stabbing, he thought that it was not, and he took it clearly, that a Sneed was a Weapon drawn within the Meaning of this Statute; and he questioned Byart's Case, Jones 340. and took the Meaning of the Words in the Statute, scil. that hath not then first stricken the Party which shall so stab, or thrust, not to be understood of the first Stroke given, but of the killing of another, before that the Party killed had struck omnino; for the Intent of the Statute was to prevent suddain Stabbing [used by the Scots] before that a Man had an Opportunity for his Defence; but where he might defend and make Resistance by Striking, this is not within the Statute; but no Judgment was given, because that Justice Rokeby was not satisfied with the Finding of the Verdict: Ideo adjornatur.

The King *and* Bernard.

6. AN Indictment for not taking the Oath of a Constable being duly elected by the Mayor, Aldermen, and Corporation of Southampton; an Exception was taken, because it is not shewn, how they had a Power to elect a Constable, no Custom or Prescription being alledged; and for this Cause the Indictment seemed to be ill per Curiam; sed adjornatur.

The King *and* Owen.

7. UPON a Motion to shew Cause why an Attachment shall not go for not making a Return to an Alias Mandamus, it was excepted to the Writ, because the Clause vel causam nobis significetis is omitted, and so it is a peremptory Writ, without the Liberty of being heard; and for this Cause they would have excepted to the Writ, but the Court would not allow it, and said, that they might make a Return, and then except to the Writ, for they have nothing before them, till a Return; and so they directed in the Case of St. John's College in Cambridge; and though no Pluries had issued in this Case, yet per Curiam in extraordinary Cases, where they are satisfied of the Irregularity and Disorder of the Place, they would require a Return to an Alias; and after the Court ordered them to take a Pluries with the usual Clause, and discharged the Rule, and gave Time to make the Return.

The

The King *and* Green.

8. SErjeant Pemberton moved for a peremptory Mandamus after a Verdict in C. B. in an Action on the Case for a false Return to a Mandamus to infrol a Chapel upon the Act for Liberty of Conscience; to which it was returned, that this was a consecrated Chapel of Ease for the necessary Use of the Inhabitants of such a Parish; but Holt Chief Justice said, that they could not take Notice here of a Verdict in C. B. and the Verdict ought to be as he thought here in R. B. and therefore he did not grant the Motion.

Armstrong *and* Lisle.

9. LISLE being endicted of Murder, was convicted of Manslaughter, and prayed his Clergy by a Friend, not being in Court himself; and after at the same Assises, an Appeal was lodged by the Brother and Heir of the Party slain, and the Conviction and Appeal were removed by Certiorari, and the Party by Habeas Corpus; and at the Return of the Certiorari it was moved by the Appellant, that he might file a Letter of Attorney, in which Case the Court would not make any Rule, but said that they might file it at their Peril, yet insinuated that they could not file a Letter of Attorney by the Stat. of Hen. 7. till after Appearance; and they admitted clearly that in Mayhem, they could not make an Attorney; and the Court said, that if he filed a Letter of Attorney, and the Law required an Appearance in Person, the Appeal would be discontinued; and Holt Chief Justice said, the Appellee ought, after the Appeal returned upon the Certiorari, to sue a Scire facias against the Appellant ad prosequendum, for the Appellant has not a Day in Court; and the Chief Justice enc'ined fortiter that the Court ought not to refuse to allow Clergy to one Convict of Manslaughter; but in Regard of some Resolutions econtra, it is fit to be argued; and he said that he had argued it both Ways, but he never

was satisfied in his Judgment with the Resolutions which had been given, that they may respite Clergy, for by this Means they put it in the Power of Judges to hang a Man; and at the Return of the Conviction the Counsel of the Appellant took Exception to the Conviction, the which Holt Chief Justice would not allow, and said, that they are Strangers to this Record, and they have not any Privity or Authority to take Exceptions.

The King *and the Town of* Chesterfeild.

10. UPON a Return of a Certiorari to remove Orders for the Settlement of one Clerk; the Question was, If one being placed with a Barber to be instructed to shave and make a Bob-Wig for a Twelvemonth, and to be found in Cloths by the Barber, and the Barber to have what he earned; if this would gain him a Settlement within the Statute of Will. & Mar. and per Curiam without any Difficulty it will gain him a Settlement; it was objected, that he is not an Apprentice by Indenture, as he ought by the last Statute, and he is not a Servant, but rather his Master is a Servant to him, for he gave him 6 l. for his Instruction; non allocatur, but ruled that he had gained a Settlement.

Worral

Worrall *and* Holder.

11. AT Guildhall: In an Action for Work done, &c. the Plaintiff gave in Evidence to charge the Defendant, a Copy of a Bill delivered to the Defendant, and copied by the Order of the Defendant, and diverse Exceptions were taken by the Defendant to the Bill, scil. first to the Quantity of the Work done, and the others were Marks against diverse Parcels, scil. O. and N. intending by it that these Parcels were wrought for others, and not for the Defendant, and other Exceptions there were to the Price, and he ordered the Servant to indorse upon the Backside, the Exceptions to the Quantity and Price, but to omit the Marks O. and N. and it was ruled by Holt Chief Justice upon Evidence; First, That this Copy of a Bill delivered was Evidence, as a Copy of the Bill, and not a Copy of a Copy, and the Bill delivered is an Original as well as the Book. Secondly, That the Acceptance of a Bill delivered, without Objection but to some Particulars, is an Admittance of the Residue to be true. Thirdly, That the Ordering a Copy of the Bill indorsed ut supra, omitting the Marks O. and N. and this Copy with the Exceptions being ordered to be delivered to the Plaintiff, it is a waiving of the Exceptions signified by those Marks. Fourthly, Tho' it was objected that this Evidence is a Confession, and therefore it ought to be taken together; yet per Holt Chief Justice they are not Part of a Confession [which ought to be of the same Thing] but a Cavil or Objection as to the Price or Quantity, &c.

The King *and Sir* Thomas Culpepper.

12. IN an Information against Sir Thomas Culpepper, &c. for a Riot upon the Person of Sir Francis Wythens in his own House; and for the Defendants a Letter of Sir Francis, who was the Prosecutor, was admitted to be read; and then they produced a Witness to swear the Contents of another Letter, which was denied, he never having seen Sir Francis write, but deposed that it was the same Hand with the Letter produced; non allocatur; for per Holt Chief Justice, though in the Case of a Deed lost or burnt, they would admit a Copy or Counterpart, or the Contents to be given in Evidence, yet they never permitted it, except it be proved that there was such a Deed executed; but here the Witness cannot prove a Letter written, for he never had seen Sir Francis write, wherefore it was disallowed.

In this Case per Holt Chief Justice a Defendant in Battery, or Trespass, Riot, &c. shall be admitted to give Evidence, except Process be sued against him, or he appear and plead, though not Party to the Issue; in which Cases he shall not be sworn, if it appear upon the Trial that such Evidence would have been given against him, that it would have been a Question to the Jury, if he be guilty or not, if the Jury had been charged with him.

Term. Hill.

8 Will. 3. R. B.

Hallet *and* Birt.

1. IN Trespass for taking his Beasts, the Defendant justifies, that the Hundred of D. is an antient Hundred, and that the Bishop of Sarum, &c. is seised of it, &c. and had an Hundred-Court, and that the Bishop and his Predecessors have upon Complaint to the Steward used to grant Replevins in the Court or out of it, to deliver and replevin Cattle, &c. and that the Bishop had leased it to Carlton Whitlock, and that one had taken the Beasts of J. S. and that he had levied a Plaint in the said Court before the Steward in placito Caption. Averiorum, and that the Steward commanded him to replevin the Beasts, &c. the Plaintiff demurred, because it amounts to the general Issue. First, The Cattle are not the Cattle of the Plaintiff, and therefore as to him he is not guilty. Secondly, The Plea is ill in Substance, for a Prescription to hold Plea in Replevin in this Manner is ill; for a Replevin ought to be by Plaint or Writ, and it cannot be by Writ in such Court; and if by Plaint, it ought to be in Court, 21 E. 4. 66. 1 Inst. 145. Fitzh. proprietate probanda 123. and though Lords of Manors may hold Plea de vetito namio, yet this ought to be in Court, for it is against the Nature of the Court, that the Steward who is the ministerial Officer, and no Judge, should award a Process, when the Suitors are Judges; and this upon Complaint out of Court, when the Cattle are the Goods of a third

Person; but it was said that the Plea is good, and there is a good Colour given, scil. a Possession; for it is said, that he had taken and impounded them, but this is but an Inclosure; and if it be a Pounding, it ought to be secundum usum & consuetudinem, 7 H. 6. 35. 14 H. 4. 25. Fitzherb. Colour 23. where the Defendant pleads Property in himself, there he ought to give Colour to the Plaintiff; but where he goes by Way of Excuse, he may plead the Matter, and Property or not, is not material, 2 Vent. 295. Hob. 127. and here it being done virtute brevis, the Defendant might justify, for being an Officer he is not obliged to regard the Property, Fitzh. Colour, 15. for the Nature of a Replevin is to replevin the Goods without Regard to the Property, and is different from an Execution, and there is no Question but an Hundred-Court may grant a Replevin, F. N. B. 73. b. 2 Inst. 140. Antient Demesne, a good Plea in Replevin; and though it was objected, that no Pledges are found, this is not an Exception to the Making of a Title, but in a Writ of false Judgment, and that a Replevin out of Court is good, 9 Ed. 4. 48. Br. Replevin, 28. 2 Inst. 139. but it was adjudged pro Quer. for the Defendant having shewn the Property in a Stranger, the Plea amounts to the General Issue; and though an Hundred Court may hold Plea in Replevin, this ought to be in Court, and not out of Court.

The King *and* Bowerbank.

2. AN Habeas Corpus being brought upon a Commitment by the College of Physicians; it was excepted first, because it was pro mala praxi, which is incertain; Secondly, The Conclusion is ill, because it was to remain without Bail, till he was discharged by the President and College, or others authorized, or by due Course of Law; for if a Commitment was for a Fine, it ought to be quousque] he paid the Fine; if for a Contempt, till he had submitted himself; Thirdly, The Offence is pardoned, for though the King has granted Fines to the Corporation, he might however pardon the Offence; and the King in this Case has pardoned all that he can pardon; and if the Commitment was for a Punishment, it ought to have been a distinct Commitment, & ulterius quod committatur for four Months, and the Commitment ought to recite the Judgment: And per Curiam he was discharged.

Term. Pasch.

9 Will. 3. R. B.

Gipps *and* Woollicot.

1. IN an Action of Trespass for Fishing in separali piscaria, ac etiam Trespass for Fishing in his free Fishery; as to the separal. piscaria, the Defendant was found Not guilty; as to the free Fishery the Jury found a special Verdict; they found, that the Place where is Parcel of the Manor of D. and that the Plaintiff is seised of this Manor in Fee, and make a special Conclusion, that they find for the Plaintiff, if he could have an Action of Trespass for taking Fish out of his free Fishery within his own Land; for the Objection was, that a Man cannot have liberam piscariam in his own Soil; for it is a Profit apprender in other Lands, and the Books cited do not warrant it, as Reg. 93. Fitzh. Bar 20. 8 H. 6. 92. and tho' son Franktenement be a Plea, yet this does not prove it, for it is so in the Case of Common. Kell. 53. that son Franktenement is not a good Plea; 1 Cr. 492. and here there not being any such Interest, no Damages may be given, it being a special Interest, and not the whole Interest, 1 Cr. 362. Dyer 7. also he does not say pisces suos or ibidem, and therefore it is ill; but it was said by Holt Chief Justice that it had been lately adjudged, that a separate Fishery and free Fishery are all one for this Purpose, Pasch. 5 Will. & Mar. Smith and Kemp upon a Motion in Arrest of Judgment; and if he had the Land covered with Water, why should he not have the Fishery? by the Grant of it the Soil passes, Davis 55. and the Pleading

Pleading in this Case proves it. Fitzh. Bar 20, 27. 116. and there is a Difference between a Fishery and a free Warren, 3 H. 4. 12. 4 H. 6. 11. and though it was objected, that this is a Liberty to fish in the Water of another, and not in his own Water, and every Man who has a River has not a free Fishery; and if it be his own, he cannot prescribe to it no more than for Common; and in this Case the Jury have made a special Conclusion, if he could have such Fishery, they find for the Plaintiff; but per Curiam, the Plaintiff may have such a Fishery; for though diverse may have Liberty to fish there beside himself, this is Libera piscaria in his Manor. And Holt Chief Justice said, that he was not satisfied, but that where the Owner of the Soil had a Right to fish with others, that he might have an Action of Trespass, for there is such a Writ in the Register, and it does not lie for one who has but a Liberty to fish; and though he might have clausum fregit, & in aqua sua piscatus, yet he thought that Trespass lay; and if it be not proved e-contra, it shall be intended his separate Fishery of Common Right; but as to the Objection of pisces suos or ibidem, the Court seemed to think it was ill. Curia advisare vult.

Term. Trin.

9 Will. 3. R. B.

Bacon *and* Dubarry.

Salk:

1. IN an Action of Debt upon a Bond for the Performance of an Award, the Condition was, that where there were several Differences between the Plaintiff and Defendant, as Attorney for De Ruyter, and that they have submitted themselves, &c. si the Defendant ex parte De Ruyter shall stand to the Award of A. and B. the Arbitrators, the Bond to be void; upon Null tiel Arbitrement pleaded, the Plaintiff replies, and shews the Award which was, Dubarry shall pay 345 l. 6 s. 10 d. to the Plaintiff, and that Bacon and Du Barry ex parte of De Ruyter shall seal a Release to the Use of each other of all Actions, Suits, &c. touching the Account aforesaid; the Breach assigned was that the 345 l. &c. was not paid; and upon a Demurrer, there were two Questions; First, If any Award could be made according to this Submission; and adjudged that there might; for Du Barry had put himself in Place of De Ruyter, and therefore an Award might be made. Secondly, If this Award is good; and adjudged, that it was not; for the Award is not mutual, and nothing is to be made to De Ruyter, for the Release is to the Use of each other, and not so much as to be delivered to De Ruyter, where it ought to be made to De Ruyter; and if it had been made to De Ruyter, it might have been delivered to Du Barry to the Use of De Ruyter; and the Court cannot here make a Construction that it was delivered

vered to Du Barry to the Use of De Ruyter, the Award being ad usum suum, scil. of Du Barry; but it was said, that it would have been a good Award, if no Release had been given omnino; but per Curiam, this might be a Question, the Award being to be made de præmissis, 2 Roll 1. but suppose that it was not de præmissis, yet if they do not rest there, but award a Thing which is void, the which they intend to be Part of the Award, and in Satisfaction, this makes the Award void. Roll's Arbitrement 254. Stile 44. But if it had been said, that the 345 l. &c. shall be in Satisfaction of all, it had been good, or that they have examined the Accounts; and this was all that was due, or that this was for all due, or for the Account; Roll, Arbitrement, 255. and though they have averred, that it was for all due, yet if the Award it self does not justify the Averment, it is not sufficient. It was adjudged for the Defendant.

Term.

2

Term. Mich.

9 Will. 3. R. B.

ſ Turberwill *and* Stamp.

1. IN an Action upon the Caſe, upon the general Cuſtom of the Realm, and alſo a ſpecial Action for negligently keeping his Fire, in which the Plaintiff counts, that he was poſſeſſed of a Cloſe of Heath, and the Defendant of another contigue adjacent. and that he had kindled a Fire in this Cloſe, the which he tam improvide & negligenter ſervavit, that it burnt his Cloſe; and after a Verdict it was moved in Arreſt of Judgment, that it does not appear in this Caſe to be done by the Command of the Maſter; and then it being out of his Houſe, he is not reſponſible; 2 H. 4. 24. for if the Servant does it without the Command of the Maſter, it is not the Negligence of the Maſter; but it was anſwered, that it being after a Verdict, be it by Negligence or by Misfortune, it is all one; for now they are upon the Record, and it may be his Fire in a Field, as well as in a Houſe; and it was Matter of Evidence, if it be his Fire or not: It was adjudged pro Quer'.

Woodyeer *and* Gresham.

2. IN a Writ of Error upon a Judgment in C. B. in a Scire facias; the Case was, A Feme Sole recovered in C. B. and took Husband, and after they joined in a Scire facias to have Execution, and had Judgment in the Scire facias; the Wife died, and the Husband sued Execution, without taking out Letters of Administration; and it was objected, that he ought not to have Execution in his own Right, but as Administrator to the Wife; the Reason that the Husband shall have Execution of a Judgment upon a Bond made to his Wife dum sola is, because by the Judgment transit in rem judicatam; but in this Case there is no Alteration by the Judgment in the Scire facias, for it is but an Award of Execution, and both are but one Judgment; a Scire facias did not lie at Common Law, 2 Inst. 469. and it is but a Method to have Execution, the which heretofore he could not have after the Year, but was put to his Original upon the Judgment; and therefore a Scire facias has supplied this Defect, and is but a Continuance of the Right, and does not alter the Debt, or give a better Right, but only entitles him to have Execution upon the former Right, after the Year incurred, where he could not have it before the Statute. If the Feme had died within the Year, her Administrator shall have Execution, and not the Husband; and it not being sued during the Coverture, it cannot be sued after her Death, and the Judgment remains of such Force ut supra, and no new Right accrues; if the Recovery upon the Debt had been during the Coverture, it would have survived, but now it will not, 1 Inst. 351. and nothing which a Feme has en auter droit is given to the Baron; and the Scire facias is only to levy the Money recovered upon the Judgment, and to remove the Impediment incurred by the Year and Day being elapsed: It was answered, that a Scire facias is an Action, and is in the Nature of an Original; and if they had recovered in an Original, there could be no Question in the Case; and by the Judgment in the Scire facias in this Case, the Debt vests, and of such Opinion

was the Court; and Holt Chief Justice said there was no Difference in Reason between this Case, and the Case of O-Brian and Ram, Mich. 3 Jac. rot. 192. which was a Scire facias against Baron and Feme upon a Judgment against the Feme in Debt due dum sola; and after Judgment against Baron and Feme, the Feme died, and the Husband was charged in a Sci. fa. brought against him; and Holt Chief Justice said, the Judgment in the Scire facias attached a joint Interest in Baron and Feme; and if the Husband died, it would survive to the Wife, and econtra; and though the Judgment in the Scire facias does not alter the Nature, yet it changes the Property of the Debt; and Debt may be brought upon an Award of Execution.

The King *and the Lord* Mohun.

3. THE Lord Mohun having been bailed by Holt Chief Justice appeared upon the last Day of the Term; and he being in Court, it was prayed, that he stand committed, there being an Indictment of Murder found against him by the Grand Jury; this was opposed by his Counsel, because he being bailed by the Chief Justice, and he having all the Informations before him, and the same Witnesses being sworn upon the Indictment, as upon the Inquisition before the Coroner, there would be the same Reason for him to stand upon the first Bail, as there was at first to admit him to Bail; but it was answered, that there would be a Difference between an Inquisition found before a Coroner, where the Depositions are in Writing, and examinable, and an Indictment of Murder found before a Grand Jury, where the Evidence is secret, and they are sworn not to discover it; and there may be more Evidence given to a Grand Jury, than was given to the Coroner, and more Evidence may be also given upon the Trial, than was given to the Grand Jury, for the Party may conceal Part of his Evidence to prevent Practices; and the Court seemed to incline strongly to commit him upon what had been said; but when it was added, that there would be a Session of Parliament

within two or three Days, they committed him; and it was said, that if the Lords in Parliament pleased, they might remove the Indictment by Certiorari, and admit him to Bail there.

The King *and* Harris.

4. HARRIS had been convicted of Perjury, and outlawed for it afterwards; and the Court was moved to give Judgment against him; but the Court said, that this could not be done, except the Party be present, and they demanded if any Precedent could be produced of such an Entry; for if they gave Judgment, that he should be put in the Pillory, it would be demanded when, and the Answer ought to be, when they can catch him; and Process to bring him into Court to stand upon the Pillory never was granted; and it is not like to a Capias pro Fine, for this is to bring him into Court to pay the Money; but he cannot stand upon the Pillory in Court.

Brown *and* Borlace.

5. THE Defendant was arrested in the Inner Temple Walks by the Officers of the Sheriffs of London, and a Rescous was made by Osbourn, Williams, &c. upon which an Action was brought, and a Motion made at the Side-Bar for an ac etiam for 400 l. to hold the Defendants to special Bail; the which being ordered Nisi causa, the Court was moved to discharge this Rule, because the Temple is a Place privileged from Arrests, it having the same Privilege which heretofore belonged to the Knights Templers, which was the most noble Order, and had the most ample Privileges of any Order in Europe; and though Sanctuaries were taken away by Act of Parliament, this was as to Felonies and Treasons, and not as to inferior Matters; and there were many Sanctuaries and Places exempt, and of this Nature is the Temple;

ple; and it was instituted for the Study of the Law, and the Students and Professors ought to be quiet in the Prosecuting of their Studies and Imployments, without being subject to Arrests, or Executions, under Colour of which Bailiffs and other Officers might enter their Chambers, and seise Writings and Evidences with which they are intrusted, and inspect the Titles of their Clients, and discover or imbezil their Charters; for if Officers might arrest, they might also execute Fi. fa. or other Executions, the which would be of perillous Consequence; also it was insisted, that it appeared in Dugdale's Origines Juridiciales, and Stow's Survey, that the Temples are not within the City of London, and there are Rules and Orders made by the Chancellor and all the Judges for their Government and Regulation; non allocatur; for per Holt Chief Justice, though the Temples are extraparochial, and out of the City of London, and the Franchise of the City, yet they are not out of the County of London; for there is not any Place in England out of some County, though it be extraparochial; and he said, that if they are exempt out of the County, who has the Administration of Justice within the Temples? for no Exemption of ordinary Justice may be pleaded, but the Party ought to shew a Jurisdiction within the Place exempted, in what Manner Justice may be done; for the King cannot grant an Exemption, without such a Provision, for a total Exemption from Justice cannot be; and without Question the Temples are within the County of London; and he cited Audley's Case, where a Man was indicted, tried, and condemned for breaking a Chamber in the Temple; and the Case of Longford's Clerk, who was hanged, for entring and breaking his Master's Chamber, and attempting to rob him; and these Persons were indicted, tried, and convicted at the Old Bailey, the which could not be, if the Temples are not within the County of London; and as to the Executing of Fi. fa. or arresting the Students of the Temple, he said that there shall be a due Regard paid to the Inns of Court, and the Members of them; but that these Privileges are not to be extended to Persons who come there by Fraud, and shelter themselves there with an Intent and Purpose to cheat their Creditors; and that this Defendant Borlace came from

Gray's

Gray's Inn with this Purpose, and came their irregularly, without any Certificate from the Treasurer, as there ought to be; and so they were ruled to find special Bail; and the same Case being after moved in C. B. there they held them to Bail but for 200 l.

A TABLE OF THE Principal Matters Contained in this BOOK.

Abatement. See **Pleading.**

IN *Trover*, that the Plaintiff had only a Common Right with the Defendant, is a good Plea in Abatement. *Page* 12

Countess *Dowager* must be named *Dotissa* in the Writ, or it shall abate. 15

Jointenancy may be pleaded in Abatement in an Action on the Case. *Page* 280

In Action on the Case for Goods sold, the Defendant pleads in Bar, that he was Executor, where the Plaintiff had charged him as Administrator; upon a Demurrer *adjudged* for the Plain-

Plaintiff, for it was but in Abatement; but it is otherwise of Letters *Ad colligend. bona defuncti.* *Page* 365

In an Appeal the Venue being laid in the Parish of St. *Giles*'s, and the Parish being alledged generally, it shall be intended to be a Vill, and the same with the Vill; but if it contains more Vills than one, this ought to be pleaded in Abatement, and the Plea shall avail, if it be true. 554

Demurrer to a Plea in Abatement, where the Defendant said, that she was baptized by the Name of *Mary*, and not of *Patience*, because she does not say that she was so called at the Time of the Bill sued; *and adjudged that she ought to give the Plaintiff a better Writ.* 620

Action, and Action upon the Case.

A. hath two Acres of Land, to which an ancient Water runneth, which he prescribes to have *pro usu & commodo* generally; sixty Years before he had a Mill upon his Land, and he builds a new Mill six Yards lower than where the antient Mill stood: *B.* hath an antient Dam upon the same Stream, which he pulls down, whereby great Part of the Stream running to the Mill of *A.* is diverted; it seems that *A.* may maintain an Action upon this Case. 65, 175

Where an Action is brought for diverting a Stream from a Mill, and the Plaintiff prescribes to a Water-course, there he must shew that the Mill was an antient Mill; but where the Stream is his own, and he claims as flowing over his own Land, there he may maintain an Action, without shewing that it was from an antient Mill. *Page* 65

Action on the Case lies against a Person for pretending himself to be single, when in Truth it was otherwise; and thereby prevailing upon a Woman to marry him. 119

Action on the Case lies against a Parson for pronouncing Sentence of Excommunication against a Person not excommunicated. 124

Action on the Case lies for causing a Man to be arrested for a Cause in an inferior Court, which arose without the Jurisdiction of that Court; but no Action will lie against the Officer, it being for a Cause the Court had Jurisdiction of. 131

Action sur Case, for that whereas the Defendant's Cattle were impounded by *A. B.* that the Defendant promised the Plaintiff, that if he would deliver them out of the Pound, that he would save him harmless from *A. B.* and then sets forth that *A. B.* had brought a *Parco fracto* against him, *&c.* after Verdict the Judgment was arrested, because the Plaintiff

tiff did not aver that he did deliver the Cattle, which was the Point traverſable. *Page* 141

In Action *ſur Caſe*, for diſturbing of his Common, Judgment by Default, and a Writ of Error brought, and Error aſſigned, for that the Plaintiff had not laid any Title either by Grant or Preſcription; *ruled* that in an Action of Treſpaſs on the Caſe, the Plaintiff need not ſhew a Title; and it does not appear by the Declaration, that it is the Defendant's Land. 214

An Attorney in an *Action ſur Caſe* may declare for ſo much due *pro opere*, and give his Solliciting, *&c.* in Evidence. 218

Action ſur Caſe, that in Conſideration the Plaintiff would permit the Defendant to occupy the Plaintiff's Land for one Year, that he would give him as much as it was worth; upon a Motion in Arreſt of Judgment, *adjudged* that ſuch Action well lay. 238, 242

Plaintiff declared that *May* 1. *&c.* he was poſſeſſed of an Houſe, from which a Courſe of Water *per & trans* the Garden of the Defendant *currere debuit & debet*; Exception becauſe not ſaid that the Water ever ran from the Houſe, or that he was poſſeſſed of it; but *ruled* to be well enough, this being a poſſeſſory Action. 316

Action ſur Caſe quod quidam fluxus aquæ currere conſuevit & debuit uſque quendam fontem, &c. and that the ſaid Well uſed to overflow, by Reaſon of the Running of the Water into it; and that the Water which ſo overflowed from the ſaid Well *uſque* the Houſe of the Plaintiff uſed to run; and alledged it in the Count to be an antient Houſe, and to be in his Poſſeſſion; and then ſhews that the Defendant had diverted the Water by digging of a Ciſtern, ſo that the Water which uſed to run into the Well, did not run into it, *& ratione inde* the ſaid Well for ſuch Time did not overflow; *Not guilty*, and a Verdict for the Plaintiff moved in Arreſt of Judgment, becauſe no *terminus a quo* of the Stream; neither is it alledged that it uſed to run, *&c.* but adjudged for the Plaintiff, for all theſe Things ſhall be intended to be proved upon Evidence; and ſo aided by the Verdict. *Page* 389

In an Action on the Caſe upon mutual Agreements, the Evidence was a Note, *bought by* A. R. *of* H. *one hundred Pieces of Muſlin, at* 40 s. per *Piece, to be fetched away by ten Pieces at a Time, and to be paid for as taken away*; *ruled* that by Sealing and Marking the Pieces, the Property is altered, and that they remain only a Security for the Money; and that if they are not taken away in a reaſonable Time, the Party may have an Action for his Mo-

Money, but may not ſell the Goods; and though there be no actual Promiſe to deliver theſe Goods, yet they being to be paid for when taken away, this implies a Promiſe to deliver them. *Page* 647

Action for Words.

To ſay of a Perſon who has an Office of publick Truſt under the Government, *He is a Papiſt*, is actionable. 68, 88

Unleſs there be a *Colloquium* precedent to apply ſcandalous Words to the Station or Profeſſion of the Perſon of whom they were ſpoken; the Action will not lie. 68, 69

A Prohibition was denied upon Suit in the Eccleſiaſtical Court for theſe Words ſpoken of a Midwife; *I will not venture my ſelf with her, ſhe is a Whore, and will kill me, and bury me in the Garden, as ſhe did her Baſtard.* 86

I have heard that a Maid of Sir J. K.*'s when he was laſt ſick, looked through the Key-hole, and ſaw a Prieſt adminiſter to him the Euchariſt, and extreme Unction*; *adjudged* to be actionable upon a Writ of Error brought. 98, 112

To ſay a Man is a *Popiſh Prieſt* is actionable. 113

To ſay a Man is *excommunicated*, is not actionable. 124

Thou art a Clipper, and thy Neck ſhall pay for it; *adjudged* actionable. 183

Words are to be taken in their natural Senſe, and according to the Apprehenſion of the By-ſtanders. *Page* 183

You are a Rogue, and broke open a Houſe at Oxford, *and your Grandfather was forced to bring over* 30l. *to make up the Breach*; *adjudged* to be actionable, for a Man who heard them could not intend other than that he meant a felonious Breaking of the Houſe. 364

The Rule of taking Words *in mitiori ſenſu*, is to be underſtood where the Words in their natural Import are doubtful, and equally to be underſtood in the one Senſe, as well as the other. 364

Libel in the Spiritual Court for theſe Words; *You are a Rogue and a Raſcal, and the Son of a perjured affidavit Bitch*; a Prohibition was denied. 390

Adminiſtration.

The Teſtator indebted to *A.* and *B.* was indebted by Bond to the Teſtator; the Executor aſſigns the Bond in Satisfaction of the Debt owing to *A.* the Adminiſtrator *de bonis non* ſhall never recover upon this Bond. 143

The Prerogative Court having once executed their Authority, in granting of an Adminiſtration, cannot afterwards alter it. 156

Adminiſtrator *durante minoritate* is only in the Nature of a Curator. 156

The Ordinary without Cause could not repeal an Administration before the Statute of *Hen.* 8. *Page* 156

R. Administrator to *T.* assigns his Letters of Administration, and then dies Intestate; *held* upon a Plea and Demurrer in *Chancery*, that the Interest passed by the Assignment of the Letters of Administration, and shall not go to the Administrator *de bonis non* of *T.* 232

Where there is a Term continuing after the Death of the Intestate, the Administrator shall be allowed for the Rent. 650

Action against an Administrator upon a Note, who pleaded *plenè Administravit*; and it was objected that this Note was assigned to *J. S. ruled* that by the Plea, the Right of the Action is admitted, and the Property of the Note in another, may not now be objected; otherwise if he had pleaded *Non assumpsit.* 650

Admiralty.

Sale of a Ship under the Sentence of a Foreign Court of Admiralty, good to change the Property. 59

Sentences in Courts of Admiralty ought to bind generally according to *Jus Gentium.* 59

A Person may be taken in any County in *England* by Execution out of the Admiralty, upon a Sentence. 93

The King may arrest, or lay an Embargo upon Ships; and this done by the Court of Admiralty. *Page* 93

The Admiralty may arrest Ships riding in the River for maritime Causes. *Ibid.*

Where there are four joint Owners of a Ship, and three will navigate, and the Fourth will not; upon giving Security in the Admiralty to answer for the Ship, the Three shall be discharged against the Fourth. 230

Unless a Part-owner of a Ship *expresly* prohibit navigating the Ship, if the Ship be lost, he shall not be answered his Part; and if it return he shall have an Account of its Earnings. *Ibid.*

Where Part-owners of a Ship will imploy the Ship, and Part will not; the Advantage of the Voyage belongs to them only who imploy the Ship. 279

The Plaintiff amongst others had freighted a Ship for *Maderas*, and from thence to a Place within the Patent to the *East-India* Company, upon the Complaint of the Defendants to the King, a Prosecution is ordered in the Admiralty-Court; at the Defendant's Instance an Embargo is laid on the Ship, and the Plaintiff detained till he gave Security not to go to any Place within the Patent of the *East-India* Company; in an Action upon the Statute of *R.* 2. for a Prose-

cution in the Court of Admiralty; upon a *special Verdict* the one Defendant was found to be President, and the other Solicitor to the Company, and that by this Means the Plaintiff lost his Voyage; and Judgment in *C. B.* was given for the Plaintiff; and upon a Writ of Error in *R. B.* the Judgment was *affirmed*; and *ruled* that this being a Suit in the Admiralty against his Goods, this is a Suit there within the Statute, and that it lies against the Defendants, as the Movers of the Suit; and though the Plaintiff was Tenant in Common of these Goods, that this was but in Abatement, and that nothing appears within the Record, which abates the Plaint. *Page* 334, 361

In Time of War, and upon great Emergencies, the King for the Service of the Publick, may lay an Embargo, and employ the Ships of his Subjects. 335

Agreement.

Though no Interest may pass by a parol Agreement, yet if the Person enjoys according to such Agreement, an Action lies for the Money upon the other's Agreement. 113

A Settlement was made on the Wife in Marriage, in Persuance of Articles in Writing sealed; if it after appear to be deficient, it shall be made up by the Heir; but if it had been only upon a parol Agreement, or if at the Time of the Settlement, the Lands had been of full Value, and after by Accident had gone less, there had been no Relief. *Page* 158

If a Man be able to read, and a Lease be drawn contrary to his Agreement, 'tis within the *Statute of Frauds, &c.* and he shall not be relieved, otherwise if he had been unlettered. 159

Moved in Arrest of Judgment in an Action brought upon this Promise; *If you will procure* 15000 l. *to be paid into the Exchequer, upon the Aid of* 12 d. *in the Pound, in my Name, or in the Name of such Person as I shall direct, I will give you* 600 l. *&c.* and insisted that this was Brocage, and a Promise against Law; but the *Court declared*, that nothing appears in the Declaration against Law, for the Borrower does not pay Brocage, nor the Lender receive it; but the Consideration is wholly between Persons not interested in the Money. 322

Where a Statute inflicts a Penalty for doing an Act, though the Act be not prohibited, yet the Thing is unlawful; and if such Thing appear in the Declaration, or upon the Pleadings, the Agreement to do such Thing is void. 323

Where an Agreement is to be performed upon a Contingent; and

and it does not appear within the Agreement, that it is to be performed after the Year; there a Note in Writing is not necessary, for the Contingent might happen within the Year; but when it appears by the whole Tenour of the Agreement, that it is to be performed after the Year, there a Note is necessary. *Page* 326, 352

The Wife of the Defendant before Marriage, and the Defendant had agreed to bring such a Sum of Money into the Hands of *J. S.* to be employed to their Use; to an Action brought upon a Bond for the Performance of these Articles of Agreement, the Defendant, pleads, that after these Articles, the Defendant married his Wife, who was the other Party to these Articles; and so the Articles were discharged by the Marriage, *&c.* to which the Plaintiff demurred; and *adjudged, ut videtur*, against the Plea, because he does not shew that he had brought the Money into the Hands of *J. S.* which was previous to the Marriage; and for not doing so an Action was attached, and that the Bond was not discharged by the Marriage. 409

Alien.

The King cannot make a League *mutui auxilii* with Infidels; other Leagues he may. 167, 204

Alien Amy being here, and then becoming Alien Enemy, his Goods cannot be seised by any Person. *Page* 204

If an Alien die before the Breaking out of a War, whereby he would become an Alien Enemy, he may have an Executor; and if he makes an Alien Enemy his Executor, who brings an Action; this being *en auter droit* is maintainable. 370

Amendment.

Judgment upon a Bond; the *Venire* was to cause *A. B.* to come before, *&c.* on a blank Day, *& idem Dies* given to the other Party; the Plaintiff comes above twenty Years after, and moves the Court to amend it, as being a Judgment of the last Term; and it was amended, though it was before the *Oxford Act.* 46

What is not amendable by the Clerk, without Order of the Court, if done by him; and if according to Law, the Court cannot alter, but may punish him. 46

In the Entry upon the Roll of the Writ of Enquiry of Damages, *per Sacramentum duodecim proborum & legalium hominum* was omitted; neither was it said *Virtute brevis*; amended in *R. B.* after Judgment there, and a Writ of Error brought. 253

Where the Proceedings upon the Record are right, a Judgment should not be reversed for a Mistake

Mistake in Transcribing. *Page* 254

The Misprision of the Clerk in the Joining of the Issue, by inserting of the Name of *John* instead of *Thomas*, though it run through the *Plea Roll*, *Nisi prius Roll*, and the *Paper Roll*; yet amended. 591

Amerciament.

In a Writ of Dower, the Defendant confesseth the Action as to Part, *Ideo in misericordia*: He pleads as to the rest, and to his Plea the Demandant demurs; and adjudged for the Demandant, *Ideo in misericordia* entred again; and *held* that the *double Misericordia* was not Error. 592, 593

Appeal.

Appeal brought by Attorney; the Letter of Attorney must be proved, or confirmed *ore tenus*. 48

Count in an Appeal of Felony was, that *circa horam primam*, *&c.* and after goes on, and so he *hora supradict.* this *adjudged* to be certain enough. 443, 553

Super superiorem partem ventris proximi ad pectus ejusdem, *&c.* *adjudged* to be a sufficient Description of the Wound. *Ibid.*

The Allegation of giving the mortal Stroke, being by the Participle *Dans*, is as well or better, than if it it had been by *Dedit*. *Page* 443, 553

The Sheriff returns *Attachiari feci eundem*, *&c.* instead of *Attachiavi*; the Return *held* to be good. 552

Though the *Precipe* to the Sheriff be that he should have the Body in *B. R. ubicunque*, *&c.* yet he ought not to return, that he hath the Body ready, *ubicunque*, *&c.* but when the Day is come, he ought to return the Body into Court, which then is in a Place certain; but such an Error in the Return is but Surplusage, and shall not avoid the Writ. 444, 553

Two Persons were indicted for Murder at the Sessions at *Exeter*; the one was convicted and attainted, the other acquitted, and against him the Widow brought her Appeal, and he removed himself hither by *Habeas Corpus*; and the Plaintiff moved to have an *Habeas Corpus* to remove the Body of the other who was attainted; which was denied; and it was said that she might arraign her Appeal against the other alone. 634

An Appeal before Appearance was discontinued, and the next Term the Defendant being in Court prayed to be discharged, the Appeal being discontinued; but the Court gave Day to bring in the Roll, when it was prayed that they might proceed against him *in Custod. marescballi*

challi by Bill, which was allowed, and the Appeal was arraigned; and the Court ordered a Roll to be made, and a Copy of it to be delivered, and gave the Defendant Day to plead. *Page* 634

L. indicted of Murder, was convict of Manslaughter, and prayed his Clergy by a Friend, not being himself in Court; and at the same Assizes an Appeal was lodged; *Holt Chief Justice* inclined *fortiter*, that the Court ought not to refuse to allow Clergy to one convict of Manslaughter. 670

The Conviction of Manslaughter and Appeal of Murder were removed by *Certiorari*, and the Party by *Habeas Corpus*; and at the Return of the *Certiorari*, the Appellant moved to file a Letter of Attorney; *the Court would make no Rule, but said*, that if he filed a Letter of Attorney, and the Law required an Appearance in Person, the Appeal would be discontinued. 670

After the Appeal returned upon the *Certiorari*, the Appellee ought to sue a *Scire facias* against the Appellant *ad prosequendum*; for the Appellant has not a Day in Court. *Ibid.*

Upon the Return of the Conviction of Manslaughter, the Counsel of the Appellant would have taken Exceptions to the Conviction, but not allowed; for *the Court said*, they were Strangers to the Record, and have not any Privity or Authority to take Exceptions. *Page* 671

Appearance.

Appearance aids, where the Party appears and pleads; but if he appears and takes Exception for a Defect in the Writ, or Return, such Defect is not aided by the Appearance, unless he waives his Exception by Pleading over. 553

Apprentice.

An Apprentice cannot be discharged but by General Sessions. 98

The Justices may discharge an Apprentice by 5 *Eliz.* and order the Money to be returned, and the Indentures to be delivered up; and this as well where the Apprentice is discharged through his own Default, as where for the Default of the Master. 108

One put out an Apprentice by the Justices, appears after to be an Ideot, the Justices may discharge the Master, and send back the Boy to the Parish. 114

The Justices cannot compel any one to take a poor Boy to be an Apprentice. *Ibid.*

Where the Plaintiff would charge the Defendant with Money received to his Use, as his Apprentice; the Hand of the Defendant to the Indentures of

Apprenticeship ought to be proved, unless the Indentures be enrolled. *Page* 579

Assignment.

By Agreement between Joint Farmers of a Revenue, each of them was to have 150 *l. per Ann.* paid quarterly, [but that not to be taken out of their Stock] to be paid at the End of five Years, with Interest after the Rate of 10 *l. per Cent.* and if any of them die within the five Years, then that 150 *l. &c.* and Interest to be paid to his Executors, and the remaining Money, if any, not to go to the Executors; one of these Farmers assigns, and within a Month of the Expiration of the five Years, dies; *held* that the Arrears before the Assignment was a *Chose en Action*, and shall not go to the Assignee. 6, 26

Whether by an Assignment of the Land by Tenant for Years, his Term shall pass. 539, 540

Assumpsit.

In Action *sur Case sur Assumpsit*, the Defendant may plead *Non Assumpsit*, and give the Statute of Gaming in Evidence. 195

Action *sur Case* upon mutual Promises upon Marriage, not within the Statute of Frauds and Perjuries; so upon a Wager. 196

An *Indebitatus Assumpsit* lies not upon a Promise to pay a Sum of Money, when he receives a greater Sum from a Stranger. *Page* 196

Where an Attorney is retained for a third Person, and the Person retaining, promises him his Fees; an *Indebitatus Assumpsit* will lie upon this Promise; but where no *express* Promise, the Law will not create one. 218

If a Man agrees to pay such a Sum at three several Days; here he may not declare for this Sum, till the Days are passed; but when the Days are passed, a general *Indebitatus Assumpsit* lies. 326

If a Man pay Money upon a Policy of Assurance, supposing a Loss when there was not, in such Case this shall be Money received to the Use of the Payer, because the Money was paid upon a Mistake; the like if it was upon a Fraud in the Receiver. 412

Attorney General.

Mr. Attorney's Consent cannot bind the King as to Matter of Law; it will as to Matter of Fact, unless the Court see it to be to the King's Prejudice. 118

Attachment Foreign.

Whether by the Custom of the City of *London*, Money can be attached in the Hands of the

the Ordinary, in case a Person dies Intestate, or in case he make a Will. *Page* 516

Where the Condemnation in an Attachment in *London* is before the Action commenced; there the Defendant may plead *Non assumpsit*, and give the Attachment in Evidence; but where the Condemnation is after the Action commenced, the Defendant ought to plead it. 639

Averment.

Where an Action is brought for a Sum not certain, by Specialty, but it is reduced to a Certainty by Averment in the Pleading; the Defendant may plead *Nil debet* generally, or take Issue upon the Averment; which if he does, he must strictly pursue the Averment. 17

Declaration in Debt that *per quoddam scriptum, &c.* [being a Deed *Poll*] *testatum est quod Defend. cepisset* of the Plaintiff, such Lands *pro uno Anno si vita tam diu viveret*; and avers that *J. M.* was the Life intended; Issue was taken that *J. M.* was not living, and after Verdict, that he was living; Repleader awarded, for the Count *si vita, &c.* being uncertain, the Averment *dehors* did not mend it; and the Issue was therefore quite immaterial. 569, 570, 571

Avowry.

Where there is a Plea in Bar to an Avowry, and Issue joined, the Court will not give Leave to the Plaintiff to confess the Avowry *relicta verificatione*, because it may be a Prejudice to the Defendant. *Page* 594

Authority.

A general Authority to a Bailiff to receive Rents, and to make Demand of them, and to make Entry, is not sufficient to authorize him to take Advantage, and make Demand of a Rent accrued due after the Authority given; for it is a new Right attached, and there ought to be a special Authority for this Purpose. 413

Award.

An Award that he shall pay so much as such Land is worth, void. 248

The Condition of a Bond for Performance of an Award was, *si* the Defendant *ex parte D.* shall stand, *&c.* upon *Nul tiel arbitrement* pleaded, the Plaintiff replies and shews the Award, *&c.* and that the Plaintiff and Defendant *ex parte D.* shall seal a Release to the Use of each other, of all Actions, *&c.* touching the Account aforesaid; and adjudged for the Defendant, for the Award is not

not mutual, and nothing is to be made to *D.* for the Releaſe is to the Uſe of each other. *Page* 679

Bail.

THE Court of *R. B.* refuſed to bail Lord *Danby*, who upon an Impeachment was committed by the Houſe of Lords. 56

Where a Party is committed by Order of the Houſe of Lords, upon a Prorogation he may be bailed. *Ibid.*

Said, that no Man can demand *de jure* to be bailed in caſe of High Treaſon, and that in Murder, to bail or not, is diſcretionary. *Ibid.*

A *Scire facias* may be brought againſt the Survivor of two Bail, being upon a Recognizance; otherwiſe upon a Judgment, for there it is joint. 100

After Judgment in a *Scire facias* againſt the Bail, the Court will not ſet aſide the Judgment, becauſe the Principal is committed in Execution; but this ſhould have been pleaded upon the *Scire facias*. 120

Upon the Removal of a Cauſe by *Habeas Corpus*, the Bail in the Inferior Court are diſcharged. 245

Where the Warrant of Commitment did expreſs it to be for aiding and aſſiſting Sir *J. M.* who was charged with High Treaſon to eſcape; yet becauſe it did not expreſs the Species of Treaſon, for which Sir *J. M.* was charged; it was held not good; and for this Reaſon the Parties committed were bailed. *Page* 596, 597, 598, 599

Bankrupt.

Being the King's Servant, and ſo under Protection of Parliament, excuſes Bankruptcy after an Arreſt. 21

Money paid for placing out a Son an Apprentice, after an Act of Bankruptcy, *ſeemeth not* to be aſſignable by the Commiſſioners. 22

Sale by Commiſſioners of Bankrupt of Lands, void, if not by Deed enrolled; and in this Caſe the Inrolment ſhall not relate. 30

Upon a Contract where there is *Quid pro quo*, an Act of Bankruptcy ſhall not over-reach it. 149

One arreſted puts in Bail, and does not pay the Money within ſix Months; if he becomes a Bankrupt, the Bankrupty ſhall not relate to the Time of the Arreſt; but he ſhall be adjudged a Bankrupt after the ſix Months only. 270

The Buying of Victuals for the Navy, though he ſells the Surpluſage to others, will not make a Man liable to the Statutes of Bankrupt, becauſe it

it is a Contract for a particular Purpose. *Page* 292
A Schoolmaster not within the Statutes of Bankrupts. *Ibid.*
A Shoemaker is within the Statutes of Bankrupts. *Ibid.*
Being Partner of a Ship, unless it be found that he traded, will not make a Man a Trader, nor Employing a Sum by way of Venture in Trade. 293

Bailiff.

He that justifies in Trespass for taking a Distress as Bailiff, for Breach of a By-law, ought to shew that he had a Precept for so doing, because he cannot do it *ex officio*, any more than a Sheriff can execute a Judgment without a Writ. 587
Difference between Justifying in Trespass and in Avowry. *Ibid.*

Bar. Vide Pleading.

Plaintiff brought an Action of Trespass against the Defendant; the Verdict and Judgment was for the Defendant; and after the Plaintiff brought Trover for the same Cause; and upon Plea in Bar and Demurrer, held that the Plaintiff was not barred to bring Trover. 49, 58
An Estoppel pleaded in Bar, that is upon Record, and the Conclusion being, Judgment *si actionem prædict. &c.* good. 49
Where the Plaintiff is barred in one Action, he shall be barred in another; and where not. *Page* 48, 49, 57.

Baron and Feme.

Baron and Feme levy a Fine of the Wife's Land, and the Wife alone declares the Uses; such Declaration is void, except an express Assent of the Husband is proved. 275
Debt upon a Bond; the Defendant after Oyer pleads the Statute of Usury, and it appeared to be an usurious Contract made by the Wife; and ruled to be an usurious Contract by the Husband, sufficient to discharge and avoid the Obligation *civiliter*, though not sufficient to charge the Husband *criminaliter*. 348
If a Tradesman having Notice of a Difference between a Man and his Wife, sells the Wife Goods only to enable her to ruin her Husband, there the Husband shall not be chargeable; but if the Tradesman deliver the Goods as fit for the Wife, upon the Credit of the Husband, without Notice of a Difference between them, the Husband shall be charged; if a Tradesman be not privy to such Differences, yet if the Goods be not suitable to the Quality of the Wife, the Husband is not chargeable; or if Part only be suitable, he shall be charged only for that Part: After a publick Trial, the Husband shall not be chargeable,

for this is Notice sufficient of the Difference between Man and Wife. *Page* 349

Bills of Exceptions.

A Bill of Exceptions lies in the Court of King's Bench. 356

Bill of Exchange.

H. draws a Bill of Exchange upon *P.* payable to *S.* who endorses it to *A.* who endorses it to *C.* *C.* brings his Action against *H.* and had Judgment; and after he brings his Action against *S.* who pleads the Judgment against *H.* in Bar of this Action; *and adjudged* a good Plea, for by suing of the Drawer, he has waived his Liberty of suing *A.* and *S.* for if he may sue *S.* then *S.* may sue *H.* and so *H.* be doubly charged. 255

In an Action *sur Case* upon the Custom of Merchants in Bills of Exchange, the Custom was laid, that if a Merchant or another Man draw a Bill upon a Merchant, or another Man having Commerce, *&c.* *adjudged* that the Custom is laid too general; it should be more confined to Place or Persons. 265

C. drew a Bill of Exchange upon *N.* in *Oporto*, for 1000 *Mille Rees*, *August* 6. payable thirty Days after Sight: *August* 14. the King of *Portugal* lessens the Value of the *Mille Rees* 20 *l. per Cent.* *Adjudged*, that the Bill ought to be paid according to the antient Value, for the King of *Portugal* may not alter the Property of a Subject of *England*. *Page* 272

Protest of a Bill of Exchange is *prima facie* an Evidence of Non-acceptance, and sufficient to put the Proof on the other Side. *Ibid.*

Action *sur Case* upon a Bill of Exchange, payable to *J. S.* or Bearer; and a Custom alledged, that such Bill is assignable, and that the Endorsee may have an Action; to which it was demurred; and *adjudged* for the Plaintiff, insomuch that the Custom was alledged; which being confessed by the Demurrer, the Court must take it to be so. 332, 346

An *Indebitatus assumpsit* does not lie upon a Bill of Exchange. 346

Every Bill is extant, till there has been a Satisfaction upon it; and the Drawer is liable, and so are all the Endorsers. 410 See there some good Distinctions relating to Bills of Exchange.

The Party has a Liberty to bring his Action against any of the Indorsers of a Bill of Exchange, if it be not paid by the Acceptor. 343

Bottomry.

If a Ship deviates in her Voyage, and is after lost, the Plaintiff who

who had lent Money upon her Hull, shall recover. *Page* 153

Bridges.

Corporations are rateable with the County, towards the Repair of publick Bridges. 254

By-laws. Vide **London.**

If a Man comes into a Corporation, he ought to take Notice of their By-laws, at his Peril. 350

By-laws in the City of *London*, where good and binding, and where void. 371 *to* 384

Carrier.

A Carrier is bound to carry Goods, as much as an Innkeeper to receive Guests. 279

Certiorari.

A Replevin by Plaint in the Sheriff's Court of *London*, and Pledges *de Retorn habend.* there found; this was moved into the Mayor's Court, and after into the King's Bench by *Certiorari*, and after Oyer the Party declared in *R. B.* and a Return awarded; and upon *Elongat'* returned, *Scire facias* went against the Pledges in the Sheriff's Court; and to this it was demurred; and *adjudged* that the Pledges in the Inferior Court are not discharged by the Removal of the Cause by *Certiorari*; for by a *Certiorari* the Record *cum omnibus ea tangent'* is removed. *Page* 244

Concerning *Certiorari's* returnable into Chancery, what is removed by them, and whether they be a *Supersedeas*; and the Difference between such *Certiorari's* and Writs of Error, as to their being a *Supersedeas* to the Judges, to whom such Writs are directed. 419 *to* 422

Challenge.

In an Information the King challenges a Juror, and the Party *touts peravail*, he must shew Cause immediately, but the King is not bound to shew Cause till all the Panel be perused; but he must shew Cause before the Jurors be drawn, and cannot challenge peremptorily. 82

Want of Freehold no Challenge to the Polls in a City, which is a County within it self. 91

If upon a Challenge the other Side demur, and the Judge over-rule it, 'tis entred upon the Original Record; if at *Nisi prius* upon the *Postea*; if the Judge over-rule the Challenge upon Debate without a Demurrer, then 'tis proper for a Bill of Exceptions. 101

Challenge to the Array *quia nullo milite in eodem panello* ex-

existent. returnat. ill; it ought to be averred, that *J. S.* and *J. N.* returned upon the Panel are not Knights; then it might be tried. *Page* 229

Chancery.

The Father being sick, a Tradesman sold Goods to the Son worth 400 *l.* and the Son gave a Judgment for 1600 *l.* defeasanced to pay 800 *l.* within forty Days after his Father's Death; the Father dies within a Year, the Son relieved in Equity; otherwise if the Father had been in perfect Health, though he had died quickly after. 107

A Devise of 500 *l.* to his Niece, *when she attains the Age of Twenty-one, or shall marry, which shall first happen, to be paid her with Interest*; this decreed to be a present Interest. 148

A Release being given without examining the Particulars of the Account; the Party was relieved against it. *Ibid.*

A Release obtained by a Guardian from an Infant, as soon as he comes of Age, it is not unfair. *Ibid.*

A Factor smuggled Foreign Customs, yet brought them as paid upon Account; Chancery would not relieve. 149

An Injunction was granted to the Ecclesiastical Court, because the rest of the personal Estate was in Question in Chancery. *Page* 287

Chancery will not make a Decree for a Portion, without having a fitting Settlement made, and suitable to the Portion to be received. 288

Charter.

A Form of electing Officers in a Corporation, being prescribed by an antient Charter, and a new Form appointed by a new Charter; tho' the new Charter of it self, cannot alter the Manner of Election vested and settled by the former Charter, yet by Consent and Acceptance of such new Charter, and acting under it, [which will be an Evidence of the Consent and Acceptance] the Manner of Election may be altered according to the new Charter. 574, 575, 576, 577

Claim.

The Commission of Claims, a Commission of Oyer and Determiner, the Petitions and Claims, are in Law *French*, and recorded and entred up in *Latin*, upon Rolls kept in the Chancery. 231

There was a Court before the House, and at the Gate of the House, the Heir said to the Tenant, that he was Heir of the House and Land which he held, and forbad him to pay more Rent to the Defendant, *& eo*

& eo instante enter'd the House: *Adjudged* to be a sufficient Claim. *Page* 412

Coin.

A Bond entred into for the Payment of 100 Guineas; Debt brought upon it; and the Plaintiff declares, that the Defendant became bound to him *in Centum nummis aureis vocat.* Guineas *attingent. ad valorem* 107*l.* 10*s.* whether this be a Variance between the Count and the Bond. 572

Where Current Coin of the Kingdom, there the Thing it self ought to be demanded, and not the Value, and the Count ought to be in the *Debet & Detinet*; but where a Foreign Coin is demanded, there it ought to be in the *Detinet*, and the Plaintiff may count to the Value. 573

The legal Value of Coin is that which it is coined for, and not what it passes for by Consent. *Ibid.*

Colleges.

Colleges are Lay Corporations. 494

Head of a College cannot maintain an Assize for his Headship: he hath no sole Seisin; he has not a Title to the Revenues or any Part, till they are divided by Consent, and then he has Property in them in his Natural, and not in his corporate Capacity. *Page* 488

Commitment.

Commitment by a Secretary of State *qua talis*, good. 596, 597, 598

Whether a Commitment for Felony or Treason, to the *Tower*, *New-Prison*, or to the Custody of a Messenger, be such a lawful Commitment, that an Escape from thence would be Felony or Treason. 599

Commitment to a Messenger said by *Holt Chief Justice* to be irregular, though not void; and that he did not approve of such Commitments, except for a short Time, in order that the Prisoner might be examined, which might be for his Benefit; for there might appear Reason not to commit him. *Ibid.*

Common.

Prescription for Common appurtenant; the Defendant traverses that they were the Cattle of the Plaintiff levant and couchant upon, *&c.* the Traverse *adjudged* good upon a Demurrer, for not only the Levancy and Couchancy is the Measure of this Common, but the Property of the Party likewise. 137

Plaintiff declares, that he was possessed of a Tenement and a Piece of Land, to which he

ought to have Common for his Beasts levant and couchant upon his Tenement in, *&c.* and that the Defendant had entred and made divers Holes in the Acres, and stored them with Conies, so that, *&c.* the Defendant demurred to the Declaration; Judgment for the Plaintiff in *C. B.* and a Writ of Error brought, and Error assigned, that the Plaintiff had not entitled himself to this Common, but only said *possessionat. & habere debuit*; but the Action adjudged to be well brought, it not appearing that the Defendant was in Possession, but only a Tort-Feasor. *Page* 621

Condition.

Condition of a Bond was, *If the Ship be hindered by Stress of Weather, or Leekage, so that she return not*; the Ship is drowned; this was *held* a Hinderance within the Words of the Condition. 3

Mr. *B.* devises to his Daughters *G.* and *F.* 20000 *l.* a-piece, to be paid at their respective Ages of Twenty-five Years, or Days of Marriage, *so as such Marriage be not before Sixteen, and so as such Marriage be with the Consent of the Lady* C. *Mrs.* B. *and one* Lea, *or one of them; and if either of my Daughters shall marry otherwise, then such Daughter shall have only* 10000 *l.* without saying what shall become of the other 10000 *l.* In the Life of Mr. *B.* there was a Treaty of Marriage proposed between *F.* and the Lord *S.* which broke off, and after his Death it was renewed again, and the Marriage had with Consent, but before *F.* attained her Age of Sixteen; and *decreed* in Chancery that the 10000 *l.* was not forfeit, for that the Consent was the chief Thing, which was had, and the Time but a Circumstance, which had been dispensed with by Mr. *B.* himself, in his Treaty in his Life-time. *Page* 286

Upon a Writ of Error upon a Judgment in the Grand Sessions in *Wales*, the Case was, *T.* having three Daughters, devises the Manor of *D.* to *Jane*, and her Heirs for ever: *Provided that she marry my Nephew* T. *at or before she attain the Age of Twenty-one Years; and if she refuse to marry my said Nephew* T. *or be married to any other before she attain the Age of Twenty-one, then he devises* D. *to his second Daughter* Mary *and her Heirs*; and he devises his other Manors to his other Daughters, with the like Limitations; and then follows this Clause: *Provided and my Will is, that if neither of my said Daughters shall be married to my said Nephew, before their respective Ages of Twenty-one, then I devise the said Estate of* D. *and*

and S. *to my Wife, and five other Trustees, and they to sell and dispose of the same*, &c. the Judgment was affirmed; for the Will is, if *Jane* and *Mary* do not marry *T.* before their Age of Twenty-one, that then the Trustees may sell; and therefore no Interest is given to the Trustees, till their Age of Twenty-one; and it appears by the Verdict, that *Jane* was not Twenty-one, at the Time of the Ejectment brought. *Page* 301, 319

Consent.

Consent of the Parties cannot alter the Law; but if such Consent appear upon Record, it is no Error. 118

Conspiracy.

Whether Action of Conspiracy for causing the Plaintiff to be endicted, be local or transitory. 44

Constable.

Where a Constable acts in Obedience to a Warrant of a Justice of Peace, upon the Face of which Warrant it appears that the Justice did not convict the Offender against whom it issued, within the Time limited by the Statute upon which he is convicted; whether he shall be chargeable in Trespass for a Distress taken by him according to such Warrant. *Page* 445, 566 *to* 569

Continuando. See **Trespass.**

Trespass for digging up Posts, breaking his Close, and carrying away the Posts, *&c. Continuando, &c.* the *Continuando* ill upon a Demurrer; but after a Verdict good by Reference. 42

In Trespass with a *Continuando*; the Party is not obliged to prove the precise Time alledged in the *Continuando*, but he ought to prove a Trespass at some Time within the Time alledged; but he may waive the *Continuando*, and give the single Trespass in Evidence. 641

Continuances.

The constant Practice on the Crown-Side, is to enter Continuances only for them who appear. 118

Where an Act of Parliament aids the Discontinuance of the Term; yet when the Term is continued by the Statute, the Party ought to enter up his Continuances; and for Default of it, his Action is discontinued. 572

Contumacy.

Acting upon a Mistake, or refusing to obey a legal Power in a dubious Point, said *arguendo* not to be Contumacy. 510, 511

Con-

Conviction.

Exception to a Conviction upon the Statue of *Will. & Mar.* for keeping of a Warehouse for Low Wines, *&c.* because in *English*, not allowed. *Page* 562

Whether though it do not appear by the Conviction, that the Party convicted was such an Offender as the Statute describes; yet he being convicted of offending against the Form of the Statute, it shall be intended that he was such an Offender, and the Conviction be good. *Ibid.*

Conveyances.

Where an Act is imperfect, and is to receive its Perfection from a subsequent Act, there of Necessity they must be taken as one entire Conveyance; but when the first Act is sufficient to pass an Estate, the Law will not expect a future Act, though to some collateral Purposes it would pass it stronger. 186

Where many Acts are done, some former, and some later, and all sufficient, between the Parties they shall be looked upon as one Conveyance; but as to the Interest of a Stranger, and for his Advantage, they shall be considered apart. *Ibid.*

Copyhold.

A. Tenant of a Copyhold for Life, Remainder to *B.* to commence after the Death, Surrender, Forfeiture or other Determination of the Estate of *A.* *A.* is attainted of Felony and pardoned, *B.* enters; whether his Entry be lawful. *Page* 8.

Copyhold not forfeited by Felony without Custom. *Ibid.*

Whether the Copyholders Estate be vested in the Lord by Forfeiture without Entry. 9

A. seised of a Copyhold for Life, Remainder to *B.* the Lord of the Manor is disseised: *A.* continues in Possession, and *B.* living, *A.* surrenders to the Disseisor; the Disseisee re-enters, the Estate of *B.* was not well surrendred, but he shall have it against his own Act. 28

Mortgagor surrenders into the Hands of two customary Tenants, to the Use of the Mortgagee, upon Condition to be void, if the Money be paid at such a Day, and to avoid the Lord's Fine, this Surrender was not presented at the next Court; but after the Court was over, a new Presentment was made; the Lord insisted upon this Non-presentment as a Forfeiture, and Relief denied in Equity. 142

Copyholds are within the Statute of 32 *Hen.* 8. and in all Cases of general Statutes, Copyholds shall

shall be within the Statutes, except a Prejudice accrue to the Lord, or there be an Alteration of the Custom. *Page* 297

Copyholds are within the *Statute of Sewers* to be taxed, but not to be sold. *Ibid.*

A Copyholder of a Manor, within which was the Custom of Free Bench, surrenders his Estate, and dies; the Wife enters, and after the Surrender is presented, and the Surrendree admitted; and *adjudged* upon a special Verdict, that the Admittance of the Surrendree had defeated the Estate of the Wife, for the Title of the Wife commences upon the Death of her Husband, and not like to the Case of Dower. 406

Corporation.

Declaration in Ejectment brought by a Corporation, was by Consent in the Baptismal and Surname, as well as Corporate Name of the Head; least if it had been in the corporate Name only, upon the Confession of Lease, Entry and Ouster, it should have been intended an Admission that he was lawful Head. 2

In a *Quo Warranto* against the Mayor and Citizens of *Chester*, there was a Warrant of Attorney under the Seal of the Mayor to appear; *Quære*, whether it should not have been under the Corporation Seal. 154

Costs.

Quare Impedit, during the Vacancy, is at Common Law; when the Church is full, it is upon the Statute; in the first Case there shall be Costs, in the last not. *Page* 25

Where a Statute gives a Penalty to the Party grieved, to be recovered by Action, *&c.* this is a Duty vested before the Action brought, and Costs shall be given for the Delay; but in case of an Information, or Action popular, then the Party is not entitled to the Money before the Information; and therefore he cannot demand it. 363, 367

Where a new Statute gives treble Damages and Costs, the Costs shall be treble. 555

In an Action of Debt, Damages may be encreased by the Court under the Head of Costs, where they see Cause; and in what Manner it may be done against an Executor; but after Judgment entred, an Application for that Purpose is too late. 561

In Trespass where the Defendant does not insist upon the Right, but pleads not guilty; whether the Plaintiff shall have full Costs; *Quære*, If there be an *Asportavit*, though not out of the Premisses, full Costs shall shall be given. 666

Covenant.

The Covenant between Joint Farmers of the Revenue being *Separatim & respectim*, and not *Conjunctim*, may an Action of Covenant be brought by one against the rest jointly; *Quære.* *Page* 6

The Covenant not being for Payment to the Assignee, can the Assignee maintain an Action of Covenant? *Ibid.*

A Share in the *East-India Company*, said *per Maynard* not to be assignable, but by way of Covenant. 7

Though the Covenantor performs the Letter of the Covenant, yet if he does any Act to defeat the Intent or Use of the Covenant, he is guilty of a Breach. 39, 40

Upon a Feoffment Husband and Wife covenant, that they are able and may grant, and will make further Assurance, if requested within seven Years; the Wife was an Infant at the Time of the Covenant, and dies within seven Years; her Nonage is a Breach as to the Ability to grant, but not as to the Making of further Assurance. 42

Covenant not to release without the Plaintiff's Consent; in an Action he ought to aver the Release was without his Consent. 120

Covenant in a Lease to repair *prædimissa* from the Time of the Lease, to the Determination of it, is a continuing Covenant, and will extend to Buildings erected after the Lease. *Page* 121

Covenant for Enjoyment of Goods, and to save harmless against *B.* and others; this a particular Covenant, and no Notice requisite; but if the Covenant be for Enjoyment of Lands, there ought to be a Disturbance upon Title. 160

Covenant upon a Charter-party for Freight of *French Goods*, the Importation of which is after prohibited by Act of Parliament; *Quære*, whether the Plaintiff shall recover. 161

Copyholder in Fee, according to the Custom, leases for thirty-one Years; the Lessee covenants to repair, the Lessor surrenders to *J. S.* and the Lessee also surrenders to *J. D.* of which the Lessor had Notice before his Surrender, and accepted the Rent from *J. D.* after the Assignment, *J. D.* suffered the Tenement to be in Decay; upon which *J. S.* brought Covenant against the first Lessee, who pleaded the Assignment to *J. D.* and Notice and Acceptance of the Rents by the Lessor, before his Surrender to *J. S.* upon which the Plaintiff demurred; and *adjudged* that the Action well lay, for if Copyholders are enabled to demise by Custom, they may covenant and make Conditions for Re-entries, *&c.* 296, 305

Lessee covenants with the Lessor, his Executors, Administrators and Assigns: *Adjudged* that an Action of Covenant was maintainable by the Heir. *Page* 305

Covenant to enjoy, free and clear from all Incumbrances, *&c.* and the Plaintiff assigns for Breach, that 64 *l.* Rent was arrear, which he had desired the Defendant to pay, and he had not done it, *&c.* the Declaration *adjudged* to be ill, *ut videtur*, because the Plaintiff does not shew that he is damnified. 397

Action of Covenant was brought by the Herald Painters, *& pro quolibet & singulis eorum*, that they should bring their Work to such a Place, and that there such Work shall be done, *&c.* and because one of the Covenantors did not bring his Work to the Place aforesaid, there to be worked, the others brought this Action, *&c.* and the Action was *adjudged* to be well brought, for the Action is founded upon the Work not being brought to the Place appointed for it; and in this Part the Covenant is joint, and the Interest joint. 401

Court of R. B.

The Jury find a *Latitat* to have been taken out 21 *Jan. &c. teste* 28 *Nov.* this Finding shall not prejudice; the Course of the Court being to take out Writs in Vacation, *teste* the Term before. *Page* 32

The Court of *R. B.* has Power to bail in all Cases of Treason, even though they cannot try the Party bailed. 163

During the Sitting of the House of Peers, the Power of the Court of *R. B.* is suspended as to Causes and Persons before them; but upon Dissolution of Parliament, the Power resorts back to the Court. *Ibid.*

The Practice of the Court, the Law of the Court, from which the Judges cannot depart. 273

Assize for the Office of Chief Clerk of the King in *R. B. ad irrotuland.* Pleas before the King, *&c.* the Demandant made Title by a Patent granted to, *&c.* to commence after, *&c.* but *adjudged* that this Office of Enrolling the Pleas of the King in the Court of *R. B.* is grantable by the Chief Justice; and that the Office meant by the Statute in 15 *Ed.* 3. is the Office of *Coronator Domini Regis, &c.* tho' neither this Office or the other be precisely within the Words of the Statute. 354

Court of Exchequer.

Court of Exchequer may hold Plea of an Annuity of the Grant of the King, and may compel the Treasurer and Chamberlain to make Payment

ment to the Grantee. *Page* 609, 610, 611
Though Writs are directed to the Treasurer and Barons, yet the Treasurer hath not any Jurisdiction in the Court of Pleas. 610
Monstrans de droit lies only in the Chancery or Exchequer, except in a special Case. 609
Instance of one in *R. B.* 611
Though the Office of Receipt be distinct from the Court of Exchequer, the Issuing out of Money may be in the Power of the Barons, and their Judgment shall bind the Treasurer. 611, 612, 613.
Rule of Law, *that Money in the Exchequer never returns*; in what Instances true. 614, 615

Courts Ecclesiastical. See Prohibition.

The Ecclesiastical Court may prove *per testes* an Original Will of Lands of any Value; but then after Proof, they must deliver back the Original. 174
Where an Ecclesiastical Court has Original Jurisdiction of a Cause, yet there is said to be a Difference in the Case of an Ecclesiastical and Lay Person, *viz.* that in the Case of the First, their Sentence may not be examined in the Temporal Court; in that of the other it may; *Quære tamen.* 493 *to* 498
The Ecclesiastical Court cannot proceed to punish a Person for a Crime, according to the Canons; for which he is pardoned, or at Common Law excused, *Page* 500, 501

Custom.

Custom to elect a Supernumerary Prebendary, who upon the Death of the next Prebendary, is to be admitted, is void. 45
Action of Trespass for breaking the Plaintiff's Spectacles; a Custom pleaded, that if any make, and expose to Sale, ill and unserviceable Goods; that the Chief Officers of the Company have used to seise them, and carry them to *Guildhall*, and impanel a Jury; and if they find them ill, to break them; a good Custom. 55
A Custom laid forty Years and more, may be Time out of Mind. 109
In Bar of the Avowry in a Replevin, a Copyhold pleaded, and a Custom laid, *Quod quælibet persona quæ admissa foret, &c.* to a Copyhold, *solveret & usi consueverunt solvere tantam denarior. summam, quant. terræ valebant per an. tempore admissionis*; to which it was demurred; and it was *adjudged* a good Custom, and reducible to sufficient Certainty; but for the Manner of laying the Custom *in futuro, quære.* 251

A Cu-

A Custom to take two Years Rent upon an Admittance to a Copyhold, good; for the Court-Rolls shew the Rent. *Page* 248

If the Lord upon the Admittance of a Copyholder, demand more for a Fine than he ought, he shall not have Judgment for as much as is due, and be barred for the Residue; but if he has entred, his Entry is tortious, and he shall make his Demand *de novo*. 249

A Custom that the Tenants of a Manor ought to chuse a Beadle to collect the Amerciaments, and that the Tenants shall be responsible for him, is a good Custom. *Ibid.*

A Custom to forfeit a Copyhold for Nonpayment of a Fine, ought to be alledged; for it is not *de communi jure*, that a Refusal is a Forfeiture; for in some Places the Lord shall seize *tantum quousque*. 250

In Replevin the Defendant makes Conusance as Bailiff to *R. T.* &c. and shews a Custom within the Manor, for the Jury to elect one of the Resiants to serve the Office of Constable for a Year; and said that they elected such a one to be Constable for the Year ensuing, and to take the Oath under the Penalty of 40*s.* and at the next Court it was presented, that he did not take the Oath, and for this 40*s.* a Distress was taken, *&c.* the Plaintiff demurred to this Avowry, and for the Defect of a Custom to distrain, and for want of alledging of Notice, the Avowry was held to be ill. *Page* 635

Indictment for not taking the Oath of a Constable, being duly elected by the Mayor, *&c.* seemed to be ill, because no Custom or Prescription to chuse was alledged. 669

Custom of the City of London, and London.

The dead Man's Part of a Citizen of *London*, who dies Intestate, was within the Custom, and not liable to a Distribution upon the Statute, before 1 *Jac.* 2. 26, 27, 41

By Custom in the City of *London*, the Lord Mayor is Chancellor, and may call Causes before him, out of the Sheriff's Court, and rule them according to Equity; this Custom held good upon a special Return of it. 67

Where in *London* one Sheriff is Party in Interest, the *Venire* goes to the other; and the Court takes judicial Notice how many Sheriffs are in each County. 105

If a Writ issue out of *R. B.* to the Sheriff of *London*, 'tis *Vicecomitibus*; if to the Sheriff of *Middlesex*, 'tis *Vicecomiti*. 105

If a Plaint be levied in a Counter in *London*, and an *Habeas*

Corpus is brought, 'tis returned by that Sheriff, in whose Counter the Party is in Custody, and he is only to answer if he escape. *Page* 105

The Act for Reversal of the Judgment in the *Quo Warranto* brought against the City of *London*, a publick Act throughout. 294

The Plaintiff declares that by a Custom within *London*, if any gives a Bill for Payment of a Sum of Money, *&c.* that he shall be bound, *&c.* and shews a Note, in which, *&c.* the Defendant demurred to the Declaration, and the Custom was *adjudged* to be ill, and not like to a Custom for Bills of Exchange; for there it ought to be precisely alledged to be *inter Commercium habentes.* 398

Prohibition to the Court of Aldermen, for making an Order to pull down the Blinds, which one Citizen had erected to stop up the Lights of another. 600

Court of Aldermen have neither Jurisdiction over the Lights, Gutters, or other Easements in the City of *London*, either by the Common Law, or by the Statutes for rebuilding the City. *Ibid.*

The Custom of the City of *London* is, that there ought to be Warning given for the Space of half a Year, when the House is of such a Rent, and by the Space of a Quarter of a Year, where it is under such a Rent; and an antient Book in *French*, where such Custom was registred, was produced and allowed to prove the Custom; but whether the Custom gave the Party an Interest, or only entitled him to an Action, *Quære.* *Page* 649

Damages.

WHERE the Omission of the Jury to give Damages shall be supplied by Writ of Inquiry, and where not. 595, 596.

Deed.

Where Writings are put into the Hands of a Person, in the way of his Profession; if he is under the Control of the Court, he shall upon Motion be obliged to redeliver all the Writings, though some of them may belong to him. 1

Deed before Time of Memory concerning private Inheritances, and not any Liberties or Franchises, if supported by Usage in *Pais*, is good, and may be pleaded, tho' there has been no Allowance of it in *Eyre*. 51, 239

The Court of *R. B.* would not order the Marshal to bring in his Deeds, whereby it might appear, in whom the Estate in the Office was, and thereby subject him to answer for the Default

Default of an Inferior; but said they might go into Chancery. *Page* 114

Father seised of a Rent-charge in Fee, in Consideration of, *&c.* did *give and grant* this Rent to his Son; and in Replevin the Defendant avowed, and pleaded this Grant in the Words of the Grant, and shews there was no Enrolment of the Deed, or Attornment to the Grant, to which was a Demurrer; and in *C. B.* adjudged for the Avowant, the Question being upon a general Demurrer; but the Court of *R. B. strongly inclined* to reverse the Judgment, for every Deed ought to be pleaded according to its Operation in Law, and not according to the Words. 315

If Tenant for Life grant his Estate to him in Reversion, and this be pleaded as a Grant, it is ill Pleading; for it ought to be pleaded as a Surrender, according to the Operation of Law. 315

Deed set forth in the Pleadings, shall not enure according to the Words, but according to the Operation of Law upon the Deed: *Per Holt Chief Justice.* 570

Declaration. See **Pleading.**

In Trespass *Queritur quare cum, &c.* instead of *Pro eo quod, &c.* not good. 33

He who prescribes for a Pew, must shew that he repaired it, and ought to set it out so in his Declaration, and the Manner of Prescribing ought not to be, as being seised of a Seat appertaining to an House, but of a House, to which a Seat is appertaining. *Page* 33, 34

The Plaintiff declares in *Assumpsit* upon a Promise to deliver Pot-ashes, and hath not, and farther declares, that the Defendant knowing the said Pot-ashes to be naught, warranted them to be good and vendible, *&c.* whether upon Demurrer this be good, for declaring upon two Causes of Action of different Natures, the one in *Assumpsit*, the other founding in Deceit; or whether the Warranty here be not in the Nature of a Contract, as well as the *Assumpsit.* 66

The Plaintiff cannot join Things of several Natures in one Action, as one grounded upon a Right, and the other upon a Tort, especially where in the respective Cases, there are several Processes; but *quære* whether it would not be good after a Verdict. 67

Action of Debt lies for the Charges of a Party-wall, and Exception that it was not alledged in the Declaration, that the Defendant had built upon the Party-wall; *non allocatur*; but the Plaintiff setting forth the Statute of 19 *Car.* 2. for rebuilding the City of *London*, and omitting to say the Party-

Party-wall was within *London*; that was held ill upon a Demurrer. *Page* 67

Debt brought upon a Statute, by which the Forfeiture is divided into three Parts, one to the King, one to the Informer, and one to the Poor of the Parish; no Parish being mentioned in the Declaration, it is ill. 83

Demurrer. See Pleading.

Where the Party is *in custodia*, and pleads to the Jurisdiction of the Court, and the Attorney demurs thereto, the Party ought to join in Demurrer precisely; but where the Party *is not in Custody*, the Court will give such Rules for joining in Demurrer, as they do for Pleading. 217

Description.

To an Action of Debt upon a Bond made *Guardianis & superviſoribus Pauperum, &c.* the Defendant pleaded that there were other Church-wardens not named, therefore incertain; the Plaintiff replied that there were not, and upon this a Demurrer; and it was urged, that this was a Description of a single Person; but *adjudged* that *Guardiani* cannot be a Description of a single Person. 243

Demand.

The Plaintiff declares upon a *Colloquium* concerning a Horse of the Defendants, which he had sold to the Plaintiff for eight Guineas, *& quod tempore barganizationis agreat. fuit* that if the Plaintiff *putaret & existimaret* the Horse not to be worth eight Guineas, that then if the Plaintiff deliver the Horse to *R. B.* for the Defendant's Use, that *R. B.* shall pay the Plaintiff eight Guineas; and if *R. B.* did not, then the Defendant would pay upon Demand; the Plaintiff says he did not think the Horse worth eight Guineas, and delivered it to *R. B.* to the Use of the Defendant, and that *R. B.* had not paid, *&c. Non Assumpsit* pleaded, and Judgment for the Plaintiff in *C. B.* and upon a Writ of Error brought in *R. B.* the Error assigned was, that he did not demand the eight Guineas of the Defendant; but the Judgment was affirmed, for the Contract is entire, and by the Redelivery of the Horse, the eight Guineas became a Duty, and a Demand not necessary; this being a Duty precedent. *Page* 347

Dilapidations.

Though by Custom of a particular Church, no one House is ascertained to any particular Pre-

Prebend, or be Parcel of the Prebend; yet when the Bishop does assign it, then it is Part of the Prebend, and shall be liable to a Suit for Dilapidations. *Page* 121

Devise. See **Exposition**, &c.

One devises all his Freehold Lands in *D.* to his Wife during her Life: *Item*, I give to her for Life, the Lands which I hold of *G. T. Item*, I give to her for Life all the Lands that I purchased of *J. S. Item*, I give, grant and bequeath my said Lands to *E.* my Son and his Heirs for ever; not only the Lands purchased of *J. S.* pass to the Son, but all the other by this Devise: *Adjudged* upon a special Verdict. 130

A Devise to Husband and Wife, and his other Nieces equally; the Husband and Wife shall take but as one Person. 182

All my Estate in a Will carries with it all the Estate which the Devisor had in the Land; and in this Case he having a Fee, 'tis as much as if he had devised the Fee-simple. 194

Heirs Males of the Body of R. B. *now living*, a sufficient Description in a Will of a Person, so as to enable him to take a present Estate; *Heir apparent* would have been a full Description, and *Heir* in common Appellation means as much. 205, 206

The Word *Heirs* in a Will has two Senses, one a Description of the Person, the other a Limitation of the Estate. *Page* 206

Heir is *Nomen Collectivum. Ibid.*

In a Will there needs not such precise Description of the Person, as in a Grant; in a Will *Heirs* and *Issues* of the same Sense. 207

The Word *Heirs* in a Will in the plural Number comprehends any Person then in Being, or which may be born afterwards, or that may be such. 208

Devise to one for Life, Remainder to the right Heirs of J. S. he must be both *Heir and Heir Male*, who takes this Remainder; and the Son of a Daughter who is Heir, shall not take within the Meaning of these Words. 208

A Devise to the Issues of *J. S.* who has several Children, they all take jointly; but by a Devise to the Heirs Males of *J. S.* if he has several Sons, but one takes. 209

Devise to *D.* his Daughter for Life, after her Decease to her first Son, and the Heirs of his Body, *&c.* so to her second and other Sons, *&c.* and the Heirs of their Bodies, and after to *N.* for Life *in eadem forma*, and for Default of such Issue to *E.* in Fee; after the Will finished, and before Publication, the Testator added this Clause: *Memorandum*, the Intent and Meaning of the

Teſtator is, that *D.* ſhall not alien the Lands given to her, but that they ſhall be to her Heirs Males; and for want of ſuch Iſſue to *N.* *Adjudged* upon a ſpecial Verdict, that this was a Clauſe of Reſtriction to *D.* and ſhall not give her an Eſtate-tail by any Implication. *Page* 242

Deviſe to his four Daughters, Share and Share alike; and if it ſhall pleaſe God, all my Sons and Daughters die without Iſſue, then he deviſes to his Siſter, and her Heirs; the four Daughters enter and are ſeiſed, the one takes Husband, has Iſſue and dies: *Adjudged* that this could be no Eſtate-tail in the Daughters by any Implication, and therefore no Tenancy by Curteſy in the Husband. 266

Deviſe to his eldeſt Son and his Heirs; and if he die without Heir, to his two other Sons; the eldeſt Son died without Iſſue: *Adjudged* to be an Eſtate-tail in the eldeſt Son. 269

Sir *H. M.* being ſeiſed in Fee of thirty-five Shares in the *New River*, and having a Son by the firſt Venter, and five Children by the ſecond Venter, deviſed to his five Children by the ſecond Venter, five Shares; *ſcil.* to *H.* and his Heirs one Share, to *A.* and her Heirs another Share: *Provided* that if any of his ſaid younger Children die before they ſhall have attained his or her Age of Twenty-one, or be married, that then the Share of ſuch Child ſo dying, ſhall go to the reſt of his ſaid younger Children, Share and Share alike; *H.* dies unmarried before Twenty-one, and after *A.* dies being married; and *adjudged* upon a ſpecial Verdict, that the Part of *H.*'s Share, which was in *A.* ſhall go to the Heir, *ſcil.* her Brother of the ſame Venter, and whole Blood, and not to the Son and Heir of Sir *H. M.* by the firſt Venter. 339

One poſſeſſed of a Term for Years, had Iſſue *R.* his eldeſt, and *J.* his ſecond Son, and deviſed the Term to *R.* and the Heirs of his Body; and if he dies without Iſſue, living *J.* then to *J.* and the Heirs of his Body; *R.* dies without Iſſue, living *J.* and *adjudged* upon a ſpecial Verdict, that *J.* ſhall have the Term, and that here is not any of the Inconveniencies of a Perpetuity, for the Eſtate is not unalienable, but only during one Life. 340

Deviſe to *A.* for Life, and then to his firſt and other Sons in Tail Male; and for Default of ſuch Iſſue to *B.* in like Manner, *A.* dies, his Wife *enſeint*: *Adjudged*, that this is *not an executory Deviſe*, and that the Iſſue of *A.* born after, ſhall not deveſt the Remainder veſted in *B.* by the Courts of *C. B.* and *R. B.* but *reverſed in Dom' Parium.* 430, 431

Two

Two Things necessary to an *executory Devise*; 1. That it be after a Fee; 2. That it be upon a Condition. *Page* 431

A. has an Estate for Life by Marriage Settlement, Remainder to his first and other Sons of the Marriage in Tail Male, he who has the Reversion in Fee, and whose Heir *A.* is, recites this Settlement in his Will, and devises the Lands to the first Son of *A.* *&c.* according to the Settlement; and if *A.* die without Issue of that Marriage, he charges the Land with 4000*l.* and gives *A.* Power to make a Jointure to any second Wife, and then devises to the first and other Sons of *A.* in Tail Male; and if *A.* die without Issue, then he devises the Land over in Fee; the Testator dies, *A.* having no Son at the Time of the Testator's Death, *A.* suffers a Recovery; the Question was what Estate *A.* had, whether Fee, Fee-tail, or for Life. 558, 559, 560

If a Man devises all his Lands to *Henry* the Son of his Brother *Thomas*, and his Heirs, if he live till Twenty-one; and if he dies before Twenty-one, then to the next Son of *Thomas*; and if *Thomas* have no Issue, then to the first Son of his Brother *William* and his Heirs; by this Devise if *Henry* dies before Twenty-one, his next Brother takes but an Estate for Life, *ut videtur*. 385, 562, 563

A Man deviseth Shares in the *New River* Company to some of his Children and their Heirs; and if any of them die, then *totam illam partem* to other of his Children; this second Devise carries but an Estate for Life to the other Children. *Page* 339, 563

Devise to the next Heir of *A.* carries a Fee. 563, 564

General Words in a Will are not to be expounded against the Intent of the Devisor. 633

Disability.

Where one may or may not plead Disability in himself. 576

Dissenters.

Whether a Presbyterian Parson be within the Words of the Statute of 17 *Car.* 2. *cap.* 2. which are, *any Person in pretended Orders*, or *pretending to have Orders*. 80

By the Statute of 17 *Car.* 2. *c.* 2. for restraining Nonconformists from inhabiting in Corporations, the Party offending against the Statute shall both pay 40*l.* and if he refuses the Oath, may also go to Prison too. 83

13 *Car.* 2. for regulating Corporations does not exempt Dissenters from serving in Offices of the Corporation, and an Information will lie against them for Refusal; *Quære* whether they are excused by the

1 *Will. & Mar.* if they are, that is a private Act, and ought to be pleaded. *Page* 574, 575, 576

No Distinction between Protestant Dissenters, and other Dissenters, till the Statute of 1 *Will. & Mar.* 576

Disparity in Marriage.

A Man of mean Fortune married a Woman, who was one of two Coparceners to 600 *l. per Ann.* the Court ordered a Settlement to be made of her Estate. 110

Distribution. See Administration.

None shall have Distribution, but who at the Time of the Death of the Intestate, is entitled to it. 103

One dies having only one Child, and no Wife living, the Child dies an Infant; Administration shall not be granted to the next of Kin to the Child, but to the next of Kin to the Father. 212, 223

The Act for settling Intestate's Estates was made in Imitation of the Custom of *London.* 213, 220

The Right of Distribution of Intestate's Estates at Common Law, and in what Manner it became distributable by the several subsequent Statutes. 219, 222

Diocese.

At Common Law a Man might be sued out of his Diocese; and the Statute of 23 *Hen.* 8. does not restrain such Citations, where the Bishop, *&c.* is a Party. *Page* 233

Dower.

What is a *Caput Baroniæ*, whereof a Woman is not endowable, and what not. 592, 593

Ejectment.

AFTER Recovery in Ejectment, the Lessor brought an Action for the mean Profits, and the Lessee released the Action; but the Release set aside by the Court. 247

The Lessor of the Plaintiff in Ejectment, cannot maintain an Action for the mean Profits, without an actual Entry, but the Lessee may. 424

The Bringing of an Ejectment is not such an Entry or Claim, which shall avoid a Fine and Nonclaim for five Years. *Ibid.*

Election.

An Election can only be into a void Place. 45

An Election inceptive does not bind the Electors when the Vacancy happens, but that they may chuse another, especially where they are both to elect and admit. *Page* 45

Elopement.

If a Wife cohabit with her Husband, and by it gains a Credit, though she depart without his Leave, and runs him in Debt, he shall be charged till Notice given of her Elopement; but after Notice the Husband shall not be charged without his Consent. 323

Error.

When the Substance of the Writ of Error is, whether the Plaintiff was *infra ætatem*, though of his own Shewing he is not of Age; this being Surplusage, and not traversable, the Writ is well brought, and he is not estopped. 10

Conviction before Justices of the Peace, and the Record removed before the Justices *ad placita tenend.* in the County Palatine of *Lancaster* by *Certiorari*; a Writ of Error to remove this Record, as being before *A.* and *B.* Justices of Oyer and Terminer, *&c. necnon ad alia, &c.* is an ill Writ. 32

No Writ of Error will lie upon a Judgment in an Action, for causing a Man to be arrested for a Cause in an Inferior Court, which arose out of the Jurisdiction of that Court; for 'tis to go against the Record, which lays it to be *infra Jurisdictionem.* *Page* 131

In a Judgment in *C. B.* a *Misericordia* entred for a *Capiatur*, and upon a Writ of Error, this assigned for Error; the Court of *R. B.* gave Leave to amend it, though after a Writ of Error brought. 165

Debt upon a Judgment in *R. B.* the Defendant pleaded in Abatement of the Action, a Writ of Error pending upon this Judgment *in Cam. Scacc.* to which the Plaintiff demurred; and adjudged for the Plaintiff. 388

A Man pays a Security of an Inferior Nature, pending a Writ of Error upon a Judgment, on a Security of an higher Nature; this was *adjudged* not a *Devastavit. Ibid.*

In Debt brought upon a Judgment in *R. B.* pending a Writ of Error *in Cam. Scacc.* the Pendancy of a Writ of Error is pleaded; and it was held that this could not be pleaded in Bar to an Action of Debt, though it might to a *Scire facias* upon this Judgment; but it ought to be pleaded in Abatement. 590, 591

Estoppel. See **Pleading.**

Where one sues as Executor, the Defendant may plead by way

of Estoppel, that he was Administrator. *Page* 365

Evidence.

Speed's Chronicle given in Evidence. 15

Statute of Limitations may be given in Evidence, but better to plead it. 24

In an Information for debauching a young Lady, she sworn as an Evidence in Behalf of the Party accused. 82

The Owners of Goods on Board, cannot be Evidence for the Master of the Ship, for they are all concerned in one Bottom, and in one Adventure. 174

An Abstract of a Deed, with a Case made upon it, and an Opinion upon it under Counsel's Hand, as likewise his Deposition in Chancery, proving the Deed to be in Force after the Death of the Party, refused as Evidence. 205

Under the Statute of Distributions, none of the Children of the Intestate can be admitted as Evidence. 223

Debt for Rent against an Assignee; *Nil debet* pleaded, and an Assignment of the Term over before the Rent incurred was given in Evidence; and ruled that it might. 318

The Lord of a Copyhold Manor being obliged to repair a common Bridge; the Custom was, that he might take necessary Timber for this Purpose, upon any of the Copyhold Lands; and in Trepass for so doing by a Copyholder, and upon *Non culp.* pleaded, he would have given this in Evidence; not allowed, for he ought to have pleaded it. *Page* 321

Action *sur Case* upon a Promise, that if the Plaintiff would endeavour to procure a Marriage between the Defendant and *A. S.* that the Defendant would give him fifty Guineas, and the Evidence was if the Plaintiff should procure the Marriage: *Ruled* that this does not maintain the Declaration; but there being also an *Indebitatus Assumpsit pro cura & labore* of the Plaintiff, *circa negotia* of the Defendant; this held sufficient to support the Action. 326

Action for Words, *per quod maritagium amisit*; upon Evidence the Plaintiff proved only Part of the Words: *Ruled* to be well enough, if the Plaintiff proves the Loss of his Marriage, by Reason of any of the Words in the Declaration. 333

A Mayhem may be given in Evidence in an Action of Assault, Battery and Wounding, as an Evidence of wounding. 402

In an Action of Assault, *&c.* brought by Husband and Wife; what the Wife said *immediate* upon the Hurt received, and before she had Time to contrive

trive any Thing for her own Advantage, might be given in Evidence. *Page* 402

Upon the Taking of a Prize, one Part was agreed to belong to the Master, the other two to the Owners; the Master disposes of some *bona peritura* to *A. B.* to be sold, and after brings an Action of Account against *A. B.* a Mariner, tho' he was to have a third Part of the Master's Share, was allowed to be sworn; for the Master is accountable to the Mariners, whether he recovers in this Action or no. 403

Though Perjury be assigned in an Affidavit made at *Serjeants Inn*, yet it is good, if it be in any Place within the same County; and it ought to be proved that the Affidavit was read; and that though an Affidavit cannot be read in Evidence, yet if the Party who made the Affidavit be sworn, and give Evidence, his own Affidavit may be read against him, to shew in what he contradicts himself. 403

An Attorney or Scrivener shall not be obliged to discover the Secrets of his Client, no more than a Counsellor. 404

If the Evidence goes to all the Promises, the Verdict may be taken upon any of them; but otherwise upon that Promise only which is proved. 411

Copy of a Court-Book good Evidence to prove one to be an Executor. 431

Comparison of Hands not good Evidence in Treason, except as to Papers found in the Custody of the Person. *Page* 579

The Declaration was, that the Plaintiff obtained Judgment against *A. B.* and intending to charge him in Execution, the Defendant suffered him to escape; this *held good*, though upon the Evidence the Escape appeared to have been before the Judgment obtained. 583

Count of an Escape *per* Baron and Feme; the Evidence was of an Escape by one only; yet *held good*. 583

Where the Original is Evidence, a Copy proved is Evidence; the Copy of a Town Clerk's Book, not allowed as Evidence in a criminal Case. 584

Where a Man makes himself a Party concerned in Interest, after the Plaintiff or Defendant has an Interest in his Testimony; this shall not deprive either of the Benefit of his Testimony. 586

Cambden's Britannia not admitted as Evidence to prove a Reputation. 623

The Herald's Books are allowed to prove a Pedigree. *Ibid.*

A History may be good Evidence or not, *secundum subjectam materiam*; it may be Evidence of the general History of the Realm, but not of a particular Custom. *Ibid.*

Dugdale's Monasticon not admitted as Evidence. 624

A Wit-

A Witness to a Bond said at the Trial, that he did not see the Obligation sealed or delivered, but the Plaintiff was allowed to prove the Obligation by Comparison of Hands of the Witness, and *said* that a Man shall not lose his Obligation, because they have tampered with his Witness. *Page* 639

The Bill of Lading is always read as Evidence in case of a Policy, to prove the Goods on Board. 640

Trover for a Ship, upon Evidence it appeared, that the Plaintiff had but a sixteenth Part of it; this is good, and the Interest of the others may be given in Evidence in Mitigation of Damages. *Ibid.*

In an Action brought by the Husband after the Death of the Wife, it appeared upon Evidence to be Money secretly deposited by the Wife, and a Note taken for it in the Name of a third Person; and it was admitted to be proved, that the Wife said, that she had received the Money again, the Case depending only upon this Transaction, what she said *ruled* to be Evidence. 647

In an Action for Work done, *&c.* the Plaintiff gave in Evidence a Copy of a Bill delivered to the Defendant, and copied by Order of the Defendant, and several Exceptions were taken by the Defendant to the Bill, and some Marks set against some particular Parcels; the Defendant ordered his Servant to indorse the Exceptions on the Bill, but to omit the Marks, and deliver it to the Plaintiff: *Ruled* that this was a Copy of a Bill, and not a Copy of a Copy, and that the Bill delivered is an Original, as well as the Book; and that the Acceptance of the Bill, and excepting only to Part, is an Admittance of the Residue, and that the Omitting the Marks in the Endorsement is a Waiving of them; and it was objected, that this was a Confession which ought to be taken together; but *ruled* that this is not a Confession, but only a Cavil to the Price, *&c.* *Page* 672

When a Deed is lost or burnt, a Copy or Counterpart, or the Contents may be given in Evidence; but it is never permitted, except it be proved that such a Deed was executed; and in the principal Case, the Witness could not prove the Letter written; the Copy of which was offered in Evidence, and therefore it was disallowed. 673

A Defendant in Battery or Trespass, or Riot, *&c.* may be a Witness, except Process be sued against him, or he appear and plead, then he shall not be sworn, if it appear such Evidence would have been given against him, as would have made it a Question to the Jury, if he had been guilty or not. *Ibid.*

Excom-

Excommunication.

The Party excommunicated for not going to his Parish Church upon the Return of the *Significavit*, may plead in *R. B.* that he has gone to any other Church. *Page* 176

Execution.

After a Verdict in Ejectment had twenty Years ago, it was now moved that the Plaintiff might take out Execution by an *Haberi facias possessionem* without Prejudice or Displeasure of the Court, and that he might not be put to his *Scire facias*; the Lease upon which the Verdict was given, not being expired, the Court refused to give any Direction. 427

Executor.

Termor for Years makes an Under-Lease, his Executor brings an Action for the Rent reserved in the *Debet & Detinet*, the Action proper. 6

The Executor arrests the Testator's Debtor before Probate; the Arrest is tortious. 22, 87

It being shewn to the Counsel of an Executrix, that she had no Cause of Suit; and she afterwards proceeding in the Suit, was *decreed* to pay Costs out of the Testator's Estate. 85

Judgment upon a *Scire facias* against an Executor, and an Inquiry, and returned that he *diversa bona testatoris disposuit, elongavit, & ad proprium usum convertit*, he comes in and pleads that he was never Executor, or administred as Executor; and traverses *absque hoc*, that he *bona testatoris disposuit, &c.* whereupon Issue joined, and found against him, and Judgment, which was held good upon a Writ of Error; for he having gone off from his Plea of *Ne unques Executor*, and traversed the Conversion, it shall be intended a Conversion as Executor. *Page* 86

The Conusee in a Recognizance makes his Executor and dies, the Executor assigns it to *J. S.* who pays the Money to the Executor; the Executor dies, and Administration *de bonis non* is committed to the next of Kin to the first Testator; he shall not recover upon this Recognizance. 143

One being indebted to *M.* makes her Executrix, and devises to her Land worth 20000 *l.* and devises his Jewels to his Wife: *Decreed* that if the personal Estate be not sufficient, the Land shall go in Discharge of the Debts, and the specifick Legacy shall not be lost; but if there be not enough besides the specifick Legacy to pay the Debts, then the Executrix may retain. 158

Executor de son tort liable to the rightful Administrator, to be punished for his tortious Intermedling in an Action of Trover, in which he shall be liable to Damages; but what he has lawfully paid, shall be recouped from the Value of the Goods. *Page* 274

Judgment was given against an Executor, who brought a Writ of Error, and the Judgment was affirmed; and *ruled*, that the Executor shall not pay Costs, and the Course has always been accordingly, which the Court said was the best Expositor of a Statute. 400

In Trover brought by an Executor, he shall pay Costs upon a Nonsuit; for there he is not obliged to name himself Executor. *Ibid.*

An Executor is not bound upon the Statute of 3 *Jac.* to find Bail upon a Writ of Error. *Ibid.*

Exposition of Words and Sentences.

The Law will not suffer Constructions by Fractions. 72

The Word *Estate* in legal Parlance, carries both the Quantity and Substance of the Estate. 194

The Words *now living* in a Will shall be intended at the Time of the Death of the Testator. 208

In the Case of a publick Officer, where the Statute says they *may* do, *&c.* this is tantamount to *shall*; and if he does not do it, an Information lies. *Page* 370

Sale of Stock, if the other approved of his Bargain, and demanded it *ore tenus*, or by Note in Writing left at the *East-India House*, before such a Day, and counts that *licet* he demanded it *ore tenus*; and by Note in Writing at the *East-India House*, the Defendant had not transferred it, *&c.* upon which the Defendant demurred, and objected that the Demand *ore tenus* could not be left at the *East-India House*, and therefore it ought to be personal; but *adjudged* for the Plaintiff, the constant Practice being an Exposition of the Words. 391

The Import and Operation of the Word *Premisses*. 532, 533

The Word *Placitum* includes a Demurrer. 550, 554

Where *Issue and Heir* may be Words of Purchase. 559

A Reversion in Fee will pass by the Words, *all his Lands, Tenements and Hereditaments* in a Will. 632

Felony.

IF the special Verdict have not sufficiently ascertained the Fact; a *Venire facias de novo* ought to issue, and a new Trial

Trial and Verdict had, for there can be no Amendment of a special Verdict found of a Felony. *Page* 667

Feigned Action.

The Court will sometimes for good Cause shewn, even in local Actions compel the Plaintiff to try the Matter in a feigned Action, that the Venue may be changed. 44

Felo de se.

The Administrator of a *Felo de se* may have a *Certiorari* to the Coroner; and upon the Return, traverse the Inquisition. 45

Fieri facias.

A *Fieri facias* was delivered to the Sheriff after the Death of the Party, and the Goods were executed in the Hands of the Executors, who moved for a Restitution, for that the Property was not bound by the Act of Frauds and Perjuries: *Adjudged*, that the Act did not aid the Party, but only a Purchaser in a Market overt. 257

Fine.

Fine after five Years past is no Bar to a Writ of Error brought to reverse it. 14

A Fine in *antient Demesne*, no Bar to a Writ of Disceit brought to reverse that Fine. *Page* 14

Upon Inspection of the Party, and Proof of her Age, the Court vacated the Fine. 24

A Fine of it self is sufficient to pass an Estate, without the Assistance of any other Conveyance. 184

Husband and Wife levy a Fine of the Jointure of the Wife, with an Intent to raise a long Building Term, and upon an Agreement that the Wife shall have her Jointure out of the reserved Rent; the Fine enures only to this particular Purpose, and does not destroy the Jointure of the Wife. 238

T. L. being seised in Fee, acknowledges a Statute Merchant to *K.* and after a Statute-Staple to *G.* and after another to *B.* and *E. B.* and *E.* extend, and after *K.* extends, and then *G.* extends; *K.* and *G.* assign to *E. L.* and *T. L.* levies a Fine to *J. L.* who devises the Lands to *E. L.* and to his Heirs Males, Remainder to the Daughters of *T. L.* and *E. L.* levies a Fine, and dies without Issue Male; *Mary* and *Elizabeth* are Daughters and Heirs to *T. L.* and also Heirs to *E. L.* and the five Years pass; the Wife of the Defendant being Executrix of the Survivor of *E.* and *B.* takes Administration *de bonis non* to *G.* and acknowledges Satisfaction upon the Statute made to *G.* the Defendant enters, and the Plain-

Plaintiffs having married *Mary* and *Elizabeth*, the Daughters of *T. L.* and Heirs of *E. L.* brought their Ejectment: *Adjudged* for the Defendants; and that the Statute of *K.* and *G.* coming into one Hand, the Statute of *K.* is extinguished, and that the Statute of *G.* is not merged, because of the intermediate Estate of *B.* and *E.* and *G.*'s Estate being in *esse*, the five Years being passed was no Bar, for after Satisfaction acknowledged upon the Statute of *G.* a new five Years accrued. *Page* 260

A. Lessee for ninety-nine Years, Remainder to *B.* for Life, Remainder to *C.* in Fee; *B.* levies a Fine; living *B.* the Lease determines, notwithstanding the five Years passed, *C.* may enter, for the Possession of *A.* amounts to a continual Claim by *C.* 262

Father Tenant for Life, with Power to make Leases for twenty-one Years, three Lives, or ninety-nine Years, determinable upon three Lives, Remainder to his Son in Tail, Remainder to the Father and his Heirs; the Father leases for twenty-one Years and dies; the Son being Tenant in Tail, leases to *J. S.* for twenty-one Years, to commence after the Determination of the first Term, and dies during the first Term, leaving Issue; the Issue levies a Fine, and declares the Use to himself in Fee; the first Term ends, and the second Lessee enters, and the Lessee brings an Ejectment: *Agreed* that the second Lease was not warranted by 32 *H.* 8. or any Power within the first Settlement; and it was *adjudged* that the Issue in Tail after this Fine, might avoid this future Lease, and enter upon the Tenant when it commences in Possession; for by the Fine the Estate was discharged of the Estate-tail, and the Conusee had a Fee in him. *Page* 284, 317, 328.

Forfeiture.

Tenant for Life suffers a common Recovery, and after reverses it by a Writ of Error; the Forfeiture remains. 74

Forests.

Forests are excepted by the *Statute of* 22 *&* 23 *Car.* 2. 99

No one can keep a Dog within the Forest, that is not expeditated. 100

Founder.

Where the Founder of a College has once given Statutes to the College, he cannot give other or new Statutes, unless he has reserved to himself an Authority for that Purpose. 513

Franchises.

Liberties are of three Kinds; *First*, The antient Flowers of the Crown, as Felons Goods, *&c.* which if forfeited Judgment may be of *Ouster* or Seisure. *Secondly*, A Thing newly created, as a Corporation, which if forfeited, and Judgment of *Ouster* given, there needs no Seisure. *Thirdly*, There are Things newly created, as Markets, *&c.* where if Judgment of *Ouster* be given, there shall be Seisure for the King. *Page* 311

Franchises not essential to a Corporation, but a Privilege appertaining to it; the Essence of a Corporation is to make By-laws, and govern their Members. *Ibid.*

Fraud.

Proposals for a Match carried on by way of Letter; 'tis a good Promise within the Statute of Frauds and Perjuries. 143

The Feoffee promised to make a Defeasance to a Feoffment by Parol: *Decreed* a good Promise within the Statute of Frauds and Perjuries. *Ibid.*

J. being in *Newgate* for Robbery and Burglary, makes a Bill of Sale of his Goods, as a Provision for the Plaintiff his Son, who after the Execution of his Father, brings an Action of Trover for these Goods against the Defendant, who was Sheriff of *London*; and the Bill *adjudged* to be fraudulent, for it can be intended to no other Purpose, than to prevent a Forfeiture, and defraud the King; and that when the Father is convict of a Fact before the Sale, this shall relate and avoid the Sale. *Page* 357

Gaming.

IF upon Play a Question collateral arises, which is referred to the Judgment of another, and a Wager be laid upon that Question, whether is such a Wager within the Statute of Gaming. 572, 573

Where Money lost at Gaming upon several different and distant Days, shall be within the Construction of the Statute of Gaming, as Money lost at one and the same Meeting. 573

Grants.

Whether the Words, *Cottage, Barn and Lands, and all other Premisses*, taken with the Recital of the Term, be sufficient to pass the Term. 528, *usque* 545

Difference between a Grant by Lessee for Years of the Term, and of the Land after his Death: *Quære.* 538, 539

Executory Grants of a Term have never yet been admitted though executory Devises have. *Page* 545

Grants of the King. See **Prerogative.**

A Debt due to the King, is not pardoned by the Act of Oblivion. 190

Where the King by his Letters Patent grants to a Company the sole Trade within such a Precinct, exclusive to the rest of his Subjects, the King is not bound from licensing others to Trade, but others not licensed are bound. 197

Grant of an Office by the King to *A. durante beneplacito*; and then after his Death, Surrender, or Forfeiture of this Patent, another reversionary Grant to *B.* and after that another reversionary Grant to *C.* whether the reversionary Grants be good. 446

Estate or Office held at the Will of a common Person, cannot be surrendred or forfeited, but it may be in the Case of the King; and a reversionary Grant made by the King upon the Determination of such Office, by Surrender, Forfeiture, or Death of the Grantee at Will, is good; and the King is not deceived in his Grant, which he would be by granting that *in præsenti*, which he intended to grant *in futuro.* 580, 581

King *Char.* 2. being indebted to diverse Persons in the Sum of 416000*l.* 8*s.* and 2*d.* for the Payment of the Interest of that Sum, grants for him, his Heirs and Successors 25000*l. per Ann.* to be paid out of his Revenue of the Hereditary Excise. *Page* 601

The King hath Power to alien or charge the Estate which he hath *in jure Coronæ.* 602 *to* 606

Of Pensions. 603

Where a Duty that did belong to the Crown is granted to the Subject, the Officers that collect it, continue the Officers of the Crown, though the Duty belongs to the Subject. 607

The King's Grant ought to be taken in such Sense, as is agreeable to his Honour. 659

Where the King intends only to confirm, yet his Letters Patents may amount to a new Grant. 661

A legal Intention in the King's Grants are not always necessary, but sometimes a moral Intent suffices. *Ibid.*

The Surrender of void Letters Patents may be a good Consideration. 663

Letters Patents shall not be avoided upon Oyer. *Ibid.*

The King grants a Manor with the Appurtenances, and the Advowson by Name, which lately did belong to the *Archbishop of* C. and to the Abbot of, *&c.* and the *Archbishop* never had it, though it was so recited;

recited; yet the Grant *adjudged* to be good. *Page* 663

The General Words of the King's Patents shall be construed with Relation to the Recital, when the King designs a Profit to himself, and not to diminish his Revenue; but if there are Words to shew his Intent, *Non obstante* the Patent will be good. *Ibid.*

Habeas Corpus.

EXception was taken to the Return of an *Habeas Corpus* upon a Commitment by the College of Physicians; the Defendant was discharged, the Offence being pardoned. 676

High Treason.

In Case of Treason, if the Person does not plead, the Indictment is taken *pro confesso*, and is not like to Cases of Felony. 145

Treason cannot be committed but against the King. 163

Upon an Outlawry for High Treason, the Court of *R. B.* over-ruled Sir *T. A.* who alledged that he was out of the Realm at the Time of the *Exigent* awarded, and prayed his Trial, the Year being expired, and he not at Liberty to yield himself up, the Court made a *Rule* for his Execution, and gave no Judgment in Court. *Page* 195

Writ of Error upon a Judgment in High Treason, the first Exception was, because it was omitted in the Judgment that *secreta sua amputentur*, this being Part of the Judgment pronounced; yet notwithstanding the Exception, the Judgment *held* to be good; for though it be always pronounced, yet it is never entred as Part of the Judgment; the second Exception was, because the Indictment wants *contra allegiantiæ suæ Debitum*; and for this the Judgment was *reversed*; for this Clause is not by way of Aggravation, but shews how he was guilty *proditoriè*. 338, 360, 425, 442

If an Alien come here and remain, the Indictment ought not to say *Naturalem suum Dominum*, because he is no natural-born Subject; but it ought to conclude *contra allegiantiæ suæ Debitum*, for he has a Protection, and a local Allegiance is due; but if an Alien come here in an hostile Manner, and never was under the King's Obedience or Protection, he cannot be endicted at all, but must be tried by martial Law, or Ransom. 360

Homine Replegiando.

Upon a *Homine Replegiando* issued, and an *Eloignment* returned by the Sheriff; he against

gainst whom the Writ issued coming upon Process, cannot plead till he bring in the Body. *Page* 61, 72

The *Eloignment* is a Contempt, for which the Court will commit, till the Body be brought in, and the Sheriff's Return of the Eloignment a sufficient Foundation, and not traversable; but if the Party will *gage Deliverance*, the Court may let him to *Mainprise*. 62, 76

An *Homine Replegiando* being brought against the Defendants for the Wife of the Plaintiff, and *Elongat'* returned; before the Return the Defendants appear, and enter a Plea of *Non ceperunt* with the Filacer; but upon Mistake a *Withernam* was awarded, which the Court upon Motion superseded; for the Party might appear at the Return of the *Replegiare*, and plead *Non ceperunt*; and then no *Withernam* ought to be awarded. 337

Hospital.

Lay Hospital, as such is not grantable in Reversion. 15

Hosteler.

An Inn-keeper is not a Trader within the Statute of Bankrupts. 276, 291

If an Inn-keeper without reasonable Cause, refuses to find Meat, Drink and Lodging for his Guests, he is liable to an Action upon the Case. 276

If an Inn-keeper takes an excessive Price for his Goods, he may be indicted; or if he be situated in an inconvenient Place, or misgoverns his Inn, he may be suppressed. 291

Inns are within the Statute of Ale-houses. 293

A Man brought an Horse to an Inn, and directed that the Inn-keeper should not give him any more Food, for he would not be responsible for it; in an Action brought for the Food after given to the Horse, it was *ruled*, that this was not a Discharge, for the Security of the Inn-keeper would be lessen'd by it, who may detain the Horse, and by the *Custom of London* sell him for his Keeping. 648

House of Lords.

Judgment by the Lords Spiritual and Temporal erroneous, because in this Case exclusive of the King; for though they give the Judgment, it is not in the proper Stile theirs, but is *per Curiam Parliamenti coram Domino Rege*. 522

The House of Lords have not Conusance of an original Cause. 522 *to* 524

An Order of the House of Lords, as to a Matter of Law not properly before them, disregarded in *R. B.* 527

The Journal of the House of Lords not a Record. *Ibid.*

Hundred-Court.

By 2 *Ed.* 3. 12. and 14 *Ed.* 3. 9. Hundreds that were not granted out of the Crown in Fee, at the Time of making those Statutes, are annexed to the Counties; and Letters Patents since granted of them are void. *Page* 41

Though an Houndred-Court may hold Plea in Replevin; this ought to be in Court, and not out of it. 675

Ideocy.

GRANT of the Custody of an Ideot, and his Lands to the Grantee, his Executors, Administrators and Assigns. 4, 138

An Inquisition finding the Party an Ideot *per* 8 *annos ultime elapsos*, repugnant. 5

Imparlance.

Where the Cause is by Original, an Imparlance is *ex gratia*. 2

Implication.

Lands devised to the Devisors two Daughters, and their Heirs, equally to be divided between them; and if they die without Issue, then all the Land to remain over to *F. M.* one of the Daughters dies without Issue, the Sister shall have her Moiety, and not *F. M.* *Page* 17

Lands are given to *A.* and his Heirs; and if *A.* die without Heirs of his Body, then *B.* to have 600 *l.* *A.* hath an Estate in Fee. 19

Imprisonment.

A Bailiff arrests one out of a Liberty, and brings him to the Gaoler of the Gaol within the Liberty, who imprisons him; this is not false Imprisonment in the Gaoler. 49, 50

Where two or more are concerned in the imprisoning the same Person, one may be guilty of false Imprisonment, and the other not. 49, 50, 51

Indictment.

Refusal of the Oath of Supremacy incurs a *Præmunire* upon 3 *Jac. cap.* 4. after Tender by a Justice of Gaol-delivery, though never tendred by the Bishop; and though in the Indictment the Tender did not appear to have been *per* Justice of, *&c.* as requisite by Statute; yet it appearing in the *Placita*, it is good. 11

Indictment upon the Statute not strictly persuing the Words of it, but omitting some, yet good. *Ibid.*

Indictment for woading Cloths but to the third Stall, and a Custom laid for forty Years and more; that Dyers used to woad their Cloth to the fourth Stall; this no Deceit to the Publick. *Page* 109

The Omission of *Vi & armis* in Indictments was so material, that before the Statute of 37 *Hen.* 8. an Indictment ought to be quashed for it. 426

Indictment upon the Statute for erecting a Cottage, and several Exceptions to it. 564

Infancy.

Where the Trial of Infancy shall be. 10, 11

Information.

Information for carrying a Child to *Jamaica*, though the Child pretended that he had no Friends, *&c.* 47

In an Information upon 35 *Hen.* 8. 17. for converting Wood-Land into Arable and Pasture, it being said generally that he cut down *Boscos*, &c. Exception taken that the Words of the Statute were not persued, it not being shewn that the Land was set apart, and used for Wood-Land; the Exception disallowed. 52. But after the Information was *quashed* for saying the Place converted was two Furlongs from the House, and not shewing where, or in what Parish the House was. *Page* 116

Information against a Justice of Peace for not convicting several Persons for being at a Conventicle. 60

Where *A.* and *B.* inform a Magistrate of the Fact, that is punishable; yet if *A.* only bring the Information *Qui tam, &c. A.* only is the Informer within the Statute, that is entituled to the Penalty. 60

Justice of Peace is bound to administer the Oath, if required by the Statute of 22 *Car.* 2. and if he refuses, an Information will lie; but he is not bound to commit upon that Oath. 60, 61

Information for making of mix'd Metals, and selling such Metals for Sterling, tho' sold but at a reasonable Price; an Offence at Common Law. 109

An Information upon an antient Statute of continued Use, and general Good; tho' the Time of making the Statute be mistaken, yet the Information held to be good. 111

An Information against a Popish Recusant convict, should set forth the Conviction. 114

An Information upon the Statute of 1 *Jac. cap.* 22. because the Defendant *allocavit & sigillavit vigint. coria tannat. Anglice*, tanned Skins, not being good and sufficient; moved in Arrest of Judgment, that this ought to be intended but one Offence; but *ruled* to be several

ral Offences, and so several Penalties incurred. *Page* 366

Information against the Defendant for not taking the Oaths, and for acting as an Alderman after the Time incurred, within which he ought to have taken the Oaths; it appeared that the Sessions in which he was to have taken the Oaths, began the 8*th*. and was adjourned to the 22*d*. the Acting which was offered to be proved, was between the 8*th* and the 22*d*, *viz*. the 18*th*; and this was *held* not to be an Acting after the Time incurred; for the *next Sessions*, when it is required he should take the Oaths, is the whole Time of the Sessions. 584, 585

An Information was exhibited against the Defendants for hiring a Ship to transport themselves into *France*, there being then War between *England* and *France*, with an Intent to assist the King's Enemies, and that they were taken going into the Ship; upon Motion in Arrest of Judgment, the *Court said*, that this Offence borders upon High Treason; and *held* it to be an Offence at Common Law, and fined the Defendants. 637

Inns of Court.

In what Manner the *Temple* may be said to be a Place privileged from Arrests. 684, 685

Though the *Temples* are extraparochial, and out of the City and Franchise of the City of *London*; yet they are within the County of *London*. *Page* 685

One indicted at the *Old-Bailey*, tried and condemned for breaking a Chamber in the *Temple*. *Ibid.*

No one ought to come from one Inn of Court to another, without a Certificate from the Treasurer of that Society which he leaves. 686

Interest vested.

The Feoffor covenants for him and his Heirs, with the Feoffee, his Heirs and Assigns, to make further Assurance; the Feoffee assigns, the Assignee brings an Action of Covenant, and then the Feoffee releases; the Bringing an Action vests such an Interest in the Assignee, that the Covenantee cannot release. 257

Devisee of a Reversion brought an Action of Covenant for Arrearages of Rent incurred after the Testator's Death; the Defendant pleads, that after the Arrearages incurred, and before the Action brought, the Plaintiff had assigned the Reversion; to which the Plaintiff demurred; and *adjudged* that the Arrearages were a Right vested in him before the Assignment. 367

Upon a *Super* returned in the Exchequer, the Question arose upon the Act for taking Shares in

in the *New River* Water, which enacts that the Shares shall be taxed in the County where the Owners inhabit; and the Defendant living in one County, and being taxed in another, refused to pay; and the Court *held* she ought to pay, there being an Interest vested in the King; and if the Remedy for Collecting, or the Method of Assessing be impracticable, the Duty being vested in the King, it shall be levied by the Assistance of this Court. *Page* 642

Joint and several.

Upon a joint Bond, if one is dead, the Declaration against the other is good, because it is his several Deed; but if the other Party be living, he may plead it in Abatement, because the Lien is joint. 280

Issue.

Where the Issue is special, if Part be found for the Plaintiff, it is well enough; for if the Defendant's Plea be false in Part, it is false in the Whole; but upon the General Issue, all ought to be true, and found for the Defendant. 299

Judgment.

Moved in Arrest of Judgment upon the Face of the Record, after an Issue found for the Plaintiff in a Plea of *plenè Administravit* pleaded, that Administration was committed by the *Archbishop* of *York*, where the Intestate had *bona notabilia* in *London*; if it had been upon a Demurrer, the Court would have taken Notice of it, but not after the Cause has been tried. *Page* 237

Where a Judgment in *B. R.* was reversed by Writ of Error in Parliament, the Court of *B. R.* refused to give a new Judgment; and the new Judgment was given in Parliament. 514, 515, 516

He that has Judgment upon a Point tried, shall defeat a fraudulent Sale of Goods; but not he who has Judgment by Confession, unless he prove, that it was for a just Debt. 586

H. was convict of Perjury, and outlawed for it afterwards; no Judgment can be given against him till he be present. 684

Jurisdiction.

A Cause is not within the Jurisdiction of a Superior Court, when it comes there *per saltum*, and before its Time, by Writ of Error, or Appeal. 522, 523

Justices of the Peace.

Justices of *Oyer and Terminer* cannot hold Plea but of Indictments taken before themselves; but the Justices *ad placita tenend.* sitting by Patent may. 32

Whether a Judgment of the Sessions, where they have Power by Statute to commit, being,

It is ordered that he be committed, be good, it not being by Words *de præsenti*, as in *B. R.* where the Judgment is, *Ideo Committitur*. *Page* 80

Where the Commitment of Justices of the Peace, by Virtue of a Statute is from a wrong Time, the Court of *B. R.* will discharge it. 81

The Justices may discharge poor Prisoners against all Creditors to whom Notice is given; but where a Creditor is left out of the List, he is not discharged against him, though Notice be given. 116

Upon a Conviction upon the Statute of 22 *Car.* 2. in a Corporation for being at a Conventicle; the Appeal shall be to the Quarter-Sessions of the Corporation. 122

No Partiality or Favour in the Justices shall be intended. 123

The Justices are only to assess the *Quantum* that other Parishes are to pay towards the Relief of the Poor of a Parish in the same Town, and the Rate is to be made by the Overseers of the Poor of the Parish. 258

The Justices may tax particular Persons of another Parish, where the proper Parish is over-burthened. 259

Ten Pounds *per Ann.* Freehold, as much within the Statute of 14 *Car.* 2. for the Settlement of a poor Man, as ten Pounds Rent; *Quære*. 268

Obligation with Condition to save the Parish of *S.* harmless from *J. G.* his Wife and Children, *Joseph* the Son of *J. G.* born at the Time of the Obligation entred into, had a Wife and Children, whom he could not maintain, and the Parish by Order of the Justices was to allow two Shillings *per* Week to *Joseph*, for the Maintenance of him and his Family; in an Action brought upon this Bond, the Condition was *held* to be broken; for though it did not extend to Grandchildren of *J. G.* becoming chargeable; yet their Father *Joseph*, who is by Nature bound to maintain them, being unable to do it, he is in that Respect impotent, and become chargeable to the Parish, and he is within the express Words of the Condition; and *held* in this Case, that all the Children of *J. G.* though born after the Obligation entred into, would be within the Words of the Condition. *Page* 557

Question upon the Statute of 3 *Will. & Mar.* was, if a poor Person being taxed in the Parish, and not having paid, but dying before Payment, or Inhabitance by the Space of forty Days, had gained a Settlement; and *adjudged* that Taxation without Payment not sufficient. 620

The Justices charged all the Inhabitants generally to the Scavengers Rates, according to the Statute of 2 *Will. & Mar.* and the Question between the Inhabitants of *N.* was, Whether the Inhabitants of that Part of the Parish which inhabited within the Country out of the Paving, should be contributory to the Assessments for the Paving; but the Order was confirmed, for the Words of the Act are general; and where the Law does not distinguish, the Court ought not. *Page* 643

One was placed with a Barber to be instructed to shave and make a Bob-Wig, for a Twelvemonth, and to be found in Clothes by the Barber, and the Barber to have what he earned; this will gain him a Settlement within the *Stat. of Will. & Mar.* 671

Justification.

If one enter upon my Land, and I desire him to go off, and he refuse, I may use Violence, but must not wound him. 228

In Assault, Battery, and false Imprisonment, the Plaintiff counted of a Detainer, *quousque* he paid 10*s.* the Defendant justifies under the Command of the *Court of Conscience in* London, and pleads that the Plaintiff was summoned to appear 1 *Nov.* and that the Process was continued till 30 *Nov.* and that there was an Order to take him and carry him to the Counter; and that *Virtute Ordinis prædict.* he arrested and detained him, till he paid 11*s.* and 10*d.* and it was *ruled* that he need not shew the Continuancy; for upon Default of Appearance, the Plaintiff might be ordered to appear at another Day; and that it suffices, if the Defendant can justify the Imprisonment, the which he may do if it be for 10*s.* *&c.* for the Sum is not material; and if the Plaintiff would take Advantage, he ought to shew, that he had paid the 10*s.* and that the Defendant after detained him, for otherwise the *Quousque* need not be answered, being only in Aggravation of Damages. *Page* 664

Lease.

A Lease made by a Person who has a tortious Reversion, shall be good, if before the Commencement of the Lease, the Tort be purged, and the Lessor hath a rightful Estate. 3

A Lease made by one who hath no Estate, good, if the Lessor be intitled before the Commencement. *Ibid.*

A Writ of Error on a Judgment in an Action of Debt for Rent; the Declaration was, that the Plain-

Plaintiff the 25*th* Day of *March*, &c. demised *unum Messuagium super acclivitatem Hampsted-Hill habend. &c.* and also upon another Demise 1 *May*, &c. and for Rent arrear, *&c.* the Defendant pleaded, that the Plaintiff *tempore dimiss. Particularium nihil habuit in tenementis*; the Plaintiff replied, that Lord *W.* was seised and demised to him for, *&c.* and he being so possessed *May* 1. demised to the Defendant; to which the Defendant demurred, and in *C. B. adjudged* for the Plaintiff; it was *said* to be wrong, for that the Action was brought for Half a Year's Rent ending at *Michaelmas*, when it was not reserved upon the four usual Feasts; *Quære.* *Page* 307

Leet.

In Trespass the Defendant pleads a special Justification for an Amercement upon a Presentment by the Jury for a Nusance at the Court-Leet of the Archbishop of *Canterbury*: *Adjudged* for the Plaintiff, for the Defendant ought to shew the Bounds and Limits of the Leet, and over what Persons the Leet has Jurisdiction, as to say *de Residentibus & inhabitantibus infra Maner. de Lambeth, &c.* 392

Levari facias.

Upon a Writ of *Levari facias* to answer the King *de exitibus terræ*, the Beasts of a Stranger *levant* and *couchant* may be taken and sold, for no *Levari facias* issues, but where the Land is Debtor; and in all Cases where the Land is Debtor, the Beasts of a Stranger are as liable as of the Owner. *Page* 617

Libel.

C. forged an Order of Chancery, in which were several defamatory Expressions against the Plaintiff; and at the End draws a Pillory, and subscribes it for Sir *J. H.* and his forsworn Witnesses by him suborned; this is but one complicated Act, and an Action will lie. 123

To print and publish a Petition before the Delivery, that one is an injust Man, is actionable. 124

To say one is a dishonest Man is not actionable, but to publish so, or put it up upon Posts, is actionable. *Ibid.*

Liberate.

Conusee of a Statute extended it, and a *Liberate* returned executed, and Possession given, but the Conusee never entred actually; and after the Conusee

see assigns, the Tenant continuing always in Possession; this does not amount to such a Possession as will make the Assignment good, for there must be an actual Entry; and tho' the Return of the *Liberate* be an actual Possession in Law, yet when he who was in Possession continues it; this amounts to an *Ouster*, which turns the Estate of the Conusee to a Right. *Page* 300

Liberty and Palace-Court.

The Authority of Bailiffs of a Liberty, and in what Cases the Sheriff may intermeddle, and where he must direct his Warrant to the Bailiff of the Liberty; and in what Manner the Process out of the *Palace-Court* must be executed, and to whom it must be directed. 413 *to* 418

Limitation. See **Remainder.**

H. seised in Right of his Wife, the Husband and Wife join in a Fine, and declare the Uses to the Heirs Male of the Body of the Husband upon the Wife engendred, Remainder to the right Heirs of the Husband; they have Issue a Son who died without Issue; and if the Plaintiff who was right Heir to the Husband, or the Defendant who was the Heir to the Wife, shall have the Land, was the Question upon the special Verdict; and *adjudged* for the Defendant, for it being limited to take Effect after the Death of the Husband without Issue generally; and there not being any Estate to support it, it is a future Use to take Effect upon such a remote Possibility, as the Law will not allow. *Page* 351

If a Man covenants to stand seised to the Use of *J. S.* and his Heirs, after the Death of *J. D.* he continues seised in Fee, and no Estate altered during the Life of *J. D.* and if the Covenantor dies, this shall descend to his Heir; but if he covenants to stand seised to the Use of the Heirs Males of his Body, because that no Descent may be to the Heir after his Death, the Law raises an Estate to him by Implication; and he does not remain seised in Fee during the Life, but his Estate is immediately put into an Estate-tail. 352

A Man may limit a future Use upon a Contingent after a Death without Issue, within the Compass of a Life. *Ibid.*

Statute of Limitations.

A. receives Money belonging to an Intestate; after this *B.* takes out Administration; six Years expire from the Time that *A.* received the Money; *B.* brings his Action, *A.* pleads *Non assumpsit infra sex annos*, *B.* replies and shews that Administration

ſtration was committed to him ſuch a Year and Day, which was *infra ſex annos*; the *Court* inclined, that though ſix Years were expired ſince the Receiving of the Money, yet not being ſo ſince the Adminiſtration committed, this Action is not barred by the Statute. *Page* 555

Lunatick.

The King hath not an Intereſt in the Lands of a Lunatick, but can only commit them to the Care of another, and ſuch Committee is accountable to the Lunatick if he recovers, and to his Executors if he dies; and by the Death of the Committee the Grant is determined. 138, 177

Where one is a Lunatick *à nativitate*, the King has an Intereſt in his Lands, and ſhall receive the Profits to his own Uſe, or grant them to another; and ſuch Grantee is not liable to account, but only to maintain the Ideot and his Family. 138, 177

Mandamus.

WHETHER a *Mandamus* ought to be directed to the Mayor and Aldermen of *London*, or to the Court of Mayor and Aldermen of *London*, to ſwear a Sheriff, where the Cuſtom is to ſwear the Sheriff in the Court. *Page* 64

A *Mandamus* was prayed by the Plaintiff, being a Proctor in the *Arches*, he being ſuſpended by the Defendant, who was Dean of the *Arches*; it was returned, that the Plaintiff was admitted a Proctor in the *Arches*, and took an Oath to obſerve the Laws and Canons of the Archbiſhop, *&c.* and ſhews a Breach of the Orders, *&c.* for which he was removed; it was *much queſtioned*, whether a *Mandamus* lay; but it was *adjudged*, that the Archbiſhop could not as Viſitor examine the Proceedings of the *Arches*; for that would be to appeal from an Act by one Authority, to the ſame Authority. 290

Sir *J. S.* prayed a *Mandamus* to be reſtored to the Office of an Alderman of the City of *London*, ſuggeſting that he was *elect. ſecundum conſuetudinem*, *&c.* upon which it was returned, that he was an Alderman, as is ſuggeſted, but that he did not take the Oaths according to the Statute of 1 *Will. & Mar.* by which his Place became void; and *adjudged*, that notwithſtanding the Franchiſes of the City were forfeited by the Judgment in the *Quo Warranto*, yet that the Corporation remained *in eſſe*; and therefore tho' that Judgment was not reverſed till the Act of 2 *W. & M.* yet by the

Recital of the Judgment in the Act for Restitution of the City of *London*, Sir *J. S.* continued an Alderman after the Judgment in the *Quo Warranto*, and was therefore obliged to take the Oaths by the 1 *Will. & Mar.* and they are to intend the Return to be true, if possible, and a peremptory *Mandamus* was denied. *Page* 293, 310

A Writ of *Mandamus* directed *Johanni Goar Præsidi, Sociis, & Scholaribus, &c. Sti. Johannis Baptistæ*, they need not put their Common Seal to the Return; and it was indorsed, *Responsio Johannis Goar, &c.* according to the Direction of the Writ; it was *held* sufficient, for the Return being filed, they are estopped to say, it is not their Return; and if any other made it for them, they have an Action on the Case against them. 368

The Court refused to grant a peremptory *Mandamus* to the Master of St. *John's* College, *&c.* to remove *A. B. C.* &c. Fellows of the College, for not taking the Oaths, because they were not made Parties. 546 *usque* 549

An Attachment may go for not making a Return to an *Alias Mandamus*, though the Clause *vel Causam nobis significetis* be omitted, for they may except to the Writ after the Return; and till the Return the Court has nothing before them. 669

In extraordinary Cases, when the Court is satisfied of the Disorder of the Place, they may require a Return to the *Alias Mandamus*. *Page* 669

Moved in *R. B.* for a peremptory *Mandamus* after a Verdict in *C. B.* the *Court said*, they could not take Notice here of a Verdict in *C. B.* and the Verdict ought to be in *R. B.* 670

Manor.

The Grantee of a Moiety of twenty Copyhold Tenements, has after the Grant of a Moiety of the Manor; he with the Grantor may hold a Court, and join in the Grant of the Copyholds. 191

A Grant of any Part of the Demesne in Fee, though but for an Instant, severs it from the Manor; so that it can never be Part of it again. 192

Master and Servant.

If the Master command his Servant to do what is lawful, and he misbehave himself, the Master shall not answer for him. 228

Monopoly.

The Difference between Monopoly and Engrossing is, the one is by Patent from the King, the other is by the Act of the Subject between Party and Party. 169

A Mo-

A Monopoly is no immoral Act, but only against the politick Part of the Law. *Page* 226
The Statute of Monopolies does not extend to Letters Patents granted to Companies. 234

Monstrans de Droit.

Where a *Monstrans de Droit*, and where a Petition of Right, is the proper Remedy for a Demand, which a Subject hath upon the Crown. 608, 609, 613, 614
Where upon a *Monstrans de Droit*, the Judgment of the Court is erroneous, if the Remedy be proper, the Court ought to give a new Judgment. 615, 616

Mortgage.

Though it does not appear that any Money was paid upon an Original Mortgage, yet the first Mortgage was good between the Parties; and being so, when the first Mortgagee assigns for a valuable Consideration, this is all one, as if the first Mortgage had been upon a valuable Consideration; for now the second Mortgagee stands in his Place, and is within the Proviso of the *Stat. of* 27 *Eliz. c.* 4. 423
Though the Mortgagor be not Tenant at Will to the second Assignee, yet he is not a Disseisor, but a Tenant at Sufferance; and therefore the Mortgagee, his Estate not being devested, may assign, though the Mortgagor be not a Party, and the Mortgagee never in Possession. *Page* 423
The Mortgagee for himself, his Executors, Administrators and Assigns, covenants with the Mortgagor, that he shall enjoy, and take the Profits till Default of Payment; the Covenant being for his Assigns, he shall be presumed Tenant at Will to all the Assigns, as well as to the first Mortgagee. 424

Murder.

W. the Party killed was Servant to *K.* who had an Intent to turn him away, and sent for his Key; it was said to *K.* that *W.* refused to bring the Key, upon which *K.* fetched his Sword, and went and expostulated with *W.* who said he might have the Key if he would; and then *K.* struck *W.* with the Sword, and *W.* having a Sneed in his Hand, struck at *K.* with the Sneed, which did not hit him; after this *W.* followed *K.* and punched him several Times with the Sneed, and *K.* thrust him with his Sword and killed him; upon a special Verdict, *held* to be Murder at Common Law, and the Denial of the Key no sufficient Provocation to extenuate the Fact to Manslaughter; but *held* not to be within the

the Statute of Stabbing, for a Sneed was a Weapon drawn within the Meaning of that Statute. *Page* 666

A Smith ſtruck his Apprentice with a Bar of Iron; adjudged to be Murder. 668

Ne exeat Regnum.

NE exeat Regnum is a Writ applied to particular Perſons and at firſt chiefly uſed in Matters of State, and but in late Time applied to Courts of Juſtice; it is not to be granted without Oath. 136

Notice.

A Man covenants to pay 200 *l.* for the Support and Maintenance of his Wife, within two Years after he ſhall be required, to ſuch Perſon, as ſhe ſhall by Deed appoint; ſhe appoints, and dies before Notice given, the Money is due upon the Covenant. 34

Only three Caſes where Notice not requiſite; 1. In Caſe of a Condition precedent; 2. Where the Thing is of a publick Nature; 3. Where the Party takes it upon himſelf. 128

The Rule, that where Nobody is bound to give Notice, that the Party is bound to take Notice, is an abſurd one. 129, 182

All Subjects are bound to take Notice of the King's Great Seal and Privy Seal. *Page* 225

A Patron ought to take Notice of a Vacancy, upon the Statute of Pluralities; and if he does not, Lapſe will incur; but at Common Law this was at his Election. 396

Adjudged upon the Acts of Diſcharge of poor Priſoners, that it is not ſufficient for a Defendant in his Plea to ſay, that he had given Notice to the Plaintiff in the Action, in which he pleads ſuch Plea; but he ought to aver that he had given Notice to the Party at whoſe Suit he was committed, tho' he be not Plaintiff. 362

Novel Aſſignment.

The Plaintiff declared that he was ſeiſed of a Ship, which he employed *pro commodo ipſius*, and ſhewed how, *&c.* and that upon her Return, the Defendants ſeiſed the Ship *March* 1. &c. *& huc uſque detinent per quod, &c.* the Defendant pleads *Actio non quia* they are incorporated, *&c.* and ſhews the Charter, *&c.* and that they ſeiſed the Ship upon Suſpicion, *&c. prætextu* of a Proceſs out of the Admiralty, *quæ eſt eadem captio & detentio*; and after by Deed between the Plaintiff and Defendants, in Behalf of the *Eaſt-India* Company, *agreatum*

tum fuit, that, *&c.* it was alſo agreed that the Plaintiff ſhould ſubmit to the Judgment of the Court of Admiralty, and that there ſhall be a Releaſe of all Actions to the Company, and all the Members of it, and ſhew that the Plaintiff releaſed, and they ſhew it to be the ſame Caption, *&c.* the Plaintiff replies, and prays Oyer of the Agreements, and takes Proteſtation, *&c.* & *pro Placito dicit*, that the Defendants took the Ship *March* 1. which was before the Caption upon the Proceſs in the Admiralty; and that this is the Caption upon which the Action is brought, and concludes, *&c.* upon which the Defendant demurred; this ſeems to be a *Novel Aſſignment*; and *adjudged* that the Agreement will not aid, becauſe but Conveyance, and not relied upon; and it was *ſaid*, that the Defendants can take no Benefit of the Releaſe in their natural Capacity. *Page* 284

Oath.

FEllows of a College, *quatenus* Fellows, ought to take the Oaths in their Colleges, according to the Statute of 1 *Will.* & *Mar.* and not elſewhere; *Quære.* 397

Officer and Office.

He who has an Eſtate for Life in an Office, is the Officer againſt whom the Forfeiture ſhall run. *Page* 114

It ought to be of Record in the Court, who is the Officer, that the Parties grieved may know againſt whom to bring their Action. *Ibid.*

Where upon an Office found a Title appears for the King, but it is not found in what Degree; there the beſt ſhall be taken for the King. 178

Between the Return of an Office, and the Grant of Letters Patent, there ought to be a Month *per Statute of* 18 *Hen.* 6. that the Parties might come and tender a Traverſe. *Ibid.*

Outlawry.

Error in Fact aſſigned to reverſe Outlawry in High Treaſon, by the Perſon outlawed *ore tenus*; and Iſſue taken upon the Error in Fact aſſigned. 16

If the Perſon outlawed was out of *England*, at the Time of the Exigent awarded, this is Error. *Ibid.*

Pardon.

A Pardon of Murder good without the Word *Murdrum*. 157

One convict of Forgery, and sentenced to be put in the Pillory, obtains the King's Pardon; upon a Motion for a Rule to set her in the Pillory, she before her Appearance upon the Rule by her Counsel shews the King's Pardon; the Court gave her Time to shew Cause. 159

The King's Pardon restores a Person to his Credit who is convicted, or has Judgment against him for a Crime, which makes him incapable of being a Witness. 578, 579

Parish.

In Replevin upon the Statute of *Car.* 2. for uniting Parishes in *London* after the Fire; the Question was, whether a several Rate made upon each Parish apart, after the Rate they paid before the Fire; and which upon Appeal, had been confirmed by the Lord Mayor; or a joint Rate made upon both Parishes together by the Lord Keeper, and two Barons, was the more pursuant to the Act; and *adjudged*, that respective Parishes must be intended in the Act, respective united Parishes. *Page* 216

The Parish of St. *Mary* being united to the Parish of St. *Swithin* by Act of Parliament, and the Parish of St. *Swithin* remaining the only Parish-Church, a Parish Rate shall charge the Inhabitants of the Parish of St. *Mary*, to contribute to the Repair of the Church of St. *Swithin*. 588, 616

Parliament.

An Act of Parliament between particular Persons, shall not bind Strangers. 97

Upon a long Prorogation of Parliament, Writs of Error in Parliament are no *Supersedeas*. 163

Acts of Parliament must be construed according to our Law. 221

Filing an Original, during a Session against a Member of Parliament, no Breach of Privilege. 527

Patent.

A Patent by which Fines are granted, must be pleaded in the Court of Exchequer, before the Court of *B. R.* can take Notice of it. 12

Peculiars.

Peculiars, and the several Kinds of them. 589

Where

Where the Peculiar is not subordinate to the Jurisdiction of the Ordinary of the Diocese in which it lies, there Letters of Request may be made from thence immediately to the Archbishop; *aliter* where it is, for then they are *per saltum*. *Page* 589

Peerage.

Where a Peer is Lessor of the Plaintiff in *Ejectment*, a Knight ought to be returned on the Panel; and this a Privilege by Common Law, and therefore cannot be waived. 229

Of Baronies in Fee, by Writ and by Tenure. 433, 434

Where a Barony in Fee descends to several Daughters, it is in the Crown, and the King may *ex gratia* vest it in which Daughter, or the inheritable Issue of which Daughter he pleases, *ut videtur*; but if a Person summoned to Parliament by Writ, and having sate, dies, leaving Issue two or more Daughters, who all die; one of them only leaving Issue, such Issue has a Right to demand a Summons to Parliament. 441

Cases where the Barony descended to one Daughter only, and the Heir Male of a collateral Line was summoned to Parliament; and the Daughter not admitted to the Title. 434, 436

The Trial of Letters Patents creating a Peer is by themselves, being produced, and therefore it need not be pleaded *prout patet per Recordum*; the Trial of Descent by which Peerage is claimed, is to be *per Pais*; therefore the Conclusion *& hoc parat. est verificare*, proper. *Page* 520

It is necessary for a Bishop to plead expresly, that he is *unus Parium Regni, &c.* but not for a Lay Lord. 521

Of what an Earldom consisted; not necessary that there should be a Place of the Name of the Title; or that if there be a Place of that Name, that it should be within the Realm. 518, 519

A Person created a Peer under the Great Seal of *England*, shall be intended a Peer of *England*, and that need not be averred. 519

A Peer cannot be *ousted* of his Dignity but by Attainder, Act of Parliament, or Judgment in a *Scire facias* upon his Patent; he cannot by Fine. 526, 527, 528

Right in an Honour or Peerage, how and in what Manner judicially determinable. 524, 525

Indictment of Murder found against a Peer by the Grand Jury; he was ordered to stand committed. 683

Perjury.

Indictment of Perjury in an Answer in Chancery; *Ruled*, that if

if the Bill be dismissed in Chancery, the Complainant there is a Witness, otherwise he is not; that the Bill taken off the File is no Evidence, though a Copy made whilst the Bill was on the File, may be read; but there being only Oath against Oath, the Defendant was acquitted. *Page* 327

Where a Man is set in the Pillory, whether it be the Judgment or the Crime, that makes him infamous, so as to lose *liberam legem*, and be incapable of becoming a Witness. 578, 579

Play-houses.

Whether the Erecting of a Playhouse be a Nusance, and whether Stage-plays be *malum in se*. 625 *usque* 630

Piepowder Court.

Piepowder Court pleaded to be held before the Mayor generally, is ill; because it ought to be held before the Steward, without special Custom. 33

So is Pleading the Contract to have been made within the Fair, to entitle the Piepowder Court to Jurisdiction, without specifying that it was for something bought or sold, or arising within the Fair. *Ibid.*

Pleading.

Whether, where the Words in a Deed are sufficient to pass a Thing by several Means, and they are pleaded generally without shewing any Election, which way the Thing passes; this be a double Plea. *Page* 63

Ouster le mere a good Plea upon the *Statute of* 23 *Eliz.* 99

Condition of a Recognizance, that the Principal shall pay the Money, or render himself; Breach assigned that he had not rendred himself, ill. 100

Where the Declaration is ill, and upon Demurrer Judgment for the Defendant; and after the Plaintiff brings another Action, the Defendant cannot plead the former Action in Bar; but where there is a Judgment upon a Demurrer to a Plea, or upon a Verdict or Confession, he may. 120

Lessee of an House covenants to repair, uphold, *&c.* the House is burnt without his wilful Act, and the Lessee within convenient Time rebuilds it; this a Breach of the Covenant, and Rebuilding within convenient Time no good Plea in Bar, the Action being attached. 211

Action of Debt upon a Bond; the Defendant demands Oyer of the Condition, and pleads that certain Letters Patents granted to the Plaintiff, and recited in the Condition, *Vacuæ devenerunt ante diem solutionis pecuniæ, scil.* 13 *Dec. & adhuc vacuæ existunt*; the Plaintiff

tiff replies, that the Letters Patents were in Force from the Time of making, *& adhuc existunt, & hoc petit quod inquiratur per Patriam*; the Defendant demurred, and the Defendant's Plea *adjudged* ill; for he ought to shew how the Letters Patents became void. *Page* 303

Hoc parat. est verificare, not Matter of Substance. 340

Action *sur Case* upon an Agreement, *&c.* and Breach assigned, that the Defendant *non performavit agreamentum prædict.* Issue upon this joined, and a Judgment in *C. B.* for the Plaintiff, and a Writ of Error brought, and the Breach said to be too general; but the *Judgment affirmed*; if this had been upon a Demurrer, it would have been good; but after a Verdict it is unquestionable. 344

It is not sufficient to plead Matter which would be a Performance of a Condition by Implication. 345

Though an immaterial Traverse is aided upon a general Demurrer, yet an insufficient Traverse is not. 346

In an Action of Trespass and false Imprisonment, the Defendant justified under a *Ca. sa.* out of the Court of *Bristol*; the Plaintiff replies and pleads a private Act of Parliament for erecting a Court of Conscience in *Bristol*, and shews that the Defendant had recovered but 5 *s.* Damage, and 50 *s.* Costs, and shews that he had arrested the Plaintiff contrary to the Act; to which the Defendant rejoined; upon which the Plaintiff demurred, and *adjudged* against the Plaintiff, for he ought to have pleaded this Matter in the Court of *Bristol*, and shewn that he was an Inhabitant, if he would have the Benefit of the Act; and if after they had proceeded there, he might have an Action. *Page* 350, 366, 407

When a Plea goes by way of Confession and Avoidance, such Plea shall not amount to a general Issue. 362

The Plaintiff *in Cur. Pal.* counted against the Defendant, that he was indebted to the Plaintiff as Administrator to *F. B.* in 10 *l. pro tant. Denar. sum. ejusdem Quer.* as Administrator of *F. B. per ipsum Def. ad usum ipsius Quer.* as Administrator of *F. B. habit' & recept.* upon *Non assumpsit* pleaded, a Verdict and Judgment there *pro Quer.* and a Writ of Error was brought in *R. B.* and Error assigned, that the Plaint was general, and no Mention of *F. B.* in the Plaint; so there is a Variance between the Plaint and the Declaration; and for this Error the Judgment was reversed. 386

Sur son assault pleaded to a Trespass of Assault and Battery; the Plaintiff replies, that the Defendant came into his House,

and continued there after the Plaintiff desired him to depart; upon which he commanded his Wife to put him out of the House, *quæ molliter manus super* the Defendant *imposuit*, *& hoc*, *&c.* but does not say *quæ est eadem transgressio*; and *adjudged* a good Replication, for it being *eodem tempore quo*, it is good without such a Conclusion; but if they vary in Time, then it is necessary to say *quæ est eadem transgressio*. *Page* 387

If a Battery be outragious, so that a *Molliter manus imposuit* be not true; it ought to be specially shewn, otherwise it shall be a good Justification. *Ibid.*

In Trespass the Defendant pleads, that the Trespass was done by him and *J. R.* and that it was accorded between the Plaintiff and the said *J. R.* that the said *J. R.* should abate 14 *s.* due to her from *E.* the Plaintiff's Father, in Satisfaction, and avers that she had; to which the Plaintiff demurs, and the Plea *adjudged* ill; for the Defendant ought to shew how the 14 *s.* was abated. 391

In an Action against the Parson upon the Custom of the Parish for not keeping a Bull and a Boar, and shews *quod opus fuit* of a Bull at such a Day, and that the Parson did not find one, *&c.* *ad damnum ipsius Quer.* the Defendant demurred and *adjudged* to be ill; for the Plaintiff ought to shew a special Damage. *Page* 399

In Avowry to a Replevin, the Defendant shewed, that *A. B.* was seised in Fee, and made a long Lease rendring Rent, and conveyed the Reversion to the Plaintiff, and for Rent *arrere* he distrained; the Plaintiff replies that *A. B.* was seised of one Moiety, and *C. D.* of the other before this Lease; that *C. D.* died seised, and this Moiety descended to his Son, and that the Plaintiff had conveyed the other Moiety to *J. D.* by Lease and Release; and traverses *absque hoc*, that the Plaintiff was seised in Fee *ad aliquod tempus* after the said Conveyance; the Avowant demurred, and the Traverse *adjudged* ill; for he ought to have traversed *absque hoc*, that *A. B.* was seised in Fee *tempore dimissionis*. 402

Exception taken, because the Sum in the Declaration was expressed in Figures; but they being *Latin* Figures, it was held to be well enough; otherwise, if they had been *English* Figures, or if it had been in an Inferior Court. 409

A Peer indicted as a Commoner pleads the Letters Patent granted to his Ancestor *gerent. Dat. &c. & hic in Curia prolat.* and sets forth his Title by Descent, and concludes *& hoc parat. est verificare*; this Plea of Misnosmer is good in A-

batement of the Indictment, and the Conclusion is good. *Page* 517

Trover brought by an Administrator, who in Pleading does not set forth Administration rightly granted to him; this Defect helped by Verdict. 551

Administrator of an Executor pleads *plenè administravit* the Day of the Writ purchased, to a *Scire facias* brought against him upon a Judgment against the Executor; Demurrer to the Plea held good, for he should have pleaded *Riens enter mains*. 565

In a Plea of Privilege it was *prædict. Def. dicit*, without saying *Venit & dicit*, or making any Defence; and as to the Omission of *Venit*, it was held good, the Defendant being *in Custod. Mareschalli*, and being before another Day of Continuance; but if it had been at another Day of Continuance, then it must have been *Venit & dicit*; and as to the Defence that was held needless. 582

Action of the Case against the Marshal for an Escape, and Objections to the Count. 582, 583

Difference between pleading a Sentence grounded on an Original Jurisdiction, and given by Virtue of a particular Authority. 496, 498

De antiquo in a Count is a good Prescription. 621

Debt for Rent upon a Demise for Years; the Defendant pleads *Nil habuit in tenementis*; the Plaintiff replies, that he had a good and sufficient Estate to make the Demise to the Defendant *modo & forma, scil.* that he was seised in his Demesne as of Fee; upon which Issue joined, and objected upon Evidence, that he ought to shew an Estate in Fee; but *ruled* that the Issue is joined upon the good and sufficient Estate, and any Estate out of which the Estate demised may be derived, is sufficient for this Purpose; and all added after the *Scil.* is but Form. *Page* 624

Action of Trover for a Ship and Cargo; and it was objected that the Cargo was shipped by *A. B.* and Company, and *B.* being dead, the Action brought by *A.* only is ill, because it appears others have an Interest; but *ruled* that this ought to be proved; and if there are others, this is a Matter in Abatement, and ought to be pleaded. 640

Where the Inducement to a Traverse is ill, the King may traverse the Inducement, and so may a Subject; otherwise he may not traverse the Inducement to a Traverse more than a Subject, except it be upon an Office found, where the Subject induces his Traverse of the King's Title found by the Office, with a Title on his Part. 657

In

In Trespass for taking his Beasts; the Defendant justifies under a Replevin, in the Hundred-Court of the Bishop of *S.* and and shews that the Bishop, *&c.* have, upon Complaint to the Steward, used to grant Replevins in the Court, or out of it, to replevin Cattle, and that one had taken the Beasts of *J. S.* and that he levied a Plaint in the said Court before the Steward; and the Steward commanded him to replevin the Beasts, *&c.* the Plaintiff demurs; and *adjudged pro Quer.* for the Defendant having shewn the Property in a Stranger, the Plea amounts to the General Issue. *Page* 674

Policy.

Policy of Assurance drawn from *Archangel* to *Leghorn*, and subscribed; the Agreement before the Subscription was, that the Adventure should begin but from the *Downs*; but this was not put into Writing; the Jury ought to have no Regard to this parol Agreement. 54, 55

Policy of Assurance, and Bills of Exchange of great Credit, tho' neither of them Specialties. 55

Policy of Assurance ran until the Ship shall have ended and be discharged of her Voyage: *Adjudged* upon a Demurrer, that Arrival at the Port, no Discharge, till she be unladed. 243

The Charter-party was that *J. S.* insured for him, and such who should have Goods upon such a Ship; *A. B.* brought an Action upon this Charter-party, and made Averment he had Goods upon the Ship, and *held good*; but held likewise, that if the Goods were insured as the Goods of an Ally, when they were the Goods of an Enemy, the Assurance is not good. *Page* 327

The Practice upon Policies of Insurances, in Relation to Passes. 404

Portion. See Chancery.

Trust-Term limited after special Tail Male in Husband and Wife, to raise, if one Daughter, 5000 *l.* if two or more 6000 *l.* to be divided Share and Share alike amongst the Daughters, to be paid at the Age of Twenty-one, or Day of Marriage; and if any of them die, to the surviving; there are Issue two Daughters of the Marriage; the Wife dies, and one of the Daughters dies, being seven Years old; the surviving Sister intitled to 6000 *l.* 38

A Sum devised to be raised out of Lands for a Daughter's Portion; the Daughter dies, the Portion shall not be raised. 287

Posts.

Erecting of Posts within particular Places, or Projects for carrying and dispersing Letters; in what Cases within the Exception of the 12 *Car.* 2. *c.* 35. and in what not. *Page* 81

Power.

Grantor limits a Term to Trustees upon such Trusts as he shall direct, reserving to himself a Power to make Leases with or without Fine, *and rendring such Rents and Services, as he shall think fit*; then by Deed declares the Trusts of the Term to be for the Payment of his Debts, and after this makes a Lease without rendring Rent; the Power well executed, and the Lease good. 428

Prerogative.

The King may restrain Merchants by a *Ne exeat regno*, without shewing Cause. 166

At Common Law none could trade with Foreigners without the King's Licence. 224

The King's Prerogative shall not be over-reached by Relation, and the Party shall not have Restitution of mesne Profits taken by the King, upon the Reversal of an Outlawry, *&c.* 615

Prescription.

One prescribes as being seised of a Messuage or Tenement; an Exception that this was in the Disjunctive, and uncertain, not allowed; but good for not saying how he was seised, for unless he was seised in Fee, he could not prescribe. *Page* 36

Presumption.

To avoid a Fraud, and to support Leases, which Trustees might have empowered *Cestuy que Trust* to make, a Conveyance and Power presumed to have been executed for that Purpose, tho' not proved. 77, 78

Act of Parliament presumed to have been made to support a Possession since the Time of the *Black Prince*, which otherwise would be a wrongful Possession. 78

Printing.

A Grant for the sole Printing of Law Books adjudged good. 234

King *Car.* 1. grants to the University of *Oxon* Power to print *tam Libros content.* in the Charter granted by K. *James* to the Stationers of *London*, *quam alios non prohibit.* in an Action brought against *P.* by the Stationers of *London*, he pleads these Letters Patents of

Car. 1. *Adjudged* a good Plea, for this is a Prerogative of Power annexed to the Person of the King, which he may resume, otherwise it is of the Grants of an Interest; *Quære.* *Page* 236

Privilege.

A Person privileged by Record pleading it, and producing his Writ of Privilege, it cannot be traversed; but if one plead Privilege as Clerk or Servant to another Person privileged; this may be traversed and tried *per pais.* 521, 582

Attorney of *C. B.* shall have his Privilege in Debt *Qui tam, &c.* but not in an Information *Qui tam, &c.* for Debt *Qui tam, &c.* is merely the Suit of the Party. 549

Process.

The Old *African* Company indebted by Bond, convey their Effects to the New *African* Company, for Payment of the Debts due by the Old Company, a Bill brought against the New *African* Company only, to subject their Effects to this Debt; and said in this Case, that Process against a Company is by *Distringas* not *Subpœna*; and if they have no Effects, there is no Way to compel them to appear. 85

A *Scire facias* in the Nature of a *Quo Warranto* brought against the Sheriff amongst other Parties; Process ought to go to the Coroner for all. *Page* 91

Proctors.

Whether Proctors in the Court of Arches may sue for their Fees due in a Suit prosecuted there, in the Court of Arches, or ought to proceed at Common Law for the Recovery of them. 589, 596

Prohibition.

Suggestion in the Spiritual Court that the Inhabitants of an antient Tenement had sat in the first Seat of an Isle, till removed by the Bishop, a Prohibition was prayed as upon an idle Custom which they went to try in the Spiritual Court, and denied. 7

Prohibition denied for Want of an Affidavit, that a Plea was refused in the Ecclesiastical Court. 20

The Court Christian cites the Members of Corporations by their proper Names, though it proceeds against them in their politick Capacities, for that Court has no Way to compel an Appearance but by personal Process; and a Prohibition was denied upon such Citation. 27, 28

One married the Sister of his former Wife, and had three Children by her; the Husband and Wife were proceeded against in the Spiritual Court; one of the Children moved for a Prohibition, that she might

not be baſtardiſed by the Spiritual Court; Cauſe to be ſhewn why a Prohibition ſhould not go. *Page* 37

Proceedings in the Spiritual Court againſt one for marrying his Brother's Daughter, and a Prohibition denied. *Ibid.*

Prohibition moved for to the Chancery Court of *Lancaſter*, upon a Suggeſtion that the Town of *Pontefract* is out of the Juriſdiction of the Dutchy, tho' the Honour of *Pontefract* appears by the Caſe to be holden of it, and for that the Defendants lived out of the Juriſdiction; Cauſe ordered to be ſhewn. 43

One excommunicated for not receiving the Sacrament in his Pariſh Church in the City of *Briſtol*, after a Monition; he pleaded in the Eccleſiaſtical Court, that he had received the Sacrament in the Country, at his Pariſh Church there, which Plea they refuſed; a Prohibition was granted. 101

After a Sentence and an Appeal brought, the Court granted a Prohibition to the Prerogative Court upon this Caſe; *H.* made *M.* his Executor, and after *M.* became a Bankrupt; and after an Examination *ore tenus*, that Court revoked the Probate; but it was *adjudged* that Bankruptcy is no Diſability, for the Teſtator's Eſtate is not liable to be aſſigned by the Commiſſioners. 299

A Prohibition to ſuppreſs a Bowling Green. 627

Inſtances where Prohibitions have been granted in Cauſes Civil as well as Criminal. *Page* 629

Quare Impedit.

IN a *Quare Impedit* the Seiſin is not traverſable, but the Preſentment. 657

The conſtant Courſe in a *Quare Impedit* is to alledge Seiſin generally, the Time of Seiſin is immaterial; and if it be not material, the not denying of it is no Admiſſion, for Non-denial is only an Admiſſion of Things materially alledged. 660

Que Eſtate.

Though the Plaintiff in Debt for Rent may plead a *Que Eſtate* in the Defendant generally without ſhewing how, yet where a Man claims under a *Que Eſtate*, there he ought to ſhew the ſeveral Aſſignments, for the Defendant may traverſe any of them. 303

In Replevin the Defendant avows; the Plaintiff replies in Bar to the Avowry, and ſays that King *James* was ſeiſed, and granted to Sir *R.* who granted to *J. S.* *Que Eſtate* by divers mean Aſſignments came to *J. D.* and he put in his Beaſts; to which Plea a Demurrer, and ruled for the Avowant; for the Plaintiff ought to ſhew that he put in his

his Cattle by the Licence of *J. D.* and ſhould therefore derive a Title to him. *Page* 303

Queen Dowager.

An Intereſt or Power of granting being veſted in a Queen Conſort, does not determine by her becoming Dowager. 15

Queen Dowager remains a Queen; and *Quære*, whether it be not unneceſſary to name her *Dotiſſa* in Pleading. *Ibid.*

Remainder and Remainder Contingent.

Contingent Remainders are not favoured in Law, nor raiſed but upon Neceſſity, when a Perſon is not in *eſſe*. 208

If a Leaſe be made to *A.* for Life, Remainder to the right Heirs of *B.* this is a good Remainder, if *B.* dies before *A.* becauſe a particular Eſtate to ſupport it; but if *A.* dies in the Life of *B.* the Remainder is void, becauſe there is no Perſon to take it, and no particular Eſtate to ſupport it. 352

J. S. having two Sons, deviſed his Lands to his eldeſt Son for fifty Years, if he ſhall ſo long live, and after the Determination of this Eſtate, to his Heirs Males of his Body; and for Default of ſuch Iſſue, to the ſecond Son for Life; and after his Deceaſe to his firſt Son in Tail, and ſo further; the eldeſt Son ſuffers a Recovery and dies: *Adjudged* upon a ſpecial Verdict, that this Recovery had not barred the ſecond Son; for the Eldeſt had not any Frank-tenement, but was only Tenant for Years, with a Contingent Remainder, which was void, not having a particular Eſtate to ſupport it. *Page* 408

A. Tenant for Life of *B.* Remainder to the right Heirs of *B.* and after *A.* grants his Eſtate to *B.* ſo that he had the particular Eſtate of the Frank-tenement for his Life, Remainder to his right Heirs; yet the Remainder continued a contingent Remainder. 408

Reputation.

By the Deviſe of a Meſſuage, a Barn, Stable, *&c.* though not originally belonging to the Houſe; yet if it be uſed and enjoyed together with it, this will be ſufficient Reputation to make it paſs for Part of the Houſe. 188

Where a Name of Dignity may be ſupported by Reputation. 664

Retainer.

Teſtator is bound to *A.* in a Bond, *&c.* to the Uſe of his Wife,

Wife, Condition for Payment of 3000 *l.* to *B.* his Wife after his Death, and dies; Administration *durante minoritate* is committed to the Wife, she may retain, for the Condition of the Bond being to pay to her, it is the same as if the Bond was to her. *Page* 214

A Retainer is not the Act of the Party, but of the Law. 215

Reversion.

Privity and the same Right of Estate, both requisite to make a Rent incident to the Reversion. 62

A Fine was levied of a Reversion to the Plaintiff and his Heirs, to the Use of the Plaintiff, and his Heirs; the Plaintiff declared in Covenant, and the Defendant demurred, because the Plaintiff does not entitle himself to the Action by any Privity of Estate, for this being a Conveyance at Common Law, an Attornment was necessary to make a Privity: *Adjudged ut videtur*, that this was a future Interest to commence after a Term *in esse*, at the Time of making the Estate to the Defendant, and therefore no Attornment necessary, or possible to be made by the Defendant; and that as to the Estate, it was sufficiently conveyed by the Fine. 387

In Case of a Grant of a Reversion, no Estate passes till an Attornment. *Page* 388

Revocation.

A. makes a Feoffment to the Use of himself for Life, Remainder to *B.* in Tail, *&c.* with a Power of Revocation by Deed sealed before two Witnesses, or by Will sealed by one Witness; *A.* levies a Fine, and a Week after by Deed declares the Use to himself in Fee, whether the Power executed or extinguished. 35, 52, 71

Powers of Revocation favoured in Law. 72

E. M. by Lease and Release, settles the Lands in Question to the Use of himself in Tail Male; Remainder to *S. M.* in Tail Male, Remainder to Sir *E. M.* in Tail Male, Remainder to *E. M.* and his Heirs, with Power to revoke the Estate made to *S. M.* and to settle new Uses; the next Day reciting that he had limited an Estate to *S. M.* and his Heirs Males, he revokes the same, and limits it to *S. M.* and his Heirs Males; provided that he pay 1500 *l.* to his Executors; and if he fail thereof, that it shall be lawful for *A.* and *B.* &c. to enter, and raise the same out of the Rents, *&c.* *E. M.* dies, leaving Issue one Son, who had a Daughter; *S. M.* dies without Issue, the Brother of *S. M.* brings his

Ejectment; and upon a special Verdict in C. B. *adjudged* for the Defendant, who was Daughter to the Son of E. M. and upon a Writ of Error in R. B. the Judgment was affirmed, though S. M. had not such an Estate, which was mentioned in the Revocation; the sole Intent of revoking the Estate of S. M. being to charge it with 1500 *l.* and after this Charge let in, that then S. M. shall have the same Estate again he had before. *Page* 324

Riot.

Where upon a lawful Meeting Acts of Violence ensue, this may be a Riot. 119

Scire facias.

Whether, when a *Scire facias* is brought against two who were Bail, and Judgment is recovered upon it by the Plaintiff, and he dies, and one of the Bail dies; the Executor of the Plaintiff can bring a *Scire facias* against the Survivor of the Bail only. 82

Where after Judgment in Ejectment the Term expires, the Tenant cannot bring a *Scire facias quare executionem habere non debet* of the Land; but he may have a *Scire facias* for Damages and Costs. 161

Upon a Writ of Error to reverse a Common Recovery, it was moved that a *Scire facias* be granted against the Terre-tenants; and *adjudged* to be a setled Rule to grant a *Scire facias* in such Case. *Page* 273

Scire facias and an Inquiry granted upon a Suggestion, that A. and his Wife, and B. and his Wife against whom the Judgment was, had wasted; the Sheriff returns that B. and his Wife *devastaverunt*, and says nothing of A. and his Wife; this seems an ill Return, and not aided by the *Statute of Jeofails*, and the Judgment given upon such Return erroneous. 571, 572

It is the constant Practice in R. B. to sue both the *Scire facias* at once, in Regard that there ought to be a full Time, between the Date of the second *Scire facias*, and the Return of it; and in C. B. there is but one *Scire facias*, except in the Case of an Executor. 633

Error upon a Judgment in C. B. in *Scire facias*, where a Feme Sole recovered in C. B. and took Husband; and after they joined in a *Scire facias* to have Execution, and had Judgment in the *Scire facias*; the Wife died, and the Husband sued Execution, without taking out Letters of Administration; and *ruled* that the Judgment in *Scire facias* attached a joint Interest in Baron and Feme; and if the Husband died, it would survive to the Wife, *& econtra*. 682

Though Judgment in *Scire facias* does not alter the Nature, yet

yet it changes the Property of the Debt, and Debt may be brought upon an Award of Execution. *Page* 683

Sheriff.

Where it is suggested on the Roll, that insomuch as a Brother of the Defendant was one of the Sheriffs of *London*, that therefore the Coroners might return the Jury, and not denied; the Coroner must return the Jury. 102

If eight only plead to Issue, and the *Venire* is awarded to the Sheriff; if after it fall out, that the Sheriff is a Defendant, the *Venire* shall go to the Coroner, though the Sheriff hath not yet pleaded. 106

If the Sheriff be a Party, or related to one of the Parties, *&c.* and the *Venire* be awarded to him, it is only Matter of Challenge, which may be waived or released. 118

Though the Sheriff may not do an Act to himself, he may do an Act for himself. 119

An Attachment granted against the Sheriff, for not returning Money for Marshalsea and maimed Soldiers; and unless the Sheriff make a Return, the Court may take any Person of the County into *Withernam*. 227

Since the Statute of 28 *Eliz.* it has always been the Usage for the Sheriff to take a Fee upon a *Ca. sa.* for the Trouble which he had in the Execution; and if there be a second Execution, he shall have a Fee for that also, and an Action will lie for this Fee; and it was said that this Statute is mistaken in the printed Books, for the Roll is *An.* 28 *Eliz.* and the Statute is *An.* 29. *Page* 363

Simony.

Sale of an Advowson, with a Covenant to present such a Person, as the Bargainee shall nominate, the Church being at that Time full of an Incumbent by Usurpation; and a *Quare Impedit* then pending to remove him, by which he is afterwards removed, held Simony. 90

Statutes.

Promise of Marriage not in Writing, whether within the Statute of Frauds. 24

Statute of *Westm.* 2. provides no Remedy for cutting down of Trees. 94

An Estate being created by the Crown, notwithstanding the Alterations made by the Statute of 4 *Jacobi*; the Reversion remains in the Crown, and is protected by 34 *Hen.* 8. 97

Statute 23 *Eliz.* extends to all Sorts of Recusants; and tho' the Party be indicted upon that Statute in a wrong County, yet he shall have no Advantage

vantage of it, or avoid the Indictment for any Cause but Conformity. *Page* 99
Wilful Wrongs not within the Statute of 22 *Car.* 2. *cap.* 9. 100
The Privilege of being a Freeman, is not such an Interest or Trust for Government, as is within the Statute of *Car.* 2. for regulating Corporations. 117
Y. was committed by a Secretary of State upon 35 *Eliz.* and the Warrant was till he shall be discharged by due Course of Law; where the Statute is, that he shall be committed, there to remain without Bail or Mainprise, till he shall make a direct Answer, if he be a Jesuit, *&c.* and the Commitment was *adjudged* to be irregular; for it is in the Nature of a Conviction, and the Party is in Execution till Answer made. 369
Whether Persons shall upon an Indictment be expounded to be within the Intent of a penal Statute, who are not within the express Words or Letter of it. 428, 429
One exercised a Trade so as to fulfil the Intent of a Statute, yet not doing it according to the Words or Letter; this was adjudged an using of the Trade contrary to the Statute. 428
Though a Statute concerns a particular Thing, and be private in its Nature; yet if the Forfeiture be to the King, that makes it a publick Act. *Page* 429

Supplicavit.

One taken upon a *Supplicavit*, and brought by *Habeas Corpus* before a Judge, and bound by him to appear in *B. R.* the Court will not read the Articles sworn against him in Chancery, and bind him upon them in *R. B.* 61

Suspension.

Where an Act is appointed to be done by four senior Fellows of a College, the Suspension of any of them, does not make the next in Order senior Fellows, so as to be qualified to do that Act. 460, 464, 474, 484

Tail.

BAron and Feme Tenants in special Tail of the Provision of the Husband, have Issue; the Baron dies, the Issue levies a Fine to a Stranger, the Feme leases for sixty Years and dies; held that Lease was good against the Conusee. 31, 36

Term.

Term.

J. S. reciting a Leaſe of a Cottage, Barn and Lands, for the Term of 1000 Years veſted in him, after 32 Years of the 1000 Years were expired, grants all the ſaid Cottage, Barn and Lands, and all and ſingular other the Premiſſes therein before recited or mentioned, together with the ſaid recited Leaſe, and all Writings and Evidences concerning the Premiſſes; *Habendum* to the Grantee, from and immediately after the Death of the Grantor and his Wife, for the Reſidue of the ſaid Term of 1000 Years then to come and unexpired; the Queſtion was, whether this be a good Grant, the Grantor having reſerved to himſelf an Eſtate for Life, which by Conſtruction of Law is greater than any Eſtate for Years; and reſolved, that the Term ſhall paſs to the Grantee by Virtue of the Premiſſes, and the *Habendum* ſhould be rejected. *Page* 528 *uſque* 545

Whether a Leaſe for Years by Grantee for Years, to commence after his Death, be good. 535, 536, 537

The Difference which the Law makes between long and ſhort Terms of Years. 538, 539

Time.

Upon the Statute of 1 *Will. & Mar.* which appoints all Biſhops, *&c.* to take the Oaths; the Queſtion was, whether the ſix Months mentioned in the Statute, are to be accounted Kalendar Months, or *Lunar* Months; and ſaid, that this being upon the Conſtruction of an Act of Parliament, it ought to be conſtrued according to our Law, that the ſix Months ſhall be accounted *Lunar* Months. *Page* 313

Trade.

No Mechanick or Merchant can be hindered from trading but by Act of Parliament. 133

No Aſſembly for Buying and Selling can be without Licence; and theſe Licences when granted, cannot be repealed without Cauſe of Forfeiture. 198

Traverſe.

Rent of 20 *l. per Ann.* granted out of *A.* to commence from the Time that a Diſtreſs ſhould be taken for Rent iſſuing out of *B.* in Bar of the Avowry

upon a Distress taken for the Rent of 20*l.* in *A.* there is a Traverse *absque hoc*, that any Distress was taken for Rent arrear, *&c.* in *B.* this is a complicated Traverse, and not good. *Page* 63, 64

In Replevin, the Defendant says, that the Goods are his, *absque hoc*, that they are the Plaintiff's; the Plaintiff replies, that they are his, *absque hoc*, that they are the Defendant's; this is an immaterial Issue. 65

In Replevin where the Defendant claims Property, the Plaintiff ought to prove the Goods to be his. 65

Trespass.

Trespass *quare claus' fregit, &c. & liberam piscar' suam piscat' est, & centum, &c.* moved in Arrest of Judgment, that Trespass does not lie, but Case; but adjudged for the Plaintiff; for *Libera piscaria* implies an Interest, and is all one with *separalis piscaria*; and he might plead to an Action of Trespass for fishing *in Libera piscaria sua*, that it is his Franktenement. 342

In Trespass for fishing in his free Fishery, the Jury find specially, that the Place where, is Parcel of the Manor of *D.* and that the Plaintiff is seised of this Manor in Fee, and conclude that they find for the Plaintiff, if he could have an Action of Trespass for fishing in his free Fishery within his own Land; and *adjudged* that the Plaintiff may have such a Fishery; for though divers may have Liberty to fish there beside himself, this is *libera piscaria* in his Manor. *Page* 677

Trover.

Two Co-Plaintiffs in Trover, one dies, the Survivor has Judgment; in Error the Judgment reversed. 39

Trover *de uno pari Vittarum, Anglice* a Suit of Knots, certain enough. 142

In Trover against an Hackney Coachman; *ruled* that Goods delivered to his Servant shall not charge the Master, for the Party does not pay the Master for it; otherwise if the Master be paid for it, or agree for it. 625

Trust.

Where there is Tenant for Life, Remainder to Trustees to support contingent Remainders; Remainder to the first and other Sons of the Marriage, Remainder to the Heirs of the Body of the Husband, if after any

any Probability of Iſſue to take, the Truſtees convey to the Husband, and this be for the good of the Family, ſaid to be no Breach of the Truſt. *Page* 78

Upon a ſpecial Verdict that there were other Owners *ſimul cum* the Defendants; *adjudged* for the Defendants, and that they may take Advantage of it upon the general Iſſue; for the Truſt and Contract is with all the Owners. 278

Trial.

Action of Conſpiracy brought in *Middleſex*, and founded upon an Indictment in *Middleſex*, altered by the Court, by Reaſon of the Power and Intereſt of the Plaintiff in *Middleſex*; and ordered to be tried in another County. 43, 44

Tythes.

Whether, where a Prior has a Manor, and the Tythes of it, and he by Deed before Time of Memory grants it in Fee, and that the Grantee *pro Decimis Dominii, & duabus Carucatis terræ* ſhould pay 5 *s. per Ann.* to the Prior, *&c.* which is accordingly paid by the Grantee to the Prior and his Succeſſors; this be a good *Modus*, it not being paid to the Parſon, but to him who had a Portion of the Tythes. *Page* 51, 239

Upon a ſpecial Verdict, it was found that twenty-ſix Acres only in a Pariſh, which conſiſts of 1200 were ſown by ſeveral Perſons with Flax; and *adjudged* that this was a ſmall Tythe, and belonged to the Vicar, who was endowed *de minutis decimis.* 341, 356

Minutæ Decimæ ſhall be conſtrued according to the Nature of the Thing, and not of the Place where it is ſown. 356

Ruled at the Aſſizes, that if a Man ſow his Land with Clover, and make his Profit by the Seed, this being a Grain, the Parſon ſhall have Tithe of it; but if he convert it into Hay only, and make his Profit of the Hay, the Vicar being endowed of Tythes of Hay, ſhall have it as a ſmall Tythe. 341

Whether a Cuſtom to be diſcharged of Tythes of barren Cattle within a whole Hundred be good. 560, 561

Venire.

IN an Action of *Scan. Mag.* laid in *London* by Lord *S.* the

the Court by Reason of his Interest there, at the Instance of the Defendant, *ruled* that the *Venire* should be changed, and left it to Lord *S.* his Election, to lay it in any other County, but *London* and *Middlesex.* *Page* 40

Venire sicut alias, is a *Venire* of it self, and a Trial may be had upon it. 119

Verdict.

In Trover the Declaration was *de una longa mensa cum plateis & abicis culinariis*, *Anglice* a long Table with Shelves and Dressers; *moved* in Arrest of Judgment, that this was incertain; *non allocatur*, for after a Verdict it shall be good, if by any Possibility it may. 289

Action on the Case, *&c.* for negligently keeping his Fire, *&c.* and that the Defendant had kindled a Fire in his Close, which he *tam improvidè & negligenter servavit*, that it burnt a Close of Heath of the Plaintiff's; moved in Arrest of Judgment, that it does not appear to be done by the Command of the Master: *Adjudged* for the Plaintiff, for this being after a Verdict, they are now upon the Record; and it was Matter of Evidence, whether it was his Fire or not. 681

Visitor.

The College return that they have a Visitor, *&c.* they need not specially return that the Visitor hath by the Statutes Power in the Matter depending; for by being Visitor, he hath Power *eo nomine* to determine all Matters that come as Grievances before him. *Page* 13

It need not appear upon the Return that the Grievance was in the Time of the present Visitor, for he may determine a Grievance in his Predecessor's Time. *Ibid.*

No Appeal from the Visitor to any other, nor to any other before him. *Ibid.*

Rector or not Rector of a College tried in an Ejectment; which Question depended upon the Validity of a Deprivation by the Visitor. 447

Whether the Validity of the Deprivation of the Rector of a College by the Visitor, may be examined in a civil collateral Action; or the Act of the Visitor ought to be taken to be just and right. 455, 456, 462, 464

Admitted *arguendo*, that where upon a *Mandamus* it is shewn by the Return that there is a Visitor, who has done an Act; it is final, and the Court is bound by it. 454, 468

But

But a Distinction being made in this Case of a Civil Action; this Distinction was denied *per Holt Chief Justice. Page* 488

Though a Visitor be by the Constitutions of the College restrained from visiting *ex officio* above once in five Years, yet he hath a constant standing Authority to hear Complaints, and redress Grievances. 478

The Bishops can visit but once in three Years by Law: *Per Holt Chief Justice. Ibid.*

A Visitor has *eo nomine* a general Power to deprive, unless it be restrained. 479

Where a Visitor has Authority to deprive, and does deprive, the Justice or Sufficiency of his Sentence, as to the Cause of it, is not examinable in the Common Law Courts: *Per Holt Chief Justice*, 482. *Argued al' contra.* 500 *usque* 503, 513

The Founder and his Heirs are Visitors of private and eleemosynary Corporations, where no Visitor is appointed: *Per Holt Chief Justice* 483, except in Ecclesiastical Corporations. 495

Where they who are to have the Charity are not incorporated, but Trustees appointed for them; there arises no visitatorial Power. 484

From the Sentence of one who is Visitor as Ordinary, there lieth an Appeal; but not from the Sentence of a Visitor, as Patron. 485

If a Sentence of a Deprivation by a Visitor be pleaded, you need not shew the Cause, it is not traversable, 485, 486. So in the Return to a *Mandamus. Page* 488

Though the first Sentence in the Case of a Visitor be final, and there lies no Appeal from it, yet that not a Reason for examining it in the Common Law Courts: *Per Holt Chief Justice*, 486, 487. *Argued al' contra.* 498, 499, 513, 514

Contumacy a good Cause of Deprivation. 489, 490

Where there are particular Causes appointed by the local Statutes of a College, for which upon a Complaint a Person shall be deprived by the Visitor; that does not hinder, but that he may upon Visitation deprive for other Causes not expressed: *Per Holt Chief Justice.* 490

Charitable Corporations take the Charity upon the Terms of the Founder, *viz.* Submission to the Power of the Visitor, which seems to be the chief Reason of the Visitor's Power. 491, 513

In whom the Right of Visitation of St. *Katharine*'s Hospital is vested, and whether the Court of Chancery can adminicularly assist the Judgment of the Visitor, where a Visitor is expresly appointed. 644 *to* 647

University.

The Charter of the University of *Cambridge* does not extend to sue there for the Penalty of an Act of Parliament; but such Suits ought to be in the King's Courts, for a Recovery there is not pleadable in Bar here. *Page* 665

The University of *Cambridge* moved for a *Supersedeas* to a Prohibition, or for a Consultation; but *ruled*, that they ought to declare and plead their Privilege, and when it was pleaded they would take Notice of it upon a Motion; and *Rule* was given for them to declare. *Ibid.*

Usury.

The Plaintiff was Co-Obligor with *J. S.* to the Defendant, and between *J. S.* and the Defendants there was an usurious Contract, the Plaintiff paid Part of the Money to the Obligee, and after pleaded the Statute of Usury upon this Bond; and it is *adjudged* an usurious Bond, upon which he brought an *Indebitatus assumpsit*; for the Money paid before the Bond was proved usurious; and *adjudged* that the Action did not lie; but that it is like to the Case of Bribes, he who receives it ought to be punished, but he who gives them, ought not to be encouraged by any Way to recover his Money again. *Page* 411

Wales.

Record returned upon a Writ of Error only by one Justice of the Grand Sessions. 10

Warranty.

Whereas the Plaintiff had bargained and bought of the Defendant sixteen Hogsheads of Wine, *&c.* that the Defendant *in consideratione inde adtunc & ibidem* did warrant the Wine to be good and merchandizable; *adtunc & ibidem* shall be intended all at an Instant. 104

Tenant for ninety-nine Years, if he so long live, Remainder to Trustees to preserve contingent Remainders, Remainder to his first and other Sons in Tail, Remainder to the Heirs Male of Tenant for Years, Remainder to *Thomas*, Brother to the Tenant for Years, and to his Heirs Male, Tenant for Years having no Issue, the Trustees convey to him, and he levies a Fine, and after suffers a Recovery; the Remainder of *Thomas* is barred by the collateral Warranty descended upon him. 106

Will.

Will. See **Devise.**

The Law will by Construction supply Words of Art in Favour of a Testator's Intent, who is supposed *inops consilii.* *Page* 19

Two Persons who were two of the three Witnesses to a Will of Lands, purporting to be made according to the Statute, giving Evidence that the Testator did not publish the Will; the Court directed the Jury to find it a good Will upon collateral Proof to fortify it, and committed the Witnesses; so likewise where two gave Evidence that the Testator was *Non compos*, and the third Witness who was the Scrivener who wrote the Will, that he was. 79

One before the Act of Frauds, *&c.* makes his Will, and signs it, declaring it to be his Will, in the Presence of one Witness, and dies after the Act; this not within the Act. *Page* 227

A Will wrote by the Hand of the Testator, and declared in the Presence of three Witnesses, though not signed by him in such Presence; a good Will; *Quære.* *Ibid.*

One makes his Will, signs it, and declares it in the Presence of three Witnesses, then does an Act which amounts to a Revocation, and then re-publishes his Will in the Presence of two Witnesses; a good Will; *Quære.* *Ibid.*

A general subsequent Clause in a Will shall never be extended further than the first Clause which is special. 319

If there are three subscribing Witnesses to a Will, this is sufficient within the Statute of Frauds and Perjuries, though upon the Trial one of them would not swear, that he saw the Testator seal and publish his Will, if it be proved to be his Hand, and that he set it as a Witness to the Will. 413

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