WE well knowing the great Ability, Learning, Judgment, and Integrity of the Author, do allow and approve of the Printing and Publiſhing of this Book, entitled, *Reports of Adjudged Caſes in the Courts of* Chancery, King's Bench, Common Pleas *and* Exchequer, *taken and collected by the Right Honourable Sir* JOHN STRANGE, *Knight, late Maſter of the Rolls.*

Hardwicke C.
D. Ryder,
Tho. Clarke,
J. Willes,
T. Parker,
T. Deniſon,
M. Foſter,
E. Clive,
Tho. Birch,
H. Legge,
S. S. Smythe,
Rich^{d}. Adams,
Hen. Bathurſt,
John Eardley Wilmot.

I. STRANGE EQ. AVR. S. SCRINIOR. MAGISTER
REG. MAIEST. A SECR. CONSILIIS OB. XV.
CAL. IVN. A. D. MDCCLIV. AET. LVIII.

I. Houbraken Sculp.

REPORTS

OF

ADJUDGED CASES

In the COURTS of

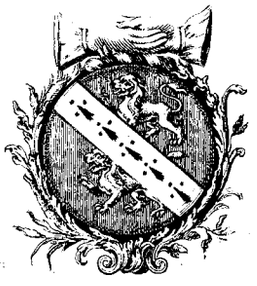
CHANCERY, KING'S BENCH, COMMON PLEAS *and* EXCHEQUER,

FROM

Trinity Term in the ſecond Year of King GEORGE I.

TO

Trinity Term in the twenty-firſt Year of King GEORGE II.



Taken and Collected by the Right Honourable

Sir JOHN STRANGE, Knt.

Late Maſter of the Rolls.

In TWO VOLUMES.

Publiſhed by his Son, *John Strange* of the *Middle Temple* Eſquire.

VOL. I.

In the SAVOY:

Printed by *Henry Lintot*, Law-Printer to the King's Moſt Excellent Majeſty, for WILLIAM SANDBY at the *Ship* over-againſt *St. Dunſtan's* Church, *Fleetſtreet*.

M.DCC.LV.

To the RIGHT HONOURABLE

PHILIP

EARL of HARDWICKE,

Viſcount ROYSTON,

Baron HARDWICKE of Hardwicke

in the County of Glouceſter,

Lord HIGH CHANCELLOR

of GREAT BRITAIN,

Theſe Reports are, with the utmoſt Reſpect and Eſteem, inſcribed by

His LORDSHIP'S

Moſt obedient and obliged

Humble Servant,

John Strange.

THE PREFACE.

THE profeſſion of the law is already ſo overburthened with reports, that I think it neceſſary, that every man who prepares any thing of this kind for the preſs, ſhould give ſome very particular reaſon for his doing ſo. And my reaſon is this:

Having during the firſt years of my attendance at Weſtminſter-hall *been pretty diligent and exact in taking and tranſcribing notes; I ſoon found, it introduced me to the honour of having them borrowed and tranſcribed by ſeveral of the Judges, and others. By this means they came into the hands of a Gentleman, who had a ſervant ſo corrupt, as clandeſtinely to make ſeveral copies, and ſell them to perſons, who had not the honour to deliver them up, when the villany was detected.*

detected. This put me under an apprehenſion, that I ſhould ſoon ſee ſome of them in print. And as many of them were only arguments in cauſes never adjudged, and therefore of no uſe to the publick; I thought it neceſſary to ſelect theſe which were actually adjudged, and collect them together, that I might at ever ſo ſhort a warning have it in my power, by printing a genuine, to ſuppreſs any ſurreptitious edition. With this view I cauſed my clerk to tranſcribe ſuch caſes, as I thought would be proper; and if no accident happens, that obliges me to publiſh them in my life, they will remain to be dealt with, as they who come after me ſhall think fit.

J. Strange.

Trinity

Trinity Term

2 Georgii Regis. In B. R.

Thomas *Lord* Parker, *Chief Juſtice.*
Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Pratt, *Knt.*
Sir Edward Northey, *Knt. Attorney General.*
John Forteſcue Aland, *Eſq; Solicitor General.*

Clark *verſ.* Elwick.

Rule made upon a witneſs to a ſubmiſſion to arbitration, to make affidavit of the execution.

MR. *Reeve* moved the laſt term, That one of the witneſſes to a ſubmiſſion to arbitration might be obliged to make affidavit thereof, in order to make it a rule of court purſuant to the *ſtat.* 9 & 10 *W.* 3. *c.* 15.

The Solicitor General inſiſted, that affidavits are voluntary; but the reaſon of the witneſs's refuſal in this caſe was, becauſe the award was unfairly made, and they had no other remedy but this to prevent the ſubmiſſion being made a rule of court. *Sed per Curiam*, The hardſhip of this particular caſe will not at all vary our rule, which muſt be a ſtanding method for the future: The act of parliament has appointed but this ſingle way by affidavit; and we will not ſuffer a witneſs to evade it by his refuſal. We force a witneſs to a bond by *ſubpœna*; and every witneſs does by his ſigning undertake

to prove it when required. And *Hil.* 6 *Geo. Singleton* v. *Bradley*, there was the ſame rule upon my oppoſing it.

Rule for the witneſs to make affidavit of the execution.

Dominus Rex *verſ.* Winteringham.

Male et negligenter ſe geſſit too general in an indictment.

INdictment *quia male et negligenter ſe geſſit in executione of the office of conſtable*, quaſhed for being too general.

Bayley *verſ.* Jenners.

A perſon qualifying himſelf after liſted ſhall be taken to be doing duty, and diſcharged upon common bail.

REEVE moved that defendant being a trooper might be diſcharged upon common bail; it appeared he was liſted 16th *May*, and arreſted 19th; and the queſtion was, whether he had ever performed duty; and the affidavit went no further than his learning to ride. The plaintiff inſiſted, that this is not doing duty as the act requires, but only in order to do duty.

Cur', It is doing duty, he receives his pay, and muſt be diſcharged upon common bail.

Dominus Rex *verſ.* Wyndham.

THE defendant Sir *William Wyndham* being brought up by the Lieutenant of the *Tower*, Serjeant *Pengelly*, Mr. *Jefferies*, Mr. *Reeve* and Mr. *Hungerford* moved, that he might be admitted to bail, and offered ſeveral arguments to induce the court to bail him, which with the anſwers given thereto by Sir *Joſeph Jekyll*, Mr. Attorney and Solicitor, are comprized in the opinion of the court, which was delivered the laſt day of the term *ut ſequitur*.

Parker C. J. This is a commitment by the ſecretary of ſtate for high treaſon generally; it has been moved on behalf of Sir *William Wyndham*, that he might be admitted to bail. I ſhall take notice of the arguments on both ſides, and of the particular circumſtances of this caſe, which have been laid before the court, with as much clearneſs, as the little time we have had to conſider of the matter ſince it was ſpoke to, and the extraordinary buſineſs of this day, will permit me.

It has been admitted on all hands that the court has a diſcretionary power in this caſe; and I think the arguments which have been made uſe of by the counſel for Sir *William Wyndham* are upon theſe five points:

1. Exception, That the commitment is, *that he ſhall be kept ſafe and cloſe*; it has been inſiſted, this is more than can be juſtified by law. This exception is offered without any authority to ſupport it, and is againſt an infinite number of precedents. But admitting this were a good exception, the conſequence would not be that we ſhould diſcharge Sir *William Wyndham*, but only *quatenus* his being kept cloſe. The *keeping him ſafe*, is only by way of admonition to the officer, to put him in mind of his duty, and the puniſhment which he muſt undergo in caſe of an eſcape. The common proceſs which goes to the ſheriff, commands him to take the defendant *et eum ſalvo cuſtod'*.

Safe and cloſe in a commitment is only by way of direction to the officer.

2. Exception has been taken, That the charge is not ſaid to be upon oath; and if a ſecretary of ſtate might commit people without oath, the whole nation would be their tenants at will. In anſwer to this, I muſt obſerve, as I did before, that the precedents are many of them ſo, and no authority has been cited in ſupport of the objection. The not mentioning it to be upon oath, is not concluſive, that it was not upon oath. In *Ferguſon*'s caſe this exception was over-ruled, *Trin.* 2 *W. & M.* and it was held in *Kendal*'s caſe, that an impriſonment may be without oath; and alſo in the Houſe of Lords, that commitments may be without oath. If a man be taken with treaſonable papers, he may be committed, and any magiſtrate may commit *ſuper viſum*, without oath.

Commitments may be without oath.

1 Salk. 347.
5 Mod. 78.

3. Exception, That the commitment is generally for high treaſon; and it has been urged, that ſome particular ſpecies of treaſon muſt be expreſſed, and that it muſt have ſo much certainty, as to appear to be high treaſon to the court. 2 *Inſt.* 52, 591. I think this opinion is not to be maintained. We preſume a magiſtrate does right, till the contrary appears; and it has never been held neceſſary to expreſs the overt act in the commitment. My Lord *Coke* puts the caſe of treaſon *contra perſonam Regis*, and admits that to be ſufficient.

Commitment for high treaſon generally, is good. *N. B.* This exception had been over-ruled before in this term in the caſe of Mr. *Harvey* of *Combe*.

4. It has been argued in favour of this laſt exception, that the *habeas corpus* act ſuppoſes the crime to be ſpecifically mentioned; becauſe it provides, that no perſon ſhall be committed a ſecond time for the ſame offence, after he has been once bailed; the conſequence of which is, that the court muſt judge by the two commitments

mitments whether the offence be the ſame. This argument will appear of little weight, if we conſider how eaſy it is to vary the expreſſion in the ſecond commitment, and yet keep cloſe to the principal charge. Suppoſe a man is committed for levying war againſt the King, and after he is diſcharged, is again committed for compaſſing the death of the King: Theſe two facts appear very different upon the face of the commitments, and yet he that is charged with the one, may likewiſe be charged with the other; and if this objection ſhould be held good, the conſequence would be, that a man may be committed as often as the ſecretaries of ſtate can vary the expreſſion; for ſeveral ſpecies of treaſon may be the ſame fact.

5. The caſe of *Kendal* and *Roe*, 1 *Salk.* 347. 5 *Mod.* 78. has been relied upon by the counſel for Sir *William Wyndham* as a caſe in point. But I am of opinion, it will not come up to that now before us. They were committed by a warrant dated 24 *Oct.* 1695. being charged with aſſiſting to the eſcape of Sir *James Montgomery*, who was guilty of high treaſon. Exception was taken, that the treaſon of Sir *James Montgomery* was not expreſſed in the warrant; and the fact he was committed for might not be high treaſon, tho' mentioned to be ſo. The caſe did not turn upon that ſingle point, for it was held neceſſary, that Sir *James Montgomery* ſhould be averred guilty *of*, and committed *for* high treaſon. And becauſe both thoſe Particulars were not expreſſed in the warrant, the defendants were admitted to bail. A commitment, it is true, for ſtealing fruit generally would not be good, becauſe if it was upon trees, it would be no felony. 2 *Inſt.* 52.

1 Anderſ. 297. Ruſh. Collect. 3 Car.

There is a caſe in *Anderſon*, which was to be a direction for the future in making commitments, which is entred in the council book. In *Crofton*'s caſe, which is reported in 1 *Sid.* 78. 1 *Keb.* 305. it was reſolved, that a commitment for high treaſon generally is good. *Vaug.* 142.

I think I have now taken notice of all the exceptions taken to the commitment. The next thing relied upon is the illneſs of Sir *William Wyndham*, which appears to be a diſtemper incident to the family. We are of opinion, that this is not ground enough ſingly, to induce the court to admit Sir *William* to bail: For it muſt be a preſent indiſpoſition, ariſing from the confinement; and ſo we held this term in the caſe of Mr. *Harvey* of *Combe*, who ſtabbed himſelf after his examination; and was refuſed to be bailed, becauſe his illneſs was from an act of his own. But I ſhall not enlarge upon this head, ſince we are all of opinion, Sir *William Wyndham* ought to be bailed. There have been four terms paſſed

ſince

ſince his commitment, and one aſſizes in *Somertſhire*, out of which county it has been hinted the ground of the complaint againſt Sir *William Wyndham* ariſes; and therefore there being no proſecution againſt him, he muſt be admitted to bail, himſelf in 10000 *l.* and four ſureties in 5000 *l.* each.

A year's impriſonment without any proſecution, inducement to the court to bail.
Salk. 103.
2 Sid. 179.

Vernon *verſ.* Goodrich. In C. B.

THE plaintiff declares, that whereas ſhe is poſſeſſed of an houſe in *Ipſwich*, to which water was conveyed by a leaden pipe from the conduit houſe; the defendant nevertheleſs has placed *quaedam epiſtomia vocat. ſtopcocks in canali plumbeo praedicto*, and thereby hindered the water from coming to her houſe, and that the defendant has diverted great quantities of water, by which ſhe loſt the uſe of her houſe.

Where the plaintiff declares upon a poſſeſſion only, and the defendant pleads *liberum tenementum*, the plaintiff muſt ſhew a title in the replication, and muſt not barely rely on traverſing the defendant's title. Yelv. 147. Poph. 1. Salk. 335.

The defendant pleads, that at the time in the declaration, *et diu antea*, he was ſeiſed in fee of half an acre of ground, being his garden, and lying between the conduit houſe and the houſe of the plaintiff: And being ſo ſeiſed, he placed the ſaid leaden pipe in his ſaid garden, *ad utend' ill' ad ejus beneplacitum*; and therefore he fixed the ſaid ſtopcocks, *prout ei bene licuit, quae ſunt eadem, &c.*

Demurrer inde, et pro cauſa, quod materia praed' non eſt placitabilis in barram actionis praed', ſed tantum in retardationem reſponſionis ad inde habend', donec legalis titulus ad aquam praed' per ipſam (the plaintiff) *oſtenſus fuerit.*

Selby Serjeant *pro quer.* That the plea is ill. It is not ſufficient in this caſe for the defendant to ſay, it is his freehold; for that may be true, and yet the plaintiff be intitled to the watercourſe. Where the plaintiff preſcribes for *ſeparal. piſcar.* it is not enough for the defendant to ſay, it is his freehold. 17 *E.* 4. 6. *b.* 7. *a.* 10 *H.* 7. 24. *b.* 18 *H.* 6. 29. *b.* 34 *H.* 6. 28. *a.*

That the plea ſhould not be generally in bar of the action, but only till the plaintiff ſhew a title. The defendant has given no anſwer to the diverting great quantities of water; and therefore he prayed judgment for the plaintiff.

Branthwayte Serjeant *contra.* That the plea is a good plea: Formerly the plaintiff muſt have ſet out a grant or preſcription; but it

is ſince ſettled, that to ſay generally he is intitled, is enough againſt a wrong doer. But it is ſtill neceſſary to ſet out a grant or preſcription, when the action is againſt the owner of the land; and as this is laid generally, it is enough for the defendant to ſhew he is not a wrong doer. 1 *Ven.* 274, 319. 2 *Ven.* 186, 291. If treſpaſs is brought for erecting coneyboroughs to the prejudice of the common, it is enough for the defendant to ſhew himſelf lord of the manor. *Lutw.* 107. *Yelv.* 104.

Plow. 26. a. *et alibi* in that caſe, 5 Co. 121. a.

A plea to a common intent is good. And we may as well bring the matter of law before the court, as a jury. But it not being ſhewn for cauſe of demurrer, the plaintiff cannot take advantage of the plea's amounting to the general iſſue. 2 *Saund.* 401.

27 H. 8. 7. Finch Law 396.

We have pleaded *liberum tenementum.* And if the plaintiff has any title, ſhe may ſhew it in her replication. And by her demurrer ſhe admits ſhe has no title. If the treſpaſs was in another place, ſhe may ſhew it by new aſſignment.

Where the plaintiff claims an eaſement out of the defendant's ſoil, the declaration muſt ſet out the title.

King C. J. It is hard to ſay here are two charges. The wrong is the ſtopping the water, the carrying away is only aggravation. This declaration is upon a poſſeſſion, which is only good againſt a wrong doer, and therefore the plaintiff muſt ſhew a title. The defendant claims the ſoil, out of which the plaintiff claims an eaſement; and therefore ſhe muſt ſhew her title. If it had appeared in the declaration that it was the defendant's ſoil, and the plaintiff had not preſcribed, the declaration would have been bad.

Blencowe, *Tracy* and *Dormer* Juſtices, *accord'*, and the plaintiff afterwards diſcontinued upon payment of coſts.

Pariſhes of Pancras *and* Rumbald in Suſſex.

Juſtices of peace may ſuperſede their own order *quia improvide emanavit.*

ORDER of two juſtices for the removal of a poor perſon from the pariſh of *Pancras* to *Rumbald.* Within three days the juſtices, reciting that they were ſurprized, ſuperſede it, and command the churchwardens to return the former order to be cancelled.

Whitaker Serjeant inſiſted, That the juſtices could not iſſue ſuch a *ſuperſedeas*; and cited *Salk.* 472.

Sed per Curiam, The *ſuperſedeas* is well ſent by the juſtices, and to prevent the charge of an appeal; and the laſt order was confirmed.

Michaelmas

Michaelmas Term

3 Georgii Regis. In B. R.

Thomas *Lord* Parker, *Chief Juſtice.*
Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Pratt, *Knt.*
Sir Edward Northey, *Knt. Attorney General.*
John Forteſcue Aland, *Eſq*; *Solicitor General.*

Memorandum; Mr. Juſtice *Powys* was abſent all this term, being indiſpoſed with the gout.

Johnſon *verſ.* Louth.

MR. Solicitor General moved, that the defendant, being a gunner, might be diſcharged upon common bail.

The gunner in a train of artillery is the ſame as a common ſoldier, and common bail ſufficient.

Baines contra. The gunner is appointed by warrant, and is in the nature of a commiſſion officer, he receives 1 *s. per diem* pay, and takes an oath; and a gunner is ſo much eſteemed, that it is very difficult for him to get leave to lay down his poſt.

Solicitor Gen. He is liſted as common ſoldiers are, and is liable to all the penalties in the act of parliament as common ſoldiers are.

C. J. I am informed, that the gunner is within the deſcription of a common ſoldier. The extraordinary pay is only in conſideration of the ſkill which is requiſite in his place.

Eyre and *Pratt* Juſtices, *accord'*. And he was diſcharged upon common bail.

Rex

Rex *verſ.* Helling.

Intr. Trin. 2 Geo.

In orders for paying wages it ought to appear the ſervice was relating to huſbandry.

INdictment for not paying ſervants wages, reciting an order of two juſtices, whereby it appeared, that 9 *l.* was due, which the defendant refuſed to pay, having had notice of the order.

Glyde pro defendente. The order is void. It does not ſet out the labour of the ſervant, and is only generally *pro ſalario*; the juſtices have only juriſdiction in caſe of huſbandry; and the order ought to ſhew, this was a matter within their juriſdiction.

Eyre J. The practice is, if an order be for paying wages, it is ſuppoſed to be ſuch as the juſtices have power over. *Salk.* 441, 484.

C. J. and *Pratt* J. of another opinion. And *Hil. ſequente* the indictment was quaſhed.

Rex *verſ.* Powell & al'.

De ſcriptis decipiebant is too general in an indictment.

SIR *William Thompſon* the Recorder moved to quaſh an indictment againſt the defendants, for deceiving one *Davila* of ſeveral lottery orders. It is *de ſcriptis bonis & catallis* of *Davila decipiebant et defraudabant*; this is trover in effect, and too generally laid. 2 *Rol. Abr.* 79. *Mod. Caſ.* 311. *Et per Curiam*, This is too general, and was quaſhed without putting the defendant to demur to it.

Brett *verſ.* Minter & al'.

Intr. Hil. 1 Geo. rot. 318.

Where the plaintiff replies full Age of the defendant, it is not neceſſary to lay a *venue* as it is of a releaſe.

THIS was a writ of error *coram vobis*, and the error aſſigned was, that one of the defendants, being an infant, appeared by attorney. The plaintiff pleads, that he was of full age; to which the defendant demurred, and ſhewed for cauſe, that the plaintiff has ſhewn no place where the defendant was of age.

Fazakerley pro defendente. Infancy muſt be tried by the country, and therefore it is neceſſary to lay a *venue*. *Godb.* 382. *Collin* v. *Taylor*. *Latch* 194. And in *Trin.* 12 *Ann. Wellell* v. *Glover*, a releaſe was pleaded without a *venue*, and held ill, though it was

inſiſted, that the name of the county in the margin was ſufficient, to which it was anſwered, that the releaſe might be in another place.

Branthwayte Serjeant *contra*. Incapacity of the perſon may be tried where the action is laid. The defendant is of age every where.

C. J. Full age is not local, as the executing a releaſe; the place is no certainty of the fact, as it is in the caſe of a releaſe. What is perſonal attends the perſon every where; if he is of full age any where, he is ſo every where.

Adjournatur; and the laſt day of the term the chief juſtice delivered the opinion of the court.

C. J. The qualities of the perſon are to be tried where the action is brought. Nonage to a releaſe where the releaſe is laid to be made. I have looked into the caſe of *Collins* v. *Taylor*, which is oddly reported; and therefore I peruſed the record, which is thus: The error aſſigned is appearance by attorney for an infant, then it goes on, *Eo quod videtur curiae*, that there is no venue; *Ideo conſideratum eſt quod the defendant aſſignet errores de novo:* Then it is, *Eo quod defendens tali die* appeared by attorney *apud Weſtminſter*, *quo tempore* he was an infant, *&c.* I think it was not neceſſary to mention all that, for it appeared upon the record. In this caſe, if there be any fault it is in the plaintiff in error, and the defendant had nothing to do but to follow him.

Qualities of the perſon triable where the action is brought. *Vide* Mod. Caſ. Lett v. Mills. Salk. 6.

Lill. Entr. 489.

Judgment affirmed.

Dominus Rex *verſ.* Biſhop.

DEfendant was convicted of printing a ſeditious libel, and appearing to be in a very ill ſtate of health, was brought up, and moved for the judgment of the court, and to be admitted to bail.

Convict for a libel being ill, was bailed before Judgment.

C. J. The offence is ſo great that an adequate puniſhment may endanger his life, and to leſſen the judgment would be an ill precedent; therefore bail him for the preſent, and we will give judgment when he is better. Defendant in 2000 *l.* two ſureties in 1000 *l.*

N. B. He died within a few days after.

Dominus Rex *verſ.* Inhabitants of Hyworth.

Order to pay money to a poor perſon muſt mention him to be poor and impotent.

ORDER to pay 3 *s.* weekly to *A.* by the pariſh of *Hyworth*, ſo long as he ſhall continue poor.

Martin. By the ſtatute 43 *Eliz. c.* 2. it ought to appear, they are poor and impotent. 1 *Keb.* 489. 2 *Keb.* 744, 643. *Paſch.* 1 *Geo. Rex* v. *Culley.* An order for a father to pay ſo much to his daughter was quaſhed, becauſe not ſaid *poor and impotent*, but only that ſhe is in a poor and deſtitute condition, and wants relief. 5 *Mod.* 197. And *poor* is to be underſtood, *poor old*, *poor blind*, *poor impotent.*

C. J. I favour theſe orders as much as I can, becauſe no body takes care to draw them up for the poor. But it muſt be quaſhed.

Paſch. 3 *Geo. Rex* v. *Inhabitants of Stoke-Urſey.* On the authority of this caſe an order was quaſhed for the ſame fault. So *Paſch.* 4 *Geo. Rex* v. *Tipper*, an order to maintain a daughter-in-law.

Pariſhes of Holy Trinity *and* Shoreditch.

A. is bound to B. but ſerves C. his ſettlement is in C.'s pariſh.

PARKER, C. J. delivered the reſolution of the court.

This is an order for the removal of one *Ferrer* from the pariſh of *Holy Trinity* to *Shoreditch:* by which it appears, that *Ferrer* was bound as an apprentice to one *Truby*, with intent that he ſhould ſerve *Green*; which he did for three years. And it has been inſiſted, that he being bound to *Truby*, who lives in *Trinity* pariſh, his ſettlement is there; and not in *Shoreditch*, where the ſervice was.

But we are of opinion the juſtices have done right in ſending him to *Shoreditch*, where the ſervice actually was. It is the ſame thing as if *Truby* had turned him over to *Green*; in which caſe there would have been no queſtion, but he had gained a ſettlement in *Green*'s pariſh. If the maſter removes out of one pariſh into another, the apprentice gains a ſettlement if he lives there forty days. The turning over an apprentice is like the aſſigning any deed. In this caſe *Truby* was only a truſtee. There is a great deal of difference between apprentices and other ſervants; for apprentices are not preſumed to become chargeable, becauſe the trade and miſtery they learn is their eſtate. Therefore the order muſt be confirmed.

Salk. 68. Difference between apprentices and other ſervants.

Garner *verſ.* Anderſon.

IN replevin out of the county court, the plaintiff declared for taking his cart and four horſes in *Nithingall-lane* in the pariſh of *Stepney*. The defendant pleads in abatement, that he took the goods in *Nithingall-lane* in the pariſh of *St. John Wapping*, *abſque hoc* that he took them in *Nithingall-lane* in the pariſh of *Stepney*. *Et pro retorn' habend'* he ſets forth his title to the goods as a deodand.

Declaration in replevin amended after plea in abatement. Paſ. 1 Geo. 2. On the authority of this caſe the pariſh was amended, *inter Lord Gage* and *Robinſon*, after the ſame plea in abatement.

Hall Serjeant moved to amend the declaration, and alledge the place to be in the pariſh of *St. John Wapping*; for the one ſide of that lane to the cauſey is by act of parliament in the pariſh of *Stepney*, and the other ſide in the pariſh of *St. John Wapping*, and the goods were taken in that ſide of the lane which is in *Wapping*. The fact was, that a ſervant of the plaintiff's was driving a cart, and by chance he run over and killed a child; upon which the defendant ſeized the cart and horſes as a deodand, and the ſervant was tried for the murder, and found *per infortunium*.

Branthwayte Serjeant *contra*. If this ſhould be amended, all pleas in abatement will be ſet aſide. *Paſch.* 2 *Ann. Leper* v. *Germain*. *Aſſumpſit* was brought by bill againſt defendant as a knight, he pleads in abatement that he is a knight and baronet; and the court refuſed an amendment. *Hil.* 1 *Geo. Mears* v. *Bowes in C. B.* was the ſame caſe as this, and the court would not grant an amendment. Nothing is removed out of the county court but the plaint only; and therefore if iſſue is joined in the county court, the plaintiff muſt declare *de novo*.

1 Salk. 50.

C. J. In the caſe of *Leper* v. *Germain* there could not be any amendment, becauſe the commencement of the ſuit was wrong, and nothing to amend by. The foundation of amendments by the court, whilſt the proceedings remain in paper before they be recorded, is, That theſe papers, delivered to and fro, ſupply the declaring and pleading *ore tenus* at the bar, and may be amended as eaſily as if ſpoke at the bar. Theſe faults ſtiled errors of the clerk are amendable after the proceedings are recorded.

Afterwards upon deliberation the court granted leave to amend upon payment of coſts.

Thruſtout

Thruſtout *verſ.* Peake & al'.

Int. Trin. 8 Ann. rot. 108.

Deviſe to A. and B. for their lives, equally to be divided, and after their deceaſes to their heirs male of their bodies, equally to be divided, and if either of them die without iſſue, then to the ſurvivor and his heirs male. A. and B. make partition, and B. levies a fine and ſuffers a recovery of his part, and dies without iſſue. The entry of A. is taken away, and no title accrues to him by the ſurvivorſhip.

UPON Not guilty in ejectment for the manor of *Welhall* and other lands in *Com' Norf'*, on the demiſe of *Edmund Miller* Serjeant at law, the jury find this ſpecial verdict.

That *Roger Weſt* being ſeiſed in fee (*inter alia*) of the premiſſes in queſtion 23 *March* 1697, made his will in writing, wherein was the following clauſe, " And my further will is, and I declare, that " if it ſhall happen, that at the time of my death, I ſhall leave no " child or children begotten by me on the body of my ſaid dear wife, " or if ſhe be not with child or breeding at the time of my death, " then I give, deviſe and bequeath all and ſingular my manors, lands, " tenements, *&c.* which are freehold, in the counties of *Bucks*, " *Hertford* and *Norfolk*, or elſewhere in the kingdom of *England*, " unto my aforeſaid dear wife for and during her natural life, or ſo " long thereof as ſhe ſhall remain my widow. And *as for my eſtate* " in the county of *Norfolk* not as yet any ways diſpoſed of, but to " my ſaid wife for life or widowhood as aforeſaid, I hereby give, " deviſe and bequeath the ſame after the deceaſe or marriage of my " ſaid wife as aforeſaid, unto my nephews *Edmund Miller* and *Ro-* " *bert Sharrock* during their natural lives, *equally to be divided be-* Pollexf. 428. " *tween them, and after their deceaſes then to the next heirs male of* " *their bodies lawfully to be begotten, equally to be divided between* " *them*; but in caſe either of them the ſaid *Edmund Miller* and *Ro-* " *bert Sharrock* depart this life without ſuch iſſue, then I give, de- " viſe and bequeath the ſame eſtate in *Norfolk* to the other of them " for life, and after his deceaſe to the heirs males of his body law- " fully to be begotten." And for want of ſuch iſſue of both of them, he deviſed it over to others, with a remainder to his own right heirs, and then goes on; " Provided always, that if any of " the deviſees ſhould fell timber, other than for repairs or firewood or " likely to decay, it ſhould be a forfeiture of their particular and re- " ſpective eſtates."

They find further, that *Elizabeth* wife of the teſtator died in his life-time, and afterwards the deviſor died without iſſue. That the two deviſees *Edmund Miller* and *Robert Sharrock* entred and were ſeiſed

ſeiſed *prout lex poſtulat*; and by their indenture dated 5 *May* 1700, reciting the deviſe, and to the end that each party may know and enjoy his own ſhare and moiety in ſeveralty, "They the ſaid *Ed-* "*mund Miller* and *Robert Sharrock* do by theſe preſents, for them- "ſelves and their heirs males, make and deliver an equal, perfect "and abſolute partition of all the ſaid manors, lands, *&c.* to and "between the ſaid *Edmund Miller* and *Robert Sharrock* in two parts, "in manner and form following, (*viz.*) That he the ſaid *Edmund* "*Miller*, and the next heirs male of his body, ſhall have, hold and "enjoy to his and their own ſeveral uſe, according to the limitations "in the ſaid recited will expreſſed, *but for no greater or other eſtate*, "*or quantity of eſtate, than he or they can or may have by virtue of the* "*ſaid* Roger Weſt's *will*, all that the manor, *&c.* in full ſatisfaction "of all his the ſaid *Edmund Miller*'s and his next heirs male men- "tioned in the ſaid will, part, portion, ſhare and moiety, *but for* "*no greater or other eſtate than he can or ought to take by virtue of* "*the ſaid will.* So in like manner, that *Robert Sharrock* ſhall hold "and enjoy *all that the manor of* Wellhall *in* Gayton, *&c.* and each "covenanted to reſt contented therewith." That *Edmund Miller* and *Robert Sharrock* entred and enjoyed their parts in ſeveralty. That *John Lyng* proſecuted a writ of covenant *de manerio de Gayton Wellhall* againſt *Robert Sharrock*, *teſte* 2 *Oct.* 13 *W.* 3. *ret' Octabis Martini*, on which a fine was levied. And that by deed dated 2 *Oct.* 13 *W.* 3. it was covenanted between *Robert Sharrock*, *John Lyng* and *John Carter*, That *Robert Sharrock* ſhould levy a fine to *John Lyng of the manor of* Wellhall *in* Gayton, to the intent to ſuffer a common recovery, and that *John Carter*, before the end of *Michaelmas* term then next enſuing, ſhould ſue a writ of entry *ſur diſſeiſin en le poſt* againſt *John Lyng*, who ſhould vouch *Robert Sharrock*; which fine and recovery then to be levied and ſuffered ſhould be to the uſe of the ſaid *Robert Sharrock* in fee. That though this deed was dated 2 *Oct.* 13 *W.* 3. yet it was not executed till 26th *November* following, but nevertheleſs that it was executed before the ſuffering the recovery at bar. And that there is no other declaration of the uſes than as aforeſaid. That *John Carter* ſued a writ of entry *de manerio de Gayton Wellhall*, *teſte* 16 *Oct.* 13 *W.* 3. *ret' Craſtino Animarum*, upon which a common recovery was ſuffered, (which is found *in haec verba*) and a writ of ſeiſin thereupon proſecuted by the ſaid *John Carter teſte* 6 *November*, returnable *indilate*; upon which the ſheriff returned, that he delivered ſeiſin 24 *November*, which is two days before the execution of the deed. That the lands in the fine and recovery are the part allotted by the deed of partition to *Robert Sharrock*, and mentioned in the deed of 2 *October* 13 *W.* 3. That 16 *February* 1707, *Robert Sharrock* ſo ſeiſed died without iſſue, and that *Elizabeth Sharrock* his ſiſter and heir entered, and married *Patrick Seagrave*, Eſquire, who became ſeiſed in right of his wife,

upon whom the leſſor of the plaintiff entered, and made the leaſe, and was poſſeſſed until ejected by the defendants, *ſed utrum, &c.*

Reeve pro quer' argued, *Firſt*, That the two deviſees *Edmund Miller* and *Robert Sharrock* take only eſtates for their lives as tenants in common, with croſs remainders for their lives; and that the deviſe *to their next heirs male* is a remainder in contingency only, and not executed. If it had been to them for life, remainder to their heirs male, it had been an eſtate-tail executed. 1 *Co.* 66. *Archer's* caſe. Where by a deviſe to *Robert Archer* for life, and after to the next heir male of *Robert*, and to the heirs male of the body of ſuch next heir male, it was adjudged, that *Robert* took only an eſtate for life. (1*ſt*), Becauſe he had an expreſs eſtate for life deviſed to him; and (2*dly*), The remainder was limited to his next heir male in the ſingular number; though that ſecond reaſon given in *Archer's* caſe was denied for law, becauſe *heir* is *nomen collectivum*, and one can have but one heir at once, and this ſhall go from heir to heir. *Cro. Eliz.* 313. 1 *Roll. Abr.* 822. *K. pl.* 1. *Owen* 148. *Clark* v. *Day.* Yet *Archer's* caſe is good law; the true reaſon of that judgment was, becauſe the words of limitation *to the heirs male of the body of ſuch next heir male* were added to the *heir*; therefore *heir* was conſtrued to be *deſignatio perſonae.* 1 *Vent.* 216, 232. In the caſe at bar it is limited, by expreſs words, That they ſhall have but for life, and then conſequently the heirs ſhall take as purchaſors.

2*dly*, The words *equally to be divided* being added to the *heirs male*, as well as to the two deviſees, prove the intent of the teſtator to be, that the heirs male ſhould take as purchaſors, and not by way of limitation. Had the deviſe been to the two deviſees and to their heirs males, equally to be divided, theſe words *equally to be divided* might have been applied to the two deviſees; but here it being twice repeated, the laſt muſt be rejected, if the heirs are to take only by way of limitation. Theſe words in a will make a tenancy in common. 3 *Co.* 39. *b.* 2 *Rol. Abr.* 89. *Salk.* 390, 391. 1 *Vent.* 376. 2 *Vent.* 365.

The rule will be objected, when the anceſtor by any gift or conveyance takes an eſtate of freehold, and in the ſame gift or conveyance an eſtate is mediately or immediately limited to his heirs in fee, or in tail, that always in ſuch caſe *his heirs* are words of limitation of the eſtate, and not words of purchaſe. As to that rule, it only holds place where the remainder is executed, and not when the remainder is in contingency. 2 *Rol. Abr.* 418. *H. pl.* 5. *Litt. Rep.* 258.

3*dly*, The proviſo in the will for the deviſees to forfeit on cutting down timber, proves the deviſe to be but an eſtate for life; for if it is an eſtate-tail the proviſo is void. 1 *Vent.* 216, 232. *King* v. *Melling*. Such an argument from the proviſo is a forcible one.

Secondly, Whether the two deviſees ſhall not have croſs remainders for their lives by implication, with a remainder to their next heirs males in contingency only, and not executed; ſo that after the death of the one the ſurvivor ſhall have an eſtate for life in the whole, and not the heir male of the perſon deceaſed. *After their deceaſes* in the will ſhall be taken jointly, (that is) after both their deceaſes it ſhall remain to their next heirs male. Such a conſtruction ſhall be made in the caſe of a will, but in the caſe of a conveyance at common law ſuch words may be conſtrued diſtributively, ſo that after the deceaſe of either, his part ſhall remain to his next heir male. 5 *Co.* 7. *Wyndham's* Caſe. The words of a will ſhall be always followed, except the intent of the teſtator appear in the will to be contradictory to the words. 2 *Jones* 172. *Raym.* 452. *Holmes* v. *Meynell*, a caſe in point. 4 *Leon.* 14. Pollexf. 123.

If they take but an eſtate for life, the fine and recovery by *Robert Sharrock* was a forfeiture of his eſtate, and a right of entry was given to the other deviſee (the leſſor of the plaintiff) which is ſufficient to preſerve a contingent remainder. 1 *Vent.* 188. *Trin.* 6 *Annae*, *Tuckerman* v. *Jeffery*. That was a deviſe to two *femes*, *Elizabeth* and *Jane* for their lives, equally to be divided between them, remainder to the heirs of *Jane*. *Jane* died, and *Elizabeth* ſurvived; and the queſtion was, whether *Elizabeth* ſhould have the whole during her life, or the heir of *Jane* have that part immediately whereof *Jane* died ſeiſed? And the court held, that *Elizabeth* and *Jane* were jointenants, and that conſequently the ſurvivor ſhould have the whole during her life, and the heir of *Jane* have nothing till the death of *Elizabeth*. Therefore this conſtruction anſwers the words *after their deceaſes*, and does not deſtroy the authority of the caſe of *Holmes* v. *Meynell*. Deviſe to A. and B. jointly for life, remainder to the heirs of A. they are jointenants, and the ſurvivor ſhall have the whole for life. *Vide* Co. Lit. 184. a.

Thirdly, The following part of the deviſe, *If either of them depart this life without iſſue, then I give the ſame eſtate to the other of them for life*, cannot make it to be an eſtate-tail executed. 1. Becauſe an expreſs eſtate for life is only deviſed to them. 2. If it is an eſtate-tail it muſt be by implication, which is contrary to the rule of law, That no implication ſhall be allowed againſt the expreſs words of a deviſe. *Cro. Eliz.* 313. *Owen* 148. *Moor* 593. 1 *Rol. Abr.* 839. *pl.* 4. 11. which reports do differ.

C. J.

C. J. And neither of them right.

Reeve. Thoſe words cannot create it an eſtate-tail, by reaſon of the intervening contingent Remainders to the next heirs male of their bodies. *Cro. Eliz.* 315. *Cordall's* caſe. Where upon a deviſe to *Edward Cordall* for life, remainder to his firſt ſon, remainder to the heirs of the body of *Edward Cordall*, he then having no ſon, it was reſolved, that the eſtate-tail was not executed, for the poſſibility of the meſne eſtate intervening, and therefore it was disjoined during the life of *Edward Cordall*; though that caſe has been denied for law. 2 *Saund.* 386. And it has ſince been adjudged, that the remainder ſhall be veſted, till the contingent remainder comes *in eſſe*, and then the eſtates ſhall be opened and disjoined for the letting in of the contingent remainder, becauſe they were all created together by the ſame conveyance. 11 *Co.* 80. *Lewis Bowles's* caſe. 1 *Sid.* 83. 1 *Lev.* 36. 1 *Saund.* 386. 1 *Vent.* 345.

If they are jointenants for life, the queſtion will be, what the fine, recovery and deed of partition have done. They cannot affect the remainder, whether contingent or executed, nor alter the quality or quantity of the eſtate deviſed. The deed can amount only to an agreement, of what lands each party ſhall receive the profits. Though it is recited to be, *to the end that each might know his part in ſeveralty*, yet the deed is only, that each ſhall hold the lands according to the limitations of the will.

The recovery is found *in haec verba*, and appears to be no more than the hiſtory of a recovery. It is in the preterperfect tenſe, *J. C. petiit*, and not *petit*.

Eyre J. That cannot be taken advantage of here.

Reeve. The fine and recovery are not of the ſame manor, as the deed to make the tenant to the *praecipe*. The one is *de manerio de Gayton Wellhall*, and the other is *de manerio de Gayton in Wellhall*; and though the jury find the lands in the fine and recovery to be the ſame as in the deed, yet they do not find the manor to be the ſame. The fine and recovery are void, for there is no tenant to the *praecipe*; for the recovery is had, and judgment given, before the *teſte* of the writ of ſeiſin, which is 6 *November*, and ſeiſin delivered the 24th, and the deed is expreſly found not executed until the 26th. And the finding the deed executed before the recovery had at bar, being contrary to the record, is void. 11 *H.* 6. 42. The finding a perſon dead, who appeared in court at the trial, was held

to

to be a void finding. And therefore he prayed judgment for the plaintiff.

Branthwayte Serjeant *pro defendente*, admitted that this was a tenancy in common; but he argued, that it is an eſtate-tail, and not an eſtate for life only. The words *equally to be divided between them* were only to ſhew, that the teſtator intended a tenancy in common. *Cro. El.* 695. *Lewen* v. *Cox*. *Archer*'s caſe was adjudged but an eſtate for life, by reaſon of the limitation upon a limitation, (*viz.*) to the heirs of the next heir male, which limitation is not in the caſe at bar. The intent of the teſtator will be beſt made out, by conſtruing this an eſtate-tail; for he plainly deſigned the eſtate ſhould go in the family. Though it is expreſly given to him for life, and after his Deceaſe to his next heirs male, yet it is an eſtate-tail. *Carter* 170. 2 *Lev.* 58. 3 *Keb.* 42. 1 *Ven.* 214, 225. *Pollexfen* 101. *King* v. *Melling*.

1 Co. 66.

Deviſe to *A.* for life, and after his deceaſe to his heirs male, is an eſtate-tail, and not a bare eſtate for life with a remainder.

C. J. That is certainly ſo, you need not labour that conſtruction.

Branthwayte. The partition alters the quality, though not the quantity, of the eſtate. For the intent of the deed was, for each party to enjoy in ſeveralty. *Biſhop of Sarum* v. *Philips*, 11 *W.* 3. *rot.* 377. *termino Mich. in B. R.* On a writ of error of a judgment in *C. B.* in a *quare impedit*, where the plaintiff ſets forth, that *A.* and *B.* were jointenants of an advowſon in groſs, and by deed agreed to preſent by turns, and as tenants in common; and it was adjudged, that this deed amounted to a partition, and ſo the part allotted to *B.* deſcended to his iſſue; and a grant from the iſſue, under which the plaintiff claimed, was held good. Tenants in tail may make a partition, and thereby bind their iſſue if it is equal, if unequal, it will bind themſelves only. As to the exception, that there is no tenant to the *praecipe*; it is ſufficient if there be one at any time before the judgment. *Show.* 347. *Salk.* 568. And therefore he prayed judgment for the defendant.

1 Salk. 43, 754.

Reeve replied, Here is no tenant till after judgment. An advowſon may be parted, ſo as to preſent by turns; but by this deed they agree to continue ſeiſed of the ſame eſtate.

C. J. The partition will not alter the eſtate, it only alters the right of ſurvivorſhip. The difference in the names of the manor is not material. It appears there is no tenant made by deed, till after judgment. But the fine being levied, and no uſe declared, the recovery being immediately ſuffered of the ſame lands, and the writ of entry brought againſt the conuzee in the fine, ſhews that the

If a fine is levied, and no uſe declared, and a recovery had immediately againſt the conuzee, the fine ſhall be taken to make him a tenant to the *praecipe*. Salk. 676.

the intent of levying the fine was to make a tenant to the *praecipe*. This deviſe intends an eſtate-tail. *After their deceaſes* are but words of form; for if one deviſes to *A.* for life, and after his deceaſe to *B.* for life, yet *B.* ſhall take the eſtate if *A.* forfeits, enters into religion, or becomes incapable to enjoy it; and he ſhall not wait till the deceaſe of *A.* for the words were not meant as conditions. *Salk.* 230. 1 *Ven.* 199. What the jury mean, that the Deed was executed before the recovery had at bar, I know not; for the law takes no notice, when a recovery is had at bar.

Eyre J. *Equally to be divided* is no more, than if one moiety had been deviſed to one, and the other to the other; unleſs ſomething appears contrary in the will. Here can be no croſs remainders ſpringing after the death of one of the deviſees, becauſe it is limited *if either die*, *&c.* When a writ of entry is brought againſt the conuzee in a fine, there is no reſulting uſe.

Pratt J. *accord'*, and judgment *pro defendente niſi*, *&c.* and abſolute afterwards, no cauſe being ſhewn.

Dominus Rex *verſ.* Bigg.

The writing croſs the face of a bank note, is properly called an indorſement.

THE indictment ſets forth, that 19 *Feb.* 1714. *Joſhua Odams* being employed and entruſted by the governor and company of the Bank of *England*, to make and ſign bank notes, made and ſigned a bank note for 100 *l.* payable to *James White*, or bearer, 90 *l.* whereof was 22 *Feb.* 1714. paid to the bearer, and indorſed upon the ſaid note, which indorſement the defendant 1 *Mar.* 1714. *eraſit*, *contra pacem*, *&c.*

The defendant pleads not guilty, and the jury find this ſpecial verdict.

That *Joſhua Odams* was employed, and made the note as in the indictment ſet forth, and that 90 *l.* thereof was paid and indorſed *prout*, *&c.* That the defendant 1 *Mar.* 1714. with a certain liquor to the jury unknown, *totaliter expunxit et delevit* the words, letters and figures of the indorſement. That from the time of making the act 8 & 9 *W.* 3. *c.* 20. to 28 *November* 1697. the method of the company was, to write the indorſements upon the backſides of their notes in black ink. But that ever ſince, the method has been, to write the payments upon the face of the notes, croſs the writing, in red ink; which laſt mentioned writing has always ever ſince been called and eſteemed an indorſement, upon ſuch notes, *ſed utrum*, *&c.*

This cauſe was argued at *Serjeants Inn*, in *Fleet-ſtreet*, before all the Judges. And the queſtion was, whether the fact found by the jury would come within the general words of the indictment, and could properly be called an indorſement?

The defendant's counſel inſiſted, that the word *indorſement* ſignified a writing upon the backſide of any deed or paper, 2 *Mod. Caſ.* 86. *Salk.* 375. and that it being found, that the words razed out by the defendant were wrote upon the face of the note, he was no ways guilty of the fact in the indictment.

But it was held by all the Judges, That the defendant was guilty. For the writing upon the face of the note was of the ſame effect as an indorſement, and being introduced by the company in the room of writing upon the backſide, and always accepted and taken to be an indorſement, was within the words of the indictment.

Accordingly at the next ſeſſions of *oyer* and *terminer*, *King* C. J. of *C. B.* delivered the opinion of the Judges; and ſentence was pronounced againſt the defendant; who was afterwards pardoned, upon condition to tranſport himſelf to *Minorca*.

Dominus Rex *verſ.* Dawſon.

At Serjeants Inn *in* Fleet-ſtreet *before all the Judges.*

INdictment for that the defendant *tali die anno et loco* a bank note for the payment of 520 *l. fabricavit et contrafecit.* Upon not guilty the jury find a ſpecial verdict.

Fabricavit in an indictment denotes forgery, and evidence of altering or razing will be good

That *Conrade de Gols* being a perſon entruſted and employed by the governor and company of the Bank of *England*, 16 *January* 1715. made and ſigned a bank note for 220 *l.* which note was delivered to the defendant unaltered, who *eraſit et alteravit* the ſaid note, by turning the word *two* into the word *five*, whereby the ſaid note, which was made only for 220 *l.* purported to be a note for 520 *l.* by colour whereof the defendant had and received of the Bank 520 *l. ſed utrum, &c.*

The counſel for the defendant inſiſted, that the facts found in the verdict were not included in the general words of the indictment, *fabricavit et contrafecit.* That this was not counterfeiting or making a note, but only altering a note made. That this muſt be admitted to be a crime within the words of 8 & 9 *W.* 3. *c.* 20. concerning

concerning the Bank. But as the indictment is not for altering or razing, they prayed judgment for the defendant.

But the Judges were of opinion, that the indictment is well enough, for this was a plain forgery, if not a counterfeit, and *fabricavit* would denote as much.

Accordingly at the next ſeſſions *King* C. J. of *C. B.* delivered the opinion of the Judges, and ſentence was pronounced againſt the defendant, who was pardoned, upon condition to tranſport himſelf to *Minorca*.

Elwell *verſ.* Quaſh & al'.

The warrant of one executor is not ſufficient to enter judgment againſt the other.

THERE were three executors, one of which gave a warrant of attorney to confeſs a judgment againſt himſelf and his co-executors, purſuant to which a judgment was entered againſt all the executors *de bonis teſtatoris* for the debt, and againſt the executor, who gave the warrant, *de bonis propriis* for the coſts.

Upon motion to ſet this aſide, it was held to be ill, for executors may plead different pleas, and that which is moſt for the teſtator's advantage ſhall be received. 1 *Roll. Abr.* 929. *A.* 1. *B.* 5.

So *Paſ.* 1 *Geo. in C. B. Baldwin* v. *Church*, one executor pleaded a good plea, and the other a bad one; and on demurrer judgment was given *in C. B.* for both the defendants, but reverſed on error, and a new judgment given for the plaintiff againſt one executor only. This is really eſtopping the others from ſaying they are not executors, and being without their knowledge, it may be ſubjecting them to a *devaſtavit* for the paying of other debts.

The judgment was ſet aſide.

Hilary Term

3 Georgii Regis. In B. R.

Thomas *Lord* Parker, *Chief Juſtice.*
Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Pratt, *Knt.*
Sir Edward Northey, *Knt. Attorney General.*
Sir William Thompſon, *Knt. Recorder of* London, *Solicitor General.*

Dominus Rex *verſ.* Fox.

THE defendant being mayor of *Totneſs* the laſt year, was by the charter a juſtice of peace for the following year, without whom the ſeſſions could not be held. And the court granted an information againſt him for a voluntary abſence.

Information againſt a juſtice for abſenting from the ſeſſions.

Cole *and* Hawkins.

Intr. Paſ. 12 Ann. rot. 254 *or* 258.

PARKER, C. J. delivered the reſolution of the court.

In an *indebitatus aſſumpſit* the day is not material, and the alledging a different time in the replication is no departure.

This is an *indebitatus aſſumpſit*, laid 16 *January* 1706. The defendant has pleaded *actio non accrevit infra ſex annos.* The plaintiff has replied a bill filed 23 *January*, 12 *Ann.* and that the cauſe of action aroſe within ſix years before. The defendant has demurred generally, and it has been inſiſted on by his counſel that the replica-

tion is a departure, there being ſeven years diſtance between the day in the declaration, and the filing the bill as ſet forth in the replication.

But we are all of opinion notwithſtanding that the plaintiff muſt have judgment. This being only a parol promiſe, the time alledged in the declaration is only matter of form, not of ſubſtance; and not being a departure in a material point, is only a defect in form of pleading, which not being ſhewn for cauſe of demurrer purſuant to the act for the amendment of the law, the defendant cannot take advantage of it. If a verdict had found the promiſe, or the filing the bill to be another day, that would not have vitiated the proceedings. 1 *Lev.* 110. 1 *Keb.* 566, 578. *Hob.* 164, 199.

1 Salk. 222, 223. But in caſe upon a promiſſory note it is.

If the day had been ſubſtance it would have been a departure; and ſo it was adjudged in this court, *Paſ.* 1 *Geo. Stafford* v. *Forcer.* That was upon a promiſſory note dated in 1704. The defendant pleaded *actio non accrevit infra ſex annos*; the plaintiff replied a bill filed 12 *Ann.* and after a verdict the judgment was arreſted, becauſe in that caſe the day was material. If the day in this caſe ſhould be looked upon as ſuch, it would be in the defendant's power in almoſt all caſes to fix the time and place. As where the plaintiff brings an action of aſſault and battery in *London*, the defendant pleads he made the aſſault in *Middleſex*, and that afterwards the plaintiff releaſed all batteries except in *London*. By this he would make the place material, and the doctrine of bringing tranſitory actions where the plaintiff pleaſed, would fall to the ground, if the defendant ſhould be allowed by artificial pleading to make the time and place matter of ſubſtance. *Vide Co. Litt.* 282. *b.* *Yel.* 114.

Judic' pro quer.'

Dominus Rex *verſ.* Bond.

Filing of an inquiſition taken *ſuper viſum corporis* five years after the death, when only the head was to be found, ſtaid.

INquiſition taken *ſuper viſum corporis* of a man that hanged himſelf; and the jury find him poſſeſſed of a meſſuage, which as a *felo de ſe* he forfeited.

Pengelly Serjeant moved, to ſtay the filing of this inquiſition, upon an *affidavit* that the man died five years before, and the coroner dug up a ſkull, which he aſſured the jury he knew by a particular mark was the deceaſed's; and thereupon the inquiſition was taken: Which he inſiſted ought to have been upon view of the whole body, that the marks if any may appear. *Regina* v. *Clerk*,

The jury ought to view the whole body.

the court held that ſeven months was too late. *Salk.* 377. 2 *Mod. Ca.* 16.

Cur', Stay the filing till further motion.

Hawkſhaw *verſ.* Rawlings.

DEBT upon a bond. The defendant craved *oyer* of the bond, *et ei legitur, &c. petit etiam auditum conditionis ejuſdem ſcripti, et ei legitur in haec verba, ſcilicet*; which appears to be for the defendant and two other obligors, joined in the bond, to pay money at a future day, *quibus lectis* he pleads payment at the day by the other two obligors, and an acceptance by the plaintiff in ſatisfaction. The plaintiff, *proteſtando* that the other two did not pay, for plea ſays he did not receive in ſatisfaction *modo et forma*; and thereupon iſſue is joined, and a verdict for the plaintiff.

Where the defendant pleads a payment and acceptance in ſatisfaction, the plaintiff may take iſſue upon the acceptance, which will be an argumentative denier of the payment.

Sir *William Thompſon* moved, that a repleader might be awarded, for that this is an immaterial iſſue, the payment, and not the receipt, being proper to be put in iſſue.

Reeve of the ſame ſide. The bond being no where ſet forth in the *oyer*, but only the condition; it does not appear upon the record, that the two perſons who, it is pleaded, made the payment, were bound in the bond: For the action againſt the defendant is *quatenus* upon a ſingle bond, and then this payment will amount to no more, than a payment by a ſtranger, which will make the iſſue an immaterial one.

Sir *Robert Raymond contra*. It muſt be admitted, that there can be no payment in ſatisfaction, without a receipt in ſatisfaction: And therefore the denying the acceptance, is an argumentative iſſue, and will be good after a verdict. *Styles* 239. in *Mich.* 7 *W.* 3. *Young* v. *Rudd*. *Indebitatus aſſumpſit* for apothecaries wares; the defendant pleaded the delivery of a beaver hat, which the plaintiff received in ſatisfaction; the plaintiff, *proteſtando* that he did not give it in ſatisfaction, *pro placito* ſaith, that he did not receive it; and this was held a good iſſue. *Vide Hob.* 178. *Sty.* 239, 263. Salk. 627,

As to the ſecond exception. If that be wrong it is amendable. The *oyer* is at the plaintiff's requeſt, and ſhould have been ſet out by him, which he neglecting to do, ſhall not take advantage of his own default. Admitting the payment is not by the two obligors, but ſtrangers, yet where the defendant admits the plaintiff's cauſe of action, and pleads matter which is not a legal diſcharge,

charge, if iſſue be joined upon that, and a verdict againſt him, the plaintiff ſhall have judgment. 5 *Co.* 43. *Nicoll*'s caſe.

Payment by a ſtranger not good, but acceptance is. If a creditor has different debts, he may apply the payment to which he will. 2 Mod. Ca. 123. 2 Chan. Ca. 83.

C. J. Although payment by a ſtranger be not a legal diſcharge, yet acceptance in ſatisfaction is. Suppoſe a man owes me 100 *l.* upon bond, and another 100 *l.* upon another account, and he pays me 100 *l.* I may apply it to which I will; and though he paid it in ſatisfaction of the bond, yet if I did not receive as ſuch, it will be no diſcharge of the bond. And therefore in theſe caſes the acceptance is the clearer iſſue. There are two requiſites to work a diſcharge, 1. Payment, and 2. Acceptance. And a traverſe of the acceptance, is an argumentative denial of the payment.

No payment in ſatisfaction without an acceptance.

Pratt J. If by neceſſary conſequence the replication denies the plea, and a verdict paſs, the court may give judgment. There can be no payment in ſatisfaction, without an acceptance in ſatisfaction. And if the plaintiff ſays, that he did not accept in ſatisfaction; the conſequence is, that it was not paid in ſatisfaction.

Judgment *pro quer'*.

Andrews *verſ.* Franklin.

To pay within two months after a ſhip is paid off, is good in a promiſſory note.

CASE upon a promiſſory note to pay within two months after ſuch a ſhip is paid off, and counts upon the ſtatute.

Branthwayte Serjeant inſiſted, That this is not negotiable, it being upon a contingency which may never happen. *Jocelyn* v. *Laſerre*, *Hil.* 11 *Ann. rot.* 214. in *B. R.* upon a writ of error, was a bill to pay out of the drawer's growing ſubſiſtence, and that was held not to be negotiable as a bill of exchange.

Sed per Curiam, The paying off the ſhip is a thing of a publick nature, and this is negotiable as a promiſſory note.

Judgment *pro quer'*.

Goodright

Goodright *verſ.* Wright.

Intr. Hil. 11 Ann. rot. 412.

S. C. 1 Will. Rep. 397.

UPON not guilty in ejectment on the demiſe of *Richard Wood*, the jury find this ſpecial verdict.

Deviſe to *A.* and to his iſſue (*A.* dying in the life of the deviſor) is void, and his iſſue can take nothing; and a remainder limited to the right heirs of *A.* is void alſo. *Vide* Salk. 238. Lat. 137. 2 Sid. 53, 78. 2 Mod. 313.

But a deviſe to *A.* and *B.* and their heirs (*A.* dying before the deviſor) is a good deviſe of the whole to *B.* in fee. Carter 2. Salk. 238. Show. 91. Caſ. in Can. 121.

That *John Wood* being ſeiſed in fee of the premiſſes in queſtion, by his will in writing 28 *July*, 8 *W.* 3. 1696. deviſed the ſame to his couſin *Edward Bazill* for life, and after his deceaſe to the iſſue of his body; and in default of ſuch iſſue, to his two nieces *Margaret* and *Suſanna Wright*, and to the iſſue of their two bodies lawfully to be begotten; and for want of ſuch iſſue, to the right heirs of *Edward Bazill* for ever. That *Edward* and *Margaret* (two of the deviſees) died in the life of the deviſor without iſſue, and that *Suſanna* alſo died in the life of the teſtator, leaving one daughter *Margaret* the now defendant, who is alſo heir at law to *Edward Bazill*, and born 10 *October* 1702. That afterwards the teſtator died, and the defendant entered, upon whom *Richard Wood* the leſſor of the plaintiff as heir at law to the deviſor entered, and made the leaſe to the plaintiff, *ſed, &c.*

Branthwayte Serjeant *pro quer'* argued, That the deviſe to *Suſanna* is void by her death in the life-time of the teſtator. For every will muſt be conſtrued as an inſtrument whereby the land muſt be conveyed, and then ſuch a conſtruction muſt be made upon the will, as would be made upon a deed; except in this particular point, that the party may not be forced to uſe ſuch particular formal words, as muſt be made uſe of in a deed, (ſo that the words be ſufficient to ſhew the intent of the deviſor) becauſe the law ſuppoſes a will to be made by one *inops conſilii*; but however that intent muſt follow the rules of the common law. It is a general rule, which holds as well in the caſe of wills as of conveyances at common law, that by neceſſity there muſt be a donee *in eſſe* of capacity to take the thing given at the time when it ought to veſt; and if there be no ſuch perſon *in eſſe*, the gift is void. In this caſe there is no perſon capable to take the land, the deviſee dying in the life-time of the teſtator, at which time nothing paſſed.

It may be objected that here are other words *iſſue of the body*, which are *deſcriptio perſonae* that is to take. As to that objection, thoſe words *iſſue of the body*, are only named as words of limitation expreſſing the quantity of the eſtate which the deviſee ſhould take, and are not named to be immediate takers; for if ſo, other perſons will

will take the eſtate whom the deviſor neither knew nor intended ſhould take.

The making and commencement of every will muſt be conſidered, and not the conſummation, (the death of the teſtator) which is founded upon the commencement. At the making the will *Suſanna* had no iſſue; and therefore the teſtator could not intend, that the iſſue which ſhould be born after the making the will ſhould be a purchaſer. In *Brett* and *Rigden*'s caſe, *Plow.* 345. it was adjudged, that where a deviſe was to *Henry Brett* and his heirs, and *Henry* died in the life of the teſtator, the ſon and heir of *Henry* ſhould take nothing by the deviſe; and that lands purchaſed after the making of a will do not paſs by a deviſe of all his lands, becauſe the law reſpects the commencement and intent of the deviſor. And as to an objection that may be made, that this caſe differs from *Brett* and *Rigden*'s caſe, this being an eſtate-tail, and that a limitation in fee; *Hartop*'s caſe, *Cro. El.* 243. was a deviſe to *Thomas Hartop* and the heirs males of his body, with remainders over; *Thomas* died, leaving iſſue in the life of the deviſor; and there it was held, that the eſtate cannot veſt in the heir, becauſe it never veſted in the anceſtor; for the word *heirs* was a word of limitation, and not to give an immediate eſtate; for if it was to veſt in him, it muſt veſt in him as a purchaſor, and that was not the intent of the deviſor; which caſe was then held not to differ from *Brett* and *Rigden*'s caſe, *Cro. El.* 422. *Raymond* 408. 2 *Lev.* 243. 2 *Jones* 135. *Pollexfen* 546. Wherefore the deviſe being void, he prayed judgment for the plaintiff.

Reeve contra. That the word *iſſue* is a good word of purchaſe, either of a preſent eſtate, or of an eſtate by way of remainder; and not a word of limitation in a deed or conveyance at common law. And if ſo, it ſhall be the ſame in the caſe of a will, unleſs ſome certain intention of the deviſor may be found in the will to alter the ſame. And therefore he argued, That the defendant might take either as jointenant for life with her mother and her aunt, and ſhe being the ſurvivor will have a good title; for if *A.* deviſe to *B.* and to his iſſue, and *B.* has no iſſue at the time, *B.* has an eſtate-tail; becauſe the intent of the deviſor was, that the iſſue ſhould take; and therefore whenever it is demanded what eſtate ſuch a deviſee has, it depends upon the circumſtances of the family, whether the deviſee has iſſue at the time of the deviſe or no. The deviſee is not of neceſſity to be *in eſſe* at the time of the deviſe, therefore a deviſe to an infant *en ventre ſa mere*, is good. So a deviſe to *B.* his eldeſt ſon for life, and after to the eldeſt iſſue male of *C.* for life, is good, though *C.* had no iſſue at the time of the deviſe and death of the deviſor, 1 *Roll. Abr.* 612. *pl.* 3. Limitations of uſes have

have been coupled in the ſame conſtruction as has been made on wills; therefore if a man make a feoffment in fee to the uſe of himſelf for life, and of ſuch wife as he ſhould afterwards marry for her life, and after he takes a wife; they are jointenants, and yet they come to their eſtates at ſeveral times. *Moor* 96. 1 *Inſt.* 188. *a.* But he did not inſiſt much on this point, it being adjudged contrary in *Wild*'s Caſe, 6 *Co.* 16. The reaſon of the judgment in *Brett* and *Rigden*'s caſe, "That lands purchaſed after the making of the "will do not paſs by a deviſe of all his lands," depends upon the words of the ſtatutes 32 and 34 *Hen.* 8. "*that every perſon, having* Plow. 344. b. "*lands, may deviſe them.*" So that if the deviſor has not the lands at 3 Co. 30. b. the time of the deviſe, it is out of the words of the ſtatute, and *all* his lands, is no more than all he then had. *Pollexf.* 549. (Except there be a republication after the purchaſe. *Salk.* 237. *Pollexf.* 548. 1 *Vent.* 341.)

Secondly, The defendant may take by way of remainder for life. And for that *Wild*'s caſe, 6 *Co.* 16. is ſtrong in point, for there it is adjudged, that by a deviſe to a *baron* and *feme*, and after their deceaſe to their children, they having children at the time of the deviſe, the *baron* and *feme* take but an eſtate for life, with a remainder to their children; and that a deviſe to *B.* and to his children or iſſue, he having no children at that time, is an eſtate-tail; the deviſor intending that the iſſue ſhall take; and as immediate deviſees they cannot take, not being *in rerum naturâ*; and by way of remainder they cannot take, for the gift was immediate to them and to their uſe; by which caſe it is proved, that if the gift is not immediate, as it is not in the caſe at bar, there being future words, "*and to their* "*iſſue lawfully begotten*," the defendant may take by way of remainder for life. But he would not inſiſt much on this point, it having been ſettled, that by a deviſe to *B.* for life, and after his deceaſe to the iſſue of his body lawfully to be begotten, *B.* took an eſtate-tail, and not an eſtate for life only, with a remainder to his iſſue. *King* v. *Melling*, 2 *Lev.* 58. 3 *Keb.* 42. 1 *Vent.* 214, 225. *Pollexf.* 104. 1 *Sid.* 47. *Carter* 171. *Secus* in a deed, *Pollexf.* 583. where an eſtate is limited to *A.* for life, remainder to his firſt ſon in tail; for there *A.* is only tenant for life, and the ſon takes by purchaſe.

Thirdly, The defendant has a good title as iſſue of the body, though the deviſee died in the life of the deviſor, admitting the deviſe creates an eſtate-tail. This point has never yet been ſettled, for the caſe of *Brett* v. *Rigden* was of a deviſe in fee, which differs from a deviſe in tail. *Hartop*'s caſe was adjudged on another point, and in the caſe of *Fuller* v. *Fuller*, *Moor* 353. the court was divided; and *Popham* ſaid, that by a deviſe to *B.* and the heirs of his body,

if

if *B.* was dead at the time of the deviſe, the heir ſhould take as a purchaſor. If a man has iſſue three ſons, and deviſes his land to the eldeſt in tail, remainder to the ſecond in tail, *&c.* if the eldeſt dies (having iſſue) in his father's life-time, his iſſue ſhall have it, becauſe peradventure the deviſor did not know of the death of his ſon, who perhaps was beyond ſea, or otherwiſe abſent. The ſtatute *de donis* takes more care of the iſſue in tail, than of the tenant in tail himſelf, *quod voluntas donatoris in chartâ ſuâ manifeſtè expreſſa de caetero obſervetur.* There has not been one judgment whereby this point has been ſettled.

Fourthly, Which he chiefly relied on, admitting this to be an eſtate-tail, and the ſame conſtruction ought to be made on this eſtate, as upon an eſtate in fee; the defendant has a good title, being found heir at law to *Edward Bazill*, by virtue of the remainder limited to the right heirs of *Edward*; which limitation is valid in law, though the firſt deviſe in tail ſhould be void by the death of the deviſee in the life of the teſtator, for the intervening eſtate limited to *Margaret* and *Suſanna* prevents the conſolidation of the two eſtates of *Edward*; for the eſtate limited to the right heirs of *Edward* is a diſtinct eſtate, independant on the eſtate-tail before deviſed to *Edward*. *Litt.* §. 578. If a leaſe for life be made, remainder to another in tail, remainder over to the right heirs of the tenant for life, the tenant for life may grant over the ſame remainder to another by deed. This limitation to the right heirs of *Edward* is a new created eſtate, and does not depend on the other eſtate, for thoſe words, *right heirs*, are in this caſe words of purchaſe, and not words of limitation.

It may be objected, that it is a rule in law, "That when the "anceſtor by any gift or conveyance takes an eſtate of freehold, "and after an eſtate is thereby limited mediately or immediately to "his heirs in fee or in tail, that always in ſuch caſe *his heirs* are "words of limitation of the eſtate, and not words of purchaſe:" To that objection he inſiſted, that this rule of law extends only to ſuch caſes, where the anceſtor takes the eſtate limited to him; ſo that if the anceſtor never takes the eſtate, that rule can have no force. And in this caſe *Edward* never took any eſtate, and then the defendant as heir at law to him ſhall take the eſtate as a purchaſor. That the reaſon of that rule depends upon a ſuppoſition that the anceſtor takes the eſtate, is proved by 1 *Inſt.* 22. *b.* 319. *b.* 376. *b.* 1 *Co.* 104. *a.* *Shelly*'s caſe. 11 *H.* 7. 74. *per Hankford.* And therefore, if the deviſe to *Edward* and to his iſſue be void by his death without iſſue in the life of the teſtator, yet the remainder to the right heirs is good, being a diſtinct remainder: and no caſe proves, that a good remainder ſhall be tacked to a void deviſe, ſo as

Vide 1 Inſt. 298. a.

to avoid the remainder; wherefore he prayed judgment for the defendant.

Branthwayte replied, *Firſt*, That the defendant is found not to be *in eſſe* at the making of the deviſe, and therefore ſhe cannot take as jointenant; for all jointenants muſt be *in eſſe* when the eſtate ſhould veſt. Were they to take as jointenants, they could only take an eſtate for life, which conſtruction would overthrow the intent of the deviſor, which it is plain was to paſs an inheritance. It is a conſtant rule, that a deviſe to one and to his iſſue in a will creates an eſtate-tail, without conſidering the circumſtances of the family at the time of the deviſe, whether the deviſee had then iſſue or not; though the word *heirs* may be neceſſary in a deed; ſo is *Wild*'s caſe, and that caſe cited by my lord *Coke* out of *Bendloe*, is expreſly againſt the opinion for which it was cited.

Secondly, That the defendant ſhall not take by way of remainder the ſame anſwer proves, for then they would take only eſtates for life, when the deviſor intended a fee-tail. 3 Lev. 408.

Thirdly, The deviſe is void by the death of the deviſee in the life of the teſtator, for the iſſue cannot take as claiming from one who was never ſeiſed; the iſſue in tail does not claim *per formam doni* by virtue of the ſtatute *de donis* only, but alſo by deſcent from the donee in tail.

Fourthly, The heir cannot take it as a purchaſer, for on a limitation to one and to his heirs, the conſtruction has always been, that the heir ſhall never take as a purchaſer, without that diſtinction, when the anceſtor takes the eſtate and when not.

C. J. Had it been limited to *Edward Bazill* only for life, remainder to another for life, remainder to his right heirs; this remainder in fee muſt have veſted in *Edward*, drowning the firſt eſtate for life, and making his heir to claim by deſcent. *Wild*'s caſe is very oddly reported, and has miſtook the judgment of that caſe cited out of *Bendloe* as it is reported in *Bendloe*, and in 1 *Anderſon* 43. *pl.* 110. Where an eſtate is limited to one and his iſſue, it amounts only to a deſcription of that iſſue, for *iſſue* is more properly a word of deſcription, than of limitation. There can be no queſtion but that by this deviſe to *Edward* and to his iſſue he has an eſtate-tail, becauſe it is limited over, *and for want of ſuch iſſue then to another*. A deviſe to one and to his iſſue, is not reſtrained to the firſt ſon, but extends to all the iſſue *in infinitum*, (for *iſſue* is *nomen collectivum*) deſcending from the deviſee. I can ſee no colour of difference between an eſtate-tail and a fee-ſimple, and I believe the

Cro. El. 423. report of that ſaid by *Popham* in *Cro. Eliz.* is miſtook. The ſtatute *de donis* has nothing to do in this caſe, becauſe the tenant in tail never took the eſtate. He that takes by purchaſe muſt take at the time when the eſtate ſhould veſt. The defendant cannot take by deſcent, becauſe the anceſtor never took it.

Powys, J. *Litt.* §. 578. makes ſtrong againſt the defendant; for if the eſtate limited to the right heirs of *Edward Bazill* by the intervening eſtate-tail is diſtinct, and may be granted over by *Edward Bazill*; that proves, that *heirs* was meant only as a word of limitation, and not as a word of purchaſe, for elſe it could not be granted over by *Edward*, preſerving his firſt eſtate. And the reaſon why it may be granted over is, becauſe in judgment of law every man carries his heirs in his body.

Pratt, J. differed from the C. J. and conceived, that there was a difference between an eſtate-tail and in fee. The caſe of *Brett* v. *Rigden* muſt be allowed for law, that the deviſe by the death of the deviſee, living the teſtator, is void; and the reaſon is, becauſe the deviſor had no intent in the deviſe to benefit any perſon but the deviſee, for he did not know who would be heir at law to the deviſee. A man has power by the ſtatute to deviſe his lands, but he cannot raiſe ſuch an eſtate as is inconſiſtent with the rules of law. When a man gives his lands to one and to the heirs of his body, it is plain that the deviſor deſigned to benefit, not only the deviſee, but alſo the iſſue of his body, thereby altering the common courſe of deſcent; therefore it is provided by the ſtatute *de donis*, *quod donatoris voluntas*, *&c.* giving a benefit to the iſſue in tail, thereby intending to perpetuate the eſtate in his own name, and ſo intending a benefit to himſelf after his death. The iſſue are intended to have a benefit, though they were not *in eſſe* at the time of the deviſe, for the intent of the deviſor was, 1*ſt*, for the deviſee to take it; 2*dly*, his iſſue, not conſidering how they ſhould take; and then though the firſt deviſee cannot take it, dying in the life of the teſtator, yet ſo far as the will can take effect, (which it may do in the iſſue) it muſt take effect. If it is limited to one man, remainder to another, though the firſt limitation be fruſtrated by the death of the party, yet the other remainder is good. Deviſe to an infant *en ventre ſa mere* is good, by way of an executory deviſe; though the child is not born in the life of the teſtator: if the child is born, it is good by way of an immediate deviſe. Though a will cannot take effect *in omnibus*, yet as far as it can it muſt take effect. *Iſſue* is more properly a word of purchaſe than a word of limitation.

Upon this an *ulterius concilium* was granted, and the cauſe argued a ſecond time, and this term *Parker* C. J. delivered the reſolution of the court.

C. J. The queſtion is ſingly, whether the deviſe be ſubſiſting, or not? If it be ſubſiſting, the title is with the defendant; if not, with the plaintiff. Reſolution of the Court.

The caſe of *Brett* v. *Rigden* muſt be allowed to be good law; in which caſe it is reſolved, that there muſt of neceſſity be a grantee or donee *in eſſe* capable to take, when the eſtate ought to veſt, and that a deviſe to *Henry Brett* and his heirs (*Henry* dying in the life of the teſtator) could not take effect in the heir; and *heirs* in that caſe were only named to create an eſtate in fee in *Henry*, and not to make the heir take immediately by purchaſe but mediately by deſcent, and by *Henry*'s death the eſtate fell as much with reſpect to the heirs as himſelf.

The caſe at bar has been diſtinguiſhed from that in two particulars.

1. That the deviſe to *Edward Bazill* and his heirs is not an immediate deviſe, by reaſon of the intervening eſtates.

2. That a deviſe to *Suſanna Wright* and her iſſue, is different from a deviſe to her and her heirs.

Firſt, We are all of opinion that the intervening eſtate makes no difference. *His heirs* are words of limitation, and therefore like the caſe of *Brett* v. *Rigden*; the only difference is in the thing deviſed, one being an eſtate in poſſeſſion, and the other a remainder. *Litt.* §. 578. 1 *Inſt.* 319. *b.* In this caſe the anceſtor never took the eſtate, which he ought to have done, to make it veſt in him in remainder. *Shelly*'s caſe, 1 *Co.* 93.

Secondly, If *Suſanna* had ſurvived, ſhe would have had an eſtate tail; the words *iſſue of the body* create an eſtate-tail in her, and are as good an expreſſion for an eſtate-tail, as the word *heirs* of an eſtate in fee. *Iſſue of the body* being therefore words of limitation, the deviſe of the eſtate-tail is void by the death of *Suſanna* in the life of the deviſor. The difference as to this between an eſtate in fee and in tail is not material, for if I deviſe one eſtate to *A.* and his heirs, and another to *B.* and the heirs of his body, it is in the power of *B.* to make this laſt eſtate as large as the deviſe to *A.* in fee.

It will be of dangerous conſequence to alter reſolutions in theſe caſes, it is removing the antient land-marks; and the authority of *Brett* and *Rigden*'s caſe, is not be conteſted, which is not materially variant from this. But admitting it to be ſo, yet *Hartop*'s caſe, *Cro. Eliz.* 243. was of a deviſe in tail, and there it was held, that the deviſee dying in the life of the deviſor, the deviſe could not take effect in the iſſue; and in the caſe of *Fuller* v. *Fuller*, *Cro. Eliz.* 423. all the Judges agreed with the reſolution in *Hartop*'s caſe, although *primâ facie* it may ſeem as if *Fenner* and *Popham* were *contra* to *Gawdy* and *Clench*; yet upon nice obſervation it will be found, that they differed only with reſpect to the new publication, and not to the other point. *Popham* puts this caſe: If a man has iſſue three ſons, and deviſes the land to his eldeſt in tail, remainder to the ſecond in tail, remainder to the third in fee, and the eldeſt dies having iſſue in the life of his father, his iſſue ſhall have it without a new publication. But the reaſon is, becauſe the heir of the eldeſt ſon was alſo heir at law to the deviſor, and no intent appeared to diſinherit any of his ſons: And *Popham* ſaid it might be otherwiſe on a deviſe to a ſtranger (which is the caſe at bar).

If the deviſor had died immediately after making his will, the effect would have anſwered the intent; for then the word *iſſue* would have been a word of limitation in all the eſtates, and if that were the ſenſe at the time of making the will, it ſhall be taken to be ſo ſtill.

It was objected, that this is an eſtate-tail raiſed rather by operation of law than the intent of the party. (Anſwer) The law takes that to be his Intent, for upon a deviſe to *A.* and to his iſſue, or after *A.*'s death to his iſſue, the law has always conſtrued this to be an eſtate-tail. If *A.* has two ſons and four daughters, and dies before the deviſor, the eldeſt ſon inſtead of having the whole would have but a ſixth part, if it ſhould be conſtrued that the iſſue ſhould take by way of remainder; whereas the intent of the deviſor was, that the eldeſt ſon ſhould have the whole during his life, which is a plain demonſtration that the law takes ſuch a deviſe to be an eſtate-tail. 1 *Ven.* 228.

The ſuppoſition of a kindneſs intended to the iſſue will be no argument in favour of the defendant, becauſe it has been always thought that a deviſe to a man and his iſſue is a kindneſs to him, for by conſtruction of law he carries his heirs in his own body. In this caſe the remainder man is more conſidered by the deviſor than the iſſue in tail. The deviſe was for the ſake of the father, that

that he made it ſo large, and for the ſake of him in remainder that he made it no larger. He cannot be ſuppoſed to have had any particular affection for the iſſue, there being none *in eſſe* at the time of the deviſe.

The plain uſe of the words was to give *Suſanna Wright* an eſtate-tail. If ſhe had lived ſhe would have enjoyed it, but by her death the eſtate is determined. There is no difference between an eſtate in fee and in tail, for in both Caſes the Deviſee muſt be *in eſſe*.

The ſame anſwer ſerves for the remainder to the right heirs of *Edward Bazill*, who never took the eſtate, and therefore could not convey a deſcent to his heirs.

There is no inconvenience in putting the deviſor in theſe caſes to review his will; and the caſes of *Brett* v. *Rigden*, and *Hartop*'s caſe, are founded upon good reaſon and authority, and are not now to be over-ruled.

Judicium pro querente.

The defendant immediately delivered into court a writ of error *coram vobis*, and the court demanding of her attorney what error he had to aſſign, he told them infancy in the defendant, who had appeared by attorney, as error in fact.

C. J. The defendant ought not to be allowed to aſſign this error in ejectment, for he comes in of his own accord, and prays to be made defendant, which the plaintiff cannot oppoſe. This is an abuſe upon the court, and the attorney ought to be committed.

Infancy in defendant in ejectment and appearance by attorney ought not to be aſſigned for error.

Whereupon the attorney withdrew his writ of error, and the court gave him a fortnight to bring error in the Exchequer Chamber, upon the matter of law, and in the mean time execution to ſtay, and directed the record here to be amended, and the defendant made to appear by guardian.

Dominus Rex *verſ.* Powell & al'.

RULE for the proſecutor of an information *in natura de quo warranto*, to pay coſts for not going on to trial, was moved to be diſcharged. *Sed per Curiam*, In the caſe of the King there can be no *laches*; but a ſubject in theſe proſecutions ſhall pay coſts as in common actions. Executors and adminiſtrators pay coſts for not going on to trial. Rule to pay coſts.

Proſecutor of information in nature of *quo warranto* ſhall pay coſts, 9 Ann. c. 20.

Cork *verſ.* Baker. In C. B.

Intr. Trin. 11 Geo. rot. 1483.

Statute of Frauds and Perjuries extends only to contracts in conſideration of marriage, and not contracts to marry.

THE plaintiff declares, that in conſideration ſhe promiſed to marry the defendant, he promiſed to marry her at his father's death, who is ſince dead, but the defendant refuſed ſo to do, and has ſince married *A. B.* which ſhe lays to her damage 1000 *l.* and upon *non aſſumpſit* obtained a verdict for 300 *l.*

The defendant moved in arreſt of judgment, that this *parol* promiſe is not good in law. But after argument it was held, that this is not within the ſtatute of frauds and perjuries, which relates only to contracts in conſideration of marriage; and that the caſe in 3 *Lev.* 411. has been contradicted by later reſolutions. The defendant having married another perſon, has diſabled himſelf to perform the promiſe, and therefore the plaintiff cannot apply to the ſpiritual court to have a performance decreed, but muſt be repaid in damages here.

Judicium pro querente.

Godfrey *verſ.* Norris. At Guildhall.

The witneſs being adminiſtrator *de bonis non* of the obligee, proof of the hand was allowed.

DEBT upon a bond, *Non eſt factum* pleaded, and iſſue thereupon.

The plaintiff was adminiſtrator *de bonis non* of the obligee, and the only ſurviving witneſs to the bond; and the proof given upon this iſſue was only a perſon who ſwore to the hand-writing, and alſo ſeveral letters from the obligor making mention of this bond.

To this it was objected by the other ſide, that the hand-writing is not ſufficient proof, where the witneſs is living. That it was the fault of the plaintiff to bring himſelf under this incapacity; he might have let another perſon have taken adminiſtration for his uſe, or adminiſtration *quoad* this bond only.

But it was ruled *per Parker* C. J. that this was good evidence; and he likened it to the caſe of a will, where the witneſs afterwards happens to be a deviſee under the will, in which caſe if there be no other witneſs, proof of the hand is allowed.

Whereupon the plaintiff obtained a verdict.

Lockart *verſ.* Graham.

Coram King *C. J.* de C. B. *at* niſi prius.

WHERE there were three obligors, and the action brought againſt one of them only, the other obligor was allowed to be a witneſs to prove the execution of the bond by the defendant; after a caſe had been made of it at *niſi prius*, and conference with *Tracy* and *Dormer*, Juſtices.

One obligor witneſs to prove the delivery by the other.

Sacheverell *verſ.* Sacheverell.

At Serjeants Inn *in* Chancery-Lane, *before a court of Delegates*, 5 March 1716.

THE marriage of the plaintiff came in queſtion after her huſband's death upon granting adminiſtration, and it appeared they were married under feigned names at the *Fleet*. The widow produced an *affidavit* of the inteſtate's, made by him before a ſurrogate of *Doctors Commons*, that he was married to her; which affidavit agreed with the regiſter, and referred to it. But it was objected, that the taking this *affidavit* was an extrajudicial act, there being nothing at that time before the eccleſiaſtical court; but the court here allowed it to be read in confirmation of other evidence. And the appeal was diſmiſſed with 100 *l.* coſts, and the marriage confirmed.

Affidavit of a dead man read to prove his marriage tho' taken before a ſurrogate, no cauſe being in court. 1 Will. Rep. 675.

Brown *verſ.* Barkham. In Canc'.

SIR *Edward Barkham* having no iſſue of his own, and only one ſiſter, and two couſins, *Robert* and *Edward Barkham*, 19 *Jan.* 1709. made his will, and deviſed the lands in queſtion to truſtees and their heirs, "in truſt to ſell ſufficient to pay my debts, and to "convey the reſidue to my couſin *Robert Barkham* and the heirs "males of his body, and in default of ſuch iſſue to the heirs males "of the body of my great grandfather Sir *Robert Barkham*, remain-"der to my own right heirs for ever." Then he gives the intereſt of 2000 *l.* to his ſiſter for her life, and the principal to her children after her death.

On a deviſe to the heirs males of the body of *A.* one who is heir male and not heir general ſhall nevertheleſs take by purchaſe.

Robert the firſt deviſee died without iſſue in the life of the deviſor, then the teſtator died, leaving a ſiſter, who is heir general to

Sir

Sir *Robert* the great grandfather; but the defendant *Edward Barkham* is heir male of the body of the great grandfather.

The queſtion was, to whom the truſtees ſhould convey the ſurplus, whether to the ſiſter, as heir general of the deviſor, or to the defendant as heir male of the body of Sir *Robert* the great grandfather, remainder to the right heirs of the deviſor.

This caſe was argued very largely at the bar. And *Cowper* Lord Chancellor took time to conſider of it, and this term pronounced his decree.

Lord Chancellor. If the manifeſt intent of the teſtator, expounded by natural reaſon, without regard to legal reſolutions, were to govern in this caſe; I ſhould think it would hardly admit of a queſtion. But ſince there is an artificial reaſon in the law, which ſometimes ſtands as oppoſed to natural (which is right) reaſon, and is founded upon the opinions and reſolutions of Judges, and that taken and allowed to be law; the courts both of law and equity ought to ſubmit to them, when they are fully examined and found to be thus ſettled; becauſe otherwiſe the law would be an uncertain undetermined rule, and lawyers would not know how to adviſe their clients. I ſhall therefore inquire how far this court is hindred in the preſent caſe by the fixed rules of law, from purſuing the plain intent of the teſtator, which was no doubt that the conveyance ſhould be made to the heirs males of the body of Sir *Robert* the great grandfather, and not to a female, who is heir general to himſelf, as long as there are any heirs males of the body of the great grandfather.

Firſt objection. The firſt objection inſiſted on was, that it has been often adjudged, that he who takes as a purchaſer by the words *heir of J. S.* immediately, muſt be compleatly heir of *J. S.* and that no perſon can take as heir whilſt his anceſtor lives.

I anſwer, That this maxim, and the caſes founded upon it, are very foreign to the preſent queſtion; one main ground of the reſolution founded on this rule is, that the term *heir* in a legal ſenſe denoting the perſon who is to take after the death of an anceſtor, cannot be uſed as a proper deſcription of a perſon whoſe anceſtor is living, for the terms of the deſcription are not then verified. But in this caſe they are compleatly verified; the anceſtor is dead, and the perſon who aſks the conveyance, is heir male of his body, and as ſuch he is allowed by all to be capable to take by deſcent: But they ſay not by purchaſe. What grounds there are for that diſtinction will be conſidered hereafter; at preſent I ſhall only obſerve, that

that *Edward Barkham* having all parts of the deſcription verified in him, his caſe is different from that of *Chaloner* v. *Bowyer*, 2 *Leon.* 70. where a deviſe was to the youngeſt ſon for life, remainder to the heirs of the body of the eldeſt; the youngeſt died in the life of the eldeſt, and the ſon of the eldeſt could not take. Why? becauſe he anſwered neither part of the deſcription, for he was neither heir, nor heir of the body of his father, while he was living; and this objection will hold in many other caſes.

The ſecond objection, which ſeems to ſtand in the way of natural reaſon is, that there are caſes in which it is held, that none can purchaſe by the words *heir male of the body of J. S.* unleſs he be heir general as well as heir male. Second objection.

I have met with but few caſes which can be urged with any colour of reaſon for the proof of this aſſertion; one is that of *Counden* v. *Clerk*, *Hob.* 31. in which it is ſaid, that when the limitation is made to the heirs male or female of the body, they that will take muſt have both words verified in them, (that is) they muſt be both heirs, and alſo heirs male or female; and he gives this reaſon for it, that this is clearly without the letter and intent of the ſtatute of *Weſtm.* 2.

In anſwer to the authority of this caſe,

1. I obſerve, that this was not the point then in queſtion, but only an opinion of *Hobart*'s, declared incidentally in the argument of the caſe, and therefore ought to have the leſs weight.

2. The reaſon that is given for it is by no means ſatisfactory, or a good one; for the ſtatute *Weſtm.* 2. is no ways pertinent to the queſtion. The whole effect of that ſtatute is, to prevent the alienation of eſtates which before were conſidered at common law as fee-ſimples conditional, and alienable after iſſue had; and how this is applicable to the queſtion concerning the deſcription of a purchaſer, and whether certain words will be ſufficient for that, I cannot imagine. The ſtatute only governs eſtates when they are veſted, but meddles not with the deſcriptions that are neceſſary to paſs thoſe eſtates. The words *heir male of the body of* J. S. were certain and known words of purchaſe at common law, and need not the aid of the ſtatute to make them ſo.

3. By what *Hobart* ſays afterwards in the ſame caſe, it may well be concluded, that had it been the point in judgment, he would have been of opinion, that a man might take by the deſcription of

the heir male of the body of *J. S.* though he is not heir general, but a female is: For he takes notice that in the caſe then in queſtion, the *heirs males* were not reſtrained to any body, which (ſays he) might have had ſome colour of help from the ſtatute *de donis.* This great man could not paſs over his own aſſertion which he made before, without ſome remorſe of judgment, if it was his aſſertion; but I rather take the words *of the body* to have been added by an unſkilful tranſcriber of the copy. So that upon the whole I think, that caſe of *Counden* v. *Clerk* of very little weight in the preſent queſtion; but the point there adjudged is doubtleſs good law.

Another caſe urged for the plaintiff is *Shelley*'s caſe, 1 *Co.* 103. which is tranſcribed into his *Co. Litt.* 24. *b.* This is indeed an authority (ſuch as it is) in point, that one cannot take as a purchaſer by the words *heir male of the body of J. S.* unleſs he be heir, as well as heir male. But in anſwer to this I obſerve,

1. That this point was not adjudged in *Shelley*'s caſe; it is only the argument of counſel, which the court in delivering their opinion took no notice of.

2. The authorities in the margin of *Co. Litt.* which are cited to ſupport this caſe, are moſt of them very little to the purpoſe, and do by no means prove it. That of *Huſſy* in *Bro.* tit. *Done* 42. makes rather againſt this poſition; and that of *Dyer* 374. *a.* is only a ſhort ſketch of *Shelley*'s caſe, and the leſs to be regarded, becauſe it differs from the elaborate report of that caſe by *Coke.*

Having thus far cleared the preſent queſtion from theſe two great authorities; there remains only one other, which I ſhould not think very material to be taken notice of, had not the counſel for the plaintiff thought it of ſo great moment, as to deſire a rehearing upon the diſcovery of it. It is the caſe of *Starling* in this court, 8 *W.* 3. and was thus: *A.* deviſed lands to *J. S.* for life, and then to truſtees, in truſt to convey them to the next heir male of the teſtator. And it was decreed, that the truſtees could not convey to the next male relation, becauſe he was not heir, which was certainly right, and the very point reſolved in the caſe of *Counden* v. *Clerk*, and in that of *Aſhenburſt*, which is cited in it; and the reaſon is, that the words *heir male* are not a ſufficient deſcription without adding *of the body*, and they are not anſwered, unleſs the perſon be both heir and male; nor are they ſufficient to paſs an eſtate by deſcent, any more than by purchaſe. Indeed in caſe of a will, the words *of the body* are ſupplied, ſo as to make it an eſtate-tail, in the perſon that takes it; but then the perſon that is to take it muſt be heir as well as male.

Having now gone through all the caſes that were urged for the plaintiff, which I believe are all that could be urged; and it appears to me that many of the points in them are not pertinent to the preſent queſtion, and thoſe that were, *gratis dicta*, and the arguments of counſel, without grounds either from reaſon or former authorities to ſupport them; I ſhall now proceed to ſhew, that a man may take by limitation, or purchaſe, as heir male of the body of *J. S.* though he be not heir general, and that for theſe reaſons.

1. The law allows a man to purchaſe by a ſufficient deſcription, though neither his chriſtian or ſurname be part of it, and that the words *heir male of the body of J. S.* are a ſufficient deſcription of that particular heir, though he be not heir general.

2. The judicial authorities that a man may take as a purchaſer by the words *heir male of the body of J. S.* without being heir general, greatly over balance thoſe that hold the contrary.

Firſt, As to the firſt point, it is ſo certain a principle in law, that a man may purchaſe by other deſcriptions as well as by his name, that it has been adjudged the words *abbot or biſhop* of a certain place, would be a good deſcription, though the name of the perſon be miſtaken. *Co. Lit.* 3. *a.* But to make a good deſcription there are three things requiſite, all which concur in the preſent caſe.

1. It muſt be true; it is true, that *Edward Barkham* is heir male of the body of the teſtator's great-grandfather, which is manifeſt, becauſe otherwiſe he could not take an eſtate by deſcent as ſuch, in caſe the great-grandfather had been ſeiſed of it to himſelf and the heirs males of his body, which all allow he would; and why he may not by purchaſe I cannot conceive, for the deſcription is as true in the caſe of a purchaſe as a deſcent, and why ſhould it not then be good as well in the one as the other. They ſay the ſtatute *de donis* aids in the caſe of deſcent, but not in purchaſe; but I have already ſhewn that the ſtatute does not at all relate to this point, for it meddles not with the deſcriptions that are to paſs eſtates; and therefore if *heir male of the body of J. S.* be not a ſufficient deſcription, that ſpecial heir could not have any aid from the ſtatute, and if it be a ſufficient deſcription, he does not want the aid of it. And the preſent caſe is the ſtronger, becauſe the great-grandfather was dead at the time of the deviſe; ſo that the maxim *quod non eſt heres viventis*, is not in the way, but all the words are immediately verified at the time of the deviſe. It is ſaid indeed, they are not, becauſe the male is not heir in this caſe; but the very ſtating of this matter will expoſe it as contrary to common ſenſe and reaſon; for it

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is manifeſt the teſtator intended, that his heir general ſhould not have theſe lands, unleſs he was a male alſo, and therefore he adds thoſe words to reſtrain the general ſenſe of the word *heir*, and to confine it to a ſpecial heir. If lands of the nature of *Borough Engliſh* at common law be deviſed to my heir according to the cuſtom of *Borough Engliſh*, by this the teſtator muſt mean, his youngeſt ſon ſhould take. But to prevent the taking in this caſe they would have you ſtop at the word *heir*, and then this ſpecial heir cannot take; but if you take all the words together then he may, for the words the teſtator has uſed are plain, certain, and well known in law, to deſcribe the perſon the teſtator manifeſtly intended ſhould take by them.

2. The ſecond thing requiſite to make a perfect deſcription is, that it be certain, and applicable to the thing deſcribed and no other. And this is ſo in the preſent caſe, for *Edward Barkham* is heir male of the body of the teſtator's great-grandfather, and no other perſon is ſo.

3. The third requiſite is, that it be expreſſed in proper words. This is not always neceſſary in a will, but here they are proper even in the caſe of a will, for the words *heirs males of the body* are the proper, and indeed the only words that can be uſed, to diſtinguiſh that ſpecial heir, from the general heir. Sometimes the word *right* is uſed with *heirs*, but improperly in caſes of this nature.

Thus you ſee all the things requiſite to make a perfect, certain deſcription, concur in this caſe; and therefore ſince it has been proved, and indeed cannot be denied, but that a man may take by any other good deſcription as well as by name, it evidently follows that he may take by this.

Secondly, I come now to ſhew that the judicial authorities that a man may take as a purchaſer by the words *heirs male of the body of J. S.* though he be not heir general, do greatly over ballance thoſe that hold the contrary.

Vide Salk. 679. Sir T. Jones 99. 1 Ventr. 334. 2 Lev. 232. Raym. 330. 3 Keb. 830.

The firſt caſe I ſhall mention is that of *Burkett* v. *Durdant*, 2 *Ver.* 311. which was adjudged in the houſe of lords; and the caſe of *James* v. *Richardſon* in *Pollexfen* 457. is the ſame. The caſe was thus: A man deviſed lands to *A.* for life, remainder to the heirs males of the body of *A.* now living, and for want of ſuch iſſue remainder over; and it was reſolved, that there paſſed an eſtate for life only to *A.* and that the remainder immediately veſted in the heir male of the body of *A.* then living; becauſe thoſe words were a a ſufficient *deſignatio perſonae*, who was intended to take; and this

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is a ſtronger caſe than the preſent, becauſe the anceſtor being alive, he could not ſtrictly ſpeaking have any heir; but thoſe words being uſed in common parlance to denote the perſon who would take as heir male, if the anceſtor were dead, that was thought ſufficient. As for the words *now living*, I do not think they were very conſiderable in that caſe, for they only ſhew that the teſtator intended, that ſome body who was then alive ſhould take.

The caſe of *Long* v. *Beaumont*, which was decreed in the Houſe of Lords, *Paſ.* 13 *Ann.* has not theſe words *now living*, and yet *heir male of my aunt Long*, was adjudged a good deſcription of the perſon that was to take, though the aunt was ſtill living, and conſequently he was neither heir nor heir male, nor was it certain he would be heir male of her body at the time of her death. 1 Will. Rep. 229.

The caſe of *Pybus* v. *Mitford* was thus: (1 *Ven.* 372.) *Mich. Mitford* was ſeiſed of the lands in queſtion, and had iſſue *Robert* by his firſt *venter*, and *Ralph* by *Jane* the ſecond, and covenanted to ſtand ſeiſed to the uſe of his heirs males begotten of the body of his ſecond wife; the queſtion was, whether *Ralph* could take. The Judges, to ſupport the intent of the party, raiſed a fine-ſpun notion of a reſulting uſe, which indeed was very well laboured by them; but *Hale* in delivering his opinion inſiſts upon the point now in queſtion, and argued very ſtrongly and clearly, that the words *heirs male of the body of J. S.* are good words of purchaſe; and puts the caſe of a gift to one and his heirs female of his body, and he has a ſon and a daughter, the daughter ſhall take. *Litt. ſect.* 22. And by ſeveral other caſes there quoted, he ſays it appears, that no regard is had whether the ſon be heir of the huſband, if he be the heir of their two bodies; and then cites a caſe which was adjudged in Queen *Elizabeth*'s time, which ſeems directly to the preſent queſtion: A man had three daughters and a nephew, and he gives 2000 *l.* to his daughters, and his land to his heir male; provided, that if his daughters troubled his heir, then the deviſe of 2000 *l.* to them ſhould be void; and it was adjudged that the limitation to his brother's ſon by the name of heir male was a good name of purchaſe; and ſays he, this agrees with *Counden* and *Clerk*'s caſe, in *Hobart*.

Theſe reaſons and theſe authorities made ſo ſtrong an impreſſion upon Juſtice *Wild*, that he immediately declared himſelf convinced, and that he was of the ſame opinion with *Hale*; and for my part, I think they are ſufficient to ſatisfy any reaſonable man.

Trin. 8 *W.* 3. *in C. B. rot.* 1484. *Baker* v. *Wall.* *J. S.* by his will deviſed his lands "to *Daniel* my eldeſt ſon, and to my heirs "males

" males for ever; and if my heir ſhould be a female, my ſaid heir " male ſhall pay my heir female 12 *l. per annum* out of my lands, " I mean my heir male, for ever." The teſtator died, and *Daniel* died, leaving iſſue one daughter only; and it was reſolved, that *John* the brother of *Daniel* ſhould take the eſtate by the deſcription of heir male of the teſtator, though the words *of his body* were not in; but the teſtator's intent appearing ſo plain, that an heir female ſhould not hinder the next heir male from taking, they gave judgment for the male.

S. C. 2 Vern. 729.

Upon the whole I am of opinion, that the words *heirs male of the body of his great grandfather* are good words of purchaſe, to paſs the eſtate to him who is heir male, though not heir general. 1. Becauſe common ſenſe, natural reaſon and underſtanding, and the manifeſt intent of the teſtator, call aloud for this juſtice. 2. Becauſe the legal authorities that are urged for the contrary opinion are of themſelves but of very little weight. 3. Becauſe the reſolutions that have been in favour of this opinion, do greatly overballance thoſe of the other ſide.

The next inquiry is, how the truſtees in this caſe ſhall execute their truſt. And it muſt be obſerved, that though the teſtator directs the truſtees, to convey the ſurplus to the heirs males, in the plural; yet that is well purſued by conveying to the heir male in the ſingular number, and to his heirs male; for ſo the legal ſenſe of thoſe words is, as was reſolved in *Shelley*'s caſe. And it is moſt properly expreſſed in the plural number, becauſe then the words denote both the perſon to take, and the eſtate to be taken. Let the conveyance be made to the perſon who is heir male of the body of the teſtator's great grandfather, and the heirs male of the body of the great grandfather. In this I follow the law, which executes conditions executory as near as may be, where the words cannot be ſtrictly purſued; and a court of equity ought to execute truſts, as the courts of law do things executory.

Dominus Rex *verſ.* Hunt & al'.

Mandamus.

THE court granted a *mandamus* on 1 *Geo. c.* 34. directed to the juſtices of the peace, to allow the defendants, being conſtables, the extraordinary charges in providing carriages on the late expedition into *Scotland.*

Dominus Rex *verſ.* Theed.

THE writ *de excommunicato capiendo* was in a ſuit *pro correctione morum* generally, and held to be ill on the authority of *Rex* v. *Gapp*, *Paſ.* 1 *Geo.* which was *in quodam negotio pro reformatione et correctione morum.*

Excommunicato capiendo may be ſuperſeded. Salk. 294. Mod. Ca. 58.

After the writ had been opened and entered of record, it was delivered out in order to take up the defendant; and before the return the defendant moved and had it ſuperſeded; for the court ſaid, they could judge of it by the entry, and ſince it appeared, the defendant could not be legally detained upon it if he was taken, it was proper to ſuperſede it, to prevent the man's being reſtrained of his liberty contrary to law: That the intent of 5 *Eliz. c.* 23. which directs the writ to be delivered in open court, was to apprize the court of the nature of the cauſe; that this was now to be conſidered as a writ that *improvide emanavit*, and they were not to wait till the return, till all the inconveniences which they ſhould have prevented by not iſſuing the writ had happened.

Dominus Rex *verſ.* Eyre.

A *Scire facias* was brought to repeal the grant of a market to the defendant, ſuggeſting that it was to the prejudice of the Duke of *Rutland*, who had a market within four miles.

Scire facias.

Upon trial it was found *pro Rege* on the iſſue whether the grant was to the prejudice of the Duke; and on motion in arreſt of judgment it was held to be a good iſſue, though the grant and not the *uſer* was found to be prejudicial.

Then it was objected, that the *ſcire facias* was brought in the late Queen's time, and by her demiſe the proceedings abated, this not being within 1 *E.* 6. *c.* 7. or 1 *Ann. c.* 8. To which it was anſwered and reſolved by the court, that this is an original writ, and therefore within the general words. *Regiſt.* 69.

Dominus

Dominus Rex *verſ.* Hamond.

Communis ſtrata and *alta via* are ſynonymous.

INdictment for that the defendant *tali die anno et loco* ten loads of ſtraw and dung *in communi ſtrata ſive alta regia via poſuit et locavit et ibidem per decem dies remanere permiſit, ita quod* the King's ſubjects could not paſs.

On demurrer it was objected, that the place where the nuſance was committed ſhould be certainly alledged, whereas here the indictment runs that it was laid in one place or another; and being diſjoined by the *ſive*, the court cannot take *communis ſtrata*, and *alta regia via*, to be the ſame. 2 *Roll. Abr.* 80. *pl.* 4, 5.

To which it was anſwered and reſolved by the court, That *ſtrata* ſignifies the highway, and that theſe are two expreſſions to denote the ſame place. *Spelman verbo ſtrata: Cowel's Interpreter, Streetward* and *Streetgavel.* So in the ſtatute of *Marleberge*, which prohibits diſtreſſes in the highways, it is *Nulli liceat diſtrictiones facere in via regia aut in communi ſtrata:* In the gloſſary at the end of the *decem ſcriptores*, there is an account of ſome travellers who happened to loſe their way; and the expreſſion is, *a publicâ ſtratâ deviantes*, which muſt certainly mean the highway. The court therefore held it well enough.

Then exception was taken, that the *terminus a quo*, or *ad quem* the way led, was not mentioned. To which the court anſwered, that in indictments for nuſances in the highway it is not neceſſary; for the highway is infinite, and leads from ſea to ſea. *Latch* 183. 3 *Keb.* 89. *Rex* v. *Thompſon*, 10 *W.* 3. There was judgment *pro Rege.*

Dominus Rex *verſ.* Simpſon.

A deer-ſtealer may be convicted before appearance, if duly ſummoned.

THE defendant was convicted upon the ſtatute 3 & 4 *W.* & *M.* for deer-ſtealing, and the conviction ſet forth, that he had been ſummoned to appear before the juſtices; but it did not appear he ever was before them.

Exception was taken to this by *Reeve*, that as no appeal lies in this caſe, the juſtices ſhould not have proceeded in the abſence of the party, eſpecially where it may end in a corporal puniſhment, as it may do here for want of a diſtreſs; and he cited *Salk.* 56, 400. and *Mawgridge*'s caſe in *Kelyng.* And at another day (on conſideration) *Parker* C. J. delivered the reſolution of the court.

We are all of opinion, the offender may be convicted, without appearing. The ſtatute is ſilent as to the method of proceeding, and the law of *England*, it is true, in point of natural juſtice, always requires the party charged with any offence to be heard before he be condemned in judgment; but that rule muſt have this exception, unleſs it is through his own default: Were it otherwiſe, every criminal might avoid conviction. The law being ſo, the magiſtrate is bound to give ſome opportunity to the party to appear, and if upon ſuch notice he neither comes nor ſends a ſufficient excuſe, the magiſtrate may proceed to judgment. If this was not to be allowed, the conſequence would be, that the offender would eſcape unpuniſhed, becauſe he would never appear purpoſely to be convicted, and that would be to make the execution of the law depend on the will of the offender.

Salk. 181. 1 Mod. Ca. 41.

The rule of law that has been objected is true, That acts of parliament, in what they are ſilent, are beſt expounded according to the uſe and reaſon of the common law. In the caſe of high treaſon (which is a much harder caſe than this) the party may be outlawed for his not appearing, and then he is liable to all the pains and penalties, as much as in the caſe of a conviction. So in real actions if the tenant makes a ſecond default, judgment peremptory is given for the demandant to recover. In crimes of a leſſer nature than treaſon or felony, and in perſonal actions, the outlawry expoſes the party to greater puniſhment than if he had appeared and been condemned in that action; for he forfeits thereby his liberty, goods and chattels, beſides other diſabilities which he incurs. In corporations if a member of the body be ſummoned, and do not appear, he may lawfully be removed. 1 *Ven.* 19. 2 *Keb.* 488. 1 *Sid.* 14. 2 *Sid.* 97.

It is the conſtant practice in this court, in ſetting aſide judgments, granting attachments, *&c.* to give notice to the party to come and make his defence, and if he neglects to make his defence, the court proceeds againſt him.

This act of parliament plainly deſigned a ſummary proceeding, and therefore the proceedings muſt be guided according to the ſummary proceedings allowed in this court. The ſolemn proceedings of the law before a man ſhall loſe his life or lands need not be followed; and yet in thoſe caſes the judgment is, that he ſhall forfeit his life or lands, not for the crime as taken *pro confeſſo*, but the judgment is really for his abſence. The proceedings therefore againſt a man in his abſence are not againſt the common law. Many acts of parliament that appoint a forfeiture or penalty, do not give the

juſtices power to bring the offender before them. There are many offences againſt acts of parliament, which are mere nonfeaſances or neglects, as not putting out of lights, *&c.* Now to require the offender to be brought before the juſtices and detained, will be a ſtrange conſtruction, for that detainer may be accounted a greater puniſhment than the forfeiture; and if in ſuch a caſe the offender, to prevent further trouble, would ſend the forfeiture, why ſhould not that be a ſufficient authority for the juſtice to convict him, though he does not appear in perſon? To compel the offender to appear would be to no purpoſe; for if he does appear, the juſtices cannot compel him to make a defence.

An objection was made to the ſummons, that it does not particularize the place and hour, it is only *licet ſummonitus fuit ad hoc tempus et hunc locum, ſed defalt' fecit.* (Anſwer) The default entered by the juſtices implies the ſummons was to appear at that time and place, for otherwiſe it would not be a default; and where the legiſlature has given a power, we will preſume the juſtices purſue that power, unleſs the contrary appears. If they did not make a proper ſummons, they are puniſhable for it by information. *Poſt*, *Rex* v. *Allington*, *Hil.* 12 *Geo.*

An attorney in theſe caſes may be made to defend.

As for the other order of conviction, whereby it appears the defendant made an attorney to defend for him; we think that is certainly good, for the offender may intruſt his defence with another, and the juſtices cannot enforce him to appear in perſon. Orders confirmed.

Brampton *and* Crabb.

After the inqueſt is taken by default, the defendant can make no ſuggeſtion on the roll.

AFTER a verdict for the plaintiff in an *indebitatus aſſumpſit*, and 22 ſhillings damages aſſeſſed, the defendant came into court, and ſuggeſted upon the roll "*quod querens nulla miſas et* "*cuſtagia verſus ipſum in hoc caſu ſuper veredictum illud recu-* "*perare debet, ſed humillime petit idem defendens quod miſae et* "*cuſtagia ſua per ipſum circa defenſionem ſuam in hac parte ex-* "*penſa per judicium hujus curiae juxta formam ſtatuti ſibi adju-* "*dicentur, quia dicit quod,*" (ſetting out the act of 3 *Jac.* 1. *c.* 15. made for the recovery of ſmall debts in the city of *London*, and which ſubjects the plaintiff to loſe his coſts, and pay coſts, where the parties are citizens, and the damages under 40 ſhillings). Then the defendant avers, that at the time of making the promiſes in the declaration, *et ſemper abinde hucuſque*, he was and is a freeman of the city of *London*, reſiding within the city, (*viz.* in ſuch a pariſh and ward) uſing the trade of a cooper, and that the plaintiff

was and is a freeman reſiding within the city, *viz. &c.* uſing the trade of a barber, and that the cauſe of action aroſe within the juriſdiction of the court of conſcience, which was held every *Wedneſday* and *Saturday* every week ſince the time of the promiſe. He likewiſe avers, that he was indebted to the plaintiff in no more than 22 ſhillings, and that he has expended ſo much in his defence, which the plaintiff ought to pay, *juxta formam ſtatuti praed'.*

The firſt doubt upon this ſuggeſtion was, whether the defendant ſhould not have made it before the cauſe had ſo far proceeded as to a verdict, and whether it was not a matter pleadable to the juriſdiction of the court: But upon citing a caſe of *Pennel* v. *Wallis*, *in B. R. Mich.* 9 *W.* 3. where after verdict for 30 ſhillings, the defendant made ſuch a ſuggeſtion, which was argued on demurrer, and held to be well ſuggeſted after a verdict, this firſt difficulty was got over.

But then it was objected, that it appeared the inqueſt was taken by default, and therefore the defendant was out of court as to all purpoſes but having judgment againſt him. After a default there can be no repleader. *Salk.* 216. 1 *Mod. Ca.* 1. *Salk.* 579. 2 *Roll. Abr.* 430. *pl.* 4.

For this laſt reaſon the court held, that the defendant could not be received to make the ſuggeſtion, and ſo the plaintiff had judgment.

Eaſter

Eaſter Term

3 Georgii Regis. In B. R.

Thomas *Lord* Parker, *Chief Juſtice:*
Sir Littleton Powys, *Knt.* } *Juſtices.*
Sir Robert Eyre, *Knt.* }
Sir John Pratt, *Knt.* }
Sir Edward Northey, *Knt. Attorney General.*
Sir William Thompſon, *Knt. Recorder of* London, *Solicitor General.*

Dominus Rex *verſ.* Barnes.

The ſeſſions cannot ſet aſide the aſſignment of an apprentice bound out by the juſtices.

A. Is bound out by the juſtices to *B.* who aſſigns him to *C.* and the ſeſſions, reciting the ſpecial matter, adjudge the aſſignment void, and order him to be returned to *B.*

Per Curiam: The ſeſſions had no power to judge of the validity of a deed, or to hinder a man from aſſigning his apprentice. The covenant to provide for him is well performed, if the perſon to whom he is bound aſſigns him to another to provide for him. And apprentices bound out by juſtices may be aſſigned as well as others. Wherefore the order was quaſhed.

Freſhwater *verſ.* Eaton.

SCIRE facias on a recognizance in the marſhal's court, to ſurrender the principal to the gaoler of the palace court, if he ſhould be condemned. Error of that judgment, and affirmance, and upon that the bail rendered the principal to the *King's Bench*, the whole proceedings being removed thither.

On a recognizance to render in an inferior court, if the proceedings are removed into B. R. the render may be there.

Whitaker Serjeant inſiſted, that this is no performance of the condition.

C. J. Upon the ſurrender to the marſhal's court, *non conſtat* to the officer that there is any charge againſt him there, and by that means he will be diſcharged; and if he be ſurrendered there he muſt be removed to this court; it will therefore be leaſt trouble, to ſurrender him here.

Eyre J. The render ought to be where it will be moſt effectual.

Pratt, J. A condition to re-enfeoff is performed by leaſe and releaſe, *Co. Lit.* 207. *a.* 1 *Rol. Abr.* 426. *Carter* 88. *Plowd.* 7. *a.* 156. *b.* Condition to pay money is performed by cauſing it to be paid. The intent of the condition in this caſe is anſwered by the defendant's being in priſon to anſwer the plaintiff's demand; and many caſes of conditions there are, where the law has never required a ſtrict performance according to the letter of the condition, provided the intent of the condition be anſwered.

Per Curiam: The render is good, and a good performance of the condition.

Dominus Rex *verſ.* Poland.

CHESHYRE Serjeant moved for treble coſts againſt the proſecutor of an indictment againſt the defendant for uſing the trade of a glover, upon an affidavit that he was a ſoldier, and diſbanded upon the peace of *Ryſwicke*, by virtue of the ſtatute 10 & 11 *W.* 3. *c.* 11. which enacts, "That the ſoldiers time ſhall be taken as if "actually ſerved, and if they be indicted they ſhall be acquitted on "the general iſſue, and recover treble coſts."

Where treble coſts are to be recovered againſt a proſecutor for a matter not appearing on the *Poſtea*, the Court will give leave to ſuggeſt the ſpecial matter.

Hill. 5 G. 2. in B.R. *Catheral* v. *Cooper & al'*, where defendants were ſued as acting under the *Kenſington* turnpike act 12 G. 1. c. 37. and acquitted, they were allowed to make the like ſuggeſtion.

The doubt in this caſe was, how theſe coſts ſhould be come at, whether by rule of court upon the *affidavit*, or by a ſuggeſtion of the matter upon the record; and for this purpoſe he quoted the caſe of *Walker* v. *Sir Philip Egerton*, *Hilary 7 W.* 3. There the defendant was collector of the land-tax, and the plaintiff being doubly taxed as a non-juror, and diſtrained, brought an *Indebitatus aſſumpſit* againſt the collector for the redemption-money. And though nothing of this appeared upon record, yet on affidavits of the fact the court directed a ſuggeſtion to be made, "*Quia conſtat curiae ſuper exa-* "*minationem quod, &c. ideo conſideratum eſt* that the nonſuit be recorded, and the defendant recover treble coſts.

Bateman v. *Wallis*, *Trin. 9 W.* 3. *in B. R. rot.* 588. That was an *Indebitatus aſſumpſit* for a cauſe ariſing in *Newcaſtle*, and a verdict under 40 *s.* The cuſtom of *Newcaſtle* was ſuggeſted, that the plaintiff ſhould not recover, but pay coſts; and ſo was the caſe of *Brampton* v. *Crabb*, *Hil.* 3 *Geo.* Upon the authority of which caſes the court ordered a ſuggeſtion to be made, not *quod conſtat curiae ſuper examinationem*, but *quod conſtat curiae ſuper ſacramentum duorum credibilium teſtium quod, &c.* and then award the coſts. *Vide* 2 *Vent.* 45. *contra.*

Woodcock *and* Elpington.

How the penalty againſt the marſhal on 8 & 9 W. 3. c. 26. ſhall be recovered.

DARNALL Serjeant moved for a rule for 50 *l.* againſt the marſhal upon the ſtatute 8 & 9 *W.* 3. *c.* 26. for not giving a note teſtifying the defendant's being in his cuſtody.

Per Curiam: The ſtatute does not give us any power, it only ſays 50 *l.* ſhall be forfeited. This neglect is a contempt to the court, and therefore the marſhal may be puniſhed as uſed to be before this ſtatute. You had a rule for him to own his priſoner, if he did not the court puniſhed him to the plaintiff's ſatisfaction. The ſtatute does not preclude us from puniſhing him, but only gives the plaintiff the 50 *l.* as a further ſatisfaction. The penalty may be recovered by bill againſt the marſhal, but it is not in our power to make him pay it in a ſummary way. The chief intent of the ſtatute was, that ſuch note from the marſhall ſhould be good evidence in caſe of an eſcape, to prove that the defendant was at that time in actual cuſtody. Take a rule for the marſhal to acknowledge his priſoner.

Dominus Rex *verſ.* The inhabitants of St. Olaves Jury.

A. Is bound to *B.* a cobler, who keeps a ſtall in one pariſh, lies in another, and the boy in a third, and the ſeſſions adjudge the ſettlement where the ſtall is, becauſe the ſervice was there.

Cobler's ſtall no inhabitancy to gain a ſettlement.

Per Curiam: The boy has gained no ſettlement in either of the three pariſhes, for the ſtall is not ſufficient to give him one, the maſter lying in another pariſh. Order quaſhed.

Between the pariſhes of St. Andrew *and* St. Brides.

ORDER of Seſſions for the removal of a wife and three children from the pariſh of *St. Andrew* to the pariſh of *St. Brides*, ſetting forth, that *A.* about twenty-three years ſince married *B.* and lived with her five years in the pariſh of *St. Brides*, and had by her four children, two whereof were dead, and the other two provided for. That at the end of five years he went away from her, and married another woman, with whom he lived ſomewhere in *England*; but that he never ſaw his firſt wife *B.* from the time of his going away.

When a wife marries a ſecond huſband, and it is found the firſt had no acceſs to her for a long time, the children of the ſecond marriage are baſtards, and the wife's ſettlement where the firſt huſband's was.

B. after the ſeparation (having heard nothing for a long time of *A.*) married a ſecond huſband, by whom ſhe had eight children in the pariſh of *St. Andrew*, who all went by the name of the ſecond huſband, five of them are dead, and the other three ſurvive. And the ſeſſions preſuming that the ſecond marriage of the wife is void *ab initio*, adjudge, that her ſettlement, and that of the three children, is in the pariſh of *St. Brides*, where the firſt huſband lived, as deeming the children the legitimate iſſue of the firſt marriage.

The court quaſhed the order as to the children, and confirmed it as to the wife.

Firſt, Becauſe the ſecond marriage and living with the ſecond huſband in *St. Andrew*'s was void *ab initio*; and therefore the place of her ſettlement was where the firſt huſband lived.

Secondly, It being adjudged that the firſt huſband had no acceſs for ſeventeen years, no preſumption ſhall be admitted but that theſe are the children of the ſecond marriage; and they not being born in the pariſh of *St. Brides*, nor having ever inhabited there forty days, can have no ſettlement in *St. Brides*.

1 *Roll. Abr.* 358 *pl.* 1. 8. *pl.* 4. 5. *Bract. lib.* 5. *fol.* 417. *Co. Litt.* 123. *b.* 2 *Roll. Abr.* 356. *Cro. Jac.* 541. *Fleta, lib.* 1. *c.* 15. 4, 5. *Bracton, lib.* 1. *c.* 9. 4. *Co. Litt.* 244. *a.* *Salk.* 123, 483. 7 *H.* 4. 9. All which caſes were quoted to prove, that improbability will baſtardize the iſſue, and therefore it was argued *a fortiori*, that impoſſibility, which was found in this caſe, would baſtardize alſo.

Dominus Rex *verſ.* Foley and Harley.

Trial at bar granted upon conſideration of the conſequences of a conviction upon an information.

INformation for taking 3 *s.* 4 *d.* for regiſtring a warrant of attorney, contrary to the lottery-act, which ſays, it ſhall be entred without fee or reward, and all perſons offending ſhall be incapable to hold any place.

The defendants moved that they might have a trial at bar; for though the queſtion ſeemed very ſhort, whether they took the fee or not; yet the conſequence was very conſiderable, the defendants are auditors for life, and that is a freehold of which they will be diveſted by a conviction upon this information. *Paſch.* 9 *Annae Regina* v. *Harcourt*, *Scire facias* to repeal letters patents, and there a trial at bar was had. *Sid.* 420. The crown it is true may ſue any where, but when they have commenced their ſuit, it is in the power of the court.

On the other ſide it was inſiſted, that the court could not take notice of what would be the conſequences of a conviction; that the queſtion was ſhort, and the *onus probandi* upon the crown, who might try it where they pleaſed.

Powys, *Eyre* and *Pratt*, were for a trial at bar; but the chief juſtice ſaid the defendants ought not to pray a trial at bar in an iſſuable term. A trial at bar was granted for next term.

Stutter *verſ.* Freſton. In C. B.

Churchwardens.

PRohibition was granted to the ſpiritual court, where it was libelled againſt the defendant, for not appearing to take upon him the office of churchwarden, though thereunto appointed by the ordinary. And it was held, that though the pariſhioners and parſon neglect for ever ſo long to chuſe churchwardens, yet the ordinary has no juriſdiction; for churchwardens were a corporation at common law, and they are different from queſtmen, who were the creatures

tures of the reformation, and came in by canon law. The 89th and 90th canons ſay that churchwardens ſhall be choſen by the parſon and pariſhioners, and if they diſagree, then one by the parſon and the other by the pariſhioners, *et alioquin non erunt. Per curiam:* The proper way is to take a *Mandamus e B. R.* 1 Ven. 115.

Denny *verſ.* Aſhwell. In C. B.

A Prohibition was denied to a ſuit in the ſpiritual court for marrying his wife's ſiſter's daughter, though caſes were quoted where ſuch a marriage has been held lawful. *Moor* 907. 2 *Keb.* 551. 1 *Sid.* 434. 1 *Mod.* 25. 2 *Lev.* 254. *contra.* 2 *Vent.* 12. Cannot marry wife's neice.

Sir Robert Saliſbury Cotton *and* Davies. In B. R.

UPON *Non fuit electus* returned to a *Mandamus* to ſwear the plaintiff a capital burgeſs of *Denbigh*, the jury find a ſpecial verdict, That by the charters there are to be two bailiffs, two aldermen, and twenty-five capital burgeſſes; and the direction how the capital burgeſſes are to be elected is in theſe words: "And "if it happen any of the ſaid capital burgeſſes to die, or be "removed, then it ſhall be lawful for the bailiffs, aldermen and "capital burgeſſes for the time being, or the major part of them, "*Quorum unum ballivorum et unum aldermannorum duos eſſe volumus*, "to elect another." That 24 *June* 1 *Geo.* there was a vacancy by the death of *J. S.* and *Michaelmas-day* following the bailiffs, aldermen and burgeſſes met and proceeded to an election. That the two bailiffs and the *major* part of the capital burgeſſes gave their votes for the plaintiff, and the two aldermen and the reſidue of the capital burgeſſes voted for another. Where a power of election is veſted in a ſet number, *quorum A.* and *B.* to be two, their preſence only is requiſite, and not their conſent.

Lutwyche pro quer' argued, that the queſtion in this caſe is only, whether upon the words of the clauſe, *Quorum unum ballivorum et unum aldermannorum duos eſſe volumus*, the conſent of one bailiff and one alderman to every election be requiſite, to make it good. And he took the negative of the queſtion; and argued, that the charter only required their preſence; for if it ſhould be thought that the election cannot be without their conſent, it would be in a manner to veſt the whole power of election in them two; which the charter never intended. In the common caſe of a quarter ſeſſions a juſtice of the *Quorum* muſt be one, but yet the act of the majority binds him. 1 *Inſt.* 250. 1 *Roll. Abr.* 514. *Hob.* 211.

Cheſhyre Serjeant *contra.* Unleſs there be one bailiff and one alderman conſenting, there can be no election. What ſignifies their preſence, if they diſavow the election? There is Serjeant *Whitaker*'s caſe, *Hil.* 3 *Annae*, *Salk.* 434. By the charter of *Ipſwich* power is given to the bailiffs, burgeſſes and commonalty to remove the recorder, *quorum* the two bailiffs *duos eſſe volumus.* Upon a *Mandamus* to reſtore Serjeant *Whitaker*, they return, that he was removed by the bailiffs, burgeſſes and commonalty, the two bailiffs being preſent; and it was objected and adjudged that their conſent was as neceſſary as their preſence. 3 *Mod.* 3. If they are preſent and diſſent, how can the election be ſaid to be by them?

C. J. This is like the caſe of the city of *London*, where the mayor and common council have power to do acts; and yet the act of the majority of the common council is good, though the mayor diſſents. In this caſe there is nothing required but the preſence of one bailiff and one alderman at every election, and they have no negative voices; to which the reſt of the court agreed, and a peremptory *Mandamus* was granted.

Newman *verſ.* Holdmyfaſt. Mich. 3 Geo. rot. 194.

Ejectment lies *pro communia paſturae* generally, if joined with other lands.

EJectment for lands, *acetiam pro communia paſturae.* And after verdict for the plaintiff, it was moved in arreſt of judgment, that it ought to have been mentioned, what ſort of common: becauſe an ejectment will not lie for all ſorts, ſuch as common *pur cauſe de vicinage.* And that a commoner cannot maintain treſpaſs, and much leſs an ejectment. And *Co. Litt.* 4. *b.* *Bro. Common* 24. *Treſpaſs* 213. *Yel.* 143. *Cro. Car.* 492. 1 *Lev.* 212. were cited.

Sed per Curiam: After a Verdict it ſhall be intended to be ſuch common for which an ejectment will lie, as common appendant or appurtenant. And the general expreſſion of *Common* muſt relate to that which is moſt uſual, juſt as the word *Tenure* imports a tenure in ſocage. Fines and recoveries are *de communia paſturae* generally. 1 *Cro.* 301. 3 *Keb.* 738. 1 *Jon.* 315. *Mich.* 1 *Geo. Cave* v. *Hunt*, in the Exchequer chamber, this objection was over-ruled. He that has poſſeſſion of the land has poſſeſſion of the common, and the ſheriff by giving poſſeſſion of one, executes his writ as to the other.

N. B. This was not a motion in arreſt of judgment, but came from *C. B.* by writ of error to *B. R.* where the judgment was affirmed.

Trinity Term

3 Georgii Regis. In B. R.

Thomas *Lord* Parker, *Chief Juſtice.*
Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Pratt, *Knt.*
Sir Edward Northey, *Knt. Attorney General.*
Sir William Thompſon, *Knt. Recorder of* London, *Solicitor General.*

Dominus Rex *verſ.* Major', &c. Norwic'.

When a *mandamus* is directed to thoſe that have and thoſe that have not a right, the court will ſuperſede it. Salk. 699, 701.

PAGE Serjeant moved for a *ſuperſedeas* to a *mandamus* directed to the mayor, aldermen and common council, to go to the election of a town clerk, upon an *affidavit* that the writ was miſdirected; for it was neither to the corporation by the corporate name, nor to the mayor and aldermen only, in whom the right of election was. And the court ſaid, they would not expect a return to this writ, which was directed to the common council, who had no right, but grant a *ſuperſedeas quia improvide emanavit.* But upon propoſals of trying the right in a feigned iſſue, no *ſuperſedeas* went.

Dominus Rex *verſ.* Percivall & al'.

The ſeſſions may by virtue of 43 Eliz. charge pariſhes out of the hundred towards the maintenance of the poor within that hundred, before two juſtices have adjudged that the hundred is not able.

ORDER of ſeſſions reciting, that the pariſh of *A.* is not able to maintain its own poor, nor any other pariſh within the hundred to contribute; therefore the juſtices at the ſeſſions tax other pariſhes in another hundred within the ſame county to the relief of the poor of the pariſh of *A.*

Reeve moved to quaſh it, and inſiſted that the 43 *Eliz. c.* 2. §. 3. gives no authority to the ſeſſions to charge people out of the hundred, till two juſtices have inquired whether any pariſh in the hundred can contribute. The firſt application to be to two juſtices, and the ſecond to the ſeſſions.

Salk. 480.

C. J. I do not ſee to what purpoſe it would be for the two juſtices to make an order, only to adjudge that no pariſh within the hundred is able to contribute. We will preſume the ſeſſions is ſatisfied of that, and if the two juſtices ſhould make ſuch an adjudication, yet the ſeſſions muſt inquire into the truth of it; and if no order appears which charges any pariſh within the hundred, it is a ſufficient ground for the ſeſſions to act. This is like the caſe of apprentices bound out by juſtices: For there, if there be any diſagreement, the maſter and ſervant may go before two juſtices to make an end between them, and if the juſtices cannot, then to the ſeſſions: But yet it has never been held, but that the ſeſſions has an original juriſdiction, and the parties are intitled to be heard at the ſeſſions, tho' they never went before two juſtices. *Salk.* 67, 68. 1 *Ven.* 174. *Salk.* 491. In this caſe if the juſtices had charged any pariſh within the hundred, that would have ſtopped the ſeſſions from proceeding; and the ſufficiency of the hundred depends on this, whether two juſtices have ever charged the hundred. *If the two juſtices do not think the hundred able*, (that is) if they do not adjudge it ſo. If two juſtices ſhould adjudge the hundred not able, yet if other two juſtices adjudge the contrary, their charge would be good, and the ſeſſions be ouſted of their juriſdiction notwithſtanding the firſt adjudication.

Seſſions has an original juriſdiction to diſcharge apprentices.

Eyre J. Here are two juriſdictions, that of the two juſtices, and that of the ſeſſions, and both are original juriſdictions. They are different in all reſpects, for the two juſtices have no power out of the hundred, nor the ſeſſions within it. There need be no appeal from an adjudication of two juſtices, for that would be to appeal from a nullity. Order confirmed.

The

The Pariſhes of South Sydenham *and* Lamerton.

ORDER of two juſtices for the removal of *A.* and his wife from the pariſh of *Lamerton* to the pariſh of *South Sydenham*, wherein the caſe was ſpecially ſtated, That about 27 years ſince the mother-in-law of *A.* dying, he entered into a term of years in *South Sydenham* in the right of his wife, and lived upon it two years, but never took out adminiſtration to the mother.

Taking an entire tenement of 10 *l. per annum* gains a ſettlement though it lies in two pariſhes; *aliter* of two diſtinct tenements making together 10 *l. per annum* in different pariſhes.

That at the end of two years he removed to *Lamerton*, and took a leaſe for 99 years, determinable upon three lives, at the yearly rent of 7 *l.* 10 *s.* whereof 4 *l.* 10 *s.* lay in *South Sydenham*, and the reſidue, and alſo the meſſuage, lay in *Lamerton*, where *A.* has lived for 25 years. That the premiſſes were of the yearly value of 13 *l.* but in regard 7 *l.* 10 *s.* rent only was reſerved, and 4 *l.* 10 *s.* of that lay in *South Sydenham*, and he had formerly lived there two years; therefore the juſtices adjudge the ſettlement to be there.

Glyde Serjeant moved to quaſh it, for a man may have a right to ſeveral ſettlements, and yet be ſettled in one only. The right of adminiſtration gave him no ſettlement in *South Sydenham*, for there muſt be an actual adminiſtration.

Reeve contra. The term is but a chattel, to which he is intitled without adminiſtration. The ſettlement was good at *South Sydenham*; but the queſtion is, whether he has ſince gained any at *Lamerton*. The ſtatute 13 & 14 *Car.* 2. *c.* 12. requires him to take a tenement of the yearly value of 10 *l.* what the value is, muſt be adjudged by the rent reſerved, and that is only 7 *l.* 10 *s.*

C. J. If *Lamerton* be a good ſettlement, the order is wrong. The quantity of the rent is not material, but the value of the land. A tenant often pays a fine, and thereby lowers the rent, and yet the land is of equal value. And if a man ſhould out of kindneſs ſettle another in a tenement of 10 *l. per annum* value, reſerving no rent, yet that will not alter the caſe.

The only difficulty is, that there is not in this caſe 10 *l. per annum* in one ſingle pariſh. As to that I am of opinion, that if ſuch a perſon as this ſhould take a tenement of 8 *l. per annum* in one pariſh, and another of 3 *l. per annum* in a different pariſh, that would not gain him a ſettlement in either; but if the tenement be intire, and the houſe in one pariſh (as this caſe is) and part of the land in

Inter paroch. North Riſton *and* Wooton Underidge, Mich. 1 Geo. adjudged that taking two diſtinct tenements, both making up 10 *l. per annum* in the ſame pariſh, gives a ſettlement. Salk. 535.

in another; yet this may properly be called a tenement of 10 *l. per annum* in that pariſh where the houſe is. The law preſumes that a perſon capable to be entruſted with the management of 10 *l. per annum* is not likely to become chargeable; but is able to maintain himſelf. Two diſtinct tenements in two pariſhes, making together 10 *l. per annum*, will give no ſettlement. But it ſeems to me to be otherwiſe where the tenement is intire.

Eyre J. *accord'*.

Pratt J. This man has fully ſatisfied the words of the act of Parliament. The miſchief was, that the poor went to the pariſhes where were the beſt common and privileges; and when they had conſumed that, removed to another. The only way to remedy this was, to ſend them back again. Though part of the 10 *l. per annum* lies in one pariſh, and part in another, yet the man is not a whit the poorer, or leſs able to provide for himſelf. There are conſiderable farmers who do not rent 10 *l. per annum* in any one pariſh, and it would be hard to adjudge that therefore they gain no ſettlement.

Per Curiam: The ſettlement is at *Lamerton*, and therefore the order of removal to *South Sydenham* muſt be quaſhed.

Dominus Rex *verſ.* Ballivos de Morpeth.

Mandamus lies to reſtore a ſchool-maſter of a grammar ſchool founded by the crown.

MANDAMUS to reſtore *A.* to the office of under ſchool-maſter of a grammar ſchool at *Morpeth*, *vel cauſam nobis ſignificetis:* And the writ ſets forth, that King *Edward* the ſixth founded this ſchool, and appointed that there ſhould be two maſters and an uſher *imperpetuum*.

Return, that at the time of publiſhing the act *primo* of his Majeſty's reign the ſaid *A.* was under ſchool-maſter, and that he never took the oaths by the act appointed to be taken; *ratione cujus* he became incapable, and therefore they cannot reſtore him.

Lutwyche. This is an improper return. The writ ſuggeſts a poſſeſſion and expulſion, and therefore they ought to lay the reaſons of turning him out before the court. There does not ſo much as a power of turning him out appear.

Bootle contra. The writ does not command them to ſhew cauſe why they turned him out, but only to reſtore him, or ſhew cauſe. By the words of the ſtatute he is *ipſo facto* deprived upon a neglect

to

to take the oaths, ſo no formal expulſion was requiſite. *Show.* 274. 4 *Mod.* 52.

A *mandamus* does not lie in this caſe. *Mandamus's* are granted to reſtore people to publick offices, where the adminiſtration of juſtice is concerned; and if the place be a freehold, the party aggrieved may have an aſſize; if of a leſſer nature, an action for the ſpecial damage. *Mich.* 2 *Ann. Vaughan's* caſe. A *mandamus* to reſtore him to the office of prover of guns in the *Tower* was denied, becauſe of a private nature: And *Holt* C. J. ſaid, a *mandamus* would not lie to reſtore a regiſter of an eccleſiaſtical court. *Show.* 252. 3 *Mod.* 335. *Show.* 217, 261, 251. *Mandamus* denied for a proctor of *Doctors Commons*. And in 1 *Sid.* 169. for a ſteward of a court baron; and in *Stiles* 458. for an uſher. 1 *Sid.* 40, 29, 71. 1 *Keb.* 5. and in *Show.* 74. for a fellow of a college. *Vide* 1 *Ven.* 143.

Lutwyche replied. Though it may not lie for a maſter of a private ſchool; yet it will for this, which is a free grammar ſchool founded by the crown. The education of youth concerns the publick, and therefore the maſters are required to take the oaths. A *mandamus* was granted for the clerk of *St. Dunſtan's*; and in 1 *Ven.* 143, 153. for a ſexton and ſcavenger. And it will be no anſwer to ſay, that an aſſize or an action may be brought; for the court grants *mandamus's* every day for freeholds, and the party has his election which remedy to take.

Mandamus lies for a pariſh clerk, ſexton and ſcavenger, for clerk of the peace. Show. 282. 2 Sid. 112.

C. J. This is of a publick nature, being derived from the crown. I think the defendants were not obliged to ſhew cauſe why they turn him out, but only why they do not reſtore him. But ſtill this return is inſufficient: It is only that he did not take the oaths *in actu praed' mentionat'*; now he is not obliged to take the *Scotch* oath. They ſhould have ſaid, that he did not take the oaths of allegiance, abjuration and ſupremacy, or the oaths required to be taken by a ſchool-maſter. The act excepts officers in the *Fleet*, *&c.* and therefore it ſhould appear he is not excepted: For the party having no opportunity to plead in this caſe, the return ought to be certain to every intent. And though we grant a peremptory *mandamus*, that will not be final; for if he has not qualified himſelf, he is *ipſo facto* deprived, and our granting a *mandamus* will have no effect. Show. 365.

Eyre J. All that is ſet forth in this return may be true, and yet this man no ways diſqualified. In the caſe of a pariſh clerk we granted a *mandamus* upon ſolemn debate. A peremptory *mandamus* was granted.

Kitſon

Kitſon *and* Fagg.

Under-ſheriff's clerk cannot aſſign a bail-bond.

UPON a caſe at the aſſizes the queſtion was, whether a bail-bond was well aſſigned by the under-ſheriff's clerk.

Parker C. J. ſaid, he had had the advice of all his brothers, and they were of opinion, that an under-ſheriff himſelf might aſſign a bail-bond in the name of the high-ſheriff, it having been the conſtant practice ever ſince the ſtatute 4 & 5 *Ann.* but that if the aſſignment was neither by the high-ſheriff nor his under-ſheriff, it would not be good; and that being the preſent caſe, the defendant had judgment.

Pariſhes of St. Mary Colechurch *and* Radcliffe.

Apprentice gains a ſettlement where he lies.

A. Is bound apprentice to a ſeafaring man, and ſerved him for a quarter of a year in the day-time on land, in the pariſh of *St. Mary Colechurch*, but lay every night on ſhipboard in *Radcliffe*. But the juſtices apprehending the ſettlement to be where the ſervice was, ſend him thither.

Corbett moved to quaſh this order; and likened it to the caſe of the cobler laſt term.

Ante 51.

F. N. B. 160. b.
2 Inſt. 122.

C. J. A man properly inhabits where he lies; as in the caſe where the houſe is in two leets, he is to be ſummoned to that in which his bed is. Order quaſhed.

Croſſier *and* Ogleby.

Goods taken in inteſtate's life and kept till his death, though uſed afterwards, is a trover and converſion in the inteſtate's life.

TROVER by an adminiſtrator for rum taken and converted in the inteſtate's life. Upon evidence it appeared, that the rum was taken in the inteſtate's life, but not uſed till after his death. And the queſtion was, whether this evidence of not uſing it till the adminiſtrator's time would not overthrow the declaration of a converſion in the inteſtate's life.

Sed per Curiam: The time of uſing the rum lay in the breaſt of the defendant, who ought to have diſcloſed that matter by his plea: And the taking it in the life of the inteſtate, and keeping it till his death, is a trover and converſion ſufficient to maintain this declaration. Wherefore the plaintiff had judgment, this being a point reſerved at *niſi prius*.

Dryer *verſ.* Mills & al'.

At niſi prius *in* Middleſex, coram Parker *C. J.*

TRESPASS for taking materials of a houſe; Not guilty pleaded; and the C. J. would not admit the defendant to give evidence of taking the goods as a deodand, becauſe he might have juſtified, and then the plaintiff would have had an opportunity to give an anſwer to it.

On Not guilty cannot give evidence of taking the goods as a deodand. *Vide* Co. Lit. 53. a. 283.

Dix *verſ.* Brookes.

THE plaintiff declares, that the defendant broke and entered his houſe, and aſſaulted his wife. After verdict for the plaintiff it was moved in arreſt of judgment, that the wife ſhould have joined in this action, and by her not joining the defendant pays damages to the huſband, and yet the action for the aſſault will ſurvive to the wife, and ſo the defendant be doubly charged. Beſides, that here is no laying *per quod conſortium amiſit*, to intitle the *baron* only to ſue and exclude the wife. *Yelv.* 89. *Godb.* 369.

Baron may bring treſpaſs for entering his houſe and beating his wife.

Econtra it was inſiſted, that the breaking and entering the houſe was the cauſe of action, and the beating the wife alleged only in aggravation of damages: And if that had not been alleged, it might have been given in evidence under the *alia enormia*. 1 *Keb.* 787. 1 *Sid.* 225. 2 *Cro.* 664. 1 *Mod. Ca.* 127. *Salk.* 119, 642.

Et per Curiam: The plaintiff may join that in his declaration to aggravate damages, for which he ſingly could not recover, and the party injured have his ſeparate action. As in the common caſe of treſpaſs for beating a ſervant, *per quod ſervitium amiſit*; both maſter and ſervant may recover. And in the caſe of *Newnam* v. *Smith* it was held, that the plaintiff might allege the beating his daughter in aggravation of damages. *Salk.* 642. The plaintiff had judgment.

Dominus Rex *verſ.* Epiſcopum Miden. in Hibernia.

Intr. Trin. 12 Ann. rot. 290.

The ſtatutes of jeofails extend to ſuits by the crown in *quare impedit*.

IN a *quare impedit* brought by the crown, the original writ was returnable at a general return, and the *venire* at a day certain; and it was inſiſted to be error, becauſe throughout the cauſe the proceſs ſhould be uniform.

Sed per Curiam: This is not a diſcontinuance, but a miſcontinuance; which is helped by 32 *H.* 8. *c.* 30. and though the King is a party, yet in theſe his civil ſuits the ſtatutes of jeofails extend to the crown. The judgment was affirmed.

Michaelmas

Michaelmas Term

4 Georgii Regis. In B. R.

Thomas *Lord* Parker, *Chief Juſtice.*
Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Pratt, *Knt.*
Sir Edward Northey, *Knt. Attorney General.*
Sir William Thompſon, *Knt. Recorder of* London, *Solicitor General.*

Anonymous.

THE court refuſed to grant a *Mandamus* to juſtices, to make a rate, to reimburſe two of the inhabitants their charges in defence of an indictment for not repairing a bridge. Mandamus.

Cork *verſ.* Baker. Ante 34.

THE defendant having brought a writ of error of a judgment in *C. B.* aſſigned for error a *Clauſum fregit* original, and took out a *Certiorari* to verify his errors. The *Cuſtos brevium* of the common pleas, inſtead of certifying the original, returned that there was ſuch a writ in his office, but that the plaintiff in the original action, having entered a *Ne recipiatur*, he could not file the original, and conſequently could not return it.

Upon

Upon this the plaintiff in error applied to this court. And a rule was made, for Mr. *Yates*, the deputy *Cuſtos brevium*, to attend. And after counſel had been heard on both ſides the court delivered their opinions.

C. J. This practice of entering a *Ne recipiatur* is very new, and in my opinion very abſurd. There may indeed be ſome colour to ſay, that if the plaintiff neglects to file his original in order to warrant his judgment, that then the defendant may ſtop the filing it; but that reaſon will not hold in this caſe, which is a *Ne recipiatur* entered by the plaintiff againſt filing his own writ, after he has had the benefit of it, by intitling that court to hold plea, and convene the defendant before them. Their authority is grounded only on the king's writ out of chancery, except they proceed by way of privilege. And the ſtatute which helps want of an original, never intended they ſhould proceed without; but only went upon a ſuppoſition, that there had been one, which was loſt; and therefore in all thoſe caſes where want of an original is helped, yet a bad original is not. 1 *Sid.* 84. *Yelv.* 109. 5 *Co.* 37. *b.* *Salk.* 267. If this practice was to prevail, no bad originals would ever be filed, but judgments be affirmed upon preſumption the original is loſt, when in truth there never was a good original at all.

Matter of fact relating to the proceedings muſt be fairly laid before the court that has power to examine into thoſe proceedings; and we will make the filazer, or the plaintiff, carry in and file the original, rather than the party ſhall not have juſtice done him; or withdraw the *Ne recipiatur*, if that was of any effect. When a writ is in the *Cuſtos brevium*'s office, it is filed in judgment of law, though the officer does not annex it to the bundle of writs. It is an unreaſonable poſition, that as ſoon as the plaintiff has had the benefit of the writ, he ſhould be ſuffered to ſtifle it. Every defendant has a right to reverſe an erroneous judgment; and he that takes upon him to obſtruct that, is guilty of a very great abuſe; and in my opinion ought to be puniſhed.

Powys J. To deny the means is to deny the thing.

Eyre J. The court having power to redreſs, has as incident thereto, a power to come at every thing which is neceſſary for their information. And the officers of *C. B.* are *pro hâc vice* officers of this court; and we will not pray in aid of the common pleas, to make the officer do his duty. His return amounts to no more than this. He ſays the writ is not filed; why? Becauſe I do not do it; though I am paid for it, and it is my duty to do it.

Pratt J. The proceedings of the two courts ſeem to claſh, and I ſhall always be very ready to pay a due reſpect to the court of common pleas. But that will never carry me ſo far, as to compliment them with our juriſdiction. And in caſes where that comes in queſtion, I think a man ought not to be mealy-mouthed, and in vindicating our own juriſdiction, we only act up to the rules of law and our own oaths. This court is ſuperior to the court of common pleas, and they ought not to have laid an inhibition upon the officer, from filing this writ. When we are told, there is error in the proceedings, we muſt make all proper inquiries; and the party has a right to demand it of us. And when we iſſue a *Certiorari*, to return up this original; ſhall the officer ſay, there is ſuch an one, but I will not file it? And can it be expected, that we ſhall ſtand ſtill, till the truth of this is falſified in an action for a falſe return? Mr. *Yates* has endeavoured to trip up the heels of our juriſdiction, and therefore ought to be committed, unleſs he obeys immediately.

Mr. *Yates* refuſing to alter the return, was committed. He immediately applied to the common pleas for a *Habeas corpus*, whither being carried, the return was read, that he was committed by the court of *B. R. pro contemptu.* And then *Cheſhyre* moved, that the return might be filed; which being done, he moved, that Mr. *Yates* might be diſcharged; and argued, that the commitment was too general, for that ſome cauſe of commitment muſt appear, to reſtrain a ſubject of *England* of his liberty. It is not ſo much as ſaid to be a contempt upon confeſſion, verdict, or examination.

2 Ven. 22. *Habeas corpus* returnable in C. B. Carter 221.

Secondly, The time ſhould appear. For it might be before the act of grace; and returns muſt contain certainty in themſelves, becauſe they are not traverſable.

Pengelly quoted *Buſhel*'s caſe in *Vaughan.* 1 *Roll. Rep.* 119, 192, 220, 245. *Moor* 840. *Carter* 221. And argued, that though it is ſaid, the defendant *praeſens hic in curia committitur*; yet that doth not infer, that due examination was had.

Vide Lord Shafteſbury's caſe, 2 vol. Trials 62.

Whereupon the court took time to conſider, and look into the caſes; and in the mean time the parties made an end of the cauſe, and applied to *B. R.* for leave to enter a *Nolle proſequi*, which was granted. And then a motion was made, that Mr. *Yates* might be diſcharged, which upon conſent, and interceſſion of the proſecutor, and an affidavit of his indiſpoſition, and ſetting a ſmall fine upon him, was granted. But the C. J. ſaid, that if Mr. *Yates* had been there, he ſhould have told him, that he muſt not think of giving ſuch ſhuffling anſwers to the king's writ of *Certiorari*; and that this

court has power, if their commitments are queſtioned, to juſtify their own proceedings.

Dominus Rex *verſ.* Marriott.

Conviction for killing a hare, ill, *quia* the witneſs ſwears generally a man is not qualified.

CONviction before one juſtice for keeping a greyhound; reciting, that one *William Toune* came and informed, that the defendant, being a perſon *not qualified* to keep a greyhound, did nevertheleſs keep one at *A.* and another at *B.* and with them killed one hare at *A.* and two at *B.* and that he being ſummoned did appear, and being aſked what he had to ſay, offered nothing in excuſe, and *ideo* the juſtice convicted him.

Pengelly Serjeant objected, that the juſtice ſhould ſet out, why the defendant is not a qualified perſon, as that he is not the ſon of an eſquire, nor has 100 *l. per annum* in his own or his wife's right. For he ought not to make himſelf the ſole judge, but give the reaſons at large. *Weſt precedents tit. Indictments*, §. 129. *page* 145. §. 270. *page* 147. §. 298. 1 *Saund.* 262.

Reeve contra. The conviction has purſued the words of the act, in ſaying the defendant *not being qualified* did ſo and ſo. The caſes quoted are upon ſtatutes where the expreſs qualifications are mentioned, but the ſtatute 5 *Annae*, *c.* 14. which gives the penalty, ſays only, " not being qualified according to the ſtatute 22 & 23 *Car.* 2. *c.* 25." The defendant at the time of the conviction might have ſhewn himſelf qualified, for there the affirmative lies.

In orders of removal it is ſufficient to ſay, the perſon came to ſettle contrary to law, without adding, " not having 10 *l. per an-* " *num*, *&c.*" though thoſe are the qualifications required by the ſtatute; and an order is as much a judgment as this, and the ſame reaſon holds in both caſes.

Pengelly. The ſtatute 22 & 23 *Car.* 2. limits the qualifications, and 5 *Annae* the penalty; and both theſe muſt be conſidered together as one act. For where one ſtatute makes the offence, and another inflicts the puniſhment; it ought to appear, that the proceedings tally with both. *Plowd.* 206. *Allen* 49. *Cro. Eliz.* 750. This caſe differs from that of an order, for there an appeal lies, but here the judgment is final.

Plow. 51. a. b. The chief juſtice ſeemed to think the conviction would be good, having followed the words of 5 *Annae*, and that if the defendant was qualified, he ought to have ſhewn it before the juſtice, being

ſummoned for that purpoſe. But then *Eyre* J. ſtarted an objection, that it was not the juſtice that had taken upon him to ſay the defendant was not qualified, but only the witneſs, for the conviction runs, that the witneſſes being ſworn, " dicunt et jurant et uterque " eorum dicit et jurat quod defendens *exiſtens perſona minimè quali-* " *ficat*' did ſuch a day keep a greyhound;" ſo that it appears, the witneſs has given the law to the juſtice, and takes upon himſelf to judge of the defendant's qualifications, and the juſtice is only made uſe of as an inſtrument, to reduce the opinion of the witneſs into a conviction.

C. J. The *exiſtens, &c.* ſhould be the concluſion of the juſtice, and not the words of the witneſs; for he ought not to ſwear generally a man is not qualified, and ſuch a general proof will not be good. This is only an invention, to ſupport a conviction in general terms, which would be bad if the particular facts were alleged.

Pratt J. Where the juſtices have a ſummary juriſdiction, and no appeal lies (as in this caſe) we muſt keep them up ſtrictly to the law; and I ſhould be glad if we could make them ſet out the whole particularly. But in this caſe I think it cannot be underſtood, that the *exiſtens, &c.* are the words of the witneſs, for it cannot be ſuppoſed that he ſwore in *Latin*, and therefore I look upon this as the ſubſtance of the evidence reduced by the juſtice into form. If words are ſet out in *Engliſh*, we keep the witneſs ſtrictly to the words; but where they are turned into *Latin*, if the ſubſtance and effect of them be proved, it is ſufficient.

C. J. If ye render it in *Engliſh*, it is no more, than that the witneſſes ſwore, that the defendant, not being a perſon qualified according to law, kept a greyhound. And we cannot intend, they ſwore negatively to every qualification. If any one of the qualifications had been omitted, the conviction would have been bad; and ſo it will be, when all are omitted. This is a record that the witneſs upon oath depoſed ſo and ſo. I have ſeen all the qualifications negatively recited in orders of removal.

Eyre J. *Rex* v. *Green*, a conviction was quaſhed, where the witneſs depoſed *de veritate praemiſſorum*. In *Engliſh* depoſitions the effect is only ſet out, that the witneſs ſwore that, *&c.* And though this is only the recital made by the commiſſioners, yet it is as large as the words of the witneſs; and we muſt intend this evidence was taken in the ſame manner. The witneſs here cannot be indicted for perjury, in ſwearing the defendant was not the ſon of an eſquire, *&c.* becauſe he has conceived the matter in ſuch general terms. I do not ſee how he could honeſtly ſwear this; for I believe had he

Contra Salk. 369.

he been aſked, as ſoon as he had ſaid the defendant was not qualified, what the qualifications are, he could not have told you.

Adjournatur. And afterwards *Pengelly* mentioned two caſes, *Regina* v. *Hayward*, *Paſch.* 12 *Annae.* There it was, " not being " qualified, licenſed or authorized to keep any engine, *&c.*" and it was quaſhed. The other was the ſame term, and quaſhed, becauſe no qualifications were mentioned. And towards the end of the term this conviction was quaſhed; and the principal reaſon declared to be, becauſe the witneſſes had taken upon themſelves, to judge of the qualifications.

Jones *verſ.* White.

Quaere, whether the coroner's inqueſt may be given in evidence in an action?

UPON a trial at bar on a feigned iſſue out of chancery, where the queſtion was, *Deviſavit vel non*; to overthrow the will, the defendant inſiſted, that the teſtator was *Non compos* at the time of making it, which was the 29th, having ſhot himſelf the 31ſt. And amongſt other circumſtances the coroner's inqueſt, which found him lunatick, was offered to be read. But being oppoſed by the other ſide, the court delivered their opinions.

C. J. The plaintiff in this caſe is executrix, and the inqueſt for her advantage, ſince the perſonal eſtate is ſaved by finding lunacy; and therefore I think it may be read againſt her. In my lord *Derby*'s caſe an inqueſt *poſt mortem* was allowed to be given in evidence. If this be read, it will have very little weight, for it only finds him lunatick *eo inſtante*, 31ſt, which is no concluſive evidence, that he was ſo the 29th. *Powys* J. with the C. J.

Eyre J. This is a criminal matter, and ought not to be given in evidence in a civil proceeding. A verdict on an indictment of bat-
3 Sid. 325. tery cannot be read in an action for the ſame battery. An inqueſt *poſt mortem* was in the nature of a civil proceeding, but this is criminal, for it might induce a forfeiture of the goods, if he had been found *felo de ſe.*

Pratt J. If a verdict be given in evidence, it muſt be between the ſame parties; and therefore an indictment, which is at the ſuit of the king, cannot be read in an action, which is at the ſuit of the party. The wife is no witneſs here, as ſhe was before the coroner; ſo that this would be to read her againſt herſelf. The reaſon why an inqueſt *poſt mortem* may be read is, becauſe of the antiquity of it, or to prove a pedigree.

The court being divided, it was not read, till *Pratt* deſired it might for this time, being only to inform the conſcience of the Chancellor, and that nothing might be ſaid to be wanting to clear this queſtion.

Dominus Rex *verſ.* Wakefield.

THE defendant was coroner of *Litchfield*, and as ſuch took an inquiſition *ſuper viſum corporis* of a man that hanged himſelf, whereby he was found *felo de ſe*. It fully appeared to the jury, that the man was lunatick; but the defendant, in order to cover the goods, told them that the finding him *felo de ſe* was only matter of courſe, with which they were contented, and found accordingly. Coming afterwards to be better informed, what the conſequence would be; they applied to the coroner, and told him they were fully ſatisfied, the man was a lunatick, and deſired he would take the verdict ſo: And thereupon he drew up the inquiſition, and they all ſet their hands and ſeals to it. A *certiorari* being brought, he returned up the firſt inquiſition, that he might ſtill cover the goods; and the court ſtayed the filing it, and committed him. 2 *Sid.* 90, 101, 144. *Mich.* 1 *Geo. B. R. Rex* v. *Keddington*, the filing ſtaid on the ſame account.

Coroner puniſhed for ill practice.

Vide 1 *Ven.* 352. where ſuch an inquiſition was quaſhed; *ſed quære* how that could be, it not appearing on the record.

Dominus Rex *verſ.* Vandeleer.

THE juſtices at the ſeſſions order an apprentice, who had been ill uſed, and not provided for, to be diſcharged, and that the maſter having received 5 *l.* with him, ſhould refund 3 *l.* as a further proviſion for him.

Juſtices cannot order money to be returned on diſcharge of an apprentice.

This was moved to be quaſhed, becauſe the ſtatute 5 *Eliz. c.* 4. §. 35. which gives the juſtices power to diſcharge apprentices upon complaint to them, gives them no authority to order any money to be returned.

Per Curiam: It is very hard, that if the maſter miſuſes his apprentice the next day after he is bound, he ſhould pay back nothing if he is diſcharged. It will be an encouragement to maſters, to treat their apprentices ill; but the ſtatute being ſilent, the order muſt be quaſhed.

Salkeld 68. It was held, that the juſtices might order money to be returned, as a conſequence of their power to diſcharge. *Ibid.* 67, 490.

Dominus Rex *verſ.* Lewis.

Information.

AN information was moved for againſt a clergyman, for perjury at his admiſſion to a living, upon an affidavit that the preſentation was ſimonaical. But the court refuſed to grant it, till he had been convicted of the ſimony.

Young *verſ.* Holmes.

At niſi prius *in* Middleſex. B. R.

On a deviſe of a term to an executor for life, he takes as executor and not as legatee without a ſpecial aſſent.

UPON Not guilty in ejectment the caſe was, That leſſee for years, deviſes the term to the executor for life, paying 50 *l.* to *J. S.* remainder to the leſſors of the plaintiff. The executor died, and his executrix entered upon the reſidue of the term, and poſſeſſed herſelf of the leaſe.

1. It being proved, the defendant had the leaſe in her cuſtody, and refuſing to produce it; an attorney who had read it was allowed to give evidence of the contents. And the C. J. ſaid, he would intend it made againſt the defendant, it being in her power if it was otherwiſe to ſhew the contrary.

What is an aſſent.

2. For the defendant it was inſiſted and agreed to by the C. J. that *James Holmes* took the term as executor and not as legatee, and then the remainder over was not executed, and that it was incumbent on the remainder-men to prove a ſpecial aſſent thereto as to a legacy. Upon this they called a witneſs, to prove payment of the 50 *l.* charged upon the term in the hands of the legatee; and this was held a ſufficient aſſent, and the plaintiff obtained a verdict. *Plow.* 544. *a.* 8 *Co.* 95. *a.*

Blewett *verſ.* Bainard.

Hil. 3 Geo. rot. 519.

A juror withdrawn for a view may be ſworn at the ſecond trial. S. C. Comyns 248.

ON error from *C. B.* it was aſſigned, that *Abraham Saunders*, who on the firſt trial was withdrawn in order for a view, was ſworn on the ſecond panel: And *in nullo eſt erratum* pleaded.

The plea of *in nullo eſt erratum* was agreed to be a confeſſion of the fact, and a demurrer to the matter of law: And at firſt the court

court inclined this was error, becauſe it muſt be taken he was withdrawn as a perſon admitted by both parties to be improper to try the cauſe. But afterwards on conſideration they held it to be right enough; and that if it was an exception, it ſhould have been taken before he was ſworn. But being withdrawn only for a view, they held it would be no objection, and affirmed the judgment.

Lord Kildare *verſ.* Fiſher.

Paſ. 3 Geo. rot. 2.

ON error from *Ireland* in ejectment it was objected, that it was brought (*inter al'*) for 100 acres of mountain, which is a deſcription of the ſituation, and not the quality of the land. And 11 *Co.* 55. 2 *Roll. Rep.* 166, 189. *Palm.* 100. *Hardr.* 58. were cited. Ejectment lies for mountain in *Ireland.*

Econtra. It was inſiſted, that ejectments have been held to lie for that in *Ireland*, which is not a known deſcription here; as for *Bog*, 1 *Cro.* 511. 2 *Keb.* 745. *Paſ.* 3 *Ann. Hind* v. *Hancock.* Ejectment in *Ireland* for a knave of land was held well, on certificate from thence, that it was a term uſed there.

After the cauſe had been adjourned, the C. J. delivered the opinion of the court. I have looked into the caſe of *Stafford* v. *Macdonolph*, in *Palm.* 100. and 2 *Roll. Rep.* 166, 189. which *Rolle* never tranſcribed into his abridgment. He being at that time the experter reporter, has given the fulleſt account, and is chiefly to be regarded. For that caſe is 17 *Jac.* 1. and *Palmer* was not attorney general till King *Charles* the Second's Reſtoration, (1 *Sid.* 465.) and muſt be very young, when that caſe was adjudged. There it is admitted, that a *praecipe* would lie *de ſtagno*, of a carve, and an oxgang; *a fortiori* will an ejectment, which requires rather leſs certainty than a *praecipe*. They were inclined however to be guided by the opinion that had prevailed in *Ireland*, and therefore referred it to two who had been Judges in *Ireland*, and deſired them to conſult Sir *William Parſons*, and upon his authority they certified, that the word *mountain* in the general acceptation was uſed to denote the ſituation and not the quality of the land, and upon that the judgment was reverſed. This caſe did not give us any ſatisfaction; though we agreed with the Judges to be guided by the ſenſe of the *Iriſh*, yet we have not thought fit to take the ſame method: And have therefore propounded to them ſeveral queſtions, which are anſwered by the Chancellor, the two Chief Juſtices, the Chief Baron, and four other of the Judges. And I have ſince ſhewed it to

two

two of the Judges, who were here in the vacation, and they concur with the reſt.

1. The firſt queſtion we propounded to them was, whether in demand the word *mountain* is underſtood to deſcribe the quality of the land, or only the ſituation?

To this they anſwer: That it deſcribes both, and is a ſort of coarſe land that yields little or no profit. For the *Engliſh* upon their ſettling there, called ſuch land as they improved *arable*, and the uncultivated part went by the name of *mountain*. And the Lord Chancellor adds, that it does not ſo much as neceſſarily include the ſituation, for he has a great deal of coarſe land which is called mountain, and yet does not lie upon a hill, but is as low as the arable land about it, and that a boy can diſtinguiſh which is arable and which is mountain.

2. Whether fines and recoveries, and writs of dower, are uſually brought of mountain?

In anſwer to this they have ſent us abundance of precedents from King *James* the Firſt to this Time; and add, that it would be of miſchievous conſequence, if it ſhould be thought that *mountain* was no deſcription, ſince it would ſhake all the ſettlements in the kingdom.

3. Whether ejectments are uſually brought of mountain, and whether this point has received any judicial determination?

To this they anſwer: That it happens very often, but has never been judicially determined, becauſe it is ſo common as never to be queſtioned.

As to the caſe in the Exchequer Chamber of *Holborn* v. *Babbington*, we are aſſured, that judgment was reverſed upon another point, whether a challenge was well allowed, and the other objection only mentioned by one of the Judges.

Since therefore the precedents are with the preſent caſe, and the thing reaſonable in itſelf, and the ſheriff may as eaſily know how to deliver poſſeſſion of mountain, as of a carve, or an ox-gang; we are all of opinion, that an ejectment will lie for mountain in *Ireland*, and conſequently the judgment muſt be affirmed.

Hilary Term

4 Georgii Regis. In B. R.

Thomas *Lord* Parker, *Chief Juſtice.*
Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Pratt, *Knt.*
Sir Edward Northey, *Knt. Attorney General.*
Sir William Thompſon, *Knt. Recorder of* London, *Solicitor General.*

Dominus Rex *verſ.* Inhabitantes de Weſtwood.

IN an order of removal the complaint was recited to be to one juſtice only, but the ordering part is by two juſtices; and this was held good. Then exception was taken, that there was no adjudication of the place to which he was removed being his laſt legal ſettlement, but only "*We order him to be removed to* A. *as the place* "*of his laſt legal ſettlement.*" And for this fault the order was quaſhed.

The complaint may be to one juſtice, the order of removal muſt be by two. Salk. 478, 488.

Dominus Rex *verſ.* Loggen et Froome.

INdictment againſt defendants for extortion, ſetting forth, that the defendant Dr. *Loggen* being chancellor, and the other defendant regiſter of the biſhop of *Sarum*, did force one *Thomas Hollier*, executor of the will of *Mary Alſton*, to prove the ſaid will in the ſaid biſhop's court, *ubi* they *bene ſciebant* that the ſaid will had be-

A prerogative probate when there are no *bona notabilia* is not void, but only voidable.

fore been proved in the prerogative court of *Canterbury*, and by reaſon thereof they *extorſive exigebant* of the ſaid *Thomas Hollier* 40 *s.* On Not guilty pleaded there was a verdict for the king, generally.

The defendants now moved in arreſt of judgment, and offered ſeveral exceptions, relating either (1.) to the merits, or (2.) to the form of the indictment.

As to the merits two things were inſiſted on;

1*ſt*, That it not appearing there were any *bona notabilia*, the prerogative probate was *ipſo facto* void, and conſequently the will ought to be proved before the defendant *Loggen*, the teſtator dying in the dioceſe of *Sarum*. 2*dly*, Admitting it not void, but only voidable, yet the prerogative court having proceeded in a matter wherein they had no juriſdiction, that ſhould not hinder the court of *Sarum* from proceeding in a matter within their juriſdiction.

As to the firſt point; before the counſel had gone far in their argument the C. J. ſtopped them, and declared, that it was not now to be conteſted, having been often ſettled, that ſuch prerogative probate is not void, but only voidable. To which the reſt of the court agreed.

2. They held that this voidable probate, being the act of the ſuperior, had ſo far taken away the power of the inferior, that he could not exerciſe his juriſdiction, till that voidable probate was avoided.

Then it was urged for Dr. *Loggen*, that in this caſe he acted as a judge, and therefore was not indictable for an error in his judgment. *Sed per Parker* C. J. In this caſe he did not act as a judge between party and party, but was only to determine whether he ſhould have ſuch fees or not; and that rule extends only to judges in courts of record, and not to miniſterial officers, as was reſolved in the caſe of *Aſhby* v. *White*.

The Exceptions to the indictment were many.

Firſt, For that it only alleged, that the defendants *bene ſciebant* that the will had been proved before in the prerogative court; whereas they ſhould have ſhewn, that it appeared judicially before them. For otherwiſe this is no more than indicting a judge for giving ſentence on one ſide, when a matter not appearing to him would have inclined him to the other.

To this it was anſwered, that he could not well know it, unleſs it appeared under ſeal; and this being after a verdict the C. J. ſaid he would intend it ſo, and in fact the ſecond probate was affixed to the ſame copy as the firſt.

Secondly, Another exception was, that this was an indictment at ſeſſions, and the juſtices have no juriſdiction as to extorſion. But this was likewiſe over-ruled, for their commiſſion has in it the word *extorſionibus*. 3 *Inſt.* 149. Juſtices of peace have juriſdiction of extortion

Thirdly, For that the indictment had not alleged what was the juſt fee; ſo *non conſtat* that the defendants were guilty of extortion. *Sed per Parker*, it matters not whether 40 *s.* was the uſual fee for probate, ſince in this caſe the defendants had no title to any fee at all.

Fourth exception. The defendants offices are diſtinct; and what might be extortion in one, might not be ſo in the other; and therefore the indictment ought not to be joint; as two cannot be jointly indicted for exerciſing a trade without ſerving an apprenticeſhip. *Et per Parker* C. J. This would be an exception, if they were indicted for taking more than they ought; but it is only againſt them for contriving to get money where none is due. And this is an entire charge. For there are no acceſſories in extortion, but he that is aſſiſting is as guilty as the extortioner; as he that is party to a riot, is anſwerable for the act of the others. Salk. 382. Salk. 334, 595.

Eyre J. doubted whether the *bene ſciebant* was ſufficient. And quoted a caſe where *habens notitiam* that he was elected conſtable, was held ill. But as to the merits, and all the other objections, the court were unanimous. *Sed adjournatur* as to this laſt, and to conſider what puniſhment to inflict on the defendants. 5 Mod. 129.

N. B. In the argument of this caſe this diſtinction was taken and agreed to on all hands; that a probate by the dioceſan in the caſe of *bona notabilia* is void, but a prerogative probate when there are no *bona notabilia* is only voidable. *Vide Mod. Caſ.* 146. And *Mich.* 1 *Geo. Cottingham* v. *Loftis*, *Parker* C. J. took this diſtinction. 5 *Co.* 30. *a.* Probate void, Plowd. 281. voidable, 8 Co. 135. a.

Dominus

Dominus Rex *verſ.* Munnery.

Excom' cap' quaſhed for generality.

A Writ *de excommunicato capiendo* was quaſhed, being only for not appearing to anſwer *certis articulis animae ſuae ſalutem morumque correctionem concernentibus.*

Butler *verſ.* Maliſſy.

Note to pay jointly or ſeverally how to be declared upon.

CASE upon a promiſory note. And the declaration ſet forth, that the defendant and another did *conjunctim vel diviſim* promiſe to pay. *Demurrer inde.* And for the defendant it was inſiſted, that the action ſhould have been brought againſt both. *Et per Parker* C. J. The plaintiff might have brought it againſt either or both, for he had his election. If the action had been againſt both, he ſhould have declared as he now does; but that is not right in the action againſt one only. For he ſhould have declared generally, that this defendant by his note promiſed to pay, and a ſeveral note by two would have been good evidence. As where there are ſeveral obligors, and one only is ſued, no mention is made in the declaration of the other obligors. Suppoſe the note had been to pay 50 *l.* *or* 100 *l.* the plaintiff is intitled to either, but uncertain which till he has made his election; for he that ſpeaks in the disjunctive ſays true, if either member of the disjunctive be verified; whereas he that ſpeaks in the affirmative, affirms both parts to be true.

1 Sid. 189, 238.

The plaintiff prayed leave to diſcontinue on payment of coſts, which was granted; and at another day moved that he might change his rule, to one to amend on payment of coſts, but this laſt motion was denied.

Forſter *verſ.* Cale.

Whether a man is an attorney or not muſt be tried by record.

IN caſe *ſur aſſumpſit* the defendant pleads, that he is an attorney of this court, in abatement, and that he ought to be ſued as a privileged perſon. The plaintiff replies, that he is not an attorney, and concludes to the country; to which the defendant demurs. *Et per Whitaker* he ought to have concluded to the record. *Raſt. Ent.* 610. *b.* *Aſton* 347. *Thompſon* 4. 2 *Mod. Caſ.* 106.

Agar contra. Thoſe entries are where the privilege of *C. B.* was pleaded, which differs from this court; for there is a regular record kept of the attornies, and they muſt be forejudged, before they can be

be arreſted: whereas here the remedy againſt attornies is ſpeedier than againſt other perſons, for the firſt proceeding is a bill left in the office, and after a rule to plead the plaintiff may ſign his judgment.

The court inquired of the ſecondary, who informed them, that anciently there were rolls kept of the attornies; but ſince the ſtamp act that method has been diſuſed, and a book ſtamped, and the names entered in that. And *Whitaker* ſaid that on the trial of the aſſize for the office of chief clerk the rolls from *Edw.* 3. were produced. *Et per Curiam:* The book which is now kept muſt be taken as minutes in order to make up the record, and it is a warrant to the proper officer for that purpoſe, and whenever they are wanted they may be made up. Let that be done regularly for the future. In this caſe the plaintiff ſhould have concluded to the record, for no man can be an attorney but by the act of the court, and that act muſt appear by the record, for we will not go to a jury to inquire into our own act. When an attorney is ſtruck out, the rule is, *quod extraponatur e rotulo attorn' et clericorum bujus cur'. Judic' quod billa caſſetur.*

Between the Pariſhes of Teelby *and* Willerton.

THE juſtices remove a certificate woman being *likely* to become chargeable. *Et per Curiam:* By 8 & 9 *W.* 3. *c.* 30. ſhe is not removable till ſhe *actually* becomes chargeable; and the order was quaſhed. In another order the juſtices adjudged, that a perſon *may* become chargeable. *Et per Curiam:* This is not ſufficient, for the ſtatute only enables the juſtices to remove perſons likely to become chargeable, for a man of the greateſt eſtate may poſſibly one time or other become chargeable, though it is very unlikely; and is ſuch a perſon removeable? There is as much difference in this caſe between *may* and *likely*, as between a poſſibility and a probability.

Certificate-men not removeable till actually chargeable. So held Mich. 5 Geo. Pariſhes of Brocton *and* Eaſtwoodhay. So Salk. 530. *May become chargeable*, ill in an order of removal. 2 Mod. Caſ. 51. Salk. 491,

Dominus Rex *verſ.* Turner.

THE Defendant being aſſeſſed towards the poor's rate for his tithes as vicar, appealed to the ſeſſions, where he is abſolutely diſcharged. *Et per Curiam:* As vicar he is chargeable by 43 *Eliz.* and the ſeſſions has only power to moderate, but not diſcharge. And the order of ſeſſions was quaſhed.

Vicar chargeable to poor's rate. Salk. 483, 524.

Vandeput *verſ.* Lord.

Grantee of reverſion before 4 & 5 Annæ cannot bring covenant without attornment. 2 Lev. 155. *Sed vide* the caſe of Woodward *and* Marſhall, Mich. 8 W. 3. B. R. (which is ſhortly put in Salkeld 82.) where it was ſaid, that the grantee might bring covenant, but not debt or diſtrein before attornment. 1 Lev. 259. *Sed N. B.* That was a grantee by fine.

COvenant by the plaintiff as aſſignee of an executor of an aſſignee, who by many *meſne* aſſignments came to the poſſeſſion of a reverſion of a term of years granted in 1624, by the mercers company, reſerving rent; and ſets forth the leaſe by them made, that the leſſee made an under-leaſe for a leſſer term, wherein the leſſee covenanted to leave the premiſſes in repair, and that then the firſt leſſee granted the reverſion to *A.* who granted it over, till it came to the plaintiff, who as aſſignee of that reverſion brings covenant againſt the defendant as aſſignee of the ſecond leſſee, the under leaſe being expired, and aſſigns the breach in not leaving the premiſſes in repair. Judgment by default, *et inquiratur de dampnis.*

Reeve moved in arreſt of judgment for that the plaintiff had not ſhewn a good title to the reverſion, there being no attornment ſet forth on the firſt grant to *A.* nor on any of the *meſne* aſſignments. And he put the queſtion and argued upon it, whether when tenant for years makes an under leaſe for a leſſer term, and afterwards grants the reverſion, it paſſes without attornment; for this caſe muſt be conſidered as at common law, the grant being made long before the late ſtatute. In *Bro. Abr. tit. Attornment, pl.* 45. it is ſaid, that ſuch a reverſion will not paſs without attornment, becauſe of the attendancy of the rent, which is the preſent caſe. If the ſtatute 32 *H.* 8. *c.* 34. be objected, I anſwer, that the ſtatute only gives a compleat aſſignee the action, and has no operation ſo as to make good his title. 1 *Inſt.* 215. *a.* A grantee by fine cannot bring covenant without attornment, *a fortiori* a grantee by deed.

Whitaker contra. The caſe in *Bro.* was before 32 *H.* 8. ſo that what was neceſſary at common law is not ſo ſince that ſtatute. I agree, attornment is neceſſary on a fine, but why? Becauſe the conuzee could compel it by a *quid juris clamat*, which the grantee of this reverſion cannot. In the caſe of *Sands* v. *Brookes*, *Mich.* 5 *W. & M. B. R.* it was held that a grantee of a reverſion of a copyhold without attornment might maintain covenant againſt leſſee. The 32 *H.* 8. was made to aſſiſt ſtrangers to deeds, and therefore ſupplies all circumſtances.

Hob. 177.

But further, this is a judgment by default, and aided by the ſtatute for the amendment of the law, which extends all the ſtatutes of jeofailes to judgments by default, in the ſame manner, as if there had been a verdict; and no body can ſay but that in this caſe a verdict would have cured the want of ſetting out an attornment.

Reeve replied, The caſe of a grantee of a copyhold doth not come up to this, for copyholders do not claim by deed, but by cuſtom, and therefore no attornment is neceſſary, as it was before the late ſtatute upon common law conveyances, which is the preſent caſe. I agree, a verdict would have cured this defect, becauſe the plaintiff could not have had a verdict unleſs he had proved an attornment, but as this is a judgment by default, and was not a jeofaile before 4 & 5 *Annae*, *c.* 16. that ſtatute can have no relation to this caſe. 2 Mod. Caſ. 87. 1 Ven. 109. Salk. 130.

C. J. The reaſon why the plaintiff is required to ſet out an attornment is, becauſe his title is not compleat without it, as a copyholder's is. The 32 *H.* 8. gives none but an aſſignee this action; it doth not enable him to be aſſignee, but only as ſuch to bring an action. To which *Powys* J. agreed. *Et per Eyre* J. The 32 *H.* 8. is out of the caſe; for as the plaintiff is not a compleat aſſignee, we muſt take it as it ſtood at common law, and at common law ſuch a grantee of the reverſion as the plaintiff is could not maintain an action of covenant. *Jones* Sir *W.* 243. *Jones* Sir *Tho.* 217, 232. *Moor* 527. This was not a jeofaile, ſo not helped by 4 & 5 *Annae*. And *Prat*, J. ſaid, that the queſtion was no more, than whether the ſtatute 32 *H.* 8. gives the action to him who has not the reverſion, for without attornment it paſſed not. For theſe reaſons the judgment was arreſted.

Lane *verſ.* Santeloe.

At Niſi prius *in* Middleſex, coram King, *C. J.*

CASE for a malicious proſecution of an indictment of felony, whereof the plaintiff was acquitted, was brought againſt the proſecutor and the juſtice who committed; and the jury gave 200 *l.* damages againſt the proſecutor, and 20 *l.* againſt the juſtice, and the C. J. directed the verdict to be taken accordingly. Different damages given.

Weſtbrooke *verſ.* Strutville.

Coram King, *C. J.* *in* Middleſex.

ON Not guilty in treſpaſs for an aſſault, the defendant gave in evidence his marriage with the plaintiff, to encounter which ſhe proved a former marriage to one *Weſtbrook*, who was alive at the time of her ſecond marriage. *Pro defendente* it was inſiſted, the plaintiff ought not to give felony in evidence to ſupport her action; but this was over-ruled, and ſhe obtained a verdict, her marriage with the defendant being void *ab initio*. Wife *de facto* only may bring treſpaſs for aſſault by huſband.

Strutville

Strutville *verſ.* ——

Coram Parker *C. J. in* Middleſex.

Wife *de facto* a ſervant.

WHERE a woman marries a ſecond huſband living the firſt, and the ſecond not privy; as to what ſhe acquired during the cohabitation, the C. J. ſaid he would eſteem her as a ſervant to the ſecond huſband, who is intitled to the benefit of her labour.

Williams *verſ.* Lady Bridget Oſborne.

Before the Delegates at Serjeants Inn, January 22, 1717.

Of the ſuppletory oath.

THE queſtion below was, whether Mr. *Williams* was married to the lady *Bridget Oſborne*; the miniſter who performed the ceremony having formerly confeſſed it extrajudicially, but now denying it upon oath. So that there being variety of evidence on both ſides, the Judge upon the hearing the cauſe required, according to the method of eccleſiaſtical courts, the oath of the party, which the civilians term the ſuppletory oath, that he was really married as he ſuppoſes in his libel and articles. The accepting this oath (as was agreed on both ſides) lies *in arbitrio judicis*, and is only uſed where there is but what the civilians eſteem a *ſemiplena probatio*; for if there be *plena probatio*, it is never required; and if the evidence does not amount to a *ſemiplena probatio*, it is never granted, becauſe this oath is not evidence ſtrictly ſpeaking, but only confirmation of evidence; and if that evidence doth not amount to a *ſemiplena probatio*, the confirmation of it by the party's own oath will not alter the caſe.

Upon admitting the party to his ſuppletory oath, the Lady *Bridget Oſborne* appeals to the Delegates. So that the queſtion now was not upon the merits, whether there really was a marriage or not, but only upon the courſe of the eccleſiaſtical courts, whether the Judge in this caſe ought to have admitted Mr. *Williams* to his ſuppletory oath, as a perſon that had made a *ſemiplena probatio* of that which he was then to confirm.

The queſtions before the Delegates were two: 1. Whether the ſuppletory oath ought to be adminiſtred in any caſe, to enforce a *ſemiplena probatio?* 2. Admitting it might, whether the evidence in this caſe amounted to a *ſemiplena probatio*, ſo as to intitle Mr. *Williams* to pray that his ſuppletory oath might be received?

1. As

1. As to the firſt, it was argued to be againſt all the rules of the common law, that a man ſhould be a witneſs in his own cauſe. It is not allowed in the temporal courts in any caſe but that of a robbery, which being preſumed to be ſecret, the party is admitted to be a witneſs for himſelf. In the temporal courts no man can be examined that has any intereſt, though he be no party to the ſuit, for *minima exceptio tollit ſacramentum juratoris.* On the other ſide many authorities and precedents were cited out of the civil law, to prove this practice of allowing the ſuppletory oath. And therefore the court held, that by the canon and civil law the party agent, making a *ſemiplena probatio*, was intitled to pray that his ſuppletory oath might be received. And though it be againſt the rules of the common law, yet this being a cauſe of eccleſiaſtical conuzance, the civil and not the common law is to be the meaſure of their proceedings, and therefore this practice being agreeable to the civil law, is well warranted in all caſes where the civil law is the rule; and the exerciſe of it lies *in arbitrio judicis.*

2. It being therefore eſtabliſhed, that a perſon making *ſemiplena probatio* is intitled to his oath; the next queſtion was, what is, according to the notion of the civilians and canoniſts, a *ſemiplena probatio.* With them it was argued on behalf of the lady, that nothing is eſteemed as a *plena probatio*, unleſs there be two poſitive unexceptionable witneſſes to the very matter of fact, as to the marriage. That a *ſemiplena probatio*, which is the next degree of evidence, is what is affirmed by the oath of one witneſs as to the principal fact, and confirmed by concurrent circumſtances.

And 1*ſt*, It muſt be *per unum teſtem.* 2*dly*, Evidence that concludes neceſſarily, and not by preſumption. 3*dly*, That has no preſumption to encounter it; and 4*thly*, The witneſs muſt be *honeſta perſona.*

That matrimonial cauſes require the greateſt certainty; and where that is the ſole queſtion, the proof ought to be fuller, than where it comes in by incident, as on granting adminiſtration.

To this it was anſwered on the other ſide, that *ſemiplena probatio* implies no more than what the common lawyers call preſumptive evidence; and that is properly called preſumptive evidence, which has no one poſitive witneſs to ſupport it, but relies only on the ſtrength of circumſtances. And when there is one witneſs, who depoſes directly to the principal fact, this immediately ceaſes to bear the name of preſumptive, and aſſumes that of poſitive evidence. And that which in the temporal courts paſſes for poſitive

evidence, is the ſame degree of evidence with the *plena probatio* of the canoniſts and civilians. The ſuppletory oath does *ex vi termini* import, that there has been no one poſitive witneſs to the principal fact; and he that demands to be admitted to take his oath, does thereby admit that he has produced no concluſive evidence to the point in iſſue, and therefore *pars ipſa ſungitur officio teſtis.*

There is no fixing the bounds of a *ſemiplena probatio*; for in many caſes circumſtances may overbear poſitive evidence, and then if thoſe circumſtances ſhould not be eſteemed to amount to a *ſemiplena probatio*, when the poſitive evidence would exceed it; that would be to overthrow the poſitive evidence, by that which is not ſo ſtrong.

Semiplena probatio therefore they concluded to be, that degree of evidence which would incline a reaſonable man to either ſide of the queſtion; and implies in the notion of it, that a poſitive witneſs has not depoſed to the principal fact. And in this caſe though there was no poſitive concluſive evidence, but only ſuch as depended on circumſtances, as confeſſions, and letters, and unuſual familiarities; yet the court thought it amounted to a *ſemiplena probatio*, and conſequently that the dean of the Arches had done right, in admitting Mr. *Williams* to his ſuppletory oath; and therefore they diſmiſſed the appeal with 150 *l.* coſts. *N. B.* Before this appeal upon the point of the *gravamen*, the Judge below had given ſentence *in principali* in favour of the marriage, and the appealing upon this collateral point was only to protract the time. To obviate this the court of Delegates, inſtead of remitting the cauſe to the Arches, retained it *ad inſtantiam partis*, and 11 *December* 1718. heard it upon the merits, and confirmed the former ſentence.

Sir Harry Haughton *verſ.* Starkey. In Scacc'.

What coſts are to be given in prohibition.

AFTER judgment for the plaintiff in prohibition, the queſtion was, what coſts ought to be allowed, the ſtatute of 8 & 9 *W.* 3. *c.* 11. giving coſts *in ſuits upon prohibitions*; and whether they ſhould be computed from the firſt motion, or only from the declaration, was the doubt. Upon ſearch it was found to be the courſe of all the courts, to tax only from the time of declaring, except in two inſtances. *Eads* v. *Jackſon*, *B. R.* 2 *Geo.* and *Brown* v. *Turner et al' in C. B.* where they were allowed from the firſt motion. And of this opinion were all the Judges, as Baron *Forteſcue* informed me. And all the officers were directed for the future to allow the coſts of the firſt motion. And afterwards, *Hil.* 12 *Geo. B. R. inter Swetnam et Archer*, it was ſtated in the ſame

manner, and agreed to be the uniform practice ever ſince; and *Paſ.* 1 *Geo.* 2. between *Sir Thomas Bury* and *Croſs*, the ſame doubt was raiſed by a new maſter, and the court ordered coſts from the firſt motion.

Dominus Rex *verſ.* Inhabitantes de Haughton.

Several hirings and ſervices for 11 months give no ſettlement.

UPON a ſpecial order the caſe was ſtated, That about five years ſince one *John Evans* was hired into the pariſh of *Haughton* from *Aſh Wedneſday* to *Chriſtmas*; that at *Chriſtmas* he went home to his father, who lived in another pariſh, took his clothes with him, and ſtaid a week. That then he returned to *Haughton*, and hired himſelf to, and ſerved the ſame maſter eleven months. Then he went home again to his father for a week, and returned, and was hired and ſerved the ſame maſter other eleven months. That then by agreement between the maſter and him, and to avoid a ſettlement in *Haughton*, he went home to his father for a week, and afterwards ſerved the ſame maſter for five weeks. And there being ſo many hirings and ſervices, the juſtices adjudge the ſettlement in *Haughton*.

Denton, *Reeve* and *Foley* moved to quaſh this order, there being no actual hiring and ſervice for a year, both which the ſtatute of 3 & 4 *W.* & *M.* *c.* 11. requires. *Mich.* 9 *Ann. Paroch. Rudſwicke* v. *Dunſole*, *Salk.* 535. there was a hiring for a quarter of a year, and afterwards for half, and then for another half year, and a ſervice for all; but this was held to be no ſettlement. *Hil.* 10 *W.* 3. *Paroch. Overton* v. *Steventon*, there was a hiring and ſervice for half a year, then a hiring for a whole year, and a ſervice for half; and this was held to be a hiring and ſervice for a year, and the ſettlement in that pariſh. So *Paſ.* 1 *Geo. B. R. Rex* v. *Inhabitantes de Brightwell* in *Berks*, there was a hiring and ſervice from three weeks after *Michaelmas* 1712. to *Michaelmas* 1713. then a hiring to the ſame maſter for a year, and a ſervice for eleven months, and theſe two hirings and ſervices were held to gain the ſervant a ſettlement. *Paſ.* 1 *Geo. Paroch. Pepper Harrow* v. *Frencham*, a hiring and ſervice from 3 *October* to *Michaelmas*, and the ſervant at the maſter's requeſt ſtaid ſo long after as brought the year about; but this was held no ſettlement. *Mich.* 12 *Ann. Paroch. Horſham* v. *Shipley*, there was a hiring from 19 *February* to *May-tide*, from thence to *Lady-day*, then to *May-tide* again, then to *Lady-day*, and then to the next *May-tide*; but there being no contract for a year, the court held it no ſettlement.

Hawkins

Hawkins contra. A ſervant whilſt ſuch is not removable by any act, when a man is hired for a year in one pariſh, and ſerves the laſt quarter with his maſter, who removes into another pariſh, yet the ſervant gains a ſettlement, as has been adjudged, notwithſtanding the act ſays, *a hiring and ſervice for a year in any pariſh. Mich.* 1 *Geo. Paroch. St. George* v. *St. Catherine*, where the maſter removed at half a year's end. The ſtatute ſays, *apprentices bound out by indenture*; and yet it has been extended to thoſe bound out by deed poll. So the ſtatute of *Glouceſter* as to waſte has been extended beyond the letter, rather than it ſhould be evaded. In the preſent caſe it plainly appears, that this was a contrivance from the beginning, to exempt this pariſh, by ſending him away at eleven months end.

Foley. He needed not to go away, to avoid that which he could not have gained by ſtaying.

C. J. This is plainly a deſign to ſave this pariſh, and I ſuppoſe all the pariſhioners have agreed never to hire any ſervant for a year. The ground of the ſtatute relating to ſervants was, that a perſon who had ſtrength of body enough to hire himſelf out for a year, would when that year is expired be able to ſupport himſelf; and the ſame reaſon holds in the caſe of apprentices. I am afraid we cannot interpoſe in this caſe, but it is proper the legiſlature ſhould.

Pratt J. We muſt take the law as it ſtands, and follow former reſolutions; for the ſeſſions have ever ſince for the moſt part acted purſuant to thoſe reſolutions; and if we ſhould do otherwiſe, it will introduce the utmoſt uncertainty and confuſion; and little reſpect will be paid to our judgments if we overthrow that one day, which we reſolved the day before. The ſtatute expreſly requires a hiring and ſervice for a year; and it is admitted that if there was but one hiring and ſervice for eleven months, that would give no ſettlement; and why any ſubſequent hirings of the ſame nature ſhould gain him one, I cannot imagine. The reaſon of hiring ſervants at firſt for eleven months only is, becauſe the ſervant may prove idle and good for nothing, and the maſter, as a prudent man ought to do, avoids bringing a charge upon the pariſh, till he has had experience of the diligence and fidelity of his ſervant: And when he has had eleven months experience of his diligence and fidelity, then if he hires him a ſecond time, that is grounded upon his good ſervice during the former hiring, but ſtill the ſecond hiring muſt be as full, as if the firſt hiring were out of the caſe. And if the firſt hiring were out of the caſe, then the ſecond would ſtand in the ſame

ſame parity of reaſon with what I mentioned before, a ſingle hiring and ſervice for eleven months, which it is agreed will give no ſettlement.

If there was any fraud, the juſtices ſhould have examined into it. We cannot judge of the fact, but the law upon the fact. 1 *Ven.* 310. Demand and refuſal is evidence of a converſion to a jury, but not to the court. 1 *Roll. Abr.* 523. 10 *Co.* 56. *Hob.* 187. 1 *Ven.* 401. 1 *Sid.* 127. *Hutt.* 10. *Salk.* 531. If that caſe of the pariſhes of *Overton* and *Steventon* was open again, I ſhould not readily go into that opinion.

The court took time to conſider of it, and at the end of the term they held, that as the law now ſtands, the ſeveral hirings and ſervices that were ſtated could give no ſettlement. They ſaid it would be dangerous to depart from the words of the ſtatute, and if they once did, they ſhould never know where to ſtop. Wherefore the order was quaſhed.

Eaſter Term

4 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Juſtice.*
Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Forteſcue Aland, *Knt.*
Nicholas Lechmere, *Eſquire, Attorney General.*
Sir William Thompſon, *Knt. Solicitor General.*

Memorandum: This term the Lord Chief Juſtice *Parker* was made Lord Chancellor, and Mr. Juſtice *Pratt* ſucceeded him as Chief Juſtice, and Mr. Baron *Forteſcue* came down into the King's Bench, and was ſucceeded by Sir *Francis Page* the King's Serjeant, and Sir *Edward Northey*, Knt. was removed from being Attorney General, and *Nicholas Lechmere*, Eſquire, was made Attorney in his room.

Anonymous.

Sunday a day in rules, unleſs the firſt or laſt. Salk. 624.

THE writ was returnable 30th *January*, and the bail-bond aſſigned the 4th of *February*, between which and 30th *January* a *Sunday* happened. *Et per Curiam:* It is well aſſigned, for *Sunday* is to be reckoned as one of the four days (there being no more allowed in actions laid in *London* or *Middleſex*.) And ſo it is in rules to plead, except the firſt or laſt day happen upon a *Sunday*;

with this difference, that if the rule be given upon a *Sunday* it goes for nothing, but if it expires upon a *Sunday*, the defendant has all the next day to plead in.

Lanquit *verſ.* Jones.

Rule on executor to return *fieri facias de bonis eccleſiaſticis.*

THE Sheriff returned to a *fieri facias*, that the defendant is *clericus beneficiatus nullum habens laicum feodum* within his bailiwick; whereupon a *fieri facias de bonis eccleſiaſticis* iſſued, directed to the late biſhop of *Sarum* in one cauſe, and in another between the ſame parties directed to the preſent biſhop. And upon affidavit that the debts were levied thereupon, the court made a rule upon the executors of the firſt biſhop, to return the firſt writ, and upon the now biſhop to return the ſecond.

Drake *verſ.* Taylor.

Where the queſtion is whether the rector or vicar be intitled to tithes, no prohibition lies.

THE vicar libels for tithes of turnips, and lays his title to them by preſcription and endowment. The defendant pleads, that there is a rectory impropriate, and that time out of mind the rector has taken tithes of turnips. And laſt term he moved for a prohibition *pro defectu triationis*, and obtained a rule *niſi*. And now *Reynolds* Serjeant came to ſhew cauſe againſt a prohibition, for that turnips are a late improvement in *Norfolk* (where the matter ariſes) and quoted 2 *Roll. Abr.* 310. *Z.* 5. 1. 2. And where the matter is originally of eccleſiaſtical conuzance unmixt with any temporal ingredient, no prohibition lies. The vicar is *prima facie* intitled to nothing, unleſs he ſhews a right either by preſcription or endowment. Theſe endowments are of an eccleſiaſtical nature, and ſo is the extent of them. For anciently and until the Statutes of 15 *R.* 2. *c.* 6. and 4 *H.* 4. *c.* 12. the ordinary endowed the vicarage at his diſcretion. In 2 *Brownl.* 36. it is ſaid and agreed, that if there be a parſonage impropriate, and a vicarage endowed, and there be any difference between them, it ſhall be tried and determined by the ordinary. *In Scaccario et in C. B.* this prohibition has been denied.

Yorke contra. That rule which has been laid down, will not be inſiſted upon now-a-days, for the clergy will not pretend to be exempted from the temporal juriſdiction merely becauſe they are eccleſiaſticks. But in this caſe both parties are not eccleſiaſticks, for the libel is againſt the pariſhioner, and it lays a cuſtom which is denied and muſt be tried, and that has always been good ground for a prohibition. We do not pray it for defect of juriſdiction, but want of trial of the preſcription, which is what the vicar grounds himſelf upon

upon in making his title to the tithes; and the queſtion is not upon the endowment, though I admit the preſcription ſuppoſes an endowment.

C. J. Though both parties are not eccleſiaſticks, yet the thing in controverſy belongs either to one eccleſiaſtick or another, for either the rector is intitled to the tithes or the vicar, and what matter is it to the pariſhioner who has them? for he can only pay them to one. This is properly a diſpute what belongs to the vicar upon the endowment, and that evidence which will intitle him to a ſentence below, will not enable him to recover here, and therefore I am againſt a prohibition. To which *Powys* and *Eyre* Juſtices agreed. *Et per Pratt* J. If we ſhould grant a prohibition in order to try the cuſtom, and it ſhould be found againſt the cuſtom, yet that will not determine the queſtion upon the endowment; and therefore we ought not to draw them out of that court, which may properly determine the whole matter. And beſides in the ſpiritual court fifty years makes a preſcription, though it will not here. The rule for a prohibition was diſcharged.

Wallis *verſ.* Scott.

Where a ſpecial requeſt is neceſſary to be alleged, and where not.

THE plaintiff declares, that the defendant, in conſideration the plaintiff would make him a ſet of ſails worth 45 *l.* promiſed to pay ſo much for them upon requeſt; and avers, that he made the *ſaid ſails*; and the defendant although often requeſted refuſes to pay. *Demurrer inde.* And *Branthwayte* Serjeant *pro defendente* argued, that this being a ſpecial contract, the plaintiff muſt ſhew a performance of all on his part, which he has not done; for he has not averred that he made the ſails worth 45 *l.* and if they were not worth it, the defendant is not chargeable.

1 Lev. 48. 2 Lev. 198. Lutw. 231. Poph. 160. Hutt. 2, 42, 73. Lat. 93. Ley. 69. Lat. 208, 209. 1 Sid. 303.

Secondly, The action being founded upon the breach of contract, there ought to be a ſpecial requeſt laid. For this differs from the caſes where there is a precedent debt or duty whereon to ground the promiſe, for there I admit the action is a requeſt. 2 *Cro.* 183. The defendant, in conſideration the plaintiff being an innkeeper would entertain the defendant's commiſſioners, promiſed to pay for their lodging and diet upon requeſt; and there being nothing but the general *licet ſaepius requiſit'*, judgment was arreſted upon that diſtinction, between a collateral contract for a thing *in fieri*, and a precedent debt or duty. And to the ſame purpoſe is 2 *Cro.* 523. In 2 *Saund.* 32. *Aſſumpſit* on mutual promiſes to perform an award, or pay each other 40 *l.* upon requeſt, and in an action for the 40 *l.* the declaration was held ill, becauſe no requeſt was alleged, and the former

former caſes and differences were agreed. Here is no money to be paid till two things are done, neither of which appear, 1. the making the ſails of ſuch a value, and 2. a requeſt to pay for them.

Yorke contra. In actions upon the caſe the plaintiff may lay it as he can prove it, and is not obliged to a general *indebitatus aſſumpſit.* The value is part of the deſcription of the ſails, and therefore when we aver we made the aforeſaid ſails, *velaturas praedictas*, that takes in the whole deſcription. As to the requeſt, the *licet ſaepius requiſit'* is ſufficient. But if not, yet the want of a ſpecial requeſt ought to have been ſhewn for cauſe of demurrer. The caſes in *Croke* can never be law, for they are after a verdict, when the court will intend a requeſt proved, and ſo is *Pop.* 160.

Branthwayte replied. It is admitted that the value ought to be averred, and the only queſtion now is, whether it be or not. *Praedict'* will not be a ſufficient averment. In *Yelv.* 36. Treſpaſs for taking goods *a perſonâ* of the plaintiff, and judgment arreſted for the inſufficiency of averring the property. Theſe caſes as to the requeſt, being after a verdict, the argument holds *a fortiori* in this caſe, which is on a demurrer. The general requeſt as alleged may be ſince the action brought, and this at moſt is but an executory promiſe.

Powys J. (*abſentibus Parker et Pratt*) thought the *praedictas velaturas* was ſufficient. *Et per Eyre* J. I do not think the value needed be alleged; but if it need, yet the *praedict'* takes it in, for if the value be part of the deſcription, then it is averred that the plaintiff made ſuch a ſet of ſails as was agreed upon (that is) a ſet of ſails which anſwers every part of the deſcription.

Where notice or a requeſt are by law neceſſary, there the general averment will not be ſufficient; but it muſt be particularly ſet forth, that the court may judge whether the notice or requeſt were ſufficient. But in this caſe I take it no requeſt was neceſſary, for on the making the ſails the money immediately becomes due. If I promiſe a taylor, that in conſideration he will make me a ſuit of cloaths, I will pay him ſo much; there needs no requeſt, for as ſoon as he has done his part, there is a duty veſted in him. And this differs from the caſes where the payment is to be to a third perſon, or where an award directs a requeſt.

Afterwards, the court being full, *Branthwayte* mentioned *Cro. Eliz.* 773. 91. *Hutt.* 107. And *Yorke* quoted *Yel.* 66, 121. 3 *Bulſ.* 258. 2 *Cro.* 639. And the former caſes of 2 *Cro.* 183, 523. were denied *per Eyre* J. and judgment given for the plaintiff.

Dominus Rex *verſ.* Inhabitantes de Ivinghoe in Com' Bucks.

Where there is an hiring for a year, and a ſervice for part to a ſtranger, yet if there be no diſſolution of the firſt contract it is a ſettlement.

ON a ſpecial order of ſeſſions the caſe appeared to be, That one *Nicholas Young*, being legally ſettled in the pariſh of *Choleſbury*, was at *Michaelmas* 1715, hired into the pariſh of *Ivinghoe*, by *John Knight*, to ſerve him as a ſhepherd till *Michaelmas* following. That he entered upon the ſervice, and continued with *Knight* till *Lady-day*, who then paid him half a year's wages, and left the farm to one *Smith*, who entered and took all the ſtock and ſervants, and in harveſt time took *Young* off from keeping ſheep, and ſet him to harveſt work, for which he paid him 5 *s.* extraordinary, and at the year's end paid him the other half year's wages. That *Knight* when he left the farm never told *Young* he was no more his ſervant, nor were there any tranſactions between them two towards diſſolving the contract; neither did *Young* ever make any new contract with *Smith* for the laſt half year. And the juſtices adjudge the ſettlement in *Ivinghoe*, where the hiring and ſervice were.

Denton moved to quaſh the order. Becauſe to make a ſettlement there muſt be both a continuance of the contract, and ſervice; both which were broke off at the half year's end. *Mich.* 9 *Annae*, *Paroch' Rudſwick et Dunſfole*, *Salk.* 538. There was a hiring and ſervice for a quarter of a year, then for half a year, and afterwards for another half year, all which were held to give no ſettlement.

Ld. Raym. 1512.

Yorke. By 8 & 9 *W.* 3. *c.* 30. it is required, that the party continue in the ſame ſervice for a year. There muſt be an identity of the ſervice, it muſt appear to be the ſame maſter, which this is not, and here is an alteration of the wages. The court will not conſider what is moſt for the benefit of the ſervant, but which is the proper pariſh to be charged; it is all one to the ſervant, where he is ſettled.

Reeve contra. It being expreſly ſtated, that there was no new contract, the firſt muſt be taken to have continuance all the year. And if *Smith* had not paid *Young* the laſt half year's wages, no doubt but as this caſe ſtands he might have come upon *Knight* for them. The 5 *s.* ſhew he was *Knight*'s ſervant all along, for otherwiſe *Smith* had no occaſion to give him that extraordinary pay. The ſtatute does not require an identity of the contract, for *Hil.* 10 *W.* 3. *Paroch' Overton et Steventon*, a hiring and ſervice for half a year, and then a hiring for a whole year, and a ſervice

for half, was held to gain a ſettlement. So *Paſch.* 1 *Geo. B. R. Rex* v. *Inhabitantes de Brightwell in Com. Berks*, there was a hiring and ſervice from three weeks after *Michaelmas* 1712 to *Michaelmas* 1713, then a hiring to the ſame maſter for a year, and a ſervice for eleven months; and this was held a good ſettlement. The ſtatute 3 & 4 *W. & M. c.* 11. ſays, that a binding and inhabitation ſhall gain a ſettlement, ſo that by the words a binding is required; and yet *Trinity* 13 *W.* 3. *B. R. Rex* v. *Inhabitantes de Eccles in Com' Norf'*, it was held, that if the maſter to whom the binding was, aſſigns his apprentice over to another, a bare inhabitation forty days with the aſſignee gives a ſettlement. In this caſe there is a hiring and ſervice for a year in the pariſh of *Ivinghoe*, and that is ſufficient. Ld. Raym. 1512.

Lee. By 13 & 14 *Car.* 2. *c.* 12. forty days inhabitation gave a ſettlement. But it being found, that diſeaſed and diſorderly perſons often came into pariſhes and ſtaid out the time, it was thought proper by the ſtatutes of 3 & 4 & 8 & 9 *W.* 3. to require a hiring and ſervice for a year. And this was thought a good remedy, becauſe it was ſuppoſed no body would incumber themſelves with a ſickly or diſorderly perſon for a whole year, who perhaps would have diſpenſed with them for forty days. And it is not preſumed, that a perſon having ability of body enough to ſerve a year, will become chargeable; and he is looked on as bringing ſo much ſubſtance into the pariſh. I agree the word *ſame* in the latter ſtatute is a word of relation, but it will be ſatisfied by referring it to *the ſame place.* Thoſe ſtatutes have always had a liberal conſtruction, as before 3 & 4 *W. & M. c.* 11. that bearing offices in a pariſh amounts to notice. *Show.* 12. So the ſtatute ſays, *any unmarried perſon having no child*, and yet a perſon having a child which was grown up, and no incumbrance to him, was held to be within the ſtatute. So *Paſch.* 10 *Annae, Regina* v. *Paroch' de Aldenham*, and *Mich.* 1 *Geo. St. Saviour's Southwark*, marrying within the year was held no hindrance of the ſettlement. *Salk.* 527, 529.

Yorke. That caſe is within the very words, for the ſtatute ſpeaks only of perſons unmarried at the time of the hiring.

C. J. The ſtatute requires two things; a hiring, and a continuance in the ſame ſervice for a year. There can be no doubt but that in this caſe there is a compleat and perfect hiring for a year; but the queſtion turns upon the ſervice. Half of it was actually a ſervice to *Knight*, and the reſt in fact was a ſervice to *Smith*; but there being no new contract with *Smith*, nor any diſſolution of the firſt contract with *Knight*; it ſeems conſiderable, whether the whole

ſhall

ſhall not be taken to be a ſervice to *Knight*. As if I lend my ſervant to a neighbour for a week, or any longer time; and he goes accordingly, and does ſuch work as my neighbour ſets him about: Yet all this while he is in my ſervice, and may reaſonably be ſaid to be doing my buſineſs.

If the firſt contract be not diſcharged, it muſt have a continuance, and under it the ſervant is intitled to demand his wages of the firſt maſter. And the 5 *s.* given him by *Smith* is no argument to the contrary, no more than if in the caſe I put before, my neighbour had given my ſervant a gratuity for his extraordinary trouble. What agreement there was between *Knight* and *Smith*, *non conſtat*, but here is no act done by the ſervant that ſhews his conſent to change his maſter. And therefore I take this to be a ſervice for the whole year purſuant to the firſt contract, and conſequently the ſettlement is at *Ivinghoe*, where the ſervice was.

Powys J. The private reaſon that we went upon in *The King* v. *the Inhabitants of Haughton*, where it was held that ſeveral hirings and ſervices for eleven months gained no ſettlement was, becauſe if we ſhould once get out of the ſtatute, there would be no end, and by the ſame reaſon that we abated one day we might abate two, *et ſic in infinitum*. I think in this caſe the ſettlement is in *Ivinghoe*.

Ante 83.

Eyre J. And ſo do I. This is a contract for a year between *Knight* and *Young*, and not to be diſſolved during the year without both their conſents. There is actually no conſent on one ſide, and but an implied conſent on the other. It weighs nothing with me, that *Smith* paid the laſt half year's wages, for I look upon him only as a perſon to whom the ſervant was lent, and there is no doubt but that *Young* might have demanded the wages of *Knight*. The paying the 5 *s.* is ſo far from being an argument that the contract was diſſolved, that it is to me a ſtrong evidence of its continuance; for when *Smith* goes to ſet him about harveſt work, no ſays he, I was hired to be a ſhepherd, and had ſmall wages accordingly; and thereupon the other agrees to give him 5 *s.* an equivalent for the hardneſs of the work.

Salk. 479.

Forteſcue J. The difficulty ariſes upon the word *ſame*, which may extend to maſter, pariſh, and buſineſs. And taking it in thoſe ſenſes, this caſe comes within the words of the ſtatute; and there can be no doubt but that it comes within the reaſon of it, for he is no more likely to be chargeable now, than if he had actually ſerved *Knight* all the year. Upon the reaſons which have been given, I think, here is the ſame maſter, the ſame ſort of ſervice, in the ſame pariſh, and a continuance of the contract throughout the whole. The order was confirmed.

Dominus

Dominus Rex *verſ.* Motherſell.

UPON a motion for a new trial, the judge certified the ſpecial matter in writing, and the court refuſed to hear any affidavits of what paſſed at the trial, looking upon the certificate of the judge, who was an indifferent perſon, to be of a much higher nature than the oath of the party intereſted, and therefore ordered the counſel to take the fact as it was ſtated by the certificate, and not argue about the fact, but the law upon the fact. And the queſtion being, whether a particular matter offered in evidence was well over-ruled by the judge, the court ſaid, that if he had rejected that which was good evidence, it would be ground for a new trial; but if the matter offered was not legal evidence, then the firſt verdict ought to ſtand. And as to that the fact was, that on an information in nature of a *quo warranto* the proſecutor produced in evidence a book, which appeared to be only minutes of ſome corporate acts ten years ago, all written by the proſecutor's clerk, who was no officer of the corporation. And this being oppoſed by the other ſide, as having never been kept amongſt, or eſteemed as one of the corporation books, in which the entries were always made by the town clerk, and there being ſome ſuſpicion that this book was not genuine, the Judge, before he admitted it to be read, required an account where it had been kept for theſe ten years, and whether any body had ſeen it before, which the proſecutor not being able to give him any ſatisfaction in, he rejected it. *Et per Curiam*, Corporation books are generally allowed to be given in evidence, when they have been publickly kept as ſuch, and the entries made by the proper officer; not but that entries made by other perſons may be good, if the town clerk be ſick or refuſes to attend, but then that muſt be made appear. Whoever produces a book, muſt eſtabliſh it, before he delivers it in. We often make people, when they produce deeds, give an account where they have been kept, and how they came by them. Therefore we are of opinion, this evidence thus offered was well over-ruled, and conſequently there muſt be no new trial.

What corporation books may be given in evidence.

Hunt's caſe.

THE court granted a *mandamus* on 1 *Geo.* againſt mutiny and deſertion, directed to the juſtices of peace, for them to compel the treaſurer of the county to reimburſe a conſtable the extraordinary charges he had been at in providing carriages on the expedition into *Scotland.*

Mandamus.

Between the Pariſhes of Horncaſtle *and* Boſton.

What is a good certificate within 8 & 9 W. 3. c. 30.

A. Being legally ſettled in *Boſton*, came into *Horncaſtle* as a certificate man; and the juſtices thinking the certificate not ſufficient, made an order to remove him back to *Boſton*. And now upon motion to quaſh the order, it appeared that the certificate was ſigned by the churchwardens or overſeers, as 8 & 9 *W.* 3. *c.* 30. directs; and that it was atteſted by two as witneſſes, who were juſtices of the peace. The ſtatute requires it to be atteſted by two witneſſes, and allowed by two juſtices of the peace. And *Cheſhyre* inſiſted, that this was a better certificate than ſuch a one as is mentioned in the ſtatute, for the atteſtation of the ſigning it is only to ſatisfy the juſtices, that it is the hand of the pariſh officers; and nothing can be ſo ſatisfactory to them, as what they ſee. And it is not requiſite, that there be four diſtinct perſons, two to atteſt, and two to allow; but the juſtices that allow the certificate may act in both capacities. To which the court agreed, when it appeared they took upon them to act both as witneſſes and juſtices; but here it only appeared they ſubſcribed as witneſſes, for there are no words of allowance. If this ſhould be held good, the juſtices may be drawn in to ſign as witneſſes, when perhaps they do not ſo much as know what the inſtrument is, and never imagined what they did would paſs for an allowance. The certificate was held void, and the order confirmed.

Froſt *verſ.* Wolveſton. In C. B.

Infant declares the uſes of a fine to be ſuffered at full age, then he may declare other uſes.

AN infant covenants to levy a fine by ſuch a time to ſuch uſes. Before the time he comes of age, then the fine is levied, and by another deed made at full age, he declares it to be to other uſes. The court held the laſt deed ſhould be that which ſhould lead the uſes.

Loyd *verſ.* Lee.

At niſi prius *in* London, coram Pratt *C. J.* de B. R.

Forbearance no conſideration where no cauſe of action before.

A Married woman gives a promiſſory note as a *feme ſole*; and after her huſband's death, in conſideration of forbearance, promiſes to pay it. And now in an action againſt her it was inſiſted, that though ſhe being under coverture at the time of giving the note, it was voidable for that reaſon; yet by her ſubſequent

promiſe when ſhe was of ability to make a promiſe, ſhe had made herſelf liable, and the forbearance was a new conſideration. But the C. J. held the contrary, and that the note was not barely voidable, but abſolutely void; and forbearance, where originally there is no cauſe of action, is no conſideration to raiſe an *aſſumpſit*. But he ſaid it might be otherwiſe where the contract was but voidable. And ſo the plaintiff was called. *Vide* 1 *Ven.* 120, 159. *Salk.* 29. *Yel.* 50, 184. 2 *Saund.* 261. *Hob.* 18, 216. *Pop.* 152, 177. *Lat.* 21, 141.

Anonymous.

At niſi prius *in* Middleſex, coram Pratt *C. J.*

THE queſtion in ejectment being parcel or not parcel, a ſurvey was offered in evidence on the plaintiff's ſide, which was taken by one under whom the leſſor claimed, wherein the lands in queſtion were included. But this being an act to which the defendants were not privy, and conſequently not bound, and it being dangerous, and tending to encourage people to take more than their own into a ſurvey, the Chief Juſtice rejected it.

Survey, where evidence.

Stafford *verſ.* the City of London. In Canc'.

THE plaintiff being a co-leſſee with *A.* brought his bill to have the rent apportioned on a partial eviction. And becauſe the other leſſee was neither plaintiff nor defendant, (for if he refuſed to be a plaintiff he might be made a defendant) the bill was diſmiſſed with coſts. And inſtances were cited where bills have been diſmiſſed for want of parties, as well as where cauſes have been put off only.

One leſſee alone cannot come into *Canc'* for an apportionment. S. C. 1 Will. Rep. 428.

Trinity

Trinity Term

4 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Juſtice.*
Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Forteſcue Aland, *Knt.*
Nicholas Lechmere, *Eſquire, Attorney General.*
Sir William Thompſon, *Knt. Solicitor General.*

Dominus Rex *verſ.* Inhabitantes de Almanbury in com' Ebor'.

Order *upon appeal* without ſaying *of the party grieved*, good

AN order of two juſtices is quaſhed at ſeſſions upon appeal, without ſaying, *at the appeal of the party grieved.* And this was objected, in order to quaſh the order of ſeſſions, and compared to the caſe of a complaint that a man is likely to become chargeable, which has been held ill, becauſe the complaint muſt be by the churchwardens and overſeers. And the caſe of *Rex* v. *Sir Thomas Putt.* Inquiſition at ſeſſions *coram A. et al' ſociis ſuis*, was held ill, for there muſt be two, and nothing is preſumed in a limited juriſdiction. And the court here inclined to quaſh the order for this fault, till they were informed the precedents were moſt of them ſo, and for that reaſon and that only, as the C. J. declared, the order was confirmed. *Yelv.* 126.

Waring

Waring *verſ.* Dewberry.

THE landlord having arrears of rent due to him dies inteſtate. The plaintiff in this action ſues out execution on a recovery againſt the defendant who was the tenant, and levies the money by ſale of the goods. Then adminiſtration of the inteſtate's goods is committed to *A.* who thereby became intitled to the arrears, and now moved for a rule to have one year's rent out of the levy money purſuant to the ſtatute of 8 *Annae*, *c.* 17. And *Robins* urged, that though he was not adminiſtrator at the time of ſerving the execution, yet as ſoon as the adminiſtration is committed, it relates to the death of the inteſtate, ſo that he may bring treſpaſs or trover for goods taken between the death of the inteſtate and the commiſſion of adminiſtration. 3 *Lev.* 35. 3 *Mod.* 276. *Salk.* 295. *Sed tota curia praeter Powys J. contra*; for relations which are but fictions in law ſhall not diveſt any right veſted in a ſtranger *mieſne* between the inteſtate's death and the adminiſtration. The ſtatute it is true was made for the benefit of landlords, and to prevent the tenant's ſetting up a ſham execution to defeat him of the rent. He has ſtill the ſame remedy that he had before, and if he will have the additional remedy, he muſt make himſelf capable of it, which the adminiſtrator here could not. He could not demand the rent; it not being certain he would be adminiſtrator, for the ordinary might refuſe, and the ſheriff is not obliged to wait and ſee if any body comes and demands the rent. He cannot take notice what arrears there are, but if the landlord comes and acquaints him with it, then and not till then is he obliged to ſee the year's rent ſatisfied before removal of the goods. If it ſhould be otherwiſe, it would be in the power of him that is intitled to adminiſtration to defeat the plaintiff of his execution. For ſuppoſe he never takes adminiſtration, muſt the execution ſtand ſtill? If the landlord himſelf had not demanded before removal, he had been too late. Here was no landlord at all, ſo that there could be no demand, and it is now too late to aſk it.

On 8 Annae the landlord muſt demand, or the ſheriff is not bound to ſecure the rent.

As to what acts adminiſtration ſhall relate to the death of the inteſtate.

Between the Pariſhes of Murſley *and* Grandborough, in Com' Bucks.

BY an order of two juſtices *John Chappell* was removed from *Murſley* to *Grandborough*. Upon appeal to the quarter-ſeſſions they ſtate the caſe ſpecially for the opinion of the court.

A man cannot be removed from his term.

That *John Chappell* before his marriage with *Suſanna* his wife was ſettled in the pariſh of *Grandborough*. That Sir *John Fetherſtone* by indenture dated 24 *September* 1667, did demiſe and grant to *Robert Eddin*, his executors, *&c.* one cottage with the appurtenances of the yearly value of 30 *s.* in *Murſley* for ninety-nine years at 1 *s.* rent. That 3d *Auguſt* 1689 *Eddin* aſſigned to *Goddin* in truſt for *Mary* his wife for life, and then to *William Eddin* his ſon for the reſidue of the term. That *Robert*, *Mary* and *William* died, and *Suſanna* the wife of *William*, as adminiſtratrix became intitled to the term, and *May* 11, 1709, in conſideration of 15 *s.* demiſed to *Nicholas Eymes* the ſame cottage (except one bay of building being the ſouth part thereof with a leaftowe for an habitation for herſelf) for twenty-four years at a pepper-corn rent. That ſhe lived in that part of the premiſſes ſo reſerved, and married the ſaid *John Chappell*; and whether he is ſettled thereby in *Murſley*, was the queſtion; and the ſeſſions adjudge it no ſettlement, and confirmed the order of the two juſtices for his removal to *Grandborough*.

Denton now moved to quaſh both the orders, *John Chappell* being legally ſettled in *Murſley*. For where a man has an eſtate in any pariſh, he gains a ſettlement if he lives there. It has been often adjudged as to a freehold. *Mich.* 10 *W.* 3. *Ryſtwick et Harrow*, *Salk.* 524. And *Paſch.* 11 *Annae*, *Harrow et Edgware*, it was reſolved in the caſe of a copyhold of a man's own for life, though but 25 *s.* yearly value.

Darnall Serjeant. He muſt be ſettled in that pariſh where the eſtate of his wife lay and on which he inhabited. For he coming by marriage to that eſtate, does not come to inhabit under the circumſtances mentioned in the act, *liable to become chargeable*, and ſo not ſubject to be removed. In that caſe of *Ryſtwick* and *Harrow*, *Holt* C. J. ſaid, the terms *not removeable* and *ſettled*, are one and the ſame thing; becauſe ſuch a perſon is not within the authority of the juſtices. He that comes to an eſtate by deſcent, purchaſe, or marriage, is not a perſon that takes a tenement within the intent of the act.

Reeve contra. The wife has but the truſt of a ſmall part of a cottage, for the legal intereſt of the eſtate is in *Goddin*. This is but an eſtate for years, and that has never yet been adjudged ſufficient to give a ſettlement. A freehold has, and ſo has a copyhold, for that is by cuſtom become a durable eſtate. And the ſame argument may be uſed, if this holds, where he takes a leaſe for years not of 10 *l.* value at a rack rent.

Lee. The wife takes the term as adminiſtratrix, ſo he is only intitled in *auter droit*; and as it is under 10 *l. per annum* yearly value, he is likely to be become chargeable, and ſo may be removed.

Curia. This is not a caſe within the intent of the act, which was to prevent perſons running up and down from one pariſh to another, till they become vagabonds. But a man who comes to ſettle upon his own, is not to be conſidered in that view; and be it for life or years, the law is the ſame. This is not a taking a tenement under 10 *l. per annum*, for the 1 *s.* is not reſerved as a rent, but only an acknowledgment uſually paid on long leaſes. The caſe of a copyhold is ſtronger than this, for that is but an eſtate at will. The way to make him chargeable, is to ſtrip him of his own, for he may not be able to let it. The orders were quaſhed.

Dominus Rex *verſ.* Inhabitantes de Hales Owen.

THE ſeſſions, reciting that *Joſeph Higgen* was bound out by indenture as the ſtatute requires, to *John Parks*, and being lame, and having the king's evil, and in the opinion of ſurgeons incurable: therefore the ſeſſions diſcharge the maſter from his apprentice, and four juſtices ſign the order.

Seſſions cannot diſcharge apprentice on account of ſickneſs.

Darnall Serjeant moved to confirm the order, becauſe the maſter cannot now have the end of the binding, which was the ſervice of his apprentice.

Willes contra. The ſtatute only empowers the juſtices to diſcharge for miſbehaviour, and not for ſickneſs. Beſides, allowing they had a power to diſcharge, yet here they have not executed it as the ſtatute requires; for it is not inrolled; neither is it mentioned to be by a juſtice of the *quorum*. There muſt be four juſtices, one of the *quorum*.

Both exceptions to the form were held good. But the court quaſhed the order as to the ſubſtance, for the maſter takes him for better and worſe, and is to provide for him in ſickneſs and in health.

Hinchcliffe *verſ.* Payne.

PAYNE the father, being in contempt in Chancery for non-payment of money, an order is made upon him. *Payne* the ſon reſiſts the ſervice, for which contempt he is committed to the *Fleet*,

Eſcape warrant where grantable.

Fleet, and turns himſelf over to the *King's Bench*, and goes at large till, he is taken up by an eſcape warrant, and committed to *Newgate*. Now he moved for a *Superſedeas* to that eſcape warrant, the contempt not being ſuch an one as is within 1 *Annae*, *c.* 6. which ſpeaks only of contempts *for not performing an order*, which *Payne* the ſon was not obliged to do. *Et per Curiam:* The father would have been within the act, but the ſon is not. This ſtatute is not to be extended by equity, becauſe it is againſt the liberty of the ſubject, and this is a new power given only in particular caſes; this is not one of them, and therefore not within the ſtatute. Whereupon the warrant was ſuperſeded, and the marſhal directed to go to *Newgate* and take him into his cuſtody again, as was done in Sir *Thomas Tippin*'s caſe.

Aires *verſ.* Hardreſs.

If execution be taken out within the year, it may be continued down, and a new execution *ſans ſcire facias*.

A *Fieri facias* was taken out within the year, and a *nulla bona* returned; this is continued down for ſeveral years, and then a *capias ad ſatisfaciendum* iſſued. And whether that be regular or no was the queſtion. The court took time to inquire, and the laſt day of the term the C. J. ſaid, If this were a new caſe they ſhould think it hard to take away all *ſcire facias's*. But the practice had gone ſo far, that there is no overturning it now. 1 *Inſt.* 290. 4 *Inſt.* 271. *Mod. Caſ.* 288. 1 *Sid.* 59. 1 *Keb.* 159. *Cliſt* 840. *Officina Brevium* 96. *Raſtal* 164. Wherefore the execution was held regular.

Dominus Rex *verſ.* Skingle.

Tithes are a *tenement*.

THE 43 *Eliz. c.* 2. charges lands, tenements, tithes, *&c.* to the poor's rate. By a private ſtatute for erecting workhouſes in *Colcheſter* the poor are provided for in another manner, and the occupiers of lands and tenements are made chargeable: And after a rate an appeal is given to the ſeſſions. The defendant was parſon and rated for his tithes, and appeals; and becauſe the word *tithes* was not in the act of parliament, which the ſeſſions looked upon as an abſolute repeal of the 43 *Eliz. quoad Colcheſter*, therefore they diſcharge him. *Et per Curiam:* He ought not to be exempted but by expreſs words, being liable before. Here he is an occupier of a tenement, for tithes are a tenement. 1 *Vent.* 173. 2 *Lev.* 139. *Lutw.* 1563. 1 *Inſt.* 6. *Dy.* 83. *Litt.* §. 647. 32 *H.* 8. *c.* 7. *Co. Litt.* 159. *Cro. Jac.* 301. 2 *Inſt.* 625. Wherefore the order of ſeſſions was quaſhed. *Powell* v. *Bull*, *C. B.* this queſtion determined in the ſame manner.

Comyns 265.

Dominus

Dominus Rex *verſ.* Arnold.

At Niſi prius *in* Middleſex, coram Pratt, *C. J.*

No parol evidence of an appointment of overſeers.

INdictment againſt defendants, for that they being churchwardens and two others overſeers *debito modo appunctuat'*, did refuſe to join with the overſeers in making a poor's rate. And the C. J. held the proſecutor to ſhew an appointment of the overſeers under the hands and ſeals of two juſtices, as the ſtatute requires. And he rejected parol evidence, becauſe he ſaid it muſt be produced, that he might judge whether it was a ſufficient appointment. He quoted *Willoughby* v. *Dixey*, *in C. B.* where a will entered in the ſpiritual court books to be delivered out to the executor, was refuſed to be read, till application and refuſal of the executor was proved. And the ſame in Sir *Edward Seymour*'s caſe as to a deed. Defendant acquitted.

Baker *verſ.* Lord Fairfax. Ibidem.

Depoſitions taken before, no evidence after witneſs becomes intereſted.

ON an iſſue out of Chancery one of the witneſſes, after his depoſitions taken, became intereſted, and confeſſing it now upon a *voire dire* he was rejected. Then it was deſired to read his depoſitions as if he was dead; and a caſe was urged, where in Chancery a witneſs was made executor and revived the ſuit, and was read at the hearing. But the Chief Juſtice remembered the caſe in *Salk.* 286. which was the reſolution of two courts on a trial at bar; and ſo he refuſed to hear the depoſitions.

Dominus Rex *verſ.* Bennett.

Court divided about a new trial in an information in nature of a *quo warranto.*

UPON the trial of an information in the nature of a *quo warranto* for exerciſing the office of mayor of *Shafteſbury*, the jury found a verdict for the defendant; and upon a motion for a new trial great doubts aroſe, whether after a verdict for the defendant there could be any new trial, though the judge ſhould certify (as he did in this caſe) that it was a verdict againſt evidence.

After the point had been twice ſpoken to *in B. R.* it was adjourned *propter difficultatem* to be argued before all the Judges of *England*, who being this term aſſembled at *Serjeants-inn* the following arguments were made.

Denton. New trials can only be granted by the ſuperior courts, and not by any inferior ones. Trials at the aſſizes are ſubordinate trials, and under the inſpection of the ſuperior court out of which the record iſſues. In *Stiles* 466. which was the firſt new trial that ever was granted, it was ſaid by *Glynne*, that the court in theſe caſes has a judicial but not an arbitrary diſcretion. I muſt agree that generally no new trial ſhall be granted after a trial at bar, but yet in the *ſcire facias* againſt *Bewdley*, *Trin.* 11 *Annae*, which was brought to the bar, and the jury refuſed to find a ſpecial verdict, the court ordered a new trial.

1 Will. Rep. 207.

It is objected, that this is a criminal proceeding. But we ſay, that ſince 9 *Annae*, *c.* 20. it has a mixture of civil. The relator is liable to coſts, and the ſtatutes of jeofailes extend to it. And why ſhould not this be conſidered in the ſame view as *Mandamus's*, upon which new trials are granted frequently. The original writ of *quo warranto* was merely civil. *Old N. B.* 107. *Sid.* 54, 86. 2 *Inſt.* 282. *Raſtal* 540. *Old Ent.* 133, 134. and upon that the franchiſe, which was a civil right, might be ſeized. Formerly indeed upon an information in the nature of a *quo warranto* the party could only be puniſhed for the uſurpation. *Yel.* 190. *Cro. Jac.* 260. 1 *Bulſt.* 54. *Co. Ent.* from 527 to 564. but now judgment of *ouſter* may be pronounced.

Theſe rights are of a high nature, and it would be a great inconvenience, to tie them up ſtricter than actions. Suppoſe the jury ſhould refuſe to find a ſpecial verdict, or the judge ſhould miſtake the law; will there not be a failure of juſtice, if a new trial cannot be had? *Mich.* 2 *Geo.* *Rex* v. *Inhabitantes de Walthamſtow*, in an indictment for not repairing the highway, and *Regina* v. *Inhabitantes de com' Wilts*, for ſuffering *Lacock-bridge* to be in decay, new trials were granted.

Pengelly ſerjeant. This is a diſcretionary queſtion, wherein no defect of power is to be ſuppoſed. The defendant cannot plead Not guilty. 2 *Inſt.* 282. 2 *Co.* 24. *b.* 28. *b.* *Hardr.* 423. *Cro. Jac.* 43. but muſt diſclaim, or ſhew his right. It is the prerogative of the crown to determine civil rights by way of information. Thus the King brings his information of intruſion in the Exchequer, which is but a common ejectment. And ſo informations by way of *devenerunt*, which is in effect an action of trover; and in theſe caſes new trials are every day granted. *Co. Ent.* 390 And in thoſe caſes there is a fine.

It

It will be no objection that the year is expired; for this profecution was commenced within the year, and the judgment muſt be the ſame, becauſe it is to avoid all meſne acts. *Co. Ent.* 527, 530. *Trin.* 8 *Ann. Regina* v. *Barber.* That was an information of this nature againſt the defendant, who claimed to be burgeſs of *Thetford.* There was judgment by default, and then came a pardon, which was held only to diſcharge the fine, but not the judgment of *ouſter.* The fine here will be *ſalvo contenemento*, according to *magna charta*, and the bill of rights. Since the ſtatute this has all the incidents of a civil proſecution, the commencement only excepted. Before the King only could have it, but now any private perſon may at peril of coſts. If no new trial be granted, the crown will be in a worſe condition than the ſubject: For here the verdict will be final, and no new information can be had.

Earl Serjeant *contra.* The only queſtion is, whether this be a criminal or a civil proſecution. For on the one hand, if it be of a civil nature, I muſt agree a new trial may be granted: And on the other hand, it muſt be admitted, that if this be merely criminal, no new trial can be had.

It is not denied, but that at common law this information was a criminal proceeding; whether the ſtatute has altered the nature of it is the doubt. We think it remains as it did before. The conſequence of it is ſtill fine and impriſonment, with this addition, that judgment of *ouſter* may be given, which could not before; and becauſe the ſtatute has made it more penal than it was at common law, therefore ſay they it is now changed from a criminal to a civil nature. This is ſuch an inference, as I cannot ſee into the reaſon of. But ſay they, the ſtatutes of jeofails do not extend to criminal proceedings, but they extend to this; *ergo* this is not a criminal proceeding. I deſire to know whether it will be pretended, that they would have extended to this caſe without the expreſs proviſion of the ſtatute. Certainly they would not. And the Parliament was aware of that, and therefore added that clauſe. The firſt new trial is *Stiles* 448. and there the witneſs died of an apoplexy. *Lord Townſend* v. *Dr. Hughes in C. B.* 2 *Mod.* 150. In *ſcandalum magnatum* a new trial was denied. Cannot the King releaſe, pardon, or ſtop this proſecution? Surely he may. In capital caſes the defendant may plead *autre foits acquit*; ſo careful is our law, that the ſubject ſhall never be bore down by the weight of the crown. 1 *Sid.* 405. 2 *Keb.* 403, 765. 1 *Lev.* 9. 1 *Keb.* 124. are caſes where the defendant was convicted, and *in favorem libertatis* a new trial may be granted. *Mich.* 3 *W. & M. Rex* v. *Davis*, 1 Show. 336. in an information for a riot a new trial was denied. *Mich.* 7 *W.* 3.

Smith

Smith v. *Frampton*, *Salk.* 644. in an action for negligently keeping his fire, wherein the defendant was acquitted, it was refuſed to be tried again. Indeed *Paſ.* 4 *Jac.* 2. *Rex* v. *Simpſon et al'*, information for ſeditious words, after acquittal a new trial was granted, but whoever obſerves the time that caſe happened, and that it was denied for law by *Holt* in *Davis*'s caſe before cited, will think it of little weight. *Paſ.* 2 *W. & M.* Dr. *Salmon*'s caſe, the defendant was convicted of perjury, and had a new trial; but the court ſaid it would have been otherwiſe if he had been acquitted. *Paſ.* 5 *Ann.* *Regina* v. *Clarke*, in an indictment for a nuſance, after acquittal the court denied a new trial, till the defendant came in and conſented. It was granted in Sir *Jacob Banks*'s caſe, only becauſe he had carried it down by proviſo, which could not be againſt the crown. *Mich.* 3 *Ann.* *Hartneſs* v. *Sir J. Barrington*, after the defendant had been acquitted of an aſſault, a new trial was denied. So *Salk.* 646. after acquittal for a libel.

Salk. 652.

In this caſe the office is determined, ſo there can only be a fine and impriſonment. And if one new trial may be had, the ſame reaſon will hold for a ſecond and a third, and no body can ſay where it will ſtop. It may happen that the defendant may be convicted on a ſecond trial, for want of that evidence which acquitted him before. The caſe of *Bewdley* was only a *ſcire facias*, which is a proceeding purely civil.

Yorke. This queſtion is of far greater conſequence to the ſubject than the crown. It conſiſts of two parts:

1. Whether a new trial can be granted in any of thoſe caſes.

2. Whether there be any particular circumſtances in this caſe, to diſtinguiſh it from the general ones, and ſo induce the court to refuſe it.

Firſt, When new trials firſt came in, they introduced a great alteration. The caſe of *Fenwick* v. *Holt* (which was an information, and not an indictment as ſome of the books ſay) is full in point; and the court ſaid they could not do it without altering the law, which ſhews there is not a diſcretionary power. This is the rule in criminal caſes, which I ſhall ſhew this to be. At common law uſurpations were a crime, a contempt to the King, and an oppreſſion of the ſubject. A *quo warranto agit in rem*, an information in nature of a *quo warranto in perſonam*. The firſt charges a crime, and the other a *uſer* of the franchiſe. This is all of the crown ſide, which the civil rights of the crown are not, as *quare impedits*, which are of the plea ſide. The replication concludes,

petit quod convincatur; and ſo is *Co. Ent. tit. quo warranto*; now *conviction* implies *crime*. This cannot be called an action, the proſecutor neither demands nor recovers any thing, *et actio nil aliud eſt quam jus proſequendi in judicio quod ſibi debetur*.

When proceedings in eyre dropt, then informations came in, which are of a higher nature than the proceedings in eyre. 2 *Inſt.* 282, 498.

The ſtatute 9 *Ann.* takes notice of this as a criminal proceeding: As for the coſts, they are collateral, and cannot change the nature of it. The 4 & 5 *W. & M. c.* 18. gives coſts in perjury, where preſented as a miſdemeanor by information; and can any one ſay it is now become a civil proſecution? In the caſe of *Strode* v. *Palmer* it was held, that *mandamus's* would not come within the deſcription of *actions*, ſo as error might lie in the Exchequer Chamber. Lill. Ent. 248.

The jury may take the law upon them if they will. *Litt.* §. 368. The relator here is only appointed for the ſecurity of the coſts. In the caſe of *Ilcheſter* he died, and thereupon the defendant moved to ſtay the proceedings: No, ſays the court, this is the cauſe of the crown. I omit his argument from the facts in this caſe.

Denton replied, The clauſe of jeofails was only thrown in, *in majorem cautelam*, as declaratory of the law.

Pengelly. Sir *T. Jones* 163. new trial after conviction of perjury.

Afterwards *in B. R. Pratt* C. J. declared, that they had called in the aſſiſtance of the other Judges, and that upon the whole they were equally divided; ſo no rule for a new trial could be made. The diviſion, as I was informed, was thus: For a new trial, *in B. R. Pratt* and *Eyre*; *in C. B. King* and *Tracey*; *in Scacc. Price* and *Montagu*. Againſt a new trial, *in B. R. Powys* and *Forteſcue*; *in C. B. Blencowe* and *Dormer*; *in Scacc. Bury* and *Page*.

Long *verſ.* Buckeridge.

Intr. de Trin. 1 Geo. rot. 555.

Attornment, where neceſſary.

REPLEVIN for taking the plaintiff's goods and chattels in the pariſh of *St. Botolph Aldgate* in his ſhop there. The defendant avows the taking by diſtreſs for a fee-farm rent, and ſays, that King *James* the Firſt by letters patent dated 24 *May*, 7th of his reign, *dedit et conceſſit* the premiſſes (*inter alia*) to the grantees therein named, *habendum* to them and their heirs for ever, *tenendum* of him and his ſucceſſors, as of his manor of *Eaſt Greenwich* by fealty only, in free and common ſocage, and not *in capite* or by knights ſervice, *reddendum* to the King and his ſucceſſors the yearly rent of 22 *l.* in lieu of all rents, ſervices and demands iſſuing out of the premiſſes. That King *James* being ſo ſeiſed of this rent in right of his crown, by letters patent, 19 *January*, 9th of his reign, gave the ſaid rent and ſervices to *Lawrence Whitaker* and *Henry Price*, and their heirs. That *Henry Price* died, and *Whitaker* ſurvived and was ſole ſeiſed, and made his will, from whence and from a great many *meſne* conveyances (as a fine to the uſe of the conuſee, and a deviſe by him) the avowant brings down a title to himſelf; and then goes on and ſays, that he was ſeiſed in fee of this rent, and avows the taking for arrears, and prays judgment and a return. To this the plaintiff has demurred, and the avowant has joined in demurrer.

This cauſe was formerly ſpoke to at large, and the opinion of the court with the avowant. Only they reſerved one point to be further ſpoke to, whether the avowry is ill for want of alleging an attornment of the terretenant upon the fine levied of the rent in queſtion by *James Bewly* and his wife to *William Buckeridge*, under a deviſe from whom the avowant claims.

Yorke pro querente argued, that the avowry is ill, which depends on two conſiderations:

1. Whether *William Buckeridge* the conuſee, who is alleged to be ſeiſed by vertue of this fine, was in at common law, or by the ſtatute of uſes. For on the one hand it is plain, that if he was in at common law, though the rent paſſed by the fine, yet it did not enable him to diſtrain without attornment; and on the other hand it is as plain, that if he was in by the ſtatute of uſes, then no attornment was neceſſary.

2. Suppoſing

2. Suppoſing he was in at common law, whether here is any other matter appearing upon this avowry ſubſequent to the fine, which has cured this defect, and taken away the neceſſity of attornment as to the avowant.

As to the firſt it is to be obſerved, that this is a fine levied to the conuſee and his heirs, and it enures by way of grant of this rent, and after it is ſet out, there comes an averment that it was to ſuch uſe.

If the matter had reſted upon the words of the concord itſelf, there would have been no doubt but he would have taken at common law; for it is a common law conveyance of the rent to him, and he muſt have been taken to have both the legal eſtate, and the uſe, which is the profitable intereſt, unleſs ſomething further had appeared to control that intendment, and give it a contrary conſtruction. So it was held in the caſe of *Lord Angleſey* v. *Altham*, *Paſ.* 8 *W.* 3. *B. R. Salk.* 676. There a fine was levied, and afterwards a common recovery ſuffered, wherein the conuſee of the fine was tenant; and there being no deed to lead the uſes, it was objected, that the uſe of the fine reſulted to the conuſor. But the court held, that it ſhould be intended to the uſe of the conuſee, and in pleading need not be averred; and ſo is *Co. Ent.* 114, 273. *Plow.* 477. But if it were to the uſe of the feoffor or conuſor, then it muſt be averred. Latch 257, 266. Palm. 483.

Shortridge v. *Lamplugh*, *Mich.* 1 *Ann. B. R.* the queſtion was upon pleading a conveyance by leaſe and releaſe, where no conſideration was ſhewn, nor expreſs uſe averred, whether it ſhould be taken to go by way of reſulting uſe to the releſſor; but the court held, it ſhould not, unleſs it were expreſly ſhewn, but that the eſtate and uſe veſted in the releſſee. 2 Mod. Ca. 71. Salk. 678. Far. 71.

If this be the proper conſtruction upon the face of the fine, then the ſubſequent averment, that it was to the uſe of the conuſee and his heirs, will not alter the caſe, nor make him to be ſeiſed by force of the ſtatute of uſes. For there is no room for the operation of that ſtatute, nor can it have any effect which the common law could not fully have without it.

Before the ſtatute of uſes, intereſts in lands fell under the conſideration of the *legal Eſtate*, which was the poſſeſſion; and *the uſe*, which was barely a truſt, an equitable right to receive the profits. Theſe might ſubſiſt in different perſons, and he who had the uſe had no remedy but in Chancery. But on a gift to *J. S.*

and his heirs, he would have had both the poſſeſſion and the uſe; for he could not be ſaid to be a truſtee for himſelf, but the uſe would have merged in the poſſeſſion.

Thus it ſtood at common law when the 27 *H.* 8. *c.*10. was made; and that only operated, where the poſſeſſion and uſe were divided, and drew the poſſeſſion to the uſe, and not the uſe to the poſſeſſion. But as to perſons who had both the poſſeſſion and the uſe, as they needed not the help of the ſtatute, ſo it left them where it found them.

N. B. Where the fine is to *A.* and his heirs to the uſe of *A.* and *B.* in fee. They are both in by the ſtatute of uſes. Hutt. 112.

The reſult of this is, that no perſon can be ſaid to be in by the ſtatute of uſes, but he who before would have only had the truſt; but in this caſe the conuſee would have had both the legal eſtate and the uſe, and therefore he cannot be ſeiſed by the ſtatute of uſes. And this diſtinction is warranted by the authorities. 2 *Roll. Abr.* 780. *pl.* 3. 2 *And.* 15. *Salk.* 90. And in *Co. Litt.* 309. *b.* it is ſaid that if a fine be levied of a ſeignory to another to the uſe of a third perſon and his heirs, he and his heirs ſhall diſtrain without attornment, becauſe he is in by the ſtatute of uſes. By which it appears, that it being to the uſe of a third perſon, that makes him in by the ſtatute of uſes.

2. Suppoſing the conuſee in at common law, and that he would have wanted an attornment to enable him to diſtrain; whether any other matter appears, to have cured the want of it as to the avowant.

It has been inſiſted, that the conuſee deviſed it by his will under which the avowant claims, and that attornment is not neceſſary on a deviſe.

Attornment, what.

This will be anſwered by conſidering the nature and reaſon of attornment. An attornment is the agreement of the tenant to the lord's conveyance of the ſeignory to another hand. *Co. Litt.* 309. *a.* The reaſon is, that by the common law there ought to be a privity, that the tenant may know who to pay his rent to, and whoſe is a lawful or a tortious diſtreſs. *Vaugh.* 39. And this privity is originally created by the tenant's accepting the tenancy.

But then the lord could not by his own act alone ſubject the tenant to the diſtreſs of another; and therefore if he granted away the ſeignory, the privity was deſtroyed, till the tenant had attorned by his voluntary agreement, or was forced to it by a *quid juris clamat*, or a *per quae ſervitia*, againſt which he might have his proper defence. And this privity was neceſſary to be continued on through every conveyance. *Yelv.* 135.

And

And attornment was of ſuch neceſſity, that by a grant *in fait* nothing paſſed without it, though by a fine indeed ſuch things as lay *in prendre* paſſed, but not ſuch as ſubſiſted *in jure tantum*, as a privity to diſtrain. *Co. Litt.* 320. *a.*

This was the caſe of him who came in by the act of the party only, but not where he came in by act of law, as the heir by deſcent, tenants in dower, courteſy, ſtatute-merchant, or *elegit*, deviſee, or lord by eſcheat. The ground for all this is, that they had no means to compel attornment, and 6 *Co.* 68. *a.* my lord *Coke* gives this rule, *Quod remedio deſtituitur, reipſa valet, ſi culpa abſit.* So that he who would diſtrain without attornment, muſt ſtand clear of all laches, which this conuſee does not, for he has ſlipt his time of bringing a *quid juris clamat* or a *per quae ſervitia*, which muſt be before the ingroſſment of the fine. *Bro. Quid juris clamat*, 355. *F. N. B.* on the writ of covenant to levy a fine. *Plowd.* 431. *b.* *Pop.* 63.

And as the conuſee ſhall not diſtrain, ſo his deviſee ſhall not, for *nemo poteſt plus juris ad alium transferre quam in ipſo eſt.* The bargainee of this conuſee could not diſtrain, though he would come in by the ſtatute of uſes. *Co. Litt.* 309. *b.* 5 *Co.* 113. *a.* The reaſon of which is, that though the ſtatute ſupplies ſuch a defect in the bargainee's title, yet it meddles not with the bargainor's. And beſides, there is an interruption of the privity, which ought to have been handed down through all the grants. *Cro. Eliz.* 832, 354. *Ow.* 23.

A deviſee cannot be in a better condition than a bargainee by deed inrolled. I agree an attornment is not neceſſary to a deviſe; and the reaſon given upon *Litt.* §. 586. is, that the tenant ſhall not have it in his power, to fruſtrate the will. But here, requiring an attornment doth not give the tenant that power, it only puts it in the power of the deviſor to defeat his own deviſe by his own laches.

In *Cro. Eliz.* 354. the caſe of a lord by eſcheat and a deviſee are coupled together, but ſurely they ſtand upon different reaſons. In the caſe of an eſcheat the privity continues, for the tenant comes in *mediately* ſubject to the ſuperior lord, whoſe title is paramount to the tenant's, which a deviſee's is not, for he comes in under the title of the deviſor, and is not a perſon to whom the tenant made himſelf ſubject either mediately or immediately.

It was objected, that this was but matter of form, and ſhould have been ſhewn for cauſe of demurrer. But I anſwer, that this is a neceſſary circumſtance to give a power to diſtrain, and is here the very merits of the cauſe.

It was ſaid, a verdict would have cured this defect, but I deny that, for by the fine the thing granted paſſes without attornment, and the jury may find *conceſſit* without it. Though in a grant by deed I agree a verdict would have helped it; becauſe there nothing paſſes till attornment. *Raym.* 487.

Squib contra. I agree the conuſee is in at common law, and that where the uſe paſſes to the ſame perſon, the ſtatute has no relation. Seignories were at firſt inſtituted on a military account; and therefore attornment was brought in, that the tenant might not be obliged to ſerve under a ſtranger in the wars.

Though the conuſee could not diſtrain without attornment, becauſe he could compel it by a *quid juris clamat*, *per quae ſervitia*, or *quem redditum reddit*, yet we are in the caſe of a deviſee, who has no means to compel attornment, and that is the reaſon why a deviſee may diſtrain without it. *Litt.* §. 586. 1 *Inſt.* 322. One that claims under letters patent may, and ſo may any body to whom no laches can be imputed. 6 *Co.* 68. 5 *Co.* 113. 39 *H.* 6. 24. *Bro. Attorn.* 29. 5 *H.* 7. 19. Lands deviſed from the heir veſt before agreement, *et intereſt reipublicae ſuprema hominum teſtamenta rata haberi.*

But admitting attornment ought to have been ſet out; then I inſiſt, that it appears ſufficiently upon this record, and that an attornment is implicitly averred. For if attornment be neceſſary, then he could not be ſeiſed by force of the fine, and it is ſaid *quod virtute inde* the conuſee *ſeiſitus fuit* of the rent; neither can that part of the avowry be true, which ſays, that the plaintiff became *onerat'* with the payment of the rent to the avowant, which he could not be, unleſs the avowant had a title to diſtrain, and he could have no title without attornment.

But even admitting that attornment was neceſſary, and that none appears upon this record; yet the want of it ſhould be ſhewn for cauſe of demurrer, for it is but a circumſtance and matter of form, ſince the act for the amendment of the law; and there appears ſufficient for the judges to give judgment according to the very right of the cauſe.

Yorke replied. The tenant might defend himſelf in a *per quae ſervitia*; and to give the deviſee a power to diſtrain, where the deviſor had not, is to ouſt the tenant of his defence. Suppoſe the conuſee had deviſed it immediately and died, would not there have been a new lord put upon the tenant without his privity or conſent? I agree, in an action of debt for this rent, the attornment would have been but a circumſtance; for the rent paſſed by the fine, but not a power to diſtrain for it. And as to what is ſaid about *ſeiſitus* and *onerat'*, I admit it to be true, that he was ſeiſed of the rent by force of the fine only, but had no power to diſtrain. *Adjournatur*; and in a few days

Pratt C. J. delivered the reſolution of the court. This caſe is now reduced to a ſingle point, whether it was neceſſary for the avowant to ſet out an attornment upon the fine to *William Buckeridge*, under a deviſe from whom he claims. We are all of opinion, that for this fault the avowry is ill. It ſeemed to be given up at the bar, and therefore I ſhall but lightly touch upon it, that the conuſee was in at common law. The fine is a common law conveyance, by which both the legal eſtate and the uſe would have paſſed to the conuſee, without any declaration of uſes, according to the caſe of lord *Angleſea* v. *Altham*; and therefore the uſes need not have been averred, it is but *expreſſio eorum quae tacite inſunt*; whereas if it had been to the uſe of a third perſon, they muſt have been averred, in order to controul the general operation which the fine would otherwiſe have had. This conuſee did not want the help of the ſtatute, and therefore it meddles not with him, but leaves him in at common law. 2 *Roll. Abr.* 780. *pl.* 3. 2 *And.* 15. *Salk.* 90. *Co. Litt.* 309. *b.*

Since he is in at common law, it is not diſputed, but that attornment was neceſſary to enable him to diſtrain; but the avowant ſays, he is in the caſe of a deviſee, and on a deviſe no attornment is neceſſary. This is true, that generally a deviſee ſhall diſtrain without attornment, but then his deviſor muſt have been enabled. If he had not that power, he could not transfer it, according to the rule in Sir *Moyle Finch*'s caſe, *Nemo poteſt plus juris ad alium transferre quam in ipſo eſt.* This rule holds in all ſciences, in logick *Nil dat quod in ſe non habet*; a bargainee has no more privileges than his bargainor, and of the two, he is to be favoured before the deviſee. 5 *Co.* 113.

The caſe of a deviſee and lord by eſcheat are unſkilfully coupled together in *Cro. Eliz.* 354. as was mentioned at the bar; and though in the latter end of that caſe there falls an expreſſion

obiter

obiter, which ſeems to make for the avowant; yet that can have no weight; it is tenderly ſaid, and is directly contrary to the principal caſe. There is no doubt but the lord by eſcheat may diſtrain without attornment, for he claims by title paramount, and the old privity revives. *Mallorie*'s caſe, 5 *Co.*

And as we think it neceſſary, an attornment ſhould be ſet out; ſo we are likewiſe of opinion, that none appears upon this record. The conuſee was *ſeiſitus*, and the tenant *onerat'* by the fine only; but that paſſed no power to diſtrain. If this had been by deed, an argument might have been drawn from thoſe words, becauſe there nothing would have paſſed before attornment. We think likewiſe, that this is matter of ſubſtance, and ſo the avowry is ill on a general demurrer.

Reeve prayed to diſcontinue, becauſe the avowant is as an actor. *Sed per Curiam:* It is the plaintiff's ſuit, and how can one man diſcontinue another's ſuit. *Judicium pro quer'.*

Michaelmas

Michaelmas Term

5 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Juſtice.*
Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Forteſcue Aland, *Knt.*
Nicholas Lechmere, *Eſquire, Attorney General.*
Sir William Thompſon, *Knt. Solicitor General.*

Brooke *verſ.* Ewers & ux'.

YORKE moved for a *mandamus* to the Judge of the court of *Sandwich*, to give judgment upon a verdict, though he had granted a new trial for exceſſive damages without payment of coſts. And for the *mandamus* he quoted 1 *Ven.* 187. *Raym.* 214. 2 *Keb.* 871. And he likewiſe inſiſted, that a Judge of an inferior court cannot grant a new trial, as was held by *Holt* C. J. *Mich.* 1 *Ann. Hall* v. *Hill*, 1 *Mod. Ca.* 84. *Salk.* 201, 650. And likewiſe by *Parker* C. J. *Paſ.* 12 *Ann. Page* v. *Round.* And to that opinion the court inclined, and granted a *mandamus* unleſs cauſe, and upon that the Judge below, as well adviſed, *quievit.*

Mandamus in nature of a *procedendo ad judicium.*

A Judge of an inferior court cannot grant a new trial.

Between the Pariſhes of Beaſton in Nottinghamſhire *and* Sciſſon in Leiceſterſhire.

Order to remove *A.* and family bad as to family; but adjudication that it *was* the place of the laſt legal ſettlement is well enough. Salk. 473.

ORDER for removal of *Thomas Block* and his family from *Beaſton* to *Sciſſon*. And the juſtices adjudge, that *he* is likely to become chargeable, and that *Sciſſon was* the place of his laſt legal ſettlement. Upon the firſt reading it was quaſhed as to the family, *quia* too general: *Salk.* 482, 485. But the queſtion now debated was, whether there was a ſufficient adjudication of a ſettlement in *Sciſſon*; for it is not that it *is* the place of his laſt legal ſettlement, but that it *was* ſo, which might be twenty years ago, and he may have gained another ſettlement. And ſome ſtreſs was laid upon the variation of the expreſſion in the order *is* and *was*, as if the juſtices deſigned they ſhould have a different conſtruction. And the court now inclined this part of the order to be bad, till *Eyre* J. quoted a caſe between the pariſhes of *Lanbaddock* and *Languined*, *Mich.* 2 *Geo.* or *Hil.* 2 *Geo.* where it was, *are* likely to become chargeable, and that *Languined was* the place of ſettlement; and this exception taken and over-ruled. And upon this authority the order was confirmed as to *Block* himſelf, but the Chief Juſtice and *Forteſcue* J. ſaid, if it had been *res integra*, they ſhould have doubted.

Stratton *verſ.* Burgis.

Amendment.

AN attorney undertakes to appear for the defendant an infant. *Et per Curiam*, He is obliged to do it in a proper manner, and having entered it *per attornatum*, when it ſhould have been *per guardianum*, it may be amended.

Lewis *verſ.* Farrel.

In caſe for malicious proſecution muſt ſhew proceedings determined, and how.

IN caſe for a malicious proſecution of an indictment, judgment was given for the defendant on demurrer, becauſe it was not ſhewn how the indictment was determined, according to the caſes of *Parker* v. *Langley*, *Trin.* 12 *Ann. B. R.* and *Blagrave* v. *Odell*, *Mich.* 3 *Geo. ro.* 228.

Dominus

Dominus Rex *verſ.* Guardianos eccleſiae de Thame in com' Oxon'.

MANDAMUS directed to the churchwardens of the pariſh of *Thame*, to reſtore *John Williams* to the office of ſexton there.

On a *mandamus* to reſtore an officer who is in at pleaſure only, it is a good return to ſay it was their pleaſure to remove him, and in ſuch caſe a ſummons is not neceſſary.

They return, That the pariſh of *Thame* is an ancient pariſh, and that for time immemorial there has been a church, with churchwardens, and a ſexton, eligible by the churchwardens and pariſhioners, or the major part of them, for that Purpoſe at a day and place prefixed aſſembled; which perſon ſo elected was to continue in at the pleaſure of the electors, and was always amoveable by the major part in form aforeſaid aſſembled. That 1 *May* 1703. *John Williams* was elected ſexton, and continued in the office till 31ſt of *July* 1717. upon which day the churchwardens and pariſhioners being duly aſſembled, *ad continuandum vel amovendum* the ſaid *John Williams*, he at ſuch aſſembly was by the churchwardens and major part of the pariſhioners removed from his ſaid office, *et ea de cauſa* they cannot reſtore him.

Denton argued, that the return was inſufficient. This is not a caſe within the *mandamus* act, ſo as we might traverſe the return; and therefore it muſt be certain to every intent. It muſt anſwer all the ſuggeſtions of the writ, which this return does not: We lay that we were *debite elect' praefect' et admiſſ.* into this office: They anſwer to the *elect'* and *praefect'*, but not to the admiſſion: For though that may be implicitly taken to be anſwered, yet returns by implication, and ſuch as are argumentative only, are not good. *Raym.* 365, 153, 431. 1 *Sid.* 286. 2 *Jones* 177. The caſes of 2 *Sid.* 49, 79. 1 *Ven.* 77, 82. *Raym.* 188. 1 *Sid.* 461. 2 *Keb.* 641. will be objected to me; but I give them this anſwer, That they were upon letters patent, where the appointment was only *durante beneplacito*; but we are here in the caſe of a cuſtom, which is more unconfined; and 2 *Cro.* 540. a cuſtom to remove a man *from his freehold* was held void. It does not appear the party was heard, or that the pariſh is ſupplied with another officer.

Yorke contra. Wherever an officer appears to be in only at pleaſure of the electors, it is ſufficient to ſhew a determination of their will. 1 *Lev.* 291. 1 *Ven.* 77, 88. 2 *Keb.* 641. And thoſe caſes being of a grant, the argument is ſtronger in this caſe; for many things are good by cuſtom, which are not ſo by grant. Where the power is to remove without cauſe, no cauſe of removal need be returned. And for this reaſon alſo no ſummons or hearing of the party

party is requiſite, for he is not removed for any crime. And whether the office is filled up or not is nothing to this man, nor can better his title a whit. The admiſſion is not the point of the writ; but if it were, yet the *elect' et praefect'* is a full anſwer. He could not be *praefectus*, unleſs he was in poſſeſſion of the office: So that when we ſhew him in poſſeſſion, that neceſſarily implies a previous admiſſion.

No *mandamus* lies for an officer at will. 2 *Lev.* 18. *Salk.* 428, 432. There appeared to be a power of removal at pleaſure, but becauſe the removal was for faults in his office, and not in purſuance of that power, a peremptory *mandamus* went: But it was held, that it had been good, if they had relied only upon their power.

The court held the return good. *Et per Pratt* C. J. The admiſſion need not be anſwered, though it is fully done by *praefect':* Nor does there need any ſummons, for the reaſon mentioned. *Et per Powys* J. a charter cannot hinder a man from ſetting up a trade without apprenticeſhip, but a cuſtom may. *Et per Forteſcue* J. a ſexton is called *oſtiarius:* We ought not to grant a *mandamus*, without a certificate that the ſexton was choſen for life. If he were removed for a crime, a ſummons is requiſite according to natural juſtice; but the preſent caſe is a removal for what the party cannot gainſay.

Henderſon *verſ.* Williamſon.

Award muſt purſue the ſubmiſſion in point of form as well as in point of ſubſtance.

DEBT upon a bond, conditioned to perform the award of *J. S.* ſo as it be made in writing under his hand and ſeal by ſuch a day ready to be delivered to the parties. The defendant after *oyer* pleads, *nul agard fait.* The plaintiff replies, that the arbitrator before the day made his award in writing, which is ſet out, and a breach aſſigned. And to this replication the defendant demurs generally. And *Comyns* Serjeant objected, that it did not appear to be under the hand and ſeal of the arbitrator, as the ſubmiſſion requires. *Bulſt.* 110. 1 *Roll. Abr.* 145. *Vaugh.* 109, 112. *Palm.* 121. 2 *Cro.* 277. And for this fault it was held ill: But the plaintiff had leave to diſcontinue.

Anonymous.

Variance.

CErtiorari to remove a conviction of forcible entry and detainer againſt *A.* and his wife: The conviction returned was againſt *A.* only: And for this variance the *certiorari* was quaſhed. *Vide Salk.* 146, 151.

Dominus Rex *verſ.* Roe & al'.

YORKE moved to quaſh the return of a reſcous, by which it appeared, that the warrant was to two, and the arreſt only by one, without any words to ſever the authority. *Sed per curiam*, Though that be an exception in the caſe of a private authority, yet it is none in this which relates to the publick juſtice; and this has always been the ſtanding diſtinction, and therefore the return is good. *Vide* 1 *Inſt.* 181. *b.*

An authority to two to do an act relating to the publick may be executed by one only.

King qui tam *verſ.* Bolton.

THE plaintiff declares in prohibition, ſetting forth that the city of *London* is an ancient city incorporated by the name of mayor, commonalty and citizens of the city of *London*, and that time out of mind there has been a common council conſiſting of the mayor, aldermen and certain citizens to the number of 250, elected within their reſpective wards yearly upon *St. Thomas*'s day at the wardmote: That there have been uſually twelve choſen for the *Tower* ward, and that the plaintiff on *St. Thomas*'s day laſt, being a citizen and freeman inhabiting in that ward, was at a wardmote holden before the alderman duly elected and admitted a common council man for the year enſuing: But the defendants, in order to oppreſs him, 6 *February*, 4 *Geo.* did deliver a petition to the court of common council, complaining of an undue election, and ſuggeſting that they themſelves were choſen; whereas the plaintiff avers, the common council had no juriſdiction to examine the validity of ſuch election, but the ſame belongs to the court of the mayor and aldermen; and notwithſtanding the plaintiff offered to prove the ſame, yet the defendants proceed againſt him, and concludes with averring the contempt. The defendants deny the contempt, *et quicquid, &c. et pro conſultatione habenda* they admit the conſtitution, and manner of election; but then they ſay, That the mayor, aldermen and common council, time out of mind have had the cognizance and authority of hearing and determining the election of common council men: That on *St. Thomas*'s day the defendants were duly choſen, but the plaintiff and one *Jeffes* pretending a right, intruded themſelves into the ſaid office, whereupon the defendants exhibited their petition to the common council, *prout eis bene licuit, abſque hoc* that the juriſdiction is in the court of the mayor and aldermen. The plaintiff, *proteſtando* that the court of mayor and aldermen have a juriſdiction, for plea ſays, the common council have it not: And concludes to the country. To this replication the defendants demur, and ſhew for cauſe, that the replication is a depar-

Where the firſt traverſe is immaterial, there may be a traverſe upon it. Lill. Ent. 523.

departure, and that the plaintiff ought to have taken iſſue on the traverſe, and not anſwered the matter of it barely by way of inducement. The plaintiff joins in demurrer.

Darnall Serjeant *pro defendent.* The plaintiff ſhould have taken iſſue upon our traverſe, and not meddled with the inducement to it. *Cro. Car.* 105. 2 *Mod.* 183. He ſhall maintain matter alleged by him, and denied by the other ſide, and not go over to matters *dehors* and collateral, ariſing only out of the inducement to the other's plea. *Vaugh.* 60. 2 *Mod.* 84. He ſhall not deſert his own title, and recover upon a defect in the defendants. It is not enough for him to deſtroy my title, but he muſt go farther, and eſtabliſh his own: If he does not he can never recover, for *melior eſt conditio poſſidentis. Hob.* 101. He that prays a prohibition, muſt prove his ſuggeſtion, as on *modus's* and citations out of the dioceſe. He that pleads in abatement, muſt give the plaintiff a better writ: Therefore when they ſay we have applied to an improper court, ought they not to ſhew us which is the proper one? and can that be determined, unleſs it be put in iſſue?

Whitaker Serjeant *contra.* This is a prohibition *pro defectu juriſdictionis*, and not barely *pro defectu triationis.* Here both plaintiff and defendant are actors, the one ſues for damages by being drawn into an improper court; and the other labours for a conſultation, and for that purpoſe muſt intitle the court wherein he ſues to juriſdiction. *Plow.* 469. *a. Dy.* 170, 171. 2 *H.* 4. 9, 10. For the only point is, whether or no the defendant has ſued the plaintiff in a court that can and ought to determine the matter. The traverſe is immaterial: We ſay the court of common council has no juriſdiction, and is it any anſwer to ſay the court of aldermen have none? We might ſafely have demurred, but we choſe to waive that, in order to bring the right to trial. And though generally a traverſe upon a traverſe is not allowed, yet that rule does not hold in all caſes. 1 *Inſt.* 282. *b. Cro. El.* 99. *Mo.* 429. *Cro. El.* 407. 2 *Cro.* 372. *Pop.* 101. This is not like the caſe of a *quare impedit*, which has been mentioned, for there the plaintiff muſt make a title, in order to have a writ to the biſhop.

Darnall replied. Suppoſe we had demurred to the declaration, and it had been held naught; ſhould not we have had a conſultation, without making out a title? They that take a cauſe from one court, muſt ſhew a juriſdiction in another: They ſay we have applied wrong, why? Becauſe you ſhould have gone to the court of aldermen, ſo that that's the point, whether the court of aldermen have the right.

C. J.

C. J. I did not expect to have heard an argument in ſo plain a caſe as this. The plaintiff ſays he is ſued in the common council for a matter whereof the cognizance is only in the court of aldermen: conſider now what is the ground of our ſending a prohibition; it is not becauſe the court of aldermen have a right, but becauſe the common council has none, and therefore the traverſe, which would avoid trying the right of the common council, and bring that of the court of aldermen in queſtion, is immaterial. For ſuppoſe they had gone to iſſue upon that, and it had been found that the court of aldermen had no juriſdiction; yet that had not eſtabliſhed the right of the common council, ſo as to intitle the defendants to a conſultation. Whether they ſhall have one or not, depends upon the right which the common council has to determine this matter; and if they have none, I am ſure we ought not to remit this cauſe to them, though the court of aldermen ſhould fail of eſtabliſhing their right. Though the plaintiff might have demurred, yet he was at liberty to go on to try the right. The caſes where a plaintiff muſt recover upon his own ſtrength, do not at all govern this; for if the common council have uſurped a juriſdiction, which they have not; the plaintiff might have had a prohibition, without ſetting out where the right was. In the caſe of a *modus* it is otherwiſe indeed, becauſe there the court below has originally a juriſdiction, which the other comes to overthrow by matter *ex poſt facto*. For theſe reaſons I am of opinion, the prohibition ought to ſtand. To all which *Powys* J. agreed. *Et per Eyre* J. The plaintiff in overthrowing the juriſdiction of the common council has no need to ſet up another in oppoſition to it. Where the firſt traverſe is immaterial, that is, where it will not put the proper point in iſſue, there may be a traverſe upon that traverſe.

Forteſcue J. The defendant is properly the actor, becauſe he muſt make title to the juriſdiction in which he ſues; and whether that court has juriſdiction, is the only matter iſſuable; and not whether the plaintiff has alleged it properly elſewhere. The caſe of a *quare impedit* is intirely different from this caſe: there the plaintiff, as here the defendant, muſt recover upon his own ſtrength, one his writ to the biſhop, and the other a conſultation. But the defendant there, and ſo the plaintiff here, needs make no title. If the right of the court of aldermen had been in iſſue, conſider what would have followed. If their right had been eſtabliſhed, it is no conſequence that the common council have none, for there may be concurrent juriſdictions. If it had been found they had no right, does it follow that it is in the common council? That could not have intitled the defendants to a conſultation. *Judicium pro quer'*.

N. B. This judgment was afterwards affirmed upon a writ of error in parliament.

Dominus

Dominus Rex *verſ.* Grant, Majorem de Taunton in Com' Somerſet'.

Quaere, Whether there remains any obligation at this day for officers of corporations to make the declaration againſt the ſolemn league and covenant.

UPON an affidavit, that the defendant at the time of taking the oath of office did not take the declaration required by the corporation act of the 13 *Car.* 2. againſt the ſolemn league and covenant, a rule was made, that he ſhould ſhew cauſe why an information in the nature of a *quo warranto* ſhould not go againſt him. And upon ſhewing cauſe:

Cheſhyre Serjeant before he came to the principal matter made two previous points. 1. That no private perſon could apply for this information; and, 2. That in caſe he might, the affidavit was not ſufficient.

Firſt, It will not be contended, but that in this caſe the court upon the ſtatute of 9 *Annae*, *c.* 20. has a diſcretionary power, either to grant or deny an information. The party is enabled to file it with leave of the court, that is upon application to it. He muſt pray to have it, and every prayer implies a power to deny. A *quo warranto* is the king's royal writ of right, which Mr. Attorney may exhibit whenever he pleaſes. *Yelv.* 192. 1 *Bulſt.* 55. But no private perſon has ſuch an unlimited power, not over informations in the nature of a *quo warranto*. The ſtatute is calculated for the determination of private rights, where any diſpute happens upon elections of members, and it was made chiefly with this view, as may be collected from the preamble and other parts of the act, which require a relator to be named, who ſhall be liable to coſts, and extend all the ſtatutes of jeofailes to theſe proceedings. He that prays the information, muſt lay ſome right to the office before the court, that it may appear the proſecution is not ſet on foot merely to gratify the humour and captious diſpoſition of the proſecutor. My Lord Chief Juſtice *Holt* has cenſured actions which have been brought out of curioſity only to try the opinion of the court, ſaying he did not ſit there to determine coffee-houſe diſputes. The election of the defendant was unanimous, no competitor at all; ſo that there is no one but himſelf who claims a right to this office. It has been held criminal, to bring an action in another's name without his privity and conſent. Here the proſecution is in the king's name, and yet he is not privy. His attorney does not appear to avow the proſecution.

Secondly, The affidavit may be true, and yet the defendant may have taken the declaration as the ſtatute requires, for he might take

it before two juſtices at a different time from his taking the oath of office. Neither does it ſet out any tender of this declaration to the defendant, which is expreſly required by the purview §. 10. and though the proviſo ſeems to carry it farther, yet it will be abſurd to make the purview void by the proviſo. *Mich.* 8 *W.* 3. *B. R. Rex* v. *Major' de Oxon'.* 5 *Mod.* 360. That was a *Mandamus* to reſtore *Job Slatford* to the office of town-clerk. They returned that he did not at the time of taking the oaths of office take the oath of allegiance. It was inſiſted, that a tender was neceſſary; but this was not the point upon which the caſe turned, but becauſe they only ſaid he did not take them at that time, without any negative words that he did not take it at any other time, which he well might. And for this reaſon a peremptory *mandamus* was granted. This caſe enforces my objection to the affidavit, and before I leave it I muſt obſerve, that though all the then great lawyers were concerned in it, yet not one of them ever thought of this declaration, which is now trumped up to ſacrifice the quiet of the whole kingdom to ſome private pique and revenge. Salk. 428.

As to the principal point (and a great point it is) I hope no information ſhall go, for three reaſons. 1. Becauſe this declaration has been diſuſed for theſe thirty years paſt. 2. From probable reaſons to induce an opinion, that this ſtatute is expired: and, 3. From the conſideration of the many inconveniencies which a contrary determination will bring along with it, and the evil influence it will have to inflame the nation.

Firſt, Sir *James Mackenzie* and Sir *David Dalrymple* in their treatiſes of the laws of *Scotland* tell us, that deſuetude of a law for forty years amounts to a repeal of it. And ſince no proſecution has hitherto been ſet on foot upon this act of parliament, it is, according to *Litt.* §. 108. an argument, that none lies; and as this law has been ſo long eſteemed to be of no force, I may properly apply, what my lord *Coke* has more than once mentioned, *a communi obſervantia non eſt recedendum*; *et periculoſum exiſtimo, quod bonorum virorum non comprobatur exemplo.* 1 Vol. of Trials 291. Lord *Balmerino*'s caſe. Treatiſe of Laws 119.

Secondly, There are many reaſons to conclude this ſtatute is expired, and all put together are ſufficient, *nam quae non proſunt ſingula, junta juvant.* It is the reaſon and ſubject matter which guides the conſtruction of acts of parliament, and from hence ſpring all thoſe inſtances which might be ſhewn, where general terms have been reſtrained to particular, and particular extended to general: where the words have reached all actions, and yet been confined to one ſpecies only; where ſtatutes mentioning the king have enured to the benefit of the ſubject; and on the contrary where acts of parliament

ment penned with latitude enough to include the ſubject, have notwithſtanding been reſtrained to the king; where the plural number has ſtood for the ſingular, and the ſingular for the plural; nay even where the ſame words in the ſame law have had different conſtructions put upon them. 4 *Inſt.* 330. 2 *Inſt.* 25. *Hob.* 128, 299, 346. As ſuppoſe a man having an inheritance in one acre and but a freehold in another, conveys both to *J. S.* and his heirs for ever. Here *for ever* muſt be conſtrued differently. 7 *Co.* 23. *Cro. Eliz.* 183.

The intention was but temporary, as appears by *Kennet Vol.* 3. 138. Though never ſo many had taken the covenant, yet the extent of one life would wipe them all off. The candles were all lighted at once, and would burn out as ſoon as a ſingle taper. It was confined only to perſons then in being, who may reaſonably be ſuppoſed to be all dead at this day: and as it was calculated chiefly for thoſe who had taken the ſolemn league and covenant, it will be of no uſe now. The ſtatute of uniformity 14 *Car.* 2. *c.* 4. which expreſly determines it in 1682, induced a belief that it had the ſame continuance in all caſes. And to ſhew this was not thought ſo conſiderable a thing as ſome people would make it, it is obſervable that it is left out in the militia act. I cannot pretend there ever was any expreſs repeal, but if 1 *W. & M. c.* 8. be not one as to this declaration, I queſtion whether it be ſo of the oaths themſelves. If the clergy were to take it but for a time, and the militia not at all, what reaſon is there to conſtrue this obligation with a greater latitude to corporations? The danger is the ſame in each caſe, and ſo is the ſecurity to be againſt it.

Thirdly, There are many inconveniencies which will flow from an opinion that this law is ſtill in force. I forbear to mention ſome of them, and ſhall only inſtance in thoſe which are obvious to all the world. Many corporations will be utterly diſſolved; the publick peace endangered, and the courſe of juſtice interrupted in all inferior juriſdictions. In ſome reſpects it may affect our legiſlature. How many will there have been, who have ſuffered under a ſentence which the recorder of *London* had no authority to pronounce? The parliament is now ſitting, and thither the proper application will be, as to the experteſt phyſicians, who ought to have a hand in cutting off ſo many members, that there be no fever or conſumption. It is not the firſt time this court has ſaid, that matters which have come before them have been too big for them. In *Edward* the third's time the ſheriffs took an oath againſt the *Lollards*, but when that came to be the eſtabliſhed religion, it was dropped. 3 *Inſt.* 188. 2 *Inſt.* 479, 436, 790. *Cro. Car.* 25.

Denton. The ſolemn league and covenant aroſe from a treaty between the parliament and the *Scots*, as appears by *Ruſhworth* and *Clarendon*, and all the hiſtories of thoſe times. This league was calculated for the extirpation of all epiſcopal government, by that means to overthrow the church; and can it then be imagined, that leſs care ſhould be requiſite to keep perſons of that pernicious principle from intermeddling in church affairs, than from ſpreading the contagion in corporations?

But admitting the declaration was not temporary; yet though not expreſly, it is implicitely repealed. The act requires the oaths and declaration to be taken together, and therefore the 1 *W. & M.* has not ſevered, but repealed them all. Some argument to evince this may be drawn from 2 *W. & M. c.* 8. for reverſing the judgment in the *quo warranto* againſt the city of *London*, and from the 11 & 12 *W.* 3. *c.* 17. and eſpecially from 1 *Geo. c.* 13. §. 23. in which the proviſo will be of no force if ſuch a latent defect as this can be trumped up. *Argumentum ab inconvenienti*, if it holds in any caſe, holds in this. In the caſe of *Bewdley* the *venire* was *de vicineto*, when it ought to have been *de corpore com'*, but becauſe this had been the practice in all *ſcire facias's*, that practice prevailed againſt the expreſs words of the act of parliament. In *Bernardi's* caſe the court ſuſpended their judgment, till they ſaw whether the parliament would think it proper to continue him and the others in priſon.

The objection ariſes from the words *for ever hereafter*. To which I anſwer, that inaſmuch as the deſign was but temporary, thoſe words can only extend to a temporary obligation. On the ſtatute of 5 *Eliz.* the precedents uſed to be, that the party did not uſe the trade at the time of making the ſtatute; but on account of the length of time that is now diſuſed.

Reeve. At the reſtoration three things were to be provided for; corporations, the militia, and the church. The militia are out of this queſtion: the church *quoad hoc* ſeemed to be moſt concerned; and no reaſon can be given why there ſhould be a more laſting proviſion for corporations, than for the church. The ſtatute of *circumſpecte agatis* extends to all biſhops, though the biſhop of *Norwich* only is mentioned. The ſtatute 1 *Geo.* deſigned to inſtance in all the qualifications, and the omitting this is an argument, the lawmakers eſteemed it none, for the affirmative there implies a negative.

Mallett. The ſolemn league and covenant was an aſſociation, and no law. Neceſſity has ſuperſeded the expreſs words of a ſtatute; as where the ſtatute of *Marleberge* prohibits the driving diſtreſſes out

of

of the county, yet where the lord's manor is in another county, it has been held lawful. In the caſe of *The King* v. *Jeffries* about a year ſince, ſuch a rule as this was diſcharged, becauſe the attorney general had no hand in praying it.

Whitaker Serjeant *contra*. Every ſubject has a right to inform the court, whenever any other is guilty of a breach of the law. An information lies for not repairing a bridge, and yet there is no private injury. The ſtatute doth not require us to name a relator, till the information is actually granted. I agree the court has a diſcretionary power, either to grant or deny what we now aſk for.

It is a new doctrine which is now advanced, that if an act of Parliament be diſregarded for a time, it ceaſes to be binding. But if it ſhould, yet there is not that argument in this caſe. Daily experience tells us, that the ſacrament is taken as that ſtatute requires; and it is coupled with the declaration, and muſt ſtand and fall with it. The queſtion is not whether there are any perſons now alive who took the ſolemn league and covenant, but whether or no there remains any obligation at this day on members of corporations to make the declaration againſt it. My lord *Clarendon* was of opinion that the obligation was perpetual, as may be gathered from his own words, *To the end that we and our poſterity*. But not to reſt this matter upon the ſingle teſtimony of any hiſtorian, here is *teſtimonium rei*, the very words of the act of parliament, which enacts, *That this declaration ſhall be made for ever hereafter*, and in default thereof the election to be void.

Whether the diſtemper be general or not, the court cannot take notice upon this motion: The only queſtion is, whether the defendant has complied with the terms of this act of parliament, which we inſiſt is in full force.

Marſh. We need not pray this information through Mr. Attorney, for the ſtatute gives it to any perſon with leave of the court. And though *Jeffries*'s caſe ſeems to thwart us, yet the conſtant practice is more than an anſwer to the authority of that caſe. As to the affidavit, we think it ſufficient. We ſhew the defendant did not make the declaration when he took the oaths of office, which was the proper time; and this is enough to put him to ſhew, he took it at any other time and place. And ſince he has not laid hold of this opportunity, it may be concluded he has not taken it at all. That a tender was not neceſſary, was reſolved in *Slatford*'s caſe.

It has been ſaid, that the reaſon of this proviſion was but temporary. In anſwer to which pretence I ſhall look a little into it, in order to ſhew, that as the obligation is perpetual, ſo is the reaſon of it. In 1643. the Parliament forces having had but ill ſucceſs, they made application to the *Scots* for their aſſiſtance. Commiſſioners were appointed on both ſides, and the reſult of their meeting was an aſſociation, which went under the name of the ſolemn league and covenant. The King immediately publiſhed his proclamation againſt it, as appears in 3 *Ruſh.* 488. The drift of this aſſociation was, to ruin the religion of our country; and to expreſs the deteſtation of ſuch abominable practices, the declaration was framed ſoon after the Reſtoration. And it had two views, one to diſengage people from that obligation which they were in a manner forced into, and the other to fix a laſting and indelible brand of infamy upon thoſe proceedings, in order to deter others from the like attempts. And now can any one ſay, the reaſon is but temporary? On the contrary, does it not manifeſtly appear to extend itſelf to all future ages?

As to the militia, there was no occaſion for this proviſion: The crown had them in their power, but not ſo of the corporations. In 1 *Inſt.* 81. *b.* it is ſaid, an act of Parliament cannot be antiquated, or loſe its force, for want of being put in execution. And *Hob.* 111. Sir *John Pilkington*'s caſe there cited, *Forteſcue* C. J. ſaid they would be well adviſed, before they would annul an act of Parliament. It is an abſurdity to ſay, that becauſe the ſubject has lived ſome time in the breach of any law, that the obligation to obſerve that law ceaſes. In *Henry* the 8th's time all the clergy were brought under a *praemunire*, for ſuing bulls from the court of *Rome*; and biſhop *Burnet* in his *Hiſtory of the Reformation*, ſpeaking of this matter, tells us, That though it had been practiced for a long time, to ſue ſuch bulls, yet the old laws prohibiting thereof were in no degree impeached by ſuch uſage.

Yorke. It is ſufficient that we lay a probable cauſe before the court, when we pray this information. We were not obliged to travel the country, to inquire of every juſtice of the peace, whether the defendant had made any declaration before him. Nor does this cauſe come within the reaſon of returns, which were not traverſable at common law, and therefore ought to be certain to every intent. The ſtatute 9 *Ann.* is general, and not confined to proſecutions by competitors only. I was of counſel in *Jeffries*'s caſe, and the reaſon why that information was refuſed was, becauſe he proved he took the oaths about a fortnight after the proper time, and not becauſe the proſecutor came without Mr. Attorney to back

him. In the caſe of *Denny* v. *Norris*, the queſtion was not about the tender, but whether that matter was aſſignable for error. *Hale* in his *Hiſtory of Law* 4, 5, 6. where he treats of old laws whereof no written monument is left, does not conclude them of no force; but only ſays they are grafted into the common law. In the caſe of *Thornby* v. *Fleetwood*, Serjeant *Cheſhyre*, who argued *in C. B.* againſt the ſtatute of 1 *Jac.* 1. *c.* 4. was pleaſed to uſe this metaphor, that it was a ſtill born ſtatute, becauſe ſays he it has not cried out till now: But that was not thought a reaſon to ſet it aſide.

There is no more abſurdity for people to take the declaration now than there was formerly, as to all perſons who had not taken the covenant. But granting there may be ſome ſeeming abſurdity, is it therefore to be diſregarded? It may be a reaſon to have it repealed, but till then it binds. Suppoſe a ſtatute requires, that whoever enjoys an office ſhall declare that two and two make four: I know of no power which could reject this as frivolous. The clauſe in the act of uniformity ſhews, that it would not have expired in 1682. without that proviſion, and there was no reaſon to continue it longer as to the clergy, for they take the oath of canonical obedience. It was ſaid cauſes have been thought too big for this court: I grant it, and take this to be one of them; it is too big for this court to repeal and ſet aſide acts of Parliament.

Reeve. 2 *Inſt.* 28. uſage prevailed againſt a branch of *magna charta.*

The C. J. *Powys* and *Forteſcue* Juſtices, held the affidavit ſufficient, and that any private perſon might apply for the information. But *Eyre* J. was *contra* as to both. And as to the principal point, it was referred to the conſideration of all the Judges. But before they gave any opinion the act was paſt for the eſtabliſhing of corporations. 5 *Geo.* 1. *c.* 6.

Dominus Rex *verſ.* Smith.

Rule on juſtice to produce examination.

A Rule was moved for upon a juſtice of peace to produce an examination at a trial; and the court doubting, it was adjourned. And afterwards the C. J. delivered their opinion. Where things are evidence of themſelves, as corporation books, we make no rule to produce them, but only that the party may have copies, which copies are evidence: But this examination is not evidence of itſelf, without proving the hand of the party; and ſo it is of warrants and affidavits, and therefore a copy of them is no evidence; and we muſt have the original, for nothing elſe concludes the party.

Make the rule, that the juſtice *produci faciat* (not *quod producat*) the examination at the trial, and give the party a copy in the mean time.

Ogburn *verſ.* Berrington.

ERROR *e C. B.* Infancy aſſigned. *Doubt del court*, and feigned iſſue. Found with the plaintiff in error, and judgment reverſed upon return of the *poſtea* upon motion without argument in the paper. But within a day or two after between Practice.

Cunningham *verſ.* Houſton.

ON error, want of an original and warrants of attorney were aſſigned. The defendant pleads a releaſe of errors, and upon *non eſt factum* replied, the plaintiff was nonſuit. Thereupon I moved to affirm the judgment, but the court bid us put it in the paper; and when it came on, they objected againſt affirming the judgment, becauſe the pleading the releaſe was a confeſſion of the errors, and ſo it would be to affirm an erroneous judgment. And beſides, the tables were now turned; the queſtion not being whether error or not, but whether barred or not by the releaſe. I quoted *Aſton's Entries* 339. where the entry is *quod judicium affirmetur*. But notwithſtanding this, the court gave the judgment *quod querens nil capiat per breve de errore*, which I had before told my client was the proper way. What judgment ſhall be given where a releaſe of errors is found. Show. 50.

Dominus Rex *verſ.* Beck.

HELD that there muſt be a formal conviction upon the ſtatute of hawkers and pedlars, though it mentions nothing of it; and that a *certiorari* lies to bring it up hither. Hawkers and pedlars. 8 & 9 W. 3. c. 25.

Ramſden *verſ.* Ambroſe.

At Guildhall, November 21, 1718. coram Pratt *C. J.*

THE huſband and wife lived ſeparate. She boarded in the plaintiff's houſe, who declares againſt the huſband for meat and drink for him found and provided. On the evidence it appeared to be for the wife. And the C. J. held, it did not ſupport the declaration; for though the huſband is chargeable upon his implied contract for what neceſſaries are adminiſtred to the wife; and therefore Where huſband and wife live ſeparate, cannot declare for her board as for meat and drink for him found and provided.

fore if goods are delivered to her, the vendor may declare generally for goods ſold and delivered: Yet in this caſe the plaintiff fails in his deſcription of the ſubject matter of the contract. So that where he now declares generally, a recovery in this action could not be pleaded to a ſpecial action for meat and drink found and provided for the wife.

Amies *verſ.* Stevens. Ibidem eodem die.

Carrier not anſwerable for goods loſt by tempeſt.

THE plaintiff puts goods on board the defendant's hoy, who was a common carrier. Coming through bridge, by a ſudden guſt of wind the hoy ſunk, and the goods were ſpoiled. The plaintiff inſiſted, that the defendant ſhould be liable, it being his careleſſneſs in going through at ſuch a time; and offered ſome evidence, that if the hoy had been in good order, it would not have ſunk with the ſtroke it received, and from thence inferred the defendant anſwerable for all accidents, which would not have happened to the goods in caſe they had been put into a better hoy. But the C. J. held the defendant not anſwerable, the damage being occaſioned by the act of God. For though the defendant ought not to have ventured to ſhoot the bridge, if the general bent of the weather had been tempeſtuous; yet this being only a ſudden guſt of wind, had intirely differed the caſe: And no carrier is obliged to have a new carriage for every journey: It is ſufficient if he provides one which without any extraordinary accident (ſuch as this was) will probably perform the journey.

Buſhel *verſ.* Miller. Ibidem eodem die.

That which makes a man a treſpaſſer may not amount to a converſion.

UPON the *Cuſtom-houſe Key* there is a hut, where particular porters put in ſmall parcels of goods, if the ſhip is not ready to receive them when they are brought upon the *Key*. The porters, who have a right in this hut, have each particular boxes or cupboards, and as ſuch the defendant had one. The plaintiff being one of the porters puts in goods belonging to *A.* and lays them ſo that the defendant could not get to his cheſt without removing them. He accordingly does remove them about a yard from the place where they lay, towards the door, and without returning them into their place goes away, and the goods are loſt. The plaintiff ſatisfies *A.* of the value of the goods, and brings trover againſt the defendant. And upon the trial two points were ruled by the C. J.

1. That the plaintiff having made ſatisfaction to *A.* for the goods, had thereby acquired a ſufficient property in them to maintain trover.

2. That here was no converſion in the defendant. The plaintiff by laying his goods where they obſtructed the defendant from going to his cheſt, was in that reſpect a wrong doer. The defendant had a right to remove the goods, ſo that thus far he was in no fault. Then as to the not returning the goods to the place where he found them; if this were an action of treſpaſs, perhaps it might be a doubt; but he was clear it could not amount to a converſion.

Fotheringham *verſ.* Greenwood.

At Guildhall, 27 November 1718, coram Pratt, *C. J.*

A. Having money of the plaintiff's in his hands, loſes it at play. The plaintiff brings an action after the three months upon the ſtatute of gaming 9 *Ann. c.* 14. and produces *A.* as a witneſs. Upon a *voire dire* he confeſſed, that if the plaintiff recovered he was not to be anſwerable; but if he failed, then the money was to be deducted out of his fortune in the plaintiff's hands. *Et per* C. J. Though the recovery againſt the defendant will not ſink the demand for the money imbezilled by *A.* yet his apprehenſion, that the plaintiff will not trouble him for it, is a biaſs upon him; for if a witneſs thinks himſelf intereſted in the queſtion, though in ſtrictneſs of law he is not, yet he ought not to be ſworn. And *Darnall* Serjeant mentioned the caſe of Mr. *Chapman* of *Bucks*, who owned himſelf to be under an honorary though not under a binding engagement, to pay the coſts; and *Parker* C. J. on ſolemn debate rejected him, and ſo it was done in this caſe.

He that apprehends himſelf intereſted, though *ſtricto jure* he is not, is no witneſs. Salk. 283.

Marks *verſ.* Marks. In Canc.

Abr. Eq. Caſ. 106.

WILLIAM Marks having a wife and five ſons, *Theodore*, *William*, *Ezekiel*, *Daniel* and *Nathaniel*, and being ſeiſed in fee of Lands in *Northamptonſhire*, and of the premiſſes in queſtion, 10 *April* 1680 conveyed the *Northamptonſhire* eſtate to truſtees, in truſt to ſell the ſame, and diſpoſe of the money according to the directions of his will, provided if *Theodore*, his heirs or aſſigns, ſhould within one month after his deceaſe pay 500 *l.* as he ſhould direct by his will, then the truſt ſhould determine, and the lands remain to *Theodore* in fee. Afterwards he makes his will, and reciting the truſt, diſpoſes of the 500 *l.* to *William* and *Ezekiel* his

Deviſe to *A.* for life, remainder to *B.* in fee, provided that if *C.* within three months after *A.*'s death pays *B.* 500 *l.* then *C.* to have the land in fee. *C.* dies living *A.* *A.* dies. The heir of

C. (though not named) may tender. But if the law were otherwiſe, equity could not relieve by conſtruing the remainder to *B.* only as a ſecurity for the payment of money.

ſons, and then deviſes the lands in queſtion to *Anne* his wife for life, remainder to *Daniel* and his heirs; " provided that if my ſon " *Nathaniel* do and ſhall within three months after the deceaſe of " my wife pay or cauſe to be paid to *Daniel*, his executors or " adminiſtrators, the ſum of 500 *l.* then I give the land to *Nathaniel* and his heirs for ever." The deviſor dies, the wife enters, and joins with *Daniel* in incumbrances. *Nathaniel* dies leaving the plaintiff his ſon and heir. The wife dies. And becauſe of the incumbrances the plaintiff, inſtead of tendring to *Daniel*, brings his bill in this court, to know where to pay the money.

Sir *Thomas Powys pro quer'*. The queſtion is, Whether the heir of *Nathaniel* can make the tender? I hold he may. In queen *Elizabeth*'s time executory deviſes came in. *Fulmerſton*'s caſe is the firſt, and they were allowed to extend as far as one life. Afterwards the houſe of lords in the caſe of *Lloyd* v. *Cary*, *Parliament Caſes* 137, allowed a reaſonable time after the life, *viz.* a year: We are within that time, for we come in three months. The objection is, That the tender is perſonal in *Nathaniel*, it not being ſaid, that he or his heir ſhall tender. To this I anſwer, That there is no laches in *Nathaniel*; it was not to be done in his life, but after the mother's death; and the heir having an intereſt, is within the reaſon of *Litt.* §. 334. Formerly it was thought, a fee could not be limited upon a fee, but it is otherwiſe ſince *Pell* and *Brown*'s caſe where the firſt fee is conditional. Though the eſtate itſelf never veſted in the anceſtor, yet an intereſt did; and therefore on performance of the condition the heir is in by deſcent, according to the third point in *Shelley*'s caſe and the caſe of *Wood* there cited, and *Chapman*'s caſe, *Plowd.* 284. Thus far in a court of law: But in a court of equity, this ſhall be taken as an immediate deviſe to *Nathaniel*, ſubject to the payment of 500 *l.* to *Daniel*, who has the former limitation only as a ſecurity, according to 1 *Chan. Caſ.* 89.

2 Cro. 592.

Cheſhyre Serjeant of the ſame ſide quoted *Litt.* §. 334. illuſtrated by §. 337. 1 *Roll. Abr.* 420. *Winch* 103, 105, 115. *C. J. Jones* 390. And a caſe in *C. B.* debated *Mich.* 2 *W. & M.* and entered *Trin.* 4 *Jac.* 2. *rot.* 751 or 707. *R. H.* ſeiſed in fee made a feoffment to the uſe of himſelf for life, remainder to his wife for life, remainder to *Mary* in tail, remainder to *Sarah* in tail, remainder to his own right heirs; provided, that if *Mary* does not pay *Sarah* ſo much within ſuch a time after his wife's death, then *Sarah* ſhall have it in tail, remainder to *Mary* in tail. *R. H.* died, *Mary* died, and then the mother died; and it was adjudged, that *Mary*'s heir might pay the money, for the heir had an intereſt veſted, though the anceſtor died living the tenant for life.

Sir

Sir *Robert Raymond*, *ad idem*. The objection is, that *heirs* is a word of limitation, whereas the plaintiff if he takes now muſt take as a purchaſer. Anſwer: He takes by deſcent. A poſſibility or remainder on contingency may deſcend. *Bro. Feoffment to Uſes* 59. 3 *Co.* 20. *Poll.* 55. *Co. Litt.* 219. *b.* *Daniel* has no prejudice, whether the 500 *l.* be paid by *Nathaniel* or his heir. The poſſibility is coupled with an intereſt. *Yelv.* 85. 7. So Sir *Francis Engle-field*'s caſe; and we are in the caſe of a will, where the intent is to be purſued. 1 *Saund.* 150.

Hooper Serjeant *contra*. This is not an executory deviſe, which can take effect before any act done: The anceſtor was to do an act, he dies without doing it; and as he could not take till he did the act, ſo the heir cannot now that it is impoſſible to be done in the manner the deviſor directs.

Mead. There is a great difference, where the heir comes to perform a condition that is to put him into his anceſtor's eſtate, and where he is to gain a new eſtate. It is admitted the plaintiff cannot take as a purchaſer, and if ſo, then to make him take by deſcent, you muſt give ſomething to the anceſtor. Here he has nothing; he has no right to the land, but a bare *ſcintilla juris*, a right to do ſomething, which will give him a title after it is done. And he had an election whether he would do it or not. It is conſiderable, that *Nathaniel* only is named to tender; but to *Daniel* are added *executors and adminiſtrators*. If *Nathaniel* had ſurvived the wife, and lapſed the time; no body can ſay, the leaſt right would have deſcended to the heir. This is a condition precedent, which ought to have been performed, and againſt this Chancery cannot relieve, as they can in the caſe of a condition ſubſequent; as was ſettled in the caſe of *Bertle* v. *Falkland*, *Salk.* 231. *Select Caſes* 129.

Adjournatur. And afterwards the Lord Chancellor and the Maſter of the Rolls delivered their opinions *ſeriatim*.

Sir *Joſeph Jekyll*, Maſter of the Rolls. The equity which brings this matter into the court is, that the defendant *Daniel* had ſo conveyed and incumbered this eſtate, that it became difficult for the plaintiff to know to whom to pay the money. Now before this can be ſettled, the court muſt firſt determine a queſtion in law, whether the heir of *Nathaniel* upon tender or payment of the money may enter. And I am of opinion, that this is not perſonal to *Nathaniel*, but goes to his heir. If this was a condition at common law, there is no doubt but the heir might perform it and enter, *Litt.* §. 334. and in the caſe of a condition for payment of money at a certain time by the

feoffee, who before the day enfeoffs another, the ſecond feoffee may pay the money. *Litt.* §. 336.

But I admit the preſent caſe is not a condition, but an executory deviſe. But wherein does the difference conſiſt? All that it can amount to is only this. In the caſe of a condition the heir has a right antecedent to the condition to enter, for he does not gain a new eſtate, but inveſts himſelf in the old one; whereas in our caſe he is to gain a perfectly new eſtate, which the anceſtor never had. In anſwer to this it is to be conſidered, that there is a condition to create an eſtate, which the law will conſtrue liberally. 1 *Inſt.* 219. *b.* it is ſaid a condition that is to create an eſtate, is to be performed as near the intent and meaning as can be, if the words and letter cannot be ſtrictly purſued. From whence I obſerve, that there may be a performance which is not within the letter. But beſides, this is the caſe of a will, in conſtruction of which the law allows a great latitude to come at the meaning of the deviſor. Now in our caſe his meaning ſeems to be this, upon a view of the whole will. He is diſtributing his eſtate amongſt his children; to ſome, money, to others, land. In the proviſo for *Theodore*'s payment of 500 *l.* recited in the will, it is worded, *if* Theodore, *his heirs or aſſigns, ſhall pay:* Now no one can imagine, that by the difference of words in that proviſo, and this in queſtion, the teſtator's intention was different. In both caſes he ſeems to be aiming at a method of charging thoſe ſeveral lands with 500 *l.* a-piece.

Let us now conſider whether by this will *Nathaniel* himſelf had any thing in the lands in queſtion. I conceive he had a future intereſt or poſſibility, which might deſcend to the heir, though that right never veſted in the anceſtor. That ſuch a future intereſt in a term will go to the executor or adminiſtrator is known law. *Walden*'s caſe in *Plowd.* 519. is full to that point. It may alſo be releaſed, as in *Lampet*'s caſe, 10 *Co.* 48. *b.* Now why ſuch a future poſſibility ſhould in a term go to the executor or adminiſtrator, and in a freehold not go to the heir, who is as much the repreſentative of the anceſtor as the other is of the teſtator, I cannot imagine. At common law ſuch a poſſibility ariſing by act executed would come to the heir; as before the *ſtat. de donis*, the reverſion upon a fee-ſimple conditional was only a poſſibility, and yet it went to the heir. And even a poſſibility may go to the heir, which never could veſt in the anceſtor, as 1 *Inſt.* 378. *b.* So the ſame poſſibility will go to the heir, where the limitation is by way of uſe. 1 *Co.* 98. *Shelley*'s caſe, and *Wood*'s caſe there cited, are very ſtrong. And though it is there ſaid, that a future intereſt or poſſibility cannot be releaſed, yet that was before *Lampet*'s caſe, where it is determined that ſuch a poſſibility may be releaſed; and I believe it would be ſo now. The

caſe

caſe of *Spring* v. *Sir Julius Cæſar*, 1 *Roll. Abr.* 420. *Winch* 103. was thus: A fine by *A.* and *B.* to the uſe of *A.* in fee, if *B.* does not pay 10 *l.* at *Michaelmas* after, and if he does then pay it, it ſhall be to the uſe of *A.* for life, remainder to *B.* in fee: *B.* dies before *Michaelmas*, and *Rolle* ſays, it ſeems the heir of *B.* may pay the money, for this is not more perſonal, being the payment of money, than in the caſe of *Litt.* §. 334. upon a mortgage: And though in the report of this caſe in C. J. *Jones* 390. it is ſaid, the court were divided: Yet *Croke* and *Jones* were of opinion, the performance of the condition was not perſonal; and they ſaid, they did not ſee the difference between that caſe and the caſe of *Littleton*; and ſince that reaſon was not contradicted by any of the other Judges, and reported by *Rolle* as law, I muſt take it for law.

Now ſince theſe ſeveral poſſibilities are judged to go to the heir; I do not ſee why ſuch poſſibility created by will, ſince executory deviſes are allowed, ſhould not go to the heir alſo. The caſe of *Brett* v. *Rigden* cited for the defendant is nothing to the purpoſe, for there was in effect no deviſe to the anceſtor, he dying in the life of the deviſor; but in the preſent caſe here is a compleat deviſe, and ſuch as the anceſtor might have taken.

It was inſiſted for the defendant, that the plaintiff's father had an election, to pay or not to pay the money; and therefore it is perſonal in him. I admit it; but then ſuch election is always given in favour of him that is to pay, the receiver having no election at all; and in *Littleton*'s caſe the mortgagor has equally an election, and yet it is not perſonal in him. My Lord *Coke* in his comment upon that ſection gives four reaſons for *Littleton*'s opinion, which all concur in the preſent caſe. 1. A day appointed; 2. If the heir in our caſe takes by this executory deviſe, (as has been ſhewn he does) in nature and courſe of a deſcent, it is the ſame thing as where in *Coke*'s ſecond reaſon the condition deſcends to the heir. The two remaining ones are plainly the ſame in our caſe, and ſo *Littleton* is indeed a full authority in point.

It is not to be made a queſtion, whether this future intereſt or poſſibility, being to ariſe beyond a life, is good by way of executory deviſe, ſince the caſe of *Lloyd* v. *Cary*, which allows a year after. Upon the whole I am of opinion with the plaintiff, as to the point of law.

It was inſiſted upon further for the plaintiff, that if the law were againſt him, yet in equity he would have a good title upon payment of the 500 *l.* the eſtate in *Daniel* being to be looked upon as a ſecurity only. And for this 1 *Chan. Ca.* 89. was cited. But now

leſt any one ſhould go away with this dangerous opinion, that another conſtruction ought to be made in a court of equity, than would be in a court of law; it is to be obſerved, that that caſe was of a truſt, and unleſs it was conſtrued as a truſt for the younger children, Sir *Thomas* would have run away with the whole eſtate.

Parker Lord Chancellor. I am of the ſame opinion with the Maſter of the Rolls. And if we look on this caſe on every ſide, it appears the right is clearly for the plaintiff. The will ſhews the intention, though the word *heirs* be left out in the caſe of *Nathaniel*, yet he ſhould be in the ſame condition with *Theodore*. The queſtion is indeed a queſtion of law, and the method I have taken to ſatisfy my ſelf has been by conſidering this proviſo; 1. As upon a feoffment; 2. As upon a will; and 3. As it would ſtand in equity, as a proviſion for payment of money.

1. At common law; if *William Marks* had made a feoffment to *B.* for life, remainder to *Daniel* in fee, with this proviſo; *Nathaniel* could take no benefit of this condition, becauſe contrary to a maxim in law, that a condition cannot limit over an eſtate to another, but can only be taken advantage of by the maker. But in caſe of a feoffment by *A.* to *B.* and his heirs, upon condition that if *A.* pays 500 *l.* to *B.* within three months, then *A.* ſhall have his eſtate back again; if *A.* dies before the three months are expired, his heir, though not mentioned, may pay the money and enter. *Litt.* §. 334.

2. Conſider it upon the ſtatute of wills, and it is the ſame upon the ſtatute of uſes, ſince executory deviſes and ſpringing uſes have been allowed of. At firſt they began when merely future, and ſprang out of the eſtate of the deviſor. Afterwards they were extended beyond a life; as if an eſtate was deviſed to *A.* for life, remainder to *B.* in fee, upon condition that if *C.* pay a ſum of money to *B.* within a certain time after *A.*'s death, then *C.* to have a fee. This has been allowed of, and it is no more than granting the advantage of a condition to another perſon, which by common law conveyance could go only to the maker himſelf. Now this advantage is in its own nature deſcendible; becauſe it is nothing but that very right, which if it had gone to the deviſor himſelf, would have deſcended to his heirs. Take this as a poſſibility or future intereſt, and the caſes mentioned by the Maſter of the Rolls ſhew plainly, that this is a right deſcendible to the proper repreſentative, whether of a term or an inheritance, the former to the executor or adminiſtrator, and the latter to the heir. But if we conſider it (as I have done) as a condition, the caſe is yet ſtronger; becauſe this benefit of a condition is what is taken notice of before by the common

mon law to be deſcendible; and ſince by the ſtatute of wills and uſes the benefit of a condition is allowed to go over to a ſtranger, that ſtranger ought to have it as fully and compleatly as the feoffor himſelf would have at common law: That is, it ſhall go equally to the heirs of the one as of the other.

3. Conſider the matter as it ſtands in a court of equity. I agree intirely, were the law againſt the plaintiff, that he could not pay the money at the day; this court could not have intermeddled: But if the law be with him, it will be another conſideration, whether if he ſlipped the time of payment, he ſhould not be relieved. This is the caſe of a mortgage; equity looks upon the mortgagee's eſtate, which is become abſolute by paſſing the day, as only a ſecurity for the money, and will therefore defeat it upon payment after the day. Now in our caſe *Daniel*'s intereſt is merely perſonal; by the will the money is to be paid to him or his executors, and the eſtate of inheritance is given to *Nathaniel* and his heirs, ſubject only to this incumbrance. And though this court has not relieved againſt an heir at law upon a condition precedent to raiſe eſtates out of the heir's eſtate; yet when it is to be raiſed only out of the eſtate of the deviſee, it may very well do it. *Nathaniel* therefore would have the equity of redemption, the eſtate of *Daniel* being only as a ſecurity. If this therefore had been the caſe, I think this court would have relieved. But the preſent caſe does not want that aſſiſtance.

To return then to the queſtion in law, whether the death of *Nathaniel* has deſtroyed the benefit of the condition as to his heir: And this contains two queſtions; 1. Whether this condition be ſuch as may be performed after *Nathaniel*'s death; and 2. Whether the eſtate muſt not firſt veſt in the anceſtor, before the heir can take. As to the firſt, I think it not perſonal in *Nathaniel*, but performable by his heir. The payment of 10 *l.* or ſuch ſmall ſum, that bears no proportion to the eſtate, may perhaps be conſidered only as a ceremony, to declare the intention of the party; and therefore if in the caſe of *Spring* v. *Sir Julius Cæſar*, the two Judges continued in their opinion, it muſt be as I conceive becauſe the ſum was ſo ſmall, that they looked upon it as a meer ceremony. But where the ſum is 500 *l.* it muſt be looked on as a certain valuable conſideration; and ſince *Engleſield*'s caſe in 2 *Co.* the payment of money is a thing of all things the leaſt perſonal, it not being material who pays it, ſo it is but paid. If therefore the plaintiff pays the money, all the purpoſes of the will are anſwered, as fully as if *Nathaniel* himſelf had paid it. And this exactly anſwers to *Littleton*, and the reaſons given by *Coke*, which are not adapted to the inſtitution of the common law only, but to the reaſon of the thing. As to the ſecond, *Wood*'s caſe in 1 *Co.* 99. *a.* proves

evidently, that an heir may take by deſcent by virtue only of a poſſibility of right which was in the anceſtor.

It has been objected, that this is a condition precedent: But I take it to be a condition ſubſequent: It would indeed have been precedent, if it had been to raiſe an eſtate out of the heir's eſtate; but this is only to defeat *Daniel*'s eſtate, and then *Nathaniel* comes into the place of the heir at law. But this is a meer verbal diſpute: No matter whether precedent or ſubſequent, if the performance by the heir be to be looked upon as the performance of *Nathaniel*, it ſhall have the ſame effect as if *Nathaniel* himſelf had paid the money. I think therefore the plaintiff would have a good title at law on payment at the day. But yet he came very properly into this court, becauſe of the hazard he run in paying the 500 *l.* to *Daniel*. There muſt be a decree in nature of redemption, that is, that the plaintiff pay the principal, and intereſt from the day of payment, and have the eſtate conveyed to him. The money muſt be brought before the Maſter, who muſt ſee what demands are upon it, and adjuſt the proportions of the ſeveral claimants.

Philips *verſ.* Smith.

Trin. 2 Geo. B. R. rot. 460.

Amendment. Lill. Ent. 254.

IN debt upon 7 & 8 *W.* 3. *c.* 25. againſt the officer who preſided at the election of members of Parliament, for refuſing to deliver a copy of the poll: After judgment for the plaintiff *in B. R.* and error brought in the Exchequer Chamber, the plaintiff moved to amend in ſeveral particulars, which he was ordered to give a note of to the other ſide. And now they came to ſhew cauſe againſt their being amended.

The firſt amendment deſired was in the warrant of attorney, where the defendant was ſtiled bailiff *bugi* for *burgi*.

Cheſhyre. There is nothing to amend this by, as there was in the caſe of *Cooke* and *Ducheſs of Hamilton*, where they produced the common rule in ejectment, and that was the foundation for putting in the attorney's name.

2. To put the word *vic.* into the *diſtringas*. It is *Rex fidei defenſor, &c. Somerſet' ſalutem*, omitting *vic.* There is likewiſe nothing to amend this by; no award of it upon the roll, as there is of the *venire facias*. And *non conſtat*, but it might be deſigned to be directed to the coroner.

3. They would amend the *teſte* of the *venire*, which in other words is to ſolve a diſcontinuance. The award is *quinden' Martini*, and they have taken it out *teſte* the firſt day of *Hilary* term, and now they would *teſte* it in *Michaelmas* term.

4. The other amendment they would make is, to add continuances. Of them they have no need, having a verdict, which cures the want of them.

Reeve. This is a proceeding upon a penal law, and therefore the court will be ſtricter than in common actions. And as the ſtatutes of jeofails will not help them, they muſt ſhew it to be amendable at common law. In the caſe of the *Queen* and *Tuchin*, which was an information for a libel, where the *diſtringas* was *teſte* the day after the return of the *venire*, the court on great debate refuſed an amendment. Salk. 51.

Wearg. The queſtion is, whether this be a penal popular ſtatute within the exception of the ſtatutes of jeofails. I agree, where a man is intitled to an action at common law, and an act of Parliament comes and gives him an increaſe of damages; that is not to be taken as a penal ſtatute. 9 *Co.* 71. 3 *Bulſt.* 378. But this is not that caſe. Any perſon who demands the poll may have the action if he be refuſed it, and that ſhews it to be a popular ſtatute.

All amendments are either at common law or by ſtatute. Nothing was amendable at common law, but the ſame term. 8 *Co. Blackmore's* caſe. *Salk.* 50. By 14 *E.* 3. *c.* 6. and 8 *H.* 6. *c.* 12. ſuch faults only are amendable, as proceed from miſtake, not ignorance; if the *teſte* of a writ be after the return of it, that is a plain miſtake, and amendable; but when a man deſignedly makes it *teſte* of one term, when it ought to be of another; that is matter of judgment. *Show.* 80. The direction of a writ is a more eſſential part than the *teſte* of it, or the return. It cannot be a writ unleſs it be directed to ſome body, but it may be good without a return, as where it is *vicontiel.* Where there were two ſheriffs, and the writ was directed *vicecomiti*; there indeed it was made *vicecomitibus*, becauſe there was a direction, though an improper one. 2 *Cro.* 188. *Yelv.* 110.

Yorke. At common law nothing was amendable, but the act of the court. If *vic.* is to be put in now, it will be giving an authority after the execution of it. In the caſe of *Sloper* v. *Child* in *Cro. Jac.* the word *vic.* was put in, but that was becauſe the award of the *venire* warranted it, which the award here does not, for it is of

a ſubſequent term, and at a time when the defendant had no day in court. In *Cro. Eliz* 820. the return of the *venire* was held amendable, but not the *teſte*, becauſe that is never mentioned in the awarding it upon the roll.

Comyns Serjeant *contra*. The ſtatutes of amendments do not except popular actions, as the ſtatutes of jeofails do. 3 *Lev.* 375. In a *qui tam*, *&c.* on the ſtatute 31 *Eliz.* for 5 *l.* for ſelling a horſe in *Smithfield* not tolled, there was an amendment. So *Salk.* 324. 1 *Roll. Abr.* 205. *pl.* 3. *Cro. Car.* 275, 278. *Jones* 302.
Hutt. 56. 1 *Roll. Abr.* 202. *pl.* 7. 1 *Brownl.* 156. upon the ſtatute of hue and cry the day of committing the robbery was amended. It appears the writ was intended to be directed to the ſheriff, for there is in it *com' tuo*, and therefore we may put in *vic.* according to *Yelv.* 69. *Cro. Jac. Sloper* v. *Child.* So the *teſte* of writs have been amended. 2 *Cro.* 442. *Yelv.* 64. *Cro. Car.* 38. 2 *Cro.* 64. 2 *Brownl.* 102. *Moor* 599. *Cro. El.* 183. *Moor* 684. *Cro. El.* 203. 2 *Cro.* 162. *Moor* 465. *Cro. El.* 467. *Noy* 57. 2 *Jones* 41. And we may add the continuances according to 1 *Roll. Abr.* 200, 205, 206. *pl.* 6.

Pengelly Serjeant. The crown has no part of this penalty, but the party grieved has it all, and he has an antecedent right before bringing the action, which a common informer has not. He ſhall have coſts. 1 *Roll. Abr.* 516. *pl.* 5. Sir *W. Jones* 447. 1 *Ven.* 133. *Cro. Car.* 539. As to the warrant of attorney, we needed not put in any addition. The other is right, and that is ſomething to amend by. Then as to the *vic'*, this writ is returned by the ſheriff; ſo no colour to ſay it might be intended to go to the coroner. *In C. B.* the laſt term, between *Child* and *Sloper*, the *venire* was to the ſheriff of *Warwickſhire*, and the *habeas corpora* to the ſheriff of *Nottingham*, and this was amended. 3 *Mod.* 78. So *Paſc.* 8 *W.* 3. *B. R. Wright* v. *Inhabitantes de Penhurſt*, the *venire* was amended from *de placito huteſii et clamoris*, to *de placito tranſgr' et contempt'*, *contra ſtatut' de Hue et cry.* As to the *teſte*, *vide Hardreſs* 321. 1 *Roll. Abr.* 201. *pl.* 36. *Cro. El.* 572. And the continuances being only matter of form, may be entred at any time. 1 *Roll. Abr.* 205. 2 *Cro.* 211.

The court doubted as to the continuances, but held all the reſt amendable. And *Eyre* J. quoted *Kite* v. *Epiſcopum Worceſter*, *Paſ.* 7 *W.* 3. where one of the defendant's names was omitted in the *diſtringas*, and it was amended after trial. *Adjournatur.* And afterwards when it came on again, the court declared for all the amendments, except the want of continuances, which they had debated again. And for the amendment the former arguments were inſiſted

on; and 1 *Roll. Abr.* 200. *pl.* 27. *Yelv.* 156. 26 *H.* 6. *amendment* 33. were cited. In anſwer to which it was inſiſted, that continuances were the act of the court, and the ſtatute 8 *H.* 6. extends only to miſpriſions of the clerk. 8 *Co.* 156. *b.* *Stiles* 339. 3 *Lev.* 431. And towards the end of the term the Chief Juſtice delivered the opinion of the court, that the continuances might be entered at any time, as well after as before the judgment; and a diſtinction was taken between miniſterial and judicial acts, the firſt of which were at common law amendable at any time, but the latter not after the ſame term. And as to amendments of judicial acts, a difference was made between amendments which deface and alter the record, and ſuch as are only additional to it, in order to eke it out and compleat it.

Gould *verſ.* Coulthurſt.

Writ of error quaſhed without coſts.

THE writ of error was *teſte* in *Hilary* term, of which the judgment was. But the plaintiff below enters continuances upon it till *Trinity* term, which occaſioned the writ of error to be quaſhed. And now the queſtion was as to coſts. And all the court agreed, that this not being a fault in the writ of error at the time of bringing it, but being occaſioned by the act of the defendant in error, which the plaintiff could neither foreſee nor prevent; it was not a caſe within the 4 & 5 *Ann.* *c.* 16. which gives coſts againſt the plaintiff in error upon quaſhing defective writs of error. Then another queſtion aroſe, whether the plaintiff in error ſhould not have his coſts in this caſe, being defeated of the benefit of this writ of error by the artifice of the defendant in error. And as to this point the C. J. and *Eyre* J. were againſt giving coſts, and *Powys* and *Forteſcue* Juſtices, were of the contrary opinion: So the court being divided, the writ was quaſhed without coſts of either ſide.

Dominus Rex *verſ.* Turner & al'.

What conſequences ſhall be conſidered in aggravation of a fine.

THE defendants having been indicted for a riot in entering into a room, they came in and confeſſed the indictment, and moved to ſubmit to a ſmall fine. The proſecutor, to aggravate the fine, produced affidavits, that a young gentleman, who was then in the room and ill of the ſmall pox, was ſo frightned, that he died; though he was in a very good way before. And whether theſe affidavits could be read upon this indictment, was the queſtion.

Eyre J. was againſt the reading of them, becauſe it was an injury to a third perſon, and no mention of it in the indictment. If in

in treſpaſs the plaintiff would give beating his ſervants in aggravation of damages, it muſt be laid in the declaration. And he mentioned the caſe of *Rex* v. *North & al'*, 9 *W.* 3. *in B. R.* where in an indictment againſt ſeveral journeymen weavers for a riot, the circumſtance of their meeting, in order to oblige their maſters to raiſe their wages, was not allowed to be given in evidence, not being laid in the indictment.

But the C. J. and *Powys* and *Forteſcue* Juſtices, were for reading the affidavits, becauſe this was the immediate conſequence of the riot, and could not ſubſiſt as a crime of itſelf. And if it was otherwiſe, every man muſt make his indictment as long as his evidence. Beſides, why are affidavits ever read, unleſs it be to inform the court of circumſtances, that cannot appear upon the general allegation of the crime? They ſaid, the true diſtinction was, where the matter can or cannot ſubſiſt as a diſtinct crime by itſelf: The combination of the weavers was a conſpiracy, which is a crime indictable; and it would have been hard to fine them upon that account, and yet leave them open to be indicted for a conſpiracy. In an indictment for a riot in breaking windows, *Holt* C. J. let them in to ſhew, that it was becauſe the proſecutor had put out illuminations for the peace of *Ryſwick*. If circumſtances are not to be conſidered, the puniſhment for a riot muſt be the ſame in all caſes, which would be highly unreaſonable. The affidavits were read.

Hilary

Hilary Term

5 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Juſtice.*
Sir Littleton Powys, *Knt.* } *Juſtices.*
Sir Robert Eyre, *Knt.* }
Sir John Forteſcue Aland, *Knt.* }
Nicholas Lechmere, *Eſquire, Attorney General.*
Sir William Thompſon, *Knt. Solicitor General.*

King qui tam *verſ.* Bolton. Ante 117.

THE defendant having brought error in Parliament, the record was tranſcribed; and as it was carrying to the houſe of Lords, the original was picked out of the officer's pocket: The Houſe of Lords received the tranſcript, without examining it. And now this court ordered a new entry to be made. They were attended in vacation at their chambers, but ſaid they could not do it there. And afterwards the judgment of *B. R.* was affirmed in Parliament. And *Paſch.* 9 *Geo. B. R. Inter Needham et Grano*, the like leave was given, on a loſs of the roll by the attorney.

Loſs of record ſupplied by a new entry. Lill. Ent. 523.

Chartres *verſ.* Cuſaick.

ERROR out of the King's Bench in *Ireland* of an affirmance of a judgment in *C. B.* there; and want of warrants of attorney on the writ of error in *B. R.* were aſſigned. And the court ſet

Aſſignment of errors ſet aſide.

ſet the aſſignment of errors aſide; and ſaid it had been done ſo ſeveral times, upon account of the delay which would follow upon awarding *Certiorari's*. And the caſe of *The King* v. *Epiſcopum Miden.* was mentioned for that purpoſe.

Anonymous.

Bringing money into court.

IN trover for money, the court gave leave to bring the whole money declared for into court. But ſaid they could do it only in this caſe, and not in trover for goods.

Morgan *verſ.* Williams.

Words actionable.

IN caſe for theſe words, *Thou art a thief. Of what? Of every thing.* After a verdict for the plaintiff, *Whitaker* moved in arreſt of judgment, becauſe the plaintiff could not be a thief of every thing, for ſtealing fruit off the trees is not felony. *Sed per Curiam:* It muſt be intended to be of every thing he can be a thief of. *Judicium pro quer'.*

Dominus Rex *verſ.* Inhabitantes de Witham ſuper Montem.

What a good adjudication.

PER Curiam: It appearing to us, that he is likely to become chargeable, is ſufficient, without ſaying *to the pariſh from whence removed*; for it is not to give a juriſdiction, but only the reaſon of the judgment.

Dominus Rex *verſ.* Leonard.

Commitment by rule of court not within the *habeas corpus* act.

THE defendant in the long vacation was committed by warrant from the Secretary of State for high treaſon. He lay by all *Michaelmas* term till the laſt day, and being then brought up, he was charged with an indictment, and recommitted by rule of court. The firſt week in this term he applied to enter his prayer upon the *habeas corpus* act; which the C. J. thought he might well do, for though he has lapſed the time upon the firſt commitment, yet that is now out of the caſe, and he ſtands upon the ſame terms with one originally committed ſince the laſt term. And though the ſtatute has only the word *warrant*, yet he took commitments by rule of court to be within the meaning of it, this being an act for the liberty of the ſubject, and never intended to leave an indefinite power any where. *Sed Eyre et Forteſcue* Juſtices (*Powys J. abſente*) were of a

contrary opinion, and ſaid it had been otherwiſe reſolved at the *Old Bailey*. Then the Chief Juſtice propoſed to enter the prayer *de bene eſſe*, and conſider the validity of it afterwards; as was done in *Bernardi*'s caſe, who at the end of the term was refuſed to be bailed, notwithſtanding his prayer was regularly entered; that entry being no eſtoppel to the court. But the others would not come into this, and ſo nothing was done. The counſel prayed that ſome *memorandum* might be made of this application, *ſed non praevaluit*.

Dominus Rex *verſ.* Gill.

PER Curiam: It has been ſo often reſolved, that the ſeſſions has an original juriſdiction, to diſcharge apprentices; that we will not ſuffer it now to be made a queſtion, though it might be doubtful upon the ſtatute itſelf. But in theſe orders it muſt be ſet forth, that the maſter appeared or was ſummoned, as was held *Paſch.* 10 *Annae*, *Regina* v. *Rutter*, and for want of this the order was quaſhed.

Seſſions has an original juriſdiction to diſcharge apprentices. Salk. 67, 68, 491. 1 Vent. 174. 5 Eliz. c. 4. §. 35.

Between the Pariſhes of Coombe *and* Weſtwoodhay.

IN 1715 *Michaelmas-day* happened to be of a *thurſday*. A man was hired upon the *ſaturday* following, to ſerve from *the ſaid thurſday after Michaelmas-day* to *Michaelmas* following. All this was ſtated for the opinion of the court. And the firſt queſtion was, whether there was a compleat hiring for a year, for if the word *ſaid* be rejected, then there wants a week, but if you keep it in and refer it to *Michaelmas-day*, then by rejecting the words *after Michaelmas-day* it will ſtand as a hiring from one *Michaelmas* to another. And *Eyre* J. thought it might well be ſo. *Sed caeteri contra*, for it would be to make it nonſenſe, in contracting to ſerve for a time paſt; whereas if the word *ſaid* be rejected, the reſt is natural enough. The other queſtion was, whether (admitting the hiring to be compleat) there was any ſervice for a year in purſuance of it as the ſtatute requires, the contract being made upon the *ſaturday*. And *Eyre* J. ſaid it might be intended he was thoſe two days upon trial, and ſo the ſervice would be ſufficient. But the reſt held, that ſuch a ſervice would ſignify nothing, for it is not in purſuance of any hiring; there muſt firſt be an hiring, and then a ſervice, and not *vice verſa* a ſervice, and then a hiring.

There muſt be a compleat hiring and ſervice for a year to gain a ſettlement.

Thatcher

Thatcher *verſ.* Stephenſon.

Practice.

ERROR *coram vobis*, and infancy aſſigned: A *ſcire facias ad audiendum errores*, and a *ſcire feci* returned. The defendant did not appear and join in error, and the plaintiff applied to the court to know what to do; and they directed him to put it in the paper, without taking out any rule to join in error. And when it came on the judgment was reverſed.

Morris *verſ.* Nixon. In Canc.

Fraudulent remainder ſet aſide in equity.

ON a treaty of marriage the attorney for the lady told the intended huſband, that his client deſired a remainder might be limited to him. The huſband conſented; and when the ſettlement was read before execution, the lady objected to this remainder; whereupon the gentleman acquainted her, that it was done at her requeſt, which ſhe denied. But however, it being a remote remainder, and they unwilling to defer the matter, the writings were executed. And a bill was brought in this court, where the remainder was ſet aſide as a fraud and impoſition.

Dominus Rex *verſ.* Cope et al'.

At Niſi prius *in* Middleſex, coram Pratt, *C. J.*

What is evidence of a conſpiracy.

THE huſband and wife and ſervants were indicted for a conſpiracy to ruin the trade of the proſecutor, who was the king's card-maker. The evidence againſt them was, that they had at ſeveral times given money to the proſecutor's apprentices to put greaſe into the paſte, which had ſpoiled the cards. But there was no account given, that ever more than one at a time were preſent, though it was proved they had all given money in their turns. It was objected, that this could not be a conſpiracy, for two men might do the ſame thing without having any previous communication with one another. But the Chief Juſtice ruled, that the defendants being all of a family, and concerned in making of cards; it would amount to evidence of a conſpiracy, and directed the jury accordingly.

Titchburne *verſ.* White.

At Guildhall, coram King, *C. J.* de C. B. 16 Febr. 1718.

PER King, C. J. If a box is delivered generally to a carrier, and he accepts it; he is anſwerable, though the party did not tell him there is money in it. But if the carrier aſks, and the other ſays no, or if he accepts it conditionally, provided there is no money in it, in either of theſe caſes I hold the carrier is not liable. *Allen* 93.

What acceptance makes the carrier liable.

Catten *verſ.* Barwick.

At a Court of Delegates in Serjeants-inn *in* Fleetſtreet, 27 February 1718.

BY the 89th canon churchwardens are to be choſen by the parſon and pariſhioners jointly, and if they cannot agree, then one by the parſon and the other by the pariſhioners. In the pariſh of *Bridge*—— in *Yorkſhire* the cuſtom is, for the parſon to appoint one, and the two old churchwardens the other, but it goes no farther. In this caſe the two churchwardens could not agree, ſo one preſents *Barwick*, and the pariſhioners at large chuſe *Catten*. It was inſiſted for *Barwick*, that his caſe was like that of coparceners, where if they diſagree the ordinary may admit the preſentee of which he will, except the eldeſt alone preſents. On the other ſide it was ſaid, that the caſes widely differed, for in the caſe of a preſentment the ordinary has a power to refuſe, but he has not ſo in the caſe of churchwardens, for they are a corporation at common law, and more a temporal than a ſpiritual officer. And a caſe was cited to be adjudged in *B. R.* where to a *mandamus* to ſwear in a churchwarden the ordinary returned, that he was *ſervus minime idoneus, &c.* But a peremptory *mandamus* was granted, becauſe the ordinary was not a judge in that caſe.

Where cuſtom in chuſing churchwardens cannot take place, they muſt reſort to the canon.

The court held, that by this diſagreement the cuſtom was laid out of the caſe; and then they muſt reſort to the canon, under which *Catten* being duly elected, they decreed for him. 6c *l.* Coſts.

Dominus Rex *verſ.* Hare and Mann. In Canc.

Scire facias returnable *ubicunque* generally is good, without limiting it to *England.*

SCIRE *facias* out of the petty bag to repeal letters patents, returnable *coram nobis in Cancellaria noſtra in octabis purificationis beatae Mariae virginis ubicunque tunc fuerit.* The defendants, *ſalvis, &c.* pray *oyer* of the writ, and then plead in abatement, that the writ ought to have been returnable *coram domino rege in Cancellaria ſua ubicunque eadem Cancellaria tunc foret in Anglia*, and not generally *ubicunque tunc foret.* To this the Attorney General demurs.

Bootle pro rege. The objection which the defendants now make by their plea, ſtrikes at all the forms of writs which have ever been in this court; for we ſhall ſhew that this is not only conſonant to the *Regiſter*, but is in the continued uniform courſe of the court.

We begin in the time of *Edward* the third, and ſhall ſhew inſtances in that reign, *Rich.* 2. *Hen.* 4. *Hen.* 6. Q. *Eliz. Car.* 2. and *Jac.* 2. and even down to the union, and ever ſince the union except in two or three inſtances, which we are not at a loſs to account for. *Regiſter* 150. The Prince's caſe, and the caſe of *Jefferſon* v. *Morton.*

2 Saund. 27.

There was a caſe which gave heart and encouragement to this exception, *Hil.* 9 *Ann. in Chan. Regina* v. *Perſehouſe*: There the writ was *ubicunque tunc fuerit in Magna Britannia*, and it was abated by plea; and the reaſon was, becauſe it differed from the *Regiſter*, and was contrary to the act for the union of the two kingdoms.

The inſtances I hinted at before, that run counter to all the other precedents, were ſubſequent to that reſolution; and from ſome expreſſions which were uſed in the arguing of that cauſe, it was thought proper *in majorem cautelam* to make ſome few writs returnable *ubicunque tunc fuerit in Anglia.* But ſurely what was done in a few inſtances out of abundant caution, can never be of force enough to overthrow that multitude of precedents, and of ſo great antiquity.

Yorke contra. This depends, 1. upon the reaſon of the thing; and 2. upon the precedents.

For I muſt agree, that though the reaſon of the thing be with us, yet if to determine this writ to be wrong would be to overthrow a multitude of judgments; then unleſs I could make ſome diſtinc-

tion that could preſerve thoſe judgments, it would be difficult for us to prevail in this exception. But I take it there is no ſuch danger.

Upon the reaſon of the thing, the nature of writs, and the common grounds upon which they have been ſettled, I muſt inſiſt, that the return of this writ ought to have been, for the party to appear at the day before the King in his Chancery whereſoever it ſhould be in *England*, and not generally *ubicunque tunc fuerit*.

There are ſeveral certainties which a writ ought to contain, with regard to the defendant, and in which he is concerned. 1. A command to a proper officer to warn the party to appear, either by ſummons or attachment. 2. The cauſe in which he is to appear. 3. The time when. And 4. The place where he is to appear. And if any of theſe fail, the writ will not be good.

1. As to the firſt: If the writ doth not contain that, it is a nullity; for it can anſwer no purpoſe, nor tend to any effect at all. And where the writ contains an improper direction in that particular, as where it has been a ſummons inſtead of an attachment, or an attachment inſtead of a ſummons, the books are full of caſes of writs that have abated for that reaſon.

2. The cauſe in which he is demanded to appear muſt alſo be ſufficiently deſcribed. If none be contained in it, then there is no charge againſt him in court, but he ought to be diſmiſſed. And if it be not deſcribed with competent certainty, nay, in all formed writs, if it be not ſet forth in ſuch and ſuch preciſe words, as in caſe the particulars are ranged in an improper order only, that is error, and the writ ſhall abate for that cauſe.

3. The day upon which he is to appear muſt alſo be preſcribed to him, and that with the moſt exact certainty; that he may know when to pay due obedience to the king's court, and be under no peril of incurring a contempt. And as this muſt be ſet forth with great certainty, ſo it muſt be with the known legal deſcription of the day when he is required to appear; and if it be not, the writ is vicious, and abateable for that reaſon. *Trin.* 25 *Edw.* 3. 47. So *Paſch.* 1 *Geo.* in *B. R. Tilden* v. *Wheadon.* That was a *ſcire facias* againſt bail, returnable *die jovis prox. poſt craſtinum purificationis*; whereas *craſtinum purificationis* itſelf was on a *thurſday*, and before the *thurſday* following *octab' purificationis* intervened, ſo that was *dies jovis prox. poſt octabas purificationis* according to the proper deſcription, though in fact it was the next *thurſday* after *craſtinum purificationis*. An exception was taken to the writ for this reaſon, and the court were at firſt doubtful, whether it might not be well enough,

enough, becauſe though the uſual way is to take the deſcription of days from the relation they bear to the laſt common return, yet a writ may be made returnable at any day in the king's bench, where the proceedings are *de die in diem*, and there was in fact ſuch a day as *thurſday* next after *craſtinum purificationis*, and that was a ſufficient deſcription for the defendant to know it by, and conſequently to know when to come in. But after argument and conſideration the court held the writ ill, and that they could not vary from their certain known deſcription of return-days; and that writ was abated.

I have laid theſe matters before the court, to ſhew how jealous the judges of the common law have always been in theſe caſes, and with what great care they have always preſerved the exact certainty of writs and their returns. And I have made it preparatory to the fourth particular, which is,

4. The court and place where the defendant is to appear. As no reaſon can be aſſigned, why the ſame exactneſs ſhould not go through the whole, and extend to the place of the defendant's appearance, as well as the time; ſo I muſt ſay, that equal certainty has been required in that alſo.

The inſtances, wherein writs have been excepted to for faults in deſcribing the place of the return, cannot be expected to be many; becauſe the form of that is ſhort and eaſily learned; therefore as ſoon as clerks know any thing, they know that. And I muſt own I have not been able to find any caſes in the books, where exceptions have been taken to original writs for an improper deſcription of the place of the return. And I would make uſe of this as an argument for me, that they have been preſerved up to that exquiſite certainty, that there has ſcarce been any poſſibility of miſtake. Therefore I rely upon this, till the other ſide produce caſes, wherein writs that have materially varied in that particular, have been allowed to be good.

The principal queſtion therefore will be this, whether here is ſuch a certainty in the deſcription of the place (of the return) in which the party is to appear, in this writ, as is agreeable to the rules of law. And I apprehend here is not.

In order to clear my way to that which is the proper conſideration of this caſe, I muſt in the firſt place rid my hands of that load of ancient precedents, which is laid upon us. I muſt agree that they are for the moſt part as has been urged on the other ſide, and therefore ſhall give up all the precedents that were before the union:

And what I ſhall rely upon as the foundation of this exception is the union of the two kingdoms.

That ſince the conjunction of the two kingdoms of *England* and *Scotland* into the united kingdom of *Great Britain*, ſuch a material change has been wrought in the juriſdiction of this court, and the extent of it, that in all writs concerning *Engliſh* ſubjects returnable here, it ought to be *ubicunque tunc fuerit in Anglia*, confining it to that part of the united kingdom called *England* only.

By the 24th article of the treaty of union, which is confirmed by 5 *Ann. c.* 8. it is provided, " That from and after the union " there ſhall be one great ſeal for the united kingdom of *Great* " *Britain*, which ſhall be different from the great ſeal now uſed " in either kingdom."

After this union the kingdoms of *England* and *Scotland* are no more. It is the crown and kingdom of *Great Britain*, and the ſeal of *Great Britain*, and is ſo ſtiled in all pleadings. In conſequence of that this court is alſo the Chancery of *Great Britain*, and ſo has been the ſtile of all bills exhibited in this court ſince the union.

As this alteration of names has been wrought, ſo there is a great and material change in things themſelves. Before the union the Lord Chancellor that ſat in this court, could iſſue no writ or inſtrument under the great ſeal, that could have any force in *Scotland*. There was then a great ſeal of that kingdom, and a Lord Chancellor who had the cuſtody of it.

Since the union that ſeal is diſannulled, and that office extinct. The general authority which it had is now veſted in the great ſeal of *Great Britain*, except in the inſtances particularly excepted and reſerved by the articles of union.

If ſo, then this court is the Chancery of *Great Britain*, and has a general juriſdiction throughout the whole united kingdom, as it had throughout *England* before the union.

The conſequence of this court's having a general juriſdiction throughout *England* before the union was, that it might exiſt and be a Chancery in any part of *England*. And by parity of reaſon, the conſequence of this court's having a general juriſdiction throughout *Great Britain* will be, that it may exiſt and be a Chancery in any place of *Great Britain*.

From hence it will follow, that it may be in *Scotland*, and then this writ requiring the defendant to appear at the day of the return before the King in his Chancery, whereſoever that Chancery ſhould then be, did require the defendant to appear in *Scotland* at that day, in caſe the Chancery had been in *Scotland*.

That I take it is ſuch an objection to this writ, as will make it illegal, and be ſufficient to abate it: It is to compel an *Engliſh* ſubject to appear out of *England*: And that by the laws of *England* no *Engliſh* ſubject whatſoever can be compelled to appear to anſwer for a matter of right out of *England*, is a principle of law which cannot be diſputed. The ſtate of the union has made no change at all in this particular, but the law of *England* is ſtill *lex terrae* as *magna charta* ſtiles it, and it is to be executed within this land of *England*.

In order to explain and enforce what I mean, when I ſay the court of Chancery may by poſſibility exiſt in *Scotland*, I muſt examine a little the foundation of that matter.

The juriſdiction of this court is of a complicated nature, and includes in it great variety. But I muſt ſubmit, whether that whole juriſdiction, that great diverſity of power, which it has, does not flow from one ſpring, and is raiſed upon one general foundation, that is the *great ſeal*. 1. If it be conſidered as a court of ſtate, where all publick acts of government are ſealed and inrolled; that manifeſtly comes from the great ſeal, which is what gives them their legal authority.

2. If it be conſidered as an *officina juſtitiae*, for the iſſuing of writs; that certainly comes from the ſeal, which gives them being.

Of the original of the equity juriſdiction in Chancery.

3. The juriſdiction of this court, as it is a court of equity, is perhaps of all others the moſt difficult to be traced, both as to its foundation, and the time when it had its original. But I think there have been very great opinions, and I am apt to believe a ſtrict ſearch into antiquity might enable one to ſhew, that this juriſdiction alſo has taken its riſe from the great ſeal. For the Chancery being upon the diviſion of the King's courts naturally the *officina juſtitiae*, from which all original writs iſſued, and where the ſubject was to come for remedy in all caſes; the Chancellor was applied to in all caſes, for proper writs, where the ſubject wanted a remedy for his right, or redreſs for a wrong that had been done him. But in the execution of this authority, he was confined by the rules of the common law, and could award no writs, but ſuch

as the common law warranted: Therefore when ſuch a caſe came before him, as was matter of truſt, fraud, or accident, (which are the ſubjects of an equity juriſdiction) the Chancellor could award no writ proper for the plaintiff's caſe, becauſe the common law afforded no remedy. Upon this it is not improbable, that the Chancellors who were moſt commonly churchmen, men of conſcience, when they found thoſe caſes grew numerous, in order to prevent the ſuiters from being ruined againſt right and conſcience, and that no man might go away from the King's court without ſome relief, ſummoned the parties before them, and partly by their authority, and partly by their admonitions, laid it upon the conſcience of the wrong doer to do right.

Of the court of Chancery conſidered as a court of common law.

4. If it be conſidered as a court of common law, as the petty bag is in which we now are; the principal parts of that juriſdiction are to hold plea upon writs of *ſcire facias* on records of this court, upon *monſtrans de droit*, and traverſes of offices found upon writs iſſued out of this court. Theſe likewiſe have their being and eſſence from the great ſeal. And this very proceeding in a *ſcire facias* to repeal letters patent, which my Lord *Coke* ſays in 4 *Inſt.* is the higheſt point of a Chancellor's juriſdiction, is in a particular manner derived from the great ſeal; for the very end of the ſuit is, and ſo is the judgment, that they be recalled back into the ſame place from whence they went forth under the great ſeal, that they may be cancelled, that is, that the great ſeal may be taken off. In the caſe of the *Mayor and burgeſſes of Leverpoole* againſt *the Chancellor of the county palatine of Lancaſter in B. R. Trin.* 12 *Ann.* there was a *ſcire facias* to repeal a charter granted to that corporation under the great ſeal of the county palatine. To this ſuit a prohibition was moved for, for want of juriſdiction in the court. But it was reſolved, that that court had juriſdiction of the cauſe, and amongſt other reaſons which were given for that judgment, it was declared, that this authority was incident to the ſeal of the county palatine: That the complaint of the writ being, that the Chancellor had wrongfully put the ſeal to it; it was proper to be examined in that court, where the ſeal was kept.

I have mentioned theſe matters in order to ſhew, how rationally and naturally all this power of the court flows from the ſeal. But there is another matter which furniſhes the ſtrongeſt argument in the world that it is ſo, and that is, that the delivery of the ſeal conſtitutes that great officer who exerciſes this juriſdiction, and gives him all this power.

The uſe I would make of this is, that if all the juriſdiction of the court of Chancery is founded upon the great ſeal; I apprehend,

hend, that it will alſo follow and attend upon it; and that whereſoever in any part of *Great Britain* the law can take notice of the great ſeal of *Great Britain* to be, there is alſo the Chancery of *Great Britain.*

Suppoſe his Majeſty ſhould take a royal progreſs into *Scotland*, and amongſt his miniſters ſhould take his Lord Chancellor along with him with the great ſeal: I muſt inſiſt, as a conſequence of my argument, *there* would be the Chancery of *Great Britain.* And what ſhews this more fully is, that the great ſeal might be put to writs there, and they would bear *teſte* in the King's name, *teſte meipſo:* Nay, they muſt bear *teſte* in his Majeſty's own name, and no other, for a *cuſtos Regni*, or Lords Juſtices, can only be appointed, when his Majeſty goes out of his kingdom; and the very moment he returns, their authority ceaſes. But ſince the union, when his Majeſty is in *Scotland*, he is ſtill within his united kingdom; and then by law there is no room for ſuch officers. And if writs may iſſue from *Edinburgh* under the great ſeal of *Great Britain*, teſted in the King's name; that is a full evidence, that the Chancery of *Great Britain may be there.*

But ſtill I muſt inſiſt, that by the law of *England* the ſubjects of *England* cannot be called to appear in the Chancery of *Great Britain* whereſoever it ſhall be; ſince as that may be in *Scotland*, it may require him to appear contrary to the law of the land, and is therefore a bad writ.

I have now done with thoſe arguments, which I have to prove this writ to be wrong, from the reaſon of the thing. I come now to conſider the precedents. And as to thoſe which were before the union, they are undoubtedly as has been opened; they have authority, and they have almoſt univerſal conſent of their ſide; and they were certainly right, and ſettled upon very good reaſon. But what I ſhall contend for is, that this form is now bad and erroneous, upon the failing of that reaſon, for which, before the union, it was good. They were good before the union upon this reaſon, that the law took notice that *England* was an intire ſeparate kingdom of itſelf, that the great ſeal was the great ſeal of *England*, and the Chancery, the Chancery of *England*, and that the Chancery of *England* could not be out of the kingdom; and therefore it was impoſſible to ſay, that this was to ſummon the ſubject to appear out of *England.* But now the very contrary to this holds true; that the law takes notice, that *England* is no intire kingdom, but a part of *Great Britain* only; that the Chancery is the Chancery of *Great Britain*, and may have a being out of *England* in any other part of *Great Britain.* So that the reaſon and the preſumption of law,

upon which that ancient form and thoſe precedents were eſtabliſhed, now failing, and turning the quite contrary way; that form and thoſe precedents will be of no authority againſt me in this caſe; but will rather be authorities for me, becauſe nothing is more certain in reaſoning, than that from foundations and premiſſes, which are contrary one to another, contrary concluſions ought to be inferred.

As to the precedents ſince the union, they are either ſuch as have paſſed of courſe in the office, *ſub ſilentio*, without examination; or they are ſuch as have come in judgment before the court, and undergone litigation, that is, judicial precedents.

Now as to the firſt kind of precedents, of what authority are they? Surely they are of little or no authority. They are the work of clerks in the office, without conſideration, and without knowing the opinion of the court. And if ſuch precedents were ſuffered to prevail againſt the reaſon of the law, that would be to ſuffer the clerks to make the law. All the precedents which have been produced on the other ſide are of this kind, and they have not ſhewn any one judicial precedent in their favour, the reaſon of which is, that there are none.

But I apprehend the ſtrength and weight of the precedents are with us. I have in my hand a liſt of near thirty writs upon the files of the petty bag, iſſued ſince the union, which are all made returnable *in Cancellar' ubicunque tunc fuerit in Anglia*, in the manner we contend for; and I have alſo a judicial precedent, a judgment of the court in a caſe of this kind, which I take to be an authority in point for me. And I am the more encouraged to think ſo, becauſe the other ſide have thought fit to anticipate me in it, it glared them ſo full in the face. That was a *ſcire facias* againſt Sir *Cleave Moor* and *Peter Perſehouſe* upon a recognizance, given in this court, made returnable *coram Domina Regina in Canc' ſua ubicunque tunc fuerit in Magna Britannia*. It was *teſte* 11 *Jan. anno* 9th of the late Queen. To this writ there was a plea in abatement, and Mr. Attorney General, that now is, took an exception, that it was wrong, and ought to have been made, *coram Domina Regina in Canc' ſua ubicunque tunc fuerit in Anglia.* And he put ſeveral caſes, where ſince the union the great ſeal, and conſequently the Chancery, might poſſibly be out of *England*, and yet the ſubjects of *England* not obliged to appear there. And that exception made ſo great an impreſſion upon the court, that my Lord *Harcourt*, who then ſat here, abated that writ for this fault only. And what explains this authority further is, what was done upon it afterwards in conformity to that judgment and the opinion which

was then delivered; for the new writ was not made returnable *in Canc' ubicunque tunc fuerit* generally, but *ubicunque tunc fuerit in Anglia*, as we contend this ought to be.

And really I am at a loſs to find any ground, upon which the preſent caſe can be diſtinguiſhed out of that authority. For why was the writ in *Perſehouſe*'s caſe held bad? was it not becauſe ſince the union the Chancery of *Great Britain* may be in any place of *Great Britain*, and conſequently a writ which required the party to appear in that Chancery, whereſoever it ſhould be in *Great Britain*, required him to appear in *Scotland* in caſe it ſhould be there. So in the preſent caſe, ſhall not this writ *pari ratione* be bad, becauſe ſince the union the Chancery of *Great Britain* may be in any place in *Great Britain*; and conſequently this writ, requiring the party to appear in that Chancery whereſoever it ſhall be, requires him to appear in *Scotland*, in caſe it ſhall be there. I own I cannot diſcern any difference between the two caſes.

By this time I hope it ſufficiently appears, that I was well warranted in ſaying, that the ſtrength and weight of the precedents is with us. For if the precedents *ſub ſilentio* are both ways, and there be no judicial precedent with the other ſide, but there is one in our favour; that judicial precedent will turn the ſcale, and over-balance the reſt; eſpecially if the circumſtances, even of our precedents which have paſſed *ſub ſilentio*, are conſidered. For they have moſt of them, if not all, been ſince the judgment of the court in that caſe of *Perſehouſe*, which ſhews what was then apprehended to be laid down as the ſtanding rule of the court for the future. And I am informed, they are all the caſes ſince that judgment, which have been of conſiderable conſequence, and can be ſuppoſed to have undergone the conſideration of counſel. And ſome of them have been litigated, and come before the court upon other points. Amongſt the reſt, there is the great caſe of the *Scire facias* againſt the charter of *Leverpoole*, which cauſed a mighty ſtruggle in *Weſtminſter-hall*, and there the return is confined to *England*.

In order to avoid the force of this argument in the preſent caſe, ſome objections have been made of the other ſide.

Where erroneous proceſs is aided by appearance, and where not.

The firſt is, that our exception comes too late, for that it is now aided by the appearance of the defendant. And this was enforced by obſerving, that it was abſurd to ſay this defendant had an hardſhip put upon him by being ſummoned to appear in *Scotland*, when the court was at *Weſtminſter* at the return, and he has appeared here.

The anſwer to this is, that it is not helped by appearance, becauſe the defendant has come in ſpecially, ſaving to himſelf all advantages whatſoever, and has challenged this defect by plea.

I may agree, without prejudice to this queſtion, that poſſibly if the defendant had come in, and not relied upon this exception, but pleaded over ſome matter of bar, that might have precluded him from taking this advantage afterwards. But when he expreſly comes in for this ſpecial purpoſe, I apprehend he may inſiſt upon it.

I do admit, that any error in *meſne* proceſs is ſalved by the party's appearance, and he ſhall not afterwards take advantage of it; becauſe the only intent of *meſne* proceſs is to bring the defendant into court, and when he is come in, that is out of the caſe; for he might have come in upon the writ without it. But an original writ (as a *ſcire facias* to repeal letters patents was determined to be in the caſe of *The King* v. *Eyre*) is of another nature; for that is not only to bring in the party, but alſo to found the juriſdiction of the court in that particular cauſe, and to be the groundwork of all the proceedings of the court afterwards. And I know no caſe in the law, where it has been held, that an appearance has cured any error in the original writ.

In the caſe of *Wilſon* v. *Law*, *Trin* 6 *W. & M. in B. R. Salk.* 59. In an appeal of death, the defendant prayed *oyer* of the original writ and return, and thereupon demurred in abatement, as he might do in appeal. Upon the argument an exception was taken to the ſheriff's return upon the original; and the anſwer was, that it was helped by the appearance. But the contrary was reſolved by the court; for that appearance only helps, when the party comes in and pleads to iſſue, not when he comes in and challenges the defect. In the caſe of *Widdrington* v. *Charlton*, *B. R. Trin.* 11 *Annae*, it was held, that error in *meſne* proceſs was aided by appearance. But in that caſe Mr. Juſtice *Eyre* in giving his opinion, expreſly allowed the authority of *Wilſon* v. *Law*, and diſtinguiſhed it, by obſerving that there the exception was to the return of the original writ, and therefore the appearance could not cure it: but here (ſaid he, and ſo was the opinion of the court) he ſhall anſwer to the original writ, becauſe that is good; and it was held that there was no difference between an appeal and any civil action, as to the effect of an appearance to cure errors; but that the effect of that was the ſame in all caſes.

As to the objection, that it is abſurd for a man to come, this court here ſitting, and object to the writ, that poſſibly he might have

have been hurt by not knowing certainly where to appear, or by being made to appear in *Scotland*,

I take it, there is no abſurdity at all in that, for the law of *England*, which delights in certainty, is more reaſonable than to put a man even to the hazard of being hurt by an illegal writ, either in his liberty or his freehold, but he may come in and take advantage of it, before he is actually affected by it.

Thus in caſes of *miſnomer*, where there is an original iſſued againſt a man, or a bill of indictment exhibited againſt him, by a wrong Chriſtian name: if proceedings were had upon that writ or indictment, they could not finally affect him. If he was to be arreſted by proceſs upon ſuch writ or indictment, he might have an action of treſpaſs and falſe impriſonment againſt the officer; nay, if he made oppoſition and killed him, it would be but manſlaughter, *Cro. Car.* 538. But notwithſtanding all this, to prevent any poſſible danger to this man's liberty or property, though he could not effectually be hurt by it, the law allows him time to come in and plead that *miſnomer* to the writ or bill, and it ſhall abate for that reaſon; and the defendant not be put to anſwer, though he is in court.

And this he may do voluntarily, without ſhewing that he was brought in either by ſummons or compulſion; only ſaying, that the defendant (ſuppoſe *J. S.*) *verſus quem* the plaintiff *tulit breve ſuum*, or *exhibuit billam ſuam*, *per nomen Samuelis*, is named *John* and not *Samuel*; and the writ ſhall abate.

I mention this to ſhew, how carefully the law has guarded the ſubject from receiving injury by erroneous proceedings; that barely upon the poſſibility of his being affected, he may come and take advantage of it, and avoid thoſe proceedings, without ſtaying till he is actually hurt by them.

And if he may do this in mere perſonal actions, much more may he do it in caſes where his freehold comes in queſtion. And that it does in this caſe; for this is a *ſcire facias* to repeal a grant of an office for life, and conſequently to ouſt the party of that freehold, and for that reaſon has ſomething in it of the nature of a real action. And it would be needleſs to mention, what great advantages the law allows to defendants in real actions in point of proceſs and pleading, in order to fence and ſecure the freehold of the ſubject.

Another objection was, that to determine this writ to be wrong, would be to overthrow a multitude of judgments ſince the union.

If this exception depends upon the ſame reaſon with that which was taken and allowed in *Perſehouſe*'s caſe (as I have endeavoured to ſhew it does) and is only a conſequence of the rule which was then laid down; then if the precedents ſhould be ſhaken, it will be owing to that judgment, and not to the judgment which we contend for in this caſe.

But I do not remember ever to have heard that argument allowed, where the former precedents are both ways, as they are in this caſe; and beſides, where there was a judicial precedent in favour of the exception. For more miſchief has always been apprehended from ſhaking one judicial precedent, than a hundred precedents *ſub ſilentio.*

I take it, that this apprehenſion of danger is but a vain terror, and that there can be no ſuch inconvenience; for that where there are judgments, this exception will be out of the caſe, and the defect cured. Where the defendant has come in, and not challenged the exception, but pleaded over ſome matter of bar; that is a waiver of it, and he cannot take advantage of it afterwards by writ of error; according to the rule which was laid down by Mr. Juſtice *G. Eyre* in the caſe of *Wilſon* v. *Law*, that an appearance will help, where the defendant comes in and pleads to iſſue, and does not challenge the defect of the writ.

There are many caſes, where want of challenge of the party will cure a defect even appearing upon the face of the writ. As in debt upon ſimple contract againſt an executor, which does not lie; yet if he pleads to it, and a verdict be againſt him, he ſhall not take advantage of it in arreſt of judgment, or by writ of error. *Yelv.* 56. 1 *Lev.* 201, 261. In the caſe of variance from the *Regiſter*, that may be pleaded in abatement, but if the defendant waives that opportunity, he cannot take advantage of it afterwards. And ſo it was held *Trin.* 12 *Ann. B. R.* in the caſe of *Skinner* v. *Newton.*

Bootle replied: The juriſdiction and proceſs of this court neither is, nor was deſigned to be altered by the Union; for there is an expreſs reſervation. Though if there had not, no body can think it would have made any alteration: However it was thought proper to declare ſo, *in majorem cautelam*, that as to all matters concerning *England* the Great Seal ſhould be uſed as it was before the Union.

Ubicunque fuerit generally, differs from *ubicunque fuerit in Magna Britannia:* The latter can by no intendment be ſet right, but the former may, according to the known rule of conſtruction, *verba generalia generaliter ſunt intelligenda.*

Precedents, though they paſs *ſub ſilentio*, are ſurely evidences of the forms of the court. And thus far they are authorities, that they ſhew it was not thought neceſſary to alter them, when in 10 *Ed.* 1. *Wales* was united to, and became parcel of the dominions of *England*; nor when *Calais* was ſo likewiſe. Two or three precedents make not the law againſt a multitude to the contrary. 39 *H.* 6. 30. 4 *Ed.* 3. 43. *a. Long Qu. E.* 4. 110. It was upon the ſtrength of the precedents, that the caſe of *Bewdly* was reſolved, and they were there ſet up in oppoſition to, and prevailed againſt the expreſs words of the act of parliament.

But if we ſhould admit their precedents, yet they muſt admit ours too; and then they being both ways, either form is good: though by the way I muſt obſerve, that the forms of the *Regiſter* cannot be altered, but by act of parliament.

Sir *Joſeph Jekyll*, Maſter of the Rolls. That is certainly ſo, and therefore if this form be warranted by the *Regiſter* and the precedents, I think nothing can be ſtronger. This court is ſtill the Court of Chancery of *England*; it is the Great Seal's being the Great Seal of *Great Britain*, which occaſions the bills to be directed to the Chancellor of *Great Britain.*

I think there would have been no claſhing of juriſdictions, if the ſpecial reſervation had been omitted. The 19th article is a covenant, that the juriſdiction of *Scotland* ſhall remain notwithſtanding the Union; and as it preſerves the former juriſdiction to *Scotland*, ſo it excludes the *Engliſh* juriſdiction from extending itſelf thither.

Parker, Lord Chancellor. The words *ubicunque fuerit* were as large as poſſible, and when *Calais* was part of *England* might extend to that, though the ſubject would not be bound to appear there. But when you go to explain it, it muſt be right; therefore *in Magna Britannia* is certainly wrong. All the powers of this court flow from the Great Seal, which though it is now made the Great Seal of *Great Britain*, yet the act has not made the Chancery ſo. The powers of the Chancery, as a Court, are in private property; and the articles excluding that, the Chancery as a court of private pro-

perty cannot be there. All contempts of this court will be diſcharged, if this form ſhould not be eſtabliſhed. In the caſe of *Bewdly* I thought the objection was very ſtrong, but it was got over for the neceſſity of the thing, and not barely for the ſake of uniformity: And this caſe and that are both in the ſame reaſon. The defendants muſt anſwer over. *Reſpondes ouſter agard.*

Dominus Rex *verſ.* Decan' et Capitul' Norwici.

Mandamus to admit a prebendary to his ſtall and voice.

MANDAMUS to admit Dr. *Sherlock* to a prebend of the cathedral church of *Norwich*. And the writ ſuggeſts, that Queen *Anne*, by letters patent, 26 *April*, 13th of her reign, incorporated Dr. *Sherlock*, then maſter of *Catharine hall* in *Cambridge*, and the fellows and ſcholars for ever; and grants that the then maſter (naming him) ſhould ſucceed to the next vacancy of a prebend in *Norwich*, and his ſucceſſors, maſters of *Catharine hall* after him, requiring the dean and chapter to aſſign him *ſtallam in choro et vocem in capitulo prout mos eſt.* Which letters patent were confirmed by the ſtatute 12 *Ann.* againſt mortuaries. And one of the prebendaries being now dead, this is the firſt vacancy, to which the dean and chapter are required to admit Dr. *Sherlock*. They return, that King *Edward* the ſixth, by letters patent, 7 *November*, firſt year of his reign, erected the deanery and chapter of *Norwich* into a corporation, and endowed the church, and gave them perpetual ſucceſſion. That neither he, nor Queen *Mary* or Queen *Elizabeth*, ever made any ſtatutes for the government of the corporation. But King *James*, by a body of ſtatutes ordained, that as often as there ſhould be any vacancy, the dean and chapter ſhould admit ſuch perſon as the King ſhould nominate under the great ſeal. And further (which is the clauſe upon which the queſtion ariſes) that none ſhould be admitted to be dean or prebendary, who before was prebendary of any other cathedral church. And that theſe are the ſtatutes which they have ſworn to obſerve. And for that Dr. *Sherlock* is dean of *Chicheſter*, and a prebendary of *St. Paul's*, they refuſe to admit him; *et ob nullam aliam cauſam.*

12 Ann. ſt. 2. c. 6.

Reeve argued that the return was inſufficient, and for a peremptory *mandamus*. The letters patent being confirmed by act of Parliament, we are now as it were upon the conſtruction of a ſtatute, and as if every part of thoſe letters patent was incorporated into the body of the act. And as ſuch it is of force enough to repeal and annul all former ordinances or uſages contrary to or inconſiſtent with it. So that whatever queſtions might ariſe upon the letters patent, if they ſtood barely upon their own ſtrength, and how

how far they would prevail to ſet aſide and controul the local ſtatutes of King *James*, will be intirely out of the caſe.

It will not be denied, but here is an expreſs intention to unite the maſterſhip of *Catharine hall* and this prebend in one and the ſame perſon for ever, and that Dr. *Sherlock* is to be the firſt perſon in whom this proviſion is to take effect. But what they inſiſt upon is, that he is a perſon incapable to enjoy this prebend under the local ſtatutes. I admit he is, if thoſe ſtatutes are in force, which I have ſhewn they are not. But then they ſay, our letters patent have in this particular affirmed the former law, for they only require the admiſſion to be *prout mos eſt*, which *mos* is *mos eccleſiae* the conſtitution of our church, and that conſtitution obliges us to refuſe any perſon, who is at that time prebendary of any other church. So that *prout mos eſt* is as much as to ſay, that the maſter of *Catharine hall* ſhall be admitted, if he be capable according to the conſtitution.

But this is going too far, if we conſider where thoſe words come in. The letters patent ſay, that Dr. *Sherlock* and his ſucceſſors, maſters of *Catharine hall*, ſhall be *habiles et in lege capaces*, to hold and enjoy this prebend, and upon every vacancy *mandantes et requirentes* the dean and chapter to admit them accordingly, *prout mos eſt*, in the uſual form.

The oath in which the dean and chapter are bound to obſerve the former ſtatutes, is of no force, now thoſe ſtatutes are repealed.

It is conſiderable, that as Dr. *Sherlock* is the firſt named, if he ſhould be held incapable, whether this proviſion can ever take effect, and whether his ſucceſſors will not be in the caſe of remainder men without any particular eſtate. No body can take if the doctor cannot; and muſt this prebend be in perpetual abeyance, which may happen to be the caſe, for his ſucceſſors may be dignified as well as himſelf. And in this caſe it is not denied, but that he is maſter of *Catharine hall*, and as ſuch he is intitled to this prebend.

Reynolds Serjeant *contra*. We do not in this caſe debate the validity of the grant, but only offer to excuſe our non-admittance. Nor do we rely upon the words *prout mos eſt*, it is but *expreſſio eorum quae tacite inſunt*, and when the office is given to Dr. *Sherlock*, he will be intitled to be admitted without that clauſe.

This is a common appropriation, and by it all the local ſtatutes expreſly contradictory to it will be repealed, as if they had diſabled every maſter of a college, and then the other had come and ſaid, the maſter of *Catharine hall* ſhall be prebendary. But what I contend for is, that the ſubſequent proviſion meddles not with any collateral incapacities, ſuch as Dr. *Sherlock* lies under by being prebendary of another church. Suppoſe he ſhould refuſe to ſubſcribe, as the 14 *Car.* 2. *c.* 14. requires; it is true he would have a right to the preferment as maſter of *Catharine hall*, but before he gets poſſeſſion of it, he muſt remove his incapacity. And here I admit, if he reſigns his other prebend, he will be intitled to be admitted. So that this is only a perſonal diſability, ariſing from his own act, from which he may free himſelf whenever he pleaſes. Suppoſe he had been able at the time of the ſtatute, ſo as then the local ſtatutes would not be affected; ſhall his ſubſequent acceptance of a prebend amount immediately to a repeal of the former proviſion?

As to the office's being in abeyance, there is no need for that. Dr. *Sherlock* is intitled whenever he renders himſelf capable, and till then the 28 *H.* 8. *c.* 11. has given the profits of vacant benefices to the next incumbent.

Reeve replied. This caſe can never be brought within the rule of legal diſabilities by act of Parliament, where a man is obliged to do any act, to give the publick ſatisfaction of his ſufficiency for the office he is to be admitted to. *Curia adviſare vult.* And afterwards

Pratt C. J. delivered the reſolution of the court. We are all of opinion, that the return is inſufficient, and that there ought to be a peremptory *mandamus*. Upon the firſt letters patent, *Jac.* 1. the power of the King as founder is reſtrained, and the dean and chapter as it ſtood upon thoſe ſtatutes, might well refuſe ſuch a perſon as Dr. *Sherlock*. And ſo they might upon the letters patent of Queen *Anne*, for ſhe having but a bare right of nomination, could never unite the canonry itſelf to the maſterſhip of *Catharine hall*. They may perhaps have their effect as a perpetual nomination; but there is no occaſion to determine that point, ſince here is an act of Parliament, which has confirmed theſe letters patent, and by which we are of opinion, the canonry itſelf is well united to the maſterſhip of *Catharine hall*. And it not being denied, but that Dr. *Sherlock* is maſter of it, he is as ſuch intitled to a peremptory *mandamus*.

Pitton *verſ.* Walter. At Surrey aſſizes.

Poſtea, where evidence.

PER *Pratt* C. J. The bare producing the *poſtea* is no evidence of the verdict, without ſhewing a copy of the final judgment. Becauſe it may happen, the judgment was arreſted, or a new trial granted. But it is good evidence, that a trial was had between the ſame parties, ſo as to introduce an account of what a witneſs ſwore at that trial, who is ſince dead.

Heralds books evidence of a pedigree.

Salk. 281.

The queſtion being, whether the leſſor of the plaintiff was heir at law to him that laſt died ſeiſed; to prove the pedigree, the Chief Juſtice admitted a viſitation in 1623. made by the heralds, entered in their books, and kept in their office, to be read in evidence: He alſo admitted the minute book of a former viſitation, ſigned by the heads of the ſeveral families, which was found in the library of my Lord *Oxford*.

Eaſter

Eaſter Term

5 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Juſtice.*
Sir Littleton Powys, *Knt.* }
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Forteſcue Aland, *Knt.* }
Nicholas Lechmere, *Eſquire, Attorney General.*
Sir William Thompſon, *Knt. Solicitor General.*

Between the Pariſhes of Burclear *and* Eaſtwoodhay.

Deſcent of a copyhold to a certificate-man gives him a ſettlement.

ON a ſpecial order of ſeſſions the caſe was ſtated for the opinion of the court. That *Abraham Hatchett*, being legally ſettled in the pariſh of *Burclear*, about 18 years ſince married and had four daughters. About eight years ſince he came with his wife and children into *Eaſtwoodhay* as a certificate-man. Whilſt they were there, a copyhold of 20 *l. per annum* deſcended to his wife, which they enjoyed for five years till her death, and then according to the cuſtom of the manor it deſcended to the eldeſt daughter. About half a year ago the man aſked relief in *Eaſtwoodhay*, and thereupon the ſeſſions ſend him back to *Burclear*. Before they took up the caſe upon the ſpecial ſtate of it, an objection was made to the order of the two juſtices, that they only adjudge him *likely* to become chargeable; whereas a certificate-man is not removable, till he becomes actually ſo. And though the order of

ſeſſions ſtates, That he aſked relief of the pariſh; yet one order ſhall not be made good by another, no more than it can by matter alleged in the return. To which it was anſwered, that if the order of two juſtices is to ſtand by itſelf, then it will be well enough; for it is a general order of removal, wherein no notice is taken of his being a certificate-man, and therefore *likely* is ſufficient. Beſides, that order is intirely out of the caſe, for the ſpecial matter being referred to the court, they are to judge upon that only. *Quod fuit conceſſum per curiam.* Then it was moved to quaſh the ſpecial order, becauſe though the man came into *Eaſtwoodhay* with a certificate, yet the enjoyment of the copyhold for five years, during which time he was not removable, had gained him a ſettlement there. On the other ſide it was ſaid, That the 9 & 10 *W.* 3. *c.* 11. having provided, that a certificate-man ſhall not gain a ſettlement, unleſs he takes 10 *l. per annum*, or ſerves a pariſh office; and that being an explanatory act, which is not to be explained; therefore this man not coming within either of thoſe caſes, was notwithſtanding the deſcent of the copyhold to his wife, removable upon his becoming a charge to the pariſh. *Et per curiam:* This is not an explanatory, but a new law, and muſt therefore receive a liberal conſtruction. The exceptions in the ſtatute prove this caſe, being a caſe more reaſonable than either that are there mentioned. If a certificate-man by taking 10 *l. per annum* gains a ſettlement, *a fortiori* ſhall he that has an eſtate of his own, eſpecially in this caſe, where he does not come to it by act of his own, (which might favour of fraud) but it is caſt upon him by the act and operation of law. If he that ſerves a pariſh office gains a ſettlement upon account of his preſumed ability, with greater reaſon ſhall he that has ability of his own viſible to all the world. It has been already adjudged, that any other perſon by the deſcent or purchaſe of a freehold or copyhold, or by becoming intitled to a leaſe for years, gains a ſettlement; and it cannot be ſuppoſed the Parliament intended, to put a certificate-man in a worſe condition. The value of the copyhold is not material, for it is its being his own makes him not removable. A man muſt take a tenement of 10 *l. per annum*, to gain a ſettlement; but yet he may come to ſettle upon a tenement of his own, though of ever ſo ſmall a value. This man therefore being for five years irremovable from *Eaſtwoodhay*, has gained a good ſettlement there, and the order to remove him from thence muſt be quaſhed.

Salk. 524.

Atkin

Atkin *verſ.* Barwick.

THE plaintiff, as aſſignee of the effects of *Cripps* and *Quarme* bankrupts, brings trover againſt the defendants for ſeveral parcels of ſilks. And upon the trial a caſe was made for the opinion of the court.

A delivery to *A.* to the uſe of *B.* upon a precedent conſideration is not countermandable, but veſts the abſolute property in *B.* before agreement.

That the defendants were mercers and partners in *London*, and uſually dealt with *Cripps* and *Quarme*, who were alſo partners, living at *Penryn* in *Cornwal.* And on 7 *April* 1715. the defendants by their order ſent the goods in the declaration, and gave them credit in their books. They being at the ſame time indebted to them for other goods. 18th of *May* following *Cripps* and *Quarme*, without the knowledge of the defendants, ſent divers ſilks (the ſame ſent down in *April*) to Mr. *Penhallow* at *Penryn* for the uſe of the defendants. *June* the 4th *Cripps* and *Quarme* became bankrupts. *June* the 6th they wrote a letter to the defendants, ſignifying their affairs were in a declining condition; and thinking it not reaſonable, the laſt parcel of goods ſhould go to ſatisfy their other creditors; therefore they had not entered them in their books, but left them with *Penhallow*, who had orders to deliver them to the defendants. *June* the 9th a commiſſion of bankruptcy iſſued, and the effects were aſſigned to the plaintiff. *June* the 13th the defendants received the letter, which was the firſt notice they had of the delivery to *Penhallow*, and as ſoon as poſſible they ſignified their conſent to take the goods again.

Reeve pro querente. The bankrupts had undoubtedly a good property in the goods by the ſale made the 7th of *April.* That is a point I need not labour. But the queſtion now to be conſidered is, whether any thing appears, to diveſt that property, before the act of bankruptcy. I ſhall maintain the negative of this queſtion. The goods it is true were delivered for the uſe of the defendants, but that delivery was without their knowledge. They were not obliged to accept them, and therefore before acceptance the property could not be altered, and the bankrupts might have countermanded that delivery. If inſtead of ſending them to *Penhallow*, they had kept them in their own hands, till an anſwer to the letter; would that have altered the property? Certainly it would not. This letter can amount to no more than a propoſal, and therefore the ſubſequent conſent (if it has any retroſpect) can only have relation to the time of the propoſal, which was two days after the act of bankruptcy. Though the delivery is ſtated to be to the uſe of the defendants, yet it does not appear to be in ſatisfaction of the precedent

debt; ſo there is no conſideration, and then the delivery is fraudulent as to creditors. 1 *Mod.* 76.

Darnall Serjeant *contra*. By the delivery to *Penhallow* the property was altered before acceptance, and the bankrupt could not countermand it; for there was a good conſideration, *viz.* in ſatiſfaction of the debt; and this is explained by not entering it in their books, and their unwillingneſs that the other creditors ſhould come into an average for theſe goods. This does not take effect as a gift, but as a ſatisfaction, and therefore not countermandable. *Dy.* 49. *a.* 2 *Roll. Rep.* 39. 2 *Leon.* 30. And ſince it cannot be countermanded, the perſon to whoſe uſe they were delivered, has an abſolute property in them, till diſagreement. 1 *Roll. Abr.* 32. *pl.* 13. *Sty.* 296. *Yelv.* 164. *Cro. Jac.* 667. Here was no diſagreement, but as ſpeedy a conſent as poſſible.

Reeve. An accord executory is no ſatisfaction, before it is executed. It is admitted that a delivery without conſideration may be countermanded, and I inſiſt this is ſuch; for the precedent debt is not merged, becauſe the party could not plead this re-delivery in bar of any action for the value of the goods, unleſs they actually were returned to the perſon who ſold them, or he ſignified his conſent, which was not done before the act of bankruptcy committed.

C. J. The queſtion is, whether by the delivery to *Penhallow*, without more, the property was altered; for if that delivery was countermandable, then the act of bankruptcy intervening before any aſſent of the defendants, will prevent the property from veſting in them. I think upon the circumſtances, that there appears a ſufficient conſideration to toll a ſubſequent power of countermanding, and that this delivery was in ſatisfaction of the debt. It is true the bare delivery will not extinguiſh it, becauſe he had a power to diſſent; but yet according to *Butler* and *Baker*'s caſe in the 3d *Report*, the abſolute property paſſes, ſubject to a diſagreement by one of the parties: The contract does not ſtand open till agreement, but is compleat, unleſs there be an actual diſagreement. The conſequence of all this is, that the delivery to *Penhallow* to the uſe of the defendants, being before the act of bankruptcy, and founded upon a good conſideration, transfers the abſolute property to them, it being ſtated that they never diſagreed. *Powys* J. *accord*.

2 Ven. 198. Show. Ca. Parl. 150. Salk. 618. Thompſon *v.* Leach.

Eyre J. All theſe caſes go upon the diſtinction, where the delivery is with and without conſideration. *Dy.* 49. If with conſideration, and the delivery is of money, debt lies. *Yelv.* 23, 24. 2 *Cro.* 687. *Raſt.* 159. If of goods, trover. 1 *Bulſt.* 68. The

precedent debt is a ſufficient conſideration, and it veſts before notice; for it being to his benefit, a diſagreement ſhall not be preſumed.

Forteſcue J. Property by our law may be diveſted, without an actual delivery; as a horſe ſold in a ſtable. But it is otherwiſe by the civil law. A general bailment alters no property, but this is not ſuch. It cannot be taken for a reſale, for defect of contract; but it is properly a payment in ſatisfaction. It is moſt reaſonable to apply it to diſcharge the debt, and not as a gift; for a man is juſt before he is kind: And ſince he paid it in ſatisfaction, we will intend an acceptance, till the contrary appears. *Judicium pro defendentibus.*

Bradſhaw *verſ.* Mottram.

THE plaintiff brought a *qui tam* upon the ſtamp act againſt the defendant, for marrying without licence; and had him in execution, where he had lain ſome time. And now *Yorke* cited the 18 *Eliz. c.* 5. §. 3. and produced an affidavit of the poverty of the defendant, and had the leave of the court, that the plaintiff might compound with the defendant.

Leave to proſecutor to compound with defendant.

Dominus Rex *verſ.* Saunders.

YORKE moved for leave for the coroner to take up the body, and take a new inquiſition, according to 2 *Sid.* 101. *Salk.* 377. which was granted; and it was ſaid, the coroner could not do it without leave of the court.

Leave to take new inquiſition *ſuper viſum corporis.*

Hudſon et ux' *verſ.* Aſh.

At Niſi prius *in* Middleſex, coram Pratt, *C. J. de B. R.*

THE plaintiff's wife was taken up by warrant of a juſtice of peace, for aſſaulting the overſeer of the pariſh, and aſſiſting to the eſcape of a woman delivered of a baſtard child. When ſhe came before the juſtice, ſhe could not find bail; but at her requeſt he gave leave for her to lie that night at the conſtable's houſe, in order to get bail againſt the morning. Then one on her behalf demanded a copy of the commitment, which not being delivered, an action was brought upon the *habeas corpus* act. *Et per Pratt*, C. J. The queſtions are two, whether the defendant be an officer, and whether

Conſtable, within *habeas corpus* act.

whether the plaintiff's wife was detained by virtue of any warrant within the meaning of the ſtatute. As to the defendant there is no doubt but a conſtable is within the act, but I do not think this action well brought. For the woman was not in his cuſtody by virtue of any warrant; what warrant there was, was only to bring her before the juſtice, and that was fully executed by ſo doing; and the time ſhe ſtaid at the conſtable's after that, was not by virtue of any warrant or commitment, but at her own conſent and deſire, to remain under a voluntary cuſtody: Neither is this a caſe within the miſchief of the ſtatute which was indefinite commitments. The plaintiff was called. Then the defendant moved for treble coſts, being a conſtable. But the Chief Juſtice would not certify, becauſe this cuſtody was not in execution of his office.

Tremain's caſe. In Canc'.

Infant.

BEING an infant, he went to *Oxford*, contrary to the orders of his guardian, who would have him go to *Cambridge*. And the court ſent a meſſenger, to carry him from *Oxford* to *Cambridge*. And upon his returning to *Oxford* there went another, *tam* to carry him to *Cambridge*, *quam* to keep him there.

Turner *verſ.* Triſby. At Guildhall.

What neceſſaries to charge infant.

PER Pratt, C. J. Neceſſaries for an infant's wife are neceſſaries for him; but if provided in order for the marriage, he is not chargeable, though ſhe uſes them.

The Eaſt India Company *verſ.* Atkins. In Canc'.

Where a man ſubmits to be examined as to matters which will be penal upon him, equity will not interpoſe.
S. C. Comyns 347.

MR. *Vernon pro defendente*, in maintenance of the plea. This bill is brought by the *Eaſt India* company, for a diſcovery of a private trade, ſuggeſted to have been carried on by the defendant and the other ſupercargoes of the *Stringer* galley, which was ſent by the company in the year 1715 upon a voyage from hence to *Canton* in *China*, and thence to return to *England*.

They firſt offer to waive the penalties and forfeitures that he might incur by ſuch diſcovery; and then they ſtrengthen themſelves by a covenant entered into by the defendant, by which he obliges himſelf to anſwer to any bill to be brought againſt him for any diſcovery in any court of equity, and not to plead the acts of Parliament, which inflict thoſe penalties and forfeitures.

As to their waiving all penalties and forfeitures which might be incurred by the defendant by ſuch diſcovery, we apprehend it is not in the power of the plaintiffs to indemnify us againſt them. Therefore I muſt take notice what diſcovery they pray.

They charge that the defendant and the other ſupercargoes agreed to receive on board ſeveral goods from the *Thurſton* galley: That for that purpoſe the *Stringer* and the *Thurſton* ſailed together to the *Downs*, where the *Stringer* took on board ſuch goods as had been agreed upon. That having ſo done, they proceeded to *Canton*, where they in a private manner diſpoſed of thoſe goods, and with the produce of them bought another cargo of goods, which they put on board the *Stringer*: That they appointed the *Thurſton* pink to meet them in their return; but failing in that deſign they touched at *Liſbon*, and there ſent away ſeveral parcels of theſe private goods: And other part was put on board the *Succeſs*. And after all this they met with the *Lemmon* at ſea, on board which they put the remainder of the goods, and they were ſent to *Holland*.

We apprehend, if we are bound to anſwer this charge, we ſhall be ſubject to all the penalties appointed by the act 9 *W.* 3. which are loſs of the ſhip, goods and double value; and alſo of 6 *Ann.* againſt breaking bulk. By the act 9 *W.* 3. three fourths of the forfeitures are given to the company, and ſo far as that goes perhaps they may waive: But the other fourth and the ſhip and the double value they have no pretence of a right to, or power to waive, that being given to the informer. Therefore to give ſome colour to this offer, there is an allegation in the bill, that the company is become the informer, and ſo they may waive the whole penalty. 9 W. 3. c. 44. 6 Ann. c. 3.

To this it was objected the laſt time, that although it is alleged that they have informed, yet it is not ſet out where or when they informed, or for what goods. If they would have enabled themſelves as informers, they ought to have ſhewn the information, and that it related to theſe goods, and theſe facts charged in the bill. The plaintiffs were ſo conſcious of that, when a perſon on behalf of the defendant went, in order to have a ſight of the information, and to ſee whether the company had a power to make ſuch an offer, he was denied a ſight of it. Therefore we think, that ought to be laid out of the caſe, and by conſequence their waiving the forfeiture will go for nothing.

As to the penalties in 6 *Ann.* againſt breaking bulk, by which it is enacted, that all goods to be laden in the *Eaſt Indies* ſhall be brought to ſome port of *Great Britain*, and there unladen, and

ſold by the company at a publick ſale by inch of candle: The penalty is forfeiture of the value of the goods, one moiety to the crown, the other to the informer or ſeizor. And they do not pretend a title to that forfeiture.

They endeavoured to evade that act, by ſaying it reſpected the company only, but not thoſe that traded privately. But ſurely that cannot be the intent of the act, that when thoſe who are licenced to trade to the *Eaſt Indies* are liable to theſe penalties, he that trades in a clandeſtine manner ſhall be in a better caſe. But to put that out of diſpute, upon reading the words 6 *Ann.* it is enacted, "That all "goods which ſhall be laden in the *Eaſt Indies* upon any ſhip or "veſſel belonging to any of her majeſty's ſubjects with intent to "be tranſported, ſhall be brought to ſome port of *Great Britain*, "and there be unloaden; upon pain of forfeiture of all ſuch goods, "one moiety to the queen, and the other to the informer." So that if the defendant ſhould be forced to make this diſcovery, he muſt be liable to the forfeitures in that act, and the waiver of the plaintiffs will not ſave him harmleſs.

Taking that to be ſo, we apprehend we are in the common caſe, that no court of equity will compel a defendant, to ſet forth any thing, that will ſubject him to penalties. But on the contrary a court of equity relieves againſt forfeitures. The plaintiffs being aware of this, have inſiſted upon a covenant, they have got the defendant into, that he would at his return to *England*, if required, anſwer upon oath to ſuch bill as ſhould be brought againſt him for a diſcovery, and not demur or plead in bar: And the company agree to waive the forfeitures, and accept of their damages, which amount to 90 *l. per cent.* and are as much as the forfeitures.

This is the firſt of the kind that has come into a court of equity, and if it ſhould be admitted, may be of dangerous conſequence. I would obſerve, that we are not plaintiffs to be relieved againſt this covenant, though the manner of obtaining it is extraordinary. After theſe gentlemen had been taken into the company's ſervice, and had prepared every thing for their voyage; then they muſt execute this covenant, or elſe be diſcharged. Theſe are hard terms to be put upon any man, but it is what the company has practiſed. Then they are alſo to contract, upon what terms they are to receive their wages; and though they go upon a trading voyage from port to port, and deliver their loading; yet there is a covenant, that if the ſhip miſcarries in her return, they are to loſe their wages. This covenant, as often as it has been brought in queſtion, has been ſet aſide.

The next thing I would obſerve is, the conſideration given to theſe people for entering into this covenant, which is an undertaking on the company's part, that they ſhall not be ſubject to any forfeitures or penalties. That ſeems to be the conſideration. But that is an undertaking, which the company cannot pretend to make good. And then the covenant is without conſideration.

Beſides, if the plaintiffs are to have any benefit of this covenant in a court of equity, it muſt be by praying a ſpecifick performance of it. And there is always a difference taken, between a circumſtance of fraud in order to ſet aſide a covenant, and where there is room to decree a ſpecifick performance of it.

It is objected, that a man may waive any benefit the law gives him, and enter into an agreement for that purpoſe. To this I anſwer, Thoſe agreements have always been ill looked upon in a court of equity. Where a man gives a mortgage on his eſtate, with a covenant not to bring a bill to redeem; it cannot be pretended, but that notwithſtanding ſuch covenant, he may bring his bill, and the court will decree a redemption. Nay though he confirms it with an oath, for ſo far Mr. *Stiſtead* went as to take an oath from the mortgagor, and yet in that caſe the court decreed a redemption. Where a man borrows money upon a mortgage, and covenants that if he doth not pay the intereſt yearly, ſuch intereſt ſhall carry intereſt; this ſeems to be a reaſonable compenſation to the party, for being diſappointed of the receipt of his intereſt. And yet a court of equity will relieve againſt ſuch a covenant. Though the party that enters into thoſe covenants, may be ſaid as much to forfeit or waive the benefit of a court of equity, as we have done in this caſe.

We apprehend the covenant to be of an extraordinary nature. It is, that a man ſhall not make part of his defence. That when he comes before the court, he ſhall not ſet forth the truth of his caſe. Indeed in a covenant to ſuffer a common recovery, there is an agreement what defence the parties ſhall make; but was it ever known in a court of equity, that a covenant to ſtrip a man of his defence was allowed? If you can abridge a man of one part of his defence, why not of the whole? If this is good, it may be carried further, and you may have a covenant, that if a bill be brought, the defendant ſhall appear and make default, and the bill be taken *pro confeſſo*. And that will be a new ſtep, and it will concern a court of equity to withſtand all ſuch attempts as this.

The

The covenant is, that he ſhall not plead the penalties and forfeitures; but what if he does plead? Is the court to paſs over that part, where he has pleaded them? Will the court upon an allegation of ſuch a covenant paſs over the merits of a cauſe? No truly, they will rather go into them, in abhorrence of ſuch a practice.

We cannot apprehend of what weight this covenant is in a court of equity. We do not know what a court of equity has to do with a covenant, unleſs it be executory; there a man may come to have a ſpecifick performance of it: But can they pray a ſpecifick performance of this covenant? He has covenanted, he will not plead, and yet he has pleaded. Is there any thing executory in this? They may take what advantage they can of this covenant at law, but a court of equity will add no weight to it, eſpecially when it is to ſubject a man to a penalty, contrary to the buſineſs and intent of a court of equity, which is to relieve againſt penalties and forfeitures.

The rule in equity, that no defendant ſhall be compelled to ſubject himſelf to penalties and forfeitures, is founded on natural right and juſtice. It is a rule that has been obſerved inviolably without exception till this attempt. Therefore as we cannot be acquitted by the company from theſe forfeitures, it would be a monſtrous thing for a court of equity to make us liable to them; and the rather in this caſe, becauſe it is making a ſtrain, upon an allegation of the company, and barely upon an apprehenſion that they have been injured by the defendants. Whereas it appears by the pleadings, that they never had a better voyage or more profitable return, for they made 200 *l. per cent.* profit.

They ſurmiſe, that the goods put on board the *Stringer* galley by the defendants were of great value, and that their tonnage would amount to a great ſum; whereas it appeared upon the ſurvey, when the ſhip arrived in the river, that ſhe was full loaden with the company's goods. So that their whole complaint ſeems to be conjectural and groundleſs, and has no oath to ſupport it: Or if there was any real ground for it, the plaintiffs may have their remedy at law. We do not come into this court to be relieved againſt this covenant; but for the plaintiffs to take from us our lawful defence, and thereby to ſubject us to forfeitures and penalties, there is no ground for it; and therefore we hope our plea ſhall be allowed.

Sir *Thomas Powys contra.* In order to remove the prejudice which the defendants have endeavoured to bring the company under, by

repreſenting them as impoſing or requiring a very extraordinary covenant from them, I would obſerve, that the act 9 *W.* 3. has eſtabliſhed an oath to be taken by members of the company, that they will not ſend to the *Eaſt-Indies* any goods for their private account, contrary to that act. So that we are upon an act of Parliament, and the covenants the company takes from their ſupercargoes, is in purſuance and execution of that act; and there is nothing charged in this bill but what is forbidden by that act; for we aſk them, Did not you carry more goods than the company allowed? Did you not when you went out make an agreement with the *Thurſton* galley, that ſhe ſhould at high ſea lay on board ſuch and ſuch goods? And ſo go on with the ſeveral parts of the fraud.

Now as to the outward voyage, the act of Parliament inflicts no penalty, and only forbids all other perſons, except ſuch as by that act may trade, their ſervants or agents. The defendants are the agents of thoſe perſons who may trade thither, and not within the deſcription of thoſe who are by that act ſubjected to penalties for exporting goods to the *Eaſt-Indies*. Therefore as to the outward voyage, they are not within any of the penalties of that act.

But ſuppoſe theſe men ſhould not be taken (with reſpect to theſe tranſactions) to be agents to the company, but to be perſons within the act; yet by this act three fourths of the forfeitures are given to the company, and the other fourth to the informer; and the company having become informers are intitled to it: And it is ſo charged in the bill, that no information having been brought by any other perſon for the forfeitures, the company have preferred one in the Exchequer.

If that be ſo, we have three fourths by the act, and the other fourth as informers, and ſo may waive all the forfeitures. And then we are in the common caſe of a man that ſues for tithes, he may waive the forfeiture, and bring a bill for a diſcovery. So a man may waive the penalties in the ſtatute and have a diſcovery what timber has been cut. We therefore apprehend, that as to the outward bound voyage we have a right to call them to an account; and if ſo, they muſt anſwer a great part of our caſe, which is all the tranſactions relating to this fraud, from the time of their entering into our ſervice, till their return. And yet the plea is general, and covers the whole, as well the outward as the home bound voyage.

The home voyage falls under another conſideration. For the ſtatute 6 *Annae* taking notice, that there had been great frauds in breaking bulk, it provides that thoſe who offend in that manner

ſhall forfeit the ſhip and goods; one moiety to the informer, and the other moiety to the crown. And that ſtands upon the point of the covenant that has been ſpoken to, whether a man may not agree, that he will not commit a fraud.

As to the caſe of a mortgage, it is in its own nature redeemable, and a covenant contrary to the nature of it ſhall not be allowed. But may not a man covenant that he will not diſturb a purchaſer? This covenant is only to prevent a fraud, and detect it if committed.

And this agreement is upon a good conſideration, for it is the foundation upon which the defendant is let into ſo conſiderable a profit. The conſideration of the covenant is, that the company allows them thoſe profits mentioned in the bill; ſo that it is both a lawful covenant, and for a valuable conſideration.

Then it is a covenant that goes along with a truſt, which no man would put in another, without a power to come to the knowledge how it is diſcharged; for theſe dealings lie in the knowledge of the defendants only, and cannot come to the knowledge of the company, without a diſcovery from the defendants. It is a truſt to be executed on board a ſhip, and at ſea; and therefore neceſſary to be guarded by ſome reaſonable proviſion. It is not like a covenant to have intereſt upon intereſt, for a man has a recompence by ſimple intereſt. And intereſt upon intereſt is what the law will not allow of. But this covenant does not hinder any man of his right, but only prevents a fraud.

It is ſaid a man has a right to plead, but may not a man renounce that right? He may in the caſe of tithes, and may not a man renounce part of his defence? May not I take a covenant, that a man ſhall give a judgment by default, and releaſe of errors? And may I not come into a court of equity and compel a performance of that covenant? In the caſe of a covenant to ſuffer a common recovery, will not the court decree a performance?

It is true, that in ordinary caſes a man has liberty to plead, where he may be ſubjected to penalties. But then a man may waive it. And it is agreeable to the known maxims, *volenti non fit injuria*, and *conſenſus tollit errorem*. If a man will waive any particular manner of defending himſelf, why may he not?

The caſe is no more than this; I have made an agreement whereby I am to be honeſt, but I will alſo have an opportunity to get more than I ought. I have made a contract that is not conve-

nient for me to perform, it is fit for me to have the profit allowed me by the company, but for me to perform my part of the covenant is no ways convenient. That is to ſay, I have played the knave, and therefore it is not convenient for me to perform this covenant, by diſcovering in what manner.

The queſtion therefore is, which of the parties ſhall ſuffer. Shall the company ſuffer, who have performed their covenant? Shall they be ſtript, and the defendant go off with the profit? or ſhall the defendant ſuffer (if he calls it ſo) for his own miſbehaviour, if he has miſbehaved himſelf? I apprehend, that to take from us the means of coming at a ſatisfaction, is to take away the ſatisfaction itſelf. He that diſſeiſes me of the water that ſhould come to my mill, diſſeiſes me of my mill.

The covenant is, that they ſhall not trade, and if they do, the company ſhall have ſo much *per* ton, and ſo much damages, which comes to 90 *l. per cent.* and this is ſaid to be an extravagant recompence. Now they ſay, they have made 200 *l. per cent.* profit for the company; and if ſo, no doubt but they have made as good profit for themſelves; and all the company is to have is but 90 *l. per cent.* and they carry off the reſt.

They ſay we may take our remedy at law. But the very covenant is, that we ſhall have a ſatisfaction in this court. If we were to go to law, how could we recover there? How could we prove what goods they carried out? Let us but have a diſcovery of that here, and the meaſure of the damages is already ſettled between us. And this is the very point that was in view, when the covenant was made; that if they carried out any ſuch goods, they ſhould make ſuch a recompence as was agreed upon. And nothing has happened ſince the covenant, to alter the nature of it, as ſome times it falls out.

It is very conſiderable, that this thing ſhould be ſettled between us; for if this plea ſhould ſtand, it may be the overthrowing the act of Parliament and the company too. As for what they ſay, that it is a new thing; it is quite otherwiſe, it is the conſtant article they make with all their ſupercargoes.

Parker Lord Chancellor. As to the offer made by the bill, to waive penalties and forfeitures; though it is ſaid that the company have informed in the court of Exchequer, yet they have not ſet forth the term wherein the information was made, nor the particulars for which the information was. But the defendant is to take their words, that there is ſuch an information, without knowing where

where to go to the record. Where a man ſets forth, he is intitled to penalties as informer, and waives them; he ought not only to ſay that he has informed, but to ſet it out, ſo that it may appear to the court, that he has done ſo. Like pleading a former ſuit depending, it muſt be pleaded ſo, that it may appear to the court, of what term it is, and that it is for the ſame cauſe.

There is another point, which I think the plea does not cover; for though the defendant is charged to be concerned in thoſe facts, yet it is laid in the disjunctive, that the defendants *or* ſome of them: He might have ſaid, that he did not know that any other of the defendants had done any of thoſe things: and if they had done them, and he was to have a ſhare with them; yet if they only did them, they only would be ſubject to the penalties.

As to the main point, this covenant is to be conſidered as relating to a matter which muſt in a great meaſure lie in the defendant's knowledge. Therefore it is impoſſible for the plaintiffs to hope for a ſatisfaction, if they cannot get a diſcovery. They may come to the knowledge of ſome things, but it is morally impoſſible they ſhould come to know all, without a diſcovery of the defendant.

In the next place, if the defendant has been guilty of a fraud, it is a prejudice to the plaintiffs, and the defendant ought to make a recompence, by reaſon of that truſt they put in him, and by means whereof he had the opportunity of doing that wrong. Therefore from the nature of the truſt, and the difficulty for the plaintiffs to come at the knowledge of theſe tranſactions, it is reaſonable they ſhould have a diſcovery.

But if this covenant is againſt law, it muſt not take place. It is ſaid it is againſt the nature of a covenant, to reſtrain a court of juſtice, and to ſtrip a man of his defence.

I think it is not a covenant to reſtrain the court from doing juſtice, but to enable the court to do it. It is a covenant, that the truth of the caſe, and the whole caſe, ſhall be laid before the court. There is a great deal of difference in the nature of the defence, upon an anſwer, or upon a plea: The plea is not a defence to the juſtice of the cauſe, but to the inquiry; that the defendant may keep back part of the truth from the court. Therefore it is not like the caſe of a covenant not to bring a bill to redeem, for a mortgage is an eſtate made to a perſon on condition to be void on payment. If the money be not paid, the eſtate is abſolute at law; but the buſineſs of a court of equity is, to let him in to redeem. A covenant to the contrary doth not alter the nature of the ſecurity; it ſtill con-

tinues a ſecurity for money as it was before, and is in its own nature redeemable. Such a covenant is to reſtrain a court from doing what is right and equitable, and is therefore void.

What is the defence in this caſe? It is, that the defendant is not bound to diſcover what will ſubject him to a penalty. It is inſiſting, that the plaintiffs have no right to demand that diſcovery. It is a negative privilege, that is allowed by the law, that a man may if he pleaſe refuſe to diſcover a matter that will ſubject him to penalties; it is only a privilege, not a natural right, for then he would ſhake that natural right whenever he thought fit to make ſuch diſcovery. If a man will waive ſuch a privilege, ſurely he may; it is not a thing prohibited by the law. But the reaſon why he is not obliged to diſcover, is a want of right in the other party to oblige him to it. But if he will make a diſcovery he may, nor is any rule of juſtice or natural right broke by it. Is it unjuſt, that the whole caſe ſhould be laid before the court? If the party has not done any thing contrary to his duty, an anſwer can do him no harm; and why ſhould not this court carry it ſo far, when there can be no prejudice, unleſs the party is a knave? And if he be one, ſhall a court of equity protect him? I am (ſays he) ſo fair in the matter, that I will give you a right to examine me. The ſending them to law would be to no purpoſe, for the damages are to be meaſured by the goods carried out, and without a diſcovery there is no knowing the *quantum*. The plea muſt be over-ruled, and the defendants muſt anſwer.

The ſame decree was made in the caſe of the South-Sea company *v.* Bumſtead, Mich. 1728. Which ſee in Abr. Eq. Caſ. 78.

Dominus Rex *verſ.* Inhabitantes Civitatis Norwici.

INformation for not repairing three publick bridges called *Harford* bridges, lying within the county of the city of *Norwich*, leading from the market-croſs to *Ipſwich*; and ſets out that they are out of repair, and that it cannot be found that any perſon or body politick is bound by tenure or otherwiſe to repair them, and therefore the inhabitants of the county of the city are bound by the ſtatute: notwithſtanding which they have not repaired them, but ſuffer them to continue in decay.

The king by letters patents may enlarge the boundaries of a city. *B. R.* has concurrent juriſdiction with the ſeſſions about repairing bridges.

Jacob Robins and *Samuel Fremoult*, two of the inhabitants *of the city and county of the city*, come in the name of all the inhabitants *of the city*, and plead Not guilty. Then the record takes notice by way of ſuggeſtion, that the queſtion is between the citizens of *Norwich* and the inhabitants of the county of *Norfolk*, and they being intereſted, there can be no indifferent trial had there, and *Suffolk* be-

ing the next county, the *venire* is awarded thither: And at the trial the jury find this ſpecial verdict.

That the city of *Norwich* is an ancient city, and has been time out of mind a county of itſelf, diſtinct from the county of *Norfolk*. That the three bridges were at the time of making the ſtatute 22 *H.* 8. *c.* 5. within the county of *Norfolk*, and not within the county of the city of *Norwich*. That *Philip* and *Mary*, 1 *April*, ſecond of their reign, reciting the many inconveniencies which had happened by not knowing the true bounds and limits of the county of the city, ſevered ſuch an extent of ground from the county of *Norfolk*, and annexed it to the city. That the three bridges are within the annexed boundaries, which are made to extend *uſque ad Harford* bridge, which is the fartheſt of the three. That they are publick bridges, and no particular perſon bound to repair them. That they are out of repair: But whether the inhabitants of the county of the city are bound to repair them, is the doubt of the jury, upon which they pray the advice of the court. *Et ſi, &c.*

Reynolds Serjeant *pro rege* made three points. 1. Whether the king can make a county of a city, or enlarge the boundaries of a preſcriptive city, and make the enlargements parcel of it. 2. Admitting he may, whether the enlarged part ſhall be conſidered as parcel of the old city, ſo as to charge them with repairing within the 22 *H.* 8. 3. Whether in this caſe the fartheſt bridge be within the bounds of the enlargements.

Popham 17. 1. As to the firſt queſtion, there is no doubt, but that the king may enlarge the boundaries of any city. Moſt of the cities of *England* are inſtances of the execution of ſuch a power, and it has been generally done by charter, which was eſteemed ſufficient, without an act of Parliament. This city of *Norwich* was ſo made at one time or other, for in *Bradley's Treatiſe of Cities and Boroughs* it is mentioned as a borough, and part of the county of *Norfolk*. *Henry* the ſeventh made *Cheſter* a county of itſelf, as appears by 4 *Inſt.* 215. 4 *Co.* 33. *a.*

2. Taking it then, that the king can enlarge any city, the next queſtion is, where the charge of repairing bridges within ſuch enlargement lies. The ſtatute lays no abſolute charge, till the bridges are in decay; ſo that when the ſtatute was made, though theſe bridges were within the county of *Norfolk*, yet as they were not in decay, the ſtatute had no operation upon them, before they were annexed to the city of *Norwich*. If an hundred were to be made at this day, the ſtatute of hue and cry would take place within it. So the prerogative of the king in collating to a benefice void by the

promotion of the incumbent to a biſhoprick extends to a new created pariſh, as was reſolved in Dr. *Birch*'s caſe in *Shower*, where there are many inſtances of this nature.

3. The third point is, whether one of the bridges be within the annexed bounds; the words are *uſque ad pontem de Harford ad exteriorem partem rivi*; and that will take it in. There is a great difference, where *uſque ad* is uſed to terminate a way, and where it is only uſed as a mark or deſignation of any conſpicuous place. *Calvin* in his *Lexicon Juridicum*, ſays *uſque ad* is ſometimes *incluſionis nota*.

It is objected, that the defendants having pleaded the general iſſue, could give nothing in evidence, but that the bridges are in repair; and therefore that the trial ſhould have been in *Norfolk*. To this I anſwer, that generally it is ſo, as 2 *Lev.* 112. 1 *Sid.* 140. 1 *Keb.* 498. 1 *Mod.* 112. 3 *Keb.* 301. becauſe *prima facie* the inhabitants are chargeable; and if they would diſcharge themſelves, they muſt do it by ſpecial pleading, and not upon the general iſſue, for the charge on the inhabitants is a common law charge, 2 *Inſt.* 701. 1 *Ven.* 256. But theſe defendants were not chargeable *de communi jure*, but the county of *Norfolk* was; ſo that they are not obliged to find out who ought to repair, as they are when *prima facie* the charge lies upon them. They might conteſt the right with the county of *Norfolk* upon the general iſſue (as indeed they did) and therefore it was proper to carry it into *Suffolk*, the next county. *Vaugh.* 303. 2 *Roll. Abr.* 576. *Cro. Eliz.* 664. *Godb.* 420. *Palm.* 100.

Raby contra. This information is grounded upon the ſtatute, now the ſtatute gives the juriſdiction to the ſeſſions, and where a ſtatute preſcribes a particular method, that muſt be followed. *Cro. Jac.* 643. 2 *Roll. Rep.* 398. 4 *Mod.* 144. 2 *Inſt.* 702, 704.

2. The city and county of the city muſt be taken to be diſtinct; and if ſo, then the citizens only have appeared, for the appearance is *in nomine omnium inhabitantium civit' Norwic'*, and then the iſſue is not well joined.

3. It is a miſ-trial, It ſhould have been in *Norfolk*. That is the next county, and intirely diſintereſted; for the only queſtion on this iſſue is, whether the bridges be in repair, for that only can be given in evidence on Not guilty. 1 *Ven.* 256. 1 *Mod.* 112. And on the record it appears not to be a trial in the next county; for the *venire* is awarded to *Suffolk* as the next county, *Norfolk* excepted,

cepted, and there the trial ſhould have been. 1 *Inſt.* 125, 155. 1 *Roll. Rep.* 28. *Dy.* 279. 2 *Roll. Abr.* 596, 597.

I agree, the king may annex land to a city or county in point of juriſdiction, but not in point of charge; for as to that it ſtill continues parcel of the old county. *Uſque ad* is excluſive of one of the bridges. As if I preſcribe for common *uſque ad Michaelmas-day*, I have no right of common upon *Michaelmas-day*.

Reynolds replied. The charge to repair is at common law, and upon that this information is founded. The ſtatute gives a concurrent, but not an excluſive juriſdiction, for here are no negative words, nor is this a new offence made by the ſtatute, and upon thoſe grounds it is that the caſes went. As to the fault in the appearance, which was deſigned as a trick, the inhabitants of the city and of the county of the city are all one, for they are commenſurate. It is abſurd to ſay the juriſdiction of the county ſhall be abridged in point of intereſt, and not in point of charge. The city has the land annexed to them, *et tranſit cum onere*.

C. J. They who are not chargeable of common right, may diſcharge themſelves upon Not guilty: and if ſo, the trial was well in *Suffolk*. If they could only give reparation in evidence, then it ought to have been in *Norfolk*. There is no doubt but the information lies in this caſe; and as to the appearance, we may take them to be the ſame perſons. It ſeems to me that the fartheſt bridge is included, for it extends *ad exteriorem partem rivi*. There is nothing in that notion about diſtinguiſhing between juriſdiction and charge, for certainly both muſt go together.

Eyre J. inclined, that the trial was right in *Suffolk*, upon the diſtinction taken by *Reynolds*. *Sed adjournatur* to be further argued. And at another day,

Reeve pro rege. Firſt exception: That no information lies in *B. R.* becauſe the 22 *H.* 8. gives the juriſdiction to four juſtices. *Cro. Jac.* 643. 2 *Roll. Rep.* 398. 4 *Mod.* 144. Anſwer. I agree thoſe caſes, for there the ſtatute makes a new offence, and chalks out a particular method; but this was an offence at common law, and the ſtatute does not give an excluſive, but only a concurrent juriſdiction. Here are no negative words, though if there were, it has been held that negative words ſhall not take away the juriſdiction of this court. 1 *Sid.* 359. 2 *Keb.* 340. 11 *Co.* 64.

Second

Second exception. They ſay this cannot be taken to be an information at common law, becauſe it lays, that the defendants *debent reparare virtute, &c.* and concludes *contra formam ſtatuti.* Anſwer. Such a concluſion will not make it an information upon the ſtatute; for nothing is here alleged, but what the common law ſaid before; and ſo it has been reſolved *Cro. El.* 148. *Cro. Car.* 340. 2 *Roll. Abr.* 82. *pl.* 6. If a ſtatute ſhould add circumſtances to a common law offence, yet the indictment need not conclude *contra formam ſtatuti.* 1 *Ven.* 13. 1 *Sid.* 409. 2 *Keb.* 479.

Third exception. The information is againſt the inhabitants of the county of the city, and the appearance for thoſe of the city only. Anſwer. Throughout the whole record the inhabitants of the city and county of the city are taken notice of to be the ſame. The bounds of the city and county of the city are generally the ſame. 1 *Roll. Abr.* 803. *pl.* 6.

Theſe are all the exceptions taken to the information and proceedings. I come now to the ſpecial verdict, upon which two points have been raiſed.

1. Whether theſe bridges are within the annexed boundaries, for the defendants ſay that *uſque* being *terminus ad quem*, and *a, terminus a quo*, all the bridges are excluded. There can be no diſpute but that two of the bridges are included. The queſtion turns upon the third, *uſque ad pontem de Harford ad exteriorem partem rivi:* This *uſque ad* is only uſed to ſhew the circumference, for the other words take in the river. Now if it be taken excluſively, then the whole breadth of the bridge all round muſt be excluded: Words have been taken incluſively according to the ſubject matter. 5 *Co.* 7, 103, 111. 6 *Co.* 62, 67. 1 *Ven.* 292. 3 *Keb.* 594. 3 *Leon.* 211. 4 Inſt. 112. The bridges were only mentioned as notorious places.

2. They ſay here is a miſtrial, for on Not guilty the defendants could give nothing in evidence, but that the bridges are in repair, and therefore the trial ſhould have been in *Norfolk.* Anſwer. Defendants by not denying our ſuggeſtion, have admitted the queſtion to be, whether the city or county ought to repair. The caſes cited of the other ſide are only, that the perſon chargeable *de communi jure* ſhall not give evidence, that another is bound *ratione tenurae*, but that is not our caſe. If a pariſh be indicted for not repairing a highway, you muſt prove it to be a highway, that it lies within the pariſh, and that it is out of repair; and if there be a failure in either of theſe, the defendants muſt be acquitted. 9 *H.* 6. 62. *Bro. General iſſue* 52, 53, 94. 34 *H.* 6. 43. *Show.* 270.

Branthwayte Serjeant *contra*. I ſhall ſpeak only to the point of the miſtrial, and upon the information.

As to the firſt: No admiſſion of the parties can alter the law. It muſt appear to the court, that the queſtion is of ſuch a nature, as to draw the trial out of the proper county. 2 *Cro.* 597. *Hardr.* 311. Here the only queſtion is, whether the city of *Norwich* is bound to repair, for they cannot throw it any where elſe, without ſpecial pleading. 3 *Keb.* 301. 1 *Mod.* 112. 3 *Keb.* 370. 2 *Roll. Abr.* 597. *pl.* 1.

Secondly, I agree the information would have laid as at common law, if that method had been purſued; but here they make it a ſtatute offence, and therefore they ought to have purſued the ſtatute remedy.

The whole court were unanimous for the King upon all the points, but the miſtrial. As to which the C. J. *Powys* and *Eyre* were of opinion, it was well in *Suffolk:* For the queſtion naturally ariſes, whether the bridges are in *Norfolk* or *Norwich*; and the reſult of that is, that either the one or the other is bound to repair; and Not guilty puts all in iſſue: There was no other way to make this appear upon record, but by ſuggeſtion; which not being denied, it is as well as if it had appeared by ſpecial pleading. And it ſhall not be in the power of the defendants, to diſappoint the King of a proper trial, by their refuſing to plead ſpecially. *Forteſcue* J. *contra*, thought the right ought not to be tried in this iſſue. *Et ſic adjournatur.*

The general iſſue goes to the ſituation as well as repair of bridges where the charge is of common right.

The cauſe came now to be ſpoke to upon the ſingle point of the miſtrial.

Cheſhyre Serjeant *pro rege*. The defendants in this caſe might put us to prove, in what county theſe bridges lie; and then the right of repair is a conſequence, wherefore the trial is right in *Suffolk*. They could not ſafely plead the ſpecial matter, becauſe it will amount to the general iſſue, and ſo be demurrable. 34 *H.* 6. 28, 43. *Bro. iſſue* 53. 18 *H.* 6. 21. *Fitzh. action ſur ſtat.* 4, 19 *H.* 8. 9. 2 *Roll. Abr.* 683. The defendants might have proved theſe to be private bridges on Not guilty. 1 *Ven.* 256. The reſolution of the caſe of the *King* v. *Inhab. Hornſey* was contrary to the opinion of *Holt* C. J. in *Show.* 270. for *Eyre*, *Dolbin* and *Gregory* denied the diſtinction, though the reporter takes no notice of it. *Mich.* 8 *W.* 3. *Rex* v. *Inhab. Ireton.* The reaſon of this ſuggeſtion was to prevent delay, and is therefore to be favoured,

ſince it hinders the defendant from challenging. If he confeſſes (as he has done here) the truth of the ſuggeſtion; then he is eſtopped: If he denies it, that denial is entered of record, and after that he ſhall never come and allege that matter as a fault. There is no other way to come at the truth of this fact, but by putting him to confeſs or deny it, for it is not a matter iſſuable, *Tri. per pais* 140. *Plow.* 74. *b.* 10 *H.* 6. 54. 14 *H.* 6. 2. *Nient dedire* amounts to a confeſſion, though it does not go on, *fore verum concedit*, as ſome of the entries are: This confeſſion is as much an eſtoppel, as in *Salk.* 310. where an executor ſuffered judgment by default, and then was eſtopped to ſay he had no aſſets.

Pengelly Serjeant *contra*. The matter of this ſuggeſtion does not warrant the award of the *venire* into *Suffolk*. It is not averred the county of *Norfolk* is concerned, but only by way of concluſion, *ideoque*, which is not ſupported by the premiſſes. I agree the ſituation might have been conteſted at the trial. The court might have refuſed this ſuggeſtion, as was done in *Delme*'s caſe. So 2 *Roll. Abr.* 597. *pl.* 1. If the jury had come out of *Norfolk*, we could not have challenged the array. *Hard.* 311. Caſe for diſturbing the plaintiff in taking the profits of a Judge of the ſheriff's court in *London*: On Not guilty, it was ſuggeſted, that the office was grantable by the mayor and aldermen, and prayed the *venire* to the next county. But *Hale* C. J. refuſed to award it, becauſe it did not appear by neceſſary collection from the record, that the title of the mayor and aldermen to fill up this place would come in queſtion. Though the ſituation may come in queſtion, yet that does not determine the right; for the defendants will be acquitted without trying the right, ſo that is not a matter within the extent of this ſuggeſtion. Beſides, this is of a matter of law, whereas ſuggeſtions ſhould be of matters of fact only. *Co. Ent.* 59, 60. 2 *Roll. Abr.* 597. *pl.* 8. 1 *Ven.* 58, 90. *Quo warranto* 28. *Nient dedire* alone is not a confeſſion. *Cro. Jac.* 547. *Dy.* 367. *pl.* 40.

C. J. Since it is admitted, the ſituation may come in queſtion; that will by way of conſequence determine the other point, who ought to repair; and therefore the trial could not be in *Norfolk*. I take *nient dedire* to be as much a confeſſion, as *cognovit actionem*. The matter of law in the ſuggeſtion ariſes neceſſarily out of the matter of fact, and without it, would not be compleat. To which *Powys* J. agreed. *Et per Eyre* J. On Not guilty, the defendant may controvert every thing the proſecutor is bound to prove. He is bound to prove, where the bridges lie, and therefore *Norfolk* was an improper county. If a man would diſcharge himſelf upon a particular account, he muſt plead it ſpecially; but not where the

the common right is his defence. If a man is charged to repair *ratione tenurae*, he may throw it upon the pariſh by the general iſſue. The ſame ſuggeſtion was made in Sir *Richard Onſlow*'s caſe, and no exception taken. There is judgment entered in that caſe of *Hornſey*, *Paſ.* 2 *W. & M. rot.* 31. and in the debate, as I find in my notes, *Holt* C. J. ſaid, the defendants might ſhew it not to be a highway.

Forteſcue J. thought, parcel or not parcel, could not be given in evidence on Not guilty: For 1 *Mod.* 112. *Hale* C. J. ſaid, Not guilty goes only to the repair or not; ſo that as to all other queſtions the defendant muſt plead ſpecially. And *Parker* C. J. held ſo, *Mich.* 10 *Ann.* There being three Judges to one, *Judicium pro rege.*

Trinity

Trinity Term

5 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Juſtice.*
Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Forteſcue Aland, *Knt.*
Nicholas Lechmere, *Eſquire, Attorney General.*
Sir William Thompſon, *Knt. Solicitor General.*

Dominus Rex *verſ.* Nixon.

THE court refuſed to quaſh an information upon motion, which had been exhibited by rule of court: *Eyre* J. obſerving, that ſuch informations are amendable. 1 *Sid.* 152, 54. Information not to be quaſhed on motion. And held ſo by *Holt* C. J. *Hil.* 8 *W.* 3. *Rex* v. *Gregory*; and he affirmed, the information in *Fountain*'s caſe, 1 *Sid.* 152. was denied to be quaſhed.

Dominus Rex *verſ.* Jones.

THE defendant having treated the proceſs of the court contemptuouſly, an attachment went againſt him, without a rule to ſhew cauſe, (according to *Salk.* 84.) and there being intimations that he relied on the aſſiſtance of his fellow workmen to reſcue him, the court ſent for the ſheriff of *Middleſex* into court, and ordered him to take a ſufficient force. Attachment abſolute on firſt motion, and ſheriff ordered to take *poſſe*.

Between the Pariſhes of New Windſor *and* White Waltham.

Certificate concludes the pariſh that gives it as to all facts therein mentioned.

JOHN *Piſſey*, being legally ſettled in the pariſh of *White Waltham*, where he had lived two years with a woman who was reputed his wife, went with a certificate from *White Waltham*, owning them as man and wife, into the pariſh of *New Windſor*, where they had ſix children. Then the man dies, and the woman ſwearing they had never been married, the juſtices adjudge the children to be baſtards, and ſettled in *New Windſor* where they were born.

Reeve moved to quaſh the order, becauſe the evidence of the mother ought not to be admitted, and becauſe the certificate was concluſive to the pariſh of *White Waltham*, to ſay they were not man and wife. For as no pariſh can refuſe a certificate-man, therefore whatever is the import of that certificate muſt be binding, elſe it would be hard to get rid of ſuch people.

Yorke contra. It is a rule, that baſtards are ſettled where born; and I believe it will not be pretended, that the baſtard of a certificate-man can be ſent back with him. But the only queſtion will be, whether the legitimacy of the marriage could come in queſtion at the ſeſſions. As to the exception about the mother's evidence, I take it not to be material in this court, what evidence the ſeſſions went upon. If the juſtices give an inſufficient reaſon for their adjudication, yet that is no ground to quaſh the order. Their adjudication, that ſuch a place is the place of the laſt legal ſettlement, is concluſive to this court, though they ſhew in the face of the order an act which in law will not gain a ſettlement; for they, and they only, are judges of the fact, and this court only declares the law ariſing from that fact. If a jury finds not only the fact, but the evidence of it; yet you put the evidence out of the caſe, without determining whether it be ſufficient or not, and adjudge upon the fact only. The mother's evidence is good, for ſhe is a ſtranger *quoad* the pariſh. *Salk.* 478.

As to the certificate, that cannot enure by eſtoppel as a deed. The ſeſſions are *quaſi* a jury, and not bound by eſtoppels. 4 *Co.* 53. *b.* *Salk.* 276. *Adjournatur*; and the laſt day of the term the Chief Juſtice delivered the opinion of the court.

C. J. We are all of opinion, that the certificate is concluſive to the pariſh of *White Waltham*, and they are not to be admitted to diſpute the validity of the marriage, and therefore the ſix children, being actually chargeable to *New Windſor*, muſt be ſent back to *White*

White Waltham. There is no doubt but the baſtard of a certificate-man is ſettled in the place of his birth, for he is not ſuch an iſſue as will follow the ſettlement of his father or mother, neither is he *his* or *her* child within the intention of the ſtatute, ſo as to be ſent back with the parent.

Baſtard of a certificate-man ſettled where born. Salk. 535. *Poſt.* Trin. 15 Geo. 2.

Dominus Rex *verſ.* Corrock.

INdictment for not repairing a highway, which the defendant was obliged to do *ratione tenurae* of a certain houſe, which in another place is mentioned to be the manſion-houſe of the defendant.

Sufficient to charge a man to repair, *ratione tenurae*, without *ſuae*.

Yorke objected, that by 5 *H.* 7. 3. it appears that the occupier and not the owner is chargeable to repairs of the highway, and therefore the indictment ſhould have been *ratione tenurae ſuae*, for it may be this houſe is let to another, and cited *Noy* 93. *Lat.* 206.

Et per curiam, (upon conſideration) There is no neceſſity to lay it ſo, for *ratione tenurae* implies it to be ſuch a tenure, as makes him chargeable. And ſo it was held 1 *Ven.* 331. *Rex* v. *Fanſhaw*, which is entered *Mich.* 29 *Car.* 2. *rot.* 12. There he was charged *ratione tenurae quorundam terrarum et tenementorum*, and the exception was taken, for want of *ſuorum*, and the indictment held well enough. But if it were neceſſary to ſay *ſuae*, we think it is implicitly averred, by calling it afterwards his manſion-houſe; ſo *quacunque via data*, the indictment is well enough.

Argyle *verſ.* Hunt.

LIBEL in the ſpiritual court for the word *whore*, which upon the face of the libel appeared to have been ſpoken in *London*, and after ſentence *Corbet* moved for a prohibition, becauſe the defect of juriſdiction appeared in the libel itſelf, and the court will judicially take notice of the cuſtom of *London*, where an action lies for the word *whore*. *Show.* 301, 331. 1 *Roll. Abr.* 550. 2 *Roll. Abr.* 69. 1 *Lev.* 116. *Sty.* 69. 1 *Inſt.* 96. *b.* *Ketelbey contra.* It is now too late, and it ſhould have been pleaded below. *Lutw.* 1023. *Et per curiam*, The rule is, that you ſhall never allege matter *dehors* the libel as a ground for a prohibition after ſentence, but the foundation of our granting it muſt ariſe out of the libel itſelf in defect of juriſdiction. And if there be a defect of juriſdiction appearing in the libel, then the party never comes too late, for the ſentence and all other proceedings are a mere nullity. But where

No prohibition after ſentence, though word *whore* appears to be ſpoke in *London*.

the ſpiritual court has an original juriſdiction, which is to be taken from them upon account of ſome matter ariſing in the ſuit, as for defect of trial; there after ſentence the party ſhall never have a prohibition, becauſe he himſelf has acquieſced in their manner of trial, which is a waiver of the benefit of a common law trial. It is true, theſe words appear to be ſpoke in *London*, but how does the cuſtom of *London* appear to us? There is nothing of that in the libel, and though we have ſuch a private knowledge of it, that upon motion we do not put the party to produce an affidavit, becauſe the other ſide never diſputes it; yet we cannot judicially take notice of it, and if any body will inſiſt on an affidavit, we muſt have it in every caſe. It was never known, that the court judicially takes notice of private cuſtoms, but they are always ſpecially returned. *Mich.* 9 *Ann. Stone* v. *Fowler.* There was a preſcription for the pariſhioners to repair the fences of the church-yard, and after ſentence they came and ſuggeſted, that the rector was bound to thoſe repairs, and that the ſpiritual court, in as much as the preſcription was not admitted, had no power to proceed; but the court held they came too late after ſentence. A prohibition was denied.

Bellew *verſ.* Aylmer.

In *ſcire facias* againſt executor, no coſts.

IN a *ſcire facias* againſt an executor, execution was awarded, and then the record went on with a *conſideratum eſt etiam*, that the plaintiff ſhould have coſts. It was admitted, that the 8 & 9 *W.* 3. *c.* 10. which gives coſts on a *ſcire facias*, does not extend to executors, and therefore the judgment for coſts was erroneous.

What judgment may be reverſed *in toto*, and what in part only.

But then it came to be the queſtion, whether the court ſhould reverſe the whole judgment, or only *quoad* the coſts. And *Fazakerley* for the executor inſiſted to have it reverſed *in toto*, for that it was one intire judgment, on which they could not have ſeveral executions. *Cro. El.* 162. There were damages given to the crown in a *quare impedit*, and the judgment reverſed *in toto*. So is 1 *Leon.* 149. *Allen* 74. If one defendant dies, and judgment is againſt all; it muſt be intirely reverſed. 1 *Roll. Abr.* 775. *pl.* 2. 2 *Keb.* 696. 1 *Roll. Abr.* 775. *pl.* 4. 1 *Ven.* 27, 39. *Cro. Car.* 471. *Salk.* 24.

Reeve contra. If the record had ſtopped at the awarding of execution, no doubt but all would have been well enough. And then when it goes on with a *conſideratum eſt etiam*, that is a diſtinct independent judgment, and may be reverſed without affecting the other. If part of the words laid are not actionable, and ſeveral damages are given, judgment ſhall be reverſed in part only. *Hob.* 6. (*ſed vide Salk.* 24. that caſe denied for law.) 2 *Cro.* 343. *Moor* 708.

708. *Cro. El.* 538. I agree the caſe in *Hob.* is denied in 2 *Cro.* 424. But the reaſon on which it was denied doth not impeach the authority of it as to my preſent purpoſe in this caſe, where there are two different judgments. 1 *Roll. Abr.* 776. *pl.* 7. 5 *Co.* 58. As to the caſe *Salk.* 24. my report differs from it, for I took the damages to be ſeveral, but he reports them to be entire.

Per Curiam: Conſideratum eſt etiam does not disjoin it at all. If a man declares for two ten pounds, it is the ſame thing whether the judgment be entire for 20 *l.* or ſeveral, for each 10 *l.* *Adjournatur.* 2 Saund. 257. 1 Sid. 357.

And *Hil.* 7 *Geo.* without farther argument it was reverſed as to coſts, and affirmed *pro reſiduo*, on the authority of *Green* v. *Waller*, *Hil.* 13 *W.* 3. *rot.* 20. and adjudged *in B. R. Trin.* 2 *Ann.* on error out of *Ireland:* It was reverſed as to coſts, and affirmed as to the reſt. Lill. Ent. 233.

Dominus Rex *verſ.* Inhabitantes de South-Marſton.

THE order run, "Whereas *J. Charlwood* and his wife *is* "come into your pariſh endeavouring to ſettle *themſelves* "contrary to law, and *are* likely to become chargeable: Theſe are "therefore to require you, to convey the ſaid *Charlwood* and his "wife *from your* ſaid pariſh to the pariſh of *A. &c.*" In orders of removal it is not neceſſary to ſay, the party is come into the pariſh.

Martin moved to quaſh the order, for the incertainty whether the huſband or wife came into the pariſh, it being in the ſingular, when it ſhould have been in the plural number; and cited *Salk.* 122. where an order of two juſtices was *doth*, and quaſhed. *Trin.* 11 *Ann. Regina* v. *Ingham*, *inſultum fecit* againſt two defendants, and held ill. 2 *Keb.* 51.

Huſſey contra. The ſingular number will ſerve for huſband and wife, though for no others. The caſe of an indictment will not govern this, for that is always conſtrued ſtrictly, but theſe have a liberal conſtruction. Nor is the caſe in *Salkeld* at all applicable, for there the fault was in the adjudication itſelf, but here it is only in the complaint. I ſee no more neceſſity to ſhew them in the pariſh, than there is to ſay did not take 10 *l.* *per annum*, or ſerve a pariſh office which is never required. But if it be neceſſary, it appears ſufficiently upon the whole order. It is ſaid, endeavouring to ſettle *themſelves*, and that they *are* likely to become chargeable, and then they are ordered to be removed *from* the pariſh. *Et per Pratt*, C. J. I do not think it neceſſary to ſhew they came in, but only an endeavour to ſettle; for that may be where the party never came in, as the caſe

of children born in one pariſh, when the ſettlement of the parent is in another. But if it were neceſſary, it is implicitly ſet forth, which in the complaint is ſufficient. To which *Powys* and *Eyre* Juſtices agreed. *Et per Forteſcue* J. The only two things requiſite for the juſtices to adjudge, is the place of the laſt legal ſettlement, and that the party is likely to become chargeable. And theſe muſt be poſitive, though as to the complaint it is well enough to take it by implication. This is not falſe grammar, as *doth* was in *Weſt*'s caſe, for it is common for *Latin* authors to put the ſingular number, where there are two nominative caſes. *Horace* ſays *Detur nobis locus, hora.* If it were neceſſary to ſtrain a point, we might refer *is* to the huſband, and then the wife will follow of courſe. The order was confirmed.

Complaint may be taken by implication, but not the adjudication.

Dominus Rex *verſ.* Munden.

ORDER, reciting that *Munden* had a good fortune with his wife, and that her mother was poor, therefore he is ordered to provide for her. And in maintenance of the order 1 *Bulſt.* —— and 2 *Bulſt.* 345. *Styles* 283. were cited. *Et per Pratt*, C. J. On conſideration, we are all of opinion, that the ſon-in-law is not bound, either within the words or intent of the ſtatute, which provides only for natural parents. By the law of nature a man was bound to take care of his own father and mother; but there being no temporal obligation to enforce that law of nature, it was found neceſſary to eſtabliſh it by act of Parliament, and that can be extended no farther than the law of nature went before, and the law of nature does not reach to this caſe. As to the caſe in 1 *Bulſt.* it is plain the word *not* was left out only by miſtake, for the ſenſe of the clauſe leads you to read it *not obliged*, and beſides the judges were divided. The caſe indeed in 2 *Bulſt.* is an authority in point as far as it will go, but that is no judicial authority, only a caſe at a judge's chamber. The ſame was alſo ſaid *obiter* in the caſe of *The Queen* v. *Fane*, *Paſch.* 10 *Ann.* but it never came judicially before the whole court till now. And therefore as it is *res integra*, we are of opinion the order muſt be quaſhed.

Man not bound to maintain his wife's mother.

Dominus Rex *verſ.* Gill & al'.

INdictment for throwing down ſkins into a man's yard, which was a publick way, *per quod* another man's eye was beat out. On the evidence it appeared, the wind took the ſkin, and blew it out of the way, and ſo the damage happened. The Chief Juſtice remembered the caſe of the hoy (*ante* 128.) and that in *Hob.* 134.

Man not criminally anſwerable for a caſual damage done to another.

where in exerciſing, one ſoldier wounded another, and a caſe in the year book, of a man lopping a tree, where the bough was blown at a diſtance and killed a man. And in the principal caſe the defendants were acquitted.

The Attorney General *verſ.* Elliſton et al'. In Scaccario.

SCIRE *facias* on a bond conditioned to tranſport coffee, and not reland it. The defendant as to part pleaded the ſtatute of equity of *Hen.* 8. That he did not tranſport the coffee, becauſe when it was in the ſhip, one of the officers of the cuſtoms came on board and ſeized the coffee, and carried it back to *London:* That when it was cleared, he continued the voyage, till he met with a tempeſt, in which both ſhip and coffee were loſt. And as to the reſidue of the coffee, he pleaded it was never relanded. The attorney general replies, that the ſeizure was, becauſe the coffee was unſhipped with an intent to be relanded; and on a traverſe of this they are at iſſue, and it is found with the king.

If the plea contains matter of excuſe, it is enough for the plaintiff in all caſes, but that of an award, to falſify the excuſe. 33 H. 8. c. 39. §. 31.

It was moved in arreſt of judgment, that here was an immaterial iſſue, for the bond being only not to reland, the replication only diſcloſes evidence of an intent to reland, which is not ſufficient to ſubject him to the penalty. On the other ſide it was ſaid, that the plea had admitted a non-performance, by offering an excuſe; and then it was ſufficient to meet the plea, and falſify the excuſe, in all caſes (that of an award only excepted) for there indeed, if the defendant pleads *nul agard fait*, the plaintiff muſt not only ſhew an award, but he muſt go farther and aſſign a breach. *Salk.* 138. But in no other caſe is he obliged to do more, than falſify the defendant's plea. And of this opinion was the court, and judgment was given for the plaintiff.

Windmil *verſ.* Cutting.

PER *Curiam:* An attorney of *C. B.* who is actually in the cuſtody of the marſhal of this court, ſhall never be ſuffered to plead his privilege. 2 *Roll. Abr.* 232. For there is a great difference between an actual, and ſuppoſed cuſtody. 1 *Salk.* 1. *Et per Forteſcue* J. As to the plea that a man is a clerk of one of the prothonotaries of *C. B.* I have looked a little into it, and find the old way of pleading was, that they were employed in ingroſſing of records, *aſſidentes in curia*, and the like. *Raſt.* 473. *b.* 34 *H.* 6. 15. And ſo in this court of late years an affidavit has been required to that effect, *Cooke* v. *Latimer*, *Read* v. *Chambers*, and the caſe of one *Worthington*

Privilege *del* C. B. where pleadable.

Worthington 11 *Ann.* In the caſe of *Baker* v. *Swindon*, *Mich.* 10 *W.* 3. *in C. B. rot.* 360. a clerk pleaded, that he ought to be ſued by bill, and not by original, but the court held the contrary, and that attornies only have that privilege.

Clift 572.

Anderſon *verſ.* Buckton.

Where the plaintiff ſhall have full coſts though the damages are under 40 *s.*

TReſpaſs for the entry of diſeaſed cattle into the plaintiff's cloſe, *per quod* the plaintiff's cattle were infected. Not guilty pleaded, and a verdict for the plaintiff for 20 *s.*

It was moved, to allow the plaintiff his full coſts, upon the account of the ſpecial damages alleged and put in iſſue, and which would have ſubſiſted of itſelf as a diſtinct cauſe of action, and the plaintiff ought not to be puniſhed for joining it with the treſpaſs, to avoid vexation. And *Cro. Car.* 163, 307. 3 *Mod.* 39. 2 *Ven.* 48. *Cro. Car.* 141. *Ray.* 487. were cited.

On the other ſide it was inſiſted, that though here is matter of aggravation laid, yet it is ſtill to be conſidered as an action of treſpaſs, in which there is a recovery under 40 *s.* And matter alleged only by way of aggravation cannot intitle the plaintiff to full coſts. 2 *Ven.* 48. *Salk.* 642.

The Chief Juſtice, *Powys* and *Forteſcue* Juſtices, were for full coſts, becauſe the conſequential damage is a matter for which the plaintiff might have had a diſtinct ſatisfaction. And they likened it to the caſe of an action of battery, *per quod conſortium* of the wife, or *ſervitium* of the ſervant *amiſit*, which for that reaſon are not within the ſtatute. The true diſtinction is, where the matter alleged by way of aggravation will intitle the party to a diſtinct ſatisfaction. Aſportation of trees may be a ground for a trover, but yet may be laid as an aggravation in treſpaſs, and the plaintiff ſhall have full coſts. If a man enters and chaſes and kills my cattle, that is a diſtinct wrong, but yet may be joined as matter of aggravation. Suppoſe I have two cloſes at a great diſtance, and the ſame water-courſe running through both, I may allege the entry into one, *per quod* the water was prevented from coming to the other, and there ſhall be full coſts.

Eyre J. *contra*, Becauſe this recovery will not be pleadable to a ſpecial action upon the caſe for the ſpecial injury, *quod caeteri negaverunt*. And the plaintiff had full coſts.

Dominus

Dominus Rex *verſ.* Kinnerſley and Moore.

INformation, ſetting forth, that the defendants *Kinnerſley* and *Moore*, being evil diſpoſed perſons, in order to extort money from my Lord *Sunderland*, did conſpire together to charge my Lord with endeavouring to commit ſodomy with the ſaid *Moore*; and that in execution of this conſpiracy they did in the preſence and hearing of ſeveral perſons falſly and maliciouſly accuſe my Lord, that he *conatus fuit rem veneream habere* with the defendant *Moore*, and ſo to commit ſodomy. The defendant *Kinnerſley* only appears, and pleads to iſſue, and is found guilty, and now ſeveral exceptions were taken in arreſt of judgment.

Conſpiracy may be laid without any overt act, and if one be convicted, judgment ſhall be given againſt him before the trial of the other.

Branthwayte Serjeant. The nature of the offence muſt appear upon the record, for by that only the court muſt judge, and the offence muſt be particularly and certainly alleged. *Conatus fuit* is incertain, for it might only be an act of the mind, which before it was put in execution was ſuppreſſed by reaſon. 1 *Roll. Rep.* 79. 2 *Bulſt.* 276. In an action for words, *per quod maritagium amiſit*, the plaintiff declared, that whereas he *intendebat et conatus fuit* to marry ſuch a woman, the plaintiff ſpoke of him ſuch words, *per quod, &c.* and this was held to be incertain, and the judgment was arreſted.

2. It ſhould appear upon the record, that the party accuſed is innocent; for it is no crime to charge a guilty perſon with ſuch an offence. They ſhould have averred, *ubi revera et in facto* he *non conatus fuit* to do the act with which he was charged. *Hut.* 11, 49. In actions for a malicious proſecution the plaintiff muſt ſhew the former action to be determined, and how; ſo likewiſe he muſt ſhew an acquittal upon an indictment. 1 *Keb.* 881.

3. To every conſpiracy there muſt be two perſons at leaſt, whereas here is only one brought in and found guilty. If hereafter the other ſhould be found Not guilty, that will conſequently be an acquittal of *Kinnerſley*. If three be indicted for a riot and an aſſault, and one only found guilty, and the others acquitted; this diſcharges them all, becauſe the riot is the foundation, and the aſſault only the conſequence. *Salk.* 593. And one perſon alone cannot be guilty of committing a riot: So in this caſe one cannot be guilty of the conſpiracy, though he may of the overt act, and yet the foundation (which is the conſpiracy) being removed, the other part, which is only the conſequence, falls of courſe.

Plow. 111. b. Poph. 202.

Comyns. Bare words are not a ſufficient overt act, without alleging ſomething actually done towards putting the conſpiracy in execution. 4 *Co.* 16. *a.* 1 *Roll. Abr.* 110. *p.* 6. 9 *Co.* 56. *b.* For if there be only words, an action of *ſcandalum magnatum* lies. If the charge on my Lord was by courſe of law, then the defendants are juſtified, till it is falſified in a legal manner, either by *ignoramus* or acquittal. 1 *Roll. Abr.* 113, 114. *R.* 2. And the court will not ſuffer the party accuſed to bring his action, till he has manifeſted his innocence; becauſe otherwiſe there might be contradictory judgments, for the parties might be condemned in an action for that proſecution, which they might afterwards eſtabliſh, and then thoſe two judgments would be inconſiſtent. 3 *Keb.* 799.

Hob. 267. Salk. 15.

The offence with which my Lord is charged is no crime puniſhable by our Law. For a bare endeavour (which is the moſt that is alleged) to do ſuch an act, is not puniſhable in the temporal courts. And the only reaſon why it is actionable, to ſay of a woman that ſhe had a baſtard is, becauſe ſhe is puniſhable for it by 18 *Eliz. c.* 3. and 7 *Jac.* 1. *c.* 4. *Poph.* 36. nor is it actionable then, unleſs it appears the pariſh was charged. *Salk.* 694. So to ſay ſhe keeps a bawdy-houſe, becauſe the common law puniſhes ſuch a perſon. *Cro. Car.* 329. And yet it is not actionable to call a woman a bawd, which is only an offence cognizable in the ſpiritual court. 1 *Ven.* 53.

If *Moore* ſhould die, be pardoned, or acquitted, how can the other be guilty of a conſpiracy? *Cro. El.* 701. 1 *Ven.* 234. 3 *Keb.* 111. 1 *Saund.* 228. 2 *Keb.* 476. 1 *Keb.* 284. 1 *Roll. Abr.* 111. *pl.* 5.

Adjournatur; and at another day *Reeve* in anſwer to the objections argued:

1. As to the *conatus* being uncertain. This goes to their own charge; from which we could not vary, but were obliged to lay it as we could prove it. We could not lay, that he ſaid my Lord did the act, when he only ſaid he endeavoured to do it. The caſe in 1 *Roll. Rep.* 79. and 2 *Bulſt.* 276. is not applicable to this. There it was in the plaintiff's power to have been more particular, and the words were not actionable without a ſpecial damage: He ſhould have ſhewn a treaty and communication between himſelf and the lady, whereas he only ſays he intended and went about to marry her, and it does not ſo much as appear ſhe knew any thing of the matter. In many caſes it is actionable to charge a man with a bare attempt to do an unlawful act. *Cro. El.* 6. You lay in

wait *intending* to murder *A.* you laid gunpowder under my window *minding* to burn my houſe. *Cro. El.* 191. You agreed to hire a man to kill me. 2 *Lev.* 205. 1 *Ven.* 323. In actions for words the plaintiff may make his own caſe, but we were obliged to follow the defendant, and lay the overt act as it was. If an indictment be imperfect, yet if it be recited in an action as it is, it will be ſufficient. 47 *E.* 3. 16, 17.

2. They object, here is no overt act. Is not the affirmation one? Surely it is. But if it be not, yet we inſiſt there was no occaſion to lay any. The conſpiracy is the *git* of the charge, and the other only matter of aggravation, of which the defendant may be acquitted, and found guilty of the conſpiracy notwithſtanding. 1 *Ven.* 304. 1 *Sid.* 174. 1 *Lev.* 125. So 1 *Lev.* 62. 1 *Keb.* 203, 254. A conſpiracy to charge a man with being the father of a baſtard child was held well laid, without any overt act. 27 *Aſſ. pl.* 44. 16 *Aſſ. pl.* 62. There were differences in opinion as to this matter formerly, but now the law is ſettled.

3. Say they, no judgment ſhall be given againſt *Kinnerſley*, becauſe poſſibly *Moore* may be acquitted, and that will be an acquittal of both. This is arguing from what has not happened, and probably never will; for though *Moore* may have an opportunity to acquit himſelf, and is not concluded by the verdict as *Kinnerſley* is; yet as the matter now ſtands *Moore* himſelf is found guilty, for the conſpiracy is found as it is laid, and therefore judgment may be given againſt one before the trial of the other. As 4 *E.* 3. 34. *b.* *Bro. Conſpiracy* 21. 1 *Ven.* 234. 3 *Keb.* 111. 24 *E.* 3. 73. *a.* *Paſ.* 7 *Ann. B. R. Regina* v. *Herne.* There the indictment was that he *with* A. *et multis aliis* did conſpire to accuſe *B.* that *he did attempt* to commit ſodomy. The grand jury found the bill as to *Herne*, with an *ignoramus* as to *A. Herne* was convicted, and then it was moved in arreſt of judgment, that there being an *ignoramus* as to *A. Herne* could not be guilty of conſpiring with him. But the whole court over-ruled the exception, and ſaid it was ſufficient, being found that he *cum multis aliis* did conſpire, and that it might have been laid ſo at firſt; and *Herne* was fined forty marks, and ſet in the pillory. My Lord C. J. of the Common Pleas, that now is, was of counſel in that caſe; and he quoted a caſe where ſeveral were indicted for a riot, *cum multis aliis*, two only were found guilty; and it was objected, that there muſt be three to make a riot; but upon the *cum multis aliis* judgment was given againſt the defendants.

4. Another exception is, that we have not averred my Lord was innocent of the fact charged upon him. It is expreſly laid, that the

the defendants did *falſly* charge, which could not be, if the accuſation was true. *Trin.* 4 *Ann. Regina* v. *Beſt*, *Salk.* 174, 376. indictment ſetting forth, that the defendants *falſo conſpiraverunt* to charge *A.* with being the father of a baſtard child: On demurrer the exception was, that there was no averment, that *A.* was not the father; and upon great conſideration and ſearch of precedents, the indictment was held good. A difference was taken in an indictment for perjury, where you muſt aver the oath falſe; and alſo in actions for a malicious proſecution, where it muſt appear the party was innocent, to intitle him to damages. *F. N. B.* 114, 115. *Raſt.* 117.

5. The laſt exception is, that the offence charged is not puniſhable in the temporal courts. We deny that. Attempts of this nature have been puniſhed, and ſo have conſpiracies to do a lawful act, which is ſtronger than this caſe.

The whole court were unanimous in over-ruling all the exceptions. And *Powys* J. quoted a caſe in *Godb.* where a man was puniſhed for an attempt to pick a pocket. And *Eyre* J. remembered Captain *Rigby*, who was pilloried for *an attempt* to commit ſodomy. And he quoted *Trin.* 11 *W.* 3. *Rex* v. *Sudbury & al'*, where four were indicted for a riot, two found guilty, and the other two acquitted; and this was held to be a diſcharge of them all, though it had been otherwiſe if it had been laid *cum multis aliis.* And *Hil.* 2 *Ann. rot.* 17. is a caſe to the ſame purpoſe as the *Queen* and *Beſt.* *Et per Forteſcue* J. *falſis allegantiis* is in the commiſſion of *oyer* and *terminer.* And *Holt* C. J. held in *Beſt*'s caſe, that an attempt to do an act cognizable in the ſpiritual court was puniſhable here. *In foro conſcientiae* the attempt is equal with the execution of it, and there is a great difference between being found Not guilty, and not being found guilty.

Whereupon judgment was given for the King, and afterwards the court proceeded to ſentence, and told the defendant, nothing but his being a clergyman protected him from a corporal puniſhment. They fined him 500 *l.* a year's impriſonment, and to find ſureties for his good behaviour for ſeven years.

In *Eaſter* term, 5 *Geo.* *Moore* was convicted and ſentenced to ſtand in the pillory, ſuffer a year's impriſonment, and to find ſureties for ſeven years.

One in execution is not to have the benefit of the rules.

And this term *Kinnerſley*, on affidavits of his being indiſpoſed, moved the court that he might be admitted to the benefit of the rules. *Sed per curiam*, We never do it for one in execution, which differs

differs from the caſe of perſons committed for high treaſon, who have been bailed on account of illneſs.

Wraight *verſ.* Kitchingman.

ERROR e C. B. of an award of execution in a *ſcire facias* upon recognizance of bail, reciting that the defendants in *Hilary* term 3 *Geo. coram Juſtitiariis de C. B. manuceperunt et uterque eorum manucepit pro Richardo Welbourn in* 106 *l.* Upon condition, that if he ſhould happen to be condemned in a certain plea of debt upon demand for 53 *l.* at the ſuit of *Kitchingman* and his wife, then the ſaid *Welbourn* ſhould pay and ſatisfy the ſaid 53 *l.* and all damages, or render his body in execution of that judgment. And then the *ſcire facias* ſets forth, that *licet* the ſaid *Kitchingman* and his wife recovered the ſaid 53 *l.* debt and 15 *l.* for damages, yet the ſaid *Welbourn* never rendered his body in execution of the ſaid judgment, or ſatisfied the ſaid debt and damages. Upon a *ſcire feci* returned, there is judgment by default, and execution awarded. The defendants aſſign for error, that the plaintiffs in *Hil.* 3 *Geo. optulerunt ſe* againſt the ſaid *Welbourn de placito tranſgreſſionis acetiam in quodam placito debiti ſupra demand'* 53 *l.* upon which proceſs iſſued againſt him, returnable *in octabis purificationis:* at which day the defendants entered into recognizance for his paying the debt or rendering his body: And that the plaintiffs did not within two terms, according to the courſe of the court, declare againſt the ſaid *Welbourn in placito praed'*, whereby the recognizance was diſcharged: But farther they ſay, that the plaintiffs in *Trinity* term following cauſed him to be ſummoned into the ſaid court to anſwer them in a plea of debt for 53 *l.* and obtained judgment thereupon, and that ſuch judgment was had upon thoſe proceedings, and not in that action wherein the defendants became bail; but notwithſtanding this, the award of execution is grounded upon the judgment in that collateral action. The other errors aſſigned are, that the Juſtices of *C. B.* had no power to take any recognizance in this form, and that there is a diſcontinuance, and ſeveral variances between the recognizance itſelf and the recital of it in the *ſcire facias.* The defendants verify their aſſignment of errors, by procuring the recognizance entered with a *placita* of *Hilary* term, and the other proceedings with a *placita* of *Trinity* term, to be ſent up by *certiorari*, with a certificate that there are no continuances from *Hilary* to *Trinity* term. And *in nullo eſt errat'* pleaded.

Matter which lies properly in the mouth of the principal, or might have been pleaded to the *ſcire facias*, is not aſſignable for error after execution awarded. Salk. 262. 4 Mod. 306.

Strange pro quer' in errore. Before I enter into the debate of our exceptions, I muſt beg leave to obſerve, that as this record ſtands, the fact of our aſſignment of errors muſt be taken to be as we have

alleged it; for we have not only verified it by the return of the *certiorari* (which is the proper trial in theſe caſes) but the other ſide have come into it, by pleading *in nullo eſt erratum*, which is a confeſſion of the matter of fact, and ſerves to put the law ariſing from that fact in iſſue before the court: it is in effect to ſay, I agree the proceedings were in the manner you mention, but notwithſtanding this, I inſiſt they are regular; they are not erroneous. So is 1 *Ven.* 252. 1 *Sid.* 147.

I ſhall at preſent omit obſerving what thoſe facts are, which ſtand admitted upon this record, but ſhall make uſe of that obſervation, as occaſion ſhall require, in ſpeaking diſtinctly to each exception.

Our exceptions are of two ſorts. 1. Such as go to the form; and 2. To the foundation of this *ſcire facias*.

Thoſe which reſpect the form are, either ſuch as ariſe upon the face of the writ itſelf, or by compariſon of it with the other parts of the record.

The exception I take to the writ itſelf is, that the breach is not well aſſigned, for they only ſay, that *licet* ſuch recovery againſt the principal, yet he never rendered his body *in executione judicii praedict'*, which ties it up to a particular kind of render, and has not left it at large to any render which would be a good diſcharge of the recognizance. And therefore though I muſt admit, he did not render himſelf in execution of that judgment; yet if I can ſhew, that notwithſtanding what the plaintiffs have alleged, the condition of this recognizance may have been performed; then I ſhall be well juſtified in ſaying, the breach is not well aſſigned.

A render may be either before or after judgment, and it may happen, that though either of theſe will diſcharge the bail, yet neither of them may be a render in execution of that judgment. It is plain, the firſt cannot: There cannot be a render in execution of a judgment, when as yet there is no judgment; but yet it will not be denied, but that a render before judgment is a good diſcharge of the bail, for the intent of the condition is anſwered, inaſmuch as the party is forth coming, and the other may have his body as a ſatisfaction for the debt when recovered.

And as there may be a render before, ſo likewiſe after judgment, and yet not in execution of that judgment. For ſuppoſe the bail bring the principal into court, and leave him there, and the plaintiff refuſes (as by law he may) to take him in execution; I believe no body will ſay this is a render in execution of that

judgment, and yet there is no doubt but this is a good diſcharge of the bail; for it amounts to a performance of the condition: And in this caſe the entry is not, that he was rendered *in executione judicii*, but *in exoneratione manucaptor'*. And if the plaintiff will not pray him in execution, the conſequence of that is, that he muſt be diſcharged. So is *Hob.* 210. *Walby* v. *Canning*.

Since therefore it appears, there are more ways than one to perform the condition of this recognizance, I need not cite many caſes to prove, that the ſaying the principal did not render in one particular manner, will not amount to an averment that he did not render at all. If a man is bound to go to *York* or *Lancaſter* by ſuch a time (where according to Sir *Rowland Heyward*'s caſe, 2 *Co.* 35. he being the party agent, has his election to go to which he pleaſes) it would be inſufficient to ſay he did not go to *York*, becauſe though that be true, yet he may have performed the condition by going to *Lancaſter* within the time: And for this the book of 21 *Ed.* 3. 29. *b.* is an authority, where both parts of the disjunctive are poſſible (as in the caſe I now put) though it was otherwiſe reſolved there in the principal caſe, becauſe it appeared that one part of the condition was become impoſſible by the act of God, and therefore as to that there was no occaſion to take any notice in aſſigning the breach. If I covenant to do an act by myſelf *or* my aſſigns, the breach muſt be in the disjunctive, ſo as to take in both ways by either of which that act might be done. So is *Cro. Eliz.* 348. *Salk.* 139.

The ſame exception was taken about two years ſince in the caſe of *Read* v. *Jenamie*, but I cannot ſay it received any judicial opinion. The court did ſeem to come into it, and the plaintiffs diſcovering their opinion, would not ſtand another argument, but applied below and got it amended.

The next exceptions to the writ are ſuch as ariſe by compariſon of it with the other parts of the record, from which it varies in ſeveral inſtances. I forbear to mention them all, but ſhall rely upon thoſe which I apprehend to be moſt material. But before I do this I muſt obſerve, that we are in the caſe of a deſcription of a record, which the court requires to be made ſtrictly, and more ſtrictly where the ſuit is founded upon that record, than where it is only deſcribed in a writ of error, in order to remove it out of one court into another. And there will follow no inconvenience, if the court in theſe caſes ties up the party to an exact deſcription; becauſe if he be but careful, he may do it with the utmoſt exactneſs, and it is his own laches if he miſtakes.

The

The firſt variance is, that in the writ it is ſaid, the defendants *manuceperunt et uterque eorum manucepit pro Richardo Welbourn in* 106 *l.* whereas the recognizance runs, that they *recognoverunt et uterque eorum recognovit ſe debere eiſdem* the plaintiffs *in* 106 *l.* Now the words *manucapio* and *recognoſco* are of different ſignifications: The latter indeed does import a being bound in a ſum, and therefore is properly uſed in theſe caſes; but *manucapio* was never taken in that ſenſe: It ſignifies a receiving another into cuſtody, of which the uſual expreſſion is, *quod traditur in ballium.* There is a great difference between *recognovit ſe debere* ſo much, and *manucepit* in ſo much: For *recognovit ſe debere* creates a duty to the party, and is an immediate lien; but *manucepit pro J. S.* is no lien as to the plaintiff in the action, no more than to any body elſe. It may as well refer to the court who delivers out the party, and thereupon he undertakes to the court that the party is forth coming. It is not *manucepit to the plaintiff* for ſuch a one, but *manucepit* generally, which form may be proper to be uſed in this court, where the bail is not bound in a ſum certain, but the *quantum* left intirely uncertain till judgment; whereas *in C. B.* where the ſum is mentioned, and thereby reduced to a certainty, they uſe the ſtrongeſt words to bind the party, ſo as to make it a certain duty depending only upon a condition ſubſequent. And in this caſe I muſt ſubmit, whether it is not releaſable by the word *debts*, as a bond is before it becomes due, becauſe it is *debitum in praeſenti quamvis ſolvendum in futuro*, according to *Co. Litt.* 292. *a.* But according to *Hoe's* caſe, 5 *Co.* the word *debts* will not releaſe a recognizance of bail entered into in this court, becauſe there is no certain duty created at the time of entering into it.

The next variance is, that the writ runs, *quas quidem* 106 *l. iidem* the bail *recognoverunt de terris et catallis ſuis fieri*, whereas the record is *voluerunt et conceſſerunt*, which are the proper words in that place, for though *recognoſco* be proper to ſignify they bound themſelves in that ſum, yet *concedo* is always uſed when they come to deſcribe in what manner the parties agree it ſhall be levied. They *recognoſcunt ſe debere* ſo much money, which they *concedunt* ſhall be levied in ſuch a manner.

The other inſtances of variance are, where the writ contains more than is in the record. And to theſe I would premiſe a diſtinction, which I have often heard laid down in this court, and that is, where records exceed, and where they do not come up to the deſcription: Where they exceed the deſcription, it will be well enough, for every exceſs implies a fullneſs, and if there be a full anſwer to the deſcription it is as much as is required; but it is

otherwiſe, where the record does not come up to the deſcription, according to the caſes ſo often cited of late of *Rogers* v. *Lloyd* and *Alſton* v. *Lucan*. In one the writ of error contained an addition, which was not in the record, and for that variance it was quaſhed; but in the other, where the writ had omitted the addition, the record was held to be well removed.

And if the crouding in an unneceſſary deſcription in a writ of error, to which the record does not anſwer, will for that reaſon vitiate it; I may argue *a fortiori* in the caſe of a *ſcire facias*, which is in the nature of an action; for there the court is ſtricter than in writs of error, in requiring an exact deſcription, becauſe otherwiſe the party might bring two actions, the one varying from, and the other agreeing with the record.

The firſt variance is, that by the *ſcire facias* the defendants were to forfeit the money, if the principal ſhould happen *in aliquo modo defaltam facere*; but there is not a word of this in the recognizance itſelf.

Another variance is, that in the writ the defendants are made to undertake, that if the principal be condemned in that action, or judgment be given for the plaintiffs, that then he ſhall pay. In the record it is only that if judgment be given for the plaintiffs, without any mention of being condemned.

In one he is to render damages *in curia aſſidenda ſeu aliquo modo adjudicanda*, but the recognizance is only for damages *in curia adjudicanda*, without any mention of the words *aſſidenda ſeu aliquo modo*.

It will perhaps be ſaid, that theſe variances are not to be regarded, becauſe they do not alter the ſenſe. But that will be no anſwer at all. In Dr. *Drake*'s caſe, *Salk.* 660. the word *nor* was put inſtead of *not*, but it was not in a place where it influenced the ſenſe one way or the other, and yet the court held it a fatal variance, for it was the careleſſneſs of the party: And *Powel* J. ſaid, that in all caſes where the party had a record or other matter by which he *might* make an exact deſcription; in ſuch caſe every variance was fatal. That if the court once gave into ſolutions of thoſe variances, they would never know where to ſtop; and for my part ſays he, whilſt I keep up to the ſettled rules, I look upon myſelf as lying in harbour, and therefore I will never conſent to ſet out to ſea again. *Mich.* 2 *Ann. in B. R. Chetley* v. *Wood*, there the recognizance was deſcribed as taken in court, and upon *nul tiel record*, it appeared to have been taken at juſtice *Neville*'s chamber, and by him delivered into court; and it was adjudged that the plain- Salk. 564, 659.

tiff had failed of his record: and yet in as much as the recognizance took its effect from the inrolment, it might not be improper in a legal ſenſe to ſay it was taken in court; but becauſe the fact was otherwiſe, the court held them to deſcribe it according to the fact, and not according to the operation of law.

I have now done with what I had to offer in relation to the form of this writ, and ſhall therefore in the next place proceed to ſhew, that it is defective in point of foundation; that it has iſſued without lawful warrant, without any foundation at all. 1. In reſpect of a defect in the proceſs by which the principal was brought into court, and upon which it appears the recognizance was taken. 2. In regard the recovery againſt the principal, upon which this *ſcire facias* is grounded, was in another action than that wherein we were bail. 3. Becauſe the plaintiffs did not declare within two terms after appearance, according to the courſe of the court. And 4. Becauſe the original cauſe was never regularly continued in court.

1. I ſhall endeavour to ſhew, that the proceſs by which the principal was brought into court, and upon which the *capias* iſſued, and the recognizance was taken, is a naughty proceſs; and that, becauſe two different actions are joined in it, debt and treſpaſs; it is *de placito tranſgreſſionis accetiam de placito debiti*; which cannot be joined together, for the proceſs to bring in the party is different, in debt by ſummons, and in treſpaſs by attachment. The one is founded upon a privity of contract created by the party or the law, and ſurvives againſt the executor; whereas the other is founded upon a tort, and dies with the perſon. Beſides, the ſame plea will not anſwer both, and for that reaſon it has been held, that *aſſumpſit* and trover cannot be joined. 1 *Ven.* 366. *Salk.* 10. 1 *Sid.* 244.

If therefore the original, which is the ground of all, is faulty; it follows, that whatever ſtands upon that foundation muſt fall with it. But the recognizance derives its obligation from thence; and therefore can have no force, when that is removed.

2. But if the court ſhould be of opinion, notwithſtanding this exception, that the principal was well brought into court, and the recognizance well taken; yet I muſt ſubmit in the ſecond place, whether it does not appear, that the judgment upon which this writ is grounded, was in another action than that to which the bail was given, which was in a plea of treſpaſs with an *accetiam de placito debiti*, whereas the judgment is in an action of debt upon a bond, on the recovery in which action it is admitted by this record, that the *ſcire facias* is grounded. I am ſenſible it would be

miſpending time, for me who am counſel only for the bail, to go into a long argument to prove, that the court of *C. B.* cannot upon an original in one ſpecies of action take any cognizance of an action of another kind againſt the principal: that court has no juriſdiction to hold plea in any caſe, but upon the King's original writ iſſued out of Chancery, except in the caſe of perſons having the privilege of that court, which is not pretended in this cauſe. The original is the commiſſion to the court to hold plea between the parties in the particular cauſe deſcribed in it, but gives no juriſdiction to proceed in any other cauſe though between the ſame parties. But I do not apprehend, how the determination of that queſtion can have any influence in this caſe, ſince whatever effect it may have as to the principal, yet it can never reach the bail, ſo as to ſubject them in any other action than that wherein they were bound; ſo that I need only prove theſe to be different actions, which cannot be taken to be the ſame. And I apprehend, the thing proves itſelf, for the court will never intend, that this action of debt, wherein the defendant appears to be brought in by ſummons, can be grounded upon, or receive any ſanction from an original, wherein debt and treſpaſs are both joined. Thoſe proceedings muſt be taken to have another foundation, *viz.* an original in debt, and not to be grounded on one which will not warrant the judgment, according to the caſe of *Chapman* v. *Barnardiſton*, where Lill. Ent. 221. an original in treſpaſs was held not to warrant a declaration in trover. So in 2 *Ven.* 153. in treſpaſs the writ was recited to be *quare clauſum fregit et herbam ibidem creſcentem conculcavit et conſumpſit*, but the declaration had omitted the *clauſum fregit*: (and ſo has the declaration in our caſe) and for this fault the judgment was arreſted after a verdict. So is *Cro. El.* 329, 185. I do not cite theſe caſes (as the immediate tendency of them is) to prove that the declaration ſhall be held ill, becauſe it does not tally with the recital of the writ, for I am ſenſible the modern reſolutions are, that in order to overthrow the proceedings, they muſt be compared with the original itſelf upon a writ of error: but the uſe I would make of them is, to ſhew, that if the writ and the declaration do ſo vary, that will be cauſe to reverſe the judgment. And from hence I preſume an original in debt and treſpaſs ſhall never be taken as the warrant for proceeding in debt only, ſince the only effect of ſuch a preſumption will be, to overthrow thoſe proceedings, which it was introduced to ſupport.

But further, we may ſafely lay all this aſide, and there is no occaſion to make uſe of intendments in this caſe; ſince it manifeſtly appears, that theſe are different actions; for by the record of the recognizance the principal comes into court, and is let out upon bail in *Hilary* term; but the action wherein the recovery is, appears to be

be of *Trinity* term, for the *placita* is of that *term*, and in that term it is recorded, that the principal *ſummonitus fuit* to anſwer the plaintiffs; ſo that it is abſurd to ſay, the recognizance of *Hilary* term ſhall extend to an action commenced two terms after, *viz.* in *Trinity* term.

If therefore theſe are taken to be diſtinct actions, it neceſſarily follows, that the defendants by becoming bail in one, made no undertaking for the other; and though they would be liable to any recovery in the action to which they were bail, yet they were not anſwerable in any action which muſt proceed upon ſome other foundation; and it is already admitted upon this record, that the judgment with which they are charged, was in this collateral action.

But even admitting, that as to the principal this declaration in debt was well delivered as a declaration by the by, (though that cannot be after the term wherein bail is filed) yet what we inſiſt upon is, that as to us who are the bail, the plaintiff is confined to declare according to the proceſs; for though there are two different actions joined in it, yet both together make but one *loquela*, which cannot be ſplit: It muſt be a recovery *in iſta actione* to charge the bail. And therefore where the plaintiff has declared for more than in the proceſs, that declaration has been taken to be one delivered by the by. 3 *Keb.* 16. *Mich.* 3 *Ann.* *Bovey* v. *Wheeler*, and *Salk.* 102. And there is great reaſon why the plaintiff ſhould not be allowed to vary in the leaſt as to the bail; for I would for argument ſake ſuppoſe, that when the defendant comes into court, and finds the plaintiff has done wrong in joining debt and treſpaſs together in the ſame original; thereupon he applies to his friends, and ſhews them the defect, how it is impoſſible the plaintiff can ever ſucceed in that action; and upon that account he procures them to be his bail, who would otherwiſe have refuſed to ſtand for him in a proper action: I muſt ſubmit it, whether it would not be a hardſhip to let the plaintiff charge the bail by delivering a declaration in debt only, when perhaps he ſet out wrong at the beginning with no other view but by that means to get good bail to his action. In *Yelv.* 52. the recognizance was, that the principal ſhould upon eight days warning appear to an action to be brought for ſuch a debt, or they (the bail) to pay the money: the breach was laid in not paying ſo much recovered againſt the principal, without ſhewing it to be an action wherein he had eight days warning: and for this fault the court held it ill; and *Popham* who gave the rule ſaid, that as to the plaintiff and defendant a voluntary appearance without eight days warning ſhould bind, for the defendant had ſubmitted to it, *et volenti non fit injuria*, but yet they could not by any agreement among themſelves ſubject the bail in any other method of proceeding than was

mentioned in the obligatory inſtrument; ſo that a voluntary appearance ſhould not bind them who became only anſwerable for a compulſory one.

3. But if the court ſhould be of opinion, that the recognizance was well taken as to that action wherein the principal is condemned; yet I take it, that the bail are diſcharged, becauſe the plaintiffs did not declare within two terms after appearance, according to the courſe of the court, and as the 13 *Car.* 2. *c.* 2. requires. This is the fact which is admitted to us, and it will be no anſwer to ſay, that though the defendant might have refuſed the declaration, and ſigned a *non pros*, yet if he accepts it, all will be well enough; becauſe his acceptance, which is an eſtoppel to himſelf, can never have that effect againſt us, who are his bail, for the ſame reaſon that the act of the bail is no eſtoppel to him, according to the caſe of *Needham* v. *Dewaivre* in this court, *Trin.* 1 *Geo. rot.* 399. There the defendant pleaded miſnomer in abatement, and the plaintiff replied by way of eſtoppel, that he had put in bail by the name in the declaration; but the court held, that eſtoppels ariſe againſt a man by his own act, whereas this was the act of the bail. So is *Salk.* 3. and the caſe I cited before out of *Yelverton*, where a voluntary appearance was held to bind the party, but not the bail.

4. The laſt branch of my exception to the foundation of this *ſcire facias* is a diſcontinuance. For the appearance was in *Hilary* term, ſince which that action has never been proſecuted, as appears by the return of the *certiorari*, ſo that as to that action the principal and bail were all out of court, and that cauſe never regularly continued in court. It muſt be obſerved, that this objection in the manner I now make it, muſt take its riſe from an opinion, that the proceedings in *Trinity* term have no connexion with, or dependance upon thoſe of *Hilary* term. I would now conſider it in another view, by ſuppoſing them to be in the ſame action, ſo as to put it both ways, either they were, or they were not; if they were, even then there is a diſcontinuance between *Hilary* and *Trinity* term. If they were not, then the firſt cauſe has never been proſecuted; and as to the ſecond, the bail are not liable in that collateral action: So that taking it either way, it will appear, this *ſcire facias* has iſſued without a proper foundation.

To recapitulate the ſubſtance of what I have offered. Firſt, we ſay the principal was never regularly in court, and conſequently the recognizance was void. But if he was well brought into court, and the recognizance well taken; yet it will not ſubject the bail to that action wherein the plaintiffs have recovered. And if it will extend ſo far, yet it appears, the declaration was not delivered in

time, nor that cauſe ever regularly continued in court. But if the court ſhould be of opinion, this writ is good in point of foundation, yet then we ſay it is defective in point of form. The breach is not well aſſigned, for the reaſons I before mentioned. And laſtly, though none of theſe points ſhould be with us, yet the variances are fatal. And therefore I pray, the award of execution may be reverſed.

Reeve contr. As to the exception to the breach; we have aſſigned it in the words of the condition, which are, that he ſhall render himſelf *in executione judicii*. And though I muſt admit the inſtances put, where this condition may be performed by a render which may not be in execution of the judgment; yet no caſe can be ſhewn, where the plaintiff is obliged to aſſign the breach ſo large as to exclude all the different ways which may be conſtrued a performance within the intent, though not within the letter. In ſuch a caſe the party muſt come and excuſe himſelf, and the law, in favour of him who perhaps has complied as far as was in his power, will allow that excuſe. A condition to re-enfeoff is performed by leaſe and releaſe; but yet it was never alleged, that the party did not make a releaſe, but only that he did not re-infeoff; and if he did make a releaſe, that muſt be ſhewn on the other ſide. The precedents are as this writ is. *Co. Ent.* 616. *Officina Br.* 277, 297.

As to the variances, I ſhall not enter into any debate whether they are material or not; but what I rely upon is, that they ought to have demanded *oyer* and taken advantage below. Now it is too late; for the recognizance is not properly before the court, and they ought not to have brought it up. And as to what is ſaid as to the effect of *in nullo eſt erratum*, I take it in this place to be a demurrer to this part, which is immaterially aſſigned. I believe a deed or a bond was never ſent for up by a *certiorari* in order to aſſign variances between them and the declaration, but the proper way to have advantage of thoſe variances is to pray *oyer*. This recognizance is in the ſame reaſon with the bond or the deed, for it is the ſpecialty upon which the action is grounded.

As to the other objections, which go to the judgment in the original action: The anſwer I give them is, that theſe defendants cannot aſſign that for error, for the bail can aſſign no matter which lies properly in the mouth of the principal: they alone, or by joining with the principal, cannot have error of that judgment. They cannot aſſign that no *capias* iſſued againſt the principal. 1 *Ven.* 38. And this anſwer will ſerve for the objection, that the declaration was not delivered in time; for they are ſo far from having a power to aſſign that for error, that in 2 *Ven.* 143. it was held, they could

not ſo much as plead it to the *ſcire facias*. And every body knows, that even matter which is pleadable to the *ſcire facias*, as a releaſe, cannot be taken advantage of after judgment in *ſcire facias*, no not by *audita querela*. *F. N. B.* 104. *i.*

Strange replied. Our pleading over can never cure a defect in their aſſigning the breach. In 1 *Sid.* 184. in treſpaſs the plaintiff had not alleged a poſſeſſion, and it was held, Not guilty did not cure it. So in *Butts*'s caſe, 7 *Co.* it is ſaid, pleading over ſhall in ſome caſes help a defect in point of form, but in no caſe a defect in point of ſubſtance. This caſe of a recognizance differs from that of a bond, one is a matter of record, and the other *in pais*, and it may as well be brought up as the original is. But whether it was proper to ſend for it or not, is not now the queſtion, ſince they have admitted the fact to be as we have alleged it, and then put it in judgment, whether upon that ſtate of the caſe it be error in point of law or not. It is as inſufficient to aſſign the breach in the words, as it is to plead performance, which may be ill. *Lat.* 16. The covenant was to deliver all his money, and held not ſufficient to plead he had delivered all. The general anſwer, that the bail ſhall not impeach the judgment againſt the principal, will not go to my ſecond objection; for there I do not diſpute the validity of the proceedings as between the parties, but only inſiſt they are not binding as to the bail. As in the caſe in *Yelverton* the bail did not overthrow the judgment for want of eight days warning, but only made uſe of that objection to excuſe themſelves, without impeaching the proceedings *quoad* the principal.

C. J. Some of the exceptions would hold, if the party did not come too late; and others, if they came out of the mouth of the principal. But as they lie under both thoſe diſadvantages, in coming too late, and from an improper perſon; I think they can have no weight in this caſe. The objection to the breach ſtrikes at the recognizance itſelf, which is indeed but oddly penned. It ſhould not have been ſo ſtrait, for courts of juſtice ought to take ſuch as will anſwer the effect of the plaintiff's demand. The effect will be anſwered by a render, though not *in executione judicii*, provided the party be liable to be ſo.

The others inclined to affirm. But it was put off to another day, when Serjeant *Branthwayte pro quer' in errore*, argued, that the breach is not well aſſigned, becauſe they charge us with not doing an act, which can only be the act of the plaintiff in the action (*i. e.*) the having him in execution of the judgment. For all we can do, is to ſurrender him, ſo as the other may have him in execution; but to ſurrender him in execution is not in our power. I agree it

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is a general rule, that the breach may be aſſigned in the words of the condition; but it is with this exception, which goes to our caſe, that where the natural performance of that condition is what the words themſelves do not import, there you muſt leave the words, and go to that which amounts to a performance within the intent of the condition. A pleader is to go according to the operation of law, and not the words of a deed. The grant of one jointenant to another muſt be pleaded as a releaſe. 2 *Saund.* 97. As to the precedents, they were as much in favour of the caſe of *Chetley* v. *Wood* in *Salk.* 659. as they are in this caſe, but yet they had no influence upon the court, becauſe they ſaid they were againſt law.

As to the variances, they were ſo fully preſt upon the former argument, that I ſhall not meddle with them; nor indeed is there any occaſion, for I do not find it is ſo much as pretended, that they are any ways to be ſolved. But the only thing I ſhall apply myſelf to is, to prove that we are not too late to have advantage of them, which was objected to us. I agree, no variance can be aſſigned between the bond and the declaration, upon a writ of error; and the reaſon is, becauſe in judgment of law the bond which was once in court is delivered out again to the party at the end of the term. But that reaſon has no place in the caſe of a record, which always remains in court. This court ſends to inferior courts for their records, and will adjudge upon them, though the party might have had the ſame advantage below. A man below may have *oyer* of an original upon which the *ſcire facias* is built. And for the point, that he was not too late, he cited *Yelv.* 218. *Hob.* 4. 2 *Cro.* 331.

Reeve contra. After a *ſcire feci* returned, the party cannot have advantage of what might have been pleaded. *Salk.* 262, 264. There is no difference between a record and a matter *in pais*, where it is not part of the ſame record, as this recognizance is not. 11 *H.* 4. 47. *b.* 1 *Roll. Abr.* 760. The defendants might have had a writ of error *tam in redditione judicii quam in adjudicatione executionis*; and if upon a common writ of error the ſame advantage might be had, what occaſion was there to provide a ſpecial one? And this differs widely from the caſe of an original, for that is only part of the proceſs: But this is like a note or a bond, the ground and cauſe of the action.

C. J. At preſent this recognizance is no part of the record. The defendant by praying *oyer*, might have made it ſo; and if the court below had denied *oyer*, (which by the way they did) he would have had the ſame advantage on a bill of exceptions. I am ſorry thoſe

who were concerned below had not the courage to do it, for by this means we are now to affirm a judgment, which if all the parts of it were properly before us, we ſhould be bound to reverſe, and by this artifice the juſtice of this court is eluded. *Powys* J. *accord'*.

Eyre J. In *Trevivian* v. *Lawrence* (which I was counſel in) the judgment on which the *ſcire facias* was brought, was really of another term than the recital mentioned; and the court held, we could have no advantage of it after a *ſcire feci*.

Adjournatur, to look into the caſe in *Yelv.* And the laſt day of the term the Chief Juſtice ſaid, they had peruſed the record, which is *Trin.* 9 *Jac.* 1. *rot.* 305. and nothing is entered there, but the award of execution, with a mark in the margin, that a writ of error was allowed; and whether the judgment was fetched up by a *certiorari*, or by a ſpecial writ of error, does not appear in the report (but they inclined it was by the latter) ſo that caſe was of ſmall authority. The judgment of *C. B.* was affirmed.

Michaelmas Term

6 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Juſtice.*
Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Forteſcue Aland, *Knt.*
Nicholas Lechmere, *Eſquire, Attorney General.*
Sir William Thompſon, *Knt. Solicitor General.*

Memorandum; The Lord C. J. *Pratt* was abſent all this term, being ill of an ague and fever.

Leighton *verſ.* Leighton.

Officer examined as to condition but not ſubſtance of records.

WEARG moved, that the keeper of records and fines in *com' Monmouth* might attend the trial at bar with ſome of the original records, to anſwer an objection, that had been made upon a former trial, that all the records were worn out and obliterated. *Sed per curiam*, We never do it: You may have a rule for copies. And though the officer cannot be examined as to the matter of a record, yet he may give evidence of the condition of them in general, without producing them, and that will anſwer your purpoſe as well.

Haſſel's caſe.

FAZAKERLEY moved for a *mandamus* to be directed to the juſtices of peace of the county of *Cheſter*, commanding them to make a rate, to reimburſe one *Haſſel* the money he had expended as ſurveyor of the highways. And it was granted. *Mandamus* to reimburſe ſurveyor of highways.

Aſplin *and* Gray.

PER curiam, If the declaration be delivered ſo early in term, that the defendant has eight days in that term, he cannot move to change the *venue* the next term. Practice, *venue*.

Harvey *verſ.* Porter.

PER curiam, If on an old iſſue notice of trial be given before the firſt day in full term, it is ſufficient; and it need not be given before the eſſoin day. What is a term's notice of trial.

Between the Pariſhes of Ratcliffe Culy *and* Exall in Civit' Coventry.

UPON an order for removal of a widow and her two children from *Exall* to *Ratcliffe Culy*, it appeared, that ſome time ſince one *A. B.* was hired and ſerved for a year in the pariſh of *R. C.* and gained no other ſettlement before his death, therefore the juſtices adjudge the wife and her children to be ſettled in *R. C.* and ſend them thither as to the ſettlement of the huſband. An order to common intent is good.

Reeve moved to quaſh the order, becauſe a married man gains no ſettlement by any hiring or ſervice; and likewiſe becauſe the children are called *her* children and not *his*. *Sed per curiam*, We never make intendments to deſtroy an order, and it does not appear he was married at the time of the hiring, and if he was married during the ſervice, that will not prevent his ſettlement. And as to the children, we muſt intend them to be *his* by *her*, till the contrary appears; and that they are ſo is implicitly averred in the adjudication of the childrens being ſettled with him; for that they could not be, if they were her children by a former huſband, ſo we muſt take them to be his. Order confirmed.

Palgrave

Palgrave *verſ.* Windham.

Conſtruction of 8 Ann. c. 17.
Lill. Ent. 46.

CASE by the plaintiff as adminiſtrator of *J. S.* againſt the defendant as bailiff of the liberty of the duchy of *Lancaſter*, for executing a *fieri facias*, and removing the goods off the premiſſes before the landlord was paid his year's rent, purſuant to the ſtatute 8 *An. c.* 17. The general iſſue pleaded, verdict and judgment *pro quer'*, a writ of error brought, and the general errors aſſigned.

Yorke pro quer' in errore, made three points: 1. Whether upon this ſtatute any action lies againſt the officer. 2. Admitting it does, whether in this caſe the plaintiff has diſcloſed ſufficient matter to maintain an action. And 3. Whether it will lie for an adminiſtrator.

1. The firſt point depends upon the words of the ſtatute, which are, "That no goods ſhall be liable to be taken by virtue of any "execution, unleſs the party, at whoſe ſuit the execution is ſued "out, ſhall before the removal of ſuch goods from off the pre-"miſſes, pay to the landlord or his bailiff one year's rent (if due), "and the ſheriff or other officer is impowered and required to levy "and pay the plaintiff as well the money ſo paid for rent, as the "execution money."

Upon this it is plain, that the plaintiff in the action, and not the officer, is the perſon who is to be accountable to the landlord; and if he does not pay the rent, the landlord will have his remedy againſt him. But what is all this to the officer? He is to execute the King's writ in the ordinary manner, with this only difference, that if the plaintiff pays the rent, then he muſt go farther, and levy that as well as the execution money; but if it be not paid (as in this caſe it appears it was not) then the payment being in the nature of a condition precedent, the officer was not obliged to go out of his way, and conſequently there were no *laches* whereon to found an action.

2. But if an action will lie againſt the officer, yet I apprehend the plaintiff has not diſcloſed ſufficient matter to maintain one, no, not even to have obliged the plaintiff in the action, to pay the rent; for here is no notice or demand alleged, and as this is a matter which lies only in the knowledge of the landlord, he ought to do the firſt act, by giving notice. 1 *Roll. Abr.* 463. *pl.* 16. *Hob.* 51. *Alleyn* 24. 1 *Bulſt.* 12. In a *quantum meruit*, you always aver notice.

It will be ſaid, that there is notice to the officer, but I take that to be as none, for no body will ſay the officer was bound to pay the money himſelf; and as to the verdict, it is true, that will help what is alleged, but can never add any new fact not mentioned in the declaration. *Salk.* 364.

3. This action lies not for an adminiſtrator. For the *git* of this action is either the non-payment of the rent, or the tort in removing the goods. If the firſt, then I ſay the officer is not bound to pay the money. If the ſecond, then this being a perſonal tort, an adminiſtrator can maintain no action for it. The inteſtate had no particular intereſt in the goods (as the plaintiff in the execution after payment of the rent would have) but this is an action ariſing merely *ex delicto.* At common law before the ſtatute *de bonis aſportatis in vita teſtatoris*, it is certain an adminiſtrator could have no ſuch action; and I take it, that ſtatute has never yet been extended ſo far as this caſe. In the caſes of ejectment, ward, and *quare impedit*, there was an intereſt veſted before the death of the teſtator, of which there is none in this caſe.

Branthwayte Serjeant *contra.* The miſchief intended to be remedied by this ſtatute was, the fraud which tenants committed, in ſetting up a ſham execution to defeat the landlord of his rent; and therefore it ought to have a liberal conſtruction. The words are prohibitory, that the goods ſhall not be removed; and therefore as the officer had notice, he ſhould have ſtopped his hand till the money was paid, and not have removed the goods, to evade the ſtatute. And it would have been a good return, for him to ſay, that he had ſeized the goods, but could not proceed to expoſe them to ſale, for that the landlord had demanded a year's rent purſuant to this ſtatute, which the plaintiff was not there ready to pay.

As to the want of alleging a demand upon the plaintiff in the action, that is not the *git* of this ſuit, it is the tort in removing the goods; and there being notice to the officer, his proceeding after is a wrong to us, for which he is anſwerable. But ſurely after a verdict, every thing neceſſary to make this an offence, muſt be ſuppoſed to have been proved.

As to our ſuing as adminiſtrator, there are caſes ſtronger than this. The difference is in actions *by* and *againſt* an adminiſtrator. This is not a wrong to the perſon, but to the eſtate of the inteſtate. Upon the ſtatute of *E.* 6. an action lies *by* but not *againſt* an executor, for not ſetting out of tithes. 1 *Sid.* 88, 407. 1 *Ven.* 30. In 4 *Mod.* 403. an executor maintained an action for a falſe return. 2 E. 6. c. 13.

Here the inteſtate had an intereſt in the goods; they were a pledge for his rent, but are now loſt. This was over-ruled in *C. B.*

Yorke replied. In the caſe of tithes there is an intereſt veſted, and that in 4 *Mod.* was after execution, where the ſheriff having the money in his hands, was liable to an action of debt. *Cro. Car.* 539. But *Jones* 173. the better opinion is, that upon meſne proceſs ſuch an action is not maintainable. In that caſe too the debt was abſolutely loſt, but here the landlord or his adminiſtrator may ſtill ſue the tenant for his rent.

Powys J. held the action lay againſt the officer for the tort, and that though notice is requiſite, yet the want of alleging it is helped by the verdict. And that the removal of the goods was a wrong to the eſtate of the inteſtate, for which his adminiſtrator might maintain an action. *Et per Eyre* J. As the officer had notice, that is enough to ſubject him, though it does not amount to a demand of the money of the plaintiff in the execution; which, though the ſtatute is ſilent, yet upon the reaſon of the thing I take to be neceſſary. Executors and adminiſtrators may ſue for an eſcape, and here the inteſtate had an intereſt, for which his adminiſtrator may bring an action. To which *Forteſcue* J. agreed. And the judgment of *C. B.* was affirmed.

N. B. I was counſel in this cauſe as an aſſiſtant to a Serjeant in *C. B.* and took another exception, that there was no ſuch ſtatute as the plaintiff had declared upon, for he ſets out with one made at the Parliament begun and holden 8 *July* 8 *Ann.* when it was in 7th of that Queen. But the court held, that the ſaying afterwards *contra formam ſtatuti in eo caſu edit' et provis'* had ſet the matter at large: And then it being a publick act, they were bound to take notice of it. And the plaintiff was not prejudiced by the miſtake.

Wegerſloffe *and* Keene.

There may be a partial acceptance of a bill of exchange.

ACTION upon the caſe upon the cuſtom of merchants brought by the perſon to whom a foreign bill of exchange is made payable, againſt the acceptor. And the declaration ſets forth, that one *James Collet*, being a merchant reſiding at *Chriſtiania* in *Norway*, according to the cuſtom of merchants drew his firſt bill of exchange upon the defendant, requeſting him to pay the plaintiff ſuch firſt bill (his ſecond not being paid) of 127 *l.* 18 *s.* 4 *d.* which bill was afterwards, *viz.* 9 *December* 1717. ſhewn to the defendant, who accepted to pay 100 *l.* part thereof, upon the 8th day

of *February* following, by virtue whereof he became chargeable, *et in conſideratione inde eiſdem die et anno ultimo ſupradictis ſuper ſe aſſumpſit*, to pay the ſame on the ſaid 8th day of *February tunc prox' ſequentem*, which he has not done according to his undertaking. There is likewiſe a count for monies had and received, and an *inſimul computaſſent*. The defendant as to thoſe two counts pleads *non aſſumpſit*, and as to the count upon the bill, he pleads, that the ſaid *James Collet* drew another bill for 100 *l.* only, wherein he countermands the payment of the odd 27 *l.* 18 *s.* 4 *d.* by virtue whereof the defendant paid the 100 *l.* in ſatisfaction of the firſt bill, and the plaintiff accordingly received it in ſatisfaction. The plaintiff, *proteſtando* that the defendant did not pay it in ſatisfaction; for plea ſaith, that he never received it in ſatisfaction. And to this replication the defendant demurs.

Strange pro defendente. I ſhall not trouble the court with an exception which has formerly been taken to theſe replications, that the payment in ſatisfaction being admitted, the traverſe of the acceptance is immaterial; for I am ſenſible, it has been adjudged to be well enough in the caſe of *Young* v. *Ruddle*, *Salk.* 627. and of *Hawkſhaw* v. *Rawlings* in this court, *Hil.* 3d of his preſent Majeſty, upon this ground, that there can be no payment in ſatisfaction, without an acceptance in ſatisfaction; and therefore a traverſe of the acceptance is an argumentative denial of the payment; for if the plaintiff did not accept it in ſatisfaction, the conſequence of that is, that it was not paid in ſatisfaction.

Laying therefore the plea and replication aſide, I ſhall take up the caſe as it ſtands upon the declaration, and upon that offer ſome things diſtinctly, both as to the matter, and as to the manner of it.

As to the matter of it, the caſe is no more than this; the perſon to whom a foreign bill of exchange is made payable, brings his action againſt the drawee, upon a partial acceptance for ſo much of it as he undertook to pay, and counts upon the cuſtom of merchants.

The ſingle point which will ariſe upon this caſe is, whether a partial acceptance be good or not within the cuſtom of merchants. And I ſhall endeavour to prove, that this acceptance is a void acceptance, and conſequently the plaintiff has no cauſe of action.

That I may not be miſunderſtood when I call this a void acceptance, I would premiſe, that I do not mean, it is ſo abſolutely void as to exclude any remedy againſt the acceptor, for I muſt admit, that this acceptance will create a contract between the parties, upon which an action upon the caſe would have laid. But what I

ſhall

ſhall inſiſt upon is, that this is a void acceptance within the cuſtom of merchants, upon which the plaintiff has founded his caſe; and if it be void within the cuſtom of merchants, then, whatever effect it would have as a private contract between the parties, will be a matter foreign to the preſent queſtion, in as much as the plaintiff has not relied on it as ſuch, but has brought his action upon the cuſtom.

I have inquired into the practice of merchants in this caſe, but have not been able to get any certain account of this matter. The true reaſon of which I apprehend to be, that it is a caſe which ſeldom or never happens amongſt merchants, for they honour one another's bills, though there are no effects of the drawer's in their hands; and they would eſteem it the greateſt blemiſh that could be caſt upon them, if their correſpondent ſhould once refuſe to anſwer their bills any further than they had effects in his hands.

What account I have received, I ſhall ſubmit to the court. Some are of opinion, that an acceptance for part is an acceptance for the whole, in as much as it deprives the party of the benefit of proteſting, and ſo reſorting back to the drawer. But I apprehend there is no reaſon at all for this. To ſay that becauſe commonly a man does honour another's bill beyond what effects he has in his hands, that therefore he muſt do it, is a ſtrange concluſion. For ſuppoſe he has but 20 *l.* of the drawer's in his hands, and is bound to anſwer a bill for ſo much; it would be highly unreaſonable, that in caſe the other ſhould draw for 10000 *l.* this man muſt either pay the whole, or ſubject himſelf to an action for non-performance of the condition.

But if this notion ſhould prevail, that an acceptance for part is an acceptance for the whole, yet as on the one hand it charges the acceptor with the intire ſum, ſo on the other hand it diſcharges him of this action. For then there can be no colour to ſplit the demand into two actions, but the plaintiff, in declaring for part ought to ſhew, that the reſt is ſatisfied. *Salk.* 65.

Others are of opinion, that the party ought not to have taken this acceptance, but proteſted the bill as to the whole, and ſent for another to the value of what the drawee would anſwer. This likewiſe makes for the acceptor the defendant.

I am informed indeed, there is one gentleman does attend to ſay, that this matter has happened in his own experience; but he by what I find is alone in that opinion, and perhaps may not have conſidered the conſequences of it.

As there is this diverſity of opinions upon a matter which ſeldom or never comes in practice, I ſhall take it upon the reaſon of the thing, with a view likewiſe to the many inconveniencies which will follow as a conſequence of eſtabliſhing this partial acceptance.

The better to come at this, it may not be improper to ſtate the method of tranſacting theſe affairs. When the party to whom a bill of exchange is made payable receives it, he immediately applies to the drawee to get his acceptance: if he accepts it, nothing farther is done till the day of payment, and then if it be paid the matter is at an end. But if the drawee will not accept it, then the party is to proteſt the bill, and ſend back the proteſt by the next poſt. When the time of payment comes, he tenders the bill again, and then the drawee may either pay it or refuſe it: if he refuſes it, then there is ſecond proteſt for non-payment, and the bill itſelf is returned. And ſo it is if he accepts it, and afterwards refuſes to pay it. From all this I would infer, that there can be no partial proteſt for non-acceptance, which as I am informed is a proteſt not in the memory of any but one of the notaries publick. The words of all proteſts are, *I exhibited the original bill to the perſon to whom directed, and demanded his acceptance thereof.* Now an acceptance of part is not an acceptance *thereof*, no more than payment of part is a payment of the whole. There is a book which goes by the name of *Advice concerning bills of exchange*, and is eſteemed amongſt thoſe who are moſt converſant in theſe affairs. And in *fol.* 33. of that book it is ſaid, that nothing but an acceptance to pay *ſecundum tenorem billae* can deprive the party of the benefit of a proteſt. And in *fol.* 16. of the ſame book he puts the caſe of a bill drawn on *A.* and *B.* who are not joint traders, and an acceptance by one only: this ſays he goes for nothing, and the party muſt proteſt the bill as in caſe of no acceptance. Theſe are the words of the book: and by putting the caſe of two who are not joint traders, I ſhould apprehend he means, that each being charged with a moiety, the acceptance of one is but an acceptance to pay a moiety, which is but a partial acceptance, and therefore void: and this is explained by the caſe of *Pinkney* v. *Hall*, *Salk.* 126. where one joint trader accepted a bill, and it was held to be the acceptance of both, becauſe both were equally liable to pay the whole. And to this purpoſe likewiſe, is *Molloy de Jure Maritimo* in the chapter concerning bills of exchange.

If there can be no proteſt for non-acceptance of part, I would conſider how the caſe would ſtand in regard to allowing this partial acceptance: the natural and plain conſequence of that will be, to put it in the power of the drawee, to defeat the other of the benefit of proteſting a bill for 10,000 *l.* by his acceptance to pay

one penny only; for this I would ſubmit, that if the party *may* take ſuch an acceptance, he *muſt* take it: if it will be good, he cannot refuſe it, for it is not at his election to charge the drawer but upon the other's default; the drawee is the perſon he muſt firſt reſort to, and if he refuſes, then and not till then, is there a proper remedy againſt the drawer; and therefore in the action againſt the drawer the plaintiff muſt ſhew a proteſt, which is an endeavour to receive the money of the drawee. *Salk.* 131.

But even admitting there may be a partial proteſt for non-acceptance, yet the inconveniencies which will follow of courſe are ſo great, that I hope it ſhall never be eſtabliſhed by the judgment of the court.

It would be endleſs to put caſes where it has been held, that rent-charges and the like cannot be apportioned; and therefore I ſhall rely entirely upon the reaſon of the thing, that in this caſe the contract between the drawer and the perſon to whom the bill is payable is entire and not diviſible. By this contract the drawer (and conſequently the indorſor) ſubjects himſelf to an action if the money be not paid at the time: but though he becomes liable to one action, yet there is no reaſon, that by tranſactions between the party to whom the bill is payable, and the drawee, to which he is not privy, this contract ſhould be branched out into ſeveral actions, which will unavoidably be the caſe of every partial acceptance: for I do not apprehend how this can be reduced to one action by refuſing this partial acceptance, and proteſting for the whole; becauſe (as I obſerved before) if the party *may* take it, he *muſt* take it, and can charge the drawer no farther than there is a default in the drawee.

As therefore two actions are the feweſt he can be charged with, I would beg leave to inſtance how he may be charged with a great many. The acceptor will charge him as far as his undertaking: then another for the honour of the drawer (as is uſual amongſt merchants) may undertake for another part, and by the ſame reaſon a third, and a fourth, and no body can ſay where it ſhall ſtop: ſo many different perſons may accept for ſo many different pence, and every one of theſe has his diſtinct remedy againſt the drawer.

This is too great an inconvenience to be got over; and it is ſuch an inconvenience (I mean the multiplicity of ſuits) as the common law has always endeavoured to meet with. In the caſe of *Hawkins* v. *Cardee*, *Salk.* 65. it was held, that the indorſee of part could have no action, becauſe ſays my lord chief juſtice *Holt*, the drawer having only ſubjected himſelf to one action, it cannot be divided ſo as to ſubject him to two. If the grantee of a rent-charge levies a fine of part, the conuſee cannot compel an attornment, for that

would be to give two actions againſt the tenant. So if a feoffment were made to a man and his heirs with warranty, and he makes a feoffment to two, the warranty is gone. If two take lands jointly with warranty, and one makes a feoffment: the warranty is gone as to him, but remains as to his companion, ſo as he may vouch for a moiety; and at common law if they had made partition, the warranty was loſt. *Co. Litt.* 187. *a.* And all this goes upon that ground, that it being *res inter alios acta*, it ſhall not turn to the prejudice of a third perſon. But this partial acceptance is a matter tranſacted between mere ſtrangers; and therefore ſhall not hurt the drawer, who was no party to it. No act of theirs, which would be prejudicial to him, ſhall bind him. But the ſubjecting him to ſeveral actions will be a prejudice; therefore he ſhall not be ſubjected to ſeveral actions.

The great benefit ariſing to the publick from theſe bills is, their being negotiable and paſſing about as well as money; for every body is ſenſible, that without the aſſiſtance of theſe bills our trade could never be carried on for want of ſufficient *ſpecie*; not to mention the trouble and danger in returning money, which is avoided by this expedient. It is this benefit which the publick receives from theſe bills, that has intitled them to all the favour they have received, of which innumerable inſtances might be given. For this reaſon it has been held, that the bare drawing or accepting a bill, makes a merchant for that purpoſe. 1 *Salk.* 125. *Show.* 125. 2 *Ven.* 295. Now if what is contended for on the other ſide ſhould prevail, the publick will be deprived of this great benefit; for no man will take this bill as ſo much money in the way of trade, when he is to reſort to one man for one part, and perhaps ſend out of the kingdom for the other to a place where he has no correſpondent. In the caſe of *Jocelyn* v. *Laſerre*, which was in this court *Hill.* 11 *Ann. rot.* 214. where the bill was to pay *out of my growing ſubſiſtence*, it was held, that in regard his growing ſubſiſtence might never amount to the ſum drawn for, therefore this was not a bill of exchange within the cuſtom of merchants, for no body would take it upon ſuch a contingency. And the caſes of promiſory notes ſince the ſtatute have gone upon the ſame reaſon. *Smith* v. *Boheme*, *Mich.* 1 *Geo. in B. R.* which was *to pay money or ſurrender a man to priſon.* And the caſe of *Appleby* v. *Biddle*, *in B. R. Hill.* 3 *Geo.* which was to pay *ſo much to A. if I do not pay ſo much to B.* and both theſe were held not to be within the ſtatute, upon that only reaſon that they were not negotiable. Ld Raym. 1396.

Another inconvenience which naturally occurs upon this occaſion is, that the drawee will inſiſt to have the whole bill delivered up, when he pays but a part only. For according to the authors who treat

treat of this ſubject he can never charge the drawer, when they come to make up their accounts, with more than he has vouchers for under the hand of the drawer. In *Lex Mercatoria* 274, it is ſaid, that if the bill be loſt, the drawee cannot juſtify the payment, though he has a letter of advice. And this refutes all the expedients of indorſing part, or giving a ſpecial receipt for ſo much, becauſe in neither of thoſe caſes will the drawee have any authority to produce under the hand of the drawer. If the drawer then refuſes to allow what the other has paid, his only remedy will be to bring his action; and how he will be able to maintain it upon the cuſtom of merchants I muſt confeſs myſelf at a loſs to find out, for he will want the neceſſary evidence to maintain ſuch an action, which is the bill itſelf that was drawn upon him.

If this then will be the caſe, where he pays the money without taking up the bill; I muſt contend that by all the rules of prudence and juſtice he may inſiſt to have the whole bill delivered up to him, when he only pays part of it according to his acceptance.

Suppoſing him then in poſſeſſion of the whole bill, I would conſider in what a condition we have left the party to whom it was made payable. He muſt be ſuppoſed to have advanced a conſideration adequate to the whole ſum, and conſequently is in juſtice intitled to his whole money of ſomebody or other. It will be ſaid, that he may get what he can of the drawee, and then go back to the drawer for the reſidue. It is true he may do ſo, and the drawer may be a man of ſo much honour as to pay him every farthing. But what muſt he do when he finds he is miſtaken in his man; when the drawer (inſtead of ordering him the money as he expected) ſhall tell him, No, you have nothing to produce under my hand, and if you have been ſo fooliſh as to deliver up the bill, you muſt take it for your pains. I know of no remedy in this caſe but what would be worſe than the diſeaſe, and therefore the prudenteſt thing he can do will be to ſit down by the loſs.

And this will be ſo far from being a trick in the drawer, that it will be no more than what every prudent man will do. For if upon the report of what has been done he ſhould advance the reſidue of the money, yet ſtill there is a bill ſtanding out againſt him for the whole, upon which bill it cannot appear he has paid the money which the drawee had left unpaid. And whether in that caſe he would not afterwards be anſwerable for the whole, may be proper to be conſidered.

I have now done with what I had to offer in maintenance of the negative of the queſtion I propoſed to ſpeak to, and ſhall therefore proceed

proceed to take notice of what was hinted at upon the former argument in behalf of the plaintiff in this caſe.

It was ſaid that the drawee may (and very often does) accept to pay the money at a different time from what is appointed in the bill. I muſt admit he may do ſo, but ſurely that caſe can bear no proportion to this caſe. It is not liable to any of the inconveniencies I mentioned; it is the ſame as if the bill had at firſt given him a longer time, and it is well known that after acceptance a month or two will break no ſquares where the man is good: With this further, that amongſt merchants ſuch an acceptance is eſteemed a general acceptance to pay the money according to the tenour of the bill. Beſides, *Molloy* ſays, that in ſuch a caſe the bill muſt be proteſted, which cannot be done in our caſe.

It was further urged to be highly reaſonable, that the drawee ſhould honour the bill as far as he had effects. I admit this to be reaſonable, and perhaps it would not have been impoſſible for the plaintiff to have declared in ſuch a manner, as to have charged the defendant to the amount of his acceptance: But we are here upon the cuſtom of merchants, and whatever might be reaſonable in caſe of private property, will ceaſe to be ſo, when it appears to be pregnant of ſo many inconveniencies to the publick as I have mentioned. And if the plaintiff has it in his power to frame a caſe wherein he may do himſelf juſtice, that makes the argument ſtronger againſt ſuffering him to break in upon the publick convenience for his private benefit. The policy of the law is, rather to let one man ſuffer, than to introduce a general inconvenience: But here we are to be led into the greateſt inconveniencies, even in a caſe where there is no danger of the parties ſuffering in the leaſt; for he has a remedy, which ſtands clear of all theſe inconveniencies, and there will be no harm in leaving him to that.

It was ſaid, that if the drawer (who is ſuppoſed to know what effects he has in the other's hands) by drawing for more, ſubjects himſelf to ſeveral actions, it is his own fault. The anſwer to this is, that the very drawing for more, deſtroys the preſumption that he knew how accounts ſtood. But amongſt merchants, as I obſerved before, that is not the caſe, for they often honour one another's bill, where there are no effects at all.

But even admitting the drawer does not ſtand altogether clear of this objection, yet ſtill this may be the caſe of one who cannot be ſuppoſed to know how the accounts ſtood between the drawer and the drawee: For it may happen this bill may be indorſed, and then the indorſor is to be charged in the ſame manner

as the drawer. The indorſor will be liable to ſeveral actions, though he is no ways privy to any of the tranſactions between the indorſee and the drawee.

Upon breaking the caſe upon the former argument a difference was taken between the caſe of the acceptor and that of any other perſon: that *he* ſhould not come and diſcharge himſelf againſt his own acceptance, whatever the other might have done as to refuſing this partial acceptance. If this was his caſe only, it might be reaſonable to extend this acceptance as far as it will go; but the hardſhip is, that what is law in his caſe, muſt likewiſe be law in the caſe of the drawer and indorſor; ſo that here are two innocent perſons who are to be involved in the ſame common fate; and that is never to be ſuffered, eſpecially when the drawee may be charged in another manner, which will not affect the drawer or the indorſor.

But if this partial acceptance ſhould be thought good within the cuſtom of merchants: yet the plaintiff can never recover in this action, in regard to the manner in which he has declared.

My firſt exception is, that the plaintiff by his own ſhewing has brought his action too ſoon. This is a declaration of laſt *Michaelmas* term, and the acceptance is laid to be the 9th of *December* 1717. to pay upon the 8th of *February* following, in conſideration whereof he did the ſame day and year laſt mentioned, which was the 8th of *February* 1717. promiſe to pay the money on the 8th day of *February tunc proxime ſequen'*. Now there muſt of neceſſity be the intervention of a whole year between the 8th of *February* 1717. and the 8th day of *February* following: and then the caſe is no more, than that the plaintiff complains, that the defendant on the 23d of *October* had not paid him a ſum of money which of his own ſhewing was not to become due till the 8th of *February* following. If it were neceſſary to cite caſes in maintenance of this exception, there are 1 *Sid.* 373. 1 *Ven.* 135.

Another exception is, that the plaintiff has not alleged any requeſt before bringing the action, which he ought to have done; for the merchant who accepts is eaſy to be found, but the party to whom the bill is made payable may only be a traveller to whom the other cannot reſort to pay the money. And this differs from the caſe of a bond, for there it is for the benefit of the obligor to ſave the penalty, ſo there needs no requeſt to him to do an act for his own benefit. It will be ſaid, that the action is a requeſt; but if it be, ſtill it recurs to that queſtion, whether a requeſt at the time of bringing the action is ſufficient. And it is plainly not ſo, for

then it is a requeſt to pay the money four months before it became due.

I ſhall trouble your Lordſhip with but a word more, and it is this, the bill runs, Pay this my firſt bill *my ſecond not being paid*, and therefore I muſt ſubmit it, whether they ought not to have averred, that the ſecond was unpaid. Indeed in the caſe of *Eaſt* v. *Eſſington*, *Salk.* 130. it was held well after a verdict, becauſe if the ſecond was paid, the jury could not find *aſſumpſit* as to the firſt: he was not to pay the firſt unleſs the ſecond was unpaid, ſo the jury finding him bound to pay the firſt, that is an argumentative finding the ſecond unpaid. But the court in that caſe inclined, it would have been ill upon a demurrer.

It will be ſaid, that this ſhould have been ſhewn for cauſe of demurrer. But this exception goes to the cauſe of action itſelf, and may as well be taken advantage of upon a general demurrer, as the want of ſetting out an attornment was in the caſe of *Long* v. *Buckeridge*. *Ante* 106.

The whole both with relation to the matter and the manner of this declaration may be reduced to this dilemma: either this partial acceptance is good, or it is not. If it is good, yet the plaintiff has come too ſoon, without alleging what is neceſſary to make out his caſe, and conſequently can never recover in this action. If it is not good, that alone will be ſufficient to intitle us to judgment for the defendant.

Reeve contra. I am no otherwiſe prepared to argue this cauſe, than by acquainting the court, that a gentleman has often attended, to inform you, that it is practicable to proteſt a bill for non-acceptance of part, and then reſort back to the drawer. As to the inconveniencies which are urged, they are as great of our ſide upon account of death or acts of bankruptcy. The drawee is not prejudiced; and as to the drawer, if part is paid, his debt is ſo much leſſened, which is a benefit to him.

As to the firſt objection to the declaration, that we have brought our action too ſoon: it runs, *in praedict. octavum diem Febr. tunc proxime ſequentem*; ſo to ſupport the declaration you will reject *proxime ſequentem*, and then it ſtands as a promiſe to pay in *February* 1717. and the action is in *October* following.

2. No requeſt was neceſſary, for upon the acceptance a duty ariſes, and this is not a collateral promiſe.

3. If

3. If the defendant had paid the ſecond bill, he ſhould have pleaded that matter in his diſcharge: and as to the caſe of *Eaſt* v. *Eſſington*, that was againſt the drawer upon the firſt contract, but this is againſt the acceptor upon a new contract.

Strange replied. As to *praedict'*, it does not make the ſentence inconſiſtent with *proxime ſequentem*; for it is common to call the ſame day in a different year, the ſame day generally: and here it is no more than that the party promiſes on 8 *February* in one year to pay upon the ſame day in another year: and where a thing is grammatically right, the court will never reject it, as was held in the caſe of *Wyatt* v. *Aland in B. R. Trin.* 2 *Ann.*

Salk. 324.

They ſhould have ſhewn the ſecond bill unpaid, for it is in the nature of a condition precedent to their having any right to this action. As to the requeſt, no debt ariſes upon the acceptance, for an *indebitatus aſſumpſit* will not lie upon a bill of exchange. *Salk.* 125.

Powys J. Either party might have refuſed this partial acceptance, and they were at the ſame liberty to take it: neither could force the other to it, but if both agree, *volenti non fit injuria.* The drawer truſts all to the diſcretion of the perſon to whom he gives the bill, and if that perſon leads him into inconveniencies, who can help it?

Where a bill runs, *Pay my firſt my ſecond not being paid*, action may be maintained on the firſt without averring the other was unpaid.

Eyre J. I think the declaration is well enough; we will reject *proxime ſequentem*, and then all is right: there is no difference between the caſe of the drawer and the acceptor, for if he pays either of the bills, the drawer is not liable. Acceptance of one is ſo of both, though in fact it amounts to no more than an acceptance to pay the contents of one of them, and payment of one is a diſcharge of both: ſo that the averment that the money was not paid upon the firſt goes to the ſecond alſo. I ſearched, but could not find the record, of *Eaſt* v. *Eſſington*; and by my notes I find it went off immediately upon the anſwer, that the verdict had cured it. The precedents are as this declaration. *Vidian Ent.* 31, 67.

Forteſcue J. I think there is a difference between the caſe of the drawer and acceptor, for the drawer is bound to pay all, the drawing being an actual promiſe; but the acceptor is bound to pay but one, and no action can be maintained but upon the very note which he accepts. There is another anſwer to the objection, that the action is brought too ſoon; and that is, that the plaintiff needed not ſet out any promiſe at all. 10 *W.* 3. *Stalk* v. *Cheeſeman*, *Salk.* 128. *Lowther* v. *Conyers*, which was upon a promiſſory note, and they

had left out *ſuper ſe aſſumpſit*, and yet it was held well enough, for the law raiſes a promiſe. And this is likewiſe an anſwer to the want of requeſt. In *Molloy* and the other books there is a whole paragraph about the partial acceptance of a bill of exchange, and they allow it to be good. So judgment was given for the plaintiff.

In count upon an acceptance, an expreſs *aſſumpſit* need not be laid.

Dominus Rex *verſ.* Tucker.

YORKE moved to quaſh the return of a reſcous of two perſons, becauſe it is only ſaid, that they could not afterwards be found, without ſaying *nec eorum aliquis*. *Cro. Jac.* 419. 3 *Bulſt.* 200. 1 *Roll. Abr.* 802. *Mich.* 11 *Ann. Davis* v. *Fuller*, where the return to a *ſcire facias* againſt three was, *non ſunt inventi* generally, and held ill. 3 *Cro.* 50.

Non ſunt inventi is no good return without *nec eorum aliquis*.

Darnall Serjeant *contra*. All the precedents in *Off. Br.* are thus. 2 *Keb.* 341, 436. *Nichil habent. Exacti non comparuer'. Nulla habent bona. Sed per curiam*, The difference lies between the affirmative and the negative. *Et ſemble* this return is ill. *Sed adjournatur*. And *Paſ.* 6 *Geo.* the return quaſhed.

Ducisſa Hamilton *verſ.* Incledon.

ERROR of a judgment in *C. B.* in an action upon the caſe upon ſeveral promiſes, verdict *pro quer'*, and general errors aſſigned.

In miſericordia, &c. is ſufficient in actions againſt peers.

Strange pro quer' in errore. A peer (and conſequently a peereſs) cannot be attached, but ſhould be brought in by ſummons; whereas this declaration runs, that the ducheſs *attachiata fuit ad reſpondendum. Sed per curiam*, Whether that be right or wrong is not material; for if it be wrong, yet according to the modern reſolutions you cannot reverſe a judgment by the recital of the writ, but muſt bring the very proceſs itſelf before the court.

Recital of a writ not to be argued from.

2. The ducheſs is put *in miſericordia* generally, which ought not to be; the ſtatute of *Magna charta*, *c.* 14. appoints *quod comites et barones non amercientur niſi per pares ſuos, et non niſi ſecundum modum delicti*. But though it ſays *per pares ſuos*, yet I admit that long uſage has veſted that power in the Judges of the King's courts, who are to be looked on as *pares quoad hoc*. The amercements of the nobility are now reduced to a certainty; a Duke 10 *l.* and an Earl or other Baron 5 *l.* And as to what may be ſaid, that here is an *&c.* which implies an amercement according to law.

To that I anſwer, that then there is no diſtinction made between the amercements of Peers and common perſons, which Mr. *Selden* in his treatiſe of Baronage ſays ought to be, for his words are, " That in caſe of amercements of Barons of Parliament upon non-" ſuits or other judgments ending *in miſericordia*, there is a ſpecial " courſe both for the ſum and the way of aſcertaining it, which " differs from the amercements of common perſons." And then he goes on and gives you the roll in *Edward* the Second's time, where a writ was directed to the juſtices *de C. B.* that they ſhould not amerce the abbot of *Crowland tanquam baro*, for that he held not *per baroniam*. Now there was no need of this, if he might be generally amerced. And my Lord *Coke*, 2 *Inſt.* 28. ſays, if a nobleman and a common perſon join in an action, they ſhall be ſeverally amerced, the nobleman at 100 *s.* and the common perſon according to the ſtatute. So is *Bro. Amercement* 2. *Sed per curiam*, It is the conſtant way, to ſay *in miſericordia*, *&c.* which implies every thing, and we cannot overturn the precedents. Judgment affirmed.

Beacon *verſ.* Peck.

If there be a *nichil* returned as to the lands, there may be a *ca. ſa.* after an *elegit*.

THE plaintiff took out an *elegit*, and by virtue thereof levied part of the debt upon the goods, and after a *nichil* returned as to the lands, ſues out a *capias ad ſatisfaciendum*, and arreſts the body of the defendant.

19 H. 6. 4. b. Dy. 162. b. 15 H. 7. 15. 1 Roll. Abr. 601. pl. 4. 2 Inſt. 395. 3 Co. 11, 12. F. N. B. 265. b. Hob. 56. 13 H. 4. 1. b.

It was moved to quaſh the *capias ad ſatisfaciendum*, becauſe the plaintiff by taking out an *elegit*, had waived any other execution. And for this all the old caſes were cited. But the court held the *capias ad ſatisfaciendum* was regular, for there being a *nichil* returned as to the lands, the *elegit* was but in the nature of a common *fieri facias*, upon which if part be levied, the plaintiff may afterwards have a *capias ad ſatisfaciendum*. The election is not compleat, unleſs the plaintiff has ſome benefit from the land; for the taking out the writ is not an actual election, but only in order to an election; and if there be no lands, there is nothing to chuſe, and conſequently no election.

Stibbs *verſ.* Clough.

Trin. 5 Geo. rot. 368.

DEBT upon a bond, conditioned to perform articles, which upon the plea appear to be an agreement, that the plaintiff ſhall furniſh the defendant with ale and beer to be ſold in his houſe at ſuch prices, and that he ſhould take it of no body elſe, but might be at liberty to take any other liquors (malt liquors only excepted): and what ſhould not be paid for at breaking up the trade, and were undrawn, ſhould be taken back. And then the defendant pleads performance. The plaintiff replies, that by the ſame articles it was further agreed, that what ſhould be drawn ſhould be paid for, and that there was ſuch a quantity of liquors unpaid for. *Demurrer inde*; and

The breach muſt be as particular as the covenant, and where a deed is pleaded the plaintiff cannot reply new matter in the deed, but muſt ſet it out upon *oyer*.

Yorke pro defendente. By the breach it does not appear, the liquors unpaid for were malt liquors; and as other ſorts are mentioned, the plaintiff ſhould have been more particular, eſpecially in the caſe of a bond, where he is to ſubject the defendant to a penalty.

Et per curiam, The replication is likewiſe ill, for the plaintiff can only allege new matter in the articles by ſetting them out upon *oyer*. The caſe of the *African Company* v. *Maſon* was a bond, conditioned, reciting that the defendant was their receiver at *Briſtol*, if therefore he do well and truly account for all ſums by him received, then the bond to be void: the breach was, that he received ſo much money, and did not account for it; and becauſe it appeared by the recital in the condition, to be only about tranſactions of a particular nature, the general aſſignment of the breach was held ill. So is 2 *Saund.* 411. *Judicium pro defendente.*

Peele *verſ.* Com' Carliol'.

DEBT on bond, conditioned to reſign a benefice. And the court refuſed to let the defendant's counſel argue the validity of ſuch bonds, they having been ſo often eſtabliſhed, even in a court of equity. And alſo where the condition is general, and not barely to reſign to a particular perſon. 2 *Chan. Rep.* 398. 2 *Keb.* 446. 1 *Sid.* 387. *Hutt.* 111.

Bond of reſignation good.

Gyſe *verſ.* Ellis.

Where the action is againſt the original leſſee, the breach need not extend to aſſigns.

COVENANT that the defendant, his heirs and aſſigns, ſhall every year during the term plant eight crab ſtocks, and the breach is, that the defendant ſuch a year neglected to do it.

Wearg objected, that the breach ſhould have been in the diſjunctive, that neither he nor his aſſigns did it. *Plow.* 199. *Cro. El.* 348. *Bridg.* 46. *A.* covenanted, that he, his executors or aſſigns, would do ſuch an act, and the breach was, that the executor did not do it, without taking notice of the teſtator, and held ill. And the difference is between doing a thing *to* a man and his aſſigns, and *by* a man and his aſſigns.

Probyn contra. The action is againſt the original leſſee, ſo there can be no aſſignment intended: we knew nothing of any; if there be one, it lies in their privity, and therefore they ſhould defend themſelves by ſhewing one. The caſe in *Cro. El.* is not *ad rem*, for there the breach was in the conjunctive inſtead of the disjunctive, and that was the reaſon of its being held ill.

Et per curiam, We muſt intend the eſtate continues in him, till the contrary appears; and therefore the declaration is well enough, being againſt the leſſee himſelf. *Qui facit per alium facit per ſe*; and therefore if the aſſigns have done it, the breach that the leſſee himſelf has not, is falſe. There is as much neceſſity to ſay, an heir did not perform the covenant, when the action is againſt the anceſtor. *Judicium pro quer'.*

Coleman *verſ.* Earle.

Willielmo for *Waltero* in the *aſſumpſit* vitiates not, if there be no *William* named before.

THE plaintiff's name was *Walter*, and on error *Branthwayte* Serjeant objected, that one of the *aſſumpſits* was laid *praefat' Willielmo*, and the damages are intire.

Reeve contra. There being no *William* mentioned in the record before, it muſt be rejected as inſenſible; and then there are other parts of the count, which ſhew the *aſſumpſit* could be only to the plaintiff. In *Roe* v. *Gatehouſe*, *Hil.* 8 *W.* 3. *Salk.* 663. it was *ſuper ſe aſſumpſit*, without ſaying who, and held well enough. So *Trin.* 2 *Ann. in B. R. Shere* v. *Brown.* The declaration run, that in conſideration the plaintiff had delivered goods to the defendant; *ſuper ſe aſſumpſit*, to pay for them; without ſaying who promiſed;

and yet this was taken to be good. *Trin.* 5 *Ann. Athorp* v. *Goſling*. In an action againſt a carrier, it was laid, that in conſideration the plaintiff had delivered goods to the defendant to carry, *ipſe praed'* (the plaintiff inſtead of the defendant) *ſuper ſe aſſumpſit*, and that was reſolved to be well enough. *Paſch.* 4 *Ann. Aſſumpſit* by an executor, who declared, that in conſideration *the teſtator* had carried goods, he the defendant promiſed to pay *quantum praedictus Thomas* (who was the executor) deſerved; and though he ought to have ſaid *quantum* the teſtator deſerved, yet the count was adjudged ſufficient. If theſe caſes ſhould not be anſwers, then I rely on 16 & 17 *Car.* 2. which cures the miſtake of the plaintiff's or defendant's name, when they are before rightly mentioned in the record.

Sed per curiam: Let us not pray in aid of the ſtatute, when the thing is well enough of itſelf. So is 1 *Mod.* 42. *Salk.* 24. And therefore the judgment muſt be affirmed.

Aleberry *verſ.* Walby. Hil. 5 Geo. rot. 206.

In what actions baron and feme may join.

ERROR of a judgment *in C. B.* in an action of covenant brought upon a leaſe for years; and the breach aſſigned in non-payment of rent: judgment by default, *inquiratur de dampnis:* general errors, and want of an original, and returned accordingly: another original alleged by defendant of another term, and a *certiorari* prayed, and one returned and ſet forth; and ſome little variances; and *in nullo eſt erratum* pleaded.

Strange pro quer' in errore. This is an action by a man and his wife and a third perſon, who is tenant in common with the wife, upon a leaſe at will made during the coverture, of lands which are the inheritance of the wife and that third perſon, for arrears of rent incurred during the coverture; and therefore the wife cannot join in ſuch an action, for 1 *Sid.* 224. ſhe ſhall join in no action, but what will ſurvive to her, or her adminiſtrator after the death of the huſband: now the huſband is fully intitled to the rent incurred during the coverture, and if ſhe dies, he, and not her adminiſtrator, ſhall have thoſe arrears. *Co. Litt.* 351. *a.* 1 *Roll. Abr.* 345. *H.* 1.

As this is but a leaſe at will, it is not within the ſtatute 32 *H.* 8. *c.* 28. which requires, that the wife ſhould be made a party to leaſes of her land, and the reſervation be to her and her heirs; for that ſtatute extends only to leaſes for life or years. And though the reſervation here be to her as well as to the reſt, yet that will make no difference; for during his life, it is in the eye of the law a reſer-

vation only to the huſband; and they are not to declare upon it according to the fact, but according to the operation of law. If one jointenant pleads, that the other *conceſſit* to him, it is ill; for it ſhould have been pleaded as a releaſe, that being the only proper conveyance between jointenants. 2 *Saund.* 97. 2 *Ven.* 141, 260, 266. In 3 *Lev.* 290. that was pleaded as a grant, which could enure only as a covenant to ſtand ſeiſed; and it was held ill. So is *Salk.* 8, 274.

Sed per curiam: The huſband and wife may, or may not, join in this action at their election, as where a bond is to both of them. 4 *H.* 5. 6. *Cro. Jac.* 77. *Cro. Eliz.* 61.

In covenant the plaintiff need not ſet out a title, for *quod cum dimiſiſſet* is enough, and if he does it wrong it is ſurpluſage.

2. *Exception.* To the manner wherein the plaintiffs have deduced their title. Under this head we are to lay the huſband out of the caſe, and conſider how the wife and the other perſons have made themſelves out to be tenants in common. They ſay, that one *James Scrape* was ſeiſed in fee of the demiſed premiſſes, and that upon his death the ſame deſcended to him and her as couſins and heirs. Now the court cannot take a man and a woman, without more ſhewing, to be coheirs. The fact I ſuppoſe is, that the mothers of theſe two were ſiſters, who both died in the life of the anceſtor, and ſo the plaintiffs, who are the reſpective iſſues of thoſe parceners, ſtand now in the place of their mothers, and claim what would otherwiſe have belonged to them, in caſe they had ſurvived *Scrape*. But then in deducing their title, they ought to have ſhewn all this; for they muſt claim through their mothers to make themſelves heirs to him that
1 Ven. 413. laſt died ſeiſed; for according to the caſe of *Collingwood* and *Pace*, it is a mediate and not an immediate deſcent; they muſt claim *mediante matre*. All the precedents of *formedons* by couſin and heir ſhew how he became ſo, and in *Salk.* 355. it was held, that he who ſues as heir, muſt ſhew *coment* heir, and it is not ſufficient for him to ſay generally, that he is heir.

It will perhaps be ſaid, that this being an action of covenant, the plaintiffs were not obliged to ſet out any title, but might have begun generally, *quod cum dimiſiſſent*. I admit they might, and then the court would have intended they had a title to make this leaſe, when the other accepted it. But when the plaintiffs undertake to ſet out a title, and fail in doing it; there is no room in that caſe for intendments, for the court will never intend the plaintiffs have a better title than they themſelves rely upon. Every man is ſuppoſed to make the beſt of his own caſe, and upon that ground the rule is, that every man's plea ſhall be taken moſt ſtrongly againſt himſelf. *Plowd.* 104. *a.* 202. *b.* And in many caſes what a man does unneceſſarily ſhall vitiate his proceedings, as where he miſrecites a publick ſtatute. 4 *Co.* 48. *a.* *Plowd.* 77. *b.*

Sed

Sed per curiam: The introduction by ſetting out the deſcent is nothing to the purpoſe here, where they declare upon their own demiſe, and therefore there can be nothing in that exception.

3. The breach is not well aſſigned: the covenant is in the diſjunctive, *to pay or cauſe to be paid to them or any of them*; but as to part of the time the breach is only that he did not pay, and as to the other part, that he did not pay to them, whereas he may have cauſed the rent to be paid to one of them, which is a performance. And there being two ways, the breach ought to have been ſo large, as to exclude both ways, by either of which the act might be done. 21 *Ed.* 3. 29. *b.* And ſince the plaintiffs have in one breach obviated one part of the objection, and in the other the other part; this looks as if they were conſcious to themſelves that there was ſome variation in the fact: that where they ſay generally we did not pay, yet we may have cauſed to be paid; and that where they charge a non-payment to all, yet there might be a payment to one of them, which is enough within the words of the covenant.

In a covenant to pay or cauſe to be paid, the breach may be general that he did not pay.

Sed per curiam: He that cauſes to pay, pays; and if you have paid the money to one of them, you may plead it in your diſcharge.

Then I moved to quaſh the writ of error, which deſcribes the ſuit to be between the plaintiff and one *John Aleberry alias dict' John Aleberry* of *Waltham abbey*, and the *alias dict'* is *abby* in the record, one is *b*, *e*, *y*, and the other *b*, *y*. This variance is in the *alias dict'*, where the court has always obliged the party to deſcribe the ſpecialty *literatim*. And in theſe caſes you never go by the ſound, becauſe the party has ſomething elſe to guide him; and if he miſtakes, it is to be imputed to his own negligence. In a plea of miſnomer indeed it is otherwiſe, becauſe there the party has nothing to go by but the ſound.

Variance.

Mich. 13 *Ann.* the writ was *Crawley*, and the record *Crowley*. 12 *Aſſ. pl.* 2. *Annſly* and *Aneſly*. *Paſch.* 4 *Geo. Shartleſs* and *Sharpleſs*. *Bro. Variance* 26. *Baxſter* with an (*ſ*) and *Baxter* without an (*ſ*). *Salk.* 264. *Giggeer* and *Giggure*. All theſe were held to be fatal variances in the deſcription of a record, and yet nobody will ſay they might have been taken advantage of by plea of miſnomer in abatement. And I apprehend the reaſon of all theſe caſes is what is laid down in Dr. *Drake*'s caſe; that in all caſes where the party has any record or ſpecialty by which he *may* make an exact deſcription, in ſuch caſe the moſt minute variance is fatal. And Mr. Juſtice *Powys*, who held with the exception, about *not* and *nor*, ſaid, that if the court once gave into ſolutions of thoſe variances, they

Salk. 660.

Ante 207.

they would never know where to ſtop; but being once out at ſea, would find it very difficult to ſteer into harbour again.

I muſt admit, that this writ of error would have been well enough, if the *alias dict'* had been left out, becauſe it is ſufficient if the record anſwers the deſcription; and though it would contain more, yet that exceſs muſt of neceſſity imply a fulneſs, and if there be a full anſwer to the deſcription, it is as much as is required. But though it would be good in ſuch a caſe, yet I have often heard it ſaid in this court, that though it is not requiſite to inſert the addition, yet any variance whatſoever, if the party will take upon him to be more thán ordinarily particular, is fatal; for then the record does not anſwer the deſcription, as it does where the writ of error makes a total omiſſion of the addition.

Sed per curiam: The caſes cited are of variances in the name of the party, which is more conſiderable than the place of his reſidence. Theſe words are both properly uſed, ſome ſpell it *abbey* and ſome *abby*; and if there be occaſion, we may take the latter as an abbreviation of the former. *Per curiam:* The record is well removed, and the judgment muſt be affirmed.

Between the Pariſhes of Little Bitham *and* Somerby.

Order reverſed, final to parties; *confirmed*, to every body. Salk. 492, 524, 527.

A. Is ſent by order of two juſtices to *B.* as the place of his laſt legal ſettlement. *B.* appeals, and the order is confirmed. Soon after, without ſtating that *A.* had gained any new ſettlement, *B.* ſends him to *C.* *Et per curiam:* An order of reverſal is final only between the two pariſhes: but if it be confirmed, it is final as to all the world; and therefore no new ſettlement appearing, the order of removal from *B.* muſt be quaſhed.

Hayman *verſ.* Rogers.

An inconſiſtent *poſtea* under a *ſcilicet*, rejected.

IN covenant, the plaintiff declared upon articles dated 30 *Sept.* 5 *Geo.* (which is 1718,) not to ſet up a trade of a baker, *a die datorum articulorum* for ſo many years, and then ſays, that *poſtea ſcilicet* 1 *May* 1718, (which is four months before making the articles) the defendant did exerciſe the trade in that place. And after verdict for the plaintiff, it was moved in arreſt of judgment, that the time in the breach was no part of that to which the reſtraint goes, and therefore the plaintiff has no cauſe of action. *Show.* 8.

Darnall

Darnall Serjeant *contra.* The verdict cures it, for we could not have recovered without proof of an exerciſing after the date of the articles. *Per curiam:* Where that which comes under a *ſcilicet* is conſiſtent with what went before, it is always looked on as an averment; but if it be inconſiſtent, we reject it. As in the common caſe in ejectment, where the leaſe is *a die dat'*, and the entry and expulſion laid the ſame day. We will reject the 1 *May* 1718, and then the caſe is that he covenanted the 30 *Sept. et poſtea* he committed the breach. *Judicium pro quer'.*

Scilicet, where an averment, and where not.

Brewer *verſ.* Turner.

REEVE moved to quaſh the writ of error, becauſe the judgment is againſt two defendants, and ſo deſcribed in the writ of error, but then it is laid to be only *ad grave damnum* of one of them. Now the perſons who are named under the *ad grave damnum* are they, and only they, who bring the writ of error. So that the caſe is no more than that one defendant brings a writ of error of a judgment againſt two, whereas all ought to join. 6 *Co. Ruddock's* caſe.

Qu. Whether one defendant may bring error of a judgment againſt two.

Strange contra. The firſt anſwer I would give to this objection is, that the ground and foundation of quaſhing writs of error is for ſome variance appearing between them and the record, of which there is none in this caſe. The three requiſites in a writ of error are, to denote the court where, the parties between whom, and the ſubject matter of the ſuit; all which are truly deſcribed in this writ of error. And then the ſaying it is *ad grave damnum* of one only, when it appears to be a judgment againſt two, can never be conſtrued to be a variance; for if it be to the damage of both, it muſt be to the damage of each, and ſo the record anſwers the deſcription. Whether therefore when there is no variance, the court will quaſh this writ of error, or not rather put the party to demur to our aſſignment of errors, that I muſt ſubmit to the court.

But waiving that, I take the writ of error to be well enough as it now ſtands. The fact is, that one of the defendants died before bringing the writ of error; but as that does not appear in the cauſe, I admit the caſe muſt be taken to be, that one defendant alone brings a writ of error of a judgment againſt himſelf and another, and this I apprehend to be well enough.

It will not be denied, but that as this judgment is joint, if there be error in it as to one defendant only, yet the whole muſt be re-

verſed. 1 *Roll. Abr.* 775. *E.* 2. *Cro. Jac.* 303. *Sti.* 121. And this may be done at the inſtance of that defendant only, who can ſay it is erroneous. 5 *Ed.* 4. 7. *a.* is expreſs, that if judgment in treſpaſs be given againſt three, one of whom was dead, the other ſhall not have a writ of error of that judgment, but only the executor of the party deceaſed; and yet the coſts being joint, the judgment muſt be reverſed *in toto. Bro. Joinder in action* 77. In treſpaſs againſt two, who are condemned in an erroneous judgment, it is ſaid, they may join or ſever in a writ of error at their election.

There is but one precedent, which comes up to this caſe, and that is in *Hearn's Pleader* 466. in the book, but the right page is 370. and it is thus: "Becauſe in the record and proceedings of a "fine between *W. B. now deceaſed and J. V. plaintiffs* and *J. L.* "deforceant error hath intervened, to the great damage of *W. B.* "ſon and heir of the ſaid *W. B.*" So that the heir alone brings a writ of error of a judgment againſt his anceſtor and another, and aſſigns that for error which vacates the fine *in toto.* And if one plaintiff, who voluntarily joins himſelf with another, may when he pleaſes deſert him; *a fortiori* may defendants ſever in their writs of error, for they are not joined together at their own election, but at the will of the plaintiff. And agreeable to this entry is *Cro. Eliz.* 115.

If the defendants may not ſever in their writs of error, the inconvenience will be great, that the plaintiff may if he pleaſes join me with a defendant who is under his own power, and will never conſent to bring a writ of error; and then I ſhall be remedileſs, be the judgment never ſo erroneous. For as to what may be ſaid, that ſummons and ſeverance lies; that is only after a writ of error brought. If two bring a writ of error, and upon the *ſcire facias quare executio non,* one only appears: there ſummons and ſeverance lies. *Yelv.* 4. And upon that the judgment is, that one alone ſhall proſecute that writ, which was brought jointly by them both. But if it be not brought by both, there can be no ſummons and ſeverance; and therefore if one refuſes to join, the other ought to be at liberty to bring it alone. And there will be no inconvenience to the plaintiff, for his judgment can but be reverſed; and if it be erroneous, what matter is it to him whether it be reverſed at the inſtance of all the defendants, or of one of them only?

Curia. If it had any where appeared, that the other defendant was dead; there is no doubt but this defendant alone without the executor of the other might bring a writ of error: but as nothing of that appears, and the judgment is joint; it ſhould ſeem as if all muſt be mentioned under the *ad grave damnum.* And to this pur-

poſe was the caſe of *Pennoir* v. *Brace tempore W.* 3. 5 *Mod.* 338. *Salk.* 319. 5 *Mod.* 16, 69.

The writ of error was quaſhed, unleſs cauſe next term.

N. B. Hil. 6 *Geo.* the Chief Juſtice being in court, I ſtirred it again, and they all held the writ of error bad: ſo it was quaſhed, and I drew a new one.

Brocas *verſ.* Civit' London.

PER curiam: It was ſettled in Sir *Peter Delme*'s caſe, and has always been the courſe of the court, that when either party will ſuggeſt any ſpecial matter about awarding the *venire* out of the common courſe, a copy muſt be given to the oppoſite party, and they muſt have a reaſonable time to conſider it, before you enter a *nient dedire*. Practice.

Newell *verſ.* Pidgeon

PER curiam: If the plaintiff be nonſuit, and a judgment againſt him for coſts, error lies *in Camera Scaccarii*. 1 *Roll. Abr.* 744. *F.* *Error ſur* nonſuit.

Biron *verſ.* Philips.

PER curiam: There muſt be the ſame notice of executing a *ſcire fieri* inquiry, as a common writ of inquiry. Practice.

Scotton *verſ.* Scotton. In Canc'.

A Daughter having married without her father's conſent, he gave her no portion, but made his will, and thereby gave her 50 *l.* to be lent out for her, and ſhe to have the uſe of it. Her huſband being informed of this legacy, applies to the father for the money preſently, who gave it him, and took a receipt for it in lieu of her portion, and of the legacy given by his will. The father died without altering his will, upon which his daughter and her huſband ſue the adminiſtrator in the ſpiritual court for the legacy, and the adminiſtrator brings his bill in this court. Legacy to a child diſcharged by proviſion ſubſequent to the will.

Vernon

Vernon pro quer' quoted *Birkinhead* v. *Birkinhead* in lord *Egerton*'s time, where the father having by will given 1500 *l.* a-piece to his three daughters, afterwards married one of them, and gave 1500 *l.* portion, and then died without altering his will; and adjudged the portion a ſatisfaction of the legacy.

Maſter of the rolls. Whether this be a caſe relievable in the ſpiritual court I am not certain: I rather think this receipt is not pleadable there, being a releaſe of a legacy before it is due. But in this court it amounts to an agreement of the ſon-in-law, to diſcharge the legacy. Beſides the precedents here run all this way, that a child's legacy is ſatisfied by a proviſion ſubſequent to the will. Let the proceedings in the ſpiritual court be ſtayed.

Counteſs dowager of Mountacue *verſ.* Maxwell. In Canc'.

What writing is ſufficient to bring a caſe out of the ſtatute of frauds and perjuries. S. C. 1 Will. 618.

THE plaintiff married the defendant without any previous ſettlement of her eſtate, which was a very conſiderable perſonal eſtate. Quarrels happened between them ſoon after the marriage, and ſhe exhibited her bill here, to oblige him to ſettle her own eſtate to her ſeparate uſe: ſetting forth, that upon his addreſſing her, ſhe inſiſted on having the entire diſpoſal of her own eſtate, and drew up a ſhort writing with her own hand to that purpoſe; that he promiſed to ſign it, but put her off on pretence of adviſing with counſel, and having writings more at large prepared; that ſhe frequently demanded of him to execute ſuch writings, which he conſtantly promiſed, as ſoon as finiſhed by counſel, but delayed it till ſhe married him. That after marriage ſhe preſſed him by letter to perform his promiſe, and he anſwered her by another letter, that he thought it very reaſonable ſhe ſhould have the diſpoſal of her own eſtate, that he never intended the contrary, but that ſhe ſhould command her own fortune as ſhe pleaſed.

29 Car. 2. c. 3.

The defendant denied he ſigned any ſuch agreement in writing, and as to any *parol* promiſe he pleaded the ſtatute of frauds and perjuries.

It was inſiſted on for the plaintiff, that the court frequently compels the execution of promiſes not ſolemnized according to that ſtatute, where fraud and trick appear, and where part of the agreement is carried into execution, as it is here by the marriage, which was the conſideration of that promiſe. But *Parker* Lord Chancellor allowed the plea, and ſaid this was only a breach of promiſe, which is a ſort of injury that this court does not take cognizance

nizance of. If there had been fraud (as if pretending to execute a real deed of ſettlement he had impoſed another on her) this might have made it a proper caſe for equity; but here is nothing of any ſuch deceit: ſhe marries him on his word and promiſe, without writing, and that is the very caſe the ſtatute intended. To ſay therefore the agreement is to be executed in this court, becauſe performed in part by the marriage, is to break the very words and intention of the ſtatute, which has put this very caſe, and ſays it ſhall not be binding.

The plaintiff afterwards amended her bill by a further charge, that in order to induce her to marry him without a previous ſettlement, and to ſecure the performance of his promiſe in executing it afterwards, he promiſed to take the ſacrament on it, and that he did take the ſacrament on the marriage accordingly. That after the marriage he wrote a letter, wherein he promiſed to make ſuch ſettlement, and that he was ready to ſign the writings according to her deſire.

To this he confeſſes he did take the ſacrament on the marriage, but ſays he did it only in compliance with a cuſtom eſtabliſhed in the *Romiſh* church (of which he was a member) of receiving the ſacrament on their marriages, and not to give any ſanction to this pretended agreement. And as to the letter, he doth not remember the particulars, but if he has wrote any thing concerning his readineſs to ſign any writings, it only related to ſome propoſals he had made of ſettling a ſum of 1500 *l.* on her, and which he did ſoon after ſign. He then pleads the ſtatute of frauds and perjuries again.

Lord Chancellor. The caſe is very much altered now, from what it was at firſt. Then it ſtood purely on the parol promiſe before marriage, upon which there was no colour to relieve the plaintiff. But ſuch parol promiſe on marriage is ſufficient conſideration, to ſupport a ſettlement made agreeable to it after marriage. This has been frequently determined. So it is alſo ſufficient conſideration to eſtabliſh a promiſe made in writing after marriage. Now here is great evidence of ſuch a promiſe made in writing after marriage; he doth not deny his writing, that he was ready to execute the writings as ſhe deſired; but avoids it by ſaying, they referred to propoſals of ſettling 1500 *l.* which is impoſſible, becauſe it appears ſhe never deſired any ſuch ſettlement. And though he ſays he has ſigned that ſettlement, it doth not appear when he did it; and I am very jealous he did it ſince the amended bill. His anſwer to the charge of receiving the ſacrament in confirmation of his promiſe, is not at all ſatisfactory. He could have no occaſion to promiſe receiving the ſacrament, but on that account; and though he might

receive it in compliance with the cuſtom of his church, yet that is very conſiſtent with his laying hold of that ſolemn act of devotion, to teſtify his ſincerity. Therefore let the plea ſtand for an anſwer.

Harriſon *verſ.* Buckle. In Canc'.

If a legacy be deviſed payable at 21, with intereſt in the mean time, and the infant dies, his repreſentative may ſue for it immediately.

A. deviſes to his daughter 1000 *l.* payable at her age of twenty-one or day of marriage, and 1500 *l.* to his ſon payable at the age of twenty-four, and a certain maintenance in the mean time; and all his real eſtate he deviſes to truſtees, to raiſe by ſale or otherwiſe ſufficient to diſcharge his debts and legacies, if the perſonal eſtate ſhould fall ſhort. *A.* dies; the ſon dies under age; the daughter marries the defendant, and they join in a ſuit in the ſpiritual court againſt the truſtees, who are alſo executors, for her own legacy of 1000 *l.* and as repreſentative of her brother for his 1500 *l.*

The executors exhibit their bill here, to ſtop the proceedings in the ſpiritual court, and compel the huſband to ſettle the legacy on the wife. The defendant inſiſts on his right to the legacy, independant of any ſettlement, he being now in a proper court for the recovery of it without the aſſiſtance of this court; and that he is intitled to the 1500 *l.* immediately, though the ſon was not to have it till his age of twenty-four.

Upon this two queſtions aroſe. 1. Whether this court could interpoſe on behalf of the wife, and ſecure the legacy for a ſettlement on her. 2. Whether the ſon's legacy of 1500 *l.* is not extinguiſhed by his death before it became due. Or if it ſubſiſts, whether his repreſentative is intitled to it ſooner than he himſelf would have been, if he had lived.

As to this laſt point Mr. *Vernon* ſaid, There had been caſes both ways, but were reconcileable on this diſtinction; where intereſt of the legacy payable at a certain age has been given to the infant in the mean time, there the money has been held payable to the repreſentative immediately: but where no intereſt has been given, the money was not payable till the time the legatee would have arrived at that age. The preſent caſe, he ſaid, was a ſort of middle way between both: no intereſt, but ſome preſent advantage, *viz.* maintenance is given.

Maſter of the rolls. The 1500 *l.* given is firſt and principally a charge on the perſonal eſtate, and is an abſolute legacy out of that: the real eſtate is only deviſed in aid of the perſonal, nor is it to be

ſold directly, but only at the diſcretion of his truſtees and executors, to be diſpoſed of ſo far as the debts and legacies ſhall require. As this then is not a direct legacy out of the real eſtate, the death of the party before it became payable ſhall not extinguiſh it. And this differs from *Pawlet*'s caſe, 2 *Ven.* 366. where the money was an immediate charge on the land, and to be raiſed out of that without any regard to the perſonal eſtate. The ſon's repreſentative being thus intitled, the next queſtion is as to the time. Had this 1500 *l.* carried intereſt immediately to the infant, though the time of payment of the principal was deferred, yet on his death his repreſentative would have had a right to it immediately: not that he would have been in a better condition than the infant was, ſince the delay of payment was only by way of caution, but with equal benefit to the legatee. And the executor is not hurt, becauſe on payment of the money the intereſt ceaſes. The appointment of maintenance is ſaid to be equivalent to the giving intereſt, but I think not; intereſt carries the whole benefit of the legacy, but maintenance is ſomething diſtinct and independant of it. It is a decent proviſion during minority, and bounded, not by the profit of the money, but the neceſſities of his ſuſtenance and education.

Where the court will oblige the huſband to ſettle what he ſues for of the wife's upon her.

As to the wife's legacy of 1000 *l.* the bill is of an unuſual nature. It has indeed been the common courſe of this court, to oblige a huſband who comes hither in right of his wife for a ſum of money, to make a proper ſettlement on her, before it is given him; and that, not only in the caſe of truſt money, which can be recovered no where elſe, but in the caſe of legacies too. Though I muſt ſay, had this been *res integra*, I ſhould be very cautious, how I went ſo far as legacies, becauſe there is a proper court elſewhere for the recovery of them: they originally belonged to the ſpiritual court only, and the ſole ground of this court's intermedling is, the diſcovery of the teſtator's perſonal eſtate. But the preſent caſe is different: the perſons liable to pay the legacies are plaintiffs here, and not the huſband; and whether they would not have been ſafe in paying the legacy, if they had ſuffered the ſpiritual court to go on to ſentence, I will not ſay.

This ſeems to have ſomething of the nature of an interpleading bill, wherein the executors call upon the huſband and wife to interplead concerning their ſeveral rights; the huſband to the money abſolutely, and the wife to a proper proviſion to be ſecured for herſelf. And then it will be like the common caſe, of a huſband's coming into this court to have a legacy againſt his wife. And I have obſerved a ſtrong inclination in Lord *Cowper*'s time, to do right to the wife. Since legatary cauſes are now become part of the juriſ-

juriſdiction of this court, I think this is fit to be conſidered. The wife is not here, therefore let her attend, to acquaint us what proviſion ſhe is willing to accept.

Hagſhaw *verſ.* Yates. In Canc'.

A ſubſequent title which is both legal and equitable, deſtroys a prior title in equity only.

PER Parker Lord Chancellor. Where a legal eſtate and equity meet in the ſame perſon, they ſhall deſtroy a prior title which is only equitable. And where the inheritance of lands mortgaged for a term is conveyed by a defeaſible but equitable title, and afterwards conveyed to another by a legal and equitable title; the latter ſhall have the benefit of the equity of redemption.

Turton *verſ.* Benſon. In Canc'.

2 Vern. 764. 1 Will. Rep. 496. Bond to refund part of portion, ſet aſide.

THE bill was to be relieved againſt a bond obtained in fraud of a marriage ſettlement: and the caſe was thus. The plaintiff being a young man in 1710. made his addreſſes to one Mrs. *Benſon:* the plaintiff's mother and uncle were concerned in tranſacting it for him, and on 29 *June* 1710. marriage articles were executed, whereby Mr. *Benſon* was to give 3000 *l.* as a portion with his daughter, and Mrs. *Turton* was to part with 300 *l. per annum* out of her jointure, to make a ſettlement on the marriage: but ſecretly, without the privity of the mother or uncle, the plaintiff gave bond to refund 1000 *l.* part of the portion, to *Benſon* at the end of ſeven years; and ſoon after, the marriage took effect. In 1713 *Benſon* depoſited this bond in the hands of Sir *Theodore Janſſen* as a ſecurity for a debt, but made no actual aſſignment. In 1714 *Benſon* died, and his wife the defendant took out adminiſtration; but his debts being beyond the value of his eſtate, the creditors came to an agreement amongſt themſelves and with her, whereby Sir *Theodore*'s whole debt was to be paid, and all *Benſon*'s effects to be turned into money, and divided amongſt the reſt of the creditors, and the plaintiff's bond, and all the debts to be got in by the adminiſtratrix: and creditors on ſimple contract to be in equal degree with thoſe on ſpecialties. During this tranſaction one of the chief creditors acquainted the plaintiff with their deſigns, and that his bond was to be aſſigned to them; who anſwered, that if Mrs. *Benſon* was to have the benefit of it, he would never pay it; but if they were, he would not diſpute it with them. In this condition the bond ſtood in 1715. when the plaintiff brought his bill againſt the adminiſtratrix to have it delivered up. When that cauſe was at hearing, the creditors bring a bill againſt the plaintiff and adminiſtratrix to diſcover colluſion. Both cauſes came on before the Maſter

of the Rolls, who decreed for Mr. *Turton*, and now they came by appeal before the Chancellor.

The queſtions were, whether this bond was void in its original creation; and if ſo, whether it has not been ſince made good by ſome ſubſequent matter, either by its being transferred for ſome valuable conſideration, or by the promiſe of the plaintiff not to diſpute it.

As to the firſt, it was ſaid by the counſel for the plaintiff, that it was a ſort of firſt principle, and ſettled rule in this court, to make void all contracts of this nature, whereby marriage articles, ſettled by the conſent of all parties concerned, are any ways defeated by the private agreements of ſome of them. And ſeveral caſes were cited, to eſtabliſh this rule. *Salk.* 156. where it was laid down as a rule, that a ſon, without the privity of the father, or parent treating the match, gives bond to refund part of the portion, it is void. *Ibid.* 158.

Sir *R. Raymond* cited *Redman* v. *Redman* in 1685. in this court, where on a treaty of marriage the friends of the lady inſiſted on the huſband's diſcharging all his debts before the marriage. There was one bond which his brother agreed to pay for him, but underhand with the privity of the lady, who was afraid of loſing the match, took a counter ſecurity of the huſband; and the marriage took effect. Afterwards the brother paid the money on the bond, the huſband died, and he ſued the counter ſecurity againſt the widow, who had taken adminiſtration. She brought her bill, and though privy to the fraud, was relieved; becauſe it was done originally to defeat a marriage agreement. 1 Vern. 348.

So in the caſe of *Gale* v. *Lindo*. On a treaty of marriage the fortune of the young woman not being ſufficient for the huſband, ſhe prevails on her brother to make up the deficiency by a bond of his; but privately agrees with him, that no uſe ſhould be made of it. They were married accordingly; and the huſband dying, ſhe took out adminiſtration, and put the bond in ſuit: the brother ſues here for relief, but denied becauſe the agreement was fraudulent. 1 Vern. 475.

Mr. *Vernon* quoted the following caſes to the ſame purpoſe. *Lamley* v. *Hamond*, *Mich.* 1714. a mother for the advancement of her ſon in marriage agreed to part with her jointure; the ſon at the ſame time had a leaſehold eſtate of his own, which he privately contracted to aſſign over to her in conſideration of what ſhe was to ſettle upon him: after the marriage the ſon died, and his repreſentative recovered this leaſehold eſtate out of her hands by a decree 2 Vern. 466, 499.

of this court, becauſe there was no mention made of that aſſignment on the marriage treaty.

1 Vern. 240. *Peyton* v. *Bladwell*, 9 *March* 1694. Mr. *Bladwell* on the marriage of his nephew *Yelverton Peyton* with the daughter of Sir *John Roberts*, agreed to ſettle an eſtate of 200 *l. per annum* on them for a jointure, and after his death to ſettle a further eſtate of 100 *l. per annum* on him and his heirs. After the marriage it was diſcovered, that there was a private agreement between him and his nephew, that he ſhould demiſe the firſt eſtate back again to *Bladwell* at 150 *l. per annum* rent; and as to the reverſionary eſtate, that he ſhould releaſe that; and ſuch demiſe and releaſe were executed accordingly: after the nephew's death his wife and Sir *John Roberts* ſue in this court to ſet aſide this private agreement, and had a decree, whereby *Bladwell* was to account for the profits of the eſtate in poſſeſſion at the rate of 200 *l. per annum* from the time of the demiſe, and to ſettle the other eſtate of 100 *l. per annum* on the heirs of *Peyton*, to commence after his own death. *Sloan* v. *Fowler*. On the marriage of *Fowler*'s ſon with *Sloan*'s daughter, *Fowler* by articles was to make a ſettlement, and to have the portion to himſelf; but he told his ſon, the portion was not ſufficient to pay younger children's fortunes, and ſo got a bond from his ſon for a ſum of money beyond the wife's fortune: this bond came afterwards into the court of Chancery, and was ſet aſide, becauſe it was taken without the privity of the wife's relations.

As to the ſecond queſtion, whether the creditors as purchaſers of this bond for a valuable conſideration are not in a better condition than *Benſon* was.

For the plaintiff it was ſaid, here was really no aſſignment at all; it was only depoſited in Sir *Theodore*'s hands as a ſecurity, but not deſigned to transfer the intereſt: or if there had been an aſſignment, that gives no property or right, a bond being a *choſe* in action not being aſſignable but in Equity, and then it muſt be attended in the aſſignee's hands with all the circumſtances of equity with which the firſt obligee held it. If therefore it was void in equity in its original creation, it cannot be made good by any equitable conveyance: the creditors can have no better right than *Benſon* had: their right is only to his eſtate, which if he poſſeſſed unlawfully, can be no better in their hands. So it is in caſe of bankrupts. Creditors under the aſſignment ſhall have no better right to the effects than the bankrupt
2 Vern. 564. himſelf had. *Taylor* v. *Wheeler*. Plaintiff had lent money on a copyhold eſtate, and a ſurrender was made accordingly: by the cuſtom of the manor ſurrenders are void unleſs preſented in a year, and this ſurrender was neglected to be preſented: afterwards, and before

before the money was paid, *Wheeler* the debtor became bankrupt, and a commiſſion was taken out, and this copyhold *inter alia* aſſigned: the aſſignees get admittance, and the mortgagee ſues here for relief: they urge in favour of the aſſignees, that this copyhold continued in the bankrupt till his bankruptcy: the only thing that ſtuck with Lord *Cowper* was, that the plaintiff by his ſuffering him to continue in poſſeſſion, and not preſenting the ſurrender by which the mortgage might have been diſcovered, induced others on the credit of that eſtate to truſt him, and now the aſſignees have both law and equity of their ſide; but yet the plaintiff was relieved on that maxim, that the creditors ſhall be in no better condition than the bankrupt himſelf was.

And in theſe caſes where fraud has been purged by a legal conveyance on valuable conſideration without notice, yet the perſons that conveyed with notice of the fraud have been obliged to make it good. In the caſe of *Ferrers* v. *Cherry*, *Cherry* having notice of a ſettlement wherein the father was only tenant for life in equity, accepts a conveyance in fee from him, and afterwards ſold it to purchaſers without notice: on a bill by the ſon for relief, the purchaſers having law and equity on their ſide had no decree againſt them, but the court went ſo far as to order *Cherry* to anſwer for the fraud. Another caſe was *Bovey* v. *Smith*. Truſtees had ſold without notice of the truſt in the purchaſer; he levied a fine, and non-claim for five years: ſixteen years after, the truſtees purchaſe back this eſtate for a valuable conſideration: this appeared to the court on a bill by the *ceſtuy que truſt*; and though the fraud was purged, yet the court decreed the eſtate became again chargeable in their hands, and the lands were decreed to the plaintiff accordingly. 2 Vern. 384. 1 Vern. 60.

As to the plaintiff's promiſe, it was ſaid to be rather a compliment than a promiſe: or if it was one, yet there was no conſideration for it.

For the defendant Serjeant *Cheſhyre* and Mr. *Talbot*, could not diſpute the general rule of diſcharging contracts made in fraud of marriage ſettlements; but ſaid the plaintiff ought not to come here, becauſe himſelf was not only not defrauded, but was even a party to the fraud againſt the mother.

The ſecond queſtion was chiefly inſiſted on. They ſaid the original fraud was purged by the ſubſequent conveyance for valuable conſideration, and likened it to the caſe of *Prodgers* v. *Langham*, 1 *Sid.* 134. where agreed *per curiam*, That though a deed be fraudulent in its creation, and voidable by a purchaſer: yet it may be made good by matter *ex poſt facto*; as feoffee by covin makes a feoffment

feoffment for valuable conſideration, the ſecond feoffee has a good title. So in the caſe of *Ellis* v. *Warns*, *Cro. Jac.* 32. In debt upon a bond, the defendant pleads an uſurious contract between himſelf and one *A.* by which he became bound to the plaintiff for a debt he owed *A.* and which *A.* owed the plaintiff; the plaintiff replies a juſt debt without any privity of the uſurious contract between him and *A.* and on demurrer held a good replication.

Sarrot v. *Fielding* in Lord *Somers*'s time. *Sarrot* was deſired by one *Dod* in the country to draw a bill for him on his correſpondent in town, payable to *Dod* or order: he did ſo, but inſiſted on the payment of the money before the delivery of the bill, but by reaſon of a hurry of buſineſs then in the ſhop it was neglected, and the bill was ſent to town without the plaintiff's receiving any money for it: the defendant purchaſed it, and ſued the plaintiff at law: he applied here for relief, becauſe he had never been paid for it; but Lord *Somers* diſmiſſed the bill.

The promiſe of the plaintiff was ſaid not to be *nudum pactum*, becauſe though he gained nothing by it, yet the creditors parted with ſome of their right, for they conſented to admit ſimple contract debts upon an equality with bond debts, and to pay Sir *Theodore* his whole debt; and a loſs on one ſide is ſufficient to raiſe an *aſſumpſit* in the eye of the law.

Lord Chancellor. Theſe private agreements contrary to publick tranſactions have been always diſcouraged by this court, even where the parties have come to be eaſed againſt their own agreement. And this is ſo far from diſtinguiſhing the preſent caſe from others, that it is a circumſtance of all the caſes that have been cited, and indeed cannot be otherwiſe, ſince the ſettlements againſt which theſe private contracts are made, are always for the benefit of the parties to the marriage. The impoſition which the court provides againſt is not upon the perſon that marries, but on thoſe that are concerned in contracting for him; and I think this caſe as great a fraud as any that have been mentioned.

The next conſideration is, whether the creditors have a better caſe of it than *Benſon*. And firſt it is clear, that any aſſignment of *Benſon* could not have mended it; that would be to deſtroy all the power and care of the court in caſes of this nature at once, for it is then but to aſſign over, and nothing can reach it. But he cannot properly aſſign a bond nor the penalty of it: the ſenſe and meaning of ſuch aſſignment is, that the aſſignee ſhall have all the benefit, which the aſſignor would have of it, in Equity. Suppoſe a perſon aſſigns a bond that is paid, can the aſſignee take advantage of

that bond? But indeed in this caſe here is no aſſignment nor any thing like it.

But in the next place, though the party doing the fraud cannot make the bond better; it is another conſideration whether the party injured cannot amend it. And I think he may as far as the conſideration of it goes; for the bond is not abſolutely void; and though the mother is the perſon injured, yet if the ſon independent of the marriage will afterwards give a new bond for it, I think it will ſtand good againſt him. But there is nothing of that nature in the preſent caſe: there is no aſſignment to the creditors. The compoſition and agreement amongſt the creditors is beneficial to them, without any conſideration of this bond. The plaintiff's promiſe inſiſted on was without any conſideration at all: it does not appear that it induced the agreement, or any thing was done on it, but what would have been done without it. Creditors are indeed intitled to favour, but it is only with regard to the debtor's eſtate, and not other peoples. I think the decree of the Maſter of the Rolls is right, and ought to be affirmed, and a perpetual injunction go as to the bond.

South *verſ.* Jones.

Intr. Hil. 5 Geo. rot. 396.

THE plaintiff declares, that he being occupier of certain lands in *Downham*, 20th of *Auguſt* cut down his graſs and divided it into cocks, and the ſame day gave notice to the defendant, who was rector, to come and carry away his tithes, which he has not done, *per quod* he loſt the uſe of that part which was under the cocks, from the ſaid 20th of *Auguſt* to the 10th of *December* following. The defendant pleads, that for all that time the cloſe where, *&c.* was ſurrounded with ditches; and that the ditches, ways and paſſages were ſo filled with water, that he could not carry off his tithes. The plaintiff replies, that the ditches, ways and paſſages were not ſo; and the defendant demurs.

Parſon not obliged to take tithe of graſs the day it is cut, but may let it lie there long enough to make it into hay.

Bootle pro defendente. The declaration is ill, in demanding more damages than the plaintiff ought to go for; he demands from the time of mowing, whereas the parſon is not obliged to carry it away then, but it muſt lie till the pariſhioner has made it into hay. 1 *Roll. Abr.* 643. X. 1 *Roll. Rep.* 420, 172. We are not after a verdict, where this might be helped by a releaſe, but on a demurrer. So *non conſtat* the plaintiff will releaſe.

2. The replication is ill in offering to put the whole time in iſſue, and though we plead to the whole, as we were obliged, yet the fault is in them.

3. The replication is in the copulative, ditches, ways *and* paſſages, when it ſhould have been in the disjunctive. 2 *Saund.* 205. 3 *Keb.* 162.

C. J. The declaration is ill, for it ſhould have ſhewn when it was made into hay, and dated the wrong from thence: the replication is well enough in the copulative, becauſe the plea is one intire matter of excuſe, and the defendant relies on the whole, and not on each particular's being impaſſable. *Et per Powys* J. The defendant has not denied the wrong which the plaintiff has laid, but takes upon him to excuſe the whole. *Et per Eyre* J. Suppoſe the tenant will not make it into hay, the parſon has no remedy to compel him, but he may do it himſelf, which it appears he has had time enough for. *Forteſcue* J. The iſſue is well offered, for the paſſages being over the ditches, (as they muſt be, becauſe it is ſaid the cloſe was ſurrounded) it was proper to put it in the copulative. The time laid in declarations is for the moſt part immaterial, and in treſpaſs it is ſufficient if part of the time be according to law, becauſe the jury may apportion it, or the party releaſe it: it is plain, here is a wrong for ſome part of the time, and I believe the precedents will warrant this declaration. *Hearn* 725. 1 *Brown.* 69, 70. *ulterius.*

Cheſhyre Serjeant *pro defendente.* If the parſon is hindred by the act of God, or the party, from taking his tithes; it is an excuſe. 1 *Roll. Abr.* 109. *pl.* 37. Though our plea is double, yet it is a principle in pleading, that if the other does not demur, he muſt anſwer the whole plea. Our plea amounts to this. The way, ſays he, to the cloſe was very bad, and if I could have got through it, yet when I came to the cloſe, it was ſo encompaſſed with ditches, and thoſe filled with water, that I could not have got over. The replication puts us to prove both, when either is an excuſe, and therefore it is bad. 1 *Saund.* 268.

The declaration likewiſe is ill, becauſe the defendant cannot be guilty as to all the time; for the court will take notice, that it is impoſſible to make the graſs into hay the ſame day it is cut: and the parſon has of common right time to have it made into hay. If a man reſerves a roſe, the court ſo far reſpects the order of nature, as not to make him pay it in winter.

Reeve contra. The plea is not double, but the defendant relies upon it as making one intire excuſe, and therefore we have properly traverſed the words of it in our replication.

As to the declaration, it is well enough, for the meaſure of the damages is not how long the cocks remained after they were cut, but after a reaſonable time to remove them; as in an action for beating his ſervant *per quod ſervitium amiſit*, the ſmart of the ſervant is not the meaſure of the damages, but it is the loſs of ſervice which the maſter recovers for; and what is a reaſonable time in this caſe, is matter of evidence, and muſt be left to a jury.

But if we do go for too much, they are not proper to make the objection, till they ſee whether we take damages for an improper time; for as part of this time is well alleged, the jury may ſever the time, and give damages accordingly.

Powys J. held with the plaintiff. *Et per Eyre* J. The plea is not double, for the firſt part is only inducement, but the *git* of it is the ditches being filled with water; ſo the replication meeting the plea is right. It is certain the defendant let his tithes lie too long, and that is a damage to the pariſhioner. If a *continuando* is laid in treſpaſs, the jury may give damages as to part of the time only.

Forteſcue J. The replication is well enough, for the ſubſtance of the plea is but one fact, That he could not come at his tithes; and all the reſt is only matter of circumſtance. We cannot judge what is a reaſonable time, becauſe of the accidents of wind and weather, but that is to be left to a jury; and if the plaintiff had gone only from three or four days after the cutting, I do not ſee how that could have mended the caſe upon a demurrer. *Judicium pro querente.*

Hilary Term

6 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Juſtice.*
Sir Littleton Powys, *Knt.* } *Juſtices.*
Sir Robert Eyre, *Knt.* }
Sir John Forteſcue Aland, *Knt.* }
Nicholas Lechmere, *Eſquire, Attorney General.*
Sir William Thompſon, *Knt. Solicitor General.*

Whitehead *verſ.* Barber.

Notice of trial to a turnkey, good.

PER curiam: Upon conference with the other courts they and we are of opinion, that within the reaſon of 4 & 5 *W.* & *M.* *c.* 21. which appoints, that the delivery of a declaration againſt a priſoner to the gaoler ſhall be good, a notice of trial to him is good alſo, though the defendant has an attorney in one caſe and not in the other.

Pierce

Pierce *verſ.* Hopper.

Int. Paſch' 5 Geo. In B. R. rot. 187.

DEclaration *ſur attachment* in prohibition, wherein the plaintiff ſets forth, that before the making of the ſtatute 3 *Geo.* intitled, *An act for the better regulating of pilots for conducting of ſhips and veſſels from* Dover, Deal *and the iſle of* Thanet *up the rivers of* Thames *and* Medway, he was publickly examined by the elder and more experienced members of the ſociety of pilots of *Trinity-houſe* touching his ſkill and experience in the piloting of ſhips, and being upon ſuch his examination approved of, he was admitted a member of that ſociety, and was afterwards confirmed accordingly. That after making the ſtatute he was a ſecond time examined, admitted and confirmed, and that according to the direction of that ſtatute his name, age and place of abode were put into the liſt and hung up at the cuſtom-houſes in *London* and *Dover*, by virtue whereof he then became and has ever ſince continued a member of that ſociety, and as ſuch ought to enjoy the privilege and profits which every member is intitled to. That the expoſition of all ſtatutes, the placing and diſplacing of officers, matters of freehold and all other matters ariſing within the body of the county, whether by land or by water, belong to the king's courts of record, and not to the courts of admiralty, unleſs ſpecially provided for by acts of parliament. That the rivers of *Thames* and *Medway* are both *infrà corpus comitatus*, and not within the juriſdiction of the court of admiralty of the *cinque* ports, but all matters ariſing out of that juriſdiction are properly determinable in the king's courts of record. Notwithſtanding which the defendant intending to prejudice him, has drawn him into plea in the court of admiralty of the *cinque* ports for a penalty or forfeiture of 10 *l.* and by his libel ſuggeſts, That time out of mind there has been a uſeful and well regulated ſociety of pilots of *Trinity-houſe* belonging to *Dover*, *Deal* and the iſle of *Thanet*, who have had the ſole piloting and loadmanage of ſhips and veſſels up the rivers of *Thames* and *Medway*. That by the rules and orders of this ſociety every perſon ought to be examined touching his ſkill in pilotage, before his admiſſion to be a member, or undertaking to pilot any ſhip or veſſel up the ſaid rivers. That by the ſtatute 3 *Geo.* it is enacted, " That if any perſon ſhall undertake to pilot " any ſhip or veſſel from *Dover*, *Deal* or the iſle of *Thanet* up the " ſaid rivers, before he ſhall be publickly examined, approved and " admitted into the ſaid ſociety, as has been uſual in the manner " that has been mentioned, every ſuch perſon ſhall for the firſt " offence forfeit 10 *l.* for the ſecond 20 *l.* and for every other of-

Conſtruction of ſtatute relating to the piloting of ſhips. 3 Geo. 1. c. 13.

" fence 40 *l.* to be ſued for and recovered with coſts of ſuit by any " perſon whatſoever, in the court of admiralty of the *cinque* ports, " if the offender be found within the juriſdiction, or elſe by action " of debt, bill, plaint or information in any of his majeſty's courts " of record, to be diſtributed in the manner which the ſtatute di- " rects." That the now plaintiff, after making the ſaid ſtatute (*viz.*) 13 *July* 1718, did take upon him to pilot the ſhip *Stratford* from *Dover* to *London* up the river of *Thames*, not having been firſt examined and admitted a member of the ſaid ſociety, as has been uſual, by which he forfeited the ſum of 10 *l.* (this being the firſt offence) and becauſe the now plaintiff lived within the juriſdiction of the court of admiralty of the *cinque* ports, therefore the defendant cauſed him to be ſummoned into the ſaid court, in order to proceed againſt him for recovery of the penalty. That notwithſtanding he alleged all the matters aforeſaid in his defence, yet the defendant the further to oppreſs him, libelled againſt him a ſecond time, thereby ſuggeſting, that for time immemorial there have been certain by-laws, cuſtoms and uſages made and practiſed in the ſaid ſociety, and that it has been always uſual for every member on his admiſſion to take an oath to obſerve and keep ſuch by-laws, cuſtoms and uſages before made, or then after to be made. That by ancient uſage it has been cuſtomary, on due ſummons, to remove any members acting contrary to the by-laws, cuſtoms or uſages, or breaking the aforeſaid oath, and every perſon ſo removed has been always deemed and taken to be in the ſame condition, to all intents and purpoſes, as if he had never been admitted a member of the ſociety. That the now plaintiff was examined, admitted, ſworn, confirmed and inliſted as the ſtatute directs. But that afterwards he offended againſt the by-laws, and broke the cuſtoms and uſages of the ſaid ſociety, and acted contrary to his oath: and thereupon, and upon due ſummons and proof of ſuch offence, and hearing what he had to ſay for himſelf, he was, according to the ancient uſage, removed and expelled from being a member of the ſaid ſociety, whereby he became as if he had been never admitted. That after ſuch removal he, (not having been again examined, approved and admitted into the ſaid ſociety) 3 *Auguſt* 1718, did take upon him to pilot the ſhip called *Stratford* from *Dover* to *London* up the river of *Thames*, againſt the form of the ſtatute, *per quod* he forfeited the ſaid 10 *l.* That to this ſecond allegation in the court of admiralty of the *cinque* ports the now plaintiff demurred in law, and put it in the judgment of the court whether he ought to be compelled to make any anſwer to it, *ubi revera et in facto* he ſays, the court of admiralty had no juriſdiction to proceed againſt him for the penalty, inaſmuch as he had been once admitted and ſworn a member as the ſtatute requires, and had alleged the ſame in his defence; notwithſtanding which the defendant is proceeding againſt him after a writ of prohibi-

tion delivered. The defendant as to the contempt pleads Not guilty, and for a conſultation demurs.

Yorke pro defendente. Before I enter upon the merits of this cauſe, I muſt obſerve, that as this record ſtands, the facts of our ſeveral allegations in the court of admiralty of the *cinque* ports muſt be taken to be true; for the now plaintiff has by his demurrer to the ſecond allegation admitted the fact, and offered to put it in the judgment of the court, whether upon that ſtate of the caſe it be ſufficient to compel him to make any anſwer at all to it. There is likewiſe a demurrer to the declaration in this court, which if the other was out of the caſe would have the ſame effect. Neither is the power of removal to be at all queſtioned, but it muſt be taken to be a legal removal.

The main queſtion in this caſe will ariſe upon the firſt clauſe in the act of Parliament, which after reciting the great uſefulneſs of this ſociety to the publick, and the danger in admitting perſons to pilot ſhips, who are not members of that ſociety, enacts, " That " if any perſon or perſons ſhall after 1 *Auguſt* 1717, take upon " him or themſelves to conduct or pilot any ſhip or veſſel by or " from *Dover*, *Deal* or the iſle of *Thanet*, to any place or places " in or upon the rivers of *Thames* and *Medway* before he or they " ſhall be firſt examined, as has been uſual, by the maſter and " wardens of the ſaid ſociety or fellowſhip for the time being, touch- " ing his or their abilities, and ſhall be approved and admitted into " the ſaid ſociety at a court of loadmanage by the lord warden of " the *cinque* ports or his deputy, and the ſaid maſter and wardens " for the time being, every ſuch perſon ſhall forfeit for the firſt of- " fence 10 *l.* (which is the penalty we go for) to be ſued for and " recovered in the court of admiralty of the *cinque* ports, if the of- " fender be found within the juriſdiction, or elſe in the courts of " *Weſtminſter-hall.*"

Upon this clauſe I ſhall inſiſt, that the now plaintiff having been legally removed from being a member of the ſociety, is (notwithſtanding his former admiſſion) ſuch a perſon as is prohibited by this act from piloting any ſhips or veſſels within the limits that have been mentioned, and conſequently that he hath incurred the penalty for the firſt offence, and being found within the juriſdiction of the court of admiralty of the *cinque* ports, there was ſufficient to found the juriſdiction of that court in the ſuit which we commenced there againſt him, and therefore a conſultation ought to go.

For this purpoſe I ſhall ſhew, that he is both within the words and intention of the ſtatute.

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As to the words. It will be objected, that the now plaintiff did not pilot this ſhip *before* he was admitted a member of the ſociety; for there was a previous admiſſion, which is enough to ſkreen him from the penalty, though as to any other benefit he is totally deprived by his expulſion out of the ſociety.

To this I anſwer. That this is not the proper conſtruction of thoſe words; the plain and natural import of which I take to be, that all perſons ſhall be excluded, who are not at the time of piloting any ſhip, members of that ſociety. It may not be improper to obſerve, that by the preamble of this act, the members of the ſociety are deſcribed to be perſons who have been publickly examined touching their ſkill and abilities in pilotage before their admiſſion. It takes notice of the many and great advantages of the fellowſhip as a fellowſhip, and the good orders and regulations the fellowſhip is under; and therefore it is conſiderable, whether the enacting clauſe, which prohibits all perſons before their admiſſion from acting as pilots, ſhall not be taken to be only a large deſcription of a member of the ſociety, by ſpecifying the particulars that make up and conſtitute a member. The preamble ſays, " That all members have been " examined, and then approved and admitted." The enacting part prohibits all perſons not examined, approved and admitted; that is, all perſons who are not members of that ſociety; for this muſt be underſtood of an approbation and admiſſion ſubſiſting and in force, ſuch as are valid at the time the party exerciſes the buſineſs of a pilot, and not ſuch as have been made void and done away by a ſubſequent removal; for how can it be ſaid that any perſon ſtands approved by this ſociety as a pilot, who is ſo far diſapproved that he has been turned out.

And this is further explained by the proviſo which follows, and excuſes perſons who undertake the pilotage of ſhips, when no one of the ſaid ſociety or fellowſhip ſhall be ready to conduct and pilot the ſame. So again, it provides, that all maſters of ſhips ſhall have liberty to make choice of ſuch pilot of the ſaid ſociety or fellowſhip, as he ſhall think fit; and no perſon ſhall continue in the ſaid ſociety or fellowſhip, who ſhall not comply with the directions of the ſtatute in what is there mentioned. So that every clauſe being tied up to the being of the ſociety or fellowſhip, makes it evidently appear, that whoever undertakes to pilot any ſhip, muſt be at that time a member of the ſociety, or elſe that he ſhall incur the penalties.

This I take to be the plain meaning of the words; but even the intention of the act goes to this caſe: That a perſon once admitted,

and afterwards removed, was as fully intended to be excluded from the pilotage of ſhips, as any other perſon who had never been admitted at all. But that what I ſhall offer upon this head may the better have its weight, I ſhall firſt obviate an objection or two which may be made.

It may be objected, that this is a penal ſtatute, and that penal ſtatutes are not to be taken by intendment; and therefore the plaintiff not being within the words, ſhall never be expoſed to what may be argued to be the intent of the ſtatute.

I muſt admit this to be the general rule of conſtruction of penal ſtatutes; but then it is under certain limitations and reſtrictions, and many caſes there are which break in upon it. For there is an higher rule of conſtruction than this, and that is, that all ſtatutes which are made *pro bono publico* ſhall be expounded in ſuch a manner, that they may as far as poſſible attain their end. That this ſtatute is a law made *pro bono publico*, I believe will not be diſputed. The nature of the thing ſpeaks it, and the ſtatute itſelf takes notice *of the many and great advantages of the ſaid ſociety or fellowſhip to the publick.* In *Magdalen college* caſe it is ſaid to be the office of judges, to make ſuch a conſtruction, as will redreſs the miſchief, and advance the remedy, and to ſuppreſs all evaſions which may be made in order to continue the miſchief; that the law will never by any conſtruction advance a private intereſt to the deſtruction of the publick; but on the contrary will advance the publick intereſt as far as poſſible, though it be to the prejudice of a private one. So likewiſe is 3 *Co.* 7. *b.* It would be endleſs to cite caſes where penal ſtatutes have been taken by intendment, and therefore I ſhall only ſingle out two, which are ſtronger than the caſe at bar, inaſmuch as the penalties are far greater, and one of them extends even to the life of the offender. 11 Co. 71. b.

By the ſtatute of 27 *Ed.* 3. *c.* 1. it is provided, "That if any per-
" ſon ſhould draw another to the court of *Rome* for a matter which
" might be determined in the king's courts, or to overthrow the
" judgments given in ſuch courts, ſuch perſon ſhould have day by
" the ſpace of two months, *and if he came not at the day*, he ſhould
" be put out of the king's protection." Upon this ſtatute a queſtion was made in 30 *Ed.* 3. 11. *b.* whether if the offender ſhould appear and be convicted, he ſhould incur the danger of a *praemunire*; and afterwards in 39 *Ed.* 3. 7. *a.* it was reſolved he ſhould: and yet that caſe is as much out of the letter of the ſtatute as our caſe: and many judgments have followed that reſolution. 44 *Ed.* 3. 36. *a.*

The other caſe I ſhall mention is in 2 *R.* 3. 10. *a.* which was a queſtion made upon the 8 *Hen.* 6. *c.* 12. which enacts, " That if " record be razed or ſtolen away, *by reaſon whereof any judgment is* " *avoided*, the offender ſhould ſuffer death as a felon;" the razure in that caſe tended to ſupport the proceedings, and yet it was reſolved to be felony.

Taking it therefore, that we are proper to conſtrue the words of this ſtatute in this manner; I ſhall now proceed to ſhew, that the offence of the plaintiff is ſuch an offence, as was deſigned to be puniſhed in the manner we are proceeding againſt it. The ſtatute takes notice of the good rules and orders of the ſociety, which tend ſo much to the advantage of the publick; and by requiring every member to be firſt examined, their deſign was, that no perſon ſhould have the pilotage of any ſhip, who was not to be under the awe, and ſubject to the rules and orders of the ſociety; leſt (as the ſtatute takes notice) unqualified perſons ſhould undertake the pilotage, whereby the ſhips and veſſels with their cargo and mariners ſhould be loſt. Every pilot is likewiſe required to have his name hung up at the cuſtom-houſes, that the merchants and maſters of ſhips may know who to apply to, and what perſons they may ſafely truſt. But this man at the time of piloting this ſhip was not under the controul, or in any degree ſubject to the rules and orders of the ſociety; his name ought not to be hung up at the cuſtom-houſe, ſo as to be known to the merchant, or any others who wanted the aſſiſtance of a pilot, becauſe none but the names of members are to be ſo liſted: a perſon who had never been admitted could but be in the ſame condition; he is only prohibited from piloting of ſhips, becauſe he will not be under any regulation, which is ſo neceſſary for the ſervice of the publick.

To inforce this a little, I would ſubmit, that perſons who have been legally removed from offices or employments, are to be conſidered in the eye of the law to be in the ſame caſe, as if they had never been admitted into ſuch offices or employments. Suppoſe the by-laws of the city of *London*, inſtead of prohibiting perſons *not being free* from exerciſing a trade, had run, that no perſon *before he was admitted a freeman* ſhould ſet up any trade; I take it
8 Co. 121. b. within the reaſon of *Wagoner*'s caſe, that ſuch a perſon after diſfranchiſement would be as much ſubject to the penalties, as perſons not being free are upon the preſent eſtabliſhment. By the act of uniformity 13 & 14 *Car.* 2. *c.* 4. §. 14. it is provided, " That no " perſon ſhall be capable to be admitted to any benefice or eccle- " ſiaſtical promotion, or preſume to adminiſter the ſacrament, *be-* " *fore ſuch time as he ſhall be ordained prieſt*, according to the form

" of the book of common prayer, under the penalty of 100*l.*" Now will any body ſay, that if a clergyman be legally deprived, yet becauſe he has been once epiſcopally ordained, that therefore he may officiate wherever he pleaſes? No, that ordination is to all intents and purpoſes as if it had never been, and the perſon liable to the penalty, or elſe this would prove a very vain proviſion. By the 11th ſection of the ſame ſtatute every ſchoolmaſter is prohibited from teaching any youth, *before licence obtained* from his reſpective ordinary, under certain penalties: now though the biſhop does grant ſuch a licence, yet it will not be pretended, but that it is in his power to repeal it; and ſuppoſing he does ſo, muſt this man ſtill continue to keep a ſchool? I apprehend he cannot; for if he may, the conſequence of that will be, that if the biſhop upon any miſ-information ſhould once grant ſuch a licence to a perſon never ſo unfit, and in whom he was much deceived; that then this perſon might go on in teaching ſchool, and corrupt our youth, when at the ſame time there is an expreſs act of Parliament which was made to meet with, and oppoſe ſo great a miſchief. In 2 *Keb.* 538. where the libel was for teaching ſchool *after* licence repealed, a prohibition was denied. In our caſe may it not happen, that a man ſhall get the uſual points of examination ſo well, as to paſs a publick examination; and yet when he comes to act as a member of the ſociety, he may be found to be ignorant, or not fit to be intruſted? This may be (and I am afraid has often been) the caſe, and will it then be pretended to be reaſonable, that this perſon may continue to act as a pilot, and ruin the merchant who commits his ſhip to his care? I apprehend the reaſon of the thing tells us, that this man ought to be diſmiſſed from the ſociety; and if he ever afterwards concerns himſelf in the buſineſs, he ſhall be ſubject to the ſame penalties as in caſe he had never been once admitted. The ſame reaſon holds in both caſes, *et ubi eſt eadem ratio, ibi idem jus.*

It will be objected, that admitting this caſe to be within the intent of the legiſlators, yet this is a proceeding in a courſe different from the rule of the common law: ſo that though a juriſdiction be given them in one matter, yet that may not be extended by equity to ſimilar caſes.

This admits of ſeveral anſwers. In the firſt place I muſt obſerve, that if it be admitted (as they who argue in this manner muſt admit) that this caſe is in equal miſchief, and a ſimilar caſe; then it is alſo admitted, that it is juſt and reaſonable it ſhould ſtand within the ſame remedy, if it may be: if one offence be of as bad conſequence as the other, what reaſon is there to favour one offender more than the other? which will unavoidably be the caſe, if the

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court of Admiralty of the *cinque* ports has no juriſdiction of this cauſe. Nay it will go ſo far, as to exclude any remedy at all againſt the offender; for the juriſdictions given to the King's courts, and the court of Admiralty of the *cinque* ports, are excluſive, and not concurrent juriſdictions, and to be made uſe of in different caſes: the ſuit is to be commenced in the court of Admiralty of the *cinque* ports, if the offender lives or is found within the juriſdiction, or elſe by action of debt in the King's courts of record: now the words *or elſe* exclude the courts of *Weſtminſter-hall* from any juriſdiction in caſes where the party is to be found within the inferior juriſdiction: the plaintiff is to reſort to one, if the offender lives or is to be found within it; but if he cannot, then, and not till then, he is to ſeek his remedy in another place.

We are now got ſo far as to take it for granted, that the plaintiff in this caſe was deſigned to be puniſhed for offences committed after his removal: now if what is contended for on the other ſide ſhould prevail, it may ſo happen, that ſuch an offender may keep intirely out of the reach of the ſtatute: for ſuppoſe he ſhould continually live within the juriſdiction of the court of Admiralty of the *cinque* ports; then upon my former reaſoning he could not be proceeded againſt in any other court: the conſequence of which will be, that if this juriſdiction does not extend to ſimilar caſes, the offender muſt go unpuniſhed.

Where inferior courts have been allowed juriſdiction in caſes ſimilar to thoſe wherein they have juriſdiction.

But further, I take it to be no new thing for inferior courts, nay courts proceeding by the rules, and in the forms of the civil or eccleſiaſtical law, where juriſdiction is given them in a particular caſe, to have a juriſdiction by conſtruction in ſimilar caſes within the like miſchief. The ſtatute of *Circumſpecte agatis* mentions only the biſhop of *Norwich*, but yet becauſe what is reaſon in his caſe muſt of neceſſity be reaſon in the caſe of any other of the biſhops, therefore it has been conſtrued to extend to all. 2 *Inſt.* 487. The ſame ſtatute after mentioning fornication and adultery has the word *hujuſmodi*, and has therefore been expounded to include inceſt and ſolicitation of chaſtity. 2 *Inſt.* 488. So the ſtatute of *Articuli cleri*, *c.* 9. gives remedy where *animalia rectorum* only are taken; and yet in 27 *Aſſ. pl.* 66. it was held to extend to abbots and priors, who were within the ſame reaſon. The ſtatute 2 *E.* 6. *c.* 13. gives the double value for not dividing, and ſetting out predial tithes, to be recovered in the eccleſiaſtical court according to the eccleſiaſtical laws; and yet that has been extended to the caſe where he does actually divide them, but then carries them away before the parſon has time to take them; and yet the eccleſiaſtical juriſdiction is given only in the caſe of not dividing and ſetting out of tithes. But becauſe it was the intent of the ſtatute, that the ſetting out ſhould be

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in ſuch a manner, as that the other might have the benefit of them; therefore this device to elude the ſtatute was not allowed to prevail. 2 *Inſt.* 649. The decree relating to tithes in *London*, which is confirmed by 37 *H.* 8. *c.* 12. has the words, "Where no rent is reſerved upon a leaſe of a houſe by reaſon of any fine or income paid before hand:" and upon this, 2 *Inſt.* 659, 660. it was reſolved to extend to caſes where no fine or income had been paid before hand; which was not a caſe within the words of the ſtatute, any more than our caſe is.

There remains ſtill another objection to be anſwered, and it is this. That to allow the court of Admiralty to proceed in this caſe, is to give them a power to judge of disfranchiſements, and the validity of corporate amotions.

Court of Admiralty may judge of matters not originally within their Juriſdiction, ſo as they come in by way of incident.

To this I anſwer, That though they cannot have original cognizance of ſuch matters, yet they may examine into them where they come in only by way of incident. Out of the many caſes that might be cited for this purpoſe I ſhall ſelect a few, to ſhew that the rule *acceſſorium ſequitur, non ducit ſuum principale*, holds equally in inferior and ſuperior juriſdictions. *Bracton lib.* 5. *f.* 401, 406. *Regiſt.* 58. The ſpiritual court, or court of Admiralty, may judge of a ſtatute, where it comes in incidentally. 2 *Roll. Abr.* 308. *pl.* 22. In *Yelv.* 134. a ſuit was commenced in the Admiralty for being aſſiſtant to the eſcape of one committed for piracy; and notwithſtanding the offence in abetting the eſcape was committed upon the land, yet in regard it was a dependant upon the offence of piracy, it was reſolved to be cognizable there. 1 *Roll. Rep.* 21. In a ſuit for tithes the defendant pleaded an arbitrement, and a prohibition was prayed for that, and denied. *Latch* 228. The right to the office of Chancellor of the biſhop of *Glouceſter* came incidentally in queſtion in the high commiſſion court; and becauſe they had juriſdiction of the principal matter, no prohibition went.

If therefore the now plaintiff ſhould be thought not to be within the letter, yet ſurely he is within the reaſon of the ſtatute; and being ſo he is liable to be proceeded againſt in the court of Admiralty of the *cinque* ports, and therefore a conſultation ought to go.

Whitaker Serjeant *contra*. I ſhall ſhew that the plaintiff is qualified within the words of the act, which is ſufficient to ſkreen him from the penalty. The demurrer can never be taken as an admiſſion of the conſtitution and power of removal, for that conſtitution is no otherwiſe ſet out than in the libel; and if any thing ſtands

admitted by the demurrer, what we ſay, that the defendant *falſo et ſubdole libellando*, &c. is confeſſed, for that denies the truth of the libel, as in 27 *H.* 8. 11. *quare crimen feloniae falſo impoſuit*, was held to be an abſolute denial of the crime.

Then as to the demurrer below, that confeſſes nothing but what is well pleaded; and in this caſe they have not pleaded the merits as they ought, for they ſhould have ſhewn, whether they are a corporation, or only a voluntary ſociety; that they had a power to make by-laws, and that the by-law, againſt which my client is ſuppoſed to have tranſgreſſed, is a good and a reaſonable by-law: all this ſhould have appeared to the court; and inſtead of demurring to our declaration, they might have come and ſhewn all this by plea. *Raſt.* 393. 18 *E.* 4. 29. *Co. Ent.* 122. For how elſe can they pray a conſultation, without eſtabliſhing the juſtice of their proceedings, and laying the whole matter before the court.

As to the merits, I apprehend this ſtatute ought to be conſtrued ſtrictly, and that upon three accounts. 1. Becauſe the ſubject matter of it is an inferior juriſdiction. 2. Becauſe it is introductive of a new law. And 3. Becauſe it is a penal law.

1. As it is an inferior juriſdiction, it is confined to time and place, to perſons, actions and things, as they are mentioned in it. In the caſe of the *Marſhalſea*, 10 *Co.* 75. it was held, that *treſpaſs* would not include *ejectment*, or where a *detainer* is coupled with it; and that is the caſe of an ancient court, this, of a new one. If the ſheriff's torn be held at a different time from what *Magna charta* directs, it is ill. 2 *Inſt.* 71.

2. Affirmatives in a new law imply a negative. *Hob.* 298. Nay where it is a remedial law, as in the caſe of a *quod ei deforceat* in 14 *H.* 7. 18. and a *cui in vita* in 18 *E.* 4. 16. 2 *Inſt.* 352.

3. This is a penal law, reſtrictive of that natural right which every man has to have the benefit of his labour and induſtry, and it gives a remedy which was not at common law before, and is therefore to be taken ſtrictly. *Keilw.* 96. So the cuſtom of gavelkind, that an infant may alien, was held not to warrant a releaſe. 10 *H.* 4. 33. And the ſame limited conſtruction has always been made upon the ſtatute of limitations.

I agree the rule of expoſition laid down about ſtatutes made *pro bono publico*, with this reſtriction, that they are no way derogatory of the common law. In this caſe the ſtatute provides for the

puniſhment of perſons who loſe ſhips, and that is an argument that they had no notion of a power ſubſiſting in this ſociety, to remove a man for that, or any other offence.

But what I inſiſt upon is, that the removal muſt be laid out of the caſe; and the only queſtion now is, whether this man was ever examined, approved and admitted: it appears he has been examined, approved and admitted, and being ſo he is not a perſon in any wiſe prohibited from acting as a pilot. The caſes where the ſpiritual court has judged of matters of freehold, are not like this; for in them they had original juriſdiction of the principal cauſe. And no caſe can be ſhewn where when an act was lawful at common law, and then an act of Parliament has come and altered the nature of it by rendring it unlawful, that ſuch a ſtatute has been extended to ſimilar caſes, which I am far from admitting ours to be.

Yorke replied. The argument from the words *falſo et ſubdole* (which are words of courſe in all ſuggeſtions) is nothing to the purpoſe, for the truth of thoſe facts is not yet determined, the queſtion being whether the court below ſhall proceed to examine into them. But there was a demurrer below precedent to their ſuggeſtion in this court, and that demurrer has put it in the judgment of the inferior court, whether taking our libel to be true, there is diſcloſed ſufficient for the inferior judge to condemn the party.

I agree that by-laws muſt be ſet forth, where the point of amotion is in diſpute; but not here, where it comes in only by way of incident, in which caſe the bare alleging, that he was removed, is ſufficient. *Bro. Pleading* 87.

Almoſt all acts of Parliament alter the common law, and yet many of them are conſtrued liberally.

C. J. The queſtion is, whether the plaintiff has incurred the penalty of the ſtatute; for if he has, the juriſdiction of the court of Admiralty of the *cinque* ports to proceed againſt him for that penalty, is not to be doubted.

As to the words of the ſtatute, I think there is no colour to ſay the plaintiff is within them; for they extend only to perſons *not* examined, approved and admitted. And therefore he is not within the words.

In the next place, to conſider the intention of the ſtatute; it ſhould ſeem as if there was a great difference between the caſe of one never admitted, and the caſe of one who has been admitted and afterwards

afterwards removed: a man that undertakes to pilot a ſhip *before* any admiſſion, acts knowingly againſt the expreſs words of an act of Parliament; and there is room to ſuſpect his ignorance as to the buſineſs he undertakes: but where a perſon has been once admitted, though he be afterwards removed, yet there is no room to doubt his ſkill in pilotage, becauſe he has paſſed a publick examination, and it may be the removal was not for want of ſkill, but upon ſome other account, which may afford no ground to diſtruſt his abilities: every man knows whether he has been admitted or not; but every man after he is admitted may not know whether he be legally removed, for that may be a matter of difficulty depending upon the power of the ſociety, and the validity, reaſonableneſs and conſideration of their by-laws; for a removal *de facto* can never be ſufficient, and it muſt appear to us, not only to be a removal for acting contrary to by-laws, but alſo for acting contrary to *good* by-laws. I do not think the caſe at bar is within the reaſon of the caſe expreſſed *in terminis*.

But even admitting it to be within the intent of the act, yet ſurely in the caſe of freehold we ought to be ſatisfied of the juſtice of that removal, by their ſhewing a power to make by-laws, and every other ſtep neceſſary to make a lawful removal; and for want of this, as well as for want of juriſdiction of the cauſe, I think no conſultation ought to go.

To which *Powys* J. agreed. *Et per Eyre* J. If this had been a return to a *mandamus* to reſtore, I ſhould have thought it ill; but there is a great difference, where the point of removal is only a collateral matter. The intent of this ſtatute was certainly to ſecure the pilotage of ſhips to ſkilful perſons, and the underſtanding of the pilot was the principal thing they had in view: now can it be ſaid, that this man is *leſs* a perſon examined, approved and admitted, by being removed? Does that take away all the knowledge he had before? One cannot infer any incapacity from his being removed, for that might be for a matter foreign to the qualifications of a pilot. If the Parliament had intended any thing of that nature, ſurely it would have been mentioned.

Forteſcue J. The act itſelf makes a diſtinction between qualified perſons and thoſe who are actually members. The publick is only concerned to ſee that they who undertake the pilotage of ſhips are capable of the buſineſs; which they certainly are, when they have paſſed examination. This act is to be conſidered ſtrictly, and not by equity; for it was never ſaid, that this court ſhall conſtrue an inferior court into a juriſdiction. The admiſſion is good

to ſome purpoſes after a removal, as 1 *Roll. Rep.* 81. in the caſe of a *pauper* diſpaupered. *Per curiam*, Judgment for the plaintiff.

The ſociety applied, and had a clauſe in 7 *Geo. c.* 21. § 14. for their relief.

Dominus Rex *verſ.* Philips.

THE coroner's inquiſition taken *ſuper viſum corporis* was quaſhed, becauſe the year of our Lord in the caption was in common figures, whereas it ought to have been in words at length, or at leaſt in *Roman* numerals. Caption in common figures, ill.

Dominus Rex *verſ.* Johnſon.

Mich. 6 Geo.

CONVICTION on 5 *Ann. c.* 14. for keeping a gun not being qualified; and exception was taken by *Fazakerley*, that here was not a reaſonable ſummons, for it was made on 5 *October* to appear the ſame day, which might be impoſſible upon account of diſtance, or the ſummons being ſerved late, and his witneſſes might not be got together on ſo ſhort a warning: then it is to appear *apud paroch' praedict'*, whereas there are two pariſhes mentioned before, ſo the man may have gone to one, whilſt they were convicting him at the other. *Salk.* 181. Appearance cures defects in ſummons.

Wearg contra. The defendant appeared at the time and made defence, ſo that cures all defects in the ſummons. *Et per curiam*, The anſwer is right.

Then it was objected, that the ſtatute requires the conviction to be by juſtices of the county where the offence was committed, and that does not appear in this caſe. *Et per curiam*, That muſt appear, or elſe they have no juriſdiction. *Et per Wearg*, It does, for they diſtribute part of the penalty to the poor of the pariſh of *Chelfield in com' Kanc'*, *infra quam paroch' offenſum praed' commiſſum fuit.* And the juſtices are juſtices of the county of *Kent*, and ſtile themſelves ſo. *Adjournatur.*

Mich. 7 *Geo.* it was quaſhed; for *per curiam*, their juriſdiction muſt appear otherwiſe than out of their own mouth.

Between the Archbiſhop of Dublin *and* the Dean of Dublin.

Coſts ſhall be given on quaſhing writ of error, where there are none to be recovered in the action.

THE defendant in prohibition obtained judgment in *Ireland*, which was affirmed in *B. R.* there, and came over hither by a defective writ of error, which was quaſhed; and now the queſtion was, whether the defendant in error ſhould have coſts, there being none given in the courts below, either on the principal judgment or the affirmance.

And for the plaintiff in error it was ſaid to have been the conſtant conſtruction on 3 *H.* 7. *c.* 10. that where there were no coſts in the original action, there ſhould be none on the writ of error; and the 4 & 5 *Ann. c.* 16. extends only to caſes where the defendant in error would have coſts on affirmance. *Cro. Car.* 425. In a *formedon* the judgment was affirmed without coſts. So 1 *Lev.* 146. in a *quod ei deforceat*, 1 *Ven.* 166. in the caſe of an adminiſtrator, (and 4 *Mod.* 7. in replevin denied to the avowant) and the reaſon given for the caſes before cited is, becauſe there were no coſts in the original action; and the words in 3 *H.* 7. *delay of execution*, are confined to ſuch judgments, where there are coſts and damages. 1 *Ven.* 88. in the caſe of *Harriſon* and *the Archbiſhop of Dublin*, 10 *Ann.* in prohibition, there was judgment for the defendant in *C. B.* in *Ireland*, that judgment affirmed in *B. R.* there, and alſo in this court, and in the Houſe of Lords, and no coſts ventured to be taken, though able counſel had conſidered the caſe.

On the other ſide it was ſaid, that though there are no coſts given below in this caſe, yet there might have been coſts on 8 & 9 *W.* 3. *c.* 11. (which they ſhewed was enacted in *Ireland*) and therefore the neglect of taking them in one court ought not to prejudice the party in another. In *Cro. El.* 659. there were coſts in a *quod permittat*, and yet the judgment is, only to abate a nuſance. *Harriſon*'s caſe paſſed *ſub ſilentio*; and in *Hyde* v. *Hallagan*, *Hil.* 2 *Geo. in B. R.* which was replevin in *C. B.* in *Ireland*, judgment for the avowant, and affirmed in *B. R.* and brought over hither; and becauſe the firſt writ of error from *C. B.* to *B. R.* was defective, this court reverſed the affirmance, and gave ſuch a judgment as *B. R.* below ought to have done, *viz.* to quaſh the writ of error, and after ſeveral motions coſts were ordered to be taxed.

C. J. The authorities on 3 *H.* 7. being both ways, I think my ſelf at liberty to go into thoſe which ſeem to me to be grounded on the beſt reaſon, and thoſe are ſuch as give coſts, for indeed the

others which are built upon the words *delay of execution* ſtand upon a very ſlender foundation. Suppoſe there were no coſts in the original ſuit, yet is there not a manifeſt delay to the party? for after a long race, when he reaches a conſultation, he is but in the ſame condition as to the forwardneſs of his ſuit in the inferior court, as when he firſt ſet out to defend himſelf againſt the prohibition. The defendant might have had coſts below if he had aſked for them, and I think he is intitled to them here. *Et per Forteſcue* Juſtice: Coſts and damages will lie in ſome prohibitions. *Cro. Car.* 559. *Cro. Eliz.* 617, 659. The ſtatute has the word *vexation* as well as *delay of execution*, and will any body ſay, here is not a manifeſt vexation to the party, to be travelled thus far from one court to the other, and to have the merits of his cauſe ſo long ſuſpended from being determined in the inferior court.

Curia adviſare vult; and *Trin.* 6 *Geo. Pratt* C. J. delivered the opinion of the court, that coſts ſhould be paid.

Dominus Rex *verſ.* Whitlock.

THE defendant being brought up from *Newgate* by *habeas corpus*, it appeared upon the return, that he was committed for deer-ſtealing, as the ſtatute 3 & 4 *W. & M. c.* 10. directs, not having ſufficient diſtreſs; and that this was done by one juſtice under the ſtatute 5 *Geo.* and two exceptions were taken to the warrant. Conſtruction on game act of 5 Geo. c. 15.

1. Becauſe it does not appear, the conviction was ever confirmed in this court, or that the rule for confirmation was delivered to the juſtice, and the words of the ſtatute are, "That *after* the confir- "mation of any conviction and *delivering the rule* to the juſtice, "it ſhall and may be lawful, *&c.*" Now this ſtatute gives the juſtice a juriſdiction after confirmation, which he had not before; and therefore he ought to ſhew every thing requiſite to found his juriſdiction, within the reaſon of the caſes on the ſtatute *Car.* 2. where orders have been quaſhed for not appearing to be *upon complaint* of the churchwardens or overſeers. So *Hil.* 4 *Ann. Regina* v. *Hinam*, a conviction on *Car.* 2. for ſelling coals by ſcanty meaſure was quaſhed, becauſe it did not appear to be done in the city of *London*. The word *after* makes what comes under it to be in the nature of a condition precedent, and imports ſomething previous to found the juriſdiction. 13 & 14 Car. 2. c. 12. 16 & 17 Car. 2. c. 2.

2. The juſtice only ſays, that it has been certified to him by the conſtable, that there was no ſufficient diſtreſs, whereas there ought to

to have been a warrant to levy, and a return to that, that there was no diſtreſs: it may be the conſtable only told him ſo.

Et per Pratt C. J. and *Forteſcue* J. (*abſente Powys* J.) the warrant is well enough, for as to the laſt objection, the word *certified* imports it to be in a legal manner. Then as to the other objection, we take notice of our own records, and by them it appears the conviction is confirmed. The ſtatute does not give the juſtice a new juriſdiction, but only revives his old one, which was ſuſpended by the *certiorari*, and therefore this widely differs from the caſe of an order of removal, for there the overſeers are in the nature of truſtees for the pariſh, and unleſs they complain, it is to be ſuppoſed there is no grievance, and it is likewiſe to give an original juriſdiction.

Eyre Juſtice *contra*. The old juriſdiction was abſolutely taken away by the *certiorari*, and this is a new juriſdiction given upon terms, for the proſecutor has his election to take a *levari* from us, or apply to the juſtice, and the delivering the rule is what makes his election. We never grant execution on affirmances in the Exchequer chamber, till a *remittitur*. The juſtice ſhould likewiſe ſhew a return, that there was no diſtreſs, before he can order the man to be impriſoned; according to Dr. *Bonham*'s caſe and the caſe *Rex* v. *Chandler*, *Hil.* 11 *W.* 3. *in B. R.* where it was held, that there muſt be a record of every fining and impriſonment. There being two Judges to one, the defendant was remanded.

Salk. 378.

Dominus Rex *verſ.* Furneſs.

Order for tithes.

ORDER for non-payment of ſmall tithes was quaſhed, *quia* ſaid only *upon complaint* generally, and the 7 & 8 *W.* 3. *c.* 6. requires the complaint to be *in writing*.

Poplewell *verſ.* Wilſon.

Note to pay for the debt of another is within the ſtatute 3 Ann. c. 9.

ERROR of a judgment *in C. B.* in caſe upon a promiſory note entered into by *A.* to pay ſo much to *B.* for a debt due from *C.* to the ſaid *B.* And it was objected, that this not being for value received was not within the ſtatute, and *prima facie* the debt of another is no conſideration to raiſe a promiſe. But the court held it to be within the ſtatute, being an abſolute promiſe, and every way as negotiable as if it had been generally for value received. And the judgment was affirmed.

5

Dominus

Dominus Rex *verſ.* Clarke.

THE writ *de excommunicato capiendo* run thus: " *Significavit* " *nobis* (the biſhop) *quod Johannes Pope* (the vicar general) " in a cauſe between *A.* and *B.* for the contumacy of the ſaid *B.* " *ipſum praefat'* B. *excommunicandum fore decreviſſet authoritate ip-* " *ſius epiſcopi ordinaria excommunicatus fuiſſet.*" And *Yorke* moved to quaſh it, becauſe the only nominative caſe to *excommunicatus fuiſſet* is *John Pope* the vicar general, ſo *he* is ſaid to be excommunicated, and not the defendant. For the ſentence is not enough to warrant this writ, but it muſt be denounced in the church by a perſon in holy orders, and therefore the *excommunicandum fore decreviſſet*, (which I admit goes to the defendant) is not enough. *Excom' cap'.*

Et per curiam: It is oddly penned. But the officer informing them, that moſt of the writs in the office were, and had been ſo, the court refuſed to quaſh it.

Dominus Rex *verſ.* Smith.

IN this cauſe, and alſo in another againſt juſtices of the peace, the court refuſed the common rule for a good jury, becauſe that is often made up of gentlemen who are in the commiſſion. Practice.

Between the Pariſhes of Ivinghoe *and* Stonebridge.

UPON a ſpecial order of ſeſſions the caſe was ſtated for the opinion of the court. That in 1702 one *Richard Plower* was bound apprentice to *John Emerton*, who was legally ſettled in *Ivinghoe:* that he ſerved part of his time there, and then the maſter went with all his family as a certificate-man to *Stonebridge*, where he purchaſed an eſtate of the value of 60 *l.* and after ſuch purchaſe the apprentice lived with him ſix months till the apprenticeſhip expired; and becauſe the ſtatute 12 *Ann. c.* 18. provides, that the apprentice of a certificate-man ſhall gain no ſettlement in the pariſh to which the maſter goes by certificate, therefore the juſtices adjudge the ſettlement at *Ivinghoe*, where the binding and great part of the ſervice was. Apprentice living forty days in a pariſh to which the maſter goes as a ſettled inhabitant gains a ſettlement.

Et per curiam: The order muſt be quaſhed: for as the apprenticeſhip expired in 1709, the ſtatute 12 *Ann.* is out of the caſe, not being made with any retroſpect; and then the caſe is no more,

than that an apprentice of a certificate-man lives forty days in *Stonebridge*, which before that ſtatute was enough to gain him a ſettlement. But if this had been a caſe ſince the ſtatute, yet we think the ſettlement would be in *Stonebridge*; for according to the caſe of *Burclear* and *Eaſtwoodhay*, *Paſch.* 5 *Geo. in B. R.* when a certificate-man makes a purchaſe, he immediately ceaſes to be there in nature of a certificate-man, and becomes a ſettled inhabitant; ſo that laying the ſtatute out of the caſe (as we muſt do, it being nothing to the purpoſe) in this view here is a ſervice for ſix months, as an apprentice, in a pariſh where the maſter was legally ſettled, which is more than ſufficient to give a ſettlement to the apprentice.

Ante 163.

Dominus Rex *verſ.* Hare et Mann.

Ante 146. King may try either iſſue firſt, where ſeveral are joined.

SCIRE *facias* out of the petty bag to repeal letters patents, and Mr. Attorney moved on behalf of the crown for a trial at bar the next term, but as to the time was oppoſed, becauſe it was alleged, that one defendant had pleaded to iſſue, and as to the other there was a demurrer joined, which went to the whole, ſo that if the demurrer ſhould be with that defendant, it would make an end of the *ſcire facias*, let the iſſue be determined which way it would; and 2 *Cro.* 134. 1 *Inſt.* 125. were cited. *Smith* v. *Bowen*, 8 *Ann.* In appeal the defendant pleaded to the writ, and at the ſame time (as he might do in appeal *in favorem vitae*) he pleaded over to the felony, and there being a demurrer to the plea to the writ, that was ordered to be argued before any trial, becauſe ſhould that be adjudged for the defendant, the other inquiry would be to no purpoſe. In treſpaſs, if there be two defendants, and one pleads Not guilty, and the other a releaſe, the plea of the releaſe ſhall be firſt tried, becauſe if that be true, it is in law a releaſe to both, and makes an end of the matter. In aſſiſe, a plea to the writ ſhall be tried before *Nul tort*, *&c.* And in the caſe of the appeal there was a ſpecial entry, *quod quoad* the iſſue of Not guilty *ceſſet triatio quouſque* the plea to the writ was determined.

Paſch. 26 Ed. 3. pl. 2. Lord Raymond 1288.

To this the Attorney General anſwered, That thoſe caſes were between party and party, and bound not the crown: here the *venire facias* is returned and filed, ſo the effect of their prayer is for me to make a diſcontinuance. *In C. B.* between *The King* and *Roberts et al'*, there is now depending a writ of deceit to reverſe a fine of lands in ancient demeſne; one defendant demurred, and the other pleaded in chief, that it is frank-fee: that iſſue is tried and found for the king, but the demurrer is not yet determined, and yet that is a caſe *quaſi* at the ſuit of the party, for the crown is only nominal, and not concerned in intereſt. *Dy.* 226.

Et per curiam: There is no danger of a diſcontinuance, for if the *venire* be filed, the proper entry is, That the jury *ponitur in reſpect'*. If it be not filed, you may yet enter a *non miſit breve*, and either way will prevent a diſcontinuance. In the caſe of the appeal, the bare award, *quod ceſſet triatio quouſque*, &c. was held to be a good continuance of the cauſe.

As to the principal point, it being the cauſe of the crown, the court took time to conſider; and the laſt day of the term the Chief Juſtice delivered their opinion, That the Attorney general was at liberty to bring on either the demurrer or the trial, as he pleaſed. A trial at bar was ordered for the next term.

Arnold *verſ.* Johnſon.

At Niſi prius *in* Middleſex, coram Pratt, poſt clauſum termini.

THE cauſe was called, and the jury ſworn, but no counſel, attornies, parties or witneſſes of either ſide appeared. Serjeant *Whitaker* being aſked his opinion, ſaid the plaintiff ought to be called, for the jury being charged, the cauſe muſt be carried on to ſome determination. But the Chief Juſtice ſaid, that no body had a right to demand the plaintiff but the defendant, and therefore the defendant not demanding him, he could not order him to be called, but the only way was to diſcharge the jury. And Mr. *Ketelbey* remembered a caſe where my lord *Parker* did ſo upon the like accident.

None but the defendant can demand the plaintiff.

Mr. Ratcliffe's caſe.

Upon an appeal to the Lords Delegates from the judgment of the commiſſioners for forfeited eſtates.

SIR *Francis Ratcliffe* being ſeiſed in fee of the premiſſes in queſtion, by leaſe and releaſe dated 19 & 20 *March* 1687, ſettled the ſame to the uſe of *Edward* his firſt ſon (afterwards earl of *Derwentwater*) for life, remainder to his firſt and every other ſon and ſons in tail male, remainder to the right heirs of Sir *Francis*. Earl *Edward* the tenant for life died, leaving *James* his eldeſt ſon, who entered and was ſeiſed of the tail: and 1 *May* 1712 (being at that time a papiſt) he conveyed the premiſſes to two perſons who were proteſtants, in order to make them tenants of the freehold, till a common

Tenant in tail may ſince the 11 & 12 W. 3. ſuffer a recovery to the uſe of himſelf in fee though he is a papiſt.

common recovery was ſuffered, which was accordingly had and ſuffered of part of the lands *in C. B. Paſch.* 1712, and of the other part, lying in the county palatine of *Durham*, 19 *June* 1712. Both which recoveries were declared to be to the uſe of earl *James* in fee. Earl *James* being thus ſeiſed of the fee, by leaſe and releaſe 23 & 24 *June* 1712, on his marriage with Sir *John Webb*'s daughter, conveyed the lands to the uſe of himſelf for life, then to the lady for life, remainder to the firſt and every other ſon and ſons of that marriage in tail male, with ſeveral remainders over, and proper limitations to truſtees to preſerve contingent remainders. The marriage took effect, and the claimant Mr. *Ratcliffe* was eldeſt ſon. Earl *James* 19 *February* 1716, was attainted of high treaſon, and by the ſtatute 1 *Geo.* all eſtates tail, whereof perſons attainted were ſeiſed, are veſted in the crown in fee. The commiſſioners ſeize this eſtate as forfeited by the attainder of earl *James*, upon which Mr. *Ratcliffe* puts in his claim, inſiſting that earl *James* was only tenant for life, and himſelf had now the right to his remainder in tail, the eſtate for life being determined by the execution of earl *James*. 23 *December* 1718, the claim was diſallowed, the commiſſioners being of opinion, that earl *James* was diſabled by the 11 & 12 *W.* 3. *c.* 4. to ſuffer ſuch recoveries, and conſequently he remained tenant in tail under the ſettlement of Sir *Francis*, and ſo the crown is intituled to the fee. The claimant appeals to the Delegates from the determination of the commiſſioners.

1 Geo. 1. c. 50.

It was argued ſeveral times at the bar on the behalf of the publick and the claimant; but there being a difference of opinion in the court, there will be no occaſion to take notice of the arguments of the counſel, ſince every thing that was materially offered on either ſide is again repeated in the judgment of the court.

The Delegates were five of the Judges, (*viz.*) Mr. Juſtice *Powys*, Mr. Juſtice *Tracy*, Mr. Baron *Mountague*, Mr. Juſtice *Forteſcue* and Mr. Baron *Page*, who all delivered their opinions *ſeriatim*: and though four of theſe concurred in opinion to reverſe the decree, yet they gave ſuch very different reaſons for that opinion, as makes it neceſſary to ſtate each of their arguments at large, in order to ſhew the grounds they ſeverally went upon.

The great queſtion in this caſe is, whether a papiſt tenant in tail can, ſince the 11 & 12 *W.* 3. ſuffer a recovery to the uſe of himſelf in fee, for it was agreed on all hands, that if the recovery had been immediately to the uſes declared by the ſubſequent ſettlement, it would have been good.

This general queſtion depends upon the conſtruction of the diſabling clauſe in that ſtatute, whereby it is enacted, " That from " and after the 10th of *April* 1700. every papiſt, or perſon making " profeſſion of the popiſh religion, ſhall be, and is hereby diſabled " to purchaſe, either in his or her own name, or in the name of " any other perſon or perſons, to his or her uſe, or in truſt for him " or her, any manors, lands, profits out of lands, tenements, rents, " terms or hereditaments within the kingdom of *England*, *&c.* " And that all and ſingular eſtates, terms, and any other intereſts " or profits whatſoever out of lands, from and after the ſaid 10th " day of *April* to be made, ſuffered, or done, to or for the uſe or " behoof of any ſuch perſon or perſons, or upon any truſt or con- " fidence, mediately or immediately, to or for the benefit or relief " of any ſuch perſon or perſons, ſhall be utterly void, and of none " effect, to all intents, conſtructions, and purpoſes whatſoever."

And if the recoveries be within this diſabling clauſe; then *nihil operatur* by the deed and recoveries, and the claimant's father remained tenant in tail as before, and the eſtate is forfeited to the crown. If not; then he became tenant for life by the new ſettlement, and the claimant has right to his remainder in tail, as limited to him by that ſettlement.

Mr. Baron *Page*'s argument. This is a caſe of very great conſequence, not only on account of the particular eſtate now in conteſt, which is very conſiderable, but alſo as it affects the eſtates of multitudes of papiſts, and proteſtants who have purchaſed under them, and as it is before a court from which there is no appeal. Mr. Baron *Page*'s argument.

I am of opinion that the claim of the appellant was well founded, and conſequently the decree of the commiſſioners diſallowing the claim is erroneous, and ought to be reverſed.

The great queſtion is, whether a papiſt tenant in tail can ſince the 11 & 12 *W.* 3. ſuffer a recovery to the uſe of himſelf in fee. This is the ſingle point to which it muſt all at laſt be reduced.

It has been inſiſted on for the publick, that by the words of the ſtatute the late Earl was incapacitated to ſuffer theſe recoveries; and to make the argument the ſtronger, it was urged that they were two diſtinct clauſes, which have no relation to each other, and that the laſt carries the incapacity of a papiſt much farther than the firſt.

Whether they are two clauſes or one only, I ſhall not determine, ſince that is not material to guide us in the conſtruction, where the

only queſtion is, whether the latter part is diſtinct from, or relative to the former. I think the words of both parts are relative to each other, and the latter only explanatory of the former: they are only different ways of expreſſing the ſame thing, in which one perhaps may in itſelf be of a ſtronger import than the other, but yet were intended by the legiſlature to convey the ſame ſenſe, only in a fuller light.

It was ſaid that unleſs the latter words are carried farther than the former, they will be intirely uſeleſs: but to ſhew that acts of Parliament are not ſo nice upon that head, but make uſe of different expreſſions as often to clear up their meaning in what went before, as to add new matter, I ſhall obſerve, that this very clauſe now before us is no new one amongſt our ſtatutes, but is uſed in ſeveral of them upon occaſions that ſhew they muſt be merely ſynonymous with what was ſaid before. Thus 1 *Jac.* 1. *c.* 4. § 6. makes perſons paſſing or ſent beyond ſeas into popiſh ſeminaries, incapable of inheriting, purchaſing, taking and enjoying any manors, lands, profits, goods and chattels whatſoever; but not content with thoſe words, it goes on and enacts, That all eſtates, terms and intereſts, (in the very words of our ſtatute) ſhall be utterly void and of no effect. And yet it is evident, theſe could not carry the incapacity of papiſts farther than the former words had done; ſince thoſe exclude him from all benefit whatſoever in any real or perſonal eſtate within the realm of *England*.

But what is more full if poſſible to our purpoſe is 25 *Car.* 2. *c.* 2. commonly called the *teſt act*, by which perſons elected into offices, and refuſing to take the oaths and receive the ſacrament, are made incapable "to take, occupy and enjoy the ſaid offices or employ-"ments, or any part of them, or any profit or advantage apper-"taining to them:" And yet the Parliament, to prevent any equivocation, and to make the matter plain to the *lay gents*, declares further, "That all ſuch office or offices, employment or employ-"ments, ſhall be void;" which no one will ſay can ſignify more than what was expreſſed in the preceding ſentence.

1 Ann. ſt. 1. c. 32. I ſhall mention but one ſtatute more, which is that of 1 *Ann.* concerning the purchaſe of the forfeited eſtates in *Ireland*, by which it appears how apprehenſive the Parliament was of the danger which might ariſe to the kingdom by a landed intereſt ſubſiſting in the papiſts, and therefore amongſt other things it was deſigned as a prevention of any of thoſe eſtates from ever returning into popiſh hands: for this purpoſe it enacts, "That all papiſts ſhall be "for ever diſabled to purchaſe any of thoſe lands;" and further, "That all acts whatſoever ſuffered or done of ſuch lands to or in

" truſt for any papiſt ſhall be void." This ſtatute ſeems to have been the very pattern of the act now before us, and though it is impoſſible to find any uſe for the latter words, not implied in the former; yet the legiſlature we ſee did not think it improper, to expreſs their minds different ways, both with regard to the diſability of the perſon, and the nullity of the acts done for his benefit, though they both in the end amount but to the ſame thing. Here was certainly no intention in the Parliament, to diſable the papiſts from ſelling or diſpoſing of their own eſtates: the reſtraint was only from purchaſing and taking, and it was equal to them, who was the ſeller or diſpoſer, whether the eſtate moved from a papiſt or a proteſtant: the papiſt was in all caſes alike ſtill diſabled from being the taker.

Having now (as I think) cleared this caſe from any difficulty it might lie under upon account of the different wording of the ſtatute, and ſhewn that no advantage can be taken againſt the claimant from the peculiarity of ſome expreſſions in the latter part, which were added by the legiſlature only out of abundant caution, and to prevent miſtakes; I ſhall now proceed to ſhew, that according to the true intent and deſign of this ſtatute, the late Earl was not reſtrained from ſuffering ſuch recoveries as he did.

And the firſt thing I would ſet out with is to obſerve, that this is a penal law: it takes from perſons what by the common law of *England* is their birth-right, and upon that account is to be interpreted ſtrictly, and in ſuch a manner as not to carry the penalty farther than the open and evident intent of the ſtatute, which is a rule of conſtruction that always has, and I truſt ever will prevail.

Now the firſt and plain view of this law was, to prevent the great miſchief that had been experienced from the power which the moneyed men amongſt the papiſts had of increaſing their landed intereſt in *England*, and conſequently of inveſting themſelves with a larger ſhare of power and influence in the country. To remedy this miſchief, the ſtatute provides, That for the future no papiſt ſhall make any new acquiſition in lands; but there is not any word in it, that looks like a deſign to take from them their own eſtates, which they had before: as to thoſe it meddles not with them, but leaves them where it found them; we ſhould then at leaſt endeavour to guard againſt any interpretation, that tends to the taking away or abridging their preſent eſtates, becauſe in ſo doing we act moſt agreeably to the ſenſe and meaning of the legiſlature.

Before the ſuffering theſe recoveries, it appears, the late Earl was tenant in tail: every eſtate-tail has this property inſeparably annexed

to

to it, that the poſſeſſor of it has a right to ſuffer a recovery. Should therefore this ſtatute be expounded in ſuch a manner, as to hinder the effect of a common recovery on a papiſt's eſtate-tail, it would be taking away one preſent right which he has as an inherent quality in his own eſtate, and ſo far extending the penalty and hardſhips of this law beyond its principal deſign, which I have before ſhewn had regard only to new acquiſitions, and being a penal law is to be conſtrued ſtrictly. I muſt therefore own myſelf at a loſs to find out the reaſon, why we are to thwart that ancient and conſtantly allowed rule of conſtruction, by going out of the words, and in my opinion out of the intent, of the ſtatute. That the power of ſuffering a recovery is incident to an eſtate-tail, I believe will not be denied: *Mildmay*'s caſe, 1 *Co.* and 6 *Co.* 40. are full to that purpoſe; and there it is ſaid too that all conditions to the contrary are void, and that a tenant in tail has the power over, though he has not the whole fee-ſimple in himſelf.

So the caſe of *Benſon* v. *Hodſon*, 2 *Lev.* 26. 1 *Mod.* 8. where Lord *Hale*, accounting for a recovery's being a bar to the remainder man, ſays, that a recovery is a conveyance or method of defeating thoſe limitations, excepted out of the ſtatute *de donis*, which never intended to hinder it, and that the recompence in value is not the reaſon why the remainder man or reverſioner is barred.

But as an anſwer to all this it is urged, that how true ſoever it is, that the Earl was ſeiſed in tail, and the power of ſuffering a recovery is the right of every tenant in tail; yet the ſtatute we are now upon has in fact ſeparated this eſtate and that right: they are to take the ſtatute as they find it, and then it has ſufficiently deprived him of the power of ſuffering a recovery, by diſabling him from purchaſing.

The ground of this argument is, that the deſtruction of the eſtate-tail by the recovery, and the taking an eſtate to himſelf in fee, is a purchaſe within the meaning of the ſtatute.

Now conſider the analogy between common ſenſe and this conſtruction: would it not ſurprize a man who aſks who you purchaſed your eſtate of, to be told you purchaſed it of your ſelf: whoſe was it before? why it was mine, and I purchaſed it of my ſelf. Would not a perſon unacquainted with the chicanery of the law think you deſigned to banter him by ſuch an anſwer? And I believe the Parliament never thought of ſuch a purchaſe, where the ſame perſon is both donor and donee, grantor and grantee.

I agree it was the intent of the ſtatute in general, to prevent the acquiſition of eſtates by the papiſts; and therefore if there is a deficiency of any words which might directly comprehend them, we may ſupply it for that purpoſe. Thus I take a deviſe to be within the ſtatute: or if a papiſt ſhould be ſuffered to diſſeiſe another, and then gain a releaſe from the diſſeiſee; or where he is tenant for life ſhould levy a fine and the five years ſhould paſs: in all theſe caſes, or any other of gaining any eſtate or intereſt in lands which he could not have purely by his own act, and without the procurement or connivance of the perſon whoſe right is loſt, I take it he will be diſabled by the ſtatute. But I can go no farther, this being in my opinion the utmoſt extent that either the words or meaning of it can bear: and if we ſhould attempt to carry it further, the miſchief aimed at will not be prevented but increaſed; the popiſh intereſt inſtead of being leſſened will be conſiderably advanced.

For I cannot but think the effect of ſuch a conſtruction will be, to fix a perpetuity to the eſtates of all the papiſts in *England*; and inſtead of removing by degrees all the landed intereſt out of popiſh, into proteſtant hands, it will tend to keep it intirely amongſt the *Roman* catholicks: for to make a papiſt incapable of ſuffering a recovery, equally hinders the ſale to a proteſtant, or a papiſt.

Or ſhould the latter part of the ſtatute be interpreted in the utmoſt latitude the words will allow of, and as a disjoined and ſeparate clauſe from the former; conſider what abſurdities we muſt run into that way. All acts for his benefit or relief are made void; and therefore I cannot but think thoſe words, when ſtretched as large as ſome people would have them, will prevent even a ſale to a proteſtant, ſince no man can be ſuppoſed to part with his eſtate to a ſtranger, but in view of ſome benefit to himſelf. But I hope it will never be pretended, that the Parliament deſigned any ſuch thing by that expreſſion, when it is evident the ſtatute was calculated to enforce and oblige papiſts to ſuch a ſale.

But if we muſt interpret the word *purchaſe* here, not according to common underſtanding, (which one would imagine acts of Parliament were moſt calculated for) but in its legal ſenſe, in oppoſition to taking by deſcent; yet then I ſay, the Earl was ſeiſed under this recovery much more in the way of a deſcent than a purchaſe. For this purpoſe it is to be obſerved, that by the firſt ſettlement Sir *Francis* became tenant for life, with a reverſion in fee to himſelf after the eſtate-tail, of which the late Earl was ſeiſed before his ſuffering the recoveries, ſhould be ſpent. This reverſion in fee deſcended on the late Earl at the ſame time the eſtate-tail came to

him, and he continued ſeiſed of both till the recovery. Now what effect had the recoveries on theſe eſtates? why as to the tail, it extinguiſhed that, but could not touch the fee; the conſequence of which was, that all the impediment being removed, he was then in poſſeſſion only of that ancient reverſion in fee, which deſcended to him from his grandfather. 4 *Mod.* 1. the caſe of *Symmonds* v. *Cudmore*. Tenant in tail with a reverſion in fee makes a leaſe not warranted by the ſtatute, and dies, the iſſue before entry levies a fine; and it was held, that the leaſe was good, for this reaſon, becauſe the tenant in tail by levying the fine did not carry off the eſtate-tail ſo as to avoid the leaſe, but only extinguiſhed it, and ſo was in as heir at law to his father of his reverſion in fee, and muſt therefore take that eſtate together with the father's charge upon it.

Now ſuppoſe the late Earl's father had made ſuch leaſe and died, and the Earl before entry had ſuffered a recovery, would not this have let in his father's incumbrance? or can there be any difference whether the tail be extinguiſhed by fine or recovery? Whatever act it is, that by removing the intermediate eſtates, lets in the reverſion, it is exactly the ſame thing: the incumbrances on that reverſion, and the incidents to it, muſt be let in too. And therefore if the Earl had been originally ſeiſed *ex parte materna*, he would have been in of the fee on the recovery on the ſame ſide.

Common recoveries, it is well known, are only as common aſſurances, to be interpreted in the ſame manner, and to convey a title in the ſame condition, as other conveyances do. Now if one ſeiſed in fee enfeoffs *J. S.* to the uſe of himſelf for life, remainder to the uſe of the feoffee in fee; the feoffee is in only by way of remainder, and not of the reverſion as of the reſidue of the eſtate which was in him as feoffee. 1 *Inſt.* 22. *b.* *Dyer* 361.

The law looks upon the deed to lead the uſes and recovery as both together making one conveyance; and therefore when it happened, that the perſon to whom a conveyance was made, in order to make a tenant to the *praecipe*, was alſo leſſee for years of the ſame land; it was adjudged in the caſe of *Fountain* v. *Cooke*, 1 *Mod.* 107. that the leaſe was not extinguiſhed, as it would have been in any other caſe; becauſe the law conſiders the recovery with all its appurtenances but as one conveyance, and each of the inſtruments to bring it about but as part of it.

What I have been ſaying now to prove that Earl *James* was in under the recovery rather by deſcent than by purchaſe, is ſuppoſing it to be true, that all are ſeiſed of their eſtates either by deſcent or purchaſe. But indeed I think there is another way of coming to

an eſtate, and that is by operation of law, as in the caſes of tenant by the courteſy, dower, and the lord by eſcheat: in each of which there is nothing either of purchaſe or deſcent, but the law caſts the eſtate on the huſband, the widow, and the lord, without any act of their own, or prior ſeiſin of their anceſtor. And under this rank perhaps we may place the eſtate gained by the late Earl under the recovery: he is not ſeiſed of any new or really different eſtate from his firſt tail, for the tail and fee are in law equal eſtates, and therefore capable of being exchanged. 1 *Roll. Abr.* 813. But by the means of this recovery the operation of the law has new moulded it, and put it in a different form, from what it was before.

The ſum of what I have ſaid under this head is, that he is not in by purchaſe (taking it in the legal ſenſe) which is prevented from having any effect by the ſtatute: but he is in either by deſcent or operation of law; both which are confeſſedly not within the ſtatute.

But then the objection recurs from the latter words of the ſtatute, which ſay they, are general, and extend to his own acts, that the law doth not regard from whence, but to whom the eſtate comes; and therefore let the act be done by the papiſt himſelf, or by any other; if thereby any eſtate or benefit accrues to the papiſt, it is made void.

But firſt, had the ſtatute intended the papiſt's own acts, it would have been natural, to have mentioned any acts ſuffered or done *by* him, whereas the words are only *to* or *for*, which can never include *by*; for *to* is no more than *to himſelf*, and *for* implies *to another* for *himſelf*.

But in the next place, let us conſider the conſequences of ſuch an extenſive conſtruction. The act ſays, "Any thing done for the "benefit or relief of a papiſt ſhall be void." Now let thoſe words be but underſtood in their full extent, to mean all acts done by himſelf or others in relation to his eſtate, that are for his benefit; and I may venture to ſay, they will not leave him even the leaſt mark of ownerſhip in that which is confeſſedly his own land. Plowing and ſowing, making leaſes (which infants are allowed to do as what is beneficial to them) mortgaging, though to a proteſtant, or ſelling in order to raiſe money to redeem himſelf from ſlavery, will all come within the comprehenſive meaning now ſet up of the words *benefit and relief*; for not one of theſe acts but are in ſome meaſure done with a proſpect of his benefit or relief.

I mention theſe, not as things inſiſted on *in terminis*, but what muſt follow as a conſequence of leaving the main deſign of the ſtatute, to find out an expoſition moſt to the embarraſment of papiſts. For I am bold to ſay, the Parliament never thought of carrying matters to ſuch a length: nor can it be imagined, that a papiſt tenant for life, with a power of committing waſte, is by this act debarred from ſo doing, and made incapable of digging mines, cutting ſtone, and the like, and yet this is a ſtronger caſe than ours, ſince it is to the diſheriſon of the reverſioner.

Agriculture is much favoured and encouraged by the law, whereas we are now inventing a method, how all the lands in the hands of papiſts muſt lie for ever uncultivated.

The caſe moſt relied on by the counſel for the publick was that of *Roper* v. *Radcliffe*, which was adjudged upon an appeal to the houſe of Lords, where an eſtate was deviſed to be ſold for payment of debts and legacies, and the ſurplus to go to a papiſt; and the deviſe of the ſurplus was held void upon the preſent ſtatute, as being an intereſt and profit out of lands.

But I muſt own my inability to find how that caſe has any relation to this before us: I am ſure it is very conſiſtent with my interpretation of the word *purchaſe*: it was an intereſt out of land, not his own but another's: and this was ſuch a profit, as gave him as full a power over the land, as if it had not been directed to be ſold, but deviſed to him chargeable with debts and legacies; for he might (if a proteſtant) have come into a court of equity, and compelled the truſtees to convey to him on payment of the debts and legacies: this therefore was to all intents a deviſe of another's land, which I have before admitted to be within the ſtatute.

But ſay they, conſider what you are doing: are not you giving a papiſt tenant in tail in poſſeſſion a power to bar a proteſtant remainder man: and does not this tend to keep the land amongſt the papiſts, inſtead of drawing it to the proteſtants? Does not this enable the anceſtor to keep the heir ſteady to his own religion, for fear of being diſinherited? And is not this a ſtrengthening of the popiſh religion?

To this I anſwer: That it is but a vain terror, and can follow no more this way, than that which is admitted on all hands would have been good. For did not every body agree, that if the recovery, inſtead of being to the uſe of Earl *James* in fee, had been immediately to the uſes declared by the ſubſequent ſettlement, then

every thing would have been right, and as it ſhould be? And where is there any eſſential difference between the two methods of new moulding the eſtate? The argument of miſchief holds both ways: nay it is univerſal in one, and but particular in the other; for I am apt to think no body who has the ſettling of *Roman* catholick eſtates for the future will ever follow the precedent of this caſe.

Whether this recovery was ſuffered really in order to make the ſettlement on marriage, or whether we can take notice of it as ſuch, I do not think it very material. It is true, it is not expreſly averred to have been for that purpoſe, but yet there is *teſtimonium rei* that it was, for the *Durham* recovery was 19 *June* 1712, and the releaſe is dated the 23d, which was as ſoon as a letter could come to *London* to ſignify that the recovery was ſuffered.

Upon the whole I am of opinion, it never was the intention of the legiſlature, to deprive Earl *James* of any right he had to his own eſtate. Being tenant in tail, he had a right to ſuffer a recovery and new mould his eſtate. He has done ſo, and raiſed a good right in Mr. *Ratcliffe*, whoſe claim I think was well founded, and ought to have been allowed.

Mr. Juſtice *Forteſcue*'s argument. I ſhall make two queſtions in this caſe. 1. Whether this conveyance is a *purchaſe* within the act. 2. If it ſhould not come under that ſtrict notion of the word *purchaſe*, whether it is not affected by the latter part of the ſtatute, which ſpeaks of all acts ſuffered and done to or for the benefit or relief of a papiſt.

Mr. Juſtice *Forteſcue*'s argument.

As to the firſt; I take it for granted, that he who takes by purchaſe, is a purchaſer; and the conſideration is not material, as has been allowed by my brother; and in the caſe of *Roper* v. *Radcliffe* it was agreed, that there was no diſtinction between taking by purchaſe and being a purchaſer. Let us then ſee what it is to take by purchaſe. *Litt.* §. 12. ſays, He takes by purchaſe, who comes to lands by his own act and agreement, and not by deſcent. The oppoſition between purchaſe and deſcent, is, that the former is the effect of a man's own act; the latter, the act of law, without, and perhaps againſt his own act. The meaning of deſcent is not confined to that particular caſe where lands come down from the anceſtor to the heir; but wherever the freehold is veſted in any perſon by the act and courſe of law, ſuch perſon is in, in nature of a deſcent. 1 *Inſt.* 18. *b.* I muſt therefore differ from my brother as to his notion of tenant by the courteſy, dower and eſcheat. Tenant by eſcheat is ſaid to come in as heir, *in loco haeredis*. *Bro.*

Eſcheat 33. where the lord's taking by eſcheat is put upon the ſame foot with the heir's taking from his anceſtor.

The ſame is to be ſaid of tenant in dower and by the courteſy: and I never till now heard of that third ſort of taking eſtates, which my brother calls taking by operation of law, as diſtinguiſhed both from a purchaſe and a deſcent. Lord *Coke* indeed does mention a third ſort by creation, but that is foreign to our caſe, and may beſides be very properly referred to the head of purchaſe.

If the act of law concurs with the act of the party, it is a purchaſe. If the act of law only works the veſting of the eſtate, it is then a taking by deſcent. This is the caſe of the recoveror. He is in, it is true, by operation of law, but his own act is that which firſt gave motion to it, and conſequently he is in by purchaſe. No one would doubt where the recovery is to the uſe of a third perſon, but that he is in by purchaſe, and yet he too is equally in by operation of law. The late Earl then was within the expreſs words of *Littleton*, for he not only took by operation of law, but in conjunction with his own act and deed executed.

But we are told, this is only the *legal* ſenſe of the word: there is another vulgar ſenſe more intelligible to the underſtanding of the generality of the world, and the ſtatute is to be intended in that ſenſe.

I muſt own this is the firſt time I ever heard, that Judges are to lay aſide the legal ſenſe of a law, and run about to find the meaning in which it is received by ruſticks and plebeians. The word purchaſe has a known ſignification, in which it has conſtantly been uſed by lawyers without any variation: and I can never ſuffer myſelf to go from that, without an expreſs direction in the body of the ſtatute.

It is ſaid this is not a purchaſe, why? becauſe he took no new eſtate, but was in only of his ancient uſe. What eſtate had he before the recovery? Only an eſtate-tail with a diſtant remainder in fee, after ſeveral intermediate remainders in tail to the ſecond, third and other ſons: what eſtate has he now by the recovery? One ſingle fee ſimple in poſſeſſion; that is, the ſeveral particular eſtates that were before partly in him and partly in others, are now joined together, and made one in him alone. Now can any one ſay, that the whole is the ſame with ſome of its parts? Or that he has the ſame eſtate now he has every thing in him, as he had when others ſhared it with him?

But then again the objection is altered, and we are told, that the recovery only removes the impediments, and leaves him in, juſt as he was at firſt. Be it ſo; he ſtill gains a new hereditament, which he had not before; and it amounts to the ſame thing, whether this is effected by taking away the incumbrance, or adding ſomething new. In numbers every one knows the removing a ſubtraction is making an addition.

But to prove that he was in of his old eſtate in fee-ſimple, ſeveral caſes have been cited. The caſe of a feoffment to the uſe of the feoffor for life, remainder to the feoffee in fee, is very little to the purpoſe. It is grounded on what is ſaid in 1 *Inſt.* 23. that whoever is ſeiſed of an eſtate, has both the eſtate of the land, and alſo the uſe or the right to take the profits; and therefore ſo much of the uſe as he does not diſpoſe of, continues ſtill in him as his old eſtate, and ſo ſhall go to the part of the mother from whence the eſtate originally moved. But all this goes on the ſuppoſition of a preſent fee-ſimple in the feoffor, which in our caſe is removed to a great diſtance, after the determination of ſeveral other eſtates.

Another caſe urged with as little reaſon, is that of *Symmonds* v. *Cudmore*; where tenant in tail with an immediate reverſion to himſelf in fee makes an unwarranted leaſe and dies, the iſſue before entry levies a fine; and held he ſhall not now avoid the leaſe. But this is diſtinguiſhed from the preſent caſe by the ſame difference as the former: the reverſion in fee was immediately in him after his eſtate-tail, ſo that he really had the whole eſtate in the land in himſelf, only it was cut into two parts. But here the eſtate-tail in poſſeſſion and the fee in reverſion are disjoined by the intermediate remainders in other perſons, who conſequently take off part of the whole inheritance. All that this caſe amounts to is only to prove, that where a man has two eſtates in him, a leaſe which he makes is iſſuing out of both, and therefore when one of them is ſpent, or any ways removed, it ſhall be ſerved out of the other.

A caſe was cited upon the argument, where tenant for life with contingent remainder in tail, remainder to the tenant for life in fee, makes a feoffment to the uſe of himſelf in fee; and held that this uſe in fee was only his old eſtate. Now there is no doubt but that this muſt be his old eſtate, for he was all along ſeiſed of the fee-ſimple, liable only to be opened upon a contingency: all that the feoffment did, was making the contingency impoſſible ever to happen, and ſo incapacitates the perſon who was to be the taker; but this makes no addition to the eſtate; it only makes that eſtate abſolute

ſolute in the tenant, which before was liable to be broke in upon and interrupted.

When a fee-ſimple conditional and an abſolute one meet, they are conſolidated. *Hob.* 223. *Salk.* 338.

The caſe of the Earl of *Lincoln*, *Show. Parl. Caſes* 154. is ſtronger than this. There *Edward* Earl of *Lincoln* ſeiſed in fee made his will, and deviſed the lands in queſtion to the plaintiff; afterwards by leaſe and releaſe he conveyed them to the uſe of himſelf in fee till an intended marriage ſhould take effect, and then to the common marriage uſes. The marriage never took effect, and he died without iſſue or other diſpoſition of the premiſſes. The queſtion in Chancery was, whether this conveyance was a revocation of the will, and held there to be ſo: and the decree was affirmed in the houſe of Lords, becauſe the eſtate in fee gained by the conveyance was not the old eſtate which the Earl had in him before, it being limited after a different manner, and to be determined on a certain qualification. Now if this variation of the eſtate was ſufficient to deſtroy his old eſtate, and put him into a new one; there is much more reaſon here, the late Earl of *Derwentwater* ſhould be adjudged in of a new eſtate, when it is agreed here is an alteration of his eſtate, and it is ſo great as to vary the very courſe of deſcent, which is certainly a mark of a different eſtate.

It has been ſaid, here is a vendee without a vendor: but this is only a gingle of words. In the caſe of a deviſe, there is a *purchaſe*, as my brother admits, but nothing of a vendor in the caſe. If the words vendor and vendee cannot be made uſe of, the law ſupplies other relative words that are as much to the preſent purpoſe; there is deviſor and deviſee, and in our caſe I do not ſee why *recoveror* and *recoveree* may not be uſed, which may anſwer the ſame end, and be applicable according to the different kinds of purchaſe.

In ſuppoſition of law the recoveror is in by purchaſe: he has gained an eſtate from the tenant in tail, which he had not before, and the tenant in tail has by intendment of law a recompenſe in value for it; and the fee, which is recovered, is nothing of that eſtate which was in the tenant in tail; it is not derived from him, nor can the recoveror make his title under him. This appears evidently from the ſtatute of 7 *H.* 8. *c.* 4. which was made on purpoſe to remove an inconvenience that aroſe from this want of privity between the recoveror and the tenant in tail. By that ſtatute the recoveror has power given him to avow and juſtify for the rents, ſervices and cuſtoms reſerved, in the ſame manner as the tenant in

tail might have done, which ſuppoſes he could not have done ſo before: and that ſtatute had been uſeleſs, if the recoverors had been in of the ſame eſtate which the tenant in tail had before, for then according to *Doct. & Stud. c.* 26. *Co. Litt.* 104. he might avow and juſtify under his title. But the recoverors do not affirm the poſſeſſion of the tenant in tail, from whom they recover, nor claim by him; but rather diſaffirm and deſtroy his eſtate; and therefore they cannot allege any continuance of their title by him. So that the recoverors do not come in by the *per* or *cui*, but in the *poſt*, and conſequently are ſeiſed of a very different eſtate from the tenant in tail.

The reaſon why the remainder-man has no part of the recompenſe in value upon a recovery is, becauſe that recompenſe is a fee, upon which no remainder can be limited.

To conclude this head, I think if the old fee cannot take place, ſo as to make him tenant in tail at the time of his attainder; then the new one muſt, which I hold to be a purchaſe, and as ſuch made void by the act.

But as to the ſecond point, whether the eſtate of the late Earl be not within the latter part of the ſtatute, an intereſt ariſing to him by virtue of ſome act or thing had, done, or ſuffered for his benefit.

It has been ſaid by my brother *Page*, that this latter clauſe ought to be tied up to the former, and as intended to take in nothing more than what was before comprehended under the word purchaſe.

But firſt here are no words by which this is referred to the foregoing part. In the next place I muſt obſerve, that the latter words are more general than the former; and though ſometimes ſubſequent particular words do reſtrain more general ones that precede, yet I never heard that general ones that come after were reſtrained by particular ones that preceded. Should we interpret this ſtatute in the manner my brother is contending for, we ſhould render the moſt common form of ſpeaking and writing vain, where a perſon that would take in every thing begins with enumerating particulars, and then leſt any thing ſhould have eſcaped him adds the moſt general words he can think of to ſupply all poſſible deficiencies.

The firſt clauſe diſables the party to purchaſe, and the ſecond makes all eſtates, *&c.* for his benefit void. But if the latter words are to ſignify purchaſes only, there could have been no need of them, it being preciſely the ſame thing to diſable the party to purchaſe, and making his purchaſe void. I ſhall give you two

inſtances of this: the firſt is *Rex* v. *Corporation of Portſmouth*, on the 13 *Car.* 2. *c.* 1. § 12. which enacts, That no perſon ſhall be elected into any office, that ſhall not have taken the ſacrament; and every perſon elected ſhall take the oath, and in default thereof ſuch election ſhall be void. I objected that the words *in default thereof* were to be underſtood only of taking the oaths, and not the ſacrament; but the court ſaid that could do us no ſervice, becauſe the incapacity of being elected which was created before in thoſe who had not received the ſacrament was the ſame thing as making their election void, and ſo there was no occaſion for thoſe latter words.

1 Co. 66. The other inſtance is that of *Magdalen College* caſe, where by ſtatute all leaſes and grants by that college are made void, and it is there adjudged, that this is the ſame thing as diſabling them to make any grants or leaſes.

I can eaſily admit theſe latter words to be explanatory of the former, but ſtill in ſuch a manner as to carry the diſability farther than thoſe did: for the legiſlature conſidered, that there were ſeveral ways by which papiſts might come to eſtates, which would not come under the notion of purchaſe, though equally within the miſchief it intended to remedy; and therefore that they might be ſure not to leave any part of the danger unguarded, added thoſe latter words, in order to take in all which the former would not.

In our caſe indeed the ſtatute does not ſay, the conveyance to a papiſt ſhall be void, but the eſtate ſhall be ſo: this amounts to the ſame thing, as a leaſe to a monk for life, remainder over in fee, the whole deed is void, becauſe it can have no effect unleſs it paſſes the particular eſtate, that being neceſſary to ſupport the remainder. 9 *H.* 6. 24. *b.* *Bro. Grants* 133. But if the conveyance can have another effect, the deed ſhall be good to that purpoſe, though the particular eſtate be void: thus a deviſe to a monk for life, remainder over is not void; though the monk cannot take, it ſhall be good for the remainder man. But in the preſent caſe the recovery itſelf is void, becauſe it can have no other effect but to paſs an eſtate to a papiſt, and ſince the recoverors cannot take for his uſe, they cannot take at all.

The matter therefore may be reduced to this dilemma. Either the eſtate-tail is barred, or it is not barred. If it is barred, the fee is in the recoverors, and the ſame moment in Lord *Derwentwater*. If it is not barred, then the tail continues, and conſequently is forfeited by his attainder.

My brother calls this is a relative clauſe, but I can find but one word of that nature in it, which is *ſuch*, and that has nothing to

do with purchaſers, but is uſed only to ſhew that the ſame perſons (papiſts I mean) are concerned in this as well as the former clauſe. Indeed there are other words in it, which can have no relation to purchaſes, ſuch as the words *truſt* and *ſuffered.*

It was ſaid the word *ſuffered* may be underſtood of ſuffered by diſſeiſin: though I ſhould allow of this, yet it does not follow that it does not extend to common recoveries too. In truth the word is applicable to both caſes, and many others: as in *Magdalen College* caſe, where the words of the ſtatute are the ſame as here, and held that a fine and non-claim is within the word ſuffered: otherwiſe it would be to no purpoſe to prevent alienations, if by ſuffering a fine to be levied, and five years to paſs without claim, the eſtate might be paſſed.

Now let us conſider whether the intereſt gained by this recovery ſuffered by Lord *Derwentwater* himſelf, is not to the purpoſes of this act the ſame as if he had gained it under a recovery ſuffered by another. I think it is: it is an act by which he procures to himſelf a larger and more valuable eſtate than he had before, and he gets it too by taking away from another perſon, as *Doct. & Stud.* expreſly ſays, he gets what he has from the remainder man. It makes no difference, that all this acquiſition is only in the ſame lands; for a larger and better eſtate in the ſame lands is all one in this reſpect, as a new acquiſition of new lands from a ſtranger. Thus where one deviſed lands to *J. S.* for life, *and all other my lands to B.* it was held, *All.* 28. 1 *Lev.* 212. that the reverſion of the lands before deviſed to *J. S.* for life paſſed, becauſe a further intereſt in the ſame lands was conſtrued by law as ſo much new land.

Suppoſe the remainder man had conveyed his right to the late Earl; can any one doubt whether this had been a new acquiſition within the ſtatute? Now where is the difference, whether he gains the ſame thing by his own act, or the act of another? It is equally in both caſes a new hereditament, which he has acquired in the ſame lands, and that is the ſame as other lands. 2 *Ven.* 286.

It is ſaid that this ſtatute had no intention to take any thing away from the papiſts which they had, but only to prevent their having any more lands, and that to ſuffer a recovery is a power and right inherent in every tenant in tail.

To this I anſwer, The ſtatute does not (nor does my argument need it ſhould) reſtrain a papiſt from ſuffering a recovery to the uſe of a proteſtant. But whether it intended to take away this power, when it is to be uſed for the benefit of a papiſt, is the queſtion.

To

To ſay there is no expreſs intention to prejudice the preſent right of papiſts to their eſtates, is of no weight; becauſe whatever is comprehended under the general incapacity put upon them by the ſtatute, has the ſame force, as if it was actually named; and I think I have proved, that the preſent caſe is ſo.

It may be ſaid that the Parliament intended not to take away any right from proteſtants, but yet we ſee it does, for it prevents their ſelling to a papiſt, who may offer more for it than another. So in
1 Geo. 1. c. 50. the ſtatute 1 *Geo.* againſt traitors, it was far from the principal deſign of that ſtatute to injure good ſubjects and proteſtants, and yet it has taken away a real intereſt from them, for it veſts all eſtates-tail of traitors in the crown in fee, whether the remainder or reverſion be in a proteſtant or a papiſt; it is the conſequence of the ſtatute, and it cannot be helped.

But to make this objection the ſtronger, it is ſaid, that this right of ſuffering a recovery is ſo cloſely connected with the very eſtate of a tenant in tail, that it cannot be taken away by a condition.

I agree ſuch a condition generally is void, but not where it reſtrains the alienation to a particular perſon. This is our very caſe. The ſuffering a recovery is left open for the uſe of proteſtants, but reſtrained only as to a particular ſort of perſons. Whether a recovery by a papiſt tenant in tail to his own uſe, is not one ſuffered for the benefit of a papiſt, as well as where it is ſuffered for the uſe of another papiſt, is a queſtion not at all affected by this objection: nor does the ſtatute regard whether it be *by* a papiſt, as my brother imagines, but if it be *to* or *for* a papiſt it is ſufficient.

I would now conſider whether the law has not ſome known ſpecies of incapacity, under which the caſe of the papiſts upon this ſtatute may be ranked. I think it has. Capacity and incapacity to purchaſe have been long known in our law, and ſignified certain preciſe conditions or circumſtances of perſons, which lawyers have been at no loſs to determine. When this ſtatute therefore incapacitates certain perſons to purchaſe, it muſt be underſtood to put them into the ſame condition in this reſpect, as thoſe were in whom the law formerly took notice of as incapable of purchaſing; ſuch as monks and other religious perſons. And the Parliament ſeems to have had their eye upon theſe ſort of perſons, and to lead us to make this compariſon, in uſing the ſame form of expreſſion to deſcribe the incapacity in this ſtatute which is made uſe of in the 31 *H.* 8. *c.* 6. which enables monks to purchaſe after deraignment. The papiſts then are to be conſidered in the ſame condition as monks, and as *ſubſtantia non recipit majus aut minus*, the incapacity to purchaſe

muſt be equal in both: and conſequently he can no more take an eſtate by virtue of a common recovery, by whomſoever ſuffered, than a monk could have taken it.

I cannot imagine how the danger of perpetuities comes to be laid in the way. No body pretends that a recovery to the uſe of a proteſtant is prohibited, and as long as papiſts are at liberty to ſuffer them, though with that limitation; they may mortgage, they may ſell, or any ways load their eſtates, and ſo carry forward the very end and purpoſe of the ſtatute, which was to remove the land of the nation out of popiſh hands, by obliging them to ſell; nor is this any real damage to the papiſt himſelf, ſince though he parts with his land, he has an equivalent for it.

It has been ſaid by ſome of the counſel, that this point was determined in the caſe of *Thornby* v. *Fleetwood*: but this objection was never made in that caſe, and indeed it had been very impertinent; for firſt, one of the recoveries in that caſe was before this ſtatute; but if both had been ſince, it could not have made for the plaintiff; becauſe if they had been void, it would have given him no title, for then *Charles* Lord *Gerard* had been ſeiſed in tail, and the heir in tail is now living: but the true point in that caſe is, whether Lord *Gerard* took any eſtate at all, ſo as to enable him to ſuffer a recovery.

Another objection has been made, that to deſtroy this recovery of Lord *Derwentwater*, would be dangerous to many proteſtant purchaſers, who have come in under ſuch titles. But whatever this might have been formerly, it is now removed by the ſtatute 3 *Geo. cap.* 18. which ſecures proteſtant purchaſers, and looks backward as well as forward, by enacting, "That no purchaſes made or here-"after to be made by proteſtants of papiſts ſhall be impeached, on "account of any diſability the papiſts were laid under, either by "1 *Jac.* or our ſtatute.

Having thus anſwered the inconveniencies urged on one ſide, let us now ſee whether there are no unanſwerable ones of the other. And I think there are: for, 1. To eſtabliſh this recovery, is to give papiſts a power of cutting off proteſtant remainder men, and ſo far taking away the very landed intereſt of proteſtants. 2. They will be able by this means to turn the courſe of deſcent, as it ſhall ſerve the purpoſe of removing the eſtate out of a proteſtant, into a popiſh line. 3. They will have a power of making themſelves tenants in fee, and upon occaſion to diſtribute freeholds in a county, and influence the ſtate of our legiſlature by the votes they make at their election. 4. It puts the heir too much in the power of the an-

ceſtor, who may make uſe of his liberty, with a view to prevent the converſion of his ſucceſſor.

Upon the whole I am of opinion, this recovery is within the words of the ſtatute, both as a purchaſe, and as a greater and better eſtate which is gained from the remainder man, and turns to the benefit of a papiſt. For the danger can never be the leſs, where he gets it for nothing, than where he pays a valuable conſideration. If it be within the words, why is it not within the meaning? Is not the meaning to be collected from the words, and the words to be interpreted according to law? It is certainly right, what the Judges ſaid in *Roper*'s caſe, that the words of a ſtatute are to be taken in a legal ſenſe, unleſs the intent appears to the contrary; and to ſay the acts of a ſtranger only are reſtrained, and not of the papiſt himſelf, is to ſpeak without any warrant from the ſtatute, for that makes no ſuch difference, but leaves the perſons conveying, all upon the ſame foot, with no other regard but *to whom* it is conveyed.

I would now mention ſome caſes to juſtify and clear my opinion. *Roper*'s caſe I apprehend is much ſtronger than this, that was a deviſe of lands to truſtees to be ſold, and after payment of debts and legacies the ſurplus was to go to a papiſt; and it was adjudged in the Houſe of Lords, that this deviſe of the ſurplus was void, not upon account of the poſſibility that the papiſt might have the land itſelf; for in ſuch caſes, if the Chancellor takes care, that the truſt be executed, and the land ſold, the papiſt can never have the land, and in fact the land was ſold, when that cauſe came into the Houſe of Lords; ſo that it was really but a pecuniary demand: but becauſe of the connexion with land, and becauſe it might draw that along with it; it was held to be within the ſtatute. And in the preſent caſe here is a greater and more valuable intereſt in land gained by a papiſt, which makes it much ſtronger.

Another caſe I ſhall mention, was *Humphrey*'s caſe, which came out of the northern circuit to be argued above. Leſſee for ninety-nine years yielding rent ſurrendered to a papiſt the reverſioner in fee; and held, nothing paſſed, and the ſurrender void. It was held ſo by my Lord Chief Baron *Ward*. Now I would obſerve, that in that caſe the reverſioner did not take by purchaſe, but the benefit which accrued to him was by a merger of the term; but becauſe it was an enlargement, and a bettering of his eſtate, it was held to be within the ſtatute. And where is the difference, whether his eſtate be enlarged before or behind; by the addition of a particular eſtate, preceding, intervening or coming after his own? The only thing that is material is the increaſe, and there is that in our caſe, as well as in the other.

To conclude, the words of this ſtatute are general, and as large as could be contrived to take in all conveyances, and to obviate ſuch objections as are now ſet up. The rule of law in conſtruction of theſe ſtatutes warrants the taking them in a full latitude, for its being a penal law will intitle it to no favour, where religion and the publick are concerned. And ſo it was reſolved in *Foſter*'s caſe, and *Magdalen College* caſe. The ſtatute takes in both conſiderations: it is made for the preſervation of church and ſtate, and therefore is to be carried to its utmoſt extent.

For theſe reaſons I am of opinion, that the claim was well diſallowed, and conſequently the decree of the commiſſioners ought to be affirmed.

Mr. Baron *Mountague*'s argument.

Mr. Baron *Mountague*'s argument. This is a caſe of great importance, as it is on the conſtruction of a ſtatute, which though made twenty years ago, has never yet been fully conſidered: and it is of difficulty too, becauſe two learned Judges have already differed, and I believe I ſhall differ from both in many points.

It appears that at the time of ſuffering this recovery there was a marriage ſettlement on foot, and it is evident to me, that the recovery was had for that end. Lord *Derwentwater* is tenant in tail of an ancient family eſtate with remainders over. When a treaty of marriage was on foot between him and Sir *John Webb*'s daughter, in order to make a jointure and proviſion for the marriage, he agrees according to the common method of conveyances, to make a tenant to the *praecipe* in order to ſuffer a recovery, and declares the uſes to himſelf for life, then to his wife for life, remainder to the claimant as firſt ſon in tail. Such recovery was had, and the marriage took effect: he was attainted of high treaſon: and the queſtion is, whether the eſtate is forfeited, ſo as to exclude the firſt ſon of the marriage.

N. B. He miſtakes the caſe, for the uſe of the recovery was only to himſelf in fee; and the uſes he mentions were afterwards declared by an original deed of ſettlement, and the Baron's whole argument depends upon a miſtake of the caſe.

For my own part I think the matter will come to this dilemma, either Lord *Derwentwater* took by virtue of this ſettlement, or he did not. If he did take, then it was for life only, and he could forfeit nothing but an eſtate for life, and being dead, the claimant's eſtate-tail muſt take place. If he did not take by virtue of this ſettlement, what hindered him? The ſtatute, ſay they, of 11 & 12 *W.* 3. which makes him incapable of purchaſing. And if ſo, then nothing was in him to forfeit.

The only way of avoiding this dilemma is, that which brother *Forteſcue* has taken, by ſaying that not only the uſes to Lord *Derwentwater*

wentwater himſelf are void, but the whole conveyance is void alſo: *nihil operatur* by all this: here has been a bargain and ſale to make a tenant to the *praecipe*, a recovery ſuffered, uſes declared, and all this comes to nothing. This I take it is the foundation of the judgment given by the commiſſioners. But ſurely he that conſiders the words of the ſtatute, which ſays only, "That all eſtates and in-"tereſts for a papiſt ſhall be void," but mentions nothing of the conveyance itſelf, cannot be of that mind. But it is ſaid it amounts to the ſame thing in the preſent caſe; for if the uſes are made void, and he is diſabled to take, and ſo the conveyance carries nothing, it is really making the conveyance itſelf void: and the caſe of a monk is put to ſupport this, where a leaſe to him for life, remainder over, is void as to the whole conveyance on account of his incapacity. I agree it is ſo where the conveyance is to a perſon incapable of taking; and ſo if in our caſe the conveyance had been to a papiſt, this might have been true; but here are ſeveral perſons capable of taking concerned in this conveyance: there are ſeveral remainders over that may be good, ſince they are to perſons who do not yet appear to be papiſts, and the preſent claimant is young and may become a proteſtant: there are alſo truſtees to preſerve the remainders from the ceaſing or forfeiture of the particular eſtate. So that I cannot ſee that Lord *Derwentwater*'s incapacity will make the whole conveyance void, when it may, and was intended to ſubſiſt for other purpoſes than that of paſſing an eſtate to a papiſt.

Let us conſider this whole conveyance particularly. Here is firſt a bargain and ſale to *Vaux* for a valuable conſideration, (*viz.* 5 *s.*) he is a proteſtant, therefore without doubt every thing is right thus far, to veſt the eſtate in him and make him tenant to the *praecipe*. Suppoſing now the ſubſequent recovery intirely void; the eſtate then remains in him. This appears evidently from *Poulter*'s caſe, 1 *Co.* that though ſuperſtitious uſes are void, yet if a penny had been given as a conſideration, it would be ſufficient to paſs the eſtate abſolutely to the feoffees to their own uſe; otherwiſe it would revert to the feoffor. In our caſe the conſideration is greater, for 5 *s.* was actually paid. And this ſhews that the uſes to a papiſt may be null, and yet the conveyance not void.

If then the bargainee is ſeiſed of this eſtate, it muſt be out of Lord *Derwentwater*; and it cannot be otherwiſe, unleſs the *praecipe* be ill brought againſt *Vaux*.

The next thing is the recovery, and this is gained by one *Ridley*. He too is a proteſtant capable of taking, and conſequently the recovery veſts the fee-ſimple in him. Should now the uſes of this be void, the conſequence would be that Lord *Derwentwater* would

would gain nothing by it, and it would make him incapable of losing any thing also, since all the estate he had is passed away to others already.

Brother *Page* says, that it is the right of tenant in tail to suffer a recovery: I agree it is so, with this limitation, that no act of Parliament declares his suffering it a forfeiture, as in the case of a tenant for life. But how comes it to be his right? It is the right in common justice of all mankind to bring a *praecipe* when they have a better right than the tenant in tail; and when the recovery passes against him, it is because in intendment of law the demandant has the better right. This is the ground of the judgment, and this is the true reason of its being a bar to the remainder man, as well as to the tail. The demandant recovers a clear fee-simple (on which no remainder can depend) without any regard to, or being at all affected by the particular limitations of the estate of which the tenant was seised. All the dependants on the estate-tail can have nothing to say to him, who comes in under the recovery paramount to the tail.

My brother who argued first, mentioned the case of *Benson* v. *Hodson* in 1 *Mod.* but did not make use of the point resolved by the court, but only the saying of Lord *Hale* in relation to recoveries. I never found my opinion on the *dictums* of reporters, in which they are very apt to mistake the words and sense of the Judges from whom they take them; and so it seems to be in that case. Lord *Hale* is there reported to have said, that the recompense in value is not the reason why common recoveries are bars to the remainder-men, but because those are conveyances excepted out of the statute *de donis*. But it is the text of *Litt.* §. 688. that if tenant in tail suffered a feigned recovery, the issue might falsify it in a *formedon*. This shews that at common law such recoveries as we now make use of to bar estates were not known; and therefore it would have been ridiculous in the statute *de donis* to have excepted recoveries, since common recoveries were not used, and recoveries on good title could not be imagined to be included. If issue was taken on the disseisin alleged in the writ of entry, and found for the demandant, and so the recovery on a point tried; this at common law would bar the issue, there lying an attaint against the jury; though where it was by default, it would not. But afterwards another middle way was found out, and favoured by the Judges, to prevent the inconvenience of perpetuities; and that was where the tenant in tail appeared and vouched over, and the vouchee made default, and so there was a judgment for a recompense to one, and for the land demanded, to the other. This judgment, though by

default, and without iſſue tried, was held a bar, on account of the recompenſe in value.

My brother *Page*'s notion of Lord *Derwentwater*'s coming in under this recovery by operation of law, as ſomething diſtinct from either a purchaſe or deſcent, is very new and uncommon. One of his inſtances of an eſtate paſſing in that manner is the caſe of a tenant by eſcheat: but I think my brother *Forteſcue*'s opinion is right as to that, for he certainly comes in by deſcent, *in loco haeredis*.

But why is not this taking by the recovery a purchaſe? I wonder how that can be made a queſtion amongſt lawyers: is not this the very point in *Shelley*'s caſe, where old *Edward Shelley* is adjudged to be a purchaſer of a new eſtate, by ſuffering a recovery?

But then the queſtion is, whether this be a purchaſe within the meaning of the ſtatute of King *William*? As to that, I think I need not enter into it, becauſe the caſe turns upon the dilemma I mentioned before.

My opinion is, that the conveyance and recovery are good, and if my Lord *Derwentwater* gained any eſtate, it was but for life. If he gained none, he had nothing to forfeit. So that taking it either way (he being now dead) the commiſſioners had no right to ſeize this eſtate, and conſequently their decree ought to be reverſed.

Mr J. *Tracy*'s argument.

Mr. Juſtice *Tracy*'s argument. I am of the ſame opinion with my brother who argued laſt, that the decree of the commiſſioners ought to be reverſed.

The queſtion is, whether the recovery be void, or not; which depends on that part of the ſtatute, by which every papiſt is diſabled to purchaſe in his own or another's name, and all eſtates, terms and intereſts had, done and ſuffered for his benefit or relief, are made void. I take this to be one entire clauſe, and the latter part put in only to explain and enforce the former; and there was great reaſon for it. The firſt part only diſables papiſts to purchaſe lands, but not intereſts or profits out of lands; and therefore the latter was neceſſary to diſable him to purchaſe thoſe as well as the lands themſelves. But if the latter part is to be conſtrued as a diſtinct independant clauſe, then the firſt part would be rendered wholly inſignificant; ſince the latter has all that the firſt has, and much more. So in 1 *Jac.* 1. *c.* 4. from whence this clauſe is taken: Perſons paſſing or ſent into popiſh ſeminaries beyond ſea are made incapable, as to themſelves

themſelves only, and not as to their heirs, of inheriting, purchaſing or taking any manors, lands, *&c.* " And all eſtates, terms and in-" tereſts made, ſuffered or done to or for their benefit and relief " ſhall be void." Now this muſt be taken all together but as one entire clauſe, for otherwiſe the latter part will be a repeal of that part of the foregoing, which makes them incapable only as to themſelves, and not as to their heirs.

But now as to the meaning of the clauſe before us. It ſounds ſtrange to me, that the act of the tenant in tail himſelf on his own eſtate ſhould make him a purchaſer of it. A purchaſe I take to be *acquiſitio rei alterius*, either by free-gift of the former owner, or for a valuable conſideration. 1 *Inſt.* 18. *b.* But what is a common recovery? It is nothing but a common conveyance, and the only method which the law gives the tenant in tail of enjoying his eſtate in its full latitude; and it is as much the proper conveyance of a tenant in tail, as a feoffment is of a tenant in fee-ſimple, and therefore very unlikely to be reſtrained by the general words of a ſtatute. I think it could not be the intent, ſince there are no expreſs words to that purpoſe; and I am the more inclined to ſuch an opinion in this caſe, becauſe it appears to me, that ſuch a reſtraint, inſtead of promoting any end of the ſtatute, ſerves to defeat its principal deſign.

The ſtrength of all that has been ſaid to bring the recovery within the diſabling clauſe lies in this, that the fee gained is a new and greater eſtate than Lord *Derwentwater* had before, and ſo makes him a purchaſer.

But this is more in appearance, than in the nature of the thing. I think the recovery cannot be ſaid to give any new eſtate, becauſe it operates only by way of bar; and an eſtate or intereſt barred is extinct and gone, and cannot properly be ſaid to be transferred. The ſuffering a recovery is no more than making uſe of that very power which the law had given him over his own eſtate, and when he has by this gained the fee, he has in reality got no greater intereſt in it than he had before; the courſe of deſcent only is altered, ſo that it ſhall now go to one ſort of heir, whereas during the continuance of the tail it would have gone to another: but as to himſelf, he had the whole eſtate abſolutely at his own diſpoſal before, and he has no more than that now. How then can this be ſaid to be a purchaſe, eſpecially in ſo penal a law?

But if this is a new eſtate, from whom does it come? Not from the remainder-man or reverſioner, for their eſtate is gone and extinguiſhed. And therefore the caſe of a grant from the reverſio-

ner of his reverſion is very different, and ſo of a ſurrender of a tenant for life to the reverſioner; in both which caſes there is an eſtate really taken from another man by his own act and conſent. So in Lord *Lincoln*'s caſe cited by my brother *Forteſcue:* he had deviſed the eſtate, and then made a leaſe and releaſe to the uſe of himſelf and his heirs; and it was held to be a revocation of the will. But this would be the ſame, if a man after making his will makes a feoffment to the uſe of himſelf and his heirs; this is a revocation, becauſe it ſhews an alteration of his mind, but yet in that caſe it is confeſſed he would be in of the ſame eſtate.

The recoveror is merely a nominal perſon, which the law requires, in order to fulfil the ſolemnity of a recovery; but has nothing at all to do with the eſtate; and if the tenant makes no declaration of uſes, the law will do it for him, for the eſtate paſſes only from the tenant in tail, and not at all from the recoveror; and ſo it was held in the caſe of *Abbot* v. *Burton*, *Salk.* 591.

The caſe of a feoffment and refeoffment is very different; becauſe the eſtate in that caſe was once really out of the feoffor, and when it comes back again by the expreſs act of the feoffee, it comes as a perfectly new eſtate: but in our caſe, in conſideration of law the eſtate was never out of the tenant in tail. The bargain and ſale to make a tenant to the *praecipe* are but one conveyance, and to whomſoever the uſe is limited, he takes immediately from the tenant in tail.

I cannot think the lord by eſcheat comes in by deſcent, as has been ſaid; there is no foundation for it in *Co. Litt.* 18. *b.* He only ſays, that ſuch an eſtate differs from one by purchaſe, becauſe he comes in by operation of law, as *he* does that comes in by deſcent. But this does not prove that the lord by eſcheat comes in by deſcent.

But now if the law itſelf, as I have ſaid, would make a declaration of uſes of the recovery to the tenant in tail, in fee, which can be nothing but the old eſtate which he had before this conveyance; it is the ſame thing if there be an expreſs limitation in the ſame manner as the uſes would have reſulted. This was adjudged upon two ejectments in the caſe of *Godbolt* v. *Freeſtone*, 3 *Lev.* 406. A man ſeiſed *ex parte materna* makes a feoffment to the uſe of himſelf for life, remainder to his wife for life, remainder to the iſſue of his body, remainder to his own right heirs. He and his wife died without iſſue, and the queſtion was between the heir of the part of the father, and the heir of the part of the mother; and held that this was the old uſe remaining in him; and there was no difference

whether the uſe be by expreſs limitation, or implied by the law without limitation, and therefore ſhould go *ex parte materna*.

Some ſtreſs has been laid on the word *ſuffered* in the ſtatute, as particularly adapted to the caſe of a recovery; and I ſhould think this of ſome weight, could that word be applied to no other recovery but this. But there is room enough for the uſe of that word, without taking in the preſent caſe: it may be applied to the caſe of a fine; to a recovery of a ſtranger's eſtate by a papiſt, fairly or by colluſion; and in general to all recoveries whereby a papiſt is to gain ſome really new eſtate.

But if this recovery ſhould be ſtrictly within the letter of the ſtatute, yet I do not think it is within the meaning of it. The intent of the ſtatute was to take away the capacity papiſts had of acquiring new eſtates, not the power of diſpoſing of their old ones: and on this ground I conceive there may be ſeveral caſes put, where even new eſtates may be gained, and yet not be within the meaning of the ſtatute. As if a papiſt had before the ſtatute made a ſettlement to himſelf for life, with remainders over, and a power of revocation, and after the ſtatute he had executed that power; he has now gained a new eſtate, and yet as this is only making uſe of the power he had over his own eſtate, I think it will not be within the ſtatute. Suppoſe a papiſt ſhould in an ejectment recover an eſtate, will any body ſay this is within the ſtatute? Or ſuppoſe before the ſtatute he had a particular eſtate with a condition of accruer of the fee on performance of a certain act, ſhall he not perform this and gain the fee to himſelf, notwithſtanding the ſtatute? Surely he ſhall, for the ſtatute had no retroſpect to take away any right veſted in a papiſt.

Another reaſon why I think it not within the ſtatute is, becauſe it will not anſwer any end of the ſtatute to conſtrue it ſo. The end of it was to leſſen the papiſts property in land; but how can this be anſwered by forcing them to continue their ancient eſtates? By virtue of the tenancy in tail they have an equal ſhare of power and influence in the country as if they had the fee. They have the ſame power in elections: they may give freeholds, and not only make votes, but even give capacities to ſtand as candidates for an election; for he may make them an eſtate for life, and I am apt to think a tenant in fee would go no farther.

But not barely to ſay this conſtruction will not anſwer the end of the ſtatute, I am bold to ſay this conſtruction will in a great meaſure defeat it, by making the eſtates of papiſts much more ſecure than they were before: by allowing theſe recoveries all papiſts in

remainder and reverſion are cut off: the eſtate becomes aſſets in the hands of the heir: it is liable to charges in favour of younger children; and all ſorts of incumbrances, which are excluded by the continuance of the tail, are let in; and it is ſubject to more forfeitures, particularly for felony, which the tail is not liable to: and thus by loading the eſtate a papiſt will be at laſt obliged to ſell, and then the end of the ſtatute is anſwered.

No argument can be drawn from the unreaſonableneſs of putting the remainder man and reverſioner into the power of the tenant in tail, for we ſee the ſtatute of forfeitures has taken no care of them at all: and why we ſhould be more ſolicitous for them than the legiſlature was, I can ſee no reaſon.

The caſe of *Roper* v. *Radcliffe* I think not at all like this, the true reaſon of that judgment was, that if he had taken by the deviſe, it was looked on in nature of a purchaſe of the land itſelf. My brother *Forteſcue* ſays, the eſtate was ſold before the hearing in the Houſe of Lords, but I do not know that.

This ſtatute is now twenty years old, and many purchaſes made under ſuch recoveries as theſe, which were never queſtioned till now: and though there is a ſtatute lately made for the ſecurity of ſuch purchaſers, yet I cannot but pay a very great regard to the opinion of ſo many learned men, who have gone on in this method ever ſince the ſtatute.

As to the point of the reverſion in fee, expectant upon the intermediate remainders, being now let in by this recovery; it was mentioned by the counſel, but I ſhall not give my opinion upon it, becauſe I think it not neceſſary; and beſides it is a very important point, only the caſe of *Symmonds* v. *Cudmore* goes a good way to prove it.

Upon the whole, I think this recovery to the uſe of Lord *Derwentwater* in fee was good, and therefore the decree of the commiſſioners ought to be reverſed.

Mr. Juſtice *Powys*'s argument.

Mr. Juſtice *Powys*'s argument. Before I deliver my opinion, I would juſt take notice of what is agreed in this cauſe; which is, 1. That a papiſt may ſuffer a recovery, in order to make a title to a proteſtant purchaſer. And 2. That if the recovery had been declared immediately to the uſe of Lord *Derwentwater* for life, *&c. prout* the ſettlement, it would have been well enough, which I take to be a great conceſſion.

I am of opinion to allow the claim. There have ſome things been mentioned in this caſe, that ſeem not ſo neceſſary to be inſiſted on, becauſe that which I take to be the main point is not affected by them. As whether the eſtate is ſo fixed in the tenant to the *praecipe*, as to continue in him if the recovery ſhould be void: but I take it, the whole conveyance is of a piece, and muſt ſtand or fall together: And if the recovery is made void, I think the whole conveyance muſt be ſo too.

Another matter not ſo neceſſary is, *quid operatur* by all this? Whether under this recovery Lord *Derwentwater* is in of his old, or a new eſtate? I ſhall take no notice of this, but go directly to that which will determine the whole caſe. And I am clearly of opinion, that the recovery ſuffered in this manner is not within the ſtatute.

Originally an eſtate-tail was fee-ſimple conditional; and the tenant had the ſame power of aliening it after iſſue had, that a tenant in fee-ſimple now has. It was this *poteſtas alienandi*, that was ſtruck at by the ſtatute *de donis*, which had no intention to alter the nature of the eſtate, but left it to continue as it was before. *Salk.* 619.

But then they began to feel the inconvenience of perpetuities, and upon that they looked out for a method to trip up the ſtatute *de donis*, and make theſe intailed lands capable of being purchaſed. For this purpoſe common recoveries were ſet up and allowed, and theſe are ſaid, *Salk* 338. to have taken off the protection of the ſtatute *de donis*, which is as pretty an expreſſion as I have met with. And the uſe of theſe recoveries for that purpoſe is grown ſo common, that they are now looked upon merely as a method of conveyance, by which the power of alienation that tenants in tail have over their eſtates is to be exerciſed; and the eſtate conveyed is not ſuppoſed to ariſe out of the eſtate of the recoveror, but of the tenant in tail only. Hence it is, that recoveries have all along been conſtrued moſt favourably, not under the notion of a judgment in a ſuit at law, but as a common aſſurance, and *Cromwel's* caſe directs the Judges not to look into them with eagle's eyes. They have been allowed even of advowſons, though no *praecipe* lies of them. 5 *Co.* 40. *Ray.* 7. The preciſeneſs of form, which is required in other writs, is not neceſſary in them. 2 *Roll. Rep.* 67. Remainders and reverſions expectant on eſtates-tail are ſo much in the power of the tenant in tail, that they are of little or no conſideration in law. 2 Co. 74.

It

It is ſaid that the recovery enlarges the eſtate; but I deny it, for the eſtate-tail is ſtill a fee-ſimple conditional as before the ſtatute of *Weſtm.* 2. and that in the eye of the law is equal to an abſolute fee-ſimple, and therefore capable of being exchanged for it. It is not an enlargement, but only a removing of an obſtacle.

Suppoſe before the ſtatute *Will.* 3. a papiſt had been in poſſeſſion of an eſtate defeaſible upon tender of a ring, and after the ſtatute that right of tender had been releaſed; will any body ſay this is a purchaſe of a new eſtate, and as ſuch made void by the act? I believe no body would offer to aſſert it.

As the eſtate is not enlarged by the recovery, ſo what is gained under it is ſerved out of the old eſtate. It is not a new eſtate which is gained, but only an excreſcence; as a new ſprout can never be called a new tree. Hence all grants and incumbrances made by tenant in tail are ſtill charged on the eſtate in fee. It takes them as related to the former eſtate; whereas if this was a real recovery of an eſtate paramount to the tail, all thoſe charges would be gone.

I think this right to ſuffer a recovery is ſuch an inſeparable intereſt, as cannot be taken away without expreſs words. 1 *Inſt.* 223. *b.* And I am of opinion with my brother who argued laſt, that to allow of theſe recoveries is a weakening of the popiſh intereſt, for the reaſons which he has given.

There is another thing proper to take notice of, which ariſes out of the ſtatute we ſit upon, which veſts the eſtates-tail of traitors in the crown in fee. This ſhews the ſenſe of the legiſlature as to the tenant in tail's eſtate; that it is in effect the ſame as a fee, and that he is the perfect maſter of the whole fee; otherwiſe they would be guilty of an injuſtice too great to ſuppoſe them capable of, in ſtripping the remainder man (who has committed no crime) of his eſtate, merely becauſe the intermediate tenant had committed treaſon.

According to the opinion of the four Judges who argued for the claimant, the decree of the commiſſioners was reverſed, and ſuch judgment given as ſhould have been given below, *viz.* that the claim be allowed.

Eaſter Term

6 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Juſtice.*
Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Forteſcue Aland, *Knt.*
Sir Robert Raymond, *Knt. Attorney General.*
Philip Yorke, *Eſq; Solicitor General.*

Nicholſon *verſ.* Simpſon.

Intr. Paſ. 5 Geo. rot. 220.

DEBT upon a bond; the defendant prays *oyer* of the condition, which recites, that whereas the defendant had been convicted for unlawfully killing one deer on a place called *Whinnyrigg Ground* in the pariſh of *Clifton* in the county of *Weſtmorland*, and within the chaſe of the Earl of *Thanet*, *on or about* the third day of *Auguſt* then laſt paſt, and had brought a *certiorari* to remove ſuch conviction into the court of *B. R.* If therefore on affirmance thereof he pays ſuch coſts as the ſtatute directs, then the bond to be void: *Quibus lectis* he pleads, that the conviction recited in the condition for killing a *red deer* at the time and place mentioned was never affirmed in *B. R.* and prays judgment of the action.

Whatever is materially alleged and not traverſed is admitted.

The plaintiff replies, and ſets out a conviction of the defendant for killing *a red deer between the laſt day of* July *and 6th of* Auguſt, in a chaſe of the Earl of *Thanet* called *Oglebird* alias *Whinfield* in the pariſh

pariſh of *Clifton* in the county of *Weſtmorland*, which was removed into *B. R.* and affirmed: and then avers, that the defendant never was convicted for killing any other deer in the ſaid chaſe, or any part thereof; that the deer and the killing mentioned in the conviction, are the ſame with thoſe in the condition; that the place called *Whinnyrigg Ground*, mentioned in the condition, lies in the chaſe called *Oglebird* alias *Whinfield* in the conviction mentioned; that the chaſe in the conviction and condition are the ſame; and the parties the ſame both in one and the other.

The defendant in his rejoinder craves *oyer* of the conviction, which is ſet forth *in haec verba*, and agrees with the recital of it in the replication; and then taking by proteſtation, that the killing in the condition and the killing in the conviction are not one and the ſame, for plea he ſays (as before) that the conviction in the condition mentioned for killing a red deer in *Whinnyrigg Ground* on or about the 3d of *Auguſt* was never affirmed in *B. R.* And to this rejoinder the plaintiff demurs.

Filmer pro quer' argued, that the rejoinder was ill; for it appears ſufficiently to the court, that the conviction upon account of which this bond was given has been affirmed. The conviction anſwers the deſcription of the condition in every part, but as to the time and place, which are not material variances. 1 *Saund.* 116. Or if they are, yet it is cured by the averments, which have been always allowed in caſes of this nature. 4 *Co.* 71. 8 *Co.* 115. 11 *E.* 4. 2. *Cro. Car.* 501. *Lutw.* 1414, 1419. 3 *Lev.* 179. Nor does any prejudice ariſe from this to the other ſide; becauſe if it be not true, he may traverſe the identity: here he had an opportunity ſo to do; he has not done it, and ſo has by his ſilence admitted the fact to be as we have alleged; for whatever is materially alleged on one ſide, and not traverſed by the other, is always taken to be admitted. 2 *Ven.* 170. *Salk.* 91. So that, be this variance material or not material, either way it is againſt him upon this record.

Agar contra. The averment as to the identity can have no force, becauſe it is contrary to what appears upon the face of the record; the killing in the condition being in a particular part of the chaſe, and the other laid to be in the chaſe at large, ſo the ſame evidence will not ſerve both: Beſides, here is no averment of the identity of the conviction, but of the crime only, whereas a man may be doubly convicted of the ſame offence.

But if the averment ſhould be taken to have cured the variances, yet the plaintiff ſhould have gone on and aſſigned a breach in the replication; for as it now ſtands, the bond is not forfeited, unleſs

the plaintiff was put to charges, and thoſe charges unpaid, and nothing of that appears. 1 *Saund.* 102. *Yel.* 78. *Salk.* 138. *Show.* 140.

Per curiam, It is certain that the identity muſt appear to us, before we can give judgment againſt the defendant. But though there are variances, yet the averments (which are conſiſtent with the record) have ſufficiently ſolved them. It would have been improper to have averred the indentity of the conviction, and ſo have ſent that to a jury, eſpecially when it is conſequentially determined by the other averments, as it would have been if the defendant had taken iſſue upon them. Then as to the objection for want of a breach in the replication; certainly there was no occaſion for that, becauſe the defendant has not made his caſe upon the performance of the condition, but upon a collateral point by way of excuſe, which admits a non-performance; and it has been often reſolved, that where the defendant pleads matter of excuſe, which admits a non-performance; it is enough for the plaintiff in his replication to meet the plea, and falſify the excuſe, except in one inſtance (which ſtands upon a particular reaſon) and that is the caſe of an award, where it has been held indeed that upon *nul agard fait* pleaded; the plaintiff muſt not only reply and ſet out an award, but he muſt go farther and aſſign a breach, that it may appear to be in a good part of the award; for ſince it has been held that an award may be good for part and void for the reſt, it is neceſſary to ſhew a breach of a good part, or otherwiſe the plaintiff has no cauſe of action, for the bare finding there is an award will not intitle the plaintiff to recover. Beſides this, payment of the coſts goes in defeaſance of the bond, and ſhould have been ſhewn by the defendant, being for his benefit. Or if the replication had been ill, yet the plea is ſo too, for it is not *ad idem*, the condition being for killing a *deer*, and the plea a *red* deer, and then the declaration muſt ſtand, and the plaintiff have judgment.

Yel. 78. Salk. 138. Show. 148. 1 Sid 180, 186, 290. 1 Saund. 102, 317. Hob. 198, 199, 233. 2 Cro. 472.

Where the defendant pleads matter of excuſe, the plaintiff need not aſſign a breach except in the caſe of an award.

Dominus Rex *verſ.* Nicholſon & al'.

BY a private act of Parliament for enlarging and regulating the port of *Whitehaven* ſeveral perſons are appointed truſtees, and a power is given to them of electing others upon vacancies by death or otherwiſe. The defendants take upon them to act as truſtees without ſuch an election as the ſtatute requires: and upon a motion for an information in nature of a *quo warranto* againſt them, it was objected by the counſel for the defendants, that the court never grants theſe informations, but in caſes where there is an uſurpation upon ſome franchiſe of the crown, whereas in this caſe the King alone

Informations are granted for uſurping a power which was no prior franchiſe of the crown.

alone could not grant ſuch powers as are exerciſed by the truſtees; the conſequence of which is, that this authority was no prior franchiſe of the crown.

To this it was anſwered and reſolved by the court, that the rule was laid down too general, for that informations have been conſtantly granted, where any new juriſdiction or a publick truſt is exerciſed without authority. That this caſe came even within the defendant's own rule, for all havens belong originally to the crown. The publick trade and revenue are much concerned in the regulations of ports; and there being a particular method of election required, we will always keep people up to that method; and rather than ſuffer them to vary from it, we have conſtrued corporations to be abſolutely diſſolved. An information was granted.

Between the Pariſhes of Albrighton *and* Skipton.

Order. UPON appeal from an order of removal made by two juſtices (*quorum unus*) the ſeſſions, reciting that they had peruſed the charter of *Albrighton*, and it not appearing *thereby* that the two juſtices were either of them of the *quorum*, therefore they quaſhed the order of removal.

Per curiam, The order of ſeſſions muſt be quaſhed; not for want of any power in the ſeſſions to look into the juriſdiction of the two juſtices, for that they certainly have; but becauſe that want of juriſdiction is not ſufficiently alleged; ſince they might have a juriſdiction, though it did not appear upon the charter of *Albrighton*. The ſeſſions ſhould have ſaid in general, that it appeared to them, that the two juſtices were neither of them of the *quorum*, and that would have been good cauſe to quaſh the order of the two juſtices.

Davila *verſ.* Herring.

Coſts. UPON trial of the iſſue a caſe was made and afterwards argued in court, but the fact not being ſufficiently ſtated, ſo as the court could give judgment according to the juſtice of the cauſe, it was recommended to the parties, and accordingly they agreed, to go to a new trial; where the plaintiff was nonſuited. And now the queſtion was about the coſts, whether the maſter ſhould tax the common coſts of a nonſuit, or take into his conſideration all the former proceedings. And upon motion for the court's direction to the maſter it was ordered, that he ſhould tax the defendant his coſts upon the whole, as well with relation to the firſt trial as the laſt.

Winter *verſ.* Lightbound.

THE plaintiff obtained judgment of *Michaelmas* term generally, but was ſtopped from taking out execution by an injunction out of Chancery; which being afterwards diſſolved, he takes out execution *teſte* the laſt day of the ſubſequent *Michaelmas* term; and whether he could do it in this caſe without a *ſcire facias* was the queſtion. If the plaintiff be hung up a year by injunction, he muſt have a *ſcire facias.*

And the whole court held the execution irregular, as taken out after the year; for the judgment being general has relation to the firſt day of the term, and ſo there is all *Michaelmas* term over and above a year. And they ſaid the ſtatute of *Weſtm.* 2. which is *infra annum*, muſt be computed by calendar months, and not by terms; for it was inſiſted, that taking one term incluſive and the other excluſive, there was but four terms. How the year is to computed.

It being thus determined, that the plaintiff was without the year; the next queſtion was, *Quid operatur* by the injunction? Which was compared to a writ of error, and there it has been often reſolved, that though the party be hung up never ſo many years by a writ of error, yet there may be execution ſued out immediately upon affirmance without a *ſcire facias.* But the court ſaid, there was a great difference between the caſe of a writ of error and an injunction; the former being a judicial proceeding appearing to them upon record, whereas an injunction is not a matter of record ſo as that the court can take notice of it. Salk. 322. Show. 402.

Anderſon *verſ.* Coxeter.

PER curiam: The 9th & 10th *W.* 3. *c.* 15. which limits the time of complaining againſt awards to the laſt day of next term, extends not to ſuch as are made in purſuance of a rule of *niſi prius*, but only where the ſubmiſſion is by obligation: and nothing is a ground within that ſtatute for us to ſet aſide an award, but manifeſt corruption in the arbitrators. We will not unravel the matter, and examine into the juſtice and reaſonableneſs of what is awarded. What is a good ground to ſet aſide awards, and to what awards the ſtatute extends.

Dominus Rex *verſ.* Leonard.

Curia de Banco noſtro, when the King ſpeaks, ſignifies the King's Bench.

TO an indictment for high treaſon he had pleaded Not guilty; but having afterwards procured the King's pardon, he was brought to the bar, and by conſent of Mr. Attorney he waived his former plea, and confeſſed the indictment: and being then aſked, what he had to ſay againſt the court's proceeding to ſentence, he kneeled and pleaded the King's pardon under the great ſeal, which was delivered into court, and read, and appeared to be upon condition to tranſport himſelf, and to give ſuch ſecurity ſo to do, *qual' curia de Banco noſtro dirigeret.* And the doubt was, whether the King's Bench could take the ſecurity? and upon conſideration it was held, they could; for this deſcription was not confined to *C. B.* as if it had been *curia noſtra de Banco*; but here *noſtro* coming after *Banco*, it runs in *Engliſh* the *court of our Bench*; and this being ſpoke in the perſon of the King, it amounts to calling it the King's Bench. And *Eyre* Juſtice, cited *Articuli ſuper chartas, c.* 5. which ſays, *Les Juſtices de ſon Banke*, and my Lord *Coke* in 2 *Inſt.* 554. ſays, they mean the King's Bench.

Woodward *verſ.* Robinſon.

If the plea does not cover the whole, and the parties are at iſſue; yet if it be a record of the ſame term, the plaintiff may ſtill take judgment.

CASE upon ſeveral promiſes, and *inter alia* upon a note for 65 *l.* an *indebitatus aſſumpſit* for 36 *l.* 9 *s.* 5 *d.* and a *quantum meruit* for carpenter's work and materials, wherein he avers he deſerved 36 *l.* 9 *s.* 5 *d.* for the work, and the like ſum for the materials.

The defendant as to the count upon the note pleads, that he gave a bond in ſatisfaction of the ſaid 60 *l.* and the plaintiff received it as ſuch. And as to the ſaid ſeveral ſums of 36 *l.* 9 *s.* 5 *d.* and 36 *l.* 9 *s.* 5 *d.* that he gave a note for ſo much in ſatisfaction, and upon iſſues tendred the defendant demurs.

Upon ſtanding in the paper, no body appeared for the defendant; but it was obſerved by the court, that there was a diſcontinuance. And at another day *Strange* for the defendant argued, that there were two diſcontinuances. 1. As to the note for 65 *l.* where the defendant in his plea has artfully dropped 5 *l.* and pleads only a ſatisfaction for 60 *l.* And 2. in the plea of a note in ſatisfaction, which covers no more than two ſeveral ſums of 36 *l.* 9 *s.* 5 *d.* whereas there are three ſuch ſums in the declaration. *Paſch.* 4 *Geo.*

Nichols v. *Backhouſe*, in an *indebitatus aſſumpſit*, the defendant *quoad* ſo much parcel of the damages, pleads one plea; *et quoad* ſo much, *reſiduum*, pleads another; and on error, when it ſtood to be affirmed, *Eyre* Juſtice obſerved, that between the two pleas the defendant had dropped a penny, and the court held it a diſcontinuance. So is *Yelv* 5. *Carter* 51.

To this it was anſwered, and reſolved by the court, that as to the firſt part of the objection, there was no diſcontinuance, it being pleaded *quoad* the whole promiſe; and though it be in law only an anſwer to part and by that means a naughty plea, yet it will not make a diſcontinuance; ſo *vice verſa*, if it be pleaded as to part, it will be a diſcontinuance, though in law it is an anſwer to the whole. As to the other point, they all held it a diſcontinuance; but then *Eyre* Juſtice obſerved, that it being a record of this term, the plaintiff might yet take judgment by *nihil dicit* for ſo much as is uncovered by the plea; and cited two inſtances where it was ſo done, *Vincent* v. *Preſton*, *Mich.* 11 *W.* 3. *rot.* 183. and the caſe of *Marcas* v. *Johnſon*, *Hill.* 3 *Ann.* *Salk.* 180.

What manner of pleading makes a diſcontinuance. Salk. 179. 2 Roll. Abr. 104. N. 1.

Lord Raym. 716.

Whereupon the cauſe was adjourned, to give the plaintiff an opportunity to ſet it right, which he did. And at another day, *Strange* for the defendant argued, that though the diſcontinuance was now out of the caſe, yet the plaintiff ought not to have judgment, becauſe by his replication to the firſt part of the plea he has offered an immaterial iſſue: the declaration being upon a note for 65 *l.* the iſſue offered is, whether any bond was given in ſatisfaction of a note for 60 *l.* And he cited *Hob.* 113. *Kent* v. *Hall*, where in debt upon a bond for 10 *l.* 10 *s.* the defendant pleads payment of the 10 *l.* *ſecundum formam conditionis*, upon which they were at iſſue, and found for the plaintiff: but a repleader awarded, for that the iſſue was not *ad idem*. And he likened it to the caſe of *Merril* v. *Jocelyn*, where in debt upon a bond the defendant pleaded payment before the day, and found for the plaintiff; but reverſed upon error, becauſe the iſſue did not leave room enough for the jury to find an abſolute breach of the condition. And ſo it was held in two caſes *in C. B. Paſch.* 5 *Ann.* *Steele* v. *Manby*, *Idem* v. *Hill.*

Immaterial iſſue.

Per curiam: The replication is certainly naught, but then ſo is the plea, and the firſt fault being there, the declaration muſt ſtand, and the plaintiff have judgment.

Moody

Moody *verſ.* Thurſton.

Practice. ACCESS was granted to the books of the commiſſioners for ſtating and determining the debts of the army, at the prayer of the defendant, being an officer's widow.

Bellamy *verſ.* Barker.

Words *nient* actionable. AFTER verdict *pro quer'* for theſe words, "Your father was "a horſe-ſtealing rogue, and you are a great rogue," the judgment was arreſted, becauſe not actionable.

Archer *verſ.* Frowde.

A general admiſſion of *prochein amy* is ſufficient. ERROR of a judgment *in C. B.* in treſpaſs and aſſault by one infant againſt another; verdict *pro quer':* and aſſigned for error, that whereas the plaintiff had appeared to proſecute this ſuit by one *Iſaac Knight* her next friend, as one ſpecially aſſigned by the court, yet the ſaid *Iſaac Knight* was never ſo aſſigned, nor does any ſuch admiſſion appear upon record. *In nullo eſt erratum* pleaded.

Strange pro quer' in errore argued, that the defendant having come in *gratis*, and pleaded *in nullo eſt erratum*, had thereby taken away the neceſſity of the plaintiff's procuring the return of a *certiorari* to verify the error, for now the fact is admitted, and put in judgment of the court, whether upon that ſtate of the caſe there be error in point of law or not.

Though there is a verdict in this caſe for the plaintiff, yet the matter aſſigned for error is ſuch as at common law would have vitiated the judgment. In the caſe of a perſon of full age want of
32 H. 8. c. 30. warrant of attorney was always held to be error, till the 32 *H.* 8. and then ſurely the want of an admiſſion of a *prochein amy* is much
Cro. Jac. 641. more ſo, becauſe according to 1 *Roll. Abr.* 287. *A.* 2. and many
Cro. Car. 61. other books, where it is ſaid, that the reaſon why an infant cannot authorize an attorney to appear for him is, becauſe he is not ſuppoſed to be capable of chuſing a proper perſon, and therefore (ſays the book) he ſhall have a guardian appointed, againſt whom he may have an eaſy remedy in caſe of miſbehaviour: but before he can ſue by *prochein amy* there muſt be the appointment of the court, and that muſt likewiſe appear upon record; whereas in this caſe it

is admitted there never was any appointment to proſecute this ſuit. The ſtatute *Weſtm.* 2. *c.* 15. which appoints an infant to ſue by *prochein amy* runs *in omni caſu quo minores infra aetatem implacitare poſſunt, conceſſum eſt quod proquinquiores amici admittantur ad ſequendum pro eis*, which in 2 *Inſt.* 261. is taken notice of to be thus rendered by *Fleta*, *Sequatur unus de proquinquioribus amicis et admittatur*, and this admiſſion, ſays *Coke*, muſt be by order of court.

As this is an error at common law, it lies upon the other ſide to ſhew, whether it be within any of the ſtatutes of jeofails. There is no ſuch thing mentioned in any of them, and there was a caſe, which is a tacit admiſſion, that it is not within them, and that was *Read* v. *Waldron in B. R. Hill.* 6 *W.* 3. *rot.* 249. Treſpaſs by *prochein amy*, Not guilty pleaded, and a verdict for the plaintiff: the ſame error aſſigned as here, and upon a *certiorari* returned, that there was no admiſſion, *in nullo eſt erratum* was pleaded. But after this a *certiorari* was awarded *ad informandum conſcientiam curiae* (which need not have been if the verdict had helped it) and then an admiſſion was returned, and the judgment affirmed. Lill. Ent. 288.

But it will be objected, that in this caſe the very fact of our aſſignment of errors appears upon view of the whole record to be falſe; for that *Iſaac Knight* is returned at the head of the record to have been admitted to proſecute and defend all ſuits *in C. B.* on behalf of the infant.

To this I anſwer; that the admiſſion returned is not ſuch an one as we have aſſigned the want of for error, which is an admiſſion to proſecute in this particular cauſe; and I have an affidavit that according to the courſe of *C. B.* there muſt be a ſeparate admiſſion in every cauſe to proſecute or defend *in placito praedicto*, and ſuch an admiſſion it is that is wanting in this caſe; ſo that to ſay here is a general admiſſion, is begging the queſtion, becauſe a general admiſſion is not ſufficient.

Indeed in this court it is taken, that an admiſſion of a guardian to appear in one cauſe will ſerve for others, but that depends upon the particular practice of this court, that one in cuſtody at the ſuit of *A.* is bound to anſwer all other ſuits againſt him of the ſame term, without a diſtinct proceſs to bring him in. But ſtill in ſuits *by* an infant (which muſt be by ſeveral proceſſes) there muſt be ſeparate admiſſions, for the reaſon fails which ſupports the contrary practice in ſuits *againſt* an infant. And agreeable to this is the entry *Raſt.* 396. *a. Conceſſum eſt quod W. B. ſequatur pro J. C. qui infra aetatem eſt, verſus H. E. de placito terrae*; and the admiſſion re-

turned upon the ſecond *certiorari* in *Read* v. *Waldron* was particular, to proſecute that ſuit.

At common law, before the ſtatute which enabled men to make attornies, all parties appeared *ſecundum exigentiam brevis* in proper perſon, unleſs where they purchaſed the King's writ of *dedimus*, and that always recited the pendency of ſuch a particular cauſe: and in the caſe of an infant, *Regiſter* 172. *a.* 93. *b.* 27. *b.* there are writs to the Juſtices of *C. B.* ſignifying that ſuch a perſon is deputed to ſue for the infant, and ſo requiring them to admit him; and theſe recite a ſuit depending between *A.* plaintiff and *B.* defendant *de placito tranſgreſſionis*, or as the caſe is.

Wearg contra. In nullo eſt erratum confeſſes no errors which are improperly alleged, but as to ſuch it ſerves for a demurrer, and that we ſay is this caſe, for the error aſſigned is contrary to the record, which runs, *et unde eadem Suſanna quae infra aetat' 21 annorum exiſt' per Iſaacum Knight proximum amicum ſuum per curiam domini Regis de Banco nunc hic ſpecialiter admiſſum exiſtentem queritur, &c. Cro. Eliz.* 655. Held that you cannot aſſign for error, that there was no ſuch attorney as the defendant has appeared by, becauſe it is contrary to the record, which calls him his attorney.

As to the practice, I am told that when this general admiſſion was entered, it was objected to by my client, and the officer of *C. B.* informed him it muſt be ſo.

But if it ſhould be error at common law, yet it will be cured by
18 Eliz. c. 14. 18 *Eliz.* which helps want of warrant of attorney; and this is a caſe within the ſame reaſon.

Strange replied. There are no general words in 18 *Eliz.* and to ſay it ſhall extend to caſes of the like nature will be making that ſtatute entirely uſeleſs, for the 32 *H.* 8. *c.* 30. had before helped want of a warrant of the party againſt whom the iſſue was tried, but went no farther; and then the making the ſubſequent ſtatute to extend to the warrant of the other party, ſhews the judgment of the Legiſlature, that ſimilar caſes were not within the former proviſion; and it is ſtronger too, becauſe in the 32 *Hen.* 8. there are general words.

The recital in the declaration can never be ſet up againſt the admiſſion returned at the head of the record, which is, *Conceſſum eſt* that *Knight* be admitted *tam ad proſequendum quam ad defendendum* all ſuits by and againſt the infant. In *Read* v. *Waldron* there was the ſame recital (*pout per* roll, which was brought into court and inſpected.)

5 *Curia.*

Curia. The practice of this court warrants a general admiſſion, and there is no inconvenience in it: it amounts to the ſame thing, whether the admiſſion be general or particular, and no reaſon can be given why it ſhould not be one way as well as the other. The judgment of *C. B.* was affirmed.

Brocas *verſ.* the Mayor and Aldermen of the city of London.

THE plaintiff moved that he might have a copy of the poll, and that Sir *John Ward*, who as mayor preſided at the election, might produce the original at the trial; and Serjeant *Cheſhyre pro quer'* cited two caſes and produced the rules, where a copy of the poll was ordered to be given, and the original to be produced. 12 *Ann.* Sir *Peter Delme*'s caſe, and *Trin.* 4 *Geo. Parminter*'s caſe.

The court never orders a poll to be produced without a particular reaſon.

Strange contra. As to a copy they have had it already: and as to producing the original, we take that to be an extraordinary attempt, becauſe no uſe can be made of the original which they will not have the ſame advantage of from a copy. *Mich.* 5 *Geo. Rex* v. *Smith*, (on conſideration) the court declared, that where things are evidence of themſelves, as corporation books, *&c.* they never will make a rule to produce the original, unleſs it appears to be neceſſary to be inſpected upon account of raſure or a new entry; and ſo it was held likewiſe *Mich.* 4 *Geo. the company of Gunſmiths* verſ. *Turville.* In *Smith*'s caſe indeed there was a rule on a juſtice of peace to produce an examination, but that was upon account of the neceſſity of proving the hand of the party, before it could be read againſt him; and in that caſe the court was ſo tender, that they would not oblige the juſtice himſelf to attend, but pronounced the rule, not *quod producat*, but *produci faciat*, the examination at the trial.

Ante 126.

As to *Delme*'s caſe, I obſerve upon the rule, that it was made without any affidavit; from whence we may apprehend, there was ſomewhat of a conſent to it: but as to *Parminter*'s caſe, I remember there was a juggle about the poll, and ſome ſuſpicion of alterations, ſo great, that the mayor attended here a whole year upon an attachment for not producing it; and that was the particular ground upon which that rule was made.

Per Pratt C. J. We never order the original to be produced, where the copy is evidence, without ſuch a particular foundation as has

has been mentioned. It was denied in Sir *Gilbert Heathcote*'s caſe, and I remember there was a conſent in the caſe of *Delme*.

Eyre J. In the caſe of *Marlborough* the original was ordered to be produced, but then it was upon an affidavit of a raſure. *Et per Forteſcue* J. This poll is either a publick thing, like corporation books; or elſe it is only in the nature of the officer's own private *memorandum*. If the firſt, then a copy is as much as you can aſk, without ſome particular foundation. If it be only of a private nature, then you cannot have ſo much as a copy. The plaintiff took nothing by his motion.

Anonymous.

The court will not turn over a priſoner till officer paid for bringing him up.

A Priſoner was brought up from *Oxford* gaol by *habeas corpus*, in order to be turned over to the King's Bench; but the court refuſed to do it, becauſe the ſheriff was not paid the charges of bringing him up, and ſo he was remanded.

Dominus Rex *verſ.* Mackintoſh.

Perſon committed for treaſon done in *Scotland*, not within the *habeas corpus* act.

Mich. 7 *W.* 3. *B. R. Rex* v. *Leeſon & al'.*

Per curiam, If one applies to us to enter his prayer, we will not bail him at the end of the term, if the treaſon be in another county than where we ſit. But we will ſend him thither by *habeas corpus*, where he muſt make a new prayer.

HE was committed for treaſon done in *Scotland*, and the firſt week in this term applied to enter his prayer upon the *habeas corpus* act. *Sed per curiam*, We cannot do it, for that prayer is only in order to be tried, and we cannot try a treaſon committed in *Scotland*. It was then offered by the counſel for the defendant, whether within the equity of that ſtatute (ſince there could be no application elſewhere) the court would not enter his prayer, and bail him at the end of the term, in caſe he is not before that time ſent to *Scotland*. *Sed non praevaluit*. *Hil. ſequente*, there being nothing done, he moved to be bailed, but denied. And *Paſ. ſequente* the attorney general conſented to his diſcharge.

Leighton *verſ.* Leighton.

Voidable act, evidence.

UPON a trial at bar the defendant made title under an old intail, and amongſt other things offered an inquiſition *poſt mortem* in 25 *H.* 8. whereby it was found, that the deceaſed tenant was ſeiſed in fee, and upon traverſe of this it went down to be tried, and found to be only a ſeiſin in tail, upon which judgment

was given, and an *amoveas manus* iſſued. This was objected to by the counſel for the plaintiff, becauſe it was taken and tried in *com'* *Salop*, whereas the lands lay in *Wales*, and this being before the 27 *H.* 8. *c.* 26. which united *Wales* to *England*, was *coram non judice*, and a miſtrial. But the court ordered it to be read, ſaying it was not void but voidable, and cited *Murrey* and *Wiſe*, where on a trial at bar depoſitions irregularly taken were allowed to be read.

The ſame objection taken on a trial in the Exchequer, and over-ruled.

Dominus Rex *verſ.* George.

ERROR of an indictment at ſeſſions for a miſdemeanor, whereof the defendant was convicted, and it was reverſed for three exceptions: 1. Becauſe it was *ideo veniat inde jurata*, when it ſhould have been *praeceptum eſt vicecomiti*. 1 *Sid.* 364. *Rex* v. *Knott*. 2. It was *venerunt* the jury in the preterperfect, inſtead of *veniunt* in the preſent tenſe. *Trin.* 2 *Geo. Rex* v. *Earl*. 3. *Quia tam*, *&c.* was left out in the award of the *venire*, which is an eſſential part. *Reg. Jud.* 76. *a.*

Exceptions in error of an indictment.

Trin. 7 *Geo. Rex* v. *Pearſon & al'. Jud. reverſ.* for this fault in indictment for diſturbing a congregation.

Withers *verſ.* Warner.

ERROR *e C. B.* in caſe upon ſeveral promiſes, demurrer to the declaration, and *judicium pro querente*, and want of an original and warrants of attorney aſſigned.

The court will take notice that *London* is a city.

Strange pro defendente in errore. As to the warrants of attorney, the plaintiff has not verified that error by the return of a *certiorari*, ſo we have entered a *non miſit breve*, and laid that matter out of the caſe.

As to the original, I apprehend the plaintiff has not verified his error in the manner he has alleged it, which can only be done by one of theſe two ways, either by the other party's coming in and confeſſing it, or by his own procuring the return of a *certiorari*, that there is no original in the cauſe: here is no confeſſion of the error, and therefore the queſtion will be upon the return of the *certiorari*, whether by that return the plaintiff in error has ſo far eſtabliſhed the truth of his aſſignment of errors, as to be intitled to have this judgment reverſed. And I take it he has not done ſo in this caſe, for the action being laid in *London*, therefore the *certiorari* commands the *cuſtos brevium* of *C. B. Quod ſcrutatis brevibus originalibus de praedicta curia de Banco, de London, de termino Paſ. anno* 5 of the King, he ſhould certify to the court, what he found about it. To this the *cuſtos brevium* returns, *Quod ſcrutatis*

brevibus originalibus ipſius Domini Regis civitatis ſuae London, non habetur aliquod breve originale civitatis London de praedicto termino in his cuſtody: all which may be true, and yet there may be an original to warrant the judgment, directed (as all other writs are) *vicecomitibus London* only: and therefore the command being to ſearch for a writ directed *vic. London*, and the return being that there is none directed *vic. civitatis London*; that amounts to no more than if he ſaid, I am it is true ordered to ſearch the files of writs in *London*, but inſtead of that I have peruſed all the writs of the city of *London*, and find none between theſe parties; or in other words, I cannot find an original directed, as never any original in the world was ever made.

As they who procure this return are labouring to reverſe a judgment, I apprehend the court will hold a ſtricter hand over them, than they would do if it were in order to an affirmance: and the court is always very exact in making the plaintiff in error verify his errors in the manner he has alleged them. There was the caſe of Lord *Peterborough* v. *Atkins* in the Exchequer Chamber in *Trin.* 5 *Geo.* where we had aſſigned ſeveral matters of error, and in order to verify them we prayed a *certiorari* to the *cuſtos brevium* of the court of Exchequer; and it was objected of the other ſide, that this was no prayer of a *certiorari*, there being no ſuch officer in the court of Exchequer; but the writ ought to have been prayed to the Barons: I was counſel in that caſe, and I did offer it to the court, whether they would not take the words *cuſtodi brevium* to mean any perſon who had the cuſtody of the writs, and not confine it to any particular perſon as an officer called a *cuſtos brevium*; but the court ſaid they would conſtrue nothing in our favour, and ſo the judgment was affirmed.

As to the variance between *London* and *civit. London*, there is *Bro. Repleader* 6. *Dett* againſt *A. B. nuper de Briſtol:* the defendant pleads, that the day of the writ purchaſed he was *commorant* at *Dale*, *abſque hoc* that he ever lived *apud praedictam villam Briſtol*; and found for the defendant: but a repleader awarded, for that the writ was *Briſtol* and not *villa Briſtol*, and yet there was the word *praedict.* to tie it up to what went before, which is wanting in our caſe.

And as to what may be ſaid, that every body knows that *London* and *the city of London* are ſynonymous expreſſions to denote the ſame place: To this I anſwer, 1. That taking this return as a matter of fact, then though *London* and *the city of London* are one and the ſame; yet in point of fact a writ directed *vic. London* is not a writ directed *vic. civit. London.* 2. In the next place, to take it as a matter of law, it is to be conſidered how this *certiorari* and re-

turn are poſſible to be reconciled; and I can ſee but one way to do it, *viz.* by the court's taking notice judicially, that *London* is a city, which I apprehend they never will do.

It is true, and therefore I muſt admit, that the court will take notice of counties, for they are to be conſidered as part of the common law, delivered down to us from time immemorial: but then in relation to cities, the applying the rule, *quod ubi eſt eadem ratio, ibi idem jus*, is (as I apprehend) begging the queſtion, for I muſt inſiſt that the ſame reaſon does not extend to both caſes.

Every city muſt be ſo, either by charter, or preſcription; and therefore to ſay the court will take notice of cities, is to ſay the court will take notice of charters and preſcriptions, which is a notion I believe was never advanced, otherwiſe than as now by way of conſequence.

If they take notice of charters, there will be the ſame reaſon to take notice of the nature of every incorporation; and when that is done, I much queſtion whether the ſame reaſon will not introduce all the by-laws and cuſtoms of particular places into the judicial knowledge of the court, which would be the abſurdeſt attempt imaginable. In the caſe of *Argyle* v. *Hunt in B. R. Trin.* 5 *Geo.* after ſentence the defendant came for a prohibition, alleging that it appeared upon the face of the libel, that the word *whore* was ſpoken in *London:* but the cuſtom of *London* did not appear, and they could not go out of the libel after ſentence for a ground for a prohibition; and therefore the court did declare, that they could not judicially take notice of it, and that though they had ſuch a private knowledge of it as not to put the party to produce an affidavit in every caſe; yet they could not proceed in any caſe without proof of the cuſtom, if the plaintiff below thought fit to inſiſt upon it. And to this I may add the conſtant form of pleading, which is ſetting out at firſt, *quod civitas London eſt antiqua civitas*, not to mention the innumerable authorities which require all inferior juriſdictions (of which *London* is one) to ſet out *quo jure* their courts are held, in all caſes where the point immediately concerns themſelves. Ante 187.

For any thing appearing upon this record *London* may as well be a ville as a city; and though I can cite no caſes where the court has ſaid they will not take notice of cities, yet I rely upon this as a ſtrong argument it was never ſo much as thought they would, till the other ſide produce authorities to ſhew they will. In the caſe of the *King* v. *Clerk*, 5 *Mod.* 162. *Salk.* 349. *Holt* C. J. put the caſe of a nonconformiſt living in a borough that ſent members to Parliament contrary to 17 *Car.* 2. *c.* 2. and he was diſcharged,

diſcharged, becauſe not averred in the return, that *London* ſent members to Parliament, for the court could not take notice of it.

But further: when this return comes to be narrowly conſidered, it will appear to be in a manner inſenſible. The words are, *non habetur aliquid breve originale civitat. London*, which in *Engliſh* will run, That there is no original *of* or *belonging to* the city of *London*; whereas the writ in this cauſe can belong to no body but the plaintiff. And how then can it be ſaid to be a verifying the error, when he is commanded to ſend up the writ which the plaintiff purchaſed to found the juriſdiction of *C. B.* for him to ſay he has not the writ which belongs to the city of *London*.

Since therefore the judgment *may not* be erroneous, the court will take it to be right; and we had no occaſion to allege diminution, and put ourſelves to the charge of fetching up the right original, when there is nothing appearing upon this record to obſtruct our having the judgment affirmed.

Wearg contra. This being a matter of form muſt be governed by the practice, and it is the conſtant form which the *cuſtos brevium* uſes. It is agreed, that the court will take notice of counties; and then *London* being a county, you will take notice of that too. If there had been a county called *London*, and a city called *London*; as *Oxford* and *Glouceſter*, and others; there might be ſome colour of objection upon account of the uncertainty. But in this record it appears, *London* is a city, for the writ of inquiry is executed *apud Guildhall civit. London.* A writ may be ſaid to be of, or belonging to *London*, without a neceſſary implication that *London* is the owner of it.

C. J. We ought to ſupport this judgment if we can: the error aſſigned is ſo much againſt the honour of the court of *C. B.* by ſuppoſing them to uſurp a juriſdiction, and proceed without authority, that I muſt have the cleareſt proof in the world, before I can declare they have done ſo: and I will intend, there is an original, till it appears impoſſible there ſhould be one. To maintain this return, and ſet aſide the judgment, we are to be led out of the record, and take notice that *London* is a city: and if the court would not do it in the caſe in *Bro.* to ſupport a verdict, I am ſure there is no reaſon we ſhould do it, where the conſequence is to overthrow the proceedings: Though *London* is a county, yet it may not be a city, as is the caſe of *Poole*, and *Haverfordweſt.*

Eyre J. (*abſente Powys*) The caſe in *Bro.* is not law. 2 *Cro.* 263. *Hob.* 6. I am afraid this form has been too often uſed, to

be now ſet aſide. *Cro. El.* 489. *Norwich* and the county of *Norwich* were taken to be the ſame. *Ibid.* 866.

Forteſcue J. We take notice of publick acts of Parliament, and in many of them *London* is called a city: we take notice what is couched under an *&c.* in the award of a *venire*, and when an avowant ſpeaks of the *locus in quo*, *&c.* we know what he means.

Adjournatur. And this term *Powys* J. being alſo in court, the Chief Juſtice and the reſt were of opinion, that they muſt take notice that *London* was a city, it being mentioned to be ſo in ſeveral acts of Parliament; and therefore held the error to be verified, and the judgment of *C. B.* was reverſed.

Hackett *verſ.* Marſhal.

ON error from *Ireland*, it was objected, that the defendant was an infant, and therefore there ought not to have been a *capiatur*. To which it was anſwered, and reſolved by the court, that there being a verdict in the caſe, and the ſtatute 16 & 17 *Car.* 2. *c.* 8. here, being enacted in *Ireland* by 17 & 18 *Car.* 2. *c.* 12. the fault was cured; although the adding a *capiatur* where neither that or a *miſericordia* lies, is not expreſly mentioned, but only the putting one for another, or omitting either of them, it being a matter of like nature not againſt the right of the matter of the ſuit, or whereby the iſſue or trial are altered. And the judgment was affirmed. *Strange pro defendente in errore.*

Adding a *capiatur* where none lies, is aided after a verdict.

Trinity Term

6 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Juſtice.*
Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Forteſcue Aland, *Knt.*
Sir Robert Raymond, *Knt. Attorney General.*
Sir Philip Yorke, *Knt. Solicitor General.*

Dominus Rex *verſ.* Inhabitantes de Telſcombe.

Contributory order muſt be to raiſe a certain ſum.

PER *curiam*, The order for the contributory pariſh to make a rate at 6 *d.* in the pound is ill for incertainty: it ſhould have been, to raiſe ſuch a certain ſum. Quaſhed.

Barber *verſ.* Boulton.

Where the charter appoints the election of a mayor to be out of the body at large, it may be reſtrained by a by-law to a ſelect number. 4 Co. 77. b. Salk. 190.

UPON *non fuit electus* returned to a *mandamus* for ſwearing the plaintiff into the office of mayor of the borough of *Macclesfield*, wherein the jury found a long ſpecial verdict, the caſe was no more than this. By the charter the mayor is to be choſen by the capital burgeſſes out of the capital burgeſſes, who are twenty-four. The uſage for fifty years has been, that the common burgeſſes have put five of the capital burgeſſes in nomination, out of which five the capital burgeſſes have choſen one to be mayor: and this the jury find was according to a by-law not now extant in writing, and

that there are no footſteps before theſe fifty years of any election in any other manner.

At the charter day the common burgeſſes meet and put eight capital burgeſſes in nomination, whereof the plaintiff was one, and he had the majority of the capital burgeſſes for electing him to be mayor.

It being agreed that this election was not according to the uſage, the counſel for the plaintiff inſiſted, that it was an unreaſonable uſage, for here the common burgeſſes who have no right in the election under the charter, have it in their power to diſſolve the corporation by their neglecting to return five; or if it were good, yet it can only have allowance in caſes where they do nominate, and if they do not, then the capital burgeſſes may make the election under the charter out of the whole body.

Per curiam, This is a good uſage, being to avoid popular confuſion: but here the election purſues neither the charter nor the by-law. It is not under the charter, for that ſays it muſt be out of the capital burgeſſes at large, and here they confined themſelves to eight; nor is it according to the uſage, becauſe more than five were nominated, which brings in all the confuſion that was deſigned to be avoided by that proviſion. *Judicium pro defendente.*

Anonymous.

Seſſions may diſmiſs an appeal for want of ſuch notice as their practice requires.

MANDAMUS to the ſeſſions, to proceed on an appeal; they return that the appeal was diſmiſſed for want of ſix days notice, which by a former order they had appointed to be given of every appeal. Serjeant *Whitaker* ſaid, they ſhould have adjourned it, and not diſmiſſed it. *Sed per curiam*, The return was allowed, for they are the propereſt judges of a point of practice at the ſeſſions; and all courts muſt have ſtated rules to go by.

Dominus Rex *verſ.* Inhabitantes de Stroud.

Order for repair of highways muſt ſhew the ſtatute labour not ſufficient.

AN order for impoſing a rate towards the repairs of the highways was quaſhed for two exceptions: 1. Becauſe it did not appear but that the ſtatute labour was ſufficient. And 2. Becauſe only the *occupiers of land* are charged, whereas others are equally liable.

Dominus

Dominus Rex *verſ.* Baker.

In convictions ill for the witneſs to ſwear the defendant is guilty generally.

CONVICTION for taking pilchards, *contra formam ſtatuti*, quaſhed, becauſe the witneſs ſwears generally, that the defendant is guilty of the premiſſes, and that is taking upon himſelf to ſwear the law.

Dominus *verſ.* Tilly.

Informer no witneſs, where intitled to part of the penalty.

A Conviction for deer-ſtealing quaſhed, becauſe the ſame perſon is both informer and witneſs, and is intitled to a part of the penalty.

Ingoldſby *verſ.* Martin.

Paſ. 6 Geo. rot. 104.

Earl a ſufficient deſcription, though the Chriſtian name is miſtaken.

IN error of a judgment by default, want of an original was aſſigned, and a *certiorari* returned, that there was none: upon which the defendant in error comes and alleges diminution, and brings up an original of the term in the *placita*, and then pleads *in nullo eſt erratum.*

Strange pro querente in errore, excepted to the ſecond *certiorari* and return, that it had not falſified the error aſſigned, it being an improper return, for that the writ was directed to *Henry* Earl of *Litchfield*, *cuſtos brevium de C. B.* and the return is made by *George Henry* Earl of *Litchfield*, who is a different perſon: and it will be no anſwer to ſay he calls himſelf the *cuſtos brevium infranominat'*, for that was the general anſwer offered to the exception taken in *Nutton* v. *Crow* and ſeveral other caſes, where the writ was directed to Sir *Thomas Trevor*, Knt. and returned by *Thomas* Lord *Trevor*; and it was again relied upon in the caſe of the *Archbiſhop of Dublin* and *the Dean of Dublin*, *Mich.* 5 *Geo.* where the writ was *Whitchett* and the record *Whitched:* and the court held it was not reconciled by the averment of his being Chief Juſtice.

Sed per curiam, There can be but one Earl of *Litchfield*, and therefore according to 1 *Inſt.* 3. *a.* a variance of the *Chriſtian* name is not material.

Variance.

Then it was moved to quaſh the writ of error, which was, *inter Jacobum Martin nuper de Weſtm' in com' Middleſex gen'*, and the

record is only *nuper de Weſtm' gen'*. So the exceſs lies in the deſcription, and not in the record, which difference has been often taken and allowed, particularly in the caſe of *Alſton* v. *Lucan*, where the writ had the word *junior*, which was not in the record.

Sed per curiam, There is *Middleſex* in the margin, and ſo it is well enough. Judgment affirmed.

Jernegan *verſ.* Harriſon.

DEBT upon a bond: the defendant prays *oyer* of the condition, which appears to be for the payment of money on the 23d of *March*, and then pleads payment on the 22d of *March* in the condition mentioned. Duplicity.

The plaintiff replies, that he did not pay the money either on the 22d or the 23d, or at any time after making the bond. And the defendant demurs for duplicity.

Strange pro defendente would have argued againſt the replication. *Sed per curiam*, You need not labour that, for it is certainly ill; but then ſo is their plea, and the declaration muſt ſtand; for if the plaintiff had gone to iſſue upon the plea, the verdict muſt have been ſet aſide, as in the caſe of *Merril* v. *Jocelyn*.

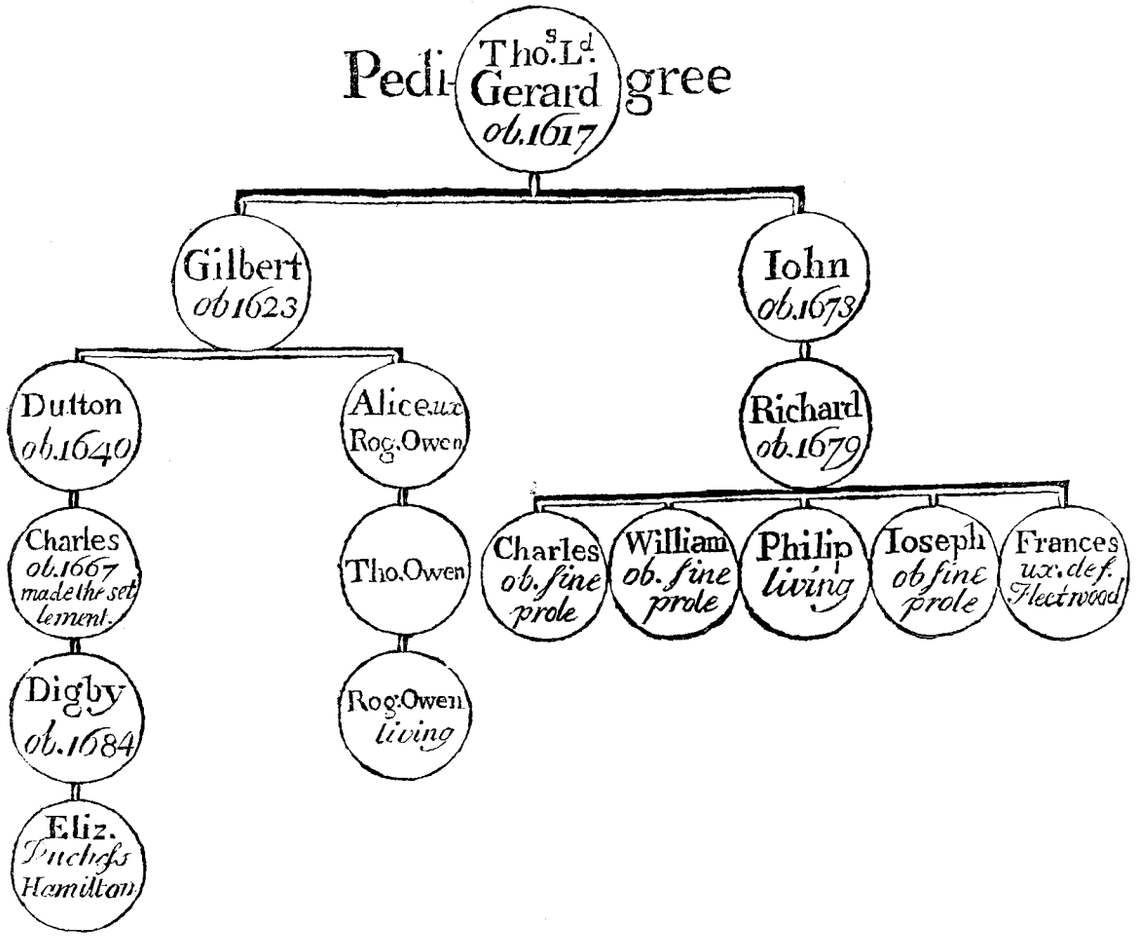
As to this, *Strange* took a difference between this and the common plea of payment before the day: he admitted it ought to have been pleaded by way of accord and ſatisfaction. 5 *Co.* 117. But as it was, he ſaid the plaintiff might have taken a ſafe iſſue by *non ſolvit modo et forma*; for the payment is pleaded abſolutely, and the time introduced under a *ſcilicet*, and then *modo et forma* would not make it parcel of the iſſue. But the plaintiff had judgment. *Solvit ante diem*, ill.

Shadford *verſ.* Houſtoun.

THE court ordered coſts for not going on to execute a writ of inquiry, as they uſed to do for not going on to trial. Coſts for not executing inquiry.

Thornby *verſ.* Fleetwood et al'.

Int. in C. B. de Trin 9 Annae, rot. 1842.



Of the effect and conſequence of a foreign education in a popiſh ſeminary.

UPON Not guilty in ejectment for lands in the county of *Stafford* on the demiſe of the moſt noble *James* Duke of *Hamilton* and *Brandon* and *Elizabeth* his wife, on a trial at bar in the court of Common Pleas, the jury find this ſpecial verdict.

That *Thomas* Lord *Gerard* had two ſons, *Gilbert* and *John*, and died 1617. That *Gilbert* (the elder) had iſſue *Dutton* and *Alice*, and died 1623. That *Dutton* had iſſue *Charles*, who had iſſue *Digby*, who had iſſue *Elizabeth* now Ducheſs of *Hamilton*, leſſor of the plaintiff. That *Alice* the daughter of *Gilbert* married *Roger Owen*, Eſquire, and had iſſue *Thomas*, who had iſſue *Roger Owen*, now living. That *John*, the younger ſon of *Thomas* and brother of *Gilbert*, had iſſue *Richard*, who had iſſue *Charles*, *William*, *Philip*, *Joſeph*, and *Frances* wife of the defendant *Fleetwood*. This being

the pedigree, they further find, that *Charles* the ſon of *Dutton*, being then Baron of *Gerards-Bromley*, and ſeiſed in fee of the premiſſes in queſtion, by leaſe and releaſe dated 28 and 29 *November* 12 *Car.* 2. conveyed the ſame to truſtees to the following uſes. As to part of the lands to the uſe of himſelf and the Lady *Jane Digby* his intended wife, for their joint lives and the ſurvivor of them; remainder to the firſt and every other ſon and ſons of that marriage in tail male, remainder to the heirs male of the body of *Charles*, remainder to the heirs male of the body of *Thomas* firſt Lord *Gerard*, great-grandfather of Lord *Charles*; remainder to the right heirs of Lord *Charles*. And as to the reſidue of the lands not in jointure, to the uſe of Lord *Charles* for life, remainder to the firſt and every other ſon and ſons of that marriage in tail male, with the like remainders over as before. That the marriage ſoon after took effect, and Lord *Charles* and Lady *Jane*, by virtue of the ſaid deed of releaſe and the ſtatute for transferring uſes into poſſeſſion, being jointly ſeiſed of part of the premiſſes, and Lord *Charles* ſole ſeiſed of the reſidue for life, had iſſue *Digby* their only ſon: and afterwards Lord *Charles* died, and Lady *Jane* ſurvived, and became ſole ſeiſed of her part. That *Digby* entered into the reſidue of the lands not in jointure, and was thereof ſeiſed *prout lex poſtulat*, and alſo of the jointure lands in remainder expectant upon the death of Lady *Jane*; and being ſo ſeiſed, died 8 *November* 1684, leaving iſſue *Elizabeth*, now Ducheſs of *Hamilton*, his only daughter and heir. That *John* the younger ſon of *Thomas*, and *Richard* the ſon of *John*, died in the life-time of *Digby*; and *Richard* left iſſue *Charles*, *William*, *Philip*, *Joſeph*, and *Frances* wife of the defendant *Fleetwood*. That *Charles* the ſon of *Richard*, as Baron of *Gerards-Bromley* and heir male of the body of *Thomas*, entered into the lands whereof *Digby* died ſeiſed, and was thereof ſeiſed *prout lex poſtulat*, and alſo of the jointure lands in remainder expectant upon the death of Lady *Jane*. But the jury further find, that *Charles*, *William*, and *Philip*, ſons of the ſaid *Richard*, in the life-time of *Richard* and *Digby*, 1676, (being then infants under the government of their father, and he being then a ſubject of King *Charles* the Second, and under his obedience in the kingdom of *England*) by the ſaid *Richard* their father were ſent, did proceed, go and paſs out of the ſaid kingdom of *England* into parts beyond the ſeas, out of the obedience of the ſaid King, *viz.* to *St. Omers*, and at and in a popiſh ſeminary or college of jeſuits, under the obedience of the King of *Spain* then being, there to be educated in the popiſh religion and ſuperſtition uſed in the church of *Rome*; and did there reſide for the ſpace of five years amongſt jeſuits and papiſts, and during that time were inſtructed and educated in, and did profeſs that religion. That *Charles* in 1681, and *Philip* in 1693, returned into *England*. That *Charles*, after the death of *Digby*, 22 *May* 1685,

1685, granted the lands to *Whitgrave* and *Jervis*, and their heirs, to make them tenants of the freehold till a common recovery was ſuffered, which was accordingly had and ſuffered *Paſch.* 1 *Jac.* 2. to the uſe of *Charles* and his heirs. And then *Charles* in conſideration of 10,000 *l.* portion with *Mary* his intended wife, grants the ſame lands to uſes which by the death of *Charles* without iſſue of that marriage are all extinct, except a rent-charge of 1000 *l. per annum* to Lady *Mary*, who is ſtill living. That 27 *October* 1703 Lady *Jane* died ſeiſed of the jointure lands, and *Charles* entered and ſuffered a common recovery, to the uſe of himſelf in fee. That *William* and *Joſeph*, ſons of *Richard*, died without iſſue in the life-time of *Charles* their brother. That *Charles* always from his going beyond ſea to the time of his death was and continued a papiſt, and died 21 *April* 1707, without iſſue, nor was his wife then pregnant. That *Philip*, brother to *Charles*, is living, and heir male of the body of *Thomas*; and always from his going beyond ſea was and did continue a papiſt, and is ſo now, uſing and exerciſing the ſaid popiſh religion. That *Mary*, widow of the ſecond *Charles*, is living. That *Roger Owen*, Eſquire, grandſon of *Alice* the daughter of *Gilbert*, is now living, and the next proteſtant of kin to *Philip Gerard*. That immediately after the death of the ſecond *Charles* Lord *Gerard*, the defendants *Fleetwood & al'* entered, and were ſeiſed *prout lex poſtulat*, upon whoſe poſſeſſion the Duke and Ducheſs of *Hamilton*, in right of the Ducheſs, did enter and were ſeiſed in manner aforeſaid, and made the leaſe to the plaintiff, who entered, and was poſſeſſed till ejected by the defendants. But whether, upon the whole matter, the re-entry of the defendants be lawful or not, the jury pray the advice of the court: *Et ſi pro quer', pro quer'; et ſi pro def', pro def'.*

The great queſtion in this caſe is, whether upon this ſtate of the fact, the ſtatute of 1 *Jac.* 1. *c.* 4. will have wrought ſuch a diſability, upon account of the foreign education of *Charles* and *Philip*, as that in judgment of law the remainder to the heirs male of the body of *Thomas*, the common anceſtor, (the death of *Digby* without iſſue male having determined all the former limitations) muſt be taken to be ſpent, ſo as to let in the Ducheſs, who is the reverſioner. If it has, then it is with the plaintiff, otherwiſe it is with the defendants.

The matter in law upon this ſpecial verdict was argued three ſeveral times at the bar *in C. B. Trin.* 11 *Annae*, by Serjeant *Hooper* for the plaintiff, and Serjeant *Pengelly pro def'*; in *Mich.* following by Serjeant *Pratt pro quer'*, and Serjeant *Selby pro def'*; and *Hil. ſequen'* by Sir *Thomas Powys pro quer'*, and Serjeant *Cheſhyre pro def'*. But the ſame perſons having argued it again *in B. R.* upon the writ

of error, where the matter was taken up more at large; I ſhall omit the arguments they made *in C. B.* and take notice only of the reſolution of the court, which was delivered by Lord *Trevor*, C. J. *Paſch.* 12 *Ann.*

Lord *Trevor*, after ſtating the heads of the ſpecial verdict, went on as follows. The plaintiff's title depends upon the conſtruction of the ſeveral acts of Parliament of 1 *Jac.* 1. *c.* 4. 3 *Jac.* 1. *c.* 5. and 3 *Car.* 1. *c.* 2. For the leſſors of the plaintiff muſt intitle themſelves to the lands in queſtion upon ſome diſability wrought by one of thoſe ſtatutes, which diſability muſt enure to make the recovery ſuffered by the ſecond Lord *Charles* to be void, and work a determination of the precedent eſtate-tail, or at leaſt a preſent *ceſſer* of it: and ſince the eſtate-tail is not abſolutely determined; as it is not, becauſe *Philip* who is heir in tail is ſtill living, and may have iſſue who may be inheritable to the eſtate-tail; therefore the leſſors, who claim after that eſtate is determined, cannot entitle themſelves to enter, unleſs ſome or one of thoſe acts of Parliament give a title to them ſo to do; for if thoſe recoveries are good, their remainder is barred; or if they are not good, yet if the eſtate-tail has in judgment of law continuance, they cannot enter by virtue of that remainder.

The only act inſiſted upon by the counſel for the plaintiff is the act of 1 *Jac.* for the other ſubſequent acts cannot intitle them, and the queſtion upon them is only how far they have altered the act of 1 *Jac.* Therefore the counſel did endeavour, with a great deal of art and ingenuity, to ſhew, that the act of 1 *Jac.* had ſo far diſabled Lord *Charles* to take the eſtate-tail by deſcent, that the recovery ſuffered by him was void, and that the ſame diſability being ſtill upon *Philip*, and there being no perſon in being who can take the eſtate-tail, they muſt be intitled, as if it was actually ſpent: then as they inſiſted, that this act wrought ſuch a diſability; ſo they endeavoured to ſhew, that this act is ſtill in force, and not repealed or any wiſe altered by the ſubſequent acts of 3 *Jac.* or 3 *Car.* for I did not obſerve they inſiſted (nor was there any foundation ſo to do) that either of thoſe two later acts could give any title to the plaintiffs, for 3 *Jac.* gives the pernancy of the profits, in caſes of diſabilities under that act, to the next proteſtant of kin; and the act of 3 *Car.* gives the forfeiture to the crown upon conviction.

So that this caſe will depend upon two things to conſider, 1. What is the operation and effect of 1 *Jac.* admitting it ſtill in force, and as if the other acts had never been made. 2. How far

that act does ſtill continue in force, and whether it be repealed or any wiſe altered by the ſubſequent acts, or either of them.

1. To conſider what conſtruction muſt be put upon the ſtatute of 1 *Jac.* That act ſays, " If any perſon ſhall paſs or go, or ſhall ſend " or cauſe to be ſent any child or other perſon under their govern- " ment, into any parts beyond the ſeas out of the King's obedience, " to the intent to enter into or be reſident in any college, ſeminary " or houſe of jeſuits, prieſts, or any other popiſh order, profeſſion, " or calling whatſoever; every perſon ſo ſending or cauſing to be " ſent any child or other perſon ſhall forfeit 100 *l.* *And every ſuch* " *perſon ſo paſſing or being ſent beyond ſeas to any ſuch intent or pur-* " *poſe ſhall, as in reſpect of him or herſelf only, and not to or in* " *reſpect of any of his heirs or poſterity, be diſabled and made inca-* " *pable to inherit, purchaſe, take, have, or enjoy, any manors,* " *lands, &c.*"

Then there is a proviſo, " That if any perſon or child ſo paſ- " ſing, ſent, or then being beyond ſeas as aforeſaid, ſhould after " become conformable and obedient; during ſuch time as they " ſhall continue in ſuch conformity and obedience, they ſhall be " freed and diſcharged of every ſuch diſability and incapacity."

I would obſerve firſt, as this act is penned, it was very difficult to determine what the effect of this clauſe would be, and what would be the conſequence of that diſability, and who ſhould have the lands during it; for in theſe particulars the act is ſilent, therefore theſe things muſt be left to the conſtruction of law, becauſe there is no expreſs declaration who ſhall have the lands in the mean time.

The counſel for the plaintiff have endeavoured to conſtrue this act in ſuch a manner, as would have a different effect upon lands that were deſcended before the diſability incurred; for they ſeem to admit, that if lands were deſcended to any one that did afterwards incur this diſability, it would diſable him only to receive the profits; but they ſaid, where the diſability is precedent, it ought to be conſtrued ſo as to prevent any deſcent.

Now I would obſerve, that this would be a pretty extraordinary conſtruction, thus to diſtinguiſh between lands coming before the diſability incurred, and all thoſe caſes that may happen upon this act: for though this conſtruction will provide for the caſe before us, yet it renders the act wholly ineffectual as to all other caſes that may be upon it.

Suppoſe it had been the caſe of an eſtate in fee, that was to deſcend to a perſon diſabled; according to this conſtruction the eſtate could never deſcend upon him; who then ſhall have it? It cannot be pretended his next heir ſhall enter in his life-time, for he is not heir to him, he cannot claim the eſtate till his death: the diſability is only perſonal, and the act ſays it ſhall not prejudice the heir, but that after the death of the anceſtor he may inherit, but it does not ſay he ſhall take in the life of the anceſtor. So that if this be the conſtruction, there is no body to take; the conſequence of which is, that the diſability is of no uſe, for though the party be diſabled, yet if nobody has a right to enter, he may keep it himſelf, ſince nobody elſe can recover it againſt him.

This would be the caſe upon this conſtruction, where an eſtate in fee deſcended: then put the caſe of an eſtate purchaſed by one diſabled: the act diſables him from purchaſing, but nobody will ſay but that the eſtate ſhall veſt in him, ſo that his heir may claim through him. An heir cannot claim through a purchaſer, if the purchaſe did not veſt in him; ſo that this caſe too would be unprovided for upon this conſtruction, for the heir cannot take in the life of the anceſtor.

This was compared to the caſe of a monk or a perſon profeſſed, but they are not alike; for there the diſability is grounded upon the maxim in law, that one profeſſed is civilly dead, but it cannot be ſaid that a perſon diſabled by this act is dead in law, for it is not an abſolute diſability, but only during nonconformity. As to the caſe of lands deſcended before the diſability incurred, it was admitted, that the eſtate and intereſt ſhould continue in him; but that the act is to have this effect, to diſable him to take the profits; and if in that caſe, why not ſo in the other?

As this is the natural, ſo it is the legal conſtruction: it is not expreſſed, who ſhall have the land; but the act having inflicted this diſability for a publick crime againſt the government, I think the conſtruction of law is, that the land during the diſability ſhould go to the crown. Where an act inflicts a pecuniary penalty, or a diſability; if the Parliament doth not declare who ſhall have it, the crown muſt have it; otherwiſe the act is wholly ineffectual: and the King being the head of the government, all penalties for publick offenſes go to him. Indeed where a particular perſon has a private injury, the law may give him the penalty by way of recompenſe; otherwiſe the crown has the forfeiture; and ſo it was reſolved in the caſe of *Woodward* v. *Fox*, 2 *Vent.* 269. where an arch-deacon ſold the office of regiſter, and the queſtion was, who ſhould have

have the forfeiture? It was adjudged, that the crown ſhould have it. So it is in many other caſes, for if you do not give the forfeiture to the crown, you cannot give it to any body elſe by implication: you cannot give it to one ſubject more than another.

And as the matter reſted on the act of 1 *Jac.* as it was doubtful who ſhould have the benefit of the diſability, ſo it was more doubtful in what manner the crown ſhould have it, whether before conviction or after; by office or inquiſition; ſo that as the forfeiture was uncertain, the method was alſo uncertain: and theſe doubts upon the penning of the act did in a manner render it ineffectual.

But however this might ſtand upon the act of 1 *Jac.* if that was the only act, I think that by the act of 3 *Car.* it is explained and altered, ſo that ſince that act it will be much plainer than it was. But before I conſider that act, let us ſee how it ſtands upon 3 *Jac.*

Now the words of that act are to this purpoſe, "That if the "children of any ſubject (not being ſoldiers, mariners, merchants, "*&c.*) to prevent their good education in *England*, ſhall be ſent "or go beyond the ſeas without licence, every ſuch child or chil-"dren ſo ſent ſhall take no benefit by any gift, conveyance, de-"ſcent, deviſe, or otherwiſe, of or to any lands, *&c.* and the "next of kin, which ſhall be no popiſh recuſant, ſhall have and "enjoy the ſaid lands, till ſuch time as the perſon ſo ſent ſhall "conform; and the perſon ſo ſending ſhall forfeit 100 *l.*"

As to this act, I do not think it has made any alteration of the act of 1 *Jac.* for it ſeems that this act was made for another purpoſe, to prevent going beyond ſea without licence, and this is a diſtinct thing from what the former act prohibited; for by this act, if they had a licence, they incurred none of the penalties; but if they went with intent to be popiſhly educated, they would incur all the penalties of 1 *Jac.* This act never intended to repeal 1 *Jac.* but was made to prevent their going beyond ſea upon any pretenſe whatſoever, without licence; ſo that it is plain, this has not altered the other: and this ſeems to be an anſwer to *Tredway*'s caſe, *Hob.* 73. for that was founded on 3 *Jac.* and the offenſe was going without licence, and it doth not appear ſhe went with an intent to be bred up in a popiſh ſeminary, though it appears ſhe was afterwards a nun profeſſed. So that caſe doth not at all influence this.

The next thing to be conſidered is the act of 3 *Car.* how far that act has either repealed, altered, explained or enlarged the

act of 1 *Jac.* and in order to form a right judgment of this matter, all the parts of this act are to be conſidered, and compared with the proviſions in 1 *Jac.*

The title of this act is, " To reſtrain the paſſing or ſending of " any to be popiſhly bred beyond the ſeas;" to lay a further reſtraint on that great inconvenience, that was found to grow every day, notwithſtanding the act of 1 *Jac.* ſo that it ſeems to be made to prevent thoſe inconveniencies, by ſome proviſions that were not made in the firſt act. And it ſeems that this act was made to the ſame intent and purpoſe with the firſt.

The next is the preamble. " Foraſmuch as divers ill affected " perſons to the true religion eſtabliſhed within this realm have ſent " their children into foreign parts, to be bred up in popery, not- " withſtanding the reſtraint thereof by 1 *Jac.*" Therefore the firſt enacting clauſe is, that that ſtatute ſhall be put in due execution: the next enacting clauſe extends to all the caſes comprized within the act of 1 *Jac.* and to ſeveral that are not within that act. For 1. It extends to perſons ſent into any *private* popiſh family beyond ſea, which was not a caſe within 1 *Jac.* that extending only to ſome *publick* college or ſeminary. 2. In the next place this act extends to the ſending any ſum of money for the maintenance and relief of any ſuch child, ſo ſent abroad, or under colour of charity. Then it inflicts the ſame penalty on the perſon ſending and the perſon ſent, whereas by 1 *Jac.* the perſon ſending forfeits only 100 *l.* with this difference between the ſender and ſent, that the laſt is diſcharged upon conformity, but there is no proviſion for the ſender. It is further obſervable that theſe penalties and diſabilities are only upon conviction.

Now the penalties here, are all the penalties in 1 *Jac.* and ſome more: they are not capable of bringing any action or ſuit at law or in equity, nor to be committee of any ward, or capable of any legacy, or to bear any office; none of which were in the act of 1 *Jac.* *And further ſhall loſe and forfeit*, (in the ſame words as 1 *Jac.*) and mentions who ſhall take the advantage. Thoſe are the ſame penalties with reſpect to the perſon, as are in 1 *Jac.* but it was not ſaid who ſhall take the advantage of them; therefore this act ſays, he ſhall forfeit to the crown upon conviction: ſo that this act ſeems to be made as a further and clearer proviſion againſt the miſchief, to prevent which 1 *Jac.* was made.

Then there are two proviſoes in this act relating to conformity, which differ from that in 1 *Jac.* Firſt, That if the perſon ſhall conform *within ſix months after his return*, he ſhall not incur the

penalties; whereas by 1 *Jac.* he was to be diſcharged upon conformity at any time. Then the other proviſo is, that upon conformity at any time he ſhall be reſtored to his land, but that does not go to the other diſabilities: ſo this act, as it has much enforced 1 *Jac.* ſo it goes further, and has made alterations in point of conformity.

I would now make ſome obſervations, to ſhew that this act of 3 *Car.* (though it is not a repeal of 1 *Jac.*) yet it has enlarged, explained and enforced it, ſo that now the meaſure of the diſability to be incurred by 1 *Jac.* is to be governed by 3 *Car.*

It was inſiſted on by the counſel for the plaintiff that this act of 3 *Car.* ſhould not be conſtrued to repeal 1 *Jac.* becauſe the firſt clauſe ſays, that act ſhall be put in due execution: I do not think it is a repeal, but that clauſe coming immediately after the preamble, may very naturally be conſtrued to be put in to ſhew, that though the act was altered for the future, yet as to all caſes and offenſes that had been committed againſt that act before 3 *Car.* it ſhould remain in force, which offenſes could not be puniſhed by 3 *Car.* it having no retroſpect.

In the next place I would obſerve, that this act of 3 *Car.* is far from repealing 1 *Jac.* for the proviſions made by 3 *Car.* are for the better execution of 1 *Jac.* therefore it was natural enough for them, at the time when they were making proviſion for the better execution of that act, to ſay, it ſhall ſtill be put in execution; for they were providing for ſeveral things not ſufficiently provided for before, ſo that the putting in execution this act of 3 *Car.* may properly be ſaid to be putting in execution the act of 1 *Jac.* for it has ſtrengthened that law, by appointing to whom the forfeiture ſhall go, and in what manner it ſhall be taken advantage of by the crown, *viz.* upon conviction.

It muſt be admitted, that upon 1 *Jac.* either the forfeiture muſt be to the crown by implication, and then 3 *Car.* only expreſſes what was implied before. Or if it ſhould not receive that conſtruction, then it muſt be agreed, that act would be defective in moſt caſes that would happen upon it, and the perſon diſabled, being in poſſeſſion, muſt hold the land, becauſe no body could make a title againſt him: I ſay, in moſt caſes; for in the caſe at bar, the counſel inſiſted, that the remainder man might enter, as if the eſtate-tail were ſpent; but that will not anſwer all the other caſes that may be upon this act, for if it were the caſe of an eſtate-tail that deſcended before the diſability, there might be a recovery ſuffered of that, and the eſtate might be barred. In caſe of an inheritance in fee de-

ſcended, either before or after the diſability, or in caſe of lands purchaſed, or which ſhould come in the nature of a purchaſe, there would be no body intitled to the lands in the life-time of the diſabled perſon; therefore this act of 3 *Car.* ſeems to be the rule by which the diſability is to be governed, and it ſhews what is to be the conſequence of that diſability, *viz.* a forfeiture to the crown upon conviction.

The counſel for the plaintiff ſeem to allow, that 3 *Car.* ſhould have an effect upon ſome lands, and they ſaid the forfeitures therein mentioned ſhould extend to lands that were deſcended before the diſability, or to lands which were purchaſed, and that theſe might be forfeited to the crown; but that it ſhould not extend to lands that came after the diſability, for that they never veſted in him.

But as to this I would give this anſwer. I think upon the act of 1 *Jac.* the conſtruction would have been to give it to the crown in all caſes. If that be ſo, it will be a full anſwer, and this act of 3 *Car.* will be only explanatory of what the law was before. But if that were not ſo; if it did not go to the crown by 1 *Jac.* but did enure for the benefit of the remainder man; yet it muſt be admitted, that this point was doubtful at that time when 3 *Car.* was made: it was a point that had never been ſettled; and if it was doubtful, and 3 *Car.* was made to explain thoſe doubts; ſhall it be explicatory only of ſome things that were doubtful, and not of all that were ſo? eſpecially when the words are ſo general, that they may extend to all caſes. It ſeems to me, that this act muſt extend to all thoſe doubts, and to explain the former act ſo far, as that all thoſe penalties ſhould go to the crown upon conviction.

Upon the whole matter: if this caſe depended only on the conſtruction of 1 *Jac.* and there had been no other law, though that act had not expreſſed that the forfeiture ſhould go to the crown, yet I conceive, the diſability being inflicted for a publick crime, the forfeiture muſt enure to the crown; or if it did not, yet it could not intitle the leſſors of the plaintiff to enter, whilſt the eſtate-tail continues. For though there is a perſonal diſability in *Philip*, yet it is but perſonal, and the eſtate-tail muſt continue for the benefit of the iſſue. If he had iſſue born, no body could pretend, that the plaintiff could enter; and though he has not, yet he may have iſſue.

In the next place the act of 1 *Jac.* being ſo doubtful in this point, who ſhould have the benefit of this forfeiture, the act of 3 *Car.* being made to enforce that law, does ſo far explain it, that this laſt act is the meaſure by which we are to conſtrue this diſability.

Accordingly

Accordingly judgment was given for the defendants. And the plaintiff brought a writ of error in *B. R.* and the general errors aſſigned, *Hil.* 1 *Geo. rot.* 564. And *Mich.* 2 *Geo.* it was argued by Mr. *Forteſcue* for the plaintiff, and Serjeant *Pengelly* for the defendant.

Forteſcue. In this caſe I ſhall make three points: 1. Whether the recovery ſuffered by the laſt Lord *Charles* be void, as ſuffered by one who was out of poſſeſſion, and conſequently could not make a a good tenant to the *praecipe?* 2. Whether *Philip*'s being alive, who is heir male of the body of *Thomas* firſt Lord *Gerard*, be ſuch an impediment, as that the reverſion cannot be executed in the leſſor of the plaintiff as right heir of the firſt Lord *Charles.* 3. Whether the ſtatute of 3 *Jac.* or 3 *Car.* have altered or repealed the act of 1 *Jac. c.* 4.

The firſt point, whether the recovery be good or not, depends ſolely on the words of 1 *Jac.* " That every perſon ſo paſſing, *&c.* " ſhall in reſpect of him or herſelf only, and not to or in reſpect " of any of his heirs or poſterity, be diſabled and made incapable " to inherit, purchaſe, take, have or enjoy any, *&c.*" Therefore *Charles*'s being out of the realm was a diſability in him, ſo as he could not take the eſtate when it ſhould have veſted in him. By this clauſe, omitting the words (*in reſpect of himſelf and not in reſpect of his heir*) the act intended that the offender ſhould take nothing, either for the intereſt of himſelf, or any other; and by a ſubſequent clauſe all eſtates and conveyances made to ſuch perſon or to his uſe are void.

There is a difference between a diſability by act of Parliament, and a diſability at common law; yet conſidering this as a diſability at common law, the law never throws any intereſt upon a perſon diſabled. If an alien purchaſes lands to him and his heirs, albeit he can have no heir; yet he is of capacity to take, but not to hold, for upon office found, the King ſhall have it. If a man be attainted, he is of capacity to purchaſe, but not to hold; for he can only purchaſe for the benefit of the King; he can neither have an heir nor be heir to any man, for by the attainder his blood is corrupted. 1 *Inſt.* 2. *b.* 8. *a.* 1 *Ven.* 417. Now though an alien may take by purchaſe by his own contract that which he cannot retain againſt the King, yet the law will never enable him by act of his own to transfer by hereditary deſcent, or take by act in law, for the law, *quae nihil fruſtra*, will not give an inheritance to one who cannot keep it.

If the common law be ſo, that an eſtate will not veſt in a perſon diſabled, the caſe at bar is much ſtronger, for this incapacity is by act of Parliament. The words are, *ſhall be diſabled and made incapable*, ſo that he is diſabled to take, either for his own or the crown's benefit. The clauſe as to the heir can be only declaratory and explanative, for words affirmative implying a new law, infer a negative, for the words precedent were full before, *he ſhall not take*, that is, he himſelf in his own perſon ſhall not take, but his heir ſhall. The reaſon of inſerting the clauſe therefore was only to ſatisfy the ſcruples of the ignorant as to the difference between a temporary and a total diſability, as in the caſe of attainder, though the difference may be well known amongſt lawyers. Where one is attainted of treaſon or felony, that is an abſolute and perpetual diſability by corruption of blood, for any of his poſterity to claim as heir to him, or any anceſtor paramount; but when one is diſabled by act of Parliament, to claim any eſtate for life, that is a perſonal diſability for his life only, and his heir after his death may claim as heir to him or any anceſtor paramount. 11 *Co.* Lord *Delaware's* caſe. Where *Thomas Delaware* petitioned the Queen for his place in the Houſe of Lords, which his great grandfather had, though *William* his father was diſabled by Parliament, 3 *E.* 6. during his life, to claim any dignity: and it was objected, that his father being diſabled by act of Parliament, the petitioner could not convey the deſcent to himſelf through the diſabled perſon; but the Judges and Houſe of Lords were of opinion, that he might claim by him, this being only a perſonal temporary diſability, which differs from an attainder.

Though nothing veſted in the anceſtor, yet the heir may take. The clauſe *not in reſpect of his heirs* can ſignify nothing, the diſability extending only to the recuſant himſelf: it is not during life, but only till conformity. This caſe being a limitation in tail, will be different from what it would be if a fee was limited, for the eſtate-tail is by the ſtatute *de donis*, and the iſſue in tail cannot be diſabled, but muſt take by the ſtatute. Therefore if tenant in tail is attainted of felony, and has iſſue and dies, although by the attainder the blood is corrupted, ſo that nothing can deſcend to his heir; yet the iſſue in tail, as to thoſe lands, is not barred, becauſe he is inheritable by force of the ſtatute *de donis*, but the wife of tenant in tail ſhall loſe her dower, becauſe ſhe claims by the common law. *Lit.* § 746, 747. In this caſe tenant in tail himſelf may have a right to take, that ſo it may deſcend, to enable the iſſue in tail to inherit, but he does not take ſuch an eſtate as that he ſhall have power to alien. A feoffment by tenant in tail gives away all the eſtate tenant in tail had, as concerning himſelf, or any benefit

that he may receive; but for the ſake of his iſſue, and him in reverſion, there ſtill remains *in him* a right of that intail by force of the ſtatute. And by that right the tail may be recovered again, as by the root which is ſtill alive, and the heir ſhall bring a *formedon in deſcender*, and lay in his count, *deſcendit jus* from that anceſtor to him as heir *per formam doni*. *Hob.* 335, 337. *Raym.* 354. 2 *Roll. Rep.* 418. For the ſtatute *de donis* ſays, that notwithſtanding an alienation by tenant in tail, the land ſhall remain to his iſſue, and ſo ſays our ſtatute.

It may be objected that it is impoſſible for the heir to take unleſs the anceſtor was ſeiſed, and therefore the eſtate muſt veſt in the recuſant. To this I anſwer, That at common law it is not neceſſary, that the anceſtor be ſeiſed, to enable the heir to claim by deſcent; for the rule of law is, that where the anceſtor *might* have taken the eſtate and been ſeiſed, there the heir ſhall inherit. 1 *Co. Shelley*'s caſe. Nay in ſome caſes the heir ſhall take by deſcent, although the anceſtor never was or could be ſeiſed of that eſtate; as if lands be given to *A.* and *B.* for their joint lives, remainder to the right heirs of him that dies firſt; *A.* dies; his heir ſhall take by deſcent, and yet the remainder never veſted during the life of *A. Co. Litt.* 378. *b.*

But even admitting that this act of Parliament cannot have this conſtruction, and at the ſame time agree with all the ſtrict rules of the common law; yet when by an act of Parliament eſtates are limited for particular purpoſes, the validity of thoſe limitations muſt not be meaſured by thoſe ſtrict rules, for it is ſuppoſed the act was made purely for a repeal of thoſe rules or maxims, and the mechanick rules of reaſon ſhall not obſtruct the intent of the act, for the ſtatute over-rules all private rules of law. 3 *Co.* 64. *b.* 6 *Co.* 40. *b.* 8 *Co. Prince*'s caſe. An eſtate-tail may be barred and ceaſe for a time, and afterwards revive again: it may ceaſe as to one perſon, and be in force as to another. 9 *Co. Beaumont*'s caſe. *J. B.* and his wife were tenants in ſpecial tail, he alone levied a fine, and died leaving iſſue; during the life of *J. B.* the intail was barred, and nothing was left but a poſſibility to the *feme*; for if ſhe ſurvives, ſhe ſhall be tenant in tail as before, for the whole tail revives and is reſtored to her.

An eſtate-tail may in its ſelf be perfect and alienable, and yet may not deſcend, though there be iſſue in tail. *Archer*'s caſe; and *Hob.* 258. An eſtate-tail may deſcend, and yet it cannot be aliened. 3 *Co.* 50. It may be full, and yet cannot be aliened or deſcend, as in *Beaumont*'s caſe, it could not deſcend to the iſſue from the mother though ſhe had the whole eſtate-tail in her, becauſe the

iſſue was barred before by the fine levied by the father; and it could not be aliened by the wife, becauſe it was aliened before by the huſband. *Hob.* 257. Though thoſe points are ſingularities, and contrary to the known rules of law, yet they being introduced by ſtatute, muſt not be carried to the rules of law as to their ſtandard. The rules of law as to inheritances are arbitrary, and do not depend on the rules of reaſon; and that is the reaſon why the rules of law vary in different countries.

Objection. That the eſtate muſt veſt in the offender, becauſe the proviſo ſays, that the offender conforming ſhall be freed and diſcharged of all and every ſuch diſability and incapacity; and there being no clauſe of reſtitution, the party conforming would have no benefit of his conformity, unleſs the eſtate always remained in him.

Anſwer. This objection is capable of the former anſwer; that an act of Parliament enacting ſuch things, they ought not to be impugned, becauſe they are inconſiſtent with the rules of law. But this admits of another anſwer, that it was not the meaning of the act, that the party conforming ſhould be reſtored to that eſtate which was once veſted in the next proteſtant; but the meaning of it was, that he ſhould from thenceforwards be able to take any other eſtate, not to have that eſtate which was once forfeited, for he could not take it again by purchaſe or deſcent. Such a conſtruction as is contended for on the other ſide, inſtead of weakening, would very much encourage popery, and give recuſants an opportunity to play the hypocrite; for if by his conformity the eſtate ſhould be reveſted in him, he would conform outwardly, go to church, receive the ſacrament, and be obedient to the laws for awhile, and then get a diſpenſation and re-enter, and ſo *toties quoties*, which would be to evade the act.

The preventing our youth from being ſent into popiſh ſeminaries, to ſuck the poiſon of their pernicious principles, and ſtir up the ſubjects to rebellions and tumults, is the greateſt bulwark to the proteſtant religion. The taking the eſtate by the anceſtor for the benefit of the heir, as is contended for, is in ſhort giving the recuſant a power by a recovery to bar his heir, and diſpoſe of it as he pleaſes, which overthrows that clauſe, the intention of which was to preſerve the eſtate for the heir.

2. The life of *Philip* is objected to be an impediment, that prevents the execution of the reverſion, for whilſt he lives ſay they, the eſtate-tail continues. But I give the objection this anſwer. That *Philip* can take nothing, no more than *Charles* did: the rule of law is, that where any limitation is to a perſon not *in eſſe*

eſſe at the time the eſtate ought to veſt, the eſtate muſt go over to the next in remainder. Here the limitation is to *Philip* and the heirs male of his body, but when that limitation ought to take effect, he is incapacitated to take, and then the limitation over to the leſſors muſt take effect immediately. *Cro. El.* 422. Deviſe to *R.* in tail, and after his deceaſe without iſſue to *Edward* his ſon in tail: *R.* dies leaving iſſue, living the teſtator, and there it was held, that *Edward* ſhould have the eſtate preſently, and not wait till the death of *R.*'s iſſue. 2 *Roll. Abr.* 415. *C.* 6. Deviſe to one for life who is a monk, remainder over is good. If a man dies ſeiſed leaving iſſue only an alien, the land ſhall eſcheat immediately, and not come to the crown. If a man has iſſue two ſons, and the eldeſt be an alien, the law takes no notice of him, and therefore as he ſhall not take by deſcent himſelf, ſo he ſhall not impede the deſcent to his younger brother, on ſuppoſition that he may have iſſue a natural born ſubject.

In reſpect to the incapacity, an alien reſembles a perſon attainted, with this difference, that a perſon attainted is one that the law takes notice of, and therefore if he be an eldeſt ſon and ſurvives his father, he ſhall hinder the deſcent to the younger ſon, though he cannot take himſelf. 2 *Ven. Collingwood* v. *Pace.* An alien, or perſon attaint, may purchaſe; becauſe it is their own act, which the law cannot hinder; but it diſables them from taking by deſcent, and impedes the deſcent from them, becauſe they muſt there come in by act of law, and the law will not truſt them with an eſtate.

If it be contended that during the life of the offender the eſtate ſhall be in abeyance: I anſwer, There is no cauſe to frame abeyances needleſly, which the law loves not, nor admits, but in caſe of neceſſity. If in this caſe the land ſhould be conſtrued to be in abeyance, then it muſt be framed againſt the benefit of the church, whereas it ought to be only for its benefit. *Hob.* 338.

3. Whether the ſtatute of 1 *Jac.* be ſtill in force. And 1. To conſider it with reſpect to 3 *Jac.* this laſt relates to a quite different matter, for though both are levelled at popery, yet the offenſes are diſtinct. In 1 *Jac.* the intention of a foreign education is the offenſe, ſo that a man may offend againſt that ſtatute, and be innocent as to 3 *Jac.* Again; a proteſtant may offend againſt 3 *Jac.* papiſts only againſt 1 *Jac.* By 3 *Jac.* the offender is capable of taking the legal eſtate, and loſes only the profits till conformity, whereas the offender againſt 1 *Jac.* takes neither the eſtate nor the profits. The words of the 3 *Jac.* are, *that he ſhall take no benefit by deſcent*, not that he ſhould not take by deſcent; and then the

ſtatute ſhews the meaning, by giving the profits during his nonconformity to the next proteſtant of kin. *Hob.* 73.

2. And as 1 *Jac.* ſtands unimpeached by 3 *Jac.* ſo does it likewiſe by 3 *Car.* The firſt buſineſs of this latter ſtatute is, to enact 1 *Jac.* to be put in due execution, which could not be, if the lawmakers had intended it for a repeal. Beſides the effects of theſe ſtatutes are different, for by 1 *Jac.* the recuſant is diſabled to take the lands which were not veſted, but by 3 *Car.* he only forfeits what *is* veſted; for the words are *ſhall forfeit all his lands*: ſo that theſe two ſtatutes are very conſiſtent, for 3 *Car.* was made as a farther proviſion to 1 *Jac.* for that only prevented the veſting the lands *after* his recuſancy, ſo that a perſon in poſſeſſion before his offence could feel no effect of 1 *Jac.* and therefore to adapt the puniſhment to both caſes the ſtatute of 3 *Car.* came and took away the eſtate veſted. But as in the caſe at bar the diſability was attached in *Charles* and *Philip* before the deſcent of the eſtate on either of them, therefore the ſtatute of 1 *Jac.* muſt be the meaſure by which this caſe muſt be ruled; and then it follows, that no eſtate ever veſted in *Charles*, and he having no poſſeſſion the recoveries are void, and *Philip* being diſabled, the land muſt go over to the leſſor of the plaintiff as right heir of the firſt Lord *Charles*; the conſequence of which is, that ſhe had a good title to make the leaſe, and therefore the judgment muſt be reverſed, and judgment given in this court for the plaintiff.

Pengelly Serjeant *contra*, argued, That under 1 *Jac.* the eſtate-tail veſted in *Charles*, and would have deſcended to his iſſue, if he had had any. That the ſubſequent ſtatutes have altered that penalty, and given the forfeiture to the crown upon conviction. That in this caſe there was no conviction. The conſequence of which is, that the eſtate continued in him all his life, and the recoveries were well ſuffered by him.

But if theſe points ſhould not be with me, yet under the firſt ſettlement there is an eſtate-tail ſubſiſting for *Philip* and his iſſue, and therefore the reverſioner cannot enter till the whole eſtate-tail is ſpent.

1. Then, the legal eſtate veſted in the recuſant, for the conſtruction of the ſtatute ought to be, that only the perception of the profits of the eſtate of the recuſant, or at moſt ſome uncertain intereſt determinable on his conformity, ought to veſt in the crown; ſo that the eſtate-tail veſted in *Charles*, and would have deſcended to his iſſue male if he had left any, and had not barred them by the recovery. The words in 1 *Jac. that he ſhall be diſabled to take in*

reſpect of himſelf, and not in reſpect of his heir, were not inſerted in the ſtatute by way of proviſo, but are incorporated into the body of the act, to preſerve the eſtate to the heir; leſt the heir, who is innocent of the crime, ſhould be involved in the puniſhment deſigned only for the offender. The act did not intend to prevent the inheritance from veſting in the recuſant, and conſequently prevent the deſcent to the iſſue *per formam doni*, for there is no clauſe to carry the eſtate to any other perſon, which proviſion is in all other ſtatutes: as 6 *R.* 2. *c.* 6. which diſables raviſhers and women raviſhed conſenting after the rape, to have any inheritance or dower, appoints the next of blood to whom the inheritance ought to deſcend, revert, or remain, to enter incontinently. So the 11 *H.* 7. *c.* 20. appoints him in remainder or reverſion (as the caſe is) to enter on diſcontinuances by women. But this act had no view or deſign to abridge the eſtate given by the donor, or to haſten the intereſt of the reverſioner; for the penalty was inflicted, not to affect the eſtate or inheritance of the recuſant, but his perſon only; the heir was not intended to ſuffer any puniſhment, but on the contrary the act deſigned to preſerve the right and eſtate of the heir. The clauſe, *that all conveyances ſhall be void*, can extend only to conveyances made to the recuſant himſelf, or to his uſe, and not to conveyances made forty years before (that is to ſay) it can never affect the ſettlement of the firſt Lord *Charles*, anceſtor to this *Charles*, for *Charles* and *Philip* were not ſuch perſons againſt whom the ſtatute ordained this puniſhment, when this conveyance was made.

This act of 1 *Jac.* having then only diſabled the recuſant as to a ſmall intereſt in the land; it follows, that the reſidue of the eſtate muſt remain in him. If the heir is to take any thing by this act, the eſtate muſt veſt and continue in the anceſtor during life; for the heir, whether he be a general or ſpecial heir, muſt derive his title by the rules of law under the ſettlement of the firſt *Charles*.

There is no difference, when the eſtate is veſted, and when it is to veſt; for it will be agreed, that by this ſtatute lands veſted are not to be deveſted from the recuſant. Our objection is, that if there is a total diſability in the anceſtor himſelf, none can claim as heir to him, and that is proved by the caſe of *Collingwood* v. *Pace*, cited by the other ſide, and then this diſability muſt deſtroy the ſettlement, and ſtop the blood; for if there be grandfather, father and ſon, and the father is attainted, though neither the blood of the grandfather, or ſon be corrupted between them, yet the corruption of the father's blood draws a conſequential impediment upon the ſon to inherit to the grandfather, becauſe the father's corruption of blood obſtructs the tranſmiſſion of the hereditary deſcent between the grandfather and the ſon. If tenant in tail is attainted of treaſon

or

or felony, and at the time of his attainder had no iſſue, and after the obtaining his pardon has iſſue, ſuch iſſue is inheritable to him; but if he had iſſue before the pardon, the deſcent to ſuch ſon is hindered, for the blood between him and his father is corrupted, which caſe contradicts *Litt.* §. 76, 77. for though the eldeſt ſon born before the pardon cannot take, nor the youngeſt ſon living the eldeſt, yet there is no *ceſſer* of the eſtate-tail upon ſuppoſition that the eldeſt will die without iſſue, and then the youngeſt ſon will inherit. In our caſe, if there is any right of the eſtate-tail remaining in the recuſant, the reverſion ſhall not be executed. In the caſe of Lord *Delaware* the diſability was impoſed for life, and the court held that one might claim as heir from a perſon diſabled only by act of Parliament.

This conſtruction which I am contending for of the intent of the clauſe in impoſing only the forfeiture of ſome uncertain intereſt till conformity, will be ſupported by the proviſo for conformity. By that clauſe the party conforming "ſhall for and during ſuch time "as he ſhall continue in ſuch conformity, be freed and diſcharged "of all and every ſuch diſability and incapacity." Now it would be ſtrange, that the party complying with the act in conforming to theſe laws ſhould not have the benefit of ſuch conformity, that is, have the eſtate again; which he could not, if the eſtate was once veſted in another, there being no clauſe of reſtitution. The intent therefore of the act was, that the party conforming ſhould be in the ſame condition as before his offence, that is, receive the profits of his eſtate to his own uſe. An act of Parliament may indeed make an eſtate ceaſe and riſe again, as in *The Prince*'s caſe, but then the words of that act muſt be expreſs.

It may be demanded, to whom did the ſtatute intend to give the profits of the eſtate? I anſwer, that forfeitures given by ſtatute, either for nonfeaſances or misfeaſances, for publick offences, fines and penalties for offences at common law againſt the publick good (no perſon being appointed to take the benefit of them) ſhall go to the King, as *pater patriae*, the head of the government and fountain of juſtice, who is concerned to ſee the laws executed. But when the offence is private, and affects only particular perſons; there it is but juſt and reaſonable, the ſufferer ſhould have the forfeiture or fine for a compenſation. In the caſe at bar the offence is of a publick nature, againſt the common good of the kingdom, and conſequently the forfeiture accrues to the crown, according to the caſe of *Woodward* v. *Fox*, 2 *Vent.* 267. 3 *Lev.* 289. In 2 *Inſt.* 650, on 2 *Ed.* 6. *c.* 13. the forfeiture of the treble value for not ſetting forth tithes was therefore by expreſs words given to the owner of the tithes, and ſo is *Moor* 238. 1 *Roll. Rep.* 90. 11 *Co.* 60.

2 *And.*

2 *And.* 127. As to *Beaumont's* caſe, the fine by the *baron*, of the lands whereof the *baron* and *feme* were ſeiſed of a ſpecial tail, was no *ceſſer* of the eſtate-tail of the *feme*, and in that caſe it is not pretended that the eſtate-tail ſhall go over to the reverſioner, whilſt there remained iſſue of tenant in tail ſo levying the fine.

This conſtruction, that the forfeiture ſhall go the crown, prevents all exceptions; but the other conſtruction, that no eſtate veſts, prevents the penalty deſigned by the ſtatute; for if no eſtate veſts, the crown cannot have the profits. The act intended no difference, whether the recuſant had the eſtate before or after the offence, nor of the quality of the eſtate, whether it was fee or tail; but in reaſon, of the two the eſtate-tail ought to be more favourably conſtrued to be preſerved, the ſtatute *de donis* taking ſo much care to preſerve the eſtate for the iſſue againſt the alienation of the tenant in tail; and therefore by that ſtatute the iſſue was not barred, though the father was attainted of treaſon, though it is ſince altered by the 26 *H.* 8. *c.* 13.

Beſides, in this ſtatute there are expreſs words preſerving the eſtate to the heir. It is more beneficial to the ſubject, that the crown ſhould have the profits, than the next of kin, who may perhaps employ them under hand to the uſe of the recuſant in all or in part: which bargain may be eaſily made, conſidering that he is but tenant at will to the offender, who whenever he pleaſes may conform, and take the land, and recover the meſne profits.

But admitting that no eſtate veſts by 1 *Jac.* yet the recovery is good; for the right of the entail continued in *Charles.* 3 *Co.* 6. *Baron* and *feme* ſeiſed to them and the heirs male of the body of the huſband, remainder to *B.* in tail: the *baron* alone levied a fine and ſuffered a recovery, in which he only was vouched, and not the wife who had a joint eſtate for life with him; yet it was adjudged, that the baron coming in as vouchee, came in in privity of the eſtate-tail, and not of any other eſtate, and ſo the recovery is good.

If the eſtate did not veſt in *Charles*, then he is a diſſeiſor, and that way the recovery is good. 3 *Co.* 59. *Lincoln Coll.* caſe. If there be tenant for life, remainder in tail, and he in remainder enters upon the leſſee, and diſſeiſes him, and after ſuffers a common recovery; that ſhall bind the tail, for the diſſeiſin does not deveſt the tail, but he is a diſſeiſor of the eſtate for life only, and as to himſelf he is ſeiſed by force of the tail. 2 *Roll. Abr.* 395. *C.* 3. 6 *Co.* 32. And ſo he concluded this point, that the eſtate veſts in the recuſant, and only a perception of the profits is forfeited to the

King: or if no eſtate veſted, yet the recovery is good, as ſuffered by a diſſeiſor, and conſequently *quacunque via data* the leſſor of the plaintiff can have no title.

2. But admitting that no eſtate veſts in the offender, and that the recoveries are void, yet the plaintiff cannot recover: for if *Philip* cannot take himſelf, yet there is no *ceſſer* of the eſtate-tail, whereby the reverſion can be executed in the plaintiff, till the death of *Philip* without iſſue, 1 *Inſt.* 28. as long as any right of the eſtate-tail remains, the law looks for iſſue; and though the tenant in tail be 100 years old, yet the law ſees no impoſſibility of his having iſſue; and *Litt.* § 34. is, that none can be tenant in tail *apres, &c.* but one of the donees in ſpecial tail, for a donee in tail general cannot be ſaid to be tenant in tail after poſſibility, becauſe always during his life there is a poſſibility that he may have iſſue inheritable to the ſame intail.

It is admitted, that if *Philip* has iſſue at any time, the iſſue may inherit; and then the eſtate muſt continue in *Philip*, becauſe the law expects his having iſſue. Tenant in tail may ſuffer a recovery and bar his iſſue, becauſe he has the whole inheritance in him. As to 2 *Roll. Abr.* 415. where a deviſe to a monk is held void, and the remainder good: in the ſame book, *pl.* 4. it is ſaid, that if a leaſe be made to a man who is not capable (as a monk) for life, the remainder over is not good: ſo that in a deviſe, becauſe the intent of the deviſor is regarded, it is good; but not in a conveyance at common law. As to the caſe, *Cro. El.* 422. there the only queſtion was, whether if the deviſee in tail die in the life of the deviſor, his heir in tail could inherit, and it was held that a ſubſequent limitation to take effect on the death of ſuch a perſon without iſſue ſhould take effect immediately, becauſe there was no poſſibility for the iſſue to inherit. *Plow.* 557. *b.* 29 *Aſſ.* 61. Tenant in tail was bound in a ſtatute merchant, and had iſſue; the iſſue was outlawed of felony, but pardoned in the life of the father; the father died, the iſſue entered, the conuſee ſued execution of the land, and the heir brought an aſſiſe; and it was held that the outlawry for felony ſo diſabled him in his blood, that he could not take by deſcent the lands in tail, any more than lands in fee, notwithſtanding the charter of pardon, which could not reſtore his blood to its former purity; and when the father died the land could not revert to the donor, becauſe the donee had iſſue, though that iſſue was diſabled, and upon the father's death the freehold was in no perſon, but *in nubibus*, and becauſe every man in the world had an equal title, the land *conceditur occupanti*. *Bro. Deſcent, pl.* 23. As to 9 *Co.* 140. *a.* that there may be an eſtate-tail which may not deſcend to the iſſue; the reaſon is, becauſe there is a total diſ-

ability by the fine of the baron, whereas the diſability in the caſe at bar is only temporary, and is removed upon conformity. 4 *Leon.* 84. *Gouldſ.* 102. An alien born purchaſed lands in tail, remainder to a ſtranger in fee, and ſuffered a recovery; and it was held, that the remainder was barred, for before office found he was a good tenant to the *praecipe*, and that the alien had a good fee-ſimple; and though in this caſe it was impoſſible for him to have iſſue inheritable to the intail, yet the recovery barred the remainder. If there is in the eye of the law any perſon that by poſſibility may be inheritable to the tail, the reverſioner ſhall never enter, till the firſt limitation is fully at end. Till 1705. *Joſeph* the younger brother of *Charles* and *Philip* was alive, and a proteſtant; and it is not pretended that he could enter, though he was iſſue in tail; and then if the life of *Philip* prevented his entry, conſequently it muſt prevent the entry of the reverſioner. Though *Philip* was a recuſant, yet no claim ever came to him, therefore no diſability could come to him in reſpect of the lands, but only in reſpect of his perſon: if the reverſioner ſhould enter, there would be no remedy for the iſſue born after.

The diſabilities are pardoned by 2 *W. & M. c.* 10. which is a general law, and therefore to be taken notice of by the court, though not found.

3. This act of 1 *Jac.* is altered by 3 *Jac.* which extends to all the offenſes in 1 *Jac.* *Hob.* 73. ſeems to admit, that the puniſhment ought to be according to 3 *Jac.* for that he that enters on the land of the recuſant is only tenant at will. 1 *Keb.* 263. The court was of opinion, that 3 *Jac.* meant no other cauſe but what 1 *Jac.* intended, to prevent the education, and that the King hath not an intereſt in the land of a recuſant, as by 3 *Eliz. c.* 3. of fugitives, only a right to a perception of the profits, which by the return and conformity of the offender immediately vaniſhes.

4. The ſtatute of 3 *Car.* has alſo made ſeveral alterations in 1 *Jac.* for it alters not only the diſpoſition of the eſtate, but the forfeiture; for by this ſtatute there muſt be a conviction, and then *Charles* not being convicted can forfeit nothing; and the opinion of *C. B.* was that this ſtatute muſt be the rule. By this the King is to have the land, and by 3 *Jac.* the next of kin, which is inconſiſtent. It is not neceſſary to cite all the caſes where it has been held, that a ſubſequent ſtatute being contrary to, or inconſiſtent with, a former, is an implicit repeal of that former law. 11 *Co.* 61. 1 *Jones* 22. It is agreed, that 3 *Car.* extends to more offenſes than 1 or 3 *Jac.* If it had extended to fewer, there might be ſome colour to ſay, that the other ſtatutes are neceſſary; but if both

3 *Car.* and 1 *Jac.* inflicting different puniſhments for the ſame offenſe, ſhould be in force; the conſequence would be, that the offender would be puniſhed twice for the ſame offenſe, contrary to the rule, *nemo bis puniri debet pro uno et eodem delicto.*

Though after the preamble of 3 *Car.* it is enacted, that 1 *Jac.* ſhall be put in execution; yet the intent of that could only be to continue 1 *Jac.* for the puniſhment of offenſes committed between that and 3 *Car.* for without this thoſe offenſes would remain unpuniſhed, 1 *Jac.* being implicitly repealed. If 1 *Jac.* continues, the puniſhment deſigned by 3 *Car.* though the heavier, will be avoided; for if 1 *Jac.* prevents any eſtate from veſting in the recuſant, nothing can be forfeited by 3 *Car.* for he cannot forfeit what he has not, and he can have nothing by reaſon of 1 *Jac.* But if 3 *Car.* is a repeal of 1 *Jac.* (as I apprehend it plainly appears to be) it follows, that *Charles* being never convicted, had a good eſtate to make a tenant to the *praecipe*, and being himſelf tenant in tail under the ſettlement of the firſt Lord *Charles*, has by coming in as vouchee in a recovery barred the remainder to the right heirs of Lord *Charles*, under which the ducheſs claims. But if that recovery be not good, yet the life of *Philip* who may poſſibly conform, or leave iſſue capable, will ſtand in her way; ſo that taking it either way, the judgment given below for the defendants was well given, and ought to be affirmed.

Forteſcue replied. 3 *Car.* can be no repeal of 1 *Jac.* for though the penalties are different, yet they are conſiſtent. The difference between a forfeiture and a diſability is, that a forfeiture can be applied only to what the offender has, but a diſability cannot be forfeited. The books are full of caſes, wherein it has been held, that a poſſibility cannot be forfeited, or a right. A diſability is an incapacity in the offender to take any eſtate. *Nil dat quod non habet.* This caſe is like that of a monk, who on his deraignment may fetch back the eſtate whereſoever it is gone; and ſo may *Philip* on conformity, or his iſſue inheritable, enter upon the reverſioner in the caſe at bar.

Parker C. J. This ſeems to be a matter of great difficulty: two different conſtructions of the act of Parliament have been ſet up, *viz.* for the plaintiff, That the diſability is total in the recuſant, and no right at all of the eſtate-tail ſhall veſt in him, but it ſhall go over to the next iſſue in tail capable; if there be none, to the reverſioner; becauſe otherwiſe the recuſant would be able to defeat the intent of the act, which was to preſerve the eſtate to the heir or poſterity. That for the defendant is, that the compleat legal eſtate ſhall veſt in the anceſtor, becauſe otherwiſe they who muſt

claim

claim through him could not take by deſcent, ſo that the intention of a benefit to the heir would be defeated that way.

Now both theſe, though they have a colour of being for the heir's benefit, yet tend to defeat it, and will not anſwer the intention. If the firſt ſhould prevail, that nothing veſted in *Charles* or *Philip*, but the eſtate paſſes over to the reverſioner; then the eſtate-tail muſt be totally determined. Then if *Philip* ſhould have iſſue capable (of which there is ſtill a poſſibility) they will be barred, for if the eſtate-tail be once determined, nothing can ſet it up again. Indeed where a man takes an eſtate, and afterwards a more worthy heir comes *in eſſe*, who may take the ſame eſtate, it ſhall deveſt out of the former and veſt in the latter: as if tenant in tail has two ſons, and dies, the eldeſt enters and dies leaving his wife privement enſeint with a ſon; the eſtate preſently veſts in the younger brother, but as ſoon as the poſthumous ſon is born, he ſhall have it; but this is, becauſe both come in under the ſame eſtate-tail, and there is no determination of it: but he in reverſion can never enter, ſo long as any right of the tail which he has granted out remains.

The other conſtruction, by making the compleat legal eſtate veſt in the recuſant anceſtor, enables him to alien: ſo that though the act ſays the anceſtor ſhall be diſabled to take for and in reſpect of himſelf, and not for and in reſpect of his heirs or poſterity; this conſtruction enables him to take for his own benefit, contrary to the benefit of the heir. Conſider therefore, whether there be not a middle way between theſe two, which may better anſwer the intention, (*viz.*) that the right of the tail ſhall veſt in the anceſtor, ſo far as is neceſſary to convey the deſcent to the iſſue, but not to enable him to alien: then indeed the defendants will have no title, but how can the leſſor of the plaintiff enter in *Philip*'s life-time?

The act of 3 *Jac.* ſeems to be quite out of the caſe, being made foran other purpoſe.

The act of 3 *Car.* does concern the ſame perſons and crimes (amongſt others) with that of 1 *Jac.* but it is not therefore a repeal of it. It is objected, that it inflicts inconſiſtent penalties; but why are they inconſiſtent, ſince one may have a proper operation upon ſome eſtates, and the other upon others?

I do not ſee what advantage can be taken of the act of general pardon; for though it is a publick act, yet he that will take the benefit of it muſt ſhew how he is intitled to it, and that he is not within any of the exceptions; ſo it ſhould have been found.

Pratt

Pratt J. The clauſe which ſays, that all eſtates, terms, and other intereſts, made to ſuch recuſant, ſhall be void; does not indeed concern deſcents, but purchaſes: but conſider whether an argument may not be drawn from thence, that the intent of the act was, that they ſhould take no right, no intereſt at all.

Paſ. 2 *Geo.* it was argued a ſecond time by Serjeant *Hooper* for the plaintiff and Mr. *Lutwyche* for the defendant.

Hooper Serjeant. The diſability by 1 *Jac.* happened before any thing deſcended either to *Charles* or *Philip:* it might have deſcended to *Joſeph*, but he being dead without iſſue, it reverts to the donor. The ſtatute of 1 *Jac.* induces ſuch a temporary diſability, as prevents any thing from veſting. *Charles* and *Philip* were no lords, though the verdict calls them ſo; for the ſtatute diſables them to take any hereditament, as a dignity is. Second argument.

As to the point, whether this act be repealed or not, it ſeems ſtrange to imagine, that an act made with ſuch deliberation ſhould in two years after be repealed; eſpecially if we conſider what happened within thoſe two years; the powder plot was then juſt diſcovered, and immediately an act paſſed for a publick thankſgiving for that deliverance; the conſpirators are attainted, and then at the ſame Parliament is this ſtatute made, which is ſet up for a repeal of 1 *Jac.* the great bulwark againſt popery. Theſe have different operations, and may well ſtand together; the one prevents eſtates from veſting, and the other meddles with eſtates veſted.

But ſuppoſing for argument ſake, that which otherwiſe I can never admit, that 3 *Jac.* does amount to a repeal of 1 *Jac.* yet ſurely then the ſtatute of 3 *Car.* has revived it; for it enacts it to be put in due execution, which plainly ſhews it was not thought to be repealed by 3 *Jac.* or intended to be repealed by 3 *Car.* and it is to be put in execution as well againſt crimes *to be*, as thoſe actually committed.

The common recovery can have no effect, being ſuffered by one who had no eſtate in him at the time, and therefore could not by deed inrolled make a tenant to the *praecipe.* By deed inrolled (that is, by bargain and ſale) nothing paſſes but what may lawfully paſs, for it does not work a diſſeiſin or any *tort.* The act 1 *Jac.* is expreſs, that ſuch perſon ſhall be diſabled to take: by the recovery he may extinguiſh his right, but he cannot alien it, he has *jus extinguendi*, but not *jus alienandi.* On 1 *Jac.* the crown can have no right, becauſe nothing veſts in the party; and therefore if the father

is ſeiſed of lands in fee, and the ſon is attainted of treaſon in the life of the father, and the father dies; the land ſhall eſcheat, for that the father died without heir, and the crown cannot have the land as a forfeiture, becauſe the ſon never had it to forfeit. 1 *Inſt.* 13. *a.* Here nothing is veſted in *Charles* or *Philip*, and ſo conſequently they can forfeit nothing. They have *ſcintilla juris* to preſerve the eſtate-tail, but not to forfeit or deſtroy it. The crown can never take but by record, either judicial or miniſterial, as in the caſe of an eſcheat the crown takes by office, which is a miniſterial record.

I come now to the chief point, whether the ducheſs can enter, living *Philip?* At common law before the ſtatute *de donis* all eſtates were fee-ſimple; and the ſtatute was calculated more for the benefit of him in reverſion, than the tenant in tail or his iſſue, for now the reverſion is certain, and the donor may limit as many remainders as he pleaſes, which he could not do before, for there could not be one fee-ſimple depending upon another; and the reverſion is now fixed, which before was but a poſſibility, for now the tenant in tail can neither bar nor clog the reverſion, except by a recovery which is not mentioned in the ſtatute *de donis*; ſince which there is no one ſtatute that gives the tenant in tail power to charge the reverſion. As to the caſe now before us, the ſtatute of 1 *Jac.* has repealed the ſtatute *de donis*, for by that *Charles* and *Philip* are made inheritable as iſſue in tail, but now by this latter ſtatute they are diſabled.

At common law before the ſtatute *de donis* a *formedon in reverter* did lie on failure of iſſue; and in our caſe if there are no iſſue inheritable to the eſtate, it muſt revert to us, who are the right heirs of the donor. If tenant in tail dies leaving his wife *privement enſeint* with a ſon, the eſtate-tail muſt revert to the donor, ſubject to the entry of a poſthumous ſon. (*C. J.* Have you any caſe to that?) *Hooper*, I did not look for any, thinking it conſtant experience.

This eſtate muſt go to the reverſioner, otherwiſe where can it go? The act of 1 *Jac.* takes away and abrogates not only all rules and maxims of law, but alſo all acts of Parliament prior to it, that are contrary and repugnant. 8 *Co. Prince's* caſe. That was a ſettlement of part of the duchy of *Cornwal* by act of Parliament, there the eſtate (as it has lately done till King *George* came to the crown) when there was no Prince of *Wales*, lay dormant for many years; and when there was a Prince of *Wales*, roſe again. In our caſe, if *Philip* ſhould have a ſon, he might enter; but in the mean time the eſtate muſt go over to the reverſioner. Some perſons are capable to take by purchaſe, that are not capable to take by deſcent; but

no caſe proves that one may take by deſcent, that is diſabled to take by purchaſe.

Lutwyche contra. As to the firſt point, whether any thing veſts in *Charles* or *Philip:* if the ſtatute had intended to induce a total diſability, there would not have been the ſaving clauſe as to the heir; which implies, that the anceſtor ſhall be capable to take for the benefit of the heir. The heir is not to be a purchaſer, but the anceſtor himſelf, and conſequently it muſt veſt in the anceſtor, for otherwiſe it cannot deſcend to the heir; be the inheritance either fee-ſimple or fee-tail, the anceſtor muſt inherit, to tranſmit it to poſterity. If no eſtate veſts, and it be an inheritance, where can the freehold be during the life of the offender? It cannot be in abeyance, and therefore the right of the intail ſhall veſt in the recuſant, but the crown ſhall have the profits.

Had this ſtatute intended a total diſability, it would have provided to whom the land ſhould have deſcended in the mean time, as in 6 *R.* 2. *c.* 6. 11 *H.* 7. *c.* 20. and 4 & 5 *P.* & *M. c.* 8. On 6 *R.* 2. the heir is a purchaſer, but on the 11 *H.* 7. he takes by deſcent. 3 *Co.* 37.

As to the *Prince*'s caſe, that was by act of Parliament; and reſolved that it would not be good at common law.

It is objected, that if the offender has the eſtate, he may deſtroy it, and bar the iſſue for whom the ſtatute is ſo careful. To this I anſwer: That if by this ſtatute the eſtate-tail veſts in him, a common recovery is as incident to his eſtate, as alienation is to a tenant in fee-ſimple. My Lord *Coke*, 1 *Inſt.* 223. *b.* enumerating the ſeveral incidents to ſuch an eſtate ſays, That the tenant in tail may ſuffer a common recovery, and therefore, ſays he, If a gift in tail is made, with condition reſtrictive of ſuch an incident, the condition is repugnant and void, for ſuch a tenant has a right to turn the fee-tail into a fee-ſimple for the benefit of his heirs, by barring ſtrangers. C. J. Can he make a deed for a tenant to the *praecipe* without an alienation? *Lutwyche*, Such an alienation only with intent to ſuffer a recovery, may not amount to ſuch alienation as is prohibited within the intent of this ſtatute. 4 *Leon.* 84. Land was given to an alien in tail, remainder to another in fee: the alien ſuffered a recovery, and died without iſſue; it was urged that the recovery was void, for that the alien was not tenant of the freehold at the time of the recovery ſuffered, but the whole court held, that the recovery was good to bar the remainder.

Another

Another queſtion is, whether the reverſion can be executed living *Philip?* 1 *Inſt.* 28. *a.* is, that if lands be given to a man and his wife and to the heirs of their two bodies, and they live till each be 100 years old, yet do they continue tenants in tail, for the law ſees no impoſſibility of their having iſſue. In our caſe, if *Philip* has any iſſue, he may inherit; but if the reverſioner once enters, he muſt enjoy it for ever, and then what becomes of the ſaving clauſe as to the heir?

C. J. Is there any caſe which proves that the eſtate ſhall not be diveſted out of the reverſioner?

Lutwyche. I could not find any. The iſſue in tail cannot enter in the life of the offender, and *a fortiori* the reverſioner ſhall not.

He inſiſted on 1 *Jac.* being repealed, and the diſability pardoned, as in the former argument.

Parker C. J. It has been inſiſted on for the defendant, that the clauſe in 1 *Jac.* as to the heir makes it neceſſary, that the legal eſtate ſhould veſt in the anceſtor, in order that the heir may convey a title through him; but it is conſiderable, whether the effect of that clauſe be not rather, that whatever difficulty would regularly ariſe to the heir from the anceſtor's not being ſeiſed, *that* ſhall not be any objection to the heir in this caſe. Not that the anceſtor ſhall be ſeiſed for his ſake, but his want of ſeiſin ſhall not prejudice the heir. The heir ſhall take the ſame advantage, as if the anceſtor had been ſeiſed.

It is contended that the diſabled perſon ſhall take by purchaſe in reſpect of his heir; but that is a notion I cannot underſtand, how he that cannot take for himſelf, can take by purchaſe in reſpect of his heir. The words *in reſpect of himſelf and not in reſpect of his heir* muſt be applied, *ſecundum ſubjectam materiam, i. e.* as the ſubject matter of the clauſe will bear. The diſabled perſon is made incapable to take a perſonal eſtate by the ſame clauſe, but it is plain that other intervening clauſe cannot be applied to that, and ſo it ſeems to be in the caſe of purchaſes. No authority has been cited of either ſide, and it ſeems a very conſiderable queſtion, whether in the caſe of tenant in tail with a remainder over, the remainder being once veſted in default of iſſue in tail, can be diveſted by reaſon of iſſue after born. Suppoſe the caſe of a fee-ſimple, the land eſcheats for want of heirs; ſhall it diveſt out of the lord, and veſt in a poſthumous heir?

The

The ſtatute of 3 *Jac.* is entirely out of the caſe. 3 *Car.* inflicts a penalty of another kind, *viz.* a forfeiture of the eſtate veſted: but if 1 *Jac.* be taken to be entirely repealed, then 3 *Car.* will not provide for all the caſes that may happen; as if lands deſcend after the diſability attached. Therefore the moſt natural conſtruction ſeems to be, that the firſt clauſe of 3 *Car.* which enacts that 1 *Jac.* ſhall be put in execution, leaves 1 *Jac.* its full force and effect, as to all caſes not afterwards provided for by 3 *Car.*

The difficulty as to the Ducheſs's taking during the life of *Philip* ſeems the moſt conſiderable; for ſuppoſe the other part of it as to the diveſting the eſtate out of the remainder-man were out of the caſe, how can ſhe enter, while there is any iſſue in tail in being? Suppoſe there had been a diſſeiſin, and ſhe was to bring a *formedon*; muſt not ſhe lay it, that all the iſſue male of the body of *Thomas* are dead?

It is ſaid that *iſſue* muſt be *iſſue inheritable*, which *Philip* is not; but he may inherit upon conformity, and iſſue inheritable *ſub modo*, *ſub conditione*, is ſtill iſſue inheritable.

Pratt Juſtice. That objection indeed has the greateſt weight; for as to the clauſe, *for and in reſpect of*, *&c.* that can have no other conſtruction, but that the anceſtor ſhall be diſabled, but that diſability ſhall not hurt the heir.

Diſability may be either total or temporary. *Total*, ſuch as that of an alien, would have prejudiced the heir. This is a temporary one, and therefore though the ſaving for the heir had been left out, I ſhould have thought it muſt have had the ſame conſtruction, as it will now have; and regularly the diſability ſhould not have prejudiced the heir in all caſes. But ſuch temporary diſabilites may in ſome caſes by intendment be prejudicial to the heir, as in caſe lands in tail deſcend after the diſability attached, and no iſſue in tail is then *in eſſe*, they muſt go over in that caſe. And ſo it ſeems to me it will be now, notwithſtanding the addition of that clauſe; if there be an heir in tail capable of taking at the time of the deſcent, that he ſhall have the land; but if not, he will be prejudiced by that accident, and it muſt go over: at leaſt till ſome perſon comes *in eſſe* capable of taking the eſtate-tail, the remainder-man ſhall enter, for the freehold cannot be in abeyance.

Hilary 3 *Geo.* it was argued a third time by Mr. *Reeve* for the plaintiff, and Serjeant *Cheſhyre* for the defendant. Third argument.

Mr. *Reeve*. The title of the Ducheſs depends on three acts of Parliament, 1 and 3 *Jac.* and 3 *Car.* which were all made to prevent the growth of popery. And he argued, ſhe had a good title under 1 *Jac.* which remains unrepealed, either by 3 *Jac.* or 3 *Car.*

1. It is not repealed by 3 *Jac.* Theſe two ſtatutes relate to different perſons and different offenſes. 1 *Jac.* relates to all perſons, 3 *Jac.* only to children. In 1 *Jac.* the offenſe is paſſing or being ſent beyond the ſeas to be there educated; in 3 *Jac.* the offenſe is going without licence. The penalty in 3 *Jac.* is leſs than in 1 *Jac.* 3 *Jac.* is only the profits, in 1 *Jac.* the eſtate itſelf is forfeited, and the reaſon is, becauſe the offenſe againſt 1 *Jac.* is greater than that againſt 3 *Jac.*

2. The ſtatute 3 *Car.* is no repeal of 1 *Jac.* The rule indeed is, *Leges poſteriores leges priores contrarias abrogant*, but thoſe two ſtatutes may conſiſt together. Though both extend to the ſame perſons, yet the penalties are different and conſiſtent. 1 *Jac.* works a diſability to *take after* the offence committed, 3 *Car.* a loſs of what the offender had before the offence. If it ſhould be conſtrued, that 3 *Car.* is a repeal, then papiſts will be bettered by that ſtatute, for they will be reſtored to their capacity of purchaſing, which was taken from them by 1 *Jac.* neither can they be convicted upon 3 *Car.* if they will but be content to ſtay abroad: no proceſs can reach them there, for they can only be outlawed in the caſe of high treaſon. 26 *H.* 8. *c.* 13. 5 *Ed.* 6. *c.* 11. 3 *Inſt.* 32.

The ſtatute therefore of 1 *Jac.* being in force, and the meaſure between us, I come in the next place to conſider whether any and what eſtate veſts in the offender. If the ſtatute had intended he ſhould take by deſcent, it would not have diſabled him to purchaſe for the benefit of the heir. In the caſe of a purchaſer the lands muſt veſt in the anceſtor, or elſe the heir cannot take. The offender is diſabled in reſpect of himſelf only, and not in reſpect of his heir: whereas if it ſhould be conſtrued, that he may take by purchaſe or deſcent, it will then be in his power to bar the heir. If he takes any right, it muſt be for his own benefit, and not barely *jus alienandi*. And when it is ſaid that admitting he does take, yet he has no advantage, becauſe he forfeits the profits; that may be avoided as I ſaid before, it being in his power to prevent a conviction on 3 *Car.* by his keeping beyond ſea, and then the whole profits notwithſtanding the ſtatute may be applied towards the ſupport of popiſh ſeminaries.

If it be ſaid, that by conſtruction of law the crown ſhall have the profits during the diſability of the offender; I anſwer, that if the offender cannot take the eſtate, the crown cannot have the profits. 1 *Inſt.* 13. *a.* If the crown were to take the profits, it would be only a pernancy of them, as in outlawry in a perſonal action; and it would be in the power of the offender to deprive the King of the pernancy of the profits by his alienation. 21 *H.* 7. 12. *Raym.* 17. *Hardr.* 101. *Salk.* 395, 408. 5 *Mod.* 109. Whereas if it be conſtrued, that the offender is diſabled to take, he will be conſequently diſabled to alien, and then the act will have its full force.

It will not be improper under this head to conſider ſome of the diſabilities at common law, and compare them with the preſent caſe. 1. *Propter delictum*, as by attaint. 2. *Propter defectum ſubjectionis*, as an alien. 3. Profeſſion in religion.

1. The firſt of theſe works a forfeiture of the eſtate to the King for treaſon, and to the lord for felony; it corrupts the blood; the crown ſhall have the purchaſe of ſuch a perſon upon office found; and this diſability differs from that created by 1 *Jac.* 1. Becauſe that created by 1 *Jac.* is temporary. 2. Perſonal, and works no corruption of blood. 3. Becauſe an offender againſt 1 *Jac.* has no capacity to purchaſe, which one attainted has for the benefit of the crown.

2. An alien has no inheritable blood in him: he can have no heir, nor be heir to any man: he has a capacity to purchaſe, but not to hold, for upon office found the King ſhall have it. And this diſability differs from that under 1 *Jac.* becauſe on the one hand the iſſue of an offender may inherit, which the iſſue of an alien cannot, and on the other hand an alien may purchaſe, which our offender cannot.

3. The next diſability is that of a monk, or one entered into religion: that comes the neareſt to the preſent caſe. For, 1. The purchaſe of a monk is void, ſo is that of the offender. 2. Neither of them can inherit. 3. Their heir is not diſabled. 4. In both caſes the diſability is temporary, for the monk is reſtored upon his deraignment, and ſo is the offender upon his conformity. It is true, in 1 *Inſt.* 2. *b.* a monk is called *civiliter mortuus*, but that is only a ſimilitudinary expreſſion: that he is not a dead perſon is proved by his being reſtored upon his deraignment, he may be abbot, executor, bring and join in actions. 1 *Inſt.* 132. *b.* The diſability therefore of a monk comes very near the preſent caſe; and it is no foreign ſuppoſition

poſition, to intend the Parliament deſigned to bring the offender under the ſame incapacity, as a monk, who tranſgreſſed no ſtatute, was under at common law. And the rule of conſtruction is always to be guided by the reaſon and practice in parallel caſes. 3 *Co.* 85. *b.*

The principal difficulties ſtarted in this caſe are two. 1. Whether the Ducheſs can enter in her remainder during the life of *Philip*, who is iſſue in tail though diſabled. 2. In caſe ſhe may, whether upon *Philip*'s conformity or leaving iſſue inheritable, the eſtate can diveſt out of her, and *Philip* or his iſſue enter.

1. As to the firſt: Suppoſing then *Charles*, *William* and *Philip* diſabled to take this eſtate: ſince *Charles* and *William* are dead without iſſue, *Philip* is now the only perſon who, as heir male of the body of *Thomas* firſt Lord *Gerard*, is next in remainder by virtue of the ſettlement, and the diſability as to him being before the eſtate devolved upon him, it muſt go over to the next in remainder, who is the leſſor of the plaintiff. The law will never caſt a deſcent upon one that is attainted, though he may hold what he acquires by his own act, till office found. 1 *Ven.* 417. 1 *Inſt.* 13. *a.* *Fitzh. Mortdanceſtor*, 47, 55. The ſecond ſon recovered, becauſe the firſt was beyond ſea. *Carter* 198. 3 *Co.* 10. *b.* 3 *Cro.* 28. 9 *H.* 6. 24. *b.* 3 *Co.* 61. *b.* Grandfather tenant in tail, father attainted, grandfather dies, the iſſue of the father may enter. The Ducheſs does not claim by deſcent from the diſabled perſon, but by virtue of the remainder limited to the right heirs of Lord *Charles*, upon this preſumption, that the former remainders are all extinct, *Philip* ſtill continuing under the ſame legal incapacity.

2. But the greateſt objection is, that the ſtatute having provided, that the land which deſcends to ſuch an offender ſhall not eſcheat, neither ſhall the iſſue be hurt; if the eſtate was to go over to the reverſioner, the iſſue of *Philip*, or he himſelf conforming, cannot take, for the eſtate is gone.

Anſwer. The ſtatute ſays, the offender upon his conformity ſhall be reſtored to his capacity as before, but doth not ſay he ſhall be reſtored to what he forfeited by the diſability.

But admitting he is deſigned to be reſtored to all upon his conformity, then I inſiſt he may call for the eſtate, and ſo may his iſſue, though it be gone over. It is a maxim in law, that a freehold cannot be in abeyance. 1 *Inſt.* 342. *b.* It cannot be in *Philip*, by reaſon of the diſability, nor in the crown, *Philip* never having been in poſſeſſion, and there being no proviſion in the ſtatute for

that purpoſe: nor in the Lord, for the whole eſtate is not ſpent; and therefore it muſt be caſt upon the reverſioner, the law being careful that the freehold ſhall never be in abeyance. 5 *Co.* 52. *b.* *Bro. Eſcheat* 33. *Prerog.* 947. 1 *Inſt.* 2. *b.* *Philip* therefore being diſabled, the next in remainder, who is the leſſor, muſt enter to preſerve the eſtate.

Plow. 486. *b.* is, That after an attainder of treaſon, and till office found, the freehold ſhall be in the perſon attainted ſo long as he lives, and he ſhall be tenant to every *praecipe*; but when he dies the land cannot deſcend to the heir, for his blood is corrupted; and it cannot be in the King till office found, and therefore till then it ſhall eſcheat to the Lord, as upon the death of his tenant without heir; though part of that caſe be denied for law in 3 *Co.* 10. *b.* for there it is ſaid, that by the common law for lands in fee-ſimple, and by 23 *H.* 8. *c.* 13. for lands in tail, the actual poſſeſſion was not in the King till office, but when tenant in fee-ſimple is attainted and dies, the fee and freehold without any office are thrown upon the King (though not held immediately of him) to prevent an abeyance, and the land ſhall not eſcheat to the lord till office, for in all caſes the eſcheat for high treaſon is to the King. But if tenant in tail is attainted and dies, it ſhall not veſt in the King before office, for neither the attainder nor the ſtatute work any corruption of blood as to the deſcent of lands intailed; but now the ſtatute 32 *H.* 8. transfers and veſts the actual poſſeſſion in the King by the attainder, as well in the life as after the death of the perſon attainted, and as well of lands in tail, as of lands in fee. So it is if an alien dies, the freehold is preſently in the King, without office. 5 *Co.* 52. 8 *Co.* 76. *Plow.* 229.

The iſſue may very well take after the death of *Philip*, for though the Lord has entered by eſcheat, yet a perſon claiming paramount to him may enter and ouſt the Lord. 3 *Inſt.* 231. 49 *E.* 3. 16. 8 *Co.* 76. *b.* *Fitz. Mortd.* 46. 2 *Inſt.* 183. *H. P. C.* 322. The iſſue in tail ſhall never be hurt by the diſability of the tenant in tail; *Philip* by his own act ſhall not hurt the iſſue, be the eſtate gone over to the reverſioner, or Lord by eſcheat: and that was the deſign of the ſaving.

A reverſion muſt take effect at the inſtant the particular eſtate is determined. If the eldeſt ſon dies ſeiſed leaving his wife *privement enſeint* with a ſon, and the ſecond ſon enters (as he muſt) and afterwards a poſthumous ſon is born, he ſhall enter upon his uncle, and ſo ſhall a poſthumous iſſue upon the Lord by eſcheat. *F. N. B.* 195.

It has been objected, that the ducheſs cannot make out her title in a *formedon in reverter*. But why not? ſhe need only ſet out her pedigree, and allege the death of the donee in tail without iſſue; and that would bring it to the queſtion, whether dying without iſſue capable of taking is not in law dying without iſſue. 8 *Co.* 88.

The recoveries ſuffered by *Charles* are of no effect, for if he was diſabled to take the eſtate, he could not make a tenant to the *praecipe*, and then the recoveries are void.

The ſtatute therefore of 1 *Jac.* being in force; no eſtate veſting in a perſon diſabled, and no recovery by him ſuffered being good; ſince *Philip* by reaſon of the diſability cannot take, but upon his conformity may be let in, or leaving iſſue capable, that iſſue may take notwithſtanding the eſtate is gone over: to prevent an abeyance the leſſor of the plaintiff ſhall take, and ſo had a good title to make the leaſe.

Cheſhyre Serjeant *contra*. The queſtion is whether the remainder limited to the heirs male of the body of *Thomas* be extinct, ſo as the ſubſequent remainder to the right heirs of Lord *Charles* ſhall take place. If the firſt remainder be not extinct, the title is with the defendants by reaſon of their poſſeſſion.

Under 1 *Jac.* we ſay, the diſability does not prevent the veſting of the eſtate, but relates only to a pernancy of the profits, which will better anſwer the end of the ſtatute in encouraging conformity than loſing the whole eſtate without a poſſibility of being reſtored: his conformity is in the nature of a condition precedent, which if he performs he ought to reap the benefit of it. On the one hand it will be an encouragement to the offender to be reſtored to a pernancy of the profits, whereas on the other hand if he ſhould not be reſtored, he will have no encouragement to conform.

The effect of the recoveries is out of the caſe, for *Philip* claims paramount to them, and it would be hard his iſſue ſhould ſee the eſtate go over, and be put to a difficulty to convey a deſcent to himſelf, and get back the land from him in remainder. There is no law which reſtrains papiſts from ſelling their eſtates; on the contrary it ought to be encouraged, for by that the proteſtant land intereſt is ſtrengthened.

The crown ſhall have the profits during the diſability of the offender, for the profits of the land are forfeited to all purpoſes of

benefit, as much as if the land itſelf were forfeited. By a grant of the profits the land paſſes. 3 *Lev.* 289. 1 *Inſt.* 4. *b.*

The government ſought not the eſtates of the offenders, but their conformity. If a minor under the guardianſhip of his uncle, who is his next heir, be ſent abroad by him; if it ſhould be conſtrued that the eſtate is gone, then the uncle who was the greateſt offender would reap the benefit (*a*). Whereas if the land veſts and the profits only are forfeited, it will be as great hindrance to childrens going beyond ſea, and no encouragement to the guardians to ſend them, and then too there will be no abeyance.

(*a*) *Sed N. B.* 3 Car. reaches him too.

The reaſon why the puniſhment under 3 *Car.* is leſs than 1 *Jac.* (for he put 3 *Jac.* out of the caſe) is, becauſe 1 *Jac.* was made upon a pinch, and when the bent of the nation was againſt the papiſts, and when that occaſion was ſerved, it was thought proper to mitigate the penalties.

This diſability cannot amount to a refuſal, ſo as to make the eſtate go over, for the offender could not bar his iſſue by matter *en pais.* The diveſting and reveſting eſtates is not favoured in law. 1 *Co.* 87. 22 *E.* 3. 19. *Hob.* 336, 346. *Fitz. Dower* 143. *Maynard* 161. If the eſtate ſhould be ſent over, it can never be brought back again, and then the proviſion in benefit of the heir would be to no purpoſe.

At common law profeſſion in religion was equivalent to death: it was a civil death, and a *formedon* would lie, *eo quod ſuſcepit ſuper ſe habitum religionis, in quo habitu profeſſus fuit.* 1 *Inſt.* 133. *F. N. B.* 196. And a writ of *Mortdaunceſtor* would lie upon ſuch a ſuggeſtion.

I admit the poſthumous iſſue in tail may enter upon the reverſioner, for he only takes *pro hac vice* to prevent an abeyance, of which there is no danger in the caſe at bar, if our conſtruction prevails.

He inſiſted likewiſe on the matter of the pardon, and the life of *Philip.*

The court ſaid nothing, taking this to be the laſt argument: and ſo it ſtood two terms upon a *curia adviſare vult.* But then underſtanding, other counſel had been retained to argue, if occaſion; they deſired to hear them. And *Trin.* 4 *Geo.* (*Parker* C. J. being made Lord Chancellor, and *Forteſcue* come down into the King's Bench)

Bench) it was argued a fourth time by Sir *Thomas Powys* for the plaintiff, and Sir *Edward Northey* for the defendant.

Fourth argument.

Sir *Thomas Powys*. In order to make a title in the plaintiff upon this record, I ſhall endeavour to prove, that Lord *Charles* being educated in a foreign popiſh ſeminary, and continuing a papiſt to the time of his death, was by the ſtatute of 1 *Jac.* 1. *c.* 4. diſabled and made incapable to inherit any legal eſtate, and conſequently the recoveries ſuffered by him are void, and ineffectual to bar the remainder under which we claim; and that *Philip* continuing under the ſame diſability, the eſtate-tail is ſpent, and the ducheſs muſt enter as in her reverſion.

For this purpoſe I ſhall conſider theſe three things. 1. What will be the conſequence upon the ſtatute of 1 *Jac.* taking it ſingly and by itſelf. 2. What alterations have been made by any ſubſequent ſtatutes. And 3. What influence the common recoveries and the life of *Philip* will have in prejudice of the Ducheſs's title.

1. Then, to take 1 *Jac.* by itſelf, and conſider it in relation to this caſe. Upon this ſtatute it is that we muſt make our ſtand, for I muſt admit that the common recoveries, and the life of *Philip*, will be objections againſt us, unleſs we can have the aſſiſtance of this ſtatute to remove them. And as this is to be our foundation, it will be proper to obſerve the time and occaſion of making it.

It is very well known, that during Queen *Elizabeth*'s reign the papiſts were very active in finding out means to ruin the proteſtant religion, or in the language of thoſe times, to fight the pope's battles. Amongſt other expedients that were thought of, and put in execution, this of erecting popiſh ſeminaries in foreign parts for the education of the *Engliſh* youth was one of the principal contrivances of the papiſts, to bring about their deſign, and therefore the government at that time was very vigilant to prevent the ill conſequences of it. And to that purpoſe a law was made 27 *Eliz. c.* 2. which being very doubtful and obſcure in many reſpects, and thought by ſome to be but a temporary act, which expired by that Queen's death, it had not the intended effect.

Immediately upon King *James*'s acceſſion to the throne the ſtatute we are now upon was made, as an effectual proviſion againſt ſo great a miſchief. And as the miſchief was great, ſo the Parliament thought there was no time to be loſt in putting a ſtop to it, and therefore one of the firſt things they ſet themſelves about as ſoon as they came together, was to apply a proper remedy to this miſchief.

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This early care of theirs will be ſufficient to ſilence any inſinuations, as if this was but a trifling and an inſignificant attempt, and not deſigned by the Parliament to bring the papiſts under thoſe difficulties, which it is objected will be the conſequence if our conſtruction prevails: in anſwer to which they of the other ſide ſet up a conſtruction, which tends only to make this (as they call it) a ſtill-born ſtatute. I need not mention the rule laid down in *Hob.* 87, 93, 97. that an act of Parliament ſhall never be conſtrued to be void, if it can poſſibly be otherwiſe; but ſhall be expounded in ſuch a manner, that it may as far as poſſible attain its end.

The ſtatute has a twofold operation. 1. To create an incapacity to take any eſtate, under the words, *be diſabled and made incapable to inherit, purchaſe, take.* 2. To prevent the enjoying any eſtate veſted before the offenſe, implied in theſe words *have or enjoy.*

The whole clauſe runs, " That every ſuch perſon ſo paſſing or " being ſent, *&c.* ſhall, as in reſpect of him or herſelf only, and " not to or in reſpect of any of his heirs or poſterity, be diſabled " and made incapable to inherit, purchaſe, take, have or enjoy any " manors, lands, *&c.*" And then follows the proviſo for conformity.

It is the firſt part of thoſe words creating the diſability *to take*, which is what we rely upon, for the offenſe was committed by *Charles* and *Philip* before the deſcent of the eſtate to either of them; ſo that what might be the conſtruction of the ſtatute as to eſtates *veſted* will not need to be now conſidered, being intirely foreign to the preſent queſtion.

The words *be diſabled to inherit, purchaſe, take*, are very ſtrong and ſignificant, and without doubt would have been ſufficient to have hindered any eſtate from veſting in the diſabled perſon, if the ſtatute had not gone on, and made proviſion for the benefit of the heir. The word *inherit* would have prevented any deſcent to the offender, and the word *take* would have ſtopped him from claiming as a purchaſer. The words in Lord *Delaware*'s caſe are not ſo ſtrong, and yet the dignity was held to be ſuſpended, and he no baron, but only an eſquire. The ſtatute of 11 & 12 *W.* 3. *c.* 4. is penned in the very ſame expreſſions, and upon that it has been held, that no eſtate would paſs to a papiſt by any conveyance whatſoever. The words of 31 *Eliz.* againſt ſimony have been conſtrued to create ſuch a diſability, as that the preſentee cannot bring an ejectment, or ſue for tithes; and yet the words there are not heaped up ſo elaborately as in our ſtatute.

But it is contended, that the words, *in reſpect of himſelf only and not in reſpect of his heir*, do reſtrain and qualify the others, and ſhew the eſtate was deſigned to veſt in the anceſtor, in order to enable the heir to take.

To this I anſwer, That they are not to be conſidered as words reſtraining the former: if it be any, it muſt be but a partial reſtriction, as to lands, tenements and hereditaments only, and not to leaſes, goods or chattels, which the heir has nothing to do with; and it is abſurd to ſay they ſhall qualify as to part, and not throughout. This ſaving the right of the heir, enures only as an exception of the heir, and leaves the ſtatute to run *in non exceptis*, for the exception helps to prove the rule, and ſhew that the offender himſelf was deſigned to be left under the utmoſt force of the former words.

The offender himſelf was the perſon principally aimed at; the care of the heir was but a ſecondary intention, and therefore the firſt is not to be overthrown to make way for the ſecond. But ſay they, what uſe then will you make of this ſaving? were the words added with no view or deſign at all? I anſwer, They were put in only *in majorem cautelam*, to ſatisfy every body, that only a perſonal diſability was intended: they were not added as neceſſary, but to prevent any doubts which might ariſe in prejudice of the heir, and as my Lord *Coke* ſays, To ſatisfy ignorant men, and alſo to clear any ſuſpicion, as if the Parliament intended to reſemble this caſe to that of an attainder, and ſo cut off the communication between the anceſtor and heir. If the other ſide will have us find out ſome uſe or other for theſe words, what can it be, but only to enable the heir to make out his title through one who was never ſeiſed?

But ſurely it is no conſequence, that becauſe the diſability is not to run upon the heir, therefore the eſtate muſt veſt in the diſabled anceſtor. This would be intirely to overthrow the ſtatute, for then, contrary to the words, he will *inherit* and *take*. And if he be allowed to inherit and take, they muſt at the ſame time give him a power to alien, and by this means he will be enabled to prevent any diſcovery of his offenſe, for none but the next heir will take that advantage, and if he does, the other knows how to revenge himſelf.

In order to overthrow our conſtruction, and yet leave the act to have ſome effect, it has been inſiſted for the defendants, that the ſtatute only creates a diſability to take the profits.

To this I anſwer; that there are no words in the ſtatute which look that way; it is perfectly ſilent as to any ſuch thing; and can it be imagined, that if the legiſlature had intended ſo, they would not have adapted the words to ſuch an intention? Can any one think they would throw in clauſes out of abundant caution in one place, and yet be intirely ſilent in ſo material a point as this? The ſtatute diſables them from taking or enjoying goods and chattels in the ſame clauſe which relates to lands; now nobody can have the profit of goods and chattels, but he who has the property, and the offender cannot have the property by reaſon of the ſtatute; ſo that conſtruing the profits only to be forfeited can go but to part, and it is abſurd to create diſtinct diſabilities as to the real and perſonal eſtate, when the ſtatute has coupled both together, and made no diſtinction between them.

The ſtatute ſays the offender *ſhall not take*. The defendants by their conſtruction ſay he *ſhall take*, and ſo they give the ſtatute an operation as to a pernancy of the profits, a matter in which it is ſilent, and this is to overthrow the plain ſenſe of the words, which diſable him from taking the eſtate.

And as it is pretty extraordinary to think the ſtatute deſigned only that the pernancy of the profits ſhould be forfeited; ſo it is much more extraordinary, that if they had ſuch a deſign, they ſhould take no care to diſpoſe of them elſewhere, or name the perſon they intended ſhould have them during the diſability. The ſame Parliament were ſo far from thinking *that* a matter proper to be left undetermined, that when by the ſtatute of 3 *Jac.* they diſabled an offender againſt that ſtatute from enjoying any eſtate, they immediately directed the next proteſtant of kin to take the profits: if they had any ſuch deſign in our ſtatute, they would have expreſſed it in the ſame manner; but they very well knew, they had no occaſion to direct the application of the profits, when they had before diſpoſed of the whole eſtate.

They endeavour to ſupply the want of a direction to whom the profits are to go, by telling us, that by conſtruction of law the crown ſhall have the profits, becauſe this is a publick offenſe, and not to the detriment of any particular perſon, according to the caſe of *Woodward* v. *Fox*, 2 *Vent.* 187, 267.

If this was to be allowed, I know no uſe the ſtatute would be of; the profits could only be forfeited as in outlawry in a perſonal action, and it would be in the power of the offender to deprive the King of the pernancy of the profits by his alienation; not to mention

tion the prejudice that would accrue to the heir; whereas if it be conſtrued, that the offender is diſabled to take, he will be conſequently diſabled to alien, and then, and not till then, the act will have its full force.

But whilſt we are arguing to preſerve the eſtate for the heir, againſt the alienation of the anceſtor, we are told, that we are endeavouring to defeat one great end and deſign of the ſtatute which was to ſtrengthen the proteſtant landed intereſt; for ſay they, give us the eſtate that we may alien it to a proteſtant, and that will be a means to work us out of the kingdom. To this, I muſt obſerve, that it is a little unlikely, they who are ſo ſolicitous to get the eſtate, will be ſo willing to part with it. To what purpoſe ſhould they argue themſelves into the eſtate, if they can ſo readily leave it as ſoon as they have it? They can never be in earneſt when they tell us, they only deſire the eſtate to have an opportunity to ſhew the world how generouſly they can relinquiſh it. They who argue in this manner, muſt diſtinguiſh between a purchaſe and a deſcent; for when they contend for lands by deſcent, in order to hand them over to a proteſtant; they can never mean, to ſecure to themſelves a power to alien to one of their own religion: that would be to make him a purchaſer againſt the expreſs words of the ſtatute, and would alſo overthrow that plauſible pretence of theirs, of ſtrengthening the proteſtant landed intereſt; for if they may alien at all, they muſt have a general power, and then it can hardly be ſuppoſed they will turn their backs on their own religion, in order to propagate hereſy, and root out themſelves.

If the gentlemen who argue in this manner are really in earneſt to advance the proteſtant intereſt, I can ſhew them a way how it may be done more effectually than that they are now in; it is only by keeping the eſtate from ever veſting in a papiſt, and giving it away to the next perſon capable of taking it. This is a plainer and eaſier way to bring about what they pretend to have ſo much at heart; for if the proteſtant intereſt be beſt advanced by working papiſts out of their eſtates, then I am ſure that end will be eaſier effected by keeping them out intirely, than by letting them in upon a bare promiſe, how ſpecious ſoever, of ſurrendering their eſtates when required.

When any great miſchief is intended to be remedied, ſuch a conſtruction muſt be made as will tend the moſt effectually to prevent the miſchief. The miſchief is, that children go beyond the ſeas for a popiſh education. Now, if our conſtruction prevails, the offender will be in a manner cut off from his own family and his native country: he will be in many reſpects as an alien, exile,

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or one profeſſed; and the bringing all theſe diſabilities upon him will be a means to deter him from going, and then the end of the ſtatute is anſwered. In making this conſtruction we go along with the words and reaſon of the ſtatute, but they on the other ſide in their expoſition leave both behind them, and under pretence of finding out a plain, eaſy operation for the ſtatute, they ſet up an imaginary conſtruction of their own, which I have before ſhewn tends only to overthrow it.

But this milder conſtruction of the diſability and ſinking it below the words ought not to prevail for theſe reaſons. 1. Becauſe it is contrary to the rules laid down in expounding ſtatutes made for the advancement of religion, for *ſumma eſt ratio quae pro religione facit*. Such ſtatutes, ſays my Lord *Hobart* in *Colt* v. *Glover*'s caſe, are to be extended even beyond the words. And ſo is 11 *Co.* 70. *Magdalen College* caſe, where there are many inſtances of this nature. There words, ſhort and imperfect in themſelves, were carried beyond the letter to attain their end, but we are told in this caſe, though the words are full and expreſs, yet the ſenſe is to be ſoftened and mitigated. 2. Becauſe it is contrary to the rule of expoſition of ſtatutes made to prevent any great miſchief in the commonwealth, or which enact any thing to its benefit. In 11 *Co.* 34. *a.* it is ſaid, that ſuch ſtatutes, though penal, ſhall be taken by intendment, and he inſtances even in criminal caſes.

This caſe comes under both theſe rules: the miſchief deſigned to be prevented by the ſtatute ſtrikes both at our Religion and Civil Government, to have our youth educated in ſeminaries of jeſuits, where they acquire the greateſt inveteracy againſt both.

The rule of the civil law is, *in dubio legis intentio non verba valent*, but no rule can be ſhewn, that where words are plain, and expreſs, an intention ſhall be preſumed contrary to the words. I believe, if a common perſon was to read this ſtatute, he would not be able to raiſe any doubts upon it, though lawyers we ſee have.

When we have drove them out of all their holds, then they reſort to the ſaving in the ſtatute as their laſt refuge; and argue, that becauſe the eſtate is ſaved to the heir, therefore it ſhall veſt in the diſabled anceſtor. But ſurely this would be a very ſtrange expoſition, to draw ſuch an inference from the ſaving words of a ſtatute, as will overturn and deſtroy the very purview itſelf. And thus they who are ſo ſolicitous to ſet up the ſaving for the benefit of the heir, are all the while doing him the greateſt miſchief; for if the anceſtor has the eſtate, he muſt have it with a power to alien, and this will enable him to keep all under him in ſubjection; for if the proteſtant

heir goes to take the advantage, he will ſell; if he be a remainder-man, he will ſuffer a common recovery, and revenge himſelf that way. There is no need in conſtructions upon ſuch ſtatutes to give the eſtate to the anceſtor, for in Lord *Delaware*'s caſe the peerage never veſted in *William*, and as the book takes notice, he was but an eſquire, and yet the dignity deſcended to *Thomas*.

They aſk us, If the eſtate is not in the offender, where is it? To this I anſwer, that certainly it is not in the diſabled perſon, if it can go any where elſe; for that would be *maledicta conſtructio quae corrumpit textum*. In *Hob*. 87. it is ſaid, that an act of Parliament may indeed be void, but not if by any poſſibility it can be otherwiſe; and that whatever is a neceſſary conſequence of a ſtatute, is as much a part of it, as if it had been contained in the body of it. *Hob*. 293. It may make a felony, and *Bro. Corone*, it may operate as a pardon by intendment.

Again: Where an act of Parliament has made any new point, the Judges are to conſtrue it ſo as to make it practicable, though it thwarts ſome of the maxims of the common law; for that is the main buſineſs of all acts of Parliament, to correct the common law; and if a ſtatute be inconſiſtent with the common law, and both cannot ſtand together, then the rules of law muſt give place to the ſtatute, and not the ſtatute to them.

I muſt admit it to be a good rule in expounding ſtatutes, to go as near the common law as we can, provided we do not ſet up the latter to deſtroy the former, but blend them one with another as long as they will hold together, and when they grow inconſiſtent, then the common law is to be rejected.

To ſee then where the eſtate is, let us firſt conſider where it is not. It is not in the offender, by reaſon of the ſtatute, as I have before ſhewn; and if not in him, then there can be no pernancy of the profits in the crown; for 1 *Inſt*. 13. *a*. where the ſon was attainted, living the father, it was held, the King could not claim by eſcheat, becauſe the ſon never had any thing. It cannot go to the heir of the offender during his anceſtor's life, for *nemo eſt haeres viventis*, and therefore ſince it cannot go any where elſe, it muſt return to us, who are the reverſioner, as to the firſt mover. Thus eſtates are ſuppoſed to have firſt moved from the lord, and therefore when the tenant dies without heir, it goes back to the lord by way of eſcheat. So of eſtates-tail; if nobody be capable to take them up, the donor muſt enter as in his reverſion.

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To this they object the proviſo in the ſtatute, for conformity; and aſk us how they ſhall have back their eſtate again, in caſe they ſhould conform.

This admits of two anſwers: 1. It does not appear that this proviſo has any retroſpect, or words of reſtoration in it: it only makes him from thenceforth capable of taking an eſtate, but does not provide that he ſhall be as if he was never under any diſability. He loſes what ſhould have veſted during his recuſancy as a puniſhment for it, and his conformity is as a condition precedent to his taking any future eſtate. When he has lived as a recuſant all his life, it is not reaſonable, that a feint conformity at the laſt ſhould put him in the ſame condition with thoſe who have been always innocent. 2. But admitting that the offender is deſigned to be reſtored to all upon his conformity, then I inſiſt that he may call for that eſtate which paſſed by him during his diſability, for the ſame act which incapacitates him to take, may put him *in ſtatu quo* on its own terms. One act may attaint a man, and another reſtore him upon condition; and why may not the ſame ſtatute do as much? There is no more difficulty in ſhifting the eſtate from the reverſioner to the conformiſt, than in the *Prince*'s caſe from him to the crown, and ſo back again when there is a new Prince of *Wales*, which deſultory kind of inheritance has been held good. In the Earl of *Derby*'s caſe in *Raymond*, it is laid down, that where eſtates are limited by a ſtatute for particular purpoſes, they are not to be meaſured by the rules of law, elſe ſays the book, how could the *Prince*'s caſe be law, but that the Judges were obliged to go according to the act.

Thus according to *Beaumont*'s caſe, 9 *Co.* and *Hob.* 257. eſtates-tail may ceaſe and riſe again. It is one of the maxims of the common law, that a freehold cannot be in abeyance, but yet we know in caſes of neceſſity, the contrary is every day's experience: as where a parſon dies, the freehold is in abeyance. *Litt.* § 646, 647. So where houſes are annexed to offices: and the like of eſtates-tail. *Litt.* § 649, 650, 613. 1 *Inſt.* 331. *a.* 345. *a.* So there may be a movable fee-ſimple both as to perſons and as to place. A man may be paſſed over as a perſon not *in eſſe*, as a monk who is *civiliter mortuus*, who may notwithſtanding upon his deraignment enter upon the reverſioner. 2 *Roll. Abr.* 150. *B.*

Suppoſe tenant in tail dies, leaving his wife *privement enſeint* with a ſon; this ſhall not hinder the reverſioner, but that he may enter till the birth, and at the birth the tail ſhall revive; for the expectation and preſumption that there may be a child ſhall not keep

the freehold in abeyance. 7 *Co.* 8. *b.* And from hence we may argue *a fortiori*, that any expectation of conformity ſhall not keep us out, ſince that is more unlikely than the birth of a child *en ventre ſa mere.* I ſhall leave this firſt point with inculcating that the incapacity in our caſe is *to take*, and not barely to *enjoy.*

2. It being thus eſtabliſhed that the act of 1 *Jac.* has created an incapacity to take: the next thing to be conſidered is, whether any ſubſequent ſtatutes have altered the law in this point, and taken off the diſability.

It is not contended on the other ſide, that there ever was any expreſs repeal of this ſtatute; but the moſt they pretend to is, that it being inconſiſtent with the ſubſequent ſtatutes, it is implicitly repealed, according to the rule, *leges poſteriores leges priores contrarias abrogant.*

Before I enter upon the conſideration of the conſiſtency or inconſiſtency of the three ſtatutes, I would obſerve, that repeals by implication are to be uſed very tenderly, becauſe they infer a very high reflection upon the law-makers, as if heedleſly and unknowingly they made contrary and inconſiſtent laws. 11 *Co.* 63. 1 *Roll. Rep.* 91.

It was given up in *C. B.* and agreed to in this court, that 3 *Jac.* relates to different perſons and different offenſes from 1 *Jac.* and therefore I ſhall paſs it by and take no notice of it.

The ſtatute of 3 *Car.* is that which is ſet up by the other ſide to be the governing act, and an implicit repeal of 1 *Jac.* notwithſtanding it enacts it to be put in due execution, which is ſufficient to ſhew it was not intended as a repeal.

It was ſaid upon a former argument, that 1 *Jac.* was made upon a pinch, and when the bent of the nation was againſt the papiſts, and it being very ſevere upon them, 3 *Car.* was made to mitigate thoſe penalties. In order to anſwer this pretence I muſt reſume the hiſtorical part of the caſe, and conſider the circumſtances of the nation at the time of making this latter ſtatute. During Queen *Elizabeth*'s and King *James*'s reigns the people were very jealous of the deſigns of the papiſts, and therefore we ſee endeavoured by ſeveral acts of Parliament to fence againſt them: upon King *Charles*'s acceſſion to the throne their ſuſpicions were rather increaſed than diminiſhed; that Prince was then newly married to a daughter of *France*, a *Roman* catholick, and ſeveral favours were at that time ſhewn to the papiſts: this occaſioned great diſquietude

and uneaſineſs to thoſe of the proteſtant reformed religion, which afterwards broke out into an open rebellion, and ended in the murder of that Prince, and the baniſhment of his ſon. It is well known, that the Parliament which enacted this law was far from being acceptable to the court, and therefore it was ſuffered to continue but a ſhort time, and then followed the long intermiſſion of Parliaments: as this Parliament was not in the intereſt of the court, ſo they were highly incenſed againſt the papiſts, who they began to fear were likely to gain ground, and therefore they ſet themſelves at work to attack them in that which was their weakeſt place, namely in taking away the eſtates veſted *before* the offenſe, as to which the former ſtatute was doubtful; ſo that now they were able to meet with them both ways: by 1 *Jac.* they prevented the *veſting*, and by 3 *Car.* the *keeping* any eſtate after the offenſe. Now if it ſhould be conſtrued, that the meaſure of all theſe diſabilities muſt be by 3 *Car.* then that Parliament, inſtead of diſtreſſing the papiſts as was intended, has rendered their condition more eaſy; for on 3 *Car.* a conviction is requiſite, to avoid which they may keep abroad, and have the profits of their eſtates tranſmitted to them, for they will be out of the reach of any proceſs neceſſarily previous to a conviction.

But the main end and deſign of this latter ſtatute (which has not yet been mentioned) was to lay a heavier puniſhment upon the perſon *ſending*, who before forfeited 100 *l.* only, and the child *ſent*, who was the moſt innocent, bore all the reſentment of the ſtatute; whereas both are now put upon the level, and ſome new diſabilities are created, as from being executor, *&c.* and it alſo extends to private ſchools, which the others did not.

3. I come now to conſider what influence the common recoveries and the life of *Philip* will have in prejudice of the Ducheſs's title.

Now as to this point, what I ſet out with will principally govern it, for if the ſecond *Charles* never had the eſtate in him (as upon my former reaſoning I apprehend he never had) then the recoveries will be void, and ſuffered by a perſon out of poſſeſſion; as if the iſſue in tail ſhould ſuffer a recovery in the life-time of his father: a fine indeed he may, but that is by the expreſs proviſion of the ſtatute 32 *H.* 8. *c.* 36.

As to the life of *Philip*, my objections againſt the eſtate's being in abeyance, and the way I have ſhewn how he, or his iſſue, may be reſtored upon conformity, will be ſufficient to remove that obſtacle.

But to come closer. Say they, whilſt there is iſſue the reverſioner cannot enter. I deny that in this caſe. *Iſſue* muſt be heir of the body, *Hob.* 346. *Dy.* 332. *a.* *Plow.* 560. and he muſt be iſſue inheritable, which *Philip* is not: he, as I have before ſhewn, is diſabled, and cannot call for the eſtate; according to 1 *Ven.* 417. he is to be conſidered in conſanguinity, but not as heir. And if he cannot take, then his iſſue cannot, (admitting him to have iſſue, which is not found, neither is it ſo in fact, ſo that the argument is only from a poſſibility of his having iſſue) for it is not enough that he is iſſue, unleſs he be heir of the body to claim the intail, and heir of the body he cannot be in the life of *Philip*, for *nemo eſt haeres viventis.* My Lord *Coke*, 1 *Inſt.* 377. *a.* puts the caſe of tenant in tail to him and the heirs male of his body, he has iſſue a daughter, who has iſſue a ſon; the grandſon, ſays he, ſhall not keep out the reverſioner, though he be heir of the body, becauſe he does not derive his deſcent through males. It is ſaid of an exile, *quod perdidit patriam*, and it will ſound as well to ſay of *Philip quod perdidit patrimonium.*

We are not obliged to wait for the poſſibility of his conforming. Shall an eſtate ſtand ſuſpended, becauſe it is poſſible an alien may be naturalized, or a monk be deraigned? Even in the caſe of an infant *en ventre ſa mere*, which is ſtronger, the eſtate goes over till the birth. *Cro. El.* 422. 1 *Inſt.* 391. 29 *Aſſ. pl.* 61. *Plowden* 557. indeed ſays, there might be an occupant in that caſe cited out of the book of *Aſſiſe*, but that was only ſaid *arguendo*, and is contrary to *Yel.* 9. 2 *Roll. Abr.* 151, 152. for he muſt claim by a *que eſtate.* If an advowſon be granted to *A.* for the life of *B.* and *A.* dies before a vacancy, the grantor ſhall preſent, and there ſhall be no occupant.

The next thing relied upon by the defendants is the act of general pardon, 2 *W. & M. ſt.* 1. *c.* 10. which, ſay they, has cured all. This has been ſufficiently anſwered by thoſe who have argued before me, as there are exceptions in it, and it is not found, the court will not take notice of it. *H. P. C.* 252. *Cro. El.* 125. 1 *Keb.* 20. 1 *Lev.* 26, 76. *Bro. Charter de Pardon* 46. *Pleading* 124. 8 *E.* 4. 7. 4 *H.* 7. 8. *b.* The general words might pardon the offenſe, but would not reſtore the forfeitures without ſpecial words. 1 *Lev.* 120. 1 *Saund.* 362. If ſimony be pardoned, yet that does not operate ſo as to reſtore the offender to the living. 5 *Mod.* 15.

The laſt thing they object to us is, that *Charles* was in poſſeſſion all his life, and therefore the recoveries are good: but was this any other poſſeſſion than that of a wrong doer? A monk might be

a diſſeiſor, but yet it will not be pretended he had any legal eſtate in him; no, he was at beſt but an occupant, and in this caſe *Charles* was no more; he had it is true a *pernancy* of the profits, but that is all; he had not ſuch a poſſeſſion and freehold as enabled him to bar the remainder by coming in as vouchee in a recovery. I deſire to know, whether it will be pretended, that if a papiſt ſince the 11 & 12 *W.* 3. *c.* 4. ſhould get into poſſeſſion, and receive the profits of any eſtate, whether I ſay he can be deemed to be in legal actual poſſeſſion? Certainly he cannot: he cannot take advantage of his own wrong, and no more ſhall the tortious entry of *Charles* (for ſuch it was) enure to his benefit, and turn to the prejudice of us, who are in reverſion.

There is one thing more which they preſs upon us, and that is, that we can ſhew no inſtance where this act has been put in execution in the manner we are contending for, or indeed in any other manner. I may retort the argument upon them, and demand to know, if they can produce any caſe which ſeems to look their way, or ſo much as countenance the conſtruction they have ſet up: the truth is, the matter is ſtill at large, and no argument can be drawn by either ſide from the diſuſe of the ſtatute. Many ſtatutes there are in full force, upon which there are no footſteps for many years. And as to this particular ſtatute, I can give them a very good reaſon why it was never yet drawn in queſtion; they of the ſame religion will never take advantage of it, and theſe are the people who moſtly have it in their power, though in our caſe indeed the reverſioner is a proteſtant: beſides, it is very difficult to prove a foreign education, and a being ſent with intent, for the jeſuits though they were caught in this caſe, will never be caught again; none but a man of Duke *Hamilton*'s application and intereſt could have brought them over; but now they know the conſequence, they will never be prevailed with to give the ſame teſtimony, and as this is the firſt caſe upon the ſtatute, ſo in all probability it will be the laſt.

Sir *Edward Northey contra.* I ſhall not need to go about to prove a title in the defendants upon this record, for their poſſeſſion is ſufficient againſt the plaintiff, who muſt recover upon his own ſtrength.

The plaintiff relies on 1 *Jac.* only, but in my argument I ſhall pin them all together, and admit them to be conſiſtent; for my Lord *Coke* ſays, where there are ſeveral ſtatutes relating to the ſame matter, one muſt not be ſingled out from the reſt, but the conſtruction muſt be uniform upon them all. The three ſtatutes now in queſtion were all made with the ſame view, and to prevent the ſame miſchief, and that was to be brought about by laying heavy puniſhments upon the offenders, and thereby obliging them to conform.

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There are two ſorts of offenders; thoſe who ſend, and they who are ſent, which latter we ſay forfeit only the profits of their eſtates, and that was taken to be the conſequence of the ſtatute at the time of making it, and therefore 3 *Jac.* does not introduce any new law when it ſpeaks of the profits, but only directs the application of them to the next proteſtant of kin, which under 1 *Jac.* the King as *pater patriae* was intitled to.

The plaintiff does not make his caſe on 1 *Jac.* which reſpects only the intent, but has brought it within the words of 3 *Car.* for it is found they were actually educated, which is carrying the intent into execution.

I ſhall put every thing out of the caſe, but the operation of the ſtatute as to deſcents. I would fain know, if this was an eſtate in fee deſcended, who ſhould have it? The heir according to their maxim cannot, and ſhall it eſcheat to the Lord, as if the whole eſtate was ſpent? Can it be thought the legiſlature intended to favour the Lord or reverſioner before the innocent iſſue? He muſt be prejudiced, unleſs it be conſtrued, that the profits only are forfeited. The conſtruction muſt be, that the anceſtor ſhall take the legal eſtate, but he ſhall take no benefit by it: he ſhall not take for the advantage of himſelf, but for the benefit of his poſterity he ſhall.

1 Will. Rep. 128.

The ſtatute 11 & 12 *W.* 3. has the words *be diſabled to inherit or take*, but yet in the caſe of *Pye* v. *George* 1 *July* 1709. *in Canc'* it was held, that the ſubſequent words had controlled the former, ſo that they carried away no more than a *pernancy* of the profits, and the legal eſtate deſcended notwithſtanding.

A man may take only for the benefit of another, as a perſon attainted, for the benefit of the crown. 1 *Inſt.* 2. *b.* 2 *Roll. Abr.* 88.

I put all the rules of law out of the caſe, and come to the proviſo for conformity: and I take it, that upon conformity the offender is to be *in ſtatu quo*; and if ſo, how can the eſtate be reveſted? There is no proviſion for it in the ſtatute, and that is an argument it was never intended the eſtate ſhould go over. My Lord *Delaware*'s caſe, cited of the other ſide, is a caſe which has room enough to hold us both. It ſays that *Thomas* ſhall claim *from William*, and not *through him*. Now the word *from* implies he was ſeiſed, for otherwiſe *Thomas* could not claim from him. Here the eſtate-tail is not ſpent, and therefore the reverſioner cannot be let in.

It is objected, that the freehold ſhall not be in abeyance. I anſwer, it is not; it is in the offender.

It is ſaid, *Philip* has no iſſue, and the reverſioner muſt not be obliged to wait upon that contingency. Anſwer: We muſt provide for what may be, as well as what is; the law never ſees any impoſſibility of having iſſue, and therefore upon a general intail there can be no tenant in tail *apres poſſibility*. Here is a poſſibility that *Philip* may have iſſue, and therefore the eſtate muſt continue to ſerve that poſſibility whenever it ariſes.

Another objection is, that if we have the eſtate, we may alien it. I anſwer: The ſtatute never intended to put the heir out of the power of the anceſtor, but only that he ſhould not be hurt by the diſability of the anceſtor.

We do not now rely on the recoveries, but ſet up the life of *Philip* againſt the plaintiff. I agree, if tenant in tail leaves iſſue an alien, the remainder-man may enter, for ſuch iſſue is as none.

If therefore the eſtate veſts, and the profits only are forfeited during the diſability, then the leſſor of the plaintiff can have no title.

Sir *Thomas Powys* replied. In Lord *Delaware*'s caſe it is ſaid the peerage never was *in William*, he was only an eſquire, and this deſtroys the inference from the word *from*. As to the caſe of *Woodward* v. *Fox*, it is a caſe *primae impreſſionis*, and a long while after this ſtatute, ſo that the law-makers could not know, the profits would go to the crown of courſe, it not being a point ſettled till that caſe. I know nobody to whom the eſtate would have gone, had this been a deſcent in fee, but to the lord by eſcheat; and it is no new doctrine to diveſt eſtates eſcheated, as on birth of a poſthumous heir, or reverſal of an attainder. 3 *Inſt.* 231. And the ſame may be done on *Philip*'s conformity.

Curia adviſare vult. And *Trinity* 6 *Geo.* the court delivered their opinions *ſeriatim*, beginning with the puiſne Judge.

Mr. Juſtice *Forteſcue*. In delivering my opinion in this caſe, I ſhall make three points, which I deſign to ſpeak to diſtinctly. 1. What eſtate veſted in the ſecond *Charles*, who ſuffered the recovery, upon the ſtatute of 1 *Jac.* 1. *c.* 4. independent of the ſubſequent ſtatute. 2. What alteration was made in that law by the 3 *Car.* 1. *c.* 2. and how the conſtruction will be on both thoſe ſta- Reſolutio curiae.

tutes taking them together. 3. What will be the effect of *Philip*'s life, who upon this record muſt be taken to be alive.

1. The reformation, which was begun in *Henry* the eighth's time, and compleated in the reign of Queen *Elizabeth*, had rendered it difficult for the papiſts to educate their youth at home as they deſigned, and therefore it was the advice of the pope at that time, to erect colleges abroad, that the *Engliſh* youth might be ſent thither. And purſuant to this advice, in the year 1598 there were two ſet up, one at *Rome* and the other at *Doway*, by which means many of our youth were drawn out of the kingdom, to the no ſmall prejudice thereof; and in order to put a ſtop to this miſchief, the ſtatute of 1 *Jac.* 1. *c.* 4. was made, which though it be a penal law, yet it ought to have a liberal conſtruction, becauſe it ſo much concerns the publick welfare of the kingdom: all laws are in ſome meaſure penal, but that is no reaſon to reſtrain them in ſuch caſes as this. 11 *Co.* 34, 70. *Hatt. of Stat.* 66. *Hob. Colt* v. *Glover.*

And upon this act I am of opinion, that a perſon who receives a foreign education in a popiſh ſeminary, has neither *jus in re* nor *ad rem:* he can take no eſtate at all, either real or perſonal; he is diſabled to inherit, purchaſe, take, have or enjoy: and can any words be ſtronger than theſe?

But it is ſaid the word *enjoy* implies a veſting of the eſtate, and that only a forfeiture of the profits was deſigned. Now if the word *enjoy* ſhould be ſo taken, I do not ſee how it could affect this caſe; for that could only relate to lands veſted before the offenſe (which is a caſe that ſeldom happens to infants, and therefore cannot be ſuppoſed to have been uppermoſt in the mind of the legiſlature) but as to lands that are to deſcend after the diſability, there are other words to take in that caſe, which are *inherit*, *purchaſe*, *take.* Beſides, 1. It is a very rare phraſe to expreſs a forfeiture by words of diſability only: in the ſtatute of 3 *Car.* there are words of forfeiture. 2. In a penal law it is too ſevere to conſtrue words of a preſent temporary diſability, into an abſolute forfeiture; but if they ſhould, they will only relate to goods and chattels. 3. And it is plainly a diſability in 1 *Jac.* If we do but compare the proviſo of that with the proviſo in 3 *Car.* which induces a forfeiture. In 1 *Jac.* he is diſabled to take, and therefore the proviſo for conformity reſtores him to a capacity of taking. In 3 *Car.* he forfeits; and there the proviſo reſtores him to the land, which ſhews the Parliament were aware of the difference between a diſability to take, and a forfeiture of the eſtate. 4. If only the profits ſhould be ſaid to be gone, what is that but the land itſelf. *Co. Litt.* 23. by a grant of the profits the land paſſes.

But it is objected, that he muſt take for the benefit of the heir, being only diſabled in reſpect of himſelf, and not in reſpect of his heir. To this I anſwer: That theſe affirmative words always imply a negative, and ſeparate the caſe of the anceſtor and heir: he himſelf in his own perſon ſhall not take, but his heir ſhall, *i. e.* this diſability ſhall not be like an attainder, which corrupts the blood, but it ſhall ſtill flow pure from the anceſtor to the heir.

In theſe caſes there is no need to leave any thing in the anceſtor, according to Lord *Delaware*'s caſe, which is expreſs, that the dignity never veſted in the grandfather, he was no baron, but only an eſquire. And there the Lords and Judges were of opinion, that the heir might claim by him, this being only a perſonal temporary diſability, which differed from an attainder.

Then the objection recurs, Are theſe words of no uſe at all? It often happens ſo, that to ſatisfy the ſcruples of the ignorant, words are added, which the more knowing part of mankind will plainly ſee were implied before: they are only explicatory of what went before, and ſerve to ſhew, that the heir in this caſe ſhall be enabled to make out his title through one who was never ſeiſed.

But ſay they, How can the heir take by deſcent according to the rules of law, if the anceſtor was never ſeiſed? To this I anſwer, 1. That at common law it is not neceſſary the anceſtor ſhould be ſeiſed, to enable the heir to take by deſcent. *Shelley*'s caſe is, that where the anceſtor *might* have taken the eſtate and been ſeiſed, there the heir ſhall inherit. Nay in ſome caſes the heir ſhall take by deſcent, although the anceſtor never was or could be ſeiſed of that eſtate, as in *Co. Litt.* 378. where lands were given to *A.* and *B.* for their joint lives, remainder to the right heirs of him that died firſt, *A.* dies, his heir ſhall take by deſcent: and yet the remainder never veſted during the life of *A.* it being uncertain all that time, whether the heir of *A.* or the heir of *B.* ſhould have it. 2. Whatever it might be at common law will not avail in this caſe, which is an incapacity by act of Parliament; and therefore the common law is a wrong *medium* to judge by. There could be no ſuch deſultory inheritance at common law as *The Prince*'s caſe, and yet it was there allowed, being by act of Parliament. And though theſe points are ſingularities, and contrary to the known rules of law, yet they being introduced by ſtatute, muſt not be carried to the rules of law as to their ſtandard.

And now let us conſider a little the inconveniencies of a contrary conſtruction. It will be an encouragement to the papiſts to continue

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in that religion, when the puniſhment is not ſo great as what I contend for. It will be a diſcouragement to the heir or remainder-man from putting the act in execution, becauſe he will then be cut off for his pains. It deſtroys the ſaving for the benefit of the heir, by putting it in the power of the anceſtor to diſinherit him. It is a repealing of the former part of the ſtatute by implication only, which is never to be allowed; becauſe it is a reflection on the wiſdom of the legiſlature. 11 *Co.* 63. *Hob.* 15, 87. It is againſt all the rules of conſtruction, to take them in the mildeſt ſenſe, where Religion and the Publick are concerned. *Hob.* 344, 388. 11 *Co. Magdalen College* caſe.

The offender may deprive the King of the *pernancy* of the profits by his alienation. 21 *Hen.* 7. 12. *Raym.* 17. *Hardr.* 101. 5 *Mod.* and *Salk. Britton* v. *Cole.* In the other act of 3 *Jac.* 1. *c.* 5. the very profits are mentioned to be forfeited, of which there was no occaſion here, when the land itſelf is gone.

It is objected that he may be convicted, and then 3 *Car.* carries all to the crown. But can he be convicted if he ſtays abroad? It is ſaid it goes to the crown by implication, becauſe this is a publick crime. For this there is no neceſſity in the caſe of a diſability, as there is upon a forfeiture, which implies a having, and then it is to be carried away, whereas in the other he never has it at all. The perſon is the ſubject of one, and the land of the other. How can he forfeit what he has not? *Nil dat quod in ſe non habet.* Beſides, a diſability reaches what cannot be forfeited, and this difference between a diſability and a forfeiture is kept up in many ſtatutes.

2. The next thing to be conſidered is, whether any alteration is made in 1 *Jac.* by the ſtatute of 3 *Car.* which, I take it, may very well ſtand with all the proviſions of 1 *Jac.* and has not impaired the force of it in the leaſt. 1. It enacts it to be put in due execution. 2. It reaches the offender more fully as to eſtates veſted before the offence, about which the former ſtatute was doubtful. 3. It lays the ſame penalty on the parent or guardian ſending the youth abroad, who before forfeited 100 *l.* only. 4. It extends to private ſchools, whereas the other was confined to publick colleges. 5. It creates a diſability to ſue, be executor or adminiſtrator or committee of any ward; and after all theſe additions, are we to be told, it was only explanatory of the former law? Can a forfeiture be the meaſure of a diſability? It is ſaid to have ſo far enlarged and enforced the former law, as to ſhew how that muſt be put in execution, *viz.* by conviction. Now does it not ſay 1 *Jac. ſhall be* put in due execution? And does not that imply, that of itſelf it is ſufficient, and *may be* put in execution?

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The caſe of a fee-ſimple is put as a difficult caſe to know where the eſtate is to go. But are caſes plain and expreſs to be broke in upon, becauſe difficult caſes may be put? In the caſe of a purchaſe ſay they, if the bargainee cannot take, who can? But was it not expreſly reſolved in *Roper*'s caſe, that a bargain and ſale would be abſolutely void. There is no reaſon why a ſtatute muſt be expounded away to nothing, becauſe one or two difficult caſes may be put upon it. The conſtruction I lay down, and which in my opinion it ought to receive, puts the act in ſome uſe. The conſtruction I have been arguing againſt leaves it no force at all.

3. The life of *Philip* is objected to be an impediment, which prevents the execution of the reverſion in the leſſor of the plaintiff, for ſay they, whilſt he lives, the eſtate-tail continues. But I give the objection this anſwer: that *Philip* can take nothing, no more than *Charles* did. It is to this purpoſe the ſame thing, whether he be incapacitated or not *in eſſe*: the rule of law is, that where any limitation is to a perſon not *in eſſe* at the time the eſtate ought to veſt, the eſtate muſt go over to the next in remainder. Here the limitation is to *Philip* and the heirs male of his body, but when that limitation ought to take effect, he is incapacitated to take, and then the remainder over to the leſſor muſt take effect immediately. *Cro. El.* 422. Deviſe to *R.* in tail, and after his deceaſe without iſſue to *Edward* in tail; *R.* dies leaving iſſue, living the teſtator; and there it was held, that *Edward* ſhould have the eſtate preſently, and not wait till the death of *R.*'s iſſue. If a man has iſſue two ſons, and the eldeſt be an alien, the law takes no notice of him, and therefore as he ſhall not take by deſcent himſelf, ſo he ſhall not impede the deſcent to his younger brother, on ſuppoſition that he may have iſſue a natural born ſubject. Indeed in the caſe of a perſon attainted, he ſhall obſtruct the deſcent. 2 *Ven. Collingwood* v. *Pace*, but his heir cannot take, for that would be to let him in by act of law, and the law will not truſt him with an eſtate. And in ſuch caſes, where the law will not ſuffer the eſtate to fall, it goes over to the next perſon capable of taking. 1 *Ven.* 417.

It is ſaid the limitation is to the iſſue of the body of *Thomas*, and *Philip* is ſuch. It is true he is ſo in common parlance, but that is not enough; he muſt be iſſue inheritable, and for want of that here is a *ceſſer* of the eſtate-tail, on which the reverſioner muſt enter. *Hob.* 346. *Dy.* 332. He is in the ſame caſe with the ſon of a daughter on a limitation to the heirs male of the body, for there the ſon is heir, and he is a male, but not a male inheritable within the form of the gift, becauſe he does not derive his deſcent through males. 1 *Inſt.* 337. *a.*

It is objected that here is ſtill a poſſibility, that *Philip* may have iſſue inheritable. But this is but a poſſibility, and for a poſſibility it was never yet known that the freehold was allowed to continue in abeyance, for the law abhors abeyances, and will never ſuffer them, but in caſes of abſolute neceſſity. In all caſes where the heir is incapacitated to take, the anceſtor may juſtly be ſaid to die without heir. *Co. Lit.* 13. *a.* The leſſor might in this caſe lay it in a *formedon*, that *Thomas* is dead without any heir male of his body. 8 *Co.* 88. This is no more than the common caſe of a poſthumous heir, where the reverſioner enters till the birth, and then the tail revives.

It is ſaid *Philip* may conform, and to ſerve this poſſibility the eſtate muſt continue. Why may not an alien be naturalized, or a monk be deraigned? and yet was there ever any eſtate ſuſpended on that occaſion? If the King's tenant dies without heir, to prevent an abeyance the law caſts the freehold on the King without office: and to prevent the like miſchief it will carry the eſtate to the reverſioner in this caſe.

This caſe of a foreign education very much reſembles the caſe of a monk, for 1. The purchaſe of both is void. 2. Neither can inherit. 3. The heir of neither is diſabled. And 4. The diſability is but temporary in both caſes. And it is no anſwer to ſay that a monk is looked on in law to be civilly dead, for that is only a ſimilitudinary expreſſion, and as he loſes no civil rights, but is conſidered in many reſpects as a member of the community, ſo he is anſwerable for any offenſes by him committed after his civil death. *Bro. Moin.* 23, 25. Our offender is more civilly dead than a monk; for the latter may be executor, but the former cannot. An outlaw, one under a *praemunire*, or abjuration, are as much civilly dead as he: and why is not this temporary diſability like the caſe of a parſon who married and was formerly on that account incapable to hold his living: or like the caſe in 2 *Roll. Abr.* 415. *C.* 6. of a deviſe to a monk for life, remainder over to *B.* who was allowed to take immediately: and ſuppoſe that had been a deviſe in tail, ſhould the iſſue of the monk have taken? certainly he ſhould not.

Another difficulty laid in the way is the proviſo for conformity, becauſe ſay they we cannot eaſily get back the eſtate again. But is not the objection as ſtrong upon their conſtruction in bringing back the eſtate from the crown? Is it eaſier to recover againſt the crown than a ſubject? Beſides it is far from being clear to me, that this proviſo does reſtore him to his eſtate; there are no ſuch words in it, but only that he ſhall be reſtored to his capacity, that is, he

ſhall for the future be capable of taking any eſtate that may come to him. If the meaning of that proviſo was to reſtore him to all; I can ſee no difficulty, but that he may as eaſily bring back the eſtate again, as in the caſe of a poſthumous heir, or a monk deraigned. 3 *Inſt.* 231. *Fitzh. Mord.* 46. *F. N. B.* 195. *Dy.* 13. The Lord by eſcheat takes but *in loco haeredis*, as the reverſioner here does in the room of *Philip*. 9 *H.* 6. 23. *b.* 2 *Roll. Abr.* 418. His incapacity ſhall no more keep back the eſtate from the reverſioner, than in the caſe of a deviſe for life or in tail, to one who refuſes, remainder over, it ſhall veſt immediately.

Upon the whole therefore I am of opinion, that in this caſe the ſtatute of 1 *Jac.* is the meaſure by which we are to conſtrue this diſability, and that under this ſtatute no eſtate ever veſted in *Charles*; by which he having no poſſeſſion, the recovery is void; and that the life of *Philip* will not ſtand in the way of the Ducheſs: as a conſequence of all which the judgment given below for the defendants is erroneous, and ought to be reverſed, and that this court ought to give a new judgment for the plaintiff.

Mr. J. *Eyre*. I muſt own I have the misfortune to differ from my brother, for I think the judgment given below for the defendants was well given, and ought to be affirmed; though I muſt ſay thus much, that I do not approve of the reaſons given by the court of *C. B.* for that judgment.

The general queſtion in this caſe is, whether a foreign education in a popiſh ſeminary infers an abſolute diſability to take any eſtate, for unleſs it does the leſſor can have no title.

There have been three ſtatutes mentioned in the debate of this caſe; the 1 *Jac.* 1. *c.* 4. 3 *Jac.* 1. *c.* 5. and 3 *Car.* 1. *c.* 2. Of theſe I think 3 *Jac.* is nothing to the purpoſe, but that of 3 *Car.* is of weight; not that I eſteem it a repeal of 1 *Jac.* but I look on it as explanatory of it, and without which the former ſtatute cannot be put in execution.

Now upon the ſtatute of 1 *Jac.* (taking the firſt and laſt part together, as we muſt do to make a reaſonable conſtruction) I am of opinion that the party ſo educated has notwithſtanding a capacity to inherit and take, for particular purpoſes, and that the ſtatute does not induce an abſolute diſability, and that the conſtruction will be the ſame in the caſe of a fee-ſimple as of a fee-tail. I do not ſay he is to be maſter of the eſtate, but thus much he muſt have, a power to tranſmit the inheritance to the heir. This is as to the caſe of a deſcent. In the caſe of a purchaſe too I think he has a qualified capacity,

capacity, for he may purchaſe for the benefit of the heir, as one attainted does for the benefit of the crown; and in both caſes, that of a deſcent, and that of a purchaſe, the eſtate will veſt, and the profits only be forfeited during the diſability.

And it is no objection to ſay, that the ſtatute is ſilent as to the profits where they are to go, for I take it ſuch a proviſion was not neceſſary, ſince this being a publick offence, they will of courſe enure to the benefit of the crown.

Roper's caſe is of no conſequence, for that was upon the 11 & 12 *W.* 3. *c.* 4. which is penned in a different manner from our ſtatute: neither is Lord *Delaware*'s caſe at all to the purpoſe, for there the diſability was abſolute for life.

But here it is objected that the offender for and in reſpect of himſelf is abſolutely diſabled, ſo that he was to be puniſhed as much as poſſible, only the heir was not to be involved in the guilt. To which I anſwer, That the true end of the ſtatute was, not to puniſh the perſons of thoſe who received this foreign education, but it was to prevent the influence they would otherwiſe have, if the eſtate ſhould be continued for their benefit. And it is no objection to ſay, that the offender may defeat the crown of the profits by his alienation, for is not this the ſame with many other caſes of forfeitures? and what reaſon is there to take more care of the crown in this caſe than any other? or what greater danger is there in having a capacity to take a future eſtate, than in being allowed to hold a preſent one, which I do not perceive it is contended will be abſolutely taken from him by this ſtatute. The heir it is true cannot enter living the anceſtor. But this rather proves the neceſſity of leaving ſomething in the anceſtor, till the heir is capable of taking. And ſurely if it had been deſigned, that the eſtate ſhould go over, it would have been ſo mentioned, as is done in 6 *R.* 2. about raviſhers of women, where there are expreſs words to carry over the eſtate. But no caſe can be ſhewn, where without expreſs words any eſtate was carried over from a perſon who has a poſſibility of being inheritable. The caſe of a monk is widely different, for that was always looked on as an abſolute death to theſe purpoſes, and a deraignment was never ſo much as looked for or expected.

Upon the whole my opinion is, that *Charles* had a ſufficient poſſeſſion and power to ſuffer a recovery, and this makes an end of the plaintiff's title, be that matter about the life of *Philip* which way it will; though if it were neceſſary to give my opinion upon

that, I ſhould think the eſtate could not go over, but muſt continue for the benefit of him and his iſſue.

Mr. J. *Powys.* In a caſe of ſo uncommon a nature as this, and of ſuch great difficulty, I think there is no occaſion to make any apology for a difference in opinion from any of my brothers.

I ſhall make four points in this caſe: 1. Whether under 1 *Jac.* any, and what eſtate veſted in *Charles* or *Philip.* 2. What alteration has been made by the ſubſequent ſtatute. 3. What is the effect of the recoveries. And 4. Of *Philip*'s life.

1. Then, to diſcharge this caſe of that which was the ground of the judgment in *C. B.* I can ſee no colour in the leaſt to think, that 1 *Jac.* is any way repealed by the ſubſequent ſtatutes. The intent of it, it is true, was to prevent the growth of popery, and in this reſpect it is a law made for the benefit of the publick; and though a foreign popiſh education is not to be favoured amongſt proteſtants, yet I can never give into any forced conſtruction, which is to carry the words to the utmoſt ſevertiy of the law.

The diſabling clauſe in this ſtatute is different from the 11 & 12 *W.* 3. which is abſolute, but this *ſub modo* only, in reſpect of himſelf, and not in reſpect of his heir, and therefore he muſt certainly have ſomething: how elſe can he purchaſe in reſpect of his heir? I agree my brother *Forteſcue*'s difference between a diſability and a forfeiture thus far, where the diſability is abſolute, but not where it is only partial, as in this caſe, which likewiſe diſtinguiſhes it from Lord *Delaware*'s caſe, for that was a total diſability for his life.

I think that upon conformity he will not only be diſcharged of the diſability, but likewiſe be reſtored to his eſtate, for the end of the ſtatute is anſwered, when it has been a means to draw him from the popiſh religion.

I do not ſay he is to have any benefit of the eſtate during the diſability: no, the profits ſhall be forfeited, but only to ſupport the eſtate for the heir, he ſhall be taken to have the legal title in him, and I can ſee no difference where the diſability is at common law, and where it is created by act of Parliament. What a confuſion would it otherwiſe create in the caſe of a fee-ſimple, or a purchaſe? In the caſe of a fee-ſimple is there any colour to ſay the Lord by eſcheat ſhall have it? he can claim only, when the tenant dies without heir; but here both the tenant and his heir are alive, and to prevent the entry of the Lord the ſtatute takes care of the heir. It cannot be pretended, that a diſabled perſon who may remove

that incapacity whenever he pleaſes, is a perſon dead without heir. I need not urge the inconvenience in veſting and reveſting eſtates, which was never favoured as yet.

It is objected that the laying this inconvenience in the way, is begging the queſtion; for ſay they, here will be no reveſting, ſince the conformity will not reſtore him to the land. But does not the ſtatute 3 *Car.* ſay expreſly, he ſhall be reſtored to the land? And is not this to be taken as a declaration of what was not ſufficiently expreſſed in the former law? Is not their conformity for the benefit of the publick? and is it not fitting, they ſhould have ſome encouragement to conform? It is ſaid they will have a future capacity to take any new eſtate that may come, but that is a rare caſe for children to meet with any beſides their paternal eſtate.

The caſe of a monk, ſo much relied on as a ſimilar caſe, is nothing to the purpoſe; for he is dead in law, and has an heir, but our offender can have none whilſt he lives. And there too the heir claims under the ſeiſin of the monk, which the heir in our caſe upon the plaintiff's conſtruction cannot, for they ſay the anceſtor had no ſeiſin at all. Neither is the caſe of an infant *en ventre ſa mere* at all applicable to this caſe, for there the perſon who enters till the birth is undoubtedly heir, and claims as ſuch from him that laſt died ſeiſed, but here there is no ſuch intermediate time as between the death of the father and the birth of the child, for the party who is to take is alive all the while, and *in eſſe* at the inſtant of the deſcent.

There is no danger of the freehold's being in abeyance, becauſe as I take it the legal eſtate veſts in the offender. I would put the caſe that a man has two ſons by two *venters*, the eldeſt of which receives a foreign education, and ſurvives the father and dies, muſt the brother of the half blood inherit to him? The law ſays no: but yet upon the plaintiff's conſtruction he muſt, if the eldeſt ſon never had any thing, for then the other will claim immediately from the father.

There are many inſtances where abſolute words in a ſtatute have received a qualified conſtruction. The ſtatute of *Weſtm.* 2. ſays the fine *ipſo jure ſit nullus*, and yet 2 *Inſt.* 336. it is held to be a diſcontinuance, for which before the 11 *H.* 7. the party was put to his *formedon.*

But when the argument that the profits only are forfeited prevails, there ariſes a ſub-point, who ſhall have the profits? I ſay the King ſhall have them. 1. Becauſe he is concerned to ſee the law

executed. 2. There are goods in the caſe as well as lands, and who can have them but the King? 3. This is an offenſe of a publick nature, *contra coronam et dignitatem ſuas*, and that makes the difference between the caſe of *Woodward* v. *Fox*, and the caſe of tithes, where a private intereſt is concerned. 4. Thoſe will be like derelict lands which go to the crown when there can be no owner found.

2. I come in the ſecond place to conſider what alterations are made in 1 *Jac.* by the ſtatute of 3 *Car.*

One great end and view of this ſtatute is ſaid to be, to reach eſtates veſted before the offenſe, but there can be nothing in that, the former ſtatute taking in both caſes, for the words *have* and *enjoy* go to eſtates veſted, and it is abſurd to think the Parliament would truſt them with a preſent eſtate, who were unfit to take a future one, which is ſuffering them to fight in armour. The true and main deſign of this latter ſtatute was to lay a heavier puniſhment on the parent or guardian ſending the youth abroad.

The ſtatute 3 *Geo.* protects proteſtant purchaſers of popiſh eſtates, and without doubt if *Charles* had ſold this eſtate the purchaſer would have been ſecure againſt that ſtatute.

3. The effect of the common recoveries need not now be conſidered, becauſe having the eſtate in him, as I hold he had, that is ſufficient to exclude the reverſioner.

4. *Philip*, who claims before the Ducheſs, is ſtill alive and keeps up the eſtate-tail; ſo the reverſioner is too ſoon: he is iſſue in tail, and a *formedon* muſt lay that there is none. In the caſe of *Pye* v. *Gorge*, 1 *July* 1709. before Lord *Cowper*, on the 11 & 12 *W.* 3. *c.* 4. which has the ſame diſabling words, it was held that notwithſtanding a default in not taking the oaths, yet the eſtate would veſt in the party.

I think upon the whole, the leſſor of the plaintiff has no title, and conſequently the judgment of *C. B.* ought to be affirmed.

Lord Chief Juſtice *Pratt*. This caſe depends upon the conſtruction of the ſtatute of 1 *Jac.* 1. *c.* 4. And as the offence ſtrikes both at our Civil and Religious eſtabliſhment, this is in every reſpect *cauſa religionis et reipublicae*; and being ſo, if it be capable of two conſtructions, we ought to put that upon it, which will tend the moſt effectually to prevent the miſchief.

It is notorious that the reformation, which was begun in *Henry* the eighth's time, was, by the unwearied diligence of the prieſts and jeſuits, very much broke in upon and interrupted, ſo that it cannot be ſaid to have been compleat till the reign of Queen *Elizabeth*, who had many and great ſtruggles with the papiſts. The firſt attempt to reſtrain them within due bounds was by very gentle and eaſy methods, but it was ſoon found that theſe ſignified nothing; private meetings were had all over the kingdom, to inſtruct and confirm people in the principles of their religion; and therefore it was found neceſſary, by a ſeverer law, to make it high treaſon for any one to reconcile another to the ſee of *Rome:* but even a little experience of this law ſhewed it to be an unequal remedy, and therefore the next ſtep was to baniſh the prieſts, and now every body hoped the work was done.

But the prieſts, though by this law they were many of them obliged to leave the kingdom, were nevertheleſs ſtill as active, in finding out means to ruin the proteſtant religion; and for that purpoſe erected ſeminaries abroad for the education of the *Engliſh* youth; and to put a ſtop to this miſchief, the ſtatute we are now upon was made, which if we do not conſtrue it in a large ſenſe, will dwindle into no remedy, and then all is at ſea again.

The clauſe on which the queſtion ariſes is this, ſpeaking of a foreign education, it enacts, "That every ſuch perſon ſo paſſing or "being ſent beyond the ſeas to any ſuch intent, ſhall, as in reſpect "of him or herſelf only, and not to or in reſpect of any of his "heirs or poſterity, be diſabled and made incapable to inherit, pur"chaſe, take, have or enjoy any manors, *&c.*"

Now on the plaintiff's ſide they ſay, the ſtatute induces an abſolute diſability to take the eſtate. The defendants ſay the eſtate veſts, and nothing is forfeited but the perception of profits. The different conſequences of theſe conſtructions are obvious. The firſt overthrows the recovery, and the life of *Philip*, and bears down all before it. The other oppoſes both to the plaintiff's title, and vindicates the method of cutting off the reverſion.

And upon this clauſe I am of opinion, that the latter conſtruction is not proper, nor will at all anſwer the end of the ſtatute.

1. It is againſt the words, by making him capable, who the act ſays ſhall be diſabled.

2. By

2. By this all the ſignificant words of the ſtatute are rejected, for there will be no need of the words *inherit*, *purchaſe*, *take*, becauſe the word *enjoy* alone will do the buſineſs of the profits: and it is inconſiſtent with the honour and wiſdom of the legiſlature to make uſe of ſuch known legal expreſſions, when at the ſame time they are to have no influence in the conſtruction of the ſtatute.

3. When the profits only are deſigned to be forfeited, the Parliament ſpeak out, as in the 3 *Jac.* 1. *c.* 5. in relation to offenders againſt that law: and there likewiſe they take care to diſpoſe of the profits during the diſability, which proviſions are not in our law; and therefore it is not to be imagined, that the ſame thing was intended in both. And ſurely if at the time of making the act of 3 *Jac.* it had been deſigned to puniſh the offender againſt 1 *Jac.* in the ſame manner, there would have been ſome declaration or other to that purpoſe.

4. The forfeiture of the profits is idle, and comes to nothing; for if the eſtate veſts, the party may alien, ſuffer a recovery, give it away, or ſettle it in other hands ſecretly for his own benefit, and then the proviſion of the ſtatute will be ineffectual. And how can it be imagined, the Parliament would apply ſo looſe a remedy to a growing miſchief they were ſo much alarmed at?

It is objected, that this is a qualified diſability. As to that, I think it was truly ſaid, that the latter words import a negative, it is but *expreſſio eorum quae tacite inſunt*; the import of which is only, that whatever difficulty could regularly ariſe to the heir from the anceſtor's not being ſeiſed, that ſhall be no objection to the heir, who ſhall be able to make out his title through one that was never ſeiſed.

Conſider the method of debating in Parliament. Somebody might object, that poſſibly it would be taken to the prejudice of the heir, by ſaying the anceſtor ſhould be diſabled; to which it might be anſwered, that though it was not neceſſary to declare the contrary, yet for the ſatisfaction of ignorant men there could be no harm in putting in ſomething to that purpoſe.

Lord *Delaware*'s caſe is ſtrong in point, for if that abſolute diſability would not prevent the deſcent, there is no colour to ſay this qualified diſability ſhall.

But ſay they, if he himſelf is abſolutely diſabled to purchaſe, what will become of the heir? As to that, I think the Parliament

deſigned he ſhould not purchaſe at all, for it follows after, that all eſtates, terms, *&c.* for the benefit of ſuch a perſon ſhall be void: and are not theſe to be taken into the conſtruction of the ſtatute? Shall we reject all this, and ſay it ſignifies nothing?

Well, but here is a diſability to take perſonal eſtate as well as real, and what has the heir to do with that? why nothing at all; and thoſe words were only thrown in *ex abundanti*, for a diſability to take perſonal eſtate as to himſelf, is as ſtrong as to take it likewiſe againſt the heir.

The heir will not be hurt in this caſe, becauſe according to *Shelley*'s caſe it is ſufficient if the anceſtor *might* have been ſeiſed.

And as to the objection about the difficulty of being reſtored on conformity, I think there is none at all; becauſe I hold, that he is not to be reſtored. The ſtatute does not ſay ſo, and therefore I do not ſee how we are warranted to give him his eſtate again. No one will conform till he ſuffers, nor then neither unleſs he ſees he is like to ſuffer further. But cannot the Parliament reſtore him by ſufficient words? Surely they have power to vary the law, according to the *Prince*'s caſe, which reduces this part of the caſe to this dilemma. Either he was, or was not deſigned to be reſtored. If he was, it may eaſily be done by force of the ſtatute: if he was not, then the objection of difficulty in doing it is vaniſhed.

It is objected that the remainder man cannot enter, living *Philip*, who is iſſue in tail. But I take it, a diſabled perſon is to be looked on as not *in eſſe*; the current of authorities is ſo, and none to the contrary, but that if the party cannot take, the eſtate muſt go over. If the eldeſt ſon dies leaving his wife *privement enſeint* with a ſon, the ſecond ſon enters, but on the birth of the other the eſtate is brought back: and ſo does the remainder man or reverſioner where the iſſue in tail is not born at the death of the tenant in tail. In the caſe of a fee-ſimple it ſhall eſcheat, and be diveſted out of the Lord on the birth of a poſthumous heir. If it was the caſe of a purchaſe it would go over, and could never be brought back, as on a limitation to the heir of a perſon living at the determination of the particular eſtate, for he who takes by purchaſe muſt be *in eſſe* at the time the eſtate ought to veſt. But it is otherwiſe in the caſe of a deſcent, for there he does not claim any new eſtate, but the old one, which his anceſtor enjoyed before him.

Suppoſe a man has two ſons, the eldeſt an alien and the other a denizen; in that caſe the eſtate ſhall go to the youngeſt, becauſe the other is diſabled, and ſo is the caſe of *Collingwood* v. *Pace*. In

the caſe of an attainder it ſhall eſcheat for the diſability. *Co. Litt.* 13. And in the caſe of profeſſion it goes over as on a natural death. 2 *Roll. Abr.* 150, 415. And the true reaſon of carrying over the eſtate in all theſe caſes is, to prevent the freehold's being in abeyance, which is a reaſon why in the preſent caſe the reverſioner muſt enter, elſe there can be no good tenant to the *praecipe*, which the law requires of every eſtate.

It is ſaid that the law ſuffers abeyances in ſome caſes, as in that of a parſon, or where houſes or lands are annexed to offices; but are not thoſe caſes of abſolute neceſſity?

I can ſee no reaſon why in this caſe the eſtate cannot be brought back as eaſily as in the inſtances I have before put.

My brother *Forteſcue* has ſo fully preſſed that matter about the ſtatute of 1 *Jac.* being in force, and unimpeached by 3 *Car.* that I ſhall not need to go over it again: nor do I find my brothers who are of a contrary opinion rely much upon that.

To conclude therefore, I am of opinion, that under 1 *Jac.* the offender takes nothing; which conſtruction obviates the recovery, and the life of *Philip*, and removes every thing that ſtands in the way of the Ducheſs: and the judgment below being againſt her, I conceive it is erroneous, and ought to be reverſed.

But the court being divided, you are now to conſider what is further to be done in this cauſe.

What is to be done where the court are equally divided upon a writ of error.

Whereupon the counſel for the defendant in error propoſed that it might be adjourned into the Exchequer Chamber for the opinion of all the Judges; which was oppoſed by the counſel for the plaintiff, who ſaid that there were no inſtances where upon a diviſion in that court, to which the cauſe was adjourned by writ of error, there have been ever any adjournments into the Exchequer Chamber: and the reaſon of that, they ſaid, was that it would be abſurd to aſk the Judges of *C. B.* whether they would adviſe this court to reverſe a judgment given by themſelves.

N. B. This was my own argument, the other counſel not being prepared.

Then the counſel for the plaintiff, Mr. Solicitor General, Mr. *Reeve* and Mr. *Strange*, being aſked what method they deſired it to be put into; they ſaid, that as the defendants were in poſſeſſion of a judgment of another court, they could not contend, that upon a diviſion of this court, the judgment of *C. B.* ought to be reverſed. But what they inſiſted upon was, that this cauſe might be adjourned into

into Parliament, that their Lordſhips might receive the direction of that great court, what judgment ſhould be entered in this cauſe.

That cauſes of a civil and criminal nature have been originally commenced in Parliament, they ſaid was a fact too notorious to be denied; and therefore they forbore troubling the court with any inſtances of that nature, but would proceed to ſhew, that as the Parliament had taken conuſance of cauſes in the firſt inſtance, ſo they had been applied to for their direction: nay they had interpoſed of their own accord in caſes where inferior courts had been divided, or thought the point too difficult for their determination.

Their firſt citation was a *dictum* of my Lord *Nottingham*'s in the Duke of *Norfolk*'s caſe, where he intimates, that there may be an adjournment *propter difficultatem* out of a court of law into Parliament.

Bract. lib. 1. *c.* 2. ſpeaking of the ſtability of the *Engliſh* laws, that they are not to be altered but by Parliament, has theſe words: " *Si autem aliqua nova et inconſueta emerſerint, et quae prius uſitata* " *non fuerint in regno, ſi tamen ſimilia evenerint, per ſimile judicentur,* " *cum bona ſit occaſio a ſimilibus procedere ad ſimilia. Si autem talia* " *nunquam prius evenerint, et obſcurum et difficile ſit eorum judi-* " *cium, tunc ponantur judicia in reſpectum uſque ad magnam curiam,* " *ubi ibi per conſenſum curiae terminentur.*

Regiſt. 124. *b.* there is a writ in theſe words: " *Quia volumus* " *quod querela pendens inter te* (one of the parties to whom it is " directed) *et* C. *et alios de quadam tranſgreſſione coram nobis et con-* " *cilio noſtro apud Weſtmonaſterium diſcutiatur et terminetur, tibi* " *precipimus quod ſis coram nobis et concilio noſtro apud Weſtmona-* " *ſterium ad quindenam ſancti Michaelis* (*quem diem praefato* C. " *dedimus*) *tunc ibidem ad informandum nos et concilium noſtrum* " *ſuper negotio praedicto, et ad faciendum et recipiendum quod per* " *nos et concilium noſtrum praedictum ſuper dicto negotio conſiderari* " *contigerit.*"

1 *E.* 3. 7. *a.* after ſtating the caſe, and what had been ſaid upon it, the book goes on: *Et puis vient breve quod ſi difficultas aliqua interſit, le record ſoit maund en parlement, et adjurner les parties la* xv *Paſ. et dit fuit al Vicount que il uſt les deniers a meme le jour. Cotton's Records* 30.

My Lord *Coke* in 4 *Inſt.* 68. takes notice, that at common law before the 14 *E.* 3. delays of judgment were provided againſt in five manners, and one of the inſtances he is pleaſed to give is, by the

the King's writ, comprehending, *quod ſi difficultas aliqua interſit*, the record ſhould be certified into Parliament, and to adjourn the parties to be there at a certain day. *Si obſcurum et difficile ſit judicium, ponantur judicia in reſpectum uſque magnam curiam.* And of this ſays he, there was an excellent record in the Parliament holden at *Weſtminſter* the *Tueſday* after the tranſlation of *Thomas a Becket.*

The laſt citation was the caſe of *Nevil* v. *Stroud* in 2 *Sid.* 168. which begins with telling us, that the caſe had been often argued in *C. B.* and by them delivered into Parliament, who took order therein. Which they relied on as a ſtronger caſe than the preſent, for that being in *C. B.* where the cauſe originally commenced, it was a caſe within the ſame meaſure with all other Exchequer Chamber caſes.

But if the court was not inclined to proceed in that extraordinary manner, then they ſaid, that rather than undergo the delay and expence of an argument in the Exchequer Chamber, they were content to go up to the Houſe of Peers under the diſadvantage of the judgment's being affirmed in this court. And if there was any difficulty with the court as to affirming a judgment upon a diviſion, where the party conſents, they put it upon the other ſide to ſhew the expediency of ſuch a method.

Then the counſel for the defendants being called upon, they declared, that they did not deſire to have the judgment affirmed. Which obliged the plaintiff's counſel to go on and argue for an affirmance.

They ſaid, they had inquired into the practice of the Exchequer Chamber erected by the ſtatute of *Eliz.* for correcting the judgments of this court, where upon a diviſion of four and four the judgment is affirmed, as was done in the great caſe of *Deighton* v. *Greenvil.*

They likewiſe relied on it as an argument for affirmance, that there were no inſtances of adjournments into the Exchequer Chamber upon a writ of error, which in a great meaſure proves the practice of affirming a judgment upon a diviſion; ſince there is as much likelihood of a diviſion upon a writ of error, as in any other caſe, where cauſes have been ſo adjourned.

So is the practice of the Houſe of Lords: and though that may be ſaid to depend on their practice of putting the queſtion only to reverſe; yet that ſhews the ſenſe of that houſe, that without a majority for reverſing, the judgment ought to be affirmed.

Many judgments they ſaid had been affirmed, even where the whole court muſt have been of opinion, that the judgment was erroneous: it is a rule that the party ſhall not aſſign for error any matter that is for his advantage, as too long an eſſoin, or the granting aid where it ought not, and yet that is error in the proceedings. 7 *H.* 6. 21. *a.* And the court muſt ſee and adjudge it to be ſo, but yet becauſe they are not told of it by a proper perſon, the judgment ſhall be affirmed; and what is that but to affirm an erroneous judgment? And many inſtances of this nature are put in 5 *Co.* 39. *b.* and 8 *Co. Beecher*'s caſe.

If the defendant in error pleads a releaſe; and it is found with him: this is a confeſſion of the errors, but yet in *Aſton's Ent.* 339. the entry is, that the judgment be affirmed.

Ante 68. In the caſe of *Jones* v. *White* on a trial at bar, *Mich.* 4 *Geo. B. R.* the queſtion was, whether the coroner's inqueſt could be read, in a ſuit between party and party, the preſent Lord Chancellor, and Mr. J. *Powys*, were of opinion it might, *Eyre* and *Pratt* Juſtices were of a contrary opinion, but *Pratt* J. after delivering his opinion, did ſo far retract, as to conſent it ſhould be read in that caſe. And in the caſe of the common council-men of *London*, the preſent Chancellor did conſent to diſcharge a rule, that the parties might not be hung up for ever, and there too was an equal diviſion of the court.

But if the party was not intitled to demand an affirmance in this caſe, yet they ſaid it might be done upon their conſent, *conſenſus tollit errorem*, and no injury was done them, if they were willing it ſhould be ſo.

Upon the whole therefore they ſubmitted it to the court, that this was not a proper caſe for the Exchequer Chamber, that it might go by adjournment into Parliament. Or if that method was thought impracticable, then they were willing to make this caſe an exception out of the general rule, *quod judicium redditur in invitum*, by their conſent that the judgment given below ſhould be affirmed.

Whereupon the court took time to conſider of it, and in *Michaelmas* term following *Pratt* C. J. delivered the reſolution of the court.

It was our misfortune the laſt term to differ in opinion, and I find we continue ſtill under that difficulty; ſo that now we are to

conſider, what is to be done upon this diviſion, for the cauſe muſt not be hung up for ever.

By the ſtatute 14 *E.* 3. it is provided, that whereas cauſes have been delayed for difficulty and diviſion in opinions, therefore to remedy the delays occaſioned thereby, there ſhall in every Parliament be choſen a prelate, two earls and two barons, who by good advice of others, are to give judgment; or if they cannot determine it, that then the record ſhall be brought into Parliament, who ſhall make a final accord, and the Judges before whom the cauſe is depending, ſhall proceed to give judgment purſuant to their directions.

But we can find no footſteps for hundreds of years of any ſuch appointment of a prelate, two earls, and two barons. So that it is to no purpoſe to think of putting the parties into that method. But into ſome method we muſt put them, that there be not a defect of juſtice.

Now in the firſt place we are all of opinion, that it is improper to adjourn this cauſe into the Exchequer Chamber. We have cauſed ſtrict ſearch to be made, and can find no inſtances of adjournments upon writs of error; nor can there be any colour for ſuch a practice, it being abſurd for us to aſk the opinions of Judges who have before given judgment in the cauſe.

We are aſked in the next place to adjourn this cauſe into Parliament. As to this we are all of opinion, that we have no power ſo to do. It would be the higheſt preſumption in us, of our own accord to attempt it, without the King's writ. If ſuch an one had been brought us, we might perhaps have gone into ſuch an expedient, but the parties have not thought fit to purchaſe ſuch an one.

N. B. We who were counſel for the Ducheſs, did not think it adviſable to get ſuch a writ: becauſe all that the Lords could have done upon it would be, to direct the King's Bench what judgment to enter, after which a writ of error would lie in Parliament in the common form: ſo we choſe rather to have the judgment affirmed upon us, that we might have it determined at once in the Houſe of Lords. Lill. Ent. 524.

But then the plaintiffs in error move us for an affirmance: as to that you ſee the court is divided, and there can be no rule: but in this caſe, becauſe the party againſt whom it is to be affirmed, is deſirous and willing it ſhould be ſo, we are all of opinion that upon his conſent the judgment of the Common Pleas may be affirmed.

But leſt this be brought in future ages as a precedent of an affirmance upon a diviſion, we direct the officer to make the rule

ſpecial

ſpecial in this caſe, on recital of the difference in opinion amongſt the Judges, and the conſent of the party.

Whereupon I moved on behalf of the Ducheſs, that in regard this was not an affirmance upon the merits, the court would give ſome directions as to the coſts. But they refuſed to do any thing in that, and ſaid, it muſt take the common courſe of an affirmance. But the defendants in error were afraid to take any coſts, whereupon the judgment of affirmance was entered up in common form, but without coſts. And upon a conſultation we were all of opinion, that it ſhould not be a ſpecial entry according to the rule, becauſe then we ſhould lie open to an objection in the Houſe of Lords, that we were ſtriving to reverſe a judgment, which by the record appeared to have been affirmed by our conſent.

Afterwards the 23d, 24th and 25th of *February* 1720. this cauſe was heard in the Houſe of Lords, where all the Judges were ordered to attend, and give their opinions: the Chief Juſtice and *Forteſcue* were for reverſing, and the other ten, who would not ſay that the recoveries were good, were nevertheleſs of opinion, that the Ducheſs could not enter during the life of *Philip*. And the houſe thinking that to be a material objection, affirmed the judgments given in the courts below. *Quære tamen*, for that ſeems to be the weakeſt point in the cauſe; and how it is poſſible to diſtinguiſh between the recoveries and the life of *Philip* I cannot conceive, for if *Philip* may take, then muſt *Charles* have the ſame capacity of taking; and on the other hand, if *Charles* could not take, ſo as to enable him to ſuffer the recoveries, then the ſame objection will go to *Philip* alſo.

Anonymous. In C. B.

Feigning bail, cauſe for the pillory.

TWO people put in bail in feigned names, and becauſe there were no ſuch perſons, they could not be proſecuted for perſonating bail on the ſtatute 21 *Jac.* 1. *c.* 26. So the court ordered them and the attorney to be ſet in the pillory, which was done accordingly.

2

Dominus

Dominus Rex *verſ.* Major' et Alderman' Civit' Carliol.

UPON return to a *mandamus* to reſtore one *Poulter* to the office of capital citizen of *Carliſle*, the caſe was thus:

Where particular powers are lodged in a ſelect number, they cannot ſeparate and act upon a general ſummons of the whole body, but there ought to be a particular ſummons for that purpoſe.

The corporation conſiſts of a mayor, aldermen, bailiffs, and capital citizens, who together make a common council, and have the power of election of capital citizens: the power of amotion is in the mayor and aldermen only, or the major part of them: then the return ſets forth, that ſuch a day the common council was aſſembled, and *Poulter* being ſummoned did not appear, and thereupon the *mayor and aldermen ſic ut praefertur aſſemblat'* made an order for his amotion (for a cauſe allowed to be legal.)

Fazakerley. There ought according to *Bag*'s caſe, 11 *Co.* 99. to be a ſummons to appear at ſuch an aſſembly as has the power of amotion, which is wanting in this caſe. The ſummons was not to meet and execute the power as mayor and aldermen, but to join with others in execution of other powers, which they had as a common council: and when they meet in that capacity, they are to be conſidered as diſtinct perſons from thoſe who upon other occaſions meet as the court of mayor and aldermen only. They cannot, when they come together upon a ſummons to meet only as a common council, divide, and execute other powers. Such clandeſtine proceedings are never to be allowed, for at this rate any man may be tricked out of his freehold. When an alderman is ſummoned to the common council, he may think there are only acts of courſe to be done, and ſo abſent himſelf; when he would not have failed being there, had he apprehended an act of ſo great conſequence was to be done as the depriving a man of his freehold: nay by this means a few may ſo contrive it, as to fall upon this buſineſs at a time when they find others who would oppoſe ſuch arbitrary proceedings may be out of the way. There ought to have been notice of a ſpecial meeting, in order to do this act. *Dav.* 48. *a.* 3 *Bulſt.* 189. 1 *Roll. Rep.* 409.

Bootle contra. There could be no ſpecial ſummons for this purpoſe; becauſe till the aſſembly was met, it could not be known whether *Poulter* would appear or not. As to the caſe in *Bulſt.* that did not appear to be a corporate aſſembly; and *Holt* Chief Juſtice ſaid of it, that it might only be a meeting in their natural capacity, to feaſt or the like. But this appears to be a corporate aſſembly: they are aſſembled in common council. And when they were toge-

ther, why might they not execute the power they had, without the formal diſſolution of that aſſembly and calling a new one?

Chief Juſtice. The powers of the common council, and of the mayor and aldermen, are diſtinct: the common council can do no acts, unleſs aſſembled in that capacity: neither can the mayor and aldermen, unleſs they met only as ſuch, upon a regular ſummons for that purpoſe: as they had diſtinct authorities, they muſt be ſummoned in their diſtinct capacities: here was no ſummons to meet as mayor and aldermen only, the conſequence of which is, that the acts done by them in that diſtinct capacity are void. Conſider how the caſe ſtands; an alderman when he receives a ſummons to appear at the common council, conſiders with himſelf, that they are a great many of them, and probably his ſingle voice will not be wanted, and therefore he ſtays at home: but when he is ſummoned to meet with the mayor and other aldermen only, then, ſays he, there are but twelve of us in all, and therefore my voice and advice (which the others have a right to) may go a great way: beſides, the powers lodged in us as a court of mayor and aldermen are of an higher nature than our other powers; and therefore upon both accounts my preſence may be neceſſary, and I will be ſure to be there. All this is natural enough, and is it then reaſonable the others ſhould proceed to act as mayor and aldermen only, when they come together in common council? What a confuſion would this make in the city of *London*, if when the whole body is got together, they ſhould all of a ſudden draw off into different parties, and execute their diſtinct powers? It weighs nothing with me, that the cauſe of removal happened ſitting that aſſembly, for they ought to have broke up, and ſummoned him again to appear before them in their diſtinct capacity.

Powys Juſtice *accord* as to the main, but doubted, becauſe the offenſe aroſe ſitting that aſſembly.

Eyre Juſtice. The ſummons ought to have been of ſuch an aſſembly only as has power to remove, elſe it may be liable to the inconvenience of ſurprize: not that a ſummons to meet and do any particular act is neceſſary, for that would be endleſs, but only to meet in their diſtinct capacity. Incidental powers are in the whole body only, but yet conſtant experience (and ſo is *Bagg*'s caſe) tells us, that if any ſelect power (which if not affirmatively given would be incident of courſe) is veſted in a ſelect number; that is excluſive of the other part of the corporation. A power of making by-laws is incident to every corporation, but yet in many they are made by a ſelect number.

Forteſcue Juſtice. Being ſummoned to appear at the common council, which includes the mayor and aldermen, he was conſequently ſummoned to appear before the mayor and aldermen, the whole including every part; and upon this foundation it ſeems to me that the removal is well enough.

Afterwards it was ſpoken to by the Solicitor General and Mr. *Willes*, who cited *Braithwaite*'s caſe, 1 *Vent.* 19. 2 *Keb.* 488. where the power of removing a common council-man was lodged in the mayor, and ſuch burgeſſes as had been mayors; and then the return ſets out, that a common council aſſembled ſuch a day, and *Braithwaite* being ſummoned did not appear, whereupon he was the ſame day amoved by the mayor and burgeſſes, as the charter directs.

To this caſe it was anſwered by the Solicitor, That this exception did not appear to have been taken in that caſe, nor did it appear by the report, that the removal was whilſt they were aſſembled as a common council, but only that it was upon the ſame day, which might be upon another ſummons to meet in their diſtinct capacity. That it was a ſtrange caſe, wherein the Judges aſſerted the power of the King and Council to diſfranchiſe members of corporations by their order, and even to pull down the walls of a town; ſo it might be they went upon ſuch an order, and every body knows matters of prerogative went very high at that time: he ſaid no record of that caſe was to be found. *Et per* C. J. I am very glad of it; I can have no regard to any opinion that was given, when Judges were worked up to ſo extravagant a pitch, as to aſſert ſuch doctrine.

Adjournatur. And the laſt day of the term the Chief Juſtice delivered the opinion of the court, that the removal in this caſe was not regular, for there ſhould have been a ſummons for the mayor and aldermen to meet in their diſtinct capacity.

Peremptory *mandamus agard.*

Hoyle *verſ.* Lord Cornwallis. Paſch. 5 Geo. rot. 309.

ON error *e C. B.* the writ of inquiry appeared to be executed on the 15th *June*, which upon looking into the almanack appeared to be *Sunday*, and it was objected by *Reeve*, that this is made void by the 29 *Car.* 2. *c.* 7.

A writ of inquiry cannot be executed on a *Sunday*, and the court is bound to look into the almanack.

Strange

Strange contra. This objection muſt take its riſe from ſome clauſe or other in that ſtatute, for it cannot be pretended that the execution of this writ was void before. At common law things of a much higher nature than this might have been done on a *Sunday.* Before the ſtatute of 5 *Ann. c.* 9. a man might have been taken on an eſcape warrant. *Salk.* 626. And even now proceſs of eccleſiaſtical courts, as citations and the like, may be affixed on a church door, which is a ſervice of thoſe citations. *Ibid.* 625. A fair might be kept on a *Sunday. Cro. Jac.* 485. And the hundred was liable for a robbery. The queſtion therefore is, whether there be any words in the ſtatute to reach this caſe, and I take it, the execution of a writ of inquiry is not ſuch an act, as is, or was deſigned to be made void by that ſtatute. The words are, "Provided alſo, "that no perſon or perſons on the Lord's day *ſhall ſerve or exe-* "*cute* any writ, proceſs, *&c.* but that *the ſervice* of every ſuch "writ ſhall be void to all intents and purpoſes whatſoever; and the "perſon or perſons ſo ſerving or executing the ſame ſhall be as "liable to the ſuit of the party grieved, as if he had done the "ſame without any writ."

Now it is obſervable, that there is a very material variance in the penning of the latter part of this clauſe from the former, for though it at firſt prohibits the ſerving or executing any writ upon a *Sunday*, yet when it comes to limit what effect thoſe proceedings ſhall have, it only makes the ſervice of ſuch writs void; but does not extend to annul the execution of ſuch writs which are not to be ſerved upon the party; and by the latter part, which gives remedy to the party grieved, that word *ſervice* is explained, to extend only to proceſs which is to be ſerved upon the body or goods of a man: now the nature of executing writs of inquiry is not by any ſummons to the party, but only a private execution of a power given to the ſheriff, which is no injury to the party: he is not grieved by the execution of this writ on a *Sunday*, any more than if it were any other day. The ſtatute only makes the ſervice of writs void, but this inquiry can by no means be called a ſervice of any writ, and therefore is not made void by the ſtatute. And it will be no anſwer to ſay, that by uſing the word *ſerve or execute* both in the former part, it is manifeſt the Parliament intended to take in one caſe as well as the other, for this being a ſtatute made in reſtriction of the common law, it is to be conſtrued ſtrictly, and not to be taken by equity.

But if the ſtatute ſhould be thought to extend to this caſe, yet I apprehend the court is confined to judge only upon the record, and cannot take notice that the 15th of *June* was a *Sunday*, unleſs it had been ſpecially aſſigned for error; and that the court will not

pray in aid of the almanack, in order to reverſe a judgment. In 1 *Roll. Abr.* 524. *C.* 3. it is held, that if one of the proclamations on a fine be the 7th of *June*, which is a *Sunday*, yet unleſs it appears on the record to be *Sunday*, the court will not take notice of it, without expreſs averment. And accordingly the conſtant courſe has been to aſſign that matter for error. So 1 *Sid.* 300. If a writ be returnable at a general return, the court is not obliged to take notice what day of the month it is. *Cro. Car.* 53. *Morris* v. *Fletcher.* There the writ was returnable *die lunae prox' poſt quinden' Hil.* and executed 27th of *January*; and the court would not go out of the record, to inform themſelves that the 27th of *January* was after the return of the writ: ſo is 9 *Co.* 66. *Mackally*'s caſe. 1 *Roll. Abr.* 525. *pl.* 14. By the ſtatute of 31 *E.* 3. the ſheriff's turn is required to be held *infra menſem poſt feſtum Paſchae*; the defendant juſtified for an amerciament at a court held 18th of *April.* And though in fact that was within a month after *Eaſter*, yet the court refuſed to look into the almanacks and ſet it right; and then *a fortiori* you will not do it in this caſe, where inſtead of ſupporting the judgment the conſequence will be to overthrow it. And if the proclamation on a fine (which is the act of the court) ſhall not be ſet aſide without a ſpecial aſſignment, ſurely this execution of a writ of inquiry, which is but a miniſterial act, an act done out of court, ſhall not; according to the diſtinction taken in *Mackally's* caſe, where it was held, that though judicial acts done upon a *Sunday* are void, yet miniſterial acts are not.

Reeve replied. The intent of the ſtatute was to prevent all acts, which are proceedings in a cauſe, from being done on a *Sunday.* The words *ſerve and execute* are ſynonymous, ſo that ſervice in the latter part includes execution alſo.

I agree the caſes are as cited, but they have been denied of late years, for now the calendar is looked upon as part of the law of the land. *Salk.* 626.

C. J. By dropping the word *execute* it ſhould ſeem as if no proceſs was made void but ſuch as is to be ſerved upon the party: to affirm a judgment we will look into the almanack, but I think we are not bound to do it to reverſe one.

Adjournatur. And at another day all the court were of opinion, that the execution of the writ on a *Sunday* was void, and that they were bound to take notice of it, without being ſpecially aſſigned for error; and accordingly would have reverſed the judgment, but the counſel deſiring to have time to apply to *C. B.* it went over, and afterwards the Common Pleas was applied to, and refuſed to amend, and I never heard any more of it.

Michaelmas Term

7 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Juſtice.*
Sir Littleton Powys, *Knt.* } *Juſtices.*
Sir Robert Eyre, *Knt.* }
Sir John Forteſcue Aland, *Knt.* }
Sir Robert Raymond, *Knt. Attorney General.*
Sir Philip Yorke, *Knt. Solicitor General.*

Gardner *verſ.* Claxton.

Where the plaintiff in error pleads to the *ſcire facias*, there ſhall be execution if it goes againſt him, but the writ of error ſhall proceed.

STRANGE moved to ſet aſide an execution taken out upon a judgment in a *ſcire facias quare executio non*, becauſe they had aſſigned their errors before: and cited *Heath* v. *Street* in this court, *Trin.* 2 *Geo.* where *Parker* C. J. laid it down as a rule, that if the plaintiff in error comes in at any time before execution, and aſſigns errors, proceedings ought to be ſtayed on the *ſcire facias*, becauſe they have had the effect of it in bringing the party into court.

Upon this it was referred to the maſter, and upon motion for his report *Reeve contra* agreed the caſe of *Heath* v. *Street* as cited, but that it was only an extrajudicial opinion, and argued the delay that would follow, if the plaintiff in error be at liberty to ſpin out the *ſcire facias* to the laſt.

The maſter reported an old rule of court, that if the party pleads to the *ſcire facias*, and it goes againſt him; execution may be ſued out, but that the writ of error ſhall go on notwithſtanding. Whereupon the court in conſideration of the delay eſtabliſhed it as a ſtanding rule for the future, that if upon the return of the *ſcire facias* the plaintiff aſſigns his errors, then all farther proceedings ſhall be ſtayed upon it; but where he chuſes to ſtand out upon pleadings to the *ſcire facias*, execution ſhall go if it be adjudged againſt him.

The caſe of Mayo and Parſons.

What acts of the ſeſſions are removable by *certiorari*, and what not.

BY the ſtatute 12 *Ann. ſt.* 1. *c.* 2. it is provided, That if any malt happens to be burnt after the duty paid, the proprietor may apply to the next quarter-ſeſſions, who are to adjuſt the *quantum*, and give him a certificate, which intitles him to receive back the duty. *Mayo* and *Parſons* were two brewers, and had a great quantity of malt that had paid duty burnt in the late fire at *Wapping*; but the ſeſſions being then very near, they could not remove the rubbiſh ſo as to make an eſtimate of their loſs before the ſeſſions was over. The following ſeſſions they made their application, where the *quantum* of the loſs was adjuſted; but then the entry of the act of ſeſſions goes on, that the juſtices being of opinion, that the juriſdiction was given only to the next quarter-ſeſſions after the fire, and there having one quarter-ſeſſions intervened, therefore they for that reaſon deny the certificate.

Serjeant *Darnall* moved for a *certiorari* to remove theſe proceedings, and cited the caſe of *Limehouſe*, where an entry of a refuſal to proceed on an appeal upon pretence of its being too late was brought up and quaſhed. But Mr. Attorney General ſhewing cauſe againſt the *certiorari* objected, that this was no order of ſeſſions, and a *certiorari* goes only to fetch up their orders: and of this opinion was the court, and denied the *certiorari*; and *Eyre* J. remembered the caſe of the Biſhop of *St. David's*, where an entry that he had prayed a prohibition for ſuch and ſuch reaſons, *et ei non conceditur*, was held to be no judgment, ſo as to be looked into and corrected upon a writ of error.

L. Raym. 539.

Denial of a prohibition no judgment of the court.

Bayly *verſ.* Boorne.

Of the power of a Judge of an inferior court over the proceedings before him.

THE defendant in the beginning of the long vacation was arreſted by proceſs out of the ſheriffs court, and gave bail, and for want of a plea judgment was ſigned. And after ſeveral motions in the court below to ſet it aſide, the plaintiff moved here for a *mandamus*, to compel the Judge to give judgment final upon the inquiry; and a rule being made to ſhew cauſe, the defendant produced an affidavit that he was a perſon unacquainted with the methods of legal proceedings, and that ſoon after the arreſt he applied himſelf to Mr. *Bennet*, a gentleman of the bar, who (taking it to be an arreſt out of a ſuperior court) told him the proceſs could not be returnable till the next term, againſt which he muſt employ an attorney to put in bail, and receive a declaration: under which advice he acquieſced, and heard nothing further of the cauſe, till a little before the term, that notice was given of the execution of a writ of inquiry: and therefore this being a plain ſurprize, he hoped the court would not order the Judge below to give judgment, but let him in to try the merits of the cauſe, upon his propoſal to bring the money recovered (which was conſiderable) into court. To this it was anſwered by the plaintiff's counſel, that there appeared no irregularity on their part; and upon this the queſtion aroſe as to what power the Judge of an inferior court had in caſes of this nature.

And as to that the whole court agreed, that the Judge of an inferior court could not grant a new trial, for this is a power that even in ſuperior courts is not of any great ſtanding, the firſt inſtance of any new trial being in *Stiles*; and beſides, the caſe of an inferior court had the ſame objection to it as there is to granting a new trial after a trial at bar, *viz.* becauſe it will be tried the ſecond time before the ſame Judge.

But they all held clearly, that for matters of irregularity, where the proceedings were contrary to the practice and rules of the court, the Judge of an inferior court might ſet aſide a judgment; but whether he ſhould be allowed to exerciſe his diſcretion, in ſetting aſide judgments, where the plaintiff was regular, was a queſtion they ſaid deſerved conſideration.

But they waived the diſcuſſion of that point, by ſaying there was a middle way in the caſe, which was to inquire into the ſurprize; and intimated to the Judge, that the refuſal of the plaintiff to try the merits, upon having the money brought into court, was

was ſome evidence of fraud: and therefore they gave leave to the Judge to examine, whether there was any fraud or ſurprize, and to ſet aſide the judgment if he found any.

Upon inquiry below, the officers ſwore, that when they arreſted the defendant he aſked them by what proceſs, and they told him it was an action in the ſheriff's court.

This having deſtroyed the pretence of ſurprize, the Judge below refuſed to ſet aſide the judgment.

Between the Pariſhes of Maidſtone *and* Dething.

IT was held well enough in an order of removal, to ſhew a complaint that the party is come into the pariſh of *A.* and is likely to become chargeable, without ſaying farther, *to the ſaid pariſh of* A.

The adjudication need not mention what pariſh the party is likely to become chargeable to.

Dominus Rex *verſ.* Juſtic' de Dorcheſter.

A *Mandamus* iſſued to the juſtices to ſign a poor's rate made by the churchwardens and overſeers. Before the return a motion was made to ſuperſede it, for ſeveral objections to the fairneſs of the rate; and that this would be ſpeedier and better for the poor, than to reſerve the debate of them for a formal return. *Sed per curiam*, The two juſtices are neceſſary to ſign the rate only by way of form, for it is the churchwardens and overſeers that have the power of making it; and whether it be a fair rate or not is proper for the juriſdiction of the ſeſſions, and was never intended for our examination.

B. R. will not meddle with the goodneſs or badneſs of a poor's rate.

The *ſuperſedeas* being denied, the juſtices returned, that they could not allow the rate, it not being a juſt and proper rate: and the court having before given their opinion of this upon the motion, they reſented this uſage ſo far, that they quaſhed the return, and ordered an attachment againſt the juſtices, who thereupon ſubmitted and returned *quod ratam allocavimus.*

Carbonel *verſ.* Davies.

Trin. 6 Geo. rot. 389.

Reference where to the next antecedent, and where not.

CASE upon a promiſſory note, ſet out to be made 2d of *November* 1719. to pay on the 31ſt of *December next*. *Lee* objected that the plaintiff had brought his action before the note was payable, for the word *next* does not refer to the date of the note, but the time the plaintiff is declaring, which was in *Trinity* term, when he is here made to ſay, that at that time the defendant had not paid him a ſum of money, which he was obliged by note to pay in *December* next: and he cited the caſe of an indictment for a forcible entry into lands, *exiſten' liberum ten'tum* of *J. S.* and for want of *tunc*, it was held that the *exiſten'* could not refer to the day of the forcible entry, but only to the exhibiting the indictment, and for that fault it was quaſhed.

Sed per curiam, We muſt take it *ſecundum ſubjectam materiam*, and as a tranſlation of the note, and then it can be no otherwiſe than a note of 2d of *November* 1719. to pay in *December* next, which is next after the date of the note. The plaintiff had judgment.

Dominus Rex *verſ.* Philips.

Hil. 6 Geo. N° 30.

Where the defendant ſets out a bad title to the office, the court will give judgment on the plea, as importing a confeſſion of the uſurpation.

INformation *in natura de quo warranto* for uſurping the office of mayor of *Bodmyn*.

The defendant by his plea makes title under two charters, one 11th of *March* 5 *Eliz.* whereby the inhabitants were incorporated by the name of mayor and burgeſſes, and after appointing who ſhall be the firſt members of the corporation, it goes on and provides for the election of others on their deaths; and as to the mayor it is provided, that on *Michaelmas* day in every year the mayor, burgeſſes and common council, or the major part of them, ſhall aſſemble and nominate two capital burgeſſes, out of whom the inhabitants are to chuſe one to be mayor, who being ſo choſen ſhould take an oath to execute the office of mayor for the next year and till another ſhould be choſen.

The

The other charter was 30th *April* 36 *Eliz.* wherein the Queen reciting the former manner and time of election and the continuance in the office under ſuch election, and reciting further that the corporation had petitioned her, *quatenus* ſhe would alter *modum et tempus eligendi* of the mayor; therefore ſhe confirming all their former rights and privileges, appoints the election to be for the future by the mayor, common council, and town clerk, on the 24th of *September pro uno anno integro tunc proxime ſequen'*. And then he avers, that as well before as ſince the ſecond charter, the uſage has been, for the mayor to hold over till another was choſen, and that he being elected mayor ſerved for a year, and the town clerk being then dead, and no new one choſen, there could be no new election of a mayor; *et eo warranto* he claims to hold the office of mayor till another ſhall be elected and ſworn, and traverſes the uſurpation.

The Attorney for the crown prays *oyer* of the laſt charter, which being ſet out, there appears a further clauſe, whereby the Queen aboliſhes all the former manner *eligendi*, *nominandi et appunctuandi* of the mayor; and then takes iſſue, that ſince the charter of 36 *Eliz.* there has been no ſuch uſage of holding over: which goes down to trial, and is found for the King.

It was now moved in arreſt of judgment, that this was an immaterial iſſue, becauſe it not being a corporation by preſcription, the title to the office muſt depend upon the charter, and not upon any uſage within time of memory; and that this is worſe than moſt caſes of immaterial iſſues, for they are often good if found one way, and bad the other, as *ſolvit ante diem* is good if found for the defendant. But here the finding for the King can neither deſtroy, nor could a verdict for the defendant have eſtabliſhed his right, becauſe his right does not depend on any uſage inconſiſtent with the charter, but muſt ſtand or fall by the charter itſelf. Immaterial iſſue.

And without much argument the court was clear in opinion, that this was an iſſue totally immaterial. But then the queſtion aroſe, what the court ſhould do in this caſe, whether they were to award a repleader, or laying the replication out of the caſe proceed to give judgment on the defendant's plea.

And for a repleader it was argued by Mr. Solicitor General, that the court could not give judgment on the plea, for every judgment muſt be either, 1. On an iſſue in fact, found by verdict. 2. Iſſue in law, on demurrer. 3. *Nil dicit.* Or, 4. Confeſſion. 1. As to the firſt, it is admitted there is no good iſſue in fact, and conſequently no good verdict to found the judgment upon. 2. Here is no

iſſue

iſſue in law, for want of a demurrer. 3. It cannot be by *Nil dicit*, for the defendant has pleaded. 4. The only queſtion is, whether this plea can be taken to be a confeſſion of the uſurpation; and I take it, it cannot, for though an uſurpation is charged, yet it is ſo far from being confeſſed, that he expreſly denies it in his traverſe; and relies upon it that he has a good right: he admits the uſer, but not the uſurpation, the charge upon him is, that he has exerciſed this office without lawful authority; it is true, ſays he, I have exerciſed this office, but I inſiſt that I had a good authority ſo to do; and now will any body ſay, this is a confeſſion of the uſurpation?

But then it is objected, that if the title ſet out is ill in point of law, then the admiſſion of the uſer is a tacit admiſſion of the uſurpation. To this I anſwer, 1. That the title is good in law under the two charters, taking them together. By the firſt charter the mayor being elected by the inhabitants on *Michaelmas-day* is to hold for a year and till another is choſen. The ſecond charter which was made to alter the *tempus et modum eligendi* only, ſays he ſhall be choſen by a ſelect number and upon 24th *September*. But it does not meddle with the right of holding over; on the contrary it expreſly confirms all their former rights and privileges, of which this of holding over was one. And it will be hard to ſay, that an alteration in the manner of *electing* only, ſhall take away the former right which the officer when *elected* had in the office, eſpecially in a point which tends ſo much to the preſervation of the body corporate.

2. But if the plea ſhould be ill in point of law, yet the court cannot give judgment that it is ſo, till it comes properly before them. If they may, then whenever a vicious plea is put in, the court may without the party's anſwer or demurrer give judgment upon it immediately; and that will be the caſe here, for now the replication is out of the caſe, and we ſtand before the court only upon the information and the plea. In 1 *Lev.* 32. *Serjeant* v. *Fairfax* the iſſue was held immaterial, and the defendant's plea a naughty plea, but yet the court did not give judgment upon it, but awarded a repleader.

Pengelly Serjeant *contra*. The defendant in his plea has made no good title to this office, for the ſecond charter is what he muſt ſtand or fall by, and in that there is no proviſion for holding over.

But ſay they, in the firſt charter there is, and that continues in force as to every thing in which it is not altered by the ſubſequent charter.

The force of this depends upon that queſtion, whether the ſecond charter is not the entire rule to go by as to the office of mayor. And that it is, is plain from the clauſe which aboliſhes all the former method of election, and if the former method of election be aboliſhed, ſurely an incidental right under ſuch election will be gone alſo. The right of election is transferred to other perſons, and can there be a duration under an election, when the foundation of that holding over is gone? *Pro uno anno integro* is the ſame as if *tantum* had been added, and the acceptance of the charter is general, without any reſervation of the former right of holding over. 1 *Ven.* 297. 2 *Mod.* 95.

And as the plea is ill, we take it judgment may be given upon it, for he has confeſſed the uſer; and as to the traverſe of the uſurpation, that is ſo immaterial, that in Sir *Peter Delme*'s caſe, and the caſe of *Honiton*, it was held, the crown could not take iſſue upon ſuch a traverſe. Whoever admits a uſer, confeſſes at the ſame time that he is guilty of an uſurpation, unleſs he makes a title to the franchiſe; as in the common caſe of a juſtification in treſpaſs or for words, where it amounts to no juſtification in law, judgment may be given upon the confeſſion. 2 *Roll. Abr.* 98. *pl.* 2. 99. *pl.* 1. 3. *Cro. Eliz.* 228, 214. 22 *Ed.* 4. 46. *b.* *Salk.* 173.

Mr. Solicitor General replied. The corporation could not do any otherwiſe than accept the charter in general, for it cannot be accepted in part, or with qualifications. I agree *tantum* is implied in charters of original creation, but not in charters of confirmation.

Chief Juſtice. We are moved on behalf of the defendant, that we will grant a repleader: that is in other words that we ſhould give this cauſe a further delay, whilſt he is holding over all the while. Now conſider, that if we ſhould grant it, the defendant cannot mend his caſe: for the plea will ſtand, and after the formality of a demurrer we muſt give judgment upon the goodneſs or badneſs of the plea. The Attorney for the crown does not pray a repleader, neither would the granting one do him any good, for we cannot better his caſe, but muſt reſt it upon the demurrer. And therefore as it will anſwer no good purpoſe either way, we certainly will not grant a repleader, if there be a more expeditious way of coming to the end of the cauſe; and I think there is, for if the plea be ill, I am of opinion it amounts to a confeſſion of the uſurpation, and that is warrant enough to ground our judgment upon.

Now the validity of the defendant's title, as he makes it in his plea, depends upon the queſtion, whether the right of holding over

ſubſiſts under the ſecond charter. And I hold it does not; for it is very obſervable, that the ſecond charter where it recites the former, takes expreſs notice of the clauſe for holding over; and then when it comes and aboliſhes all the former method of election, and appoints it to be in another manner, and that the mayor ſhall continue in for a year, it cannot be imagined but that this right of holding over was intended to be aboliſhed alſo. Suppoſe the ſecond charter had ſaid, that the mayor ſhall continue in for three quarters of a year; will any body ſay, that the reſervation of their former privileges ſhould intitle him to hold on for the other quarter under the old charter; I believe no body will think ſo; I think this is not to be diſtinguiſhed from the caſe of an ill juſtification in treſpaſs, and therefore as the plea is ill, and contains no title to the franchiſe, I am of opinion, we may give judgment upon it, as confeſſing an uſurpation.

Powys Juſtice. I am of the ſame opinion, for if we ſhould grant a repleader, I do not ſee how we can have any new light in the cauſe.

Eyre Juſtice. If the defendant's plea had confeſſed the uſurpation, I ſhould think it proper enough to give judgment upon the plea: but I do not think any more is confeſſed by it than the uſer. The ſecond charter it is plain was made only for particular purpoſes in relation to the election, but meddles not with the duration in the office; and therefore I can never agree, that any affirmative words in the charter can take away ſo great a privilege as that of holding over is, and a privilege too that may often ſerve to prevent the extinction of the corporation; eſpecially when it provides that all the former rights of the corporation, not altered by the ſubſequent charter, ſhall ſtill continue. And as to the clauſe of abolition, that is expreſly confined to the authority, form and manner *eligendi*, but not a word of any right *tenendi*.

I think he is not a new mayor abſolutely, but as to the right of holding over it ſubſiſts in him under the former charter; the conſequence of which is, that he has confeſſed no uſurpation, and then no judgment can be given againſt him upon the plea.

Forteſcue Juſtice. The defendant cannot mend his caſe, becauſe the plea is good in form, though not in fact; which is a diſtinction always taken into the doctrine of repleaders: and of this opinion was *Holt* Chief Juſtice, in the caſe of *Jones* v. *Bodinner*, *Salk.* 1. where he ſaid, that if the fact be admitted, there ſhall be no repleader, but a judgment upon the confeſſion.

Here the defendant admits the uſer, and then the uſurpation is a conſequence of law, and that is the reaſon why it is not traverſable. Every juſtification, to make it a perfect one, muſt both confeſs and avoid; and where it does not do the latter, the confeſſion ſtands.

As to the merits of the plea, I think the power of holding over is gone upon the ſecond charter; for the *modus eligendi* takes in all the circumſtances of the election, and the duration in the office is one of thoſe.

Beſides, as the day of election is altered, there can be now no holding over under the old charter, for that only empowers him to do it from *Michaelmas-day*; but then what right has he to hold over from the 24th of *September* till that time? I am of opinion that judgment may be given immediately.

Per curiam, Judgment for the King. And the corporation petitioned for a new charter.

Taylor *verſ.* Dobbins.

Paſch. 6 Geo. rot. 183.

IN caſe upon a promiſſory note, the declaration ran, that the defendant made a note, *et manu ſua propria ſcripſit*. Exception was taken, that ſince the ſtatute he ſhould have ſaid that the defendant ſigned the note, but the court held it well enough, becauſe laid to be wrote with his own hand, and there needs no ſubſcription in that caſe, for it is ſufficient his name is in any part of it. *I J. S. promiſe to pay*, is as good as I promiſe to pay, ſubſcribed *J. S.*

If the note be of the defendant's own writing, it need not be ſaid in the declaration, that he ſigned it.

Mills *verſ.* Bond.

Trin. 6 Geo. rot. 382.

IN debt on a bail-bond, exception was taken, that the original proceſs appeared to be returnable at a day out of term. *Fazakerley* ſaid, they ſhould have pleaded the ſtatute of *Hen.* 6. But the court held it not neceſſary, this being a void proceſs. And the plaintiff prayed leave to diſcontinue.

Writ returnable out of term avoids bail-bond taken on it, and that without plea.

Perry

Perry *verſ.* Edwards.

Paſ. 6 Geo. rot. 83.

A covenant to ſave harmleſs againſt all perſons, extends not to tortious acts: *ſecus* where it is particular againſt the acts of a particular perſon.

ERROR *e C. B.* in an action of covenant, wherein the plaintiff ſets forth a covenant, which recites, that the defendant had ſold a certain quantity of goods to her teſtator, which had been arreſted at *Archangel* by one *Edward Bell*, and therefore the defendant covenants to ſave him harmleſs from any coſts or damages relating to ſuch ſeizure: and then aſſigns for breach, that the ſaid *Edward Bell* having arreſted the ſaid goods *praetextu* of a debt due from the defendant to him, touching which arreſt the teſtator was put to 1500 *l.* expence, which the defendant had neglected to pay.

There were ſeveral pleadings in the cauſe, which are now out of the caſe, the queſtion turning upon the declaration.

To which *Wearg* objected, that the covenant does not extend to tortious acts, for which the plaintiff had a remedy; and therefore the title of *Edward Bell* ought to have been ſet forth, 4 *Co.* 80. *Vaugh.* 118. *Cro. Car.* 443. and that *habens legale titulum* is not enough. 2 *Saund.* 177. 1 *Mod.* 219. 2 *Ven.* 61. *Cro. El.* 828. *All.* 41. *Mar.* 40. Here it is only ſaid *praetextu*, which is not ſo much.

Reeve contra, agreed it to be a general rule, that in theſe caſes the plaintiff muſt ſhew a title in the diſturber; but then it extend only to the caſe of a general covenant, and not where it is particular againſt the acts of particular perſons, for there it takes in even tortious acts. *Cro. El.* 212. *Hob.* 35. 1 *Roll. Abr.* 431. 2 *Lev.* 37.

Et per curiam, This pretence of *Bell*'s being recited in the covenant, ſhews it was meant a ſecurity againſt it in all events; and though it ſhould be tortious, yet being particular, it comes within the difference that has been well taken.

Adjournatur. And *Hil. ſequen'* the plaintiff had judgment, the defendant's counſel declining to argue it.

Hillier *verſ.* Froſt.

THE court at the ſide bar made a rule to amend the return of a *ſcire facias* from *die Veneris in craſtino ſancti Martini* to *die Sabbati*, *Friday* being the feaſt of *St. Martin*; and now *Ketelbey* moved to diſcharge it, becauſe not a proper motion for the ſide bar; nor can the court amend the writ, but the proper way would be to quaſh it. I was counſel in maintenance of the rule, but had little to ſay for it, ſo it was diſcharged; and I moved to quaſh the writ, which was ordered accordingly.

Scire facias, not amendable.

Rex *verſ.* Gwyn Major' de Chriſt-Church.

ON a trial at bar the queſtion was, whether *A. B.* at the time he did a corporate act, was an out burgeſs or not. And to prove he was, the defendant, who had a rule for copies *omnium librorum et recordorum burgi praed'*, produced a copy of a letter fifty years old, and found in one of the corporation cheſts, wherein *A. B.* is mentioned to be of another place: but the court refuſed to hear it read, becauſe not a corporate act within the rule, ſo that a copy is not evidence, but the original ought to be produced.

What copies of corporate acts may be given in evidence.

Webb *verſ.* Thompſon.

IN *Michaelmas 6 Geo.* the plaintiff brought his action, and the defendant put in bail, and in *Hilary* following iſſue was joined, and notice of trial given and countermanded, and the defendant was the ſame term ſurrendered in diſcharge of his bail. He lay all *Eaſter* and *Trinity* term, and in the vacation made his eſcape, upon which the beginning of this term an eſcape warrant iſſued againſt him, which *Short* now moved to ſuperſede, becauſe the plaintiff having ſlept three terms, the defendant was intitled to be diſcharged upon common bail. I oppoſed this, becauſe he had been guilty of an eſcape, and therefore intitled to no favour, but he ought to lie till he has tried it by proviſo. *Et per curiam*, He is not indeed proper to pray a favour, but it would be hard he ſhould lie by till you think fit to try the cauſe; for it is not to be ſuppoſed one who cannot find bail ſhould be able to bring it on by proviſo. And beſides, as ſoon as he is taken upon the eſcape warrant, he will be intitled to his diſcharge by the rules of the court; ſo that to prevent the multiplying vexation and expence, we think proper to ſuperſede the warrant.

Eſcape warrant ſuperſeded, becauſe the party was intitled to be diſcharged at the time of the eſcape.

Gynn *verſ.* Kirby.

Attorney ordered to pay the coſts, where no plaintiff to be found.

THE plaintiff's attorney was ſummoned before Mr. Juſtice *Forteſcue* to produce his client; and the Judge thereupon made an order, that unleſs he was produced in a month, the defendant ſhould by conſent be at liberty to ſign a *non pros.* He did not produce him, and the *non pros.* was ſigned: and upon an affidavit, that we could find no ſuch man as the plaintiff, the court on my motion made a rule upon the attorney to pay the coſts; and afterwards upon an affidavit that they were demanded and unpaid, I moved for an attachment againſt him, which was ordered accordingly.

Between the Pariſhes of Barleycroft *and* Coleoverton in com' Rutland.

Where a certificate man is ſent back, there needs no adjudication of his not gaining a ſettlement during his ſtay; and if it appears the certificate was legally allowed, that ſupplies the want of ſhewing an atteſtation.

ORDER of removal from *B.* to *C.* reciting that the party had fifteen years ſince come with a certificate allowed according to the act of Parliament from *C.* to *B.* and being now actually chargeable, they ſend him back to *C.*

This was moved to be quaſhed: 1. Becauſe they do not ſay that during the fifteen years he gained no ſettlement in *B.* for a certificate-man may gain a ſettlement as well as any other. *Sed non allocatur*, for all that is neceſſary to be ſhewn is the certificate, and that the party is chargeable, and the length of time makes no difference.

Second exception. It is not ſaid the certificate was atteſted, but only that it was allowed. *Ser per curiam*, The atteſtation is by the ſtatute made previous to the allowance, and therefore when they ſay it was allowed according to the act of Parliament, we muſt intend it was atteſted, for otherwiſe it could not be ſo allowed. The order was confirmed.

Reeve *verſ.* Trindal.

Defendant in appeal of murder cannot be bailed after conviction, without conſent of appellant. Comyns 257.

ON the trial of the appeal there were two iſſues. The firſt as to a plea in abatement, where the defendant pleaded that he was not a labourer according to the addition of the writ, but a barber chirurgion; which was found with the defendant. The ſecond was upon his plea over to the felony, where the jury found

him guilty of the murder. And what would be the conſequence upon theſe two verdicts, was a point to have been argued in court. But neither ſide bringing it on for near three years, the defendant now moved to be bailed, and the appellant ſaid he did not oppoſe it. *Sed per curiam*, We cannot do it: he is convicted of murder, and therefore we cannot bail him, unleſs the appellant will actually conſent; which he refuſing to do, the defendant was remanded.

Gally *verſ.* Serjeant Selby. In Canc.

In equity the mortgagor preſents to a living. S. C. Comyns 343.

IT is a rule in equity, that though in the caſe of a mortgage in fee the legal right of preſentation is veſted in the mortgagee; yet they will interrupt that preſentation, and compel the ordinary to inſtitute the clerk of the mortgagor any time before foreclоſure; it not being any part of the profits of the eſtate. 2 *Vern.* 401.

Heath *verſ.* Percival. In Canc.

On a bill to diſcover aſſets, equity can provide for payment of the debt. 1 Will. Rep. 682.

THE defendant's teſtator was partner with Sir *Stephen Evance*; and upon breaking up the partnerſhip it was agreed between them, that all joint bonds by them entered into ſhould be diſcharged by Sir *Stephen* only; who had an allowance made him for that purpoſe.

The plaintiff was a bond creditor of the partners, and ſome time after the diſſolution of the partnerſhip applied himſelf to Sir *Stephen Evance* for the money; upon which they two came to an agreement, that the bond, which before carried 5 *l. per cent.* ſhould for the future ſtand out at 6 *l. per cent.* and ſome intereſt at the rate of 6 *l. per cent.* was paid accordingly.

Thus it ſtood when Sir *Stephen Evance* broke, againſt whom there was a commiſſion of bankruptcy, and the plaintiff came in and had his dividend; and now brings his bill againſt the defendant, who is the ſurviving executor of the other partner, to diſcover aſſets, and compel him to redeem the bond.

The defendant by his anſwer confeſſes aſſets, but relies on the notoriety of the diſſolution of the partnerſhip, and the agreement as to bond creditors, of which the proofs had affected the plaintiff with notice, and that his coming afterwards to an agreement with Sir *Stephen Evance* to let the bond ſtand out on the advance of 1 *l. per cent.* and taking his dividend on the commiſſion, were a ſtrong evidence of the plaintiff's diſcharging his teſtator; and that it was his own

own laches not to take his money, Sir *Stephen* having continued to pay for many years after the partnerſhip expired.

Lord Chancellor. Both parties being now before the court, and no diſpute as to the bond or aſſets; I think it proper to retain the bill, without ſending them to law. As to the agreement between Sir *Stephen Evance* and the defendant's teſtator, that was *res inter alios acta*, which ought not to prejudice the plaintiff, as it will do if it be of any avail, becauſe it tends to leſſen his ſecurity. I do not think the ſubſequent agreement for 1 *l. per cent.* advance has altered the caſe, for the other partner might notwithſtanding have come in and been diſcharged on paying the principal and intereſt at 5 *l. per cent.* Neither does the plaintiff's taking a dividend prejudice his right at all, for that was an advantage to the defendant, by leſſening the debt, ſo that now he will have an allowance for what the plaintiff received upon the dividend.

Let the maſter take an account of what is due for principal and intereſt at the rate of 5 *l. per cent.* and on payment of that, let the bond be delivered up, deducting the money already received upon the dividend.

Leighton *verſ.* Leighton. Ibid.

Perpetual injunction granted after two trials at bar. 1 Will. Rep. 671.

AFTER two verdicts on trials at bar in favour of the plaintiff's title a perpetual injunction was decreed, according to the caſe of Lord *Bath* v. *Sherwin* in the Houſe of Lords; which practice was introduced that the right might be quieted in ejectments, (where at law the party is always at liberty to bring a new one) as it was in real actions where the verdict was final. And this was affirmed in the Houſe of Lords.

N. B. There had been ſeveral country verdicts to the contrary, but the trials at bar were laſt.

Dominus Rex *verſ.* Drew.

Habeas corpus.

DEFENDANT came up on a *habeas corpus* from the *Savoy*, to which it was returned, that for ſeveral years laſt paſt the *African* company have been a body corporate, and retained the defendant in their ſervice, and ſent him to the *Savoy*, to be provided with neceſſaries, till he ſhould imbark for *Africa*, *et haec eſt cauſa*, *&c.* The court diſcharged the defendant for the inſufficiency of the return, and ordered an information againſt the colonel who liſted the men, and the keepers of the *Savoy*.

Poultney

Poultney *verſ.* Holmes.

At niſi prius *in* Middleſex B. R.

THE defendant having a term for years, whereof one year and three quarters was to come, agrees with the plaintiff, that he ſhould have the premiſſes for the remainder of the term, paying to the defendant the ſame rent as was reſerved upon the original leaſe. The plaintiff took poſſeſſion, and now brings treſpaſs againſt the defendant for a re-entry.

If the leſſee reſerves the rent to himſelf on granting over, it is an underleaſe, and not an aſſignment, though he parts with the whole term.

It was objected, that this amounted to an aſſignment of the leaſe, and was therefore void by the ſtatute of frauds and perjuries, not being in writing; to which we who were for the plaintiff anſwered, that it muſt be taken as a leaſe, and not as an aſſignment, becauſe the reſervation was to the leſſee, and not to the original leſſor; and the leſſee might maintain debt for rent upon it, though he could not diſtrain for want of a reverſion; and of this opinion was the Chief Juſtice, and my client obtained a verdict.

Dominus Rex *verſ.* Pattle. Ibid.

THE defendant being owner of ſeveral houſes in *St. Catherine*'s, let the rooms out to ſeveral families: and for this was indicted on the ſtatute about inmates; but the Chief Juſtice ruled it not a caſe within the ſtatute, for the houſe was not a cottage, and all the new buildings about town would be liable to the ſame proſecution, there not being four acres laid to any of them: and he held further, that the proviſo in the ſtatute for market towns would take in this caſe; for in this reſpect, as far as the houſes are contiguous, *Wapping* is part of the town.

What a cottage within the ſtatute 31 *Eliz. c.* 7.

As far as the houſes are contiguous they are part of a market town. *Rex* v. *Crockford, Trin. ſequ.* held ſo of *Enfield.*

Campion *verſ.* Nicholas. Ibid.

THE cargo of the ſhip was loſt by the capture of a *Swediſh* privateer, who carried her into *Gottenburgh:* the maſter ſtaid there three months, to refit the ſhip, and take in new lading; and to prevent the ſeamen from going away, he agreed to pay them ſo much *per* month whilſt they ſtaid there: and in an action for this, the maſter would have diſcharged himſelf, on the rule that freight is the mother of wages, and that none are ever paid while the ſhip

The admiralty law for wages may be ſuperſeded by a ſpecial agreement.

is lading and unlading; which the Chief Juſtice agreed to be the general doctrine: but he held it not ſufficient to controul a ſpecial agreement, as there was in this caſe, and where too there was ſo long a ſtay at *Gottenburgh*.

Teſhmaker *verſ.* Hundred de Edmington in com' Middleſex.

At niſi prius coram King *C. J.* de C. B.

If party is robbed on a *Sunday* going to church, the hundred is liable. S. C. Comyns 345.

THE plaintiff lived a mile from the church, and going thither with his lady in his coach upon a *Sunday*, was robbed; and brought his action againſt the hundred, and recovered; for the ſtatute extends only to the caſe of travelling: but the Chief Juſtice ſaid, if they had been going to make viſits, it might have been otherwiſe.

Dutch *verſ.* Warren.

At Guildhall coram King *C. J.*

On a contract for ſtock the party who has the difference in his hands is receiver of ſo much to the other's uſe.

CASE for money had and received to the plaintiff's uſe. The caſe was, the plaintiff paid money on a promiſe to transfer ſtock at a future day, which not being done the plaintiff brought this action. At the trial the doubt was, whether the plaintiff had brought a proper action, becauſe at the time this money was paid, the plaintiff never intended to have it again; and the promiſe to transfer the ſtock was a ſufficient conſideration for his parting with the money. The Chief Juſtice directed, the court ſhould be moved; and they were all of opinion, that the action was well brought; not for the whole money paid, but the damages in not transferring the ſtock at that time, which was a loſs to the plaintiff, and an advantage to the defendant, who was receiver of the difference money to the uſe of the plaintiff.

Hawkins *verſ.* Perkins.

At Guildhall coram Pratt *C. J.*

Where bail are obliged to give evidence, and where not.

CASE upon a note. The plaintiff called one of the defendant's bail to prove the hand; and whether he was bound to give evidence was the queſtion. The Chief Juſtice ſaid, if he was a ſubſcribing witneſs, he would oblige him; but otherwiſe he would leave him to his liberty.

1 Anonymous.

Anonymous.

Coram King *C. J.* *at* Guildhall.

A Man paid money on a contract for the old ſtock of a company, and the party gave him ſo many ſhares in the additional ſtock. Upon this the other brings his action for the money, as ſo much money had and received to his uſe. And the Chief Juſtice held, it well lay, becauſe the thing contracted for was not delivered: he ſaid it would have been otherwiſe, if the thing contracted for had been delivered, though to a leſs value.

Where money is paid and the thing contracted for not delivered, it is money received to his uſe.

Anonymous. In Canc.

A. Makes his will, and deviſes 300 *l.* to his daughter, provided ſhe married with the conſent of her mother, otherwiſe only 200 *l.* After this in his own life he marries her and gave 200 *l.* with her. And this was held a revocation of the deviſe, ſo as to deprive her of the other 100 *l.*

Marriage portion a revocation of a deviſe.

Rex *verſ.* Major' et Jurat' de Dover.

MANDAMUS teſte 14th of *November*, returnable 28th, was moved to be ſuperſeded, for want of fifteen days between the *teſte* and return: upon this the practice was inquired into, and agreed to be, and ſettled accordingly, that where the party lives forty miles from *London*, there muſt be fourteen days, otherwiſe only eight days, and that one is to be taken incluſive and the other excluſive; ſo that a writ *teſte* 14th may be returnable the 28th.

How many days there ought to be between the *teſte* and return of a *mandamus*. *Vide* Salk. 434, *contra*, but the rule of that Caſe was produced, and it appeared to be fourteen and not fifteen, as expreſſed in the report. It had indeed the words *ad minus*, but yet held, one ſhould be incluſive and the other excluſive.

Williams *verſ.* Fowler.

Mich. 6 Geo. rot. 113.

ERROR of a judgment in *C. B.* in an action upon the caſe againſt the defendant as adminiſtrator of *J. S.* for work and labour done in the inteſtate's time: the defendant pleads, that the inteſtate in his life was indebted to *A. B.* in 21 *l.* for goods ſold and delivered,

Executor may plead an erroneous judgment. Lill. Ent. 253.

delivered, and neglecting to pay in his life, the ſaid *A. B. Michaelmas* 5 *Geo.* impleaded the defendant as adminiſtrator *in placito debiti ſuper mutuat'*, *taliterque proceſſum fuit*, that judgment was given for the plaintiff. Then he pleads another judgment for a debt of the ſame nature, and recovered in the ſame manner; and a third which was for money lent; and a fourth like the two firſt. Then he avers that all theſe were for good and juſt debts, and that he has adminiſtred all the goods to 100 *s.* which are liable to theſe judgments. And hath not aſſets *ultra.*

Demurrer inde et jud' pro defendente, after two ſolemn arguments in *C. B. ubi intratur*, *Hil.* 5 *Geo. rot.* 1587. and error brought in this court.

Reeve pro quer'. Though the debts are averred to be true, yet being recovered in improper actions, they can be no bar to us. The debts are ſtill ſubſiſting as debts upon ſimple contract, and ſo are not pleadable to us. The adminiſtrator if he ſhould be ſued in an action for goods ſold and delivered, could never plead theſe judgments (which are in actions of debt) in bar. In 1 *Ven.* 198. *aſſumpſit* againſt an executor, he pleads four judgments, one whereof was in an action of debt for a principal ſum and intereſt borrowed by the teſtator; and on demurrer it was adjudged for the plaintiff, becauſe no action of debt lay for intereſt: and though the defendant had not taken advantage of it by plea, it was ſaid no admiſſion of his could prejudice the other creditors. In the preſent caſe, if the defendant had made a proper defence, the plaintiffs could never have recovered in thoſe actions.

Wearg contra. That phraſe *placitum debiti ſur mutuat'*, is not confined to money lent only, as *placitum debiti* generally is; for that is the known deſcription of an action of debt, but this is not. When I deliver goods and am not paid, I may properly be ſaid to be a lender of the money which I truſt. Suppoſe the ſeller lends the buyer the money with one hand, and receives it with the other; ſurely that will not deprive him of his action for money lent. It may be there were in the declarations proper counts added to reach theſe demands.

But if *mutuat'* be inconſiſtent, you will reject it, as you do an inconſiſtent *poſtea* under a *ſcilicet*. In this caſe we have done more than we needed, for there was no occaſion to aver the recovery *pro vero et juſto debito*, or even to have ſhewn how it accrued. 1 *Lev.* 200. *Lutw.* 662. The plaintiff might have replied, there was nothing due, and was not driven to his demurrer. *Jones* Sir *William* 91, 92. The caſe in *Ven.* is not at all applicable, for there

1 Sid. 333.

there was no debt which would be a lien upon the executor, but here there is a real debt.

One of theſe judgments is out of the exception, the debt being for money lent, and properly recovered, and that covers all the aſſets, and deſtroys the plaintiff's action; for he muſt avoid ſo many of the judgments, as that it will appear there are aſſets, according to the caſe of *Dee* v. *Edgecomb* in *Vaugh.* But here according to his own reckoning he has avoided but three, and the fourth, which is for more than the aſſets, remains unimpeached.

It was argued a ſecond time by Serjeant *Comyns* for the plaintiff, and Serjeant *Miller* for the defendant.

Serjeant *Comyns*. On a ſpecial *plene adminiſtravit* (as this is) the executor muſt bar us by good judgments, and not by ſuch as are erroneous. 8 *Co.* 133. 3 *Lev.* 141. 9 *Co.* 108, 110. *b. Salk.* 312. Indeed it is otherwiſe in caſes where the adminiſtrator might have pleaded it in abatement, but this is not a matter avoidable by plea, it appearing upon the face of the record. An action of debt it is true will lie upon an executory promiſe, but then the party muſt declare according to the truth.

Suppoſe in an action for money lent the parties had gone to iſſue, and on the trial it had appeared, that the ſame demand was the price of goods ſold and delivered, no doubt but in that caſe the plaintiff would have been nonſuit: and here it will be the ſame thing, ſince that which would have turned him round upon the evidence, appears now upon the record.

There may be a great deal of fraud in allowing this practice, for theſe judgments are entered up immediately, *pendente lite* of another perſon, when if they were to go on in the ordinary way by writ of inquiry, that other perſon perhaps might have got judgment firſt. And if theſe judgments are erroneous, then the executor has the benefit of them in covering ſo much aſſets, and may get rid of them afterwards, when he has ſerved his turn.

Serjeant *Miller contra.* This is at moſt but an improper action, and the whole record not being ſet forth, you will intend there was another count proper to take in the demand. In theſe caſes the true point is, whether there be a juſt debt or not. *Lutw.* 662. 1 *Sid.* 230. 1 *Keb.* 808. *Vaugh.* 94. 1 *Sid.* 333. An erroneous judgment is pleadable, till reverſed. *Cro. El.* 471. Sir *W. Jones* 91.

C. J. Both ſides have gone upon begging a queſtion, for which I think there is no foundation; which is, that theſe judgments are erroneous. For conſider, though the recital of them is, that the defendant was indebted for goods, and impleaded in a *mutuatus*, yet that is more than will appear upon the record of thoſe judgments, which are only common *mutuatus's*. The moſt that the ſpecial ſetting them out amounts to is, to ſhew there was a precedent debt, and that the judgments were not fraudulent; and this is more than the pleader needed have done, for he might have relied upon it, that there were ſuch judgments, without ſhewing the conſideration of them, the want of which ſhould come of the other ſide, and be taken advantage of in an iſſue upon the fraud. Here the executor has done more than he was obliged to do; he has ſhewn that there were ſuch judgments, and leſt you ſhould think theſe were demands ſet up on purpoſe to cover the aſſets, he tells you further that there was a fair and honeſt debt recovered by them. I think the judgment ought to be affirmed. To which *Powys* and *Forteſcue* Juſtices agreed. *Et per Eyre* J. There is no inconvenience in letting executors confeſs judgments, for if there be a precedent debt, all is fair; if none, the party will have them upon the fraud. I think this a good judgment; though if it were erroneous, it might be a bar, for all we have to look to is to ſee it is not fraudulent. Where *intereſt* is damages, debt will not lie, but it is otherwiſe where a ſtated intereſt is fixed at a ſtated rate. The judgment of *C. B.* was affirmed.

Hilary Term

7 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Juſtice.*
Sir Littleton Powys, *Knt.* } *Juſtices.*
Sir Robert Eyre, *Knt.* }
Sir John Forteſcue Aland, *Knt.* }
Sir Robert Raymond, *Knt. Attorney General.*
Sir Philip Yorke, *Knt. Solicitor General.*

Dominus Rex *verſ.* Inhabitantes de Bicham.

Executing the office of collector of the duties on births and burials, gives a ſettlement.

THE ſeſſions ſetting out the fact ſpecially, adjudge the ſettlement of a poor perſon to be at *Bicham*, becauſe when he lived in that pariſh he executed the office of collector of the duties given by the 6 & 7 *W.* 3. *c.* 6. on births and burials.

Serjeant *Darnall* moved to quaſh it, becauſe this was not a pariſh office, and it would be giving the commiſſioners (who are to appoint the collectors) a power to bring what charge they would upon the pariſh: beſides, it was not ſtated in the order, that this was an annual office, as it muſt be to give a ſettlement within the expreſs words of 3 & 4 *W.* & *M. c.* 11.

Reeve contra, cited the caſe, *Hil.* 9 *Ann. between the pariſhes of St. Mary* and *St. Lawrence in Reading*, where it was held that the execution of the office of warden over all the pariſhes in the town of *Reading* (which office was in the nature of that of a tithingman) gave him a ſettlement in that pariſh where he lived.

Et

Et per curiam, The reaſon why the executing offices gives a ſettlement without notice is, becauſe of the notoriety of the thing, of which the Parliament thought it impoſſible but the pariſh ſhould have notice: can any thing be more notorious than this, which is to collect a duty from houſe to houſe? We cannot ſuppoſe a fraud in the commiſſioners, that they would appoint a perſon of no ſubſtance to be collector, only to bring a charge upon the pariſh. It needs not be a pariſh office, but a publick annual office in the pariſh. And as to its not being ſaid that this man executed it for a year, we muſt take it he did ſo, becauſe it appears on looking into the ſtatute that the power given the commiſſioners is to appoint a perſon who ſhall be collector of the duties for a year, and then give in his accounts. It has been held a ſettlement in the caſe of the land-tax, and why not in this? The order was confirmed.

It need not be a *pariſh* office but an annual office in the pariſh.

Shepherd *verſ.* Shorthoſe.

Mich. 7 Geo. rot. 83.

If the probate be loſt, the executor may declare on an exemplification of it.

CASE by the executors of the aſſignee of commiſſioners of bankrupt for goods ſold and delivered by the bankrupt: the defendant prays *oyer* of the letters teſtamentary, which are ſet out, and then demurs. And *Strange* for the defendant objected, that the declaration was of *Trinity* term, when the executor ſays that he brings into court the letters teſtamentary, by which, ſays he, *ſatis liquet* to the court that I am executor of the will, *et inde habere execution'*, *&c.* Whereas upon *oyer* it appears that the inſtrument produced under ſeal of the ordinary does not bear date till *November* following, ſo the objection is, that the executor declares before probate, contrary to all the caſes, where it is held that though he may commence an action, yet he cannot declare in it before probate.

To ſtate the objection fairly, I do admit, that the letters of the ordinary, which are ſet out, do recite that 13 *January* 1718. the will was exhibited, *probatum et approbatum*, which is before the action; but this is not ſufficient, for though the will was exhibited, and though evidence was given to ſatisfy the judge of the execution of it, yet that is what this court can take no notice of, but only the act of the ſpiritual court, that commits the execution of the will. 9 *Co. Henſloe*'s caſe is expreſs, that the teſtament muſt be ſhewn duly proved under the ſeal of the ordinary; and in the caſe of *Clark* v. *Clark in B. R. Hil.* 1 *Geo.* it was laid down by the preſent Lord Chancellor, who delivered the reſolution of the court, that the producing *literas teſtamentarias* was ſufficient, becauſe they

imported the will, with that further circumſtance of its being under ſeal of the ordinary; for unleſs they were ſo under ſeal, it could not *ſatis liquere* to the court, that he was executor.

Sed per curiam: The inſtrument here produced is not the probate, but an exemplification of it; and that ſhewing there was a probate before the action, is ſufficient: this is their conſtant way, when the probate is loſt, for they never grant a ſecond probate, only exemplify the firſt, and thoſe exemplifications have been allowed to be given in evidence. The plaintiff had judgment.

Dominus Rex *verſ.* Buckland.

THE court was moved to deprive one in cuſtody on an *excommunicato capiendo* of the benefit of the rules; but on conſideration and ſearch for precedents they refuſed to do it.

One in cuſtody on *excom' cap'* is to have the benefit of the rules.

Anonymous.

THE mortgagee after the day of payment brought an ejectment, and the court ordered him to ſhew cauſe, why on payment to the leſſor, or bringing into court, principal, intereſt and coſts, proceedings ſhould not be ſtayed: and *Denton*, who moved it, ſaid, it was done often in *C. B.*

Dominus Rex *verſ.* Newton et al'.

BY the ſtatute 1 *Geo. c.* 13. §. 11. it is enacted, that any two juſtices of peace may ſummon any perſon to take the oaths before them; and if they do not appear, then on oath of ſerving ſuch ſummons, the juſtices are to certify the ſame to the quarter ſeſſions, where if the party ſo ſummoned does not appear to take the oaths, he ſhall ſtand convicted of recuſancy. The defendants were juſtices of the peace, and iſſued their ſummons accordingly; but coming afterwards to underſtand, the party was a gentleman of faſhion, and not ſuſpected to be againſt the government; leſt a tranſaction of this nature ſhould be an imputation upon him, they refuſed to give the proſecutor his oath of the ſervice of ſuch ſummons, that the matter might go no further. And now upon motion againſt them for an information, the court declared, that the juſtices had no diſcretionary power to refuſe to put the act in execution, and therefore granted an information againſt them.

Juſtices of peace have no diſcretionary power as to tendring the oaths, when application is made.

Wiar *verſ.* Smith.

Defendant's attorney ordered to give plaintiff copy of proceedings loſt.

THE plaintiff's attorney ſent the iſſue-book to the defendant's, who accepted it and paid for it; but the plaintiff not going on to trial, the other ſide gave him a rule to enter his iſſue, in order to carry down the cauſe by proviſo. And upon an affidavit that the plaintiff's attorney had miſlaid the papers, the court ordered the defendant's attorney to give him a copy of the iſſue, the better to enable him to comply with the rule.

Dunſley *verſ.* Weſtbrowne.

At Guildhall coram Pratt *C. J.* de B. R.

Where the maſter brings treſpaſs *per quod ſervitium amiſit*, the ſervant beaten is no witneſs.

TRESPASS for beating his ſervants, *per quod ſervitium amiſit*; the plaintiff called one of the ſervants to prove the caſe. I objected, that he having a right to bring an action in his own name, it was in effect ſwearing for himſelf, and he muſt be under a byaſs, becauſe what he ſays now upon his oath, may be given in evidence againſt him in his own action. The Chief Juſtice inclined to the objection, ſo the plaintiff ſet him aſide; and in the debate of it the Chief Juſtice put this caſe. A ſailor ſues for wages, and the queſtion turns upon the loſs of the ſhip: no ſailor who has wages due, ſhall be a witneſs as to the ſalvage of the ſhip, becauſe he is concerned in the event of that queſtion.

Sailor no witneſs in action by another for wages, where the queſtion turns upon the loſs of the ſhip.

Anonymous.

Coram Pratt *C. J.* *at* Guildhall.

If the firſt contract with warranty be broke off, the warranty will not extend to a ſubſequent ſale.

THE defendant came to the plaintiff, who was a ſword-cutler, to ſell him a ſecond-hand ſword: and upon his warranting it to be a ſilver hilt, the plaintiff offered him a guinea and half for it; the defendant refuſed to take the money, and thereupon went to ſeveral other ſword-cutlers, but not meeting with any that would give ſo much as the plaintiff, he came back to him, and told him he ſhould have it for the price he offered: the plaintiff upon that, thinking to have it cheaper, refuſed to give the guinea and half, and at laſt beat down the price to 28 *s.* which was paid the defendant for the ſword. Afterwards the plaintiff found that the gripe of it only was ſilver, and the reſt of the hilt was braſs; upon which he brings his action againſt the defendant, and declares upon the warranty of the

hilt's being ſilver, when in fact it was braſs: but not being able to prove a warranty upon the ſecond bargain, he was nonſuit: the Chief Juſtice being of opinion, that the warranty upon the bidding a guinea and half would not extend to this ſale, which was a new and a different contract at a different time. Alſo he ſeemed to be of opinion, that the gripe being ſilver, the plaintiff ſhould have declared ſpecially on a warranty of the reſt of the hilt only, and have ſaid that that part was braſs.

Smith *verſ.* Potter. B. R.

Proceedings in a popular action ſtayed, *quia* brought in *B. R.* and the fact aroſe at Cambridge. Salk. 373.

IN a *qui tam* on 5 *Eliz.* for exerciſing a trade without an apprenticeſhip, *Strange* moved to ſtay the proceedings, becauſe the nominal plaintiff had releaſed, and the fact was laid at *Cambridge*, whereas the juriſdiction of *B. R.* is at laſt ſettled to be reſtrained by the 21 *Jac.* 1. *c.* 4. to actions ariſing in the county where *B. R.* ſits, ſo that if they were to go on to trial, the plaintiff could have no effect of his ſuit. And of this opinion was the court, and they made a rule that proceedings ſhould be ſtayed.

Moore *verſ.* Warren, coram Pratt, } *at* Guildhall.
Holme *verſ.* Barry, coram King, }

If the party who receives a goldſmith's bill tenders it the next day, it is not his loſs if the goldſmith fails. Salk. 442.

THE defendant in each of theſe actions at two of the clock in the afternoon gave the plaintiffs goldſmiths notes in payment, which were tendered the next morning at nine, when the goldſmiths had a quarter of an hour before ſtopt payment. The Chief Juſtices directed the juries, that the loſs ſhould fall on the defendants, there being no laches in the plaintiffs, who had demanded their money as ſoon as was uſual in the courſe of dealing, and that the keeping the notes till the next morning could not be conſtrued a giving new credit to the goldſmiths. And both juries found accordingly. And afterwards between

Turner

Turner et al' *verſ.* Mead et al'.

Coram Pratt, *at* Guildhall.

And the common uſage in tranſacting affairs of this nature is to be chiefly regarded.

THE defendant paid the plaintiffs, who were the ſword-blade company, two goldſmiths notes at three in the afternoon; the plaintiffs ſervant the next morning leaves the notes with the goldſmiths in order to have the money ready for him as he came back a clearing; it being as they proved cuſtomary for the bank and the ſword-blade company to ſend out their notes in the morning, and then call for the money as their ſervant returned in the evening; and the goldſmiths upon receiving the notes always cancelled them, and got the money told out againſt the time it was uſually called for. The notes in this caſe were brought early in the morning, and received, and cancelled: and between four and five in the afternoon the ſervant that left them called again for the money, when the goldſmiths had juſt ſtopt payment: upon which the ſervant takes new notes of the ſame tenor and date with the cancelled ones he left in the morning. And becauſe the plaintiffs had done nothing but what was uſual, in leaving the notes inſtead of taking the money when he firſt called in the morning, the Chief Juſtice directed the jury to find for the plaintiffs, which they did.

Dominus Rex *verſ.* Hall. Ibidem.

What confeſſion of being author of a libel is ſufficient to read it.

IN an information for a libel againſt the doctrine of the Trinity, the witneſs for the crown, who produced the libel, ſwore that it was ſhewn to the defendant, who owned himſelf the author of that book, errors of the preſs and ſome ſmall variations excepted. The counſel for the defendant objected, that this evidence would not intitle Mr. Attorney to read the book, becauſe the confeſſion was not abſolute, and therefore amounted to a denial that he was the author of that identical book. But the Chief Juſtice allowed it to be read, ſaying he would put it upon the defendant to ſhew that there were material variances.

Purret *verſ.* Weeks.

At Taunton *aſſizes*, coram Price, un' Baron' Scaccarii.

Exciſeman to be taxed in the county where he lives.

THE plaintiff was an exciſeman, and lived in the county of *Devon*, and executed his office in ſeveral pariſhes in that county, and alſo in a pariſh that extended into *Somerſetſhire*. And the commiſſioners of that county, apprehending they had a concurrent power with the commiſſioners of *Devon* to tax him for his ſalary, on account that he executed his office in their county, they tax him accordingly, and for want of payment diſtrain. For which treſpaſs was brought; and ruled, that it well lay, for though he rides about to the publick houſes in that county, yet he muſt be ſaid to keep his office in the town where he lives and has his books, and there he was only taxable.

Leeds *verſ.* Power.

How to compel an aſſignment of errors on writs from *Ireland*.

ERROR tam in redditione judicii in an ejectment in *C. B.* in *Ireland*, *quam in affirmatione ejuſdem in B. R.* there.

The beginning of the term I moved for the common rule, that the plaintiff ſhould aſſign his errors, it not being uſual to take out a *ſcire facias* as we do on writs of error from *C. B.* When that rule was out, I moved again, upon an affidavit that we could find no body concerned for the plaintiff in error, and had fixed it up in the office; that therefore we might be at liberty to ſign a *non pros*, elſe if we ſhould be put to ſend the rule over to *Ireland* to be ſerved, the delay would be as great as in the caſe of a *ſcire facias*, and it being a writ of the plaintiff's own ſuing out, he muſt be apprized when was the due time to come in and proſecute it. Whereupon the court made a new rule, that unleſs errors were aſſigned within four days after fixing a new note up in the office, the defendant in error ſhould be at liberty to ſign a *non pros*.

Hill. 8 *Geo. Huxley* v. *Burton*, in an *Iriſh* writ of error I had the ſame rules.

Hill. 11 *Geo. Waters* v. *Ballantine*, I had the ſame rules on my motion.

Within the time errors were aſſigned; and on the arguing *Reeve* objected, that it is an ejectment for lands in the county of *Dublin*, and yet the trial is at the King's courts in the county of the city of *Dublin*.

Strange contra. This court will not take notice that they are diſtinct counties, but rather intend the city to be part of the county. That the county of the city of *Dublin* is the county in which the city of *Dublin* lies. Or if they ſhould, yet the trial may be right, for it runs *poſtea die et loco infra content'*, which *locus infra contentus* may be as well the place within the county of *Dublin*, where the demiſe is laid to be made, as any other.

Or admitting it a trial out of the proper county, yet it is helped by the 16 & 17 *Car.* 2. *c.* 8. which is enacted in *Ireland* by 17 & 18 *Car.* 2. *c.* 12. being a trial by a jury of the proper county, for the award of the *venire* is previous to any mention of the county of the city, and commands the ſheriff of the county, to ſummon twelve men of his county, and then the trial is had by the *juratores unde infra fit mentio.*

If this be not right, there never was a proper trial of any cauſe ariſing in the county of *Dublin*; for the King's courts ſitting in the city of *Dublin*, it is there all the trials of thoſe cauſes are had: juſt as here, where cauſes of *Middleſex* are tried in the ſame place where the King's Bench ſits. We have inſtances in *England* of county cauſes being tried in cities which are counties alſo, as at *Worceſter* where both are tried in the ſame place.

The court ſaid, they muſt intend them diſtinct counties, but as to the other points they went over to be inquired into. And afterwards,

In anſwer to the objection made the laſt term, that the lands lay in the county of *Dublin*, and the trial was in the county of the city of *Dublin*; *Strange* now cited an act of Parliament made in *Ireland* 17 & 18 *Car.* 2. *c.* 20. which appoints the trial of cauſes ariſing in the county of *Dublin* to be at *niſi prius* in the ſame place where the King's courts ſit, in the county of the city of *Dublin.* So the judgment was affirmed.

N. B. There being ſuch an expreſs act of Parliament, I thought it not neceſſary, to put it on the former foot of being a trial by a jury of the proper county, which would have been a ſufficient anſwer: for *Paſch.* 10 *W.* 3. *B. R. Lady Calverly* v. *Sir Richard Leving* in covenant, the caſe was ſent into the county palatine of *Cheſter*, on a local plea of a matter ariſing in the county of the city of *Cheſter:* the *mittimus* to the C. J. was, to award a *venire* to the ſheriff of the county of *Cheſter*, which was done accordingly; and after verdict *pro quer'* moved by Sir *Barth. Shower* in arreſt of judgment, that this is a miſtrial, not aided by the ſtatute of jeofails; being a trial in a wrong county: but the court held it was aided: and that is a ſtronger caſe than this, where it appears the trial was by a jury of the proper county, as it was not in that caſe; and in delivering the reſolution of the court *Holt* C. J. cited *Chew* v. *Brigs* in *B. R.* where he ſaid it had been ſo held likewiſe, and ſo is 1 *Saund.* 246. *Craft* v. *Boite.*

Carth. 448.

Eaſter Term

7 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Juſtice.*
Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Forteſcue Aland, *Knt.*
Sir Robert Raymond, *Knt. Attorney General.*
Sir Philip Yorke, *Knt. Solicitor General.*

Myer *verſ.* Arthur.

THE plaintiff recovered judgment againſt the principal, and took out a *capias ad ſatisfaciendum*, and had a *non eſt inventus* returned: of this judgment error is brought, and two days after the plaintiff ſues out a *ſcire facias* againſt the bail, who now moved to ſtay the proceedings upon the *ſcire facias*, as is done in caſes where pending error the plaintiff brings an action of debt upon the judgment; inſiſting that it was more reaſonable in this caſe, becauſe otherwiſe the bail might loſe the advantage of diſcharging themſelves, by a ſurrender of the principal, which they can do at any time before the return of the ſecond *ſcire facias*. And the court thought it reaſonable, that the proceedings ſhould be ſtayed, on the bail's conſenting, that if the judgment be affirmed, they would ſurrender the principal, or give judgment on the *ſcire facias*.

Proceedings againſt bail ſtayed pending error by the principal.

Trin. 10 *Geo. Tucker v. Waller*, the ſame rule upon my motion.

Cutler

Cutler *verſ.* Goodwin.

Where the plaintiff releaſes part of the damages, he need not releaſe any of the coſts given by the jury.

ERROR of a judgment in *C. B.* in caſe upon ſeveral promiſes; on the inquiry damages are given ſeparately, *et pro miſis et cuſtagiis ad viginti ſolidos*, and then the plaintiff releaſes the damages as to two of the counts, and has judgment for the reſidue with coſts *de incremento.*

Branthwayte Serjeant objected, that the 20 *s.* coſts given by the jury went to the whole, whereas by the releaſe the plaintiff confeſſes he has a cauſe of action but as to part. *Hob.* 168. *Sed per curiam*, All the precedents are ſo, the jury give the ſame coſts in all caſes, and if the defendant is put to any particular expence as to the bad count, the court can make him an allowance in the coſts they give *de incremento.* Judgment affirmed.

Bayly *verſ.* Raby et al'.

The court cannot join declarations againſt ſeparate perſons.

FAZAKERLEY moved, that four ſeveral declarations in treſpaſs againſt four different perſons might be put into one, on an affidavit that the treſpaſs, if any, was committed by all jointly. *Sed per curiam*, We never went ſo far as the caſe of different perſons, but only where the declarations are between the ſame parties. The plaintiff may have the benefit of the other's evidence in his action againſt either, but this will be to deprive him of that.

Noaks *verſ.* Watts.

How pauper ſhall be puniſhed for not going on to trial.

PER curiam, It is ſettled in *C. B.* and we rule it ſo here, that a *pauper* ſhall not pay coſts for not going on to trial, as other plaintiffs do. But if the coſts are taxed, we will prevent his being vexatious, by obliging him to pay them, before he ſhall try the cauſe.

Dominus Rex *verſ.* Revel.

You are a rogue and a liar, ſpoke of a juſtice of peace, indictable.

INDICTMENT againſt the defendant for ſaying of Sir *Edward Lawrence* a juſtice of peace, in the execution of his office, You are a rogue and a liar. And *Wearg* moved after verdict *pro rege*, in arreſt of judgment, that though the juſtice might have committed him for the contempt, yet the words are not indictable,

ſince it is not to be preſumed they would provoke a juſtice of peace to a breach of the peace, which is the reaſon why indictments have been held to lie for words. *Sed per curiam*, The allowing he might be committed, ſhews they were indictable. It is true the juſtice may make himſelf judge, and puniſh him immediately; but ſtill if he thinks proper to proceed leſs ſummarily by way of indictment, he may: the true diſtinction is, that where the words are ſpoke in the preſence of the juſtice, there he may commit; but where it is behind his back, the party can be only indicted for a breach of the peace. Caſes cited, *Salk.* 698. 3 *Mod.* 139. 2 *Show.* 207. 1 *Roll. Rep.* 79. *Regina* v. *Langley*, *Soley*, *Nuns and Legaſſeck.* Judgment *pro rege.*

Sanderſon *verſ.* Clagget.

LIBEL in the ſpiritual court by the archdeacon, for procurations; the defendant who was curate, ſuggeſts that they have never been paid, and that the church for which they are demanded is a rectory impropriate without a vicarage endowed. And having obtained a rule to ſhew cauſe, why there ſhould not go a prohibition; Mr. *Williams* for the archdeacon produced an affidavit, that 6 *s.* 8 *d.* had been conſtantly paid every year, and cited *Davis* 6. where it is ſaid, that the viſitor has the ſame right to procurations, as the parſon has to tithes; for as one inſtructs the laity, ſo the other inſtructs the parſon as to the points of his duty; and that a clergyman can no more preſcribe not to pay procurations, than a layman can preſcribe in a *non decimando* for tithes. *Et per curiam*, That is certainly ſo; of common right procurations are due to the ordinary or archdeacon, and here the ordinary ſuffering the archdeacon to ſue for them before him, we muſt take it they belong in this caſe to the archdeacon; which is made more reaſonable by coupling it with the evidence of payment. Formerly the viſitor demanded a proportion of meat and drink for his refreſhment, when he came abroad to do his duty, and examine the ſtate of the church; afterwards theſe were turned into annual payments of a certain ſum, which is called a procuration, being ſo much given to the viſitor *ad procurandum cibum et potum.* Though there be no vicar endowed, yet the reaſon for theſe payments continues, for the impropriator is obliged to find a curate, and that curate will have as much inſtruction from the archdeacon, as if he was rector of the pariſh, or a vicar endowed.

Suit lies in the ſpiritual court for procurations. 1 Will. Rep. 657.

And as this is a mere eccleſiaſtical right, the ſuit is properly inſtituted before the ordinary. It was never known, that an action was brought for theſe procurations, nor in the caſe of tithes are there any inſtances before the ſtatute of *Edw.* 6.

It was objected, that the libel runs, That time out of mind the archdeacon had this right, and yet it appears the archdeaconry was made within time of memory, and this is to let the ſpiritual court try a preſcription. *Sed per curiam*, We all know what they mean by the phraſe *time out of mind*, which with them goes no farther back than fifty or ſixty years. But if it were a new archdeaconry, why is it not like a new rectory, where tithes are due as before for all the lands within the diſtrict. Here the demand is ſpiritual, and ſo are the perſons, who are bound by the canon law; which being the rule of theſe payments, we are of opinion, that the ſuit below was well inſtituted, and therefore there ought to be no prohibition.

It was formerly denied in Chancery by the Maſter of the Rolls, on debate, and time to adviſe.

Hillier *verſ.* Plympton.

Hil. 7 Geo. rot. 46.

Departure.

ACTION upon the caſe upon ſeveral promiſes; the defendant pleads infancy, the plaintiff replies, it was for neceſſaries, and the defendant rejoins an account ſtated, *quodque ſuperinde praed' querens exoneravit* the defendant. And on demurrer judgment was given for the plaintiff, becauſe the rejoinder was a departure from the plea; or if not, yet *exoneravit* generally will not do, for the party muſt ſhew how he was diſcharged.

He that pleads *exoneravit*, muſt ſhew how.

Onſlow *verſ.* Orchard.

Where the defendants confeſs the treſpaſs, the damages cannot be ſevered.

TRESPASS againſt two, and judgment by default, and ſeparate damages, 20 *l.* as to one, and 1 *d.* as to the other; and ſtayed till further motion, on the authority of *Heydon*'s caſe, that the damages cannot be ſevered, where the treſpaſs is confeſſed. *Trin. ſequen'* the judgment was arreſted. 11 *Co.* 5.

The Mayor of Northampton's caſe.

Libel.

HE ſent Lord *Halifax* a licence to keep a publick houſe, which the court ſaid was a libel in the caſe of a perſon of his quality, and granted an information for it.

Anonymous.

PER curiam, If a man eſcapes, and returns again, and after commits a ſecond eſcape, he cannot be taken up for the firſt eſcape, it being purged by his return. Eſcape purged by return.

Dominus Rex *verſ.* Inhabitantes de Iſlip in com' Oxon.

UPON a ſpecial order of ſeſſions, the caſe was ſtated for the opinion of the court. That *Henry Wilſon* was regularly hired for a year by *Samuel Jones* into the pariſh of *Iſlip*; that during the year he was ſick for ſix days, and incapable of doing any ſervice; that afterwards he went without leave of his maſter to ſee his mother, and ſtaid away four days; and that three days before his year was up he aſked leave of his maſter to go to a ſtatute fair, to be hired, which the maſter refuſed, but the ſervant perſiſting he muſt go, the maſter replied, I am reſolved you ſhall gain no ſettlement in this pariſh, and therefore if you will go, it ſhall be for good and all. No, ſays the other, I will ſerve out the year, and thereupon he went, and never returned during the laſt three days; and when he came to be paid, the maſter deducted for the time he was ſick, and when he went to ſee his mother, which deductions the ſervant agreed to, and the maſter at the ſame time abated 6 *d.* for the laſt three days, which the ſervant refuſed to allow, but the maſter refuſing to pay it, the ſervant took the reſt of his wages. And whether theſe interruptions of the ſervice ſhould defeat the ſettlement in *Iſlip*, was the queſtion; and the ſeſſions adjudged it a ſettlement. Sickneſs or abſence of ſervant for part of the time does not prevent the ſettlement.

It was argued largely by Mr. *Hawkins*, who moved to quaſh the order; and he cited the caſe *between the pariſhes of Pawlet* and *Bernham*, *Mich.* 1 *Geo.* where the maſter and ſervant parted by conſent three weeks before the end of the year, and it was held no ſettlement.

And now *Pratt* C. J. delivered the opinion of the court.

In this caſe here is no doubt but that there was a compleat and perfect hiring for a year. The only queſtion is, whether there has been ſuch a ſervice in purſuance of it, as will give a ſettlement to the party. Three objections have been made at the bar, which it will be proper to take notice of.

1. That

1. That the ſervant being ſick for ſix days, and incapable of ſerving, can never gain a ſettlement, which is to be acquired only by a ſervice for a year; but here ſay they, he did not ſerve for ſix days, and ſo there wants ſo much of a ſervice for a year. This was lightly touched upon at the bar, and ſurely there is little in it; a ſervant that lies thus under the viſitation of the hand of God, which befals him not through his own default, is and muſt be taken to be all the while in the ſervice of his maſter; and if this exception was to be allowed, it might prevent all the ſettlements in the kingdom: it is not to be preſumed, that the ſervant is leſs able to provide for himſelf at the year's end, becauſe he has had a ſlight indiſpoſition during the year; and that preſumption of an ability is the foundation of making it a ſettlement.

2. It was objected that his going to ſee his mother without leave was a deſertion of the ſervice, and the time he ſtaid away takes ſo much off from a compleat ſervice for a year. As to that we are all of opinion, that it will not prevent the ſettlement; it was never the intent of the ſtatute, that if a ſervant happened to ſtay out a night or two, it ſhould avoid the ſettlement; but here the maſter taking him again, has diſpenſed with his non-attendance, ſo there is nothing in that objection.

3. The Third and indeed the moſt conſiderable objection was, that the going away three days before the year was up, and never returning again during the year, is a forfeiture of the ſettlement.

Now though that would *prima facie* be a good objection, yet as this caſe is circumſtanced, we are of opinion it cannot prevail. Conſider how the caſe ſtands with regard to the ſervant. He knew his maſter deſigned to part with him at the year's end, and therefore it was high time for him to look out for another place. To this end he applies in a very proper manner for leave to go to the ſtatute fair, which is a place where in all likelyhood he might provide himſelf, and not be obliged to lie idle all the year, it being uſual for people in the country to go thither to hire their ſervants; the maſter like an unreaſonable man refuſes ſo reaſonable a requeſt, coupling it with a declaration, that the ſervant ſhould gain no ſettlement with him, which is a badge of fraud on the ſide of the maſter that ought not to prevail; as therefore the requeſt was reaſonable, and upon a juſt ground on the ſide of the ſervant, and the refuſal unreaſonable on the ſide of the maſter, we think the ſervant's going afterwards without leave is no forfeiture of his former ſervice, eſpecially if we take in the declaration the ſervant made at that time, that he would ſerve out the year, and his refuſal afterwards

wards to allow the maſter 6 *d.* for the laſt three days, which plainly ſhew that the contract was not diſſolved before the end of the year, as was ſtrongly inſiſted on at the bar.

Theſe are all the exceptions that were taken to this order; we are all of opinion, that they are not ſufficient to overthrow the ſettlement, and conſequently the ſeſſions have done right in ſending him to *Iſlip*, and the order muſt be confirmed.

Woodford *verſ.* Eades et al'.

ON a contract for ſtock between the plaintiff and *J. S.* they each depoſit 200*l.* in the hands of the defendant, and *J. S.* not performing his agreement, the plaintiff ſues for the depoſit, and had judgment on demurrer, and took out a writ of inquiry, and proved his caſe; but the jury, on a notion that the defendant could not pay out the money without conſent of both parties, gave 1 *d.* damages; which was now ſet aſide, the court ſaying, that the rule of not ſetting aſide verdicts for the ſmallneſs of the damages did not extend to this caſe, where the jury miſtook in point of law; and the Chief Juſtice ſaid he knew no reaſon why the court ſhould not interpoſe in the other caſe.

Court ſet aſide verdict for ſmallneſs of damages. *Vide* Salk. 647.

Clare *verſ.* Froſt.

TRESPASS for cutting down the plaintiff's tree. *Strange* moved, and had leave to plead double; *viz.* that the defendant was leſſee of an houſe and the cloſe where the tree ſtood, and having liberty to cut down for repairs, he felled it on that account; and ſecondly, That *J. S.* was owner of an antient mill, to which there was a watercourſe through the ground of the plaintiff, and ſo preſcribe for a right to enter and cleanſe the watercourſe, and that the tree hung over, and the root ſpread ſo into the ſtream, that it ſtopped the water, and ſo juſtify the cutting down.

Two juſtifications allowed to be pleaded.

Edwards *verſ.* Blunt.

PER curiam, After judgment on demurrer, the defendant ſhall not come to arreſt the judgment on return of the inquiry, for an exception that might have been taken on arguing the demurrer. The parties cannot be ſaid to come as *amici cur'*, nor ſhall any body tell us, that the judgment we gave on mature deliberation is wrong; it is otherwiſe indeed in the caſe of judgment by default, for that is

After judgment on demurrer, no motion to arreſt judgment.

not given in ſo ſolemn a manner; or if the fault ariſes on the writ of inquiry or verdict, for there the party could not allege it before. *How* v. *Godfrey*, *Mich.* 4 *Geo.* 2.

Seagood *verſ.* Neale. In Canc.

What writing evidence of agreement within the ſtatute of frauds.

S. Agreed to ſell an eſtate in land to *O.* and wrote to his agent to deliver the title deeds to *O.* he having agreed to diſpoſe of it to him. Afterwards *S.* ſold this eſtate to *D.* who had notice of this tranſaction: *O.* brought a bill againſt *S.* and *D.* inſiſting that the letter brought the caſe out of the ſtatute of frauds and perjuries. But Lord Chancellor held it did not, becauſe the agreement does not appear in it.

Cumber *verſ.* Wane.

Trin. 5 Geo. rot. 173.

Giving a note for 5 *l.* cannot be pleaded as a ſatisfaction for 15 *l.*

ERROR e C. B. in an *indebitatus aſſumpſit* for 15 *l.* The defendant pleads, that he gave the plaintiff a promiſſory note for 5 *l.* in ſatisfaction, and that the plaintiff received it in ſatisfaction. The plaintiff put in an immaterial replication, to which the defendant demurred. And after judgment for the plaintiff, it was objected on error, that the plea was ill, it appearing that the note for 5 *l.* could not be a ſatisfaction for 15 *l.* and that where one contract is to be pleaded in ſatisfaction of another, it ought to be a contract of an higher nature. *Hob.* 68. 2 *Keb.* 804. One bond cannot be pleaded in ſatisfaction of another. 1 *Mod.* 225. 2 *Keb.* 851. Even the actual payment of 5 *l.* would not do, becauſe it is a leſs ſum. 5 *Co.* 117. 1 *Leon.* 19. Much leſs ſhall a note payable at a future day.

Econtra. It was argued, that the plaintiff's demand conſiſting only in damages, it was for his benefit to have it reduced to a certainty, and to have the ſecurity for it made negotiable. A ſtated account may be pleaded in bar of an action of covenant. 4 *Mod.* 43. 1 *Mod.* 261. 1 *Roll. Abr.* 122. Formerly indeed executory promiſes were not held a ſatisfaction, but the contrary has been ſince adjudged. *Raym.* 450. *Salk.* 76. And now it is held that an award before performance is a bar of the former action.

Et per Pratt C. J. (on conſideration) We are all of opinion, that the plea is not good, and therefore the judgment muſt be affirmed: as the plaintiff had a good cauſe of action, it can only be extinguiſhed by a ſatisfaction he agrees to accept; and it is not his

agreement alone that is ſufficient, but it muſt appear to the court to be a reaſonable ſatisfaction; or at leaſt the contrary muſt not appear, as it does in this caſe. If 5 *l.* be (as is admitted) no ſatisfaction for 15 *l.* why is a ſimple contract to pay 5 *l.* a ſatisfaction for another ſimple contract of three times the value? In the caſe of a bond, another has never been allowed to be pleaded in ſatisfaction, without a bettering of the plaintiff's caſe, as by ſhortning the time of payment. Nay in all inſtances the bettering his caſe is not ſufficient, for a bond with ſureties is better than a ſingle bond, and yet that will not be a ſatisfaction. 1 *Brownl.* 47, 71. 2 *Roll. Abr.* 470. The judgment therefore muſt be affirmed.

Then it was alleged, that ſince the time which the court took to adviſe, the defendant in error was dead; and therefore they prayed, that they might enter the judgment *nunc pro tunc*, as was done in the caſe of *Baller* v. *Delander*, *Trin.* 1 *Geo. in B. R.* which was ordered accordingly.

Judgment entered *nunc pro tunc* where the party died pending a *cur' adviſare vult.*

Right *verſ.* Hamond.

IN ejectment, a caſe was made at *Kent* aſſizes; that *Thomas Came*, being tenant for life of the lands in queſtion, remainder to his wife for life, remainder to his own right heirs, 20 *October* 1673. made his will in theſe words: "*Item*, my lands by *Woolwich* my "wife is to enjoy for her life, after her deceaſe of right it goeth to "my daughter *Elizabeth* for ever, provided ſhe hath heirs; if my "ſaid daughter *Elizabeth* ſhould die before her mother, *or* without "heirs, and my ſaid wife *Mary* ſhould marry again and have an "heir male, I bequeath him all my right to that eſtate, not think-"ing I can ſufficiently reward her love; if my ſaid wife marrieth "again, and fails of heir male, after her deceaſe and my daughter, "ſhe failing of heirs, I bequeath 50 *l. per ann.* of that eſtate to my "brother *Joſeph Came*, and to his heirs for ever." And then diſtributed the reſt to other perſons.

Conſtruction of a deviſe.

The deviſor died, and the wife married again, and had iſſue *Thomas Hamond* the defendant, and died. Then *Elizabeth* the daughter died without iſſue. And upon her death the leſſors of the plaintiff claim the eſtate as right heirs of the deviſor, and the defendant claims under the deviſe to the heir male of the deviſor's wife by a ſecond huſband.

Reeve pro quer' argued, that the deviſe to the defendant was void, being of a fee upon a fee. 19 *H.* 8. 8. *Cro. Cro.* 57. For when it was to go to his daughter and her heirs, there could be no limitation over;

over. Indeed 3 *Lev.* 70. ſays it is but a tail; but the difference is, where the limitation is to one who can be heir to the daughter, there it is a fee-tail, becauſe the deviſor muſt know the remainder would be void if the firſt was a fee-ſimple, becauſe the remainder-man would claim as heir to the daughter; but here the defendant is a ſtranger, and cannot be heir to the daughter.

Then it is objected, that the words *ſhe failing of heirs*, ſhew what heirs were meant, and there is a limitation to the uncle, who may be heir to the daughter. But why may not that be conſtrued to be a rent-charge of 50 *l. per ann.* to the brother, and then it can have no influence to turn the daughter's eſtate into a tail; beſides, this is an independent clauſe, and therefore not to controul the conſtruction of the former, according to the caſe in *Dy.* 124.

The defendant cannot take by way of executory deviſe, becauſe it is a contingency on a dying without heir, which is too remote.

But if the deviſe was good, yet the contingencies have never happened. The words are, *if my daughter dies before her mother, or without heirs:* now the words are not to be taken ſtrictly, for then perhaps the iſſue of the daughter may be barred by her death before the mother; but the natural way is, to read it in the copulative, as we have many inſtances. 1 *Ven.* 62. 1 *Leon.* 70. *Pollex.* 645. *Plow.* 286, 289. So that taking it that way, then the mother died firſt, and conſequently the defendant who is to claim on the daughter's dying before the mother, can have no title.

Cheſhyre Serjeant *contra.* I admit, if the firſt words ſtood alone, they would carry a fee to the daughter. But it would be endleſs to cite caſes, where the fulleſt words have been controuled by what has come after, ſo as to make that a deviſe in tail, which otherwiſe would paſs a fee. 1 *Roll. Abr.* 836.

I do not contend, that this is an executory deviſe; it muſt be a contingent remainder. 2 *Saund.* 88. 2 *Cro.* 416. 1 *Saund.* 142. 3 *Co.* 31.

I ſee no reaſon to alter the word *or*; if you do, why may not we read it, *if* ſhe dies before her mother, *or after* without heirs.

Adjournatur. And afterwards *Pratt* C. J. delivered the reſolution of the court.

We are of opinion, that the firſt part of the will is no deviſe, the teſtator only taking notice how the eſtate was ſettled before, that if he made no will his wife would have it for her life, and after her deceaſe of right it would go to his daughter *Elizabeth* for ever. The deviſe therefore to the defendant can be only conſidered as a contingent remainder, or an executory deviſe: as an executory deviſe it cannot be good, for the contingency is too remote; and it is not like the caſe of *Lloyd* v. *Cary*, where the contingency was ſo very near the compaſs of a life, whereas here it is limited on the wife's having no iſſue male by a ſecond huſband, and the daughter failing of heirs. Com. 20.

As a contingent remainder it will not do for want of a particular eſtate, taking the firſt part of the will to be only a declaration how his eſtate was ſettled, and not as a deviſe to the daughter.

Beſides, it appears the contingency never happened, for the daughter did not die before the mother, conſequently the leſſors of the plaintiff, who are both heirs to the daughter and heirs to the deviſor, muſt enter, and therefore the plaintiff muſt have judgment.

Crompton *verſ.* Ward.

Intr. de Hill. 4 Geo. rot. 379.

IN caſe for the eſcape of *Mary Oglethorpe*, the declaration ſet forth, that *Mich.* 2 *Geo.* in *C. B.* the plaintiff recovered judgment againſt her for 232 *l.* which coming into *B. R.* by writ of error, the writ was *non pros* and execution awarded, which judgment is ſtill in force: That 12 *June* 2 *Geo.* the ſaid *Oglethorpe* ſurrendered herſelf to the *Fleet* in diſcharge of her bail, from whence ſhe was removed by *habeas corpus* to *Newgate una cum die et cauſa*, *&c.* where the plaintiff intended to charge her in execution, but the defendants, ſheriff of *Middleſex*, voluntarily permitted her to eſcape. The defendants confeſs the ſaid *Oglethorpe* in their cuſtody, *prout*, *&c.* but ſay that 20 *Junii* a *habeas corpus* was delivered to them, requiring them to bring her to the Chief Juſtice's chamber, upon which they made a warrant to their bailiff commanding him to carry her and bring her ſafe back again, by virtue of which he took her out of *Newgate*, and in carrying her along ſhe was reſcued. The plaintiff demurs. And *Mich.* 5 *Geo.* *Yorke pro quer'* took three exceptions to the manner of pleading,

Qu. Whether a reſcue upon a *habeas corpus* between judgment and execution be pleadable to an action of eſcape?

1. It is improperly pleaded: they ſhould not have ſet forth the fact, but the operation of law reſulting from that fact; therefore

pleading the reſcue from the bailiff is wrong; it ought to have been as from the ſheriff, for the law takes no notice of a bailiff or his acts. In *Cooke*'s caſe, *Hil.* 2 *Geo.* a reſcue was returned on a bill of *Middleſex* in this form: that a *capias ad ſatisfaciendum* iſſued to the ſheriff, who thereupon took the debtor, and the reſcue was made of the priſoner under that arreſt: exception was taken, that this return was only argumentative, becauſe an eſcape of one in cuſtody of the ſheriff is an eſcape for all ſuits wherein he had proceſs. The return indeed was held good, it being *veritas facti*, but the court held it would have been otherwiſe in pleading. 2 *Saund.* 97. If one jointenant pleads that the other *conceſſit* to him, it is ill; for it ſhould have been pleaded as a releaſe, that being the only proper conveyance between jointenants. 2 *Vent.* 149, 260, 266. 3 *Lev.* 290. That was pleaded as a grant, which could only enure as a covenant to ſtand ſeiſed, and the plea was held ill; for it ought to have been pleaded according to the effect of it in law. *Salk.* 8, 274.

2. The defendants ought to have averred, that ſhe was not afterwards found *in balliva ſua*. *Dalt.* 215, 216. *Officina Brevium* 203, 204, 217, 226.

3. The *habeas corpus* requires her to be brought *ſub ſalvo et ſecuro conductu*, but the defendants have not ſhewn that they complied with this direction; and this they ought to do, when they plead a reſcue.

As to the principal point, whether the reſcue here pleaded be a ſufficient excuſe; I muſt obſerve, that ſuch returns have never been favoured, becauſe there may be fraud and combination impoſſible to be diſcovered, and they infer a reflection upon the King, by ſuppoſing an unlawful force, as appears by *Weſtm.* 2. *c.* 39. which recites, that the ſheriffs *multotiens falſum dant reſponſum, mandando quod non potuerunt exequi praeceptum regis propter reſiſtentiam:* and concludes, *Caveant vicecomites de caetero, quod hujuſmodi reſponſio redundat in dedecus domini regis et coronae ſuae.* A return of a reſcue may diſcharge the ſheriff againſt the King, but not againſt the party. Formerly ſuch a return of a reſcue upon *meſne* proceſs was held not pleadable, becauſe the ſheriff might take ſufficient power of the county. *Cro. Eliz.* 868. But ſince in the caſe of *May* v. *Proby*, *Cro. Jac.* 419. 3 *Bulſt.* 198. *Moor* 852. 1 *Roll. Abr.* 807. it has been reſolved, that the arreſt being on *meſne* proceſs, and not upon execution, the ſheriff is not bound to take the *poſſe comitatus*, and therefore reſcous is a good return: but if the priſoner had been once in the gaol, the ſheriff ought to keep him at his peril, and reſcous is no excuſe, for he is to take care that his priſon be ſtrong enough to keep the priſoners. And upon proceſs of execution ſuch a return is no excuſe againſt the King or the party, for the proceſs

proceſs being once executed, the party can have no other: from this caſe I draw two inferences, 1. That when the priſoner is once in gaol, a reſcue thence will be no excuſe to the ſheriff. 1 *Roll. Abr.* 807. *pl.* 3. 33 *H.* 6. 1. 4 *Co.* 84. *a.* is a much ſtronger caſe than the preſent; for there it is held that if rebel ſubjects break the priſon, whereby the priſoners eſcape; this is no excuſe, though it is otherwiſe where it is done by foreign enemies. In 33 *Hen.* 6. 1. the caſe was adjourned, but in 16 *Ed.* 4. 3. it is reſolved by all the Judges; and the marſhal of *B. R.* was forced to get an act of Parliament. 2. The other inference is, that wherever the ſheriff may raiſe the *poſſe*, he is not excuſable for a reſcous, becauſe no power is by intendment able to reſiſt the ſheriff and his *poſſe*. 8 *Hen.* 4. 19. The priſoner here is to be taken to be in actual cuſtody. It cannot be intended the *habeas corpus* was ſued out at the inſtance of the plaintiff, and the ſheriff might have raiſed the *poſſe*; the very words of the writ ſuppoſe it, *ſub ſalvo et ſecuro conductu.* Since it appears therefore, that the ſheriff is liable for the reſcue of one in execution, and for a reſcue out of the priſon where the cuſtody is on *meſne* proceſs only, becauſe in thoſe caſes he may raiſe the *poſſe*, I can ſee no reaſon to diſtinguiſh this caſe from thoſe, and why he may not have the *poſſe* in one as well as in the other.

Bootle contra. As to the firſt objection, we may plead either according to the truth of the fact, or the operation of the law upon that fact, and either way is good. *Palm.* 532. 2. We have confeſſed and avoided the eſcape, and the caſes cited are of returns, where it may be neceſſary to ſay the party was not afterwards to be found in his bailiwick; becauſe according to the latter reſolutions, 1 *Vent.* 269. which denies the ſheriff of *Eſſex*'s caſe in *Hob.* 202. the priſoner may be re-taken, and therefore the return muſt anſwer every poſſibility, which need not be done in pleading. The third objection depends upon the principal point, as to which I muſt obſerve, that it appears *Oglethorpe* was not in execution, for which reaſon caſe is brought, becauſe the 1 *Rich.* 2. *c.* 12. gives debt only for the eſcape of one in execution. 11 *Hen.* 4. 11. *A.* wounds *B.* and being in the cuſtody of the conſtable eſcapes, and then *B.* dies; the conſtable is not anſwerable as for the eſcape of a felon. *Salk.* 614. 2 *Mod. Caſ.* 158. At this day a reſcue upon *meſne* proceſs is a good excuſe, though the former opinions were otherwiſe. 3 *Lev.* 46. 2 *Lev.* 144. and 2 *Cro.* 419. *May* v. *Proby.* There is a great difference between priſoners at large, and thoſe in actual cuſtody; the latter by *Weſtm.* 2. *c.* 11. may be kept in irons, but that extends only to ſuch as are within the walls of the priſon: one in cuſtody out of the priſon is not required to have ſo ſtrict a guard, and therefore, though a reſcue out of the gaol of one in upon *meſne* proceſs makes the ſheriff liable, yet he is not ſo for the reſcue of a perſon

not carried to gaol. On a *habeas corpus* the ſheriff may go out of the way with the priſoner, provided he has him ready at the return of the writ. 3 *Co.* 44. *a.* The ſheriff is obliged to bring out the party in obedience to the King's writ, and he is not compellable to have a ſtricter guard than for a perſon arreſted on *meſne* proceſs: a common *capias* has the words *ſalvo cuſtodias* as well as the *habeas corpus*, ſo no inference can be drawn from the wording of the writ. The reaſon why the ſheriff ſhall raiſe the *poſſe* in caſe of execution doth not hold in this caſe; for the party doth not loſe his debt, nor even his proceſs, for there may be a re-caption: the ſtatute of *Marleberge*, *c.* 21. and *Weſtm.* 1. *c.* 17. *Weſtm.* 2. *c.* 39. are but in affirmance of the common law. 2 *Inſt.* 454. For the ſheriff might have had the *poſſe* before. But though he may, yet he is not obliged to raiſe the *poſſe* upon every occaſion, for it is to be preſumed men will act according to law, and the contrary is never ſuppoſed. 10 *H.* 7. 26. The ſheriff in this caſe might plead a re-caption. *Godb.* 177. And as on a *habeas corpus* he may let the priſoner go out of the way, it ſhews he is only conſidered as a perſon in cuſtody upon *meſne* proceſs: eſcapes being ſo penal, the judges have always made a favourable conſtruction for the officers. 3 *Co.* 44. *a.*

Yorke replied. This is more than a cuſtody on *meſne* proceſs. The demand *tranſit in rem judicatam*; and if the ſheriff is not liable, it will be very eaſy to bring a *habeas corpus* for no other end, but to let the priſoner eſcape.

Chief Juſtice. Here the fact pleaded is true, that ſhe was in the cuſtody of the bailiff, and reſcued from him; and though this amounts in law to the cuſtody of the ſheriff, yet it differs from the caſes of grants, for there the fact was not true: it was not a grant but a releaſe, and a covenant to ſtand ſeiſed, but here the fact is true, and properly pleaded. 2. The defendants have confeſſed and avoided, and therefore it lay upon the plaintiff to ſhew a re-caption in his replication. The third objection likewiſe has nothing in it, for the words of a common *capias* are as ſtrong.

As to the principal point, I cannot ſee how this caſe is diſtinguiſhed from a cuſtody on *meſne* proceſs, where a reſcue is pleadable. The ſheriff was obliged to bring her out, and as ſhe was not in execution, ſhe can only be ſaid to be in upon *meſne* proceſs. *Powys* Juſtice *accord.*

Eyre Juſtice inclined the reſcue was a ſufficient excuſe, and well pleaded.

Forteſcue Juſtice *accord* as to the firſt objection. As to the ſecond I think the plea ſhould have gone on, and ſaid ſhe was not found afterwards; as this ſtands, there may be an intendment that ſhe was. As to the third, it appears ſhe was carried by one ſingle officer, which is certainly a neglect. This is a ſort of middle proceſs after the plaintiff has run a long race; and though the crown may command the ſheriff to bring out his priſoner, yet that is without prejudice to the party: ſhe ought to be conveyed as ſecurely as ſhe is kept, and the ſheriff here may have his remedy againſt the reſcuers. He might before he brought her out have inſiſted on money to pay a guard.

Hil. 7 *Geo.* it was argued a ſecond time, by *Wearg pro quer'*. The queſtion is, whether after judgment and before any charge in execution, a reſcue on the party's being brought out on a *habeas corpus* be a good excuſe for the ſheriff in an action of eſcape.

To prove it no excuſe I ſhall conſider, 1. What are the grounds of this action, taking it as intirely new. 2. Compare it with the reſolutions already in the books. 3. The objections that have been, or may be made.

1. To conſider the foundation of ſuch an action; and that is the damage which the plaintiff has ſuſtained by the neglect of the defendant, which he might have prevented by the uſe of thoſe means that he had in his power; for the law ſuppoſes the *poſſe* to be a ſufficient defence againſt a reſcue, and that no force is able to reſiſt the ſheriff and his *poſſe*. Here is not the act of God, as fire; or any foreign force, as the caſe of enemies, which I admit are excuſes for the ſheriff. 33 *Hen.* 6. 1. 16 *Ed.* 4. 3. 4 *Co.* 84. 1 *Roll. Abr.* 808. The ſheriff may if he pleaſes raiſe the *poſſe* in execution of any proceſs whatſoever. 2 *Inſt.* 193. 3 *Hen.* 7. 1. *Dalt. Sher. cap.* 20. *p.* 104. *cap.* 95. *p.* 354, 5. The plea admits the neglect, and the officer has a fee. 3 *Bulſt.* 212. *Cro. Eliz.* 873. 1 *Vent.* 268. *Winch* 90. 21 *Ed.* 3. 45. *b.*

2. The caſes in the books. I would compare this with the caſe of a reſcue of one taken upon *meſne* proceſs before he is carried to gaol. In Queen *Elizabeth*'s time this queſtion was determined againſt the ſheriff. 3 *Cro.* 868. *Noy* 40. But I admit it has ſince been reſolved otherwiſe. 3 *Bulſt.* 198. And now it is held, that the ſheriff ſhall not be anſwerable. 2 *Cro.* 419. 1 *Roll. Abr.* 807. *D.* 1. 1 *Lev.* 144. 3 *Lev.* 46.

But taking the law according to the latter reſolutions, I ſhall ſhew, that the reaſons they go upon do not affect this caſe.

1. In the caſe of *meſne* proceſs though the ſheriff may, yet he is not bound to raiſe the *poſſe*. *Dalt.* 154. But in this caſe, where the priſoner is conveyed by proceſs after judgment, he ought to take the ſame caution, as if he was upon a *capias ad ſatisfaciendum*, nay a greater, if he obſerves the words of the *habeas corpus*, which require him to convey the priſoner *ſub ſalvo et ſecuro conductu*. Beſides, this is a proceſs not ſo eaſy to be renewed as a *capias ad ſatisfaciendum* or *meſne* proceſs. *Cro. Car.* 240, 255.

2. Another reaſon why reſcue on *meſne* proceſs is an excuſe is, becauſe of the multiplicity of ſuch writs, which are executed at the ſame time in different parts of the county, which makes it impoſſible for the ſheriff to raiſe the *poſſe*; but this is a writ which rarely iſſues, and there is no danger of having many of them to execute at the ſame time.

In the caſe of *meſne* proceſs the plaintiff has the conduct of that, but the defendant may purchaſe the *habeas corpus*.

3. The objections are, 1. That we may have our remedy againſt the reſcuers; but will not they ſend us back again to the ſheriff? Beſides, it is a doubt whether the plaintiff has any remedy againſt the reſcuers; the ſheriff indeed has, and therefore he is not hurt by being ſubjected to our action. *Hutt.* 95. 2 *Cro.* 419. *Cro. El.* 53. The wrong is done by both the ſheriff and the reſcuers. 1 *Roll. Abr.* 698. *B.* 3.

2. Say they, why ſhould the *habeas corpus* put the ſheriff in a worſe condition, when he is obliged to bring her out in obedience to that command? But we ſay, no command of the crown can excuſe him as to the ſubject. *Dyer* 296. *b.* 297. *a.* 1 *Roll. Abr.* 808.

3. It is objected, that this will be a hard caſe upon the ſheriff, who may be ruined by combinations between the plaintiff and defendant. But has not the law furniſhed him with the means to prevent any thing of that nature, by inveſting him with a power to raiſe the *poſſe*?

Upon the whole it appears here has been a neglect, an interruption of the courſe of juſtice, a damage to the plaintiff, for which he ought to have redreſs.

Reeve contra. This is a reſcue of one in cuſtody on *meſne* proceſs only, and not out of the walls of the priſon: for ſhe was brought thence by the King's command, which the ſheriff was bound to obey. And 4 *Co.* 44. it is ſaid, that every thing is to be taken moſt favourably for the officer. In the caſe of a *capias ad ſatisfaciendum*, the reaſon why the ſheriff was liable was, becauſe the party could have no new writ. *Hob.* ſheriff of *Eſſex*'s caſe. Though it is otherwiſe reſolved ſince, that the party himſelf may retake him. 1 *Sid.* 330. 1 *Lev.* 211. 2 *Keb.* 340. 2 *Lev.* 109, 132. 1 *Vent.* 267. *Show.* 177. But what if he is reſcued on *meſne* proceſs, and cannot be re-taken; does not the plaintiff loſe his debt as much as in the caſe of an execution? The reaſons now given for that caſe, are not given in the books.

This is no more than a cuſtody on *meſne* proceſs out of the walls of the priſon; every common *capias* has the words *ſalvo cuſtodias*, ſo no argument can be drawn from thoſe words in the *habeas corpus*. The ſheriff is liable in no caſe for a reſcue, but where he was obliged to take the *poſſe*, which here he was not. If the ſheriff after the party is charged in execution, brings him out on a *habeas corpus*, it is no eſcape if he goes out of the direct way. 3 *Co.* 44. *Moor* 257.

And as to the objection that the plaintiff is no party to the ſuing out the *habeas corpus*; is not that the caſe where there are ſeveral proceſſes charged againſt the ſame perſon, and he is reſcued when taken on one only? And though the warrant is to one bailiff only, yet that is no argument of a neglect, becauſe that bailiff had it in his power to raiſe the *poſſe* without reſorting back to the ſheriff.

Adjournatur. And this term *Pratt* Chief Juſtice delivered the reſolution of the court.

It was admitted at the bar, and is not now to be diſputed, but that on the one hand if the ſheriff arreſts the party by virtue of *meſne* proceſs, and he is reſcued as he carries him to gaol, it will be a good excuſe for the ſheriff. *Cro. Jac.* 419. And on the other hand, if the party be once within the walls of the priſon, though the cuſtody be on *meſne* proceſs only, yet a reſcue from thence by any but common enemies will be no excuſe: if a company of rebels break the priſon, and let out the priſoners, yet the ſheriff is anſwerable; becauſe the law ſuppoſes the ſheriff and his *poſſe* are ſufficient to reſiſt ſuch a force. 1 *Rol. Abr.* 811. 4 *Co.* 84. Theſe, I ſay, are grounds that are not to be diſputed.

The

The caſe at bar is new, and differs from both theſe; but, however, we muſt take it up upon the different reaſons of thoſe caſes. In the caſe of *meſne* proceſs the ſheriff, if he meets the party againſt whom he has ſuch proceſs by accident, and is told it is the defendant, he is bound to arreſt him; and then becauſe it is not ſuppoſed that he has always the *poſſe* along with him, he is excuſed againſt a reſcue. But in the preſent caſe there is no ſuch danger of ſurprize, he has notice before, that ſuch a day he is to bring the party out of priſon, and it is his duty, and ſo he is directed by the writ, to provide for the ſure and ſafe conduct of the party. Here he has not taken that caution, whereby the plaintiff, who had an intereſt, a ſort of property in the body of the priſoner, has ſuſtained a damage. This damage has happened by the neglect of the ſheriff, and therefore he muſt anſwer it to the plaintiff in this action. Judgment *pro quer'*.

Trinity

Trinity Term

7 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Juſtice.*
Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Forteſcue Aland, *Knt.*
Sir Robert Raymond, *Knt. Attorney General.*
Sir Philip Yorke, *Knt. Solicitor General.*

Dominus Rex *verſ.* Butcher.

In order of baſtardy it muſt appear the child was born in the pariſh to which relief is ordered. Salk. 474.

EXCEPTION was taken to an order of baſtardy, that it did not appear the child was born in the pariſh to which the relief is ordered: for it ran, *We* A. *and* B. *two juſtices of the borough of* Lime Regis, *reſiding within the limits where the pariſh church is, within which pariſh the child was born, do,* &c. which is only an averment, that the juſtices reſided in that pariſh where the child was born, but that might not be the ſame pariſh to which relief is given; and for this fault the order was quaſhed.

Paſ. 3 *Geo.* 2. *Rex* v. *Childrens* an order was quaſhed, for not ſhewing the child was born in the pariſh, to which relief was ordered.

Between the Pariſhes of Eaſtwoodhey in com' Hants *and* Weſtwoodhey in com' Berks.

If a ſon grown up removes with his father as part of the family, he gains a new ſettlement with the father; but if the father afterwards removes and leaves him behind, he gains no ſettlement in this laſt place.

UPON appeal from an order of two juſtices for the removal of *Robert Baker*, *Elizabeth* his wife, and *Thomas* their ſon under ſeven years, from the pariſh of *Weſtwoodhey* to the pariſh of *Eaſtwoodhey*, the ſeſſions ſtate the fact ſpecially for the opinion of the court.

That forty years ſince, *Thomas Baker*, the father of this *Robert*, was ſeiſed in fee of a freehold eſtate in the pariſh of *Hampſtead Marſhal* in the county of *Berks*, where he lived till the year 1697. and had this ſon *Robert*, who was at that time eight years old. That in 1697. the father and all his family removed to *Cheveley*, where he rented a tenement of 20 *l. per ann.* for two years. That in 1699. he purchaſed a copyhold eſtate of 11 *l. per ann.* in the pariſh of *Weſtwoodhey*, whither he removed with his ſon and ſervants, and ſerved churchwarden and other pariſh offices, and paid taxes, till 1716. when he purchaſed a cottage of 1 *l.* 12 *s.* 6 *d. per ann.* in *Eaſtwoodhey*, and went and lived upon it till his death; but they ſtate it ſpecially, that *Robert* the ſon ſtaid behind in *Weſtwoodhey*, where he married a wife, and has work'd ever ſince on his own account, and that he is thirty years old. Upon the whole, the ſeſſions confirm the order of the two juſtices for his ſettlement at *Eaſtwoodhey*.

Strange moved to quaſh the order of ſeſſions, for that the ſettlement of *Robert* the ſon is either at *Hampſtead Marſhal*, where he was born, and where he lived till eight years old: *Salk.* 470. Or if it ſhould be carried ſo far, as that he gained a new ſettlement with the father, by removing with him as part of his family, according to the caſe of *Cumner* v. *Milton*, *Salk.* 528. yet that can carry him no farther than *Weſtwoodhey*, which is the laſt place to which he accompanied his father; but let the ſettlement be in either it is not material now, the only queſtion being whether here is any ſettlement in *Eaſtwoodhey*, for which there is no colour.

Mr. *Strode e contra* inſiſted, that let the ſon be of what age he will, he ſhall follow the ſettlement of the father, till he gains one by his own acquiſition; and it appearing he had never done any thing to gain a ſettlement by act of his own, either in *Hampſtead Marſhal*, *Cheveley*, or *Weſtwoodhey*, then he muſt follow the ſettlement of the father as well in *Eaſtwoodhey* as in any of the reſt.

C. J. The queſtion is not where this man and his family are ſettled, but whether there appears a ſettlement of him in *Eaſtwoodhey*. If he had gone thither with his father as part of the family, poſſibly it might have been a ſettlement of him there, but by ſtaying behind he was divided from his father, and therefore there is no colour to make it a ſettlement in *Eaſtwoodhey*. I think his ſettlement is in *Weſtwoodhey*, which was the laſt place where he lived as part of the father's family. To which *Powys* J. agreed. *Et per Eyre* J. He is ſettled at *Weſtwoodhey*, and it is not material how that ſettlement was acquired, whether by his own act, or the act of his father. Suppoſe a maſter has two farms in two pariſhes, and he removes during the year, and leaves the ſervant behind to take care of the farm: ſhall the maſter's gaining a new ſettlement transfer the ſettlement which the ſervant gains by his ſervice? Certainly it ſhall not.

Forteſcue J. *accord'*, and the order was quaſhed.

Jeffry *verſ.* Wood.

Mich. 7 Geo. rot. 264.

THE plaintiff in error aſſigned errors in law, and in fact; and on demurrer for duplicity the queſtion was, what judgment the court ſhould give; and after conſideration they ordered an entry, *quod affirmetur*, according to *Yelv.* 58.

On demurrer to aſſignment of errors the judgment is *quod affirmetur.*

Turton *verſ.* Hayes.

THE plaintiff had been *non pros'd* in a former action for want of a declaration, and now in a ſecond action Serjeant *Whitaker* moved, that the defendant might be diſcharged upon common bail, alleging it to be the practice of *C. B. Sed per curiam*, We know of no ſuch practice here, and think it very unreaſonable; for the plaintiff ſuffers enough by paying coſts in the firſt action, and therefore ought not to be in a worſe condition than before.

After *non pros.* the defendant ſhall find bail to the ſecond action.

Bellew *verſ.* Scott.

Paſ. 6 Geo. rot. 408.

In the caſe of an executor if a *devaſtavit* be returned, there needs no allegation of a converſion to their own uſe.

ERROR, *tam* in the award of execution in a *ſcire facias* againſt executors upon a judgment againſt their teſtator in *C. B.* in *Ireland*, *quam in affirmatione ejuſdem in B. R.* there.

Strange pro querente in errore took ſeveral exceptions, and *inter alia*,

Firſt, The proceedings are againſt a man and his wife as executrix, and the *devaſtavit* is returned in this manner, that goods of their teſtator did come to their hands ſufficient to pay the debt, which they (*i. e.* the huſband and wife) have waſted and converted to their own uſe, which he ſaid a *feme covert* could not do; and cited 1 *Ven.* 12, 24, 33. where in trover it was held ill, to ſay a *feme covert* converted goods to her own uſe; and though this be the caſe of an executrix, who has a particular intereſt in the goods, and may diſpoſe of them as ſhe pleaſes; yet that cannot alter the caſe, becauſe the converſion has quite extinguiſhed that particular intereſt of hers, and can enure only to the benefit of the huſband. 1 *Roll. Abr.* 932. *F.* 1. ſpeaks of the ſheriff's returning, that the huſband had converted, and he ſays that in that caſe the execution ſhall be *de bonis propriis* of the huſband, whereas here it is awarded againſt the goods of them both. *Sed per curiam*, The precedents are ſo as this in the caſe of a *feme* executrix. It is ſufficient to ſay that the wife waſted the goods, without going on to ſpeak of a converſion; and therefore if the expreſſion be not proper, we may reject the *converterunt in uſum ſuum proprium.* In trover it is eſſential, but here it is not. 1 *Roll. Abr.* 930. *pl.* 9. *Cro. Car.* 519. are, that the judgment on ſuch a return ſhall be *de bonis propriis* of both.

The court may award a *certiorari* before errors aſſigned.

Second exception. Upon the writ of error in *B. R.* before errors aſſigned, or diminution alleged, there goes a *certiorari*, by which all the ſeveral proceſſes of execution are brought up and made parcel of the record; whereas the only ground for awarding it can be to verify or falſify an aſſignment of errors, and therefore it ſhould not have iſſued before. *Sed per curiam*, The court may take notice, that the record is imperfect, and award the writ for their own ſatisfaction.

Videtur cur' is no eſſential part of the judgment.

Third exception. In all judgments it muſt appear, the court has fully conſidered of the caſe, and are convinced that the judgment they

they give is right at the time of pronouncing it; and in *Salk.* 402. *Atwood* v. *Burr*, a judgment on demurrer was held erroneous, for want of *quia videtur cur' quod placitum minus ſufficiens in lege exiſtit.* In the caſe at bar it appears the judgment was affirmed before the merits of the caſe had been conſidered, for the record is, *quia videbitur*, in the future tenſe, inſtead of *videtur:* ſo that becauſe *it will appear* at a time to come, that the record is right, therefore do they before that time affirm the judgment.

Sed per curiam, That caſe of *Atwood* v. *Bur* was of an inferior court; neither (as Mr. J. *Eyre* ſaid) is the report of it right; indeed that point was mentioned in *Mich.* 1 *Ann.* but the cauſe hung till *Hil.* 4 *Ann.* when the judgment was reverſed on another point. *Videtur cur'* is no judgment, *Cro. El.* 145. and is implied in the *ideo conſideratum eſt.* There was a caſe in the Exchequer Chamber, where the *quia videtur* was, that the defendant's plea is good, *ideo conſideratum eſt*, that the plaintiff have judgment. But the court ſaid, that if it did not appear to be erroneous, they would not reverſe it merely becauſe a wrong reaſon was given for the judgment. The judgment was affirmed.

Robins *verſ.* Sayward.

Quaker no witneſs to ground an attachment for non-performance of an award.

PER curiam, We cannot ground an attachment for non-performance of an award on the affirmation of a quaker; for though it be in a ſuit between party and party, yet it is a criminal proſecution within the proviſo of the ſtatute 7 & 8 *W.* 3. *c.* 34.

Bromley *verſ.* Frazier.

Indorſor of bill of exchange may be charged, without firſt reſorting to the drawer.

CASE upon a foreign bill of exchange by the indorſee againſt the indorſor, and on general demurrer it was objected, that they had not ſhewn a demand upon the drawer, in whoſe default only it is that the indorſor warrants: and becauſe this was a point unſettled, and on which there are contradictory opinions in *Salk.* 131. and 133. the court took time to conſider of it.

And on the ſecond argument they delivered their opinions, that the declaration was well enough. The deſign of the law of merchants in diſtinguiſhing theſe from all other contracts, by making them aſſignable, was for the convenience of commerce, that they might paſs from hand to hand in the way of trade, in the ſame manner as if they were ſpecie; now to require a demand upon the drawer, will be laying ſuch a clog upon theſe bills, as will deter

every body from taking them: the drawer lives abroad, perhaps in the *Indies*, where the indorſee has no correſpondent to whom he can ſend the bill for a demand, or if he could, yet the delay would be ſo great that no body would meddle with them. Suppoſe it was the caſe of ſeveral indorſements, muſt the laſt indorſee travail round the world before he can fix his action upon the man from whom he received the bill. In common experience every body knows, that the more indorſements a bill has, the greater credit it bears; whereas if thoſe demands were all neceſſary to be made, it muſt naturally diminiſh the value, by how much the more difficult it renders the calling in the money. And as to the notion that has prevailed, that the indorſor warrants only in default of the drawer; there is no colour for it, for every indorſor is in nature of a new drawer, and at *niſi prius* the indorſee is never put to prove the hand of the firſt drawer, where the action is againſt an indorſor. The requiring a proteſt for non-acceptance is not becauſe a proteſt amounts to a demand, for it is no more than a giving notice to the drawer to get his effects out of the hands of the drawee, who by the other's drawing is ſuppoſed to have ſufficient wherewith to ſatisfy the bill.

Upon the whole, we are of opinion, that in the caſe of a foreign bill of exchange, a demand upon the drawer is not neceſſary to make a charge upon the indorſor, but the indorſee has his liberty to reſort to either for the money. Conſequently the plaintiff muſt have judgment.

Dominus Rex *verſ.* Carter.

INDICTMENT for treſpaſs before juſtices of peace, and excepted that it did not appear they had any juriſdiction, for want of *necnon ad diverſas felonias tranſgreſſiones et alia malefacta in comitatu praedicto perpetrata audiendum et terminandum aſſign'*, for theſe words are in all the commiſſions ever ſince 18 *Edw.* 3. and the opinions have been, that without that clauſe the juſtices as juſtices cannot hear and determine. *Lamb. Juſt.* 46, 47. *Cro. Jac.* 633. 1 *Ven.* 33. 2 *Keb.* 160. 2 *R.* 3. 9.

Hil. 10 *Geo. Rex* v. *Straw.* Another quaſhed on the authority of this caſe without debate.

Et per curiam, The indictment muſt be quaſhed. At firſt the juſtices were only conſervators of the peace, and the ſubſequent power to hear and determine given by the ſtatutes 18 and 34 *E.* 3. is only, that by commiſſion they may have ſuch a power. The commiſſion of the peace appears to have been altered into the preſent form immediately after making thoſe ſtatutes, which ſhews the opinion of the King's council at that time. *Lambart* ſays, that *they*

ſhall have power, which muſt be underſtood *by commiſſion*. As therefore this is not a proceeding upon their common law juriſdiction, but a juriſdiction given by ſtatute; whenever they hold ſuch pleas, they muſt ſhew an appointment to hear and determine, and we cannot intend that they have ſuch a power.

Everett *verſ.* Gery.

Where error is not brought till it is too late for the bail to ſurrender, the court will not ſtay proceedings. *Trin.* 10 *Geo. Alridge* v. *Snowden*, they did not move till both *ſci. fac.* were out and the rules upon them, and the court held they came too late.

ON the return of the ſecond *ſcire facias* againſt bail, a four days rule was given, and on the fourth day the principal brings error, and Mr. *Wearg* thereupon moved to ſtay proceedings againſt the bail, pending the writ of error; and cited *Myer* v. *Arthur*, *ante* 419. and *Church* v. *Throgmorton* in the Houſe of Lords, where the Houſe threatned to commit the attorney, for proceeding againſt the bail pending error in Parliament.

As to the firſt caſe, the court ſaid, it differed, for there the bail came in time, while they might ſurrender the principal; which they cannot do here, after the return of the ſecond *ſcire facias*, at which time no writ of error was brought. And as to the caſe in the Houſe of Lords, it was there agreed, that the court below could not reſtrain them; but the Lords ſaid they expected more reſpect. *Curia.* We can make no rule.

Dominus Rex *verſ.* Landen.

Conviction of forcible entry in the preterperfect tenſe, ill.

A Conviction of forcible entry was moved to be quaſhed, becauſe taken before juſtices *ad pacem in comitatu praedicto conſervandam aſſignatis*, without ſaying *pro comitatu*. *Salk.* 474. *Sed per curiam*, Let it be quaſhed for another fault, that it is in the preterperfect tenſe *acceſſimus et vidimus*, whereas it ſhould have been in the preſent tenſe.

Dominus Rex *verſ.* Stapleton.

Practice.

STRANGE moved, that the defendant who was convicted for a miſdemeanor, and lay in execution for the fine, might aſſign errors by attorney, to ſave the charge of being brought up; the clerks ſaying it could not be otherwiſe without leave of the court. *Curia.* It is in our diſcretion, let it be ſo.

Watkins *verſ.* Parry.

In caſe of bail bond the arreſt of the principal is not traverſable.

DEBT upon a bail bond, the defendant traverſed the arreſt of the principal; and on demurrer judgment was given for the plaintiff; for otherwiſe this will be a way to avoid all bail bonds that are civilly taken, without expoſing the party by an arreſt.

Dominus Rex *verſ.* Barber.

On attachment, party not bound to anſwer what may convict him of another offence.

HE preſented a petition to the common council of *London*, reflecting upon one of the aldermen, and uſed contemptuous words of this court at the ſame time. For the petition the court granted an information againſt him and thoſe who ſigned it, and for the contempt, an attachment.

The proſecutor in his interrogatories aſks him, If *he* did not preſent the petition, and uſe ſuch and ſuch words. And now the defendant moved, that the interrogatory, as to preſenting, might be ſtruck out, becauſe it is making him accuſe himſelf of that which will convict him of the libel. *Et per curiam*, He is not obliged to anſwer it; you may aſk him whether, when the petition was preſented, he did not ſay ſo and ſo; therefore let that part of the interrogatory be ſtruck out.

N. B. This proſecution went no further, the act of grace interpoſing.

N. B. I drew them at firſt as the court now ſettled them, but that queſtion was put in after they went from me, though I cautioned the attorney againſt it.

Dominus Rex *verſ.* Clarkſon et al'.

On a *habeas corpus* the court will make no other order as to the party, but to ſee he is under no illegal reſtraint.

DIBLEY pretending to have married Mrs. *Turberville*, a lady of fortune, took out a *habeas corpus* directed to her guardians, commanding them to bring her into court. To this writ I drew a return, that by her mother's will ſhe was committed to the care of Mrs. *Clarkſon*, who had put her out to ſchool to the other defendant, where ſhe had continued ever ſince with her own liking, and with the approbation of her guardian; and that ſhe now remains there of her own accord, under no reſtraint: *et nulla alia eſt cauſa, &c.*

When ſhe was brought into court, and the return had been read, the Chief Juſtice aſked her, if ſhe deſired to be taken out of the hands

hands of the perſons ſhe lived with, and go with *Dibley?* She denied him to be her huſband, and deſired ſhe might continue with her guardians. *Et per curiam*, We have nothing to do to order her to go with *Dibley*, but only to ſee that ſhe is under no illegal reſtraint: all we can do is, to declare that ſhe is at her liberty to go where ſhe pleaſes; but leſt this writ be made uſe of by *Dibley* as a means to get her abroad, and ſeize her, (as I told the court we had reaſon to apprehend) we will order our tipſtaff to wait upon her home to her guardians; and ſo it was done in lady *Harriot Berkley*'s caſe, 3*d Vol. State Trials* 78.

Power *verſ.* Jones.

THE defendant brought a writ of error *coram vobis*, and aſſigned infancy and appearance *per* attorney. *Strange* moved, that the attorney might be obliged to ſet it right, and cited *Goodright* v. *Right*, and *Stratton* v. *Burgiſs*. But the court ſaid they could not do it in this caſe, becauſe here was no expreſs undertaking to appear, as there was in thoſe caſes; if there had, the court would oblige the attorney to do it in a proper manner.

Appearance of infant by attorney, not amendable. Ante 25, 114.

Buſby *verſ.* Greenſlate.

At niſi prius *in* Middleſex coram Pratt *C. J.*

IN ejectment the Chief Juſtice ruled this caſe. *A.* ſurrendered a copyhold eſtate to the uſe of his will, and then deviſed it to *B.* for life, and after his deceaſe to the heirs of his body. *B.* died after making the will; and it was held, that his heir could take nothing, for it is a deviſe in tail to *B.* and *his heirs* are words of limitation; and then *B.* dying in the life of the deviſor, it is the ſame caſe with *Fuller* v. *Fuller* in *Cro. El.* and *Goodright* v. *Right*. And the Chief Juſtice ſaid, it made no difference, that thoſe caſes were of freehold lands, and this of copyhold where the deviſee was living at the time of the ſurrender.

Where the deviſee of copyhold dies after the ſurrender and before the death of the deviſor, the deviſe is void.

In this caſe a perſon, who had ſold the inheritance without any covenant for good title or warranty, was allowed to be a witneſs, to prove the title of the vendee.

Vendor witneſs as to title, where no covenant for warranty, &c.

Jocelyn *verſ.* Hawkins.

At Guildhall, coram Pratt.

In contracts for ſtock the computation muſt be by lunar months.

THE contract was to deliver ſtock one month after; the tender was according to the calendar month. But the Chief Juſtice ruled it muſt be a lunar month, though we called a great many witneſſes to prove the courſe of the alley to be to reckon according to calendar months. So my client was called. *Vide* 4 *Mod.* 185.

Anonymous.

At Niſi prius, coram Pratt *Chief Juſtice, in* Middleſex.

Action againſt a conſtable not confined to the proper county, where he does not act in execution of his office.

TRESPASS and aſſault. On the evidence it appeared the defendant was a conſtable, and lived at *Dover*, and that being ordered to take the plaintiff and carry him before the mayor, he executed his warrant, and the mayor diſcharged the plaintiff. Soon after which a diſpute happening between the plaintiff and the defendant, the defendant beat the plaintiff, for which this action was brought.

For the defendant they inſiſted, that he being a conſtable, they ſhould have brought the action in the proper county, according to the ſtatute 21 *Jac.* 1. *Sed per Pratt* Chief Juſtice, That is only where it is for a matter relating to the execution of his office; but if after his authority is expired, he abuſes the party; or if he meets a man and knocks him down, he may be ſued for it as all other people may.

Dominus Rex *verſ.* Jeffries. Ibidem.

Evidence.

KEBLE's ſtatutes and *Raſtal*'s differed, and they who were for adhering to *Keble* proved that they had examined him with the Parliament roll. The Chief Juſtice ruled it was enough, and *Keble* was read.

Sir

Sir Harry Peachy *verſ.* The Duke of Somerſet. In Canc'.

THE plaintiff brought his bill to be relieved againſt a forfeiture of his copyhold by making leaſes contrary to the cuſtom of the manor without licence of the lord, felling timber, digging ſtones, and grubbing up hedges; offering to make a recompence. And on the pleadings the caſe was this: Sir *Harry* being ſeiſed of a copyhold eſtate of inheritance of 90 *l. per annum*, held of the manor of *Petworth*, of which the Duke of *Somerſet* is lord, made a leaſe of part of it for ſeven years without licence at 13 *l. per annum.* The Duke upon this brings an ejectment againſt all the plaintiff's copyhold, which occaſioned the plaintiff to bring a bill in his own and his ſon an infant's name for relief. The Duke in his anſwer inſiſting on other cauſes of forfeiture, beſides the making the leaſe without licence, Sir *Harry* brought a ſupplemental bill for diſcovery and relief againſt thoſe other forfeitures: upon the plaintiff's giving judgment in ejectment ſubject to the order of the court, an injunction was granted, and now upon the hearing the caſe came out to be this.

No relief againſt a voluntary forfeiture of copyhold eſtate.

Upon Sir *Harry*'s marriage in 1693, all the copyhold lands were ſurrendered to the uſe of Sir *Harry* for life, with remainder to the firſt and every other ſon in tail male, in purſuance of an agreement before marriage for that purpoſe, but no admittance was ever taken upon that ſurrender. Before Sir *Harry* came into poſſeſſion, there had been a quarry of ſtone in the freehold adjoining to the copyhold, and during Sir *Harry*'s time it was worked in the copyhold; but whether it was firſt opened in the copyhold in the plaintiff's time did not appear. The avenue to the plaintiff's houſe, which conſiſted both of freehold and copyhold, was planted with timber trees by the plaintiff's father; the plaintiff had topped thoſe trees that were on the copyhold part of the avenue, by which from timber they were become pollards. There were ſeveral hedges and boundaries of lands upon the copyhold, which the plaintiff had grubbed up and deſtroyed; but whether they are boundaries between copyhold and freehold, or only between one part and another of the copyhold, did not appear. And in the year 1714, the plaintiff, as before mentioned, let part of the copyhold for ſeven years, without licence, or any cuſtom of the manor to warrant it.

Upon this it came in queſtion, whether any, and which of theſe ſeveral acts are forfeitures at law? And if ſo, whether any, and which of them are relievable in equity? And if not, whether the ſon's caſe is to be diſtinguiſhed from the father's.

1. Whether theſe are forfeitures at law? Which were of four ſorts: the digging the quarry, the topping the timber trees, the deſtroying the boundaries, and making the leaſe without licence.

As to the quarry the plaintiff's counſel inſiſted, it was opened even upon the copyhold in his father's time, and ſo purged by the admittance; and his digging in it ſince was but like the caſe of leſſee who may dig in quarries and mines that were open at the time of his leaſe, though he cannot upon any new ones.

As to the topping of timber trees, which the plaintiff inſiſted was done only for the uniformity of his walk, and without deſign to injure the lord, It was anſwered that it was voluntary waſte, and the motives for doing it are not material to the lord.

As to the deſtroying the fences, a caſe was cited out of *Litt. Rep.* 264, *&c.* where grubbing up the fences and removing the boundaries upon copyholds were held to be forfeitures, without diſtinguiſhing between the outward boundaries and thoſe within the copyhold, as it tends to the deſtroying the evidences relating to the lord's intereſt in the eſtate. And ſaid it is on this foundation laid down 1 *Inſt.* 53. that though a tenant might cut down wood to repair fences as he found them, yet not to make new fences.

As to the making the leaſe without licence, it was acknowledged on allſides to be a forfeiture at law.

2. The next queſtion was, whether ſuppoſing all theſe to be forfeitures, relief was proper in this court, either upon the general caſe of theſe ſort of forfeitures, or any particular equitable circumſtances that may be in the preſent caſe.

For the particular equitable circumſtances of this caſe, one was, that the ſteward's deputy ingroſſed and was a witneſs to the leaſe. This was compared to the lord's being privy to or witneſs to ſuch leaſe, which would be held in equity as a permiſſion or kind of licence; and it has been held, that licence granted by a deputy ſteward was good. But anſwered, that this rather aggravated the injury, by making the lord's ſervant a party in the confederacy to injure him.

Another circumſtance was the plaintiff's not having notice of this cuſtom. But this is not material, for the tenant comes in under the cuſtoms of the manor, and is bound to take notice of them; and beſides, this is common law.

But if thoſe circumſtances were not ſufficient to ground a relief upon, whether the general nature of thoſe forfeitures will not admit of relief.

In favour of the plaintiff it was argued, that it is a ſort of maxim that all forfeitures are odious. That copyholds are now become a more fixed and eſtabliſhed eſtate than they were formerly, and the law itſelf has been altering theſe hundred years very much in their favour; and therefore a court of equity ought to go as much in their favour, to keep them out of that vaſſalage and ſubjection which the original nature of their eſtates laid them under, which their preſent fixed condition ſeems inconſiſtent with. That the forfeitures are intended only to ſecure the lord's rents and ſervices, and therefore very proper for a court of equity to interpoſe and prevent his having more than that ſecurity. And this is agreeable to the common caſes of relief againſt the penalty of a bond, and upon mortgages, and conditions of re-entry on non-payment of a rent, and *nomine poenae*: in which caſes this court will not allow the parties to take any other advantage of the forfeitures, than what is neceſſary to ſatisfy the original intent of the agreement. The law has annexed theſe conditions in the caſe of copyholds inſtead of the parties; but as it had ſomething elſe in view by them, than the gaining the land to the lord; this court may make amends to the lord, and fulfil the deſign of the law, and ſave the eſtate to the party. In the caſe of making a leaſe without licence, the intent of the law in making that a forfeiture is, to prevent the lord's being diſinherited of his intereſt in the copyhold, and to ſecure the fine due on a licence; both which may be eaſily ſecured, by obliging the tenant either to accept a licence, or make ſurrender and admittance and pay the fine; which will be a compleat recompenſe for any injury the lord may have ſuffered; and then it comes within the common rule, that this court will relieve againſt forfeitures, wherever a compleat ſatisfaction can be made for the injury which is the cauſe of the forfeiture.

Several caſes were cited. *Shelley* v. *Maſon* in Lord *Coventry*'s time, 5 *Car.* 1. where a copyholder came into this court to be relieved againſt a forfeiture by making leaſe without licence, and decreed the lord to account for the profits he had received ſince his entry, and pay the coſts. 1 *Chan. Rep.* 51. where a copyholder was relieved by Lord *Coventry* for non-payment of fine on admittance. *Cox* v. *Hickford* by Lord *Harcourt*. The bill was to be relieved againſt a forfeiture by ſuffering a copyhold tenement to fall to ruin, and refuſing to repair it for thirty years together, though frequently ordered to do it by the lord; the Chancellor refuſed to grant relief on two accounts, his obſtinacy, and the lord's having been in poſſeſſion nine 2 Vern. 664.

years after his entry, in which caſe great ſtreſs was laid on the obſtinacy of the copyholder. Caſe of *Rowland* v. *Dean of Exon*, where relief was granted againſt a forfeiture by cutting timber. *Gnaſh* v. *Lord Derby*, the decree of which was now read in court. The plaintiff having a copyhold tenement that wanted repair, applied to the defendant the lord of the manor to have ſome timber aſſigned for that purpoſe, but the lord refuſed to aſſign any; upon which the plaintiff hearing that there was a cuſtom in the manor for two tenants to aſſign timber for the purpoſe of repair, did get two tenants to make ſuch aſſignment, and then cut the trees down; upon which ejectment was brought, and a verdict for the lord, there being no ſuch cuſtom: the plaintiff brought his bill for relief, which was granted on his paying the value of the timber and coſts at law and in equity. *Cudmore* v. *Raven*, where a quaker being tenant of a copyhold refuſed to take the oath of fealty, and the lord entered for the forfeiture, and the tenant was relieved. *Cox* v. *Brown*. 1 *Chan. Rep.* 170. a leaſe being made on condition not to aſſign it without licence, the tenant did aſſign; but relief was granted on ſearch of precedents; it being the caſe of an aſſignee of an executor makes no favourable circumſtance, becauſe there were aſſets without it. *Thomas* v. *Porter*. Tenant of a copyhold *durante viduitate* cut down timber upon one copyhold in order to repair another, which was a forfeiture; but yet relief granted in this court.

2 Vern. 537.

Abr. Ca. Eq. 121.

If it is a difficult matter to aſcertain damages in any of theſe caſes of forfeiture, it is becauſe there really is no damage; and ſurely it is no reaſon againſt relief, that the perſon who ſeeks it has done no injury.

For the defendant, theſe diſtinctions as to relief againſt forfeitures were inſiſted on. Whether the forfeiture was for nonfeazance or malfeazance, whether the condition was annexed by law or the party, whether there were any particular circumſtances of equity or not.

As to the difference between nonfeazance and malfeazance, as where tenant refuſes to pay a fine upon admittance; this court will relieve, on doing that which he ought to have done. The difference is only as to the circumſtance of time, which this court eaſily ſupplies. So where there is only permiſſive waſte, the court has relieved; but if by obſtinate refuſal this forfeiture is aggravated, the court will look upon it as voluntary waſte, and not grant relief, as in the caſe before cited of *Cox* v. *Hickford*.

All the inſtances of forfeiture in the preſent caſe are of voluntary acts. One is making a leaſe without licence, which is a diſ-

ſeiſin

ſeiſin of the lord, 4 *Co.* 21. *b.* and an attempt to diſinherit him. The others are all voluntary waſtes.

The next diſtinction is between conditions in law, and by the party. The intention of the parties is eaſy to be diſcovered, and you anſwer the end of the contract, if you give them every thing they expected, which may in many caſes be eaſily done. This is the caſe of all mortgages, conditions of re-entry on non-payment of rent, *&c.* But even in conditions of the parties, where the aſcertaining the damage is not plain and clear, the court will not relieve againſt ſuch conditions or penalties. It was never known that this court relieved againſt a *nomine poenae* for ploughing up ancient meadow. It was denied in the duchy of *Lancaſter*, *Eyre* v. *Hatton.*

But in caſes of forfeitures on conditions in law this court ſeldom relieves. If tenant for life makes a feoffment, or levies a fine *ſur conuſance de droit come ceo*, *&c.* it was never pretended, this forfeiture could be relieved in equity. Or if the reverſioner brings waſte on the ſtatute for recovery of the place waſted, equity would not interpoſe. Thoſe conditions in law are a ſort of limitations of the eſtate of the party, and though the intent of the party is never ſo plain, equity will not alter the legal conſtruction of the words: as where by will one gives an eſtate to *A.* for life, remainder to the heirs male of *A.* equity will not give the ſon of *A.* a remainder, and confine *A.*'s to a life eſtate, though the intent was plainly ſo.

But though this is generally the ſtate of forfeitures, yet there may be ſome circumſtances of equity to ground relief upon; and wherever the court has granted relief, it is upon ſome ſuch circumſtances, as where the party who is to take advantage of the condition is himſelf the means of its being broke. It was ſaid by Lord *Somers* in the caſe of *Bertie* v. *Falkland*, that conditions precedent Salk. 231. are not relievable, unleſs ſome indirect means be uſed by the party to prevent the performance. So in the caſe of *Hamond* v. *Ainge* before the preſent Chancellor, where a lord of a manor tells one that had a freehold held of his manor, that it was copyhold, and he muſt be admitted by copy of court-roll, and pay a fine: the lord was in this court obliged to eraſe the admittance, and repay the fine.

The third queſtion relates to the infant plaintiff, whether he is in any better condition than the father.

It was admitted on all hands, that if an admittance had been taken purſuant to the ſurrender upon the marriage, the ſon being remainder man could not be prejudiced as to his eſtate by the forfeiture of the tenant for life: only in that caſe the bill was too early

for

for the ſon, whoſe intereſt was not concerned till the death of the father.

But though the ſon has no legal right, yet there being a ſurrender to his uſe, and this purſuant to a marriage agreement; it ſhall be conſidered in a court of equity as if it had been executed, and the infant would be very proper to bring a bill in this court againſt the father and the lord, in order to admit his father purſuant to the ſurrender, that he might in law be intitled to the remainder.

On the other ſide it was ſaid, that Sir *Harry* not being admitted upon that ſurrender, continued tenant under his former admittance; and the lord was no party to, or concerned in the marriage ſettlement, his title was paramount to that, and conſequently the forfeiture affected the inheritance, and ſhould not be ſubject to or limited by the private truſts or tranſactions of the parties.

Lord Chancellor. This is a point of ſo great conſequence, that if relief could be given in this court, it is ſtrange it ſhould not have been found out long ago. The forfeitures in thoſe caſes ariſe purely from the imbecillity of the copyholder's eſtate. He was originally merely tenant at will, and is ſo ſtill on all accounts but as to the continuance of his eſtate. There have been indeed very favourable conſtructions for the copyholder in that particular, becauſe he is called tenant at will *ſecundum conſuetudinem manerii*; it has been held, the lord cannot determine his will but according to that cuſtom. The true meaning of thoſe words *ſecundum conſuetudinem manerii* was not to bound the lord's pleaſure in the determination of his will, but that the tenant as long as he continued tenant was to hold his land under thoſe terms and conditions which the cuſtom had eſtabliſhed.

Theſe matters which are mentioned as forfeitures, are indeed limitations of the eſtate; ſuch as determine it, when they happen. Tenant for life making a greater eſtate than his own, gives up or ſurrenders the right which he had before, and yet he does no damage to the remainder man. So tenant by copy taking upon him to make a greater eſtate than by law he may, and contrary to the nature of his eſtate, does by that determine his eſtate: the law has made it ſo; and what is there in this caſe to ground relief upon, and require me to ſet aſide the law?

It is a hard law, and therefore the party muſt not be ſubject to it; but is not this directly repealing the law?

In action of waſte for recovery of the place waſted, it is certain and admitted this court cannot relieve; and yet this may be called a very unconſcionable thing. But is it ſo to take advantage of a law which is known and equal to all? Nor can I ſee any difference, whether the ſtatute makes this condition, or the common law makes it.

It is not ſufficient to ſay here is no damage in this caſe, and therefore it is there can be no recompenſe given by this court, for it is the recompenſe that gives this court a handle to grant relief.

The true ground of relief againſt penalties is from the original intent of the caſe, where the penalty is deſigned only to ſecure money, and the court gives him all that he expected or deſired: But it is quite otherwiſe in the preſent caſe. Theſe penalties or forfeitures were never intended by way of compenſation, for there can be none.

But even in the caſe of copyholds there are ſome caſes of forfeitures intended for a different purpoſe, as for non-payment of rent or fines, which are only by way of ſecurity of the rent or fine; and therefore when theſe are paid afterwards with intereſt, the money itſelf is paid according to the intent, only as to the circumſtance of time; which is the true foundation of the relief which this court gives in thoſe caſes.

Caſes of agreements and conditions of the party, and of the law, are certainly to be diſtinguiſhed; you can never ſay the law has determined hardly, but you may that the party has made a hard bargain.

Thus it ſtands on the general ſtate of theſe kind of forfeitures. But what equitable circumſtances are there peculiar to this caſe? It is certain there may be circumſtances, which may make it fit and equitable for this court to relieve, either in theſe caſes or in actions on the ſtatute of waſte: if the lord ſhould give the tenant encouragement by *parol* only to pull down a meſuage, and he did it accordingly; this might induce the court to prevent the lord's taking advantage of a fraudulent act of his own. In the preſent caſe, if the lord had been preſent at the making the leaſe, and adviſed it; relief might be reaſonable: but the ſteward's ſtanding by, or even ingroſſing the leaſe, is rather a circumſtance againſt relief, as it looks like a confederacy to cheat the lord, and break the cuſtoms of the manor.

As to the other caſes of forfeiture relating to the quarry, the topping the trees, and the deſtroying the boundaries; there does not enough appear to determine, whether they are legal forfeitures or no: but if they are, I think they are all, as the making the leaſe, under the ſame conſideration in this court, and not proper for relief.

As to the infant, his caſe does not ſeem as yet ripe for this court; but it may be a queſtion how far his equitable intereſt will intitle him to be ſecured againſt theſe forfeitures.

I am apprehenſive the lord muſt always have ſuch a tenant upon his lands, as may be ſufficient to anſwer all demands, and capable of committing forfeitures.

Suppoſe one lets a truſtee be admitted for him, who commits a forfeiture; no doubt the eſtate would be forfeited, and the *ceſtuy que truſt* would have no equity againſt the lord.

Suppoſe the truſtee ſhould die without heir, the lord would be intitled by eſcheat, without being ſubject to the truſt.

The perſon who is the legal tenant, is ſubject, with regard to that eſtate, to all the imbecillities of that eſtate; if not, by the means of a truſt a copyhold would be intirely diſcharged from all thoſe imperfections it labours under, and the lord's intereſt be taken away, for the lord can take advantage of no body's acts but thoſe of his tenant. He is not at all concerned with the private agreements or truſts of the parties.

In the preſent caſe, ſuppoſe Sir *Harry* admitted according to the ſurrender, the infant is then tenant in remainder, and the father's act cannot prejudice the ſon, who is now admitted as a diſtinct tenant. But till admittance the ſon is no tenant; and ſuppoſe when he comes of age he ſhould releaſe to his father, there would be no occaſion for any admittance at all, but Sir *Harry* would continue tenant upon his old admittance. The lord is not bound to take notice of any thing, but what appears on the court rolls.

I am therefore apprehenſive, it will be a hard caſe to relieve the ſon. But I agree, that if the lord's fine for admittance be paid, though there was no actual admittance; ſince the lord received all the advantage that could be had from the admittance, it might be a good reaſon for relieving the ſon; and then it might be proper, perhaps even now, for the ſon to bring a bill againſt his father and the

the lord, in order to have his father admitted purſuant to the ſurrender. But it does not appear whether the fine was paid.

I ſhould therefore for theſe reaſons diſmiſs the bill abſolutely. But ſince the points of law are diſputed as to all the forfeitures, excepting the making the leaſe, which concern other parts of the copyhold, and ſince judgment in ejectment is given, which would take in other lands as well as thoſe comprized in the leaſe; I think the bill ſhould be retained, till the points of law are tried at law upon the ejectment, which the plaintiff ſhall immediately receive declarations in, and plead to trial.

As to coſts, they ſhall wait the event of the trial, and as to them I think the equity of them will depend upon the iſſue of that; if the plaintiff recovers there, he ſhould pay coſts here, becauſe he had no occaſion to come into this court, excepting as to the diſcovery. If the Duke gets the better, I think as this is a point of equity that has not been fully ſettled before, and in ſuch caſe it is natural for a man to ſtruggle the moſt to retain his eſtate; it would be too hard to make him loſe his eſtate and pay coſts likewiſe.

As to the infant I will not diſmiſs the bill abſolutely, but without prejudice, becauſe being an infant he may not have made the beſt of his caſe.

Frederick *verſ.* Frederick. Ibid.

IN the year 1674. a match was propoſed between Mr. *Frederick*, ſon of Sir *John Frederick* an alderman of *London*, and Mrs. *Marino*, a city orphan, whoſe fortune was 8000 *l.* in purſuance of which articles were entered into between Sir *John Frederick* and his ſon of the firſt part, Mrs. *Marino* and her relations of the ſecond part, and certain truſtees therein mentioned of the third part, by which it was agreed that Sir *John* ſhould pay 11500 *l.* 5000 *l.* part of it, to Mr. *Frederick*, and the other 6500 *l.* to the truſtees, which with the 8000 *l.* to be received from the chamber of *London*, ſhould be veſted in land, to be ſettled as uſual upon the huſband for life, remainder to the wife for life, remainder to the firſt and every other ſon in tail, *&c.*

The huſband covenanted to take up his freedom in *London*, but did not, and his eſtate diſtributed according to the cuſtom. 1 Will. Rep. 710.

Upon 25th of *February* application was made to the court of aldermen for licence for Mr. *Frederick* to marry Mrs. *Marino*, upon which ſeveral entries appear to be made that day; 1. That a licence be granted, if Mr. Common Serjeant approve of the marriage. 2. That when a perſon applies for a licence to marry a city orphan

phan he ſhall be urged to take up his freedom. 3. A freedom is granted to Mr. *Frederick*, which he is to take up in a year's time.

The marriage ſoon after took effect, and 15th of *March* 1680. Sir *John Frederick* being then deputy Mayor, there is an entry, that upon conſideration Mr. *Frederick* had not taken up his freedom according to his agreement, whereby his wife would not be intitled to her thirds, it is referred to the Recorder and Common Serjeant, to conſider, whether the ſettlement upon the lady was agreeable to the intent of the court; but there were no further proceedings, neither did Mr. *Frederick* ever take up his freedom, but proved a very unkind huſband, and a ſevere father, and by his will deviſed 10 *l.* only to his wife, 1000 *l.* to his eldeſt ſon, and each of his daughters, and the reſidue of his perſonal eſtate, which amounted to 400000 *l.* he gave to the children of his ſecond ſon.

The widow preferred her bill, that ſhe might have the benefit of the agreement, as if Mr. *Frederick* had taken up his freedom. And after ſeveral arguments Lord Chancellor pronounced his decree.

The demand of the plaintiff was grounded upon the common rule in a court of equity, that where an agreement is made upon a good conſideration, which is not performed, the party intereſted may apply to a court of equity, to have the ſame benefit as he would have had in caſe the agreement had been performed.

It was urged, that the articles made by Sir *John* and his ſon with the lady and her relations, and which was a compleat agreement, do not contain any ſuch clauſe that Mr. *Frederick* ſhould take up his freedom. Anſwer: An agreement between ſome parties does not hinder other perſons from entring into another agreement, and the agreement to take up his freedom was with the court of aldermen. Beſides, the relations of the lady had no power to diſpoſe of her in marriage, but the court of aldermen alone could make a legal agreement for that purpoſe; ſo that what was done by the relations was only propoſals to be laid before the court of aldermen; they might have diſapproved of the whole, or part, or have required ſomething further. They might have agreed by *parol*, (for this was before the ſtatute of frauds) that Mr. *Frederick* ſhould do ſomething further; they did require ſomething further of Mr. *Frederick*, when they made their agreement with him, and this is proved beyond all doubt by the records of the proper court, which had cognizance of this affair, and had it then under conſideration; ſo that this is in nature of a fine, for it is an agreement of the parties entred upon record.

It was urged, that this was only done by the city to provide freemen of ſubſtance for the benefit of the city, and not deſigned for the benefit of the lady, to be part of the agreement. Anſwer; This is a very ſtrange conſtruction, that a court of aldermen, when they are tranſacting a thing which concerns an infant under their care, ſhould conſider their own private intereſt, without any regard to the benefit of the infant; this is not to be intended of any perſons who act in a publick character.

It was argued, that if the common ſerjeant approved the match, the licence was to be granted abſolutely; and the agreement to take up the freedom was voluntary, and no part of the contract. Anſwer; What was referred to the common ſerjeant was only the validity of the ſettlement in point of law; not the ſufficiency of it, which the court of aldermen could judge of better than the common ſerjeant. And the taking up his freedom is to be looked upon as part of the proviſion.

It was argued, that it is probable this part was waived afterwards. Anſwer; The court of aldermen could not waive it, becauſe they were only truſtees; and it is plain it was not waived before the marriage, becauſe the court of aldermen ſome years after inquire into the reaſon why it was not complied with, and the wife being a *feme covert* could not waive it.

It has been ſaid, that a court of equity ought not to give relief in this caſe, becauſe it is to ſupport a cuſtom againſt the rules of law. Anſwer; A court of equity will ſupport and execute a contract made upon a good and ſufficient conſideration, whether it relates to a cuſtom or not, and will prevent a fraudulent avoiding of the cuſtom, as a fraudulent diſpoſition of goods.

It has been urged, that if the city had applied for the guardianſhip and care of the orphan under this ſettlement, they could not have had relief; becauſe he was not actually a freeman when he died. Anſwer; There is no conſideration ariſing from the city, and therefore no grounds for a court of equity to aſſiſt them.

It was objected, that the party being dead, it was beome impoſſible that a ſpecifick performance ſhould be had, and this court will not give damages. Anſwer; Though a ſpecifick performance cannot be had, yet the end and deſign of it may be obtained, which is all that a court of equity requires; for if he had been alive, and deſired not to take up his freedom, to avoid the trouble and expence of bearing offices; and could he have given the court ſatis-

faction, that his wife and children ſhould have the ſame benefit: I do not know that a court of equity would have compelled him to have taken up his freedom.

Objection: It will be very improper to admit ſuch an application after his death; becauſe had he been alive, he might have veſted his eſtate in land, and diſpoſed of it by will, as he has done of the perſonal eſtate. Anſwer; This is an argument not to be inſiſted upon in a court of equity, that the effect of the contract ought not to be decreed after his death, becauſe had he known that you would have inſiſted on it, he would have contrived ſome way to have avoided it: where money is veſted in truſtees to be laid out in land and ſettled upon *J. S.* in tail; if he dies before the ſettlement, he cannot diſpoſe of the money; and yet if the ſettlement had been made, he might have levied a fine, and ſuffered a recovery, and diſpoſed of the land. A caſe was mentioned, that where tenant in tail makes a mortgage by bargain and ſale, and covenants for farther aſſurance, and dies without levying a fine; a court will not compel the iſſue in tail to compleat the title. Anſwer; The iſſue in tail claims prior to the perſon who made the mortgage, and not as his repreſentative. But where tenant in fee-ſimple makes a ſale by bargain and ſale, which is not inrolled, with covenants for further aſſurance, a court of equity will compel his heir to make good the title, becauſe he is repreſentative, and claims under the covenantor. So it is in the preſent caſe. Therefore he decreed that one third ſhould go to the widow, and one third amongſt the children, they waiving their legacies under the will. As to the other third, the will ſtands good as to that. Afterwards in *May* 1731 the decree was affirmed in the Houſe of Lords.

Merrit *verſ.* Rane.

Trin. 6 Geo. rot. 338.

On a covenant to transfer ſtock paying ſo much. *Qu.* What is to be the firſt act?

THE plaintiff declares upon a ſpecial agreement, that in conſideration of 252 *l.* paid to the defendant, he agreed to tranſfer 6000 *l.* *South-Sea* ſtock to the plaintiff, his executors, adminiſtrators or aſſigns, at any time before the 9th of *January* 1720, within three days after the ſame ſhould be demanded by note in writing delivered to the defendant, or left for him at his houſe in *Angel Court*, upon payment of the further ſum of 9000 *l.* Then he ſets forth, that he appointed one *James Martin* to demand the ſtock, and pay the price it was agreed to be ſold at, who on the 25th of *March* 1720, left a note in writing at the defendant's houſe, requiring him to transfer the ſtock on the 28th, where he ſays he

attended all the while the books were open, but the defendant did not appear to transfer. The defendant pleads, that the demand was made by the plaintiff the 20th day of *January*, and that upon the 21ſt he transferred the ſtock according to the agreement. The plaintiff replies, that he did not transfer the ſtock on the 21ſt *modo et forma* as he has pleaded. And the defendant demurs.

Wearg pro defendente took ſeveral exceptions,

1. This contract cannot be aſſigned, for it is a *choſe en action*; and therefore the defendant was not bound to transfer to *Martin*, becauſe that would not have been a performance of his agreement. And if it be ſaid, that *Martin* is not an aſſignee of the contract, but only a perſon authorized to pay the money and take the ſtock; the objection to that is, that his authority is only to demand, not to receive the ſtock, for ſo the plaintiff has made his caſe in the declaration.

2. The demand is to be by notice to the defendant, or leaving a note *for him* at his houſe; but here the averment is only that a note was left at his houſe, and perhaps that might be ſo managed as never to come to his hands, which was deſigned to be obviated by the words *for him*.

3. The agreement is, that upon the transferring the ſtock the plaintiff ſhall pay 9000*l.* which if it be not a condition precedent, yet according to *Turner* v. *Goodwin* it is at leaſt a concurrent act; and therefore the plaintiff ſhould have ſhewn, that he had the money there to have paid upon the transfer; but all he ſays is, that *Martin* attended to accept the ſtock, not to pay for it, though his authority was at firſt both to demand and pay.

4. But if the declaration be good, yet the replication is ill, for the demand pleaded was on the 20th, and the transfer the 21ſt, which was the next day, ſo that if the iſſue was found for the plaintiff it would not do, becauſe the jury could not find a breach of the condition in ſaying he did not transfer on the 21ſt, when he had two days after that to do it by the plaintiff's own ſhewing. It is to all purpoſes the ſame with payment before the day.

Reeve contra. I agree, *Martin* cannot be a legal aſſignee, but only a perſon appointed to tranſact this matter on behalf of the plaintiff. The aſſignment of a bond is good to ſome purpoſe, for it amounts to a covenant that the party ſhall have the money when received. *Martin* is appointed to require the ſtock and pay for it, which neceſſarily gives him a power to take it.

Aſſignment of a bond amounts to a covenant that the party ſhall have the money.

2. Notice

2. Notice left at a man's houſe is in the nature of the thing a notice left *for him.*

3. The money was not to be paid but upon transferring, ſo no neceſſity of a tender; and we having ſhewn that the defendant was not there to perform his agreement, that is enough to intitle us to our action.

4. Here the day is material, and might therefore very properly be made parcel of the iſſue.

Chief Juſtice. *Aſſign* ſignifies no more than a perſon appointed to accept; and he being authorized to require and pay, ſurely that is enough to impower him to receive it. The notice is ſhewn to be *for him*, how elſe could it be a requeſt to him to do the act, which the declaration ſhews was made?

The payment of the money is not a condition precedent, but a concurrent act; and if the defendant had been there, the plaintiff muſt have laid down his money, though not ſo as to part with it till transfer; and ſo it was held in the caſe of *Turner* v. *Goodwin.*

As to the replication, conſider, if the defendant ſays he did it on a day ſooner than he was obliged, whether it is not enough to ſay he did not do it on the day he pleads he did; for it muſt be taken he had waived the benefit of any longer time.

It was ſpoke to a ſecond time upon the former exceptions. And *Fazakerley pro defendente* inſiſted, that the plaintiff ought not to have fixed the day, but have left the defendant to his liberty of appointing which of the three days he pleaſed, ſince that time was given in eaſe and for the benefit of the defendant.

Sed per curiam: The demand was made to have the ſtock at the time moſt for the defendant's advantage; and if it ſuited his convenience to do it ſooner, he might have given notice to the plaintiff. As to the plaintiff's not ſhewing a tender, we think that ought to come from the defendant by way of excuſe, that he was there ready to have transferred, if the plaintiff or any body for him had been there to have paid the money. The notice as it is laid is well enough within the meaning of the contract, for it muſt be a notice left *for him* if what the declaration ſays be true, that notice was left at his houſe *requiring him* to transfer the ſtock. As to the exception taken on the former argument to the replication, the court did not much debate it, becauſe admitting it ill, yet then the plea

plea was ſo too, and it muſt conſequently come to be adjudged on the goodneſs or badneſs of the declaration.

The plaintiff had judgment, which was affirmed in the Exchequer Chamber and Houſe of Lords.

Oates *verſ.* Robinſon.

UPON a trial in ejectment a caſe was made, on which the ſole queſtion was, whether after an extent upon a ſtatute into one county, and a *liberate* returned and filed, the conuſee can have any other extent into another county.

2. Whether there can be a re-extent into another county without a total eviction. 2 Will. Rep. 91.

Serjeant *Cheſhyre* argued, that he might. At common law there could be no execution againſt lands, but in the caſe of the crown; and when it was given in the caſe of the ſubject, he was to extend all the lands, or elſe the tenant where part only was extended might defeat it by *audita querela*. 3 *Co.* 14. 2 *Inſt.* 296. And where the lands lay in ſeveral counties, there was a neceſſity for ſeveral extents and *liberates*. *Mo.* 524. 2 *Cro.* 506.

There are many precedents before the 32 *H.* 8. *c.* 5. ſome where the extent went into ſeveral counties for the whole debt, *Co. Ent.* 296, 297. which indeed is the propereſt way, becauſe the judgment is intire, and others into one county for ſo much of the debt, into another for another part, and into a third for the reſt. *Raſt.* 596. *Dy.* 162, 208. *Mo.* 24. 2 *Cro.* 246. 2 *Bendlow.* 59. *Dalt.* 29. 1 *Sid.* 194. 2 *Roll. Abr.* 469. *pl.* 6. 482. *pl.* 16. *Fitzh. Execution* 40. So it is plain, that before the ſtatute 32 *H.* 8. *c.* 5. we might have had this extent.

And as to that ſtatute, the queſtion will be, whether it has altered the law in this reſpect: which it has not, becauſe that ſtatute gives a remedy only in the caſe of a total eviction, which this is not, for this is only a further carrying on and perfecting the firſt execution. The *ſcire facias* is given only to the party who is evicted out of all, but that is not the plaintiff's caſe, and therefore he muſt ſeek his remedy as he could by law before the ſtatute. And in the *petty bag* there are abundance of precedents to this purpoſe, the practice having never been diſputed till this caſe.

Reeve contra. I agree this caſe depends upon the law as it ſtood before the ſtatute 32 *H.* 8. and I take the law to be, that it is not the return of the ſheriff, but the acceptance of the party, that binds him in this caſe. Will any body ſay, that after an extent of all the

lands of the debtor in one county, a ſubſequent purchaſe of lands in the ſame county can be taken in? No body can ſay it, and yet it is certain if the purchaſe had been after the acknowledgment, and before the extent, it might have been extended: and why ſhould there be any difference as to lands in another county? The rule in the *Regiſter* 152. *a.* is, that in the caſe of extents into ſeveral counties, each muſt recite the award into the other county. The precedents of the debt's being divided, are an argument that if the firſt execution had been for the whole debt, it would have concluded the party. *Dy.* 162. 2 *R.* 2. 7. *b.* 15 *H.* 4. 14. *b.* 2 *Cro.* 338. 1 *Lev.* 92. 3 *Lev.* 269. *Lutw.* 429. In 2 *Keb.* 314. this very caſe is cited, and ſaid to be ill.

There cannot be a new extent into another county, unleſs prayed at the time the firſt iſſued.

Per curiam, We are all of opinion, that if the prayer of an extent into the ſecond county was entered at the time the firſt extent was taken out, then the ſecond extent will be regular, otherwiſe not. *N. B.* Upon application to my Lord Chancellor he gave them leave to enter the prayer *nunc pro tunc*, ſo this court made no rule, but it went off upon propoſals of going to a new trial. And the cauſe went down to trial, and a verdict for the plaintiff, ſubject to the Judge's opinion; who on hearing counſel ordered the *poſtea* to the plaintiff. And a writ of error being brought, and no good bail put in, the plaintiff had his execution.

Fazakerley *verſ.* Wiltſhire.

Cuſtom of the city of *London* that none but free porters ſhall carry corn, *&c.* good.

UPON a *habeas corpus* to the Mayor of *London*'s court, the cuſtom of *London* is returned, that the porterage from any veſſel on the river, and meeterage of corn, roots, *&c.* imported or exported, belongs to the city, upwards from *Staines Bridge* to *London Bridge*, and downwards as far as *Yendal* in *Kent*, and alſo another cuſtom to make by-laws, confirmed by *Richard* the ſecond, where any of their cuſtoms wanted *remedium congruum.*

That in the 18th year of King *James* the firſt a by-law was made by the corporation, "That the corn porters ſhould be a company with twenty-four aſſiſtants, who were called free porters, who ſhould work at a particular ſettled rate; and that none but the free porters ſhould intermeddle in importing or exporting any corn, roots, *&c.* within the bounds mentioned in the cuſtom, on pain of 20 *s.* for every offenſe, (except in time of danger or urgent neceſſity, or in the caſe of *bona peritura*) the forfeiture to be recovered by action in the name of the chamberlain, and four hundred porters are appointed for the future."

That

That the free porters have ever ſince uſed and exerciſed this by-law, till the defendant intruded by carrying of barley, though a free porter was preſent, *per quod forisfecit* 20 *s.* which the plaintiff as chamberlain is intitled *ad exigendum et habendum*, and for which he ſues in the Mayor's court.

Paſ. 6 *Geo.* it was argued by

Serjeant *Pengelly pro defendente* againſt a *procedendo*, and that the return be filed. 1. Becauſe it is informal in ſetting out the claim. 2. Becauſe the cuſtom was ill. And then 3. The by-law muſt fall of courſe. Or 4. Though the cuſtom ſhould be good, yet the by-law is ill.

1. This is a franchiſe ſuppoſed to be veſted in the body politick, and therefore ought to be claimed by preſcription, being perſonal. 2 *Roll. Abr.* 579. *pl.* 2. *Hob.* 85. the difference between a preſcription and cuſtom is, that one is perſonal, and the other local, and to be alleged in an inſenſible thing, as a place. 4 *Co.* 32. 6 *Co.* 60. 1 *Inſt.* 113. And the conſtruction of them is very different, becauſe it is ſufficient if a cuſtom is reaſonable; whereas a preſcription muſt have a lawful commencement. *Dav.* 32. 6 *Co.* 50. *b.* And it is likewiſe laid in an abſurd manner, that they have time out of mind been called by ſeveral names, and yet claim the porterage as belonging time out of mind to a body called by the preſent name. *Dy.* 279. Nor have they averred any intereſt in the port, ſo as to raiſe a merit in themſelves for what they claim.

2. The cuſtom is unreaſonable, and ill.

1. Becauſe it deprives a man of that natural right which he has to employ one he knows and can truſt, and obliges him to make uſe of a perfect ſtranger whom he may not be ſafe in truſting. And it tends to no good end, as the preventing of fraud, becauſe when people are at their liberty to employ any body, they will for their own ſakes take care it is a truſty one.

2. Becauſe it is not confined to the carriage of goods as a trade, but extends even to what a man brings from his own garden in the country for his private uſe in town. 1 *Roll. Abr.* 561. *pl.* 4. *Hob.* 189.

3. The city does not appear to be at any expence in repairing the port, ſo this is not a toll for the uſe of the port, which perhaps

haps might account for the reaſonableneſs of its commencement. 1 *Ven.* 71. 1 *Sid.* 464. 1 *Mod.* 47, 104. 2 *Lev.* 96. *Raym.* 232. In the caſe of *Cudden* v. *Gilſtrup*, *Trin.* 12 *W.* 3. upon the cuſtom of weighing at the city beam, it was poſitively averred, that the city kept a key, and had proper officers for the receiving of goods.

4. Becauſe it extends to places out of the limits of the city, and you cannot take notice what they are, as you do on a writ of error. *Salk.* 269. 1 *Ven.* 196. *Pal.* 44. By-laws will not bind out of the limits. 3 *Mod.* 158. *Jones* Sir *T.* 144. And then if it goes too far, and is void in part, it will be void in the whole; for a cuſtom is intire. *Hob.* 189.

5. This is only a bodily labour, where no ſkill is required, and therefore it is unreaſonable to deprive the other freemen from exerciſing this buſineſs by themſelves, or their ſervants: and no length of time can make good an unreaſonable cuſtom. 1 *Roll. Abr.* 559. *pl.* 6. *Davis* 32. 11 *Co.* 86. 8 *Co. Wagoner*'s caſe. In the caſe of the *Mayor of Wincheſter* v. *Wilks*, *Paſ.* 4 *Ann.* it was held, that a right to trade could not be taken away without a conſideration. *Salk.* 203.

3. If the cuſtom is ill, the by-law will fall of courſe, becauſe it is not only liable to the ſame objections, but to others alſo. For,

4. The by-law itſelf is ill,

1. Becauſe it exceeds the cuſtom, which is only *to* and *from* ſuch places upon the river, whereas the by-law prohibits the landing, carrying up and down from one ſhip to another, and to warehouſes near adjoining to the port. And by the clauſe which ſettles the wages, it appears they go as far as *Cheapſide*.

2. It is not reſtrained to the carrying goods for hire, but even where the owner carries his own, which is highly unreaſonable. 1 *Roll. Abr.* 364. *pl.* 6. *Mo.* 576, 591.

3. The merchant or the publick have no benefit by this. *Mich.* 13 *W.* 3. *Lewis*'s caſe. An act of common council, that none ſhould uſe dancing, that was not free of the company of muſicians, was held void, becauſe the party could not compel them to admit him. 5 *Mod.* 104. Here we cannot oblige a free porter to work, ſo this goes in deſtruction of trade; and ſuch by-laws have always been held ill. *Palm.* 395. 2 *Roll. Rep.* 391.

4. The city ought not to impoſe a penalty for breach of their own franchiſe. Would not a cuſtom that cattle depaſturing upon my common ſhould be forfeited, be held ill?

5. This is a great incumbrance to trade: the merchant is to let a meeter know his goods are ready to be landed: this is to be ſignified by him to one of the rulers, who is then and not otherwiſe to appoint a porter.

Mr. Solicitor General *contra*. The firſt objection goes to all the returns from the city of *London*, which are all by way of cuſtom, as in *Wagoner*'s caſe. This amounts to a preſcription, being in the caſe of a body politick, which has perpetuity, and then the calling it a cuſtom will not alter the caſe. The manner of claiming does not import that the city have had no more than one name at a time, for a corporation may have ſeveral; and ſo it is enough to ſay, this franchiſe has been in them time out of mind by either of their names. In the caſe of the *quo warranto*, the preſent name of mayor commonalty and citizens was only mentioned.

As to the merits. The general queſtion is, whether this by-law be good, ſo as to ſupport this action: and as on the one hand the court will not ſuffer us to uſurp a juriſdiction we have not, ſo on the other hand it will not deprive us of any legal privilege we have.

I agree this by-law is in reſtriction of trade, 1. By way of excluſion of ſtrangers, and 2. By regulation for publick convenience, both which I ſhall ſhew are proper and good. 1. The cuſtom is good; 2. The by-law has purſued it.

1. As to the cuſtom in reſtriction of trade, there are three ſorts: 1. Reſtraints where there is no one of the trade. *Regiſt.* 105. 2. Only partial, where ſome are ſuppoſed to uſe the trade. Sir *William Jones* 162. 3. As to thoſe who are expreſly alleged to uſe the trade, which is our caſe, and there every member is preſumed to receive a benefit. *Cro. El.* 203. 2 *Bulſt.* 195. *M.* 22 *H.* 6. 14. 2 *Brownl.* 177. 8 *E.* 3. 37. 8 *Co.* 125. Which are all caſes of reſtriction in particular diſtricts for the benefit of perſons uſing the trade, and yet theſe are as much againſt the common right of the publick. This cuſtom and by-law have been tacitly allowed. 1 *Mod. Caſ.* 123. *Cudden* v. *Eaſtwick* was againſt the employer; and there indeed it was held ill, becauſe he could not know who was or who was not a free porter; but yet it was not diſputed as to the power of appointing porters. *Salk.* 143.

1. It is objected that this reſtrains bodily labour, and that too in a buſineſs for which no ſkill is required. *Anſwer:* Whether it be an art or not is never the meaſure, but the conſideration is the right of the perſons, as in the caſe of the *Graveſend* boat.

2. It is ſaid here is no conſideration, becauſe the city is not obliged to provide porters. *Anſwer:* That is implied in the nature of the cuſtom. It is ſtated that their officers have done it, and that amounts to ſaying they have maintained officers. The defendant might have given ſuch a matter in evidence, and it would have been a ſufficient excuſe. 22 *H.* 6. 14. the caſe of a mill, and in the *Graveſend* boat caſe there was no conſideration expreſſed. *Co. Ent.* 641. *Raſt.* 9. *b.* 591. *Hearn* 83. *Brownl. Red.* 63. 1 *Brown's Ent.* 68.

3. It was ſaid here are not porters enough. This is anſwered by the power lodged in the mayor and aldermen to increaſe the number: but that is a matter of fact not before the court.

4. That the owner is reſtrained from carrying his own goods. *Anſwer:* He is not excluded, being tacitly excepted. *Pro mercede* ſhews it was intended only to take in the carrying by way of trade. And in *Wagoner*'s caſe it was ſaid that making candles to be ſpent in a man's own family was not prohibited.

5. They ſay they have no recompenſe. But ſurely this objection is very hard after ſo long an enjoyment, when the circumſtances which firſt eſtabliſhed it are forgot. There were many tenures kept on foot, though people were at a loſs how to account for them. It muſt be ſuppoſed this was created by compact between the founders of the city and the firſt traders.

6. This binds ſtrangers. Do not all excluſive cuſtoms do ſo? And they are no otherwiſe uſeful than as they do ſo.

7. They ſay it extends beyond the limits of the city. *Anſwer:* The whole diſtrict appears to be within the port of *London.* 1 *Roll. Abr.* 557. *Calth.* 115. But that will not deſtroy the cuſtom. Indeed without the cuſtom the by-law would be void, according to the caſes cited, which are all of by-laws. The cuſtoms of *London* are all confirmed by Parliament, and though I agree that extends only to good cuſtoms, yet it ſhews of what conſideration the cuſtoms of *London* are above thoſe of other places; and a particular regard has been always had to them, as appears in *Wagoner*'s caſe

126. 2 *Roll. Rep.* 277. This very cuſtom is averred in the return to have been confirmed by Parliament.

2. The by-law has purſued the cuſtom; it follows the words of it, but then it is ſaid,

1. That the city have made themſelves judges in their own cauſe. But are there not many reſolutions in favour of theſe by-laws? And was there not a penalty too in the caſe of the city beam; and yet it was allowed, becauſe no inconvenience would follow, ſince the court may judge of the reaſonableneſs of the penalty. 1 *Lev.* 16.

2. It is ſaid the freemen of the city are excluded. But is not this done in full common council, where their own conſent is implied? And why may not they conſent to part with any branch of their privilege?

3. They tell us, it binds foreigners out of the diſtrict. *Anſwer:* It is done by cuſtom, and that according to *Wagoner*'s caſe is good, even in the caſe of a private benefit. The by-law can only be void *pro tanto* as to what ariſes out of the city, as in the caſe of an award. 2 *Ven.* 33. This carriage appears to have been in *London*, and ſo within a part of the by-law that is good: and this anſwers another objection, that the by-law exceeds the cuſtom, for this is no caſe within the exceſs.

The inconveniencies in this caſe are anſwered by the exception, which warrants a carrying by the non members in ſuch caſes.

The cuſtom therefore we ſay is good, and well purſued by the by-law: that the further proviſions will not infect what is conſiſtent with the cuſtom; and even thoſe proviſions will be good under the notion of by-laws for the regulation of trade: this is a caſe within the cuſtom, and therefore we pray a *procedendo.*

Pengelly replied. It has not been ſhewn, and I rely upon it, that the merchant ought not to be obliged to employ theſe porters, when he has no means to compel them to attend and do the buſineſs.

Curia adviſare vult. And it was ſpoke to this term upon ſome of the objections that ſeemed to have moſt weight with the court.

Wearg for the city. One objection is, that this is to reſtrain a man from the uſe of his bodily labour, to which every one has a natural right. But is not the cuſtom to reſtrain the exerciſing a trade by one not free allowed, and is not this more reaſonable? If a

man

man is not to uſe an art which he has been ſeven years in learning, and perhaps not able to turn his hand to any thing elſe, ſurely he may be reſtrained from one ſort of bodily labour, and apply himſelf to another.

But the great objection is, that the cuſtom as here laid extends itſelf out of the city. It does indeed appear to go beyond the walls, but what we rely upon is, that the liberties of the city and their ſuperintendency on the river of *Thames* extends from *Staines Bridge* to *Yendal*. 14 *E.* 2. *Lib. regum antiquorum* 256. cited in *Stow* 35. It appears the juſtices in *Eyre* ſitting in *London* took cognizance of a matter ariſing upon the river of *Thames*; the defendant pleaded to their juriſdiction, *et juſticiarii dixerunt quod aqua Thameſiae pertinet ad civitat' London uſque mare, et ſi velit reſpondeat.* 9 *E.* 4. *p.* 2. *m.* 7. It appears the King had granted to the Earl of *Pembroke* power to build a wear in the *Thames*, but upon complaint of the city it was repealed, with this declaration, *quod de antiquo jure habent cives London ſuperviſum et gubernationem aquae Thameſis ad pontem de Staines. Stow* 37. makes mention of them, and the records themſelves are ſo. 1 *Roll. Abr.* 557. the very limits now in queſtion are declared. And *in Scaccario*, 3 *Jac.* 1. *Ro.* 89. *Co. Ent.* 535. The Attorney General confeſſes the claim of the city to a juriſdiction on the *Thames* between *Yendal* and *Staines Bridge*.

The claim is confined to the port of *London*, which is an averment, that the port extends ſo far, and the court will intend the port to be part of the city, as in the caſe of a bridge it has been done. 1 *Lev. Bernard* v. *Bernard.* The cuſtom of the city that their traders may ſet up in any part of the kingdom extends beyond the city, and yet that has been allowed. 1 *Mod.* 79. 1 *Saund.* 311. The caſe of the *Graveſend* watermen extends all the way between that town and *London*.

C. J. I am of opinion that both the cuſtom and by-law are good, notwithſtanding the objections that have been taken: I ſhall not go over them all, becauſe the opinion of the court has been given as to ſome of them upon the former arguments.

A cuſtom to reſtrain trade in a particular place is good; and ſurely much more ſo, where the reſtraint is only from bodily labour in one inſtance, than where it prevents a man from exerciſing an art he has been a long time in learning. I think the cuſtom is good, as it is a convenience to the publick, and that there is an equivalent by the obligation the city is under to provide porters; if they do not, I am of opinion an action will lie, as in the common caſe of a ferry; neither is the merchant obliged to rely on an action

action only, for he may certainly employ who he pleaſes if the free porters do not attend. The convenience to the merchant is very great, in having perſons ready to aſſiſt him as ſoon as he comes into port, and ſo he is not obliged to go and ſearch for porters who are ſtrangers to him.

As to the objection about the extent, I think it is fully anſwered by the ancient records that have been cited, and above all by the confeſſion of the Attorney General, which is of more weight than any of the reſt; ſince it cannot be imagined that the King's Attorney would confeſs a juriſdiction againſt the crown, which the city had not the cleareſt right to. We muſt take the port to be within the limits; or if it went beyond the limits of the city, yet I do not ſee how this caſe can be diſtinguiſhed from that of the *Graveſend* watermen. The cuſtom of meetage extends as far, and yet that has never been queſtioned upon this account.

There is no doubt but a by-law may be good in part, and void for the reſt; for where it conſiſts of ſeveral particulars, it is to all purpoſes as ſeveral by-laws, though the proviſions are thrown together under the form of one. I am of opinion there ought to be a *procedendo*. *Powys* J. *accord'*.

Eyre J. The reaſons on which the other cuſtoms of meetage and weighing at the city beam have been allowed, will ſupport this; becauſe an action will lie, if the city do not provide porters. Corporations or publick bodies are preſumed to diſcharge their duty in caſes of this extenſive nature better than any private perſons can. *Et per Forteſcue* J. If this was an inconvenient cuſtom, it would have been complained of before ſo long an enjoyment. The caſe of carts was allowed, to prevent nuſances; and we may put this upon the ſame foot. In *Cudden* v. *Eaſtwick* the cuſtom was allowed, and only determined, that it was ill to lay a penalty upon the merchant. I think it is enough to ſay, that it does not appear that this cuſtom extends itſelf out of the port, though it is plainly confined to it, and we muſt take notice of the extents of ports. Does not the cuſtom for trying felonies committed in *Middleſex* at the *Old Bailey* extend itſelf through the whole county of *Middleſex*? *Per curiam*, There muſt be a *procedendo*.

Trin. 2 *Geo.* 2. *Robinſon* v. *Webb* the ſame return was made, and upon my motion a *procedendo* was granted without argument, the point having been ſettled the ſame way in *C. B.* on a ſolemn argument. *Paſ.* 13 *Geo.* 1. *Ludlam* v. *Bradley*.

Michaelmas Term

8 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Juſtice.*
Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Forteſcue Aland, *Knt.*
Sir Robert Raymond, *Knt. Attorney General.*
Sir Philip Yorke, *Knt. Solicitor General.*

Dominus Rex *verſ.* Inhabitantes de Warminſter.

A perſon irremovable needed not give notice before 3 & 4 W. & M.

THE ſeſſions return an order of two juſtices for the removal of *J. S.* whereby it appeared, that after the ſtatute 1 *Jac.* 2. *c.* 17. and before the 3 & 4 *W. & M. c.* 11. *J. S.* had been hired into the pariſh of *Warminſter*, and had lived there as a ſervant for forty days, which the two juſtices adjudged had gained him a ſettlement. And now Mr. *Fazakerley* moved to quaſh the order, becauſe it did not appear, that *J. S.* had given notice, and the ſtatute of 1 *Jac.* 2. is expreſs, that the forty days are to be accounted from giving notice in writing; and beſides the *certiorari* ſhould have gone to the two juſtices and not to the ſeſſions, becauſe it did not appear any act had been done at ſeſſions, either to confirm or reverſe the order. As to this laſt matter the court held that the order was well returned by the ſeſſions. And Mr. Juſtice *Eyre* ſaid, it had been ſo determined already, for the juſtices are ſuppoſed to return all the orders they make to the ſeſſions, where they are to be recorded. And as to the other part of the caſe, it was held well enough

Certiorari to remove an order of two juſtices may be directed to the ſeſſions, and returned by them.

enough without notice, for the intent of that was only to give the pariſh an opportunity of ſending away perſons that were removable; but that is not the caſe of hired ſervants or apprentices who are irremovable; ſo that requiring them to give notice, is requiring them to do a vain thing, for as to themſelves it can be of no benefit in making it a better or a ſtronger ſettlement, and as to the pariſh, they can do nothing upon it either to eaſe or diſcharge themſelves.

Between the Pariſhes of Chewton *and* Compton Martin.

TWO juſtices make one order for the removal of two different families, and the ſeſſions upon appeal quaſh the order for inſufficiency: and to maintain the order of ſeſſions *Reeve* objected to the order of two juſtices, that though the pariſhes are the ſame in both caſes, yet the removal of two families by one order is ill: for ſuppoſe the removal of one is legal, and the other illegal, and there is an appeal to the ſeſſions as to both, and the order is confirmed as to one, and reverſed as to the other; what is to be done in that caſe as to coſts, the ſtatute of 8 & 9 *W.* 3. *c.* 30. giving coſts to the pariſh in whoſe favour the appeal is determined, and now the appeal will be determined in favour of neither, and of both; it cannot be ſaid that the order is reverſed, becauſe it ſtands good as to part, and it cannot be ſaid to be confirmed, becauſe it is not held good as to the whole.

Though the pariſhes are the ſame, yet different perſons cannot be removed by the ſame order upon independent ſettlements.

Eyre and *Forteſcue* Juſtices were of opinion, that the order was ill, giving this further reaſon, that the party removed had a right to appeal, for it may be he was removed from his own eſtate, and then upon his appeal it will conſequentially draw over the other matter in which perhaps the parties on all ſides acquieſce. The Chief Juſtice ſaid he had not fully conſidered it, but his two brothers being clear that the order of the two juſtices was ill, and the counſel for maintenance of that order refuſing to refer the whole matter to the judge of aſſize, he pronounced the rule, That the order of ſeſſions ſhould be confirmed.

Vicars *verſ.* Worth.

THE wife libelled in the ſpiritual court for words which appeared on the libel to be ſpoken in *London*: the words were (ſpeaking to the huſband) "You are a cuckoldly old rogue, and "was cuckold by a porter." And againſt a prohibition *Lut.* 1039. was urged, that the cuſtom of *London* extends only to the word *whore*,

Words tantamount to whore are within the cuſtom of *London*.

whore, and words that only import a woman to be ſo, are not within the cuſtom. *Sed tota curia contra*; for prohibitions have been often granted where the words are tantamount; *Batchelor* v. *Dennis*; *Evans* v *Jones*, 3 *Annae*, *Paſch.* 1 *Geo. in B. R. Kilburn* v. *Podger.* And in the principal caſe a prohibition was granted.

Dominus Rex *verſ.* Caywood.

The *praemunire* clauſe in the bubble act leaves a power in the court to moderate the judgment. 6 Geo 1. c. 18. §. 18, 19. Ld Raym. 1361.

THE defendant being convicted upon the late act of Parliament of being the projector of an unlawful undertaking to carry on a trade to the *North Seas*, whereby many of his majeſty's ſubjects had been defrauded of great ſums of money, came now to receive the judgment of the court, which was prayed by Mr. Attorney General upon the ſtatute of *praemunire*; whereupon the counſel for the defendant argued, that the late ſtatute had not tied up the hands of the court from pronouncing any milder ſentence, if any favourable circumſtances could be laid before them, but had left a diſcretionary power in the court to puniſh, as (the words are) for a common nuſance; and if they thought fit, that then the party ſhould likewiſe incur *any* of the pains and penalties ordained by the ſtatute of *praemunire*. And if it ſhould be taken otherwiſe, it could be to no purpoſe, that the firſt clauſe of fining for a common nuſance was inſerted, when the judgment of *praemunire* alone would reach every thing that the party could have, to anſwer any fine.

To this it was anſwered by Mr. Attorney and Solicitor, that the whole judgment in a *praemunire* might ſtand, and yet there might ſtill be ſome uſe for the clauſe about nuſances, where part of the judgment might be to abate the nuſance, and the party convicted may be likewiſe ſet on the pillory or whipped, which is no part of the judgment againſt one convicted upon the ſtatute of *praemunire*. And they ſaid the word *any* in the ſtatute was the ſame as all; if he is to incur *any* of the pains and penalties, that is *every one*.

Paſch 10 *Geo.* he was fined 5 *l.* and impriſoned during the King's pleaſure.

Adjournatur. And the laſt day of the term the Chief Juſtice declared the opinion of the court, that they had a diſcretionary power to inflict all, or only ſome, of the penalties of a *praemunire*.

Dominus Rex *verſ.* Mendez.

UPON exhibiting articles of the peace againſt the defendant, it was objected by Mr. *Wearg*, that the fact whereon the proſecutor grounds his apprehenſions of danger appeared to be committed before the act of grace, and pardoned thereby; and the crime by that being gone, it muſt be conſidered as never done; and the court never demands ſecurity of the peace barely on a man's ſwearing he goes in danger of his life, without laying ſome fact before the court, that it may appear to be ſuch a *metus, qui cadere poſſit in conſtantem virum.*

A fact committed before the act of grace may be a ground for articles of the peace.

Sed per curiam: Suppoſe it was threats only, would not they be a ground for articles, tho' they are not puniſhable? Though the fact is pardoned, yet it may be inſtanced for an inducement to us to believe the defendant a dangerous perſon. The defendant entered into a recognizance to keep the peace.

Edwards *verſ.* Carter et al'.

THE defendant and another were partners in the trade of a brewer, and the plaintiff ſupplied them with malt, for which they neglecting to pay, the plaintiff ſued out a bill of *Middleſex*, and arreſted *Carter*, who at the return of the writ put in bail before a judge; but the other partner could never be arreſted: whereupon the plaintiff, without taking any notice of the proceedings upon the bill of *Middleſex*, takes out an original againſt both partners, and outlaws them. And now *Strange* moved, that the outlawry as to *Carter* might be reverſed at the plaintiff's expence, becauſe he had proceeded to outlawry againſt one that was preſent in court.

Where the proceſs is againſt two on a joint cauſe of action and one only appears, the other muſt be outlawed before there can be any further proceedings.

Upon the motion the court made a rule to ſhew cauſe; and ſaid it was ſuch a contempt, that they ordered an attachment *niſi.* And *Wearg pro quer'* coming to ſhew cauſe inſiſted, that the other defendant not appearing upon the bill of *Middleſex*, it was impoſſible for the plaintiff to go on upon it with any effect; and as to taking the orginal againſt both, that was neceſſary, becauſe it was a joint contract. *Sed per curiam*, Though you could not proceed on the bill of *Middleſex*, and though it was neceſſary to join the other, who could not be arreſted, with the defendant, in the ſame original, yet you could not go on to outlawry againſt him: you ſhould have outlawed one onely, and then you might have come and declared upon

the original, that *Carter*, together with *A. B.* his late partner *aſſumpſerunt ſuper ſe*; but the proceeding here is altogether irregular, becauſe the party was in court, and had done every thing in his power to put the plaintiff in a fair way of recovering his debt: he could not appear or file bail for the other partner, becauſe an action would lie againſt him for doing it without authority. The court ordered the outlawry to be reverſed, and the plaintiff to pay coſts, on the defendant *Carter*'s appearing to the original, and diſcharged the attachment part.

Groenhouſe *verſ.* Cleever.

Where the defendant is in cuſtody the declaration muſt be delivered to the turnkey and not into the office.

THE defendant being in cuſtody for want of bail, after the ſecond term moved for a *ſuperſedeas* for want of the plaintiff's declaring, which was oppoſed by Mr. *Reeve*; becauſe though no declaration had been delivered to the turnkey according to 4 & 5 *W.* & *M. c.* 21. yet there had been one left in the office in time, and this he ſaid would be enough to prevent the defendant's diſcharge, though he could not be obliged to plead to it, or let the plaintiff take a regular judgment. And of this opinion was the ſecondary, who informed the court, that a *ſuperſedeas* is never granted, till the clerk of the declarations has certified there is no declaration againſt him in the office; which certificate would be uſeleſs, if the delivery of a declaration into the office be not ſufficient to prevent a diſcharge upon common bail. But the court upon conſideration granted a *ſuperſedeas*, taking the delivery of a declaration to which the defendant was not obliged to plead, and on which the plaintiff could not ſign a regular judgment, to be no delivery at all.

Dominus Rex *verſ.* Jones.

Where a conviction of forcible entry is quaſhed, the court *muſt* award reſtitution.

A Conviction of forcible entry was quaſhed for the old exception of *meſuagium* ſive *tenementum*; but the reſtitution was oppoſed, on an affidavit that the party's title (which was by leaſe) was expired ſince the conviction. The court ſaid, they had no diſcretionary power in the caſe, but were bound to award reſtitution on quaſhing the conviction.

Dominus

Dominus Rex *verſ.* Cleg.

AN order of baſtardy was made at ſeſſions, (which was admitted to have original juriſdiction) and Mr. *Denton* objected, that it was not ſaid the defendant was ever ſummoned or appeared, and natural juſtice required that he ſhould at leaſt have an opportunity to defend himſelf.

Where an order of baſtardy is made originally at ſeſſions (as it may) Q. If a ſummons ſhould not be ſet out.

C. J. I believe theſe orders made originally at ſeſſions are very rare, the uſual way being to bring the matter before the ſeſſions by way of appeal from the order of two juſtices. Now if it ſhould be taken, that the order of two juſtices will be well enough, without their ſhewing a ſummons or appearance; yet I think this caſe will fall under a very different conſideration. For in the other caſe the party has an opportunity to relieve himſelf by appeal, whereas upon an original order at ſeſſions he can have no opportunity to bring the matter to a farther examination; ſo that it is but a lewd woman's going behind his back and ſwearing a baſtard upon him, by which means the moſt innocent man in the world may be condemned. In the caſe of the *Queen* v. *Simpſon*, it was long debated, whether there ought not to have been a perſonal appearance of the deer-ſtealer; at laſt indeed it was determined, that a ſummons was ſufficient, but it was never offerred to be ſupported upon the foot of not ſhewing a ſummons. So far from it, that exceptions were taken to the manner of the ſummons, and the court delivered a ſpecial opinion as to them. *Ante* 44. *Lord Raym.* 1406.

Eyre J. (*abſente Powys*). It not appearing this order was made in the abſence of the party, I think we muſt take it to be a regular proceeding. And ſo it was held in the caſe of the *King* v. *Peckham*, *Carth.* 406. The court ſaid, where a ſummons was neceſſary, they would preſume there was one, unleſs the contrary appeared; for all juriſdictions are preſumed *prima facie* to act according to law.

Forteſcue J. It is certain, that natural juſtice requires, that no man ſhall be condemned without notice; for which reaſon I think the order will be good, becauſe it does not appear to us that he had no notice: are we to ſuppoſe the ſeſſions have proceeded contrary to right and juſtice, and that too in a caſe where they have undoubted juriſdiction? In the caſe of ſervants wages the juriſdiction is given only in huſbandry, and yet orders have been held good, where it did not appear the ſervice was in huſbandry; for the court ſaid they would intend it ſo, unleſs the contrary appeared. *Salk.* 442.

C. J. I do not ſee to what purpoſe we exerciſe a ſuperintendency over all inferior juriſdictions, unleſs it be to inſpect their proceedings, and ſee whether they are regular or not. I have often heard it ſaid, that nothing ſhall be preſumed one way or the other in an inferior juriſdiction. And as to the caſe of wages, it was always wondered at, and in my Lord *Parker*'s time it was actually contradicted in the caſe of the *King* v. *Helling*, *ante* 8. *Adjournatur. Trin.* 12 *Geo.* it was moved and confirmed without oppoſition.

Pitt *verſ.* Coney.

On error in action *ſur* bottomree bond there muſt be bail.

THE plaintiff recovered on a bottomree bond, and the defendant brought a writ of error, but put in no bail; and the queſtion was on the words of the ſtatute, which are, *bonds for the payment of money only. Et per curiam*, The contingency having happened, this is now in every reſpect a bond for the payment of money only, and therefore there muſt be bail.

Between the Pariſhes of Wookey *and* Hinton Blewet.

Where a perſon ſettled in *A.* has an eſtate deſcended to him in *B.* he cannot be ſent thither, though if he was there he would be irremovable.

A Perſon ſettled at *Hinton Blewet* had an eſtate deſcended to him in *Wookey*, whereupon the juſtices ſend him thither as to the place of his laſt ſettlement. *Et per curiam*, The order quaſhed, for it is no ſettlement nor inhabitation, though if he ſhould go thither he could not be removed: it may be a great injury to ſend him away from a good trade in *H.* to perhaps half an acre of land wherein he has but a term.

Between the Pariſhes of Landinaboe *and* Much Birch.

Where a woman with child of a baſtard is removed from *A.* to *B.* and privately returns to *A.* and is there delivered, the ſettlement of the baſtard is in *B.*

ORDER for removal of a female baſtard child from *Landinaboe* to *Much Birch*, wherein the fact is ſtated ſpecially, that *Mary Wells* had been lately removed from the pariſh of *Landinaboe* to *Much Birch* aforeſaid, being the place of her legal ſettlement; and that ſoon after, ſhe of her own accord did ſecretly return to the pariſh of *L.* from which ſhe was removed, and has been there ſince delivered of a female baſtard child, which at the time of her removal ſhe went with: and the juſtices ſend the baſtard to *M.* the ſettlement of the mother.

Fazakerley moved to quaſh the order, upon the general ground, that a baſtard is ſettled at the place of its birth. Which was oppoſed by *Strange*, who cited *Trin.* 1 *Geo. between the pariſhes of Tottenhoe* and *Newton Longville*, where a baſtard born at *A.* pending an illegal order of removal, was ſent back with the mother upon reverſal, and adjudged that the baſtard ſhould follow the ſettlement of the mother. So is *Salk.* 474, 532. 2 *Bulſt.* 349. *Et per curiam*, (*abſente* C. J.) That caſe will govern this, and therefore the order muſt be confirmed.

N. B. This caſe was never well conſidered, for it went off without any debate, upon the anſwer given by the caſes which I cited, and which ſeem to differ widely from the preſent caſe; for thoſe caſes were all adjudged upon the apparent fraud, in illegally removing a woman big with child of a baſtard; and leſt the pariſh ſhould take advantage by their own wrong: but in the preſent caſe, it is ſtated that ſhe returned of her own accord, which makes it no more than the common caſe of a baſtard born in the pariſh of *A.* when the mother is ſettled in another pariſh; which ſettlement of the mother was never thought to be the ſettlement of the baſtard. And I do not ſee that it makes any difference, that ſhe returned to the pariſh from whence ſhe was removed, any more than if ſhe had rambled into any other pariſh.

Elwood *verſ.* Sir Godfrey Kneller.

ON a reference to the maſter, he informed the court, that it was neceſſary one Mr. *Holbech* ſhould attend him: and upon this the court was moved for a rule, which they were very tender of granting at all, but at laſt they made a rule, that he ſhould ſhew cauſe, why he could not attend the maſter.

Rule for one not party to the ſuit to attend the maſter.

Combes *verſ.* Blackall.

DEBT upon a bond, *non eſt factum* pleaded, and verdict and judgment *pro quer'*. To a *ſcire facias* on this judgment the defendant pleaded bankruptcy, and that the cauſe of action accrued before: and on the trial it appeared, the bond was given before the bankruptcy, but the judgment was after: and the Judge who tried the cauſe being of opinion againſt the defendant, there was a verdict for the plaintiff. And now in an action of debt upon the judgment, Serjeant *Birch* moved, that the defendant might be

Where the defendant might have pleaded bankruptcy in the firſt action, he ſhall give bail in debt upon the judgment.

diſcharged upon common bail, becauſe the bond, which was the foundation of the demand, was before the bankruptcy. *Sed non allocatur.* For *per curiam*, We can look no farther backward than the judgment, and therefore there muſt be bail.

Dominus Rex *verſ.* Liſter.

Power of the huſband over his wife.

THE defendant married the lady *Rawlinſon*, and they diſagreeing, a deed of ſeparation was executed, whereby ſome part of her fortune was made over to him, and the reſt ſettled for her ſeparate maintenance. In purſuance of this agreement they lived ſeparately for ſome time, till Mr. *Liſter* thought fit to ſeize on her, as ſhe came out of church, and hurried her away to a remote place, where he kept her under a guard, till her relations found her out, and brought a *habeas corpus*, by virtue of which ſhe came before the court. And all this matter appearing, and that he declared he took her into his power, in order to prevail with her to part with ſome of her ſeparate maintenance; the Chief Juſtice declared, and all the reſt agreed, that where the wife will make an undue uſe of her liberty, either by ſquandering away the huſband's eſtate, or going into lewd company; it is lawful for the huſband, in order to preſerve his honour and eſtate, to lay ſuch a wife under a reſtraint. But where nothing of that appears, he cannot juſtify the depriving her of her liberty: that there was no colour for what he did in this caſe, there being a ſeparation by conſent. And therefore they diſcharged the lady from her confinement, and being deſired to bind the huſband from attempting the like for the future, they refuſed to do that; but however intimated to him that they ſhould bear a heavy hand over him, if he acted contrary to the declared opinion of the court.

Smallwood *verſ.* Vernon.

The charge againſt the indorſor may be laid *ſecundum tenorem* of the indorſement, againſt the drawer *ſecundum tenorem billae.*

CASE by original in *B. R.* and declares againſt the defendant as indorſor of a promiſſory note, and after ſetting out the note, and indorſement, he goes on, that *virtute inde* the defendant became chargeable with the payment of the money *ſecundum tenorem* of the indorſement. The defendant upon *oyer* of the original, pleads in abatement, that the charge againſt him ought to be according to the tenour of the note, and not of the indorſement. And *Strange pro def.* inſiſted, that it might be, that the indorſement appointed the money to be paid at a different time from what is mentioned in the note; which are terms that the indorſor cannot lay upon the party who made the note. Suppoſe the note be payable

able 1 *May*, ſurely the party to whom it is given cannot ſay, I appoint the contents of this note to be paid to *J. S.* upon 1 *April*. Or if he ſhould, yet the other will not be bound to pay it till *May*. And if he is charged according to the terms of the indorſement, his only remedy muſt be, to traverſe the being charged otherwiſe than according to the tenour of the note. And as to the objection, that in counts upon promiſſory notes there is no occaſion to lay any expreſs *aſſumpſit*, and therefore the whole may be rejected; he anſwered, that where the pleader does not rely upon the firſt part of the caſe he makes, but goes on further and alleges other matter, he by that gives the other ſide an opportunity of traverſing the laſt matter; as *Lutw.* 108.

Sed per curiam, There is no occaſion to pray in aid of that objection here, where the action is againſt the indorſor; it is true *he* cannot lay a charge upon the giver of the note in a manner different from the terms of it; but he may charge himſelf if he pleaſes, for every indorſement is the ſame as making a new note; and if the note be payable 1 *May*, and the indorſement appoints it to be 1 *April*, as to the indorſor this is a promiſſory note payable 1 *April*. If this was an action againſt the giver of the note, there might be more in the objection. *Reſpondes ouſter agard.*

Preſton *verſ.* Lingen.

IN ejectment on the demiſe of Lord *Coningsby*, the plaintiff moved on the common affidavit of value, for a trial at bar, which was oppoſed by the defendants on another affidavit, that they ſeverally held but ſmall parcels of lands by different titles: and this is putting it in the power of the plaintiff, by joining ſeveral together, to bring the owner of but 5 *l. per ann.* to the bar. *Sed per curiam*, There muſt be a trial at bar, for if the plaintiff makes but one title to the whole, he has a right to join them all together. It was moved that the leſſor, having privilege, might name a good plaintiff to be liable to coſts; but the court denied it with ſome reſentment, ſaying it had been often attempted, and as often refuſed.

Trial at bar, where grantable.

Anonymous.

ON a motion for an attachment, the Chief Juſtice declared, that all the Judges (on conſideration) had reſolved, that the ſheriff could not take bail on an attachment, but a Judge at his Chamber might.

Sheriff cannot take bail on an attachment.

Mich. 13 *Geo. Rex* v. *Bentley*. Reſolved accordingly.

Cary

Cary *verſ.* Webſter.

At Guildhall coram Pratt *C. J.*

Where money is paid to the ſervant and he miſapplies it, the party has his remedy againſt the maſter or ſervant at election.

THE defendant was a clerk of the *South-Sea* company, and took in the payments on the third ſubſcription: the plaintiff paid him 600 *l.* and he by miſtake never entered it in the book, but however paid it over to the company. And the Chief Juſtice ruled, that no action would lie againſt him. That if he had not paid it over, the plaintiff would have had his option, either to charge him or the company; as in the common caſe of payment to a goldſmith's ſervant, who does not carry it to the account of his maſter, the party has an election to go againſt either: he may charge the ſervant, becauſe till the money is paid over the ſervant receives it to his uſe; or he may paſs by the ſervant and make his demand upon the maſter, becauſe the payment to the ſervant is made in confidence of the credit given him by the maſter.

Atwood *verſ.* Dent.

In Middleſex coram Pratt *C. J.*

The party who excepts to a witneſs may call him afterwards.

THE plaintiff called a witneſs, who was ſet aſide upon an exception taken by the defendant. But afterwards the defendant himſelf thought fit to call him, and then the plaintiff oppoſed his being examined. But the Chief Juſtice ordered him to be ſworn, for he is a good (nay a better witneſs) *for* the defendant, though he is not to be admitted againſt him.

Dickenſon et ux' *verſ.* Davis. Ibid.

In an action *by* huſband and wife, the defendant on the general iſſue ſhall not be admitted to controvert the marriage.

TRESPASS by huſband and wife, for an aſſault on the wife, and on Not guilty the defendant would have given in evidence, that the man had a former wife ſtill living, and then the defendant could not be guilty of ſuch a beating for which the plaintiff was intitled to damages; and Not guilty does not go barely to ſay I did not beat this woman, but I did not beat the plaintiff's wife. *Sed per Pratt* C. J. I can never allow it: you might have pleaded this in abatement, and then they would have had an opportunity to meet you upon that queſtion; whereas if I was to let you into it now, the honeſteſt couple in the world may be branded for adulterers.

Moody *verſ.* Thurſton.

At niſi prius *in* Middleſex coram Pratt *C. J.*

BY the act for ſtating the debts of the army, the commiſſioners have power to call the officers and agents before them, and if it appears there is any money due from one to the other, the commiſſioners are to give the party a certificate, and he may maintain an action for the money as upon a ſtated account. The plaintiff now produced his certificate; and the defendant offered in evidence his accounts, by which he ſaid it would appear, he had at that time no money in his hands: and beſides, the commiſſioners had never heard him, but on the firſt ſummons made the certificate, and refuſed to give him time to produce his accounts. But the Chief Juſtice would not let him into this evidence, being of opinion, that the certificate was concluſive.

Act of the Commiſſioners for ſtating the debts of the army, concluſive evidence.

Hil. ſ. quen' on a motion for a new trial they were all of the ſame opinion.

Dominus Rex *verſ.* Gray.

At the Old Bailey.

ONE of the ſervants in the houſe opened his lady's chamber door (which was faſtened with a braſs bolt) with deſign to commit a rape: and C. J. *King* ruled it to be burglary, and the defendant was convicted, and tranſported.

Burglary.

Kelyng 67.

Dominus Rex *verſ.* Vincent et al'. Ibid.

INdictment for forging a will relating to perſonal eſtate; and on the trial a forgery was proved, but the defendants producing a probate, that was held to be concluſive evidence in ſupport of the will.

A will relating to perſonal eſtate cannot be ſaid to be forged, after probate granted.

Dominus Rex *verſ.* Burton. Ibid.

THE defendant came to town in a chaiſe, and before he got out of it he fired his piſtols, which by accident killed a woman; and *King* C. J. *de C. B.* ruled it to be but manſlaughter.

Manſlaughter.

Statford *verſ.* Neale.

Paſ. 3 Geo. rot. 183.

In prohibition the contempt is but form, and the jury need not give any verdict about it.

ERROR on attachment *ſur prohibition*, wherein the plaintiff declares, that by the laws of *Ireland* no tithes ought to be paid twice in one year, or for cattle fed with hay whereof tithes have been paid, or for ſtubble, *&c.* That he was ſeiſed of certain lands for which he had paid tithes, and yet the defendant libelled againſt him, as being rector, and intitled to two thirds of the tithes of certain bullocks and horſes depaſtured upon the land, for which tithes had been paid as aforeſaid; and that he was proceeding againſt him, though he had alleged all this in his defence.

The defendant as to the contempt pleads Not guilty, upon which iſſue is joined; and for a conſultation, that as to two intire parts of the tithes of the agiſtment of thoſe lands he is intitled to them as rector, and therefore libelled; and traverſes, that for all the time aforeſaid the cattle were fed with hay for which tithes had been paid, and only in meadows that had been tithed: upon which iſſue is joined and found with the defendant in the words of the traverſe: on this the King's Bench in *Ireland* award a conſultation, upon which error is brought, and the general errors aſſigned.

Mr. Solicitor General *pro querente in errore* took ſeveral exceptions.

1. That the traverſe to the merits of the ſuggeſtion was immaterial, for it ought to have been to the refuſal of the plea, which is the foundation of ſending the prohibition, and it is not any want of juriſdiction. 2 *Co.* 45. *a.* *Cro. El.* 511. The Judge below might have tried whether the beaſts were fed with hay of which tithes had been paid.

2. If the matter was properly traverſable, yet the traverſe is too narrow; for it is, that during *all* the time they were not ſo fed, and ſo is the verdict, whereas they ſhould have anſwered to every part of the time. 2 *Townſ. Jud.* 174. *F. N. B.* 54.

3. The traverſe is a negative pregnant, that the beaſts were not fed with hay that had paid tithes and only in meadows which had been tithed that year; all in the conjunctive, whereas theſe being ſeveral matters ought to have been ſeparately traverſed. 1 *Roll. Abr.* 640. *pl.* 12, 13, 14. *Yelv.* 86. It amounts only to ſaying both

facts are not true, but yet one of them may. A negative pregnant is a denial with an inſinuation of another affirmative, as *ne dona pas per le fait* implies a parol gift. *Cro. Jac.* 505, 560. And this exception goes likewiſe to the verdict, for that finds both the ſame way; when if one was true, the plaintiff will be excuſed. 12 *E.* 4. 6. *Bro. Iſſue* 39. And the difference lies between the affirmative and negative propoſition.

4. There is no verdict as to the iſſue upon the contempt, which is a diſcontinuance. 1 *Roll. Abr.* 801. *pl.* 4. 802. *pl.* 7. And it is not barely an imperfect verdict. 3 *Lev.* 55. Treſpaſs for a coat and mantle, and a ſpecial verdict as to one, and none as to the other; held ill. *Co. Ent.* 459. the precedent is with the objection.

5. The defendant in his plea does not go for a conſultation as to every thing in the libel; whereas the conſultation is awarded generally for the whole. 1 *Book of Judg.* 97. *Aſh.* 376. 2 *Townſ. Jud.* 107, 172, 173, 174. *Vid.* 61. 5 *Co.* 66. *Jeffries*'s caſe.

6. After the judgment *quod nil capiat per billam*, there is no *eat inde ſine die.* 1 *Roll. Abr.* 771, 772. *pl.* 26. *Cro. Jac.* 439. 1 *Keb.* 488. 1 *Book of Jud.* 102.

7. The quantity demanded in the plea is uncertain, being for two intire parts, but does not ſay whether thirds or tenths. Now that ought to be certain, for the plea is in nature of a count, being a ſuit for a conſultation.

Cheſhyre Serjeant *contra.* 1. We have followed the words of the allegation, as to the refuſal of the plea. 2 *Co.* 45. ſays, it is but form, and not traverſable.

2. I did not hear the anſwer.

3. The traverſe is in his own words, and we could not divide them by ſeveral traverſes.

4. In the caſe of treſpaſs there never is any verdict as to the *vi et armis.* 1 *H.* 7. 19. *Salk.* 346. And in the caſe of *Sumner* v. *Acton in Scaccario* I took this very exception in treſpaſs, and it was over-ruled; and yet that is in a point material, becauſe the King is intitled to his fine of 6 *s.* 8 *d.*

5. The general award of a conſultation can only go to what is covered by the plea.

6. *Eat*

6. *Eat inde ſine die* would not be proper, becauſe there may be another prohibition. Nor is it neceſſary here, where the plaintiff claims nothing.

7. The incertainty in the quantity is nothing in the temporal courts: their proceedings below are more looſe than ours; they libel for words *et eis ſimil':* for ſuch a ſum of money, *aut eo circiter.* 2 *Lev.* 193. 2 *Roll. Abr.* 298. 2 *Lev.* 173. 1 *Mod.* 182. Fine for two parts of a manor. 1 *Leon.* 115. And 13 *Co.* 58. explains it that two parts are two thirds, three parts three fourths, *&c.*

Mr. Solicitor General. The caſe of treſpaſs is different, for there finding the juſtification is a denial of the force, but here a verdict upon the merits is no denial of the contempt.

C. J. The incertainty of the demand in their proceedings is no objection in a caſe within their juriſdiction, as to which their law is the rule. The refuſal of the plea need not be traverſed; the material point being, whether tithes are payable or not. I think the traverſe good, in denying it as the plaintiff alleges it, but there does ſeem to be a difference between the caſe of a treſpaſs and the contempt.

Eyre J. In demurrers the contempt is never anſwered, for that is but form, and of a modern introduction, it being the courſe before Queen *Elizabeth*'s time to ſue out a *ſcire facias quare non fieret breve de conſultatione. Co. Ent.* 452. 2 *Co.* 46. *Archbiſhop's caſe*, has no *eat inde ſine die*; nor can it be neceſſary, becauſe *inde* would refer to the contempt, and that is only matter of form.

Forteſcue J. I think the incertainty is no objection, and as to the contempt it is but form, and the jury is never charged with it.

Adjournatur. And this term

Reeve pro querente in errore, waiving all the exceptions which on the former argument the court inclined had nothing in them, mentioned only three, which he inſiſted on.

1. The praying a conſultation for two integral parts, without diſtinguiſhing whether thirds, fourths, *&c.*

2. The plea extends to lands not mentioned in the libel, ſo the award of a conſultation *in hac parte* goes to the whole; and a conſultation cannot be granted for a matter not in ſuit below.

3. But the objection he principally relied upon was, that there was no verdict as to the iſſue joined upon the contempt. It muſt be agreed, that if the verdict does not go to all the material points put in iſſue, it will be error, 3 *Lev.* 39, 55. (which the court agreed) then the nature of this contempt is to be conſidered. In a prohibition both parties are actors, the plaintiff for damages, and the defendant for a conſultation, and no body can ſay but the proceeding after a prohibition is a damage, an injury to the plaintiff. 1 *Cro.* 559. 1 *Jon.* 447. 2 *Roll. Abr.* 516, 575. And therefore in 1 *Vent.* 348, 350, 362. 2 *Jon.* 128. a judgment was reverſed for want of alleging a *venue* where the proceeding was, and *Jones* cites two precedents, *Paſch.* 3 *Car.* 2. and *Paſch.* 22 *Car.* 2.

Pengelly Serjeant *contra*. When two parts are demanded, it cannot be underſtood otherwiſe, than that one only remains. It is allowed in ejectment, 1 *Leon.* 115. 1 *Mod.* 182. 13 *Co.* 58, 59. In fines and *formedons*.

2. The conſultation can go only to what lands are comprized in the libel, and therefore *in hac parte* is confined to that; or if it ſhould go farther, yet as it can give no new authority to the court below, it ſignifies nothing. *Hob.* 119.

3. As to the contempt, every body knows it is but form, and like the caſe of the *vi et armis* in treſpaſs. 1 *Saund.* 81. *Parl. Caſ.* 201. where the cauſe is determined on a demurrer, there never was any inſtance of inquiring into the contempt. 1 *Townſ. Jud.* 101, 102, 103, 105, 106. *Raſt.* 491. 1 *Saund.* 140, 143. *Co. Ent.* 456. *a.* 457. *b.* 467. *a.* *Lutw.* 1072, 1043, 1052. 2 *Townſ. Jud.* 172. 2 *Co.* 43. *Cro. Eliz.* 512.

Chief Juſtice. The general rule laid down is certainly right; that it will be error, if the verdict does not go to all the material parts of the iſſue: and therefore the queſtion is truly ſtated, whether this be material or not. Now as to that, conſider what is the deſign of the party's declaring in prohibition; it is only to ſee whether the court below ought to proceed farther, and not whether they have proceeded; for that is a matter alleged for form ſake, that there may be a demand of damages, to give it the requiſites of a ſuit in law; but in fact we all know it is a fiction, for they never proceed after the firſt motion, and we muſt take notice of the courſe of proceeding: beſides if this exception ſhould prevail, it will avoid almoſt every judgment in prohibition. As to the other two objections, I think there is one anſwer for both; that upon the whole it appears,

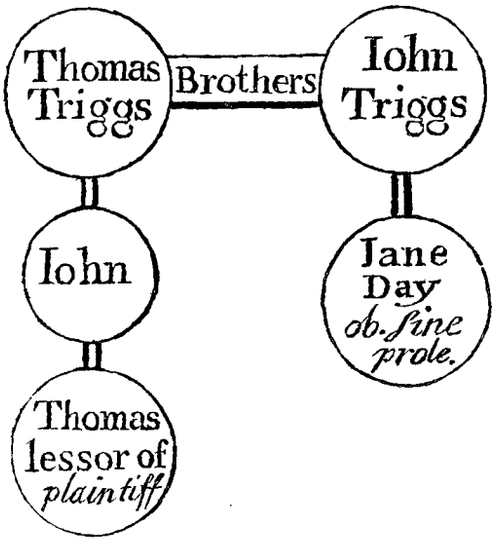
the court below ought to proceed upon the libel, and the conſultation doth not enlarge their juriſdiction. *Powys* Juſtice *accord.*

Eyre Juſtice. The only point in prohibition is, whether the court below ſhall be admitted to proceed. Formerly this was determined by a *ſcire facias quare non fieret breve de conſultatione*, and then it lay upon the inferior court to ſhew they had a juriſdiction. But in eaſe of them this method of declaring was introduced, and that puts the plaintiff to ſhew, that the court below has not a juriſdiction.

The conſultation does not depend on the prayer of the plea, but upon the libel, and is only giving them a power to proceed upon the libel, without any regard to the pleadings upon the declaration. As to the contempt, it is merely fictitious, for does any body think we would not puniſh the judge if he ſhould proceed? The caſe where no *venue* was alleged is widely different, for there the point was tried; and if they do try it, no doubt it muſt be in the ſame manner as all other iſſues are tried.

Forteſcue Juſtice. I do not think *duas partes* are two thirds, they may as well be fifths. But the true anſwer is, that the libel is two thirds. And it matters not what the party prays in his plea. In *Co. Ent.* there is a precedent, where the judgment is *quod fiat conſultatio*, and that the judge ſhall proceed *in iſta cauſa*. The ſame anſwer ſerves for the ſupernumerary lands. As to the contempt, I concur with the reſt, for ſince the precedents are both ways, we muſt adhere to them which tend to ſupport the judgment. The judgment affirmed.

Smith *verſ.* Triggs.



A copyholder *ex parte materna* deviſes to his heir, who dies before admittance: the lands remain deſcendible to the heir on the part of the mother.

UPON Not guilty in ejectment for copyhold lands in *Middleſex*, a caſe was made at *Niſi prius* for the opinion of the court.

That *Hugh Hunt*, being ſeiſed in fee of the premiſſes in queſtion, married *Jane* the widow and relict of *John Triggs* the leſſor of the plaintiff's great uncle. That after the marriage *Hugh Hunt* ſurrendered the premiſſes to the uſe of his will, and afterwards deviſed the ſame to *Jane* his wife and her heirs, and died without iſſue by her; after whoſe death *Jane* was admitted and likewiſe ſurrendered to the uſe of her will, and deviſed the ſame to *Jane Day* her daughter and heir by her firſt huſband *John Triggs*, and to her heirs for ever, and ſoon after died. That *Jane Day* before admittance made her will, and thereby gave the premiſſes to the defendant in the words following; "*Item* I give and bequeath all my freehold and "alſo all my copyhold eſtate, *which I intend to ſurrender to the* "*uſe of this my will*, lying in *Edmington* in the county of *Middleſex*, "unto my couſin *Thomas Triggs* (the defendant) for and during "the term of his natural life, with remainder over. That after making the will, and before any court day, *Jane* the deviſor died, having never ſurrendered to the uſe of her will; but the defendant who is the deviſee is notwithſtanding admitted under the deviſe.

The leſſor of the plaintiff claims the lands as couſin and heir of *Jane Day*, (*viz.*) as grandſon and heir of *Thomas Triggs*, elder brother of *John Triggs*, father of the ſaid *Jane Day*. And the defendant claims under the deviſe.

Short

Short pro quer' argued, 1. That the deviſe by *Jane Day* to the defendant is void for want of a ſurrender to the uſe of her will, and, 2. That the leſſor of the plaintiff, who is heir at law to *Jane Day* is therefore well intitled to the lands whereof no diſpoſition was made by his anceſtor.

1. That the deviſe is void. The nature of a copyholder appears in 1 *Inſt.* 57. *b.* and he is called tenant by copy of court-roll, becauſe all the evidence which he has of his title are the rolls of his lord's court, by which copyholds may be transferred from one to another as effectually, as freeholds may by deed. And he enjoys the method of paſſing his eſtate by the court-rolls, in lieu of the power which a freeholder has to alien his land by deed; for if a copyholder aliens by deed it is a forfeiture. 4 *Co.* 209. *Litt.* §. 74. *Alienare* (ſays my Lord *Coke*) *eſt alienum facere*, that is in legal underſtanding when the eſtate paſſes out of one into another, and that cannot be unleſs there appears ſome evidence of the right's being changed upon the rolls of the court. A copyhold is not deviſable but by cuſtom, for the ſtatute of *Hen.* 8. of wills relates only to freeholds, and doth not extend to copyholds, ſo that a bare deviſe of a copyhold will not paſs the eſtate, as it will of a freehold. *Cro. Car.* 44. And as a copyholder has not ſuch power to deviſe as a freeholder has, ſo likewiſe he cannot exchange his eſtate by parol, as a freeholder could for lands in the ſame county at common law; but is obliged to ſurrender the ſame into the hands of his lord, to the uſe of him with whom he exchanges. So is 1 *Bulſt.* 200. 1 *Inſt.* 50. *a.*

1 Salk. 188.

The law will not ſupply a defect in a title againſt the heir at law, but will conſtrue every thing in his favour; and therefore a ſurrender to the uſe of this will ſhall not be ſupplied, ſince that will be to the prejudice of the heir at law. *Salk.* 187.

2. The deviſe being void for want of a ſurrender, the leſſor of the plaintiff has a good title as heir at law to the deviſor. And if it be objected to him, that he is not heir on the part of the mother, I anſwer, that theſe lands are not deſcendible to the heir of the part of the mother, for though they came to *Jane Day* by her mother, yet the courſe of deſcent was altered by the ſurrender and deviſe made to her by the mother, under which the lands veſted in her as a purchaſer, and not as heir by deſcent. That a ſurrender will alter the courſe of deſcent is proved by this, that if there be two jointenants of copyhold lands, and one ſurrenders to the uſe of his will and dies; by this the jointure is ſevered, and the ſurrenderee is in from the ſurrender, by which the land is bound. *Co. Litt.* 59. *b.*

2 *Cro.* 100. *Cro. Eliz.* 717. And yet a bare deviſe would not take away the right of ſurvivorſhip. So in the caſe at bar, the ſurrender and deviſe was a compleat conveyance to *Jane Day*; and though ſhe died before admittance, yet her heir ſhall not be prejudiced. 1 *Vent.* 260. 3 *Keb.* 329. 4 *Co.* 22. *b.* *Dy.* 291. *b.* 2 *Sid.* 61, 37. (*Contra Yelv.* 144. *Pop.* 127. that the grantee of ſuch a ſurrenderee ſhall not be admitted.)

The courſe of deſcent being therefore altered, and the deviſe to the defendant void, the heir at law of the part of the father has a good title, and therefore he prayed judgment for the plaintiff.

Darnall Serjeant *contra.* Agreed the deviſe would not paſs the eſtate to the defendant without a ſurrender to the uſe of the will; but his poſſeſſion would be a good title againſt the leſſor of the plaintiff, who muſt recover upon his own ſtrength. He can have no title as heir to *Jane Day*, becauſe he is not heir of the part of the mother; for as he argued, *Jane Day* took the lands as heir by deſcent, and not as a purchaſer under the deviſe. And that for theſe reaſons:

1. Becauſe her title by deſcent is more worthy than one by purchaſe; and where two rights meet, the elder or worthier is to be preferred. 2. Becauſe the deviſe was void, being made to the heir, and therefore ſhe ſhall be adjudged in by deſcent, which is moſt for her advantage. 1 *Roll. Abr.* 626. *Salk.* 241, 242. 3. Becauſe admitting the deviſe was well made to the heir, yet in this caſe, it is not compleated by her admittance under it, as it ought to be; for before admittance ſhe could be no purchaſer, and then the leſſor could not be heir to her as a purchaſer, becauſe his anceſtor was never ſeiſed. 1 *Roll. Abr.* 627. *pl.* 9.

Jane therefore took by deſcent as heir of the part of the mother, and the leſſor being only heir of the part of the father can have no title, ſince the lands remain deſcendible to the heir *ex parte materna.*

Chief Juſtice. The deviſe without a ſurrender will not paſs the eſtate to the defendant, but his poſſeſſion will be a good title againſt the leſſor of the plaintiff, if *Jane Day* took as heir by deſcent: and that ſhe was in as ſuch is plain, becauſe the ſurrender to her never took effect for want of her admittance, and ſo ſhe had no good title as a purchaſer, but her title by deſcent was compleat. She had her election of two rights, one veſted immediately, and the other not before election, ſhe died before election, and therefore that which veſted muſt take effect: and then the courſe of deſcent

was not altered, and the heir of the part of the father can have no title. *Adjournatur.* And this term,

Deviſe of a copyhold to the heir is void, and he is in by deſcent.

Pratt Chief Juſtice delivered the reſolution of the court. The caſe in ſhort is this. It was the eſtate of *Hugh Hunt*, who married *Jane Triggs*, and by ſurrender and will deviſed it to *Jane* and her heirs. *Jane* ſurrendered it to the uſe of her will, and deviſed it to her daughter *Jane Day*, who before admittance deviſed it to the defendant, and died without any ſurrender or admittance.

As to the defendant there is no title in him for want of an admittance of *Jane Day*, and alſo for want of a ſurrender to the uſe of her will; and therefore the matter reſts upon what title the leſſor of the plaintiff can make, and if he makes none the defendant muſt have judgment.

And the title which the leſſor makes is this: ſays he, I am the couſin and heir of *Jane Day*, *i. e.* I am the grandſon and heir of *Thomas Triggs*, the elder brother of *John Triggs*, who was her father, and this being a void deviſe to the defendant, I am intitled to the eſtate as heir at law.

And it is true, and is ſo ſtated in the caſe, that the leſſor is heir at law to *Jane Day*, that is on the part of the father; but the objection is, that theſe lands are deſcendible to the heir *ex parte materna*; and if they be, then the leſſor has no title.

And in order to ſee what heir theſe lands are to go to, it is to be conſidered under what title *Jane Day* took the eſtate, whether ſhe was in by purchaſe or by deſcent: if ſhe was in by purchaſe, then the leſſor muſt take them as heir to her: but if ſhe took by deſcent, he has no title, becauſe he cannot make himſelf of the blood of the firſt purchaſer *Jane Triggs*, who was afterwards married to *Hunt*. 1 *Inſt.* 12. *b.* is expreſs, that he muſt be of the blood of the firſt purchaſer.

And we are all of opinion that *Jane Day* took by deſcent, and conſequently the lands remain deſcendible to the heir *ex parte materna*.

Jane Day was heir at law to her mother, who ſurrendered the eſtate to the uſe of her will, and deviſed it to her daughter in fee; that is, ſhe gave her ſuch an eſtate as would have deſcended to her without the will.

Conſider it firſt upon the ſurrender; that we all know was only an inſtrument by which the lord took nothing, and the eſtate notwithſtanding remained in the ſurrenderor: this is plain from *Cro. Eliz.* 441. where the tenant made a ſecond ſurrender, and it was adjudged for the ſecond ſurrenderee, upon the bare ſurrender; therefore nothing paſſes, and the lands will deſcend notwithſtanding.

The next thing to be conſidered is the will. *Quid operatur* by that, to prevent the courſe of deſcent. And we hold that to be of no force in this caſe. A deviſe to the heir is void, 1 *Roll. Abr.* 626. becauſe he has a better and more worthy title by deſcent. This rule holds as well in the caſe of copyholds as freeholds. Indeed where the will deviſes the eſtate in a different manner from what it would have deſcended in, it will be good; this is ſo notorious, that inſtances will be needleſs.

If *Jane Day* was to claim by the will, that title was never compleat for want of an admittance. That plainly ſhews her election to be in of her more worthy title by deſcent. That was a compleat and a perfect title, but the other was not. And for this the caſe of *Abbot* v. *Burton* is ſtrong in point, where a man ſeiſed in fee of lands which deſcended to him of the part of the mother, levies a fine to ſeveral uſes, with a remainder to his own right heirs; and it was reſolved, that this remainder was the ancient uſe, and the heir *ex parte materna* ſhould have it. The caſe of a feoffment is certainly as ſtrong as a ſurrender to the uſe of the will. Salk. 590.

The daughter therefore taking by deſcent, and the mother being the firſt purchaſer; the leſſor, if he claims any thing, muſt make himſelf heir to the mother, which he is not, and conſequently the defendant muſt have judgment.

Hilary

Hilary Term

8 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Juſtice.*
Sir Littleton Powys, *Knt.* }
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Forteſcue Aland, *Knt.* }
Sir Robert Raymond, *Knt. Attorney General.*
Sir Philip Yorke, *Knt. Solicitor General.*

Martin *verſ.* Wyvill.

Q. Whether in *B. R.* the continuances may be entered *de die in diem*, or only from term to term?

IN *Trinity* term laſt the plaintiff delivered a declaration upon a ſtockjobbing contract, with an imparlance to *Michaelmas* term, and then upon a demurrer to the replication the book is made up, and after the firſt of *November* it was made a *concilium*, and the plaintiff had judgment *niſi* before the end of the term; and the day before the end of the term that rule is diſcharged, and an *ulterius concilium* to this term; at the firſt return of which the defendant comes in and pleads as *puis darrein continuance*, that the contract is not regiſtered according to the act of Parliament: whereupon the plaintiff makes a ſpecial entry of the continuances from the firſt day of *Michaelmas* term to that day when it ſtood in the paper, and ſo on to the laſt day of laſt term, and then again to the firſt day of this term. And now *Wearg* moved to ſet aſide the plea, becauſe not pleaded after the laſt continuance, the time for regiſtering expiring the firſt of *November*, after which there are two continuances upon the roll before the plea comes in, whereas all pleas *puis darrein conti-*

continuance ſhould be pleaded before the next continuance after the fact happens; and as to the ſpecial entry here made, he ſaid that indeed the common practice is only to enter continuances from term to term, becauſe that being ſufficient to prevent a diſcontinuance, the attornies for their own eaſe never enter any more; but yet in fact the party has a right to enter all the continuances, the proceedings here being *de die in diem.* Beſides, the plea is falſe in fact, and that is another reaſon to ſet aſide a dilatory; the words of the act are, "That ſuch memorial ſhall be ſigned by the party," and it is upon that they ground themſelves, for the contract is regiſtered, and in this manner, "This contract was made for the "benefit of me *William Martin*, and has not been compounded;" which being all the plaintiff's hand writing, that is a ſigning, though the name is not at the bottom. Like the caſe of a will, which the teſtator writes himſelf, and begins I *A. B. &c.* and does not ſubſcribe it, yet that has been adjudged to be a ſigning. 3 *Lev.* 1.

A will written by the teſtator himſelf needs no ſigning.

As to the point of the continuances the court did not determine that matter: the C. J. and *Forteſcue* J. inclined that as the fact would warrant it, every act of the court might be entered, and then the plea muſt be ſet aſide, as not coming in time; but *Eyre* J. (*abſente Powys* J.) thought this uncommon entry, which was to deprive the defendant of a benefit, which in the common courſe of practice he would be intitled to, ought not to be allowed; however they did not determine this point, being all of opinion, that for the ſecond reaſon the plea ſhould be ſet aſide as falſe, ſaying it was conſtant experience at the aſſizes, to put the party to verify ſuch a plea, before it is allowed, and if the party does not give ſome evidence of the truth of it, the Judge will reject it and go on with the cauſe. And at another day *Eyre* J. cited *Mo.* 871. that a plea *puis darrein continuance* could not be pleaded after a demurrer. The others gave no opinion as to this, but ſet it aſide upon the point of its being falſe in fact, without meddling farther with the continuances.

Where a plea *puis darrein continuance* is put in, the court will immediately require ſome evidence of the truth of it. *Vide* Hob. 81. *contra.*

Colborne *verſ.* Stockdale.

DEBT upon a bond conditioned for the payment of 1550 *l.* The defendant upon *oyer* pleads in bar, that part of the ſum mentioned in the condition, *ſcilicet* 1500 *l.* was won by gaming, contrary to the ſtatute, *per quod* the bond became void. The plaintiff replies, that the bond was given for a juſt debt, and traverſes that the 1500 *l.* was won by gaming, *contra formam ſtatuti modo et forma*, as the defendant has pleaded. The defendant demurs, and

The replication will be ill, if it makes an immaterial part of the plea parcel of the iſſue.

Strange pro def. argued, that the replication was ill, becauſe it makes the ſum parcel of the iſſue, and obliges the defendant to prove, that the whole ſum of 1500 *l.* was won by gaming; whereas the ſtatute avoids the bond, if any part of the conſideration became due on that account; and he urged the common caſe of a plea of payment *before* the day, where if iſſue is joined, and a verdict *pro quer'*, there ſhall be a repleader, becauſe it leaves it open to a poſſibility, that there might be a payment *at* the day, and then the plaintiff could have no cauſe of action: ſo in this caſe the finding that the whole ſum of 1500 *l.* was not won by gaming will not *tell* the preſumption as to a leſs ſum. Beſides, the ſum is put in only for form, and therefore within the reaſon of the caſe of *Stallard* v. *Tims*, the replication will be ill, for making it the ſubſtance of the iſſue.

Wearg contra inſiſted, that the replication following the words of the plea, would be well enough; and cited *Dy.* 365. *pl.* 1. for that purpoſe. *Sed per curiam*, There is no colour to maintain the replication: the material part of the plea is, that part of the money for which the bond was given was won by gaming, and the *ſcilicet*, *ſo much*, is only matter of form, of which no notice ſhould be taken in the replication.

Wearg, then admitting the replication to be ill, ſo is their plea, and then the declaration muſt ſtand, and the plaintiff have judgment.

For this, my exceptions are, 1. That the words of the ſtatute are not purſued: the ſtatute ſays, the bond ſhall be void where it is given for money won by gaming, whereas the plea is, that the money for which the bond was given was won by gaming, and though in fact that may be the ſame, yet the very words of the ſtatute ſhould be purſued. *Sed per curiam*, It amounts to the ſame thing, and is good to a common intent.

2. The ſtatute only avoids bonds given after the firſt of *May* 1711. and therefore the defendant ſhould ſhew this to be ſo; and the time in the declaration (3d of *September* 1720.) will not be ſufficient, becauſe the bond may be given at a different time from what it bears date.

That which appears in the plaintiff's declaration need not be averred in the plea.

Strange. The time is not mentioned as the date of the bond, but that ſuch a day the defendant *conceſſit ſe teneri*, which relates to the execution of it; and therefore it appearing upon the whole record to be ſince the ſtatute, it is the ſame as if it had been in the

words of the plea. *Et per curiam*, The anſwer is right, and there is nothing in that objection.

3. The main objection he inſiſted on was, that it is not ſhewn at what play or game the money was loſt, and that ought to appear to the court, that they may judge, whether it was ſuch gaming as is contrary to the ſtatute: ſome people call ſtockjobbing gaming, and yet if it had appeared to the court, that there was no more in the caſe, they would not have determined it to be a gaming within this act of Parliament.

Where the defendant pleads that the bond was given for money won by gaming, he muſt ſhew what game they played at.

It may be ſaid that concluding *contra formam ſtatuti* is an averment that it was at ſuch a game as is contrary to the ſtatute, and then what game, is not material, but the caſe in *Dy.* 363. is a full anſwer to that, for *contra formam ſtatuti* being only the inference of the party, muſt be ſupported by premiſſes, or it ſtands for nothing.

Strange contra. I ſhall endeavour to anſwer this by ſhewing, 1. That it is not neceſſary to mention the game, and 2. That if it be, the words of the plea are ſufficient.

1. As to the firſt, there might be ſome colour for the objection, if the ſtatute had only made it penal to play at ſome particular games, but here are added the general words, *other game or games*; ſo that it can anſwer no purpoſe whatſoever to particularize the game, becauſe the bond may be void, and yet the money not be loſt at any one of the games enumerated in the ſtatute. The fact of gaming is all that need be alleged, the mode and manner of it is only matter of evidence, of which the jury are judges; and ſo it was ſaid in the caſe of *Groenvelt* v. *Burwell*, *Trin.* 12 *W.* 3. *B. R.* where in treſpaſs, the college of phyſicians juſtified under a conviction *pro mala praxi* in adminiſtring unwholſome pills and drugs, whereby a woman died; and it was held by the court, that if the matter of the conviction was traverſable, even then the fact was ſufficiently alleged, without ſetting out what the drugs were, becauſe that was matter of evidence.

It is likewiſe conſiderable, whether obliging the defendant to mention the game, may not be a hardſhip; for though he may be able to prove in general, that he loſt ſo much money at unlawful games, it may be impoſſible for him to diſtinguiſh how much was loſt at hazard, and how much at picquet.

2. Admitting it neceſſary to be particular, the plea is ſufficient; for if the ſtatute avoids the bond where it is given for money loſt at gaming, then the words of the plea, that the bond was given for money

money won by gaming contrary to the ſtatute, are an averment that it was ſuch gaming as is contrary to the ſtatute. 1 *Sid.* 337. the plaintiff maintained his action on a promiſe made by the defendant *ut* adminiſtrator, and that was held an averment of his being ſo.

Beſides, this general way of pleading, that the money was loſt by gaming *contra formam ſtatuti* is agreeable to the entries where offenſes againſt acts of Parliament are alleged. *Co. Ent.* 46. *a. Raſt. Maintenance.*

C. J. I think the game ought to be mentioned in the plea, for it is matter of law, and not barely evidence; and the ſaying in general that it was *contra formam ſtatuti* will not be ſufficient. *Et per Eyre* J. It is like the caſe of an uſurious or ſimoniacal contract, where the agreement itſelf muſt be ſhewn; and ſo it is likewiſe upon the ſtatute of *Edw.* 6. againſt the ſale of offices, where the particulars of the contract muſt be expreſſed. *Et per Forteſcue* J. In *Lutw.* 180. *Clift* 187. the game is mentioned. The plaintiff had judgment.

Cary *verſ.* Jenkings.

Double plea. IN debt for rent *Strange* moved for leave to plead a tender and eviction, which was granted.

Dominus Rex *verſ.* Filer.

Conviction for *keeping* (only) a lurcher good. CONviction on 5 *Ann. c.* 14. for keeping a lurcher to deſtroy game, not being qualified.

Mr. *Eyre* excepted, that it is not ſhewn he made uſe of the dog to deſtroy game; and it may be he only kept it for a gentleman who was qualified, it being common to put out dogs in that manner.

Sed per curiam, The ſtatute 5 *Ann. c.* 14. is in the disjunctive *keep or uſe*, ſo that the bare keeping a lurcher is an offenſe, and ſo it was determined in the caſe of the *King* againſt *King*, *Paſ.* 3 *Geo. B. R.* which was a conviction for keeping a gun, and it was not doubted by the court, whether the keeping was not enough to be ſhewn, but the only queſtion they made was, whether a gun was ſuch an engine as is within that ſtatute: and in that caſe a difference was taken as to keeping a dog which could only be to deſtroy the game, and the keeping a gun, which a man might do for the defence of his houſe. The conviction was confirmed.

Dominus

Dominus Rex *verſ.* Gibbs.

INdictment againſt the defendant for ſelling *diverſas quantitates cerviſiae lupulatae* (*Anglice* beer) *diverſis fidel' ſubdit' Domini Regis* to the jury unknown, in unlawful meaſures; and on demurrer, Indictment for ſelling divers quantities of beer is too general.

Fazakerley excepted, that it is not ſaid to whom the beer was ſold; and *Sti.* 186. an indictment quaſhed for that exception, becauſe the defendant, if he ſhould be convicted, can never plead it in bar to a new indictment. *Sed per curiam*, It is well enough, the informer may not know the name of the perſon to whom it was ſold; it is an offenſe, let it be ſold to whom it would: indictment for the murder of a perſon unknown is good.

Second exception. That *diverſas quantitates* is too general, and the court cannnot form a judgment in what degree to puniſh him. *Cro. Car.* 380. 2 *Roll. Abr.* 80. *pl.* 14. 81. *pl.* 15, 16, 17. *Et per curiam*, For this fault the indictment muſt be quaſhed.

Adams *verſ.* Verells.

ON a motion for common bail, it appeared to be a borrowing of ſtock, and a promiſe to transfer the ſame quantity at a future day. *Et per curiam*, There muſt be bail, for this is a lending, and therefore not within the act, which ſpeaks only of contracts for the ſale or purchaſe of ſtock. Borrowing of ſtock not within the ſuſpending act.

Dominus Rex *verſ.* Sparling.

CONviction for profane curſing and ſwearing ſets forth, that one *William Collier* came before the juſtice, and gave information, that one *James Sparling* of the pariſh of *St. James Clerkenwell*, leather dreſſer, did within ten days laſt paſt profanely ſwear 54 oaths, and profanely curſe 160 curſes, *contra formam ſtatuti*; and the witneſs being ſworn did depoſe, the defendant ſwore 54 oaths and 160 curſes, and the defendant being ſummoned and heard, the juſtice adjudged him to be guilty of the premiſſes, and to forfeit 21 *l.* 8 *s.* In a conviction for ſwearing and curſing, the oaths and curſes muſt be ſet out. *See* 19 Geo. 2. c. 21.

Serjeant *Darnall* moved to quaſh the conviction, becauſe the penalty is at the rate of 2 *s. per* oath, whereas the ſtatute 6 & 7 *W.* 3. *c.* 11. lays the penalty at 1 *s.* only where the offender is a ſervant, Muſt ſhew the defendant not a ſervant if adjudge the penalty of 2 *s.*

ſervant, labourer, common ſoldier, or ſeaman, and therefore it ſhould be ſhewn that the defendant is not ſuch a perſon.

Baines contra. It appears by his addition that he is a leather-dreſſer. *Sed per curiam:* That is not enough, he may be ſo, and yet he may likewiſe be a ſoldier or ſeaman: in convictions for deſtroying the game, it muſt be ſhewn, that the defendant is not qualified, becauſe otherwiſe the juſtices have no juriſdiction. So here to give the juſtice a power to adjudge the forfeiture at the rate of 2 *s.* it muſt appear, that the defendant is not ſuch a perſon upon whom a leſs penalty is inflicted by the ſtatute.

And the court held the conviction naught for another exception, that the oaths and curſes were not ſet forth; for what is a profane oath or curſe is a matter of law, and ought not to be left to the judgment of the witneſs: he may think falſe evidence is ſo: ſuppoſe it was for ſeditious or blaſphemous words, muſt not the words themſelves be ſet out, be they ever ſo bad, that the court may judge whether they are ſeditious or blaſphemous? the witneſs here takes upon himſelf to ſwear the law, and it is a matter of great diſpute amongſt the learned, what are oaths, and what curſes: the caſe of *Colborne* v. *Stockdale* is freſh in every body's memory, where we held the particular game ought to be ſet out, becauſe what is gaming is a matter of law. *Ante* 493. The conviction was quaſhed.

Lord Bernard *verſ.* Saul.

On *non aſſumpſit* an uſurious contract may be given in evidence.

ON a motion for leave to plead double, the court declared, that on *non aſſumpſit* the defendant might give in evidence an uſurious contract, becauſe that makes it a void promiſe; but in the caſe of a ſpecialty, it muſt be pleaded. And on the trial the defendant was admitted to that evidence upon the general iſſue, and the plaintiff was nonſuit.

Dominus Rex *verſ.* Bickerton.

If a libel be true it will be an inducement to *B. R.* to leave the ſame to a grand jury. *Mich.* 9 *Geo. Rex* v. *Beharrel,* an information for a libel upon the cornfactors at *Bear-key* denied for the ſame reaſon.

ON a motion for an information for a libel in advertiſing that one *Madox* an apothecary had perſonated Dr. *Crow* a phyſician, and wrote and took his fee (which the apothecary did not pretend to deny) the Chief Juſtice declared, that though truth be no juſtification for a libel, as it is for defamatory words, yet it will be ſufficient cauſe to prevent the interpoſition of the court in this ex-

traordinary manner, and induce them to leave it to the ordinary courſe of juſtice before a grand jury. Whereupon the rule for an information was diſcharged.

Jewell *verſ.* Hill.

IN the borough court after notice of trial the parties agreed to refer the cauſe, and during the reference the plaintiff, without new notice, went on to trial and had a verdict, which the judge afterwards ſet aſide. And upon motion againſt him the court declared, that the judge of an inferior court might ſet aſide ſuch a verdict, upon the foot of irregularity.

Judge of an inferior court may ſet aſide a verdict for irregularity.

Dominus Rex *verſ.* Reaſon and Tranter.

THE defendants being indicted by the grand jury that attends the court of *B. R.* for the murder of Mr. *Lutterell*, were brought up to the bar and arraigned, and pleaded Not guilty; and upon their requeſt were remanded to *Newgate*, inſtead of being turned over to the marſhal.

Manſlaughter, *quid.*

Upon the trial (which was at bar) we who were counſel for the King offered to give in evidence ſeveral declarations made by the deceaſed on his death-bed, whereby he charged the defendants with barbarouſly murdering him, and without much heſitation the court let us into that evidence. Whereupon we called a clergyman who attended him, and he ſwore that being deſired by ſome friends of the defendants to preſs Mr. *Lutterell* to declare what provocation he had given the defendants to uſe him in that manner; he declared upon his ſalvation, that as he was a dying man he gave them no provocation, but they barbarouſly murdered him: that in the afternoon of the ſame day, two juſtices of the peace being preſent, and having given him his oath, he made another and more particular declaration to that purpoſe, which the witneſs at the deſire of the juſtices took down in writing, but Mr. *Lutterell* not being able to write, it was not ſigned by him, and therefore we did not deliver it in. And the ſame witneſs proved, that upon his adminiſtring the ſacrament to him he exhorted him in the moſt proper manner to deal ingenuouſly, and declare once more, whether there was no provocation given by him, and whether he would ſtand by the account he had before given; upon which the deceaſed anſwered, that as he hoped to be judged at the laſt day, it was every ſyllable true, and ſoon after expired.

When

When this gentleman had finiſhed his evidence, the court called upon us to produce the paper that had been written from the mouth of the deceaſed, ſaying that was better evidence than the memory of the witneſs; whereupon we acquainted the court, that we had not the original, it being in the cuſtody of one of the juſtices, whom going to *ſubpoena* we found he was in *Wales*; but the clergyman ſaid he had a copy of it, which he took for his own ſatiſfaction, before he delivered in the original to the coroner, and he offered to ſwear this to be a true copy.

Whereupon a debate aroſe, whether this copy was evidence or not: we who were for the King inſiſting, that the firſt paper being only the writing of the witneſs, not ſigned by the examinant, this which he now produced, was as much an original as that. But the court refuſed to let it be read, unleſs we could ſhew the original was loſt, whereas it appeared we might have had it to produce, if we had ſent after it in time.

It was then objected by the Chief Juſtice, that ſince the written evidence was not produced, the whole evidence of the deceaſed's declarations ought to be rejected, for the firſt, ſecond and third being all to the ſame effect, are but one fact, of which the beſt evidence was not produced; and therefore he was of opinion, that we could not be let in to give any account of the firſt and third conference.

But the other judges were of opinion we might, ſaying they were three diſtinct facts, and there was no reaſon to exclude the evidence as to the firſt and third declaration, merely becauſe we were diſabled to give an account of the ſecond.

Thereupon the witneſs was directed to repeat his evidence, laying the examination before the juſtices out of the caſe, which he did accordingly.

And upon the whole evidence the fact (upon which the queſtion of law aroſe) was this:

The defendants were officers of the ſheriff of *Middleſex*, and had a warrant to arreſt Mr. *Lutterell* for 10 *l.* they arreſted him coming out of his lodgings, whereupon he deſired them to go back with him to his lodgings, and he would pay the money. They complied with this, and *Reaſon* went up with him into the dining-room, having ſent *Tranter* to the attorney's for a bill of the charges. Whilſt *Reaſo* nand the deceaſed continued together, ſome words paſſed

paſſed between them in relation to civility-money, which Mr. *Lutterell* refuſed to give, and thereupon went up another pair of ſtairs to order his lady to tell out the money, and then returned to *Reaſon* with two piſtols in his breaſt, which upon the importunity of the maid he laid down upon the table, and retired to the fire which was at the other end of the room, declaring he did not deſign to hurt the defendants, but he would not be ill uſed.

By this time *Tranter* returned from the attorney's with the bill, and being let in by the boy went directly up ſtairs to his partner, being followed by the boy, who ſwore, that as he was upon the ſtairs (*Tranter* being that minute gone into the dining-room) he heard a blow given but could not tell by whom, and thereupon haſtening into the room he found *Tranter* had run the deceaſed up againſt the cloſet door, and *Reaſon* with his ſword ſtabbing him. Mr. *Lutterell* ſoon ſunk down upon the ground, and begged for mercy; but *Reaſon* ſtanding over him continued to ſtab him, till he had wounded him in nine places.

By this time the maid came in, and ſeeing her maſter in that poſture, ſhe and the boy run out for help, and immediately heard one of the piſtols go off, and preſently after the ſecond, which a woman looking out at window on the other ſide the way proved to be fired by *Reaſon*; and ſeveral people upon the alarm of the maid coming into the room found Mr. *Lutterell* upon the ground where the maid left him, without any ſword or piſtol near him.

Upon the defendant's evidence it appeared, that Mr. *Lutterell* had a walking-cane in his hand, and that *Tranter* had a ſcratch in his forehead, which might be probably a blow with the cane, and the blow heard by the boy upon *Tranter*'s firſt going into the room. And one of the ſurgeons depoſed, that the deceaſed had made ſuch declarations to the clergyman, but this witneſs afterwards being alone with Mr. *Lutterell* preſſed him very earneſtly to diſcover the truth, upon which Mr. *Lutterell* did ſay, that he believed he might ſtrike one of them with his cane, before they run him through.

Upon this the queſtion aroſe; whether Mr. *Lutterell*'s ſtriking one of the bailiff's firſt would reduce the ſubſequent killing to be man-ſlaughter only?

For the King it was argued, that notwithſtanding ſuch ſtroke the defendants would be guilty of murder, that not being a ſufficient provocation for giving the death's wound with the piſtol: and for this *Holloway*'s caſe *Cro. Car.* 139. and *Kelying* 127. were cited, where the woodward finding a boy in the park who came to ſteal wood, tied him

to a horſe's tail in order to correct him, the horſe run away and the boy was killed: and this was adjudged to be murder, becauſe the tying him to the horſe's tail, being an act of cruelty, for which no ſufficient provocation had been given, he was anſwerable for all the conſequences of it.

The defendants inſiſted, that the bringing down the piſtols was a ſufficient alarm to them to be upon their guard; and then when he ſtruck one of them, it was reaſonable for them to apprehend themſelves to be in danger; and in ſuch caſe a prudent man would not leave it any longer in the power of his adverſary to do him any further miſchief.

To this it was anſwered by the counſel for the King, that if Mr. *Lutterell* had continued to keep the piſtols in his boſom, there might be ſome colour for an apprehenſion of danger; but the contrary appearing, *viz.* that he was at a diſtance from the piſtols, with the defendants between him and them; they had no ground to fear any harm upon that account: and the death's wound was given after Mr. *Lutterell* was fallen down with the wounds he had received with the ſword, and was intirely in the power of the defendants: ſo that what they did afterwards was murder in them, becauſe it exceeded the bounds of ſelf-preſervation.

But the court in the direction of the jury did poſitively declare, that if they believed, Mr. *Lutterell* made the firſt aſſault upon the bailiffs, the killing with the piſtol after he was down would be but manſlaughter; and the jury upon that direction found them guilty of manſlaughter only, though otherwiſe they were diſpoſed to have hanged them for the barbarity of the fact.

The defendants prayed the benefit of the ſtatute, and were burnt in the hand.

Between the Pariſhes of Cranly *and* St. Mary Guilford.

A leaſe at will gains a ſettlement.

UPON a ſpecial order of ſeſſions it was ſtated, that a certificate-man agreed with the leſſee of a mill, that he ſhould occupy the mill, and pay 12 *l. per annum*; that there was no underleaſe or aſſignment, but in purſuance of that agreement the certificate-man occupied the mill two years, and paid the rent. The ſeſſions adjudge it no ſettlement.

Et per curiam, The order muſt be quaſhed: for if this be not an abſolute leaſe for a year (as *Eyre* Juſtice, ſaid it was, the rent being

reſerved as the rent for a year) yet it is undoubtedly a leaſe at will, which is ſufficient to gain a ſettlement.

Dominus Rex *verſ.* England.

TWO orders of baſtardy were returned, one made by two juſtices, and another original order made at ſeſſions; and now both were quaſhed. The order of two juſtices, becauſe the ſex of the baſtard, or the name of it, were not mentioned, only a certain baſtard child born of the body of *A.* and the order of ſeſſions, becauſe there being an order of two juſtices before, the ſeſſions had no juriſdiction but upon appeal.

Gilbert *verſ.* Bath.

PER curiam, According to 1 *Saund.* 291. If the defendant in debt upon a bond would take advantage of another's being jointly bound, he muſt plead it in abatement, and cannot demur upon *oyer:* for if he does, the court will preſume the other did not ſeal it.

That another was jointly bound muſt be in abatement.

There was a demurrer here, and the plaintiff had judgment.

Anonymous.

A Priſoner taken on an eſcape warrant moved to ſuperſede it, on producing a day rule for that day. But the court refuſed a *ſuperſedeas*, becauſe it appeared he went out early in the morning, and did not ſign the petition till he was taken up. Though Sir *Thomas Tipping*'s caſe was urged, where he ſigned the petition in the morning, and went out before the court ſat; and they held, that being intitled to a rule, that rule would protect him the whole day, and they could make no fraction of a day.

A priſoner muſt ſign the petition for a day rule before he goes at large.

Gardener *verſ.* Walker et ux'. In Canc.

AN executor brought his bill for the direction of the court touching the payment of a conſiderable legacy left by his teſtator to the defendant's wife, who was his daughter; and inſiſted to have the ſame put out for the benefit of the wife and her iſſue, and likewiſe for an injunction againſt the defendant's proceeding in the ſpiritual court in a ſuit there inſtituted for the legacy.

Chancery will order a legacy to a wife to be put out for her uſe where the bill is by the executor. Ab. Ca. Eq. 64.

On

On the hearing the defendant inſiſted, that he having commenced his ſuit in a proper court, ought not to be injoined; or if he ought, yet there could be no reaſon to direct the money to be put out as inſiſted on by the bill, it having been never done but in caſes where the huſband has brought the bill to compel the executor to pay the money; and no precedent was produced, where ſuch directions had been given upon a bill brought by the truſtee.

Et per Macclesfield Lord Chancellor, Then it is time to make one; can the difference, who is plaintiff in equity, alter the reaſon of the thing? If it ſhould, it will but be for the huſband, inſtead of coming here, to go into the ſpiritual court, (as to be ſure he will) and ſo get the whole into his power. There muſt be the uſual direction, that the money may be diſpoſed of for the benefit of the wife.

Williams *verſ.* Johnſon.

At niſi prius *in* Middleſex coram King *C. J.* de C. B.

Wife witneſs to prove goods delivered on huſband's credit.

THE plaintiff brought his action againſt the daughter's huſband for her wedding cloaths; and the defence was, that the goods were furniſhed on the credit of the father; and to prove this the mother who was preſent at the chuſing the goods was called to charge her huſband, and allowed.

Clark *verſ.* Tyſon.

At Guildhall coram Pratt *C. J.*

Tender of ſtock, how to be proved.

UPON an iſſue whether ſtock was tendered at the day, the plaintiff proved, that though the books were not open to make transfers in the common form, yet they were ready at the office, and upon leave from a director there might have been a transfer, it not being uſual to deny it on ſuch occaſions; but the defendant not attending to accept the ſtock, the plaintiff contented himſelf with ſtaying there all day, and did not actually get leave from a director to have the books opened if the defendant ſhould come. And for this omiſſion the Chief Juſtice ruled it not to be a ſufficient tender, for there was a poſſibility that leave might not be given, and the plaintiff had not done every thing in his power: he ought to have prepared matters ſo, that if the defendant had appeared, there might have been a tranſfer immediately.

Mead

Mead *verſ.* Hamond. Ibid.

THE plaintiff according to the common courſe of dealing delivered to the defendant's ſervant an ingot of gold to eſſay; and it not being returned, he brought trover againſt the maſter. And the Chief Juſtice directed the jury, that the delivery to the ſervant was ſufficient to maintain the action againſt the maſter, on proving a ſubſequent demand and refuſal; ſo the plaintiff had a verdict.

Trover lies againſt maſter for goods delivered to the apprentice.

Armory *verſ.* Delamirie.

In Middleſex coram Pratt *C. J.*

THE plaintiff being a chimney ſweeper's boy found a jewel and carried it to the defendant's ſhop (who was a goldſmith) to know what it was, and delivered it into the hands of the apprentice, who under pretence of weighing it, took out the ſtones, and calling to the maſter to let him know it came to three halfpence, the maſter offered the boy the money, who refuſed to take it, and inſiſted to have the thing again; whereupon the apprentice delivered him back the ſocket without the ſtones. And now in trover againſt the maſter theſe points were ruled:

Finder of a jewel may maintain trover.

1. That the finder of a jewel, though he does not by ſuch finding acquire an abſolute property or ownerſhip, yet he has ſuch a property as will enable him to keep it againſt all but the rightful owner, and conſequently may maintain trover.

2. That the action well lay againſt the maſter, who gives a credit to his apprentice, and is anſwerable for his neglect.

3. As to the value of the jewel ſeveral of the trade were examined to prove what a jewel of the fineſt water that would fit the ſocket would be worth; and the Chief Juſtice directed the jury, that unleſs the defendant did produce the jewel, and ſhew it not to be of the fineſt water, they ſhould preſume the ſtrongeſt againſt him, and make the value of the beſt jewels the meaſure of their damages: which they accordingly did.

Towers *verſ.* Sir John Oſborne.

At Guildhall coram Pratt *C. J.*

Executory contracts for goods, not within the ſtatute of frauds.

THE defendant beſpoke a chariot, and when it was made refuſed to take it; and in an action for the value, it was objected, that they ſhould prove ſomething given in earneſt, or a note in writing, ſince there was no delivery of any part of the goods. But the Chief Juſtice ruled this not to be a caſe within the ſtatute of frauds, which relates only to contracts for the actual ſale of goods, where the buyer is immediately anſwerable, without time given him by ſpecial agreement, and the ſeller is to deliver the goods immediately.

Denniſon *verſ.* Spurling.

In Middleſex coram Pratt *C. J.*

Wife of *prochein amy*, a witneſs.

IN an action by an infant, I called the wife of the *prochein amy*, and the Chief Juſtice allowed her to be a good witneſs. But the next day in *C. B.* between

Clutterbuck *and* Lord Huntingtower.

Guardian on record, not.

I Called the defendant's guardian upon record, and Chief Juſtice *King* would not allow him. So note an authority on both ſides of the queſtion.

Hazard *verſ.* Treadwell. Ibid.

Where the maſter has once paid for goods delivered to the ſervant on truſt, the tradeſman may truſt him after.

THE defendant, who was a conſiderable dealer in iron, and known to the plaintiff as ſuch, though they had never dealt together before, ſent a waterman to the plaintiff for iron on truſt, and paid for it afterwards. He ſent the ſame waterman a ſecond time with ready money, who received the goods, but did not pay for them; and the Chief Juſtice ruled the ſending him upon truſt the firſt time and paying for the goods, was giving him credit, ſo as to charge the defendant upon the ſecond contract.

Snow *verſ.* Como. Ibid.

THERE was a demurrer to one count, and an iſſue on the other, and the *venire* was awarded, as well to try the iſſue as to aſſeſs contingent damages upon the demurrer. The plaintiff was nonſuit upon the iſſue, and the Chief Juſtice would not go on to aſſeſs the damages, ſaying he had no power ſo to do, the plaintiff being out of court.

Where the plaintiff is nonſuit on the iſſue, contingent damages on the demurrer ſhall not be aſſeſſed.

Brownſon *verſ.* Avery. Ibid.

A. Sells goods to *B.* and afterwards *C.* deſires *D.* to pay *A.* and promiſes to repay him; *D.* pays *A.* and afterwards *B.* allows the money to *D.* on account; and in an action againſt *C.* I called *B.* to prove the account, (it amounting to payment). And it was objected, that the contract being originally only between *A.* and *B.* *B.* was ſtill liable to *A.* and was therefore ſwearing to diſcharge himſelf; but the Chief Juſtice ſaid he would allow him to be a witneſs to prove the payment as a ſervant to *C.*

Original debtor taken as a ſervant to prove the payment by another.

Shuttleworth *verſ.* Bravo. Ibid.

BY the bankruptcy act it is provided, that if the bankrupt has within one year before loſt 5 *l.* in one day at gaming, he ſhall not have his certificate, nor the uſual allowance: and upon an iſſue out of Chancery to try the point of gaming, a creditor of the bankrupt was called, to prove the gaming: but the Chief Juſtice would not allow him to be a witneſs, becauſe he would be intitled to a ſhare out of the uſual allowance to the bankrupt, which if he has not by having forfeited it on account of gaming, the dividend to the creditors will be the larger.

Creditor of bankrupt no witneſs to prove him a gameſter.

Johnſon *verſ.* Wollyer.

At Guildhall coram Pratt *C. J.*

REPLEVIN in *London*, defendant appears upon an *elongata*, plaintiff declares for taking guns *in quodam loco vocat'* the *Minories* in *London*; defendant pleaded *non cepit modo et forma.* At the trial the plaintiff proved the taking at *Rotherhithe* in *Surrey*; upon which it was objected, that the plaintiff had not proved his iſſue,

Where in replevin the place is material.

iſſue, for the place is material, and therefore part of the iſſue under the *modo et forma.* The counſel for the plaintiff admitted, that it was traverſable; but inſiſted that by not traverſing it particularly, the place was admitted, and could not be inſiſted on upon *non cepit.* But the Chief Juſtice held, that where the plaintiff avows at a different place, in order to have a return, he muſt traverſe the place in the count, becauſe his avowry is inconſiſtent with it; but where he does not inſiſt upon a return, he may plead *non cepit,* and prove the taking to be at another place, for it is material. Whereupon the plaintiff was nonſuit.

Manwaring *verſ.* Harriſon. Ibid.

Within what time a goldſmith's note muſt be demanded.

UPON the 17th of *September* (being *Saturday*) about two a clock in the afternoon, *Harriſon* gave to *Manwaring* in payment a note for 100 *l.* by *Mitford* and *Mertins* goldſmiths, dated 5th of *September*, payable to *Harriſon* or order. The ſame afternoon *Manwaring* pays away the note to *J. S. Mitford* and *Mertins* paid all *Saturday* and *Monday*, and on *Tueſday* morning as ſoon as the ſhop was opened, and before any money paid, *J. S.* came and demanded the money, but *Mitford* and *Mertins* ſtopt payment: *Manwaring* paid back the money to *J. S.* and demanded it again of *Harriſon*; who refuſing to pay it, an action was brought. And on *non aſſumpſit* the Chief Juſtice told the jury, that giving the note is not immediately payment, unleſs the receiver does ſomething to make it ſo by neglecting to receive it in a reaſonable time, by which he gives credit to the maker of the note. He left it to them whether there had been any neglect, and obſerved that the note was payable to *Harriſon* who had kept it eleven days, and probably would not have demanded it ſooner than *Manwaring* did, it appearing the goldſmiths were in full credit all the while. The jury deſired they might find it ſpecially, and leave it to the court whether there was a reaſonable time; but the Chief Juſtice told them they were judges of that: whereupon they found *pro def.* and declared it as their opinion, that a perſon who did not demand a goldſmith's note in two days, took the credit on himſelf.

Philips *verſ.* Biron et al'.

Paſ. 7 Geo. rot. 249.

TRESPASS and falſe impriſonment againſt two, who both plead jointly, that there was a judgment againſt the plaintiff at the ſuit of *Biron*, which was afterwards ſet aſide by the court, but that before it was ſet aſide a *capias ad ſatisfaciendum* was proſecuted by the then plaintiff, under which he and the other defendant, who was the officer, juſtify the impriſonment. And on demurrer *Wearg* objected, that though an erroneous judgment is a juſtification, yet an irregular one is not, for that is a matter in the privity of the plaintiff or his attorney. *Raym.* 73. The officer indeed, if he had juſtified ſeparately, might have made a better caſe than the plaintiff; but having joined with him he muſt take the ſame fate.

Where a judgment is vacated for irregularity, the plaintiff is not juſtified, as he is where it is reverſed for error.

2 Sid. 125.

Et per curiam, It is a reaſonable difference in the firſt point, and like the caſe of avoiding acts done by an adminiſtrator, where the adminiſtration is revoked, and not reverſed; in the caſe of error it is no fault of the party, but of the court, and therefore binds till reverſed. But as to the other point *Eyre* J. differed, for he thought the court might upon theſe pleadings ſeparate the officer, ſince it appears he is juſtified in what he has done.

Caeteri contra, That he had waived the benefit by joining with the other; and now the only queſtion before the court is, whether the whole plea taking it all together, be good or not. The treſpaſs is laid as joint, and the defendants juſtify it in the ſame manner; how then can the court ſever it and ſay that one is guilty and the other is not, when both put themſelves upon the ſame terms?

Adjournatur; and this term, it coming into the paper again, the court were of opinion, (*Eyre* J. *haeſitante*) that the officer had forfeited his defence, by joining in the ſame plea with the defendant, who was plaintiff in the firſt cauſe, and cited 1 *Saund.* 28. 2 *Cro.* 27. and gave judgment *pro quer'*.

Where the officer joins in defence with one for whom the warrant is no juſtification, he forfeits the benefit of it.

Hammond *verſ.* Stewart.

Attachment granted againſt a witneſs for not attending on a *ſubpoena.*

THE defendant ſummoned one *Turner* a witneſs to attend the trial of the cauſe, who on ſervice of the *ſubpoena* ſaid, he would not attend, but run the hazard of forfeiting the 100 *l.* penalty: and on affidavit of this *Ketelbey* moved for an attachment, that they might not be put to bring their action upon the ſtatute, ſaying they do it every day in Chancery, even for not attending a maſter upon his ſummons. And in the principal caſe the court made a rule to ſhew cauſe.

What notice a witneſs ought to have of a trial to which he is ſubpoena'd.

And this term the rule for an attachment *niſi* againſt the witneſs was diſcharged, it appearing that the *ſubpoena* was not ſerved till two in the afternoon in the city, to attend the ſittings that day in *Middleſex*, which the court ſaid was too ſhort notice, and that witneſſes ought to have a reaſonable time to put their own affairs in ſuch order, that their attendance upon the court may be as little prejudice to themſelves as poſſible.

Eaſter Term

8 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Juſtice.*
Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Forteſcue Aland, *Knt.*
Sir Robert Raymond, *Knt. Attorney General.*
Sir Philip Yorke, *Knt. Solicitor General.*

Glyn *verſ.* Yates.

THE plaintiff recovered judgment againſt the defendant, and took out a *capias ad ſatisfaciendum*, and had a *non eſt inventus* returned and filed: then he took out *ſcire facias* againſt the bail, and before the return of the ſecond *ſcire facias* the principal died, upon which the queſtion aroſe, whether the bail ſhould be relieved in this caſe, within the reaſon of that practice which indulges them to ſurrender the principal any time before the return of the ſecond *ſcire facias*.

If the principal dies between the return of the *ca. ſa.* and the ſecond *ſci. fa.* the bail are liable.

And after argument and ſearch of precedents it was ruled, that the bail ſhould not be relieved, they having taken the time after ſuing out the *capias ad ſatisfaciendum* at their own peril, and after that they could not diſcharge themſelves but by an actual ſurrender.

Atkinſon *verſ.* Coatſworth.

Indentura facta inter A. et B. imports a ſealing by both. 3 Danv. Abr. 266.

UPON error out of the county palatine of *Durham* in an action of covenant brought by the executor of the leſſee againſt his aſſignee, wherein the breach was aſſigned in non-payment of rent to the original leſſor; *Bootle* objected, that it did not appear, the firſt leſſee ever ſealed the leaſe; and if he did not, then there was no obligation upon him to pay the rent, and conſequently no action could be maintained upon this covenant, which is only to pay the ſame rent to the firſt leſſor, as was payable by the firſt leſſee before the aſſignment. To which it was anſwered and reſolved by the court, that the firſt deed being ſet out as *indentura facta inter* the leſſor and leſſee, by which the leſſee *convenit et agreavit* to pay the rent, that was an implicit averment of a ſealing by him within the reaſon of the caſe of *Taylor* v. *Dobbins*, *Mich.* 7 *Geo.* where *fecit notam ſuam* was held to import a ſigning. *L. Raymond* 1377.

2. That if this was not ſo, yet the defendant by covenanting to pay the rent reſerved by the firſt indenture, was eſtopped to ſay there was no ſuch deed as could raiſe the rent. And therefore the judgment given below for the plaintiff was affirmed.

Dominus Rex *verſ.* Inhabitantes de Rufford.

Mandamus to appoint overſeers in an extraparochial place.

MANDAMUS directed to the juſtices of the peace of the county of *Nottingham*, reciting, that within the *ville* of *Rufford* there are divers ſubſtantial freeholders able to contribute to the maintenance of the poor, and that there are no churchwardens or overſeers to make a rate, and that there are poor unprovided for, *ideo* it commands them to appoint overſeers.

They return, that the *ville* of *Rufford* is part of no pariſh, but time out of mind has been extraparochial without church, chapel, or parochial rights, and that there never have been any overſeers of the poor, *et ea de cauſa* they cannot appoint.

And there having been only an *obiter* opinion of the court in the caſe of *Dolting* v. *Brewcomblodge*, *Hil.* 11 *Ann. B. R.* that overſeers of the poor might be appointed in an extraparochial place; the court directed an argument, that the point might be ſolemnly determined.

And

And after argument and conſideration of all the ſtatutes relating to the poor, the court were of opinion, that the powers given by the 43 *Eliz.* to be executed in pariſhes, were by the 13 & 14 *Car.* 2. *c.* 12. extended to all townſhips and villages, whether parochial or extraparochial, and conſequently overſeers might be appointed in this caſe, for which purpoſe a peremptory *mandamus* was awarded.

Mayo *verſ.* Archer.

IN trover for goods, on Not guilty pleaded a trial was had at *Niſi prius* in *London*, where the jury found this ſpecial verdict:

Qu. Whether a farmer who buys and ſells potatoes can be a bankrupt.

That one *Richard Baxter* for divers years before any commiſſion of bankruptcy taken out againſt him occupied a farm of 300 *l. per annum*, and during ſuch occupation annually planted divers acres of the farm with potatoes, which he ſold for gain: that he likewiſe bought of other perſons ſeveral great quantities of potatoes, with intention to ſell them for gain, which he publickly did in ſeveral markets, and that he hired warehouſes to put them in, till he could conveniently ſell them. That if this makes him a trader, he committed an act of bankruptcy within the intention of the ſtatutes, and a commiſſion iſſued, and the plaintiff was made aſſignee. That after the act of bankruptcy, and before any commiſſion iſſued, the defendant recovered judgment againſt the ſaid *Baxter* for 600 *l.* debt beſides coſts of ſuit, and took out a *fieri facias*, by virtue whereof the ſheriff ſeized the goods mentioned in the declaration, which they find were before the bankruptcy the goods of *Baxter*. And whether *Baxter* was a trader or not within the intention of the ſeveral ſtatutes againſt bankrupts, is the doubt of the jury, whereon they pray the advice of the court: *et ſi pro quer'*, they aſſeſs damages, and if not a trader, they find *pro defendente*.

Cheſhyre Serjeant *pro quer.* The 13 *Eliz. c.* 7. (which the ſubſequent ſtatute *Jac.* 1. appoints to be largely expounded) deſcribes a bankrupt to be one buying and ſelling for gain. I admit a farmer or an inn-holder are not within the ſtatutes, and were conſtrued to be exempt before 5 *Annae* had made them ſo. *Cro. Car.* 549.

His being a farmer will not ſcreen him, if he deals as a trader likewiſe, and therefore I ſhould think ſome farmers might be made bankrupts under the notion of cheeſemongers. I remember a motion to ſuperſede a commiſſion, where it was held that a gentleman of the

bar who had a colliery, and dealt in coals at *Durham*, was ſuch a trader as might be a bankrupt. He need not get his whole living by buying and ſelling, for the word is *ſeeking* not *getting*, and therefore if he ſeeks his living this way, his ſeeking it another way will not alter the caſe. A dealing of this ſort gains him that credit, which traders give one another, and that is the beſt rule to go by. 1 *Vent.* 166, 266, 29. 1 *Sid.* 411. 1 *Lev.* 17.

Artificers differ from thoſe that buy and ſell, and yet they may be bankrupts. Such are ſhoemakers, and many others.

There can be no doubt but ſuch a dealing as this would have made him a trader, if the farming had not been found; now if that be taken to have altered the caſe, every man may take a farm, in order to avoid the ſtatutes.

Branthwayte Serjeant *contra*. He might buy theſe potatoes in the ground, as many gentlemen do a crop of turnips, of which they ſell the overplus, and yet were never reckoned to be traders. The caſe in 1 *Roll.* 520. ſays, that the buying and ſelling in order to promote a buſineſs which does not make a trader, will not cauſe a man to be a bankrupt. 2 *Jones* 156.

Chief Juſtice. I think the queſtion will turn on the manner of finding, for there can be no doubt but on one hand a farmer cannot be a bankrupt, and on the other, that a dealer in potatoes may, if ſuch a dealing be found as will ſhew it to be the man's trade: it is indeed ſaid only, that he bought divers great quantities, which in an indictment would be ill; but I am inclined to tkink it will be well enough here, where it is only neceſſary to ſhew that he ſought his living in that manner. I ſhould think, if a *Herefordſhire* man bought apples to mix with his own, and then ſold the cyder, he would be a trader. As far as circumſtances can conclude, it appears this man was a trader, for he bought the goods, and kept markets and warehouſes. *Powys* Juſtice *accord.* If a farmer ſhould deal in wool or hops, he will be a trader, and ſo will an inn-keeper who ſells corn in quantities, which are not conſumed in his houſe.

Eyre Juſtice. The verdict muſt ſet out the quantities, that we may judge what ſhare of his living was ſought thus.

Forteſcue Juſtice ſaid the quantity muſt be mentioned, That it might appear whether this or farming was his chief buſineſs.

Adjournatur. And afterwards the plaintiff moved, on an affidavit that the quantities were proved at the trial, that a *venire facias*

de novo might be awarded. *Sed per curiam:* Let the ſpecial verdict be amended in that reſpect: and ſo it was, and ſtood over upon an *ulterius*. And *Mich.* 9 *Geo.* without much argument judgment was given for the plaintiff.

Land *verſ.* Harris.

THE defendant gave bond to pay a ſum of money by inſtalments at 5 *l. per annum*, and having failed at one of the days, the plaintiff brought his action for the penalty. And now *Wearg* moved upon the act for amendment of the law, that upon paying the 5 *l.* and coſts, proceedings might be ſtayed. *Sed per curiam:* We cannot do it, for it never was the intent of the obligee that he would be put to ſo many ſeveral actions as one a-year.

The act for amendment of the law relieves only on payment of the whole principal.

Windham *verſ.* Wither.

Idem *verſ.* Trull.

THE plaintiff brought two actions upon a promiſſory note, one againſt the drawer, and another againſt the indorſor, and recovered in both. And now *Wearg* moved, that they having tendered the principal in one, and the coſts in both, no execution might be taken out; which the court ordered accordingly, and ſaid they would have laid the plaintiff by the heels, if he had taken out execution upon both.

Practice.

Hall *verſ.* Stone.

UPON executing the inquiry, the plaintiff was ſurprized with a defence, and not prepared to prove his whole demand; and the court ſet it aſide on payment of coſts, the damages being too ſmall.

Writ of inquiry ſet aſide where damages too ſmall by neglect of plaintiff.

Lawrence *verſ.* Jacob.

IN an action by the ſecond indorſee of a bill of exchange againſt the firſt indorſor, it was held ſufficient to ſay the drawer had not paid it, without ſhewing a demand.

In action againſt indorſor, need not ſhew demand on drawer.

Jordan

Jordan *verſ.* Harper.

In ejectment the plaintiff has his election to pay coſts to which defendant he pleaſes.

SIR *Sebaſtian Smith* brought an ejectment againſt ſeveral perſons who lived in cottages upon the waſte as *paupers*, to try whether the cottages belonged to him as lord of the manor. The pariſh made defence, and the plaintiff was nonſuit, and paid the coſts to one of the defendants who was in his intereſt; and upon motion the court ſaid, they could not relieve the pariſh or the other defendants.

Connor *verſ.* Martin. In C. B.

Feme covert cannot indorſe a bill of exchange.

THE plaintiff declared upon a promiſſory note made to a *feme covert*, and indorſed by her to him, and on argument judgment was given for the defendant, the right being in point of law veſted in the huſband, and the wife having no power to diſpoſe of it.

Dominus Rex *verſ.* Archiep' Armagh.

What acts of Parliament bind the crown, tho' not named.

ERROR of a judgment *in B. R. in Hibernia* in a *quare impedit* brought by the crown for the preſentation to the church of *Louth*, being an advowſon in groſs. The attorney general counts that King *Charles* the Second was ſeiſed of this advowſon in right of his crown, and preſented one *John Hudſon*, and ſo alleges ſeveral preſentations by the crown, and brings down the title to his preſent Majeſty, and ſhews a vacancy by the death of *Thomas Cox*, *unde* it belongs to the King to preſent; but the biſhop and *Peter Jackſon eum injuſte impediunt*.

The biſhop pleads, that long before 10 *Car.* 1. and ever ſince, there were within the pariſh of *Louth* both a rectory and vicarage endowed, and that King *William* and Queen *Mary* being ſeiſed of the advowſon of the rectory preſented the ſaid *Thomas Cox*, who was admitted, inſtituted and inducted; and *Narciſſus* archbiſhop of *Armagh*, being ſeiſed of the advowſon of the vicarage, in the year 1712 preſented the ſaid *Peter Jackſon*; and *Cox* died and *Jackſon* ſurvived, and before any preſentation by the crown, the archbiſhop, by virtue of an act of Parliament 10 *Car.* 1. by writing under his archiepiſcopal ſeal, united and conſolidated the rectory and vicarage, *prout ei bene licuit*: and ſo concludes that he claims nothing but as ordinary, with the proper averments to bring the rectory and vicarage within the deſcription of the act of Parliament.

The incumbent pleads the conſolidation in the ſame manner, and the attorney general demurs to both pleas, and judgment is given below for the King, and on error in this court the general errors are aſſigned.

Fazakerley pro queren. in errore. The only queſtion below, and which I ſhall ſpeak to is, whether the crown ſhall be bound by this act of Parliament though not ſpecially named: and to prove that the King is bound, I need only inſtance in ſome of the exceptions out of the general rule laid down in the books, and ſhew that this caſe falls within them. Acts for the advancement of religion, learning, providing for the poor, are mentioned as caſes where the crown is bound. 11 *Co.* 70, 72, 73. 2 *Inſt.* 359, 681. *Plow.* 248. 5 *Co.* 14. 1 *Roll. Rep.* 151.

This proviſion is for the advancement of learning, by making it worth the acceptance of a man able to inſtruct the people: it encourages learning, when miniſters have a proſpect of being rewarded for their pains; and the poor will be the better for it, becauſe the parſon will be more able to relieve them.

Reeve contra. At the time of the union there was a right in the crown to preſent on the vacancy, and the intention of the ſtatute was, that the union ſhould be made when both the rectory and vicarage were full, that ſo both patrons might have an equal chance; for after the clauſe which enables the archbiſhop to conſolidate, the act provides, that during the lives of the two incumbents they ſhall enjoy the rectory and vicarage diſtinctly, and upon the death of either, then the two rights ſhall ſurvive to the other, and the patron of him that died firſt ſhall have the firſt preſentation: no direction is given for ſettling the right, where the union is made during the vacancy of one; which ſhews that the intention of the Parliament was, to have the union made when both the incumbents were living: but now by this contrivance the archbiſhop is ſure in all events of having the firſt preſentation to the united benefices.

C. J. At common law two churches could not be united without conſent of both the patrons, but now this act of Parliament giving the archbiſhop a right to controul the title of the patrons, we muſt conſtrue it ſtrictly, that ſo the act may do as little wrong as poſſible: and therefore if upon conſidering every part of the act it appears to be the intention of the Parliament that the union ſhould be made when both the rectory and vicarage were full; as this conſtruction works the leaſt injuſtice, we ſhall certainly follow it if poſſible.

The clauſe runs thus: " And whereas in divers places of this " kingdom of *Ireland* there are within one pariſh both a parſon " and vicar endowed, and in ſome pariſhes more: be it enacted, " that in every ſuch caſe it ſhall and may be lawful to and for the " biſhop of that dioceſe and metropolitan of that province within " which the ſaid pariſhes are ſituate, by their writing under their " archiepiſcopal and epiſcopal ſeals, at any time or times hereafter, " to unite and conſolidate all and every the ſaid parſonages and " vicarages ſo being within one pariſh, into one intire parſonage or " rectory or benefice, *yet nevertheleſs ſo*, that if ſuch parſonages " and vicarages, or any of them, be at that time full of incumbents, " that every of the ſaid incumbents may hold and retain to their " own uſe his and their reſpective parſonages and vicarages, and all " the profits thereof, for ſo long time as they ſhall live, and con- " tinue lawful incumbents thereof; *and if one* or more of ſuch in- " cumbents do die, or otherwiſe ceaſe, reſign, be depoſed, or de- " prived, that then the ſaid parſonage, vicarage or benefice, ſo or " by any other means growing void, ſhall ſurvive, remain, and " accrue, to the ſurvivors of the ſaid incumbents; and after ſuch " ſurvivors accruing or coming into one hand, ſhall thenceforth for " ever be and continue one whole and intire rectory and parſonage " or benefice, according to the union and conſolidation aforeſaid to " ſuch ſurviving parſon and his ſucceſſors for ever." And then it goes on to direct the method of preſentation; and as to this caſe the direction is, that after the death of the ſurvivor the patron of him that died firſt ſhall preſent, and then to take it by turns.

Now taking all this together I think the only view of the Parliament was, to have the union made when both churches were full, and therefore they provide, that though the union be made when both are full, yet it ſhall not take effect till the death of one of the incumbents. As to that which was the main point below, I think they were miſtaken, for I take it the King will be bound in this caſe; but we will conſider of it.

Powys J. It is far from being clear to me, that the King ſhall not be bound by this act of Parliament. As to the conſtruction of it, I think the only reaſonable one is, that the union ſhould be made in the life of both incumbents.

Eyre J. I think this ſtatute will extend to the crown, becauſe it does not deprive the crown of any prior right, but only new models it, and therefore differs from Dr. *Birch*'s caſe, where the ancient prerogative of the crown was to be deſtroyed. As to the conſtruction of this ſtatute, I am of opinion, that the archbiſhop may unite

during the vacancy, for the power is given him to do it *at any time or times*, and then when the ſubſequent clauſe provides only for ſome particular caſes, I can only take it to be a direction as to thoſe particular caſes, and not intended to abridge or controul the former power; and as to all other caſes not expreſly provided for, they muſt receive ſuch a determination as is agreeable to law: this is what ſticks with me, and is the only difficulty in the caſe, whether the latter part of the clauſe be a reſtraint of the general power, which it muſt be admitted would (if it ſtood ſingly upon that) include the caſe now before us.

Forteſcue J. I make no doubt but the crown is bound by this ſtatute; but then as it works a wrong to the crown, whichever way we take it, I think we are to afford it no latitude in conſtruction. The caſe at bar I take to be neither within the words nor meaning of the ſtatute, *yet nevertheleſs ſo that*, *&c.* is a part of the ſame clauſe, and in my apprehenſion is the ſame as if the ſtatute had run, *yet in theſe caſes only*, *&c.* for as they are introductive of a new law, they infer a negative; and therefore if this caſe does not fall within the ſubſequent proviſions, it is not a caſe within the act of Parliament. Can any man think the Parliament would do ſo abſurd a thing, as to give an alternative, and not ſay who ſhall preſent firſt? And yet that will be the caſe of all conſolidations, that do not fall within the direction of the ſubſequent words: but then it is ſaid this caſe muſt be left to the deciſion of the law; for my part I know of no law that will determine who ſhall preſent firſt; ſo that by this method of conſolidating during the vacancy, the archbiſhop is to unite the King's rectory to his vicarage, and ſo to get the firſt turn; whereas take it the other way there will be no difficulty; it is expreſly determined who ſhall preſent firſt, and the act does as little wrong as poſſible, by giving an equal chance to both: for theſe reaſons I think the court below have done right in giving judgment for the King.

Adjournatur; and this term it was argued by Serjeant *Reynolds pro queren. in errore.* It being given up at the bar, that the crown was bound by the ſtatute, he proceeded to maintain the conſolidation, though made during a vacancy of the rectory. At common law all unions were derived from the authority of the ordinary with the licence of the crown and the conſent of the patrons. 2 *Corp. jur. civ.* 256. *Cro. El.* 500. 2 *Roll. Abr.* 778. And *Dy.* 259. ſays, the proper time for an union was in a vacancy. If the ſtatute has not adjuſted the manner of preſenting in this particular caſe, it muſt be done according to the rules of the common law.

Wearg

Wearg contra. The common law has laid down no rules; for as theſe things were done by conſent, the parties ſettled that matter amongſt themſelves. This act according to *Hatton of ſtatutes*, muſt be conſtrued to work as little wrong as poſſible; the law regards our advowſon as a thing of value, it is what we have a property in, there is a recovery in value for it, and it may be ſold. The 31 *H.* 8. had no ſaving of the rights of ſtrangers; and yet *Jones* Sir *William* 71. it was held to be implied in order to prevent a wrong.

It may be a queſtion whether by this union the patron of the vacant rectory has not intirely loſt this right, it being difficult to determine how the ancient right can ſubſiſt in the new created church, ſince he can never ſay that church has been full of *his* incumbent, as the archbiſhop may.

C. J. Though the words of the act are general enough to take in this particular caſe; yet if it appears not to be within the intent and reaſon of the ſtatute, we muſt conſtrue it to be excluded. The plain intent was, that the union ſhould be upon the moſt equal terms, and the leaſt prejudicial to either party in favour of the other. At the time of the union the crown had a right to preſent, and this is to be taken away without any equivalent, by a conſtruction that is to let in *iniquum*, and by a contrivance that ought not to be favoured. Beſides the apparent injury of depriving the crown of the preſent turn; it is conſiderable, that the act not having ſettled the terms of preſenting for the future, but only where both are full at the time of the union, it muſt neceſſarily create great difficulties in adjuſting the right upon an union made whilſt one church is vacant. I think this is a caſe that deſerves no farther conſideration, and the judgment muſt be affirmed. To which *Powys* J. agreed. *Et per Eyre* J. It is plain the prerogative right is invaded by the archbiſhop, who makes himſelf judge in his own caſe. *Forteſcue* J. *accord'*. And the judgment was affirmed.

Curwen *verſ.* Fletcher.

Matters of record pleaded by way of dilatory if of another court muſt be *ſub pede ſigilli.*

DEBT upon a bond: the defendant pleads in abatement, that the oaths were tendered to the plaintiff by virtue of the ſtatute 1 *Geo.* as a ſuſpected perſon, and upon his refuſal to take them the ſame was certified to the quarter-ſeſſions and there recorded, *prout*, *&c.* and afterwards the ſame was certified into *B. R.* by the clerk of the peace, as the ſtatute directs, whereby the plaintiff became

came a papiſt recuſant convict; *unde* the defendant prays *quod loquela remaneat ſine die, &c.* And the plaintiff demurs.

Wearg pro quer'. This being a dilatory, the record of ſeſſions ought to have been pleaded *ſub pede ſigilli.* 1 *Inſt.* 128. *b.* *Lutw.* 17, 1100. 3 *Lev.* 334. *Mich.* 5 *Geo. in C. B. Coteſworth* and *More*, this exception was taken and allowed; for if *nul tiel record* were replied, there muſt be no day given. *Bro. Record* 36. And though the clerk of the peace has certified it hither, yet that is not concluſive, but traverſable. 41 *E.* 3. 26. *Bro. Traverſe of Office* 2. For he does not do it as a Judge, but as a miniſterial officer.

2. The ſtatute 1 *Geo.* which creates this diſability, has a proviſo to exempt perſons who before ſuch tender have taken the oaths, and therefore it ought to have been averred that he had not taken them. On the ſtatute 5 *Eliz. c.* 4. it was always uſual to aver, the party did not exerciſe the trade at the time of making the ſtatute. 1 *Ven.* 148. 1 *Sid.* 303. Now indeed that is diſcontinued, by reaſon of a moral impoſſibility, of which there is none in our caſe. It will be ſaid, that this coming in by way of proviſo, ought to be ſhewn on the other ſide; but that rule does not hold place, where the matter is the very *git* of the whole. 1 *Leon.* 18.

3. There is another proviſo, to reſtore the party on conformity; ſo that the diſability being only temporary, the defendant ought not to pray that the *loquela* may be put without day. 1 *Inſt.* 128. *b.* 5 *Co. Trolop's* caſe. *Lutw.* 17, 18. And it has been held, that an ill prayer of judgment vitiates the whole plea. 5 *Mod.* 145. *Salk.* 297.

Bootle contra. The record of ſeſſions alone does not create the diſability, but only that of this court, which is the ſum of all: and records of the ſame court need not be pleaded *ſub pede ſigilli.* *Lutw.* 40. 2. This coming in by proviſo ought to be ſhewn by them in their diſcharge. 1 *Ven.* 134. 1 *Lev.* 26. 3. The *&c.* at the end implies every thing proper to make it a right prayer of judgment. At leaſt this ſhould have been ſhewn for cauſe of demurrer. 3 *Lev.* 66. *Lev. Ent.* 11. *Thomſ.* 191. *Brownl. Red.* 461, 466. 2 *Mod. Ent.* 6. 1 *Inſt.* 362. *Litt.* § 691. 2 *Lev.* 19. 34 *H.* 6. 1, 2, 24.

Wearg. It ſtill contiues a record of ſeſſions, and the clerk of the peace only tranſmits an account, that there is ſuch a record.

Et per curiam, The diſability being only temporary, this plea is in the nature of a dilatory, and therefore ſhould be pleaded *ſub pede ſigilli*. And it is conſiderable, whether this certificate be any record of this court. This does not ſeem to be within the general rule of proviſo's, becauſe the enforcing people to take the oaths being the aim and deſign of the ſtatute, it is much ſtronger than the common caſe of a proviſo.

Where matter of record muſt be pleaded *ſub pede ſigilli*.

Adjournatur; and this term it was argued by *Fazakerley pro querente*. This plea of a diſability cannot be pleaded after a general imparlance. 1 *Mod.* 14. *Yel.* 112. 1 *Ven.* 76, 135. Neither can privilege. 3 *Lev.* 343. *Trin.* 9 *Ann. in C. B. Kelſey* v. *Sedgewicke*. Nor to the juriſdiction. 1 *Lev.* 89. 1 *Inſt.* 128.

2. It ſhould be with a *profert in curia ſub pede ſigilli*, whereas it is only with a *prout patet per recordum remanens* in this court. *Bro. Record* 36. *Co. Lit.* 128. *Lutw.* 17, 18. 3 *Lev.* 334. *Lutw.* 1100. *Lit.* § 201. *Mich.* 5 *Geo. in C. B. Moor* v. *Coatſworth*, this exception was taken and allowed on demurrer. The matter of the conviction is traverſable, and ſhould therefore be alleged, otherwiſe you give the clerk of the peace a very great power to bind perſons by his certificate. 1 *Leon.* 205. *Mo.* 541. *pl.* 714.

He mentioned the two other exceptions, for want of a *quouſq.* and that of the proviſo, and cited the ſame caſes.

Reeve contra. The rule laid down as to imparlances is generally right, but the reaſon of it does not extend to this caſe; for where you are to give the plaintiff a better writ, you muſt do it in the firſt inſtance, that he may receive as little delay as poſſible; but here we ſay the plaintiff is intitled to no writ at all.

2. The conviction is a record of this court, and ſo need not be pleaded *ſub pede ſigilli*; and this differs from the caſe of an outlawry, where the record is that which creates the diſability, whereas here the record is only the evidence of it. It is a matter of fact, whether he neglected to take the oaths, and as ſuch it might have been traverſed; and it is like the plea of *auter action pendent* in another court, which is never pleaded *ſub pede ſigilli*, becauſe it involves a matter of fact, whether both are for the ſame cauſe of action.

3. It will be very well without a *quouſque*, and there are many precedents ſo in the caſe of an excommunication pleaded. 1 *Inſt.*

127, 128. *Raſt.* 320, 333, 334. *Lev. Ent.* 11. *Tho.* 191. It would be well enough, if it was only *petit judicium*, becauſe the court will give the proper one. 2 *Lev.* 19. 1 *Lev.* 222. *Hil.* 2 *Ann. B. R. Wilſon* v. *Croſs*, *Error e C. B.* in replevin, the defendant pleaded *priſel en auter lieu*, to which there was a demurrer concluding in bar; and the court rejected all that came under the *petit judicium*, ſaying, as that was ſufficient, the other ſhould not vitiate it.

He ſaid the proviſo extended only to ſuch as were to take the oaths upon account of qualifications, but upon looking into the act of Parliament, it appears to be general.

Curia adviſare vult. And *Trin.* 11 *Geo. reſpondes ouſter agard*, without further argument or debate, they ſaying it could never be ſupported after an imparlance.

Trinity

Trinity Term

8 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Juſtice.*
Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Forteſcue Aland, *Knt.*
Sir Robert Raymond, *Knt. Attorney General.*
Sir Philip Yorke, *Knt. Solicitor General.*

Dominus Rex *verſ.* Inhabitantes Sancti Petri in Civit' Oxon'.

If the maſter carries his ſervant on a viſit and ſtays forty days, the ſervant gains a ſettlement.

MARY Norris having intruded herſelf into the pariſh of *St. Peter*, was by an order of two juſtices removed to *Fawley-Court*, as the place of her laſt legal ſettlement. Upon appeal to the ſeſſions they ſtate the fact ſpecially, that ſhe was hired for a year into *Chriſt-Church* College in *Oxon*, being an extraparochial place, where ſhe ſerved part of the time; that during the year her miſtreſs went upon a viſit to *Fawley-Court*, where ſhe ſtaid three months, and took her ſervant with her, and afterwards they returned to *Chriſt-Church*: and upon the whole, the ſeſſions diſcharged the order for ſending her to *Fawley-Court*.

And now upon debate it was adjudged a ſettlement in *Fawley-Court*, and conſequently the laſt order was quaſhed, and the order of two juſtices ſet up again.

It

It was not diſputed, ſince the caſe of *Ruſſord*, but that the hiring into an extraparochial place would give a ſettlement. The only doubt was, whether the ſettlement gained at *Chriſt-Church* was not ſuperſeded by a ſubſequent ſettlement at *Fawley-Court*; and they were all of opinion, it was. As to the caſe of a maſter who goes upon a viſit, they ſtrongly inclined it would be no ſettlement; becauſe it muſt have that conſequence, that he may be ſent away. But as to the caſe of the ſervant, they all held it a ſettlement; for he comes there in the capacity of a ſervant, and is taken to be hired into any pariſh where he ſerves forty days; and it is not material to him, whether the maſter goes there under the capacity of gaining a ſettlement or not; like the caſe of a ſchool-boy, he gains no ſettlement, but the ſervant that waits upon him will. And the court ſaid, they could not take the return to *Chriſt-Church* to have given her a new ſettlement there, it not being ſtated to have had a continuance of forty days.

Dominus Rex *verſ.* Inhabitantes de Lambeth.

THE parſon lets his tithes to farm; and the farmer agrees with the tenant of the land, that in conſideration of his paying ſo much, he ſhall retain the tithe, and gather in the whole crop without dividing: and which of the two is chargeable to the poor's rate as occupier of the tithes was the queſtion. And the ſeſſions diſcharge the leſſee of the parſon, and tax the tenant of the land. *Et per cur'*: The order muſt be quaſhed. The farmer of the tithes is *prima facie* liable to the poor's rate, and therefore unleſs he can throw that charge over upon another, the tax muſt be made upon him. The tenant of the land in this caſe can never be ſaid to be the occupier of the tithes; for he is either a perſon who buys the tithes, or elſe he is to be taken as only excuſed from paying any; and no body can ſay but that though the parſon thinks fit to excuſe a pariſhioner, he will ſtill remain in point of law the occupier of the tithes. This agreement being only by *parol*, cannot enure as an under-leaſe of a thing that lies only in grant. Suppoſe it was the caſe of underwoods, which are ſold ſtanding, and the vendee grubbs them up; can it be imagined, that makes him the occupier; or ſuppoſe the tenant ſells the whole crop ſtanding, will that make him leſs the occupier of the land? If it ſhould, it would be impoſſible for the officers of the pariſh to know whom to charge. We muſt take this tenant of the land to be like any other buyer of the tithes, ſince he has no more title to them than any ſtranger whatſoever; and when the parſon or his farmer receives a ſum of money in lieu of tithe, that is in law a receipt of the tithe; with

Where the parſon agrees that the tenant ſhall retain the tithes, yet the tax for them muſt be upon the parſon.

this only difference, that it is not tithe in kind. In the caſe of a compoſition (as this is) or a *modus*, it was never thought but that the parſon was chargeable as occupier of the tithe: therefore there being no colour to charge the tenant of the land, the order of ſeſſions muſt be quaſhed.

Between the Pariſhes of Eaſtland *and* Weſthorſley.

Turning the ſervant out of doors before the end of the year doth not prevent the ſettlement.

THE fact was ſtated ſpecially on an order of ſeſſions, that a ſervant was hired for a year, and the day before the year expired the maſter told him, that to prevent his gaining a ſettlement in that pariſh, he ſhould go away immediately, which the ſervant refuſed to do, inſiſting to ſerve out the year, whereupon the maſter turned him out of doors. And the court held this to be ſuch a fraud in the maſter, as ſhould not prevent the ſettlement of the ſervant.

Robinſon *verſ.* Davis.

Practice.

UPON affidavit that the original award was loſt by coming up in the *Briſtol* mail, which was robbed; *Huſſey* moved upon a copy of it, and had a rule for an attachment *niſi*.

Fiſher *verſ.* Emerton.

Practice.

THE plaintiff got judgment on the *ſcire facias* againſt bail, pending error by the principal, and took them in execution; and now they moved to be diſcharged. *Sed per curiam:* Though you might have applied, and had the proceedings ſtayed; yet we will not ſet them aſide. If an action of debt had been brought upon the judgment, we ſhould have granted an imparlance, if it had been aſked; but we never ſet aſide the judgment, when it is once ſigned; becauſe we take it, you by your not applying in time have ſubmitted to meet the plaintiff. *Fieri non debet, factum valet.*

Noke *verſ.* Caldecot.

Warrant of attorney of any term *pendente lite* is ſufficient.

UPON error *e C. B.* the court held, that if there be a warrant of attorney of any term *pendente lite*, it is enough to warrant the proceedings, and there is no neceſſity it ſhould be of the term in the *Placita*.

Colebrooke *verſ.* Diggs.

THE plaintiff obtained judgment in *B. R.* of which error was brought in the Exchequer-Chamber, and bail put in: after affirmance there, error was brought returnable in Parliament; and upon conſideration the court held that there muſt be freſh bail.

There muſt be new bail on a ſecond writ of error.

Fry *verſ.* Carey.

AN action was brought in the ſheriff of *London*'s court againſt two partners, one brings a *habeas corpus* and puts in bail for himſelf only. And *Strange* moved for a *procedendo*, which was granted; for otherwiſe the plaintiff will be diſabled to go on in either court.

Procedendo.

Dominus Rex *verſ.* Green.

I MOVED to exhibit articles of the peace on behalf of *Elizabeth Collet* a *Quaker*, but ſhe refuſing to ſwear, the court could do nothing.

Quaker cannot exhibit articles of the peace without oath.

Between the Pariſhes of Hobey *and* Kingſbury.

TWO juſtices adjudging the ſettlement of the huſband to be at *Kingſbury*, and that he is likely to become chargeable to *Hobey*, ſend him, his wife, and ſon of one year old, to *Kingsbury*: and whether this was good as to the wife and child was the queſtion; and held well enough, and the order confirmed.

Adjudication of huſband's ſettlement ſufficient to ſend the wife with him.

Anonymous.

In Middleſex coram Pratt, *Chief Juſtice.*

THE Chief Juſtice allowed the wife's declaration, that ſhe agreed to pay 4 *s. per* week for nurſing a child, was good evidence to charge the huſband; this being a matter uſually tranſacted by the women.

Declaration of wife, where evidence againſt her huſband.

Michaelmas Term

9 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Juſtice.*
Sir Littleton Powys, *Knt.* }
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Forteſcue Aland, *Knt.* }
Sir Robert Raymond, *Knt. Attorney General.*
Sir Philip Yorke, *Knt. Solicitor General.*

Inter paroch' Sancti Petri in Civit' Oxon' *and* Chipping Wicomb in Com' Bucks.

Hired ſervant is ſettled where ſervice is.

UPON a ſpecial order of ſeſſions it appeared, that the maſter of the *Oxon* ſtage coaches hired a ſervant for a year, to ſtay in an inn in *Wicomb* where the coach baited, and to take care of the horſes: he lived there for the whole year, but in as much as the maſter lived all the while in *Oxford*, the ſeſſions adjudge the ſettlement of the ſervant to be with him. *Et per curiam:* The order muſt be quaſhed, for the ſettlement is gained by the ſervice, which was in *Wicomb*; and it would be hard to make it a ſettlement in *Oxon*, when the officers there had no power to remove him: the officers of *Wicomb* might have removed him, if they had pleaſed; they did not do it, and therefore they muſt provide for him.

Between the Pariſhes of St. John's in the Town, *and* Amwell in the county, of Hertford.

BY the ſtatute 9 & 10 *W.* 3. *c.* 11. it is provided, that no certificate-man ſhall gain a ſettlement in the pariſh to which he comes with ſuch certificate, unleſs he takes a leaſe of 10 *l. per annum*, or ſhall execute ſome annual office *in ſuch pariſh*. In this caſe the certificate-man took a farm of 10 *l. per annum*, part of which was in *St. John*'s, and part in *Amwell*, but the greateſt part, together with the houſe, being ſtated to lie in the pariſh that received his certificate, the court held it a ſettlement there.

An entire tenement of 10 *l. per ann.* tho' it lies in two pariſhes, gives a ſettlement in that where the party lives.

Sir George Ludlam, Chamberlain of London, *verſ.* Lopez.

BY the ſtatute 6 *Ann. c.* 16. intitled "An act for repealing an "act for the well garbling of ſpices, and for granting an equi- "valent to the city of *London* by admitting brokers," it is taken notice, that the office of garbler of the ſpices is an inheritance of the city of *London*, and by them leaſed out for 300 *l. per annum*, which office and duty it was convenient to aboliſh, by which the revenues of the city would be diminiſhed; it was therefore enacted that every broker ſhould on his admiſſion pay 40 *s.* to the chamberlain, and a yearly ſum of 40 *s.* for the uſe of the city, and that every perſon acting as a broker without ſuch admittance ſhould forfeit and pay to the uſe of the mayor, commonalty and citizens of the ſaid city, for every offence the ſum of 25 *l.* to be recovered by action of debt in the name of the chamberlain.

The act of grace doth not releaſe a forfeiture to which an intereſt is veſted in another.

The defendant acted as a broker without admittance; and in an action for the penalty the queſtion was, whether this forfeiture was pardoned by the laſt act of grace?

For the defendant it was inſiſted, that this is a ſtatute offence of a publick nature, and the action ariſes *ex maleficio*, like the caſe of exerciſing a trade contrary to 5 *Eliz.* which is always pardoned, unleſs it be excepted. *Cro. Eliz.* 632. In an appeal of murder the defendant was convicted of manſlaughter; and though this was the ſuit of a private perſon, yet it was held that the King might pardon the burning in the hand. And as the penalty is but a conſequence of the offence, if that be done away, the penalty muſt fall: and it makes no difference that the penalty is given to the chamberlain, and not to a common informer. 5 *Co.* 49.

Sed per curiam: This is not to be compared to the caſe of a common informer, who has no intereſt veſted in him till action brought, whereas here the city has an intereſt veſted upon committing the offenſe, and they may releaſe the penalty without bringing any action. They are purchaſers of this revenue, and the laying a penalty does not make it a publick offenſe; it is only a ſecurity for the duty, that if brokers do not take a licence, they ſhall pay ſo much; and if this penalty were not added, the revenue would be worth nothing. 3 *Inſt.* 238. is expreſs, that the King cannot pardon, where the action is given to the party grieved; for that would be for him to diſcharge the intereſt of another. The offenſe againſt 5 *Eliz.* is of a publick nature, and indictable, but this is not. *Et per Eyre* Juſtice, I much queſtion, whether that caſe of the appeal be law, for the burning the hand is part of the judgment.

This being upon a point ſaved at *niſi prius*, the plaintiff had judgment.

Dominus Rex *verſ.* Kelley.

Warrant for treaſon executed in court.

THE defendant having been formerly bound over, appeared the firſt day of the term upon his recognizance, and Mr. Attorney acquainted the court, that there was a new warrant againſt him for treaſonable practices committed ſince the laſt term, which the officer had not been able to execute; and therefore deſired leave that it might be executed in court, which was granted, and done accordingly.

Bland *verſ.* Pakenhan.

Practice.

THE court held, that the preſence of an attorney of *C. B.* at the execution of a warrant to enter up judgment in *B. R.* was ſufficient.

Dominus Rex *verſ.* Tod et al'.

Mandamus to proceed to judgment.

BY the ſtatute 6 *Geo. c.* 21. the juſtices of peace have a juriſdiction given them in ſome caſes to receive an information, and make their determination, upon a ſeizure of brandy: upon information exhibited by the officer of the cuſtoms, the fact appeared not to warrant the ſeizure, but the juſtice in favour of the officer refuſed to diſmiſs the information, ſo as the owners might have

their brandy again; and now *Wearg* moved for a *mandamus*, to compel him to determine the matter, which was granted accordingly.

Green *verſ.* Guantlett.

THE court on motion for a new trial held, that the giving notice of trial at the end of half a year after iſſue joined, would prevent the neceſſity of giving a term's notice, till a year after the laſt notice which was given and countermanded. *Strange pro def.* Practice.

Dominus Rex *verſ.* Reader.

THE defendant was convicted for keeping an alehouſe without licence, and was thereupon committed for a month as the act directs. After he had lain a fortnight, he brought a *certiorari*, and upon the return of it he was admitted to bail; the court being of opinion, that if the conviction was confirmed, they could commit him in execution for the reſidue of the time. Practice, bail.

Hooper *verſ.* Dale.

THERE being a vacant poſſeſſion, a leaſe was ſealed upon the premiſſes, and the defendant ejected the leſſee, and then gave a warrant of attorney to confeſs judgment: which was now moved to be ſet aſide, for that the caſual ejector can in no caſe confeſs judgment. I endeavoured to diſtinguiſh this from the common caſe, where the caſual ejector is only a nominal perſon; but the court ſaid it was a trick, and ſet it aſide. Caſual ejector cannot confeſs judgment.

Sheather *verſ.* Holt.

STRANGE moved for an attachment for a reſcue of one taken on a *capias ad ſatisfaciendum*. And upon the rule to ſhew cauſe, the court ſaid, that in regard theſe motions grew upon them more than they at firſt intended, they would expect a return in all caſes for the future; and therefore diſcharged the rule. No attachment on affidavit of a reſcue without a return.

N. B. Afterwards upon conference with the Judges of *C. B.* who grant theſe attachments every day, the court thought fit to come into that practice again.

Hil. 9 *Geo. Grindley* v. *Touſter*, *Meare* v. *Gallard*, they reſumed the old rule, and required a return. *Young* v. *Paine*, *Trin.* 5 *Geo.* 2.

The

The gaoler of Shrewsbury's caſe.

No attachment for a voluntary eſcape.

MR. Attorney moved for an attachment againſt him for a voluntary eſcape of one in execution for obſtructing an exciſe officer in the execution of his office; but the court refuſed to grant it, there being no precedent for that purpoſe; however they ordered him to ſhew cauſe, why there ſhould not be an information.

Fleming *verſ.* Langton.

Where there are iſſues in fact and in law, the plaintiff may waive the iſſues in fact, and take out an inquiry upon the demurrer.

THERE were four counts in the declaration, *non aſſumpſit* pleaded to three, and a demurrer to the fourth. After judgment on the demurrer, the plaintiff takes out a writ of inquiry and executes it. This was moved to be ſet aſide, there being no *nolle proſequi* on the roll; and it was inſiſted, that the plaintiff ought to take out a *venire*, *tam* to try the iſſue, *quam* to inquire of the damages upon the demurrer. *Sed per curiam*, That is indeed the courſe where the iſſues are carried down to trial before the demurrer is determined, and in that caſe the jury give contingent damages; but here the demurrer being determined, and the plaintiff being able to recover all he goes for upon that count; there is no reaſon why we ſhould force him to carry down the cauſe to *niſi prius*: and as to the want of a *nolle proſequi* upon the roll, he may ſupply that when he comes to enter the final judgment; if not, you will have the advantage of it upon a writ of error. The judgment upon the inquiry muſt ſtand.

Barker *verſ.* Forreſt.

Replication *non eſt attorn'*, muſt not conclude *al pais.*

IN *C. B.* the defendant after ſpecial imparlance pleaded his privilege of an attorney of *B. R.* The plaintiff replied him not an attorney, and concluded to the country. And on demurrer judgment in chief is entered for the plaintiff, but reverſed on error, becauſe being on demurrer, the moſt the plaintiff could have, was a *reſpondes ouſter*. *Et per curiam*, That there muſt be in this caſe, becauſe though the replication is ill in concluding to the country, yet the plea is ill too, as coming after an imparlance, though it be a ſpecial one.

Lock *verſ.* Major.

BY ſtatute 5 *Geo. c.* 24. §. 30. it is provided, "That a bankrupt's certificate ſhall be given in evidence, and be a full diſcharge of any action that ſhall be brought by any creditor of *ſuch bankrupt.*" A point was reſerved at *niſi prius* before *Pratt* C. J. whether it was not ſtill neceſſary to prove an act of bankruptcy. And upon debate in open court they were all of opinion it was, for the word *ſuch* was relative, and therefore he muſt be proved to be ſuch a perſon as is before deſcribed.

Bankrupt's certificate no evidence of the bankruptcy. *Altered by* 5 Geo. 2. c. 30.

Anonymous.

THE court granted a rule for the coroner of *Wenlock* in *com' Salop* to take up a body, in order for a new inquiſition, the former having been quaſhed.

Rule for coroner to take up the body.

Thornton *verſ.* Moulton.

At Guildhall coram Pratt *C. J.*

AT the opening of the books the two brokers met, and the ſelling broker told the other, he was ready to transfer; the other alleged it was uſual to indulge the buyer for two or three days, and that he would find his principal in that time, which the other not diſagreeing to, nothing further was done. And for want of having the buyer called at the books the firſt day of the opening, the Chief Juſtice ruled it not a good tender, and the plaintiff was nonſuited.

What a tender of ſtock.

Hopſon *verſ.* Trevor. In Canc.

THE defendant being the ſon of the late Maſter of the Rolls, and under the diſpleaſure of his father, did upon the marriage of his daughter with the plaintiff enter into a bond of the penalty of 5000 *l.* conditioned to ſettle one third of whatever eſtate in lands ſhould come to him on the death of his father. The Maſter dying without a will, a very conſiderable eſtate deſcended to the defendant his eldeſt ſon, who neglecting to make any ſettlement within the time limited, the plaintiff brought his bill in this court for a ſpecifick performance. The defendant by his anſwer inſiſts,

Specifick performance decreed where the party inſiſted to forfeit the penalty. 2 Will. Rep. 191.

that he ought to be left to ſue the penalty, having his remedy upon that at law: but Lord Chancellor decreed a ſpecifick performance, ſaying it was unreaſonable to give an election to the defendant, when the plaintiff could have none; for if the lands to be ſettled were not of the value of 5000 *l.* he could never reſort to the penalty; and on the other hand, if they exceeded that value, it was not juſt he ſhould be left to it; neither would it anſwer the intent of the parties, which was to ſecure a proviſion for the wife and children by the ſettlement of the eſtate; becauſe if the plaintiff was to have the penalty, it muſt be as a debt due to himſelf, and this court would have no power to compel him to do any thing out of it for their benefit.

Peele *verſ.* Capel. In Canc.

Bond of reſignation, where to be allowed.

CAPEL on preſenting *Peele* to a living, took a bond from him to reſign when the patron's nephew came of age, for whom the living was deſigned. When the nephew was of age, inſtead of requiring a reſignation, it was agreed between them all, that *Peele* ſhould continue to hold the living, paying 30 *l. per ann.* to the nephew. *Peele* makes the payment for ſeven years, but refuſing to pay any more, the patron puts the bond in ſuit; and then *Peele* comes into this court for an injunction, and to have back his 30 *l. per ann.* On the hearing the Chancellor granted the injunction, not (as he ſaid) upon account of any defect in the bond itſelf, which he held good, but on account of the ill uſe that had been made of it: and as to the money, it being paid upon a ſimoniacal contract, he left the plaintiff to go to law for it.

Keen *verſ.* Whiſtler. In C. B.

Where more coſts than damages.

TRESPASS for chaſing his cow, and his domeſtick fowls, *viz.* hens, geeſe, *&c.* with dogs, which dogs were uſed to bite tame fowl, by whoſe biting they were killed. On Not guilty, verdict for the plaintiff; and he had his full coſts, becauſe this is not a treſpaſs wherein the right of the freehold may come in queſtion.

Blackwell *verſ.* Naſh.

Intr. Mich. 8 Geo. rot. 212.

IN debt for a penalty, the plaintiff declares, that he covenanted to transfer to the defendant on or before the 21ſt of *September* ſo much ſtock, and that the defendant *in conſideratione praemiſſorum* covenanted to accept and pay *for it*; and then avers that he was at the books the 21ſt of *September*, *et paratus fuit et obtulit ad tranſferendum* to the plaintiff, who then and there refuſed to accept, or pay.

A. is to tranſfer ſtock, and *B.* to pay *for it*, the tranſfer is not a condition precedent.

On demurrer it was objected by *Acherley*, that *for it* made it a condition precedent. 14 *H.* 4. 19. 5 *Co.* 21. 15 *H.* 7. 18. *Dy.* 76. 2 *Saund.* 352. And therefore to intitle himſelf to this action, the plaintiff ſhould have ſhewn an actual transfer of the ſtock, and the rather here, becauſe the covenant was not to pay the money till the day of transfer, which brings this caſe out of the diſtinction laid down in *Thorpe* v. *Thorpe*, *Salk.* 171.

Reeve contra. Here are mutual covenants, and therefore we need not ſhew a performance of our part of the agreement; but if we were obliged, a tender is ſufficient, eſpecially a perſonal one, as this muſt be taken to be from the refuſal which is alleged; and it being a perſonal tender, that helps the want of any averment of the uſage of the company, and of ſtaying till the books were ſhut, according to the caſe of *Lancaſhire* v. *Killingworth*, for this is like the tender of rent, where a refuſal on any part of the day excuſes the party from any longer attendance: beſides, this declaration is according to the precedents. 1 *Brownl. Ent.* 14. *Br. Red.* 109. *Lutw.* 226. *Lev. Ent.* 30, 44. Salk. 623.

Et per curiam, *In conſideratione praemiſſorum* is in conſideration of the covenant to tranſfer, and not of an actual transferring, for which the defendant has his remedy; or if it were, a tender and refuſal would amount to a performance: in all theſe caſes the great queſtion is, who is to do the firſt act: but when the transfer is to be *upon payment*, there is no colour to make the transfer a condition precedent.

Judicium pro quer' niſi, but enlarged to next term on the importunity of the defendant's counſel, who alleged he had new points. *Hil.* 9 *Geo.* the plaintiff had judgment without argument.

Trin. 10 *Geo.* the judgment was affirmed in the Exchequer Chamber.

Dominus

Dominus Rex *verſ.* Decan' et Capitul' Dublin.

2. Whether error will lie on the award of a peremptory *mandamus*.

ERROR *e B. R. in Hibernia* of the award of a peremptory *mandamus* to admit *Robert Dowgate* to his ſtall in the choir and his voice in the chapter.

The firſt *mandamus* recites, that the ſaid *Robert* had been legally inſtituted and inducted to his ſtall and voice, which the dean and chapter had refuſed him; *ideo, &c.*

After an *alias* and *pluries* they return, that *Hen.* 8. by his letters patent under the great ſeal of *Ireland*, dated 10 *May*, *Anno Regni* 33. gave to the dean and chapter and their ſucceſſors a power to make ſtatutes and ordinances for the better government of the church, by virtue of which they ordained, that every perſon before he ſhould be admitted to his ſtall in the choir and his voice in the chapter, ſhould take his corporal oath before the dean and chapter for the time being, of canonical obedience to the dean, and to obſerve the ſtatutes and cuſtoms of the church, and to keep the ſecrets of the chapter. That they were ready to have admitted the ſaid *Dowgate* to his ſtall and voice, but that he refuſed to take the ſaid oath, though requeſted ſo to do, *et ea de cauſa* they cannot admit him. Then the entry goes on with a *quia videtur cur'*, that the return is inſufficient, *ideo concedatur, et per cur' hic ordinatum eſt, quod fiat breve de peremptorie mandamus.*

Upon error of this the general errors are aſſigned, that no ſuch writ ought to have been awarded, and that the return ſhould have been allowed. The Attorney General here pleads *in nullo eſt erratum.*

Fazakerley pro queren. in errore. That a writ of error will lie in this caſe, though that is a point never yet determined: it is the policy of the law, that no one court ſhould be intruſted with the ſole determination of any man's property; for which reaſon it furniſhes the party with writs of error, bills of exceptions, demurrers to evidence, *&c.* If the validity of this return had been determined in an action, no body will ſay, but a writ of error would lie; and is not the very ſame matter put in judgment, only in a more ſummary way? and is not property more and more every day the ſubject of *mandamus's?* 2 *Cro.* 6. ſays all proceedings of courts of juſtice ought to be examinable in another place; and in the caſe of *Aſhby* v. *White* it was held, that a writ of error would lie on the award to remand, where the court refuſed to bail.

Error lies on the award to remand, where the court refuſes to bail.

Taking

Taking it therefore for granted that a writ of error will lie, I ſhall proceed to mention my exceptions to the *mandamus*.

1. Here is no title to the archdeaconry ſet out, only that he was collated, inſtituted and inducted: in a *quare impedit* they always ſhew a vacancy.

2. The writ is *felo de ſe*, and ſhews it to be unneceſſary, for being inducted he has a right to all the incidents of his office. Suppoſe an houſe was annexed to the archdeaconry, would this court grant a *mandamus* for that? No ſurely, they would leave him to his ejectment: you will indeed help him into the office, without which he could not maintain an ejectment. The caſe of a parſon is the ſame, for he is put to ſue for his tithes, and cannot have a *mandamus* to the pariſhioners to ſet them out. In the caſe of corporation officers indeed you grant a *mandamus* to deliver the *inſignia* after the party is ſworn in; but that is becauſe the office is annual, and it is neceſſary the mayor ſhould have them immediately, in order to command the more reſpect.

3. This is an eccleſiaſtical office, and therefore the right may not be ſo properly determinable on a *mandamus*, as before the ordinary.

Reeve contra. A writ of error may by the ſame reaſon lie on the award of the firſt writ of *mandamus*, as on the peremptory one; and then it is eaſy to ſee, the delay would be infinite.

The property is not determined on this writ, for it gives the party no right whatſoever; on the award of a *habeas corpus* error will not lie. 8 *Co.* 127. And in the caſe of the biſhop of *St. David's* the entry was, that the party prayed a prohibition, *et ei non conceditur*, and yet no error was held to lie of it. And in the caſe of *Strode* v. *Palmer*, *Trin.* 2 *Geo.* where this point was ſtirred but not determined; it was however reſolved by all the court, that it would be no *ſuperſedeas* to the peremptory *mandamus*; and therefore I cannot imagine what uſe it will be of, for as the *mandamus* gives no right, he has nothing to make reſtitution of upon the reverſal.

Ld. Raym. 545. Error lies not on denial of a prohibition. Lill. Ent. 248.

But if error will lie, yet the return is inſufficient, and therefore the peremptory *mandamus* was well awarded. 1. Becauſe the by-law is void, in impoſing an oath on a perſon not obliged to take one, and in giving themſelves a power to adminiſter it. Beſides, he is not a member till admitted, and therefore this is to bind one not a member. 2. They have not ſet out, when the by-law was made,

Where a corporation has a power to make ſtatutes they cannot give themſelves a power to adminiſter an oath.

made, perhaps it was ſince our induction. 3. They ſay he was requeſted to take the oath, but not that it was tendred to him.

As to the exceptions to the *mandamus*, I ſhall content myſelf with this general anſwer, that the party here has no occaſion to ſhew his title; and it was never intended he ſhould be as exact, as if he was anſwering an information in nature of a *quo warranto*.

Fazakerley. The caſe of *Strode* v. *Palmer* is very different from this, for that was a caſe upon the *mandamus* act, and the judgment of the court was founded on the words of that ſtatute, which are, "That if the return be adjudged inſufficient, a peremptory "*mandamus* ſhall iſſue *without delay*."

Chief Juſtice. Here are three queſtions, 1. Whether the *mandamus* be good? 2. If the return be ſo? And, 3. If the writ of error will lie?

A *mandamus* is only to give a *legal*, not an *actual* poſſeſſion.

As to the firſt, it is true we grant *mandamus's* where otherwiſe the party would be without remedy, as to be ſworn in; but if that be done, we go no further, but leave him to get an actual admiſſion how he can: we give him a legal poſſeſſion, and then leave him to his remedy. Indeed in the caſe of *mandamus's* to reſtore, we go further: but that is becauſe he had an actual poſſeſſion before: and the reaſon why in the other caſe we do not meddle with the actual poſſeſſion is, becauſe when we have given him a legal one, he is by law as much intitled to every right belonging to the office, as if he had the actual poſſeſſion, and may maintain that right without our aſſiſtance, even againſt another who is in poſſeſſion of the office. Conſider what would be the conſequences if we ſhould interpoſe: here are two perſons who both claim a title to the ſame office, and each of theſe have an equal right to our aſſiſtance; we grant each of them a *mandamus* to be admitted, which writs are executed on behalf of both; what then are they to do when they come together? neither will ſubmit to the other, and ſo there is no remedy but to fight it out, by which means we are the inſtruments of breaking the peace. He that has the legal poſſeſſion, may maintain his right againſt any diſturbances, we only put him in the way to purſue his proper remedy. Here has been an induction, and that is ſufficient; and therefore I think the *mandamus* deſtroys itſelf. As to the caſe of the *inſignia*, that depends upon the particular reaſon that has been mentioned.

2. But if the writ were proper, then the return is ill: can they force an oath upon a man not to reveal ſecrets? I am ſure it is a very dangerous one: and as to the canonical obedience, they may enforce

enforce that by eccleſiaſtical cenſures without an oath. Dr. *Sherlock*'s caſe was founded on an act of Parliament, which ſaid he ſhould have a ſtall and voice; and till that was aſſigned, he was not in legal poſſeſſion of the prebend. *Ante* 159.

3. As to the third point, I am doubtful whether the writ of error will lie; if the return had been allowed, I ſhould think it hard to re-examine it.

Powys Juſtice. I think the *mandamus* is not proper, and that the caſe of the *inſignia* ſtands ſingle on that particular reaſon, that without them no body will give the mayor due reſpect.

Eyre Juſtice. I think the *mandamus* is good, for as to the want of title, here is as much ſet out as is done in the caſe of corporation officers, where they only ſay *debito modo electus*. As to the main point, I think a *mandamus* is very proper to admit a man to the exerciſe of his office; and that if a common-council-man, after ſwearing in, ſhould be denied admiſſion into the council-room, he might have a writ for that purpoſe. And I take Dr. *Sherlock*'s caſe to be the ſame with this, for he was prebendary by virtue of the act of Parliament, without any further ceremony, and had the ſame right to his ſeat and voice as this man has; and if a *mandamus* will not lie, I do not ſee what other remedy he has to get into his ſtall, unleſs it be by force.

As to the return it is certainly ill, for it is not the charter but their own by-law that gives them power to adminiſter the oath: in the caſe of corporations where the charter doth not impower any body to give the oath, they are forced to get a *dedimus* out of Chancery. Neither is the by-law well ſet out, for it is only *inter ſtatuta ordinatum eſt*, without ſhewing when or by by whom it was made.

Where the charter gives no power to adminiſter the oath of office, there muſt be a *dedimus* for that purpoſe.

This entry of the award of a peremptory *mandamus* is no judgment, for want of *conſideratum eſt*, which ſhould have been in. *Mich.* 10 *W.* 3. *rot.* 83. the writ recites, that the return was held inſufficient, *per quod conſideratum fuit, quod fieret breve de peremptorie mandamus tam in complemento judicii quam in executione ejuſdem.* 16 *Car.* 2. *rot.* 135. *Rex* v. *Majorem de Maidſtone.* 29 *Car.* 2. *rot.* 44. *Mich.* 3 *W.* 3. *rot.* 139, 142. 7 *W.* 3. *rot.* 60. are all ſo. But I do not find they ever entered up a formal judgment.

This award therefore of a peremptory *mandamus* is a judgment of which error will lie; and the party will have the effect of it in ſuperſeding the writ, if reverſed.

Forteſcue Juſtice. I think it is hard to maintain, that a writ of error will lie, becauſe without *ideo conſideratum eſt* it is no judgment: it is againſt the nature of *mandamus's*, which are *feſtinum remedium*, and great inconveniencies will follow, where the writ is to deliver the *inſignia*, or publick records. *Ryley* ſays they were formerly no more than letters, and now the diſobedience of them is only a contempt. Entries are made of contempts, and yet I believe error was never brought. *Bags*'s caſe was the firſt judicial *mandamus*, and till 12 *W.* 3. they were never entered of record, when a rule was made, that they ſhould be entered of the ſame term they come in.

As to the point of the *mandamus*, I am inclined to be of my Lord Chief Juſtice's opinion, that it will not lie where there is a legal poſſeſſion, and there was not that in *Sherlock*'s caſe, for he was never ſworn.

It was afterwards argued a ſecond time *Paſch.* 8 *Geo.* when *Wearg pro quer' in errore* made two points, 1. Whether the writ of error lay; and, 2. Admitting it did, whether the judgment was erroneous.

As to the firſt point, appeals are a privilege much favoured by law, and therefore a new erected juriſdiction is not exempt from them. *Salk.* 263. A *mandamus* is now become a formed writ, and like other writs muſt bear *teſte* in term. 2 *Keb.* 91. It is like a civil action, the party muſt ſhew a title, and the return muſt either admit or deny it, and when the proceedings are cloſed, the judgment is entered with an *ideo conſideratum eſt.* A writ of error lies upon a fine, and yet that is only an agreement of the parties upon record.

The rights that are determined upon theſe writs are many times of an high nature, and are of conſequence to the publick in keeping out an improper, or bringing in a rightful officer: and it is of conſequence likewiſe to the party himſelf, who has his private right bound by ſuch a determination as is made upon this writ.

It was objected, that if error will lie upon the award of the peremptory *mandamus*, it may as well lie upon the firſt writ, and then the delay would be infinite. But I take it to be no conſequence, that if it lies on the laſt, it muſt lie alſo on the firſt; for I look upon that to be of the nature of an interlocutory judgment, of which error will not lie, but the party muſt ſtay till the cauſe is cloſed.

The inconvenience of delay may be avoided, by conſtruing this writ of error to be no *ſuperſedeas*, as they did in the caſe of *Strode* v. *Palmer*, *Lill. Entr.* 248. and in many other inſtances, which might be put. 1 *Mod.* 285, 106. 1 *Vent.* 266. 2 *Lev.* 120. 1 *Sid.* 184, 44.

But then it is objected, if it be no *ſuperſedeas*, to what purpoſe ſhould you bring it? Anſwer; to have him turned out again, if the judgment be reverſed: that reverſal may put him in the ſame condition as when he brought the writ.

2. Taking it therefore for granted, that a writ of error will lie, I ſhall proceed to ſhew wherein the judgment is erroneous. It will be admitted, that if the original *mandamus* ought not to have been granted, then every thing done upon it muſt fall. A *mandamus* is not to give a right, but only a capacity of aſſerting it, which the party cannot do till he has a legal poſſeſſion; if he has that, it is all the writ can give him, and then he ſtands in no need of any writ. In this caſe it appears, the party was in poſſeſſion of the office, which gave him a right to his ſtall and voice, and he might as well have taken the writ to the verger or the ſexton, or to have a houſe, or his dividend; in which caſes he having ſuch a right as will enable him to maintain an action, the law leaves him to that. Dr. *Sherlock*'s caſe is widely different, for there the letters patent were no more than a ſtanding nomination, which left the right of admiſſion in the dean and chapter as it was before, and ſo was no more than the common caſe upon a bare nomination or election; but the party here has at the time of ſuing out the firſt *mandamus* all that which Dr. *Sherlock* did not enjoy till the peremptory *mandamus* gave it him.

Pengelly Serjeant *contra*. That the *mandamus* well iſſued, and that the writ of error would not lie.

As to the *mandamus*, it appears that *Dowgate* has a right to a ſtall, and in conſequence of that he muſt have a remedy to come at it. It is not pretended, that a *quare impedit* will lie, nor can he bring an aſſiſe, he having the office already, and that for which he is contending, being only a particular privilege annexed to it. He cannot have an ejectment, it not being ſuch a thing whereof the ſheriff can give poſſeſſion; nor will an action upon the caſe anſwer his purpoſe, becauſe in that he cannot recover his ſtall, but only damages for being kept out.

As therefore he can have none of theſe remedies, he is under a neceſſity of praying a *mandamus*, which lies for him on behalf of the crown, as he is an officer appointed by the royal charter.

I wonder to hear it ſaid we are already in poſſeſſion of every thing the writ can give us, when it appears by the writ and return, that though we are archdeacon, yet we have no ſort of poſſeſſion of this particular franchiſe. In the caſe of the *inſignia* the officer is not without remedy, if a *mandamus* ſhould not be granted, for no doubt he may maintain an action of trover; but the reaſon you do not put him to that is, becauſe damages will not anſwer the purpoſe, which reaſon holds equally in our caſe. 1 *Lev.* 119. a *mandamus* was granted for ſuch a privilege as this annexed to an office, for that was to give an alderman his precedency. 1 *Vent.* 188. 2 *Roll. Rep.* 482. *Pal.* 51. It is no objection, that this office is of a ſpiritual nature. Sir *T. Jones* 199. *F. N. B.* 34. *D.* a writ to induct to a ſtall.

2. Whether the *mandamus* was well granted or not, will be immaterial here, if I ſhew that no writ of error will lie upon it. It can be of no conſequence or inconvenience if error does not lie, becauſe the *mandamus* neither gives, nor concludes the right. Suppoſe there ſhould be a reverſal, who can pray that the party may be put out again? Error will not lie on a *habeas corpus*. 8 *Co.* 127. Nor on a fine impoſed by the court; and yet theſe may be matters of great conſequence to the parties: here is no body elſe contending for this ſtall, or who can demand a reſtitution; and if it had ever been imagined a writ of error would lie, we muſt have met with it before now.

Wearg replied. The reaſon why the party cannot bring a *quare impedit* is, becauſe that is not his proper remedy, which he muſt ſeek by action upon the caſe. A *mandamus* will not lie to command the providing neceſſaries upon a viſitation, but the party muſt ſue for procurations. In the caſe of precedence the alderman could have no action, and therefore the *mandamus* might be proper.

Adjournatur; and this term it was argued *ex parte defendentis in errore* on the ſingle point of the writ of error, upon which only the court delivered their opinions.

Chief Juſtice. This cauſe being argued *ex parte*, I ſuppoſe the plaintiff in error gives it up. Several matters have been ſtirred in the caſe, which might deſerve conſideration, if we could properly come at them; but as we are all of opinion that the writ of error does

does not lie, it is not neceſſary to enter into the debate of them. A writ of error is calculated to reſtore the party to ſomewhat that is loſt; the *mandamus* gives no right, not even a right of poſſeſſion; ſo that if the judgment ſhould be reverſed, ſtill the ſame right would ſubſiſt in him, which makes the reverſal ſignify nothing. To which *Powys* Juſtice agreed. *Et per Eyre* Juſtice, A writ of error only lies on what is properly a judgment, which this is not. I was indeed inclined to think it a judgment from the entries that I mentioned formerly; but upon looking further into it, I find that the entries, where returns have been allowed, do not warrant that opinion, for they are without an *ideo conſideratum eſt*. In all *procedendo's* the entry is with an *ideo conſideratum eſt*, and yet it is certain error will not lie, neither will it on the return of a reſcue. The entry in the caſe of the *Ayleſbury* men is, *Super quo viſis et per curiam hic plenius intellectis omnibus et ſingulis praemiſſis, pro eo quod videtur curiae hic quod cauſa captionis et detentionis ſupranominati* A. B. *non pertinet ad hanc cur', ideo remittitur*, without an *ideo conſideratum eſt*; which entry was made on great conſideration, and is an argument the judges thought that not to be a caſe relievable by writ of error. *Et per Forteſcue* Juſtice, Entries of *mandamus's* are of late date; perhaps in *Ireland* they do not enter them yet: the party cannot traverſe this return, and why then ſhould he bring a writ of error? There would be no end of proceedings, if all ſorts of officers that are intitled to a *mandamus* ſhould be hung up by writs of error. *Per curiam:* The writ of error muſt be quaſhed.

Afterwards a writ of error was brought in Parliament, and the judgment of *B. R.* in *England* affirmed, with 60 *l.* coſts.

Hilary

Hilary Term

9 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Juſtice.*
Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Forteſcue Aland, *Knt.*
Sir Robert Raymond, *Knt. Attorney General.*
Sir Philip Yorke, *Knt. Solicitor General.*

Between the Pariſhes of Burleſcome *and* Sampford Peverell.

Executing the office of tithingman gains a ſettlement.

THE ſeſſions on a ſpecial order adjudge, that executing the office of tithingman would not gain a ſettlement. *Et per curiam*, The order muſt be quaſhed, for this is an annual office in the pariſh within the words and meaning of the act of Parliament.

Between the Pariſhes of St. Michael in Bath *and* Nunny in com' Somerſet.

Order to remove a married woman is good unleſs it appears ſhe is ſent from her huſband.

ORDER of removal, reciting that the wife of *B.* who is now living, and *C.* his child, had intruded, *&c.* and were likely, *&c.* and that the place of ſettlement of the wife and child was in *St. Michael*, they are therefore removed thither. It was moved to quaſh the order, becauſe it did not appear, the huſband was at the time

time of the removal in the pariſh of *St. Michael*, ſo that it may be they ſent the wife away from the huſband. *Sed per curiam*, We cannot intend he was not; if he was in the pariſh from which ſhe was ſent, that indeed would vitiate the order; but as neither of theſe facts appear againſt the order, to ſatisfy us that it is bad, we are not to preſume it to be ſo, and therefore it muſt be confirmed.

Hodgkins et ux' *verſ.* Corbet et ux',

Words tantamount are within the cuſtom of *London*.

NORTHEY moved for a prohibition for theſe words ſpoken in *London*, "You are a cuckoldly dog, and bid the bitch your "wife come out"; and cited *Hil.* 12 *Ann. Evans* v. *Horwood*, where "She is with child," ſpoken of a ſingle woman, was held tantamount to calling her whore, and a prohibition went. So *Paſ.* 1 *Geo. Wil orn* v. *Coddy*, the wife libelled for calling her huſband cuckold, and a prohibition was granted. *Et per curiam*, Formerly it was held that words tantamount were not within the cuſtom, but the later reſolutions have denied that caſe in *Lutw.* 1042. And *Mich.* 11 *W.* 3. *B. R. Smith* v. *Glaſs*, the words ſpoken in *London* were, "She was never married, and what is her hopeful ſon;" and by the opinion of the whole court there was a prohibition. There muſt be a prohibition in this caſe.

Alcock *verſ.* Carter.

Under what circumſtances the court will allow want of warrants of attorney to be aſſigned on a writ of error out of *Ireland*.

MR. *Atwood* moved the common motion to ſet aſide ſo much of the aſſignment of errors in a cauſe out of *Ireland*, as related to the want of a warrant of attorney; which was oppoſed by *Strange*, who produced an affidavit ſworn before one of the Judges in *Ireland*, with a certificate from the proper officer, that there was no warrant filed; and alſo an affidavit of the agent here, that he received both from *Ireland*, and believed them to be authentick; and inſiſted that it now appearing they were not ſham errors aſſigned merely for delay, the reaſon upon which the common motion is made failed. *Et per curiam*, This is ſufficient to ſatisfy us that there is ſome foundation for our ſending a *certiorari*, and therefore the errors muſt ſtand. *Strange* moved for time till the next term to return a *certiorari*, which was granted accordingly.

Payne *verſ.* Fry.

The clerks of a prothonotary of *C. B.* are not intitled to privilege.

THE defendant pleaded in abatement, that he was one of the clerks of Sir *G. Cooke*, prothonotary in *C. B.* and *Squib* moved to ſet it aſide. Upon a rule to ſhew cauſe, *Strange contra* produced the affidavit annext to the plea, wherein the defendant ſwore, that he ſerved his clerkſhip with a Common Pleas attorney, and that he had for many years acted as an attorney or ſolicitor, and followed no other employment. And after conſideration the court ſet aſide the plea, being all of opinion, ſuch clerks had no privilege at all, they not being ſworn as attornies are, nor ever acting as clerks in the prothonotary's office. And that it was not ſufficient for the prothonotary to enter their names in his book. As to ſuch clerks as were actually employed under him, for ſo long as they continued in that employment, they would be privileged, but no longer; as in the caſe of a Judge's clerk; and an old rule 8 *Car.* was cited, where they were reſtrained from practiſing as attornies.

Dominus Rex *verſ.* Gage.

THE defendant was convicted on 5 *Ann. c.* 14. for uſing a greyhound in killing four hares, *per quod* he forfeited 20 *l.*

Where juſtices have power to convict on oath of one witneſs, they may convict on the confeſſion of the party.

Reeve excepted to the conviction, that the act of Parliament had only given the juſtices juriſdiction to convict upon the oath of one or more credible witneſſes, whereas this was upon his own confeſſion, which he inſiſted the juſtices had no power to take; and it follows in the act, that the perſon ſo convicted ſhall forfeit, which word *ſo* is relative to the former method by oath of one or more credible witneſſes: and he put the common caſe upon the removal of a poor perſon, which muſt be upon complaint of the churchwardens or overſeers, the juſtices having juriſdiction only in that manner.

Sed per curiam, (*praeter Eyre* J.) The conviction muſt be confirmed. The intent of mentioning the oath of one witneſs was only to direct the juſtices, that they ſhould not convict on leſs evidence: ſuppoſe the confeſſion had not been before the juſtices, but before two witneſſes who had ſworn it; that would be convicting him on the oaths of witneſſes, and yet the evidence would not be ſo ſtrong as this. By the civil law confeſſion is eſteemed the higheſt evidence, and in ſome caſes, though there are one hundred witneſſes, the party is tortured to confeſs. Here the juſtices had a better

evidence than the oath of any ſingle witneſs, and it is a monſtrous thing to ſay that a better ſort of evidence ſhall not do.

Eyre J. *contra*, thought there was no occaſion to carry this act of Parliament ſo far, the 22 & 23 *Car.* 2. *c.* 26. giving power to convict for this offenſe upon confeſſion, with a different penalty, and that it ought to have been a conviction upon that ſtatute. The conviction was confirmed.

Dominus Rex *verſ.* Sarah Salisbury.

Practice.

SHE was committed to *Newgate*, for ſtabbing a gentleman with a knife, ſo that his life was deſpaired of: and having obtained a *habeas corpus* out of the King's Bench, the day before ſhe was to be brought up ſhe moved, that a phyſician and ſurgeon of her own nominating might be permitted to be preſent at the dreſſing the gentleman's wound, ſo as to be able to ſatisfy the court that he was out of danger, in order that they might bail her. *Sed per curiam*, There never was a motion of this nature, eſpecially ſo early as this is; the courſe is, for the friends of the party injured to lay his condition before the court when they oppoſe the bailing: if they do not do it, then we may order ſuch an attendance for our own ſatisfaction; but at preſent the defendant has no right to demand it.

Dominus Rex *verſ.* Harvey et al'.

The court will not grant information where the only acting is voting for Parliament men.

UPON a motion for an information againſt the defendants, to ſhew by what authority they acted as burgeſſes, having never been admitted; the only act alleged was, their voting for Parliament men at the laſt election. The defendants by affidavits ſhewed they were inhabitants of the borough, and that as ſuch they had a right to vote, though they were no burgeſſes; but did not deny their voting as if they were burgeſſes. *Per curiam*, Since they had a right to vote, we will not inquire into that queſtion, which is more properly determinable in the Houſe of Commons. The rule was diſcharged.

Mr. Dottin's caſe.

In what caſes the court will order an attorney to deliver deeds.

HACKET agreed to aſſign a leaſe to *Sutton*, who ſent for *Dottin* an attorney to take the deeds and peruſe them. *Dottin* drew an aſſignment, and then *Sutton* paid him for it and took back the deeds. And now *Hacket* moved for a rule on *Dottin*, to deliver him

him the deeds. But upon laying the caſe before the court, they would make no rule upon the attorney, it appearing to be a fair tranſaction in delivering back the deeds to his own client.

Lord Coningsby's caſe.

No new ejectment to be brought till coſts paid of the firſt.

HE brought an ejectment, and had a rule for a trial at bar; but it being upon the demiſe of a wrong perſon, he delivered new ejectments, and coming again for a trial at bar, the court would not grant it, but upon payment of coſts of the former ejectment.

James *verſ.* Hatfeild.

At Guildhall coram King *C. J.*

What the guardian ſaid admitted as evidence againſt the infant.

AN infant brought an action of aſſault, and declared *per guardianum.* And to prove that his witneſs was the promoter of the cauſe and at the expence of it, the Chief Juſtice allowed the defendant to give the guardian's declaration to that purpoſe in evidence, he being a perſon liable to coſts.

Eaſter

Eaſter Term

9 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Juſtice.*
Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Forteſcue Aland, *Knt.*
Sir Robert Raymond, *Knt. Attorney General.*
Sir Philip Yorke, *Knt. Solicitor General.*

Bailee *verſ.* Vivaſh.

IN treſpaſs for taking away goods the defendant pleaded tender of amends, and on demurrer judgment was given for the plaintiff: the 21 *Jac.* 1. *c.* 16. giving ſuch plea only in the caſe of an involuntary treſpaſs with a diſclaimer, and ſo is 2 *Roll. Abr.* 570.

Amends not pleadable to a voluntary treſpaſs.

Dominus Rex *verſ.* Wells.

THE court granted a *certiorari* for the defendant to the *Old Bailey* to remove an indictment for forgery; the defendant appearing to be a man of good repute, and the proſecution upon ſlight grounds.

Indictment removed from *Old Baily.*

Macdonnel *verſ.* Welder.

Hil. 9 Geo. rot. 273.

An entry before the commencement of the leaſe will not avoid the payment of the rent reſerved.

IN replevin the defendant avows for rent under a leaſe dated 24 *June*; *habendum a praed'* 24 *die Junii, &c. virtute cujus* the plaintiff entered the ſaid 24th of *June*.

On demurrer in *C. B.* it was objected, that the plaintiff was a diſſeiſor by entering the 24th, when the leaſe was not to commence till the next day, and conſequently the poſſeſſion was not under the leaſe, but by virtue of a tortious fee.

But after conſideration, judgment was given for the avowant; the court being of opinion, there was a great difference between this caſe, and an ejectment, where the plaintiff who claims a term does at the ſame time ſhew he has gained a tortious fee; whereas here be the entry tortious or not, it cannot diſcharge the contract for payment of the rent. *Cro. El.* 169. 2 *Leon.* 99. 1 *Roll. Abr.* 65. The judgment of *C. B.* was affirmed.

Holliſter *verſ.* Coulſon.

A *latitat* prevents the ſtatute of limitations. 1 Sid. 53, 60. Sty. 156. L. Raym. 1441.

THE defendant pleaded *non aſſumpſit infra ſex annos*; the plaintiff replied a *latitat*; and the court on demurrer held it well enough, without ſhewing a bill of *Middleſex*. *Judicium pro quer'*.

Hayward *and* the Bank of England.

In what time a goldſmith's bill muſt be tendered.

THE plaintiff, who kept caſh with the Bank, on *Saturday* left a note for 50 *l.* on *Cox* and *Cleeve*: on *Monday* they gave it to the runner, who left it at the ſhop in the morning, where they cancelled the note; but when he called in the afternoon for the money according to his uſual practice, he found the bankers had ſtopt payment; whereupon he took a new note of the ſame tenor and date. And *King* C. J. directed the jury, that it would be dangerous to ſuffer perſons to deal with notes in this manner, and ſaid the Common Pleas was of that opinion in the like caſe. But however he directed they ſhould only find the value of the note when cancelled, upon which the jury found 25 *l.* the goldſmiths having paid 10 *s.* in the pound.

Thompſon *verſ.* Berry. In C. B.

TRESPASS for breaking his cloſe and chaſing his bull. Verdict for the plaintiff and 1 *s.* damages. And the queſtion was, if he ſhould have any more coſts than damages; and held by the court that he ſhould have his coſts, becauſe the 22 & 23 *Car.* 2. *c.* 9. extends only to ſuch actions of treſpaſs where the freehold may probably come in queſtion. *Vide Raym.* 487. 3 *Mod.* 39. And how could the freehold come in queſtion upon chaſing of a bull? Where no more coſts than damages.

Rawbone *verſ.* Hickman.

IT was moved in arreſt of judgment, that the record was, *et praed' querens* (inſtead of *def.*) *ſimiliter*, ſo no iſſue joined: but the court held it was aided. *Cro. El.* 435, 904. And *Mich.* 5 *Geo.* 2. on the authority of this caſe the court would hear no argument on the like objection. Jeofail.

Trinity

Trinity Term

9 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Juſtice.*
Sir Littleton Powys, *Knt.* } *Juſtices.*
Sir Robert Eyre, *Knt.* }
Sir John Forteſcue Aland, *Knt.* }
Sir Robert Raymond, *Knt. Attorney General.*
Sir Philip Yorke, *Knt. Solicitor General.*

Anonymous.

Mandamus to commit adminiſtration.

STRANGE moved for a *mandamus* to the official of the Biſhop of *Glouceſter*, to commit adminiſtration to the widow of an inteſtate. *Sed per curiam*, That will be to deprive the ordinary of his election, in granting it to her, or the next of kin; therefore take your *mandamus* generally, to grant adminiſtration of the goods of the inteſtate.

Dominus Rex *verſ.* Hotch.

Indictment on 5 *Eliz.*

MR. *Eyre* moved to quaſh an indictment on 5 *Eliz. c.* 4. where it was averred to be a trade uſed at that time in *Great Britain*, inſtead of *England*; and after a rule to ſhew cauſe it was made abſolute without oppoſition.

Trin. 13 *Geo. Rex* v. *Pariſh*, another quaſhed on the authority of this caſe.

Dominus Rex *verſ.* Athoe ſenior' et junior'.

THE defendants were convicted at *Hereford* aſſizes for a murder committed in *Pembrokeſhire*, which is an ancient *Welch* county, and no part of the lordſhips marchers in *Wales*; and at the aſſizes they moved in arreſt of judgment, that the 26 *H.* 8. *c.* 6. did not extend to all the principality of *Wales*, but only to the lordſhips marchers, where the inconvenience only was recited to be: Mr. Juſtice *Forteſcue*, before whom they were tried, thinking it proper, a point of ſo great conſequence ſhould be ſolemnly determined, ordered a *certiorari* and *habeas corpus* to be brought, by virtue of which the defendants and the conviction were both brought before the court of *B. R.* And after hearing of counſel on both ſides, and conſideration of the ſeveral ſtatutes of 26 *H.* 8. *c.* 4. 26 *H.* 8. *c.* 6. and 34 & 35 *H.* 8. *c.* 26. the whole court were unanimouſly of opinion, that the Judges of aſſize in the next adjacent *Engliſh* county had a concurrent juriſdiction throughout all *Wales* with the juſtices of the grand ſeſſions; and conſequently the defendants were well tried at *Hereford*. The defendants thereupon received ſentence of death, and being in the cuſtody of the marſhal were executed at the watering place by *Kent-ſtreet*, being the uſual place of execution for his priſoners.

Murders and felonies in any part of *Wales* may be tried in the next *Engliſh* county.

Lilly *verſ.* Hedges.

THE plaintiff brings an action againſt *Hedges* only, on a covenant entered into by him and *Griffin*, that they and each of them will account for all rents that they or either of them ſhall receive of the plaintiff's eſtate; and aſſigns the breach, that *licet Hedges* and *Griffin* received 7000 *l.* yet they nor either of them ever accounted.

Where the covenant is joint and ſeveral, in an action againſt one only the breach may be aſſigned in the neglect of both.

After verdict for the plaintiff *Wearg* moved in arreſt of judgment, that though the plaintiff had an election to bring either a joint or ſeparate action; yet this was neither joint nor ſeveral, being againſt one only for the neglect of both. *Sed per curiam*, The action is well brought, perhaps the other never ſealed the deed, and it is no new thing for one man to covenant for the act of another. The plaintiff muſt have judgment.

Between the Pariſhes of Allhallows on the Wall *and* St. Olave in Surrey.

A. is bound to *B.* but ſerves *C.* his ſettlement is in *C.*'s pariſh.

UPON a ſpecial order of ſeſſions the caſe was ſtated, that an apprentice was bound to *A.* in one pariſh, but by agreement ſerved *B.* in another pariſh, and the ſeſſions ſettle him with *B.*

Et per curiam, The order muſt be confirmed. This is exactly the caſe that was in this court, *Mich.* 3 *Geo. between the pariſhes of Holy Trinity* and *Shoreditch*, where *Ferrer* was bound to *Truby* with intent to ſerve *Green* (as he did); and the court upon a ſpecial reſolution adjudged the ſettlement to be with *Green*. *Ante* 10.

Grumble *verſ.* Bodilly.

Where there is judgment *pro def.* in ejectment, coſts ſhall be paid before a new one brought.

THERE was a verdict for the defendant in ejectment, and the plaintiff brought a writ of error, and a new ejectment. And it was moved to ſtay the proceedings in the ſecond ejectment, till the coſts of the firſt were paid. *Salk.* 255, 258. *Et per curiam*, Unleſs the plaintiff can ſatisfy us, that the writ of error is brought with ſome other view than to keep off the payment of coſts, we will not ſuffer the plaintiff to proceed in his new ejectment. And he not ſhewing any thing elſe, the proceedings were ſtayed, unleſs coſts paid in a fortnight.

Woolley *verſ.* Briſcoe.

Surpluſage.

IN a ſtock cauſe the defendant pleaded that the contract was not regiſtered before the firſt of *November* 1720. *ſecundum formam ſtatuti in hujuſmodi caſu editi et proviſi.* The plaintiff replies, that it was regiſtered *ſecundum formam ſtatuti*; upon which they are at iſſue, and it is found for the plaintiff.

It was moved in arreſt of judgment, that this was an immaterial iſſue, becauſe the act of Parliament does not require ſuch regiſtry till the firſt of *November* 1721. and then the plea being only to the firſt of *November* 1720. upon which the iſſue is joined, the jury could not find it to be regiſtered according to the directions of the ſtatute.

Sed per curiam, The time was impertinently mentioned in the plea; the iſſue is joined upon that part which is only material, *viz.*

the regiſtry *ſecundum formam ſtatuti*, and therefore the reſt muſt be rejected as ſurpluſage. If not, then the replication is ill, and ſo is the plea, and then the declaration muſt ſtand, and the plaintiff have judgment.

Dominus Rex *verſ.* Ford.

Conviction for keeping an alehouſe.

CONviction on 3 *Car.* 1. *c.* 3. for keeping an alehouſe without licence: and *Forteſcue* objected, that in the act there is a proviſo to exempt perſons who have been puniſhed by the former law of 5 & 6 *E.* 6. *c.* 25. and therefore it ſhould have been ſaid he had not been proceeded againſt upon that act.

Sed per curiam, That coming in by way of proviſo, he ſhould have inſiſted on it in his defence; it appears he was aſked what he had to ſay, and therefore we may reaſonably preſume he had no ſuch defence to make. The conviction was confirmed.

Dominus Rex *verſ.* Robbiſon major' de Helſtoun.

Mandamus to proceed to election where a clauſe for holding over.

SERJEANT *Pengelly* moved for a *mandamus* to him, to proceed to an election of a new mayor upon the next charter day; it appearing by affidavit, that under a clauſe for holding over he had been in poſſeſſion four years; and it being doubtful whether, where there is a charter day, there can be an election at any ſubſequent day, the court granted the *mandamus*.

Cook *verſ.* Wingfield.

Strumpet tantamount to whore.

THE word *ſtrumpet* was held to be within the cuſtom of *London*; but the defendant not coming for a prohibition till after ſentence, the court denied a prohibition on the authority of *Argyle* v. *Hunt*, though it appeared on the libel to be ſpoken in *London*.

Dominus Rex *verſ.* Inhabitantes de Little Dean.

The court will preſume a leaſe to be by deed.

IT was ſtated, that a man took a leaſe for ſeven years, and objected that it might be only by *parol*, and then it is void for the whole, and there can be no ſettlement. *Sed per curiam*, Then it ſhould have been ſtated to be by *parol*; we muſt take it to be by deed, otherwiſe it is no leaſe at all. Order confirmed.

Gray

Gray *verſ.* Mendez.

Mich. 9 Geo. rot. 346.

The ſtatute of limitations runs notwithſtanding a bankruptcy.

CASE by the aſſignee of the commiſſioners of bankruptcy, the defendant pleads *non aſſumpſit infra ſex annos*, to which the plaintiff replies the bankruptcy, and aſſignment, and that the cauſe of action aroſe within the ſix years, before the aſſignment.

On demurrer the court held the replication to be ill, becauſe when the ſix years were once begun, the ſtatute runs over all *meſne* acts, ſuch as coverture, and infancy, in the caſe of a fine. 1 *Lev.* 31. And it would be to defeat the ſtatute, as to all ſimple contracts, if an aſſignment at the end of five years and an half was to ſet all at large again. *Judicium pro defendente.*

Horſpoole *verſ.* Harriſon.

A trader may be ſued by his degree, and the writ ſhall not abate unleſs he pleads another degree.

IN an action by original againſt the defendant as of ſuch a place yeoman, he pleaded in abatement, that he was a lime merchant, and not a yeoman: and on demurrer the court held it an ill plea, and awarded a *reſpondes ouſter*, upon this ground, that every man, be he a trader or not a trader, has a degree by which he may be denoted; and having a degree, (if he has a trade likewiſe) it is in the election of the plaintiff to ſue him by one or the other; and if he ſues him by his degree, it is not enough for the defendant to ſay he is of ſuch a trade, becauſe he does not give the plaintiff a better writ. In this caſe therefore the defendant ſhould have ſhewn himſelf to be of a degree higher than a yeoman, and that would have abated the plaintiff's writ, and have given him a better. This was ruled upon the authority of a former caſe, where a man was ſued as yeoman, and he pleaded he was a horner, and the court awarded a *reſpondes ouſter*.

Jones *verſ.* Pearle.

Paſ. 9 Geo. rot. 21.

Innkeeper cannot ſell the gueſt's horſe for keeping, except in *London*.

IN trover for three horſes, the defendant pleaded, that he kept a publick inn at *Glaſtenbury*, and that the plaintiff was a carrier and uſed to ſet up his horſes there, and 36 *l.* being due to him for the keeping the horſes, which was more than they were worth, he

detained and ſold them, *prout ei bene licuit:* and on demurrer judgment was given for the plaintiff, an innkeeper having no power to ſell horſes, except within the city of *London.* 2 *Roll. Abr.* 85. 1 *Ven.* 71. *Mo.* 876. *Yel.* 67. And beſides, when the horſes had been once out, the power of detaining them for what was due before did not ſubſiſt at their coming in again.

Acheſon *verſ.* Fountain.

Mich. 9 Geo. rot. 363.

UPON a caſe made at *niſi prius coram Pratt* C. J. it appeared that the plaintiff had declared on an indorſement made by *William Abercrombie*, whereby he appointed the payment to be to *Louiſa Acheſon*, or order, and upon producing the bill in evidence it appeared to be payable to *Abercrombie*, or order; but the indorſement was only in theſe words, "Pray pay the contents to *Louiſa Acheſon*;" and therefore it was objected, that the indorſement not being to order did not agree with the plaintiff's declaration.

The order of an indorſee may ſue on a general indorſement to him only.

But upon conſideration the whole court were of opinion, it was well enough, that being the legal import of the indorſement, and that the plaintiff might upon this have indorſed it over to another, who would be the proper order of the firſt indorſor. *Judicium pro querente.*

The King *againſt* the Chancellor, Maſters and Scholars of the Univerſity of Cambridge.

MANDAMUS to reſtore *Richard Bentley* to his academical degrees of batchelor of arts and batchelor and doctor of divinity.

Mandamus. L. Raym. 1334.

To this they return, that the univerſity of *Cambridge* is an ancient univerſity, and a corporation by preſcription, conſiſting of a chancellor, maſters and ſcholars, who time out of mind have had the government and correction of the members, and for the encouragement of learning have conferred degrees, and for reaſonable cauſes have uſed to deprive. That time out of mind there has been a court held before the chancellor or vice-chancellor for the determining of all civil cauſes where one of the parties was a member of the univerſity. And that Queen *Elizabeth* by letters patent 26 *April* 3d year of her reign, granted them conuſance of pleas, and to be a court of record, and ſeveral other clauſes of the charter are ſet out, upon which no queſtion ariſing, they may be omitted.

That 13 *Eliz.* this and all other charters of the univerſity were confirmed by act of Parliament. That at a court held 23 *September* 1718. according to the uſage of the univerſity, before *Thomas Gooch*, D. D. the then vice-chancellor, one *Conyers Middleton*, D. D. a member of the univerſity, levied a plaint in debt for 4 *l.* 6 *s.* againſt the ſaid *Richard Bentley*, and prayed proceſs againſt him. That thereupon according to the cuſtom of the univerſity a proceſs iſſued to *Edward Clark* the beadle, to compel the ſaid *Bentley* to appear at the next court. That before the return the beadle waited upon *Bentley* at his lodgings within the juriſdiction, and ſhewed him the proceſs, and ſerved him with it: and upon diſcourſe between them concerning the proceſs and the vice-chancellor, *Bentley* contemptuouſly ſaid, the proceſs was illegal and unſtatutable, and that he would not obey it; that he took the proceſs out of the hands of the beadle, ſaying the vice-chancellor was not his judge, *et quod praed' procancellarius ſtulte egit.* That at the next court held 3 *October* 1718. *Middleton* appeared, and declared in debt for 4 *l.* 6 *s.* and the regiſter of the court exhibited a depoſition of the beadle touching the contempt, which being read, the ſaid *Richard Bentley* according to the uſage of the univerſity was ſuſpended *ab omni gradu ſuſcepto.* That time out of mind there has been a cuſtom for the chancellor or vice-chancellor to ſummon a congregation, conſiſting of ſuch and ſuch particular members, who are ſpecified in the return, who have uſed to examine and determine all matters relating to the univerſity, and to take away degrees for contumacy or reaſonable cauſe. That a congregation was held 17 *October* 1718. when the vice-chancellor declared this whole matter to them, and deſired their judgment upon it, after which having read the depoſition and the ſeveral acts of court, a certain grace was propounded, according to the uſage of the univerſity, in theſe words, *Cum reverendus vir Richardus Bentley collegii Trinitatis magiſter, ad ſummos in hac univerſitate titulos et honores veſtro favore dudum promotus, adeo ſe immemorem et loci ſui et veſtrae authoritatis dederit, ut debite ſummonitus ad comparendum et reſpondendum in cauſa coram procancellario, obedientiam recuſaverit, miniſtrum univerſitatis ſummonentem indignis modis tractaverit, procancellarium et capita collegiorum opprobriis impetiverit, juriſdictionem denique univerſitatis longo uſu, Regiis chartis, et authoritate Parliamenti ſtabilitam, pro nihilo habendam eſſe declaraverit; cumque idem Richardus Bentley ſuper his cauſis ab omni gradu ſuſpenſus fuit, et poſtea per tres dies juridicos expectatus, comparere tamen neglexerit; placeat vobis ut dictus Richardus Bentley ab omni gradu, titulo et jure in hac univerſitate dejiciatur et excludatur: et ſuperinde per ſententiam et conſiderationem dictae congregationis ab omni gradu, titulo et jure in eadem univerſitate dejectus et excluſus fuit.*

fuit. That he has not yet ſubmitted himſelf to the authority of the univerſity, *Et his de cauſis ſalva authoritate academica*, they cannot reſtore him.

Cheſhyre Serjeant *pro Rege.* The matter of the writ's iſſuing having been argued upon the rule to ſhew cauſe why there ſhould not be a *mandamus*, I ſhall ſay nothing as to the writ itſelf; but taking it to have well iſſued, I ſhall proceed to conſider, whether this return be ſufficient to hinder the awarding a peremptory *mandamus.*

The return I take to be an inſufficient return, and therefore a peremptory *mandamus* ought to go.

As this is not a caſe within the act of Parliament, it muſt be conſidered as a *mandamus* at common law, and the return muſt be certain to every intent.

That this writ is not brought for a ſmall matter, I would juſt mention the conſequence of the deprivation: there are many preferments and privileges which can only ſubſiſt in dignified clergymen, and ſome of them are mentioned in our ſtatutes. 13 *Eliz. c.* 12. 17 *Car.* 2. *c.* 3. §. 6. So that now theſe degrees which at firſt were only titles of honour, (*Seld.* 326 to 333.) now affect men in their freeholds and poſſeſſions.

The defendants have ſhewn themſelves to be a corporation by preſcription, and as ſuch they are under the controul of this court, and therefore they, as all other corporations, muſt ſhew the removal to be for a reaſonable cauſe, and that the proceeding has been in a legal manner.

But this we ſay is neither a reaſonable cauſe, nor a legal proceeding.

As to the reaſonableneſs of the cauſe, I think the whole will come under theſe four heads, and if neither of them will warrant the ſuſpenſion (for I am now upon that only) it will be admitted to be illegal. 1. The firſt is, that *Bentley* ſaid, the proceſs was illegal. 2. That he declared, the vice-chancellor was not his judge. 3. That he acted raſhly, *ſtulte egit.* And, 4. The taking away the proceſs.

As to the firſt, in ſaying the proceſs was illegal, do not the parties every day ſay as much of your proceedings in *Weſtminſter-hall?* Is any thing more common than for a man to tell the court, they have given judgment *erronice*, or have charged him *minus juſte?*

You

You bear all this even where it is falſe in fact, and the judgment not erroneous; whereas in this caſe I am ſure the return has verified what was ſaid of the proceſs, that it was illegal. For, 1. It doth not appear whether the officer was to compel the appearance, by an arreſt of the body, or goods, or by diſtreſs infinite. 2. The plaint was in debt, and therefore it ſhould have been a ſummons. 3. It is to appear at the next court, without ſaying when it was to be holden; which objection has been often allowed. 2 *Cro.* 314. *Cro. El.* 105. 1 *Mod.* 81. 1 *Vent.* 181. *Raym.* 204. 1 *Roll. Abr.* 484. 4. It is not ſaid in the citation, at whoſe ſuit, or for what account, he was to appear. 6 *Co.* 54. Theſe are all good objections to the proceſs, and ſhew that *Bentley* was well juſtified in ſaying the proceſs was illegal; though if it was legal, I know no harm in any man's diſputing the legality of any proceſs whatſoever.

2. He ſaid the vice-chancellor was not his judge. But could his denying that weaken the power of the vice-chancellor over him, if he was his judge? In theſe caſes they ought to have returned the occaſion of ſpeaking the words, which perhaps may very much alter the caſe.

3. He ſaid the vice-chancellor *ſtulte egit*. What we are to underſtand by that expreſſion, ſince they have not put an *anglice* to it, I cannot tell. It may ſignify that he has acted raſhly, or unadviſedly, or ſomething that is very innocent.

4. His taking the proceſs. I do not find that he did any more than aſk to ſee it, and ſo received it from the officer; it does not appear he did not give it him again, or that he took it out of the officer's hands without his conſent.

But now if all this charge againſt *Bentley* was true, yet it will never warrant the ſuſpenſion; admitting them to be improper expreſſions, yet for contemptuous words a man cannot be deprived. If he had ſaid ſo in court, perhaps he might have been committed; and as they were out of court, he might be bound to his good behaviour; but removals for words can never be juſtified. 1 *Vent.* 302. 2 *Cro.* 586. 1 *Vent.* 327. 3 *Keb.* 709, 811. *Cro. El.* 78, 689. *Mo.* 247. *Latch* 299. *Noy* 92. *Palm.* 451. In *Baggs*'s caſe he charged the mayor with acting fooliſhly (which is the moſt they can make of *ſtulte egit*;) but it was held, they could not remove him for it.

But admitting all this againſt me, that here was a reaſonable cauſe of ſuſpenſion, yet if there be not likewiſe a legal proceeding, the ſuſpenſion will be void.

The firſt objection to the legality of the proceeding is, that the vice-chancellor had no ſufficient evidence of the contempt; the regiſter only exhibited *quaſdam depoſitiones*, which doth not conclude them to be upon oath, for *depono* is a relative term, and muſt be applied.

But in the next place, if the word depoſition ſhould be thought to import the evidence to be upon oath, yet here is no authority to adminiſter the oath ſet out in the return: the old books call ſuch an oath *ſacramentum fatuum.* 3 *Inſt.* 167. *Yelv.* 72, 111. A maſter in Chancery muſt be averred to have power to adminiſter an oath, or elſe the court takes no notice of it. *Latch* 39, 133. 2 *Keb.* 284.

Another imperfection in the proceeding is, that here was no notice given to *Bentley*, to come in and defend himſelf againſt the contempt; if he had been there, he might have ſo far explained himſelf, as to have taken off the force of the expreſſions: he might have told them, It is true, I did ſay the proceſs was illegal, and have ſhewn them wherein: he might have ſhewn that the vice-chancellor was not his judge, but that he was viſitable by ſome body elſe: and if you take *ſtulte egit* to ſignify no more, than that the vice-chancellor had acted raſhly, it would have been eaſy enough for *Bentley* to have ſatisfied any body, but the vice-chancellor, of the truth of his aſſertion: and as to the charge about taking the proceſs out of the hands of the officer, might not he have replied, though I took the proceſs out of your hands, yet did not I give it you again, when I had looked upon it? All this would have been a very good defence, if they had given him an opportunity of making it.

But now to take it in the ſtrongeſt manner, that he was utterly defenceleſs againſt every part of the charge, and that the charge will warrant his ſuſpenſion; yet ſtill there ought to have been notice: *quia quicunque aliquid ſtatuerit, parte inaudita altera, aequum licet ſtatuerit, haud aequus fuerit.* 11 *Co.* 99. 1 *Sid.* 14. 2 *Sid.* 97. *Sti.* 446, 453, 457, 478. I ſhould not have cited theſe authorities to prove firſt principles, but only for the information of ſome who attend the argument of this cauſe.

The only matter which remains now to be conſidered is, what was done by the congregation in conſequence of the vice-chancellor's ſuſpenſion. If the ſuſpenſion was illegal, what was done by the congregation will fall of courſe. If the ſuſpenſion was legal, yet I ſhall inſiſt the deprivation was not ſo.

The defendants themſelves have ſhewn, that even this body is bounded by a reſtriction, to deprive only for reaſonable cauſe. Now though the ſuſpenſion, and the non-appearance for three court-days to ſubmit himſelf (which by the way he was never called upon to do) will warrant a deprivation by the congregation; yet it is but reaſonable that this accuſation ſhould be made out to them in a proper manner: and ſurely theſe gentlemen will never contend, that becauſe Mr. Vice-chancellor *narravit* the contempt, and *petiit* the judgment of the congregation *de praemiſſis*, that this is ſufficient to found the ſentence upon. But they tell you, they inſpected the acts of the court, and heard the depoſitions; perhaps there were no acts of court relating to this matter entered in the books; the expreſſion is general, *inſpectis actibus curiae*, without referring it to this caſe.

But further: If the ſuſpenſion without notice could be got over, yet the deprivation never can. It was never imagined, that a member of a corporation, whoſe only privilege is perhaps to dine at the ſame table with Mr. Mayor, could be removed without a ſummons; and then *a fortiori* there ought to be one in this caſe, where the conſequence will be the loſs of ſeveral valuable preferments. It would be miſpending your time, to cite caſes to prove the neceſſity of a ſummons, and therefore I ſhall reſt it upon the notoriety of the fact, which is every day's experience.

The defendants have founded their proceedings on cuſtom, preſcription, and act of Parliament, all ſubjects of the juriſdiction of this court; and if on the one hand they cannot reſtore him *ſalva authoritate academica*, on the other hand this deprivation cannot conſiſt with the preſervation of all rights, liberties, and rules of law, which the members of the univerſity are intitled to as *Engliſhmen*.

Comyns Serjeant *contra*. The nature of the proceeding at the ſuit of Dr. *Middleton* is no more than an outlawry or excommunication, to compel the appearance of the party: *Excerpta ex Statut. Oxon.* printed in 1674. *tit.* 21. *de judiciis*. The return amounts to ſhewing a juriſdiction to hold plea, an action properly inſtituted againſt *Bentley*, his contempt to the court, for which he was ſuſpended, and afterwards upon his non-ſubmiſſion deprived.

It is very true what my brother *Cheſhyre* has ſaid, that degrees in univerſities were firſt introduced to encourage learning and learned men; but then it is no conſequence, that if learned men behave themſelves

themſelves in a manner that does not become them, they may not be ſuſpended or deprived.

To conſider therefore the ſeveral parts of the return, I ſhall firſt endeavour to contradict what *Bentley* ſaid to the officer, that the proceſs was illegal. It appears the vice-chancellor had juriſdiction of the cauſe; it is averred to be agreeable to the courſe of the court, which anſwers the two firſt objections, that it ſhould have diſtinguiſhed how the officer was to compel the appearance, and that being in debt it ought to have been a ſummons.

The objection that the time when he was to appear is not mentioned, would overthrow all inferior juriſdictions that hold courts at no certain time, but only ſummon one when they have buſineſs, in which caſe the party muſt take care to inform himſelf as well as he can. The diſtinction is, where the courts are held at a certain day, and where not. *Dy.* 262. 2 *Cro.* 214. 2 *Bulſ.* 36. 2 *Cro.* 571. *Cro. Car.* 254. 1 *Roll. Abr.* 484. *pl.* 22, 35. *Show.* 95.

It is ſaid that it does not appear at whoſe ſuit, nor for what occaſion he was cited. But upon the whole return it does appear, *taliter proceſſum fuit*, that Dr. *Middleton* came in and declared for 4 *l.* 6 *s.* ſhews it to be a proceeding upon what was done before in iſſuing the proceſs.

My brother is pleaſed to ſay, the whole behaviour does not amount to a contempt, and that any man may inſiſt the proceſs is illegal, and that he is not convened before his proper judge: and certainly ſo he may, but then it ought to be in the courſe of a legal proceeding. If *Bentley* had ſo far complied as to have appeared before the vice-chancellor, and have inſiſted on theſe ſeveral matters; though there ſhould perhaps have been no ground for the objection, yet it would have been unreaſonable in the vice-chancellor to have taken it as a contempt. But when nothing of this nature is done, when there is no appearance at all, but a great deal of matter inſiſted on without doors, in order to arraign the juriſdiction of the vice-chancellor, and the manner of the proceeding; it is certainly a behaviour which no man who is ſummoned to appear before a court of juſtice can juſtify. Is it fitting any man ſhould tell a beadle, that he will not obey the vice-chancellor, and that he has acted fooliſhly? Or is the vice-chancellor to ſit and hear all this, without ſhewing he has a power to puniſh ſuch a contempt?

But then it is objected that though this be a contempt, yet the manner of the proceeding was not regular. In anſwer to which I would obſerve, that it is agreeable to the methods, both of the common

common and civil law courts, to puniſh contemptuous words without calling in the party. If a man treats the proceſs of this court with contempt, the way is to grant an abſolute attachment, without giving him an opportunity to ſerve you ſo a ſecond time.

As to the evidence of the contempt, it is averred to be according to the courſe of that court. A depoſition is a matter related upon oath: the civil law ſays it may be done at the relation of the officer, that the court will ſo far give credit to their own officer, as to puniſh a contempt that he only relates to them.

The charge againſt *Bentley* for taking the proceſs, does amount to an actual taking away; it is *de manibus abſtulit.*

The caſe of disfranchiſement of corporators has been inſiſted on, but ſurely that does not come up to this. There the right of the officer is finally concluded, whereas here is only a ſuſpenſion till a ſubmiſſion: beſides the members of a corporation have an intereſt in one another, but *Bentley*'s caſe has no relation to any body elſe.

The method of the whole proceeding, both as to the ſuſpenſion, and what was done by the congregation, may be right, though it does not tally with the method of our common law proceedings. A *feme covert* may ſue in the ſpiritual court without her huſband, and if in a motion for a prohibition caſes ſhould be cited to prove the neceſſity of the huſband's joining in a ſuit, yet we ſhould be told at laſt, that it was the method of their proceedings below, and was well enough: does not our admiralty court enforce the ſentence of a foreign court, without examining into their method of proceeding?

I would not have it gone away with as a notion, that the univerſity of *Cambridge* affect an uncontroulable juriſdiction. They only deſire to enjoy their privileges in a manner conſiſtent with law and juſtice: they inſiſt, that what they have done in this caſe is ſo, and therefore they hope there ſhall be no peremptory *mandamus.*

C. J. This is a caſe of great conſequence, not only as to the gentleman who is deprived, but likewiſe as it will affect all the members of the univerſity in general.

I think the return has fully juſtified us in ſending the *mandamus*, as it ſhews the power of the vice-chancellor and the congregation is only to deprive for a reaſonable cauſe; and as it is not pretended there is any viſitor, or any other juriſdiction, to examine into the reaſonableneſs of the deprivation, but that of this court.

It is the glory and happineſs of our excellent conſtitution, that to prevent any injuſtice no man is to be concluded by the firſt judgment; but that if he apprehends himſelf to be aggrieved, he has another court to which he can reſort for relief; for this purpoſe the law furniſhes him with appeals, with writs of error and falſe judgment: and leſt in this particular caſe the party ſhould be remedileſs, it was become abſolutely neceſſary for this court to require the univerſity to lay the ſtate of their proceedings before us; that if they have erred, the party may have right done him, or if they have acted according to the rules of law, that their acts may be confirmed.

The univerſity ought not to think it any diminution of their honour, that their proceedings are examinable in a ſuperior court. I am ſure this court, which is ſuperior to the univerſity, thinks it none; for my own part I can ſay, it is a conſideration of great comfort to me, that if I do err my judgment is not concluſive to the party, but my miſtake will be rectified, and ſo injuſtice not be done.

As to the proceeding againſt Dr. *Bentley*, it muſt be agreed that the vice-chancellor had conuſance of the cauſe, and ſo the ſuit was well inſtituted againſt him. I muſt likewiſe take the proceſs to compel an appearance to be regular, being averred to be according to the courſe of that court.

As to Dr. *Bentley*'s behaviour upon being ſerved with the proceſs, I muſt ſay it was very indecent, and I can tell him if he had ſaid as much of our proceſs we would have laid him by the heels for it: he is not to arraign the juſtice of the proceedings out of court before an officer, who has no power to examine it.

When he ſaid the vice-chancellor *ſtulte egit*, it was what he might have been bound over for to his good behaviour; but I believe it is alſo eſtabliſhed, that ſuch a behaviour will not warrant a ſuſpenſion or deprivation.

He ſaid he would not obey, but *non conſtat* but he thought better of it afterwards, and did appear.

I cannot think the evidence of this contempt was ſufficient: it does not appear to have been upon oath, as it ſhould have been.

But be theſe matters how they will, yet ſurely he could never be deprived without notice. I do not obſerve but it is a total deprivation, and not temporary only, as was ſaid at the bar.

As to the proceedings before the congregation, it does not appear they reheard the matter any otherwiſe than by the relation of the vice-chancellor. They ſhould have adjudged all the facts again, and have averred, that the deprivation was for them; whereas *his de cauſis* they deprived him, amounts to no more than that the vice-chancellor told them ſo.

The vice-chancellor's authority ought to be ſupported for the ſake of keeping peace within the univerſity; but then he muſt act according to law, which I do not think he has done in this caſe.

Powys J. *accord' in omnibus.*

Eyre J. The univerſity, unleſs they had a viſitor, are certainly accountable to this court. As to the deprivation, I am not ſatiſfied, that for a contempt to the vice-chancellor's court, the congregation which is another court can deprive; for it is not a contempt to the univerſity in general, and it is not ſaid in the return, that for contempts to the vice-chancellor the congregation can deprive. Every court has a power to puniſh contempts to itſelf, but I never till now heard of one court's reſenting a contempt to another.

But ſurely for a contempt they cannot deprive. We puniſh our officers, but we do not turn them out. Or if they could deprive, it can never be done without notice.

Though the vice-chancellor had juriſdiction in this matter, yet in virtue of our ſuperintendency over all inferior juriſdictions, we muſt take care he does not abuſe his authority. Do not we prohibit the ſpiritual court, till they give a copy of the libel, in all caſes within their juriſdiction?

Forteſcue J. If they had returned a viſitor, it would be ſomething, but without that they muſt ſubmit to the juriſdiction of this court, which is no more than exempt juriſdictions, as the county palatine which has *jura regalia*, do.

A deprivation can never be the proper puniſhment for a contempt, becauſe it cannot hold in the caſe of under graduates. I think the behaviour of Dr. *Bentley* was a contempt, for which he might be bound to his good behaviour, as it was out of court.

There is another thing conſiderable in this caſe, whether upon any account the univerſity can deprive a man of his degrees; becauſe he is in from the crown, whence the power originally flows.

Beſides, the objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it obſerved by a very learned man upon ſuch an occaſion, that even God himſelf did not paſs ſentence upon *Adam*, before he was called upon to make his defence, *Adam* (ſays God) where art thou? Haſt thou not eaten of the tree, whereof I commanded thee that thou ſhouldeſt not eat? And the ſame queſtion was put to *Eve* alſo. *Per cur'*, *ulterius concilium.*

Hil. 10 *Geo.* it was argued a ſecond time by Mr. *Reeve* for the writ, and Mr. Attorney General *e contra.* And without entering much into the debate of the other matters, the court held the whole proceeding to be illegal for want of a ſummons, and ſo granted a peremptory *mandamus.*

Between the Pariſhes of Foſton *and* Carlton.

TWO juſtices ſend a poor perſon from *Foſton* to *Carlton.* On appeal the order is quaſhed, and at three months end two juſtices, without ſhewing any new ſettlement ſince the laſt order, make a new order to remove him from *F.* to *C.* a ſecond time. *Et per curiam*, The laſt order muſt be quaſhed. The caſe of *Barrow* v. *Ingoldſby*, *Paſ.* 11 *Ann.* was at the diſtance of nine months, but the court quaſhed it, becauſe there could be no inconvenience in putting them to ſhew a new ſettlement.

After an order of removal is quaſhed, the party cannot be removed a ſecond time without ſtating a new ſettlement.

Dominus Rex *verſ.* Unitt.

THE court declared that a declaration in ejectment was ſo far a proceſs of the court, that they would puniſh contemptuous words on the delivery of it, as a contempt of this court.

Ejectment is a proceſs of the court. Salk. 260.

Dominus Rex *verſ.* Burchett.

THE court ordered an attachment *niſi* againſt the town clerk of *Guilford*, and a defendant convicted on the game act, for granting and ſuing out a replevin of goods diſtrained for the penalty. But on ſhewing cauſe the next term, when *Eyre* J. only was preſent, he diſcharged the rule, becauſe it was only a contempt to the inferior juriſdiction of the juſtices, and in that caſe *B. R.* never interpoſes.

Contempt.

Dale

Dale *verſ.* Johnſon.

At niſi prius *in* Middleſex coram Pratt *C. J.*

Evidence.

THE defendant in the action aſſigned for error, that the plaintiff died before judgment; and to prove it he called the wife of the plaintiff, and the Chief Juſtice allowed her to be a witneſs. *Quaere tamen*, for that is begging the queſtion, which was then to be tried.

Mountcan *verſ.* Wilſon. Ibid.

Coram Eyre *and* Forteſcue *Juſtices.*

All acts done by commiſſioners muſt be ſigned during their ſitting. Dav. 42.

A Certificate from the commiſſioners for ſtating the debts of the army was offered in evidence, but rejected, becauſe it appeared to be ſigned by one at a time at their houſes, the Judges being of opinion that it could only be ſigned ſitting upon the commiſſion, like the dean and chapter of *Fernes*'s caſe of *capitulariter congregati.*

Ruſhdell *verſ.* Carneſſe. In Canc.

Where there is a legacy to the executor for his trouble, the ſurplus ſhall be diſtributed.

JUSTICE *Powys* (who ſat for Lord Chancellor) delivered a ſpecial reſolution on this caſe.

A woman makes her will, and amongſt ſeveral ſmall legacies ſhe ſays, And to *A. B.* my executor 5 *l.* for his care in fulfilling my will.

1 Vern. 473. 2 Vern. 673, 675, 736.

This has long been a litigated queſtion, whether the executor ſhould have the ſurplus, where there is a ſpecifick legacy to him. The caſe of *Forſter* v. *Monk* before Lord *Jefferies* was ſoon after the ſtatute of diſtributions, and he held that the ſurplus ſhould be diſtributed. The three commiſſioners of the great ſeal afterwards reverſed this decree, but upon appeal to the Houſe of Lords the reverſal was reverſed, and the decree for a diſtribution ſet up again.

2 Will. Rep. 114.

The next was the Ducheſs of *Beaufort*'s caſe, where the uſe of the plate was given her for life, and Lord *Cowper* decreed a diſtribution; but the Lords reverſed it, becauſe it was only a poſſeſſion of it that was given her, and no property.

Then came the caſe of *Littlebury* v. *Buckley*, which was in the equity court of *London* before Sir *Peter King* the Recorder, who decreed a diſtribution where the deviſe to the executor was of all his effects beyond ſea. But there being in that caſe a ſtrong evidence of a contrary intent, the Lords allowed themſelves a latitude of examining ſuch proof, and thereupon reverſed that decree. 2 Vern. 677.

The laſt caſe I ſhall mention was that of *May* v. *Lewen* in this court in *February* 1720, before the preſent Chancellor, where there was a deviſe to two executors of 50 *l.* a-piece for their trouble and pains; and a diſtribution was decreed.

This caſe is the very ſame with the caſe at bar. The giving a legacy for his care, ſhews plainly the teſtator intended him only as a truſtee, and therefore I found myſelf upon thoſe words, in decreeing a diſtribution in this caſe.

N. B. This being *vexata quaeſtio*, in 1725 *King*, then Lord Chancellor, brought a bill into the Houſe of Peers (which paſſed that Houſe) to ſettle the point; but upon ſending it down to the Commons it was thrown out upon the firſt reading; a bill ſent up by the Commons to prevent bribery and corruption in elections having been refuſed to paſs in the Houſe of Lords. The bill was to have ſettled it for the benefit of the executor.

Lock *verſ.* Wright.

Hill. 7 Geo. rot. 353.

THE plaintiff declares, that the defendant by his writing indented agreed with the plaintiff, that he (the defendant) would accept of the plaintiff 500 *l.* fourth ſubſcription ſo ſoon as the receipts ſhould be delivered out by the company, and would pay for the ſame 950 *l.* on the 5th of *November* next after the date of the writing. Then he avers, that the defendant did not pay the money at the day.

Where there are mutual remedies, either may ſue without ſhewing a performance on his part.

Difference between an indenture and deed poll.

The defendant demurs generally, and Mr. *Lingard pro defendente* objected, that the plaintiff had not ſhewn the delivery of any receipts, or an impoſſibillty of doing it, and cited 1 *Lutw.* 245. *Salk.* 171.

Probyn contra anſwered, That there were mutual remedies, and therefore it need not be ſhewn. 1 *Saund.* 319. 1 *Lev.* 274.

Eyre Juſtice doubted whether here was a mutual remedy, for the plaintiff does not covenant to deliver, but the other only to accept; to which *Forteſcue* Juſtice inclined. *Sed per Pratt* Chief Juſtice, The time for payment of the money is certain at all events; but as for the delivery of the receipts, that was left incertain, becauſe it was impoſſible to fix a time for that; and if the defendant has made a fooliſh bargain in undertaking to pay the money on the 6th of *November*, whether he had the receipts or not, we cannot help him. The nature of theſe contracts is for the other party to give a deed obliging himſelf to deliver the ſtock; but even upon this agreement I ſhould think the defendant would have his remedy. In the caſe of a deed poll, if the leſſee enters and enjoys the land, the other ſhall maintain debt for rent, and yet the whole is the words of the leſſor.

Paſch. 8 *Geo.* it was argued a ſecond time by *Weſt pro defendente.* It will not be diſputed but that generally ſpeaking the word *pro* will create a condition precedent. 1 *Vent.* 147. 2 *Mod.* 33. 1 *Lev.* 87. *Salk.* 112. And that it will do ſo in this caſe, if I can clear it from two objections that have been made. 1. That here is a mutual remedy; and, 2. That here is a particular day fixed for the payment of the money.

As to the firſt; That is begging the queſtion, for I take it there is not a mutual remedy, the words being the words of the defendant only, " That he will accept the ſubſcription, and pay for the " ſame:" which lays the plaintiff under no obligation to deliver the receipts. 1 *Saund.* 320.

2. As to the ſecond objection, that here is a particular day appointed for payment of the money; I do admit, that if it appeared upon the contract, that ſuch a day muſt of neceſſity happen before the receipts could be delivered, it would then be very difficult to anſwer it; but that is not this caſe, for the company might if they pleaſed have given out the receipts; and that brings the caſe within the diſtinction laid down by Lord Chief Juſtice *Holt* in the caſe of *Thorpe* v. *Thorpe*, *Salk.* 171. Beſides, it is obſervable, that this is an entire covenant, to accept and pay, ſo that he is not to pay till he can accept. *Lutw.* 490.

Reeve contra. I admit the firſt part of Mr. *Weſt*'s argument, but inſiſt on the two objections he has taken notice of, as ſufficient to bring this caſe out of the reach of that general doctrine.

Here is a certain ſum to be paid at a certain day, and that too before the other part of the contract could poſſibly be performed. The court will take notice of the *South-Sea* acts, and by that of 7 *Geo. ſt.* 2. it appears the receipts could not be delivered by the 6th of *November*; ſo that this caſe falls within the firſt diſtinction of *Thorpe* v. *Thorpe*, that if a day be appointed for payment of the money, and that day is to happen before the thing can be performed, an action may be brought for the money, before the thing be done; becauſe it appears the party relied upon his remedy.

But then ſay they, here is no mutual remedy. But I take it, that this being an agreement by indenture, the court will intend it was executed by both parties. As to the caſes they are all of parol agreements, where a conſideration muſt appear to make it a binding promiſe; but here the action will be maintainable on the bare covenant to pay, without any conſideration at all, and therefore the *pro, &c.* may be left out.

Adjournatur. And this term *Pratt* Chief Juſtice delivered the reſolution of the court.

This is an action upon a deed poll made by the defendant, and whereby he covenants to accept ſo much ſtock, and to pay for the ſame, and the plaintiff in an action for the money has not averred a delivery or tender of the ſtock, and for this fault we are all of opinion, the declaration is not good.

The intent of the parties appears to be, that one ſhould have the money, and the other the ſtock; and not that either ſhould perform his part of the agreement, and lay himſelf at the mercy of the other for the equivalent. This is not a covenant entered into by both parties, upon which each will have his mutual remedy; but it is the deed poll of the defendant only; and therefore though upon delivery or tender of the ſtock the plaintiff will have his remedy for the money, yet the defendant on the other ſide upon payment of the money will have no remedy to compel the delivery of the ſtock; and having no ſuch remedy he ſhall not be obliged to pay the money, till the conſideration for which it is payable is performed.

The word *pro* will be either a condition precedent or ſubſequent, as will beſt anſwer the intent of the parties: in this caſe it muſt be

a condition precedent, becauſe otherwiſe the intention of the defendant to have the ſtock for his money can never take effect, and this is proved by 7 *Co.* 10. and 1 *Inſt.* 204. where the annuity *pro una acra*, ſays the book, ſuppoſes the acre to be firſt granted.

The caſe of *Callonel* v. *Brigs*, (*Salk.* 112.) was not ſo ſtrong, for there was a promiſe to transfer, which gave a mutual remedy; but yet *Holt* Chief Juſtice held the plaintiff to ſhew a tender, becauſe that was the conſideration for the defendant's payment of the money. And the caſe he there puts of the ſale of a horſe for 10 *l.* is exactly the ſame with this.

The reſolutions that were mentioned at the bar of the caſe of *Thorpe* v. *Thorpe*, are all founded on great reaſon, and the firſt of them is agreeable to the reſolution of this caſe, which is an executory contract, where one is to do the act, and for the doing thereof the other is to pay.

And this difference between a mutual covenant and a deed poll is likewiſe taken and allowed in the caſe of *Pordage* v. *Cole*, 1 *Saund.* 320. where the court were of opinion the defendant had his remedy, " otherwiſe (ſays the book) it would have been, if the deed " had been the words of the defendant only," which is this caſe.

For theſe reaſons we are all of opinion the defendant muſt have judgment.

Michaelmas Term

10 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Juſtice.*
Sir Littleton Powys, *Knt.* }
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Forteſcue Aland, *Knt.* }
Sir Robert Raymond, *Knt. Attorney General.*
Sir Philip Yorke, *Knt. Solicitor General.*

Paine *verſ.* Maſters.

Pleading the delivery of any thing in ſatisfaction is not ſufficient without ſhewing an acceptance.

ACTION *ſur le caſe* upon a promiſſory note, the defendant pleads the delivery of twenty hogſheads of claret in ſatisfaction, and which *ipſe praed'* the defendant (inſtead of the plaintiff) received in ſatisfaction. On a general demurrer *Strange pro quer'* objected, that the averring the delivery of the wine to the plaintiff was not ſufficient without ſhewing his acceptance of it, which was wanting in this caſe by the defendant's name being put inſtead of the plaintiff's. And cited *Salk.* 629. and the caſe of *Hawkſhaw* v. *Rawlings in B. R. Hil.* 3 *Geo.* in both which the court held, that the bare pleading he gave the thing in ſatisfaction, without ſhewing that the plaintiff received and accepted it, as ſuch, would be inſufficient. *Et per curiam*, Judgment for the plaintiff. *Ante* 23.

Robinſon *verſ.* Green.

Non aſſumpſit a good plea to an action againſt a carrier.

THE plaintiff declares againſt a carrier upon the cuſtom of the realm, and ſets forth, *quod ipſe* (the plaintiff) *requirebat* the defendant *ad carriand' bona praed'* from the pariſh of *St. Sepulchre's* to *Uttoxeter*, *dictuſque* the defendant *adtunc et ibidem bona praed' ad carriand' recepit*, and afterwards loſt them.

The defendant pleaded *non aſſumpſit*, and after verdict for the plaintiff it was moved in arreſt of judgment, that this action is founded upon the tort in not delivering the goods, and therefore the proper plea would have been Not guilty.

E contra it was inſiſted, that though it is a tort, yet it ariſes from an agreement, and any general iſſue will be good, that will bring the merits of the cauſe in queſtion. As Not guilty in *aſſumpſit*. *Cro. El.* 470. 1 *Lev.* 142. Sir *T. Jones* 184. And it will certainly be aided after a verdict. 1 *Sid.* 340. 1 *Saund.* 103. Sir *W. Jones* 140. *Cro. Car.* 78.

Et per curiam, It is well enough, the undertaking to carry is the *git* of the action, and as in *aſſumpſit* you may plead Not guilty, as was done in the caſe of *Cogs* v. *Bernard*, *Salk.* 26. as appears by the record at the end of the book, *page* 733. So in the caſe of a tort founded on an agreement *non aſſumpſit* will be ſufficient, becauſe it tries the merits, as much as Not guilty could have done. The plaintiff had judgment.

Davies *verſ.* Hoyle.

Where a *nolle proſequi* is entered, the plaintiff need not be amerced.

ON error *e C. B.* in an action upon the caſe on ſeveral promiſes, there is judgment on demurrer as to one count, whereupon the plaintiff enters a *nolle proſequi* as to the reſt, and the defendant is put without day.

It was objected, that this is a confeſſion, that the plaintiff had no cauſe of action as to thoſe counts, and therefore he ſhould be amerced *pro falſo clamore*. But *Eyre* J. (*ſolus*) thought it agreeable to all the entries, and ſo the judgment was affirmed.

Ball *verſ.* Boſtock. At Guildhall.

IN trover for three *South-ſea* bonds the caſe was this. *Ball* delivered to *Lechmere* a broker theſe bonds to ſell, and they were picked out of his pocket. Notice being given at the *South-ſea* houſe they were ſtopt by Mr. *Henry* one of the clerks, upon *Boſtock*'s bringing them to receive the intereſt. Upon this *Boſtock* brought trover againſt *Henry*, who at the trial offered to prove the property to be in *Ball*, and called *Lechmere* for that purpoſe. But it appearing he had given bond to indemnify the company in ſtopping the bonds, *King* C. J. refuſed to let him be examined, ſaying that though there are many inſtances where a party ſhall be a witneſs, though he is concerned in the event of the cauſe; yet there never was a caſe of allowing one who had made himſelf liable to pay coſts in the action; upon this the plaintiff recovered. Then *Ball* brings trover againſt *Boſtock*, and at this trial exception was taken to *Lechmere*'s evidence, becauſe if *Ball* ſhould recover againſt *Boſtock*, that would be ſet in equity againſt the former recovery by *Boſtock* againſt *Henry*, and ſo diſcharge *Lechmere*'s bond: but the Chief Juſtice ſaid, that was too remote to exclude him from being a witneſs, and went only to his credit. Whereupon he was ſworn, and proved the property in *Ball*, and that they were ſtolen. On the other hand the defendant proved that he bought them at a tavern of a clergyman, and paid 300 *l.* in money beſides the intereſt: the Chief Juſtice left it to the jury upon the validity of the ſale, and they found for the defendant.

Where a perſon may be intereſted and yet ſhall be a witneſs.

Douglaſs *verſ.* ——

UPON an affidavit that they had tendered a declaration in ejectment, and that the ſervants refuſed to call their maſter, or receive it, ſaying they had orders to take no papers, *Wearg* moved, that leaving it at the houſe might be ſufficient, which was ordered accordingly.

Practice.

Taylor *verſ.* Lake.

IT was moved to ſet aſide a verdict, becauſe the *diſtringas*, when it was at *niſi prius*, was not ſtamped: but the plaintiff now producing it ſtamped, the court would do nothing in it, ſince the penalty muſt have been paid, and then it is as good as if ſtamped at firſt. 9 & 10 *W.* 3. *c.* 25. § 59.

Stamp duties.

Tarrant

Tarrant *verſ.* Mawr. In C. B.

Huſband cannot ſtop the wife's proceedings in ſpiritual court for defamation.

THE wife libelled in the ſpiritual court for calling her whore, and there being proceedings likewiſe for defamation againſt her by the other, the two huſbands enter into an agreement to ſtay proceedings on both ſides; and upon one of the wives going on, the huſband moved for a prohibition; but denied, for *per curiam*, the ſuit is by the wife, to recover her fame, and it is not in the power of the huſband to reſtrain her. 1 *Roll. Rep.* 426.

Johnſon *verſ.* Lancaſter.

Tender pleadable to a *quantum meruit*.

IT was ſettled on demurrer, that a tender is pleadable to a *quantum meruit*, and ſaid to have been ſo held before in *B. R.* 10 *W.* 3. *Giles* v. *Hart*, *Salk.* 622.

Palmer *verſ.* Epiſcopum Exon.

No ornaments can be ſet up in the church without conſent of the ordinary.

SIR *Thomas Bury* ſet up his arms in the church of *St. David's* in *Exon:* the ordinary promotes a ſuit in the ſpiritual court, to deface them, as being ſet up without his conſent, Mr. *Cruwys* moved for a prohibition on the authorities that action lies by the heir for defacing the monument of his anceſtor; but *Eyre* and *Forteſcue* Juſtices ſaid, the ordinary was judge what ornaments were proper, and might order them to be defaced.

Serjeant *Glyde* moved it in *C. B.* and it was denied there alſo.

Richardſon *verſ.* Atkinſon.

At niſi prius *in* Middleſex coram Eyre et Forteſcue (abſente *C. J.*)

Taking part and ſpoiling the reſt is a converſion of the whole.

THEY held that the drawing out part of a veſſel, and filling it up with water, was a converſion of all the liquor, and the jury gave damages as to the whole.

Beck *verſ.* Nichols. In C. B.

Where no more coſts than damages.

TRESPASS of aſſault, battery, wounding and impriſonment, and alſo for breaking and entering his houſe, and opening the doors of the ſaid houſe, and breaking the locks and three bars belonging to the ſaid doors; the defendant pleaded Not guilty to all except the impriſonment, which he juſtifies; on trial the juſtification was found for the defendant, and the Not guilty for the plaintiff. Damages 2 *s.* 6 *d.* And held by the court that the damages being under 40 *s.* he could not have full coſts for the battery, becauſe the Judge had not certified the battery to be proved, neither could he have full coſts for breaking the houſe, *&c.* becauſe this was a treſpaſs relating to the freehold, the conſtruction of the 22 & 23 *Car.* 2. *c.* 9. § 136. having been, that it extends to treſpaſſes relating to the freehold and inheritance, and to ſuch treſpaſſes only; which is collected from the exception where the Judge certifies that the title came in queſtion, which ſhews that the act extends only to ſuch treſpaſſes, where the freehold might come in queſtion, and not to treſpaſſes of chattels.

Hilary Term

10 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Juſtice.*
Sir Littleton Powys, *Knt.* }
Sir John Forteſcue Aland, *Knt.* } *Juſtices.*
Sir Robert Raymond, *Knt.* }
Sir Philip Yorke, *Knt. Attorney General.*
Sir Clement Wearg, *Knt. Solicitor General.*

Dominus Rex *verſ.* Major' de Kingſton ſuper Hull.

Cannot join diſtinct rights in one *mandamus.*

A Motion was made for a *mandamus* to the mayor, to aſſemble and do the buſineſs of the corporation, and the writ was granted accordingly. In drawing up the writ they made it out for an aſſembly, and to admit all perſons having a right to their freedom, who ſhould appear before them and demand it. Serjeant *Pengelly* moved to ſuperſede it, becauſe every perſon's was a diſtinct right, and it would be hard to oblige the mayor to make a return that he had admitted all who had a right. *Et per curiam,* It muſt be ſuperſeded, for we never intended ſuch a complicated *mandamus* as this.

Salk. 433, 436.

Dominus

Dominus Rex *verſ.* Inhabitantes de Cirenceſter.

IT was ſtated, that an apprentice was bound in the pariſh of *A.* and lived there off and on for three quarters of a year. Exception was taken, that this was no ſettlement, ſince he might not inhabit forty days together. *Sed per curiam*, That is not neceſſary, and the order for making it a ſettlement was confirmed.

The forty days inhabitation of an apprentice need not be all together.

Dominus Rex *verſ.* Johnſon.

A Female child of nine years old was brought up by *habeas corpus* in the cuſtody of her nurſe. And it was moved that ſhe might be diſcharged, if ſhe was under any reſtraint, which was agreed to, but it appeared ſhe was not. Then it was moved, upon producing her father's will deviſing the cuſtody of her to an uncle, that ſhe might be delivered up to him as her guardian. The court at firſt doubted whether they ſhould go any further than to ſee ſhe was under no illegal reſtraint, and took time till the next day to look into Mrs. *Turberville*'s caſe, *ante* 444. And then declaring, that this being the caſe of a young child, who had no judgment of her own, they ought to deliver her to her guardian, who took poſſeſſion of her in court.

Child brought up by *habeas corpus* delivered to guardian. L. Raym. 1334.

Bullock *verſ.* Noke.

At Guildhall coram Pratt *C. J.*

IN a ſtock cauſe the plaintiff proved a tender on the ſecond day of the opening, and would have examined into the cuſtom of the alley, which was to allow either party a day or two to tender or accept; but the Chief Juſtice refuſed to hear us, ſaying their uſage could never alter the law, and ſo the plaintiff was called. *N. B.* In *C. B.* Chief Juſtice *King* left it to the jury upon ſuch an evidence, and they found it a good tender.

Tender of ſtock muſt be on the very day.

Between

Between the Pariſhes of St. Giles in Reading *and* Everſley Blackwater in Berks.

2. Where children born at the reſidence of the father for four years, in a place where he was not ſettled, are ſettled after his death. L. Raym. 1332.

UPON a ſpecial order it was ſtated, that *William Cheſterman* was born in *St. Giles*'s, and put apprentice in *Everſley Blackwater*, where he ſerved two years, till the maſter failed; that then he returned to *St. Giles*'s, where he lived four years, married a wife by whom he had there two children, and died; and that during the laſt four years he never lived in *Everſley Blackwater*.

Upon this order the queſtion was, where the wife and children were ſettled. As to the wife, all agreed her to follow the laſt ſettlement of her huſband, which was in *Everſley Blackwater*; but as to the children the court were divided, the Chief Juſtice and *Powys* J. inclining, that they having never been removed during the life of the father, they were ſettled in *St. Giles*'s, the place of their birth. But *Eyre* and *Forteſcue* Juſtices, thought the ſettlement to be in *Everſley Blackwater*, and that ſince during the life of the father they might have been ſent thither, his death would not vary the caſe.

Children born where the father is not ſettled may be ſent to his ſettlement after his death.

Adjournatur; and this term it was debated again, and the Chief Juſtice changed his opinion, holding now that the ſettlement of the children was in *Everſley Blackwater*, and that the death of the father would not hinder their being ſent thither; *Powys* J. likewiſe came over, ſo that there were three of that opinion againſt *Raymond* J. who thought that this caſe muſt often have happened, if children could be thus ſent after the death of the father. They ſaid the caſe of ſettling baſtards and vagrants at the place of their birth was *ex neceſſitate*, but here was none.

The order for ſending the children to *Everſley Blackwater* was confirmed.

Eaſter Term

10 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Juſtice.*
Sir Littleton Powys, *Knt.*
Sir John Forteſcue Aland, *Knt.* } *Juſtices.*
Sir Robert Raymond, *Knt.*
Sir Philip Yorke, *Knt. Attorney General.*
Sir Clement Wearg, *Knt. Solicitor General.*

Knight *verſ.* Cambridge.

Idem *verſ.* Dodd.

Hil. 9 Geo. rot. 375.

ACTION *ſur le caſe* upon a policy of inſurance, whereby the inſurer undertakes againſt the *Barratry* of the maſter and mariners; and aſſigns the breach in a loſs *per fraudem et negligentiam* of the maſter. Judgment *pro quer'* in *C. B.* and the general errors aſſigned.

Barratry in a policy, the ſignification thereof. L. Raym. 1349

It was objected in this court, that the *fraud* and *negligence* of the maſter was not within the policy, being more general than the word *barratry*. *Et per curiam*, The negligence certainly is not, but the fraud is. *Barratry* is of a general ſignification, and not confined barely to the running away with the ſhip. It comes from *barat*, which ſignifies *fraus* and *dolus*, and extends to any fraud of the maſter. The end of inſuring is to be ſafe in all events, and it would

Du Freſne Gloſſ. Dict. de Forenſes.

be very prejudicial, if we were to be making loop-holes to get out of theſe policies. The inſurer knows the maſter, and whether he can truſt him; and he that inſures againſt his running away with the ſhip, never imagined he might or would be guilty of any other fraud. Judgment affirmed.

Between the Pariſhes of Puckington *and* Chepton Beencham in com' Somerſet.

The bankruptcy of the maſter does not diſſolve the apprenticeſhip. L. Raym. 1352.

UPON a ſpecial order the caſe was ſtated, that *A.* was bound an apprentice, and ſerved and inhabited two years, till a commiſſion of bankruptcy was taken out againſt the maſter, at which time the apprentice without having the indenture delivered up, or any diſcharge at the ſeſſions, hires himſelf as a common ſervant into another pariſh, and ſerved a year. The ſeſſions adjudge this to be no diſſolution of the apprenticeſhip, and conſequently, that the ſettlement of the apprentice was in the firſt pariſh where he was bound.

Et per curiam, Their judgment is right. There could be no diſſolution of the contract, unleſs the indenture had been delivered up, or the ſeſſions had diſcharged him; as no doubt they would have done, if they had been applied to. And then as the firſt contract had continuance, the apprentice had no power to hire himſelf; and the ſervice afterwards for a year was void, as to any pretence of giving him a ſettlement. That ſervice muſt be taken as a ſervice to the firſt maſter, who by law was intitled to the wages, and therefore the order muſt be confirmed.

Caſe of the Mayor of Penryn.

There muſt be judgment of *ouſter* where the party is found duly elected but not ſworn.

This judgment was affirmed in Parliament.

ON an information *in natura de quo warranto*, to ſhew by what authority he exerciſed the office of mayor, there were two iſſues, the firſt as to his election, which was found with the defendant, and the ſecond as to the ſwearing, which was found againſt him. Upon return of the *poſtea*, it was moved, that judgment of *ouſter* ſhould not be againſt him, ſeeing he was duly elected, but that he ſhould rather have a *mandamus* to ſwear him in. *Sed per curiam*, The acting without being ſworn is certainly an uſurpation, and that being found, we muſt pronounce judgment againſt him upon this record. If he be not too late, he may have a *mandamus* to ſwear him in, but we muſt puniſh him for his uſurpation hitherto. Judgment *pro rege*. 9 *Ann. c.* 20.

Ruſſel *verſ.* Martin.

Idem *verſ.* Thorpe.

IN debt upon a bail bond the *memorandum* was of *Trinity* term, and I excepted, that the aſſignment appeared to be in *November* following. Then the plaintiff moved to amend, and I objected, there was nothing to amend by. *Et per curiam*, We cannot amend it, as it now ſtands; but we will give leave to file a new bill of *Michaelmas* term, with a ſpecial *memorandum*; which the plaintiff afterwards did, and then amended of courſe upon payment of coſts.

The court will give leave to file a new bill to amend by.

Dominus Rex *verſ.* Gunſton.

SERJEANT *Darnall* moved for a *certiorari* to the *Old Bailey*, to remove an indictment againſt a perſon of credit, for falſly pretending that a perſon of no reputation was Sir *John Thornycraft*, *per quod* the proſecutor was induced to truſt him. *Sed per curiam*, As you move on behalf of the defendant, we muſt have a more particular reaſon; *ideo nil capiatur per motionem.*

No *certiorar* to *Old Bailey* without ſpecial cauſe.

Stevenſon *verſ.* Nevinſon.

On a trial at bar in B. R.

THE queſtion was, whether the plaintiff was qualified to be elected common council-man of *Apulby*. The defendant attempted to diſqualify him, by ſetting up two qualifications which he had not, *viz.* a burgage tenure, and being an inhabitant; and to prove this called one who was an inhabitant, but had not a burgage tenure. It was objected, that he was no witneſs to narrow the right, and confine it to burgage tenants and inhabitants, having one of the qualifications himſelf, and therefore ſo far intereſted, as he was nearer the right he ſet up than other perſons; but the court ſaid there was a neceſſity of allowing ſuch people in a queſtion of this nature, ſince they muſt beſt know the right; beſides he was in effect a witneſs againſt himſelf, by ſaying, though I am an inhabitant, yet I have no right to be choſen, becauſe I have not a burgage tenure.

Where there are two qualifications to an election of an officer, he who has but one only may be a witneſs as to the right. L. Raym. 1353.

Anonymous.

Anonymous.

On a trial at bar in C. B.

Where the power is only to revoke, no new uſes can be declared.

A. Suffers a recovery to the uſe of himſelf for life, remainder to *B.* in tail, remainder to *C.* in tail, remainder to *D.* in tail, remainder to *A.* in fee, with power to revoke the three remainders in tail by any writing under his hand and ſeal. He revokes them within the terms of the power, and by the ſame deed declares new uſes in favour of the plaintiff, without any words of conveyance, covenant to ſtand ſeiſed, or conſideration expreſſed: and upon this the queſtion was, whether this new declaration of uſes was good or not.

It was inſiſted on *pro quer'*, That *A.* having revoked the intermediate remainders, had the whole fee in himſelf, and might diſpoſe of it as he pleaſed; and whether it was by the ſame deed or by a different deed was not material.

But it was anſwered and reſolved by the court, That true it was he might by will or any new conveyance have made ſuch new diſpoſition, and even the ſame deed would have been ſufficient for that purpoſe, if there had been a new grant, or a new covenant on conſideration expreſſed; but here he had declared new uſes as under the recovery, whereas the uſes of the recovery were full before, and the power was only to revoke, and not to limit new uſes. *Ex relatione aliorum.* The plaintiff was nonſuit.

Sir Chriſtopher Muſgrave *verſ.* Nevinſon.

New trial granted after a trial at bar. L. Raym. 1358.

THE corporation were all invited to a treat, when one of the aldermen deſired leave to reſign, upon which his reſignation was taken, and the plaintiff at the ſame time choſen and ſworn in. Upon a trial at bar the jury found it a good election; and the court granted a new trial, it being fraudulent, and it appearing one of the members was not there till after the election, and there was no ſummons to meet to do ſuch a corporate act, that the members might come prepared. The meeting likewiſe was not in the *Moot-hall* but at a tavern, and it was a plain ſurprize, and even all not preſent.

As to the point of its being a trial at bar the court made no difficulty of that, ſince the caſe of *Bewdley*, and another of Sir *Joſeph*

Tyley v. *Roberts* in *C. B.* where on a trial at bar whether *compos* or *non compos* the jury found againſt the weight of the evidence, and there was a new trial. The caſe in *Stiles* (which is the firſt new trial in print) was after a trial at bar; and in the caſe of an alderman of *Derby* he was afterwards ouſted upon a *quo warranto*.

Et per Raymond Juſtice. My Lord Chief Juſtice *Holt* uſed to ſay, he was of opinion that the practice of granting new trials was much ancienter than the caſe in *Stiles*; ſince we meet with challenges that the party was ſworn on the former trial, and therefore ought not to be a juror again.

N. B. As to another of the corporators of *Apulby*, he was put to prove the receiving the ſacrament within a year before his election, it being recent, and therefore the court required it, though no notice was given him for that purpoſe.

A corporator on a recent proſecution muſt prove receiving the ſacrament within a year.

Wilkinſon *verſ.* Myer.

Ld. Raym. 1350.

IN an action of covenant on a *South-Sea* contract the defendant pleaded, that the contract was never duly regiſtred according to the late act of Parliament; and upon the trial of that iſſue a caſe was made for the opinion of the court.

What is a good regiſtry of a *South-Sea* contract.

That the contract was by indenture (ſet out *in haec verba*) whereby the plaintiff in conſideration of 1436 *l.* 10 *s.* to be paid by the defendant, doth covenant to transfer to him all ſuch ſtock, bonds and money, as the *South-Sea* company ſhall allow on the account of 1277 *l.* 1 *s.* 6 *d.* lottery annuities then lately ſubſcribed into the ſtock by and in the name of the plaintiff: in conſideration of which the defendant covenants to accept the produce of ſuch annuities, and to pay for the ſame 1436 *l.* 10 *s.* at the ſame time: that this contract was entered in the books of the *South-Sea* company *in haec verba*, under which the plaintiff ſubſcribed theſe words, *This is for my proper uſe and benefit*; and then ſigned his name *Philip Wilkinſon*.

That no evidence was offered that the contract was made for the uſe and benefit of any perſon beſides the plaintiff, nor that the contract was made for the uſe and benefit of the plaintiff only.

And a verdict was given for the plaintiff, ſubject to the opinion of the court upon this caſe.

Strange pro quer'. The queſtion is, whether this contract be duly regiſtred, according to the direction of the late act of Parliament. I ſhall offer my reaſons in ſupport of this regiſtry; and ſince this is like to be a leading caſe, and that many thouſands of contracts are to ſtand or fall by the event of this queſtion, I ſhall ſtate the clauſe at large, becauſe I apprehend it will be material.

The act of Parliament upon which this queſtion ariſes is the only act that paſſed in a ſeſſion held for that purpoſe at the latter end of the ſeventh year of his Majeſty's reign; and after ſome other proviſions for reſtoring the publick credit, which then greatly ſuffered by the miſmanagement of the *South-Sea* directors, it comes to the caſe of contracts between private perſons, and takes notice of the neceſſity there was, to make ſome regulations or orders touching contracts for the ſale or purchaſe of ſubſcription or ſtock, for preventing a multiplicity of vexatious and doubtful ſuits in law or equity concerning the ſame, and therefore it enacts, "That every "contract for the ſale or purchaſe of ſubſcriptions or ſtock, which "ſhall be unperformed and not compounded before ſuch a time, "or an abſtract or memorial thereof, ſigned by the party intereſted "therein, and who ſhall be minded to take advantage of the ſame, "ſhall be entered and regiſtred in books, which the reſpective "companies are required to prepare for that purpoſe: and in de-"default of ſuch entry or regiſter every ſuch contract, as to ſo "much as ſhall remain unperformed or not compounded, ſhall "be void." And then it follows, "That ſuch entries ſhall expreſs "the names of the parties or perſons for whoſe uſe or benefit "ſuch contracts were made."

Having ſtated the clauſe, I ſhall conſider what was the intention of this act of Parliament, and whether our regiſtry has fulfilled that intention. The intention of the legiſlature is expreſſed in that part of the clauſe which is introductive to the enacting part; it was to prevent a multiplicity of vexatious and doubtful ſuits in law or equity, by giving the buyer of ſtock a view, as well of him who has the legal remedy, as he who has the equitable intereſt, thereby to eaſe him of the trouble and expence of a ſuit in equity againſt the viſible contractor, to diſcover whether the ſale was not ſecretly in truſt for another, againſt whom perhaps the buyer might have an equitable bar; and therefore if it is diſcloſed in the regiſtry, not only where the legal remedy lies, but alſo who has the equitable intereſt, there is an end of any trouble from vexatious and doubtful ſuits in law or equity about that matter, which was all that was propoſed or deſigned by the legiſlature.

In

In the caſe at bar, the contract is regiſtred *in haec verba*, and by that it appears the now plaintiff has a legal remedy (ſuch an one as he has purſued) by action of covenant againſt the defendant. But ſay they on the other ſide, that is not enough, he may only be nominal in this affair. In anſwer to that, he has added theſe words that are ſtated in the caſe, *This is for my proper uſe and benefit, Philip Wilkinſon.* So that he has anſwered the intent of the act in both reſpects; he has regiſtred the deed, which gives him the title at law, and he has likewiſe ſhewn the equitable intereſt to be in himſelf.

To this it is objected, that by the words of the act he is required to expreſs for whoſe uſe or benefit the contract *was made*; and that in the preſent caſe, it is only expreſſed for whoſe benefit the contract was at the time of regiſtring.

I would ſubmit two things as an anſwer to that objection. 1. That this is a forced conſtruction, and carries the words *were made* farther than is neceſſary to anſwer the deſign of the act. And, 2. That if your Lordſhip ſhould be of opinion to conſtrue it ſo nicely, yet our regiſtry will be ſufficient.

1. To ſhew this to be a forced conſtruction, and what there is no occaſion to make, in order to attain the end of the legiſlature, I would beg leave to ſay, that conſidering, this act is made to reſtrain men in ſome degree from the full exerciſe of a legal remedy they had before; it is to be conſtrued in ſuch a manner, as will deprive the ſubject of as little as may be, and it is not to be extended to any conſtruction beyond what will ſtrictly anſwer the view of the Parliament; and ſo the court did often intimate upon ſeveral motions that have been in this court relating to bail upon this act of Parliament, where they kept ſtrictly to the words of the act, without extending them to ſimilar caſes.

The expreſſion in the act is indeed in the preterperfect tenſe, *were made*; but I ſhall ſubmit it, whether conſidering how that expreſſion comes to be made uſe of, it ought to be expounded ſtrictly to mean the time of making the contract.

The legiſlature are ſpeaking of contracts then in being, and therefore it was natural to ſpeak of them as contracts that *were made*; and in this view the expreſſion will be far ſhort of what it would have been, if the act had required the entry to expreſs the names of the parties for whoſe benefit the contracts were at the time of making; and it may be material to obſerve, that in another

part of the act that phraſe is uſed, where they are providing for the caſe of a contract, when the ſeller had not the ſtock at the time of the contract: now if it had been intended to have gone ſo far back in our caſe, what reaſon is there why the ſame expreſſion was not made uſe of? The act of Parliament was never intended as a ſnare, to avoid all contracts that were not regiſtred according to the ſtricteſt letter of the law. The only general view (beſides what related to particular perſons) was to ſee a little into the number and extenſiveneſs of the contracts, in order to apply farther remedies if there was occaſion.

In a common law conveyance the word *procreatis* (which ſtrictly ſpeaking ſignifies children that *were* born at the time of the feoffment) has nevertheleſs been conſtrued to take in all the iſſue, whether born before the feoffment or after; and yet that is an expreſſion as ſtrongly reſpecting a time paſt as the phraſe made uſe of in this ſtatute; and if in that caſe it was extended to a future time, why not as well in our caſe? eſpecially when by that conſtruction the intent of the legiſlature is anſwered.

2. Admitting this act does require the entry to ſhew for whoſe uſe the contract was at the time of making; even then our regiſtry, if we take it altogether, will be ſufficient. It appears upon the books of the *South-Sea* company (where the deed is entered *in haec verba*) that Mr. *Wilkinſon* was poſſeſſed of ſeveral lottery annuities, which he ſubſcribed in as his own, ſold as his own, regiſtred that contract as ſuch, and which he ſhews continued to be his own ſole property and intereſt to the time of ſuch regiſtry. Is there now after all this any room to doubt, whether this contract was made upon his own account or not? If there be no room to doubt it, and if it be a matter naturally to be collected from this regiſtry; then it is a regiſtry that in the ſtricteſt acceptation of the words is conform to the act of Parliament, and there is an end of their objection that way.

It is ſtated in the caſe, that no evidence was offered, to prove that this contract was for the benefit of any body but the plaintiff: what influence that will have in this queſtion I muſt ſubmit; and alſo another matter that appeared upon view of the *South-Sea* books, which was, that hardly any of the entries were even ſo ſtrong as this ſigning by the plaintiff, it's being for his own proper uſe and benefit.

So that upon the whole matter I muſt ſubmit it, that as by this regiſtry the defendant is fully apprized who he has to deal with, and therefore has no occaſion to go into equity to diſcover who

would be intitled to the benefit of the contract, ſince he ſees at one view that both the legal and equitable intereſt are in Mr. *Wilkinſon*; the giving him all this light is performing every thing that was required of us by this act of Parliament; and therefore I hope your Lordſhip will be of opinion, our action of covenant was well brought, and that the queſtion which has ariſen upon this regiſtry ſhall be determined in favour of the plaintiff.

Fazakerley contra. It muſt be admitted, that this regiſtry is not according to the words. They require it to ſhew for whoſe uſe the contract *was*, the regiſtry only ſhews for whoſe uſe it *is* at the time of regiſtring.

And as it is not within the words, ſo neither is it within the reaſon and intent of the act. The preamble takes notice of the great frauds and abuſes that had been committed by the late *South-Sea* directors, to the prejudice of the publick; and therefore being made for the benefit of the publick, it ought to be carried as far as may be. One main end of this act was, to diſcover what contracts the directors were intereſted in, that ſo the publick might have the benefit of them; and that it ſhould not be in the power of a director, to ſet up a nominal perſon, to recover for his private uſe, in order to defraud the publick of ſo much, which was declared to be forfeited. But how will that end be attained if this regiſtry ſubſiſts? Not at all. For ſuppoſing Mr. *Wilkinſon* to have been at firſt only nominal, and in truſt for a director; may not that director aſſign over the equitable intereſt after the contract is made, and then that will be a contract for the benefit of Mr. *Wilkinſon* at the time of regiſtring, though at the time of making it was not. By this means the act will be eluded, and thoſe fraudulent clandeſtine aſſignments can never be got at.

There can be no inconvenience in keeping them ſtrictly to the words of the act, for if the tranſaction be fair, then they may make the regiſtry according to the words; but if the fact will not warrant it, I apprehend the legiſlature never intended to give the equitable proprietor a power to change hands, perhaps to the defrauding the publick, or at leaſt the private contractor.

Mr. *Strange* ſays it will be ſufficient, becauſe now it appears both where the legal and equitable intereſt *are*; and ſo it does, but that is not enough, the ſtatute intending to give the buyer an opportunity of knowing who had the equitable right when the contract *was made*.

I muſt therefore inſiſt, that if this regiſtry ſtands, the intent of the act is not anſwered; becauſe it is liable to that objection, that

it might at firſt be in truſt for another, which truſt might afterwards be aſſigned or releaſed.

Chief Juſtice. This was tried before me at *niſi prius*, and it being a caſe of very great conſequence, I did not think it proper to determine it there, though I muſt own that I was in no great doubt about it.

It is certain that this regiſtry is not within the words of the act, ſince it is not ſaid that the contract was at firſt made for the uſe and benefit of the plaintiff. But though it be not within the letter, yet I think we are to give this act ſuch a conſtruction as is reaſonable, conſidering the nature and circumſtances of the caſe. I believe the Parliament never intended to avoid contracts upon ſo great a nicety as this, and therefore ſince the plaintiff has ſhewn, that he is the only perſon the defendant can have to do with, or be called upon by, in this matter, I am of opinion the regiſtry is well enough, and the plaintiff muſt have judgment.

Powys Juſtice. I think this is a good regiſtry. There is nothing in the deed that looks like any thing of a truſt, and we are not to ſuppoſe it one. Beſides, conſidering the nature of this caſe, it is not probable that it could be a tranſaction privately for the benefit of a director, becauſe this is not a money ſubſcription, but a ſubſcription of lottery annuities; and every body knows that though in the caſe of the money ſubſcriptions they made uſe of other people's names, yet they were fond enough of ſubſcribing annuities in their own names; and the thing has anſwered, by the Parliament's giving greater allowances to thoſe directors who ſubſcribed in the moſt. The words of the act are *minded to take advantage*, and all they intended was to ſee what bargains were inſiſted on.

Forteſcue Juſtice. The intent of the act was, to let the buyer know, whether he that ſued him was really intitled to the money; you ſhall regiſter your contract, and put your name to it. *This is for my proper uſe*, in a legal acceptation, denotes it *was* ſo; becauſe being a *choſe* in action it could not be aſſigned. In the nature of the thing ſurely it is well enough.

Raymond Juſtice. This is an act *ex poſt facto*, to lay a clog upon a legal remedy, and therefore ought to have ſuch a conſtruction as the plaintiff contends for. The caſe of the directors was not under conſideration at the time of paſſing this act, their buſineſs having been ſettled before. This deed imports it to be for the benefit of the plaintiff, and no proof is offered to the contrary; we muſt therefore take it to be ſo, and I ſee no inconvenience therein. *Per cur':* Judgment for the plaintiff.

Trinity

Trinity Term

10 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Juſtice.*
Sir Littleton Powys, *Knt.*
Sir John Forteſcue Aland, *Knt.* } *Juſtices.*
Sir Robert Raymond, *Knt.*
Sir Philip Yorke, *Knt. Attorney General.*
Sir Clement Wearg, *Knt. Solicitor General.*

Jenny *verſ.* Herle.

Paſ. 9 Geo. rot. 144.

A bill drawn payable out of a particular fund is not a bill of exchange. L. Raym. 1361.

ERROR of a judgment in *C. B.* in an action upon the caſe, wherein the plaintiff declares, that the defendants according to the cuſtom of merchants drew a bill of exchange upon *J. P.* whereby they requeſted him to pay the plaintiff 1945 *l. out of the monies in his the ſaid* J. P.*'s hands belonging to the proprietors of the* Devonſhire *mines, being part of the conſideration money for the purchaſe of the manor of* Weſt Buckland. That *J. P.* refuſed to accept it, and the defendants as drawers are liable. There was judgment in *C. B.* for the plaintiff, but upon error in *B. R.* that judgment was reverſed, the whole court being of opinion, that this appointment to pay out of a particular fund, which might or might not anſwer, was not a bill of exchange, and exactly like the caſe of *Jocelyn* v. *Laſerre in B. R. Paſ.* 1 *Geo.* which was a bill drawn by an officer upon his agent, requeſting him to pay out of his growing ſubſiſtence;

ſubſiſtence; which the court on a ſpecial reſolution delivered by *Parker* C. J. held not to be a bill of exchange, becauſe in the nature of the thing no body would negotiate it, by reaſon of the uncertainty of the fund. And it would be of dangerous conſequence to make thoſe orders, which a man gives to his ſteward or bailiff, no way concerning trade, to be bills of exchange. The judgment of *C. B.* was reverſed.

Crow *verſ.* Rogers.

A ſtranger to the conſideration can maintain no action.

IN *aſſumpſit* the plaintiff declares, that whereas one *John Hardy* was indebted to the plaintiff in 70 *l.* upon a diſcourſe between this *Hardy* and the defendant it was agreed, that the defendant ſhould pay the plaintiff's debt of 70 *l.* and that *Hardy* ſhould make the defendant a title to a houſe. Then he avers, that *Hardy* was always ready to perform his part of the agreement, and that the defendant in conſideration thereof promiſed to pay the plaintiff.

The defendant demurs; and it was inſiſted, that there was no conſideration moving from the plaintiff to ſupport this promiſe: and the caſe of *Bourne* v. *Maſon*, 1 *Ven.* 6. 2 *Keb.* 457, 527. was cited, where *A.* being ſeverally indebted to *B.* and *C.* and having a debt due to him from *D.* *C.* in conſideration that *A.* would permit him to ſue *D.* in his name promiſed to pay *B.* And it was held, that this being a matter of no trouble to the plaintiff, or benefit to the defendant, he was a ſtranger to the conſideration, and could maintain no action.

On the other ſide was cited the caſe of *Dutton* v. *Pool*, 1 *Ven.* 318, 332. where it was held, that *aſſumpſit* lay for the daughter, upon a promiſe by the heir to pay her portion in caſe the father would not fell timber; and the caſe of 1 *Roll. Abr.* 32. *pl.* 13. where goods were given to *A.* on conſideration to pay *B.* 20 *l.* And it was reſolved, *B.* might maintain an *aſſumpſit*.

The court gave no opinion. *Adjournatur.* And *Paſ.* 12 *Geo.* it was moved again, and without much debate, the court held, the plaintiff was a ſtranger to the conſideration, and gave judgment *pro def'*.

Dominus Rex *verſ.* Burridge.

What a contempt of *B.R.* L. Raym. 1364.

N.B. The information was againſt him as mayor of *Tiverton* for abſenting at the election day.

IN an information for a miſdemeanor there was a rule for a ſpecial jury to be ſtruck by the maſter, who was to chuſe forty-eight out of the freeholders book, out of which each ſide was to ſtrike twelve, and the remaining twenty-four were to be returned for the trial of the cauſe. At the trial the defendant challenged the array for want of hundredors, and the challenge was allowed; whereupon the proſecutor moved for an attachment againſt the defendant, as being guilty of a contempt of the rule; and upon the motion it appeared, that the defendant's agent in ſtriking out his twelve had expunged all the hundredors.

The defendant's counſel inſiſted, it was no contempt becauſe they were not reſtrained by the rule; and mentioned ſeveral precedents, where the rules have been expreſs, that the defendant ſhould ſtrike out twelve, and not challenge the array for want of hundredors. In Queen *Elizabeth*'s time, *Regina* v. *Lord Hunſdon* was ſo. *Rex* v. *Kiffin*, 29 *Car.* 2. 3 *Keb.* 340. The Attorney General moved to add thoſe words, but it was denied. *Rex* v. *Sherrard*, 1 *Geo.* thoſe words are added *ex aſſenſu.*

Sed per curiam, This is a plain contempt. Does not he defeat the rule, by inſiſting, that the twenty-four, who the rule ſays ſhall be returned to try the cauſe, ſhall not try it? Suppoſe a ſubmiſſion to arbitration be revoked (as by law it may) after it is made a rule of court, that is certainly a contempt. The ſame in a releaſe procured from the nominal plaintiff in ejectment. In Mr. *Gibbon*'s caſe he pleaded ſuch a releaſe *puis darrein continuance*; and Lord *Trevor*, who tried the cauſe, ſaid he was bound to allow the plea, if they inſiſted upon it: but at the ſame time told them, he would lay them by the heels; upon which the plea was withdrawn. This is not making contempts by implication, but it is the natural conſtruction of the rule, without which the juſtice intended by making theſe rules cannot be had. He might indeed have had a challenge to the polls, becauſe that would not hinder the cauſe from going on; for they might have had a *tales*. If there was a rule to reſtrain the party from taking out execution, does any body think we would ſuffer him to bring an action of debt upon the judgment? *Per curiam*, An attachment was granted.

Burgeſs *verſ.* Brazier.

Et taken diſjunctively after a verdict. L. Raym. 1366.

DEBT on articles for a horſe race, whereby it was agreed to ride without whip *or* ſtick, *or* other weapon, beſides boots and ſpurs, and avers that he rode *ſine flagello et baculo vel aliis armis*. *Nil debet* pleaded.

After verdict for the plaintiff it was moved in arreſt of judgment, that the averment ſhould have been in the disjunctive throughout, whereas upon this declaration he might have one, though he had not both; and *Cro. El.* 348. 1 *Leon.* 124. were cited.

Et per curiam, This would have been ill upon a demurrer, but is well enough after a verdict. The laſt *vel* may be taken to diſjoin the former *et*, and though the conjunctive ſenſe be the moſt obvious, yet ſince it is capable of being taken disjunctively, it will do. 1 *Ven.* 114. *Salk.* 140. 1 *Mod.* 42. The jury find that he rode without whip and ſtick or other arms, which cannot be true if he had either. The plaintiff had judgment.

Between the Pariſhes of St. John Baptiſt in Deviſes *and* St. James in Biſhops Kenny.

Apprentice is ſettled where he lies. L. Raym. 1371.

UPON a ſpecial order, ſtating that *A.* was bound apprentice to *B.* and ſerved five years in the pariſh of *St. John*, but had always lain in the pariſh of *St. James* with his father, the ſeſſions adjudge it a ſettlement in *St. John*'s.

Et per curiam, The order muſt be quaſhed, the ſerving without lying makes no inhabitation, which is neceſſary to gain a ſettlement in the caſe of an apprentice: and ſo it was held in the caſe of *St. Olave Jewry*, and in the caſe of *St. Mary Cole Church* v. *Radcliff*.

Oates *verſ.* Machen.

At niſi prius *in* Middleſex coram Forteſcue et Raymond *Juſtices.*

IN an action of eſcape againſt the marſhal, it was alleged, that the priſoner was ſurrendered to him at the Chief Juſtice's Chamber in the pariſh of *St. Bride*'s, whereas it appeared upon the evidence, that it was in the pariſh of *St. Dunſtan.* But the Judges held it well enough, this being debt, and the ſurrender the only thing material, and that it differed from the caſe of treſpaſs, where every part of the declaration is deſcriptive. And the next day

Where in the declaration the deſcription of a place is material. *N. B.* The defendant was in execution for the coſts in ejectment, and it was held good notice within the ſtatute 8 *W.* 3. *c.* 27. if ſigned by the leſſor of plaintiff.

At Guildhall coram King *C. J.* inter Boddy *verſ.* Smith.

EJECTMENT for a houſe in the pariſh of *St. Peter* in *Warda de Cheape*; the defendant proved it was in *Warda de Farringdon infra*, and that no part of the pariſh of *St. Peter* was in the ward of *Cheape*, and the plaintiff was nonſuit.

Dominus Rex *verſ.* Moiſe.

Coram Forteſcue et Raymond *Juſtices.*

INDICTMENT againſt the defendant for tearing a note, whereby he promiſed to pay to *A. B.* ſo much money. *A. B.* was produced as a witneſs, and it was objected, that it was ſwearing to ſet up his own demand, becauſe if the defendant was convicted, the court would oblige him to give a new note. But the Judges allowed her.

Proprietor of note a witneſs on indictment for tearing it.

Duel *verſ.* Harding.

In Middleſex coram Forteſcue et Raymond *Juſtices.*

IN an action for beating his ſervant, *per quod ſervitium amiſit*, they allowed the ſervant to be a witneſs.

Servant witneſs in action by maſter for beating him.

Underwood *verſ.* Hewſon. Ibid.

Treſpaſs lies for an accidental hurt.

THE defendant was uncocking a gun, and the plaintiff ſtanding to ſee it, it went off and wounded him: and at the trial it was held that the plaintiff might maintain treſpaſs. *Strange pro defendente.*

Lady Coventry *againſt* Lord Coventry. In Canc.

The poſſeſſor of an eſtate has a power to make a jointure, but dies before a compleat execution of the power according to his marriage articles; the remainder man was decreed to perfect it. S. C. 2 Will. Rep. 222. Abr. Ca. Eq. 348.

THOMAS late Earl of *Coventry* being ſeiſed in fee of ſeveral manors, lands and hereditaments, in ſeveral counties in *England*, ſome in poſſeſſion, and other part in reverſion expectant on the death of Lord *Deerhurſt* his eldeſt ſon, and of *Gilbert*, afterwards Earl of *Coventry*, his ſecond ſon (the plaintiff's late huſband) without iſſue male, by his will dated the 24th day of *March* 1698. gave ſeveral parts of his eſtates, therein particularly mentioned, to *Elizabeth* his wife for life, and after her deceaſe to truſtees and their heirs to the uſe of his firſt and other ſons by his then wife in tail male, remainder as to part to the uſe of his ſon *Gilbert* for life and his firſt and other ſons in tail male, remainder to his ſon the Lord *Deerhurſt* for life, with like remainders to his firſt and other ſons in tail male, remainder to his uncle *Francis Coventry* for life, with like remainder to his firſt and other ſons, remainder to his couſin the defendant *William* the preſent Earl of *Coventry* for life, and to his firſt and other ſons, with other remainders over. And as to the other parts of his eſtate ſo deviſed to his wife for her life, to the uſe of his ſon the Lord *Deerhurſt* for life, with remainder to his firſt and other ſons in tail, with like remainders to Earl *Gilbert*, *Francis Coventry*, and the now Earl, for their lives, and their ſons in tail male, with remainders over, remainder to his own right heirs.

He alſo deviſed to his ſaid truſtees and their heirs divers other manors and eſtates, which he had in poſſeſſion and reverſion, to the uſes following, *viz.* As to *Woolſton*, *Sintfield*, *Edgware*, *Griffe*, *Cotton* and *Woolvey*, to the uſe of his firſt and other ſons by his then wife in tail male, remainder to his ſon the Lord *Deerhurſt* for life, with remainder to his firſt and other ſons in tail male, with remainder as to *Woolſton*, *Sintfield*, and *Bearly*, to the uſe of *Gilbert Coventry* for life, with remainders to his firſt and other ſons in tail male, with remainders as to the ſaid manors, and alſo as concerning the ſaid manors of *Edgeware*, *Griffe*, and *Woolvey*, to the uſe of *Francis Coventry* for life, remainder to his firſt and other ſons in tail male, with remainder to the defendant the preſent Earl of *Coventry*

ventry for life, and to his firſt and other ſons in tail male, with remainders over, remainder to his own right heirs: and as to his manors of *North Littleton*, *South Littleton*, *Offenham*, *Berlingham* and *Deſtford*, other parts thereof in poſſeſſion, to the uſe of the Lord *Deerhurſt* for life, with remainder to his firſt and other ſons in tail male, remainder to the uſe of his ſon *Gilbert*, and his ſons in tail male, remainder to the firſt and other ſons of the ſaid Earl *Thomas* by his then wife, remainder to the uſe of the ſaid *Francis* for life and his ſons in tail male, remainder to the defendant the preſent Earl for life and his ſons in tail male, with ſeveral remainders over, with remainder to his own right heirs: in which will it is provided, "That it ſhould be lawful for any perſon or perſons who ſhould "at any time then after by virtue of the ſaid will, or any codicil "or codicils to be added thereto, be ſeiſed of any of the teſtator's "manors or lordſhips, lands, tenements or hereditaments, by any "writing or writings under his or their hands and ſeals to limit and "appoint any ſuch manors or lordſhips (except *Great* and *Little* "*Milton*, and all ſuch other manors where there are any copyhold "eſtates) and any of the ſaid meſſuages, lands and tenements or "hereditaments, not exceeding the yearly value of 500 *l.* to any "wife or wives ſuch perſon or perſons ſhould have or happen to "marry, for her or their reſpective life or lives, for her or their "jointure or jointures, ſo as ſuch perſon or perſons ſhall have with "ſuch wife or wives upon ſuch marriage a portion equivalent for "ſuch a jointure:" and after making other proviſions in his ſaid will, the teſtator appointed his wife executrix, and died without iſſue by her; who afterwards married *Thomas Savage*, Eſq; and is ſtill living. *Thomas* Lord *Deerhurſt* died in the life-time of his father, leaving an infant ſon, afterwards Earl of *Coventry*, who died without iſſue, and the title deſcended to *Gilbert* the ſecond ſon.

Upon a treaty of marriage between Earl *Gilbert* and the plaintiff his ſecond wife, articles of agreement dated the 23d of *June* 1715. were made between Earl *Gilbert* of the firſt part, the defendant Sir *Strenſham Maſters*, and the plaintiff his only daughter, of the ſecond part, and the defendants Mr. *Leigh* and Mr. *Williams* of the third part, whereby in conſideration of *ſuch marriage, and of* 10000*l.* *marriage portion* paid down by Sir *Strenſham Maſters* to the ſaid Earl *Gilbert*, he the ſaid Earl *Gilbert* for himſelf, his heirs, executors and adminiſtrators, did covenant, promiſe and agree to and with the ſaid Sir *Strenſham Maſters*, his heirs, executors and adminiſtrators, and to and with every of them by the ſaid articles in manner and form following, (that is to ſay) that he the ſaid *Gilbert* Earl of *Coventry*, or his heirs, ſhould and would at any time after the ſolemnization of the ſaid intended marriage, at the requeſt of the ſaid Sir *Strenſham Maſters*, his heirs, executors or adminiſtra- Marriage articles 23d of *June* 1715.

tors, but at the proper coſts and charges in the law of the ſaid *Gilbert* Earl of *Coventry*, his executors or adminiſtrators, according to the power given to him the ſaid Earl of *Coventry* for that purpoſe, in and by the laſt will and teſtament of the right honourable *Thomas* the late Earl of *Coventry* deceaſed, father of the ſaid *Gilbert* Earl of *Coventry*, bearing date on or about the 24th day of *March* in the year of our Lord 1698. or otherwiſe by good and ſufficient conveyances and aſſurances in the law, well and ſufficiently convey, ſettle, limit and appoint, or cauſe or procure to be conveyed, ſettled, limited or appointed, manors, meſſuages, lands, tenements and hereditaments, of the full and clear value of 500 *l. per ann.* unto or upon the ſaid *Anne Maſters*, for and during her natural life for her jointure, to commence and take effect in poſſeſſion immediately from and after the death of the ſaid *Gilbert* Earl of *Coventry*, in caſe the ſaid *Anne Maſters* ſhall him ſurvive, as by the ſaid Sir *Strenſham Maſters*, his heirs, executors or adminiſtrators, or by his ſurveyor, or any of their counſel learned in the law, ſhall be reaſonably deviſed, adviſed or required: and alſo that his heirs, executors or adminiſtrators, ſhould after his death pay her during her life 250 *l. per ann.* as an addition to her jointure, half yearly, free from taxes.

And it was further agreed that Earl *Gilbert* ſhould depoſit 5000 *l.* part of the 10000 *l.* in the Bank of *England*, or inveſt it in Exchequer notes carrying intereſt, and depoſit them in a box or trunk to be locked up with three locks, upon truſt that the defendants *Leigh* and *Williams* ſhould lay out the 5000 *l.* in the purchaſe of lands, and ſettle them to the uſe of the Earl for life, with remainder to truſtees to preſerve contingent remainders, and after his death to the uſe of the plaintiff for life, to be with the manors and lands of 500 *l. per ann.* aforeſaid, and the ſaid annuity of 240 *l. per ann.* in full for her jointure and in bar of dower; with other limitations to the uſe of the children of that marriage; and in default of ſuch iſſue to the uſe of the ſaid Earl *Gilbert*, his heirs and aſſigns, as therein is mentioned, with a power in the truſtees, until a purchaſe, to put out the 5000 *l.* at intereſt, to be applied as therein directed.

The marriage took effect, and the 10000 *l.* marriage portion was paid, and 5000 *l.* part thereof, was inveſted in bank bills, and afterwards lent on a mortgage that had been made of part of the family eſtate, purſuant to ſaid articles. And Earl *Gilbert* ſoon after his marriage gave directions to his ſteward, to find out proper lands for a jointure, and the ſteward according to orders peruſed the family ſettlements, and could find no other eſtate than the manor of *Woolvey*, which was free from incumbrances, and which

was within the Earl's power to ſettle; and the ſaid manor being of little more than the yearly value of 400 *l.* the Earl paid off a 1200 *l.* mortgage on lands in *Woolſton*, and agreed to make up the 500 *l. per annum* out of thoſe lands; and accordingly, at the requeſt of Sir *Strenſham Maſters*, cauſed a ſettlement by way of leaſe and releaſe the 5th and 6th of *July* 1719 to be prepared, which was agreed to by all parties, and approved of by Sir *Strenſham*, and actually ingroſſed; wherein, after recital of Earl *Gilbert*'s power by the ſaid will, and of the articles, the ſaid Earl *Gilbert* is therein mentioned to limit and confirm unto Sir *Strenſham Maſters* and Mr. *Leigh*, their heirs and aſſigns, the ſaid manor of *Woolvey* and ſeveral lands in *Woolſton* therein particularly mentioned, of the value of 500 *l. per annum*. And the Earl often expreſſed his intentions to execute the ſaid ſettlement; but by his ſudden illneſs, whereof he died, and the abſence of the ſteward, in whoſe cuſtody the intended ſettlement was at that time, and many other unforeſeen accidents, ſet forth in the pleadings, the ſame was not executed before his death.

Earl *Gilbert* died without iſſue male, leaving by *Dorothy* his firſt wife the Lady *Anne*, now the wife of Sir *William Carew*, his only daughter and heir. But before his death made his laſt will and teſtament in writing, dated 27th of *October* 1719, and thereby (*inter alia*) gave the plaintiff (beſides what was agreed to be ſettled on her by the marriage articles) 3000 *l.* and ſeveral ſpecifick legacies, and made his ſaid daughter the Lady *Anne Carew* ſole executrix, who hath ſince proved his will, and taken upon her the execution thereof.

Francis Coventry alſo died without iſſue male. So that upon the death of Earl *Gilbert*, the defendant *William* (the preſent) Earl of *Coventry* became ſeiſed of divers manors and eſtates under and by virtue of the limitations in the ſaid will, ſubject not only to the 5000 *l.* mortgage, but, as the plaintiff inſiſts, to the 500 *l. per annum* agreed to be limited to the plaintiff for her jointure: and the plaintiff's bill is, to compel the truſtees in the mortgage to call in the 5000 *l.* in order to lay it out in a purchaſe, and to compel Sir *William Carew* and his lady to give a real ſecurity for the 250 *l. per annum*, and to pay the 3000 *l.* legacy. And againſt the Earl of *Coventry*, that ſhe may hold and enjoy the land contained in the ſettlement intended to be executed, for her life; but in caſe the indenture ſo ingroſſed ſhould prove defective, and not amount in equity to a ſufficient appointment purſuant to the power, then that ſhe may have a ſatisfaction out of the Earl's real and perſonal eſtate.

On

On the hearing of this cauſe the 18th of *April* 1722. ſeveral caſes being then cited, the court was pleaſed to refer it to Mr. *Conway*, one of the Maſters, to take account of the real and perſonal aſſets of Earl *Gilbert* come to the hands of any of the parties, who were to be examined on interrogatories, and the Maſter was alſo to take an account of the debts of Earl *Gilbert* unſatisfied at his death, and alſo of his legacies, and to ſtate the real and perſonal aſſets, and any other matter he ſhould find difficult, ſpecially to the court: and when the Maſter ſhould have made his report, this cauſe was to come on again to be heard thereupon; and alſo as to the 500 *l.* *per annum* claimed by the plaintiff upon the marriage articles. At which time the court (being before attended with the caſes then cited) would deſire the aſſiſtance of ſome of the Lords the Judges and the Maſter of the Rolls: and all further directions were reſerved until the cauſe ſhould come to be heard on the Maſter's report.

The Maſter made his report, and thereby certified, that the real and perſonal aſſets of the ſaid Earl *Gilbert* amount to 13,467 *l.* 0 *s.* 9 *d.* over and beſides the 1200 *l.* and intereſt due on the ſaid mortgage of *Woolſton*, and that there was 3792 *l.* 9 *s.* 7 *d.* paid and to be paid by the ſaid Sir *William Carew*, in diſcharge of debts, legacies and funeral charges, beſides what is due to the plaintiff, as in the report is mentioned: and the plaintiff's demands out of the ſaid 13,467 *l.* 0 *s.* 9 *d.* are as follows, *viz.* 250 *l.* annuity clear of taxes; jewels, furniture, and other ſpecifick legacies, amounting to 1448 *l.* 1 *s.* 7 *d.* halfpenny; and the demand of 500 *l.* *per annum* now in queſtion, with the arrears thereof from Earl *Gilbert*'s death, being four years and upwards.

In this caſe it was argued for the defendant, that here was no execution of the power limited in Earl *Thomas*'s will, becauſe the covenant with Sir *Strenſham Maſters* was, that Earl *Gilbert*, or his heirs, ſhould and would, at the proper coſts and charges of the ſaid Earl, his executors or adminiſtrators, according to the power in the will of Earl *Thomas*, *or otherwiſe* by good and ſufficient conveyances in the law, ſufficiently convey lands to the value of 500 *l.* *per annum*: and that therefore they could not come into a court of equity for a ſpecifick performance, becauſe they were not ſpecially mentioned in the covenant to be ſet forth as a jointure; and that the covenant was to be interpreted as a perſonal covenant, becauſe it was made with *Maſters*, his heirs, executors and adminiſtrators, either to ſettle in purſuance of the power, or *otherwiſe*; ſo that Earl *Gilbert* had his election, to ſatisfy the covenant, either by ſettling the lands under the power by appointment, or by limiting any other lands to the ſame purpoſes: and according to the circumſtances of

this caſe he could not be ſaid to have made his election, becauſe from 1715 to 1719, there was nothing done, nor any requeſt by Sir *Strenſham*, to ſettle any particular lands in purſuance of the power. And though about *July* 1719, a draught was prepared and ingroſſed, yet that continued to lie by till *October* 1719. and was never executed; and he had therefore an *animus deliberandi* continuing, and had not taken hold of the power, by appointing the lands of *Woolvey* and *Woolſton* in performance of the covenant, ſince the indentures were only ingroſſed, and never executed. And in all conveyances of this nature the *animus deliberandi* muſt be ſuppoſed to continue, till the act be compleatly executed. And the power not being executed, this was compared to the caſe of *Lanyon* v. *Wiliams*, where tenant in tail for valuable conſideration covenants to ſell the eſtate-tail and dies; a court of equity would not compel him to execute ſuch conveyance, though there had been a decree againſt the tenant in tail to levy a fine and ſuffer a recovery: and therefore it was urged, that ſince the remainder was veſted before the legal eſtate was executed by Earl *Gilbert*, the court would not compel the remainder-man in this caſe to execute conveyances in purſuance of this covenant.

And here they quoted thoſe caſes of law, which ſay that powers, which go in derogation of remainders veſted, are to be taken ſtrictly; becauſe it was looked upon as dangerous for a court of equity to overthrow by their decrees the intereſts that were originally veſted in the parties by legal conveyances; and the rather in this caſe, becauſe there was a perſonal and ſome real eſtate to ſatisfy the covenant: and this covenant is to be conſidered as a debt due from Earl *Gilbert* on receiving his marriage fortune; and wherever there is a debt, the perſonal eſtate ſhall go in exoneration of the real, which is to ſupport the honour and dignity of the family. And it was further urged, that the heir being expreſly bound in the covenant, the eſtate deſcended to the heir ſhould be firſt liable.

But it was anſwered and reſolved by the court, that after the ſtatute of 27 *Hen.* 8. *c.* 10. for transferring of uſes into poſſeſſion, the courts of common law held, that powers in derogation of eſtates executed were to be taken ſtrictly; and therefore if not purſued, they would not impeach or deſtroy an eſtate already executed by legal conveyances. But in the courts of equity they ſoon found that the conſtruction was too artificial, and not according to natural equity; and therefore they conſtrued theſe powers as a reſervation of ſo much of the ancient dominion of the eſtate, to be under the controul of the tenant for life. *Et cujus eſt dare illius eſt diſponere*; and as often as any ſuch dominion is reſerved, the tenant for life

may contract about it; and where a marriage contract is made, as this was, in contemplation of the execution of ſuch a power, it was a real lien upon the eſtate; for both the marriage was had, and the marriage portion paid, in contemplation that the charge ſhould be laid on the eſtate in purſuance of the power. And therefore a court of equity may decree it againſt the remainder-man, becauſe he claims under the deviſe of Earl *Thomas*, whoſe intention was, that ſuch a charge ſhould be induced on the land; and the preſent Earl taking the eſtate under the will, takes it *ſub onere:* ſo that a court of equity may decree the charge to be made good by the remainder-man, becauſe it is decreeing a charge in purſuance of the intent of the teſtator. And equity in this caſe was obliged to make ſuch decree, becauſe the firſt proviſion was made both for the honour and advantage of the family; ſince they could not have married according to their quality, without having a power to make ſuch a jointure: and the preſent Earl takes the benefit of ſuch power, by having ſuch a dominion over the eſtate for his own advantage, and therefore he is obliged in conſcience to diſcharge the intention of the teſtator in behalf of Earl *Gilbert*. And this is not like a caſe of tenant in tail, for when ſuch tenant ſells, and dies before cutting off the entail, equity cannot relieve; becauſe the ſtatute *de donis* binds a court of equity, as it does the courts of law: but if the vendee avoids the ſtatute by a recovery, the courts of equity have never prohibited ſuch a fictitious ſuit to overthrow the title of the heir in tail. Nay farther, if there was a truſt in tail, and the *ceſtui que truſt* ſhould covenant to convey for valuable conſideration, there the court of equity would oblige the heir in tail to convey; becauſe this is a creature of equity, and out of the ſtatute. And wherever an agreement is made, and money paid; equity does not conſider the form of the conveyance, but takes it as if it were actually executed in the beſt manner that could be contrived at law; for the ſubſtantial part of the agreement is the price, and for that the right is transferred, and what ought to be done is looked upon as done. And therefore if a man article for the purchaſe of land, and ſells all his eſtate, it would paſs the lands in the articles. And this diſtinction was taken, that if it had been a mere voluntary conveyance, the *animus deliberandi* ſhould have continued till the conveyance was executed; but here being a contract to ſettle in purſuance of that power; when an eſtate is afterwards ſet out, it ſhall be preſumed to be an execution of that contract, which in conſcience he was obliged to perform; eſpecially in a caſe ſo circumſtanced, ſince nothing can be objected to the value of the lands: and in this caſe what the perſons contracting had in contemplation was an eſtate executed in purſuance of the power: and the words *or*

otherwiſe, &c. are to be looked upon as auxiliary, and to aid the eſtate to be conveyed; ſo that if the Earl had ſettled, or purchaſed other lands in order to be ſettled, according to the contract, he might have exonerated the lands ſubjected to the power by Earl *Thomas*'s will; and ſince the real eſtate now in queſtion was mortgaged, it was neceſſary the covenant ſhould be large enough to bring in all the real and perſonal eſtate of Earl *Gilbert* in aid of the ſettled eſtate, in caſe of deficiency. And therefore the covenant is not to be conſtrued on the one hand ſo ſtrictly, as to ſubject the heir in the firſt place, nor ſo generally as if the word heir was only matter of form, and merely the word of the conveyancer; but the intention was, that he at his election ſhould have a power out of any other eſtate to ſatisfy the covenant, and after his death, in caſe the land contained in the power ſhould be deficient, that all other his eſtate ſhould be ſubject thereto: but ſince Earl *Gilbert* did not ſettle any other eſtate, as he might have done, to diſcharge the contract; it remains as a real lien on the ſettled eſtate in the firſt place to bind the ſame, as what the party had in contemplation to bind by the contract. And this is not like the caſes where equity decrees that the perſonal eſtate ſhall go in exoneration of the real; for the reaſon of that is, that the perſonal eſtate is the natural fund for the payment of debts and legacies, and therefore as far as that is not ſpecifically deviſed, it ſhall exonerate: but the articles of Earl *Gilbert* muſt not be conſidered as a debt, but as a conveyance of ſo much of the eſtate, over which he had a power, becauſe his primary intention was to convey: and if it be conſidered in this light, there can be no application of the perſonal eſtate, ſince there is no debt of which the real eſtate was to be exonerated: and that this was the conſtruction of powers in equity, the following caſes were quoted, *Dr. Garth* v. *Lady Beaufry*, by Lord *Somers*, *Paſch.* 1695. *Henry Beaufry* ſettles lands to the uſe of himſelf for life, then as to part to his wife for life for her jointure, then to the iſſue male of his own body, with ſeveral remainders over; with a proviſo, that if he ſhould have any younger children, it ſhould be lawful for him, by deed or will, executed in the preſence of two or more witneſſes, to limit and appoint any of the ſaid lands (except thoſe in jointure) to ſuch perſons and for ſuch eſtates as he ſhould think fit, for raiſing 500 *l.* a-piece for ſuch younger children, to be paid at ſuch times, and in ſuch manner, as by ſuch deed or will ſhould be declared or covenanted. *Henry* died, leaving ſeveral younger children, but did not make any appointment. Decreed this was a charge upon the land, and bound the iſſue in tail, and ordered the 500 *l.* a-piece to be raiſed for the younger children.

Accord-

Accordingly the covenant in this caſe was looked on as an execution of the appointment in purſuance of the power.

2 Vern. 379. Lady *Clifford* v. Lord *Burlington*, by Lord Keeper *Wright*, in the *Temple-Hall*. Lord *Clifford* had power to ſettle a jointure not exceeding 1200 *l. per annum*. On his marriage with the plaintiff, he covenants to ſettle on her 1000 *l. per annum:* he ſends to his ſteward for a particular of lands of that value, and ſettles according to that particular. After his death it appeared that the lands ſo ſettled were but 800 *l. per annum*: the bill was againſt the remainder-man, to have theſe lands made 1000 *l. per annum*; and decreed againſt the remainder-man.

Parker v. *Parker*, 15th *June* 1714. Mr. *Parker* had a power to raiſe 7000 *l.* for younger children, by deed or will executed in the preſence of three witneſſes. Afterwards by will executed in the preſence of two witneſſes he charged the premiſſes with 8000 *l.* for his younger children. Decreed good for 7000 *l.*

Holingſhead v. *Holingſhead*, 14 *June* 1708, before Lord *Cowper*. A man deviſes his eſtate to *A.* for life, with ſeveral remainders over, with a power to the perſon in poſſeſſion to limit any part of the premiſſes for a jointure, not exceeding one moiety: the firſt deviſee for life, whilſt an infant, marries the plaintiff, and with his mother enters into articles to ſettle lands of 100 *l. per annum* on the plaintiff for her jointure; but in the articles no notice was taken of the power. Before any jointure made purſuant to the power the tenant for life dies: the bill was againſt the remainder-man, to have the jointure made good. Decreed accordingly.

Hearle v. *Greenbank*, 3 *Aug.* 1749. Q.

Alford v. *Alford*, at the *Rolls*, 5 *December* 1709. *Gregory Alford* tenant for life, remainder to his firſt and other ſons in tail, remainder to *Francis* for life, to his firſt and other ſons in tail, remainder to the defendant, with a power for *Francis* (after the death of *Gregory* without iſſue) to make a jointure: *Francis* marries in the life-time of *Gregory*, and before marriage covenants to make a jointure on the plaintiff, and to execute this power when he ſhould come into poſſeſſion. *Gregory* dies without iſſue male, and *Francis* ſurvives him, but dies without making a jointure or executing this power: Bill againſt the remainder-man, to have a jointure made, becauſe *Francis* ſurviving *Gregory* might have executed this power, and had covenanted ſo to do. Decreed accordingly.

So in the principal caſe it was decreed, that the plaintiff ſhould hold and enjoy the lands of *Woolvey* and *Woolſton*, according to the articles, and the deeds of 5 and 6 *July* 1719. And that the plaintiff, and the defendant the heir, and the Lord *Coventry*, ſhould have their coſts out of the perſonal eſtate, becauſe Earl *Gilbert* ought to have ſettled it during his life, and the preſent Earl had only by his anſwer laid his caſe before the court, and had not joined in the examination of witneſſes, but the plaintiff had examined to prove the allegations of the bill.

Michaelmas Term

11 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Juſtice.*
Sir Littleton Powys, *Knt.*
Sir John Forteſcue Aland, *Knt.* } *Juſtices.*
Sir Robert Raymond, *Knt.*
Sir Philip Yorke, *Knt. Attorney General.*
Sir Clement Wearg, *Knt. Solicitor General.*

Cooper *verſ.* Ginger

Where the judgment is againſt two, a writ of error *ad dampnum* of one only will not lie. S. C. Ld. Raym. 1403.

THE plaintiff recovered judgment in *C. B.* againſt two defendants, and a writ of error is brought, alleging it to be *ad grave dampnum* of one only, without taking any notice of the other: and *Reeve* moved to quaſh it, which was done without much argument, upon the authority of a like caſe, *Mich.* 6 *Geo.* in *B. R. Brewer* v. *Turnerb*, *ante*, 233.

Coſts on quaſhing writs of error are to be given in all caſes.

Then the defendant in error moved for coſts, and upon conſideration the court were of opinion he was entitled to them, the act for the amendment of the law not being confined to the caſe of a variance from the record, (which this is not) but having general words, *other defect*, to take in this caſe.

Then the plaintiff in error brought another writ of error *coram vobis*; and *Reeve* moved to quaſh that alſo, as not lying in this court; becauſe the firſt writ of error being quaſhed, the record is not removed. He argued, that if the record had been once well removed, and the writ had abated by matter *dehors*, as death; in that

that caſe a writ of error *coram vobis* will lie: but this he ſaid was never a good writ of error, and the fault appeared upon the face of the record; ſo that it is no more, than if an entire ſtranger, making a true deſcription of the record, had brought the writ of error, which no body can pretend would be a removal of the record.

Serjeant *Comyns contra* inſiſted, that the record was well removed, though by a miſtake in not joining the other defendant, they could not proceed to reverſe the judgment; and therefore to ſet that matter right, they had brought a writ of error in the name of both. 3 *Mod.* 134. 1 *Roll. Abr.* 753, 929. 1 *Sid.* 104, 139. *Dyer* 356. *b.* *Yelv.* 3, 6.

If a writ of error be quaſhed for any other fault than variance, *error cor' vob'* lies. Co. Ent. 289.

Chief Juſtice. If the record was ever well removed, this writ of error *coram vobis* is the only one which could be had. I ſhould think, beſides a true deſcription, that the writ ſhould be brought by one who can entitle us to examine the record, and it is admitted, that one defendant alone cannot. I can ſee no reaſon to conſtrue this a removal of the record; ſince if it be a removal, it is a removal to no purpoſe. *Powys* Juſtice *accord.*

Forteſcue Juſtice. I am very doubtful in this caſe. A writ of error has in its nature two things, a *certiorari* to remove the record, and a commiſſion to examine it; and that is the reaſon why it was never amendable at common law, becauſe no court was ever allowed to amend their own commiſſion. The *certiorari*-part of the writ is good, if the record be rightly deſcribed, as this was; and therefore I ſee no inconvenience in conſtruing it a removal of the record. I remember a caſe of *Walter* v. *Stokoe* in this court, which was an action againſt five defendants; and one being dead, the other four, without taking any notice of that, bring a writ of error; and it was quaſhed for the ſame reaſon as we quaſhed the firſt writ of error in this caſe; the plaintiff in error there brought a writ of error *coram vobis*, and the cauſe was determined upon that, without any objection to the propriety of the writ.

Ld. Raym. 71, 151.

Raymond Juſtice. I remember that caſe, and it was ſo. As to this caſe I ſhould think, that when a writ of error goes to remove a record for a particular purpoſe, and by ſome defect in that writ the purpoſe for which it iſſued cannot be obtained, the record ſhould be taken to be in the ſame condition as if no writ of error had been brought. If one defendant only can remove the record, I do not ſee why a meer ſtranger may not.

Adjournatur. And *Trin.* 11 *Geo.* without much debate they declared, that the writ of error *coram vobis* did lie.

Dominus Rex *verſ.* Theed.

Conviction preſumed right if the contrary does not appear. S.C. L.Raym. 1375.

CONVICTION for obſtructing an exciſe officer in coming to weigh candles: and it was objected, that by 8 *Ann. c.* 9. the officer has power to enter by day or night, and if by night, then in the preſence of a conſtable, and here it is not ſaid whether it was by day or night; it might be by night without a conſtable, and then it was lawful for the defendant to obſtruct.

Sed per curiam, That ſhould have been ſhewn by the defendant, and then he would not have been convicted. It is enough that this conviction does not appear to be wrong: we will preſume the entry to have been in the day, elſe it would have been ſaid *in nocte ejuſdem diei*. The conviction was confirmed.

Ravenhil's caſe.

Mandamus.

THE court granted a *mandamus* to ſwear him in ale-taſter of *Honiton*. It appeared to be a previous requiſite to his being choſen port-reeve, who is the returning officer for members of Parliament.

Dominus Rex *verſ.* Roberts.

Proceedings upon convictions muſt be in the preſent tenſe. S.C. L.Raym. 1376.

CONVICTION for profane ſwearing quaſhed, being *praeſtitit ſacramentum* in the preterperfect tenſe. It was held good in ſubſtance, being for ſwearing 150 oaths *in his verbis, videlicet by G.* and curſing 150 curſes *in his verbis, videlicet G. damn you*, without repeating each 150 times.

Between the Pariſhes of Aſhbrittle *and* Wyley.

Long poſſeſſion is a ſettlement till the right is determined.

UPON a ſpecial order of ſeſſions the caſe appeared to be, that thirty years ſince, *Humphry Card* built a cottage upon the waſte in *Wyley* belonging to the Earl of *Pembroke*, and lived on it till his death, about three years ſince, when it deſcended to his daughter *Elizabeth*, then married to *John Darby*; that they entered and enjoyed it three quarters of a year, and then ſold the poſſeſſion of it to *John Wyvel*, who has enjoyed it ever ſince without any moleſtation from the lord; but no original grant appears. And whether *John Darby* and his family are ſettled in *Wyley*, where they lived three quarters of a year in the cottage in right of his wife, or

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in *Ashbrittle*, which was the place of his laſt ſettlement before the marriage, was the queſtion: and by the order of two juſtices, and the order of ſeſſions, it is adjudged to be a ſettlement in *Wyley*.

Et per curiam, The order muſt be confirmed; he lived forty days in the capacity of a perſon irremovable, and that is a ſettlement of itſelf. Here has been an enjoyment for thirty years, during all which time the lord never claimed any thing. The leaſt that can be made of it is a title by diſſeiſin, and a deſcent is caſt. This man had undoubtedly a title againſt all the world but the lord, and even againſt him it may be doubtful, after ſo long a poſſeſſion. In ejectment he might either make or defend a title by twenty years poſſeſſion. Therefore in this caſe there is no colour to determine againſt his right, when the lord does not think fit to impeach it; though if he did, it would never be allowed, to determine the title upon an order of removal, but upon an ejectment only.

Elliot *verſ.* Cowper.

THE plaintiff declares, that the defendant *fecit quandam notam in ſcriptis per quam promiſit ſolvere*. And exception was taken, that here is no ſigning by the defendant, as the ſtatute requires; and the caſe of *Taylor* v. *Dobbins*, *ante* 399. had the words *manu ſua ſcripſit*, which was the ground of the judgment in that caſe. But in the principal caſe the court held it well enough, for unleſs it was ſigned or wrote by him, it could not be ſuch a note whereby the defendant promiſed to pay. Judgment for the plaintiff.

Fecit notam per quam promiſit ſolvere, imports a ſigning. L. Raym. 1376.

Paſ. 12 *Geo. Boyce* v. *Fiſher*, ruled the ſame way on demurrer.

Caſe of the Commiſſioners of Sewers for Yorkſhire.

THE court held, that a *certiorari* to bring up an order made by the commiſſioners, for the removal of their own clerk, was of common right, and not diſcretionary, as in the caſe of other orders, where great inconveniencies may follow by inundations in the mean time.

Certiorari, where diſcretionary.

Dominus Rex *verſ.* Simpſon.

MANDAMUS to the archdeacon of *Colcheſter*, to ſwear *Rodney Fane* into the office of churchwarden. He returns, that before the coming of the writ he received an inhibition from the biſhop of *London*, with a ſignification that he had taken upon himſelf to act in the premiſſes.

Swearing a churchwarden is only a miniſterial act. S.C. L.Raym. 1379.

Et per curiam, The return is ill. It does not appear that the town of *Colcheſter* is within the dioceſe of the biſhop who inhibits: beſides, the archdeacon is but a miniſterial officer, and is obliged to do the act, whether it be of any validity or not. A peremptory *mandamus* was granted.

Townſend *verſ.* Duppa & al'.

Attorney cannot change *venue* to *Middleſex* where there is another defendant joined.

AN action of trover was laid in *Worceſterſhire*; and *Willes* moved to change the *venue* to *Middleſex*, becauſe the action againſt ſome of the defendants was as they were commiſſioners of bankruptcy, and they had privilege, as being barriſters or attornies. But the court refuſed it, ſaying the privilege could not take place where they are joined in an action with unprivileged perſons.

Brigs *verſ.* Greinfeild and Benger.

One defendant overthrows the action after judgment *per* default againſt the other, it ſhall be ſtayed as to both. S.C. L.Raym. 1372.

TRESPASS againſt two defendants; one ſuffers judgment to go by default, and the other pleads a diſtreſs for rent, and a licence from the plaintiff to ſell the goods, upon which iſſue was joined, and a verdict for the defendant.

Serjeant *Eyre* moved to ſtay the judgment againſt the other defendant, ſince upon the whole record it appears the plaintiff has no cauſe of action. 1 *Inſt.* 125. *b.* *Salk.* 23. *Cro. Jac.* 134. 1 *Lev.* 63.

Et per curiam, Judgment was arreſted as to both.

Skipwith *verſ.* Green.

The tenant is not eſtopped by deſcribing lands in the leaſe. S.C. 3 Danv. 272.

IN covenant the plaintiff declares, that whereas he had demiſed to the defendant a houſe and ſeveral parcels of land, which are particularly deſcribed, ſome to be arable, ſome meadow, and ſome paſture, and eſpecially two meadows called *Laine*'s meadows, the defendant covenanted to pay 5 *l. per* acre for every acre of meadow which he ſhould plough up during the leaſe, and aſſigns the breach in ploughing up *Laine*'s meadow, *&c.* The defendant pleads, that for ſixty years paſt *Laine*'s meadow has been arable land, and by times ploughed up and ſowed, as the tenants thereof thought proper; and traverſes, that at the time of making the leaſe it was meadow ground, as is ſuppoſed in the declaration.

To this the plaintiff demurs; and it was objected by *Reeve*, that the leaſe being by indenture the defendant was eſtopped, to ſay that what is called meadow in the leaſe is of any other nature; and that though they had not replied the eſtoppel, it was the ſame thing now it came before the court upon a demurrer. And he cited *Paſ.* 4 *Ann. Kemp* v. *Gooday*, where in debt for rent the defendant was eſtopped from ſaying the plaintiff *nil habuit in tenementis*, it appearing that the leaſe was by indenture. And the ſame was ruled this term in the caſe of *Browne* v. *Hardwick*. L. Raym. 1154.

Sed per curiam, The indenture is to be conſtrued according to the intent of the parties, and here the intention was only to covenant againſt the ploughing up real meadow. Every body knows that in deeds of this nature the parcels are very often taken from former deeds, without regard to every alteration of the nature of the land: and it would be the hardeſt caſe in the world, that if this land has been arable at one time, and laid down at another, that the tenant ſhould be concluded by calling it by either of thoſe deſcriptions. This is not the eſſence of a deed, as what is ſtruck at by *nil habuit in tenementis*. It would be carrying of eſtoppels too far, ſhould we extend them to this caſe: therefore we are all of opinion, the defendant had a right to try the fact, whether it was ancient meadow or not. The conſequence of which is, that the plea is good, and the defendant muſt have judgment.

Welder *verſ.* Buckland.

Informality ill, on ſpecial demurrer.

SCIRE *Facias* againſt pledges in replevin, ſetting out a judgment for the avowant in *C. B. prout per recordum ibidem jam reſidens: quod quidem recordum coram nobis certis de cauſis venire fecimus*, where the judgment was affirmed. The defendant demurred, and ſhewed for cauſe, that it was incongruous to ſay that the record remains in *C. B.* and at the ſame time was removed to *B. R.* by writ of error.

Serjeant *Branthwayte* would have had it rejected as an unneceſſary averment, and then it would ſtand with only a right reference to the record remaining in *B. R.*

Sed per curiam, You cannot ſay but it is informal, and that is enough upon a ſpecial demurrer. The defendant muſt have judgment.

Dominus

Dominus Rex *verſ.* Chandler.

Indictment. S.C. L.Raym. 1368.

INDICTMENT for ſecreting a woman big with an illegitimate child, ſo that ſhe could not be had to give evidence about the father. The defendant demurred. *Et per curiam*, Judgment for the defendant, for it cannot be illegitimate before born, there being always a poſſibility that it may be born in lawful wedlock.

Eaſt-India Company *verſ.* Glover.

Eadem *verſ.* Lutman et al'.

Suffering judgment to go by default is an admiſſion of the contract declared on.

THE plaintiffs declared upon a ſale of coffee at ſo much *per* hundred, which the defendant was to take away by ſuch a time, or anſwer in damages. There was judgment by default, and on executing a writ of inquiry before Chief Juſtice *Pratt* at *Guildhall*, he refuſed to let the defendant in to give evidence of fraud on the ſide of the plaintiffs at the ſale, becauſe he ſaid the defendant had admitted the contract to be as the plaintiff had declared, by ſuffering judgment by default, inſtead of pleading *non aſſumpſit*; and now they were only upon the *quantum* of damages.

The Dutch Weſt-India Company *againſt* Jacob Senior Henriques van Moſes. In C. B.

Dutch Weſt-India company ſue for money in *England* which was borrowed at *Amſterdam*, and when it was payable in Bank there. And have judgment. S.C. L.Raym. 1532.

ONE borrowed money of the *Dutch Weſt-India* company, which he by articles covenanted to pay *in Bank at Amſterdam*. *The Dutch Weſt-India company* ſued thoſe articles here in *England*, and called themſelves *Generalis ſocietas Belgica privilegiata ad Indos occidentales negotiandum*, and laid the articles to be made at *Amſterdam* in *Holland*, *viz. apud London in parochia ſanctae Mariae de arcubus in warda de Cheap.*

Upon the trial it appeared, the money was borrowed at *Amſterdam* in *Holland*, and by the covenant was to be paid in *Bank* there: and that this company had never ſued by this name before, or ever had any particular name given them by any act of the States; but upon the diſſolution of an old *Weſt-India* company, it was declared, that there ſhould be ſtill a general *Weſt-India* company, the members of which ſhould be privileged to trade to the *Weſt-Indies*, and that all others ſhould be prohibited.

Note;

Note; The jury found, that this was the ſame company that lent the money.

Upon the trial at *niſi prius* before *King* C. J. two points were reſerved for the conſideration of the court: 1. Whether theſe articles could be ſued in *England*. 2. Whether this was a good name for the company to ſue by.

Cheſhyre Serjeant for the defendant agreed, that where a covenant is made beyond ſea, and is to be performed here, or *e converſo*, an action may be well brought upon ſuch covenant in *England*: but when a covenant is made beyond ſea, and is to be performed there, it cannot be tried here, becauſe there is no place from whence the *venue* ſhall come, nor can our Judges be informed of the law of that country: and this is reſolved in *Dowdal*'s caſe, 6 *Co.* 47. *b.* It hath been always held, that if a bond be ſaid to be made at *Bourdeaux in Regno Franciae*, it wants trial at our law; and whether it ariſes upon the evidence, or appears upon the pleading, is not material. *Lutw.* 950. Treſpaſs done at *Fort St. George in partibus tranſmarinis*, is not triable here. Lord Chief Juſtice *Vaughan* in his treatiſe of *Wales* ſays, if a bond be made in *Wales*, *Ireland*, or *Scotland*, it cannot be tried in *England*. The covenant in the preſent caſe, appoints the money to be paid at *Amſterdam*, and therefore cannot be performed in any other place, and the defendant cannot oblige the plaintiffs to accept the money here, but is confined to pay it in *Holland*.

As to the ſecond point, whether this be a good name for the company to ſue by, I apprehend it is not a ſufficient name: for this corporation never having any particular name given them, are not enabled to ſue even in *Holland*, much leſs in *England*. Corporations made by act of Parliament are to be taken notice of; but when private corporations ſue, they muſt produce their charter or grant by which they are conſtituted, and ſhew to the court that they have a name and a capacity to ſue. And he ſaid that the name by which the plaintiffs were called in the declaration, was different from the common name that they are known by.

Pengelly Serjeant *contra*. This is an action brought for the loan of money, which is a thing clearly tranſitory and perſonal; and in ſuch a caſe the defendant is a debtor, wherever he goes, and may be ſued wherever he can be found. I admit that where it appears from the party's own ſhewing, that the bond was made at *B. in Regno Franciae*, that the court here is ouſted of juriſdiction; but in this caſe the covenant is ſaid to be *apud Amſterdam in London in parochia*, *&c.* and it being not traverſable, the court hath a

ſufficient juriſdiction. It is the common practice to bring actions here upon bills drawn in *Holland* payable in *France* and aſſigned to *Dutch* merchants. An action was brought upon a bond which appeared to be dated at *St. David*'s in the *Eaſt-Indies*; and it was reſolved, that if it had been laid in the declaration to have been made at *St. David*'s in the *Eaſt-Indies*, *viz. in London in parochia*, *&c.* it had been ſufficient, and ſuable here. In *Trin.* 7 *Ann. in B. R.* an action of trover was brought for timber cut in *Ireland*; and it was objected, it could not be tried here, becauſe title of land would come in queſtion: But *per Holt* C. J. *et totam curiam*, This action being merely tranſitory, may be ſued any where.
Salk. 290. This was the caſe of *Brown* v. *Hedges*, *Trin.* 1708. *Vide Styles* 331. *Rogers* v. *Done*. And to this point a caſe was cited by *Dormer* J. where *William Penn* was ſued here for rent, upon a leaſe of lands in *Penſilvania*; and it was adjudged the action well lay.

To the ſecond point *Pengelly* ſaid, Though the company had no certain name given them by any act of the States, yet they may collect a name by reputation from their buſineſs; and being always known by that name, may be well ſued by it. He cited the caſe of *Queen's College Oxford*, 11 *Co.* 19, 20, 21. That college had no name given them at their foundation, but having received their foundation, and ſeveral other benefactions from the Queen, they collected by reputation the name of *Queen's College*, by which name they ſue and are ſued. *Hab.* 122, 124. And this preſent caſe is the ſtronger, becauſe there is not any other company that pretends to uſe this name that the plaintiffs ſue by, and they are found by the verdict to be the ſame perſons who lent the money. If a particular name be given to a corporation, and in ſuing, when their name is turned into *Latin*, though there be ſome circumlocution in naming them; yet if it appear to be the ſame corporation, it is ſufficient. So in an information for words, or for a libel, if the words or libel be ſet forth in *Latin*, for the very words need not be ſet forth, the jury may find the defendant guilty of thoſe words.

Per totam curiam, The action is well brought: and they were all of opinion for the company in both points. And the judgment was affirmed in *B. R.* and in Parliament.

Wyvil *verſ.* Stapleton.

Shelburne *verſ.* Eundem.

ERROR of a judgment in *C. B.* in debt, wherein the plaintiff declares, that by writing between him and the defendant it was agreed, that the plaintiff ſhould upon payment or tender of 1360 *l.* by the defendant on or before the day of ſhutting of the books, transfer to him 200 *l. South-Sea* ſtock; in conſideration whereof the defendant agreed, that he would on or before the ſhutting of the books accept the ſtock, and *would then* pay for the ſame; with a proviſo to enable the plaintiff to ſell it out, if the defendant did not accept it: then the plaintiff avers that he was at the *South-Sea-houſe* the day of ſhutting the books, and then offered to transfer; but the defendant did not appear, whereupon he ſold out the ſtock, and brings his action for the deficiency. The defendant pleads a feoffment in ſatisfaction, and on demurrer judgment is given in *C. B.* that the plea is good; *ideo querens nil capiat per billam.*

A feoffment is not pleadable in ſatisfaction of a ſpecialty.

It was agreed on all hands that the plea was bad, ſo that the reaſon on which the court below founded their judgment was not right; but whether upon the whole record the judgment was not warranted was a queſtion.

Reeve objected to the declaration, that the plaintiff had ſhewed no cauſe of action, for that the covenant to pay was only on acceptance, and here was only a tender (and that inſufficiently alleged) but no acceptance. The defendant covenants to accept on or before the ſhutting the books, and *then* (that is) upon ſuch acceptance to pay.

Fazakerley contra inſiſted, they were mutual covenants; or if not, yet the plea of a feoffment in ſatisfaction admits every thing neceſſary to entitle the plaintiff to be ſatisfied. *Cro. Car.* 384. 1 *Vent.* 114, 126. *Hob.* 233, 198. 2 *Saund.* 180. 1 *Sid.* 466. *Show.* 213.

Chief Juſtice. I think the judgment of *C. B.* ought to be reverſed. The conſtruction the defendant puts upon this covenant is a very ſtrange one, for it is no leſs than to diſcharge himſelf of one covenant by the breach of the other: it is true, ſays he, I did not accept the ſtock as I ought to have done, and therefore I am diſcharged from the payment of the money. This is ſo harſh, that

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if any fairer conſtruction can be made of it, I am ſure it ought. Now I think the natural import of it to be, that *then* ſhould not relate to the actual acceptance, but only to the time at which he covenants to accept. If ſo, then as theſe are mutual covenants, the breach is well alleged in non-payment of the money, and if the plaintiff has failed on his part, it will be no excuſe here, becauſe the defendant has his action to right himſelf. *Powys* J. *accord'*.

Eyre Juſtice. This not being an action for the whole money, but only for the deficiency, I take it the mutual remedy is gone. And if ſo, then a tender and refuſal are neceſſary to be averred, to entitle the plaintiff to ſell out the ſtock. This is not a ſufficient tender, either as to time or place; as to the time, if nothing be ſhewn to the contrary, the laſt part of the day is what the law appoints, and the plaintiff is deficient in that; and as to the place, it ſhould have been averred, that the *South-Sea-houſe* is the proper place, for we cannot take notice of it. *Lancaſhire* v. *Killingworth*, (*Salk.* 623.) entered *Trin.* 12 *W.* 3. *rot.* 369. *Shales* v. *Seignoret*, *intr. Paſch.* 10 *W.* 3. *rot.* 115. and adjudged *Paſch.* 11 *W.* 3. *Lutw.* 516.

Forteſcue Juſtice. If it be neceſſary to aver a tender, this is certainly naught; but I am not clear that there is any occaſion for it. I think the payment is ſo far from being to be ſubſequent to, or upon the acceptance, that it is the very firſt act to be done according to this contract, which is, that the plaintiff ſhall *upon* paying transfer, and the *adtunc* refers to that time. *Per cur' ulterius concil'*.

A covenant to pay *upon transferring* is mutual.

And *Mich.* 11 *Geo.* it was argued a ſecond time by Serjeant *Pengelly* for the plaintiff, and Serjeant *Comyns* for the defendant; and the court kept them to the point of the mutual covenants, declaring that the tender and the pleading over were both to be laid out of the caſe.

Serjeant *Pengelly* inſiſted, that the firſt act was to be done by the defendant, the covenant on the plaintiff's part being only *upon payment or tender to transfer*, and then comes the clauſe for the defendant to accept and pay, and the proviſo to ſell out is on any default of the defendant.

Serjeant *Comyns contra* inſiſted, that in the nature of the thing there muſt be ſomething done on the part of the plaintiff, at leaſt he ought to be there, and ready to transfer; and wherever the defendant's act depends upon an act to be done by the plaintiff, it is not enough to ſay they are mutual covenants.

Adjournatur. And in a few days the Chief Juſtice delivered the reſolution of the court. The objection is, that the plaintiff ſhould have done the firſt act by transferring, or tendering at leaſt, elſe how could the defendant *adtunc accipere et ſolvere proinde.* This depends upon the wording of the indenture and the intent of the parties. It could never be the intention to make the payment depend upon the defendant's own acceptance. *Adtunc* is the time mentioned for the transfer, not the act of transferring, and it would be unreaſonable to oblige the plaintiff to part with the ſtock firſt, ſince every body knows that was not the nature of theſe agreements. The money is not to be paid as the conſideration of a transfer, but of the covenant to transfer; and the true conſideration in this caſe is the remedy, which the defendant has upon the covenant to transfer. We are all of opinion that theſe are mutual covenants, and therefore though there is no tender ſufficiently alleged, yet the declaration is well enough. And the judgment below being for the defendant, when it ſhould have been for the plaintiff, it is erroneous, and ought to be reverſed. We accordingly reverſe it, and give judgment for the plaintiff.

N. B. This judgment of reverſal was afterwards reverſed in Parliament, and the judgment of *C. B.* ſet up again.

Afterwards the court was moved for their direction to the Maſter in taxing the coſts, the plaintiff inſiſting on full coſts to this time, the ſtatute of *Glouceſter*, 2 *Inſt.* 288. extending to all coſts conſequent upon the ſuit.

Sed per curiam: At common law there were no coſts upon any writ of error, and 3 *H.* 7. *c.* 10. and 8 *W.* 3. *c.* 11. extend only to the caſe of affirmance of a judgment, and that very reaſonably; for why ſhould any man in the caſe of a reverſal pay coſts for the error of the court below? We are in this caſe to give ſuch judgment as the court below ſhould have given, that is judgment for the plaintiff, with his coſts to that time. They could have no conſideration of the coſts upon the writ of error, and therefore let the maſter tax the plaintiff ſuch coſts as he would have been intitled to in the court below; but as to coſts upon the writ of error in this court, he can have none.

No coſts on reverſing judgments.

Aſton *verſ.* Blagrave.

THE plaintiff declared, that he was a juſtice of peace, and that upon a *colloquium* of him and the execution of his office, the defendant ſaid, "You are a raſcal, a villain, and a liar.

Words of a magiſtrate, where actionable. S. C. Ld. Raym. 1369.

After verdict for the plaintiff it was moved in arreſt of judgment, that theſe words are not actionable.

Cheſhyre Serjeant *pro quer'*. There is a great difference between magiſtrates and common tradeſmen: words of the latter muſt affect them in their particular way of dealing, but any thing that tends to impeach the credit of the former is actionable. A juſtice of peace is ſworn to do his duty. What can be worſe than to call a man a villain? An action lay for claiming a man as a villain, *Keilw.* 34. And the pillory we call a villainous judgment. The word *liar* does not ſignify a ſingle erring from the truth, but denotes a habit of lying. It is actionable to ſay of a tradeſman, "He keeps falſe books."

Reeve. It muſt be taken now that the words were ſpoken in relation to his office, which will much aggravate the matter. I agree, theſe words ſpoken of a common perſon would not be actionable; but the diſtinction between magiſtrates and others has been often allowed. *Mo.* 243. *Cro. Car.* 199. 1 *Vent.* 50. 1 *Sid.* 432. 1 *Lev.* 280. 2 *Cro.* 223. *Cro. Car.* 14. Words that are actionable will not be indictable, unleſs they tend to a breach of the peace; but though not indictable, yet they may be actionable. *Mich.* 4 *Ann. B. R. Regina* v. *Soley* (mentioned in the caſe of *Regina* v. *Wrightſon*, *Salk.* 698.) "Mr. *Soley* is not fit to be a juſtice, "for if a cauſe comes before him he'll give it right or wrong for "Mr. *G.*" were held not indictable, but yet no body will ſay that they are not actionable.

Girdler contra. In *Show. Parl. Caſes* 12. amongſt others the word *liar* is mentioned as not actionable; and the principal caſe there was words of a juſtice, *You are diſaffected to the government*, and held no action lay. As to *villain* and *raſcal*, they likewiſe are not actionable. 2 *Cro.* 58. *Yelv.* 64. 4 *Co.* 15. *a.* 2 *Ed.* 4. 4. *b. Mar.* 82. *Goldſ.* 115. 4 *Co.* 16. *a. Mo.* 418. 1 *Roll. Abr.* 57. *pl.* 30. 1 *Vent.* 258. *Salk.* 696. *Hob.* 117. *Cro. Jac.* 90. *Hardr.* 501. 2 *Cro.* 196. 1 *Lev.* 277, 148.

Reeve. In many of thoſe caſes there was no *colloquium* of the office, and the words were capable of a good as well as a bad ſenſe, which theſe are not.

Curia adviſare vult. And this term the Chief Juſtice delivered the opinion of the court, That though *raſcal* and *villain* were uncertain, yet being joined with *liar*, and ſpoken of a juſtice of peace, they did import a charge of acting corruptly and partially, and therefore there ought to be judgment for the plaintiff.

Hilary

Hilary Term

11 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Juſtice.*
Sir Littleton Powys, *Knt.*
Sir John Forteſcue Aland, *Knt.* } *Juſtices.*
Sir Robert Raymond, *Knt.*
Sir Philip Yorke, *Knt. Attorney General.*
Sir Clement Wearg, *Knt. Solicitor General.*

Memorandum: Mr. Juſtice *Raymond* was abſent all this Term, being one of the Commiſſioners of the Great Seal.

Whitechurch *verſ.* Whitechurch.

In Canc' coram Gilbert *et* Raymond.

SIR *Jeffery Gilbert*, one of the Commiſſioners of the Great Seal, delivered the reſolution of the court.

Where the owner of the fee with a term to attend the inheritance, makes an incompleat deviſe to carry the inheritance, it ſhall not be ſet up in equity as a deviſe of the term. S. C. 2 Will. 236.

The lands in queſtion were mortgaged to *Edward Whitechurch* for a term of five hundred years, and upon advancement of a further ſum of money, another term of two thouſand years, from the expiration of the firſt term, was made to truſtees, in truſt for the ſaid *Edward Whitechurch*; after this *Edward Whitechurch* bought in the inheritance of the mortgagor.

Edward

Edward Whitechurch being ſo poſſeſſed of both the ſaid terms, and of the inheritance of the ſaid lands, he wrote his will with his own hand, and deviſed theſe lands to *William Whitechurch* his younger brother for life, remainder to *Edward Whitechurch* his nephew in tail, with divers remainders over. But this will was never ſigned or executed in the preſence of three witneſſes, as is requiſite by the ſtatute 29 *Car.* 2. *c.* 3.

It is plain by this will the teſtator intended to paſs an eſtate-tail to *Edward Whitechurch*, which he had power to do by the ſtatute 32 *Hen.* 8. *c.* 1. But by the 29 *Car.* 2. *c.* 3. "That all deviſes "of any lands and tenements deviſeable, *&c.* ſhall be in writing, "and ſigned by the party ſo deviſing the ſame, or by ſome other "perſon in his preſence, and by his expreſs direction, and ſhall be "atteſted and ſubſcribed in the preſence of the ſaid deviſor, by three "or four credible witneſſes; or elſe they ſhall be utterly void and "of none effect." So that where this ſolemnity is wanting, the ſtatute makes ſuch deviſe of lands utterly void. But in this caſe the deviſor had a term of years in him. Now though a term for years be within the words of the ſtatute, yet the ſtatute doth not extend to it, for the term would have gone to the executors, had it been undeviſed, and it never was the intent of the ſtatute to take any thing out of the hands of the executors: but where the will comes to derogate from the intereſt of the heir, for whoſe ſecurity, among other things, the ſtatute was made, there the will ought to have the ſolemnity of the ſtatute.

It will be ſaid, that if this will cannot paſs the inheritance, yet the teſtator intended ſomething ſhould paſs by this deviſe; therefore the term ſhall paſs, for which the ſolemnity of the ſtatute is not requiſite.

But when the teſtator had the inheritance in him, and deſigned to paſs it as ſuch by this deviſe; nothing elſe ſhall paſs but what he intended. Beſides, the will was not compleat, but under deliberation; and whilſt it was ſuch, you cannot conſtrue that will ſo as to paſs any other intereſt in the mean time, till ſuch time as he had perfected it; and therefore this being a will *in fieri*, a court of equity will not carry it further than the teſtator himſelf has done.

And in this caſe there is to be no argument made from the dominion and intent of the teſtator, for the intent of the ſtatute was to reſtrain the exerciſe of his dominion: and this ſtatute has always had a large conſtruction, in order to remedy thoſe miſchiefs, which it was deſigned to prevent, and therefore it extends to all eſtates of

freehold. For ever ſince the 32 *H.* 8. by which lands are made deviſable, great inconveniencies were found in the deviſing of eſtates, for want of a ſolemnity. And in the making of this ſtatute, which was contrived by the Lord Chief Juſtice *Hale*, and the moſt learned men of that time, they went upon the foot of the old *Roman* law, by which at firſt ſeven witneſſes were neceſſary to a deviſe of lands, but afterwards they were reduced to three, the number which this ſtatute requires: and ſince this ſtatute was made with ſo much care and caution, to prevent thoſe inconveniencies, which attended the common way of deviſing eſtates before, it ought to be ſtrictly purſued, and no relief be given in a court of equity where any part of this ſolemnity is wanting. Therefore in this caſe nothing ſhall paſs by the deviſe, but the inheritance ſhall go to the heir, and the terms muſt attend it. The decree of the Maſter of the Rolls was confirmed.

Dominus Rex *verſ.* Hulſton.

THE court granted an information in nature of a *quo warranto* againſt the defendant for exerciſing the office of ſteward of a court leet; but ſaid they would not grant it in the caſe of a court baron, that being only a private right, and no court of record.

Quo warranto lies againſt ſteward of a court leet.

Strong *verſ.* Howe.

MR. *Strong* who had a mortgage on the eſtate of Mr. *Howe*, had depoſited the writings in the hands of his counſel, who upon a propoſal to pay the money delivered the writings to Mr. *Howe*'s brother, who was an attorney, and took a receipt from him to re-deliver them upon demand. Mr. *Howe* the attorney intruſted them with the mortgagor, who immediately took up 200 *l.* and left the writings as a pledge, without the privity of his brother. And now upon motion againſt the attorney the court made a rule on him to re-deliver the writings at his peril, otherwiſe an attachment: for they ſaid, they would oblige all attornies to perform their truſt, and how hard ſoever this might be as between him and his brother, yet between him and Mr. *Strong* it ſtood only upon the note, by which he had engaged to return the writings in all events.

Attorney ordered by rule to deliver writings.

Amyon *verſ.* Shore.

IN aſſault it was once well laid, but then went on with a *cumque etiam*, and laid another aſſault: there were intire damages: and it was moved in arreſt of judgment, that the laſt aſſault was not poſitively

Cumque etiam in treſpaſs ill.

poſitively charged, but only by way of recital. *Lee contra* would have had the court conſtrued *cumque* as *moreover:* but they ſaid it had been always taken only as a recital in theſe declarations; ſo the judgment was arreſted.

Dominus Rex *verſ.* Inhabitantes paroch' ſancti Gregorii in villa de Sudbury in com' Suffolk.

Noctanter.

UPON ſearch of precedents, and oppoſition by the clerks of the plea ſide, it was held, that proceedings upon a *noctanter* muſt be of the crown ſide.

Martin *verſ.* Pritchard.

Payment before the day, how to be replied to.

ERROR of a judgment in *C. B.* in debt upon bond: on the *oyer* the condition appeared to be for the payment of 100 *l.* and intereſt on 5 *December* 9 *Geo.* and the defendant pleads, that before purchaſing the original, *ſcilicet* 1 *December* 9 *Geo.* he paid the principal and intereſt. The plaintiff replies *non ſolvit modo et forma*, and on demurrer judgment is given for the plaintiff.

Strange pro quer' in errore objected, that the iſſue upon payment before the day was immaterial; and cited the caſe of *Merril* v. *Jocelyn in B. R. Trin.* 13 *Ann.* where on the like iſſue a verdict was found for the plaintiff, and the judgment reverſed.

But the court took a difference between the two caſes. The preſent caſe being pleaded as a payment with intereſt, it muſt be taken as a plea upon the act for amendment of the law, and then the day is not material, the only point upon that ſtatute being whether it was paid before bringing the action.

To this it was anſwered by Mr. *Strange*, that the act for amendment of the law was not applicable to this caſe, the act only giving a plea of payment *after* the day, when the defendant had broke the condition. And as to the intereſt, he ſaid it ought to be ſo pleaded even in the caſe of payment *before* the day, becauſe the bond carries intereſt from the date.

But notwithſtanding this (*Powys* and *Forteſcue* Juſtices being only in court) the judgment was affirmed. *Quaere?*

Eaſter Term

11 Georgii Regis. In B. R.

Sir Robert Raymond, *Knt. Lord Chief Juſtice.*
Sir Littleton Powys, *Knt.*
Sir John Forteſcue Aland, *Knt.* } *Juſtices.*
James Reynolds, *Eſq;*
Sir Philip Yorke, *Knt. Attorney General.*
Sir Clement Wearg, *Knt. Solicitor General.*

Dominus Rex *verſ.* Weſton et al'.

INDICTMENT againſt ſix jointly and ſeverally for exerciſing a trade: quaſhed, becauſe there ought to be diſtinct indictments. 2 *Roll. Abr.* 81. *pl.* 6.

Cannot indict two perſons together for diſtinct offences.

Stead *verſ.* Lateward.

UPON conſideration the court held, that there muſt be the ſame notice given of executing a *ſcire fieri* inquiry, as in the caſe of a common writ of inquiry; and ſaid it had been ſo ruled formerly, *Mich.* 12 *Ann. Crawley* v. *Hayward.*

Practice. L. Raym. 1382.

Clarke *verſ.* Othery.

No more coſts than damages.

IN treſpaſs aſſault and battery on the plaintiff the declaration went on, *necnon inſult' fecit* upon the horſe of the plaintiff. Verdict *pro quer'* and 20 *s.* damages; and it was moved to have full coſts on account of the ſpecial matter about the horſe; but refuſed upon conſideration, and the plaintiff had no more coſts than damages.

Dominus Rex *verſ.* Epiſcopum Ceſtriens'.

A deed is good though executed before ſtamped.

UPON a writ of error out of the county palatine of *Lancaſter*, it appeared upon a bill of exceptions, that a patent produced in evidence was not duly ſtamped at the time of ſealing, or at the time that it was firſt produced; and the whole court were of opinion, it was proper evidence, being ſtamped at the time it was produced on the trial; for they ſaid the act never intended to avoid deeds that were not ſtamped, but only to add a penalty to enforce the duty, and here the penalty had been paid. Judgment affirmed.

Phillybrown *verſ.* Ryland.

In action for being excluded from the veſtry room muſt ſhew the pariſh had a right to meet there. L. Raym. 1388.

THE plaintiff brought a ſpecial action upon the caſe for excluding him from the veſtry room, and upon demurrer the court made no difficulty, but that ſuch an action was maintainable: however in this caſe they gave judgment for the defendant, it not being averred that the pariſh had any property in this room, or right to meet there, ſo that for ought appears it might be defendant's own houſe, and then he might let in whom he pleaſed, and refuſe the reſt: and this was a fault in ſubſtance, and needed not be ſhewn for cauſe of demurrer.

Dominus Rex *verſ.* Wilkins.

Practice.

PER curiam, Attachments for a reſcue muſt be made returnable at a general return, though the original proceſs was at a day certain.

Foot

Foot *verſ.* Prowſe Major' de Truro.

THE mayor was to be choſen out of the aldermen, who are *annuatim eligend'*: the fact on a trial at bar was, that the aldermen preſent at his election had been in ſeveral years, and had none of them been re-elected within a year. On a bill of exceptions, the court was of opinion, that the election of the mayor was void for want of an annual election of the aldermen. But upon error in the Exchequer Chamber, and two ſolemn arguments, the judgment was reverſed: and it was held, that the words *annuatim eligend'* were only directory, and that an annual election of them was not neceſſary to make an election in their preſence good: and *King* C. J. *de C. B.* who delivered the opinion of the court, compared it to the caſe of a conſtable and other annual officers, who are good officers after the year is out, until another is elected and ſworn. The reverſal affirmed in Parliament.

Annual officers continue till another is choſen.

Kent *verſ.* Kerry.

ERROR of a judgment in *C. B.* in dower, *de tertia parte* of three houſes and a tenement. Judgment for the demandant, but reverſed; becauſe it does not lie of a tenement. 2 *Cro.* 125, 621.

Dower lies not of a tenement. L Raym. 1384.

Dominus Rex *verſ.* Hearle.

MANDAMUS to ſwear in one *Pender*, mayor of *Penryn*: return, that an information in the nature of a *quo warranto* was exhibited againſt him, to ſhew by what authority he exerciſed the office of mayor, whereon two iſſues were joined, one whether he was duly elected, and the other whether he was duly ſworn: the firſt iſſue was found for the defendant, and the ſecond for the King, whereupon judgment of *ouſter* was given againſt him; and becauſe he was never ſince elected mayor, he cannot now ſwear him in according to the command of the writ.

Mandamus lies not to ſwear one who has had judgment on an information againſt him for an uſurpation.

Huſſey pro quer'. The queſtion is, whether after this judgment of *ouſter* he be intitled to a *mandamus*, to ſwear him in, in conſequence of his precedent election. And I ſhall inſiſt, that though he was juſtly puniſhable for acting before he was ſworn; yet his election was not ſo totally done away, but that it ſtill ſubſiſted.

The nature of this corporation appears upon the writ and return to be, that no particular time is appointed for the ſwearing, and that he is to hold over; ſo it is no objection that the year is out. It muſt be agreed he had once a right to be ſworn, this writ gives him no right; he is ſtill liable to be proſecuted, if the firſt election be gone. It is therefore proper to be determined upon a new information after he is ſworn, rather than to refuſe to put him in a capacity to aſſert his right. The return admits the truth of our ſuggeſtion in the writ, that *Pender* was duly elected, and has not been ſworn: will it not be hard to ſay, that becauſe he once acted before he was ſworn, therefore for the future he ſhall never act at all? He confeſſes he did wrong to act before ſwearing, and ſubmits to be puniſhed as an uſurper for ſo doing; but now ſays he I am convinced of my error, and am deſirous of conforming my ſelf to the rules of law for the future. He had a right to the office before he was ſworn, though he had not a right to act; he does not forfeit the office by acting, but ſubjects himſelf to puniſhment.

Beſides it is conſiderable, whether his acting can forfeit the intereſt which the corporation have in this election; for it appears upon the return, that if this election be gone, the corporation (as the law now ſtands) is gone alſo; this being an election upon a death, ſo as there is no predeceſſor to hold over. *Old N. B.* 170. 1 *Sid.* 54, 86. 2 *Inſt.* 282. 9 *Co.* 28. *Raſt.* 540.

The judgment upon an information is not final as to the right, though in a writ of *quo warranto* it is. 1 *Sid.* 54. 1 *Inſt.* 293. The judgment here is not that the franchiſe ſhall be ſeized into the King's hands.

This man muſt be conſidered as one that got into poſſeſſion before his time. If a copyholder enters before admittance, the lord may turn him out; but does any body think he is not intitled to be re-admitted? A feoffee enters before livery, but is not he capable of livery afterwards? *Lit.* § 70. 1 *Inſt.* 56, 57.

Chapple Serjeant *contra.* We confeſs the election, and avoid it: we ſay you were once intitled to the office, but you were guilty of an uſurpation, and were excluded upon that account: the words of the judgment are, that in the ſaid office *nullo modo ſe intromittat, ſed penitus abjudicetur et excludatur.* Can any words be ſtronger to deſtroy the firſt election than theſe? Even in a writ of *quo warranto* they are not. *Raſt.* 540. *Co. Ent.* 527, 537, 540, 559. As he does not pretend to any new right, we ſay he can have no *mandamus* to be ſworn into this office.

5 *Curia*

Curia adviſare vult. And this term, Mr. Juſtice *Reynolds* being come into court ſince the argument of this cauſe, the counſel were directed to repeat what they had before offered; and then the court delivered their opinions.

C. J. The party certainly comes in time for this *mandamus*, though the year is out, it appearing that he is intitled to hold over, and that no other perſon hath been ſince elected into this office. I think the judgment on the information was right, for he then appeared to us as an uſurper, and we puniſhed him as ſuch; and I believe no precedent can be ſhewn where in theſe informations the judgment was ever entered in any other manner. If the judgment is right, we muſt give the words of it their full latitude: they import an abſolute excluſion from the office, and are we to intend a *quouſque* in any caſe? or are not the words of this judgment as ſtrong as the caſe of a corporate amotion? It ſeems to me that the election is done away, and that unleſs there had been a new election ſince the judgment, the party is not intitled to this *mandamus*. *Powys* J. *accord'*.

Forteſcue J. A *quo warranto* is the King's writ of right, and as againſt the crown want of ſwearing is as much as want of an election: the jury therefore have found in effect, that he had no title to this office, and then of courſe he is to be excluded from it by our judgment. I never heard of any other judgment, nor can any thing be more reaſonable, than to exclude him who appears to have no title. Where the franchiſe claimed is ſuch as may ſubſiſt in the crown, the judgment is to ſeize it into the King's hands, but where (as in this caſe) it cannot be exerciſed by the crown, the judgment is only to exclude the party. This judgment is as ſtrong as a forfeiture or amotion. We have expreſly adjudged, that he ſhall never take upon him this office, and therefore it would be abſurd for us to command him to be ſworn in conſequence of a right prior to our judgment. If a man who has one right, claims that in a manner different from his grant, he loſes even the right granted; as in 2 *H.* 7. 11. where one had a grant of a fair for one day, and he claimed it as a grant for two; the judgment is that he ſhall loſe his fair, and that grant could never be ſet up again.

Reynolds J. I ſhould have had ſome difficulty in giving this judgment, had I been in court when it was pronounced, for I know of no certain form of words in judgments, but every judgment may and ought to vary according to the circumſtances of the

the caſe: and it is no new thing to meet with judgments that are only *quouſque*, as I think this might have been. But whatever my opinion might be in that caſe, yet in the preſent caſe I muſt concur with my brothers, becauſe I am bound to take and conſider this as a judgment; and whether he ſhould have been barred or not is not material, ſince in fact he is barred, and will be ſo, till that judgment is reverſed by writ of error. *Per curiam*, The return muſt be allowed.

On error in Parliament adjudged that error does not lie, and the writ quaſhed.

Trinity Term

11 Georgii Regis. In B. R.

Sir Robert Raymond, *Knt. Lord Chief Juſtice.*
Sir Littleton Powys, *Knt.*
Sir John Forteſcue Aland, *Knt.* } *Juſtices.*
James Reynolds, *Eſq;*
Sir Philip Yorke, *Knt. Attorney General.*
Sir Clement Wearg, *Knt. Solicitor General.*

Morris *verſ.* Lee.

THE plaintiff declares, that the defendant made a promiſſory note under his hand, whereby he promiſed to be accountable to the plaintiff or order for 100 *l.* value received, and counts upon the ſtatute.

Note to be accountable for money is within the ſtatute. L. Raym. 1396.

After verdict for the plaintiff it was moved in arreſt of judgment, that this was not within the ſtatute, and that the diſtinction had always held between negotiable and accountable notes: that no note was negotiable, that was not for the payment of money abſolutely, according to the caſes of *Appleby* v. *Biddle*, and *Smith* v. *Boheme*, whereas the defendant in this caſe might diſcharge himſelf by payment of the plaintiff's debts or otherwiſe.

Sed per curiam, There are no preciſe words requiſite to make a promiſſory note: it is enough if it may be brought within the intention

tention of the act. This is for value received, and he makes himself accountable to the order; a fourth or fifth indorsee can settle no account with him, therefore we must take the word *accountable* as much as if it had been *pay*, and the plaintiff must have judgment. *Quaere tamen.*

Dominus Rex *verſ.* Inhabitantes St. Leonard Shoreditch.

Pariſh rates.

ON a ſpecial order for a ſcavenger's rate, it was ſtated, that in the pariſh there were three diviſions, and this rate was made for one only, but that in this diviſion there were no churchwardens or overſeers reſiding, though the pariſh at large had ſuch officers. At the ſeſſions this rate was quaſhed, on account that there ought to have been a general rate for the whole pariſh: and now upon bringing all orders before the court it was offered in ſupport of the firſt order, that the 2 & 3 *W. & M. ſt.* 2. *c.* 8. had the word *place* as well as *pariſh*; and therefore a rate for the diviſion was good. *Sed per curiam*, Whatever it might have been in caſe the churchwardens and overſeers had reſided in this diviſion, yet this being made for a place that has no ſuch officers, can never be maintained. The ſeſſions therefore did right to quaſh the rate, and the order of ſeſſions muſt be confirmed.

Vaughan *verſ.* Evans.

Prohibition to a ſuit in *Wales* where the proceſs was ſerved out of the juriſdiction. L. Raym. 1408.

A Bill of foreclоſure was brought at the grand ſeſſions of *Montgomeryſhire*, and the *ſubpoena* was ſerved in *England* upon the defendant, he and the plaintiff having both eſtates within the juriſdiction, the mortgaged premiſſes lying there alſo. *Et per curiam*, A prohibition ought to go. They can ſerve no proceſs out of the juriſdiction: and though the court of Chancery here do ſend *ſubpoena's* to *Ireland* and *Scotland*, yet the right of doing ſo was never eſtabliſhed.

Forteſcue J. Said poſitively they could not do it, and cited *Hutt.* 59. *Cumber.* 468. A prohibition was granted.

Dominus Rex *verſ.* Venables.

Alehouſes. L. Raym. 1405.

THERE was an order for ſuppreſſing an alehouſe; and after that a ſecond order, reciting that he had ſince continued to ſell ale, and therefore committing him for three days, and till he finds ſureties not to ſell without licence.

It was moved to quaſh the laſt order for want of ſhewing a ſummons or appearance of the defendant; and *Salk.* 181. and the caſe of *The Queen* v. *Green*, 12 *Ann.* were cited. *Sed per curiam*, We will not preſume they acted unlawfully: a ſummons is certainly neceſſary, and the juſtice is puniſhable if he proceeds without: you never ſhew notice to the pariſh that is to be charged in orders of removal. The order was confirmed.

Dominus Rex *verſ.* Inhabitantes de King's Langley.

Child of two years old cannot be a vagrant.

AN order in nature of a paſs for a child of two years old as a vagrant was quaſhed; it not being of age ſufficient to commit an act of vagrancy within the intention of the ſtatute.

Hutton *verſ.* Stroubridge.

Practice.

ON the 2d of *June* (which was in *Trinity* term) the defendant brought a *habeas corpus*, and put in bail: the plaintiff did not proceed in that term, or in *Michaelmas* term, but in *Hilary* term delivered a declaration; and, upon my motion, the court held the defendant's attorney was not bound to accept it, though but a part of *Trinity* term elapſed after bringing the *habeas corpus*; ſo as there were not two whole terms.

Morfoot *verſ.* Chivers et ux'.

In a *ſcire facias* on a judgment recovered *by* an executor, the death of the teſtator need not be ſhewn. Ld. Raym. 1395.

SCIRE fieri inquiry againſt huſband and wife, as ſhe was executrix in her right, brought by the plaintiff as executrix, upon a judgment recovered by her on a bond to her teſtator. The defendants demurred, and ſhewed for cauſe, that it was not alleged in the *ſcire fieri* inquiry, that the teſtator of the plaintiff was dead. And *Martin pro defendente* inſiſted, that though this might perhaps be well enough upon a general demurrer, yet ſurely it was informal, and would be ill upon a ſpecial demurrer, which was this caſe.

Strange contra. In a common *ſcire facias* by an executor to revive a judgment recovered by the teſtator, it may perhaps be neceſſary to ſhew him to be dead, becauſe that is the firſt act or proceſs after his death; but in this *ſcire facias*, which comes after a ſuit by the executrix, and wherein ſhe has recovered a judgment, which muſt be taken to be good, there is not the ſame neceſſity: it may as well be expected to be repeated in every proceſs, which

was

was never done. When the executrix firſt comes into court, ſhe muſt ſhew herſelf to be compleatly ſo; but when ſhe has once done it (as it muſt here be taken ſhe has, elſe ſhe could not have had judgment *as executrix*) it will be to no purpoſe to repeat the ſame thing over again. In every declaration it is neceſſary to ſay the defendant is *in cuſtod' marr'*, to give this court a juriſdiction, but it is never taken notice of in the ſubſequent proceedings. In the firſt ſuit the defendants might have pleaded *ne unques executrix*, but not having done it at firſt, they have loſt the opportunity: if we had averred in this *ſcire facias* that the teſtator was dead, the defendants could not have been admitted to traverſe that ſuggeſtion, after a judgment againſt them at the ſuit of the plaintiff as executrix. In the caſe of the firſt proceſs after the death of the teſtator, they might traverſe that matter, and therefore it may be neceſſary to be ſhewn; but in this caſe they are too late to object any thing of that nature, and I ſubmit this as a good anſwer upon that diſtinction.

The court at firſt doubted upon the point of its being ſhewn for cauſe of demurrer, but ſaid afterwards there was nothing in the objection, and gave judgment for the plaintiff.

On error in Parliament the judgment was affirmed.

There was another exception that the ſheriff had returned, that the wife as well as the huſband had converted to her own uſe; but this was over-ruled on the authority of *Bellew* v. *Scott*, *ante* 440.

Writ of error ſued out before judgment is a *ſuperſedeas*.

The judgment was pronounced about one of the clock, and the plaintiff ſent immediately and put an officer into poſſeſſion of the defendant's goods, who had before ſued out a writ of error; and it ſtood equal before the court as to the point of time, whether the execution was firſt ſerved, or the writ of error firſt allowed. The court ſet aſide the execution, ſaying, that though not being ſerved with the allowance it was no contempt, yet in point of law it was a *ſuperſedeas* from the moment of pronouncing judgment.

39 Hen. 6. 50. a.

Bourne *verſ.* Turner.

Practice.

SERJEANT *Comyns* moved on affidavit, that the tenant in poſſeſſion was a material witneſs for the landlord, that therefore the landlord might be made a defendant in the room of the tenant in poſſeſſion.

Strange contra inſiſted it was never done, and it would not make him a witneſs when done. *Et per curiam*, He is liable for the *meſne* profits. The declaration is regularly delivered to the tenant in poſſeſſion

poſſeſſion: it was never done in this court, though Serjeant *Comyns* ſaid it had been done in *C. B.*

Clark *verſ.* Godfrey. In C. B.

IT was ſettled by the court on great conſultation, and delivered in a ſolemn reſolution by *Eyre* Chief Juſtice, that an attorney's bill muſt be delivered, on the 3 *Jac.* 1. *c.* 7. before any action brought; that ſo the client may have an opportunity of looking into it, before he is run to any farther expence. 2 *Geo.* 2. *c.* 23. §. 22. Practice in delivering attornies bills.

Shank qui tam *verſ.* Payne.

In Middleſex, coram Raymond, *Chief Juſtice.*

IN a *qui tam* on the ſtatute of uſury, the Chief Juſtice refuſed to let the party to the contract be a witneſs to prove the re-payment of the money, becauſe till that was proved he was no witneſs at all. *Strange pro defendente.* Party to uſurious contract cannot be called to prove payment.

Dominus Rex *verſ.* Azire. Ibidem.

ON indictment againſt the huſband for an aſſault upon the wife, the Chief Juſtice allowed her to be a good witneſs for the King, and cited Lord *Audley*'s caſe, *State Trials*, vol. 1. Wife witneſs againſt huſband.

Dominus Rex *verſ.* Fletcher. Ibidem.

TWO were indicted for an aſſault, one ſubmitted and was fined 1 *s.* and paid it: the other pleaded Not guilty, and upon the trial the Chief Juſtice allowed him to call the other defendant, the matter being now at an end as to him. Where one defendant is fined, he is a witneſs for the other.

Anonymous. In C. B.

TRESPASS *quare clauſum fregit et quendam taurum perſonae ignotae fugavit, per quod* the plaintiff's gooſberry buſhes were thrown down, *necnon quinque perticas, anglice* poles, *in eodem clauſo erectas, affixatas et exiſtentes fregit, laceravit et ſpoliavit:* verdict for the plaintiff, and a ſhilling damages. And on motion for full coſts the court held, that the words in this declaration did Where no more coſts than damages.

not import an actual aſportation, which muſt be an entire carrying away; and that the tearing and pulling up the poles was not ſuch an aſportation: that this was a caſe in which a certificate might have been made, becauſe the freehold might have been in queſtion. In debating this caſe, 2 *Vent.* 48. was cited, which was treſpaſs *quare clauſum fregit*, and putting ſtakes upon his ground, where it was held, that the plaintiff ſhould not have full coſts, but if any thing had been taken away, of how little value ſoever, it had been otherwiſe. The court did not ſeem ſatisfied with the caſe in 2 *Ven.* 215. which was treſpaſs *quare clauſum fregit*, and digging up and carrying away his trees; wherein it appeared upon the evidence, that the defendant had digged up ſeveral roots of the plaintiff's trees, and removed them to a place upon the ſame ground about two yards diſtance off; and upon a queſtion whether this was ſuch a carrying away as that the plaintiff ſhould have full coſts, or only coſts according to the ſtatute, *Pollexfen* and *Rokeby* were of opinion, that the plaintiff was to have full coſts, becauſe the roots were carried from the place where they were digged, though not removed off from the ground; but *Ventris* thought that it was not ſuch a taking as amounted to an aſportation; and to ſupport this opinion they relied on the caſe of *Franklin* v. *Jolland*, *Hil.* 8 *W.* 3. in *B. R.* which was treſpaſs for breaking and entering the plaintiff's cloſe, and eating his herbs, and for pulling up and throwing down three perches of hedge lately erected; and on a verdict for the plaintiff and 5 *s.* damages, he moved for coſts notwithſtanding the 22 & 23 *Car.* 2. becauſe there was an aſportation laid in the declaration, *viz.* pulling up and throwing down the hedge, which could not be done without ſome aſportation. But *per Holt et Curiam*, By aſportation is meant a carrying quite away, and not ſuch an aſportation as this; ſo the motion was denied.

Reynolds *verſ.* Clarke.

Trin. 8 Geo. rot. 474.

Where it muſt be treſpaſs, and where caſe. Ld. Raym. 1399.

TRESPASS for entering the plaintiff's yard, and fixing a ſpout there, *per quod* the water came into the yard and rotted the walls of the plaintiff's houſe. The defendant juſtifies, that before the treſpaſs *John Fountain* was ſeiſed in fee of the plaintiff's houſe and yard, and two other houſes adjoining, and demiſed the plaintiff's houſe and yard to one *Tyler*, except the free uſe of the yard and privy for the tenants of the other two houſes jointly with the tenant of the plaintiff's houſe: then he ſhews how the houſe of the defendant, which was one of the two houſes, came to him, and

that he entered the yard and fixed the ſpout for his neceſſary uſe, to carry off the rain, *prout ei bene licuit.* The plaintiff demurs. And

Reeve pro defendente inſiſted, that this exception amounted to a licence of the party, and that a diſtinction has always been taken between a licence in law, as to go into a tavern, and the licence of the party, and that this being of the latter ſort an action of treſpaſs will not lie; but if the ſpout be a prejudice, the plaintiff muſt right himſelf by an action upon the caſe. 11 *Co. The ſix Carpenters* caſe. This is an action of treſpaſs brought for a nuſance upon our own poſſeſſion.

Et per Chief Juſtice, Though he had a right to enter into the yard, yet it is conſiderable, whether if he abuſes that right to the detriment to another, he is not in the ſame caſe with every other treſpaſſer. *Et per Forteſcue* Juſtice, Treſpaſs is a poſſeſſory action, and how does this invade the plaintiff's poſſeſſion? The difference between treſpaſs and caſe is, that in treſpaſs the plaintiff complains of an immediate wrong, and in caſe, of a wrong that is the conſequence of another act. *Et per Raymond* Juſtice, That diſtinction is perfectly right. I remember a caſe in *B. R. Courtney* v. *Collett*, Ld. Raym. 272. which was for the defendant's diverting his own water-courſe in his own land, *per quod* the plaintiff's land was overflowed; after a verdict *pro quer'*, it was often debated, whether this was an action of treſpaſs, or upon the caſe, and at laſt judgment was for the plaintiff, who had brought treſpaſs only.

The court ſaid it was a nice caſe, and therefore they gave not their opinion, but ordered an *ulterius concilium.*

After a ſecond argument to the effect of the former, the court delivered their opinions this term. Chief Juſtice: We muſt keep up the boundaries of actions, otherwiſe we ſhall introduce the utmoſt confuſion: if the act in the firſt inſtance be unlawful, treſpaſs will lie; but if the act is *prima facie* lawful (as it was in this caſe) and the prejudice to another is not immediate, but conſequential, it muſt be an action upon the caſe; and this is the diſtinction. The caſe I mentioned the laſt time of *Courtney* v. *Collett* was a plain treſpaſs, and the account I then gave of it from my memory was miſtaken: it was *Hil.* 9 *W.* 3. in *B. R.* treſpaſs for taking fiſhes, *necnon pro eo quod* he broke down the bank of the river, *per quod* the water iſſued and other fiſhes went away: after verdict for the plaintiff, it was moved in arreſt of judgment, that the latter part was caſe, and not joinable with treſpaſs; but the court held that was a treſpaſs, and what came under the *per quod* was only matter of aggravation. There was another caſe in *B. R. Hil.* 8 *Ann. Leveridge* v. *Hoſkins.*

That

That was caſe for digging trenches, whereby the water was drawn away from the plaintiff's river; it was moved in arreſt of judgment, that this was treſpaſs; but the court ſaid, that it not being laid to be a digging upon the plaintiff's ground, the action upon the caſe was moſt proper: and I take that and this to be the ſame caſe, the defendant having a right to enter the yard, and do the firſt act, which is here complained of, I think this ſhould have been an action upon the caſe, and that treſpaſs will not lie.

Powys accord. *Et per Forteſcue* Juſtice, Treſpaſs will not lie for procuring another to beat me; if a man throws a log into the highway, and in that act it hits me; I may maintain treſpaſs, becauſe it is an immediate wrong; but if as it lies there I tumble over it, and receive an injury, I muſt bring an action upon the caſe; becauſe it is only prejudicial in conſequence, for which originally I could have no action at all. *Et per Reynolds* Juſtice, The diſtinction is certainly right; this is only injurious in its conſequence, for it is not pretended that the bare fixing a ſpout was a cauſe of action, without the falling of any water; the right of action did not accrue till the water actually deſcended, and therefore this ſhould have been an action upon the caſe. *Per curiam*, Judgment for the defendant.

Michaelmas

Michaelmas Term

12 Georgii Regis. In B. R.

Sir Robert Raymond, *Knt. Lord Chief Juſtice.*
Sir Littleton Powys, *Knt.*
Sir John Forteſcue Aland, *Knt.* } *Juſtices.*
James Reynolds, *Eſquire,*
Sir Philip Yorke, *Knt. Attorney General.*
Sir Clement Wearg, *Knt. Solicitor General.*

Wyat *verſ.* Effington.

TRESPASS for entring the plaintiff's houſe, and taking *diverſa bona et cattalla ipſius Sarae adtunc et ibidem inventa:* after verdict for the plaintiff, it was moved in arreſt of judgment, that this was too general. 5 *Co.* 35. And without much debate the court were all of opinion, that this was not maintainable, and ſo the judgment was arreſted.

Taking *bona et cataila* is too general in treſpaſs. Ld. Raym. 1410.

Dominus Rex *verſ.* Sir William Lowther.

THE court refuſed to grant an information in nature of a *quo warranto* againſt Sir *William Lowther* for erecting a warren, it being only of a private nature. And *Forteſcue* Juſtice ſaid, he knew it formerly attempted and denied.

No information for erecting a warren. Ld. Raym. 1409.

Smith *verſ.* Key.

Practice.

IN a *quantum meruit* the defendant pleaded a tender on the 4th of *May*, *ante diem exhibitionis billae:* the plaintiff replied, *non obtulit ante diem*, *&c.* and to ouſt the defendant of the benefit of the plea, made up the book with a general *memorandum*, that would refer to the firſt day of the term, which was before the 4th of *May*. I moved on an affidavit that the tender was upon the 4th, and no writ taken out till the 6th of *May*, that the plaintiff might be obliged to make his *memorandum* ſpecial, according to the truth of the fact: and after a rule to ſhew cauſe, the ſame was ordered accordingly.

Pocklington *verſ.* Peck.

Where a *ſcire facias* is abated by a plea, there ſhall be no coſts.

ERROR was brought of a judgment in *C. B.* in an action there by a *feme* ſole: to the *ſcire facias quare executio non*, the plaintiff in error pleaded in abatement, that the defendant in error was married ſince the judgment, and before the iſſuing of the *ſcire facias*. Upon this *Reeve* moved on behalf of the defendant in error, to quaſh their own *ſcire facias*; and *Strange contra* inſiſted upon coſts. *Sed per curiam*, It is the ſame in a *ſcire facias* as in an action, where you plead in abatement and the plaintiff's writ is abated, he pays no coſts. Had there been no plea in abatement, and the party had moved to quaſh his own writ, we ſhould have made him pay coſts. The writ was quaſhed without coſts.

Pether et al' *verſ.* Shelton.

On tender pleaded, the money muſt be paid into court, or the plaintiff ſhall take judgment.

THE defendant pleaded a tender with a *profert in curia* of the money; and on a certificate that no money was paid in, *Strange* moved to ſet aſide the plea. *Et per curiam*, It is no plea, and the plaintiff might ſign judgment.

N. B. I did not venture to adviſe my client to do this, becauſe in another caſe this term, where a plea in abatement was put in without *affidavit*, and the plaintiff ſigned judgment; the court ſet it aſide.

Flower *verſ.* Comit' Bolingbroke.

ABOUT twenty years ſince the plaintiff obtained judgment againſt the then Earl of *Bolingbroke*, but by the careleſſneſs of his attorney it was never entered up, though he had charged the plaintiff for doing it, and had been paid his bill. The attorney being dead, whereby the plaintiff had loſt his remedy againſt him, and there being a decree in Chancery for the payment of theſe debts in a courſe of adminiſtration; the plaintiff to have a preference before other creditors, moved the court for leave to enter up the judgment *nunc pro tunc*. But upon conſideration the court refuſed to do it, (though by not being docquetted it could not affect purchaſers) it being at ſuch a diſtance of time, that the preſumption was, that the debt was ſatisfied.

The court will not give leave to enter up a judgment of twenty years ſtanding *nunc pro tunc*.

Sherman *verſ.* Alvarez.

ACTION by original in *B. R.* The defendant on *oyer* pleaded in abatement, that the writ was never returned: and it was moved by *Fazakerley*, to ſet the plea aſide, becauſe there was not an affidavit to verify it; for the intent of the act was, that the plaintiff ſhould not be delayed by being obliged to take iſſue, unleſs when the plea came in there was ſome cauſe to believe the truth of it.

Affidavit to plea in abatement where neceſſary. L. Raym. 1409.

Lee contra, obſerved that the act did not confine the affirmance of the plea to the oath of the party, but to *any other probable cauſe*; and what can be more probable that this writ was never returned, than when the plaintiff in giving *oyer* of it has not ſet it out. *Sed per curiam*, When you demand *oyer*, it is only *oyer* of the writ: whether it be returned or not is a matter of fact, wherein the plea not being verified by *affidavit*, it muſt be ſet aſide.

The Company of Mercers and Ironmongers of Cheſter *againſt* Bowker.

ERROR of a judgment in the grand ſeſſions of *Cheſter*, whereby a judgment given in the mayor's court of *Cheſter* was reverſed for an error in fact: the error aſſigned and found on record was, that the action was properly commenced and tried before a mayor who was no party; but that after the verdict, and before the judgment, one of the company of mercers was choſen mayor, and gave judgment

In actions before a mayor he muſt not appear to be a perſon intereſted.

judgment for the plaintiffs. The court of grand ſeſſions reverſed the judgment, and upon error in *B. R.* it was argued by *Reeve*, that the verdict being before a right perſon, the judgment thereupon which was but matter of form, might be well enough. 2 *H.* 4. 4. *Bro. Err.* 32. *Parol remand.* 2. *Cro. Eliz.* 320.

Fazakerley contra. The defendant had no opportunity in the court below to be relieved, it being after the verdict. *Pearſon* v. *Parkins*, *Hil.* 3 *Geo.* The judgment is the only material part; for as to the verdict, that is given by the jury, and there being a judgment for damages to the plaintiffs, this man was intereſted, and therefore could not be a judge.

Et per curiam, This was very properly aſſigned as error in fact, and that was the firſt opportunity the defendant had to take advantage of this matter: he had no day in court, either to admit or deny the juriſdiction: he could only move in arreſt of judgment, had it been a fact appearing upon the record, as it was not. My Lord *Hobart* carries it ſo far as to ſay, that an act of Parliament to make a man judge in his own cauſe would be void: if the defendant could have been admitted to ſuggeſt this matter below, muſt it not have been tried, and been tried before this man? The judgment of reverſal in the grand ſeſſions muſt be affirmed.

Parker *verſ.* Thoroton.

One challenged ſworn as a taleſman, ill. L. Raym. 1410.

A Juror on the principal pannel was challenged, and afterwards ſworn on the *tales* by a wrong name, and though no fault was found with the verdict, yet the court granted a new trial.

Pees *verſ.* Major', &c. Leeds.

Mandamus to reſtore muſt be directed only to the body that had power to amove.

UPON the return of a *mandamus* it appeared, that the power of amotion is in the mayor, aldermen *et al' de communi concilio:* and it was moved by Serjeant *Pengelly* in arreſt of judgment, that the writ was directed to the mayor, aldermen *and* common council, which infers that the mayor and aldermen are no part of the common council, for want of the word *al'*, which is in the power of amotion. *Et per curiam*, The writ ſhould be directed to the body who are to do the act: here is no body in this direction but who muſt join in the act; this is only repeating the ſeveral conſtituent parts of the corporation, and the mentioning the intire common council, after the mayor and aldermen, is but a repetition *quoad* the mayor and aldermen. The writ is well enough, and there muſt be a peremptory *mandamus*. The

The caſe of the bail of Boiſe and Sellers.

BOISE and *Sellers* were brought up by *habeas corpus* from *Winchester* gaol, and were returned with two civil ſuits, and ſeveral Exchequer informations for frauds in the cuſtoms. It was moved on behalf of the bail in the civil actions, that they might be at liberty to ſurrender according to 25 *E.* 3. *c.* 19. To which it was anſwered by the Attorney General, that the King had a prerogative to hold his debtor in what lawful gaol he pleaſed, (*Salk.* tit. *habeas corpus*). However the court would never turn them over, till they were ſatisfied as to the reality of the debts, and its being an application by the bail: whereupon a reference was made to the maſter, and it appearing the next day on his report, that the civil actions were for juſt debts, and actually brought before any of the crown's informations, they were turned over to the marſhal upon the ſurrender of the bail.

The King's debtor may be brought up and ſurrendered in a civil ſuit.

Hatton *verſ.* Iſemonger.

Intr. Trin. 11 Geo. rot. 324.

IN an action upon ſeveral promiſes the defendant pleaded a foreign attachment, and lays the cuſtom to be, that the plaintiff ſhall ſwear his debt; but in ſetting out the caſe upon the attachment pleaded, he did not ſhew any oath. And upon a general demurrer the court held it a fatal exception, the defendant not having purſued his own cuſtom. *Lat.* 208. *Cro. El.* 713. *Trin.* 7 *Geo. Flewſter* v. *Hackſhaw*, the ſame caſe. *Judicium pro quer'.*

Foreign attachment how to be pleaded.

Cooper *verſ.* Spencer.

AFTER verdict for the plaintiff *Strange* moved in arreſt of judgment, that it was an action of aſſault and battery, to which the defendant had pleaded *ſon aſſault*, and the plaintiff had replied *de injuria ſua propria*, concluding to the country; and without any *ſimiliter* on the part of the defendant, had carried the cauſe down to trial.

Want of a *ſimiliter* not aided, or amendable.

Serjeant *Girdler e contra* would have maintained it, becauſe there was an iſſue joined upon the *vi et armis*. To which it was anſwered, that that had been held to be immaterial, *Stratford* v. *Neale*. And the court inclining to arreſt the judgment, the Serjeant at another

Ante 482.

day moved for leave to amend, and cited many caſes to prove that a *ſimiliter* was but form, and amendments on misjoining of iſſues were infinite. *Cro. Jac.* 502, 67. *Fitzh. Amendment* 32. 8 *Co.* 161. *b.* *Dy.* 160. 1 *Roll. Abr.* 200. *Cro. El.* 435, 752. 2 *Roll. Rep.* 59.

Strange contra, admitted a misjoinder of the iſſue would be helped, the 32 *H.* 8. *c.* 30. expreſly mentioning it; but the objection here was not matter of form, for the defendant was not obliged to join iſſue, he might demur; and in many caſes the replication of *de injuria propria* was demurrable to: that it not being pretended the iſſue book was right, there was nothing to amend it by.

The court were all of opinion that it was a fatal objection, and not amendable; ſo the judgment was arreſted.

Dominus Rex *verſ.* Minify et al'.

On motion to ſubmit to a fine, affidavits read denying the fact.

THE defendants were returned reſcuers on *meſne* proceſs, and upon motion to ſubmit to a fine the court ſaid, they muſt take the return to be true: but they permitted the defendants in mitigation of the fine to ſhew that in fact there was no actual arreſt, it being in the night; and the court only fined them 1 *s.* a-piece. They ſaid that anciently there was a ſettled fine for reſcuers, but of late the courts had fined according to their diſcretion, upon conſidering the circumſtances of the caſe.

Hale *verſ.* Cove.

Where the jury drew lots, the court ſet aſide the verdict though it was according to evidence.

THE jury having ſat up all night, agreed in the morning to put two papers into a hat, mark'd *P.* and *D.* and ſo draw lots; *P.* came out, and they found for the plaintiff, which happened to be according to the evidence and the opinion of the Judge.

Upon motion for a new trial, it was agreed that the verdict muſt be ſet aſide; but the queſtion was, whether the defendant ſhould pay coſts; the court inclined to give the plaintiff coſts, comparing it to the caſe of a verdict againſt evidence: but at laſt it was agreed that the coſts ſhould wait the event of the new trial.

Suell *verſ.* Timbrell.

ON a motion for a new trial, it was held, that deſiring a juror to appear in his cauſe, which was between a miller and a baker, was no ground to ſet aſide the verdict. And the court remembered the caſe of the Duke of *Leeds*, who wrote a letter to a juror, deſiring him to attend, and you will oblige your humble ſervant, *Leeds*; which was thought no reaſon to ſet the verdict aſide.

What is not labouring a juror.

Haley *verſ.* Fitzgerrald.

IN debt upon a bail bond, it was objected on demurrer, that the plaintiff had not ſhewn, that the defendant in the original action was arreſted, and the act for amendment of the law confines the aſſignment of a bail bond to ſuch actions wherein the party is arreſted. *Et per curiam*, The words of the act are ſo, but we muſt give them a liberal conſtruction: after mentioning an arreſt, it goes on and ſays, *the perſon againſt whom ſuch proceſs is taken out*, which are general enough to take in this caſe. It would be of miſchievous conſequence, if a bail bond taken civilly, without expoſing the party by an arreſt, ſhould not be as effectual as if there had been an actual arreſt: and *Forteſcue* J. remembered the caſe of *Watkins* v. *Parry*, *Trin.* 7 *Geo.* where the court for this reaſon refuſed to let the defendant traverſe the arreſt. The plaintiff had judgment.

In actions upon bail bonds need not ſhew an arreſt.

Ante 444.

Gore *verſ.* Gofton.

UPON an execution againſt the defendant the court was moved on behalf of *Sadler* the defendant's landlord, for a rule on the ſheriff to levy and pay him a year's rent; and the queſtion came upon this, whether the ſheriff was to have his poundage, and from whom. After ſeveral motions the court made a rule for him to pay the landlord without any deduction. They inclined that this was in the nature of a farther execution, and that the ſheriff was intitled to his poundage, but from whom they gave no opinion, it not being before them as to any thing but the caſe of the landlord. *Strange pro Sadler*, the landlord. 8 *Ann. c.* 17.

On execution the landlord's rent ſhall be paid without deduction.

Dominus Rex *verſ.* Johnſon.

Trial at bar ordered in a miſdemeanor.

AN information was exhibited by order of *B. R.* againſt the defendant for neglects and abuſes in his office of juſtice of the peace in relation to deer-ſtealers; and it was moved on behalf of the crown, on affidavit of the defendant's having 700 *l. per annum*, and there being above thirty witneſſes for the proſecutor, that it might be tried at the bar: and the caſe of *Regina* v. *Wakefield*, the town clerk of *Litchfield*, who fixed up a paper reflecting upon a jury, which was tried at the bar, was mentioned; and alſo the caſe of auditor *Harley*, where the matter in diſpute was a trifle, but like to be of long examination; upon which authorities the court granted a trial at bar in this caſe. Mr. Attorney ſaid, had it been an information exhibited by him, he would have had a right to bring it to the bar if he had thought fit. *N. B.* The defendant was convicted and fined 400 *l.* and committed till paid.

Ante 52.

Dominus Rex *verſ.* Warne.

Baſtard chargeable only where born.

INDICTMENT for taking a baſtard child born out of the pariſh of *A.* and bringing it into that pariſh, and there keeping it privately without notice to the churchwardens, and with intent to charge the pariſh. The court quaſhed the indictment, becauſe it appeared, the pariſh could not be burthened, the baſtard being born out of the pariſh of *A.*

Obrian *verſ.* Frazier.

Scire facias may be ſerved immediately before the return is out.

MR. *Ketelbey* moved to ſtay proceedings on a *ſcire facias*, becauſe it was not ſerved till the day before the return. *Sed per curiam*, If it lay four days in the office, that is all which is required: the ſummons may be made any time before the court is up on the day of the return.

Trin. 4 *Geo.* 2. *Bland* v. *Perry*, it was ſo ruled again, on great debate. *Strange pro quer'.* And *Mich.* 4 *Geo.* 2. *Williams* v. *Maſon*, it was ruled that it muſt lie four days in the office, as well where a *ſcire feci* is returned, as a *nichil.*

Gibſon *verſ.* Hudſon's Bay Company.

In Canc. Aſſiſten' Raymond et Price.

THE plaintiff as aſſignee of the effects of Sir *Stephen Evance* a bankrupt, brings his bill againſt the company, to oblige them to ſuffer him to transfer ſtock. The company inſiſt, that Sir *Stephen Evance* was their banker, and greatly indebted to them, and that upon the clauſe in the bankrupts act, which directs the commiſſioners to ſtate the account between mutual dealers, they ſhall be allowed to hold the ſtock, and account only for the ballance, if any ſhall appear againſt them. And of this opinion was the court, and decreed accordingly. 2.

Stock a pledge to the company.

N. B. In the quotation of this caſe in Abr. Eq. Ca. 9. it is ſtated that there was a by-law which ſubjected every member's ſtock to his debts to the company, on which the decree was founded. But the general doctrine was exploded.

Carter *verſ.* Fiſh. In B. R.

DEclaration for words, and then it goes on *quorum quidem falſorum verborum propalationis praetextu idem Carolus non ſolum in bonis, nomine, et in negotiis ſuis honeſtis, multipliciter laeſus et deterioratus exiſtit, verum etiam occaſione verborum praedictorum, per procurationem* of the defendant he was taken up and carried before a juſtice (the words charging him with ſtealing a hen). There was a verdict for the plaintiff and 1 *s.* damages; and it was moved the laſt term for full coſts, and *Salk.* 206. *Cro. Car.* 140. *Salk.* 642. *Cro. Car.* 163, 307. were cited: and this term the Chief Juſtice delivered the opinion of the court, that the plaintiff ſhould have full coſts, becauſe this was not laid as an aggravation, but as a diſtinct fact; he ſpoke the words, and he procured him to be carried before a juſtice.

Where no more coſts than damages.

L. Raym. 1589.

Blunt *verſ.* Mither. In C. B.

TRESPASS for breaking and entering the plaintiff's houſe, and keeping the plaintiff out of the uſe of the houſe, with a *continuando* for a month, whereby the plaintiff was put to great expences to regain the poſſeſſion, and in the mean time loſt the profit and uſe of it: there was a verdict *pro quer'* and 2 *s.* 6 *d.* damages. And upon motion for full coſts, they were denied by the court, for this is a plain treſpaſs, *quare clauſum fregit*, and the *per quod* is only aggravation; and in this caſe the title to the freehold

Where no more coſts than damages.

might have come in queſtion, and if ſo there ſhould have been a certificate of the Judge, which not being in this caſe, the plaintiff can have no more coſts than damages.

Shelling *verſ.* Farmer.

At Guildhall coram Eyre *C. J.* de C. B.

Seizing an houſe in the *Eaſt-Indies* is not triable here.

IN an action of treſpaſs and impriſonment for facts done in the *Eaſt-Indies*, the plaintiff laid them all (being tranſitory) in *London*, and *inter alia* declared for ſeizing the plaintiff's houſe ſituate *apud London praed' in parochia et warda praed'*. It was objected *pro def'* that the treſpaſs as to the houſe was local, and they could not give evidence of ſeizing a houſe in the *Eaſt-Indies*. And *Eyre* C. J. refuſed to let the plaintiff give evidence as to the houſe, comparing it to the caſe of rent for a houſe at *Barbados*, where it has been held you may bring covenant for the rent in *England*, but an action of debt, which is local, cannot be brought here.

In the courſe of the evidence it appeared, the action was brought againſt the defendant for an impriſonment by him as governor of a factory in the *Eaſt-Indies:* and for his defence he alleged, that he had orders from the company ſo to do, and appealed to the company's books of letters, *&c.* which he deſired might be produced.

Eaſt-India company not obliged to produce book of letters, *&c.*

I attended on behalf of the company, to deſire to be excuſed, alleging that theſe were not of the nature of publick books, which every body has a right to have acceſs to, and of which copies are evidence; whereas theſe related only to the private tranſactions of the company: and it might be of miſchievous conſequence, if in every action wherein the company is not concerned, they ſhould be obliged to lay open the ſecrets of their trade, and diſcloſe to all the world a whole ſeries of letters and correſpondence between them and their agents: however we had the books and papers there, and ſubmitted to the directions of the court.

The Chief Juſtice ſaid he would not oblige the company to produce them, and ſo left us to our liberty; whereupon we refuſed to produce them, and they were carried back again to the *India* houſe. The action was againſt the defendant as deputy governor: and on Not guilty he gave in evidence a releaſe given by the plaintiff to the *Eaſt-India* company in purſuance of an award, whereby reciting he had ſuſtained ſeveral injuries by the company's agents, particularly the deputy governor, therefore they award him 1000 *l.* and order him to give a general releaſe. The defendant being no party

party to that releaſe, could not plead it, but the Chief Juſtice allowed him to give it in evidence in mitigation of damages; and theſe not being private papers, I conſented on behalf of the company that they ſhould be produced.

The plaintiff in reply would have called the arbitrators, to prove that they refuſed to take into conſideration the occaſion of this action, which was for the private perſonal wrong: but the award and releaſe having general words ſufficient to take in all, the Chief Juſtice would not ſuffer any evidence to be given to contradict the award; ſo the jury found for the plaintiff (as they could not help doing, the defendant having pleaded *Non cul'*) and gave him a ſhilling damages.

Where an award is made to take in all matters, ſhall not be admitted to ſhew any thing was not taken into conſideration.

Morris *verſ.* Martin.

At Guildhall, coram Raymond, *Chief Juſtice.*

ACTION for meat, *&c.* provided for defendant's wife. The defendant proved ſhe went away from him with an adulterer: and the Chief Juſtice held, that the huſband ſhould not be charged for neceſſaries for her, though the plaintiff who provided for her had no notice; and he ſaid, Chief Juſtice *Holt* always ruled it ſo. And he put the caſe of an apothecary who took a ſick woman into his houſe, being the wife of a country gentleman, from whom ſhe had gone away with an adulterer. So my client the plaintiff was nonſuit.

Where a wife goes away with an adulterer, the huſband cannot be charged for neceſſaries. *Mich.* 8 *W.* 3. *Todd* v. *Stoakes*, at *Guildhall.*

Martin et al' *verſ.* Horrell. Ibidem.

THE plaintiffs were goldſmiths, and one *Stone* their apprentice over-paid a bill 10 *l.* and in an action for money had and received to the plaintiff's uſe, the Chief Juſtice allowed *Stone* to be a witneſs; though it was objected, that unleſs the money was recovered back from the defendant, *Stone* would be anſwerable to the plaintiffs. But the Chief Juſtice ſaid, he did it *ex neceſſitate* of the thing, and it would be of miſchievous conſequence, if in tranſactions of this nature a goldſmith's ſervant ſhould not be a witneſs. So the plaintiffs recovered the 10 *l.*

Goldſmith's ſervant who over-pays money is a witneſs in action for it again.

Weaver

Weaver *verſ.* Boroughs. Ibidem.

Where there is a ſpecial agreement the plaintiff cannot go upon a general *indebitatus aſſumpſit.*

THE plaintiff declared on a ſpecial agreement for the hire of a horſe at 2 *s.* 6 *d. per diem,* and to keep him ſo many days, and return him ſafe at the end of the time. There was likewiſe an *indebitatus aſſumpſit* for the hire. And on the trial the plaintiff could not prove the ſpecial agreement in the manner he had laid it, and therefore his counſel would have had recourſe to the *indebitatus aſſumpſit* to recover only the hire: but the Chief Juſtice was of opinion, that the agreement for 2 *s.* 6 *d. per diem* being laid as part of the ſpecial agreement, which was not proved, he could not let them ſeparate that clauſe, and recover for the hire, as they might have done on a general *indebitatus aſſumpſit*; it not being a debt, unleſs the agreement had been proved. And he put the caſe of a contract for goods at a certain price, where the plaintiff is never ſuffered to recover upon the *quantum meruit.* So the plaintiff was called.

Wilkinſon *verſ.* Lutwidge. Ibidem.

In action againſt acceptor of bill need not prove the hand of drawer.

CASE upon a bill of exchange againſt the acceptor. And it was objected, that we ſhould not be admitted to prove the acceptance, until we had proved the hand of the drawer. And a difference was taken between this caſe, and the caſe of an action againſt the indorſor, who is liable though the bill be not ſigned by the perſon who is ſuppoſed to draw it; becauſe an indorſor is in the nature of a new drawer, whereas an acceptor is not liable, unleſs the bill was fairly ſigned by the drawer. But as to this the Chief Juſtice was of opinion, that the proof of an acceptance was a ſufficient acknowledgment on the part of the acceptor, who muſt be ſuppoſed to know the hand of his own correſpondent: but he ſaid it would not be concluſive evidence, and therefore if the defendant could ſhew the contrary, the reading the bill on behalf of the plaintiff ſhould not preclude him.

What amounts to an acceptance of a bill of exchange.

Whereupon the bill was read, and the queſtion came upon the validity of the acceptance: as to which the caſe was this: The bill was drawn from *New England* for a ſum of money advanced there, to fit out a ſhip that had put in there, after having been taken by pirates. The bill was drawn upon the defendant, who was the freighter, and he living at *Whitehaven*, the plaintiff applied to a merchant in *London*, who was his correſpondent, to get him to ſend this bill and another of 150 *l.* drawn by the ſame perſon, and on

the ſame account. He ſent both bills incloſed to the defendant, who by letter acknowledged the receipt of them, and writes thus: "The two bills of exchange, which you ſent me, I will pay them "in caſe the owners of the *Queen Anne* do not; and they living in "*Dublin*, muſt firſt apply to them; I hope to have their anſwer in "a week or ten days. I do not expect they will pay them, but "I judge it proper to take their anſwer before I do; which I requeſt "you will acquaint Mr. *Wilkinſon* with, and that he may reſt ſatiſ-"fied of the payment." In another letter he writes, "I have not "had an opportunity of ſending the bills you ſent me, to the own-"ners of the *Queen Anne* to *Ireland*, but will take the firſt oppor-"tunity, and then ſhall remit to the gentleman concerned, accord-"ing to my promiſe."

The defendant upon this paid the 150 *l.* bill; but in this action inſiſted, that it did not amount to an acceptance, being only conditional, to pay it in caſe the owners of the *Queen Anne* did not; and his promiſe to procure it from them was in favour of the plaintiff. But the Chief Juſtice was of opinion, that it was rather in favour of himſelf, and he having undertaken to write to them, it was not incumbent on the plaintiff to ſhew any application to them; and as to the acceptance, it was in his opinion a very ſtrong one; the bill was preſented to the defendant; ſays he, This is a good bill, and I will pay it: you need not proteſt it, for it ſhall be paid; I only deſire, that for my convenience you would ſtay till I can write to the owners in *Ireland*, who I do not expect will do any thing in it: this will be of ſervice to me; and as to you, you ſhall be ſecured, for I promiſe you ſhall have the money in all events.

The bill being payable thirty days after ſight, the jury gave us intereſt from thirty days after the date of the firſt letter, which acknowledged the receipt of the bill.

Intereſt given from the time of acceptance.

Syderbottom *verſ.* Smith.

Coram Eyre *Chief Juſtice* de C. B. *in* Middleſex.

IN an action againſt the indorſor of a promiſſory note; the Chief Juſtice directed the jury, to find for the defendant, becauſe the plaintiff had not proved diligence to get the money of the drawer: being of the old opinion, that the indorſor only warrants upon the default of the drawer. Q.

In action againſt indorſor muſt prove demand on drawer. *Vide* Salk. *tit.* Bill, *&c.*

Norcott *verſ.* Orcott. Ibidem.

A creditor allowed to prove debtor not intitled to his diſcharge on the *Mint* act. Ante 507.

THE defendant pleaded the *Mint* act; and the iſſue to be tried was, whether he was a ſhelterer within the *Mint* on the 11th of *February* 1722. To prove him at large at that time, the plaintiff called ſeveral of the creditors; and it was objected, that they were not good witneſſes to prove it, being intereſted in the event of the queſtion: and I cited the caſe of *Shuttleworth* v. *Bravo*, where on an iſſue out of Chancery to try whether a bankrupt had forfeited the allowance out of his eſtate by gaming contrary to the act, it was refuſed to let any of the creditors be ſworn to prove a gaming, becauſe that was ſwearing to increaſe their own dividend.

The Chief Juſtice allowed that caſe, but ſaid that affected all the creditors, whereas here the plaintiff only was at preſent concerned. He ſaid it would go to their credit, but not to their competency; ſo they were ſworn.

Powell *verſ.* Hord, vic' Oxon'.

Coram Raymond, *Chief Juſtice*, *in* Middleſex.

Sheriff's bailiff no witneſs to prove attempt to arreſt. Ld. Raym. 1411.

ACTION for falſe return of *non eſt inventus* on *meſne proceſs*. And the Chief Juſtice refuſed to let the defendant prove by the bailiff who had the warrant, that he had endeavoured to execute it, becauſe he had given ſecurity, ſo that it was his own cauſe in effect.

In action for falſe return on *meſne* proceſs the jury may give the whole debt in damages.

The ſheriff not being able to excuſe the return; it was attempted to mitigate the damages, by ſhewing that the defendant was ſtill viſible, and it being only *meſne* proceſs, the debt was not loſt, and the meaſure of damages ſhould be only the expence of the proceſs. The Chief Juſtice in his direction inclined to give the plaintiff the whole debt of 43 *l.* (it being an action of debt on a judgment) becauſe there was but a poſſibility of the plaintiff's recovering againſt the original defendant. He ſaid it would depend on circumſtances, and if the defendant had been a man of eſtate, and ſo no danger; he ſhould think the debt would be too much to give: but that not being this caſe, the jury found the whole debt in damages, with the opinion of the Chief Juſtice. And afterwards the defendant moved for a new trial; and upon the Chief Juſtice's ſtating the caſe, as it appeared upon the evidence, the whole court were of opinion, the

Chief Juſtice had done right, in refuſing the bailiff to be a witneſs; and that as to the point of damages the verdict was right, and there ought to be no new trial.

Stone *verſ.* Lingwood.

At Guildhall, coram Eyre.

THE plaintiff was captain of a ſhip, and the defendant owner: the plaintiff brought over a ſmall parcel of elephants teeth on his own account, and a large parcel for the defendant, who entred the whole at the *Cuſtom-houſe*, paid the duty, and had the whole delivered out to him; and not re-delivering to the captain his parcel, an action of trover was brought. And it was inſiſted for the defendant, that the plaintiff ſhould ſhew a tender of the duty, otherwiſe the goods were in the nature of a pledge, and he was not bound to deliver them: but the Chief Juſtice ſaid, that would not juſtify the defendant in keeping them, for he had his action for the money; and if he would ſhew what the duty came to, it might be deducted in damages. Which was done accordingly.

In trover the defendant cannot juſtify detaining goods till money laid out upon them is paid.

Ryley *verſ.* Hicks.

In Middleſex, coram Raymond, *Chief Juſtice.*

THE plaintiff declares, that 24 *February* 1723. ſhe demiſed to the defendant a chamber, a cellar, and half a ſhop, *habendum* from *Lady-day* then next for a quarter of a year, and ſo from quarter to quarter, ſo long as both parties ſhall pleaſe, at 5 *l. per* quarter.

Leaſes by parol to commence at a future day, are good.

It was objected by *Whitaker*, that this being to commence at a future day, was but a leaſe at will ſince the ſtatute of frauds. The Chief Juſtice at firſt thought it a good objection, but upon farther conſideration he was of opinion, that the exception was not confined to leaſes that were to commence from the time of making, but was general as to all leaſes that were not to hold for above three years from the making. So the plaintiff had a verdict. *Strange pro quer'.*

Titus *verſ.* The Lady Preſton.

At Guildhall, coram Gilbert, *Chief Baron.*

Change-alley computation is to be taken by calendar months.

DEBT on bond: the defendant pleaded, that the money was lent from 24 *Auguſt* to 24 *May*, for a premium of 150 Guineas. And on evidence it appeared, the bargain was for nine months. It was objected, *pro quer'*, to be a variance, becauſe months muſt be taken to be lunar, and not calendar, and then it does not come ſo far as the 24th of *May*. But the Chief Baron thought it well enough, the general underſtanding being of calendar months in caſes of this nature. So the defendant had a verdict. *Strange pro defendente.*

Moreland *verſ.* Bennett.

In Middleſex, coram Raymond, *Chief Juſtice.*

If any intereſt was paid upon an old bond after the day, it muſt be a plea upon the ſtatute.

TO a bond of thirty years ſtanding, the defendant pleaded *ſolvit ad diem*, and relied upon the preſumption: the plaintiff in anſwer could only prove payment of intereſt two years after the time mentioned in the condition, but gave no evidence of any receipt or demand for twenty-eight years paſt. The Chief Juſtice was of opinion, that this plea of payment at the day, was to be taken as ſtrictly in this caſe, which went only upon the preſumption, as in any other caſe; and the plaintiff having falſified the plea, by ſhewing a payment of intereſt two years after, it was not enough to ſay the other twenty-eight years were enough to let in the preſumption; becauſe to take advantage of that, the defendant ſhould have pleaded upon the act for amendment of the law, that he paid the money after the day, in which caſe it would have been with him upon this evidence.

Dominus Rex *verſ.* Fox. Ibidem.

Laying a wager doth not incapacitate for a witneſs. 3 Lev. 152. 2 Mod. Caſ. 31.

ON an indictment for an aſſault, it was proved, that the proſecutor had laid a wager, that he ſhould convict the defendant. And the Chief Juſtice held him to be a good witneſs for the King, though it might go to his credit.

Fowler *verſ.* Sir Thomas Samwell.

At Guildhall coram Raymond *C. J.*

FOWLER being the ſurviving partner of *Niccols*, brought an action upon the following note, and likewiſe declared on an *indebitatus aſſumpſit*, "Received and borrowed of *Richard Niccols* and "co. 4500 *l.* which I promiſe to repay with intereſt, on *his* tranſ-"ferring to me or order 550 *l. South-ſea* ſtock." The tender of ſtock was proved to be after the death of *Niccols*. And the Chief Juſtice was of opinion, that it being tied up to a tender by *Niccols* (who had time during life, if not haſtened by requeſt) no tender after his death could make this an abſolute debt recoverable upon an *indebitatus aſſumpſit:* but the plaintiff muſt go upon the ſpecial count. *Strange pro quer'.*

Where a debt is to ariſe upon a condition ſubſequent, there muſt be an exact performance to intitle the plaintiff to recover on a general *indebitatus aſſumpſit.*

Grammer et al' *verſ.* Nixon.

At Guildhall coram Eyre *C. J.*

A Goldſmith's apprentice ſold an ingot of gold and ſilver upon a ſpecial warranty that it was of the ſame value *per* ounce with an eſſay then ſhewn. Upon the evidence it appeared he had forged the eſſay, and that the ingot was made out of a lodger's plate, which he had ſtolen. And the Chief Juſtice held the maſter was anſwerable in this caſe. *Strange pro def'.*

Maſter liable for fraud of apprentice.

Burnaby's caſe.

In Canc. coram Domino King.

TOMS and *Allen* having recovered judgment againſt him, he was ſurrendered by his bail, and then charged in execution; after which the plaintiffs in that action prefer their petition to the Lord Chancellor, as creditors, for a commiſſion of bankruptcy, which iſſued; but was ſuperſeded upon the bankrupt's petition, the Chancellor being of opinion, that the body of the debtor being in execution, it was a ſatisfaction of the debt in point of law, ſo that they were not creditors, who could petition. *Strange pro creditoribus.*

He who has the body in execution cannot be a petitioning creditor.

The Duke of Somerſet *verſ.* France et al'.

Tenant for life by a marriage ſettlement of a manor, is intitled to a general fine from the cuſtomary tenants of that manor, upon the death of the laſt admitting lord.

UPON the death of her grace the Ducheſs of *Somerſet*, the Duke her huſband claimed a general fine of the ſeveral cuſtomary tenants of the ſeveral manors of *Cockermouth*, *&c.* in the county of *Cumberland*, which were the inheritance of the Ducheſs. And the Duke having aſſeſſed their fines, and the tenants having refuſed to pay them, the Duke brought his bill in the court of Chancery, to eſtabliſh his right to theſe fines, as next admitting lord.

The bill ſet forth that *Jocelyn* Earl of *Northumberland* was ſeiſed of the ſaid manors in fee, and that upon his death they deſcended to his daughter and heir the lady *Elizabeth*, who afterwards was married to the Duke of *Somerſet*, and that upon ſuch marriage ſhe levied a fine of the ſaid manors, to the uſe of herſelf for life, remainder to the Duke for life, remainder to their firſt and every other ſon in tail, with other remainders over. That upon the marriage of Lord *Hertford*, who was the eldeſt ſon and heir of the ſaid Duke and Ducheſs, recoveries were ſuffered of the ſaid manors, to the uſe of the Ducheſs for her life, remainder to the Duke for his life, remainder to the Lord *Hertford* in tail, with other remainders over. Then the bill ſet forth, that it was the cuſtom of theſe ſeveral manors, for the lord or lady thereof for the time being to admit the ſeveral tenants of the manors to their reſpective eſtates, and that by virtue of ſuch admittance the ſeveral tenants had a right to hold their reſpective eſtates, during the joint lives of ſuch tenant and ſuch admitting lord or lady. That in conſideration of ſuch admittances from the lord, the tenants have time out of mind reſpectively paid to ſuch admitting lord a fine or *greſſum*, which hath been generally aſſeſſed by the lord's ſteward at a court held for that purpoſe, called the court of dimiſſions. And that theſe fines or *greſſums* are called the general fines, and are due to the next ſucceeding lord upon the death of the laſt admitting lord; by whoſe death there is a general determination of the eſtates of the tenants. That there are likewiſe other fines, which by the cuſtom are due to the lord from theſe tenants; and thoſe are, where the tenant dies, then his heir, who has a right to be admitted to his father's eſtate, is obliged to pay the lord a fine for ſuch admittance. And where this tenant aliens his eſtate, the lord upon the admiſſion of the alienee, has a right to a fine; and theſe fines which thus happen upon the death or alienation of the tenant are called *dropping* fines.

General fine.

For the meaning of the word *greſſum*, vide *Raſtal's Terms of the Law*. *Spelm. Gloſſ.* 263, 269.

Dropping fines.

The fines the Duke demanded by this bill, were the general fines, which he inſiſted were due to him as next admitting lord,

upon the death of his lady, the Ducheſs of *Somerſet*. And the bill ſet forth, that the Ducheſs being the lady of theſe manors, and having married the Duke, a court of dimiſſions was held in the names of the ſaid Duke and Ducheſs, in order to grant the tenants new eſtates, their former having been determined by the death of Earl *Jocelyn:* and at ſuch court, admittances were granted to the ſeveral tenants, *habendum* at the will of the lord, according to the cuſtom of the ſaid manors, during the joint lives of the ſaid Ducheſs and the ſaid tenant. That the defendants (being tenants of the ſaid manors) held their eſtates under ſuch admittances, till the death of the ſaid Ducheſs; and that ſhe being dead, the Duke became lord of the ſaid manors, and the tenants eſtates being determined by the death of the Ducheſs, their admittances being only for their joint lives, the Duke, as next admitting lord, had a right to a general fine. And the bill ſet forth, that the Duke in purſuance of this right had called proper courts, and had regularly aſſeſſed the defendants fines; and that ſeveral of the tenants of theſe manors had ſubmitted to pay their ſaid fines; but that the defendants, with ſeveral others, had refuſed, under a pretence that a general fine was not due to the Duke, but was to be paid to the heir after his death. The bill therefore prayed that the Duke's title to theſe general fines might be eſtabliſhed.

The defendants in their anſwer admitted the ſeveral allegations in the bill, and that the Duke was intitled to be tenant by the curteſy. They inſiſted that the fines which they were obliged to pay, were known and aſcertained by cuſtom, and that the lord was bound by ſuch cuſtom, and could not without their being parties, create any eſtate to a ſtranger, which would ſubject them to any extraordinary fines. They inſiſted that by the cuſtom of theſe manors a lord who was tenant by the curteſy, or lady tenant in dower, had no right to a general fine; and that they were only obliged to pay a general fine to the lord who comes in by deſcent, or to him that comes in, *in loco haeredis.* They inſiſted that although the Duke was become tenant for life of theſe manors by the Ducheſs's death, yet no fine was due to him; for if he had been tenant by the curteſy, no fine would have been due, and his claiming by ſettlement cannot better his caſe; for then it would be in the power of the lords of ſuch manors, to multiply the tenants fines, and greatly burthen their eſtates, if every ſuch lord who hath an intervening eſtate by ſettlement ſhould be intitled to a general fine. Anſwer.

Upon the 11th of *June* 1725. this cauſe came to be heard before the Lord Chancellor *King*.

Serjeant

Serjeant *Pengelly*, and *Yorke* Attorney General, argued for the Duke: that the Duke by this ſettlement was a purchaſer, and ſtood *in loco haeredis*. That the tenants having accepted admittances to hold during the life of the tenant and the life of the Ducheſs, and the Ducheſs being dead, their eſtates were neceſſarily determined: and the fines being by cuſtom due to the next admitting lord, and the Duke of *Somerſet* being ſuch lord, the fines were undoubtedly due to him, and there was no pretence that the payment of them ſhould be poſtponed: nor is this any wrong or hardſhip upon the tenants, for this was a juſt and honeſt ſettlement, made without the leaſt appearance of fraud, and upon the moſt valuable conſideration in the law: nor is it any inconvenience to the tenants, for their eſtates will ſtill depend upon the life of the lord, who admits them; and the life of a tenant for life, is as good as the life of a tenant in fee. It is in proof from ſeveral of our depoſitions, that tenants in dower, and tenants by the curteſy, have admitted in ſuch caſes, and have received general fines; and theſe inſtances determine the preſent queſtion, and prove that the Duke hath an unqueſtionable right to the fines which he demands.

Wearg, Solicitor General, for the defendants argued, that the payment of theſe fines depends intirely upon the cuſtoms of theſe manors: and though the tenants eſtates ſhould be determined by the death of the Ducheſs, yet it does not neceſſarily follow from thence, that the Duke is intitled to a general fine, unleſs there be a cuſtom to ſupport his claim. Theſe fines were originally payable only to the heir, or a purchaſer, and were paid in nature of a relief. We have many inſtances in our depoſitions, where tenants in dower and tenants by the curteſy have demanded theſe fines, and the tenants have refuſed to pay them; and it is the received notion throughout all the counties where theſe ſort of cuſtomary eſtates prevail, that only the heir who comes in by deſcent, and he who comes in *in loco haeredis*, are intitled to a general fine.

This ſettlement which the Duke claims by, does not alter the nature of his eſtate; it is only a life eſtate, and what the law would have given him; it does not enlarge his eſtate, but only exempts him from being puniſhed for waſte. The tenants are ſtrangers to this ſettlement, and are not at all concluded by it, and it muſt be conſidered as a fraud upon them, if it was intended to create ſuch an eſtate in the Duke, as would neceſſarily multiply their fines and encreaſe the burthen upon their eſtates.

We admit that dropping fines have been paid to tenants in dower and tenants by the curteſy; but no argument can be drawn from thence,

thence, that they are intitled to a general fine: and if the rule, that every admitting lord is intitled to a general fine, ſhould prevail; then tenants for years of thoſe manors, who are *domini pro tempore*, would be intitled; and the conſequence of that would be, that ſhort leaſes of theſe manors might be made, and the tenants be thereby oppreſſed by frequent and extravagant fines.

But what the defendants chiefly inſiſt upon is, that there is no cuſtom in any of theſe manors, or in any other manor of the ſame tenure, which can ſupport the Duke's demand of a general fine; yet as the depoſitions contain contrariety of evidence upon this point, the faireſt way of determining this queſtion ſeems to be, by directing an iſſue, in which this cuſtom and the Duke's right may be tried.

King Lord Chancellor. The firſt queſtion ariſes upon the determination of the tenants eſtates; and they were undoubtedly determined upon the death of the Ducheſs of *Somerſet*; for the grants or admittances being to each tenant to hold for his life and the life of the Ducheſs, the eſtate of each tenant is neceſſarily determined by her death.

The next and principal queſtion is, whether a fine is due to the Duke from his tenants upon the death of his Ducheſs. And in the reſolving this queſtion it is firſt to be conſidered, upon what account theſe general fines become due: now it appears from the nature of theſe admittances, that upon the death of the laſt admitting lord, all the eſtates of the tenants, which are held under his admittances, are determined; and their eſtates being ſo determined, it is neceſſary for the tenants, before they can have any new eſtate, to have a regrant from the ſucceeding and next admitting lord, which regrant they have a right to, and that right gives their eſtates the denomination of *tenant-right-eſtates:* from hence it appears, that the fines which are paid, are paid upon account of the admiſſion to the new eſtate; and therefore that lord who hath a right to admit, hath a right to the fines; the lord grants the tenant a new eſtate, and in conſideration of that, a fine becomes due to him from the tenant. The only queſtion then ſeems to be, whether the Duke hath a right to admit. And the tenants ſeem to agree that he has; for they allow that if a particular tenant dies, the Duke upon the admiſſion of his heir, is intitled to a dropping fine: now how can the Duke be intitled to this dropping fine, if he be not the admitting lord? And if he hath a power to admit, and hath a right to a fine upon the determination of a particular eſtate by the death of a particular tenant, why hath he not an equal power to admit, and an equal right to his fines, upon the determination of the te-

nants eſtates in general by the death of the laſt admitting lord? it is very extraordinary to allow it in the one caſe, and not in the other: if a particular tenant dies, his eſtate is determined, and his heir muſt pay a fine to the Duke; yet if the laſt admitting lord dies, all the eſtates of the tenants are determined, and yet the Duke hath no right to a fine.

It hath been objected, that this is multiplying the fines of the tenants, and ſubjecting them to frequent burthens of this kind. But where is the inconveniency to the tenants? they are ſtill to hold during their own lives and the life of the lord who admits them; and that is the very tenure of their eſtates: nay if a leſſee for years, or any other *dominus pro tempore* ſhould admit them, their eſtates would be good, according to theſe admittances, during their own lives and the life of ſuch lord; and the determination of the lord's eſtate would have no influence upon theirs. Indeed if there ſhould appear to be any fraud or contrivance in a ſettlement of this kind, by putting in a number of lives ſucceſſively, on purpoſe to multiply the fines of the tenants; this court would undoubtedly interpoſe in ſuch caſe, and relieve them; but in the preſent caſe nothing of that kind can be pretended.

Theſe are my preſent thoughts upon this queſtion: but as the counſel for the defendants have inſiſted upon having an iſſue tried, I readily agree to it.

And this being agreed to by the counſel for the Duke, an iſſue was directed to be tried at the bar of the court of King's Bench by a jury of *Middleſex*; which iſſue was this, *viz.* whether a general fine was due to the Duke of *Somerſet* from the tenants of the manors of *Cockermouth*, *&c.* as next admitting lord, upon the death of the Ducheſs of *Somerſet*.

And in the beginning of this term, this iſſue was accordingly tried before *Raymond* Chief Juſtice, Mr. Juſtice *Forteſcue*, and Mr. Juſtice *Reynolds*, (Mr. Juſtice *Powys* being abſent).

Upon the trial three points came in queſtion in relation to evidence.

Lords of cuſtomary manors diſallowed as witneſſes.

1. Whether lords of other cuſtomary manors ſhould be allowed as witneſſes. And it was reſolved, that they ſhould not, becauſe the preſent queſtion concerned the right of lords of ſuch manors, who came in by ſettlement to their fines; and therefore they had a plain intereſt in the event of the cauſe.

2. The

2. The ſecond queſtion aroſe upon this; the plaintiff's counſel offered to give in evidence, that ſeveral other tenants who hold of the manors in queſtion, under the ſame tenure as the preſent defendants, had ſubmitted and paid their fines to the Duke: and this evidence was oppoſed by the counſel of the defendants, who inſiſted, that what was done by other tenants could not be given in evidence againſt them, for they were ſtrangers to the defendants, and had ſubmitted ſince the ſuit was commenced. It was ſaid, that even if a verdict had been recovered againſt the other tenants, it could not be given in evidence againſt the preſent defendants, much leſs a matter *in pais*, which was ſo recent, that it could be of no manner of weight.

It was allowed as evidence againſt the defendants, that other tenants had ſubmitted, and paid.

To this it was anſwered, that it being a cuſtom which was now trying, it was very proper to give in evidence the acts and uſages of the tenants of the ſame manors. And the caſe of the city of *London* v. *Clarke* in this court before *Holt* Chief Juſtice was cited, where (it was ſaid) verdicts againſt former defendants who were in the like circumſtances as the then defendants, were permitted to be given in evidence. So in the caſe of toll, where actions are brought for not paying it, the plaintiff is always allowed to give in evidence payment by others; unleſs it be made appear, that ſuch payment was by colluſion. So in the caſe of *modus's* this kind of evidence is always allowed.

Carthew 181.

The court held, that they never knew this kind of evidence denied; and the weight of it, and the recency of the fact, were circumſtances entirely proper for the jury: ſo the plaintiff was allowed to give the evidence he offered.

3. The third point was the moſt material, and that aroſe upon the plaintiff's offering to give in evidence ſeveral inſtances of fines being paid in like caſes, to lords of other manors.

Cuſtoms of other manors given in evidence.

This was oppoſed by the Solicitor General for the defendants, who inſiſted, that this kind of evidence could not be given; for the cuſtom which was now in diſpute, was uſed and confined to the manors in queſtion; and therefore no cuſtom which prevailed in other manors, could be any ways applicable to the particular cuſtom now in diſpute. Cuſtoms are different in different manors, and it would be of the worſt conſequence, and create the utmoſt confuſion, if the cuſtom of one manor ſhould be allowed in proof to ſupport the cuſtom of another manor. Cuſtoms of particular manors are in their nature diſtinct, but if this ſort of evidence ſhould be allowed, the cuſtoms of all manors muſt become the ſame: in

ſome

ſome manors heriots are paid, in ſome not; in ſome the fines are certain, in ſome arbitrary; but becauſe a heriot is paid in the manor of *A.* is it therefore any reaſon that a heriot muſt be paid in the manor of *B?* Certainly no; for the cuſtom of one manor can by no means be concluſive upon another manor; becauſe each manor hath its particular cuſtoms, and they have no relation to one another, but by accident. Each manor hath its own cuſtoms, and the validity of thoſe cuſtoms muſt depend upon their own ſtrength, without having any aſſiſtance from the cuſtoms which prevail in other manors.

Serjeant *Wynne* of the ſame ſide ſaid, that it had been the conſtant practice on the northern circuit, where queſtions of this kind frequently aroſe, always to diſallow of this ſort of evidence; and he cited a caſe, in which Mr. Juſtice *Reynolds* ruled it ſo, the laſt aſſizes at *Carliſle.*

Serjeant *Pengelly contra.* The evidence we offer, is in order to ſhew the uniformity of the cuſtoms of theſe kinds of manors in general, throughout the whole county. We do not ſay, that becauſe there is ſuch a cuſtom in one manor, that there muſt therefore neceſſarily be the ſame cuſtom in another; no, we are only attempting to explain the nature and tenure of theſe cuſtomary eſtates, and are going to ſhew, that wherever theſe ſort of eſtates prevail, the lords who have been tenants for life of ſuch manors, have always, without any controverſy, received their general fines: and this muſt certainly be very proper evidence in the preſent queſtion: it will prove, that it is the nature of theſe eſtates in all places where they prevail, to be ſubject to the payment of fines in like caſes, and that it is the undoubted privilege of like lords to be intitled to them. If there ſhould be a queſtion whether a copyhold can be entailed; the party would have liberty to give in evidence the cuſtom of entailing in other manors. But I hope the court will have no difficulty in allowing this ſort of evidence, ſince this very queſtion hath been already determined upon a ſolemn trial at bar between *Chapman* and *Atkinſon*, *Mich.* 24 *Car.* 2. *B. R.* 3 *Keb.* 90. where the queſtion was, whether a general fine was due to an infant ſucceeding lord, during his minority; and upon the trial of this iſſue, the defendants gave in evidence, that other manors adjoining had the ſame cuſtom not to pay to the lord till he was of full age; and the book ſays, that the court held this evidence to be good.

Attorney General of the ſame ſide, The preſent queſtion concerns the nature of cuſtomary eſtates in general, and this is a tenure by which the greateſt part of the eſtates in the northern counties are held;

held: it is not the cuſtom of theſe particular manors, which the preſent queſtion is confined to, but the queſtion relates to theſe eſtates in general, and therefore it is very proper to examine into the tenure and nature of theſe eſtates in all other places where they prevail. The iſſue which is to be tried is not whether there is ſuch a cuſtom in theſe particular manors, but whether the Duke of *Somerſet*, as next admitting lord, hath a right to theſe fines; ſo that the right is the thing in queſtion, and to prove that he hath a right, we are going to ſhew, that it is the nature of theſe eſtates to be ſubject to a general fine in ſuch caſes. If any diſpute ſhould ariſe about *Gavelkind* lands which lie out of the county of *Kent*, (as ſome lands of that tenure do) can it be pretended, that the party would not be admitted in that caſe, to examine into the cuſtom of *Gavelkind* in general? And it is no more that we contend for in the preſent caſe; we only deſire that we may give evidence of what is the general cuſtom of tenant-right eſtates.

Lutwyche of the ſame ſide, I have gone the northern circuit many years, and I have always obſerved it to be the practice, to allow this ſort of evidence (and in this *Bootle* and *Fazakerley* who had gone the ſame circuit many years, and were of counſel with the Duke, agreed with him.) He cited the caſe of *Relf*, which was tried ſome years ago at *Carliſle*, and was thus: *A.* was lord of a manor, and was the laſt general admitting lord, and ſold the manor to *B.* afterwards *C.* one of the cuſtomary tenants of the ſaid manor died, and *B.* admitted his heir; then *A.* who was the laſt general admitting lord, died; and *B.* demanded a fine of the heir of *C.* and upon the heir's refuſing to pay it, *B.* brought his action againſt him to recover it; and upon the trial *B.* was permitted to give evidence of what was the cuſtom of other manors throughout the county.

Raymond Chief Juſtice, I have always looked upon it as a ſettled principle in the law, that the cuſtoms of one manor ſhall not be given in evidence to explain the cuſtom of another manor; for if this kind of evidence ſhould be allowed, the conſequence ſeems to be, that it would let in the cuſtom of one manor into another, and in time bring the cuſtoms of all manors to be the ſame. I ſhould readily admit that this evidence might be allowed, if the cuſtoms of tenant-right eſtates were the ſame in all manors; but it is plain that the cuſtoms of theſe eſtates are different in different manors: for theſe reaſons I am inclined in my own private opinion, to diſallow the evidence, which is now offered: but upon the authority of the caſe in *Keble*, and upon the credit of the gentlemen who go the northern circuit, and affirm that it has been

the conſtant practice to allow this kind of evidence there, I muſt ſubmit, though againſt my own opinion.

Forteſcue Juſtice, I think the evidence which is offered ought to be allowed; there is a great difference betwixt the *cuſtom* of a manor, and the *tenure* of a manor; and the queſtion which we are now trying merely concerns the *tenure* of the plaintiff's manors; therefore it is very proper to enquire, what are the qualities which attend other eſtates, which are held by the ſame *tenure*. And it muſt give great ſatisfaction to thoſe who are to try the preſent queſtion, to know how far this quality of paying fines in like caſes, has attended the like tenure in other manors. I think the caſe in *Keble* is a plain authority, and we muſt follow precedents.

Reynolds Juſtice, I have been always of opinion, that the cuſtoms of one manor could not be made uſe of to influence the cuſtoms of another. And ſo it has always been held in caſes where the diſpute is concerning the intailing of a copyhold; where the cuſtoms of adjoining manors are never allowed, as evidence to ſupport the cuſtom of the particular manor in queſtion. But upon the authority of the caſe which has been cited, and upon what has been affirmed by the gentlemen at the bar, I ſubmit that the evidence that is offered ſhall be allowed, though it is contrary to the notion I have always had of the rules of evidence.

N. B. It was intended to ſend down to *C. B.* for their opinions, but they were up; however upon putting the caſe to them and the Barons of the Exchequer, they were all of opinion (as Judge *Denton* told me) that the evidence of other manors ſhould not have been allowed, and ſaid they had never known it.

Upon this, the plaintiff proceeded to give evidence of the cuſtoms of other manors.

And after a long examination of witneſſes in relation to the cuſtoms, and what had happened in other manors, *viz.* that tenants in dower, jointureſſes, and tenants for life by ſettlements, had had general fines paid to them by their tenants; the jury, by the direction of the court, brought in a verdict for the plaintiff the Duke of *Somerſet*.

And at the end of this term, the cauſe came on again before the Lord Chancellor, who decreed the tenants to pay their fines, and gave the Duke his coſts.

Dominus Rex *verſ.* Collingburne.

THIS was an order of ſeſſions made at *Hicks's Hall*, for the diſcharge of an apprentice to a freeman of the city of *London*, and who was bound and inrolled there: and the order being removed hither, there were theſe exceptions taken to it.

A. is bound apprentice to *B.* who is a freeman of the city of *London*, and *A.* is bound and inrolled there, then goes and lives with his maſter in *Middleſex*. The juſtices of the peace for the county may diſcharge him. L. Raym. 1410.

1. That the apprentice was bound and inrolled in *London*. 2. Not bound by the juſtices. 3. Not a trade within the ſtatute, he being a glaſier.

To theſe exceptions it was anſwered, that the clauſe of the ſtatute 5 *Eliz. c.* 4. §. 35. enacts, "That if any maſter ſhall miſuſe his "apprentice, he ſhall repair unto one juſtice of the peace where he "dwelleth, *&c.* And §. 40. provides, "That the cuſtoms of "*London* and *Norwich* ſhall be ſaved." *Sect.* 35. has always received a large conſtruction in favour of the juriſdiction of juſtices, for though upon the maſter's complaint no power is given to the juſtices to diſcharge, yet in 21 *Car.* 2. 1 *Saund.* 313. 1 *Vent.* 175. *Hawkſworth* and *Hillarie*'s caſe, it is held, that it was reaſonable, and within the intent of the ſtatute, that an apprentice ſhould be diſcharged from an ill maſter, as well as a maſter ſhould be diſcharged from an ill apprentice; and in 1 *Mod. Wilkins* v. *Edwards* there is the ſame point, and in 1 *Vent.* 174.

1. The firſt and principal queſtion is, whether the court of ſeſſions at *Hicks's Hall* have any juriſdiction to diſcharge an apprentice to a freeman of *London*; or whether he is not to be diſcharged only by the mayor's court. It is found that the apprentice lived with his maſter out of the city of *London*, and within the juriſdiction of the juſtices of *Middleſex*.

To this exception it was anſwered, that the ſtatute does not regard where the binding or inrolling is, but gives the juriſdiction expreſly to the juſtices of peace where the maſter lives; and if this did not belong to the juſtices of *Middleſex*, where the maſter lives, there would be a failure of juſtice; for neither the chamberlain, or any other city magiſtrate, have power to compel the maſter's appearance before them.

2. To the ſecond exception it was ſaid, that it was immaterial where the apprentice was bound, for the ſame reaſon.

3. And to the third exception it was ſaid, that formerly indeed it was a doubt, whether the ſtatute did extend to all trades; but of late it hath been ſettled and agreed, that it does. *Salk.* 471. *Palm.* 526. 2 *Keb.* 822. *Rex* v. *Taunton*, *Hil.* 6 *Geo.* The

The court affirmed the order of diſcharge, and ſaid they would not take away the juriſdiction of the mayor's court, but only give a concurrent juriſdiction to the juſtices of the peace for the county. And it would be very inconvenient, to have apprentices to a freeman of *London*, who are bound there, and who live in diſtant countries, obliged to come up to the mayor's court to get themſelves diſcharged: and the words of the ſtatute are very plain; for they give the juriſdiction to the juſtices where the apprentice lives.

Cheval *verſ.* Nichols. In Scaccario.

Annuity granted out of lands lying in *Middleſex*; *A.* hath notice of this grant, and then purchaſes the inheritance of the lands; the grantee ſhall have his annuity againſt *A.* though his grant was not regiſtered.

ONE *John Hall* was poſſeſſed of a term for years in certain lands lying in the county of *Middleſex*, and granted an annuity of 40 *l.* to the plaintiff, to be iſſuing out of the lands. The defendant being concerned for this *Hall* in the management of ſome of his affairs, knew that *Hall* had granted this annuity to the plaintiff, and had ſeen the deed, and paid him part of the annuity upon *Hall*'s account: afterwards *Hall* purchaſes the reverſion of theſe lands, and then the defendant purchaſes the term and the reverſion of *Hall*. *Hall* dies, and the defendant refuſed to pay the plaintiff his annuity, becauſe the deed by which *Hall* had granted it was not regiſtered according to the ſtatute 7 *Ann. c.* 20. which requires that all deeds or conveyances of, and all incumbrances upon, lands lying in the county of *Middleſex*, ſhall be regiſtered within ſuch a time at the office; otherwiſe every ſuch conveyance ſhall be void againſt any ſubſequent purchaſer for a valuable conſideration. The defendant therefore inſiſted that he was a ſubſequent purchaſer for a valuable conſideration, and that the plaintiff's claim of an annuity could not affect him, becauſe it was not regiſtered.

The whole court were clearly of opinion, that the plaintiff was intitled to have his annuity out of theſe lands againſt the defendant, notwithſtanding this ſtatute. For the ſtatute only intended to give ſuch notice of former incumbrances to purchaſers, that they might not thereby be defrauded; but if a man knows of his own knowledge, that there is a prior incumbrance, and notwithſtanding that knowledge will be a purchaſer, the ſtatute was never intended to relieve ſuch, though the firſt incumbrance was not regiſtered. For where a man purchaſes with notice of a prior incumbrance, he purchaſes with an ill conſcience; and in a court of equity his purchaſe ſhall never be eſtabliſhed.

Therefore they decreed the plaintiff his annuity and the arrears.

Buckley

Buckley *verſ.* Nightingale. In C. B.

THE plaintiff as adminiſtrator of the goods and chattels of *Joan Terry* widow deceaſed, which were unadminiſtred by *John Terry* deceaſed, who was the executor of the ſaid *Joan*, brought an action of debt againſt the defendant as ſon and heir of *Matthew Nightingale* deceaſed, upon a bond executed by the ſaid *Matthew* the father, for the payment of 200 *l.* to the ſaid *Joan*. The defendant pleads, and admits that he is ſon and heir of the ſaid *Matthew* (the obligor), but ſays that the ſaid obligor his father in his life-time was ſeiſed of a meſuage or tenement called *Pryors*, and in conſideration of the ſum of 300 *l.* demiſed the ſame to *J. S.* for ninety-nine years, reſerving only a pepper corn yearly rent; and that the ſaid defendant hath not any lands or tenements by hereditary deſcent, nor had he *ad diem impretrationis brevis originalis praed'*, or at any time after, except the reverſion of the ſaid meſuage and tenement, and one meſuage and three roods of land in *R.* being together of the value of 300 *l.* and no more: and then he ſets forth, that the obligor his father, in his life-time, before his entering into the ſaid bond upon which this action was brought, did become bound to one *Thomas Poole* in 120 *l.* which laſt bond at the time of his death was in full force and undiſcharged; and then goes on and ſets forth in like manner three other bonds, each for the ſum of 200 *l.* in which his ſaid father was bound to three other perſons; and ſhews that he died and left the ſaid bonds ſtanding againſt him in full force and virtue: then the defendant ſays, that long *ante impetrationem brevis originalis praed'* of the plaintiff, *viz.* upon the firſt of *June* 1720. he, the defendant, agreed with the ſeveral perſons aforeſaid to whom his father was bound, to pay them the ſeveral ſums aforeſaid, which in the whole amounted to 600 *l.* which he avers is more than the value of the ſaid meſuage and tenement and lands in *R.* and the reverſion; *et petit judicium ſi ipſe ut filius et haeres ipſius Matthei patris de debito praed' virtute ſcripti praed' onerari debeat, &c.* and then avers that the ſaid *Joan Terry* in her life-time refuſed to accept in ſatisfaction of her ſaid debt, her proportion of the ſaid ſum from the defendant together with the reſt of the ſaid creditors. To this plea the plaintiff demurred.

An heir hath lands by hereditary deſcent, yet he ſhall not be liable for the debt of his anceſtor any further than to the value of the lands deſcended.

And upon argument the whole court were of opinion, that the defendant's plea was good; for though it was the defendant's debt becauſe his anceſtor had bound him, yet he is liable no further than to the value of the land deſcended; and as ſoon as he has paid his anceſtor's debts to the value of the land, he ſhall hold the land

 diſcharged.

diſcharged. Otherwiſe he might be chargeable *ad infinitum*. The caſes which were cited in the argument were 20 *H.* 7. 5. 6. *Keilw.* 62, 63, 64. 26 *H.* 8. 1. *Plow.* 440.

Browning *verſ.* Newman.

At Guildhall coram Raymond *C. J.* de B. R.

Caſe *for words* by which he loſt the cuſtom of *J. S.* and ſeveral others; the plaintiff ſhall only be admitted to prove the loſs of *J. S.*'s cuſtom particularly.

THIS was an action upon the caſe for theſe words; "You "are a thief, and I will prove you ſo." The plaintiff declared that by reaſon of the defendant's ſpeaking them, one *John Merry* and divers others, who were his cuſtomers, left off dealing with him in his trade.

Upon the trial the plaintiff proved the ſpeaking the words, and the ſpecial damage as to *Merry*; and would have gone on to prove by ſeveral others, that they had likewiſe left off dealing with him by reaſon of the defendant's ſpeaking theſe words.

But the defendant oppoſed this; becauſe (as he inſiſted) he could not be ſuppoſed to be prepared to anſwer ſuch uncertain kind of evidence.

The Chief Juſtice ſaid, That in actions for words which are not in themſelves actionable, and where the ſpecial damage is the *git* of the action, this ſort of evidence is allowed, though the particular inſtances of ſuch damages are not ſpecified in the declaration: but in actions for words which are in themſelves actionable, (as the preſent words are) particular inſtances of ſpecial damage ſhall not be given in evidence, unleſs particularized in the declaration. And therefore he thought the plaintiff could not be allowed to give particular inſtances of the loſs of any other cuſtomer, except *Merry*. He ſaid that he had known it ruled otherwiſe; but that this was his opinion: however he admitted the plaintiff to give general evidence of the loſs of cuſtomers.

But he may give general evidence of the loſs of cuſtomers.

Marriot *verſ.* Marriot. In Scaccario.

After probate of the will a court of equity may inquire into the fairneſs of a reſiduary deviſe of perſonal eſtate.

MARRIOT, Maſter of the Exchequer of pleas, made his will, and left his wife executrix and reſiduary legatee. His ſons were plaintiffs in this caſe, and contended, that this deviſe of the *reſiduum* was gotten by fraudulent means, and by ſurprize. The wife produced the probate of the will; and the counſel in behalf of the wife the defendant contended, that the probate of the will was concluſive

concluſive evidence touching this diſpoſition of the *reſiduum*, and that a court of equity could not look into the ſame, but that it was merely of eccleſiaſtical juriſdiction, and to be determined there.

And in this queſtion four things were conſidered by the court. *Firſt*, How the juriſdiction of teſtamentary matters ſtood by the civil law.

The way of authenticating wills in the civil law was firſt before the *praetor*, and afterwards before the *magiſter cenſus*, for they reckoned wills to be in the nature of judgments or deciſions that a man himſelf made touching his eſtate. And therefore they were ſhut up with the magiſtrate during the life of the perſon, for the quiet and repoſe of the family, but were opened after his deceaſe. They were ſigned by the teſtator, and ſealed by him, and by the witneſſes, upon a thread, and carried in to the *praetor:* after the death of the party the witneſſes were called if living, to acknowledge their ſeals; if they were not living, then the ſeals were broke, and the will opened, in the preſence of other ſufficient witneſſes; and the will was read and regiſtered, and a copy of it delivered over to any perſon that would aſk for the ſame. For it was reckoned as a matter of record, and therefore any perſon might have acceſs to it. For this ſee *Digeſt. lib.* 28. *tit.* 1. *Qui teſtamenta facere poſſunt, et quemadmodum teſtamenta fiant:* and *Cod. lib.* 6. *tit.* 32. *Quemadmodum teſtamenta aperiantur, &c.* When any legacy was diſpoſed of to pious uſes for the uſe of the church, or for monaſteries, or for the poor, the biſhops were to ſue for the ſame, and ſee to the adminiſtration thereof. This appears by the *Code*, *lib.* 1. *tit.* 3. *leg.* 42. §. 6. *neceſſarium.* §. 7. §. 8. and §. 9.

Tract. Tractatuum, to. 1. fo. 38. b. n. 8.

Tract. Tractatuum, to. 14. fo. 200. n. 89.

Upon this the biſhop began to intermeddle with the probate of wills, which was a temporal authority. But this *Juſtinian* would not endure, and therefore in his *Code* he puts the law againſt the biſhop's probate of wills before the laws herein before mentioned: and it is afterwards ſaid, *eodem tit. leg.* 41. *Repetita promulgatione, non ſolum judices quorumlibet tribunalium, verum etiam defenſores eccleſiarum hujus almae urbis, quos turpiſſimum inſinuandi ultimas deficientium voluntates genus irrepſerat, praemonendos eſſe cenſemus, ne rem attingant, quae nemini prorſus omnium, ſecundum conſtitutionum praecepta, praeterquam magiſtro cenſus, competit; abſurdum etenim clericis eſt, immo etiam opprobrioſum, ſi peritos ſe velint* [*oſtendere*] *diſceptationum eſſe forenſium: temeratoribus hujus ſanctionis poena quinquaginta librarum auri feriendis: datum* XIII. *Kal. Dec. C. P. Juſtiniano A.* II. *et Opiliano* Coss. DXXIIII. Thus things ſtood by the civil law.

We come now, in the ſecond place, to conſider how things ſtood by the canon law. The popes, as their power increaſed, endeavoured to get the juriſdiction over teſtaments; and this appears by the decretal, *lib.* 3. *tit.* 26. *c.* 6. *Si haeredes juſſa teſtatoris non adimpleverint, ab epiſcopo loci illius omnis res quae eis relicta eſt canonice interdicatur, cum fructibus et caeteris emolumentis, ut vota defuncti adimpleantur.* And likewiſe *Decret. lib.* 3. *tit.* 26. *de teſtamentis, c.* 17. *Tua nobis fraternitas intimavit, quod nonnulli tam religioſi quam clerici ſeculares, aut laici, pecuniam et alia bona quae per manus eorum ex teſtamentis decedentium debent in uſus pios expendi, non dubitant aliis uſibus applicare; cum igitur in omnibus piis voluntatibus ſit per locorum epiſcopos providendum, ut ſecundum defuncti voluntatem univerſa procedant, licet etiam a teſtatoribus id contingeret interdici: mandamus quatenus executores teſtamentorum hujuſmodi, ut bona ipſa fideliter et plenarie in uſus praedictos expendant, monitione praemiſſa, compellas.*

Tract. Tractatuum, to. 14. fo. 199. n. 88.

Pope *Innocent* the fourth upon this law, *fol.* 152. ſays, that the biſhop may diſpenſe this charity, if there be no executor appointed by the will, and if there be an executor and he does not fulfil the will, that then he may take it to himſelf. *Decret. lib.* 3. *de teſtamentis, tit.* 26. *c.* 19. *Johannes clericus et P. laicus executores ultimae voluntatis O. clerici ſanctae crucis, qui venerabilibus et piis locis de bonis ſuis in ultima voluntate legavit, mandans inſuper ſatisfieri creditoribus per eoſdem, poſt mandatum ſuſceptum per dioeceſanum cogi debent teſtatoris explere ultimam voluntatem. Vide Innocent. in legem* 153.

Pan. to. 4. fo. 157. *Panormitan* upon the law, *Si haeredes*, ſays, that this matter of wills, even where the deviſe is to pious uſes, is *mixti fori*, and that the heir or executor is to have a year's time to fulfil the will, before he can be compelled to it by eccleſiaſtical cenſure.

Pan. to. 4. fo. 176. Upon the law, *Tua nobis*, *Panormitan* ſays, that the biſhop is to compel by eccleſiaſtical cenſure the executor to perform the will to pious uſes, although the will itſelf ſays, that the biſhop was not to intermeddle: for they look upon that as an irrational part of the deviſe, which is in itſelf void.

Pan. to. 4. fo. 179, 180. The laſt chapter, *verbo Johannes*; The caſe as *Panormitan* ſtates it was, where after debts paid the reſidue was left to pious uſes, and there the biſhop was to compel the payment of debts, and afterwards to ſee the diſpoſition of the *reſiduum*. I do not find that any of the canoniſts pretend, that wills are of eccleſiaſtical cognizance *ſua natura*, but only ſuch wills as were made for pious uſes.

Lyndwood,

Lyndwood, fo. 174. *verbo Approbatis* ſays, that juriſdiction of the eccleſiaſtical courts touching teſtamentary matters is by the cuſtom of *England*, and not by the eccleſiaſtical law.

We are thirdly to conſider upon what foot the eccleſiaſtical juriſdiction ſtood by the law of *England*. In *England* the biſhop and ſheriff ſat together in the county court, as it appears by the laws of King *Edgar*, *cap.* 5. *de comitiis. Centuriae comitiis quiſque* (*ut ante praeſcribitur*) *intereſto: oppidana ter quotannis habeantur comitia: celeberrimus autem ex omni ſatrapia bis quotannis conventus agatur, cui quidem illius dioeceſis epiſcopus et ſenator interſunto, quorum alter jura divina, alter humana populo edoceto. Leges Canut. c.* 17. *de comitiis municipalibus. Et ter in anno habeantur comitia municipalia, et duo conventus provinciales, aut plures etiam, et illis interſit epiſcopus ac ſenator, et ibi ubique doceatur tam jus divinum quam humanum.* Wilkins 78. Lamb. Saxon Laws 69.

From theſe laws it plainly appears that the probate of teſtaments was in the county courts. *William* the conqueror was the firſt that ſeparated the eccleſiaſtical court from the civil. *Selden* in his notes upon *Eadmerus* 167. gives us the very charter of ſuch ſeparation. *Propterea mando et regia authoritate praecipio, ut nullus epiſcopus vel archidiaconus de legibus epiſcopalibus amplius in hundred. placita teneat: nec cauſam quae ad regimen animarum pertinet, ad judicium ſecularium hominum adducant.* This charter, as Mr. *Selden* has told us, was recited in a cloſe roll of *Richard* the ſecond, and then confirmed: but the charter of *William* the firſt does not mention matters teſtamentary, or the probate of wills, to be of eccleſiaſtical cognizance. It only ſays, that the crimes that were to be proſecuted *pro ſalute animae*, were to be of that cognizance.

That which ſeems firſt to have given birth to the eccleſiaſtical juriſdiction, was the charter of *Henry* the firſt: which ſays, *Si quis baronum vel hominum meorum infirmabitur, ſicut ipſe debet vel dare diſpoſuerit pecuniam ſuam, ita datum eſſe concedo, quod ſi ipſe praeventus vel armis vel infirmitate pecuniam ſuam nec dederit nec dare diſpoſuerit, uxor ſua, ſive liberi aut parentes et legitimi homines ſui, pro anima ejus eam dividant.* This let in the ſeveral canons before mentioned into *England:* for ſince the perſonal eſtate was to be diſpoſed of for the ſoul, they looked upon every will to be a diſpoſition of the teſtator in a gratuitous or charitable manner: that whatever was left, was to be diſpoſed of by the executor for the good of the ſoul: ſo that all the canons touching charitable diſpoſitions were to take place in *England*. Mat. Paris, fol. 56.

In the time of *Richard* the firſt, when he was in confinement, the clergy got a confirmation from him of the eccleſiaſtical immunities: this is mentioned by *Mat. Paris* 161. *Item diſtributio rerum quae in teſtamento relinquuntur authoritate eccleſiae fiet, nec decima pars ut olim ſubtrahetur: ſi quis enim ſubitanea morte vel quolibet caſu praeoccupatus fuerit, ut de rebus ſuis diſponere non poſſit, diſtributio bonorum ejus eccleſiaſtica authoritate fiet.* This charter is likewiſe mentioned in the ſame terms in *Radolphus de Diceto,* one of the *Decem ſcriptores F.* 658. And theſe eccleſiaſtical immunities were confirmed by the pope, and the confirmation appears in 1 *Vol. Foedera* 104. though there is no expreſs mention of a teſtamentary juriſdiction. *Note* alſo it appears by the charter, that the King releaſes the tenth, that uſed to be taken on the death of the tenant; and henceforward the King and his Lords only took heriots as an acknowledgment in lieu of ſuch decimation.

From henceforth the eccleſiaſtical court began to conſider a proper method for the publication of wills; therefore when any perſon died, they ſummoned in the executor or next relation to take care of his ſoul, and the executor was obliged to bring in the will. And both executor and adminiſtrator were obliged to bring in an inventary of his goods, and the charges were heightened, by the canons, in order to bring every thing into the eccleſiaſtical court: *Lyndw.* 176. *Canon* of *Simon Mepham.* And it appears by the canon of *Stratford,* that the reſidue in the hands of the executor was to be diſtributed for the good of the ſoul. *Lyndw.* 178. And by the canon of *Otobon* an inventary was to be exhibited. *Lyndw.* 107.

Notwithſtanding all this the juriſdiction of the county courts ſtill continued, for this was acknowledged to be a matter *mixti fori,* and therefore they could not hinder the county court from proceeding, even according to their own canon law. But in order to get the whole juriſdiction, in the time of *Richard* the ſecond, as is mentioned by *Selden* in his notes on *Eadmerus,* they got the right to publiſh the law of *William* the conqueror, and confirm the ſame; that no matters of eccleſiaſtical cognizance ſhould be tranſacted in the county courts, this is in the charter of 2 *R.* 2. *Membran.* 12. *n.* 5. and is mentioned in *Selden's Eadmerus* 168.

From henceforward the clergy had the whole juriſdiction of wills, becauſe the county court could not receive the probate, and the King's court had never intermeddled with it; for by the charter of *Rich.* 1. herein before mentioned, and likewiſe by *Magna charta, cap.* 18. the King had granted the liberty to his own tenants, to diſpoſe of their goods, and therefore the will touching perſonal

eſtate never received any ſanction in the immediate court of the King.

This reconciles that caſe in *Fitzherbert's Abridgment*, tit. *Teſtament*, fol. 148. ſaid by *Fairfax*, that it was but of late, that the church had the probate of wills, which was by an act, I ſuppoſe he muſt mean the confirmation, of *Ric.* 2. before mentioned, for there is no act of Parliament that gives them that probate. And he ſays, that in other countries the probate was of temporal cognizance, which *Selden* notes to be true in all countries, except *France*. And *Tremaile* in that caſe aſſerts the uſage of proving wills in courts-baron, which certainly may be where the cuſtom prevails.

In 11 *H.* 7. 12. *Fineux* aſſerts, that the probate of wills did not belong to the ſpiritual court by the eccleſiaſtical law, but came to them by cuſtom and uſage only: and theſe are the foundations on which my Lord *Coke* in *Henſloe's* caſe, 9 *Rep. fol.* 38. concludes, that when the will is proved in the eccleſiaſtical court, that court has executed its authority; but the executors are to ſue in the temporal courts, to get in the eſtate of the deceaſed.

Fourthly, we are to ſee what have been the ſeveral diſtinctions in our law touching this juriſdiction, which will fall under five heads.

1. That the ſpiritual court is the only court now, that has authority to receive the probate of wills, and to give a ſanction to them; becauſe the juriſdiction of the county court is loſt by non-uſage; and ſince *Magna charta*, *cap.* 18. the King's courts did not intermeddle with the goods of a deceaſed tenant. But here muſt be excepted all courts-baron that have had probate of wills time out of mind, and have always continued that uſage.

2. The ſeal of the eccleſiaſtical court does anthenticate the will, for there the will is to be brought in and proved. And therefore the caſe in *Raymond* 406, 407. is certainly good law, that the ſeal of the ordinary cannot be contradicted, becauſe if there be no way in the temporal courts to prove the will relating to chattels, it muſt go on in the ſpiritual court, and the determination muſt there be final: for the temporal court cannot make a judgment concerning the will contrary to what was made in the eccleſiaſtical court; and therefore it is certainly good law, that if they ſhew a probate under the ſeal of the ordinary, they cannot give in evidence that the will was forged, or that the teſtator was *non compos mentis*, or that another perſon was executor; but they may give in evidence that the ſeal was forged, or that there were *bona notabilia*, becauſe that is not

2 Roll. Abr. 299.

in

in contradiction to the real ſeal of the courts; but it admits the ſeal, and avoids it. 1 *Lev.* 235. *Vaughan* 207. 1 *Shower* 293. And ſince the eccleſiaſtical court has the probate of wills now ſettled by cuſtom, the temporal court cannot prohibit them in their inquiries whether the teſtator was *compos mentis* or not, or whether the will be revoked or not, becauſe that is neceſſary for authenticating the will. *Hardr.* 131, 313.

3. If a temporal matter be pleaded in bar of an eccleſiaſtical demand, they muſt proceed in the eccleſiaſtical court according to the temporal law, or elſe the temporal courts will prohibit. As if payment be pleaded in bar of a legacy, and there is but one witneſs, which the eccleſiaſtical court will not admit; there the temporal courts will prohibit them, becauſe it is a matter temporal that bars the eccleſiaſtical demand. *Shutter et ux'* v. *Friend*, 1 *Show.* 158, 173. 1 *Vent.* 291. 3 *Mod.* 283. But if upon the probate of the will they allege on the other ſide, that the will was revoked, and they would prove the revocation by one witneſs, according to the reſolution in *Yelverton* in the caſe of *Brown* v. *Wentworth*, *fol.* 92, 93. they might be prohibited from granting the probate; but that reſolution, which was only of three Judges againſt two, and ſeems againſt the opinion of *Rolle*, 2 *Abr.* 299. ſeems to intrench upon their juriſdiction; for if they cannot judge by their law, whether the will is revoked or not, they cannot judge whether there is a will or no will: indeed the judges there ſay, that the revocation is a temporal matter, and therefore it is to be proved according to their law, by one witneſs; but then they will not be ſuffered to determine touching the validity of a will of perſonal eſtate, which every body allows to be of eccleſiaſtical cognizance. But if the ſpiritual court do admit a will, and yet will not give the probate out to an executor, becauſe he cannot give ſecurity for a juſt adminiſtration, it ſeems that a *mandamus* will lie. And this was reſolved in the caſe of *The King* v. *Sir Richard Raines*, *Mich.* 10 *W.* 3. *in B. R.* For though they are to determine, whether there be a will or no will, yet if there be a will, the executor has a temporal right, and they cannot put any terms upon him but what are mentioned in the will; and therefore if they will not grant the probate, where they admit there is an executor, the court will grant a *mandamus*.

Salk. 299.

4. If a man give lands to be ſold for the payment of debts, and diſpoſes of the money to ſeveral perſons; that cannot be ſued for in an eccleſiaſtical court, but only in a court of equity, becauſe that is not a legacy merely of goods and chattels, but it ariſes originally out of lands and tenements, and they have a teſtamentary juriſdiction touching chattels only. *Hob.* 365. *caſe* 345. 2 *Rol. Ab.* 285.

5. The

5. The courts of equity can hold plea concerning a legacy, and likewiſe concerning the deviſe of the *reſiduum*, which is but a legacy. They may in notorious caſes declare a legatee, that has obtained a legacy by fraud, to be a truſtee for another: as if the drawer of a will ſhould inſert his own name inſtead of the name of a legatee, no doubt he would be a truſtee for the real legatee. As to the deviſe of the *reſiduum*, nothing can be more clear: for ſince the caſe of of *Foſter* v. *Monk*, wherever an executor had a ſpecifick legacy, 1 Vern. 473. he was looked upon as a truſtee for the relations in a courſe of diſtribution: and no body ever attacked theſe reſolutions upon this head of argument, that they were contrary to the eccleſiaſtical juriſdiction. But in all ſuch caſes a court of equity muſt conſider what is the real will of the teſtator, and they cannot declare a truſt according to their own fancy, nor according to what the teſtator ſhould have willed, for then they make the will, and not the teſtator. But they may, to anſwer the real intention of the teſtator, declare a truſt upon ſuch will, though it be not contained in the will itſelf; which is in theſe three caſes. 1. In that of fraud upon a legatary before mentioned. 2. Where the words imply a truſt for the relations, as in the caſe of a ſpecifick deviſe to executors, and no diſpoſition of the *reſiduum*. 3. In the caſe of the legatee promiſing the teſtator to ſtand as a truſtee for another. And no body has thought, that declaring a truſt in any of thoſe caſes is an infringement of the eccleſiaſtical juriſdiction.

The court being thus of opinion, that they had a power to relieve againſt the deviſe of the *reſiduum*, they directed proper iſſues to try the matters of fraud and ſurprize inſiſted on by the plaintiffs, againſt which decree the defendant brought an appeal, but before any thing further was done upon it, the plaintiffs and defendant agreed to divide the *reſiduum* between them.

Jefferies *verſ.* Auſtin.

In Middleſex, coram Eyre, *C. J.* de C. B.

Conſideration of a promiſſory note inquired into.

IN an action upon the caſe upon a promiſſory note brought by the perſon to whom it was payable, the Chief Juſtice let the defendant in, to ſhew that it was delivered in the nature of an eſcrow, *viz.* as a reward, in caſe he procured the defendant to be reſtored to an office; which it being proved he did not effect, there was a verdict for the defendant.

Dominus Rex *verſ.* Major' de Canterbury.

Where an officer is at pleaſure, the choice of another is a determination.

ON a *mandamus* to reſtore a recorder, they returned that he was only an officer at pleaſure, and that upon due ſummons to chuſe another, they did chuſe another, *et perinde* the former was removed.

It was objected, that this was only argumentative, and that returns to writs of *mandamus* muſt be certain to every intent. *Et per cur'*, That is good general doctrine, but not applicable to this caſe. They needed not ſay any thing of his being removed, becauſe the chuſing another is a determination of their will, which is enough for them to ſhew.

Adjournatur. And at another day the Solicitor General objected, that the ſummons was only to elect a new recorder: and many a man, who would have appeared, had the ſummons been to remove, might abſent himſelf when it was only to chuſe a new one. *Et per cur'*, We muſt preſume people know the effect and conſequence of their own acts, that in the caſe of an officer at pleaſure a new election is an actual amotion. 1 *Vent.* 342.

Pleading letters patent *ſub ſigillo* without *ſigillat'* is well.

Then it was objected, that the letters patents are only ſaid to be granted *ſub magno ſigillo Angliae*, without *ſigillat'*. *Sed per cur'*, The word *ſub* imports it; the other would be but a repetition. The return was allowed.

Wannel

Wannel *verſ.* Camerar' Civit' London.

MANDAMUS to admit *George Wannel* to his freedom of the city of *London*: ſetting forth that he was bound apprentice to one *Samuel Vanreyven* of *London*, merchant-taylor, for ſeven years; that he had ſerved out his time, and been admitted into the merchant-taylors company, and in due form preſented to the chamberlain, who refuſed to admit him to his freedom.

By-law to oblige a joiner in *London* to be free of the joiners company, good.

The chamberlain returns, that *London* has time out of mind been a corporation, and conſiſts of ſeveral ſocieties, gilds and fraternities of freemen of the city; and that no perſon could ever be a freeman of the city, till he was a member of one of thoſe fraternities. That time out of mind there has been a company called the joiners company. Then he returns a power to make by-laws, and that 19 *October* 6 *W. & M.* a by-law was made, reciting that ſeveral perſons not free of the joiners company had exerciſed the trade of a joiner in an unſkilful and fraudulent manner, which could not be redreſſed whilſt ſuch perſons were not under the orders and regulations of the company; therefore it enacts that no perſon ſhall uſe that trade, who is not free of the company, under the penalty of 10 *l.* That the plaintiff did exerciſe the trade of a joiner, and that at the time of his being preſented to the chamberlain he was not free of the joiners company, and therefore he does not admit him to the freedom of the city.

Upon this return the queſtion was, whether this by-law, to oblige a member of one company to be admitted in another company, was good or not. And to prove it naught, the caſe of *Robinſon* v. *Groſcourt*, 5 *Mod.* 104. was relied on, where a by-law to oblige all perſons uſing muſick and dancing, to be free of the company of muſicians, was held void; and even there it did not appear that the perſon was free of any other company, as it does in this caſe.

On the other hand it was ſaid, that this was a very reaſonable by-law: ſince it tended to prevent frauds in trade. And of that opinion was the court, it being propereſt for ſuch a perſon to be under the regulation of that company who underſtand the trade beſt. That the caſe of *Robinſon* v. *Groſcourt* was adjudged upon the foot of a dancing-maſter's not being a trader; and there was no inconvenience to an honeſt man, in being free of this company rather than another.

But the Chief Juſtice ſtarted a difficulty, whether the plaintiff having ſerved a merchant-taylor, could oblige the joiners company to admit him, it not being ſo ſtated in the return; and without that be taken for granted, the by-law will be void. To which it was anſwered by *Forteſcue* Juſtice, That the impoſing the penalty of 10 *l.* for not taking up his freedom, is the ſtrongeſt implication that they are bound to grant it. *Per cur' ulterius concilium.*

It was argued a ſecond time in laſt *Trinity* term by Mr. *Reeve* and the Solicitor General, much to the effect of the former argument. And now this term *Raymond* Chief Juſtice delivered the reſolution of the court.

We are all of opinion, that this is a good by-law, being made in regulation of trade, and to prevent fraud and unſkilfulneſs, of which none but a company that exerciſe the ſame trade can be judges. This does not take away his right to his freedom, but only his election of what company he ſhall be free; it is only to direct him to go to the proper company.

As to the objection, that it does not appear the joiners company are bound to admit him; we are all of opinion, that it being ſaid he *ſhall* take up his freedom in that company under the penalty of 10 *l.* he will be intitled to have a *mandamus*, to prevent a forfeiture. *Per curiam*, The return muſt be allowed.

Hilary Term

12 Georgii Regis. In B. R.

Sir Robert Raymond, *Knt. Lord Chief Juſtice.*
Sir Littleton Powys, *Knt.*
Sir John Forteſcue Aland, *Knt.* } *Juſtices.*
James Reynolds, *Eſq;*
Sir Philip Yorke, *Knt. Attorney General.*
Sir Clement Wearg, *Knt. Solicitor General.*

Dominus Rex *verſ.* Williams Major' de Helſtone.

THE defendant was elected a corporator eight years ago, and an entry was made in the corporation books of his taking the oath of office, and the oaths of allegiance and ſupremacy: it was now moved for an information in nature of a *quo warranto* upon the affidavit of the town clerk, who ſwore, that he did not adminiſter the oath of allegiance, though he made the entry in the manner it appeared to be. But the court would do nothing in it, after ſo long an acquieſcence; and ſaid it would be of dangerous conſequence, to allow a town clerk to diſqualify members by his own oath, contrary to the record.

Where there is an entry of adminiſtring oaths, there muſt be a recent proſecution if the fact be falſe.

Dominus Rex *verſ.* Allington Recorder of Hertford.

If a juſtice convicts without ſummons, there ſhall go an information. L. Raym. 1407. Ante 630.

THERE being affidavit made, that no ſummons was had in the caſe of the *King* and *Venables*, the court granted an information againſt the juſtice who made the conviction.

Caſe of the Priſon of the King's Bench.

Rules of the priſon inlarged till priſon repaired.

THE priſon being in a ruinous condition, and the late rains having broke in, there was an order made for the proprietors to attend the court; and upon their attendance the court was moved to enlarge the rules of the priſon, ſo as to take in the *Marſhalſea*, that the priſoners might be removed thither. But the court would do nothing in it, till there was an undertaking by rule of court to put the priſon in repair, which they ſaid the proprietors were obliged to do, upon pain of forfeiting their right. Whereupon the proprietors ſubmitted to a rule, and the rules were enlarged accordingly.

Between the Pariſhes of Kinver *and* Stone in com' Stafford.

Renting a coney warren is a ſettlement. Salk. 536.

UPON a ſpecial order of ſeſſions, it was ſtated, that a poor perſon rented a coney warren and a cottage upon it at 10 *l. per ann.* which the juſtices were of opinion did not gain him a ſettlement within the ſtatute of *Car.* 2. *Sed per curiam*, A mill has been held to be a tenement within that ſtatute, and why not this? It is his ability to pay 10 *l. per ann.* that is the foundation of the ſettlement, and whether he pays it for a houſe for habitation, or for a warren which brings him in a profit, is not material: the order of ſeſſions muſt be quaſhed.

Harriſon *verſ.* Winchcombe.

Plead double.

STRANGE moved for leave to plead *non aſſumpſit*, and *non aſſumpſit infra ſex annos*, and cited *Folkes* v. *Smith in C. B. Mich.* 12 *Geo.* where there was the like rule; and in the principal caſe it was ordered accordingly.

Mich. 13 *Geo. Briſtow* v. *Woodward* granted again on my motion. *Eodem termino Toephen* v. *Elking* the ſame rule.

Dominus Rex *verſ.* Buck.

STRANGE moved to quaſh an indictment for killing a hare, this not being a matter indictable, the ſtatute of 5 *Ann. c.* 14. appointing a ſummary proceeding before juſtices of the peace; and cited *Rex* v. *James*, *Trin.* 1 *Geo.* where an indictment for keeping an alehouſe was quaſhed, becauſe the ſtatute 3 *Car.* 1. *c.* 3. had directed a particular remedy. *Et per curiam*, The indictment muſt be quaſhed.

Indictment lies not for killing a hare.

Parker *verſ.* Stanton.

TO the *ſcire facias quare executio non* upon a writ of error, the plaintiff in error pleaded, that the damages recovered were levied upon a *fieri facias.* And *Strange* moved to ſet aſide this plea, ſaying it was never the intent of the court to give the party a liberty to plead to it, when it was only a method uſed to bring in the party to aſſign his errors; and that if this was to be once allowed, it would be done in all caſes, and be an effectual method to get one term extraordinary upon every writ of error, by obliging the party to go to trial upon an iſſue to the *ſcire facias*, whilſt the writ of error ſtood ſtill for want of an aſſignment of errors. And he cited *Elmes* v. *Martin in B. R. Hil.* 10 *Geo.* where a plea of payment (which is the ſame in reaſon with the preſent caſe) was ſet aſide. The Chief Juſtice at firſt made a difficulty of ſetting aſide this plea, becauſe it might be true, and then why ſhould the party be brought in to ſhew cauſe why there ſhould not be execution, when it has been had already. But the other Judges made no difficulty of ſetting it aſide, on account of the apparent delay that it would introduce. And if execution has been had, the defendant may go on with his writ of error to obtain a reſtitution. So after great debate the plea was ſet aſide. And in the debate of this caſe it was ſaid by the court, and the ſecondary, that if iſſue had been joined on this plea, and it had been found for the defendant in error, he might have taken out execution, but could not *non pros.* the writ of error, till after a rule to aſſign errors.

Practice in error. L. Raym. 1414.

After this errors were aſſigned; and when the cauſe came on to be argued, it appeared to be an action of trover *pro duobus inſtrumentis ligneis*, *Anglice ſtands.* And it was objected by *Fazakerley*, who cited *Cro. El.* 817. 1 *Lev.* 48. *Sti.* 327. that there was a proper *Latin* word for *ſtands*, and therefore *inſtrumentum ligneum*, which would ſerve for any thing made of wood, was too general: but the court held it well enough, and the judgment was affirmed.

Inſtrumentum ligneum well enough in trover.

Welſh

Welſh *verſ.* Craig.

Debt lies not upon a promiſſory note.

DEBT upon two promiſſory notes and a *mutuatus*. And on demurrer to the declaration, I objected, that an action of debt would not lie: that before the ſtatute no action at all lay upon the note, as a note, (*Salk.* 129.) nor did an *indebitatus aſſumpſit* lie on a bill of exchange. And the only remedy given upon the note by the ſtatute, is the ſame that was before on an inland bill of exchange. And of this opinion was the court, and pronounced judgment for the defendant. But then it was obſerved by Serjeant *J. Comyns* for the plaintiff, that there was one good count upon the *mutuatus*, and the demurrer was to the whole. Whereupon judgment was given for the plaintiff, which I believe it will be difficult for him to enter, ſo as to maintain it.

Goſwill *verſ.* Dunkley.

In account a diſcharge to a common intent is ſufficient.

IN account for a watch and ſword delivered to the defendant, *ad mercandizandum*, he pleaded, that he carried them to *Porto Bello*, and in order to keep them ſafe, till he had a convenient opportunity to ſell them, he put them into the warehouſe of the *South-ſea* company, and that the warehouſe was broke open by enemies, and the watch taken away and loſt, and that the ſword had likewiſe been taken away, *niſi* an *Engliſhman* had put it on and claimed it as his, and that the defendant was forced to come away before he met with the *Engliſhman* to get it again. And on demurrer

It was objected by Serjeant *Whitaker*, that this was no good diſcharge; and he cited 1 *Roll. Abr.* 124, 125. *Yel.* 202. 1 *Bulſt.* 101. for theſe goods were delivered to the defendant under a ſpecial and particular truſt; and that he could not defend himſelf againſt the plaintiff's demand, by ſhewing that he had lodged them in a warehouſe, which was a committing them to the care of a third perſon, in which caſe he will be anſwerable for the loſs.

Reeve contra. Though this is a perſonal truſt, yet he is not bound to keep them always about him. If he was robbed of them himſelf, it is a diſcharge. 1 *Ven.* 122. 2 *Lev.* 5. 5 *E.* 4. 4. 9 *E.* 4. 40. *Et per curiam*, This is *prima facie* a good account: if the warehouſe was not a place of ſafe cuſtody, that ſhould have been replied: a robbery there is the ſame as if from his own perſon, for a bailiff *ad mercandizandum* is not obliged to keep the goods always about him. At another day Serjeant *Hawkins pro quer'* endeavoured

to

to maintain the action, but the court ſtood to their former opinion, and gave judgment *pro defendente*.

Short *verſ.* King.

THE plaintiff declared in ejectment on one demiſe, to which there was Not guilty pleaded; but afterwards finding it neceſſary to add the demiſe of the truſtees, he delivered a new ejectment on the double demiſe. Whereupon I moved to ſtay the proceedings on this laſt, till payment of the coſts, and for notice where the leſſors were to be found; and grounded my motion for the firſt part on Lord *Coningſby*'s caſe, and for the latter on the common caſe of a *qui tam*, becauſe here the leſſor was to enter into a rule for coſts. The court granted the laſt part, but as to the coſts they ſaid it was never done, but where it appeared the party was vexatious, or had run the defendant to a great expence, which was Lord *Coningſby*'s caſe, who came for a trial at bar on his new ejectment, after the former cauſe was ready for the bar, which was a matter of mere favour, in which they might make their own terms.

Practice in ejectment.

Ante 548.

Dobs *verſ.* Edmonds.

THE plaintiff declared in treſpaſs with a *quod cum*, and then went on to another treſpaſs, which was introduced with a *necnon de eo quod, &c.* The verdict was *pro quer'* as to the laſt part, and *pro def'* as to the treſpaſs under the *quod cum*. And it was moved in arreſt of judgment, that the whole was but recital. *Sed per curiam*, We muſt not extend that exception, which has gone far enough already: the latter part is by way of poſitive charge, and the finding of the jury has cured it as to the firſt. The plaintiff muſt have judgment.

Necnon de eo quod after a *quod cum* is a poſitive charge. L. Raym. 1413. 2 Show. 295. Cro. Jac. 536.

White *verſ.* Cleaver.

DEBT upon a bond conditioned to indemnify the plaintiff. The defendant upon *oyer* pleaded generally, *quod indempnem conſervavit*, without ſhewing how. And on a general demurrer it was agreed the plea was ill before the act for amendment of the law, for that no iſſue could be joined upon it. 2 *Cro.* 165. *Hob.* 296. 2 *Co.* 4. 2 *Cro.* 363, 503, 634. But then it was objected, that this ſhould have been ſhewn for cauſe of demurrer. And of that opinion was the court, for the ſubſtance is the ſaving harmleſs,

Where a plea is general *quod indempnem conſervavit*, it muſt be ſhewn for cauſe that it does not ſay *how*. L. Raym. 1416.

1 Lev. 194, 183. and how that was done, is but matter of form; ſo the plaintiff prayed leave to diſcontinue upon payment of coſts, which was granted accordingly.

Portman *verſ.* Came.

Where executor muſt declare as executor, he ſhall pay no coſts. L. Raym. 1413.

THE plaintiff brought an action of debt upon a bond as executor, and upon *oyer* it appeared to be conditioned, that the defendant ſhould not hunt in any of the lands of the teſtator; and in the replication a breach was aſſigned by a hunting in the time of the executor, and a verdict for the defendant.

And now Serjeant *Chapple* moved for coſts, becauſe the hunting, which was the cauſe of action, aroſe in the time of the executor, and was a matter within his knowledge. 6 *Mod.* 91, 181. 1 *Ven.* 92. *Sed per curiam*, The caſes are only where he needed not declare as executor, and ſo was *Baller* v. *Delander*, *Trin.* 1 *Geo. in B. R.* But here the bond was the cauſe of action, and he was obliged to declare as executor: and therefore they denied coſts.

Lat. 214, 220.

Lady Caſs *verſ.* Title.

Verdict incertain.

ERROR of a judgment in *C. B.* in ejectment on four demiſes of a different commencement and continuance: verdict for the plaintiff againſt two defendants only as to one third part of 28 acres of meadow; and as to the reſt of the premiſſes, and all the other defendants, Not guilty: upon which there is judgment, that the plaintiff ſhall recover *terminum ſuum praed' de et in praed' una tertia parte praed'* 28 *acrarum prati* againſt the two defendants who are found guilty, and that the acquitted defendants ſhall recover 7 *l.* coſts.

Upon this judgment the two defendants, who were found guilty as to part, bring a writ of error, and aſſign the general errors. And *Strange pro quer' in errore* objected, that the verdict and judgment are uncertain.

1. For that the plaintiff declares on four ſeveral demiſes of a different commencement and continuance, and yet the judgment is only to recover *terminum ſuum praed'* in the ſingular number, without determining which of the terms he ſhall recover. *Hil.* 4 *Geo. B. R. Hodſon* v. *Backhouſe*: the writ of error was *de quadam tranſ. et ejection' firmae* inſtead of *firmarum*, there being two demiſes: and quaſhed.

2. It is impoſſible for the ſheriff upon this judgment to know what he is to deliver poſſeſſion of, for there are four demiſes of four different 28 acres of meadow, and whether the plaintiff is to have thoſe which *A.* demiſed, or thoſe which *B.* or *C.* or *D.* demiſed, is uncertain; it ſhould have been to recover the 28 acres of meadow which the firſt, or ſecond, or third, or fourth leſſor demiſed. 1 *Book of Judgments* 74. 2 *Ditto* 119. 2 *Roll. Abr.* 694. 1 *Roll. Abr.* 779. By this verdict no body can ſay which of the leſſors title is eſtabliſhed, nor can either of them bring an action upon it for the *meſne* profits.

Variance.

Whitaker Serjeant *contra* did not offer to anſwer the objections, but ſaid they would try below and get it ſet right: at preſent he took an exception to the writ of error, that it was only to remove a record of an ejectment between the plaintiff and the two defendants who are found guilty; whereas it appears by the record, that there were eleven other defendants to the ſuit: and though the writ can be brought only by theſe two *ad grave damnum* of themſelves, yet the ſuit muſt be deſcribed as it really was. *Et per curiam*, So it ſhould, and the caſe of *Cook* and *the Ducheſs of Hamilton* was cited. Then *Strange* inſiſted, that it was amendable by the late act; and of that opinion was the court, ſo the writ of error was amended. And as to the objections to the judgment, it was adjourned, to give the defendant in error an opportunity to ſet it right if he could.

Dent *verſ.* Lingood.

How the entry ſhall be where a releaſe of errors is found.

THE defendant in error pleaded a releaſe of errors, which was found for him; and the court ordered the entry to be, that the plaintiff ſhould be barred of his writ of error, not *quod affirmetur*.

Between the Pariſhes of Weſtham *and* Chiddingſtone.

Woman's ſettlement before marriage remains, if huſband has no ſettlement. *Mich.* 1 *Geo. int. paroch. Tunskwell* and *Upotery*, held ſo likewiſe.

IT was ſtated, that a ſingle woman ſettled at *C.* was married to a man who is ſince dead, but his ſettlement did not appear: *Et per curiam*, Her ſettlement before marriage ſtands.

Hughes

Hughes *verſ.* Alvarez.

Writ of inquiry amended.

IN an action upon the caſe upon two promiſes, there was judgment for the plaintiff as to the firſt promiſe, and as to the ſecond a *nolle proſ.* A writ of inquiry is taken out to inquire what damages the plaintiff had ſuſtained *occaſione praemiſſorum*, and upon the return of this it was moved to amend the writ, and make it *occaſione non performationis praed' primae promiſſionis:* and upon the authority of *Baker* v. *Cambell*, *Paſ.* 4 *Ann. in B. R.* the writ was amended in this caſe, the record of the judgment by default being a warrant to amend by.

Haywys *verſ.* Savage.

Upon a ſpecial *capias* by original the defendant ſhall not be obliged to plead ſooner than upon a common *latitat.*

A Special *capias* by original was taken out returnable *craſtino animarum*, and for want of a plea to enter before the eſſoin day of *Hilary* term judgment was ſigned the 19th of *January*, which was now moved to be ſet aſide. And it was agreed, that if this had been by bill, the defendant would not have been obliged to plead till within *Hilary* term. But I inſiſted, that it being a ſpecial *capias*, wherein the whole caſe was ſet out at large, it made it more reaſonable, than where there is only a common *capias de placito tranſgreſſionis.* And it has been always taken to be for the expedition of the plaintiff, to ſue out theſe ſpecial writs: whereas if this judgment be ſet aſide, it will be putting them upon the ſame foot with a common *latitat.* The fact and practice was certainly on my ſide, but the court, out of a diſinclination to favour proceedings by original, would not allow there was any difference, but ſet aſide the judgment: ſo that now there is no advantage in taking out a ſpecial *capias*, and therefore I ſuppoſe it will be diſcontinued.

Helbut *verſ.* Held.

No error to be aſſigned contrary to the record. L. Raym. 1414.

ERROR of a judgment in *C. B.* after verdict for the plaintiff. And it was aſſigned for error, that *Edward Richeir*, who was ſworn as a juror returned upon the principal pannel, was never returned by the ſheriff; and alſo that there was diminution in the record, for want of the *venire facias* and *habeas corpora.* And to this *in nullo eſt erratum* was pleaded.

Parker

Parker pro quer' in errore objected, that *in nullo eſt erratum* was a confeſſion of the errors aſſigned, and then no doubt but that in point of law the ſwearing a perſon upon the jury, who was never returned by the ſheriff, will make ſuch an error in the proceedings, as will overthrow the judgment. 5 *Co.* 42.

Strange contra. I admit that where a matter of fact properly aſſignable is aſſigned for error, *in nullo eſt erratum* will be a confeſſion; but where the matter alleged is not by law aſſignable, there *in nullo eſt erratum* is a demurrer in law; it is inſiſting the party has no right to aſſign ſuch a matter for error, and that therefore the defendant ought not to be drawn into an inquiry about the truth of it. And I take it the error here alleged is not aſſignable, as being contrary to the record: for after the joinder in iſſue, the record goes on to the award of a *venire facias* returnable at ſuch a day, *ad quem diem*, ſays the record, *jurata inter partes praed' ponitur in reſpectu* till the next term, *niſi prius* the Chief Juſtice comes to *Guildhall:* at which time he comes, *et juratores unde infra ſit mentio exacti unus eorum*, (that is, one of thoſe returned by the ſheriff) *viz. Edwardus Richier ven' et in juratam illam juratus exiſtit:* ſo that the record expreſly ſays, that the *Edward Richier* who was ſworn, was one of them that was returned by the ſheriff; and therefore the error aſſigned is contrary to the record: and that ſuch an error is not aſſignable, I rely on 1 *Roll. Abr.* 758. *pl.* 8. If *A. B.* is ſworn upon the principal pannel, and another of the ſame name is ſworn upon the *tales*; it ſhall not be aſſigned for error, that the *A. B.* firſt ſworn and *A. B.* the *tales* man were one and the ſame perſon, ſo as to make it a trial by eleven jurors only; for that this (ſays the book) is contrary to the record, which ſays that they who were ſworn upon the *tales* were *alii de circumſtantibus:* he could not be *idem* conſiſtently with the record, which ſays that he was *alius:* and therefore ſuch an averment, contrary to the record, is not to be admitted.

As to the diminution alleged, I ſhall make no difficulty after a verdict, of admitting even that there are no ſuch writs at all.

Et per curiam, The caſe in *Rolle* is exactly in point, and according to the reaſon of the law in other caſes: therefore the judgment muſt be affirmed.

Dominus Rex *verſ.* Popplewell.

In conviction for ſwearing the oaths muſt be ſet out.

CONVICTION for profane curſing and ſwearing was quaſhed, for want of the particular oaths and curſes being ſet out.

Anonymous.

Mandamus.

STRANGE moved for a *mandamus* to be directed to the churchwardens of *St. Botolph Biſhopsgate*, commanding them to call a veſtry in *Eaſter* week, for the election of churchwardens: but the court refuſed it, ſaying there was no inſtance of ſuch a *mandamus*, and they could not take notice who had a right to call the veſtry, and conſequently did not know to whom it ſhould be directed.

Dominus Rex *verſ.* Betts et al'.

Amendment on the crown ſide.

TO a *ſcire facias* on the crown ſide upon a recognizance for keeping the peace, the defendant as to the breach aſſigned pleaded Not guilty, but concluded with an averment, inſtead of concluding to the country: and after a demurrer, I moved to amend the plea: and the court gave leave to amend it accordingly.

Dominus Rex *verſ.* Pappineau.

What judgment ought to be entered on a conviction for a nuſance.

THIS was a writ of error directed to the juſtices of the peace of the county of *Surrey*, to remove a conviction for a nuſance upon an indictment ſetting forth that the defendant ſuch a day, *Super quendam rivum ſive aquae curſum ibidem vocat' Wandle prope adjacen' et contigue adjungen' communi altae viae Regiae ibidem vocat' Tooting-Lane, necnon prope ſeparales domus maſionales diverſorum ligeorum et ſubdit' dicti Domini Regis, erexit et aedificavit quandam molam depſere coria* (*Anglice* to dreſs hides) *et macerare cutes ovium in aqua* (*Anglice* to ſteep ſheep ſkins in water) *et quod praed' (def')* *apud molam praed' depſuit et maceravit triginta cutes ovium magnum foetorem et inſalubrem odorem emittentes, et eaſdem cutes in quodam loco ibidem prope communem altam viam Regiam praed' poſuit et locavit, per quod aer ibidem maxime corrumpebatur et adhuc corruptus et infectus exiſtit ad commune nocumentum, &c.*

After Not guilty pleaded a trial is had, and the defendant found guilty; upon which the judgment of the court is entered, that the

defendant be fined 100 *l.* for the ſaid nuſance, *et capiatur*, *&c.* Upon this judgment the general errors are aſſigned, and the coroner and attorney pleads *in nullo eſt erratum.*

Strange pro querente in errore argued, that this ſhould be reverſed. And his firſt objection was, that as it was laid, it was not a fact indictable, it not being laid to be *in* but *near* the highway, for the *per quod aer ibidem* muſt refer to the erection, which is laid to be upon a rivulet *near* the highway, and if it be not *in* the highway, an indictment will not lie. *Sed per curiam*, Surely this is well enough. If a man erects a nuſance *prope adjungen'* to the highway, *per quod* the air thereabouts is corrupted; it muſt in its nature be a nuſance to thoſe who are in the highway, and therefore the indictment is well enough.

Then I went on to another objection, (and which I principally relied upon) that the judgment was erroneous for want of an adjudication that the nuſance be abated. The end of the law in giving an indictment for a publick nuſance is, to have the whole removed by one ſuit, and to avoid a multiplicity of actions. And it is preferred before an action upon the caſe, becauſe in that each party can only recover his ſeparate damages; whereas upon an indictment there may be an end of the thing at once. By theſe indictments the publick inconvenience is to be removed, which can be no other way effected, than by a judgment to abate the nuſance; for as to a fine, the publick is never the better for that, and a man in many caſes may find it worth his while to pay a fine, and continue the nuſance, in which caſe the publick has no redreſs.

In the caſe of the *King* v. *Walcot*, which was an attainder for high treaſon, the words *ipſo vivente* were omitted, and that was held a ſufficient error to reverſe that attainder; and yet that is not in ſo material a part as this; for there being a judgment that he ſhould ſuffer death, (which is *extremum ſupplicium*) it was but an omiſſion in the form; but the court ſaid that the common law having made that part of the judgment, it was not in the power of the court to omit it: in this caſe the principal judgment that the law has appointed is, that the nuſance be abated, to which the court may add the further puniſhment of a fine; but unleſs they give judgment to abate the nuſance, the publick is no better for this proſecution, but there muſt be a multiplicity of actions, which it is againſt the policy of our law to admit, where it may be prevented. The intereſt of the publick is ſo great, that in *Salk.* 458. it is held, that for the concern of the publick an act of general pardon ſhall take away the fine, but not the abatement. And an indictment for a nuſance is not good, unleſs it concludes *ad commune nocumentum* of the

Salk. 632. 4 Mod. 395. Cumb. 369. Parl. Ca. 127.

the King's ſubjects: which ſhews that the removing the common nuſance is the chief end of the indictment.

There are few precedents to be found of theſe judgments entered at large. *Bro. Nuſance* 39. it is ſaid how the judgment ought to be, which is an abatement and a fine; and in the *Old book of Entries* 144. *b.* in an aſſize of nuſance for diverting a watercourſe the entry is, *quod nocumentum praed' amoveatur et trenchea praed' obſtruatur.*

And it is no objection to ſay, that this is an error for the advantage of the defendant. It was for *Walcot*'s advantage to have that painful circumſtance omitted, but the court would not take that into conſideration, and held it ill, as varying from the judgment which the law had appointed. If upon an indictment for murder the defendant ſhould have judgment to be whipt; will any body ſay this is a good judgment, and yet ſurely it is for the benefit of the defendant.

Fazakerley contra. Every judgment muſt be according to the circumſtances of the caſe. This is not a permanent, but a tranſitory nuſance, in dipping of ſkins, and I do not know how that is to be abated: we may truſt the court in ſetting ſuch a fine as will be as effectual as an abatement: the defendant may have left off dipping his ſkins, and that is all the abatement the thing is capable of.

C. J. Regularly the judgment ought to be, to abate ſo much of the thing as makes it a nuſance. 9 *Co.* 53. *Godb.* 221. *Winch* 3. If a houſe be built too high, ſo much of it as is too high ſhall only be pulled down. The caſes cited by Mr. *Strange* were of a permanent nuſance; but here erecting the mole is not the nuſance, (for it might be lawful to do that) but the nuſance ariſes from the uſe he puts it to. If a dye-houſe, or any ſtinking trade were indicted, you ſhall not pull down the houſe where the trade was carried on. I think here could be no judgment to abate any thing, and therefore the judgment muſt be affirmed.

To which *Powys* J. agreed. *Et per Forteſcue* J. The queſtion is, whether in the caſe of a publick nuſance it is not neceſſary to give two judgments in all caſes. I am not ſatisfied this is not a permanent nuſance; the erecting is the cauſe of the nuſance, and the concluſion of the indictment *ad commune nocumentum* goes to the whole, as well the erection as the dipping. I remember the caſe of a glaſs-houſe, where the judgment was to abate the nuſance, not that the houſe ſhould be pulled down, but only to prevent his uſing it again as ſuch; which might have been done in this caſe, to prevent

vent his dipping ſkins again. *Co. Ent.* 92. *b.* 9 *Co. Batten's* caſe: it appears the plaintiff could not go on for damages after the defendant had abated the nuſance, which ſhews an abatement to be the moſt neceſſary part. 2 *Roll. Abr.* 84. And as no inſtance is given, where the judgment has varied in purſuance of the diſtinction now ſet up between permanent and tranſitory nuſances, I am of opinion that this judgment is erroneous, and ought to be reverſed.

Reynolds J. I think the judgment is right. Every judgment ſhould be adapted to the nature of the caſe: where the erection is the nuſance, there ought to be a demolition: roaſting of coffee was formerly thought a nuſance, and yet no body ever imagined the houſe in which it was roaſted ſhould be pulled down: and what other way is there to abate ſuch a nuſance? A glaſs-houſe is a nuſance in its own nature; but this is a lawful act, provided the ſkins which are dipt are not ſtinking ſkins. I ſhould think it would have been going too far, if they had adjudged the whole erection to be abated for a particular abuſe of it in dipping ſome ſtinking ſkins.

The Judges took further time to conſider of it; and in *Trinity* term following it was mentioned again, and all ſtanding to their former opinions, it was adjourned.

N. B. It was put in the paper about a year after, and no body appearing for the defendant, the judgment was affirmed.

Haſket *verſ.* Strong. At the Rolls.

Third mortgagee buying in the firſt ſhould be prior to the ſecond.

MR. *How* made a mortgage for 500 years, dated 9 *June* 1720. to *Neal.* He afterwards made a mortgage in fee to the plaintiff; and *Neal* aſſigned to the defendant, who afterwards advancing more money took a conveyance of the inheritance, with an agreement that the term ſhould be kept on foot as an additional ſecurity: the term was never aſſigned over to a third perſon. And on the queſtion touching priority it was agreed, that if the term had been regularly kept on foot, the defendant would have been in the common caſe of a third mortgagee taking in the firſt incumbrance to protect himſelf, by which he would have had the law on his ſide; whereas here the term was merged upon the grant of the inheritance, and therefore at law it would be with the plaintiff, who had the firſt mortgage in fee. To which it was anſwered, and decreed by the court, that the plaintiff's conveyance of the inheritance interpoſing between the term and the defendant's grant, the grant of the defendant was void in law, the grantor

having nothing in him; and then the term could not be merged in a void grant of the inheritance, and the defendant muſt be firſt paid his whole money. *Strange pro defendente.*

Southerton *verſ.* Whitlock.

At Guildhall coram Raymond *C. J.*

Infant bound by promiſe of payment at full age.

IT was held, that if goods which are not neceſſaries, are delivered to an infant, who after full age ratifies the contract by a promiſe to pay, he is bound: and he left it to the jury whether there was any confirmation of the contract at full age.

Lambell *verſ.* Pretty John.

Error *coram vobis* lies not after affirmance in Exchequer Chamber. 1 Roll. Abr. 755. pl. 16.

JUDGMENT was given in *B. R.* in treſpaſs, and on error in the Exchequer Chamber the judgment was affirmed. The defendant then brought a writ of error *coram vobis in B. R.* which Mr. *Parker* moved to quaſh, and cited 1 *Ven.* 207. 2 *Lev.* 38. 3 *Keb.* 28, 29. that it will not lie after an affirmance.

Belfield Serjeant inſiſted, the record never was removed from *B. R.* and that debt would ſtill lie upon it. *Sed per curiam*, Before the ſtatute of *Eliz.* we could not examine our own errors in fact after an affirmance in Parliament: and the Exchequer Chamber is now in the ſame degree with regard to us, as the Parliament was before. The writ of error muſt be quaſhed.

Eaſt-India Company *verſ.* Pullen.

At Guildhall coram Raymond *C. J.*

If I ſend my ſervant with the goods, the carrier is not liable.

ACTION againſt the defendant as a common carrier, on an undertaking to carry for hire on the river *Thames* from the ſhip to the company's warehouſes. Upon the evidence it appeared, the defendant was a common lighterman, and that it was the uſage of the company on the unſhipping of their goods to clap an officer, who is called a guardian, in the lighter, who as ſoon as the lading is taken in puts the company's lock on the hatches, and goes with the goods to ſee them ſafe delivered at the warehouſe. It appeared to be done ſo in this caſe, and part of the goods were loſt.

The

The Chief Juſtice was of opinion, this differed from the common caſe, this not being any truſt in the defendant, and the goods were not to be conſidered as ever having been in his poſſeſſion, but in the poſſeſſion of the company's ſervant, who had hired the lighter to uſe himſelf. He thought therefore the action was not maintainable, ſo the plaintiffs were nonſuited. *Strange pro quer'.*

Price *verſ.* Brown.

At Guildhall coram Raymond *C. J.*

Evidence.

UPON payment after the day and before bringing the action, it was pleaded to be a payment of the principal and all intereſt then due: on evidence it appeared a groſs ſum was paid, which upon computation did not amount to the full intereſt, but it was ſworn that the plaintiff accepted it in full. I objected, that they ought to prove it as they had pleaded; but the Chief Juſtice thought it well enough, upon which there was a verdict. And the next term I moved on affidavits of the falſity of the defence, and that we did not expect any defence, and therefore were not ready to contradict the ſingle witneſs who ſwore to the payment of the money. But the court would grant no new trial, ſaying it would be of dangerous conſequence, to ſuffer people to be ſetting up new evidence, after they knew what was ſworn before.

No new trial where party might have had evidence on firſt trial.

Chambers *verſ.* Robinſon.

Evidence.

IN an action for a malicious proſecution of an indictment for perjury, the Chief Juſtice allowed the plaintiff to give in evidence an advertiſement put into the papers by the defendant of the finding the indictment, with other ſcandalous matter, though an information had been granted for it as a libel, not (as he ſaid) that the jury were to conſider it in damages, but only as a circumſtance of malice.

Action lies for malicious proſecution of a bad indictment.

Upon the trial it appeared, the perjury was ill aſſigned, ſo that the now plaintiff could not have been convicted; and that exception was taken to it by the judge, and he was acquitted without examination of any witneſſes. But the Chief Juſtice held the action lay, though it was a faulty indictment, relying upon the caſe of *Jones* v. *Gwynn*, where the diſtinction in *Salk.* 13. was denied, and held by the whole court that the action would lie, though the indict-

Salk. 15.

indictment was bad; a bad indictment ſerving all the purpoſes of malice, by putting the party to expence, and expoſing him, but it ſerves no purpoſe of juſtice in bringing the party to puniſhment if he be guilty.

New trial granted for exceſſive damages, but the ſame damages being given a ſecond time, another trial cannot be had.

Whereupon the jury gave the plaintiff 1000 *l.* damages, and the next term the defendant moved the court for their judgment upon this point, (which was ſaved at *niſi prius*) and for leave to move for a new trial after the court had given their opinion upon the point, which was granted: and as to the point of law, the court made no difficulty of agreeing with the caſe of *Jones* v. *Gwynn*, and the defendant's counſel did not ſeem to think the reaſon and authority of that caſe was to be ſhaken.

Then the defendant moved for a new trial on account of the exceſſiveneſs of the damages; and the court ſaid it was but reaſonable he ſhould try another jury, before he was finally charged with 1000 *l.* So a new trial was granted upon payment of coſts. And a new trial being had, the ſame damages were given again; upon which the defendant applied to the court, who ſaid it was not in their power to grant a third trial; and ſo is *Salk.* 649. the caſe of *Clerk* v. *Udal.*

Eaſter

Eaſter Term

12 Georgii Regis. In B. R.

Sir Robert Raymond, *Knt. Lord Chief Juſtice.*
Sir Littleton Powys, *Knt.*
Sir John Forteſcue Aland, *Knt.* } *Juſtices.*
James Reynolds, *Eſq;*
Sir Philip Yorke, *Knt. Attorney General.*
Charles Talbot, *Eſq; Solicitor General.*

Lorymer *verſ.* Holliſter.

Where an attorney undertakes to appear, the court will oblige him to do it in all events.

THE bailiff, who had a writ againſt the defendant, came to Mr. *Stapleton* an attorney, and told him the defendant deſired he would back the writ, and appear for him; and afterwards upon the plaintiff's attorney's applying to him, he told him he had ſent orders to his agent to appear, and he believed he had done it. Whereupon the plaintiff's attorney delivered a declaration, and ſigned judgment for want of a plea. Upon motion to ſet it aſide, it appeared the bailiff went of his own accord to Mr. *Stapleton*, without the direction of the defendant, and that Mr. *Stapleton* diſcovering this, had countermanded the orders for appearing, and that in fact there was no appearance. But the court refuſed to ſet it aſide, and ſaid they would oblige Mr. *Stapleton* to file common bail according to his undertaking, in order to make the proceedings regular, there being no fault in the plaintiff's attorney. *Strange pro quer'.*

Noke *verſ.* Windham.

Practice.

THE leſſor of the plaintiff being an infant, the court obliged him to name a good plaintiff, who might be anſwerable for coſts.

Eden *verſ.* Wills.

The *ſcire facias* in error muſt be returnable as the original proceſs was. L. Raym. 1417.

AN action was commenced in *C. B.* by writ of privilege, which was returnable at a day certain: after judgment for the plaintiff a writ of error was brought, and a *ſcire facias quare executio non* was taken out, returnable at a general return. And upon motion to ſet it aſide, the matter was ſtirred ſeveral times. And after conſideration and ſearch of precedents, the *ſcire facias* was ſet aſide, for that it ought to purſue the nature of the firſt proceſs: and whereas in the common caſe of actions by original in *C. B.* the proceſs upon error in *B. R.* muſt purſue that, and be returnable at a general return; ſo where the proceeding below is by attachment of privilege, which is returnable at a day certain, the proceedings here muſt be returnable in the ſame manner. And a caſe was cited of *Vavaſour* v. *Parker*, *Trin.* 11 *Ann.* where it was ſo ruled. *Theſ. Bre.* 121. The writ was quaſhed, but without coſts.

Courtney *verſ.* Satchwell.

An immaterial traverſe muſt be ſhewn for cauſe of demurrer.

IN treſpaſs, aſſault, and falſe impriſonment, the defendant juſtifies under a proceſs out of the ſheriff's court in *London*, *quae eſt eadem*, *&c.* and traverſes being guilty *aliter vel alio modo*: to this the plaintiff demurs, and ſhews for cauſe, that the traverſe is idle, and unneceſſary. And upon argument the court were of opinion, that this was ill on a ſpecial demurrer, the *quae eſt eadem* being a ſufficient traverſe. *Lutw.* 1457. And ſo it was held in the caſe of *Carvil* v. *Manby*, where on a general demurrer it was allowed to be well enough; but the court ſaid if it had been a ſpecial demurrer, it would have been otherwiſe. *Judicium pro querente.*

Liſter

Liſter *verſ.* Baxter.

LISTER being maſter of a ſhip that was in diſtreſs at ſea, put in at *Amſterdam*, and there borrowed 60*l.* of *Baxter* to repair the ſhip, and hypothecated it for repayment of the money. The money not being paid, *B.* libelled in the admiralty; whereupon a prohibition was moved for, on account of it's being a contract at land; and it not appearing by the words of the contract, that the ſhip was upon her voyage, it would be preſumed ſhe was only to begin her voyage from *Amſterdam*.

The maſter cannot hypothecate the ſhip before the voyage begins.

But the court was clearly of opinion, there ſhould go no prohibition; it appearing by the libel, that the ſhip was upon her voyage; and if ſhe was not, it might be pleaded below, which would ouſt the admiralty court of juriſdiction; the maſter having no power to hypothecate the ſhip in port, before ſhe ſet out upon her voyage.

Sir Thomas Hales *verſ.* Taylor.

THE plaintiff having brought an action againſt the defendant for diverting his water, the matter was referred to arbitration, and the arbitrators awarded the defendant to fill up a canal, reſtore the ſtream to its former courſe, and to do ſeveral other matters relating to his water-works. The plaintiff afterwards applied to the court for an attachment for non-performance of the award, and read ſeveral affidavits to prove it. The defendant on the other ſide read affidavits, to prove his compliance with the directions of the award. Whereupon the court ſaid, it was diſcretionary whether they ſhould enforce the award by an attachment; and there being a contrariety of evidence, they would not determine it by affidavits, ſince the plaintiff was not without another remedy, by action upon the award.

Executing an award by proceſs of contempt is diſcretionary.

Sullivane *verſ.* Seagrave.

ERROR of a judgment in ejectment *in B. R.* in *Ireland de parte domus cognit' per nomen de le Three Kings in A.* And it was objected, that an ejectment would not lie *de parte domus*, and that the ſheriff could not know of what part he was to deliver poſſeſſion, and 2 *Roll. Rep.* 483. 11 *Co. Savil's* caſe. 4 *Mod.* 166. *Mo.* 702. *Lutw.* 974. *March* 97. *Salk.* 254. were cited.

Ejectment lies *de parte domus*.

But the court was of opinion, it was well enough, the ſituation of the houſe being ſufficiently deſcribed, and the ſame certainty is never required in an ejectment as in a *præcipe*.

Then exception was taken, that the record was not well returned; the writ of error being directed to *William Witched* Chief Juſtice, and the return is only by *William Witſhed* without adding *capital' juſtic' infra nominat'*, which *Forteſcue* Juſtice, thought a material objection, and mentioned the caſe of the *Queen* verſ. *Somers* 7 *Annæ*, which was a *certiorari* directed to the juſtices of the peace of *Oxon*, and the return was by two aldermen, without naming themſelves juſtices. *Sed per* C. J. and *Reynolds* J. (*abſente Powys* J.) Here are the words *prout interius mihi praecipitur*, which are enough to ſhew him to be the ſame perſon to whom the writ is directed: So the record being well removed, the judgment muſt be affirmed.

Caſe of the Borough of Chriſt-Church.

No trial at bar before iſſue joined.

UPON a motion for a trial at bar, which was conſented to on both ſides, it appeared iſſue was not joined: And the court refuſed to grant it, ſaying it was below the dignity of the court to do it, till they knew whether the iſſue joined would be a matter of difficulty or not.

Anonymous.

Mandamus.

A *Mandamus* was granted on Serjeant *Pengelly*'s motion, to ſwear in a director of the Amicable aſſurance, which is a company created by charter from the crown.

Ludwell *verſ.* Hole.

Words not actionable. L. Raym. 1417.

AFTER verdict for the plaintiff, who laid himſelf to be a gentleman, in an action for theſe words, '*You are a cheating old rogue, and have cheated the fatherleſs and widow*'. The judgment was arreſted for want of ſhewing the defendant to be a trader, or laying any *colloquium* of his trade. 5 *Mod.* 398. 1 *Rol. Ab.* 62. *Hardr.* 8. *Raym.* 62, 169.

Vat qui tam *verſ.* Green.

IN a *qui tam* on the ſtatute of uſury, I moved to ſtay proceedings, till notice given of the plaintiff's place of abode: After the rule was ſerved on the plaintiff's attorney, he ſends notice in writing that the plaintiff was in *Switzerland*, and was going on with the action: Upon which I moved a ſecond time to ſtay proceedings, till the plaintiff's return from *Switzerland*, or ſecurity given for the coſts, which is the reaſon the common rule is founded upon: And after hearing Mr. *Huſſey* for the plaintiff, the court made a rule according to my motion, and ſecurity was given for coſts. Practice.

Rig *verſ.* Wilmer.

ACTION by the plaintiff as aſſignee under a commiſſion of bankruptcy; and the declaration was, that the defendant was indebted to the bankrupt, and being ſo indebted he promiſed to pay to the bankrupt; but throughout the whole declaration there was no *aſſumpſit* to the plaintiff the aſſignee. Aſſignee of a commiſſion may declare on a promiſe to the bankrupt.

On demurrer it was inſiſted on by the defendant, that the ſtatute had transferred the promiſe to the aſſignee, and that a promiſe before made to the bankrupt was afterwards in point of law a promiſe to the aſſignee, and ought to have been declared on as ſuch.

Sed per Curiam, What reaſon is there to differ this from the common caſe of an action by an executor where you always declare on a promiſe to the teſtator, and yet the promiſe is as ſtrongly transferred to the executor, as it is here to the aſſignee. Judgment for the plaintiff.

Foot *verſ.* Prowſe. *Ante* 625.

THE judgment of the Exchequer Chamber, whereby the judgment given in *B. R. pro defendente* was reverſed, being now affirmed in parliament, the plaintiff came and moved for a peremptory *mandamus*: inſiſting, that he had now falſified the return, and conſequently ſet aſide the defendant's excuſe. To which it was objected, that no peremptory *mandamus* ought to go, unleſs beſides the reverſal of the judgment given for the defendant there had been alſo a new judgment given for the plaintiff; that a peremptory *mandamus* is a judicial writ, and muſt be founded upon A peremptory mandamus may go before any formal judgment.

ſome judgment eſtabliſhing the party's right that applies for it. Salk. 428. *Parl. Ca. Philips* v. *Bury*. *Salk.* 431. 2 *Cro.* 206. *Yelv.* 74. 2 *Vent.* 295. *Paſ.* 10 *Ann.* *Lidd* v. *Rodd*, *Trin.* 7 *Ann.* *Hicks* v. *Sherburn*.

To which it was anſwered, that here was every thing done by the plaintiff that was poſſible for him to do, for he can have no new judgment, the Exchequer Chamber and Houſe of Lords being confined only to reverſe or affirm.

And the whole court were of opinion, that a peremptory *mandamus* ought to go; for this was not a judicial writ founded upon the record, but is a mandatory writ, which the court always grants, when they are ſatisfied of the parties right: The reverſal of our judgment is declaring the opinion of the ſuperior court, that the plaintiff had a right; and there is no occaſion for any new judgment. We every day grant peremptory *mandamus's* on producing the *poſtea*; which ſhews a formal judgment is not neceſſary. A peremptory *mandamus* was awarded.

Dominus Rex *verſ.* Inhabitantes de Leofield.

Poor. AN order of removal whereby *J. S.* was adjudged *likely to become chargeable*, without ſaying *to the pariſh from whence removed*, was confirmed.

Dominus Rex *verſ.* Warre et al'.

Caption *ad feſtum Epiphanii* ill. UPON demurrer to an indictment, the caption appeared to be, at a ſeſſions held *ad feſtum Epiphanii* inſtead of *Epiphaniae*: and it was inſiſted *pro defendente*, that this was a different time from that preſcribed in the ſtatute, for *Epiphanius* is in the *Roman* calendar, and was a biſhop of *Salamis* in the time of the Emperor *Theodoſius*: and the court held it ill, and gave judgment for the defendant.

Mr. Delamotte's caſe.

No writ of privilege againſt a juſtice's being conſtable. 13 & 14 Car. 2. c. 12. §. 15. HE was a juſtice of peace in *Kent*, and lived at *Black-heath* and in *London*. And being appointed conſtable in *London*, Serjeant *Cheſhyre* moved for a writ of privilege, and cited *Cro. Car.* 585. But the court denied it, ſaying they had nothing to do with it, but the proper method was under the ſtatute *Car.* 2. to apply to the ſeſſions.

Siſney *verſ.* Nevinſon.

THE plaintiff had brought an action of debt upon a bond againſt the defendant as adminiſtratrix; and filed a bill in equity to diſcover aſſets; and had inſtituted a ſuit in the ſpiritual court, to oblige her to give in an inventary. After judgment for the plaintiff in the action, a writ of error was brought *in B. R.* and the judgment reverſed: then the plaintiff brought a new action *in B. R.* And the defendant moved to ſtay proceedings, upon the act for amendment of the law, on paying principal, intereſt and coſts. And now upon motion for the court's direction to the maſter in taxing the coſts, it was inſiſted for the plaintiff, that the defendant ought to pay the whole coſts of the firſt ſuit, the proceedings in Chancery, and the ſpiritual court: and the caſe of *Merril* v. *Jocelyn*, *Trin* 13 *Ann.* was mentioned for this purpoſe. Coſts.

Sed per cur', We have nothing to do to order coſts for proceedings in another court, which has a power to award coſts, if the party is intitled to them; and as to the judgment, that is reverſed, there is no reaſon why the defendant ſhould pay for the error and miſtake of the plaintiff. We are of opinion, the proceedings in this cauſe muſt be ſtayed on payment of the coſts of this ſuit.

Dominus Rex *verſ.* How.

INDICTMENT againſt the defendant, for that he *quendam Nich'um Carew, Baronettum*, being a juſtice of peace in the execution of his office, *per diverſa ſcandaloſa, minacia et contemptuoſa verba abuſus fuit, et ipſum in executione officii ſui praedicti vi et armis illicite retardavit.* Upon demurrer to this indictment, it was objected by Serjeant *Darnall*, that it was too general, and that the words ought to be ſet out, that the court may judge whether they are indictable or not, according to the late caſes of convictions for curſing and ſwearing, where the court has required the oaths to be ſet out. Indictment for words muſt ſpecify what they were. *Vide* the reſolution in Dr. *Sacheverel*'s caſe.

Strange contra admitted the indictment to be bad as to the words, but inſiſted that it was good as to the obſtructing the juſtice in the execution of his office: and if any part of it be well laid, there ſhall be judgment for the King. Juſtices are indictable for neglecting their duty, and it is but reaſonable to give them the ſame remedy againſt the obſtructers. *Salk.* 380. Indictment too general.

Et

Et per curiam, If any part of the indictment was good, we ſhould not give judgment for the defendant. But this is bad *in toto*. *Retardavit* will hardly warrant calling this an obſtruction; but if it would, ſurely ſome act or other ſhould be ſet out. *Judicium pro defendente.*

The King *againſt* the Inhabitants of Saint Mary the Virgin in Marlborough.

Order. AN order was made upon the 43 *Eliz.* for a neighbouring pariſh to contribute *ſo long as we the ſaid juſtices ſhall think fit. Et per curiam*, It muſt be quaſhed, for the diſcretion that is left in the juſtices is, as to the *quantum*, and not as to the duration of the contribution.

Dominus Rex *verſ.* Travers.

At Kingſton *Aſſizes* Lent 1726. coram Raymond *C. J.* de B. R.

What age the law will allow an infant to be a witneſs at. THE defendant was indicted the laſt ſummer Aſſizes, for a rape upon the body of a child, then little more than ſix years old. And becauſe the Lord Chief Baron *Gilbert* refuſed to admit the child as an evidence againſt him, he was acquitted.

But at the ſame Aſſizes an indictment was found againſt him for an aſſault with an intent to raviſh the ſaid child. And this indictment coming now to be tried before *Raymond* C. J. the ſame objection was now taken by *Comyns* and *Darnall* Serjeants, *viz.* that the girl being now but ſeven years of age, could not be a witneſs: they inſiſted that it had formerly been held, that none under twelve years of age could be admitted to be a witneſs, and ſaid that a child of ſix or ſeven years of age, in point of reaſon and underſtanding, ought to be conſidered as a lunatick or madman.

On the other ſide it was ſaid, that in capital caſes, which concerned life, this objection might be allowed; but in caſes of miſdemeanor only, as this was, ſuch a witneſs might be admitted: they inſiſted, that the objection went only to the credit of the witneſs; and *Hale's P. C.* ſays, that the examination of one of the age of nine years has been admitted: and a caſe at the *Old Bailey* 1698. was cited, where upon ſuch an indictment as this, *Ward* Chief Baron admitted one to be a witneſs, who was under the age of ten years,

years, after the child had been examined about the nature of an oath, and had given a reaſonable account of it.

But *Raymond* C. J. held, that there was no difference betwixt offences capital and leſſer offences, in this reſpect. And that a perſon who could not be a witneſs in the one caſe, could not in the other. The reaſon why the law prohibits the evidence of a child ſo young is, becauſe the child cannot be preſumed to diſtinguiſh betwixt right and wrong: no perſon has ever been admitted as a witneſs under the age of nine years, and very ſeldom under ten. At the *Old Bailey* in 1704. this point was thoroughly debated in the caſe of one *Steward*, who was indicted upon two indictments for rapes upon children. The firſt was a child of ten years and ten months, and yet that child was not admitted as a witneſs, before other evidence was given of ſtrong circumſtances, as to the guilt of the defendant, and before the child had given a good account of the nature of an oath. The ſecond indictment againſt *Steward* was attempted to be maintained by the evidence of a child of between ſix and ſeven years of age: but it was unanimouſly agreed, that a child ſo young could not be admitted to be an evidence, and the child's teſtimony was rejected, without inquiring into any circumſtances to give it credit. And it was merely upon the authority of *Hale's P. C.* where it is ſaid, that a child of ten years of age may be a witneſs, that the other child of that age was admitted to be a witneſs in the firſt indictment. And in the preſent caſe, the child was refuſed to be admitted a witneſs. And there not being evidence ſufficient without her, the defendant was acquitted.

Bredon qui tam *verſ.* Harman.

At Guildhall coram Eyre *C. J.* de C. B.

ACTION *qui tam* for not regiſtring articles of apprenticeſhip according to the ſtamp act: the defendant pleaded *nil debet*: and upon the trial he offered in evidence a record of a recovery againſt him for the ſame forfeiture by another perſon, and ſo endeavoured to diſcharge himſelf by this under the plea of *nil debet*. And it was inſiſted for him, that if it appeared, that there was a recovery againſt him by another perſon for the ſame forfeiture, he was thereby diſcharged againſt all men, and owed nothing upon that account, and therefore it was very proper to give this record in evidence upon *nil debet*.

A former recovery not to be given in evidence on *nil debet* in a *qui tam*. *Strange pro quer'*.

But *Eyre* C. J. denied this record to be given in evidence, and ſaid the defendant ought to have pleaded it, if he would take advantage of it; for if it had been pleaded, the plaintiff would have been at liberty to have replied *nul tiel record*, or that it was a recovery by fraud to defeat a real proſecutor, which he could not be prepared to ſhew upon this iſſue.

Dominus Rex *verſ.* Brotherton.

Selling meat on a *Sunday* no offence at common law.

INDICTMENT for exerciſing the trade of a butcher on a *Sunday*. And exception was taken, that it was not laid to be *contra formam ſtatuti*, and it was no offence at common law. But the court refuſed to quaſh it, and put the defendant to demur; and afterwards upon demurrer judgment was given for the defendant.

Trinity Term

12 Georgii Regis. In B. R.

Sir Robert Raymond, *Knt. Lord Chief Juſtice.*
Sir Littleton Powys, *Knt.*
Sir John Forteſcue Aland, *Knt.* } *Juſtices.*
James Reynolds, *Eſq;*
Sir Philip Yorke, *Knt. Attorney General.*
Charles Talbot, *Eſq; Solicitor General.*

Dominus Rex *verſ.* Rhodes.

Pending a ſuit in the ſpiritual court touching the validity of a will, an indictment for forging it ought not to be tried.

THE defendant exhibited a will in *Doctors Commons* as executor, and demanded probate: after a long conteſt there, it was determined in favour of the will; and upon appeal to the Delegates the ſentence was confirmed.

Afterwards the parties who had been concerned in cooking up the will, fell out amongſt themſelves about the diviſion of the eſtate; and thereupon it came out, that the will was forged, and upon full affidavits of the forgery a commiſſion of review (which it was agreed was the only method to bring the matter over again) was granted by the Lords Juſtices; and an indictment was alſo found for the forgery, and ſtood ready for trial in *B. R.* Upon motion for a *habeas corpus ad teſtificandum* the Chief Juſtice declared, that he would not try the cauſe. For there being yet a ſentence ſubſiſting in favour of the will, and the validity of that being now put under a proper examination; he did not think it fitting to determine the property by an indictment, which would come on more properly after the ſentence was reverſed.

Dominus Rex *verſ.* Davie.

Apprentice not to be diſcharged without a reaſon.

ORDER of ſeſſions for diſcharging an apprentice was quaſhed, the only reaſon given for the diſcharge being, that the maſter declared in open court he would not take him again.

It was agreed to be a point not now to be diſputed, but that the ſeſſions had an original juriſdiction to diſcharge apprentices.

Dominus Rex *verſ.* Smith.

Nuſance.

THE defendant was convicted on an indictment, for making great noiſes in the night with a ſpeaking trumpet, to the diſturbance of the neighbourhood: which the court held to be a nuſance, and fined the defendant 5 *l.*

Dominus Rex *verſ.* Lewis.

Certiorari lies to *Wales* on indictments for miſdemeanor.

INDICTMENT in the grand ſeſſions of *Angleſea*, for embracery. And it was moved *ex parte def'* for a *certiorari*. It was admitted, that in capital caſes the *certiorari* lay by the 26 *H.* 8. *c.* 6. §. 6. But it was contended for the proſecutor, that in caſes of miſdemeanor it had never been granted; of which the court would adviſe. And at another day ſeveral precedents were produced, and *poſteas*, where the indictment removed from the grand ſeſſions had been ſent down to be tried in an *Engliſh* county, and returned up to *B. R.* therefore in this caſe there being an affidavit, to induce a ſuſpicion, that a fair trial could not be had in *Wales*, a *certiorari* was granted.

How affidavits muſt be intitled.

N. B. The affidavit was intitled *Rex* v. *Lewis*. And it was objected there was no ſuch cauſe in this court. But the court ſaid it was enough that there was a cauſe below between the *King* and *Lewis*, ſo the affidavit was read. At another day *inter*

Regem *et* Jones.

THE affidavits on which an information was moved for had no title (which was agreed to be right) but the affidavits *pro def'* on ſhewing cauſe were intitled. *Rex* v. *Jones*. And upon objection to the reading them, the court ſaid, that there being a rule

in *B. R.* to ſhew cauſe why there ſhould not be an information, that was a proceeding in court between the *King* and *Jones*, and warranted the intitling the affidavits in that manner.

Onſlow *verſ.* Booth.

A Plea of privilege of clerk to a prothonotary in *C. B.* was ſet aſide, the affidavit annext to it being *that this is a true plea*, and not *that the plea is true*, the ſtatute requiring the affidavit ſhould eſtabliſh the fact, and not the legality of the plea. Plea of privilege ſet aſide.

Braceby *verſ.* Dalton.

IN an action upon the caſe Mr. *Wynne* moved on affidavit that the defendant did not know the plaintiff, that the attorney for the plaintiff might give an account who his client was, and where he lived. But the court refuſed it, ſaying it had never been done but in a *qui tam*. Practice.

Powel *verſ.* Gay.

IT was ſettled, that if the defendant craves *oyer* of any thing whereof he is intitled to have *oyer*, and it is not delivered in time; he ſhall have ſo many days to plead after the rules are out, as he demanded *oyer* before the rules were out. Practice.

Frontin *verſ.* Small.

IN covenant, the plaintiff declares, that by deed made between her as attorney for *James Frontin* on the one part, and the defendant on the other part, ſhe demiſed a houſe to the defendant, and that he covenanted to pay the yearly rent of 60 *l.* to *James Frontin*, and then aſſigns a breach in non-payment of rent, *ad damnum* of the plaintiff, who was the attorney. Where a warrant of attorney is given to execute a deed, it muſt be executed in the name of the principal. L. Raym. 1418.

Demurrer inde, and *Strange pro defendente* objected, that this is a void leaſe, and that no action can be maintained upon it, eſpecially by the plaintiff who was but the attorney, and to whom the rent is not reſerved: neither is it ſo much as a covenant *with the plaintiff*, but only generally *quod convenit* to pay the rent to *James Frontin*. The power is not purſued by a leaſe in the name of the

attorney, for it ought to have been in the name of the principal. 9 *Co.* 76, 77. *Combe*'s caſe is expreſs, " If attornies have power to " make leaſes by indenture for years, they cannot make the inden- " tures in their own names, but in the name of him who gave the " warrant of attorney;" and 1 *Roll. Abr.* 330, 501. *Godb.* 389. *Mo.* 71. it is ſaid ſuch leaſes are void. A warrant of attorney in the nature of it is only giving another a power to ſet my name in my abſence, but not to enable him to act as owner of the eſtate.

Reeve contra inſiſted, that the agreement that one ſhall procure an entry and enjoyment, and the other ſhall pay the rent, may be good, though the deed be void ſo as to paſs an intereſt in the land: and the word *dimiſit* is a covenant, upon which an action will lie. 4 *Co. Noaks*'s caſe. And a leaſe may be good reſerving rent to a ſtranger, who is no party to the deed; and ſo is 1 *Mod.* 113. *Et per curiam*, No doubt but in a good leaſe the rent may be ſo reſerved, and that *dimiſit* will amount to a covenant; but then that muſt be where the deed is valid, as this is not: and if on the one hand it be void ſo as to paſs an intereſt in the land, it is but juſt on the other hand that it ſhould be void as to the reſervation of rent: eſpecially in this caſe, where the covenant is not *with the plaintiff*, nor the rent reſerved to her. Judgment for the defendant.

Chadwick *verſ.* Allen.

What a regular note.

UPON demurrer to a declaration on the following note, it was held to be a note within the ſtatute; " I do acknow- " ledge that Sir *Andrew Chadwick* has delivered me all the bonds " and notes for which 400 *l.* were paid him on account of colonel " *Synge*, and that Sir *Andrew* delivered me major *Graham*'s receipt " and bill on me for 10 *l.* which 10 *l.* and 15 *l.* 5 *s.* ballance due " to Sir *Andrew*, I am ſtill indebted, and do promiſe to pay. *Judicium pro quer'. Strange pro defendente.*

Manwairing *verſ.* Sands.

In Middleſex coram Raymond *C. J.* de B. R.

Huſband not chargeable for goods ſold to adulterous wife. Salk. 116.

IN an action againſt the huſband for a laced head ſold to the wife; it was proved, that the wife lived from her huſband in adultery, and that ſhe told the plaintiff ſhe had a huſband, but that ſignified nothing, for ſhe would pay him herſelf: the Chief Juſtice held the defendant not chargeable, and ſaid he ſhould have

ruled it ſo, if there had been no actual notice, which only ſtrengthned the caſe. *Strange pro defendente.*

Pepys *verſ.* Sir John Lambert.

At Guildhall coram Raymond *C. J.*

THE third indorſee of a promiſſory note kept it from the firſt of *November* to the ſeventh of *January* without receiving it of the maker of the note: and in an action againſt the firſt indorſee, without notice, the plaintiff was nonſuited for his neglect. *Strange pro querente.* Within what time a note ought to be demanded.

Dominus Rex *verſ.* Edwards.

INDICTMENT for conſpiring to marry a poor perſon ſettled in *A.* to a perſon ſettled in *B.* in order to bring a charge upon the pariſh of *B.* And on demurrer *judicium pro defendente*, becauſe not an offence indictable. *Vide Salk.* 174. Indictment *ou ne giſt.*

Wheeler *verſ.* Thompſon.

ON a motion for a prohibition, it was held that a carpenter may ſue for wages in the Admiralty. 2 *Ven.* 181. *Salk.* 33. 1 *Mod.* 93. Carpenter may ſue in the Admiralty.

Jenkins *verſ.* Purcel.

At Guildhall coram Raymond *C. J.*

WHILST the jury were ſwearing, the defendant's counſel called for the record, and finding a miſtake in it, ſaid they would make no defence. The plaintiff's counſel upon this, in order to avoid a nonſuit, and to ſave the coſts, refuſed to pray a *tales*; and though twelve had been ſworn, yet there having been no actual prayer of a *tales*, the cauſe was ſuffered to remain for want of jurors. Practice at *niſi prius.*

Turner

Turner *verſ.* Turner.

In Canc. coram King *Chancellor*, 14*th of* May.

Infant pays no coſts on a bill filed by the *prochein amy*. 2 Will. Rep. 297.

THE plaintiff being an infant, brings a bill in this court, by his *prochein amy*, to diſcover whether a will was cancelled by the defendant after the death of the teſtator, or by the teſtator himſelf. And upon the hearing, the court directed an iſſue at law, to try this point, and upon the trial of that iſſue, a verdict was found for the defendant.

Upon the day of trial of this cauſe the *prochein amy* dies, and within a ſhort time afterwards the infant comes of age, but does not proceed any further in the ſuit.

The defendant brings on the cauſe upon the equity reſerved, and the plaintiff's bill was diſmiſſed with coſts.

Upon which the plaintiff obtained a rehearing as to the point of coſts. And for the plaintiff it was argued by *Talbot* and *Cowper*, that any perſon might bring a bill in this court in the name of an infant, which the infant could not diſcover whilſt under age: that it would therefore be very hard to make an infant pay coſts in a ſuit which might be commenced without his conſent; and that it had never been the practice, unleſs the infant avowed the ſuit after he came of age, which made it his own act.

That the *prochein amy* was the perſon only relied upon for coſts; and if at any time it appeared to the court, that he was not reſponſible for this purpoſe, the court upon motion would order a new one to be named, that was ſo: and in caſes where it is neceſſary to examine the *prochein amy* as a witneſs in the cauſe, it can never be done till he is diſcharged from being *prochein amy*, and a new one named; becauſe of his intereſt in the cauſe, in being ſubject to coſts.

That they could not find one inſtance, where an infant under theſe circumſtances ever paid coſts: that they had ſearched the *ſubpoena* office, and found, that wherever an infant's bill was diſmiſſed with coſts generally, that the *ſubpoena* for coſts was always made out againſt the *prochein amy*; from whence they argued, that the practice was to make him only liable.

A *feme covert* when ſhe ſues by *prochein amy* may be ſubject to coſts, but an infant is not; for a *feme covert* may at any time diſavow the ſuit, which an infant cannot: and this they ſaid was the diſtinction; and therefore inſiſted, that the plaintiff, in regard he had not proſecuted the ſuit after he attained his full age, ſhould not be made ſubject to coſts.

For the defendant it was argued by *Lutwyche* and *Mead*, that the infant and *prochein amy* were both liable, and ought to be ſo, otherwiſe the infant might be as vexatious as he pleaſed: at common law the judgment is always entered againſt the infant, and the execution follows the judgment; ſo that at law the infant here is liable to coſts; and there being in this caſe both coſts at law and in equity, a court of equity will not in ſuch caſes take from the defendant the remedy he has at law. It was admitted, that they knew of no precedent in this court, where the infant paid coſts; and therefore they would argue from caſes at law, which they ſaid were equally founded upon reaſon as caſes in equity: and the reaſon of the common law in ſubjecting infants to coſts, was in reſpect of their intereſt in the matters in controverſy. The *prochein amy* has not an abſolute power to carry on a ſuit without an infant's conſent; for upon application to the court on the behalf of the infant, ſuggeſting that the ſuit is not for his benefit, the court will refer it to a maſter, and if he reports it ſo, the court will ſtop the ſuit. The caſe of lord *Dudley* was mentioned, where an infant would have controverted an account before a maſter; but the court would not permit him to do it, till he had given ſecurity to anſwer coſts; from which it was inferred, that an infant ought to be made liable to anſwer coſts.

King Lord Chancellor, At common law no coſts were given either to plaintiff or defendant: but the plaintiff found pledges *de proſequendo*, and in caſe it was found againſt him, he was amerced *pro falſo clamore ſuo*.

Infants found no pledges at common law. The ſtatute of *Glouceſter* was the firſt ſtatute which gave coſts to demandants in real actions, and the power for infants to ſue by *prochein amy* was firſt introduced by the ſtatute of *Weſtminſter* 2. It was made general, and *Coke* in his commentary upon theſe ſtatutes ſays, that both guardian and *prochein amy* ought to be admitted by the court, and that no one can have a teſtamentary guardian for this purpoſe. I think it a proper power lodged in the court, that they may have reſponſible perſons; for at common law, if the guardian loſt the infant's land by miſpleading, the infant could not falſify the judg-

ment; but a writ of deceit lay to recover in damages againſt the guardian. I do not find that any caſe has been cited, where an infant plaintiff has been obliged to pay coſts either at law or in equity: and in *Cro. Eliz.* 33. *Grave* v. *Grave*, an infant brought treſpaſs by guardian, and was nonſuited; yet the court would not charge him with coſts. And in another caſe 1 *Bulſt.* 109. the court ſeemed to be of the ſame opinion.

And the chancellor having enquired, what was the practice, of the regiſter, who ſaid he had never known an infant liable in that court; he diſmiſſed the bill without coſts in equity; but left the defendant to recover at law, as he could.

Keilway *verſ.* Keilway.

Coram King *Chancellor* 19 May 1726.

How the eſtate ſhall be diſtributed where there is a wife, a mother and brothers, but no children. 2 Will. Rep. 344.

R. *Keilway* died inteſtate poſſeſſed of a conſiderable perſonal eſtate, and without iſſue, leaving a wife, and ſeveral brothers and ſiſters, and his mother living.

The wife under the ſtatute of *Car.* 2. takes a moiety; and a queſtion ariſing upon the ſtatute 1 *Jac.* 2. *c.* 17. how the other moiety ſhould be diſtributed, whether the mother ſhould have the whole, or only a diſtributary ſhare with the brothers and ſiſters, and to have the opinion of the court, a bill was brought; and upon hearing the Lord Chancellor was clearly of opinion, and decreed, that the mother ſhould have no more than a ſhare of the other moiety in common with the brothers and ſiſters of the inteſtate.

Hill *verſ.* Bateman & al'.

Coram Raymond, *Chief Juſtice*, *at* Weſtminſter.

Action lies againſt a juſtice for committing where there was no attempt to diſtrain firſt.

THE defendant *Bateman*, being a juſtice of peace, had convicted the plaintiff for deſtroying game, and though (as it was proved) the plaintiff had effects of his own which might have been diſtrained, which were ſufficient to anſwer the penalty he had incurred, yet the defendant ſent him immediately to *Bridewell*, without endeavouring to levy the penalty upon his goods: and an action of treſpaſs and falſe impriſonment being brought againſt *Bateman* for this commitment, the Chief Juſtice was of opinion, that the action well lay.

The other defendant was the conſtable, who had executed this warrant of commitment; and as to him it was agreed, that the warrant was a ſufficient juſtification, it being in a matter within the juriſdiction of the juſtice of peace: but if a juſtice of peace makes a warrant in a caſe which is plainly out of his juriſdiction, ſuch warrant is no juſtification to a conſtable. See 24 *Geo.* 2. *c.* 44.

And it was agreed, that where actions of this kind are brought againſt juſtices of peace, they are obliged to ſhew the regularity of their convictions; and the informations, *&c.* laid before them upon which their convictions are grounded, muſt be produced and proved in court.

In theſe actions juſtices muſt ſhew the regular proceedings.

Dominus Rex *verſ.* Chipp.

THE defendant was convicted upon the ſtatute 4 *&* 5 *W. & M. c.* 23. for deſtroying game; not being a perſon duly qualified.

Conviction for game.

Filmer for the defendant took ſeveral exceptions to the conviction.

1. That the information, which was ſet forth in the conviction, was inſufficient to warrant the conviction; for the information only recited that he was an *inferior tradeſman*, but did not ſhew that he had *waſted his ſubſtance*, or that he was a *diſſolute perſon*, which are the words of the ſtatute; and therefore it did not appear by this conviction, that the defendant was ſuch a perſon aswas intended by the ſtatute, for he might be an *inferior tradeſman*, and yet have a ſufficient eſtate to qualify him to hunt, *&c.*

2. That it was not any where ſet forth in the conviction, that the defendant did *unlawfully hunt*; and for any thing which appears in this conviction, the defendant might have bought the hare; and have hunted and killed it in his own yard, which would have been lawful.

3. That the conviction ſet forth, that information was given to ſuch an one *juſtice of peace*, but did not ſay *adtunc* a juſtice; and he might be a juſtice at preſent, and not at the time of the information.

But the court over-ruled all the exceptions; and to the firſt they ſaid, that the ſtatute was in the disjunctive, *viz. inferior tradeſman or diſſolute perſon*; and therefore ſaying that the defendant was either was ſufficient.

To

To the ſecond, the court ſaid, that the ſtatutes forbid ſuch perſons as the defendant to *hunt at all*, and made it criminal for ſuch perſons to *hunt* generally. And in this ſtatute there is no diſtinction betwixt *lawful* and *unlawful hunting*, as there is in the ſtatute againſt deer ſtealers; and they agreed, that in a conviction for deer ſtealing, it muſt be ſet forth, that the defendant did *unlawfully hunt*; but in the preſent caſe it need not, becauſe there is no ſuch diſtinction.

To the third exception the court ſaid, that the conviction ſet forth, that information was made to ſuch an one *exiſten' un' juſtic'*, *&c.* which muſt be intended, that he was one at that time, and was ſufficient without ſaying *adtunc*.

And ſo all the exceptions were over-ruled, and the conviction confirmed.

Dawſon et ux' *verſ.* Myer Mil'.

In the Exchequer Chamber.

What are mutual covenants.

A Writ of error was brought in the Exchequer Chamber upon a judgment in *B. R.* in an action of covenant, in which the plaintiff declared, that in conſideration of 730*l.* 10*s.* to be paid by the defendant, he (the plaintiff) covenanted on or before the 25 *March* then next, to transfer the produce of 634*l.* 7*s.* 6*d.* in lottery annuities ſubſcribed by the plaintiff, and that the defendant covenanted to accept and pay; and the plaintiff ſet forth, that the company allowed 173*l.* 16*s.* ſtock upon the ſaid annuities, and then ſets forth, that he made a tender thereof to the defendant upon the day, and that the defendant refuſed to accept.

The defendant pleaded double, *viz.* that there was no tender, and that the contract was not regiſtred. The plaintiff replied that the contract was duly regiſtred, and offered an iſſue, to which the defendant demurred; and as to the defendant's plea that the plaintiff made no tender, the plaintiff demurred.

And upon joinder in demurrer, the court of *B. R.* gave judgment for the plaintiff; for they ſaid, that there were mutual covenants, *viz.* an expreſs covenant from the defendant to pay the plaintiff 730*l.* 10*s.* and then a diſtinct covenant from the plaintiff to transfer the produce of the annuities to the defendant; and the covenants therefore being mutual, they held that the tender was out of the caſe,

caſe, and the plaintiff was not obliged to anſwer it; for if the plaintiff did not tender, the defendant had his remedy againſt him for not doing it.

A writ of error being now brought upon this judgment in the Exchequer Chamber, *Eyre* Chief Juſtice of the Common Pleas, *Gilbert* Chief Baron, *Price*, *Page* and *Hale*, Barons, and *Denton* Juſtice, were unanimouſly of opinion, that the judgment of *B. R.* was right, and they affirmed it accordingly.

Fazakerley was of counſel for the plaintiff in error, but he not attending there was no argument.

And *Strange*, who was ready to argue it for the defendant in error, only opened the caſe, becauſe the court were clearly of opinion for his client upon the firſt opening. But the caſes upon which he relied as authorities were theſe.

Blackwell v. *Naſh*, *Mich.* 9 *Geo.* *ante* 535. which was a covenant by the plaintiff to transfer ſtock to the defendant, and the defendant *in conſideratione praemiſſor'* covenanted to accept and pay for it; and the court held that the words *in conſideratione praemiſſor'* implied the covenant on the other ſide to transfer; and were held to be mutual covenants, and judgment *pro quer'*, which was affirmed in the Exchequer Chamber. 1 *Saund.* 319. *Pordage* v. *Cole.*

The caſe of *Wyvil* v. *Stapleton*, *ante* 615. which was affirmed in the Houſe of Lords, was to pay *proinde adtunc* at the time of the tender; which is different from this caſe, for here the defendant's covenant is, to pay ſo much abſolutely in ſatisfaction for the ſtock. The defendant here covenants to do two diſtinct acts, 1. to accept; 2. to pay; here is no *proinde*; and the words *in conſideratione praemiſſor'* relate only to the covenant on the other ſide to transfer, and not to the actual transferring.

If the covenant of the defendant *ad idem tempus ſolvere* is to be confined to his acceptance, then it gives him the liberty of avoiding one contract by the breach of the other. In the caſe of *Wyvil* v. *Stapleton* there were not the words *ad idem tempus*, and thoſe words in the preſent caſe are to be conſtrued to be the time the defendant *agreed to accept the ſtock*, and not the time the plaintiff *does actually transfer.*

He had another exception to the defendant's plea, which was this: by the contract the plaintiff was to transfer the produce of the

ſaid annuities, with all dividends, profits, &c. and the plea only offers an iſſue as to the produce of the ſtock. So that it is putting that in iſſue, which if found for the plaintiff, will not eſtabliſh the performance of the whole agreement on his part. This was as immaterial as the caſe of payment before the day; which has been often held ill, if found for the plaintiff. *Trin.* 13 *Ann. B. R. Merril* v. *Jocelyn.* So in *Hob.* 113. in debt upon an obligation for the payment of 10 *l.* 10 *s.* the defendant pleaded payment of 10 *l.* only, upon which they were at iſſue, and a repleader was awarded, though the defendant had pleaded that he paid it *ſecundum formam conditionis.* But this exception did not come before the court for their opinion: and judgment was affirmed upon the firſt point.

Upon which affirmance a writ of error was brought returnable in Parliament, where after the caſe was ſettled, and I was ready to argue it, the plaintiff in error ſubmitted, and paid the money.

END of the FIRST VOLUME.