REPORTS
OF
CASES
Determined in the
Court of King's Bench,
TOGETHER
With ſome other CASES;
FROM
Trin. 12 Geo. I. to Trin. 7 Geo. II.
WITH
TABLES of the NAMES of the CASES and of the PRINCIPAL MATTERS.

In Two Volumes.

VOL. I.

BY

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Term. Trin.

12 Geo. I. 1726.

Twiford *and* Huggins.

THIS was an Action of Debt against the Warden of the Fleet for an Escape. The Defendant pleads that he is an Officer of the Common Pleas, ratione cujus attendentia fua indies requiritur in that Court. To which the Plaintiff demurs. Exception was taken to the Plea, for that he does not say he does every Day attend. But the Court took a Difference between such Officers, as in the Case at Bar, whose Attendance the Court have a Right to Virtute Officii, and such Officers, who attend only casually, as Attornies, and Clerks to the Prothonotaries; for the first may plead such a Plea as the present one, but the other must say, they do every Day attend; accordingly the Court gave Judgment for the Defendant.

When an Action is brought in the King's Bench against an Officer of the Common Pleas, what shall be a good Plea of Privilege to such Action.

Anonymus.

A Writ of Error was brought upon a Judgment given in the County Palatine of Durham. Exception was taken to it, for that it had not the Continuances from one Session to another. As in Writs of Error on Judgments in the Common Pleas, there must be the Continuances of the Action from one Term to another. Which Exception was allowed. However the Court did not reverse the Judgment, but awarded a Certiorari in order that the Continuances might be certified.

When Actions are brought in Counties Palatine, how far the Continuances must be entered up from one Sessions to another.

Term. Mich.

13 Geo. I. 1726.

The King *and* The Occupiers of Land in Burough-Fen.

Conſtruction upon that Part of the Statute of 43 Eliz. 2. which allows the making one Pariſh to be Contributory to another.

AN Order of two Juſtices was made upon the Occupiers of Land in Burough-Fen for the Relief of the Poor of the Pariſh of St. John Baptiſt. The Exception, that was taken to it, was, that the Statute of 43 El. only gives two Juſtices a Power of charging any other of other Pariſhes within the Hundred, in caſe where a Pariſh is overburdened with Poor; but it does not appear by this Order, that the Occupiers of Land in Burough-Fen are of a different Pariſh from that of St. John Baptiſt; therefore non conſtat that they have purſued the Authority given 'em by that Statute. Accordingly the Order was quaſhed.

Barker *and* Wharton.

When Prohibitions go to the Admiralty Court, the Difference which there is between ſuch of them as are granted before Sentence and ſuch of them as are granted after.

A Maſter of a Ship libels in the Admiralty Court for his Wages, and recovers there. A Prohibition was moved for, for that it does not appear they had Juriſdiction, in as much as 'tis not ſaid in the Libel that the Contract was made infra altum mare. But the Court took a Difference between where a Prohibition is moved for before Sentence, and where 'tis moved for after; for in the firſt Caſe they ſaid it muſt appear they have a Juriſdiction upon the very Face of the Libel; but in the other it muſt appear upon the Face of the Libel that they have none. An Inſtance of the firſt ſort is this; Where a Prohibition is moved for before Sentence, 'twill not be enough for the Libel to lay the Contract to be made infra Juriſdictionem maritimam, but it muſt appear to the King's Court to be ſo indeed, as by laying it infra fluxum et refluxum maris. Accordingly the Court did not grant the Prohibition.

Storey *and* Atkins.

What ſhall be a good Averment that one Action was brought for the ſame Cauſe as another is.

THIS is an Action of Indebitatus aſſumpſit, and there are three ſeveral Counts; the firſt upon a Promiſſory Note; the ſecond for Money lent; the third for Money laid out to the Defendant's Uſe. To the two laſt the Defendant pleads the general Iſſue; and to the firſt he pleads Actio non accrevit infra ſex annos The Plaintiff replies that true it is, that from the Time of the Promiſſory Note given to the Time of bringing his Action upon

it here 'tis above six Years; but says that he levied a Plaint in the Sheriff's Court within five Years after the Action accrued, upon an Indebitatus Assumpsit for the same Sum as is laid in the Declaration, secundum consuetudinem of London, without alledging in the Plaint what the Ground of the Action was; and avers that he exhibuit billam prædict' pro eâdem causâ Actionis pro quâ levavit his Plaint in the Sheriff's Court, which Plaint was removed here by Habeas Corpus. To which the Defendant demurs specially; and two Matters were shewn for Cause, one that the Averment was not good, the other that the Plaint was too uncertainly set forth. Judge Fortescue said that the Replication was naught; for the Causes of Action were intirely different, and then no Averment can help it. The Causes of Action, he said, are different, in as much as the one is brought upon the Statute of the 3d and 4th of Queen Anne, Ch. the 9th, the other at Common Law. This Action is brought upon that Statute, because the Promissory Note is laid in the Declaration, whereas at Common Law it could only have been given in Evidence. But he said, in the Plaint the Plaintiff had only proceeded at Common Law. But as to the Objection, that the Plaint was too uncertainly set forth in its being only generally laid secundum consuetudinem of London, he said, if the Action here had been at Common Law, that would have been good. For he remembred a Case adjudged here about three Years ago, where the setting out a Plaint by Concessit solvere secundum consuetudinem was allowed to be good. But the other three Judges were of different Opinion as to the first Point. For they said a different Cause or Nature of Action was not given by the Statute, only a new and shorter Remedy; therefore tho' the Plaintiff has declared here according to the Statute, and taken Benefit of it, yet as the Statute did not take away the old Method, the Plaint might very well be according to that, and the Identity of the Action still the same. They said farther, if the second Point was determined, concerning the Concessit solvere secundum consuetudinem being good, without setting out the Custom, it put the Matter beyond all Question. Accordingly Judgment was given for the Plaintiff. Vide the Case of Finch and Lamb, Cro. Car. 294. where 'tis said that the Plaint and Action differing in the Sum make not different Causes of Action, which was said by the whole Court in this Case.

What shall be a good setting out a Plaint in an inferior Court.

Griffin *and* Scott.

PLaintiff brings an Action of Trespass against the Defendant for entring into his Land. Defendant pleads an Entry and Distress for Rent. Plaintiff replies that Defendant continued upon the Land with the Distress six Days, and had eight Bailiffs there. To which Defendant demurs. But Judgment was given for the Plaintiff. For the Court said, that by the Common Law a Person that distrains is obliged to carry off the Distress immediately, and put it into a Pound Covert or a Pound Overt, and not detain it upon the Land, and the present Case is not within the Statute of 2 W. & M. 5. And Judge Reynolds said, that the very Reason why Shocks of Corn could

How far a Distress is necessary to be carried off the Premisses.

could not be diſtrained at Common Law, was, becauſe they could not be carried off without Damage to the Tenant, which implies that a Carrying off of the Diſtreſs is neceſſary.

Whight *and* Clever.

How far a Rejoinder ſhall be ſaid to be a Departure from the Plea.

THE Plaintiff brings an Action of Debt upon a Bond; Defendant pleads the Condition, which was, that he ſhould execute ſuch an Office without the Aſſiſtance of the Plaintiff, and ſays that he did execute it without his Aſſiſtance; Plaintiff replies that he did not execute it without his Aſſiſtance; Defendant rejoins, and ſays that if the Plaintiff did give him his Aſſiſtance, 'twas voluntary. To which Plaintiff demurs. And the Demurrer was held to be good, for that the Rejoinder was a Departure from the Plea.

Farding *and* Baker.

How far an Information muſt be brought in the proper County.

AN Information was brought upon the Statute of 21 H. 8. for Non-Reſidence; and it was moved in Arreſt of Judgment, that the Information was brought in the King's Bench, whereas it ought to have been brought before the Juſtices of Aſſiſe in the County where the Cauſe of Action lay, by the Statute 21 Jac. And the Caſe of The King and Gaul was cited out of Salkeld to that Purpoſe. Accordingly the Court gave Judgment for the Defendant.

Freſcobaldi *and* Kinaſton.

When an Infant is made an Executor, and an Action is brought againſt him in that Right, how far he muſt appear by Guardian.

AN Action of Debt was brought by the Defendant in Error in the Common Pleas againſt the Plaintiff and another as Executors, and Judgment thereupon. Writ of Error is brought and the Error aſſign'd was, for that the Plaintiff in Error was an Infant and appear'd by Attorney, whereas he ought to have appear'd by Guardian, as 'tis adjudg'd in 2 Cro. 420. This Caſe was thought to have a good deal of Difficulty in it; accordingly it ſtood over.

Braxton *and* Dyke.

How far it ſhall not be neceſſary that a Perſon ſhall appear by Attorney.

How far a Writ may be executed on the Day of the Return of it.

THIS was an Action upon the Caſe in the Common Pleas. Writ of Error was brought, and one Error aſſign'd was, that 'tis not ſaid that he appear'd by Attorney; but the Court ſaid that then they would intend that he appear'd in Perſon. Indeed they admitted that if the Surname of the Attorney had been only mentioned without the Chriſtian Name, there inaſmuch as it appears that he came by Attorney, and there is no Attorney mention'd, that is a good Error. Another Error was aſſigned, and that was in the Writ of Inquiry, viz. that the Writ of Inquiry was executed on the Day of the Return, and that it does not appear 'twas executed during the ſitting of the Court, after which Time the Juriſdiction of the Sheriff as to that purpoſe ceaſes. But this Exception the Court like-

wiſe over-ruled, for they ſaid, they would not admit of any Fractions in a Day.

The King *and* Puſey.

THE Defendant was indicted at the Old Baily, and Motion was made for a Certiorari to remove the Indictment here, for that he was a Perſon of Diſtinction; but the Court ſaid they would never do it upon that Account, for that would occaſion great Confuſion. They ſaid, in ſome Caſes they did grant 'em; as where it appear'd that the Fact would not ſupport an Indictment. As 'twas done in the Caſe of Sir Humphry Mackworth, who was indicted at the Old Baily for Forgery; for that he, being Governor of a Company ſet the Seal of the Company to a Deed without Authority; there, as it appear'd to the Court, that that Fact was not indictable, they did grant it.

How far a Certiorari ſhall not remove an Indictment from the Old Baily.

Anonymus.

JUdge Forteſcue in this Caſe ſaid, that where a Certiorari goes, the very Record itſelf is to be remov'd, in all Places except London, where they are only oblig'd to ſend up the Tranſcript. Which was not denied.

How far a Certiorari ſhall remove the Record it ſelf, and not barely the Tenor of it.

Caſtle *and* Richardſon.

THE Plaintiff was choſen Chapel-Warden to a Donative, and was proſecuted in the Eccleſiaſtical Court for not taking his Oath of Office; upon this he moved for a Prohibition, in as much as the Chapel is a Donative, and not under the Ordinary's Juriſdiction. But the Court were of Opinion, that tho' a Chaplain or Parſon of ſuch Donative, is not ſubject to the Deprivation or Suſpenſion of the Ordinary, but the Donor is only Viſitor in ſuch Caſe; yet as to the other Officers, they are under the ſame Juriſdiction of the Ordinary, as in other Places; for the Parſon or Chaplain the Donor only puts in, not the other Officers. They ſaid a Pariſh-Church might be a Donative. So no Prohibition went.

How far the Officers belonging to a Church which is a Donative are under the Juriſdiction of the Ordinary, notwithſtanding the Chaplain himſelf is not.

Forteſcue Aland *and* Maſon.

THE Plaintiff brings a Writ of Error in the King's Bench in Ireland to reverſe a Common Recovery ſuffer'd in the Common Pleas there, under which the Defendant claims; the Defendant pleads there his Nonage, and Judgment is given againſt the Plaintiff. Upon this he brings another Writ of Error here, complaining that that Plea was allow'd wrongfully, and the Defendant pleads the ſame Plea. But the Court reſolved that that Plea was not good, for they ſaid that the Allowance of that Plea, would be admitting that Thing to be right, which is complain'd of as an Error in the Judgment, and whether 'tis ſo or not, till they have look'd into the Judgment, they cannot determine. So they ſaid would it be in caſe a Fine had been levied in the Common Pleas there, and a Writ

How far a Plea ſhall not be allowed of by Reaſon that it falls within the Rule, Quod non poteſt adduci exceptio ejuſdem rei, cujus petitur diſſolutio.

of Error brought there into the King's Bench, to which the Defendant should plead Nonclaim, yet in such Case if upon a Writ of Error here the same Plea should be pleaded, they would set it aside. Now in the Case at Bar they said they could not yet possibly tell whether the Plea of Nonage in the Writ of Error in Ireland was allowable or not, and therefore they could not allow it in this Writ of Error. For suppose the Action in Ireland had been a Writ of Dower, in which Nonage is not allowed, and the Defendant had pleaded it there, should such a Plea here be a Bar to this Court's looking into the Judgment? That they said would be against the known Rule of Law, Quod non potest adduci exceptio ejusdem rei cujus petitur dissolutio. Accordingly the Court set the Plea aside.

Goodright *and* Pullen.

What Words in a Will give an Estate-Tail, and not barely for Life only.

THIS was a special Verdict given upon an Ejectment. And the only Point of Law that came before the Court in this Case was upon the Words of a Will, which were these: I give and bequeath unto Nicholas Lyng the Lands in Question for and during the Term of his natural Life, and after his Decease to the Heirs Male of the Body of him lawfully begotten and his Heirs for ever; and if he die without such Heir Male, then he limited several Remainders over. The Question in this Case was, Whether Lyng had an Estate in Tail or for Life devised to him? And 'twas strongly objected on the Part of the Plaintiff, that 'twas an Estate for Life and not an Estate in Tail. For it was said by the Words, his Heirs, were meant the Heirs of the Issue Male, and that tho' the Words Heirs Male were generally put, and in the Plural Number, yet it was said one Heir Male of his Body was only intended, and that appear'd from the subsequent Clause, namely, and if he should die without such Heir Male, which is in the singular Number. But the Court were of a contrary Opinion; they said it was very true if this was so, that one Issue Male was only intended, Lyng would be only Tenant for Life, and the Remainder-Man a Purchaser. And they took the same Distinction as there is in Shelly's Case, 1st Report, fol. 104. between a Remainder limited upon an Estate for Life, to the Heirs Male of the Body of the Tenant for Life, and where 'tis only limited to the Heir Male. For in the first Case they said the Heirs Male take by Descent, and consequently the first Person who is to take has an Estate-Tail; but in the other Case, the Heir Male of the Body of the Tenant for Life takes by Purchase, and the first Person who is to take has but a bare Estate for Life. But in the Case at Bar the Court said the Words were properly Words of Limitation. They said too, if these Words had been in a Deed, as they are in a Will, 'twould have been beyond all Question, that an Estate-Tail had pass'd to the first Taker. And they laid it down for a Rule, that Words in a Will shall give the very same Estate as such Words in a Deed would, unless the Intent of the Party can be discover'd to the contrary. Accordingly they adjudg'd that Lyng should take an Estate-Tail, Remainder to his Heirs in Fee, and gave Judgment for the Defendant. N. B. A Case

in More, fol. 124. was cited to ſhew that the ſubſequent Words, Heir Male, make no Alteration in this Caſe; and that Caſe was, of an Eſtate being deviſed to a Man and his Heirs Male of his Body, and if he ſhould die without Heir of his Body, that the Land ſhould remain to a Stranger; where 'twas determin'd that an Eſtate in Tail Male only paſſed, notwithſtanding the ſubſequent Words; which is a ſtronger Caſe than the Caſe at Bar; for here are plain relative Words, namely, ſuch Heir Male, which evidently refer to and ſhall be explain'd by the foregoing Words.

Goodtitle *and* Rogers.

How far the Plea of Antient Demeſne need not be verified by Affidavit.

THIS was an Ejectment, wherein the Defendant pleads Antient Demeſne; a Motion was made to ſet aſide the Plea, in as much as there is no Affidavit made to verify it; whereas the Act for the Amendment of the Law ſays, That no Dilatory Pleas ſhall be allowed unleſs verified by Affidavit. But the Court ſaid, this was no Dilatory; 'twas only a Plea to the Juriſdiction of the Court, and therefore need not be verified by Affidavit.

The King *and* Chiping-Norton.

How far a Certiorari ſhall be granted to remove an Indictment of Felony.

A Motion was made for a Certiorari to remove an Indictment of Felony that was found in a private Juriſdiction, in order that it might be tried in the County. And the Reaſon given was, for that Affidavit was made that this was an Indictment for Felony againſt a Clergyman, for only taking a Handful of Hay out of a Barn, which 'twas ſworn was but of the Value of a Penny, and they ſwore 'twas nothing but a malicious Proſecution. And the Caſe of The King and Powel was cited where a Certiorari went to remove an Indictment out of the Seſſions of the County of Sarum. The Court ſaid they never did grant ſuch Certiorari, but upon a particular Occaſion. But they made a Rule to ſhew Cauſe. And at the laſt Day of the Term, they granted it.

Dawkins *and* Burridge.

How far a Member of Parliament is to be proceeded againſt by Bill only, and not by Original.

THIS was a Writ of Error to reverſe a Judgment given in the Common Pleas; and the Error aſſign'd was, that the Suit there was by Bill, as in the Caſe of a privileg'd Perſon of that Court, whereas it ought to have been brought by Original, according to the uſual Courſe of that Court; for tho' this was an Action againſt a Member of the Houſe of Commons; yet in as much as 12 W. 3. c. 3. on which that Action was grounded, does not allow the Courts of Weſtminſter-Hall to iſſue out any different Proceſs than according to the Courſe of each reſpective Court, they have no Juriſdiction to proceed in any different Manner than againſt a common Perſon. But the Court ſaid that a new Juriſdiction is given 'em by that Act, different from what they can exerciſe againſt a common Perſon; and this they ſaid not only was clear from a Section

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in it to that very purpoſe, but was ſtrongly implied too from the laſt Proviſo in it; which ſays, that they ſhall not proceed in any real or mixed Action in any different Manner from that, which they proceed againſt common Perſons in; which ſtrongly implies that in perſonal Actions, as this was, they may. Accordingly Judgment was affirmed.

The King *and* Rich.

How far an Inſtrument cannot be produced in Evidence for want of its being Stamped in due Time.

THIS was a Trial at Bar upon an Information in the Nature of a Quo Warranto to know by what Authority the Defendant exerciſed the Office of Burgeſs. Four Iſſues were joined. And when he came to the laſt, which was, whether he was duly ſworn and admitted into the Office, he produc'd his Admiſſion; but it appearing by the Witneſſes, that the Stamps were put to it a Month or two after 'twas drawn up, the Court ſaid it could not be given in Evidence, by a Statute in the 9th and 10th of King Will. c. 25, 59. which ſays that no Admiſſion ſhall be given in Evidence of a Perſon's being admitted into an Office of Burgeſs, unleſs ſuch Admiſſion has double Stamps. This ſame Point, the Court ſaid, was determined in the Caſe of Dr. Gaſtrill, Biſhop of Cheſter, and Peploe. But if the Penalty be paid, and a Receipt taken from the Stamp-Office, before 'tis produc'd in Evidence, 'tis very allowable. The Court ordered too the Jury to find all the Iſſues for the King, in as much as the Defendant had fail'd in one. And this Point, they ſaid, was ſettled in the Caſe of Pindar and Earle upon a Writ of Error brought into the Houſe of Lords. They ſaid too, that when once a Perſon has entered upon Evidence by Deed, he cannot, if he fails of that Evidence, afterwards go to Parol Evidence of that Fact. Indeed the Attorney General ſaid that if they had not produced this Evidence by Deed, he did not know but they might have been admitted to have given Parol Evidence of it. Accordingly Judgment of Duſter went.

Term.

Term. Hill.

13 Geo. I. 1726.

The King *and* The Inhabitants of Rowley.

A Vill was preſented for not repairing its Highways; and in order to quaſh the Preſentment, 'twas objected, that every Pariſh of common Right is bound to repair its Highways, and they ought not to throw the Charge upon a Vill, unleſs by Cuſtom, Contract, &c. no more than upon a particular Perſon in the Pariſh, for there may be many Vills in one Pariſh, and therefore as ſuch Cuſtom, &c. was not ſet forth in the Preſentment, it ought to be quaſh'd. But the Court ſaid it did not appear there was more than one, and therefore they would intend them coextenſive.

How far a Vill and a Pariſh ſhall be ſaid to be coextenſive.

Radley *and* Rudge.

THIS was an Action of Trover. And Exception was taken to the Declaration, for that it was too general; it being only unam peciam of black and white Tabby, and it does not expreſs the Quantity of Yards. And they cited a Caſe lately adjudg'd, where parcellam Papyræ was held to be bad. And this Caſe the Court allowed; but they ſaid in the firſt Caſe, a Piece of Silk contains a certain Quantity; but a Parcel does not.

How far the Goods, which an Action of Trover is brought for, ſhall be ſaid to be deſcribed with ſufficient Certainty.

The King *and* Seymour.

THE Defendant in an Information pleads in Abatement, that he is a Surgeon, and not Generoſus. The Counſel for the King moved to amend; but it was objected, that the Information cannot be amended; becauſe in order to amend, the King muſt pay Coſts, which it would be derogatory from his Honour to do. But the Court ſaid, when the King comes for a Favour he may pay Coſts; accordingly they let him amend upon Payment of Coſts or giving an Imparlance; the Counſel for the King choſe to pay Coſts. And they cited a ſtronger Caſe than this, namely, The King and The Corporation of Malmesbury, Paſch. 9. of this King, where the Amendment was in the very Name of the Corporation.

When Leave is given to amend an Information, what Terms it muſt be upon.

The King *and* Ward.

What ſhall be ſaid to be a Forgery at Common Law.

THE Defendant being convicted in an Information for Forgery, mov'd ſeveral Things in Arreſt of Judgment; Firſt, That this Information was laid at Common Law, and Informations of this Sort for Forgery did not lie, but where the Thing forg'd was a Writing under Seal; and this was only a Forgery of an Order from the Duke of Buckingham to Ward. But the Court was of Opinion that this was an Offence indictable at Common Law; for they ſaid equal Prejudice might attend another in the having his Order or Receipt forg'd, as in the having his Deed forg'd or other Evidence. And that this was a Matter never queſtioned, appears from ſeveral Caſes, wherein the Counſel have taken remote Exceptions to ſuch Indictments, but never mov'd this in Arreſt of Judgment. As in 1 Salk. 342, 406. They did indeed admit the Caſe in Noy 99 to be Law, where the Obligee's changing the Word Libris to Marcis was held to be no Forgery; but they ſaid, the Reaſon of that was, becauſe ſuch Alteration could not be to the Prejudice of any Perſon but the Obligee himſelf. And they ſaid Forgery was the Alteration of any Writing, which may be given in Evidence, by the means of which another may be prejudiced. The ſecond Exception was, that the Offence was not ſufficiently laid in the Indictment; for the Words are, Johannes Ward obligabilis exiſtens ad deliberanda trecentum dolia Alumni, Anglice Tuns of Allom, Duci de Buckingham, ad certum diem præteritum, ipſe idem Johannes machinans & intendens ad evitandam deliberationem prædictam, committed this Forgery on the firſt of February 1724. Now they objected, that it did not neceſſarily appear that the Defendant was chargeable at the Day he committed the Forgery, and if ſo it was no Forgery indictable, becauſe at the Time of the Forgery there muſt be a Poſſibility of a Prejudice coming to another. But the Court ſaid that the Words Ipſe idem Johannes were Surpluſage, and they would throw them out; and then they ſaid, they muſt offer Violence to Common Senſe and Grammar, to give any other Meaning to the Words than that he was chargeable at that Day; for how could he intend to avoid the ſaid Charge by the Forgery, if there was not any Charge upon him at that Time? A third Exception was taken to the Publication; but the Court ſaid they did not care what became of that; for in the Information there are two diſtinct Charges, one of Forging the Order, the other of publiſhing it; and if the firſt be made out, that is enough for them to give Judgment upon. A fourth Exception was taken to the Word Dolium, for they ſaid it only ſignified a Tun in Meaſure and not in Weight; but it was over-ruled, ſeveral Precedents being cited, wherein it was uſed in the preſent Senſe. Fifthly, To the Word Contrafecit for Counterfeiting, where the Word ſhould have been Controfecit; but this it was ſaid was the conſtant old Word. Sixthly, To a Diſagreement between the Venire and the Diſtringas; in the one, the Iſſue being joined between the King and the Defendant, in the other between the Attorney General and him. That Exception was over-ruled likewiſe.

What ſhall be ſaid to be a good Information for Forgery.

Wats *and* Goodman.

THE Defendant pleads a Plea in Abatement as a Plea in Bar, by concluding Ideo petit quod declaratio caſſetur; upon which the Plaintiff demurs generally. And the Court ſaid, ſuch a general Demurrer is good. And Judge Reynolds declar'd that in no Caſe a Perſon is obliged to demur ſpecially upon a Plea in Abatement, for 'tis not within any of the Statutes for the Amendment of the Law.

How far the Plaintiff need never demur ſpecially to a Plea in Abatement.

The King *and* Lewis.

A Motion was made to quaſh an Information taken at the Seſſions. But the Court ſaid, they never quaſh'd Informations, for they may be amended.

How far the Court never quaſhes an Information.

The King *and* The Inhabitants of Paulſperry.

A Motion was made to quaſh an order of Seſſions; the Fact was in this Manner; A Father dies leaving ſeveral Children, and the Mother goes with them and gets a new Settlement; upon this the Juſtices order, that the Children ſhall be remov'd to the Settlement of the Father; and now it was moved that this Order might be quaſhed. Which the Court accordingly did; for they ſaid, that by the Law of Nature, a Mother is as much oblig'd to take care of her Children as a Father is; and therefore they ought not to be removed from her. And they ſaid, that the Caſe of St. George's Southwark and St. Catherine's was a Caſe in Point; and that was in the firſt of the King.

How far the Settlement of Children changes with the Settlement of the Mother, as well as it does with the Settlement of the Father.

The King *and* The Inhabitants of Grimſton.

THIS was an Order of Removal; and the Exception that was taken to it was, that the Removal was to the Pariſh or Hamlet of A. which was uncertain. The Court ſaid, that indeed a Hill and a Pariſh they would intend coextenſive; but that a Hamlet was nothing elſe but Part of a Pariſh. So they quaſh'd it.

How far an Order of Removal ſhall not be good, by Reaſon of the Uncertainty of the Place, to which the Perſons remov'd are ſent.

Term. Paſchæ

13 Geo. I. 1727.

Tyrrell *againſt* Sir Clobery Holt & John Hopley.

Which Side ſhall begin with producing their Evidence firſt.

THIS was an Iſſue out of Chancery that came to be tried at the Bar. And it was whether one Mrs. Bruerton was of ſound Memory at the Time of her executing ſeveral Deeds; and becauſe the Execution of the Deeds was at ſeveral Times, there were four Iſſues, but each of them turned upon that ſingle Queſtion. The Defendant was to prove that ſhe was of ſound Memory; the Plaintiff that ſhe was not. And the Counſel of each Side argued who ſhould produce their Evidence firſt. And the Court took this Difference, that if there is one Affirmative in any of the Iſſues, the Plaintiff ſhall firſt go through his Evidence as to all of them; but in this Caſe the Affirmative thro' the whole lies upon the Defendant, and therefore he ſhall go firſt through his Evidence.

Shippman *and* Lethalier.

When there are two Returns made to a Certiorari contrary one to the other, which Return ſhall be taken to be true.

THE Plaintiff in Error aſſigns for Error Want of a Writ of Inquiry, and takes out a Certiorari to verify it; and the Cuſtos Brevium returns that there was none filed of that Term, which the Certiorari went to be informed of. Subſequent to this the Defendant in Error files it as of that Term, takes out a Certiorari himſelf and has a Return made, that it was filed. Upon this the Counſel for the Plaintiff moves that the ſecond Certiorari may be quaſhed. The Court ſaid, that they ought to have entered a Caveat to have prevented its being filed; but however made a Rule to ſhew Cauſe.

Mackleed *and* Sleed.

What ſhall be ſaid to be a good Bill of Exchange.

UPON a Writ of Error the Queſtion was, whether the preſent Writing was a Bill of Exchange; and the Words of it were to this Effect, Pray pay to ſuch a one or Order within a Month after the Date hereof nine Pounds ten Shillings, as is a Quarter's Rent, due from the 24th of June to the 25th of September next following, by Advance; Witneſs my Hand, &c. Dated the 24th of May 1724. And the Court affirmed the Judgment in the Common Pleas, adjudging that it was a good Bill of Exchange. For they ſaid, if it had gone no farther than the nine Pounds ten

Shillings, 'tis very clear it would have been ſo; and the Words ſubſequent have no other Operation, than to ſhew the Perſon upon whom 'tis drawn, how he ſhould reimburſe himſelf. Indeed if theſe nine Pounds ten Shillings were to iſſue out of the Quarter's Rent, they admitted, 'twould not be a Bill of Exchange; inaſmuch as it would have been wholly uncertain, at the Time the Money contained in the Bill was to be paid, whether any ſuch Rent would ever be due. And a Bill of Exchange muſt be peremptory and good at all Events. And that is the Reaſon the Court ſaid of the Caſe of Joſling and Laſcer, Hill. 11 Anne, where a Man orders another to pay to ſuch a one 1945 l. out of the Money in the Defendant's Hand, belonging to the Proprietors of the Devonſhire Mines; and that was adjudged no Bill of Exchange; becauſe it depends upon a Contingency, whether the Perſon on whom the Order was made ſhould pay the Money or no.

The King *and* Dormer.

A Rule was made upon the Defendant to ſhew Cauſe why an Information ſhould not go againſt him for a Libel, made upon one Mr. Carter, a Juſtice of Peace in Oxfordſhire, which inſinuated that Mr. Carter had lately forſworn himſelf in an Affidavit. And the Cauſe that he ſhewed was, that the Fact contained in the Libel was true; and therefore he hoped the Court would not allow him this ſummary way of Proceeding, but leave him to his Indictment or Action upon the Caſe. And Mr. Strange cited the Caſe of The King and Bicarton, Hill. 8 Geo. 1. where an Information was refuſed for the ſame Cauſe. In that Caſe the Defendant was charged with perſonating Dr. Crow, and taking a Fee as repreſenting him; the Defendant made Affidavit of the contrary; and the Court would not grant the Information. But the Chief Juſtice ſaid, he did not believe that Caſe was true. And he ſaid, in all Caſes Informations for Libels go, unleſs you can ſhew the Court ſome probable Cauſe for them to believe that you did not publiſh it. Now if you had denied it, it would have ſignified nothing; for then Affidavit ſtands againſt Affidavit, therefore the Information ſhall go, that the Fact may be tried. And Judge Forteſcue ſaid, that it would be a ſtrange Thing if a Man ſhould be allowed to juſtify, when an Information is pray'd againſt him, and ſhould not be allowed to juſtify in the Information itſelf, when it is gone. Accordingly the Information was granted.

How far an Information is the proper Remedy for a Libel.

Stanton *and* Squibb.

THIS was an Action for Words. And the Declaration ſet forth that the Plaintiff was a Brewer; and that the Defendant ſpeaking of him ſaid, he is a pitiful Fellow and a Rogue, and has compounded for five Shillings in the Pound; and upon that the Plaintiff concludes that he was damnified by them to the Sum of Upon this the Defendant demurs. And the Coun-

What Words are Actionable which are ſpoke of a Tradeſman.

ſel ſhewed for Cauſe, firſt, That it did not appear, that he was ſpeaking of him in his Trade; ſecondly, That he ought to have ſhewn ſome ſpecial Damage. But Judge Forteſcue ſaid, that he has heard my Lord Chief Juſtice Holt often ſay, That he would take the Words always in a common Senſe, and if they imported any Fact that might probably prejudice the Perſon they were ſpoke of, he would look no farther. And the whole Court gave their Opinion, that theſe Words were Actionable.

Cockman *and* Mather.

How far an Hiſtory cannot be given in Evidence.

THIS was a Trial at Bar, concerning the Right of Viſiting Univerſity-College in Oxford. One of the Iſſues in this Caſe was, Whether King Alfred was Founder? And the Counſel for the Plaintiff would have given in Evidence ſeveral Hiſtorians as to this Point. But the Chief Juſtice declared, that ſuch Evidence is never admitted, unleſs in Proof of a Point concerning the Government; the reſt of the Court did not deny it. Accordingly 'twas waived.

Shippman *and* Lethalier.

Vide p. 12.

How far ſeveral Certioraries may be taken out before In nullo eſt Erratum is pleaded.

THIS Matter now came on again, and the Fact was in this Manner; This was a Writ of Error upon a Judgment in the Common Pleas. And the want of a Writ of Inquiry being filed was aſſigned for Error. Upon which the Plaintiff took out a Certiorari to verify that Error. And the Cuſtos Brevium returns, quod non habetur affilatio talis brevis in craſtino aſcenſionis Domini in prædicto Termino Paſchæ, which was the Term the Certiorari went to be informed whether there was ſuch a Writ filed of. Before In nullo eſt erratum pleaded, the Defendant takes out a Certiorari for the ſame Purpoſe, and has a direct contrary Return made to it. Upon which the Counſel for the Plaintiff would have had the Judgment reverſed, ſaying, That they had verified their Error; and whatever contrary Return is afterwards made, it is not to be regarded. But the Court ſaid, that as here were two inconſiſtent Returns, they would certainly take that, which made in Affirmance of the Judgment. Another Point the Court agreed to, that the Parties may take out as many Certioraries as they pleaſe, before In nullo eſt erratum pleaded; but after that they cannot take any out but upon Motion; and thoſe the Court will grant ad informandam Conſcientiam Curiæ.

Aſlett *and* Vincent.

How far the Plaintiff may reply de injuria ſua propria abſque tali cauſa, by Reaſon that the Plea does not contain in it Matter of Record.

IN Treſpaſs the Defendant pleads, that he took the Goods by way of Diſtreſs, and as they were not replevyed within five Days after Notice, he ſold them ſecundum formam Statuti. The Plaintiff replies, that he took the Goods de injuria ſua propria, abſque tali cauſa. Upon which the Defendant demurs. And now ſhews for Cauſe, that as his Plea was mixed with Matter of Record, as well as with Matter of Pais, the Plaintiff ought not to have replied generally abſque tali cauſa;

but should have traverſed ſome particular Part of his Plea. And Crogate's Caſe in the eighth Report was cited to this Purpoſe. But the Court ſaid, that this Plea was not mix'd with Matter of Pais and Matter of Record; for a Statute is not Matter of Record but a publick Law.

Term. Trin.

13 Geo. I. 1727.

Conſet *and* Warren.

Where Nil debet may be pleaded.

THIS was a Writ of Error upon a Judgment in the Common Pleas, in an Action of Debt upon a Bond. And the Declaration ſet forth, that an Agreement was entered into between the Plaintiff and Defendant, for the Plaintiff's transferring ſome Stock to the Defendant, and that the Defendant ſhould pay 1200l. for it, and accordingly the Defendant entered into a Bond for the Payment of the Money. The Plaintiff did deliver the Stock, upon which he demands the Penalty of the Bond. The Defendant pleads Nil debet; to which Plea the Plaintiff demurs. And the Court held the Plea to be nought; for they took this Diſtinction; that where-ever an Action is brought ultimately upon a Specialty, though mixed with Matter of Pais, the Plea of Nil debet is not allowed; but where the Action ultimately ariſes upon Matter in Pais, though mix'd with Matter of Specialty, the Plea of Nil debet is good. And they relied upon the Caſe of Smith and Whitehead, Trin. 9 Geo. 1. where this Plea was not allowed in an Action brought by the Plaintiff as Aſſignee of a Bail-Bond; which they ſaid was a Caſe in Point. Indeed in the Caſe of an Action of Debt brought upon an Indenture of Leaſe for Rent, 'tis allowed; but that Caſe falls under the ſecond Part of the Diſtinction, for there the Demiſe, which is Matter of Pais, is the Ground of the Action; ſo in an Action of Debt for an Eſcape Nil debet is a good Plea; for the Act of Eſcaping, not the Judgment, is the Principal Ground of the Action. Accordingly the Judgment below was affirmed.

Blake

Blake *and* Dodemay.

What ſhall be a good Scire Facias brought by a Huſband and Wife upon a Judgment belonging to the Wife dum ſola.

THIS was a Writ of Error upon a Judgment on a Scire facias, brought by the Plaintiffs as Huſband and Wife, upon a Judgment obtained by the Wife dum ſola. The Defendant demurs to the Scire facias, and ſhews for Cauſe ſpecially, that there is no Venue laid of the Place where they were married, nor is there any Day mentioned whereon they were. And the Counſel ſaid that where-ever a Matter traverſable is alledg'd, the Time and Place where that Matter was done, muſt be alledg'd, unleſs where the Matter is Perſonal; as the taking upon a Perſon the Order of Knighthood, &c. for there indeed the Place need not be laid; for thoſe Matters ſhall be tried where the Writ is brought. The Court thought there was a good deal of Weight in the Objection; but as there were a great many Precedents ſhewn of Scire facias's brought in this very Form, though no Caſe was cited, where they were ever demurr'd to upon this Exception, they allow'd it to be good. Another Exception that was taken was, that the Defendant in his Demurrer had concluded & ideo petit quod narratio prædicta caſſetur; but the Plaintiff in his Joinder in the Demurrer replied, ob cauſam prædictam breve non debet caſſari; ſo that they ſaid the Plaintiff had not anſwer'd the Defendant's Plea. But the Court ſaid, that a Scire facias was a Writ and no Declaration; ſo that you have concluded wrong; and now you take an Exception to their not having follow'd you, which if they had done, it would have been a Diſcontinuance. Accordingly Judgment was affirm'd.

What ſhall be a good Joinder in Demurrer.

Jennings *and* Mott.

Where an Information ſhall be granted for a Battery notwithſtanding the Fact is denied.

AN Information was moved for againſt the Defendant, for coming a ſporting on the Plaintiff's Ground, and beating him in a very grievous Manner, becauſe he only came up to him and deſired him to go off. The Defendant's Affidavits directly contradicted the Plaintiff's. And therefore Judge Forteſcue ſaid, the Information ought to go, that the Fact might be tried. But the reſt of the Court ſaid, the Rule was not ſo. Indeed in Informations to try a Matter of Right it does hold, becauſe there you have no other Remedy; but in Informations of this Nature you have, by Indictment at the Seſſions; and therefore where the Fact is contradicted poſitively, the Court does not grant them. However, becauſe it appear'd that the Defendant was a Man of Intereſt in the County, and the Plaintiff a Poor Man, and as the Plaintiff had made Application to a Juſtice of Peace, and he would not take any Notice of it, the Court did grant it.

Webb *and* Urlin.

How far Pleading double ſhall not be permitted of in Actions to be brought on Penal Statutes.

A Motion was made to plead double in an Action qui tam. But the Court looked into the Act for the Amendment of the Law, which allows theſe Pleas upon Motion, and found an expreſs Proviſo in it againſt Allowing them in Actions upon penal Statutes.

Doyley *and* Sherrington.

How far the Court will ſet aſide a Demurrer by Reaſon of its appearing upon the Face of it to be merely frivolous.

ON Motion to ſet aſide a Sham-demurrer to a Scire Facias to aſſign Errors. The ſpecial Cauſes of Demurrer are, firſt, that it does not appear by the Scire Facias whether the Judgment in the Common Pleas was by Original or Bill, and as it was an Attorney of that Court that was ſued, it muſt have been by Bill. The ſecond Cauſe was, That it ought to have been Sciri Facias, and not Scire Facias. And the Court ſaid, as it was evident that the alledging ſuch Errors as theſe could be only for Delay, they would ſet the Demurrer aſide, as they do very often Sham-Pleas.

The King *and* Oneby.

What ſhall be ſaid to be Murder.

UPON an Indictment preferred againſt the Priſoner, for murdering one Mr. Gore, the Jury gave a Special Verdict; which was removed into this Court by Certiorari. And after all the Judges had met upon it, the Lord Chief Juſtice of this Court delivered their unanimous Opinions that it was Murder; Murder he ſaid, was the killing of a Man of Malice prepenſe. And whether that Malice is expreſs or implied, it is not material. As if a Man ſhould lead a Horſe, which he knew was apt to kick, amongſt a croud of People, with an Intention to do Miſchief, and the Horſe ſhould ſtrike any of the People, of which they died, that would be Murder in him; for the Law would ſupply the Malice. But he ſaid there was no Occaſion to look out for Malice implied in the Caſe in Queſtion; for his Malice expreſs was ſufficiently diſcoverable; and that from two very material Circumſtances; the one, when the Deceaſed deſired they might be Friends, his telling him, No, Damn him, he would have his Blood; which he ſaid plainly carried with it Premeditation. The other, his ſtaying in the Room when the reſt of the Company was gone, and calling the Deceas'd back, and ſaying to him, young Man, I have ſomething to ſay to you; it was true indeed, he ſaid, the Deceas'd did give the Priſoner ill Words in Return to what he ſaid to him, by telling him, whoever called him a Puppy was a Raſcal. But Words are no Provocation. However, that which was the principal Rule, that govern'd this Caſe, was the ſame with that, which is the Foundation of Mawgridge's in Keyling's Reports; and that is, that where-ever two Perſons fall into a Paſſion with one another, which Paſſion carries the Perſon killing beyond his Reaſon, (for that the Chief Juſtice declared to be a neceſſary Circumſtance,) and they agree to fight inſtantly, that is indeed only

Manſlaughter. But where-ever any Act intervanes which ſhews Conſideration and Forethought, that is always Murder. And therefore if two Men have ſuch a Quarrel with one another, and they agree to fight in the Afternoon, and do ſo, that is Murder. So in my Lord Morley's Caſe, which is referr'd to in Mawgridge's Caſe Keyling 129, where my Lord Morley had a Quarrel with another, upon which they agreed inſtantly to fight, yet becauſe he looked upon his Shoes, and ſaid he was afraid he had a Diſadvantage becauſe the Heels were very high, the Court determined that to be Murder; for his doing that Action plainly ſhewed a Deliberation. So he ſaid, if two fall into ſuch a Quarrel, and the one ſays to the other, I will not ſtrike you firſt, but I will give you a Pot of Beer to ſtrike me firſt, and the other does ſo, and upon that the Perſon making the other this Offer, gives him a Blow, with an Inſtrument likely to occaſion Death, or ſome great bodily Harm, by which the other dies, that is Murder. The Nature of the Inſtrument, the Chief Juſtice ſaid, was indeed material. And accordingly Turner's Caſe was agreed to be Law; and that was, that a Maſter ask'd his Servant what he meant by not cleaning his Miſtreſſes Clogs, and upon that he took one of them, and ſtruck the Servant croſs the Head with it, of which he died, that was held to be only Manſlaughter. But Gray's Caſe in Keyling 133. was likewiſe agreed to be Law; and that was that a Smith ſtruck his Servant with an Iron Bar, for being rude to him, of which Wound the Servant died; which was held to be Murder. The Caſe in 12 Co. 87. was likewiſe held to be Law. And ſo was the Caſe in Coke's Inſt. 296. which are Caſes of Manſlaughter. And for the Reaſons aforementioned the Court adjudged the Priſoner guilty of Murder. Vide Rayley's Caſe 2 Co. 296. which was allowed by the Court to be Law.

The King *and* Landen Jones.

How far the Court will give Leave to add a new Interrogatory

THE Defendant had anſwered to certain Interrogatories for a Contempt of the Court. And a Motion was now made for adding a new Interrogatory; the Counſel of the other Side ſaid, that that was never allow'd. Upon that the Court ask'd Mr. Harcourt, whether it was ever done; and upon his ſaying there were ſeveral Precedents of it, they allow'd it in this Caſe.

Proude *and* Willimot.

How far a Perſon cannot carry down a Cauſe by Proviſo without giving a Rule in the Office for that Purpoſe.

UPON a Motion to ſet aſide a Trial, for the Defendant's carrying it on by Proviſo, without having a Rule for that Purpoſe; the Court ask'd the Maſter, whether that was neceſſary? Upon his ſaying it was, they ſet it aſide.

Anonymus.

How far an Indictment for a Forcible Entry shall not be good by Reason of its not setting forth the Interest which the Party had in the Land.

ON Motion to quash an Indictment for a Forcible Entry and Detainer; the Exception to it was, that it is only said in the Indictment, of which House he was possessionatus; and it is not said what Estate he had in it; and if he was only Tenant at Will or Sufferance, the Statute does not extend to him. Upon this Exception the Indictment was quashed.

Anonymus.

How far an Issue may be amended notwithstanding it is entered upon the Nisi Prius Roll.

A Motion was made to have Leave to amend an Issue, by putting in the Name of the Plaintiff, instead of the Defendant's, upon Payment of Costs, it being not upon Record. The Counsel of the other Side objected, that it was in the Nisi Prius Roll, and that supposes its being first of Record. Judge Reynolds answered, that in Strictness it ought to be so, but every Body knows it is not. Accordingly the Court allowed the Amendment.

Webster *and* Vaughan.

What shall not be said to be a good Testatum Fieri Facias.

HERE were two Exceptions taken to a Testatum Fieri Facias; the one was, that there was no Fieri Facias first taken out, on which the Testatum was grounded. The other was, that after the Sealing of the Writ, the Attorney fill'd up a Blank in it. The Court admitted both the Exceptions; and accordingly quash'd it.

The King *and* The Borough of Truro.

How far the Court will not grant an Information in nature of a Quo Warranto, by Reason of the Length of Time.

A Motion was made for an Information, to know by what Authority certain Persons exercised the Office of Burgesses in the Borough of Truro; some that were Aldermen there at the Time of the Election not having Notice of the Election. But the Court said, as it appeared they had continued in their Offices for six Years they would not do it; for it would be a Thing of dangerous Consequence to have Burgesses Elections tried over again after so long a Space of Time for Omissions of Things of that transient Nature. Judge Fortescue said, it had been determined several Times, that for the Omission of giving Notice to one of the Electors, the Court has refused to have their Elections tried over again, where such Omission was by Mistake. And he and Judge Probyn too said they remembered the Case of the Town of Buckingham, where a Man was made an Alderman in an Alehouse, yet as he had continued in the Office for several Years, they would not allow of a new Election.

The

The King *and* Budgel.

How far a Witneſs ſhall not be examined before a Judge in Criminal Caſes.

A Rule was made upon the Proſecutor to ſhew Cauſe why the Trial ſhould not be put off, one of the Defendant's Witneſſes not being able without Danger of her Life to appear at the Trial. The Proſecutor offered to allow her Teſtimony to be taken before a Judge. But the Court ſaid, they never ſuffer'd it to be done in Criminal Caſes.

Anonymus.

How far Liberty ſhall not be given to amend a Plea in Criminal Caſes.

THIS was an Indictment for not mending a Highway. A Motion was made by the Defendants to amend their Plea; they had pleaded it was a private Way; and they deſired to plead the General Iſſue. But the Court ſaid it was againſt the Rules of the Court to allow it in Criminal Cauſes, but upon Conſent. So upon their deſiring to have a good Jury, and to have a View, the Court ſaid, they could not grant them without Conſent.

Anonymus.

What ſhall not be a good Indictment for exerciſing a Trade without having ſerv'd an Apprenticeſhip.

ON Motion to quaſh an Indictment on 5 Eliz. 31. for exerciſing a Trade which was uſed at the Time of the Statute, the Perſon not having ſerv'd an Apprenticeſhip ſeven Years. The Exception to it was, that it charg'd him with exerciſing a Trade, which was uſed infra hoc regnum Angliæ at the Time of the Act. Accordingly the Court quaſhed it; for they ſaid there was no ſuch Kingdom now; if indeed the Word hoc had been out, they admitted it would have been good; becauſe at the Time of the Act there was ſuch a Kingdom; and that was the Reaſon why they ſaid they could not reject it, becauſe it is a material Word.

Term. Mich.

1 Geo. II. 1727.

Anonymus.

IN this Caſe the Court ſaid it is a ſtanding Rule, that a Man ſhall not have Leave to add a new Count after the ſecond Term; they ſaid alſo that when a Motion is made to amend a Declaration, the Amendments muſt either be inſerted in the Rule to ſhew Cauſe, or the Plaintiff muſt give the Defendant a Note of them at the Time he ſerves him with the Rule. Otherwiſe the Court will diſcharge it.

How far a Perſon ſhall not have here Leave given him to add a new Count after a ſecond Term.

Studley *and* Stert.

A Man was ſerv'd with a Latitat returnable die Mercurii the 26th of July, and put in Bail above the Monday following; and whether the Bail was not given too late was the Queſtion. The Court ſaid, that four Days, excluſive of the Day of the Return, was the Time that was allowable for putting in Bail; and though Monday was the fifth Day after the Return, yet, becauſe Sunday was no Law-Day, they thought it was well enough.

Within what Time Bail is to be put in above.

Johnſon *and* Weſt.

IN an Action of Debt upon a Bond, the Defendant pleads Payment of the Money by Force of a Foreign Attachment; the Plaintiff replies that the Defendant was attached before the Day of Payment contained in the Condition, though Judgment was given after the Day. But the Court held the Replication to be ill; for inaſmuch as there was a Debt at the Time of the Attachment, though not to be paid then, and in as much as it was to be paid before the Judgment on the Foreign Attachment, the Judgment was well given. And a Caſe in Roll's Abridgment, Placito 5. was cited to this Purpoſe.

How far Debt may be bound by a Foreign Attachment, notwithſtanding it was not at that Time payable.

Anonymus.

For what Offences the Court will grant an Information against a Juſtice of Peace.

THIS was an Information that was mov'd for againſt a Juſtice of Peace, who was likewiſe an Attorney. And the Caſe was, that a Bailiff had taken a Diſtreſs, and continued with it on the Poſſeſſion; upon that, the Juſtice ſent a Warrant for him, and asked him, why he continued with the Diſtreſs on the Poſſeſſion, telling him, he had ſued out a Replevin. The Bailiff told him, the Diſtreſs was delivered to him to keep, and he would take care of it: Upon which the Juſtice ſent him to the Houſe of Correction, to continue there, till he ſhould be diſcharged by due Courſe of Law. And for this the Court granted the Information; for they ſaid they would never ſuffer a Man to inforce his Authority as an Attorney, with that of a Juſtice of Peace.

Chambers *and* Robinſon.

How far ſpecial Bail need not be given in an Action of Debt, which is brought upon a Judgment.

THE Plaintiff recovered in an Action brought againſt the Defendant for a malicious Proſecution; upon which Judgment he brings an Action of Debt, and recovers; and upon that Judgment brings another Action of Debt. Now the Queſtion that came before the Court was, Whether the Defendant ſhould give Special Bail in this Caſe? And the Court determined, that he need only find Common Bail; for they ſaid, that this third Action was only vexatious; and for the ſame Reaſon that Special Bail ſhould be required in this third Action, it might be required in infinitum; though indeed they ſaid in the firſt Action brought upon a Judgment, they will allow it.

The King *and* The Inhabitants of Anow.

How far a Servant ſhall gain a Settlement.

ON a Motion to quaſh an Order of Seſſions. The Caſe, as it was ſtated in the Order, was, that a Perſon had got a Settlement in the Pariſh of Anow, and after that had let himſelf to one in another Pariſh, from Chriſtmas to Michaelmas, and lived with him all that Time; and ſome time after he let himſelf to the ſame Perſon in the ſame Pariſh for a Year, and lived with him only a Quarter; upon which Matter the Juſtices made an Order on the Statute of the 8 & 9 Will. 3. upon the Pariſh of Anow to keep him. And now the Queſtion, that came before the Court, was, Whether the Servant's living with his Maſter for a Year in the whole upon theſe two ſeveral Contracts was ſufficient to gain him a Settlement within that Act; or whether it was not neceſſary, that he ſhould have lived with him for a Year upon that Contract of a Year? It was objected by the Counſel for the Order, that as this was a Law explanatory of the 3 & 4 Will. & Mar. the Words of it ought to be kept cloſe to. The Words of it are, Whereas ſome Doubts have ariſen touching the Settlement of unmarried Perſons, lawfully hired into any Pariſh for a Year; Be it declared, That no ſuch Perſon ſo hired, as aforeſaid, ſhall have a Settlement in ſuch Pariſh, unleſs ſuch Perſon ſhall continue in the ſame Service during one whole Year; theſe Words are in the

fourth Seaion of it. The Caſe of Redgwick and Dunsford in Salkeld was cited too, where there is an Opinion given, that the Service muſt be purſuant to the Hiring. But the Court ſaid that this Point had been ſolemnly ſettled in the Caſe of Brightwell and Henry, Hill. 1 Geo. 1. and therefore though there was a great deal to be ſaid of the other Side, they could not go againſt it. They ſaid too, that Caſe was within the Letter of that Clauſe, if not within Common Senſe of the Words; and they thought within the Meaning of the Act. For the Act intended to prevent a Fraudulent Practice before made uſe of, which was, that People would hire Servants for a Year, tho' they were not able and did not intend to keep them ſo long; now this Act provides againſt that, by making it neceſſary, that the Servant ſhall live with his Maſter in that Pariſh a Year; but does not require it ſhould be upon the ſame Contract. Accordingly they quaſhed this Order, adjudging the Settlement to be in the laſt Pariſh. It was objected farther by the Counſel for the Order, that this ſecond Hiring appeared to be Fraudulent; but the Chief Juſtice ſaid, they would never collect Fraud upon Facts ſtated in Orders as ſpecial Verdicts, unleſs ſpecially found, for they will intend, if there was Fraud, that it would have been found ſo.

How far the Court will not imply a Fraud from Facts ſtated in an Order, but the Fraud muſt be particularly found.

Freſcobaldi *and* Kinaſton.

Vide p. 4.

THIS was a Writ of Error upon a Judgment in the Common Pleas againſt two Executors. And the Error aſſign'd was, that one of the Executors was an Infant at the Time of the Judgment, and that he defended by Attorney, whereas he ought to have defended by Guardian. The Counſel on the other Side ſaid, that they relied upon the Caſe of Foxwith and Tremayne, which is reported in Vent. 102. and in ſeveral other Books. And that was a Caſe wherein it was allowed, that where there are two Executors Plaintiffs, and one of them is an Infant, he may appear by Attorney. And the Counſel ſaid, that there was no Difference between that Caſe and the Caſe at Bar; for in the Caſe cited, the Infant may be prejudiced (which is the only Reaſon that can be alledged for a Difference) as well as in the Caſe at Bar; in as much as he may be amerced pro falſo clamore, and ſuffer other Inconveniencies. And though in the Caſe at Bar perhaps the Infant may ſuffer more Damage, than in the Caſe cited; yet the Quantum of the Damage can make no Difference. But it was reſolved by the Court to the contrary. And they ſaid, that the ſame Reaſon why Infants ſhall ſue by Prochein amy and defend by Guardian in Matters that concern their own Right, holds here, where they are ſued in auter droit as Executors; for they may ſuffer Damage in this Caſe, as well as in the other; and therefore it is proper there ſhould be a Perſon whom they may have Remedy over againſt. And it has been determined that in caſe of an Attorney's loſing his Client's Cauſe barely by Miſmanagement, there is no Remedy againſt him. Now they ſaid, that one Inconvenience in the preſent Caſe was, that the Infant might ſuffer, if he ſhould appear by Attorney, for a Devaſtavit would lie againſt him, de

How far an Infant muſt appear by Guardian.

de bonis propriis for his losing by Default or sham Pleading; nay in not taking that Advantage, that he might, in pleading. Besides, they said, it was a most clear Point, that where one sole Infant-Executor sues or is sued by Attorney, it is Error; and therefore there could be no Reason for its being otherwise in this Case. And as to the Case of Foxwith and Tremayne, the Chief Justice and Justice Reynolds intimated their Doubts of its being Law; for they said, that the Reason, that the Judges, who gave that Resolution, went upon, was clearly not Law; which was, that the Infant could not be prejudiced; and that which weakens the Authority too of that Case is, that there are only two Judges against one. The Case tho', which they said they relied upon, is a Case in Style 318. which is in Point. Accordingly the Court revers'd the Judgment of the Common Pleas; declaring that one of the Executors ought to have appear'd by Guardian, the other by Attorney; and so sever'd in Plea; as there are Cases in the Books, in which that has been done; and to have had distinct Judgments against them.

De la Costa *and* The Russian Company.

How far a Rule shall be granted in order that a Return may be made to a Mandamus.

THIS was a Mandamus, that went to the Russian Company, to make the Plaintiff free of it. And a Motion was now made, that there might be a Rule upon the Company to make a Return to the Writ. But Mr. Lee, who was of Counsel for the Company, objected, that before the Statute of 9 Ann. 20. no such Rule was usually made in any of the Cases of Mandamus till an Alias and Pluries were first gone; (tho' indeed he did admit, that the Court had it in their Power to make such Rule sooner;) but that Statute has taken it out of the Power of the Court to exercise this Indulgence in respect of annual Officers of Corporations, by compelling a Return to the first Writ of Mandamus; but he said, that the Case in Question and all other like Cases were left as they were at Common Law. And therefore as there was nothing particular in this Case, he hoped the Court would go according to their usual Way. But the Court said, that it was very true, that this was the usual Course before that Statute, and that that Statute did not extend to Cases of this Nature. But they said, that this Practice had been much complained of before the Act; and therefore as the Statute had pointed out to them a Direction in the one Case; the Court had always thought that they could not take a better Course than by following that in the other. Accordingly they said, that this had been the constant Course to make Rules for Returns to the first Mandamus in all Cases since the Statute: Upon which they granted it now. The Chief Justice absent.

The King *and* Scott.

THIS was an Information in the Nature of a Quo Warranto, that was mov'd for against the Defendant upon 9 Ann. cap. 20. sect. 8. for continuing in the Office of Mayor above his Year, and preventing the Election of a new Mayor. The Counsel for the Defendant objected, that this Town, which the Defendant was Mayor of, was a Town and County, and that

the Sheriff was returning Officer; and that this Act only extended to such Mayors, or other Head-Officers, that preside at Elections, and make Returns of Members to serve in Parliament. The Court all deliver'd their present Thoughts to be, that the Act extended only to such Mayors; but yet as it might bear a Dispute, they said, they would not determine this Matter upon Motion; but granted the Information, in order that it might come before the Court in another Manner. And this, the Chief Justice said, was the usual Method of the Court to do; for if they should refuse Informations in these Cases, the Party would be absolutely without any Remedy; but if they do grant them, and afterwards adjudge that they rightfully go when they do not, the Party has his Remedy in a superior Jurisdiction; so that in the one Case there is less Inconvenience, than in the other. And this the Court said was their Way in Motions for Prohibitions.

How far the Statute of 9 Ann. ca. 20. sect. 8. does not extend to such Corporations as are Towns and Counties of themselves.

Miles *and* Wourlidge.

THIS was a Motion to stop the Proceedings on a Scire facias against Bail, for that the Plaintiff in the original Action declar'd for a greater Sum, than was contain'd in the Ac etiam. And the Chief Justice produc'd a Rule, that was made 22 Car. 2. which says, that wherever you declare for more than is contain'd in the Ac etiam, the Bail shall not be chargeable. This was the Point that the Court went upon; and accordingly stopp'd the Proceedings. There was indeed something farther in this Case, and that was, that Judgment was given for the whole Sum contain'd in the Declaration; and this second Action demanded that whole Sum against the Bail. And the Chief Justice said, that indeed 'twas necessary, that there should be the same Sum demanded against the Bail, as was contain'd in the Judgment; for the Action against the Bail was founded upon the Judgment; and if there was a Variance in the Sums, the Bail might plead Nul tiel Record. After this the Counsel for Plaintiff offer'd to enter a Remittitur upon Record for so much as the Judgment exceeded the Ac etiam. But as the other Side would not consent to it, the Court said they could not alter their antient Rules.

When the Plaintiff declares for more than the Sum contained in the Ac etiam, how far the Bail cannot be liable.

White *and* Woodhouse.

THIS was a Rule to shew Cause why 8 s. should not be brought into Court, and struck out of the Declaration. The Counsel said, that this was a Quantum meruit for using a Chaise ill, that a Person hir'd of another; and that the Court had never gone so far as to allow of these Motions in such Cases as these. For they said at this Rate, they might come in Time to allow of them in Battery and Trespass, &c. 'Tis true indeed, Mr. Strange said, that in general Quantum meruits for the Hire of a Chaise, &c. the Court does grant 'em. The Court agreed to this Difference. And the Chief Justice said, that this Rule was first made in my Lord Chief Justice Kelynge's Time. And the Reason of it he said was, for the Difficulty of

Where Money shall not be allow'd to be brought into Court.

Pleading a Tender. Accordingly they discharg'd the Rule in this Case.

Ivory *and* Machen.

How far the Bail shall be allow'd to surrender the Principal before the Return of the two Scire facias.

A Motion was made to stop the Proceedings on a Scire facias against the Bail. The Reason, which the Counsel gave, was because the Defendant in the original Action died between the Teste and the Return of the Scire facias; so that the Bail is depriv'd of the Benefit of surrendring him in Discharge of themselves, which they are intitled to by the Rules of the Court. And they cited the Case of Endrop and Hurten, Hill. 1723. where they said, this very Thing was done. But the Court said, that the Allowing of the Bail to surrender the Party in Discharge of themselves, after the taking out of the Scire facias was but a meer Indulgence: And that the Bail ought to have taken Care to have deliver'd up the Party before the Scire facias taken out against them. And this very Point the Chief Justice and Just. Reynolds said, they remembred very well was determin'd in the Case of Parry and Berry. And the Chief Justice produc'd a Note of this Case, Mic. 1726. And he said, that Hill. 1723. was the first Term he sat in Court; and that he remembred no such Case as was mentioned by the Counsel.

Anonymus.

When a Mandamus is mov'd for, how far the Court will not make a Rule for inspecting the Books of the Corporation till a Return is made to the Writ.

A Person obtains a Mandamus, and some Time after, but before the Return, he applies to the Court for a Rule to inspect the Books of the Corporation. But the Court refus'd to grant it. They said indeed, where a Rule is made to shew Cause for an Information in the Nature of a Quo Warranto, they do grant this Motion; because there the Court almost determines the Right of the Information upon the Motion; and therefore there they see, that it may be requisite to have the Inspection of the Publick Books immediately. But here they said, they could not see whether you would have any Occasion for them till the Return; for perhaps the Corporation will do what the Mandamus requires of them. Salk. 430.

The King *and* Tucker.

When an Election of Burgesses is to be made in a Corporation, how far Notice must be given previous to such Election.

ON a Rule to shew Cause why an Information in the Nature of a Quo Warranto should not go against the Defendant for exercising the Offices of Capital Burgess and Mayor of Lyme Regis. The Objection against him as Capital Burgess was, for there being no Notice given to some of the Burgesses at the Time he was chose. His Counsel tho' said, 1st, That all the Burgesses were present at the Time he was chose; and therefore tho' there had been no Notice, 'twould not have signified. And to this Purpose they cited Strangeways's Case, Hill. the first of the late King; where they said this Point was determined. 2dly, They said that there was Notice given. As to the first Point that the Counsel said down, the Court said, that the Reason that the Court went upon in Strangways's Case was,

that the Burgeſſes went all voluntarily to an Election. But in our Caſe ſome of the Burgeſſes oppos'd the going on to an Election; and therefore Notice is material. To the ſecond Point, they ſaid, that there was not a legal Notice; for to a legal Notice for the filling up of a Body, 'tis neceſſary, that the Deſign of the Meeting ſhould be contain'd in the Notice. The Chief Juſtice ſeem'd to admit, that if they go on to ſeveral Buſineſſes, they all need not be put into the Notice, but the principal Buſineſs and Deſign of their Meeting muſt. And the Chief Juſtice ſeem'd to take a Difference between Notices for Acts of that Conſequence, as filling up the Body, &c. and Notices for inferior Acts of the Corporation; for in theſe he ſeem'd to think it was not neceſſary, that the Deſign of the Meeting ſhould be contain'd in the Notice. And ſo did the Attorney General intimate in his Argument. And therefore for as much as in the Caſe at Bar there was only a general Notice, and it was not contain'd in the Notice for what Purpoſe the Meeting was to be; the Court ſaid it was irregular; and therefore made the Rule abſolute for the Quo Warranto's going as to the Office of Capital Burgeſs. The Objection againſt him as Mayor was, that his being a capital Burgeſs was a Quality eſſential to his being Mayor, and therefore as he was not a capital Burgeſs firſt, he could not have a Right to be Mayor. To this his Counſel anſwer'd, that his being a Burgeſs was as much as was requir'd by the Charter; for the very Words of it are, that the Mayor ſhall be choſe de Burgenſibus Burgi prædict'; and that he was a Burgeſs was admitted on all Hands. Upon which the Counſel for the King ſaid, that the Word Burgenſis & Capital' Burgenſis was uſed promiſcuouſly one for the other in the Charter; and in the next immediate Clauſe 'twas expreſly provided, that if the Mayor be removed or dies in the Office, the new one ſhall be choſe de Capital' Burgenſibus; and they ſaid there could be no Reaſon for providing that the Mayor ſhould be choſe out of a different Set of People in the one Caſe, from what he ſhould be in the other. They ſaid too, they had produced Affidavits of ſeveral Perſons, that had been well acquainted with the Borough, to ſhew that the Mayor has been conſtantly choſe out of the Capital Burgeſſes; and the other Side had produced no Inſtances to the contrary. Accordingly the Court ſaid, that this Uſage would be good Evidence of a By-Law for confining the Number of thoſe out whom the Mayor is to be elected, tho' there are no Memorials now in Being of ſuch By-Law. And ſuch a By-Law the Court ſaid would be good, tho' there had been no Words in the Charter to render the Word Burgenſis dubious and uncertain. And the Attorney General ſaid, this was like the Caſe of Corporations, which is in 4 Co. 77. And he took a Difference between a By-Law's being able to confine the Number of Electors, or Perſons mention'd in a Charter, out of whom a Mayor ſhall be elected; but not being able to amplify or increaſe the Number; as was the Caſe the other Day that came before the Court, of the King and the Town of Brecknall where the Charter requir'd, that the Mayor ſhould be choſe de Burgenſibus inhabitantibus; in that Caſe indeed the Court held, that no By-Law could make it ſufficient for the Mayor to be choſe de Burgenſibus non inhabitantibus.

When a Notice is given to the Members of a Corporation, how far the Intention of the Meeting muſt be inſerted in the Notice.

How far the Word Burgeſs ſometime ſignifies the ſame as Capital Burgeſs.

How far a Uſage in a Corporation ſhall be Evidence of a By-Law.

What ſhall be ſaid to be a good By-Law.

tibus. Accordingly the Court made the Rule absolute as to the Informations going against the Defendant too for his exercising the Office of Mayor.

The King *and* Tucker.

How far Liberty shall not be granted to take Copies of Charters of a Corporation.

THIS was a Motion to have Leave to inspect the Charters of the Corporation of Lynn Regis. But the Court said they never grant such a Rule; for you may take Copies of them at the Rolls.

Dorvill *and* Aynesworth.

THIS was an Action brought upon a South-Sea Contract. And the Declaration set forth, that the Plaintiff was bound to transfer 800 l. Stock, and that the Defendant was bound to pay 5800 l. that two reciprocal Notes were given for that Purpose, and that the Plaintiff was ready to make a Tender of it at the Day; but that the Defendant was not there; upon which he now demands the Money. Two Things were moved in Arrest of Judgment. One was, that the Contract was not registred pursuant to the Statute of 7 Geo. 1. The other was, that 'twas laid in the Declaration, in Capitali Fundo Societatis Mercatorum negotiantium ad Maria Australia Americæ, Anglice, South-Sea Stock; whereas it ought to have been Maria Australia. As to the first Point, the Counsel said, that the Promissory Note of 5800 l. was only registred, and not the Note, which the Plaintiff gave for transferring; so that the full Contract was not registred. And as to what the other Side might say, that 'twas not in their Power to register more than what was in their own Hands; to this they answer'd, that they might at least have register'd a Memorial or Abstract of the Whole; and the Act gives them a Power to register the Contract itself or a Memorial of it, at their Election. Now that the whole Contract was not registered by registring this Note only, they said was plain; for the Words of the Note are; I Promise to accept of 800 l. South-Sea Stock, and to pay 5800 l. for the same; by which, the Counsel said, there was nothing registred that imported any Contract on the Part of the Plaintiff, and therefore the Whole was not registred. That the Words (for the same) did not import a reciprocal Covenant, they said, was plain; for if it did, then in an Action brought upon such Note, you need not aver the Tendring of the Stock, which 'tis evident in this Case you must. Upon this they took a Difference between Instruments containing reciprocal Covenants, and Instruments containing only a Covenant of one of the Parties. And this Difference is well warranted in 7 Rep. 10. The first Part of it they said too was laid down in the Case of Pordridge and Cole. The second Part of it by the Case of Peters and Opey, 2 Saund. But the Court gave their unanimous Opinions, that the Contract was well registred; for it appear'd by the Register, that each Party was under mutual Covenants; in as much as it appear'd, that the Party registring had accepted the Note, by which Acceptance he was neces-

How far a Contract relating to South-Sea Stock shall be said to be well registered.

ſarily bound. And accordingly they ſaid, that this very Point was ruled thus at Niſi prius in the Caſe of Hardey and Paterſon. But as to the ſecond Exception, the Court agreed with it; for they ſaid, that a Corporation can only be known by its Name. And they ſaid, it was a Rule, that where there is a proper Latin Word to expreſs any Thing, and that Word is not uſed, but a Word inſenſible, in ſuch Caſe an Anglice cannot help it. However the Counſel for the Plaintiff mentioned the Caſe of Smith and Walner, Raym. 15. which was an Action of Trover for a Frying-Pan; and there it was laid Satagena inſtead of Sartagena. But Judge Reynolds ſaid, that the Utenſils among the Romans were not the ſame as amongſt us, and therefore the Court would allow greater Latitude, and let you coin Words in ſuch Caſes. The Counſel for the Plaintiff though cited one more Caſe, and that was in 10 Rep. 133. where Vitrium, Anglice a Glaſs, was held good, though there is a proper Word, which is Vitrum. But the Court ſaid the Judgment, where that Caſe is cited, proves nothing againſt this, for there was a Replevin brought for the taking of ſeveral Pieces of Goods, one of which was a Glaſs; and in that Caſe general Damages were given; which does not at all imply that Vitrium is good; for tho' it be a Word inſenſible, and of Conſequence the Jury could not take that into their Conſideration, yet general Damages are well given; for the Law ſuppoſes that the Jury did not increaſe their Damages upon that Score. However the Court ſaid, they would take a farther Day to conſider whether this ſecond Exception could be got over.

How far a Jury ſhall not be underſtood to have given Damages for any particular Things laid in the Declaration by Reaſon that they are deſcribed by improper Words.

The King *and* Curl.

THIS was an Information exhibited againſt the Defendant for publiſhing two obſcene Books; the one ſtil'd, The Nun in her Smock; the other, The Art of Flogging. And now it was moved in Arreſt of Judgment, that this was not an Offence within the Cognizance of the Common Law. But after ſolemn Deliberation, the Court held it to be an Offence properly within its Juriſdiction; for they ſaid, that Religion was Part of the Common Law; and therefore whatever is an Offence againſt that, is evidently an Offence againſt the Common Law. Now Morality is the Fundamental Part of Religion, and therefore whatever ſtrikes againſt that, muſt for the ſame Reaſon be an Offence againſt the Common Law. The Caſe of The King and Taylor, 1 Vent. is to this very Point.

How far the Speaking againſt Religion is an Offence againſt the Common Law.

Holyday *and* Fletcher.

THIS was a Special Demurrer to a Declaration in an Action againſt a Woman as Adminiſtratrix. And the Cauſe, that was ſhewn, was, for that it is not ſaid in the Declaration cui Adminiſtratio commiſſa fuit. And to prove that this was neceſſary, the Caſe of Wade and Atkinſon, 2 Cro. was cited. Likewiſe an Opinion to this Purpoſe, in 1 Syd. 228. And a Caſe in 2 Vent. 84. where this was directly adjudg'd. But

When a Defendant has an Action brought againſt him as Adminiſtrator, how far ſuch Declaration ſhall be ſaid to be good.

But the Court ſaid, That the Declaration charging the Defendant as Adminiſtratrix is the very ſame in Common Senſe, as if it had ſaid, cui Adminiſtratio, &c. They ſaid too, that one Part of the Caſe in 2 Cro. had been over-ruled ſeveral Times; and therefore this Part of it was of leſs Authority. It is true, they ſaid, there was ſuch an Opinion in Syd. And as to the Caſe in Ven. the Counſel gave an Anſwer to that; for they ſaid, that that was a Caſe in the Common Pleas, and there the Declaration is, that the Plaintiff queritur, quod, &c. ſuch a one died Inteſtate, and in ſuch Caſe therefore you muſt aver, that Adminiſtration was committed to the Defendant to intitle you to your Action; but in our Caſe it is queritur de the Defendant Adminiſtratrix; and that is certainly good. Accordingly the Court gave Judgment for the Plaintiff.

The King *and* Lyſter.

What ſhall be ſaid to be ſuch a Trade as that the Exerciſe of it ſhall be an Offence within the Statute of 5 Eliz. for want of the Party's ſerving an Apprenticeſhip to it.

TWO Exceptions were taken to an Indictment for Exerciſing the Trade of a Salter, contrary to the Statute of Eliz. the Defendant not having ſerved an Apprenticeſhip ſeven Years. The firſt Exception was, that this Myſtery was not within the Number of thoſe mentioned in the Act, and conſequently not puniſhable by that Statute. But it was anſwered, that this Act had provided a very proper Remedy for the Advancement of Trade; and therefore was not to be confined barely to thoſe Myſteries mentioned in the Act; but where there are like Trades, that require Knowledge and Experience, they are within the Intention of it, and the Myſteries mentioned in the Act are only ſet down for Examples. Accordingly the Court over-ruled this Exception. The other Exception was to its being ſaid in the Indictment that the Trade was infra hoc Regnum uſitat' at the Time of the Act made. Now they ſaid, hoc Regnum would as well extend to Scotland as England; and the averring that this Trade was uſed in Scotland at the Time of the Act would ſignify nothing. Upon this Exception the Court quaſh'd the Indictment.

The King *and* Sir Edmund Elwell.

What ſhall be ſaid to be a good Conviction for a Forcible Detainer before a Juſtice of Peace, notwithſtanding an Exception that the Continuance of the Eſtate is not rightly ſet forth.

THIS was a Conviction upon the Statute of 8 H. 6. 9. for a Forcible Detainer. And one Exception to it was, that it was indeed ſaid in the Conviction, that at the Time the Entry was made into the Houſe, the Party had an Eſtate for Life in it, but it is not ſaid that that Eſtate continued at the Time of the Detainer complain'd of; it was indeed ſaid adhuc ab ea detinet; but ſaid the Counſel, the Party might have ſurrendred her Eſtate between the Entry and the Detainer with Force, and taken an Eſtate at Will; ſo that it may be truly ſaid adhuc ab ea detinet, and yet not an Offence within that Act; and it does not appear but the Entry was very lawful. To this it was anſwered by the Court, that when a Perſon is out of Poſſeſſion, he cannot ſurrender, and therefore the Eſtate muſt neceſſarily continue. Another Exception was taken to it, that it appears

that the Conviction was made five Days before the Certiorari went down to the Justices; and yet there is no Fine in the Conviction; the Counsel said, that a Fine must be set immediately upon the Conviction; or at least within a moderate and convenient Time for the Justices to think of it; but they said, that by the same Reason that they might stay five Days, they might stay five Months; and by this Means the Offender would be deprived of the Benefit of discharging himself from Imprisonment, which the Statute gives him by paying his Ransom. The Court seem'd to think this an Exception, which deserved some Consideration, and accordingly they ordered it to stand over.

How far Justices of Peace must set the Fine at the Time of the Conviction.

Anonymus.

THE Court refused to let a Man justify Bail without Notice, though it was the same Bail as was taken by the Sheriff upon the Attachment. They said indeed where the Plaintiff takes an Assignment of the Bail-Bond, there is no Occasion for Notice in justifying, because the Plaintiff has before accepted the Bail.

How far Notice is necessary to be given concerning the putting in of Bail.

The King *and* Hayes.

THIS was an Information for forging a Bond. The Defendant was found guilty; and now the Counsel for the King applied to the Court for Leave to make an Amendment in the Nisi Prius Roll, there being a false Spelling of a Letter in one of the Words, and to set it right by the Plea-Roll. In Civil Cases the Counsel for the King said, there was nothing more common, than to amend after a Verdict, where there was something to amend by. And this they said had been done sometimes in Criminal Cases. To this Purpose they cited a Case quoted in the Case of Adington and Derby, 2 Bulst. 35. where two were indicted for Felony; but the Indictment ran in the Singular Number; this was moved in Arrest of Judgment; upon which this Matter was referred to the twelve Judges; and it was ordered to be amended; and they were both accordingly executed. The Chief Justice said, If this had been before a Verdict, no Doubt they would have amended it. And he said as this Case was, he thought they should certainly allow it; for the Nisi Prius Roll is the Defendant's own making up, and therefore he should certainly not take Advantage of his own Fault. But however it stood over.

How far Indictments may be amended after a Verdict.

The King *and* Street.

AN Exception was taken to an Order of Bastardy, for that the reputed Father is ordered to pay two Shillings weekly for the Support of the Child, till he shall come to the Age of nine Years, if he shall live so long. And it is not said, if he shall so long become chargeable. Now the Counsel said, he may have an Estate left him before he comes to be nine Years old; and then he will not want the two Shillings; so

What shall be a good Order of Bastardy.

ſo that the Order is too general. But the Court ſaid, that the very late Caſes have all allowed theſe Orders to be good; for there is not a reaſonable Intendment that he will be able to provide for himſelf ſooner. Though indeed the Chief Juſtice did admit that even the Caſes ſo late as Salkeld went otherwiſe.

Term. Hill.

1 Geo. II. 1727.

The King *and* Hayes.

Vide p. 31.

How far the Evidence given upon an Indictment ſhall be ſaid to ſupport the Iſſue.

THIS Matter now came on again, and the Fact appeared to be in the Manner following; this was an Indictment for forging a Bond. And there was a Variance between the Record in which the Iſſue was joined, and the Niſi Prius Roll; in that the Iſſue on the Record was, whether the Defendant did not forge a Bond, wherein ſuch a one in paroch' of ſuch a Place ſtood bound to him in ſuch a Sum. And the Bond produced in Evidence was peroch'. Upon this a Special Verdict was found, and the Doubt that the Jury left to the Court was, Whether the Bond given in Evidence maintain'd the Iſſue; if ſo, they find the Defendant guilty. And now the Court was moved to amend the Niſi Prius Roll, and make it agreeable to the Record. But the Counſel of the other Side objected, that the Bond given in Evidence did not maintain the Iſſue; for it was between different Parties. And the Iſſue, which the Juſtices at Niſi Prius and the Jury there had before them, was that contained in the Niſi Prius Roll, and the Evidence does not maintain that Iſſue. But the Court ſaid, that the Iſſue which the Juſtices at Niſi Prius and the Jury there have to try, is not that contained in the Niſi Prius Roll, but that contained in the Record, which the Niſi Prius Roll is only a Copy of; and the Bond given in Evidence very well ſupports that Iſſue. They ſaid too, that the Defendant himſelf makes up the Niſi Prius Roll, and to be ſure he ſhould not take Advantage of a Variance he himſelf had made. Judge Reynolds ſaid beſides, that he did not think this a material Variance; and therefore the

Court was bound to give Judgment for the King, tho' the Counsel for the King had not moved to make the Amendment. The Chief Justice however said, that it was proper in all such Cases, where there is but the least Colour of a Variance, that signifies any Thing, to direct the Jury to find the Matter specially; for in criminal Cases there is no other Way of taking Advantage of it; as in Civil Cases there is; for there the Justices of Assise direct the Jury to give a general Verdict, and then that Point is reserved to be argued afterwards.

How far in criminal Cases 'tis proper that a Special Verdict should be given.

Hill *and* Martin.

MR. Strange mov'd to set aside a Writ of Inquiry for two Irregularities; the first was, for that the Notice for executing it was at such a Day at eleven o'Clock; and it was executed at half an Hour after Eleven, tho' the Defendant was not there; whereas by the Rules of the Court it ought not to have been executed till an Hour after the Notice, if both Parties are not there ready. The other Irregularity was, that the Plaintiff gave no Evidence to the Jury, and yet they have given him Damages, which he said was always a Cause for setting them aside. Accordingly the Court did set it aside.

How far a Writ of Inquiry shall be set aside.

Anonymus.

A Motion was made to set aside a Procedendo, and that the Defendant might be at Liberty to give Bail to the Habeas Corpus, which had removed the Cause out of an inferior Court. The Reason that was given for this Motion was, that the Defendant had a Design to have given Bail to the Habeas Corpus according to the Course of the Court; but that the Plaintiff himself propos'd Terms of Accommodation, and while they were under a Reference the Time for putting in Bail slipped, and upon this the Plaintiff took his Advantage to snap the Procedendo. But the Counsel of the other Side said, that by the Rules of the Court the Defendant is obliged to put in Bail to Habeas Corpus's of this Nature within six Days after the Plaintiff has given him Notice; and that the Plaintiff accordingly did give such Notice, and the six Days laps'd before Terms of Accommodation were ever offer'd. Upon which the Court said, that the Procedendo is very regular.

When a Cause is removed up by Habeas Corpus, how far a Procedendo shall be said to be regular.

Anonymus.

A Motion was made to set aside a Plea to a Scire facias to assign Errors. The Plea was, that there is a Discontinuance between the first and the second Scire facias; the first bearing Teste the first Day in Michaelmas-Term last, returnable at a Day within that Term; the second bearing Teste the first Day of this Term, returnable at a Day within this Term. But this, 'twas said, was a meer frivolous Plea; for the second might have been taken out at any Time. And Mr. Strange, who was of Counsel for the Motion, said, that 'tis not a long Time, that these Pleas to Scire facias's to assign Errors have been allow'd at all; for they used to assign Errors upon them immediately.

How far a Plea to a Scire facias to assign Errors shall be set aside

diately. Accordingly Mr. Justice Page (who deliver'd the Opinion of the Court, the Chief Justice being absent) said, that in Scire facias's concerning a Matter of Right, indeed the second Scire facias must bear Teste the Day of the Return of the First; but the second Scire facias to assign Errors may be taken out at any Time after the First; for Scire facias's to assign Errors are only to hasten the Plaintiff in Error to assign his Errors, which it appears by his bringing the Writ of Error he ought to have done. And so the Plea was set aside. The like was done afterwards in this Term in the Case of Owen and Wright.

Brasington *and* Eyre.

How far a Person shall not be allow'd to take an Assignment of the Bail-Bond, by Reason that the same Persons are Bail above, who were Bail to the Sheriff.

A Motion was made to stay the Proceedings upon a Bail-Bond. The Reason that Mr. Blincoe gave for it was, that the same Bail was given before a Judge, as was taken by the Sheriff, and notwithstanding this the Plaintiff has got an Assignment of the Bail-Bond, and is now Proceeding upon it; and he said it was contrary to the Practice of the Court to allow an Assignment in such Cases. Mr. Justice Page (who delivered the Opinion of the Court, the Chief Justice being absent) said, that he had inquired of the Master, and he found the Practice was so. And therefore the Proceedings were stay'd.

The King *and* Dr. Whaley.

THIS was a Writ of Error upon a Judgment in a Quare Impedit given in the King's Bench in Ireland. And the King declar'd, that Dr. Vigars was late Parson of the Church in Question, and that King William and Queen Mary promoted him to the Bishopric of Lile and Ferns, that by this Means the Crown had a Right to present the next Turn, that King William and Queen Mary did not present, that after their Death the Turn came to Queen Anne, that she did not present, and that from thence it came to K. George I. that he never presented, per quod Ecclesia prædicta adhuc vacans existit promotione prædicti Vigars; and so that King brought his Quare impedit. To this the Archbishop pleads, that true it is such Right of Presenting was in the Crown in the Manner as is aforesaid; but says, that this Rectory of Armagh now in Question, &c. has been Time out of Mind Part of the Possessions of the Archbishoprick of Armagh; that King William and Queen Mary collated Dr. Drelincourt to this Deanry of Armagh, cum omnibus Membris, Juribus & Pertinentiis, that by Virtue of these Letters Patent the late Archbishop of Armagh, Predecessor to this present Archbishop, admitted, instituted and inducted the said Dr. Drelincourt to this Rectory of Armagh now in Question; by Means of which the Crown had taken Advantage of its Turn, and that Dr. Drelincourt was dead. Dr. Whaley pleads, that true it is that such Right of Presentation was in the Crown; but says that K. William and Q. Mary presented Dr. Drelincourt to this Rectory by Letters Patent; prætextu quarum quidem Literarum Patentium he was instituted and inducted, and died in Possession of it; that Dr. Vigars the Promotee is dead; absque hoc, quod Ecclesia prædicta adhuc vacans existit promotione prædicti Vigars. The Attorney

General demurs to the Plea of the Archbishop; and to the Plea of Dr. Whaley replies, that King William and Queen Mary did not present Dr. Drelincourt to this Rectory; & hoc petit quod inquiratur per patriam. Upon this Dr. Whaley demurs. The Court below had given Judgment against the King. Now this Court said, that the Plea of the Archbishop could not be maintain'd; for by collating Dr. Drelincourt to the Deanery of Armagh, cum omnibus Membris, &c. the King only intended to give him the Deanery and the Right of presenting to the Rectory, as incident to it, without the least Design of making him Rector. Another Point tho', which was in Question here, was, whether the very Admission, Institution, and Induction, without any Presentation, did not make a Plenarty in this Case, and by this Means the next Turn taken, and consequently the King's Right to have the next Turn lost; but the Court said, that true it was, that such Admission, &c. without a Presentation, would make the Church so far full, that the Incumbent would have a Right to demand the Profits of the Church against all that ought to pay them, &c. so that in these Respects the Church is by this Means full; and the Reason is, that such Persons are at no Inconvenience; for once they ought to pay them, and but once they shall pay them; therefore it shall not lie in their Power to controvert whether the Incumbent is in by Right or not; but in as much as he is in by the Acts of the Bishop, him they shall be accountable to. But such Admission, &c. shall not take away the Right of Presenting that is in another hac vice; for there is in this Case no publick Act, which the lawful Patron is bound to take Notice of to prevent his being dispossest of his Right of Presenting; and therefore such Incumbent is clearly removeable at any Time, and the Church consider'd as to him absolutely void. Dr. Whaley's Demurrer came to be considered; and the Reason for it was, that the King in the Replication did not tender him an Issue on the absque hoc, &c. and this 'twas said was a material Point to be travers'd; for 'tis not only necessary for the King to shew how such Title once was in the Crown; but to support his Quare impedit he ought to shew, that such Title is in the Crown now; and to this Purpose the King did right to continue down to himself a Title in his Declaration; and he ought to have pursued the same Way in his Replication, by not only joining Issue upon the Turn's being taken by the presenting Dr. Drelincourt, but by offering an Issue upon the Absque hoc, &c. to shew that the Title is in him now. But the Court said, that when the King had set forth a Title to himself, the other Part of the Declaration to shew the Continuance of his Title was Surplusage; for the Law supposes it to continue till something appears to the contrary; and therefore the Traverse was immaterial; and consequently no Issue need be offer'd upon it. Another Point, that was mentioned to shew the King had no Title now, was, that the Promotee was dead, and therefore 'twas too late for the King now to take it; for the very Foundation of this Right is the changing one Life for another, by which the Patron would be at no Inconvenience; and this was said to be the Foundation of it in the great Case of Lancaster and Birch, on a Writ of Error brought into the House of Lords upon a Judgment in the

The Construction of a Collation made by the King.

What shall not be said to make the Church to be full.

How far a Traverse need not be taken by the King.

Within what Time the King must take Advantage of a Right to promote

the King's Bench, where this Prerogative of the King's having any such Title to present at all was disputed. However as it was nothing but Changing one Life for another, the House of Lords did affirm the Judgment of the King's Bench. But the Counsel said, that if the King was not confined to take his Turn in the Life of the Promotee, there would be the most manifest Injury to the Patron, for no one Fault, unless that was one, to present him to a Living, who was afterwards thought worthy to be a Bishop. For they said according to this Way of thinking, the King would have it in his Power to keep the Church vacant for ever; unless some Body would present and get his Clerk industed; and then the King would punish him as a Usurper, and remove his Clerk by Quare impedit. 6 Rep. 30. But the Court said, that they could not enter into the Reason of this Prerogative; that they were only to consider, that by the Law the King has a prerogative Right in this Case vested in him, and the Consequence of it was, that the King was not confin'd to take it within the Life of the Promotee, for Nullum tempus occurrit Regi. This they resembled to the Case of Simony, which the Statute of 31 Eliz. cap. 6. has provided, that whoever is guilty of it, the King shall have a Right to present for that Turn. Now it appears by the Preamble of the Statute of 1 Will. & Mar. cap. 16. that the King was not bound to take that Turn in the Life of the Simoniack, but had a Power of presenting after such Patron had again presented, and turning such Incumbent out. And this Inconvenience the Statute relieves. By which it is evident, that the King need not in the present Case take his Turn in the Life of the Promotee. However the Court gave no Opinion in this Matter at present, but it was put off to the Beginning of next Term.

Thresher *and* Chapman.

How far a Person may avow as Bailiff to a Husband and Wife.

THIS was a Writ of Error upon a Judgment in the Common Pleas. 'Twas in an Action of Trespass; the Defendant avow'd for Damage-feasant, as Bailiff to Lord and Lady Walpole, for a Trespass committed upon the Freehold of my Lady, which my Lord was seis'd of in her Right. The Plaintiff replies, that he had a Common pur cause de vicinage, and so the Beasts strayed into the Freehold. The Defendant traverses this Justification. Upon which they went down to Trial; and the Plaintiff was nonsuited. So Judgment went against him. One of the Errors assign'd was, that the Plea of the Defendant was ill, upon account of his Avowing as to my Lord and Lady, whereas he ought to have avow'd only as Bailiff to my Lord; and consequently Judgment ought not to be given against the Plaintiff for any subsequent Default of his. But the Court said, that the Plaintiff could not take Advantage of any Errors in the Defendant's Plea, inasmuch as he was out of Court by the Nonsuit. Besides, they said, this was no Error; because it is certain a Husband may make a Bailiff for himself and his Wife; notwithstanding a Case in Fitzh. Abr. Title Avowry 198. to the contrary. Another Error assign'd was, that the Costs are wholly assessed by the Court in this Judgment; whereas Costs are always given first by the Jury, and then the Court

adds to them by Way of Incrementum. But it was answer'd by the Counsel of the other Side, that when a Man is nonsuited, the Jury do not appear; and consequently they cannot give any Part of the Costs. Accordingly the Court affirm'd the Judgment.

The King *and* Franklyn.

THIS was an Information for a Libel. And it was now moved for a new Trial. The Reason given for it was, that the Verdict was ill; inasmuch as it appears, that the Jury was not return'd by the proper Officer. And to shew this, they said, that the Distringas was returned by John Grovenor Mil' and Thomas Lome Mic', whereas there was no such Sheriff of London as Thomas Lome Mic', but Tho. Lome Mil'; and this was verified by Affidavit. The Court said, unless something farther appears, this is a good Exception; for they must take it upon what lays before them, that Tho. Lome Mic' is a different Person from Tho. Lome Mil'; and if it was a different Person that made the Return, from the Person that was Sheriff, 'twould certainly be ill; and there's no other Way to take Advantage of it but this, by moving for a new Trial, and making Affidavit that such a one was Sheriff at the Time of the Return, who appears to bear a different Name from him, whose Name is anner'd to the Return. Upon which the Attorney General said, that the Sheriff's adding his Title of Knighthood at all to his Signing the Return is Surplusage; and therefore his doing it in an improper Manner shall not make ill what was good before. He admitted indeed, that this Addition was necessary in Declarations, Deeds, &c. for it is Part of the Description of the Person, as it was determin'd in the Case of the Bishop of Chester; but when a Man subscribes his Name, those Additions are always omitted. But the Chief Justice said, that there's no such Thing as Surplusage in the Names of Persons; and therefore unless something else appears, they must intend that a different Person made the Return than ought to have done it. Then the Attorney General desired Time of the Court, that he might be able to verify, that Tho. Lome Mil' did actually make the Return; and prayed that a Rule might be made, upon Tho. Lome Mil' one of the Sheriffs of London to attend and inform the Court, whether he did not make this Return, and that upon his so informing the Court the Return might be amended. This proceeding, the Attorney said, was warranted by 9 Rep. 31. The Court said, that this was a new Point; and therefore order'd it to be spoke to again next Term.

How far the Court will give Leave, that a Return to a Writ may be amended.

Pamsford *and* Fen.

THIS was an Action of Debt upon a Bond. And the Cause of Action was laid to arise in Glocestershire, but the Venue was laid in London. Upon this the Defendant demurred generally. And the Court said, that it was their Opinion, that this Error might be taken Advantage of upon a general Demurrer. But as the Counsel desir'd to look into it, it was order'd to stand over.

How far a wrong Venue may be taken Advantage of upon a general Demurrer.

The King *and* Blackgrave.

How far the King's Bench may exercise a Jurisdiction over the Writ of Excommunicato Capiendo before the Return of it.

THIS was a Motion for an Attachment against the Defendant for a Rescous. Mr. Reeves was Counsel against the Motion, and he said, it was true indeed the Defendant was taken up upon an Excommunicato capiendo, and that he did rescous himself; but he said, till the Writ is returned into this Court, there is nothing of the Cause in Court, and therefore the Court cannot grant an Attachment for a Contempt done before the Return of it; and consequently the Attachment ought not to go. But Judge Reynolds said, that the Writ is supposed to be inrolled in this Court before the Return, and therefore the Court may grant an Attachment for a Contempt done before the Return. And he said he remembered a Case where it was determined, that a Writ of Excommunicato capiendo might be superseded before the Return. Upon which the Court granted the Attachment.

The King *and* Sir Edmund Elwell.

THIS Matter now came on again; this was a Conviction for a Forcible Detainer. And two Exceptions were taken to it last Term. The first was, that it is only recited in the Conviction, whereas such a one was seised of these Lands for Life at the Time of the Force, and it is not said that she was seised of them for Life all the Time of the Detainer, and she might have surrendered that Estate and taken one only at Will, in which Case he ought not to have been convicted of a Forcible Detainer for that Time which she had taken the Estate at Will; so that it does not appear, but the Justices have convicted him of a greater Offence than he was guilty of. The other Exception was, that it appears upon the Conviction, that they have committed him till he should pay a Fine, which they would set upon him; now according to this rate they might never set the Fine, and so he may lie in Gaol all his Life-time. As to the first Exception the Chief Justice said, it was a remote Intendment, that she should change her Estate so as is suppos'd; and he could easily get over that. But the second Exception, he said, deserved more Consideration. Yet there were two Reasons that made the Court something doubtful whether they could not get over it. One was, what Judge Reynolds said, that he believed it was the common Way to commit a Man first, and afterwards to set the Fine, by which he should redeem the Commitment. The other was, what the Chief Justice mentioned, that he did not know whether this Court could not set the Fine. Upon which this Matter was then put off. And now it came on again, and the Court said, they were of Opinion the Conviction ought to be quashed. For this Court cannot set the Fine, as it was determined in the Case of The King and Layton, which is reported by Keble; so that it might be a Commitment for Life. Accordingly they quash'd it, unless Cause to Morrow.

Anonymus.

A Motion was made to put off a Trial, upon an Affidavit, that one of the Defendant's Witneſſes was gone to New-York, and the other was lately become a Bankrupt and abſconded. But the Counſel of the other Side objected, that the Defendant ought to have ſworn, when he believed his firſt Witneſs would be back; and when he believed his ſecond Witneſs would appear; for at this Rate, he ſaid, a Trial might be put off for ever. But the Chief Juſtice ſaid, as this was the firſt Time, that the Defendant had moved to put it off, he did not ſee, but ſuch an Affidavit would do. And Judge Reynolds ſaid in ſome Caſes it was impoſſible to ſwear when he believes his Witneſs will be back, as was in a Caſe the other Day, when a Trial was put off upon account of one of the Defendant's Witneſſes being gone with Sir Charles Wager's Fleet; in which Caſe he ſaid it was impoſſible to ſwear when a Man believes he would be back, unleſs you could know what the Orders from the Government were. But however for ſome other Defect in the Affidavit, the Court did not grant the Motion in this Caſe.

What ſhall be a good Affidavit for putting off a Trial.

The King *and* Sir Edmund Elwell.

THIS was a Matter, that was mentioned before in Page 38. and the Court was unanimouſly of Opinion, that the Conviction was ill, for its committing the Defendant to Priſon quouſque finem fecerit; for, they ſaid, that this Court could not ſet the Fine; and the Chief Juſtice ſaid, he remembered the Court was of this Opinion in the Caſe of The King and Layton, which is reported in Keble; for he was of Counſel in it. They ſaid too, that they could have no proper Meaſure to ſet a Fine by in ſuch Caſes, but the Juſtices have, for they can do it upon View. And till the Fine was ſet, they ſaid, the Conviction was not complete; and Judge Reynolds was of Opinion, that if a Certiorari ſhould come down to the Juſtices before they had ſet their Fine, they might notwithſtanding complete their Judgment by ſetting the Fine. They all delivered their Opinions too, that the Juſtices were not obliged inſtantly to ſet the Fine upon the Conviction, but they might take a little reaſonable Time to conſider of it. But they ſaid, that the Commitment was wrong, for the Fine not being ſet at the Time the Juſtices did commit; and therefore the Conviction was quaſh'd. The Caſe of The King and Layton, 2 Keb. 670. was cited, where ſuch a Conviction was quaſhed for this very Exception.

How far Juſtices of Peace muſt ſet their Fine at the Time of the Commitment.

The King *and* Budgel.

THIS was an Information for a Battery. The Defendant moved to have Leave to inſpect the Venire. The Chief Juſtice ſaid, that he took it, indeed in Indictments for Treaſons, Felonies, &c. that the Defendant had no Right to inſpect

How far the Party has a Right to have the Inſpection of Proceſs without Leave of the Court.

ſpect it but upon Leave of the Court; but in Miſdemeanors he had.

The King *and* The Dean and Chapter of Rocheſter.

How far a Mandamus will lie to a Dean and Chapter to admit a Prebend.

A Motion was made for a Mandamus to be directed to Dr. Claget, Dean of Rocheſter, requiring the Dean and Chapter to inſtall the preſent Provoſt of Oriel College in Oxford into a Prebend of Rocheſter without Inſtitution; in as much as this Prebend was annex'd to that Provoſtſhip by Charter from the Crown, which was confirmed by an Act of Parliament made in the late Queen's Time. And the Court made a Rule to ſhew Cauſe.

Culley *and* Brown.

How far the Court of King's Bench will give Liberty for the Inſpection of the Court-Rolls of a Manor.

THE Defendant was a Copyhold-Tenant, and had loſt his Copy; upon this he applied to the Court to have Leave to inſpect the Rolls of the Court of the Lord of the Manor, and to take a Copy of his Admiſſion at his own Expence. And it was granted.

The King *and* Scott.

How far the Court will direct a Trial at Bar notwithſtanding the Expence which will attend the granting it.

THIS was an Information in the Nature of a Quo Warranto againſt the Defendant for exerciſing the Office of Mayor of Poole for two Years together. The Attorney General ſaid, that Poole was a Town and County; and therefore this Cauſe could be tried no where but in the Town, (where perhaps the Mayor would have a good deal of Intereſt) unleſs it was tried at the Bar; and therefore he moved for a Trial at Bar next Term. The Defendant made Affidavit, that the Expence of a Trial at Bar would ruin him; which the Court took for a ſufficient Anſwer. Then the Attorney ſaid, he would make the old Propoſals in theſe Caſes, to take Niſi prius Coſts, in Caſe the Iſſue ſhould go for the King, and to pay Bar-Coſts in Caſe it ſhould go againſt the King; upon this the Court immediately granted the Motion.

Anonymus.

What ſhall not be ſaid to be a good Preſentment.

THIS was a Motion to quaſh a Preſentment, for not repairing one of the Streets in Weſtminſter, upon the Statute of 2 W. & M. which impowers Juſtices of the Liberty of Weſtminſter to view the ſaid Streets, and to certify at the next Seſſions after ſuch View the ill Repair of ſuch Streets, and ſo to preſent them. Now the Exception, that was taken to the Preſentment, was, that it does not appear that the Certificate was made at the next Seſſions after the View; for the Certificate is general, whereas I have viewed ſuch a Street I do certify it is in ill Repair. The Court ſaid, they could intend nothing to make Juſtices come within their Juriſdiction, and therefore upon this Exception, amongſt others, the Preſentment was quaſhed.

The King *and* Hughes.

How far the Court will make a Rule for the Inſpection of particular Books belonging to a Corporation.

THIS was a Motion, that was made laſt Term, for a Rule to inſpect the Poll-Books of the Corporation of Liverpool in Lancaſhire, where the Names of the Perſons were ſet down, who were Electors of a Mayor of that Town, in order that it might be ſeen, who had the Majority of Votes at ſuch Election. The Chief Juſtice ſaid then he would make no particular Rule; but if the general Rule for inſpecting the publick Books of the Corporation would do them any Service, they might take it; which accordingly they did. And Motion was now made for an Attachment for their not granting them the Sight of theſe Poll-Books purſuant to this Rule. And Affidavits were now produced on each Side in order to have the Opinion of the Court, whether they were publick Books or not. But the Chief Juſtice ſaid, they need not enter into their Affidavits; for one of their Officers had ſhewn them three Rules; one in the Caſe of The King and Taylor, in 8 Queen Anne, another in the Caſe of The King and Sir Peter Delmé, in 12 Queen Anne, the other in the Caſe of The King and the City of Norwich, in 4 Geo. I. by which it appear'd the Court had granted even particular Rules in Caſes of this Nature for the Inſpection of Poll-Books relating to Mayors and Aldermen. So that the Court was of Opinion, that ſuch Poll-Books were Publick Books of the Corporation, and accordingly made a Rule in this Caſe for the Inſpection of them. Of Conſequence, they ſaid too, this falls under the general Rule for the Inſpection of publick Books. But the Chief Juſtice ſaid, as the Court was very far from being clear in this upon the firſt Motion, they would not grant the Attachment.

The King *and* Chipping-Norton.

Ante p. 7.

How far the Court will admit a Perſon to be bail'd for Felony.

THIS was a malicious Proſecution againſt a Clergyman by Way of Indictment of Felony for taking a Bunch of Hay; and upon that Account in Mich. Term 1726. the Court granted a Certiorari to this inferior Juriſdiction of Chipping-Norton to remove the Indictment up. And now the Parſon came and held up his Hand at the Bar and pleaded Not guilty; and upon that was admitted to Bail; four Perſons entring into a Recognizance, each in the Sum of 50 l. for his Appearance; tho' the Chief Juſtice ſaid, it was held in my Lord Chief Juſtice Holt's Time, that the Bail ſhould be bound Corpus pro Corpore; but the Practice now, he ſaid, indeed was otherwiſe. A Motion was made now too, that he might have a good Jury; which the Court granted; but the Chief Juſtice ſaid, he could not have a Special Jury without the Conſent of the Attorney General.

Anonymus.

How far the Court will not allow a Perſon to amend his Declaration by altering his Venue.

A Motion was made to amend a Declaration by altering the Venue. But the Court ſaid, they never heard of ſuch a Motion; ſo refuſed it.

Term. Paſchæ

1 Geo. II. 1728.

The King *and* Dr. Whaley.

Ante 34.

THIS Caſe now came on again; and the Court came to the following Reſolutions. Firſt, They reſolv'd that the Plea of the Archbiſhop was clearly bad. Another Point the Court reſolved, and that was, that the King had a general Right to the next Avoidance, not limited during the Life of the Promotee: And this the Chief Juſtice ſaid appeared from its being never laid in any of theſe Pleadings, that the Promotee ſtill continues alive; which, if the Life was neceſſary, muſt have been in them all, in order to ſet up a Title in the Crown. A third Point the Court reſolv'd, that if there had been any mean Preſentation, and ſuch Preſentee had died, the King's Turn would have been gone. The Fourth was, that the Admiſſion and Inſtitution and Death of Dr. Drelincourt could not ſerve for a Collation againſt the King; becauſe it appears the Archbiſhop did it upon the Foundation of the King's Title, and not to the King's Wrong. The laſt Point was, that Dr. Whaley had ſufficiently confeſs'd and avoided the King's Title in his Plea, before he came to the Abſque hoc, &c. that was only a Concluſion of Law from what he had ſaid before; and therefore the Attorney General did right in not joining Iſſue upon it; and conſequently the Doctor's Demurrer was bad. For theſe Reaſons the Judgment below was reverſed, and Judgment by this Court pronounced for the King.

The King *and* Dr. Newton and others.

How far the Court will grant an Information againſt a Husband for Wrongs done to his Wife.

THIS was an Information, that was applied for upon Account of an Abuſe, that was made upon a Wife by the Husband and ſome others in putting her into a Mad-houſe without any Reaſon. And a Rule to ſhew Cauſe was granted. It appear'd too, that upon a former Motion the Court had granted a Habeas Corpus to take her out of another of theſe Mad-houſes, that ſhe was put into once before.

Hiſham *and* Rodes.

THIS was a Motion for a Superſedeas to diſcharge the Defendant out of Execution, by Reaſon of his not being charged within two Terms after Judgment. But it appear'd, that the Plaintiff died preſently after Judgment, and that a Caveat was entered againſt the Executors, ſo that they could not revive the Judgment by Scire facias and charge the Defendant in Execution within the two Terms. And therefore the Court refuſed the Motion.

How far the Court will not diſcharge a Perſon out of Execution by Reaſon of his not being charged within two Terms.

Kichley *and* Couſton.

THE Court was moved to amend a Capias ad Satisfaciendum in altering the Teſte of it, it being dated out of Term. Several Precedents were ſhewn of the Court's amending judicial Writs, where there have been Miſtakes in the Clerks. Accordingly this was amended. And the Chief Juſtice ſaid, he thought there was a clear Difference between Judicial and Original Writs in this Reſpect.

How far the Court will give Leave, that a Writ of Execution may be amended.

Holdfaſt *and* Pedigree.

ON Rule to ſhew Cauſe, why Judgment ſhould not be entred againſt the caſual Ejector, an Exception was taken to the Notice, that was annex'd to the Copy of the Declaration, for its not being ſign'd by the caſual Ejector. And for this Cauſe it was diſcharged.

How far the Court will ſtay Proceedings in an Ejectment, by Reaſon that the Notice, which was annexed to the Copy of the Declaration, was not ſign'd by the caſual Ejector.

Anonymus.

A Sheriff had taken in Execution a Stranger's Goods; and now Motion was made, that they might be ſtaid in the Sheriff's Hands, upon offering to try the Property. And Mr. Strange, who was of Counſel in this Caſe, ſaid, that the like Motion he remembred granted about three Years ago in the Caſe of Sir Godfrey Kneller. But the Court ſaid, they never knew ſuch a Motion made before; and ſo refuſed to grant it.

How far the Court will not direct that Goods which are taken in Execution, ſhall be ſtaid in the Hands of the Sheriff.

Chadwell *and* Bruer.

THIS was an Action of Debt upon a Bail-Bond. And the Plaintiff got Judgment and Execution of the Penalty. Now the Court was moved to make a Rule, that it may be referred to the Maſter to ſee what is due in Conſcience, and that the Overplus may be return'd. The Court ſaid, if you had come before Judgment, we could have helped you; but now you have Relief only in Equity. Another Thing was mov'd, and that was, that the Plaintiff's Attorney's Bill might be taxed; but the Court ſaid, that a Perſon may move to have his

How far the Court will not direct that Proceedings upon a Bail-Bond ſhall be ſtaid after Judgment.

his own Attorney's Bill tax'd; but not the Attorney's of another Person.

Smith *and* Lidcote.

How far the Court will not allow a Person to proceed on a second Notice of Trial, till he has paid the Costs of the first.

THIS was a Motion that the Plaintiff might not go on to Trial without first paying the Costs of the former Notice. The Court seem'd first of all to think, that the Defendant ought to have applied by Way of Attachment for the Plaintiff's not paying Costs. But yet, as it appear'd the Plaintiff was already in Custody, so that the Attachment would be of but little Service, the Court made a Rule to shew Cause, why he should not be hindered. And in another Day of this Term the Court made the Rule absolute.

The King *and* Morris.

How far the Court will not quash an Indictment, by Reason that the Defendant did not appear to it in due Time according to his Recognizance.

THIS was a Motion to quash an Indictment. But it came out that the Defendant had forfeited his Recognizance for appearing; the Condition of it being, That he should appear as of last Michaelmas Term; whereas the Master informed the Court, that he did not appear till Hilary Term. And in these Cases the Court said they never quashed them.

Wiltshire *and* Wiltshire.

What shall not be said to be a good Service of a Declaration upon a Prisoner.

A Motion was made to set aside a Judgment, and that a Supersedeas may issue to discharge the Defendant out of Custody, upon his finding common Bail. The Case was, that the Defendant was in Custody by Virtue of a Latitat, and that the Plaintiff had neither serv'd the Defendant himself nor the Turnkey with a Copy of the Declaration, but a mere Stranger. Upon this the Court order'd the Irregularity to be referred to the Master.

Holdess *and* Cornwall.

How far upon a Writ of Inquiry the Jury cannot give the Plaintiff Damages to the Time of executing the Writ.

ON Motion to set aside a Writ of Inquiry. One Reason given was, that there was indeed a Note produc'd, which the Plaintiff said was under the Defendant's Hand; but the Defendant offered to give Evidence, that it was not his Hand; and yet the Under-Sheriff would not allow him to do it. But the Court was of Opinion, that this was no Reason to set it aside; for it appeared that the Plaintiff had declared upon this Note; and the Defendant let Judgment go against him by Nil dicit; so that he had already confess'd its being his Note; and therefore could not come then and deny it. The other Reason given for it was, that the Jury had given the Plaintiff Interest and Damages to the Time of executing the Writ. And this the Court said, was irregular. Therefore the Counsel desired Time to answer that Part of the Affidavit; which was granted them.

The King *and* Marſh.

ON Motion to quaſh an Indictment. The Exception to it was, that it charged the Defendant only with digging a Ditch in quodam compaſcuo ſive vacuo adjungen' to a Highway ad commune nocumentum of all thoſe, who paſs over this void Piece of Ground. Now the Counſel ſaid, it does not appear that ſuch an Act as this is a common Nuſance, for the Place might be a private Property. But the Court ſaid, they never do quaſh Indictments for common Nuſances; and therefore they would not enter into the Exception; for that would be overturning the very main Deſign of the Rule. But where it appears, that the Court where the Indictment is taken has no Juriſdiction in thoſe Caſes, this Court will quaſh them. As in the Caſe of Indictments of Perjury at the Quarter-Seſſions.

How far the Court will not quaſh an Indictment for a Nuſance.

Hawkins *and* Robinſon.

THIS was a Writ of Error upon a Judgment in the Common Pleas in an Action upon the Caſe for ſeveral Promiſſes. The Exception to one of the Counts was, that it was an Action as of laſt Michaelmas Term, which muſt be intended as of the firſt Day in the Term, whereas the Cauſe of Action does not appear to have been till the Middle of it. But the Court ſaid, that the Demand of the Money was indeed laid to have been in the Middle of the Term; but it was mere Surpluſage to lay any Demand at all in this Caſe. Therefore the Judgment was affirmed.

How far an Action ſhall not be ſaid to be brought before the Cauſe of it aroſe.

Wyat *and* Wynkworth.

THIS was a Motion for an Attachment againſt a Witneſs for not appearing at the Trial, upon which the Plaintiff was nonſuited. The Caſe of Hammond and Steward, Mich. 8 Geo. I. was cited, where this Court granted a Motion of this Nature. The ſame was done in the Exchequer, Mich. 10 Geo. I. in the Caſe of Daliſon and Aland. And therefore the Court made a Rule to ſhew Cauſe, why it ſhould not go in this Caſe, upon Account of the Defendant's having tamper'd with him. And they ſaid, that his not appearing was a Contempt to the Proceſs of this Court.

How far the Court will grant an Attachment againſt a Witneſs for not attending at the Trial.

Felila *and* Rawlins.

THIS was an Action for ſeveral Promiſſes. The Defendant pleaded, that he is chargeable as Bailiff, and therefore the Action ought to have been in Account, and concludes, & ideo petit quod narratio caſſetur. Upon which the Plaintiff demurs. But the Court ſaid, that the Plea is in Bar; and that is the Difference between where a Plea concludes in this Way, and where it concludes quod Billa caſſetur; for that is only in Abatement. So Judgment in Bar was given in this Caſe.

What ſhall be ſaid to be a Plea in Bar, and not in Abatement, by Reaſon of the Concluſion of it.

Anonymus.

How far the Court will not grant an Attachment for diſobeying a Judge's Order.

MOTION was made for an Attachment againſt an Attorney for not obeying an Order of Mr. Juſtice Page. But the Chief Juſtice ſaid, that the Method of Proceeding againſt Perſons, that diſobey Orders made at the Judges Chambers, was ſettled about two Years ago. And the Judges agreed it ſhould be, by moving the Court, that the Party might ſhew Cauſe, why the Orders ſhould not be performed. Which was done accordingly in this Caſe.

The King *and* The Overſeers of the Poor of Colbitch.

What Things the Seſſions cannot order the Overſeers of the Poor to do.

AN Order of Seſſions was made upon the Overſeers of this Pariſh, that they ſhould pay a Surgeon his Bill for curing certain Poor under their Care. The Court ſaid, that the Seſſions have no Power to make ſuch Orders; and ſo quaſhed it.

Field *and* Gooding.

How far a Declaration ſhall only be conſidered to be of that Term, in which Notice was given of it.

THIS was an Action upon the late Act of Parliament to prevent vexatious Arreſts. The Caſe was, that the Plaintiff filed his Declaration of laſt Michaelmas Term; but did not give Notice of it till Hilary Term; notwithſtanding this the Plaintiff entered up Judgment for want of a Plea as of that Hilary Term. Upon this the Court ſet aſide the Judgment; and ſaid, that it was a Rule, that the Declaration is only to be conſidered as a Declaration of that Term in which the Notice was given.

Reynolds *and* Thorp.

The Certainty required in an Avowry.

THIS was a Writ of Error upon a Judgment in the Common Pleas on a Replevin. The Defendant avowed there for Rent; and pleaded, that one A. having ſufficient Eſtate in the Lands in Queſtion, demis'd them to the Avowant for the Term of twenty Years, and he over to the Plaintiff for ten, reſerving a certain Rent; that the Rent was behind, and ſo he diſtrained. Upon which the Plaintiff demurs; and ſhews for Cauſe ſpecially in his Demurrer, that the Avowant has not laid a ſufficient Eſtate in A. by ſetting forth to the Court, what it was. Upon which the Court below gave Judgment for the Plaintiff, and now that Judgment was affirmed. The Reaſon, which the Court gave, was, that an Avowry is not in this Reſpect of the Nature of a Declaration; for the general Iſſue cannot be pleaded to it; and therefore every Thing muſt be ſet out certain in it. For this Reaſon, they admitted, that this would have been otherwiſe in the Caſe of Debt for Rent. And this Point, they ſaid, has been lately ſettled in the Caſe of Silley and Dalley. Salk. 562. Vide 3 Cro. 22. Syd. 297. 2 Ven. 102, 253, 271. Skin. 624.

Crutchfield *and* Scot.

THIS was an Action brought by an Executor. The Defendant desired to bring a certain Sum into Court, and that it might be struck out of the Declaration. Whether this could be done in the Case where an Executor is Plaintiff, was the Question. The Court was of Opinion, that it might. And the Case of Baker and Turberville, Mich. 3 Geo. 1. was cited by Mr. Thomson, where, he said, this Motion was allowed. The Court ask'd Mr. Reeves, whether he remembered that Case, who said, he did. Now in this Case if the Plaintiff should go on, and not prove more than is brought in, accordingly the Motion was refused.

How far a Person shall be allowed to bring Money into Court, notwithstanding the Plaintiff is Executor

Berry *and* Cross.

THE Plaintiff declar'd in Prohibition, and recover'd. The Question was, from what Time the Defendant should pay Costs? And the Court was of Opinion, that he ought to pay Costs from the very first Application for the Prohibition; for the whole is but one Suit; and the Statute of 8 & 9 W. 3. which gives the Costs in this Case, says, that the Plaintiff shall pay the Costs of Suit. Mr. Fazacherly said, that this very Point was determined some Time ago in the Exchequer in the Case of Sir Henry Houghton and Starkey.

From what Time the Party shall pay Costs in Case of a Prohibition.

Botamley *and* Harrison.

ERROR was brought on a Judgment in the Common Pleas in an Action of Trover. Exception was taken, that the Declaration charged the Defendant with finding unam Parcellam of Pack-Cloth, Rappers and Cords, which the Counsel said was not certain enough; Parcellam being a Word of an uncertain Signification. And this same Exception they said was allow'd in a Case depending, Hil. 1726. But the Court said, that Parcella seems here to signify a Parcel or Bundel of Goods, which is certain enough. Indeed in Replevin, &c. this would not be good; for there the Thing itself is to be recovered. But here only Damages. However it stood over. Lev. 303. V. 50.

The Certainty required in describing the Things which an Action of Trover is brought for.

The King *and* Wakeford.

ON Motion to quash an Indictment for disobeying an Order of Sessions. The Exception taken to it was, that the very Order itself was quash'd this Morning. But the Court said, they could not quash Indictments for Faults not appearing in them, but only shewn to the Court by Matter extrinsical.

The

The King *and* Hayes.

How far a Special Verdict ſhall be ſaid to be ſufficient.

THE Defendant was indicted for forging a particular Bond, and then for publiſhing it, and afterwards for publiſhing a Bond forged generally. The Jury give a Special Verdict; and find that the Defendant committed the two firſt Facts charged in the Indictment; but ſay nothing as to the Third; yet at laſt they come with a general Concluſion, and ſubmit the whole Matter to the Court to judge de malegeſturis prædictis; and according as the Court ſhall be of Opinion, they find the Defendant Guilty or Not guilty. The Queſtion now was, whether this Verdict was perfect and compleat enough, ſo as that the Court might give Judgment upon it, or whether it was imperfect, ſo as that the Court muſt award a new Venire facias. 'Twas objected ſtrongly on the Part of the Defendant, that the Verdict was imperfect; for the Jury find nothing as to one Part; and then the general Concluſion contrary to the Premiſſes cannot make it good. To this Purpoſe the Caſe of Auncelme ver. Auncelme, 2 Cro. 31. was relied upon. Another Caſe was put; and that was, that if a Man was indicted for ſtriking A. B. and C. and the Jury ſhould find, that he lift up his Hand to ſtrike at A. and B. and ſtruck at them, but miſt them; and ſo ſhould conclude in as general a Manner, as in the Caſe at Bar; the Counſel ſaid, that this Verdict would be imperfect. This Caſe the Court admitted; but they ſaid, it was diſtinguiſhable from the Caſe at Bar; for there the Defendant is charged with one Fact in the Indictment, and the Verdict finds, that he did another, which is no Anſwer: But in the Caſe at Bar the Defendant is charged with three Facts; to two of them the Jury give a poſitive Anſwer, and then make a general Concluſion, by which the Whole is ſubmitted to the Court; ſo that here the whole Evidence given to the Jury is laid before the Court; and the Court is to judge upon the Evidence found as they ſhall think proper. By this it appears, that the Jury had taken into their Conſideration all the Charges; but they thought the Court the propereſt Judges of what ought to be done upon the Evidence given. This ſame Anſwer too makes a clear Diſtinction between the Caſe in Crooke and our Caſe; for there it appear'd that the Jury had found but Part of the Fact; and there was nothing to ſhew, that they had thought any Thing about the other Part. So the Court ſaid Judgment ſhould be given for the King as to the Two firſt Charges; and acquitted the Defendant as to the other.

Fox *and* Halpyn.

How far the Plaintiff cannot be intitled to ſign Judgment againſt the caſual Ejector.

THIS was a Motion to ſet aſide a Judgment in Ejectment againſt the caſual Ejector. The Caſe was, that a Rule was made for Judgment in Ejectment againſt the caſual Ejector; the Terms of which are, unleſs the Tenant of the Land ſhall appear and plead, Judgment ſhall go againſt him. The Tenant of the Land did not appear and plead, and therefore the Rule of Courſe made itſelf abſolute, and accordingly Judgment was ſign'd, and Execution taken upon it. Application was made to ſet this Judgment

aſide. The Reaſon given was, that tho' in the Rule drawn up there is nothing elſe expreſs'd but theſe Words, unleſs the Tenant, &c. yet there is ſomething elſe implied precedent to the Tenant's being obliged to plead, and that is, that the Plaintiff ſhould join with the Defendant in a Rule, which is to be ſign'd by a Judge, by which the Defendant is bound to appear and plead, and confeſs Leaſe, Entry and Ouſter. Now in this Caſe the Defendant could not get the Plaintiff to join with him in ſuch Rule; and therefore as yet he was not bound to appear and plead. For which Cauſe the Court held the Judgment ſign'd in this Caſe to be irregular; and accordingly ſet it aſide.

Watkins *and* Weſt.

THIS was an Action of Trover for taking two Diſhes, againſt two Officers of an inferior Juriſdiction in the Borough of Hurſt. The Defendants pleaded, that they took them by Diſtringas, by Virtue of a Plaint levied in that Court; upon which the Plaintiff demurred generally. Now Exception was taken to the Plea, for its being not ſhewn how the Cauſe aroſe within that Juriſdiction. But the Court ſaid, that this indeed has been formerly a Point much controverted, whether in the Caſe of an Officer 'tis neceſſary to ſhew how the Cauſe of Action aroſe within ſuch Juriſdiction; but this has been fully ſettled in the Caſe of Pool and Gwyn, Lutw. 2. 935. That in the Caſe of an Officer 'tis not neceſſary; ſo that now they would not allow that to be diſputed again. Another Exception was then taken, that the Defendants had ſet out the Precept to have been made Ballivis Burgi prædict', and that they executed it as Bailiffs Curiæ prædict'; ſo that the Counſel ſaid, that it did not appear that the Defendants had any Authority given them by this Warrant. Upon this Exception it ſtood over. V. 50.

When an Officer of an inferior Court juſtifies under Proceſs of that Court, what ſhall be ſaid to be a good Plea of that Sort.

Boot *and* Grayham.

THE Defendant being a Member and Reſident of the Univerſity of Oxford, was ſued in this Court upon a Contract he entred into in London. And now the Chancellor of Oxford came primo die, and demanded that his Plea of Conuſance might be allow'd; King Edward the Third giving the Univerſity a diſtinct Juriſdiction by his Charter, which was confirm'd by Parliament, to hold Plea of all Matters, which a Member and Reſident of the Univerſity is concerned in, except ſuch as relate to Matters of Freehold; by which ſame Charter all Judges are prohibited to proceed in any of theſe Cauſes, after the Chancellor has put in his Claim. But now an Exception was taken to the Manner of this Claim put in; upon Account of the Defendant's Reſidence being only certified by the Chancellor, and not verified by Affidavit. The Court ſeem'd to be of Opinion, that this Exception had a good Deal of Weight in it; for they ſaid, a Judge cannot certify a Matter of Fact of this Sort which will be final, but only Matters appearing upon Record; and they ſaid, that the bare being upon the Matriculation Roll will not be enough in this Caſe, but it is equally

How far Perſons may be ſued in the Courts of Weſtminſter-Hall, notwithſtanding they are Members of one of the Univerſities.

necessary that such Person should be resident in the University. So upon this Exception it stood over to another Day.

Vide 47.

Botamley *and* Harrison.

THIS Matter now coming on again, the Court seem'd to think, that Parcella was a Word too incertain. Thereupon Mr. Strange cited a Case in 2 Lev. 195. where Parcella pensarum lanearum, Anglice a Quantity of Woollen Yarn, was held to be bad. Indeed the Court admitted, that if in the Case in Question, it had been laid, Anglice a Parcel or Bundel, that would have been good; for in our Language a Parcel, or Bundel of Goods are of a certain Signification. However it stood over again.

Ante 49.

Watkins *and* West.

THIS Matter now coming on again, the second Exception was chiefly spoke to. Serjeant Hawkins said, that these Persons who were Bailiffs of the Court might have been Bailiffs of the Borough too; and argumentatively it does appear that they were; for it is said in the Plea, that they being Bailiffs Curiæ prædict' took the Distress virtute præcepti prædict'. Now they could not take it by Virtue of this Precept, unless they were Bailiffs of the Borough too. And he laid it down for a General Rule, that Defects in Pleas, which may be made good by Argument, cannot be taken Advantage of upon general Demurrers. To this Purpose he cited a Case in Cro. 3. 746. where 'tis held, that a Person's declaring that he was Lessee at Will, without averring the Life of the Lessor, was good upon a General Demurrer; in as much as it was laid in the Declaration, that he was possessed of the Lands by Virtue of the Lease aforesaid. Vide Aleyn 48. to the same Purpose. The Court were inclin'd to think, that this gave an Answer to the Exception; but it stood over.

The King *and* Budgel.

Upon what Day a Writ ought to be returnable.

THIS was an Information, on which the Defendant was convicted for a Libel. And now an Exception was taken to the Return of the Distringas, with an Intent to have a new Distringas, and so a new Trial awarded. The Exception was, that the Writ is returnable die Martis prox' Octabis Sancti Hillarii; whereas it ought to have been Die Martis prox' post, &c. And the Defendant's Counsel said, that as it is put the Tuesday next to the Octave of St. Hillary generally, it is uncertain which Tuesday is meant, upon the Face of the Return, whether that before the Octave or that after; and if it was meant that before, it is not good, for the Jury must be order'd to appear at a Day within the Term, and the Tuesday before is out of Term. They said too, it will be no Answer to this to say, that in this Case the Octave of St. Hillary fell on a Saturday, and therefore the Tuesday nearest to the Octave must be the Tuesday within the Term; for the Return-Days must be certain, and good at all Events, and not depend upon Contingencies, whether they will

be good or not; whereas in this Caſe it is intirely accidental, whether it is good or not; for if the Octave had fell upon the Thurſday or Friday, it clearly would have been bad. To this Purpoſe Mr. Strange cited the Caſe of Sayer and Milton, Mic. 12 of the late King, where the Return of a Scire facias was die Jovis prox' poſt Octabis Sancti Martini, whereas the common Form of theſe Returns is Quindena Martini; now in that Caſe it happen'd that the Octave fell upon a Thurſday, and therefore the Thurſday after was exactly the Quindena Martini; but yet as this was only accidental and not appearing to be good upon its ſelf, the Court there held it to be bad. The Court was divided in their Opinions upon this Exception; and therefore it ſtood over.

The King *and* Burden and Wakeford.

How far Juſtices of Peace have not a Power of removing Conſtables from their Office.

THIS was a Motion to quaſh an Order of Seſſions. The Caſe was, that the Mayor of a certain Town ſet up a Cuſtom, that the Jury of the Court-Leet there ought to make a Liſt every Year of five Perſons, which ſhould be preſented to the Mayor, and that the Mayor ought to chooſe one out of the Number for Conſtable, and that the Jury ſhould chooſe the other out of the remaining Four; now this Year the Jury had made no Liſt, but the Pariſhioners choſe the Conſtables themſelves. Upon this the Mayor applied to the Court of Seſſions, and they made an Order of Diſcharge of one of the Conſtables, and that the Mayor's Conſtable, whom he nominated in Default of the Jury's giving him a Liſt, ſhould be confirm'd. The Court now quaſh'd this Order; for they ſaid the only Statute, that gives the Juſtices Power at all in Relation to Conſtables, is the Statute of 13 & 14 Car. 2. cap. 12, 15. and that Act only gives Juſtices Power to put in Conſtables in Default of the Court-Leet; but does not impower them to diſcharge Conſtables already put in. Accordingly the Order was quaſh'd.

Wiltſhire *and* Wiltſhire.

Vide 44.

How far an Affidavit is neceſſary to be made, when a Perſon, who is in actual Cuſtody has a Declaration deliver'd againſt him.

THIS Matter now came on again, but the Maſter did not report that for an Irregularity, which is complained of there, but another Thing; and that is, that the Plaintiff gave the Defendant Rules to plead without making the Affidavit that is requiſite in theſe Caſes, where a Man declares againſt one that is in Cuſtody. The Affidavit contains ſeveral Things, one of which is, that the Defendant is in Cuſtody by Virtue of a Proceſs of this Court. And this the Chief Juſtice ſaid was neceſſary; for he remembred all the Judges meeting upon the Act of 4 & 5 Will. & Mar. cap. 21. and making this Rule upon it, that ſuch an Affidavit ſhould be filed in all theſe Caſes. Accordingly the Judgment was ſet aſide. But the Superſedeas was not granted, becauſe the Defendant was already in Execution at another Suit; ſo the Court only ordered that he ſhould be charged in Execution with a freſh Action.

The

The King *and* Porter and others.

How far a Perſon, who owns himſelf perjured, ſhall not be credited.

AN Information was moved for againſt the Defendants for ſeducing a Man's Wife, that was under Age, to take a great Part of her Husband's Goods and delivering them to one of the Defendants that was her Mother, and for perſuading her to ſwear the Peace againſt her Husband; whereas the Wife came now and ſwore, that ſhe had no Manner of Cauſe to do it, and that this Seducement was done only to make Veration between her Husband and her. But the Court ſaid, that they would never grant Informations upon the Oath of a Perſon, who comes and ſays, that ſhe before forſwore herſelf.

The King *and* The Biſhop of Cheſter.

How far the Court will not grant a Mandamus, where there is a Viſitor appointed.

THIS was a Mandamus, directed to the Biſhop of Cheſter as Warden of Mancheſter-College, to ſwear in one Mr. Aſhton Chaplain of that College. The Warden returns, that this College is of a Royal Foundation, and that King Charles the Firſt made the Biſhops of Cheſter for the Time being Viſitors of it, and ſo concludes, that no Mandamus ought to go to him. As to this the Court did admit, that in all theſe Eleemoſynary Societies, where there is a Viſitor appointed, either by Act of Law, or by Act of the Party, the Court cannot interpoſe, unleſs in thoſe Caſes where the Viſitatorial Authority is ſuſpended or extinct. But that this Authority is ſometimes ſo, they ſaid, was evident, from the common Queſtion that is always ask'd in theſe Applications for Mandamus's, whether there is any Body that can viſit. Now, they ſaid, that this Queſtion can only be applied to Suſpenſions or Extinguiſhments of this Authority; for in every one of theſe Eleemoſynary Bodies there neceſſarily muſt be one upon the Foundation of thoſe Bodies, who has a general Right of Viſiting in general Caſes. The Court ſaid, they would then conſider, whether any Body has a Right of Viſiting in this particular Caſe now in Queſtion. The Biſhop 'tis clear cannot; for he is party and therefore cannot be Judge. The King cannot; for he has transferred his whole Right of Viſiting to the Biſhop. Therefore this Caſe muſt fall within the general Current of Reaſons, in which all other Caſes do. There was tho' one Caſe, which Mr. Lee cited out of a Collection of Caſes in Relation to the Privileges of the Univerſities. It was, that by the Statute of All-Souls College in Oxford, the Archbiſhop of Canterbury is made Viſitor of it; and the Statute farther ſays, that if the Fellows cannot agree to chooſe a Maſter within ſuch a Time, the Right of Nomination ſhall devolve to the Archbiſhop. The Fellows did not agree; upon which the Archbiſhop nominated one to them, and they refuſed to admit him. The Archbiſhop viſited them, and compell'd them to do it; and they reſted under it; which, Mr. Lee ſaid, is an Argument, that they were adviſed, that they could

have no Reasons elsewhere. The Court said, they were not obliged to consider how that Case was; but the Chief Justice and Judge Reynolds said, that they did not know, but there might be a Difference. Upon which the Court made a Peremptory Rule upon the Bishop Nisi on Monday; and that Day made it absolute.

Williamson *and* Dyer.

When a Writ of Error is brought on a Judgment in Ireland, how far the Court above will help the Party to assign his Errors.

THIS was a Writ of Error upon a Judgment in Ireland; and now Motion was made, that the Court would set it aside, unless the Plaintiff would assign his Errors in due Time; he having not proceeded in it for a long while. Which the Court granted; and farther said, that in Writs of Error upon Judgments in the Common Pleas, the Defendant may Non-pross them himself without applying to the Court.

The King *and* The Inhabitants of Caywood.

THIS Matter now coming on again, Mr. Reeves said, he did remember a Case, where the Court had gone as far as in this Case, if they should allow this Word Ulleskelf to be good instead of Uleskelf. And that was the Case of Young and Slatterford, which was argued Trin. 8 Ann. There, he said, was an Exception taken to a Variance between the Venire and the Distringas; the one ordering the Jury to come out of the Parish of Chidingford; the other, out of the Parish of Chiddingford; but yet the Court held this Variance to be immaterial in Arrest of Judgment; and accordingly the Defendant was actually hang'd. This he said, was a stronger Case than ours, for that was in the Case of Felony. So that the Court only minds in these Cases, whether the Words be eadem sonantia or not. Upon this Case the Matter stood over. Post Page 60.

The King *and* The Bailiffs of Bridgnorth.

How far one joint Officer shall be answerable for the Acts of the other.

A Mandamus went to the two Bailiffs of this Town to admit a Man into the Office of Chamberlain. No Return was made to it. Upon which an Attachment was moved for. And the Court granted it against them both, though Affidavit was made that one of them was always willing to make a Return, but could not, because the other had got the Mandamus into his own Hands, and would not let him have it. The Reason the Court gave was, that they were both to be considered as one Officer to them.

Muttit *and* Denny and others.

How far Amendments shall be allow'd in an Ejectment.

THIS was an Ejectment to try the Right of an Estate. It was moved in Arrest of Judgment, that there was a Mistake in the Nisi prius Rolls, the Action being brought against two Persons for entering upon the Plaintiff, and the Expulsion being laid against one only, and him not a Defendant.

Now Application was made to amend this Miſtake; for the Counſel ſaid they had ſomething to amend by, and that was the Plea-Roll; every Thing being Right but this Part of the Niſi prius Roll, and the ſame Part in the Copy of the Iſſue. And Mr. Lee ſaid, that Ejectments are Creatures of the Court, and feigned Suits to put the very Right in Trial; and therefore though in other Caſes this might not perhaps be amendable, yet in Ejectments, he hop'd it would. To this purpoſe the Biſhop of Worceſter's Caſe, Sel. 48. was cited, where there were ſeven Defendants, and two omitted in the Niſi prius Roll, and yet that was amended. Upon this it ſtood over. And afterwards it was amended.

Matthews *and* Spicer.

How far the Plaintiff ſhall be allowed to vary the Time which he alledged by his Declaration that his Cauſe of Action aroſe in.

THIS was an Aſſumpſit for depaſturing of Sheep; the Plaintiff declares for four Pounds ten Shillings, and ſays that he demanded the Money on the 26th of March; the Defendant pleaded a Tender on the 16th, ante exhibitionem billæ prædictæ; the Plaintiff replies, that he proſecuted his Latitat on the 12th of February. Upon which the Defendant demurs. The Reaſon which the Counſel gave, was, that the Plaintiff had precluded himſelf to ſay, that his Action comment'd the 12th of February; when he had before laid the Cauſe of it to have begun the 26th of March. But the Court ſaid, that the Party is indeed precluded to do this himſelf of his own accord; but he is not precluded, when the other Party inſiſts upon the Day, and would make that material. Accordingly the Court was going to give Judgment for the Plaintiff, but upon a Doubt of Mr. Juſtice Page, it was ordered to ſtand over.

Shaw *and* Wey.

What Words in a Will give an Eſtate for Life only, and not an Eſtate-Tail.

THIS was a Writ of Error upon a Judgment given at the Grand Seſſions in the County of Flint. It was in an Ejectment. And now the Difficulty aroſe upon the Words of a Will, that were found in a Special Verdict. They were to this Effect, I give unto my Siſters, Anne Lunsford and Dorothy Evans, the Lands in Queſtion for their Lives, without committing Waſte, and if either of my Siſters die leaving Iſſue of their Bodies lawfully begotten or to be begotten, then to ſuch Iſſue or Iſſues the Mother's Share; or elſe to the Survivor or Survivors of them, and their reſpective Iſſue or Iſſues; and if they die without ſuch Iſſue or Iſſues, then he limited Remainders over. The Queſtion was, what Eſtate the Siſters took, whether for Life or in Tail? And the Court was of Opinion, that they took an Eſtate for Life only. They ſaid the Words, that make this very thing doubtful, were thoſe that give the Lands to the Iſſue after the Death of the Siſters; but whether it be the Deviſor's intent, that they ſhould take by Deſcent or Purchaſe, that muſt be left to the general Meaning of this Clauſe. Now, they ſaid, the firſt Part of the Clauſe clearly made for an Eſtate for Life, the Lands being

given to them for their Lives, without committing Waſte; but then the next Clauſe in Relation to the Iſſue makes the Difficulty in the Caſe; and they did admit, that if the Words had gone no farther, the Siſters would have had an Eſtate in Tail, unleſs the conditional Words make a Difference. And this appears by the Caſe of King and Melling, Keb. 99. which Caſe the Court ſaid was certainly Law; and it has been admitted ſo in Chancery and in Parliament; but then they ſaid, they would not carry theſe Conſtructions one Inch farther than that Caſe has gone. Then what is the Effect of the next Words in this Clauſe? The Deſign of them plainly is to make the Iſſue of the firſt Iſſue inherit as Heirs to them, and not to the Siſters; by which it is plain that the Intereſt of the firſt Iſſue was chiefly reſpected; that the Words relating to them were put in for a deſignatio Perſonæ of the Iſſue, and not for a Limitation of the Eſtate of the Siſters, which the Court ſaid was the direct Difference between the Caſe of King and Melling and the Caſe at Bar. Accordingly the Judgment below was reverſed.

Term. Trin.

2 Geo. II. 1728.

Giles *and* Venſon.

How far an Attachment ſhall not be granted againſt a Perſon for a Contempt of the Proceſs of the Court.

A Motion was made for an Attachment againſt the Defendant for ſpeaking Contemptuous Words of the Court at the Time he was ſerv'd with a Writ of Privilege. But it appearing, that the Defendant only told the Plaintiff he would make him eat it, if he left it with him, the Court thought that would hardly be enough; but yet made a Rule upon him to ſhew Cauſe. Judge Reynolds mentioned a much ſtronger Caſe than this, which was about two Years ago, where a Defendant actually made a Bailiff eat a Writ, which he ſerv'd him with; and yet the Court would not there grant an Attachment.

Barber *and* Evans.

When a Judgment is entered up on a Warrant of Attorney how far the Court will ſet it aſide by Reaſon that the Warrant of Attorney was forged.

THIS was an Irregularity of a Judgment, that was referred to the Maſter. The Maſter reported, that the Judgment was entered up upon a Warrant of Attorney; but that the Warrant of Attorney was forg'd by the Plaintiff. Upon this the Court ſet aſide the Judgment and awarded Reſtitution, and ordered the Plaintiff too to be indicted.

The King *and* Weſton.

How far an Information ſhall not be granted for Perjury.

AN Affidavit was made, that Pool is a Town and County of itſelf, and not within the County of Dorſet. But yet the Pool Men for the laſt two Elections pretended to have a Right to Vote for Knights of that Shire; and accordingly at this laſt Election the Defendant did vote amongſt them, as being a Pool Man; and took the uſual Oath of his having a Freehold within the County; but yet had no pretence to have any

but only at Pool. Upon this the Court was moved to grant an Information against him for Perjury; because the Counsel said they had a Design to try the Right in this Way. But Judge Reynolds said, the Court would never allow a Matter of Right to be tried in an Information for Perjury; and accordingly they refused to grant it. And the Chief Justice said, that they very rarely granted Informations for these Offences; for they are too great to punish in this Way.

Anonymus.

How far the Court cannot hinder a Person from Proceeding at the same Time in two different Actions.

AFfidavit was made, that the Plaintiff had commenced an Action in the Court of Lisbon beyond Sea against the Defendant for the same Cause as was then and is now depending between them in this Court. And upon this the Court was moved to make a Rule upon the Plaintiff not to proceed there; but they said, they could not do it.

Mathews *and* Spicer.

Vide ante 54.

THIS Matter now came on again, and the Point there was determin'd for the same Reasons the Court then gave. And the Court said farther, that they thought there was a clear Difference between this Case, where the Day is not material, and where it is Part of the Contract; for they admitted, that where it is Part of the Contract, the Day cannot be departed from; for a new Day in those Cases makes a new Contract. They said too, that where the Proceedings are closed, and a Writ of Error brought, it was clear the Day could not be altered; for there the Court above is only to judge upon the Record; and upon the Record it appears to be wrong. And this is the Case in 1 Roll. 792. Another Point was started too by the Counsel, and that was a Distinction between these Cases where the Suit is by Latitat, and others where it is by Original; for he said, a Latitat will be good, tho' it be taken out before the Cause of Action arises, provided the Defendant is not arrested upon it before that Time; but an Original will not. And what Mr. Justice Page said, confirm'd this; for he said, the Latitat is no Part of the Record, whereas an Original is. Vide 2 Cro. 561. 3 Cro. 271, 325. 1 Ven. 28.

Lock *and* Johnson.

What shall not be said to be a good Writ, which is directed to the Bishop of Durham.

A Motion was made to supersede a Capias, that was directed to the Bishop of Durham. The Exception to it was, that the Writ order'd him to take the Defendant; whereas it only ought to have order'd him to make out a Writ to the Sheriff to take him. And Mr. Fazakerly said farther, that these Writs directed to the Bishop of Durham pay him a higher Respect than those directed into other Counties Palatine do those Persons; for those only order them to cause the Defendant to be taken. Accordingly the Court set the Writ aside, quia erronice emanavit.

The King *and* Lawrence and others.

What ſhall be a good Appointment of Eliſors.

APplication was made to the Court to appoint Eliſors in this Caſe, whom the Venire ſhould be directed to; the Sheriff and Coroner being both Parties. The Counſel ſaid, that their being Parties was entred upon the Roll. And this the Court ſaid was neceſſary; otherwiſe it would be Error upon the Record. They ſaid farther, that a Rule muſt be made upon the Parties to attend the Maſter, and he muſt appoint the Eliſors; accordingly made a Rule to ſhew Cauſe.

The King *and* Robinſon.

How far Bail ſhall be neceſſary to be given upon an Attachment.

THE Defendant was brought up by Attachment for a Reſcous. And now Mr. Strange moved, that he might give Bail to it; and he ſaid, it is not long, that Bail in theſe Caſes has been required at all. Which was accordingly done.

Tenton *and* Beſt.

When a Proceſs iſſues from the Courts of Weſtminſter-Hall into a County Palatine, what ſhall be the proper Manner of inforcing ſuch Proceſs.

THIS was a Motion for an Attachment againſt the Defendant, who was a Clerk of the Duchy Court of Lancaſter, for not making out Proceſs upon a Record of this Court, that was ſent down by Mittimus. And the Court ſaid, it was the Practice now to move for Attachments againſt the inferior Officers of theſe Courts upon ſuch Occaſions, and not againſt the ſuperior Officer; and accordingly the Court granted it in this Caſe. Mr. Fazakerly took an Occaſion to enlarge a little upon the Juriſdiction of theſe County Palatines; and he ſaid, that wherever a local Action is brought in theſe ſuperior Courts upon a Matter ariſing in one of thoſe inferior Juriſdictions, this is Error, whether the Defendant pleads to the Juriſdiction or not; wherever a tranſitory Action is brought here for a Matter ariſing there, and that appears upon the Pleadings, that is Error, but yet the Defendant can only plead to the Juriſdiction, where the Cauſe of Action appears to ariſe there upon the Plaintiff's Declaration. Vide 4 Inſt. 123, 223. in Proof of both theſe Diſtinctions.

Scrimpſhaw *and* Proctor.

How far the Court will ſet aſide the Verdict, when there is no Defence made at the Trial.

THIS was a Rule to ſhew Cauſe, why a Verdict ſhould not be ſet aſide, there being no Defence. That which was moved was, that there was a ſmall Miſtake in the Copy of the Iſſue delivered, it concluding & prædictus querens ſimiliter, whereas it ought to have concluded, & prædictus defendens, &c. And the Court ſaid, that let it be ever ſo immaterial a Miſtake, it is irregular; and as it is in the Copy of the Iſſue we muſt ſtay the Judgment upon it.

Tulley *and* Sparks.

THIS was an Action of Debt upon a Bond for the Penal Sum of 800l. The Plaintiff sets forth the Whole of it in his Declaration; and shews the Condition of it to have been, that in Case the Obligor should marry one Martha Latimer, and she should survive him, his Heirs, Executors, &c. should pay the Obligee the Sum of 400l. in Trust for her within two Months after his Death. And then the Plaintiff avers, that the Marriage did take Effect, that the Obligor died, and the Wife survived him; then sets forth, that the two Months pass'd, and the Executor never paid the Money; by Reason of which the Obligee now brings his Action against the Defendant, being Executor to the Obligor. The Defendant pleads, that sometime after the Obligor married this Martha Latimer, he became a Bankrupt, and so pleads the Certificate in Bar. Upon which the Plaintiff demurs. And the Court upon Argument was now of Opinion for him. For they said, at the Time the Commission of Bankruptcy was taken out, it was intirely uncertain, whether the Plaintiff should ever have any Demand upon this Bond; and consequently he could not be obliged to come in with the rest of the Creditors. The only Thing, which gives any Colour of Difficulty in this Case is the Statute of 7 Geo. 1. cap. 31. But the Court said, this Statute only extends to Creditors at a future Day certain; and not to mere contingent Creditors, as this Case is. They said further, that it seemed clear he could not be prejudiced for not coming in; because if he had come in, it would have done him no Service. This was what was said by the Court in Relation to the Insufficiency of the Defendant's Plea as to the Matter of it. Another Fault they found as to the Manner of it; and that was, that it does not set forth any Petition to have been made to my Lord Chancellor; and without this the Court said the Chancellor has no Right to grant it. It is true the Defendant pleaded, that the Commission was debita juris forma super Stat'; but the Court said, that was not enough. So that the Act of Bankruptcy as it stands upon the Plea is no Bar; as it does not appear to have been regular. Accordingly they made a Rule for Judgment for the Plaintiff nisi. Vide . This Matter came on next Term upon a new Action; and the Court was of the same Opinion. Salk. 521.

What are such Creditors as shall not be bound to come in as Creditors under a Commission of Bankruptcy.

Curser *and* Smith.

THIS was a Motion for a Mandamus to be directed to the Bailiffs and Steward of the Court in Andover, to order them to go on in the Proceedings of a Cause in that Court. The Court said, that there was no doubt but Mandamus's lie in their Cases; but they doubted whether they could grant it without an Affidavit. Mr. Lacey said, that he did not apply for this Mandamus for any wilful Delay of Justice in this Case, but only to hasten on the Proceedings; and therefore he thought the Court might grant it without an Affidavit. And he said this was

How far the Court will grant a Mandamus without an Affidavit.

was like the Case, where a Justice of Peace refuses to sign a Rate. He did admit indeed in Case, where an Attachment is moved for, an Affidavit is requisite. But the Court said, that the Case of the Justice's not signing the Rate was certainly wrong; for 'twas determined lately to the contrary. And Mr. Masterman told the Court, that he remembred a Case, which he imployed the Attorney General in, where the Attorney General made such a Motion as in this very Case at Bar; and the Court refused to grant it without an Affidavit. Upon which the Court refused the Motion in this Case; for, they said, they would not suppose Judges would delay Justice.

The King *and* The Inhabitants of Caywood.

Vide ante 53. THIS was a Matter that is mentioned before in Page 53. And as to that Case of Young and Slatterford there mention'd, the Chief Justice said, he had order'd that Record to be searched, and as it stands upon the Record, it is all right; so that he suppos'd if that was an Exception, that was made in that Case, it was answered on a sudden, and not relied upon. However Mr. Reeves went on, and cited some more Cases to make the Order good; and one was out of Sir Tho. Jones 219. the Case of Nonne and Maxey. The Plaintiff there declares as Administrator, by the Name of Nonne, and produces Letters of Administration by the Name of Nunne, and it was held good upon a Demurrer to a Plea in Abatement. Another was cited out of 3 Cro. 258. where Shacroft and Shacraft, and Abbotson and Abbatsan were held to be the same. The Court seem'd to think these as strong Cases, as that in Question. But it stood over for two or three Days.

Greenhill *and* Riveloe.

How far the Court will set aside a Plea, by reason of its being frivolous. TO set aside a Plea. This was Debt upon a Bond; and the Condition was for the Payment of a certain Sum on the thirtieth of April. The Defendant pleaded Payment on the twentieth. The Court said, that this was meerly frivolous. For if the Plaintiff should join Issue upon it, and have a Verdict found for him, he could not recover; and if he should demur, the Defendant would not join with him, and so the Plaintiff would lose the Term. Accordingly they set it aside. Judge Page said, this was frequently done in the Common Pleas. Vide a like Case, p. . Vide 3 Cro. 823. 2 Ven. 222.

Lady Faulconbridge *and* Forrest.

How far the Court will not change the Venue in an Action of Scandalum Magnatum. THIS was an Action of Scandalum magnatum. And now the Defendant moved to change the Venue from Middlesex into the County Palatine of Chester. And the Counsel said, this was a common Motion in the Exchequer; and Judge Page admitted it. But the Court said, it was an old Rule, that they never changed the Venue into these County Palatines; because they had no Officers of their own in those Counties. They said farther,

ther, that if this was in the Caſe of a Peer they would not have alter'd the Venue into any County, where the Action is brought in Middleſex, as this Caſe is; becauſe Peers are ſuppoſed to be reſident here about the Buſineſs of the Nation. However the Court gave the Counſel Liberty to move it again, if he could find any Thing new to ſay.

Strangeways *and* Selby.

IN an Action of Debt upon a Bond, the Defendant demands Oyer, and then ſets forth the Condition to be, that he ſhould ſtand to the Award of three Perſons; and avers, that they made no Award. The Plaintiff replies, that they did; and ſays, that they made their Award on the 21ſt of December, by Virtue of a Bond of Arbitration bearing Date the 22d of December laſt paſt, or thereabouts, (whereas it appeared upon the Plaintiff's Declaration, that the Bond on which he brought his Action bore Date the 22d of September) and then ſets forth the Subſtance of the Award, and aſſigns a Breach. Upon this the Defendant demurs, and the Court was of Opinion for the Defendant. For they ſaid, that the Submiſſion on which the Arbitrators have made their Award could never be intended to be the ſame with the Submiſſion contained in the Bond, on which the Plaintiff has declared; as there is ſo long a Space of Time between them; and therefore no Action can be brought upon this Bond for the not performing ſuch an Award. However this Matter ſtood over. What ſhall not be ſaid to be a good Pleading of an Award.

More *and* Jones.

THIS was an Action of Covenant in the Common Pleas. The Plaintiff declares, that the Defendant, per quoddam ſcriptum factum apud Weſtmonaſterium ſub manu ſua propria pro conſilio impenſo & impendendo, granted him an Annuity, and covenanted to pay it him half-yearly; then ſays, that from the 29th of September in ſuch a Year to the 25th of March in that Year he had never paid him any Thing, ſo brings his Action for that half year's Payment. The Defendant pleads, that all that Time the Plaintiff never gave him his Counſel. Upon which the Plaintiff demurs. The Defendant did not join in Demurrer; upon which Judgment went by Default, and Error brought. And now the Court was of Opinion againſt the Plaintiff upon the Face of the Declaration; for they ſaid, an Action of Covenant could not be maintained upon this Writing unleſs it was a Deed; and it does not appear to be a Deed upon the Face of the Declaration; becauſe it is not laid to be Sigillo ſuo ſigillat'. They ſaid too, that its being laid with a Profert hic in Curia cannot help it, though it ſhould be found to be a Deed upon producing it. And for a Caſe in Point the Court cited, that in 3 Cro. 571. They took a Difference likewiſe between technical Words laid in a Declaration, and ſuch Words as in the Caſe at Bar; for there they admitted legal Ceremonies might be ſupplied, but here they cannot. To this Purpoſe the Caſe in 3 Cro. 737. was cited. For this Reaſon they allowed, that if the Plaintiff had ſaid, that the Defendant granted this Annuity What ſhall not be ſaid to be a good Pleading of a Deed.

per factum ſuum, this would have been good. Upon this the Counſel ſaid, that they would conſider Factum in our Caſe as a Subſtantive, and not as an Adjective; ſo that it ſhould be the ſame as if the Plaintiff had ſaid, that by a written Deed he granted him this Annuity. But the Court in general gave one Anſwer to this; and that was, that the Writing of this Inſtrument could not be intended to be done at Weſtminſter, but the making of the Inſtrument. And Judge Probyn gave another Reaſon to ſhew, that this would not do for the Plaintiff; and that was, that according to ſuch a Conſtruction it muſt be intended, that there was no Sealing and Delivery at Weſtminſter at all; and then clearly it will not be good. However the Counſel urged another Argument, which was, that the Plaintiff lays in the Declaration, that the Defendant did covenant to pay this Annuity by this Writing; and he ſaid, this could be no Covenant, it was not by Deed. But the Court anſwered, that the Word (Covenant) will not do the Plaintiff's Buſineſs in this Caſe; but he muſt ſhew how 'twas ſuch a Covenant on which an Action of Covenant may be maintained. However this ſtood over to be argued again.

Wright *and* Kenning.

How far the Court will amend a Writ of Error.

THIS was a Writ of Error upon a Judgment in the Common Pleas. 'Twas teſted before the Judgment given, and returnable between the Time of its being given and its being entred on Record. For this Fault the Plaintiff in Error moved to quaſh his Writ; for he ſaid, it could not remove the Record, as the Judgment was not then entred up; the Words of the Writ being, Si judicium inde redditum ſit. He ſaid too, that the Occaſion of this was owing to the other Side's not entring it up, as they ought. But the Court ſaid, that they thought they might amend it upon the Statute of 5 Geo. 1. cap. 13. for that Statute intended fully to prevent vexatious bringing of Writs of Error; and to that End gives the Court Power to amend any Defects in them. The Caſe of Grayham and Leech, Mich. 6. of the late King, was indeed cited by the other Side to ſhew that ſuch Defect could not be amended; but there the Court ſaid, the Writ of Error was teſted before any Action commenced below; and it was clear, the Court could not amend a void Writ. However this Matter ſtood over.

The Eaſt-India Company *and* Lopes.

How far the Court will ſet aſide a Judgment by Reaſon of a Defect in the Warrant of Attorney.

THIS was a Writ of Error upon a Judgment in a Scire facias againſt Bail. One Error aſſign'd was, that it does not appear the Plaintiff had made any Attorney at the Time of the Return of the Writ; whereas he muſt be in Court then; and as this Caſe is, the Plaintiff could not be in any other Way, than by Attorney, becauſe it is a Company. And this the Court ſeem'd to allow. However the Counſel of the other Side ſaid, that it was very true the Warrant of Attorney was not entred up of that Term of which the Return of the Writ was; but it does not appear, but the Warrant of Attorney might have

been

been made before that Time; and indeed it is entred up of the very next Term. To this purpose he cited the Case of the common Recovery, where it has been held, that if there is a Tenant to the Præcipe before the Judgment given, 'tis good. But the Court said, that Case was certainly Law, and they remembred when it was determined; but then the Reason of it is, that common Recoveries are common Assurances of the Realm. But they said, in the other Case they did not see much Reason for intending that the Warrant of Attorney was made before it was entred up. Another Error was mentioned, which the Court allowed too; and that was, that by the Judgment there are Damages given upon this Scire facias as well as Costs; the Words of it being pro misis & custagiis, & damnis dilationis executionis. This Error the Court seem'd to allow too; for they said, the Statute of 8 & 9 Will. 3. 10. gives only Costs in these Cases. Stand over.

How far a common Recovery shall be good, provided there is a Tenant to the præcipe before the Judgment given.

How far Damages cannot be recovered against Bail, but only Costs.

Fox *and* Halpyn.

Ante 48.

THIS was an Ejectment. And sometime before the Plaintiff had got Judgment, and taken out Execution against the Defendant, but upon Motion that was set aside, and Restitution awarded. But the Plaintiff not delivering up the Possession, an Attachment was moved for. Mr. Lee made one Objection against this Motion, that Halpyn had not been yet made a Defendant in this Cause, which was the very Reason, why the former Judgment was set aside; and till he was made a Defendant, he said, an Attachment could not be moved for against the Plaintiff Fox, for not delivering it him up, so that the Affidavits were wrong titled by titling them in a Cause of Fox and Halpyn. But the Court said, as here had been one or two Motions about this Matter already, they would not allow of such an Exception.

How far an Affidavit shall be said to be duly titled.

Muttit *and* Denny.

Ante 53.

THIS Matter now coming on again, the Court allowed of the Amendment by putting in Robertus & Johannes in the Room of Georgius, & ejecerunt & expulerunt for ejecit & expulit. However Mr. Reeves made an Objection against it, and said, that the Plea-Roll itself was wrong; and ought to be made agreeable to the Copy of the Issue; for in this feigned Suit the Copy of the Issue is to be the Direction for making up this Part of the Plea-Roll; as in all other Cases the Declaration delivered is. For here no Declaration between the Plaintiff and the Tenant in Possession is ever delivered; but only a Copy of the first Declaration, to which the casual Ejector is Party. The Court admitted, that indeed in common Cases the Plea-Roll shall be made agreeable to the Declaration delivered. But here they said, there is no Declaration ever delivered; and therefore the Defendant cannot suffer any Inconveniencies, as in other Cases he may, where it is not made agreeable to the Copy of the Declaration delivered. So that the

Plea-

Plea-Roll muſt at all Events in ſuch Caſe be intended good. And as to the Copy of the Iſſue, they ſaid, the Plea-Roll could not be made agreeable to that; for that is a different Part of the Proceedings.

Ante 42.

The King *and* Dr. Newton.

THIS Matter now coming on again, the former Rule there was made abſolute. For the Court ſaid, it would be a Thing of dangerous Conſequence to let ſuch a Matter as this paſs without taking Notice of it in a pretty ſevere Manner. The Counſel for the Defendants though ſaid, that the Wife had been guilty of very unjuſt Practices to her Husband by being taken in an Adulterous Correſpondence; and therefore it was certain, the Husband might juſtify confining her in his own Houſe, and for the ſame Reaſon in another Perſon's Houſe, if it was not a Mad-houſe; and they ſaid, they could not ſee, how its being a Mad-houſe could make ſuch Difference. The Court admitted, that a Man might confine his Wife in his own Houſe for proper Reaſons; but they ſaid, they would never allow of ſuch Things as this.

The King *and* Martyn.

How far the Court will give Leave, that an Information may be amended.

AN Information had been granted in this Caſe againſt the Clerk of the Peace for not entring an Order of Seſſions according as it was pronounced. And now Application was made to the Court for Leave to alter it by making the Facts charged in the Information agreeable to the Facts charged in the Affidavit, on which the Information was granted. The Miſtake was, that the Order of Seſſions has laid in the Information to have been at Eaſter 1722. whereas it ought to have been in 1723. And a Rule was made to ſhew Cauſe.

Strangeways *and* Selby.

THIS was a Matter that is mentioned before in Page 61. but now it came on upon a different Application; which was, that the Record might be made according to the original Proceedings; there being a Miſtake made by the Clerk in the Date of the Award, by making it the 22d of December, whereas it ought to have been the 22d of September. But the Court ſaid, they muſt hear the other Side; and afterwards made the Rule abſolute upon the common Terms of paying Coſts, &c.

Botam-

Botamley *and* Harriſon.

THIS Matter is ſtated before in Page 47. and now it came on again upon the ſame Exception; which was, that the Declaration was too incertain; it only charging the Defendant with finding unam Parcellam ſegeſtrium, involucrorum & funium, Anglice of Packcloths, Rappers and Cloths. But upon Argument, the Court was of Opinion, that the Declaration was certain enough. For Parcella in this Caſe only expreſſes one certain Thing, and not ſeveral Things at large. Where indeed the Declaration expreſſes ſeveral Things at large, they admitted it would not be good. And for Authority, they ſaid Parcella hordei, & Parcella Culmi has been held good. So in the Caſe of Harford and Jones, 12 Will. ſeventy two Ounces of Cloves, Mace and Nutmegs has been held good, and yet the certain Quantity of each was not ſet down. And in the Caſe of Kempſter and Nelſon, 1 Geo. 1. the Court went rather farther than in this Caſe; for that was even in Replevin in the Detinuit; and yet upon ſolemn Argument they were of Opinion, that two Parcels of Writings, and one Parcel of Childbed-linen, was well enough. So Trover for a Study of Books has been allowed. Accordingly the Judgment in the Common Pleas was affirmed.

Wright *and* Kenning.

THIS Matter is ſtated in Page 62. And now upon a ſecond Argument the Court was of Opinion that the Return-day in the Writ of Error could not be amended. For they ſaid, the Statute there mentioned gives this Court only Power to amend Writs of Error, where they have ſomething to amend by; but here they ſaid they have nothing to amend by. Accordingly it was held not to be amendable.

Boot *and* Graham.

THIS Matter is mentioned in Page 49. And now the Court ſeemed to be of Opinion, that the Affidavit is neceſſary. However this Matter did not come fully in Queſtion; but was prevented in a good Meaſure by an Exception taken by Judge Page, which made it not neceſſary for the Court to decide the other Queſtion. And this was, that the Demand of Conuſance ought to have been entered upon the Roll, before they came to apply to have it allowed. And the whole Court was of Opinion, that this Exception was fatal; for they ſaid, whenever any Thing is ſuggeſted in Bar of the Juriſdiction of the Court, it ought to be entered firſt upon the Roll. And this they ſaid is ſuppoſed to be done even in Suggeſtions, where Prohibitions are moved for; but yet the Chief Juſtice ſaid, he thought it was another Queſtion, whether they could not allow the Demand of the Conuſance to be entered nunc pro tunc; and then that Point fell into Debate. But yet the

What ſhall not be ſaid to be a good Demand of Conuſance.

Court was at laſt of Opinion, that they ought not to allow it; for Bars to their Juriſdiction ought to be ſtrictly purſued. And this, the Court ſaid, was the Reaſon, why you cannot make ſuch an Application as this after an Imparlance. There was another Point, that was laid down by Serjeant Hawkins, in this Caſe; and that was, that the Defendant himſelf might have pleaded this. But that the Court directly denied, and ſaid it has been determined to the contrary. For the Statute which gives the Chancellor power to demand this Conuſance, makes it neceſſary for him himſelf to demand it in this Way. And this is the Reaſon, why this Caſe differs from that of Antient Demeſne and other Caſes of the like Nature. Theſe were the Determinations the Court gave in this Caſe, and were guided in them by the like Proceedings, which they ſaid were in the Caſes of Maners and Fern, and Huit and Fern, which were Caſes, where the Chancellor of Cambridge demanded his Conuſance.

Merryfield *and* Wellen.

How far Bail ſhall be requiſite in Writs of Error quod coram vobis.

THE Plaintiff had obtained Judgment in this Court; and upon the Defendant's bringing a Writ of Error in the Exchequer Chamber, the Judgment was affirmed. After that he brought another Writ of Error quod coram nobis reſidet; but gave no Bail to it. Upon which the Plaintiff moved now for Leave of the Court to take out Execution. The Court ſaid, that this indeed uſed to be a Point, that was doubted amongſt the Practiſers, whether Bail was requiſite in Writs of Error quod coram nobis. But they could never ſee any Reaſon for diſtinguiſhing this from other Writs of Error. And, they ſaid, it has been determined lately in the Caſe of Ginger and Cooper, that there was no Difference. Accordingly, the Court told the Plaintiff, that he might take out Execution without applying to them at all.

The King *and* The Inhabitants of Benjoe.

How far a Purchaſe ſhall gain a Settlement within the Statute of 9 Geo. 1.

ON Motion to quaſh an Order of Seſſion. The Queſtion fell out upon the Statute of 9 Geo. 1. which allows the Purchaſing a Houſe or Lands to the Value of 30 l. in any Pariſh to gain the Party a Settlement in that Pariſh. Now in this Caſe, the Purchaſe Money was only 25 l. but yet the Party had laid out above 100 l. immediately upon it. And upon this the Juſtices at the Seſſions adjudg'd that he gain'd a good Settlement. And now it was moved to quaſh the Order; becauſe the Counſel ſaid, the original Purchaſe-Money ought to be at leaſt 30 l. The Court made a Rule to ſhew Cauſe.

Tulley

Tulley *and* Sparks.

THIS Matter is ſtated in Page 59. And now upon a Rule Niſi it was ſhewn, that the Condition of the Bond was, if the Heir, Executor, &c. of the Obligor ſhall pay that Sum, and yet the Plaintiff hath only averred, that the Executor did not pay it; whereas he ought to have ſaid, that neither the Heir nor the Executor did pay it. The Court thought, that this Exception could not be got over; but it was ordered to be ſpoke to again. There was another Thing, that the Chief Juſtice ſaid too in this Caſe; and that was a Reaſon, which he gave for the Plaintiff's ſetting out the Condition ſpecially in the Declaration; which was, that if he had declared in the common Way, the Defendant in his Plea of Bankruptcy would have infallibly ſucceeded; for he would not have prayed Oyer of the Condition; but directly pleaded the Certificate in Bar. Afterwards the Plaintiff thought it beſt to diſcontinue, which accordingly they did.

Wyat *and* Wynkworth.

ONE Ralph Bayley was ſubpenaed as a Witneſs to attend a Trial at the Aſſizes; but did not attend. And a ſhort Time ago the Plaintiff obtained a Rule to ſhew Cauſe for an Attachment againſt him for it; alledging that he was nonſuited at the Trial for want of his Evidence to prove the Hand-writing of Humfrey Wale, a Steward of a Court, and his Predeceſſor, and that he gave him a Guinea to bear his Charges. And now on Rule to ſhew Cauſe he came and ſet forth to the Court, that it was true he was ſubpena'd, and that the Plaintiff told him his Evidence was requiſite to prove the Hand of this Wale to an Admiſſion under which the Plaintiff claimed; but at that Time he told the Plaintiff he could do him no Service at the Trial, becauſe he never ſo much as ſaw this Wale write, and ſo deſir'd him to excuſe his Attendance. He ſwore farther too, that he ſent his Clerk with the Court-Rolls to the Trial, amongſt which this Admiſſion was. The firſt Matter which came in Queſtion here was, whether the Court could grant an Attachment for Witneſſes not attending at a Trial? And the Court was of Opinion, that they might. They ſaid too, that they remembred this done in this Court. And the Caſe of Farnham and Haynes, Eaſt. 1 Geo. 2. was cited, where the ſame Motion was allowed in the Common Pleas. The other Queſtion was, Whether in this Caſe, they ought to grant it? They were of Opinion likewiſe that they ought; for they ſaid that there are other ways of proving a Man's Hand, beſides ſeeing him write. And in this very Caſe, they ſaid he would have ſufficiently prov'd Wale's Hand, if he had attended himſelf at the Trial with the Court-Rolls; but his ſending them by his Clerk could ſignify nothing, ſo that his not attending was a Contempt of the Court. Accordingly they granted it.

Curſer

Curſer and others *and* Smith.

THIS Matter is mentioned in Page 59. And now an Affidavit was produc'd, to ſhew that the Defendant had been arreſted by the uſual Proceſs of this Court, held at Andover, and that the Gaoler let him eſcape. Upon which he was again arreſted by Virtue of a Latitat, according to the Cuſtom of the Court, and carried to the County Gaol. After which a Habeas Corpus was likewiſe taken out to command the Gaoler to bring his Body into that Court. But the Gaoler made no Return to it; upon which the Court amerced him twice or thrice, but it was done very moderately, the largeſt Amerciament being not above 3 s. 4 d. And now they began to leave off holding a Court at all, though it ought to be holden every Monday. Upon this Complaint the Court began to conſider about granting the Mandamus. Judge Reynolds ſaid, that if there was any Colluſion between that Court and the Gaoler, he could not ſee how this Court could well help it. For this Court cannot ſet the particular Quota of Amerciaments, which the inferiour Court ſhall aſſeſs upon the Gaoler. However the Court thought they might ſend down a general Mandamus to the Bailiff and Steward to go on in the Proceedings of the Cauſe; which accordingly they did. And Judge Page ſaid, that he remembred a Caſe, which he was concerned in, the Name of it was The King and Langton, where the Court granted a Rule to ſhew Cauſe, why an Attachment ſhould not go againſt the Defendant, for not entring up a Judgment of the Court-Leet, as he was Steward and Judge of the Court. And he intimated as if he did not ſee why an Attachment would not lie in this Caſe.

Lady Faulconbridge *and* Forreſt.

THIS Matter is mentioned in Page 60. And now the Counſel cited the Caſe of Goodyer and Filpot, Trin. 12 Geo. 1. where this Court made a Rule to ſhew Cauſe for changing of a Venue into a County Palatine; though indeed they afterwards diſcharged it upon the Plaintiff's entring into a Rule to give Evidence in London where he laid his Action. However the Chief Juſtice ſaid, as this was an Action founded upon the Statute of Scandalum Magnatum, there was no Difference between Peers and Peereſſes; ſo that they might bring their Action in Middleſex, let the Cauſe of it ariſe any where. This was what the Court ſeemed to put this Matter upon this Time; though they put it upon another Point before.

Atwood *and* Elwood.

ISSUE was joined in this Case upon Nul tiel Record. And the Counsel, who pleaded this Plea, had moved the Court a few Days ago, that the other Party might produce the Record before the Court. But they said at that Time that the usual Method of trying Issues of this Nature was to bring the Record before the Master; and it is his Business to examine into it. Where indeed there is any Doubt before the Master it is proper to apply here. Accordingly this Matter did go before the Master; and now he reported, that the Party, who pleaded this Record in Bar, had set forth a great Part of it in hæc verba, but several Parts of it he had set out imperfectly. But yet the Court was of Opinion, that the Record produc'd would warrant the Issue; for they said, that the Party was not obliged to set forth any Part of the Record in hæc verba; and therefore his setting out the Record only in an imperfect Manner could not prejudice him; if indeed there was any Inconsistency in the setting out of the Record, or any Variance between the Record set forth and that produced, the Court admitted it would not warrant the Issue.

When a Plea of Nul tiel Record is pleaded, what the Practice of the Court is concerning verifying of the Record

When Nul tiel Record is pleaded, how far the Record shall be said to be verified.

The East-India Company *and* Lopes.

THIS Matter is mentioned before in Page 62. And now as to the first of the Errors there assign'd the Court was of Opinion that it was none. For they said, it was clearly no Error before the Statute for Amendment of the Law; for then the Warrant of Attorney might have been entred up of any Term before Judgment. And they agreed likewise, that this Statute had not made the Want of entring it up Matter of Error, but only gives a Penalty for not doing it. They said farther, that though this Warrant of Attorney was entred up of Easter Term; yet it does not follow but it might be made of Hilary Term. This the Court gave for an Answer to what Mr. Strange said, that the Warrant of Attorney must be intended to be made of that Term it was entred up. Then as to the other Error, the Court was of Opinion, it was well assigned. And now Mr. Reeves desired the Court to affirm the Judgment as to one Part, and reverse it as to the other. For he said here were distinct Judgments given below; the last beginning Et consideratum est etiam, that he shall recover his Costs. To this Purpose he applied the Case of Green and Waller, Trin. 2 Annæ, which was upon a Writ of Error on a Judgment given in the King's Bench in Ireland. There the Judgment below was quod recuperaret his Costs, whereas it ought to have been quod recuperet; but yet the Court affirmed the Judgment as to the other Part, and reversed it as to this. Which they did accordingly in the present Case. 1 Ven. 27.

Watkins *and* West.

THIS Matter is mentioned in Page 50. And now the Court was of Opinion, that the Plea was bad; and that the virtute cujus could not make it good; for that is only a Conclusion, and therefore will be of no further Service, than the Premisses will warrant it. The Case though of Sullivan and Seagrave, which was determined about two Years ago, was cited by the Defendant's Counsel. And that was the Case of a Writ of Error's going out of this Court to Thomas Witchet, Chief Justice of the King's Bench in Ireland; and a Return was made to it sign'd by Thomas Witchit, without his Title of Chief Justice. It was objected there, that it did not appear, that the Person to whom the Writ of Error was directed, and the Person who made a Return to it, were the same Person; but yet the Court held it to be good in that Case. But the Court said, that that Case does not at all warrant this; for there, besides the Name Thomas Witchit, it was further added, prout interius mihi præcipitur. Then as to the other Point, which was mentioned last Term in relation to the Demurrer, the Court was of Opinion, that this Defect in the Plea might be taken Advantage of in the Manner that it was; for they said, the Defendants have made no Justification of what they did, as they have not shewn the Bailiffs of the Court and the Borough to be one and the same Persons. Mr. Marsh though said, he would take an Exception to the Declaration, for charging the Defendant with taking unum Lebetem, Anglice a Brass Kettle, whereas Lebes is an antient Latin Word signifying a Kettle only in general, and not a Brass one. But the Court said, as the Latin was good they would then reject the English; and so gave Judgment for the Plaintiff. 2 Lev. 131.

King and his Wife *against* Jones.

How far a Person shall not be estopped by a Recognizance of Bail.

THE Plaintiffs brought a Writ of Error quod coram vobis upon a Judgment given in an Action between the Defendant Jones and King's Wife, by the Name of Judith Parnel, being her Maiden Name. The Error assigned was, that she was sued by the Name of Judith Parnel, whereas at the Time she appear'd to that Suit her Name was King, and she was under Coverture. The Defendant pleads, that King the Husband is estopp'd from alledging this for Error; because he entered into a Recognizance as Bail for the Defendant in that Action; and consequently did by that Act admit the Suit was rightly brought against her. To which Plea the Plaintiff demurs.

What shall be said to be a good Plea of Coverture.

Now as to the Plea of the Defendant, the Court was of Opinion, it was clearly bad; for they said, the Substance of the Recognizance only was, that that Person, who was sued in that Action should appear, and not that she should under the same Denomination. But another Question took up greater Consideration in this Case, and that was, whether the Assignment of the Defendant's Coverture is right; in as much as it is only averred, that she was a Feme Covert at the Time

ſhe appeared; but it does not follow, that ſhe was ſo at the Time the Action was commenced againſt her. And the Court ſaid, no Defendant ſhall have it in her Power to deſtroy a Plaintiff's Action which is well brought againſt her. Accordingly the Court affirm'd the Judgment.

Bouton *and* Hurſler.

THE Defendant libelled in the Spiritual Court for Tithe of Sylva Cædua. The Plaintiff pleaded there, that the Wood demanded was not titheable. And now made a Suggeſtion to the Court, that they were Timber-Trees, and of 20 Years Growth; and verified it by Affidavit. And now Mr. Lee ſubmitted it to the Court, that this was ſufficient, without pleading it in the Court below. He ſaid he relied upon the Authority of 2 Inſt. 608. where it is laid down, that when a Libel is in the Spiritual Court for Tithe of Sylva Cædua, and the Defendant ſuggeſts, that the Wood is of twenty Years Growth, he may have a Prohibition. He ſaid likewiſe, that the Court had Authority to grant this Prohibition upon the Face of the Libel; for there the Demand of the Tithe of Wood is ſet forth generally, and therefore muſt be intended to be due de communi jure; whereas the Right of Tithe of Wood is only by Cuſtom. And that is the Reaſon, which is given in the Caſe of Woods and Hickſon, 2 Salk. 655. why a Hundred may preſcribe in a Non decimando of Tithe of Wood; for as by Cuſtom it grows due, by Cuſtom it may be made not due. But the Court ſaid, that this Reaſon indeed was laid down by the Judges of this Court in that Caſe; but they ſaid, this has never been allowed for Law, by any of the other Judges in Weſtminſter-Hall; and it certainly is not Law; for Tithe is as much due of Sylva Cædua by the Law of England, as any other Tithe whatſoever. And Judge Reynolds ſaid, this may evidently be ſhewn not to be the Reaſon of this Law in relation to Hundreds; for if it was, the ſame Reaſon would prove that every private Man may preſcribe in a Non decimando of this Nature. Then as to the other Point in Relation to the Plea, the Court ſaid, that the Juriſdiction, ariſing to the Spiritual Court by Matter diſcloſed in the Libel, cannot be taken from them but by other Matter diſcloſed in the Plea; and therefore they ſaid, it ought to have been ſet forth in the Plea, that the Trees were of twenty Years Growth. Accordingly the Prohibition was refuſed.

How far a Prohibition ſhall not go to the Spiritual Court without Pleading the Matter below.

How far Tithe of Sylva Cædua is due of common Right.

The King *and* The Inhabitants of Caywood.

THIS Matter now coming on again, the Court gave their Opinion, that Uleskelf and Ulleskelf were pretty much of the ſame Pronunciation, and therefore they thought the Order of Appeal good. They ſaid too, that the Court had gone farther than in this Caſe, for Flixſon and Flickſon, Barkwaye and Barkwayes have been held to be the ſame.

Vide antea 53, 60.

Philipps

Philipps *and* Davis.

When a Computation of Days is made, how far the laſt Day ſhall not be conſidered as one by Reaſon that it is no Hall-Day.

TERM began the 21ſt of this Month, and yet the Defendant put in a Plea of Abatement the 25th, whereas by the Rules of the Court it ought to have been put in within four Days. Upon this Motion was made to ſet it aſide. But the Court ſaid, the 4th Day was Midſummer-Day; and as it was no Hall-Day, of Conſequence it could not be put in then. Therefore the Court thought it regular.

The King *and* Mountague and others.

How far the Court will grant a Mandamus to Juſtices of Peace.

ON Affidavit, that Application was made to the three Defendants, being Juſtices of Peace, to put in Execution the Statute of Forcible Detainer, and that they have done nothing in it, tho' it is fifteen Days ſince, the Court granted a Mandamus to order them to do it.

Maſters *and* De la Ware.

In whoſe Office Writs are to be filed.

A Motion was made to ſtay the Proceedings againſt Bail; becauſe the Return of the Capias ad Satisfaciendum againſt the Principal was not filed. And a Certificate was produced from Mr. Tulley, that there was no ſuch in his Office. But the Court aſked, whether the original Suit was not by Bill; and it being anſwer'd that it was, they ſaid there muſt be a Certificate from Mr. Halley as well as Mr. Tulley; becauſe at preſent there's a Diſpute in which of the Offices the Return ought to be filed.

Halls *and* Thorn.

When an Action is brought by an Aſſignee of a Bail-Bond, how far the Plaintiff cannot take Exceptions to the Declaration upon a General Demurrer.

THIS was a Writ of Error on a Judgment in the Common Pleas given there by Default in an Action brought by one, as Aſſignee of a Bail-Bond. The Error aſſigned by Mr. Reeves was, that there was a Defect in the Declaration, in as much as it appears to be a Bail-Bond, that was given to the Sheriff Edward Perſon, and yet the Bond itſelf does not appear to be given to him by the Name of his Office; for the Obligation is only to Edw. Perſon generally. And firſt, he ſaid, that it was not a clear Point, whether this Statute of 23 Hen. 6. on which this Bail-Bond was given, was not a General Law, which the Court is bound to take Notice of. And if ſo, he ſaid it was clear they might take Advantage of this Error, tho' they have not pleaded the Statute. But what he chiefly relied upon, was, that this Action is founded upon the Act for the Amendment of the Law, which is a General Statute, and no Action can be brought by an Aſſignee of a Bail-Bond upon this Statute, unleſs the Bail-Bond is a good one; ſo that now by a mean the Court is bound to take Notice of the firſt Statute, to ſee whether this is a Bail-Bond within that Law, or not. To theſe firſt of the Points, the Court ſaid, it has often been held, that the Statute of 23 H. 6. is a private Law; and there-

foꝛe if the ſecond does not help you, it is clear you cannot take Advantage of it. Now as to that, the Court ſaid, that the Woꝛds of the Statute foꝛ the Amendment of the Law are, that any Plaintiff may take an Aſſignment of a Bond given to any Sheriff oꝛ other Officer foꝛ his Appearance; here the Plaintiff has ſhewn himſelf to be ſuch Aſſignee; and conſequently he may recoveꝛ upon it. If indeed the Woꝛds of this Statute had been, that any Plaintiff might take an Aſſignment of a Bail-Bond given to the Sheriff, the Court ſeemed to think, that there might be a good Deal in the Objection. But as they were not, the Court affirmed the Judgment niſi.

Strangewayes *and* Selby.

THIS Matter came on now in the Paper, and the Plaintiff moved foꝛ Judgment. But Mꝛ. Reeves objected, that the Plaintiff had no Right to amend, till he had paid the Coſts, which as yet he had not done; foꝛ he had only left the Money laſt night with the Clerk, which he ſaid was no Tender to the Attoꝛney. This Objection he made, in hopes of hindꝛing the Judgment being given now, and if he could have done that, he would have kept off Judgment the whole Vacation; foꝛ this was the laſt ſpecial Paper-day. But the Court ſaid, they would not allow of ſuch a Thing as this; accoꝛdingly gave Judgment foꝛ the Plaintiff niſi; ſo that if they do not pay you the Coſts befoꝛe the End of the Term, you will have a Hand oveꝛ them. Vide ante 61, 64.

Parker *and* Stephens.

When Money is brought into Court, how far the Perſon who has brought it in ſhall be allowed to have it back again, unleſs the other Side accepts it within a reaſonable Time.

AN Oꝛder was made by the Chief Juſtice at his Chambers, that Pꝛoceedings upon the Bail-Bond ſhould be ſtayed upon paying 17 l. into Court. Four Services had been given of this Rule, and yet the Plaintiff would never take the Money. Application was now made to the Court, that the Money may be repaid; foꝛ the Counſel ſaid, there muſt be a reaſonable Time, in which the Plaintiff muſt be bound to take it. Accoꝛdingly the Court made a Rule, that the Plaintiff ſhould accept it within a Week.

The King *and* The Bailiff of Scarborough.

How far a Juſtice of the Peace hath no Authority to commit.

ONE Dickenſon was bꝛought befoꝛe the Defendant upon a Complaint, that had been made of him, and the Defendant committed him to Pꝛiſon upon a General Warrant foꝛ contemptuous Woꝛds, that he ſpoke to him, whilſt he was beꝛe him. Upon which an Infoꝛmation was now moved foꝛ. And the Court granted it. Foꝛ they ſaid, a Magiſtrate has indeed a Right to bind a Man oveꝛ to his Good Behaviour, foꝛ ill Language given to him; and if the Party cannot find Sureties, then to commit him; but he cannot commit him diꝛectly. Foꝛ which illegal Commitment without any ſufficient Reaſon the Court pꝛincipally granted it. Judge Pꝛobyn ſaid too, that foꝛ indecent Expꝛeſſions ſpoke of a Magiſtrate out of his Pꝛeſence, he has no Right ſo much as to bind him oveꝛ to his Good

How far a Commitment ſhall not be ſaid to be good in Point of Form.

Behaviour. There was a Fault too, which the Court found in the Form of the Commitment itſelf, becauſe it did not ſet forth the Reaſon in particular for which the Party was committed, but was only a General Commitment for ſeveral Miſdemeanors. And theſe Forms of Commitments the Court ſaid were illegal; for the Reaſons upon which they are made ought to be ſet forth with ſo much Certainty, as the Court may judge upon the Face of them, whether they are ſufficient or not. There was one Thing tho', which was a good Deal relied upon by the Counſel for the Defendant, that this Dickenſon had already commenced an Action in the Common Pleas for this very Injury, that he now complains of; and therefore as he had made his Option, they hoped the Court would not aſſiſt in ſuch a ſummary Proſecution. But the Court ſaid, they have often known Informations granted, where a Civil Suit has been depending at the Time of the Rule made, upon the Party's offering to withdraw it; but in this Caſe, they ſaid, the Party had done more; for he had already obtain'd a Rule in the Common Pleas for Leave to diſcontinue, and to be ſure that Court would not let him proceed after this.

How far the Court will grant an Information notwithſtanding the Party, who applies for it, has brought a Civil Action upon the ſame Account.

The King *and* Gumley.

The Conſtruction relating to Return-days in Writs.

IT was moved in Arreſt of Judgment, that the Trial was had in this Caſe ſooner than the Diſtringas warranted it. The Reaſon given was, that the Diſtringas ordered the Jury to appear die Lunæ prox' poſt Quinden' Sanctæ Trinitatis, whereas, as it was alledged, the Trial was on the Quindena itſelf. For it was ſaid, the Quindena Sanctæ Trinitatis is the Monday fortnight after Trinity Sunday; and yet the Trial was on that very Day. Now to prove, that this is the Quindena, the Counſel ſaid, that it was the ſame, as if the Return-day had been a die Sanctæ Trinitatis in Quindecim dies; and then, it was clear, they ſaid, the dies Sanctæ Trinitatis muſt be taken excluſive; and conſequently the Monday fortnight after is the Quinden'. The Court admitted the Quinden' and the other to be the very ſame Day of Return; but yet they ſaid, Trinity Sunday muſt be taken incluſive in the Computation; not indeed, that Propriety of Speech allows of ſuch a Conſtruction; (and that is the Reaſon, why in Deeds, &c. the a die is always taken excluſive) but becauſe in Returns it has always been underſtood ſo; for the Day from which you compute is always taken as Part of the Number. But Mr. Fazakerly objected, that this cannot be underſtood ſo in the Return of all Writs, and ſo the Sunday Fortnight be the Quinden'; for if it was an original Writ, then the Return muſt be void; as it is of a Day on which the Party cannot appear. But Judge Reynolds directly denied that Poſition to be Law; for he ſaid, wherever the Return-day is of a Sunday or any other Day, which the Party cannot appear on, he ought to appear on the Day after. Mr. Marſh cited too a Caſe in Show. 60. directly in Point with the Opinion of the Court; and ſo they adjudged the Trial to have been regular.

Campbel *and* Hoar.

ON Rule to ſhew Cauſe why an Attachment ſhould not go. And Mr. Reeves alledged for Cauſe, both that the Award was void, and likewiſe, that the Umpire declared at the Time he deliver'd it, that if the Defendant Mr. Alards, who was then in Scotland, ſhould not ſatisfy the Umpire that the Award was not right when he ſhould come home, the Award ſhould be of no Force. He ſaid Mr. Alards did not ſatisfy him of it, when he came home; and therefore he hoped the Attachment would not go. The Plaintiff's Counſel took off the firſt Objection, by ſaying, that the Defendant was too late to make it; the Stat. 9 & 10 Will. 3. cap. 15. requiring ſuch an Exception to be taken the next Term after the Award is deliver'd; and here was longer Time ſlipp'd. To the other the Court ſaid, the Drift of the Objection goes to ſhew, that the Award is void; and therefore what has been ſaid juſt before over-rules its being taken; however if it had come in proper Time, they ſaid, it would be of dangerous Conſequence to admit of ſuch an Exception; for then Awards might be overturn'd by Parol Diſcourſe. Vide poſt.

How far the Court will not ſet aſide an Award.

The King *and* Martyn.

ON Rule to ſhew Cauſe, why an Information ſhould not be made agreeable to the Affidavits, on which it was granted, the Counſel ſaid, that it was agreeable to them, on which the Rule to ſhew Cauſe for the Information was granted; which were the only Affidavits, that they could then Anſwer; tho' indeed it was not agreeable to ſome other Affidavits, that were thrown in corroboratory at the Time they came to ſhew Cauſe; but they ſaid, as they could not give an Anſwer to them then, and as it was impoſſible the Rule for granting the Information could be founded upon them, but only on the firſt Affidavits, they hoped the Court would not make a Rule for altering it. They farther offer'd to produce an Affidavit, by which it was directly ſworn, that the Defendant did not omit entring up any Order of Eaſter-Term 1723. But the Court ſaid, as you did not at all rely upon the Time when the Rule for the Information was made, and as this was a meer Miſtake, they would give Leave for amending it. Ante 64.

Homes *and* Wood.

IN an Action upon the Caſe brought by the Plaintiffs for a Sum of Money promis'd to the Wife, in Caſe ſhe ſhould Cure the Defendant's Wife of a Wound, and provide Plaiſters for the ſame; it was moved in Arreſt of Judgment, that this Action ought to have been brought by the Husband ſolely. But Mr. Reeves objected, that this Promiſe was founded upon a perſonal Service of the Wife; that therefore this Cauſe of Action would ſurvive to the Wife; and conſequently they both well join'd in bringing it. And ſo cited an Exchequer-Chamber Caſe 2 Cro. 77.

What Action the Wife cannot join in with her Husband.

2 Cro. 77. in Point. But the Court ſaid, that Caſe has been ſince over-ruled; as Mr. Filmer ſaid it was in the Caſe of Buckley and Collier, 2 Salk. And the Reaſon, which the Court gave, why the Husband ought to have brought it ſolely, was, that this Promiſe ſhould be conſider'd as made to him, as the Plaiſters were to be provided with his Money. They ſaid too, that this Service ought not therefore to be conſidered barely as perſonal to the Wife; and conſequently the Action would not ſurvive; and ſo arreſted the Judgment till it ſhould be moved again.

Robinſon, Chamberlain of the City of London, *and* Webb.

The Privilege relating to the free Porters in London.

THIS was a Matter in Relation to a Cuſtom in the Company of the Free Porters, which has been often debated in Weſtminſter-Hall, and ſeveral Times determin'd to be good, as in the Caſe of Sir George Rutland and Bradley, Mich. 3. of the late King, &c. And now this very ſame Cuſtom was literally returned again. Therefore Mr. Strange ſaid, he hoped the Court would not allow it to be argued again, but grant a Procedendo immediately. Which the Court accordingly did.

The King *and* Strudwicke.

What Priſon a Perſon ſhall be confin'd to.

THIS was a Writ of Error to reverſe an Outlawry; the Error aſſigned was, that the Defendant was beyond Sea at the Time of the Outlawry pronounced. The Attorney General pleaded In nullo eſt erratum. Upon which the Court reverſed it. And then the Defendant deſired, that either the Court would be pleaſed to bail him, or elſe turn him over from Newgate to the Marſhalſea; and in order to induce the Court to do him the laſt Favour at leaſt, he offered them unqueſtionable Bail likewiſe. To the firſt the Court told him, they could not do it, as he was in Cuſtody upon an Excommunicato Capiendo, as well as for ſeveral other Offences. To the other they ſaid, he had already eſcaped out of the Marſhalſea upon this Information, and was now in Cuſtody upon an Eſcape-Warrant, and therefore it was againſt the Rules of the Court to indulge him with being there again. But then, he ſaid, it was not by Force, that he broke the Priſon; but only, after he had been brought up from thence to this Court, he went with the Turnkey to a Tavern, and there privately eſcaped; and this he ſaid, he was compelled to by the dangerous State of Health his long Confinement had reduced him to. The Court told him, they could not enter into the Manner of his Eſcape, but they were only to conſider, that he had eſcaped. And Judge Reynolds ſaid, that an Act of Parliament has provided, that where a Perſon eſcapes from a private Priſon, he ſhall not be allowed to be carried to that Priſon again under that Complaint, but ſhall be confin'd in the County Gaol.

Webſter *and* Guering.

THIS was a Queſtion, that has been long depending, whether the declaring for more, than is contained in the Ac etiam, diſcharges the Bail intirely, or whether, they ſhall ſtill be liable pro tanto. In the Caſe of Miles and Wourlidge the Court indeed was of Opinion, that the declaring, and having Judgment too for more than is contain'd in the Ac etiam, does diſcharge them wholly; but Mr. Strange ſaid, there was a great Deal of Difference, between that Caſe and this. And he ſaid, the laſt Time, when this was ſpoke to, Lord Chief Juſtice produced a Rule, made in the Caſe of Wyat and Evans, directly in Point, that the Bail ſhall be liable pro tanto. Mr. Marſh tho' on the other Side cited the Caſe of Kenybaldo and Cognoni, where Lord Chief Juſtice Holt was full of Opinion, that the Bail is in ſuch Caſe diſcharg'd intirely. The Court ſeemed to be of Opinion, that the Bail was liable; but upon Mr. Marſh's undertaking to ſpeak to it the firſt Week in next Term, they inlarged the Rule. Vide 2 Cro. 128 and 630. where it appears, that the having Judgment for more, than is contained in the Writ, is Error. 6 Mod. 266.

How far the Bail ſhall not be diſcharged, notwithſtanding the Plaintiff declares for more than is contain'd in the Ac etiam.

Wilſon *and* Polton.

See post 118.

IN an Action of Trover for certain South-Sea Bonds, this Queſtion fell out upon the Trial, Whether if a Bankrupt's Wife imploys another to buy Bonds with the Bankrupt's Money, and he accordingly does ſo, and delivers them to the Wife, the Aſſignees under the Commiſſion may come upon the Buyer. Upon which Queſtion the Lord Chief Juſtice, whom the Cauſe was tried before, ordered the Poſtea to be ſtayed. And now the Court ſeemed to be of Opinion, that the Commiſſioners could not come upon the Buyer; for they ſaid, if they could, it would be of dangerous Conſequence; becauſe he only acts as an Agent or Servant to the other. However it ſtood over.

When a Wife of a Bankrupt imploys a Friend of her's to buy Goods with the Bankrupt's Money, how far the Aſſignees may come upon the Buyer.

Term. Mich.

2 Geo. II. 1728.

Satcher *and* The Bail of Cowen.

How far the Court will not ſtay Proceedings in a Scire facias againſt Bail upon a Motion.

THE Scire facias was returnable a die Sanctæ Trinitatis in tres Septimanas, and the Sheriff returned, that he had ſerved it. And now Motion was made to the Court to ſtay the Proceedings upon it. For the Counſel ſaid, that this Return-Day was always of a Sunday, and yet the Notice for Bail's Appearance was given on the Monday, ſo that it was a Day too late. To the firſt he cited the Caſes of Harvey and Brown, Davis and Salter, which were both determined Trin. 3 Annæ, where this Point was ſettled, that the Eſſoin-Day was of a Sunday. To the other, he offered to produce an Affidavit. But the Court ſaid, there was a good Remedy by Action for a falſe Return againſt the Sheriff, and therefore they would not allow of ſuch a ſummary Way of examining into the Returns of their Officers. Indeed Judge Reynolds ſaid, where a Sheriff had received Money upon an Execution, and will not pay it over, there they do proceed in an expeditious Way with him; for the Money is ſuppoſed to be brought into Court. And ſome other Caſes were cited to the ſame Purpoſe. But the Motion was refuſed.

Jackſon *and* Hall.

How far the Court will not grant an Attachment againſt a Steward of a Court Baron.

MOTION was made, that the Defendant, who was Steward of a Court-Baron, might anſwer the Matters of an Affidavit, for refuſing to admit an Heir at Law to Copyhold Lands, which deſcended to him. The Affidavit went further too, that a Trial was had for theſe Lands againſt the Heir, and that he could not make any Defence for want of his Admiſſion; and therefore he mov'd for a new Trial too. To the firſt, the Court ſaid the only Relief was in Equity; and to the other, that if the Heir had prov'd himſelf in by Deſcent, it would have been enough of it ſelf, and therein he differed from a Purchaſer. So refuſed the Motion.

Tulley *and* Sparks.

THE Defendant intended to plead Bankrupcy, and therefore he had made a former Motion to have the Commiſſion aſſigned to him; but the Court ſaid, they could only give him Leave to take Copies of it. And now he mentioned again the Neceſſity of having the Commiſſion itſelf; becauſe he was obliged to plead it with a profert in Cur', and therefore the Plaintiff might demand Oyer of it. But the Court ſaid if Oyer was demanded, they would help him; ſo made no farther Rule than their former. Another Thing the Court was of Opinion of too, upon a former Argument in this Caſe, and that was, that the very Petition to my Lord Chancellor for the Commiſſion is neceſſary to be ſet forth.

Vide ante S. C. Page 59, 67.

Vide poſt S. C. Page 81.

Ward *and* Purcel.

THE Defendant was Secretary to the Reſident from Venice, but yet was taken in Execution. Accordingly upon Affidavit from the Reſident that he was ſo, and that his Name was entred in the Duke of Newcaſtle's Office, though it was not tranſmitted over to the Sheriff of Middleſex at the Time he was arreſted, but a few Days after, and upon Affidavit that he offered to ſhew his Teſtimonial to the Officer, and that he really exerciſed the Office, the Court diſcharged him, Notice being given of the Motion.

How far a Servant of an Ambaſſador ſhall not be ſubject to an Arreſt.

The King *and* Johnſon.

THE Defendant was indicted for High Treaſon in counterfeiting the King's Coin, and outlawed in February laſt, and having obtained a Habeas Corpus was now brought up upon it, and would have aſſigned for Error to reverſe the Outlawry his being out of the Realm at that Time. But the Outlawry was not before the Court, and therefore they ſaid, they could do nothing in it. The Reaſon why it was not, the Attorney General ſaid, was, becauſe it could not yet be drawn up and laid before him, but in a few Days it ſhould be done. Then the Priſoner ſaid, that he did now ſurrender himſelf into the Hands of the Chief Juſtice, in Purſuance of the Statute of 5 & 6 Ed. 6. 11. and was ready to traverſe the Indictment, and prayed that his Render might be recorded. But the Attorney General oppoſed that, for when the Outlawry was ready, he ſaid, he ſhould offer ſome Reaſons to ſhew, that the Priſoner was not within the Benefit of that Act. The Court then ſaid, that they could not allow of ſuch an Entry to be made, that he did ſurrender himſelf, for that would be to admit his Render to be good, which was in Diſpute. However the Court did allow of an Entry to be made in this Form. Memorandum, The Priſoner being brought up by the Keeper of Newgate charged with an Indictment of High Treaſon, and alledging that he was outlawed for the ſame, and that he was beyond the Sea at the Time of the Outlawry, has offered to ſurrender himſelf up to

What relates to Outlawry in Caſe of High Treaſon.

Vide poſt S. C.

to the Chief Juſtice and to traverſe the Indictment. And then he was remanded back.

Prior *and* Prior.

How far the Court will ſet aſide a Judgment by Reaſon of its being ſigned notwithſtanding a Judge's Summons.

THE Rules for pleading were out, and the next Day the Plaintiff told the Defendant he would ſign his Judgment on the Morrow, if he would not put in his Plea. The Defendant being afraid the Plaintiff would do it, took out a Summons from a Judge to ſhew Cauſe, why he ſhould not have four or five Days longer. But the Plaintiff being reſolved the other ſhould not have his End, upon receiving the Summons ſign'd his Judgment. And now on Motion the Court thought it ſhould be ſet aſide; for they ſaid, it was true a Judge's Summons ſtaid nothing; but yet the Signing the Judgment in this Manner was plainly a Snap, and therefore refer'd it to the Maſter.

Ward *and* Purcel.

What Perſons ſhall be allowed the Privilege of an Embaſſador's Servant.

MOTION was now made to diſcharge that Rule, that was made before for ſetting aſide the Defendant's Execution; becauſe, it was ſaid, he was a Half-pay Officer, and did not reſide in the Ambaſſador's Houſe, and ſo was not a Domeſtick within the Statute of 7 Annæ 12. But the Court ſaid that the Nature of his Office ſhewed him to be a Domeſtick, and living in the Houſe with an Ambaſſador is not requiſite. Indeed they ſaid, where a Perſon does not execute the Office, which he has his Teſtimonial for, but only gets himſelf enter'd in the Liſt to have the Benefit of a Protection, they will not ſuffer it. And this, the Counſel ſaid, was the Caſe ſome Time ago of the Morroco Ambaſſador.

The King *and* Wake

What Perſons have authority to adminiſter the Oath of Office to the Members of a Corporation.

When Notice is given of a meeting in a Corporation for particular Buſineſs, how far other Buſi- cannot be gone upon.

ON Rule to ſhew Cauſe, why Informations in the Nature of Quo Warranto ſhould not be filed againſt the Defendants for exerciſing ſeveral Offices in the Borough of Southwold in Suffolk, ſeveral Points of Conſequence fell into Debate; and therefore the Court ſaid, they would not determine them upon Motion, but would grant the Informations, that they might come before them in a more proper Way. One of the Points was, in Caſe a Charter is ſilent as to the Perſon, who ſhall adminiſter the Oath of Office of Burgeſſes, whom does the Law appoint to adminiſter it? Judge Reynolds ſaid, his Opinion was, that none could do it, but by Dedimus from the Chancellor. And that, he ſaid, was the Caſe of the Deviſes. Another Point was, in Caſe a Charter appoints nothing about an Oath of Office, whether any ſuch Oath can be adminiſtred at all. And to this no Opinion was given. Then ſome Difficulties fell into Debate about Notice. And one Rule the Chief Juſtice laid down, that wherever Notice is given for one particular Buſineſs only, the Body cannot go on to other Buſineſs, unleſs the whole Body is met, and it is done by Conſent.

Tulley *and* Sparks.

Vide ante S. C. 59, 67, 79.

How far the Court will give Liberty that a Perſon ſhall inſpect Proceedings under a Commiſſion of Bankrupcy.

Vide poſt S. C.

THE Defendant not being able to get Copies of the Proceedings in the Commiſſion of Bankrupcy, upon account of the Rules not being drawn up right; the Court ordered it to be drawn up in this Manner, That the Defendant ſhould have Liberty to take Copies at his own Expence of all the Proceedings upon the Commiſſion of Bankrupcy, that were in the Plaintiff's Hands. The Counſel ſeemed to make ſome Doubt too, whether the Bond given to the Chancellor muſt not be ſet forth in the Pleading as well as the Petition. But the Court ſaid, that is never given in Evidence upon an Iſſue of Bankrupcy, and conſequently there can be no Occaſion to ſet it forth in the Pleading.

The King *and* The Borough of Plymouth.

When a Mandamus is to go to a Corporation, requiring them to proceed to the Election of a Mayor, in purſuance of the Statute of ——— how the Mandamus is to be directed.

THE Defendants had omitted to chooſe a Mayor on the Charter-Day or the Day after, and thereupon this Court had a Right to ſend down a Writ of Mandamus to this Borough, in Purſuance of an Act made in the late King's Time, to require them to go to the Choice of a Mayor. And now the Queſtion was, How the Writ ſhould be directed? For on Rule to ſhew Cauſe, why it ſhould not be directed to thoſe that have a Right to elect, the Counſel objected, that it ought to be ſent to the Mayor, &c. according to their Name of Corporation. But it was anſwered on the other Side, that that would be a wrong Direction, becauſe in Default of their going on to an Election the laſt Charter-Day, there was no Mayor at all. The Court ſaid, let it be drawn up wrong or right, it is at their Peril for having it drawn up ſo, and therefore they would not concern themſelves in it. And Judge Page ſaid, that in Brocas's Caſe of the City of London, where ſuch a Motion as this was made, the Court would not go into it; if the Direction ſhould be wrong, they declared they would quaſh it. But however Mr. Reeves produced the Act of Parliament, by which the Court ſaid it appeared this was the proper Direction. And then they appointed the Day on which the Election ſhould be, and the Perſon to give Notice of it in Purſuance of the Act.

Wilcox and Litchey *ver.* Pokinhorn.

When a Sheriff takes Goods in Execution, how far he has a Right to ſell them notwithſtanding his Office be determined.

SErjeant Belfield mov'd, that the late Sheriff of Cornwall might deliver over to the preſent Sheriff the Goods, which he had returned he had taken upon a Fieri facias, but could not ſell pro defectu emptorum. For he ſaid, the Right of ſelling them determin'd with his Office, and therefore the Writ of Venditioni exponas muſt be directed to the preſent Sheriff. And this is held in Yel. 44. But the Court ſaid, that that Caſe is reported to the contrary in 2 Cro. 73. And ſo this Point has been lately ſettled in the Caſe of Clark and Wythers in Salk. Therefore they were of Opinion the Writ of Diſtringas nuper Vicecomitem ſhould be directed to the preſent Sheriff; ſo refuſed the Motion.

The King *and* Long.

What shall not be taken to be a Return to a Mandamus.

A Mandamus had been granted by the Court against the Defendants, who were three Justices of Peace, to put in Execution the Statute of Forcible Entry. And now by way of a Return to it they sent up an Inquisition taken before a Jury, which they had caused to be impanelled, who find that the Parties complained of for the Entry extratenuerunt possessionem & adhuc extratenent, which is only an Indictment for a Forcible Entry. They annexed to the Writ of Mandamus a Certiorari too, and two Recognizances. The Counsel said, that this Return was no kind of Obedience to the Writ; for the Writ commanded the Defendants to clear the Possession of the Wrongdoers, and put the lawful Owners into it; whereas they have only procured them to be indicted; and therefore for this plain Contempt of the King's Writ he hop'd the Court would grant an Attachment against them. He said too, that there was a Case in 7 Geo. 1. which was The King and The Justices of Dorchester, where a Mandamus went to order the Justices to sign a Poor's Rate; the Justices made a general shuffling Return, that the Rate was not made secundum Actum Parliamenti; and in that Case the Court granted an Attachment. Mr. Hussey said, that he was Counsel in that Case, and it was granted upon the present Lord Chief Baron's Motion. But the Court said, if it was granted in that Case, they believed it was the first in which it ever was. But however here they said, they could not take this to be any Return to their Writ; for the Certiorari is enough of itself to bring the Indictment up, and therefore they would suppose it came up upon that; and accordingly made a Rule upon the Defendants to make a Return to it.

How far the Court will grant an Attachment for an improper Return to a Mandamus.

The King *and* The Borough of Liverpool.

In what manner Rules are proper to be drawn up which are made for the granting Mandamusses to Corporations.

The Attorney General came and produc'd the Charter of this Corporation, by which it appeared, that they were to choose Under-Bailiffs, who were in the Nature of Mace-Bearers, on St. Luke's Day every Year. He produced Affidavits too, that these Officers usually had executed the Processes of the Court in this Borough. He said too, that there was a By-Law, that on the first Wednesday in every Month a Common Council should meet, which by the Constitution consists of the Mayor, Bailiffs and a select Number of the Commonalty, to settle the Business of the Corporation. Notwithstanding this, a Common Council has not met for these two Years last past; by which Means many Leases have run out unrenewed, no Under-Bailiffs had been chosen all this Time, and much Business of the Corporation wanted to be done. For which Reasons he applied to the Court for a Mandamus to be directed to the Mayor, Bailiffs and Commonalty of this Borough, to meet in Common Council accordingly, and to perform the Business of the Corporation according to their Duty. He said further, that he had in his Hand a Rule, which was made Mich.

10 Geo. 1. whereby the Court ordered a Mandamus to iſſue, in as general Terms as theſe he prayed his in, to the Mayor and Aldermen of the Borough of Kingſton upon Hull. The Rule was, that a Mandamus ſhould go to order them ad agendum neceſſaria Negotia Villæ prædictæ. But the Court ſaid, that they never knew a Mandamus go to require a Corporation to aſſemble themſelves, unleſs there were ſhewn to the Court ſome Matters neceſſary to be done in the Corporation relating to the Publick. Now they ſaid indeed, Officers to execute Proceſſes of the Court were certainly Miniſters of Juſtice, and therefore if ſuch Perſons were wanting to be choſen, it would be very proper for this Court to interfere. But the Natuer of theſe Offices, they ſaid, was to be determined by the Charter that created them. And as it ſtands upon that, it appears that they were only to attend the Perſon of the Mayor, without any Ways being intereſted in the Concern of the Publick. Then as to the Renewal of the Leaſes, they were Matters of private Property, in no Ways fit to require this ſummary Interpoſition of the Authority of this Court. Judge Reynolds repeated it twice too, that if it ſtood barely upon the Foot of the By-Law, he thought a Mandamus would never lie to inforce it. He ſaid farther, admitting theſe Officers to be Miniſters of Juſtice, he thought it would be a very ſtrange Thing for this Court to order the Corporation to chuſe them now, when there is a Day certain appointed by the Charter for the Choice of them. Then as to the Rule produced, the Chief Juſtice ſaid, he remembred the Court at that Time ſaying it was drawn up wrong, and upon that account ſuperſeding the Mandamus that iſſued upon it. However upon the Attorney General's deſiring to look a little farther for Rules that have been drawn up of this Nature, the Court made one to ſhew Cauſe. And afterwards Affidavit was made, that the Defendants had held a Court in Purſuance of the Rule; ſo the Court diſcharged it, and ſaid, they need not return the Mandamus.

How far a Mandamus ſhall nor be granted requiring Perſons to proceed to the Election of Officers, by Reaſon that thoſe Officers do not relate to the Adminiſtration of publick Juſtice.

Anonymus.

A Motion was made to ſet aſide a Judgment, upon Account of the Plaintiff's dying before the Signing it. But it appearing to be entred up as of the Term in which he was living, the Court ſaid that was what was material, and it did not ſignify when it was ſigned. And this, Judge Reynolds ſaid, was the common Caſe of a Man's giving another a Letter of Attorney to enter up Judgment againſt him of ſuch a Term, and dying the Vacation after; where it is frequent to enter up the Judgment afterwards as of the Term before he died. Accordingly the Court held it to be regular.

How far the Court will not ſet aſide a Judgment by reaſon of its being ſigned after the Death of the Plaintiff.

Fullneſs *and* Baker.

THIS was a Writ of Error in an Ejectment; in which Caſe the Statute of 16 & 17 Car. 2. cap. 8. requires, that the Defendant in the original Action, who would ſtay Execution by ſuch Writ, ſhall be bound in a Recognizance of ſuch reaſonable Sum

When a Writ of Error is brought upon a Judgment in an Ejectment, and the Defendant enters into a Recognizance, how far he ſhall not be required to juſtify.

Sum as the Court ſhall think proper. The Counſel ſaid, the uſual Recogniſance in ſuch Caſe is of two Years Value of the Land in Queſtion, and in that Sum the Defendant was bound. But yet the other Side would have had him juſtified. Now the Court ſaid, there was no Reaſon for that; for the Statute appoints, that his Recogniſance ſhall be taken, and therefore whether he can juſtify or not, cannot be material. Indeed the Chief Juſtice ſaid, it was a Queſtion one Time, whether he muſt not have two Bail to join with him; but it has been determined, that the Party's own Recogniſance is ſufficient upon the Words of the Act. So they would not make him juſtify.

Blackborn qui tam *and* Daniel.

Vide ante S. C.

MR. Reeves now moved on the Part of Hall, who was complain'd of before. And he ſaid he did not act any Thing for the Plaintiff after the Defendant imployed him; and as to his not taking due Care of the Cauſe, he ſaid, the Defendant firſt imployed one Collins, who died, and then when Hall began to be imployed he writ to Collins's Agent to inquire about the State of the Cauſe, and he ſent him Word, that the Defendant had pleaded, and when the Proſecutor ſhould proceed any farther in the Cauſe he would ſend him Word of it. Upon which the Court ſaid, that they thought this a ſufficient Excuſe to clear him of an Attachment.

Smith *and* Bear.

Who is the proper Perſon to be conſidered as Attorney in a Cauſe.

ONE Crosby, who was Attorney for the Defendant, gave Notice to the Plaintiff, that he would file common Bail. But not being an Attorney of this Court, filed it in the Name of one Stokes. The Plaintiff's Attorney however looked out for Stokes, and ſerved him with the Declaration, which the Court ſaid was irregular; for he ought to have ſerved Crosby. Accordingly upon the Maſter's Report ſet aſide the Judgment.

Anonymus.

How far Articles of the Peace ſhall not be diſcharged.

ON Motion to diſcharge a Perſon of Articles of the Peace upon Account of his being convicted upon an Indictment of Battery for the Offence, which was the Foundation of them, the Court refuſed to do it. For they ſaid, the Indictment was to puniſh him for what he had done, and the Articles were to prevent him from doing ſomething worſe. They ſaid too, that the Conviction upon the Indictment was a farther Argument of the Neceſſity of the Articles.

Philipps *and* Knightley.

How far an Award ſhall not be ſaid to be good by Reaſon of its not making an End of all the Matters contained in the Submiſſion.

THIS was an Action of Debt upon an Arbitration-Bond. The Defendant pleaded no Award made. The Plaintiff replied and ſet forth the Submiſſion to have been of all Matters in Difference between the Parties; that in Purſuance of that the Arbitrators awarded, that one Marſhall on whoſe Be-

half the Submiſſion was made, Defendant, ſhould covenant to indemnify the Plaintiff againſt all future Coſts attending an Action that he had againſt him in the Common Pleas on Behalf of himſelf and the Poor of the Pariſh of ; and that they Two with this Marſhall (who was not Party to the Award, but intereſted in it) ſhould meet at a certain Place on a certain Day, between the Hours of Ten and Twelve, and that Marſhall ſhould pay the Plaintiff 28 l. The Plaintiff avers, that the Defendant and he met between the Hours aforeſaid, and continued at the Place appointed, but ſays, that Marſhall did not come, nor any for him, for which he brings this Action. Upon which the Defendant demurs. And now his Counſel took two Exceptions to the Replication. The one was, that the Award was not in Purſuance of the Submiſſion; for the Submiſſion is, that the Arbitrators ſhall make an End of all Matters in Difference; whereas it appears by the Award, that there was a Suit depending at the Time, and the Arbitrators have not put an End to it, but only ordered, that Marſhall ſhould give a Bond of Indemnity to the Plaintiff not to go on with it; whereas they ſhould have ordered, that Marſhall ſhould have diſcontinued his Suit, or done ſomething of that Nature. The other was, that the Breach is not well aſſign'd; for the Plaintiff only ſays, that the Defendant and he met between the Hours of Ten and Twelve, and continued there, but it does not appear, that they were there all the Time; ſo that Marſhall might have been there notwithſtanding. To the firſt Exception, it was anſwered on the other Side, that a Court of Equity would make Marſhall put a Stop to his Suit upon this Award. And to this Purpoſe was cited the Caſe of Beckett and Taylor, 1 Mod. 9. To the other it was ſaid, that it ſhall be intended he continued there all the Time, unleſs the contrary appears; and therefore if it was otherwiſe, the Defendant ſhould have ſhewn it in his Rejoinder. However the Counſel ſaid, whether this Breach was well aſſigned or not, was but Surpluſage; for the Defendant's Pleading no Award made, admits a Performance in no Part of it; and therefore when the Plaintiff ſhews forth an Award, he need not ſay any Thing farther. Eſpecially too, he ſaid, this could not be taken Advantage of upon a general Demurrer ſince the Statute for the Amendment of the Law. The Chief Juſtice ſaid, that he only intended this ſpeaking to the Caſe to be to open the Difficulty of it, and therefore he ſhould only give his Opinion in general, that he thought both the Exceptions would go pretty hard with the Plaintiff. And as to the laſt Thing mentioned, he ſaid, the Principle the Counſel went upon was not Law. Vide poſt S. C

More *and* Jones.

THIS Caſe was now more largely ſpoke to than it was upon the former Argument. There was nothing that was ſaid by the Court then, but what they agreed in now; but yet ſome new Matter was reſolved by them. The Chief was, whether the Defendant's demanding Oyer of this Writing, and its appearing upon the Oyer, to have been enter'd, ſign'd, ſeal'd and deli- Ante 61. S.C.

ver'd in the Preſence of ſuch Witneſſes, had not cured the Defect in the Declaration. For this Purpoſe the Plaintiff's Counſel cited the Caſe of an Action brought upon a Bail-bond by a Sheriff, and the Plaintiff's not ſhewing in his Declaration, that the Bail-bond was given to him in the Name of his Office; in which Caſe if nothing farther appear'd, the Bail-bond would certainly be void; yet when the Defendant demands Oyer, and by the Sight of the Bond it appears it was given to him in the Name of his Office, it has been held to be good enough. A Caſe to the like Purpoſe was cited out of 1 Cro. 209. In the ſame Manner it was ſaid of Letters Patent, they may be ſet out wrong in Pleading, but yet the Profert in Curiam helps them. Theſe Caſes the Court admitted, but yet they ſaid, they do not come up to the Caſe in Queſtion; for by the Oyer a Writing is only ſet forth, which has theſe Words in it, ſigned, ſealed and delivered, but it does not appear that that was ever done but in the Caſes cited, by the producing the Inſtrument the Thing it ſelf appears to have been done. And as to the Caſe in Croke, the Defendant admits it by his Plea. So in our Caſe Judge Reynolds ſaid, if the Defendant had prayed Auditum Facti in Narratione mentionat', he did not know, but that Caſe might have come up to Croke's. However, beſides this Matter about the Oyer, a good Deal of Streſs was laid by the Plaintiff's Counſel upon the Word convenit, in order to ſhew, that that was a technical Word as well as Factum, and of Conſequence carried with it an Implication of there being all Circumſtances complied with neceſſary to found an Action of Covenant upon. To this Purpoſe he cited the Caſe of Atkinſon and Coteſworth, Paſ. 8. of the late King, where the Plaintiff had charged in the Declaration, that the Defendant per ſcriptum obligatorium convenit to do ſuch and ſuch Acts. In that Caſe, it was argued, whether the Declaration was good or not. It was held, that it was good; there ſome of the Judges put it upon the Words Scriptum obligatorium being technical, and others of them upon the Word convenit being ſo. The Court ſaid, they paid a great Regard to the Opinions of thoſe Judges; but yet they could not ſee, how convenit could carry with it thoſe Circumſtances; for if it could, then convenit would do alone of it ſelf, which never was heard of. It was hinted at farther by the Counſel, as if this Form was uſual to declare in, in the Common Pleas. The Chief Juſtice ſaid, if that could be made out, it would be very hard, that this Court's declaring in another Way ſhould overturn the Precedents in that Court; but that he did not think that that could be the Way of declaring in that Court. So for theſe Reaſons the Judgment below was reverſed.

The King *and* Weſton and Weſtley.

Vide ante 56. S. C.

AN Information of Perjury was applied for againſt the Defendants laſt Term, for voting for Knights of the Shire of the County of Dorſet, and ſwearing that they had a ſufficient Freehold in Pool in that County; whereas Pool is a Town and County of it ſelf, out of the County of Dorſet. The Court ſaid at that Time, that if the Counſel thought proper, they might apply to the Aſſiſes, but this Court would not concern themſelves

ſelves in it. The Grand Jury there returned Ignoramus upon their Bill of Indiſtment; and therefore the Counſel came again and applied for the Information; but the Court refuſed it; for they thought it would be ſtrange, that a Man ſhould be puniſh'd for Perjury, for being miſtaken in a Point of Judgment; and therefore they thought the Grand Jury did right. Then the Counſel ſaid, they did not know, how they could prevent theſe Things for the Future. But, the Court ſaid, the Sheriff ought not to allow of their Votes, and that that was the proper Method to be taken.

The King *and* Roo and Glanvil.

How far the Court will not grant an Information againſt a Man for obtaining a Note from another unduly.

SErjeant Belfield moved for an Information againſt the Defendants, for making one Alden drunk, and then drawing him in to ſign a Note for 20l. But the Court ſaid, they would not let a Matter of Civil Right be influenced by an Information of a criminal Nature. They ſaid indeed, that where a Man takes a Bond or Note out of another Perſon's Hand, which that Perſon has a Demand upon him for, and tears it, the Court will grant an Information againſt him.

Sir Thomas Eveskyn *and* Merry.

What ſhall be a good Declaration of a Bill of Exchange.

THIS was a Writ of Error upon a Judgment in the Common Pleas; and now ſeveral Exceptions were taken to the Declaration. Firſt, it was, that this was an Action founded upon a Bill of Exchange, and therefore the Bill of Exchange ought to have been laid to have been made according to the Cuſtom of Merchants. Another Exception was taken for its not being ſaid, to be ſigned by the Party, that drew it. A Third was, for its not being ſaid to be accepted in Writing by the Defendant, whereas by the Stat. of 9 & 10 Will. 3. c. 17. this is neceſſary. The laſt was, that it was not laid to be made for Value received; for it is only ſaid in the Declaration, pro valore in manibus accommodato de denariis Querentis. The ſecond Exception chiefly ſtuck with the Court. For as to the firſt they ſaid, it has been held often, that the general Cuſtoms of Merchants they are obliged to take Notice of; and therefore they are bound as Judges to know, whether this Bill of Exchange is within that Cuſtom. To the Third, they ſaid, that indeed the Statute of William required the Acceptance to be in Writing, where a Perſon would take Benefit of that Act; but it does not require in general, that the Acceptance ſhall be by under-writing. To the laſt they ſaid, that Value received is not neceſſary to be laid in the Declaration, and therefore they would ſtrike out that Clauſe pro valore, &c. as Surpluſage. But to the ſecond Exception, the Court ſeemed to think, there was a little more Difficulty in it; for they admitted, that fecit notam would not be good in an Action upon a promiſſory Note; and then the Queſtion was, how fecit Billam could? But the Court ſeemed to think, that a Signing is neceſſary to be laid in an Action upon a promiſſory Note to bring the Plaintiff within the Benefit of the Statute of 3 Ann. c. 9. which requires it. But they doubted, whether a Bill of Exchange ſhall not be conſi-

der'd

der'd as a technical Word, and conſequently will include the Circumſtances of Signing. The Court ſaid in the Argument of this Caſe at another Day, that there was no Occaſion for Value received to be in the Bill of Exchange itſelf, ſo affirm'd the Judgment.

The King *and* Hales.

How far Trials at Bar ſhall be granted in criminal Caſes.

THE Defendant was indicted for forging an Indorſement of a Note of 800 l. which Indictment was preferred againſt him at Hicks's Hall, and was afterwards removed up by Certiorari into this Court; and now the Attorney General moved, that it might by tried at the Bar next Term. He ſaid, this was not indeed a Proſecution carried on by the Direction of the Crown, but only ſupported upon the Expence of a private Perſon. However he mentioned two Caſes, where the Court had granted the like Motion with this, upon the Application of the King's Attorney. One was the Caſe of the King and Ward; the other the Caſe of the King and Johnſton. The Attorney General ſaid too, that ſtrictly this Matter cannot be tried at the Sittings without his Leave; for every Writ of Niſi prius in criminal Caſes muſt be ſigned by him, to have his Conſent. But the Court ſaid, if the Attorney had made this Motion in Right of his Office at the Inſtance of the Crown, it was certainly demandable of Right, tho' the Trial was moved to be had in an iſſuable Term. But here the Attorney moves only as Counſel, and therefore he can only apply to the Court upon the ordinary Circumſtances, which theſe Motions are granted on, which are the Length or Difficulty of the Caſe. And here, they ſaid, nothing of this was pretended. The Chief Juſtice ſaid, he remembred very well the Rule for granting the Trial at Bar in that Caſe of the King and Johnſton was founded upon the Length of Examination, that would be requir'd in that Caſe. And as to the Caſe of the King and Ward, that Proſecution was carried on by the Direction of the Houſe of Lords, which might Influence the Court to have had the Trial at the Bar. And as to what the Attorney ſaid, about the Writs of Niſi prius being ſigned by him, the Court ſaid, he may very well refuſe it in Proſecutions at the Inſtance of the Crown; but it is never done in Proſecutions of this Nature, which are conſidered as the Suits of private People, tho' the King's Name is made uſe of. Judge Probyn tho' ſaid, that this was a Forgery of a Note of Hand, and concerned publick Credit in general, and therefore he did not know but the Conſequence of this Caſe might make it ſomething diſtinguiſhable from others. However the Motion was afterwards granted upon the Attorney's ſaying, that he had ſince got the King's Command to carry on this Proſecution.

Wills *and* Hern.

How far the taking an Aſſignment of a Bail-Bond is a Perſon's only Remedy.

ONE King was Bail for the Defendant, and when he came to give his Bail at a Judge's Chamber, he altered the Plaintiff's Chriſtian Name, and changed it to Thomas. Now the Court ſaid, this was no Bail to that Action, and therefore ſet

aſide the Judgment, upon Account of the Defendant's having never appeared. They ſaid, that the Plaintiff ought to have look'd on the Bail at the Time it was given in; and that now the only Remedy was to take an Aſſignment of the Bail-Bond.

The King *and* Baker and others.

THE Counſel came to ſhew Cauſe upon a Rule, that was made in this Caſe. But firſt Mr. Fazakerly made an Objection againſt the Affidavits, on which the Rule was made, that they were titled in a Cauſe of Holdfaſt and Baker, whereas the Facts in theſe Affidavits cannot any Ways affect that Cauſe; and if they ſhould think proper to indict the Perſons that made them for Perjury, they could only indict them for Perjury in a Motion for a Rule to obtain an Information, and as the Affidavits were titled in a particular Cauſe, they could not produce them on ſuch an Indictment. But the Court ſaid, that at the Time thoſe Affidavits were made there was ſuch a Cauſe depending, as Holdfaſt and Baker, and theſe Affidavits concerned it. For they charge the Defendants with conſpiring to raiſe up and ſuborn Evidence againſt the Plaintiff. For which Reaſon the Court ordered the Counſel to proceed. And now upon Reading many Affidavits the Caſe appeared to be, that this Turner, who is mentioned before, with one Quinn, had entred into a Contrivance with Two more to ſet up a ſham Story about Turner's Marriage in order to get Money out of the Defendants, by perſuading them that by the Diſcovery they might obtain a new Trial and ſet aſide the former Verdict. Turner and Quinn finding at laſt, that they could not have their Ends of getting Money out of the Defendants, turned Sides now with an Appearance of ſerving the Plaintiffs, in Hopes that by this other ſham Story about the Conſpiracy they might amuſe the Plaintiffs, and get ſomething out of them. But in that they could not ſucceed neither. However the Counſel for the Rule ſaid, that though it ſhould be diſcharged as to Baker and ſeveral of the other Defendants, yet they hoped it would be made abſolute as to thoſe Two, who joined themſelves with Quinn and Turner in the firſt Contrivance. But the Court ſaid, they would not grant the Information againſt them neither, for they would never let them be puniſhed, and their two Confederates go acquitted. And if croſs Informations ſhould go, then only his Evidence could be allowed of, whoſe Information ſhould happen to be firſt tried. Therefore the Court thought, that the proper Way was to apply for an Indictment to the Grand Jury.

Farthing *and* Wright.

IN this Caſe the Writ of Error upon a Judgment in the Common Pleas was returnable two Terms before the Judgment given. Upon which the Plaintiff moved, that his Writ might be amended. But the Court ſaid, they thought they ought to quaſh it with Coſts; which they accordingly did.

How far a Writ of Error ſhall be quaſhed with Coſts.

Lamb *and* Roſs.

The Courſe of Proceedings againſt an Attorney.

THE Defendant was an Attorney of this Court, and lived 100 Miles off; the Plaintiff filed a Bill againſt him, and ſent it him down, and at the ſame Time ſerv'd him with a four Days Rule to plead; now the Counſel ſaid, that it was impoſſible for him to plead within that Time, and yet the Plaintiff immediately after the Time ſigned Judgment. The Defendant ordered his Agent to plead the General Iſſue for him as ſoon as poſſibly he could; and therefore the Counſel moved, that this Judgment might be ſet aſide. But the Court ſaid, the Judgment was regular, and therefore they could not do it. And Judge Page ſaid, that Attornies of this Court are always here by themſelves or their Agents.

The King *and* Roberts.

How far the Court will not grant an Information for a Libel.

MR. Lee moved for an Information againſt the Defendant, for publiſhing a very great Reflection upon the African Company in one of the News Papers, by charging them with having ſupported their Trade by Treachery and Fraud. But as this was only a Diſpute about a Matter of Trade, the Court thought it would be ſufficient to apply to the Grand Jury.

The King *and* Johnſon.

Vide ante S. C. 79.

THE Attorney General moved for Judgment againſt the Defendant, who was Outlawed for High Treaſon at Hicks's Hall upon an Indictment, that was there found againſt him, for diminiſhing and guilding over the current Coin of the Kingdom. The Defendant being demanded what he had to ſay, why Judgment ſhould not be pronounced againſt him, deſired, that a Plea which he produced might be read, which was done accordingly. The Subſtance of it was, that he ſurrendered himſelf into the Hands of the Chief Juſtice, that he was at Fluſhing in Holland at the Time the Outlawry was pronounc'd, (which was in February laſt) and then traverſed the Charge in the Indictment. Upon which the Attorney ſaid, that as this was a new Caſe, he ſhould at preſent only deſire a Copy of the Plea. Upon which the Priſoner prayed, that he might have a Copy of the Indictment and Counſel aſſigned him. But the Court told him, that that he could not have; for he was not within the Statute of 7 W. 3. 3. which gives this Privilege only in ſuch Treaſons, whereby there is a Corruption of Blood. But as to his having Counſel to every Point, concerning the Outlawry, the Court told him, he was intitled to it of Right; for that is a Matter collateral to the principal Charge.

Vide poſt 91.

The King *and* The Inhabitants of Benjoe.

Vide ante S. C. 66.

How far a Purchaſer ſhall gain a Settlement within 9 Geo. 1.

ON Rule to ſhew Cauſe, why an Order of Seſſions ſhould not be quaſh'd, the Caſe appeared to be, that a Man had purchaſed an Acre of Ground within this Pariſh, which he paid 25 l. for, and then built a Houſe upon it, which he lived in for nine Months, and afterwards ſold the whole for 50 l. Upon which the Juſtices at the Seſſions adjudged, that by this Purchaſe he gained a Settlement within the Statute of 9 Geo. 1. And now for Cauſe Mr. Reeves ſhewed, that though that Statute only provided, that whoever ſhould pay 30 l. for the Purchaſe of Land in any Pariſh ſhould gain a Settlement by it; yet ſuch a Purchaſe as in the Caſe in Queſtion was within the Reaſon of that Act. For it was more probable, that a Perſon who could give 25 l. for a Piece of Ground, and lay out ſo much Money upon it as he did, would not be a Charge to that Pariſh, than a Perſon, who could afford barely to give 30 l. for ſuch a Purchaſe. And theſe Acts relating to the Poor were, he ſaid, to be taken by Equity; and for this purpoſe cited a Caſe upon the Stat. of 3, 4 W. & M. 11. where it was held that the Service of an unmarried Perſon, having Children that were grown up and got a Settlement elſewhere, was within the Equity of that Statute. So, he ſaid, upon that Statute it was held too, that if a Perſon was in Poſſeſſion of a Freehold or Copyhold, or even a Leaſehold Eſtate, he need not give Notice to gain him a Settlement. However the Court ſeemed pretty clear in their Opinions, that ſuch a Purchaſe as in the preſent Caſe, was not within the Benefit of the Statute of 9 Geo. 1. becauſe it by no Means complied with the Terms of it. And they were not to conſider whether ſuch a Perſon as this, was ſo likely to become chargeable as the other; for that would lead them into a wild Enquiry. However Judge Probyn ſaid, that he did not know, whether this Caſe might not fall within the Statute of 13 & 14 Car. 2. The Court were in ſome Doubt as to this laſt Point, ſo it ſtood over.

The King *and* Johnſon.

Vide ante 79, 90.

THE Court now ſaid, that there was a Miſtake in the Priſoner's Plea, for upon the Face of it it appears to be a Plea as of Wedneſday laſt, whereas the Outlawry was not brought into Court till the Saturday following. They ſaid, they mentioned it to prevent any Surprize or Difficulty that the Priſoner might otherwiſe fall into. Upon which the Defendant's Counſel ſaid, that if the Attorney General pleaſed, he might waive this Matter as to the Outlawry, and go on wholly upon the Indictment. And they ſaid, that this ſame Thing was done in the Caſe of the Regicides. But the Attorney General ſaid, that

that in that Caſe the then Attorney General had Orders from the Crown to conſent; and without them he did not think he had Authority to conſent. So the Court ſeemed to think, that that was a Matter much to be queſtioned. However the Attorney ſaid, that he was willing all Matters ſhould be taken out of the way, that might any Ways entangle this; and therefore he would now lay that Queſtion aſide in relation to the Surrender, and readily own that this was not ſo ſtrong as Sir Thomas Armſtrong's Caſe, and therefore that the Surrender was good. For in that Caſe the Defendant was taken up upon the Outlawry itſelf, whereas in our Caſe he was taken into Cuſtody upon an Eſcape-Warrant. And of this Opinion was the Court. Yet he ſaid, that in theſe Proceedings of the Defendant about his Defence there was great Uncorrectneſs, and therefore he would mention them now, that they might be put into a better Manner, ſo as not to be made a Precedent of. He ſaid, the putting in a Plea and Suggeſtion both, was wrong; for the Priſoner muſt certainly ſtick to one; and then he doubted, whether a Suggeſtion could be entered upon the Roll, without the Leave of the Court. He ſaid too, that the Traverſe to the Indictment was put in too ſoon, for the Defendant as yet has not been arraigned upon it, and therefore he could take no Iſſue upon it. Which Point the Chief Juſtice affirmed too. For theſe Reaſons the Court thought it adviſeable, that the Counſel ſhould take their Plea back, and plead ore tenus; and they ſaid, they ſhould make no Scruple in giving ſuch an Order; for if the Attorney had demurr'd to it on theſe Objections, they ſhould have given Leave to have had it amended.

Vide poſt S. C. 95.

Nayler *and* Scot.

THE Motion for a Prohibition, that was made before in this Caſe, was upon the Foot of the Libel, and now Mr. Reeves came to ſhew Cauſe upon a Rule that was then made. But Mr. Fazacherly ſaid, that ſince that Time they had pleaded below, and denied the Cuſtom; notwithſtanding which the Plaintiff was there going on; now he ſaid, if the firſt Matter ſhould go againſt them, they ſhould move upon this other Footing; and therefore it would a good deal ſhorten the Buſineſs, if the Suggeſtion was amended by Conſent, and made according as he has opened it now. Upon which it was amended by Conſent.

Vide poſt S. C.

Davie *and* Davie.

SErjeant Darnel came to ſhew Cauſe the other Day on a Rule that was enlarged in this Matter; and the Cauſe, that he then ſhewed, was, that the Perſon, whom they arreſted was one Davis, and not Davie, and therefore he hoped the Rule would be diſcharged. Upon which Mr. Strange deured further Time to clear this Matter. But the Serjeant ſaid, that at that Rate there would be no End of this Affair. However the Court did give farther Time; for they ſaid, that this was a new Execution, that was ſtarted; and therefore it was proper the other

Side ſhould have Time to anſwer it, which they accoꝛding gave. And now Mꝛ. Strange pꝛoduced an Affidavit from the Marſhal, that the Defendant was committed by the Name of Davie; but that the Security he gave to have the Benefit of the Rules was by the Name of Davis, ſo as there can be no Diſpute as to Identity of the Perſon. Upon which Serjeant Darnel made a different Defence; and ſaid, that the Defendant was a viſible Man in Newington, woꝛking openly at his Buſineſs foꝛ ſeveral Months together befoꝛe this Arreſt, ſo that there could be no Occaſion foꝛ any Contrivance to get him out of the Rules; and diꝛectly denied that any Foꝛce was uſed in making the Arreſt, which was ſwoꝛe to be out of the Rules; but the only one was when they were carrying him thꝛough the Rules upon this Arreſt, and he was foꝛ making an Eſcape. But the Court ſaid, it appears there was a Contrivance uſed to get him out of the Rules, and theꝛefoꝛe they made the Rule abſolute.

Dr. Snape *and* The Biſhop of Lincoln.

ON Demurrer in Pꝛohibition the Caſe was, that one Mꝛ. Dale, a Fellow of King's College in Cambridge, had made a Speech upon a publick Occaſion in the Hall of that College, in which he reflected upon the Pꝛovoſt and Fellows. Foꝛ which Reaſon they put him out of Commons, and oꝛdeꝛed him to retire to his Chamber. Upon that he ſent them Woꝛd, that he would appeal to the Viſitoꝛ, and foꝛ that Puꝛpoſe deſired Leave to go out of College. But without having any Leave given him he went out accoꝛdingly and appealed to the Biſhop of Lincoln; upon which they expell'd him, and from this Sentence of Expulſion he appeal'd again. The Biſhop accoꝛdingly came into the College, and viſited them upon this Appeal. And whether he had a Right to do ſo oꝛ not, was the Queſtion now befoꝛe the Court. Mꝛ. Reeves was Counſel foꝛ the Plaintiff. And in his Argument he laid it down, that in all Temporal Foundations, the Founder and his Heiꝛs are Viſitoꝛs by Law, unleſs another Perſon is particularly appointed. He ſaid too, that either this Viſitatoꝛial Authoꝛity may be diſtributed into different Hands; oꝛ one Perſon may be appointed partial Viſitoꝛ, and the remaining Part of this Power may continue in the Hands of the Founder and his Heiꝛs. Now this, he ſaid, was the pꝛeſent Caſe. Foꝛ Hen. 6. who founded this College, thought pꝛoper to intruſt the Biſhop with the Exerciſe of this Authoꝛity only in particular Inſtances; but the remaining Part of it he either kept to himſelf, oꝛ would not have it exerciſed at all, foꝛ the ſake of the Repoſe and Quiet of the Body. And this, he ſaid, appeaꝛed from the 65th Statute which appoints the Viſitoꝛ, and is ſtiled, Statutum de Viſitatione Epiſcopi Lincolnienſis per ſe vel ejus Commiſſarios in dicto Collegio facienda. The Statute begins, Cum ſperemus quod Epiſcopus Lincolnienſis (ſicut noſtri Collegii Regalis Viſitator eſſe debebit) Jurium & Privilegiorum Collegii Conſervator eſſe velit; Idcirco volumus & liceat, that he ſhall have ſuch and ſuch particular Powers. Now he ſaid, that the giving the Biſhop ſome particular Powers in this laſt Clauſe was a circumſcribing the general Juriſdiction,

How far the only Remedy is to apply to the Viſitor.

which he might have ſeemed to have given him before; for otherwiſe this Clauſe would be without any Effect. But what he ſaid fully determined this Matter was, that there comes afterwards a Clauſe in this very Statute, which has Negative Words in it, and ſays, that the Ordinary ſhall have no farther Power, than has been particularly given him. The Words are, per præmiſſa tamen prædicto Epiſcopo Lincolnienſi ſeu ejus Commiſſariis, quoad alia, quam in præſenti noſtro Statuto Regalis Collegii & aliis noſtris Ordinationibus contenta, aut quod poſſint citare extra Collegium, or come in but once in three Years to viſit, unleſs requeſted by the Provoſt and Burſers, aut aliquam aliam Poteſtatem, concedere non intendimus; ſed Poteſtatem hujuſcemodi iis & eorum cuilibet adimimus omnimodo. However Mr. Reeves ſaid, if he ſhould admit, that the Biſhop had a general Authority of examining into all Matters relating to the State of the College, when he came in his triennial Viſitation; yet there was no Pretence to ſay, he could come in upon a particular Appeal of a private Fellow; for this Statute reſtrains his coming in at any other Time than his general Viſitation, unleſs called in by the Provoſt and Burſers. Beſides he ſaid, the Statutes appoint, that every Fellow and Scholar ſhall take an Oath not to appeal in any Caſe; for the Words are, That they ſhall obey the Orders of the Provoſt and Fellows abſque appellatione aut querelæ obſtaculo quocunque. But the Attorney General anſwered on the other Side, that as to the Extent of the Biſhop's Authority, he thought it clear, it was General and Univerſal; for the inſtancing in ſome particular, principal Parts of this Authority could never take away the Reſt of it, which was given by the general Words. He ſaid it was a common Way of penning almoſt all Statutes of this Nature. And ſo this Point is ſettled in the Caſe of Philips and Berry, 4 Mod. And as to the Negative Clauſe, that, he ſaid, did indeed confine the Biſhop to the Place in which he ſhould exerciſe his Juriſdiction, and to the Time in which he ſhould make his general Viſitation; but was far from tying him up to the Inſtances juſt before mentioned. Then as to the Biſhop's coming in upon a particular Appeal of a private Fellow, he ſaid, it was determined in the Caſe juſt before cited, that though a Time is ſtated by the Statute for a Viſitor's exerciſing his general Jurisdiction; yet as incident to his Office he may de jure at any Time make a particular Viſitation on a private Appeal, and examine into the Matters he was requeſted to inquire into, unleſs there is an expreſs prohibitory Clauſe to the contrary. But that, he ſaid, was not in the preſent Caſe; for at the moſt the Clauſe, which the other Side rely'd on, is but doubtful and obſcure; the Word adimimus being in no Ways proper to ſignify a reſtraining of an Authority at that Time given, but to take away an Authority that was given, or might be thought to be given before. Now as to that, the Attorney ſaid, it appears by another of theſe Statutes, that Hen. 6. had obtained a Bull from the Pope to take away the Ordinary Juriſdiction of the Biſhop of Ely over the Members of this College, and to give it to the Biſhop of Lincoln. By which Act it was ſomething doubtful at the Time of the making of theſe Statutes,

whether the Bishop of Lincoln had not a Power of visiting this College, as Ordinary. And there are several Opinions scattered amongst the old Books, which favour this Notion, though now the Law is settled to the contrary. Then the Design of this Clause possibly might be to take away from the Bishop all Colour of visiting upon that Account. Upon which, the Attorney said, he would now consider the Force of the Oath. The Form of it is not in general Terms as the other Side stated it; but only the Party swears he will not Appeal, when he shall be punished propter sua delicta secundum exigentiam Statutorum. Now, who is the proper Person to judge of the Deservedness of this Punishment, but the Visitor? And as to the Word Appeal, which was relied on by Mr. Reeves, Mr. Attorney said, it might be understood of Foreign Appeals to Courts Temporal or Ecclesiastical, and not to this Statutable Visitor, who was appointed to redress all Grievances of this Nature; and to this Purpose he cited Dr. Yerbury's Case, 1 Keb. 166. and Appelford's Case, 1 Mod. 82. Upon which Matter he pray'd for a Consultation. But the Court said, that this was a Case of a good deal of Consequence and Difficulty, so would not deliver their Opinions till the next Term. Vide post S. C.

The King *and* Johnson.

THE Defendant's Counsel being desirous to bring on this Indictment to Trial this Term, the Attorney General said, that he should be as willing to do it as they; but it could not possibly be done; because as this Indictment was not originally found in this Court, there must be fifteen Days between the Teste and the Return of the Venire facias; according to Sanchar's Case in Coke's Reports. He said too, he should be glad if this Indictment could be sent down by Mittimus into the Court from whence it was brought up, upon the Statute of 6 Hen. 8. 6. but that Statute only extends to Indictments of Murder and Felony. Upon which Mr. Strange said, that by Consent of the Defendant the Venire might be antedated; for there being so long Time allow'd is only for his Benefit. But the Court said, they would never allow of a Venire to be before Issue joined; and as yet the Defendant had not been arraigned upon his Indictment. Vide ante S. C. 79, 90, 91.

The Duke of Rutland *and* Hodgson.

THE Defendant had given a Promissory Note to the Plaintiff's Father in 1720, by which he engaged to pay him 11000 l. in Case he would transfer to him 1000 l. Capital South-Sea Stock, at or before the shutting of the Books for the then next Christmas Dividend. The Plaintiff's Father accordingly sent a Notice in Writing to the Defendant, that he would transfer this Stock to him on the Friday or Saturday next, being the Day for the shutting up of the Books. And then the Plaintiff avers in his Declaration, that his Father was at the South-Sea House on the Day to make a Tender, but that neither the Defendant nor any for him was there to receive the Transfer. Upon which the Plaintiff, as Executor to his Father, What shall not be a good Tender of South-Sea Stock.

ther, brings this Action. And now this Matter came before the Court upon a new Trial had at the Bar, the Verdict in the former Cause being contrary to Evidence. The Plaintiff gave in Evidence that the usual and only Time for making of these Tenders was between the Hours of nine and one, and that not so much as the transferring any Stock can be made but between these Hours, unless in these particular Days just before the shutting of the Books for the making of their Dividends. That the Plaintiff's Father had a Person ready to make this Tender all the Time between those Hours; that three Calls accordingly were made; but that no Body came for the Defendant to accept it. The Court said, that this Matter was now brought to one single Point of Law, whether upon the Face of the Plaintiff's own Evidence it does not appear, that the Tender was not good; in as much as his Witnesses admit, that the Time for transferring Stock in these Days continues after the usual Hours, and in Fact this Time continued till late in the Evening? Upon this Question the whole Court delivered their Opinions, that the Tender was not good. For they said, in all these Cases the Tender of the Act must be made at the last Point in which the Act itself can be done. And this they said was held in the Case of Lancashire and Killingworth. So that this differs from the Tender of Rent, where the Law for the Convenience of Landlord and Tenant has appointed the Hour of Sun-set to be the last Period of Time for that Purpose. And therefore as the Law has appointed the Time for this Tender, no Usage to the Contrary for a few Years can alter it; for this same Reason too is it, that the Notice was wholly unnecessary. The Court delivering their Opinions in this Manner, the Plaintiff was nonsuited.

How far a Certiorari cannot be granted by a Judge at his Chambers.

The King *and* Steers.

THE Court said, that no Certiorari should be granted by a Judge at his Chambers in Term-Time; and that they had lately agreed to this Rule.

Garnum *and* Bennet.

How far a new Trial shall not be granted.

THIS was a Matter that was tried before Judge Probyn at the Assizes, and Special Point reserved for the Opinion of the Court. A Captain of a Ship, who was an Infant, had given Orders for Repairs to be done to it, and at the same Time gave a Promissory Note for the Payment of the Money, which the Work should come to; the Question now was, Whether the Plaintiff could not come upon the Defendant for the Money, as Owner of the Ship? Upon this Case the Court was of Opinion, that he could not. They did admit indeed, that if the Captain had given only general Directions for the Repairs, the Owners of the Ship would be chargeable, according to the Mercantile Law; because the Credit is put upon the Ship, as well as upon the Captain, so that the Plaintiff would have had it in his Election to have brought his Action

againſt either of them. But here, they ſaid, the Credit is upon the Captain only, and not upon the Ship; and therefore whatever Inſufficiency the Captain lies under, it muſt be reckoned the Party's Folly for contracting with him; and conſequently his being an Infant in this Caſe can make no Difference. They ſaid the preſent Caſe was like that of a Woman's coming into a Shop to buy Goods, and the Owner's not being willing to truſt her, becauſe ſhe is under Coverture; a third Perſon comes by and undertakes the Payment. They thought it clear, that the Owner cannot come upon the Huſband for the Payment, for whoſe Benefit the Goods were delivered. The Court ſaid too, that this would have been a different Caſe, if the Captain had firſt given general Directions for the Repairs, and afterwards had undertaken by his Note to pay for them; there indeed the Party may ſtill come upon either; becauſe his having once had a good Cauſe of Action againſt either, cannot be taken away by the one Party's expreſsly ſubjecting himſelf to the Payment. Accordingly the Court refuſed to grant a new Trial.

The King *and* Robinſon.

THE Defendant having been examined upon Interrogatories, the Maſter reported him in Contempt. Upon which Mr. Lee moved, that he might be committed. But upon the Defendant's making an Offer to pay Mr. Chambers ſo much of his Debt as that Execution ought to have ſatisfied, and likewiſe all the Coſts he had been at, the other Side conſented, that he ſhould not be committed. Upon which a Rule was drawn up by Conſent, that he ſhould have his Liberty. Vide ante 58. S. C. Vide poſt S. C.

The King *and* Upton.

IN an Indictment for Uſury upon the Statute of 12 Ann. ſeſſ. 2. cap. 16. ſeveral Exceptions were taken in Arreſt of Judgment. One, that it was laid in the Indictment, that Anna Upton corrupte aggreatum fuit inter prædictam Annam Upton, and another, which was intirely inſenſible. Another, that it is not averred that ever any Money was lent in Purſuance of the Agreement. A third Exception was taken for the want of Addition to the Defendant's Name. And the laſt was, that there was no Venue laid. The Counſel ſaid indeed, that the Pariſh of St. Clement Danes was mentioned in the Clauſe, where the corrupt Agreement was intended to be laid, but as that was an inſenſible Clauſe, whatever is in it, muſt be reckon'd as inſenſible too. But the Court ſaid, that they did not ſee but they might reject the Words Anna Upton, and if ſo, the firſt and laſt Objections were anſwered. To the third they ſaid, it ought to have been taken Advantage of in Abatement. But the ſecond, they thought, there was a good deal of Difficulty to get over; for a corrupt Agreement does not ſeem to be within that Statute, unleſs it is carried into Execution. Upon which the Court was going to put it off to another Day, but Judge Reynolds, reporting that the Cauſe was tried before him, and

What ſhall not be ſaid to be a good Indictment for Uſury.

that he thought the Evidence was but tender, the Court arrested the Judgment. Vide 2 Cro. 210. where there is a much ſtronger Caſe than this. 3 Cro. 20. Sid. 247.

Fuller *and* Barnes.

How far Oyer ſhall not be granted of a Scire facias to aſſign Errors.

MR. Strange moved to have Oyer of a Scire facias. But it appearing that it was taken out to aſſign Errors, the Court ſaid, they do grant this Motion in Scire facias's againſt Bail, and to revive a Judgment, but here they could not do it.

The King *and* ——

AN Information was moved for againſt a Bailiff for replevying Goods, that were ſeiſed upon a Conviction on the Game Act: And the Counſel to ſupport his Motion cited the Caſe of the King and Parſons, which was laſt Term. But the Court ſaid, that in that Caſe the Party, that replevied the Goods, knew of the Conviction; but here it does not appear he did; ſo refuſed the Motion.

Oates *and* Viſcount Say and Seal.

How far a Reverſion ſhall paſs by a Common Recovery.

UPON the Evidence given in a Trial at Bar in Ejectment, the Caſe appeared to be, That William Lord Twiſelden, Viſcount Say and Seal, was ſeiſed of the Lands in Queſtion in Fee, and had Iſſue James, Nathaniel, and two other Sons. In 1674 he made a Settlement of them to the Uſe of himſelf for Life, with Power of making a Jointure upon any Wife he ſhould afterwards marry, ſo that it ſhould not be to more than the Value of 500 l. Remainder to his Son Nathaniel in Tail, Remainder in the ſame Manner to his two younger Sons, Remainder to John Fines in Tail, whoſe Iſſue the Defendant was. After that he did take to Wife Katharine, and then made an Appointment of theſe Lands to her for Life, as a Security to her of an Annuity of 300 l. to be paid out of the Profits of them, and died. Nathaniel entred with her Conſent, and paid Lady Katharine this Annuity conſtantly, and then ſuffered a Recovery of the Manors of Braughton and Newton, which were ſettled by this Deed to the ſame Uſes as the Lands in Queſtion, and which the Plaintiff contended the Lands in Queſtion were Part of, to the Uſe of himſelf and his Heirs. Nathaniel dies without Iſſue. And now Fines Twiſelden, Leſſor of the Plaintiff, makes his Title to the Lands, as Son and Heir of Cecil, Daughter of Elizabeth, Daughter of James Twiſelden. The Point of Law, that aroſe upon this Caſe was, whether, admitting the Lands in Queſtion to be Part of the reputed Manors of Braughton and Newton, the Remainders in Tail were barred by this Recovery? Upon which the Counſel for the Plaintiff ſaid, that a Manor is a Thing intire, and therefore that a Grant of a Manor will convey all the Intereſts in it, that the Party has a Power to convey. For which Purpoſe they cited Sir Moyle Finche's Caſe, where it is held, that if a Lord grants away one of the Acres of the Demeſne for Life, the Reverſion of it will paſs by a gene-

ral Conveyance of the Manor. They said too, that the Case of Thynn and Thynn, 1 Sid. 190. was a stronger Case than this; for there two Acres of Pasture had been leased out and enjoyed with a Manor only from the Time of Edward VI. and yet the Court was of Opinion, that they pass'd by a Grant of the Manor cum pertinentiis. Now they said, that the present Conveyance being by Way of a Common Recovery could make no Difference; for a Recovery is now become a common Assurance. And to this Purpose the Case of Walter and Jackson, 2 Roll 121. was applied; where it is held, that a Recovery of a Manor will pass the Reversion expectant upon one Acre in it. But the whole Court delivered their Opinions, that this Case differed from that of Walter and Jackson, which the other Side chiefly relied upon; for there they said, he that had the Reversion was Party to the Recovery, and consequently was estopped to say, he was not Tenant of the Freehold; but here, the Remaindermen expectant upon the Estate in Tail are not Parties to it, and consequently may set forth the whole Truth. They said then, that the present Question was the very Case with that of Blundel and Baugh, where it is held a Fine levied by Mortgagor does not devest the Estate of Mortgagee. So in our Case Nathaniel was Tenant at Will only, of this Part of the Lands, the legal Estate of the Freehold was in Lady Katharine, and consequently the Recovery void as to the Defendant. If indeed a Feoffment had been first made, they did admit it would have been different. But the true and proper Way in this Case would have been to have got the Tenant of the Freehold to have made a Surrender. Thus the Matter stood in Point of Law. And as to the Fact, the Counsel first produced attested Copies of Fines and Recoveries, and antient Deeds, to shew that the Manors of Braughton and Newton were Manors in Reputation; though they could give no Proof of their being so in Reality; and for Evidence that these Lands were Parcel of them, they produced two Witnesses, who swore, that they were always reckoned so, and the other Side produced no Evidence to the contrary. The Case being thus, notwithstanding the Court delivered their Opinions as is above-mentioned, the Counsel for the Plaintiff desired they might have a Special Verdict found, in Case the Jury should be with them as to the Point of Fact. Upon which Minutes were drawn up accordingly; the Court directing the Jury to give their Verdict meerly upon this one Point of Fact, whether the Lands in Question were reputed Parcel of the reputed Manors of Braughton and Newton? But the Jury bringing in their Verdict, that they were not, there was an End put to the Matter. Note; the Court said, they were of this Opinion as to the Point of Law, for the Reason that I have mentioned. But yet Mr. Fazakerly cited the Case of Johnson and the Earl of Derby, which he had got the Special Verdict of in his Hand, and he said was directly with the Defendant, even admitting the Manors in the present Case to have been real ones. There the Manors of Newpark and Newbery were always reputed Parcel of the Manor of Latham. An Estate for Life had been granted of these two Manors, and then a Recovery was suffered

The Construction of the Grant of a Manor.

ſuffered of the Manor of Latham, and it was determined the Reverſion of the other Two did not paſs.

Lewis *and* Baker.

How far the Courts of Law will not make a Rule for the Inſpection of Books.

MR. Abney moved to have Inſpection of the Publick Books, belonging to the Vicar and Church-wardens of St. Sepulchre's, the Queſtion being upon a Demiſe under that Corporation, which was diſputed in an Ejectment. And to ſupport his Motion, he ſaid, that the Court had made the like Rule in the Caſe of a Clerk to a Dean and Chapter, where his Office was in Diſpute; which was a Matter of as little Conſequence to the Publick as this. But the Court ſaid, that was a publick Office; but this is only a Matter of a private Right; ſo refuſed the Motion.

Forteſcue Aland *and* Maſon.

Vide ante 5.

A Writ of Error was brought by the Plaintiff as Remainderman expectant upon an Eſtate-tail in Ireland, to reverſe a Recovery ſuffered of theſe Lands in the Common Pleas in Ireland, on which Recovery a Writ of Error was brought in the King's Bench there; but upon one of the Defendants in Error pleading his Infancy, Judgment was given quod loquela remaneat. And now Mr. Strange took ſeveral Exceptions to the Allowance of this Plea. And firſt he ſaid, that the Infant was in by Deſcent, and therefore he could not plead it. So is it held in 1 Roll. Abr. pl. 33. Another was, that the Defendant who pleads this does not ſhew himſelf to be Ter-tenant; and indeed the contrary appears by a Return made to the Scire facias againſt the Ter-tenants. But beſides, he ſaid, that which was aſſign'd for Error was Error in Law; and therefore he could not plead his Infancy; for Matters of Law are left to the Court to judge of, and therefore they will take Care, that the Infant ſhall not be prejudiced. And this Diſtinction between Errors in Law and Errors in Fact is taken by Mr. Juſtice Dodderidge in 3 Bulſt. 139. Farther he ſaid, admitting he might have his Infancy allowed him, yet the Plea is wrong; becauſe it is pleaded after an Imparlance; which being a dilatory Plea is therefore improper. Another Exception to the Manner of Pleading this was, that he has not ſaid, what Age he was of; and that is neceſſary in order that the Court may award a Reſummons after he comes of full Age. So is it pleaded too in Coke's Entries 156. Mr. Strange excepted too to the Form of the Judgment, its being quod loquela remaneat generally as to all the Defendants, whereas it ſhould have been only as to the Infant. He then took ſeveral Exceptions to the Recovery itſelf. One that the Writ of Entry was for ducentum acras boſci & ſubboſci; which is uncertain. To this Purpoſe the Caſe in 1 Roll 779. was cited, where a Recovery of two Acres Terræ & Paſturæ was held to be bad. Another, that the Writ of Entry was brought for tria Caſtria, whereas it ſhould have been Caſtra. And he ſaid, if the Judgment is in theſe Reſpects bad, it cannot be affirmed for the other. So is Cro. Car. 471. The laſt Error aſ-

ſigned was, that there are two Tenants in this Recovery, who vouch Jonathan Aland, and he enters into Warranty, but only ſays, & ei warrantiſat; which is uncertain, which of them he warrants to, and yet the Judgment is for both of them to recover over againſt him. But Mr. Bootle anſwered on the other Side, that there was a Variance between the Writ of Error and the Record brought up; the Writ of Error being of a Recovery ſuffered by Jonathan Maſon Tenant for Life, whereas the Record brought up is of a Recovery ſuffered by Jonathan Maſon, Tenant in Tail, ſo that there was no Occaſion now to give an Anſwer to the Exceptions. But the Court ſaid, they could not indeed go on upon the Writ of Error, till it was amended; becauſe, as it now ſtands, there is a Variance; but yet it was clearly only a Miſtake, becauſe if he was only Tenant for Life, the Plaintiff might certainly enter. So ordered it to ſtand over. Vide poſt S. C.

Garner *and* Lanſon.

How far the Court will grant an Attachment againſt an Attorney.

AFFIDAVIT was made, that the Defendant gave the Plaintiff a Warrant of Attorney to confeſs a Judgment. The Plaintiff gave his Attorney a Guinea for drawing it, and two Guineas for entring it up. Notwithſtanding this the Attorney took no Care to do it, and the Defendant has been now dead near a Twelvemonth. Upon which the Court made a Rule to ſhew Cauſe, why an Attachment ſhould not go againſt him.

The King *and* Woodman and others.

How far the Court will not grant an Information in Nature of a Quo Warranto in order to try an Election, by Reaſon of the Length of the Time.

ON Rule to ſhew Cauſe, why an Information in the Nature of a Quo Warranto ſhould not go againſt Woodman for exerciſing the Office of Bailiff of the Borough of Andover, and againſt three other Defendants for taking upon them the Offices of approved Men in this Town, not being Inhabitants at the Time they were choſen Burgeſſes, the Counſel ſaid, that the Affidavits, on which the Rule was made were not certain enough, they only ſpeaking in general, that they were not Inhabitants of this Borough, without ſaying of what other Place they were Inhabitants. But beſides, they ſaid, they had Affidavits directly ſhewing the contrary, not in a general and inſufficient Manner, but by particular and poſitive Evidence. And the Attorney General ſaid, that if ſuch Evidence as this would not prevail, he did not ſee, to what Purpoſe it was to make a Rule to ſhew Cauſe in theſe Caſes, and why an Information cannot go directly. But the Court ſaid, that the Intent of theſe Rules is to give the Party an Opportunity of Diſcovering to the Court the Evaſiveneſs of the Plaintiff's Charge; and not by poſitive Words to deny it, which is the preſent Caſe. Upon which the Counſel ſaid, that they had ſomething farther to offer, and that was, that theſe three Defendants had continued in the Exerciſe of their Offices for five or ſix Years, and therefore they hoped, they ſhould not now be diſturbed in the quiet Poſſeſſion of them. To this the Court obſerved, that if it was a ſmall Slip only in their Elections, they would not ſuffer them to be moleſt-

ed after ſo long an Enjoyment; but that which is offered againſt theſe three Defendants goes to the very Merit of their Right; and they knew no Time which would bind the King in ſuch Caſes from calling their Elections in Queſtion. This, they ſaid, was the eſtabliſhed Diſtinction; and accordingly granted the Information againſt theſe three Defendants, and Woodman too of Conſequence, whoſe Election muſt fall of Neceſſity with the others. The Court made a Diſtinction too between theſe Informations moved for againſt the Parties themſelves, who have continued in theſe Offices ſo long, and Informations moved for againſt Strangers; for in them, they admitted, ſuch Elections as theſe cannot be controverted.

The King *and* Johnſon.

Videante 79, 90, 91. S. C.

THE Defendant having withdrawn his Plea, the Attorney General demanded an Award of Execution againſt him; upon which he pleaded the ſame Matter, ore tenus, which he had before delivered in Writing. Upon that the Attorney replied, that he was within the Kingdom at the Time of the Outlawry pronounced, and traverſed his being out of the Realm. Iſſue being joined upon this Point, the Defendant was immediately tried upon it and acquitted. Then the Attorney General ſaid, that there was no Reaſon for any Judgment to be given upon this Outlawry; and the Court was of the ſame Opinion, becauſe when he has proved, that he was out of the Realm, the Statute ſays the Outlawry ſhall be void. Upon which the Defendant was arraigned upon his Indictment; and a Trial ordered to be at the Bar next Term.

Vide poſt. S. C.

Blinkinſop *and* Eyles.

What ſhall be a good Judgment given on a Plaint in an inferior Court.

THIS was a Writ of Error upon a Judgment given in the Court of N. in the County of York. The Record ſet forth, that a Plaint was levied in a Plea of Treſpaſs, whereon Proceſs was prayed, and the Defendants brought into Cuſtody. On which the Plaintiff declared againſt them for taking a Grate, and breaking his Shop. Upon this there was an Imparlance; the Defendant pleaded Not guilty, and Judgment was given againſt him. Mr. Filmer took ſeveral Exceptions to the Judgment. Firſt he ſaid, Lord Burlington was Steward of this Court, and it is ſaid to be held before Thoma Fletcher ſubſeneſchallo hujus Curiæ ſecundum conſuetudinem; but it does not appear, that he was ever appointed by Deed. Then, he ſaid, the Plaint was too general; for it is only de placito Tranſgreſſionis; without ſaying what Sort of Treſpaſs. And a Caſe to this Purpoſe is in Style 86. Hales and More; where de placito debiti was held ill; becauſe it was not laid in what Sum the Action was. Another Exception he took to the Proceſs; for the Defendants were taken up by a Capias, whereas an Attachment ought firſt of all to have iſſued, as it is in Treſpaſs; and a Summons, if it had been in Debt. A fourth was to the Venire; that the Precept was directed to a Bailiff, to order him to impanel a Jury of twelve Men, per quos veritas melius ſcire

poſſit; whereas it ought to have been Sciri. To this were cited the Caſes of 1 Roll. Abr. 800. Lutwyche 957. Skinner and Newton, Trin. 9 Ann. A Fifth was, that it was ſaid of the Jury, qui ad veritatem dicendam per eandem Curiam electi, triati & jurati; whereas they ought to have been tried by Perſons appointed by the Court, and not by the Court itſelf. To this Purpoſe the ſame Caſe in Lutwyche was applied. The laſt was to the Concluſion of the Judgment; for its being ſaid, that ſo much was given him for Coſts and Damages, but not circa ſectam ſuam in hac parte appoſit'. To this was cited the Caſe in Style 164. And that was upon an Exception after a Verdict. But the Court was of Opinion, that none of theſe Exceptions were fatal. For to the firſt they ſaid, this is only in the Stile of the Court, and as it is ſaid to be ſecundum conſuetudinem, it is therefore good enough. To the ſecond, they did not think the Caſe in Style to be Law; and it is only an Opinion of one Judge; and therefore it did not warrant the Exception. They thought indeed, that the next had more Weight in it; and there are Opinions in the old Books to warrant it; but it appears by the Record, that he appeared and pleaded over, without taking Advantage of the Illegality of the Proceſs; and the Law is now ſettled upon that Diſtinction, that he may take Advantage of it before he pleads any other Matter, but not afterwards. To the fourth, they ſaid, that they were of Opinion it would have been ill, if the Record it ſelf had been as it was ſtated by the Counſel; but it appeared by the Roll to be right. They thought the Fifth might be got over reddendo ſingula ſingulis. And to the laſt, Judge Reynolds obſerved, that the Jury gave the Damages right, for they have given them circa ſectam in hac parte appoſit'; and the Judgment is for ſo much by Way of Incrementum pro miſis & cuſtagiis prædictis; which refers it very well to the Suit aforeſaid. Accordingly the Court affirmed the Judgment. They ſaid too, that the Statutes of Jeofails extend to theſe inferior Juriſdictions. Lev. 289. 1 Ven. 240.

Palmer *and* Ekyns.

THIS was a Matter, that had been depending ſeveral Terms, and now the Chief Juſtice delivered the Reſolution of the Court upon it. It was an Action of Covenant, that was brought for Rent; the Plaintiff ſets forth his Title to it, that John Palmer was ſeiſed in Fee of the Lands, from which the Rent is due, and by Indenture demiſed them to the Defendant in 1716, for twelve Years, rendring Rent; that the ſaid John being thereupon ſeiſed of the Reverſion granted it to Henry Palmer the Plaintiff and his Heirs; that certain Rent is become due, by Means of which he brings this Action. The Defendant pleads, that true it is, that John Palmer was ſeiſed of theſe Lands in Fee, but that he granted them by Feoffment to one Brag in 1706. To which the Plaintiff demurs generally. The Chief Juſtice ſaid, that if the Defendant had pleaded directly, that the Leſſor Nil habuit in Tenementis, the Plea would certainly have been bad, as it is held in Salk. 277. Now the preſent Plea is nothing but a ſpecial Nil habuit in Tenementis; becauſe by the Rules

What ſhall be ſaid to be a ſpecial Plea of Nil habuit in Tenementis.

Rules of Law an Eſtate by Feoffment once veſted in a Perſon muſt be intended to continue in him till the contrary appears; and therefore it is clear the Leſſor himſelf might have taken Advantage of this Plea upon a general Demurrer. The Queſtion then is, whether the Leſſor's Aſſignee can do it? To this, the Chief Juſtice ſaid, that all Eſtoppels annexed to the Intereſt of Land go with the Land, and therefore as the Plaintiff has the Land, he muſt have all Benefit belonging to it. And this Caſe, he ſaid, he thought was diſtinguiſhable from that in Cro. Eliz. 436. which the other Side principally relied on. He ſaid too, that Eſtoppels were of that Nature, that they bind the Court and Jury as well as the Party himſelf, wherever they are relied on; but yet the Party may waive the Benefit of them, and then the Court and Jury are left at large. As if a Defendant ſhould plead Nil habuit in Tenementis, and the Plaintiff ſhould join Iſſue upon it, the Court and Jury are not tied up to the Eſtoppel, but may relieve the Party according as the Truth of the Caſe requires. Accordingly Judgment was given for the Plaintiff. 3 Cro. 141.

Jones *and* Maſon.

What ſhall be ſaid to be a good Declaration by an Aſſignee of a Bail-Bond.

IN an Action upon a Bail-Bond, Demurrer was to the Declaration. The Exception was taken to it, for that it was brought by an Aſſignee, and it does not appear, that he has brought himſelf within the Act for the Amendment of the Law, which allows of ſuch Aſſignments. For the Statute ſays, that the Aſſignment of every Bail-Bond ſhall be ſtamped, before any Action ſhall be brought upon it; and it does not appear by the Declaration, that ever it was ſtamped. The Counſel admitted, that if the Statute had required this in a diſtinct Proviſo from the Body of the Act, it ought to have been ſhewn on the other Side, that the Aſſignment was not ſtamped; but here it is neceſſary for the Plaintiff to ſhew that it was ſtamped, becauſe the Statute requires this in the very Body of the Act, and makes it to be one of the Terms of his Taking the Benefit of it. But the Court ſaid, that theſe Statutes are upon the Roll in one intire Clauſe, ſo that there could be no Diſtinction between its being in a diſtinct Clauſe and not. They ſaid beſides, if they were to allow of this Exception, they might reverſe all the Judgments that have been upon this Statute; accordingly gave Judgment for the Plaintiff.

Hornby *and* Cornſworth.

How far the Statute of Ed. 6 c. . to prevent the Buying and Selling of Offices is only a private Law.

IN Debt upon Bond, the Plaintiff ſet forth the Condition to have been for the Performance of ſeveral Things. The Defendant ſhewed a Performance of all but one, which was omitted. On which there was a ſpecial Demurrer. But however Serjeant Hawkins ſaid, that the Declaration itſelf was bad, for one of the Things to be performed was, to pay the Plaintiff 5 l. yearly for executing for him the Office of Bailiff in the Duchy of Lancaſter; and ſuch a Bond is void by the Statute of 5 & 6 Ed. 6. cap. 16. And this the Serjeant ſaid was a publick Statute, becauſe it related to all Offices in general. But the Court

ſaid, there was an Exception of Offices, that are in Fee and expreſſly within the Statute, and therefore you ought to have ſhewn, that you were not one of the Perſons excepted; and if you had done that, Judge Reynolds ſaid, the Court would have been bound to have taken Notice of your Caſe. However it ſtood over. Vide poſt S. C.

Thomas and his Wife *againſt* ——

A Motion was made, that the Court would inſpect a Mayhem and increaſe the Damages, that have been given upon a Writ of Enquiry. The Court ſaid, they may do this in Battery as well as Mayhem. But here it appeared only that a Woman had received a violent Blow, which had broke the Griſtle of her Noſe; and this had affected her Voice ſo, that ſhe in a Manner had loſt her Speech, ſo that ſhe could not follow the Buſineſs ſhe had before ſupported herſelf by of crying Things about the Streets. For which Reaſon they had nothing to inſpect in this Caſe, and therefore they ſaid, they could not do any Thing in it. Sid. 108. 1 Ven. 327. Sid. 433. How far Damages may be increaſed by the Court upon an Inſpection.

The King *and* Steers.

MOTION was made for a Certiorari to remove up an Indictment from the Quarter-Seſſions. No Judgment had been given; becauſe at the Time the Indictment was trying, a Certiorari came down from the Court of Chancery returnable here. That Certiorari, the Court ſaid, was void. But however the Counſel ſaid, the Juſtices below were afraid to go on; which was the Reaſon, why he made this Application to the Court, that they would be pleaſed to give the Judgment, as a Verdict had been had already. But the Court ſaid, this was an Indictment for a Riot, where the Fine is Diſcretionary; and therefore they could not do it. Indeed where the Law appoints a certain Judgment, as in Felony, &c. there they ſaid they could do it. But then the Counſel prayed a Certiorari, that he might take an Exception in Arreſt of Judgment, for there being but two Perſons only found guilty of the Riot, whereas there ought to have been three at leaſt. The Court ſaid, where there were any general Words in Indictments to charge other Perſons unknown for joining with one or two particular Perſons in ſuch Offence, that would make the Indictment good enough. Judge Reynolds cited a Caſe, where an Indictment charged one Man with being guilty of a Riot cum centum ignotis; and that was held good. How far a Certiorari cannot iſſue out of Chancery to remove an Indictment.

When an Indictment is removed up by Certiorari into the King's Bench how far that Court cannot ſet the Judgment upon it.

Moxam *againſt* Penny and Downs, Church-wardens of the Pariſh of St. Bennet's in Glaſſenburgh.

How far a Perſon may be rated to the Repairs of a Church according to his Stock in Trade.

A Prohibition was moved for to ſtop the Defendants ſuing in the Court of the Vicar General of the Dioceſe of Bath and Wells. The Defendants libelled there upon a Cuſtom in their Pariſh, that every Pariſhioner was chargeable with a Rate for the Repairs of the Church, according to his Stock in Trade, per Canones Eccleſiaſticas & Regias Conſtitutiones. They averred that the Plaintiff, who was a Quaker, was a Pariſhioner, and had a Stock in Trade, but that he had refuſed to bear his Proportion in a Church Rate. The Plaintiff denies the Cuſtom in his Plea, and traverſes his being a Pariſhioner. And upon this Suggeſtion the preſent Motion was made. Mr. Draper ſaid, he ſhould ſubmit it, whether any Man's Perſonal Eſtate was chargeable with the Repairs of a Church; the landed Inheritance is adapted to that Purpoſe; but his Perſonal Property is only liable to a Rate, made for the Ornaments of the Church. He ſaid farther, admitting a Man's Perſonal Eſtate was ſubject, he thought it would be pretty hard to carry it ſo far, as to ſay, that his Stock in Trade ſhould, for that would be ſubjecting the Tradeſman to greater Inconveniences, than others in the Pariſh. Beſides, the Statute of 7 & 8 W. & M. 34. has eſtabliſhed a particular Method for the Recovery of Eccleſiaſtical Duties owing from Quakers, by applying to a Temporal Conuſance; and therefore the Biſhop's Court was not a proper Place for the Defendant's Application. Thus much was ſaid upon the Face of the Libel itſelf; but then Mr. Draper obſerved, that this Suit, that is now going on, is ſtill more improper upon the Defendant's Plea; becauſe the Eccleſiaſtical Courts have not Authority to try either of the Points that are denied in it. To this the Court made anſwer, that there are ſome old Opinions in the Books to ſupport the Diſtinction mentioned, but that the Law was now ſettled to the contrary. Then as to the ſecond Obſervation, they ſaid, it has been determined, that a Stock in Trade is liable to a Poors Rate, and they could not diſtinguiſh that from the preſent Caſe. To the third, they ſaid, that Statute gives a new Method of Recovery, but has no Words to take away the old one. And Judge Reynolds cited a Norfolk Caſe, which he was of Counſel in, where the Church-wardens actually applied to two Juſtices to give Relief in a Caſe of this Nature, and they would do nothing in it; upon which they went into the Eccleſiaſtical Court. A Prohibition was moved for in the Common Pleas, and upon Debate refuſed. To the fourth Inducement, they obſerved, that this was not a local Cuſtom, which was libel'd upon; but only a Cuſtom by the Canon Law, which was nothing elſe but the Canon Law itſelf. And to the laſt Argument, they ſaid, that the Eccleſiaſtical Courts had Conuſance of who were Parochial Perſons, as well as what were Parochial Rights, and accordingly were refuſing the Prohibition; but ſeveral Caſes being cited out of the Canon Law, they made a Rule to ſhew Cauſe; and no Body oppoſing it afterwards made it abſolute.

Robot-

Robottom *and* Roe.

ON Rule to ſhew Cauſe, why an Attachment ſhould not go againſt one Clendon, for extorting two Guineas from the Defendant, before he would allow him to be bail'd, his Counſel ſaid, that the Defendant abſconded, and for that Reaſon Clendon was forced to be made a Special Officer in the Writ; and the Fee for that is 10s. of the Money. Beſides he was two Days lying in watch for him, with a couple of Followers, and he thought 1 l. 12 s. little enough for that. The Court ſaid, the Fee of 10s. is certainly due; and the Reſt of the Money is moderate enough; but yet it ought not to have been demanded of the Defendant; ſo granted the Attachment.

How far the Court will grant an Attachment againſt a Bailiff for Extortion.

The King *and* Huſk & al'.

THE Court was moved to quaſh a Writ of Noctanter for breaking down of Hedges, which was founded upon the Statute of 6 Geo. 1. 16. But the Court ſaid it was in the Nature of a Civil Suit; ſo refuſed to do it.

How far the Court will not quaſh a Writ of Noctanter.

Budicome *and* Jones.

MR. Reeves moved to ſet aſide a Writ of Inquiry, which was had in an Action brought againſt the Defendant for lying with the Plaintiff's Wife. One Reaſon was, that the Jury have given but 6 s. 8 d. Damages. Another, that they were intereſted for the Defendant. The Court ſaid, where indeed the Damages are certain upon the Face of the Declaration, they do ſet theſe Writs of Inquiry aſide, if they do not give as much. But in other Caſes they never do it. And as to the Exception about the Jury's being intereſted, the Court ſaid, you ſhould not have gon on then. So they would do nothing in it. 1 Lev. 97. 1 Ven. 65.

How far the Court will not ſet aſide a Writ of Inquiry by reaſon of the Smallneſs of the Damages.

The King *and* Chapman.

MR. Fazacherly moved to diſcharge a Rule for the Inſpection of publick Books, for its being drawn up too general. He ſaid, it was drawn up, that the Defendant ſhould have Inſpection of the Records and publick Books, and that would intitle him to ſee the Charter. The Court ſaid, that they did not know that the Records of the Corporation did include the Charter, for that is a Record of the Court of Chancery. And theſe Rules are always drawn up in this Manner. So they refuſed the Motion.

When a Rule is made to inſpect the Books of a Corporation in what Manner the Rule is to be drawn up.

The King *and* Willis.

How far the Court will direct that a Venire facias de novo ſhall be awarded.

HERE were two Indictments. But by Miſtake the Panel of the Jury, that were to try Bromley, was return'd upon Willis's Diſtringas; and the Panel of the Jury, that were to try Willis, was returned upon Bromley's Diſtringas. For which Reaſon the Court thought, that both Indictments were tried by Perſons without Authority; accordingly ordered Venire facias's de novo to be awarded. 2 Cro. 396.

The King *and* Mallard.

How far an Indictment is not the proper Remedy to recover a Penalty given to the King by Act of Parliament.

IN Arreſt of Judgment upon an Indictment for burning Brace-Bricks and Stock-Bricks in the ſame Kiln, upon the Statute of 12 Geo. 1. Mr. Reeves ſaid, that there's a particular Method of Proceeding chalk'd out by this Act, which gives the Maſter and Company of Bricklayers a Power of ſetting a Fine of 20 s. for every thouſand Bricks burnt contrary to the Act. So that this preſent Courſe is wrong. The Court did not enter into that Exception, but ſaid, they thought it bad upon another; becauſe an Indictment does not ſeem to be a proper Method to recover a Penalty given to the King by an Act of Parliament. They thought this was proper only for a Proſecution in the Exchequer; ſo arreſted the Judgment. 1 Ven. 63. Sal. 460.

Neve *and* Foſter.

How far the Court will ſtay Proceedings againſt Bail.

THE Plaintiff ſwore that his Debt was 60 l. ſo held the Defendant to Special Bail; and then recovered 79 l. Now the Counſel moved, that upon bringing this Sum of 60 l. into Court with the Intereſt and Coſts, the Proceedings againſt the Bail might be ſtaid, which the Court granted; for they ſaid, that otherwiſe the Intent of the Act would not be obſerv'd; which was to ſecure the Bail. Indeed in the Common Pleas, they ſaid, this Act has not this Effect, becauſe the Bail are bound there in a Sum certain. But however the Court ſaid, you muſt file a common Appearance likewiſe for the Defendant, which they agreed to.

The Inhabitants of St. Michael's Norwich *and* The Inhabitants of St. Matthews in Ipſwich.

How far the Settlements of Children vary with the Settlement of their Parents.

ONE Edmund Williams had gained a Settlement in Shipton-Mallet in Somerſetſhire; from whence he removed to Bruton in Norfolk, and there had Iſſue Edmund the Younger, who lived with his Father there for nineteen Years; Edmund the Younger marries and goes with his Wife to Norwich, and there has ſeveral Children by her. Edmund the Grandfather in the mean Time goes to Ipſwich, and there gains a new Settlement. Upon which two Juſtices make an Order for removing

Edmund the Father, his Wife and Children to the Settlement newly gained by the Grandfather. The Parish of St. Matthew's in Ipswich upon this appealed to the Quarter-Sessions, and the Justices there accordingly made an Order to send them back again. And now Mr. Lee moved to quash this Order of Sessions. For he said, the Settlement of Edmund Williams the Younger, and consequently of his Children, properly followed Edmund Williams the Elder's Settlement; for till they have gained a new Settlement for themselves, they must be upon Edmund the Elder's Settlement. But the Court said, as they were not Part of the Grandfather's Family at the Time he gained this new Settlement, because they had left him, and were upon their own Establishment; consequently no new Settlement of the Grandfather can be any Benefit to them. To this purpose they applied the Case of St. Giles's Reading and the Inhabitants of Eversley Blackwater, Trin. 9 Geo. 1. where it was held, that a Son's serving an Apprenticeship, and by that means gaining a Settlement of his own, intirely discharges the Parish, where the Father's Settlement was before. The Question then is, Where the Settlement must be for the Father and his Children. Ipswich is not, Norwich cannot; Mr. Fazacherly said, Bruton must not; because a Man's Settlement is not to be where he is born, but where his Father's Settlement is at the Time he is born; and therefore Shipton Mallet seems to be the Place, where they ought to be sent. However as this was a Case of some Difficulty, the Court made a Rule to shew Cause.

Vide post S. C.

Crayfoot *and* Crackcraft.

How far an Ejectment will not lie in the Sheriff's Court of London.

MR. Strange moved for a Procedendo to send down an Ejectment into the Sheriff's Court of London, which was removed from thence by a Habeas Corpus cum causa. The Reason he gave was, that this Ejectment was only between nominal Persons, and therefore the Habeas Corpus cum causa would not lie. But Mr. Wynn said, that the Sheriff's Court had no Jurisdiction in Ejectments, as appears by 4 Inst. and for that Reason it was proper to remove it. And as to the Objections made by Mr. Strange, the Court said, it amounted to as much as if he had said, that no Ejectments could be removed from thence at all; accordingly denied the Motion. The true Reason for bringing this Habeas Corpus cum causa, Mr. Wynn said, was, to have the Opinion of this Court upon a Point of Law, whether, if a Mortgagee comes in with other Creditors upon a Commission of Bankrupcy, he shall continue still his Interest in the Mortgaged Premisses; or whether, he does not by such Act waive the Benefit of his Mortgage, and shall be considered only a common Creditor?

Milbourn *and* Stephenſon.

How many Days Notice is requiſite to be given upon a Writ of Inquiry.

MR. Filmer moved to ſet aſide a Writ of Inquiry, which was executed at York, upon account of there not being fourteen Days Notice given; which he ſaid by the Rules of the Court they were intitled to, as the Parties live above forty Miles from London. The ſame he ſaid, was of Notice of Trial. But the Court obſerved, that there is but eight Days Notice requiſite as the Writ was not executed in London or Middleſex.

Tulley *and* Sparks.

Vide ante 81.

THE Defendant's Counſel mov'd to ſet aſide an Execution, by which Part of the Judgment was levied ſince a Writ of Error brought. The Court ſaid, you muſt make out one Fact, that the Allowance of the Writ of Error was before Execution. The Counſel had the Allowance in his Hand, but that he could not do. Upon which he made a farther Motion, that a Rule might be made upon the Plaintiff not to go on with the Execution. But the Court ſaid, they could not make a Rule quia timet; and if the Plaintiff ſhould go on, that Court where you have taken out your Writ of Error will lay him by the Heels, and ſet the Execution aſide.

The King *and* The Sheriff of Leiceſterſhire & al'.

How far the Court will not grant an Attachment againſt a Perſon for replevying Goods which have been ſeiſed upon a Warrant of a Juſtice of Peace.

THIS was an Attachment that was mov'd for againſt the Defendants for replevying three Horſes, which were ſeiſed as forfeited upon a Juſtice's Warrant, they being driven in a Waggon againſt an Act of Parliament. The Act ſays, that there ſhall not be above three Horſes driven in any Waggon, where the Wheels of it are not two Inches and half thick; but here there were ſix Horſes driven in it, where the Wheels of it were not ſo broad. And the Caſe of The King and Birchin was cited by Mr. Abney, which was, where two Perſons were convicted upon the Game Act, and the Juſtices granted their Warrant of Diſtreſs; and yet the Steward of the Liberty replevied the Diſtreſs; and a Rule was made to ſhew Cauſe for an Attachment in that Caſe. He ſaid farther, that if theſe things were allow'd, the Effect of theſe Acts would be rendred to no Purpoſe. The Court ſaid, the Attachment was not granted in the Caſe cited, only a Rule to ſhew Cauſe. And they thought it would be enough to grant an Information; ſo they accordingly made a Rule to ſhew Cauſe.

Vide the next Caſe.

The King *and* The Sheriff of Leiceſterſhire & al'.

Vide the Caſe before.

THIS Matter coming on again upon a Rule to ſhew Cauſe, the Court thought there was enough to excuſe the Sheriff, but granted it againſt Parſons whoſe Horſes were ſeiſed; becauſe he knew that the Juſtice had granted this Warrant; but it did not appear that the Sheriff did.

Term. Hill.

2 Geo. II. 1728.

The King *and* Floyd.

ON Rule to ſhew Cauſe why an Information ſhould not go in this Caſe, the Counſel ſaid, that the Complainants received no real Injury, though they were in ſome Danger of it; and therefore they ought in this Caſe only to have exhibited Articles of the Peace. But the Court ſaid, there is no Occaſion that the Party ſhould receive a bodily Injury; for if a Man ſends a Challenge to another in Writing, they conſtantly grant an Information. Then the Counſel made another Objection, that the whole of the Complainant's Charge was poſitively denied by Affidavits, which the Defendant had to produce. But as to that the Court ſaid, that as this was a Charge of a very outragious Aſſault, it therefore ought to be tried, ſo granted the Information. Ante 77.

The King *and* Farwell.

MR. Wynn moved to diſcharge a Recogniſance, which the Defendant had entred into for the Security of the Peace, becauſe he was now dead. But Mr. Strange objected, that this was no Reaſon for diſcharging it; for if it was not yet broken, the Recogniſance could ſignify nothing. But then he farther ſaid, that it was really broken, and that was a Reaſon, why it ought to ſtand. But the Court ſaid, that the Defendant was a Lunatick, when he entred into the Recogniſance, and was under the ſame Circumſtances when he broke it; and therefore, as now the Peace was out of all Danger of being broke by him, they thought it was hard that the Eſtate in the Heir's Hands ſhould ſuffer; and accordingly diſcharged it. The Sureties too were diſcharged upon the ſame Account.

How far the Court will diſcharge a Security which is entered into for preſerving of the Peace.

The King *and* Johnſon.

MR. Kettelby moved, that the Court would be pleaſed to appoint a Day for the Defendant's being brought up to receive his Trial. But the Court ſaid, that he could not make this Motion as Counſel; for the Treaſon, which the Priſoner was charged with was not within the Statute of 7 Will. 3. cap. 3. Ante 79, 90, 91, 102.

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as the Attainder of it works no Corruption of Blood; and therefore he could not be allowed Counsel within the Benefit of that Act. They observed farther, that this Application could not be made without the Prisoner's being present. Upon which Mr. Kettelby desired, that the Court would grant a Rule to bring him up. But the Attorney General said, that he apprehended, he could only be brought up by Habeas Corpus; but if he had appeared this Term before, he allowed a Rule of Court would be now sufficient. But the Court said, he was committed to Newgate by Rule of Court when he was brought up from thence, and therefore they might now send for him up in that Manner again. So made such a Rule in this Case.

Vide post S. C.

The King *and* Robert Hale.

How far a Person shall be said to be a Principal in Forgery.

ONE William Hale, Brother to the Defendant, was a Man in pretty low Circumstances, and had supported himself for some Time by discounting of other People's Notes, which they used to trust him with. The Defendant had several Times been serviceable to him in this Way. And upon the 21st of May last his Brother came to him to desire him to do him a Piece of Service of this Nature, by drawing a Note, payable to one Mr. Samuel Edwards; and he told him, he did not fear but he could get Mr. Edwards to indorse it. The Defendant accordingly did this; and the Note was for 800 l. which he subjected himself to the Payment of. Afterwards the Brother forged this Indorsement; and the Defendant was privy to it, but he would not discover it. The Defendant was now indicted for this Forgery, and upon these Circumstances the Jury found him guilty. In the Direction which the Court gave to the Jury they told them, that admitting he was privy to it at the first, he was a principal in the Forgery; for in Crimes of this inferior Sort, the Law allows of no Accessaries. Another Point too fell into Debate upon something Mr. Reeves said in Proof of the Defendant's Innocence, that he made himself liable at all Events, and that the Indorsor was chargeable only in Default of the Drawer, if he was insufficient; and therefore it could not be conceived how the Defendant should be guilty of such a Piece of Villany to prejudice a third Person, when he himself was alone immediately liable. But the Court said, that that was a Mistake in Point of Law. Indeed, they said, that upon Trials of this Sort in Actions upon Notes against Indorsors, Evidence is always given, that the Drawer was requested to pay the Money, and that he refused; but never that he was unable. And Judge Reynolds said, in Bills of Exchange that is not necessary.

How far an Indorsor of a Note shall be liable.

The King *and* Chamberlayn.

How far an Information shall be granted against a Man for persuading another from attending as a Witness at a Trial.

ON Rule to shew Cause, why an Information should not go against the Defendant, for persuading a Witness not to attend a Trial; his Counsel said, that the original Cause was not depending in Court, and therefore this Court could not concern themselves in it. They said too, that there are other

Offences as great as this, viz. Perjury, &c. which the Court would not grant an Information for, tho' the Cause should be depending here. But the Court said, that they did not know, but they might grant an Information for Perjury, if the Proceedings were depending here. And they said, it was certain the original Cause was in Court at the Time of this ill Practice, for tho' indeed it was commenced below, yet a Certiorari was issued out to remove it up, and it is a Cause in Court from that very Instant. Accordingly they granted the Information.

N. B. The Cause below was an Indictment of Forgery against one Crooke, and within two Days afterwards another Motion of this Sort was granted in the same Matter.

The King *and* The Bailiffs of Scarborough.

MOTION was made for an Information against the Defendants for a very great Abuse in the Exercise of a Jurisdiction, which they took upon themselves as Justices of Oyer and Terminer, without any Colour of Authority. The Court said, if they have not such an Authority, the proper Remedy is a Quo Warranto; and if they have, it is an Authority of that high Nature, as this Court will not grant an Information for the Abuse of. Salk. 397.

How far the Court will not grant an Information against Persons for exercising a Jurisdiction without an Authority.

The King *and* Clendon.

MR. Kettelby moved, that the Defendant might be discharged out of Custody upon his making a Submission and paying all the Costs he had put the Defendant in the Action to: The other Side opposed it, because he was not yet taken up upon the Attachment. The Court said, it was your own Fault in not taking out the Attachment yet; however they said, they could do nothing in it till he was brought here in Person.

How far a Person must be present in Court at the Time a Motion is made.

The King *and* The Inhabitants of Darlington.

MR. Abney moved to quash a Return to a Certiorari, directed to two Justices of Peace, because it was only made by one. But the Court over-ruled the Exception, because they are judicial Officers. Upon which he took two others, that the Return was in English and likewise upon Parchment, and both those the Court allowed; and made a Rule upon them to make another Return, for this they said was none.

What shall not be said to be a good Return to a Certiorari.

Dunbald *and* Aldworth.

MOTION was made to have Time to plead till the Plaintiff gives Oyer of the Bond, which he declares upon. The Court said, he has declared with a Profert in Cur', so that his Declaration is not compleat without giving Oyer; and therefore this Motion is not necessary, for he cannot go on without it. Indeed in Originals, &c. this Motion is necessary. And therefore they did nothing in it.

How far Oyer is not necessary to be demanded.

Buroughs *and* Willis.

How far Officers of the Court have a Right to lay the Venue in Middlesex.

THE Plaintiff was a Master in Chancery and Barrister at Law, and had laid the Venue of a personal Action in Middlesex. The Defendant moved to change it, but the Court was of Opinion he could not; for they said, Officers that are bound or have Business to attend at Westminster-Hall, have a Right to have the Venue in these personal Actions laid in Middlesex. And to this Purpose the Cases of Knight and Farnely, Salk. 670. and Hicks and Foot, Hill. 9 Geo. 1. in the Common Pleas were applied.

Jones *and* Mason.

How far the Court will direct that different Causes of Action shall be joined in one Action.

THE Plaintiff brought several Actions for different Arrears of Rent upon the same Lease; upon which the Defendant moved, that the Plaintiff might join them in one. Judge Reynolds said, if these were several Actions upon different Notes, he thought the Court would make him join them in one; and the Court did so in the present Case.

Hawkes *and* Tomson.

When an Action of Debt is brought upon a Judgment, how far the Court will stay the Proceedings in it, on Payment of Principal, Interest and Costs.

SErjeant Girdler moved to bring Principal, Interest and Costs, into Court in an Action of Debt upon a Judgment, and the Proceedings may be staid. And he said, he had known this done in Dr. Burgess's Case in my Lord Chief Justice Holt's Time, and several others. The Court said, they had allowed these Motions in an Action of Debt of Rent, and they should go as far in these Cases as the Rules of the Court would any Ways allow them, so made a Rule to shew Cause: And no Cause being shewn, it was afterwards made absolute.

Gilbert *and* Billingsley.

How far the Court will stay the Proceedings in a Scire facias against Bail.

MR. Reeves moved to make a Rule absolute for staying Proceedings against Bail. His first Exception to the Proceedings was, that the Scire facias was served the Day it was returnable. Another was, that the Bail surrendered the Principal before the Return of the Scire facias. A third Exception taken was, for the Writ's not being left in the Office four Days before the Return of it. Mr. Reeves farther said, that the Proceedings were after Notice of the Allowance of a Writ of Error. And the last Exception was, that the Scire facias was directed to the Sheriffs of London, whereas it ought have been directed to the Sheriffs of Middlesex, as the Recognisance was of that County. Mr. Strange was Counsel of the other Side, and first he said, in general, that this Application was too early, because the Bail have yet received no real Injury; and the Complaint is only, because he is afraid there may be Reason for it. But then he went on, and gave an Answer to the Exceptions in Order. And to the first he said, that the Service was regular, and that was determined in the Case of Obrian and Frasier, Mich. 12 Geo. 1.

To the ſecond he obſerved, that the Surrender was at a Judge's Chamber, and not till the Court was up; whereas the Effect of the Writ was determined by the Riſing of the Court, and therefore the Surrender was too late. To the Third he ſaid, that it is true, where the Plaintiff only intends to have two Nihils return'd, the Practice of the Court does require the Writ's being left in the Office four Days in order that the Bail may have reaſonable Notice; but here the Bail are returned warned, and therefore that Circumſtance cannot be neceſſary. Then as to the Objection about the Writ of Error, he ſaid, that the Plaintiff in Error ought to have given Bail to it according to the Statute of 3 Jac. 1. cap. 8. whereas he did not, and therefore the Writ of Error could be no Stop to their Proceedings. And to the laſt he took Notice, that this was a Recognizance entred into at a Judge's Chamber in London, and therefore the Scire facias may be well directed to the Sheriffs there according to the Caſe in Hob. 195. To the two laſt Anſwers Mr. Reeves replied, that as to the Writ of Error, it was not within the Statute; for the Statute ſpeaks only of ſuch Actions of Debt upon Bond, where the Condition is for the Payment of a Sum certain; but the Condition of the Bond in the preſent Caſe is the Performance of Covenants. And as to the Recogniſance he ſaid, there was a Difference between thoſe taken by the Judges of this Court, and thoſe taken by the Judges of the Common Pleas; for here the Practice is, that a Recogniſance taken by a Judge at his Chambers is entered upon the Roll as a Recogniſance taken by the Court; but Recogniſances taken by the Judges of the Common Pleas at their Chambers are entred as Recogniſances taken by them; and therefore in thoſe Caſes, he admitted the Scire facias was to be directed to the Sheriffs of London, but not in the preſent one. And to this Purpoſe he relied upon the Caſe in Salk. 659. The Court then gave their Reaſons to ſhew the other Anſwers were not ſufficient. And as to the general Objection of Mr. Strange they obſerved, that it was the conſtant Rule to allow Bail to complain, as ſoon as there are any irregular Steps taken in the Proceedings. To the firſt Objection they ſaid, it did not ſignify, though the Service was regular; for the ſecond Objection clearly makes the whole bad. And they ſaid it was true, that all the Judges but the Puiſny one left the Court before the Surrender; but they ſaid, that Judge was ſitting at the Time the Bail ſurrendered the Principal at Judge Reynolds's Chambers; and therefore the whole Proceedings were after that irregular. And as to the Third, Judge Page ſaid, he thought there was as much Reaſon for the Scire facias's being left four Days in the Office, where the Party is returned warned, as where two Nihils are returned. And ſo the Court ſtayed the Proceedings.

Note; Mr. Strange made another Obſervation, that the Plaintiff is ſtrictly intitled to proceed againſt the Bail at any Time after a Writ of Error, tho' the Court out of Indulgence indeed ſtays the Proceedings upon the Bail's giving Judgment upon the Scire facias, to ſtand for a Security, that they bring in the Principal within four Days after the Judgment affirmed.

Jones

Jones *and* Maſon.

Vide ante 114. S. C.

SErjeant Baynes came now and informed the Court, that theſe Actions were firſt of all of different Terms; one of Trinity, the other of Michaelmas. The Declaration of Trinity was faulty, and for that there was a Demurrer; and thereupon the Court on Motion gave Leave it ſhould be amended, and then it became a new Declaration and happened to be of the ſame Term with the other. Upon which he moved the Court, that they would not allow of theſe Actions to be joined in one, but upon new Bail being given, equivalent to both the Cauſes of Action. The Court ſaid, this was a reaſonable Propoſition, and muſt be the Practice of the Court in all theſe Applications to join different Cauſes of Action in one; accordingly diſcharged their firſt Rule, unleſs the other Side would conſent to do this on Friday.

Barker *and* Merryfeild.

How far the Court will ſet aſide an Execution in an Ejectment, by Reaſon of a Defect in the Notice annex'd to the Declaration.

MR. Marſh moved to ſet aſide a Judgment and a Writ of Poſſeſſion; becauſe the Notice of the Delivery of the Poſſeſſion, which was annexed to the Bottom of the Declaration, was ſigned by the nominal Plaintiff, and not by the caſual Ejector. And he ſaid the Defendant's Attorney gave the Plaintiff's Notice of this, and took out a Summons before a Judge, notwithſtanding which he proceeded. But the Court (Judge Raymond abſent) were of Opinion it was well enough; becauſe the caſual Ejector is a fictitious Perſon, and the Notice itſelf is the Subſtance. But however, upon Mr. Marſh's ſaying, he believ'd there was a Caſe expreſly of his Side, they gave him Leave to move it again, if he ſhould find it. And upon his informing the Court afterwards, it was that of Holdfaſt and Pedigree, Eaſter 13 Geo. 1. they accordingly ſet the Judgment aſide.

Anonymus.

How far the Court will not grant an Information againſt a Juſtice of Peace, notwithſtanding he has in ſome Meaſure mixed his Authority of a Juſtice with his Buſineſs as an Attorney.

AN Information was moved for againſt one Morgan, a Juſtice of Peace and an Attorney too, for exerciſing his Authority in an illegal Manner, upon a Reference to him of a Civil Right. The Caſe was, that one Sir Charles Floyd had a Mind to make up his Accounts with his Steward, and accordingly directed him to go to Mr. Morgan, and ſettle them before him. Morgan preſently orders him to ſwear to his Accounts, and after that was done, demands of him his Vouchers, and locked them up; then immediately kick's him out of the Houſe, and after ſends for him back again with a Warrant for a Forcible Entry. But however (the Chief Juſtice abſent) the Court ſaid, that they did not ſee, that any of theſe Charges made an Information requiſite. To the Second, Judge Reynolds ſaid, that if this Matter of Account had been depending here, they ſhould

certainly make him deliver the Vouchers up; but as it is, he thought an Application in Chancery was the properest Remedy. To the first too Judge Page made something of the same Observation. If, said he, a Justice of Peace should take an Affidavit of a Witness in a Cause depending here, in order to confront him at the Trial, this Court would certainly take Notice of him in this Way; but as this Case is, he said indeed, it was what the Justice ought not to have done; but yet as it was a Thing that is pretty common, he thought an Application of this Sort was too severe. And Judge Reynolds said, this is something of the same Nature, as if a Justice of Peace should make a Warrant for a Man without an Oath, such a Proceeding would not be within the Bounds of his Authority but yet hardly reprovable in this Way. Then as to the Battery, the Court said, it was one only of the common Sort. And to the last Charge against him, they said, they could not enter into the Reasons for his doing this; for it was a Matter properly within his Authority, and there were no positive Facts laid before them to make them think he had abused it. Accordingly they rejected the Motion.

Grandey *and* Wiltshire.

MR. Gapper moved, that the Master might be directed to tax full Costs in this Case; for he said, this was an Action of Trespass for a very great Detriment and Spoiling of the Plaintiff's Land; and therefore though the Damages given were under 40 s. it was not within the Statute of 22 & 23 Car. 2. 9. Sect. the last. But the Court said, an Asportation was out of that Statute, but not a Spoliation. And Judge Page said, that the Courts have given Discouragement to Suits of this Nature. For upon the Statute of 43 Eliz. 6. if the Judge certifies the Suit to be Vexatious, though the Damages are above 40 s. they will not allow the Party his full Costs. Indeed he said, if the Plaintiff had produced a Certificate from the Judge of the Trespass being wilful and malicious, they would have granted it. This is required by 8 & 9 W. 3. 10.

How far the Plaintiff shall recover no more Costs than Damages by Reason that the Damages are under 40 s.

Bobington *and* Parry.

IN an Action of Trover for several Goods Mr. Agar moved to bring a Laced Head into Court, or else the Money it had been appraised at. But the Court said, they never allow Goods to be brought into Court; and they could not allow of the Motion.

How far Goods cannot be brought into Court in an Action of Trover.

Anonymus.

How far the Ecclesiastical Court has a Right to hold Plea in Matters of Slander.

A Prohibition was prayed to be directed to the Consistory Court of Ely for holding Plea in these Words, you are a Jilt and Strumpet. But the Court said it has been determined, that they may hold Plea for Words of calling a Man a Cuckold; for giving a Man that Name is by Implication calling his Wife a Whore. And in the present Case, they said, the Word Strumpet signifies a Whore and more; so refused the Motion. 2 Lev. 66. 1 Cro. 111. Salk. 207, 552, 692.

Wilson & al' *and* Poulter,

Vide ante 77.

THIS was an Action of Trover brought by the Plaintiff as Assignee of a Commission of Bankrupcy. There were two Counts in the Declaration; one for 1000l. which the Jury gave the Plaintiff a general Verdict upon; the other for 308ol. which the Defendant was charged with receiving from the Bankrupt's Wife. And as to that a Point of Law was reserved upon the Trial for the Opinion of the Court. It was the same that was before stated, and it was only then put off, that a Case might be drawn up in a proper Manner. But before the Court entred into the Question, they seemed to think the Case was stated so, that it would be to no Purpose to enter into it; because the Plaintiff claims as Assignee of an Assignee of the Commission; which he cannot do, because he claims a Chose in Action; and though the Statute of Bankrupcy allow of such an Assignment to one Person, yet they have not alter'd the Law as to any after Assignments. But Mr. Parker informed the Court, that he sat as Commissioner at the Time of this Transaction, and the Case was only stated imperfectly; for he said, the Truth was, that the first Assignment was only for a particular Purpose, that the Goods of the Bankrupt might be secured and got together, and therefore that could be no Hindrance to the general Assignment, which was afterwards, and which the first Assignee and the Commissioners joined in. And upon this the Court ordered the Counsel now to go on to the Question before them. Serjeant Darnel for the Plaintiff said, that he should consider it in two different Lights. The first should be upon a Supposition, that the Defendant knew of the Act of Bankrupcy at the Time he received the Money, and if so, he said, it was pretty clear, that here was a Conversion, which would charge the Defendant, because it was an Intermeddling with the Bankrupt's Goods. Now to support this Supposition, he said, the Evidence upon the Trial was that the Defendant's Brother, the Bankrupt, surrendred himself into the King's Bench upon a Judgment; which was the Act, that made him a Bankrupt; and the Defendant was Security for him, that he should keep the Rules of the Prison; which was the Act, that made him privy to it. And the Conversion, which he is charged with, was a Conversion afterwards. But however the second Light, which he would consider this Matter in, he said should be upon an Admission, that he was

not privy to it. And as to that he said, that this Act of the Wife could prejudice the Assignees no more than it would the Husband; and he said, there were as strong Cases as this at the Common Law to shew the Weakness of the Wife's Authority over the Effects of her Husband. To this purpose a Case in 2 Cro. 2, 617. was cited, and one in last Term, Sater against Goding. There a Feme Covert wanted to borrow a Sum of Money upon her Husband's Plate, who was a Bankrupt, and accordingly carried it to a Friend of hers to take up Money upon it. Her Friend pawn'd it for 50 l. and paid her the Money; yet it was held the Assignees might bring Trover. So in Case a Woman loses Money at Play, the Husband may recover it in this Action. 1 Sid. 422. And the same in that Case is of an Infant, he may bring Trover, though he cannot have an Action for Money received to his Use. To the first of these Points the Chief Justice said, that the Defendant's Privity to the Act of Bankrupcy was by no Means proved at the Trial; for the Surrender is not an Act of Bankrupcy, though an Escape is by 27 Jac. 1. 19. But Judge Reynolds and Probyn said, that if that had been proved, they should have thought this had been a Conversion; for the Money is changed into Things of an intire different Nature from what it was; for Bank and East-India Bonds are a Sort of Property intirely fluctuating, some Time at one Value and some Time at another, but Money is of a settled Nature. So that the Property is intirely altered. And Judge Reynolds said, it was like the Case of a Bankrupt's Servant bringing another a Sum of his Master's Money, and desiring him to buy a House for him. The House is bought accordingly, this is clearly a Conversion, provided he knew of the Bankrupcy, though he gets no Profit by it whatever. And as to the second Point, they thought it would be a hard Case to charge the Defendant with this Money, who acted merely as a Broker. But however they said, be that as it would, the Plaintiffs cannot recover upon the second Count; for it appears by the Case, that they seised Part of the Bonds, and by that they affirmed the Contract in Part, which was an Affirmance of it in the whole; so that they ought to have brought their Action for the other remaining Notes only. Upon which Serjeant Darnel made the Defendant an Offer to try the whole over again, provided the Court would give him Leave to add a new Count, as to these remaining Bonds. But not getting the Consent of the other Side, they said, they could not do it. Upon that he made another Request to the Court, that they would give Leave for a new Trial upon this second Count and not upon the other. But the Court telling him, that was not within their Rules neither, he prayed their Judgment upon the first Count, with Costs, which they immediately gave him.

Note; The Case of Sater and Goding, as it stands, is directly the present Case. But the Court said, that they remembred the Wife's Friend gave his own Note for the Payment of the Money; so that he by that Act made the Goods in a Manner his own Pledge, and therefore that Act was manifestly a Conversion.

Lewis

Lewis *and* Lewis.

The Remedy in Case of Embracery.

THIS was a Writ of Error upon a Judgment in an Action for Embracery given in the Grand Sessions of Anglesey in the Principality of Wales. The Foundation of the Action was the Defendant's tampering with the Jury, to persuade them to give a Verdict for him on Action brought by him against the present Plaintiff for Words; and the Occasion of bringing it was owing to the Plaintiff's not being able to have any other Remedy in Wales. For the Plaintiff had got the Defendant indicted for this in England before, and was found not guilty; so that in any other Indictment, he would plead auterfoits acquit. Serjeant Whitaker said, that this Action was a little hard upon that Account. He observed too, that though a private Remedy should lie for this Offence, yet it was an Offence, so very injurious to the Publick, and of so ill an Example, that at least the King ought to have joined in the Suit with the Party immediately suffering. But he submitted it to the Court, that no private Action would lie, as this Case is. For it does not appear by the Declaration, that any more Damages were by this means given, than what otherwise would have been given. The Chief Justice said, that he thought an express Charge of that Sort would be extraordinary in a Suit of this Nature; for by that Means the Truth of Verdicts would be called in Question in a different Manner from what the Law prescribes. Accordingly the Court seem'd inclinable to reverse the Judgment, though after a Verdict. But it stood over.

Ellison *and* Lynn.

How far the Court will amend a Writ of Error within 5 Geo. 1. 13. without making a Rule to shew Cause.

IN a Writ of Error the general Errors were assign'd, but not verified. Mr. Parker desired therefore that the Judgment might be affirmed. But however, he said, he ought to inform the Court first, that the Plaintiff in Error had made a Variance between the Writ of Error and the Record brought up; and therefore he prayed at first of all it might be amended upon 5 Geo. 1. 13. though before that Statute the Court could have only quashed it. Judge Reynolds made a Doubt, whether they should do it immediately, or whether they ought not rather to make a Rule for doing it, unless Cause. For he said the Record produced, which the Defendant would amend by, is only a Transcript of the Roll below, and therefore possibly the Original Record may be agreeable to the Writ of Error. But however at last the Court all agreed to amend it immediately; for they said, they had done the same in a Case or two before of this Sort; and then affirmed the Judgment.

The King *and* The Inhabitants of Mansfield.

ON Rule to ſhew Cauſe why an Order ſhould not be quaſh'd, the Exceptions to it were, Firſt, That the Order is of the Removal of a Man and his Wife, and it is not ſaid, that any Complaint was of the Officers belonging to the Place from whence the Removal is. To that it was anſwered, that the Fact appears to be contrary. Another, that the Order requires the Pariſh to whom it is directed to receive them or either of them, which it was ſaid, was uncertain; for according as it ſtands there, the receiving one of them only would be ſufficient. But the Court ſaid, that there was Reaſon for penning it in that Manner; for the Deſign was, that the Pariſh ſhould receive one only, if both could not be found to belong to them. A third, that the County is in the Margin only, and not mentioned in the Body of the Order. And this Exception, Mr. Abney ſaid, had been allowed on his Motion in the Caſe of The King and The Inhabitants of Aydelthorp and ſome others. Mr. Strange ſaid, in thoſe Caſes poſſibly there was no Reference to the Margin, as here there is. But the Chief Juſtice ſeemed to think this Exception fatal, and he mentioned the Caſe of The King and Auſtin, in which he thought this had been allowed. Then another Exception was taken, which the whole Court allowed; and that was, that the Statute of 2 H. 5. requires theſe Seſſions to be held at ſtated Times, and the Feaſt of St. Thomas the Martyr is one of them; but it appears that this Seſſions was not held within a Week after that Day; and though it is ſaid per adjournment', it does not appear to be within the Time. Accordingly the Order was going to be quaſhed; but Mr. Abney making a Propoſal, that the whole Merits might be referred to a Judge of Aſſiſe, the Court did nothing in it. Sid. 312. 1 Ven. 116.

What ſhall not be ſaid to be a good Order of Removal.

Smith *and* Lutwiche.

THE Plaintiff declared againſt the Defendant by the Name of Richard Lutwiche. The Defendant pleads that his Name is Lutwiche and not Lutwick. Upon which Mr. Strange moved it might be ſet aſide. Which was done accordingly.

How far the Court will ſet aſide a Plea in Abatement.

Anonymus.

IN an Action by two Partners for Goods ſold and delivered, the Plea in Abatement was, that one of them died pending the Suit. The Court accordingly ſet it aſide; for they ſaid, the Statute of 8 & 9 W. 10. 7. declares that theſe Suits ſhall not abate for ſuch Cauſe; and this is an implicit Diſallowance of ſuch Plea.

How far the Court will ſet aſide a Plea of Abatement.

Dr. Snape *and* The Biſhop of Lincoln.

Vide ante 93. THE Chief Juſtice delivered now the Reſolution of the Court upon this Caſe. He ſaid, the principal Matter they relied upon was the ſame with that in Philips and Berry's Caſe, 4 Mod. that where-ever a general Viſitor is appointed, and his Time for viſiting is preſcribed to particular ſtated Times, the Court will always conſtrue that to be underſtood of his viſiting ex officio, and not to hinder his coming in at other Times upon a private Appeal, unleſs there are direct Negative Words to that Effect. For if it was not for ſuch a Conſtruction, the Body would be left without any Redreſs in the mean Time. He ſaid too, that the Reaſon of that Reſolution warranted them in another they made, that where-ever a Viſitor is appointed only to particular Purpoſes, and his Time of Viſiting confin'd in this Manner, they will always conſtrue it with the Diſtinction before mentioned. He obſerved too, that the Biſhop in the preſent Caſe was general Viſitor; for the Words in the Recital in the Statute of Viſitation make him ſo; and the Concluſion reckons up all the Inſtances, which it can be ſuppoſed there may be occaſion for exerciſing this Authority. But tho' it had not, they were yet of Opinion, a certain Number of particular Inſtances would not have circumſcribed the general Juriſdiction before given. And here he thought a proper Rule might be applied, that where particular Words are in the ſame Sentence, which the general Words are in, they may be conſtrued to abridge the Senſe of them; but where they are in diſtinct Clauſes, the ſecond ſhall only be conſtrued as a looſe Enumeration; and eſpecially too in antient Writings, where perhaps ſo much Accuracy was not obſerved as now there is. Then as to the Negative Words ſo much inſiſted on, they were of Opinion, they did not at all refer to this Right, which is now claimed, as Viſitor; for the Words are quoad alia that what is mentioned as Viſitor; but they thought they might well refer to the general Notion, which was at that Time received, of his viſiting as Ordinary. The Chief Juſtice then gave an Anſwer to ſome of the main Objections. The firſt, he took Notice of, was the Provoſt's being Viſitor himſelf as to ſome particular Things. But that he obſerved could not be; for the Biſhop has undoubtedly a Right of controuling what he has done, when he comes in upon a general Viſitation, and all Viſitors are neceſſarily, in the very Notion of the Words, final Judges. Then as to the Objection about the Oath, he ſaid it was determined that would not bind the Party in Appelford's Caſe, and in Colworth's cited in that of Philips and Berry. But beſides, in the preſent Caſe the Oath is far from being general; for it is, that he will not Appeal, when he ſhall be puniſhed ſecundum Exigentiam Statutorum. However there is one good Effect that this Oath may have, that if the Appeal be found unjuſt, it will be good Cauſe to expel him. For theſe Reaſons, he ſaid, the Court were reſolved, that a Conſultation ſhould be awarded. Upon which Mr. Harding, as Counſel for the Biſhop ſaid, he did not know, but it might be proper

to move for Costs. But the Court observed, that they could not give Costs, but where some Act of Parliament has allowed them. And then Mr. Strange said, that the Statute of King William does give Costs on Demurrer in Prohibition. Upon which the Court told them, that if so, they had a Right to them without making this Application.

Anonymus.

How far a Mandamus cannot be granted for the restoring an Officer.

SErjeant Darnel moved for a Mandamus to be directed to the Mayor and Aldermen of the City of London, to restore one Edmund Turner to the Office of Woodward; because it is an Office in which he had a Freehold. But the Court said, that that Reason would not do, unless the Office was of a Publick Nature. And then an Affidavit was read, which affirmed it to be a publick Office. But the Court said, that would not do neither; for it is necessary, that the Affidavit should set forth some particular Marks to shew it is such an Office. And Judge Reynolds took a Difference between such Offices, which are Parts of the Corporation, and concern the publick Government of the Body, and those that are only Beneficial Offices, belonging to the Corporation. And accordingly they told him, he must move it again.

The King *and* Mouseley and Syms.

How far the Court will grant an Information for a Battery.

ON Rule to shew Cause, why an Information should not go against the Defendants for an inhuman Assault; the Counsel produced Affidavits of the Parties themselves, by which they positively denied, they had any Hand in it; and likewise Affidavits of other indifferent Persons, by which it appeared they could not have committed it in Point of Time and Place. But Judge Reynolds said, that Circumstances of Time and Place are not so very material in Cases of this Nature; for the Injury the Prosecutor received, might very well occasion his being not so exact in these Particulars. And the Court said, the Assault is very outragious; for it is the cutting a Man's Throat, and leaving him for dead, merely out of Malice; and therefore they thought the Rule ought to be absolute, that the Offence may be tried.

The King *and* Johnson.

Vide ante 79, 90, 91, 102, 111.

THE Prisoner was now tried at the Bar upon the Indictment of High Treason. The Charge against him was for filing and washing the current Coin of the Kingdom against the Form of the Statute 5 Eliz. 11. The Evidence of one Kelly was the principal Testimony on which the Counsel for the King relied. And against his Evidence being allowed at all the Prisoner objected, that he was already convicted for uttering false Money, knowing it to be so; which was an Offence so very prejudicial to publick Credit, that his Testimony never ought to be admitted in publick Prosecutions. And his Counsel being admitted to speak to this Point, they said, they

they relied upon the Authority of Co. Lit. 61. But the Court said, the Offences there mentioned are chiefly such as bring Scandal and Contempt upon the Persons, committing them; and the Reason, which that Rule is founded upon, is that quæ sunt minoris Culpæ sunt majoris Infamiæ. But in the present Case, they said, the Judgment is only, that he shall be fined and imprisoned for what he did, and nothing of an infamous Punishment. Upon which the Court allowed of his Testimony; and then he gave full Evidence against the Prisoner. The Attorney General then went on and laid before the Jury several Circumstances in Corroboration of this Witness. And one was, that an Information had been made before a Justice of Peace by this Person of the Prisoner's being guilty of this Crime; and upon that a Warrant was made to seise the Tools and other Instruments, which might be found for this Purpose; Gold-Dust, and a File, he said, were found in his Lodgings; and yet he made a Letter of Attorney to one of the Persons that seised them and to another, to gather in his Effects, by Virtue of which Authority, these very Things were got up again; for if the Justice of Peace, who kept them in his Possession, had not delivered them up, he was threatned to be sued. But the Court said, they could not allow of this to be given in Evidence; unless the Prisoner had given the Attorney particular Directions to take these particular Goods. For they said, in Civil Cases, they do indeed allow of a General Letter of Attorney being good Evidence of the Attorney's acting by Force of it. But in Criminal Cases, this would be a dangerous Proposition; that a Person that receives an Authority from another shall be able to charge the Person criminally, from whom he receives it. The Prisoner then entred upon his Evidence; and what he relied upon was, that the only Witness, in a Manner against him, was a Person of that profligate Character, as he was not to be believed; and that he had declared several Times before a great many Witnesses, that he had nothing of Truth to charge the Prisoner with; but yet that he would do it, because by doing it, he was promised his Liberty. To this the Attorney General, by way of Reply, desired Leave to lay before the Court the Information mentioned before; by which it would appear, how incredible it was, that a Person who had given this Information upon Oath some Time before, should afterwards deny that he knew any Thing of the Matter in the Presence of several indifferent Persons. Judge Page thought that this Evidence was very material and necessary; for the Evidence for the Prisoner could by no Means so effectually be taken off by a direct Negative Oath to the contrary. And he said, if the Case had been, that the Evidence had swore that Kelly own'd this to be a new trump'd up Story about a Month ago, it was evident, the Court would allow of this Information to be given in Evidence, if it could appear by the Date of it to be given a Twelve-Month. But the three other Judges were of a different Opinion; for they said, it was a constant Rule of Evidence in High Treason, never to allow of these Informations to be produced upon the Trial. For as this is a Crime of the highest Nature the Law knows of, it will not allow of

Evidence to be given, that the Party has been accused of this Offence; but requires, that he shall now be accused of it. Accordingly they would not allow of this Matter to be given in Evidence; but yet, they said, the Counsel for the King might call again their Principal Evidence, and examine him to this Point viva voce, whether he did make such a Confession, or not. Upon this whole Matter the Court left the Circumstances to the Consideration of the Jury, and they brought him in Not guilty.

Baldwin *and* Morgan.

How far Costs are allowable or not upon a Scire facias against Bail.

ON Rule to shew Cause, why it should not be referred to the Master, to see how much the Plaintiff had received from the Bail, more than he ought, the Counsel said, that they were willing to refore what they had received upon the Execution more than their due, provided they might be allowed Costs upon the Scire facias against the Bail. And Mr. Strange said, that Costs were in this Case allowable; for there was a much stronger one than this in the late Queen's Time, that of Wale and Josling; where the Court was of Opinion, that upon a Defendant's Pleading a bad Plea in the Common Pleas, and Judgment, given for him, reversed upon that Account; the Bail to the second Action should pay the Costs the Defendant put the Plaintiff to in the first; and otherwise they refused to stay the Proceedings. But the Chief Just. and J. Reynolds said, that they thought it a pretty extraordinary Case. And in the principal Question the whole Court agreed, that no Costs were to be paid upon the Scire facias as this Case is, because the Bail did not appear to it. And this Difference between where they do appear to it, and where not, they said, was warranted by the Statute of 8 & 9 Will. 3. cap. 10. Then another Thing was mentioned by the Counsel, that at least in Equity and good Conscience the Bail ought to pay Costs; and therefore this Court would not indulge them with this summary Method of Proceeding, but Leave them to their Action at Law, without they would make an Allowance for them. But the Court said, that the Bail's having Restitution of the Overplus was what by Law they were intitled to. And they did not know, that in any Case they required Costs to be allowed, but where a Statute has given them. Accordingly upon the Court delivering their Opinion in this Manner, the Plaintiff's Counsel said, they would pay them back the Overplus, without deducting the Costs. Upon this the Rule was not made absolute.

Note; The Court said, they did not know but this Case might have been different, if it had been upon a Recognisance in the Common Pleas, and the Execution had been only for so much as was recovered; there they thought the Court might allow Costs to be given upon the Scire facias in any Case, where they would not make up the Sum recovered more than the Recognisance. Because a Court of Equity would hinder a Plaintiff recovering more than the Judgment; and yet they would certainly allow Costs there. But in the present Case they said Equity would give no Costs.

The King *and* The Mayor, Bailiffs and Commonalty of Exeter.

AFFIDAVITS being now produced, that the Banks of the River were much out of Repair, and that it would be very mischievous if there was not some speedy Relief given, the Court made the Rule absolute.

Anonymus.

How far the Court will grant, or not, an Information for a Cheat.

ONE Cosins had had a Note given him, but it was upon a certain Condition; he brings an Action upon it against the Indorsee; and tears off the Condition. Upon which an Information was moved for against him for this Fraud. And the Court made a Rule to shew Cause.

Goodchild *and* Cayward.

MR. Fazakerly came now to shew Cause, why the Writ of Execution should not be set aside against the Bail. And the Court was of Opinion with him, that the Execution was regular. For they said, it was clear, that Debt would lie upon this Recognisance; and in such Action they did not see, but there must be the same Remedy, as in other Actions of Debt; and consequently if this had been the Case, that Debt had been brought, they could not see, but the Body of the Bail would be liable to Execution. Then they observed, that the taking this immediate Remedy upon the Recognisance can make no Difference. Especially too as the constant Practice has been to allow Executions against the Body upon these Recognisances in Writs of Error, they thought it was pretty clear, that the Execution was right. Upon which Mr. Strange made two other Objections against the Regularity of this Execution. One was that the Judgment against the Principal was above a Twelvemonth before Proceedings against the Bail, and yet it was not revived by any Scire facias. To this the Court answered, that here had been Proceedings against the Principal by Fieri facias's immediately after Judgment, and so it appeared by several of them, that were brought into Court. He then said, that these Fieri facias's might have been taken out not above two or three Days ago; and besides here are no Continuances entred up since the Judgment. Upon which the Court observed, that the Plaintiff might file them when he would; and to the other, the Plaintiff might enter them up whenever he pleased. And this they said, had been allowed even after a Writ of Error brought. The second Objection was, that the Capias against the Bail was marked for 25 l. only, and yet the Plaintiff had levied 29 l. The Court said, that must go before the Master.

Grandey *and* Wiltſhire.

THE Counſel moved this Caſe again, which is before in Page 117. and he ſaid the Count, he relied upon, was that which charges the Defendant with ſpoiling unam ſtruem, Anglice a Hay-rick. Now this does not appear to be annexed to the Freehold, but only a perſonal Chattel, which ſtood upon the Ground, and full Coſts are always allowed in ſuch Caſes. The Court ſeemed to think the Diſtinction was right. But they doubted, whether ſtrues was a proper Latin Word for a Hay-rick; for it ſignifies a Bundle in general, and not a Bundle of Hay; but ſtrues fœni is the proper Expreſſion. Upon this it ſtood over. Vide ante 117.

The King *and* Penſax.

ON Rule to ſhew Cauſe, why an Indictment ſhould not be quaſh'd, two Exceptions were taken to it. One, that it was upon the Stat. of 1 Jac. 1. cap. 17. for making Caps and Hats not having ſerved an Apprenticeſhip; whereas the Statute creates a new Offence, and appoints certain particular Remedies, of which this is not one; and therefore it is not allowable. The other, that the Statute of 21 Jac. 1. cap. 4. requires all Proſecutions upon Penal Statutes to be brought in the true County; whereas this was brought in Middleſex, and the Cauſe of it aroſe in London; and the King's Bench is no more privileged in theſe Caſes, than other Courts. To this Purpoſe the Caſes of the King and Gall, and the King and Hicks, 1 Salk. were relied on. Both theſe Exceptions were allowed by the Court, and ſo the Indictment was quaſhed. What ſhall not be ſaid to be a good Indictment upon 1 Jac. 1. c. 17.

Bret *and* Hillars.

IN a Writ of Error upon a Judgment in the Common Pleas, Exception was taken to the Declaration, for that the Defendant's Name was uſed inſtead of the Plaintiff's in the principal Part of it; for as it ſtands there, the Benefit is laid to be to the Plaintiff, and not the Defendant, and yet that the Defendant promiſed. The Court ſaid, as this is only Robertus inſtead of Rogerus, and it is Right in the other Parts of the Declaration, it is helped by the Statute of 16 & 17 Car. 2. cap. 8. Vide Sid. 49. 6 Mod. 265. 1 Salk. 24. 1 Mod. 42. Salk. 324. N. B. 1. 322. Skin. 591. 2 Cro. 586. How far a Defect in a Declaration ſhall be ſaid to be cured after a Verdict by 16 & 17 Car. 2. cap. 8.

Anonymus.

THE Copy of the Iſſue was left in this Caſe with the Defendant's Wife; and the Plaintiff's Attorney ſigned Judgment, becauſe it was not paid for in Time. The Court ſaid, that this was a Snap; ſo ſet the Judgment aſide. And they ſeemed to think, that they ſhould have done the ſame, if it had been left with How far a Perſon cannot ſign Judgment for not paying for the Copy of the Iſſue.

with the Defendant himself: And in Michaelmas-Term after the Court declared, that a Service upon the Party himself is irregular; but it must be upon his Attorney.

Goodright *and* Hart.

How far in Ejectment 'tis not neceſſary, that Iſſue ſhould be join'd before a Trial at Bar can be moved for.

ON Motion that the Defendants in Ejectment might appear and plead inſtanter; Mr. Fazakerly ſaid, that the Reaſon for making it was, that by this Means they might go to iſſue preſently; and ſo move for a Trial at Bar this Term, in order that it may come on the next. But the Court ſaid, in Ejectments it is never neceſſary, that Iſſue ſhould be joined before a Motion for a Trial at Bar; though in all other Caſes it is.

Hemry *and* Berklet.

What ſhall be a good Declaration upon a promiſſory Note, notwithſtanding the Omiſſion of laying a Venue in ſome Parts of it.

IN Error upon a Judgment in the Court of Litchfield, Mr. Parker took two Exceptions; one was to the firſt Count, for its being upon a promiſſory Note for Value received, and yet no Venue laid where the Value was received; the other was to the ſecond Count, for its being upon a Computaſſet, and yet no Venue laid, where the ſeveral Items of the Account aroſe; whereas, he ſaid, that was neceſſary to be ſet forth, in order that there might be a Conſideration ſhewn for this Action. The firſt Objection was eaſily got over; becauſe it would have been a Variance to have lain the Note in any other Way. And to the other the Court obſerved, that nothing is neceſſary to be ſet forth in a Declaration, but what is the Cauſe of the Action; and the Cauſe of an Action is that which is neceſſary to be produced in Evidence upon a Trial. Now here they ſaid, the Cauſe of Action is the ſtated Account; and that is of itſelf a ſufficient Conſideration to found an Aſſumpſit upon; and the ſeveral Items of it are of no manner of uſe in ſuch Caſe upon this Action. And Judge Reynolds obſerved, that an Account adjuſted does not only carry with it a Conſideration for a new Aſſumpſit, but likewiſe extinguiſhes the Remedy, that lay upon the Account before. Accordingly they affirmed the Judgment. Salk. 208.

Stephens *and* Houghton.

How far an Avowry ſhall be good, which is made upon a Diſtreſs for an Amercement.

IN Replevin the Defendant avowed for a Diſtreſs taken upon an Amercement in a Court-Leet in a Preſentment for making and ſelling Bread, not having ſufficient Weight. Several Exceptions were now taken to the Avowry. Firſt, for that two Courts-Leet were ſet out in the Avowry to be in one Year, and yet another Court was laid to be per Adjournamentum in that Year, whereas but two Courts-Leet only can be in one Year; indeed the Counſel ſaid the Adjournment was laid to be ſecundum conſuetudinem; but that was not full enough. A Second

was, Admitting the first Exception not to be good, that yet the Court by Adjournment must have Relation to the Day on which the first Court was held, whereas one of the Offences for which the Avowry is, is laid to be after the first Court. A third Exception was, that 'tis laid that the Jury set the Amercement, whereas they could only affeer it. A Fourth, that it was only set out, quod præsentatum fuit, that the Plaintiff did the Offence, without averring that he really did it. And to this Purpose Salk. 107. was cited. The last was, that one Distress is taken for three Amercements, whereas the Distresses ought to have been several; for otherwise, if any of the Amercements should not be good, the Plaintiff could not have a Return of any Part of the Distress. To the first of these Exceptions, Mr. Wynn said, that an Adjournment is incident to every Court, and therefore the Setting out the Adjournment in the Manner as is done is well enough. To the others he desired a Day to give an Answer to them, which the Court accordingly allow'd.

Vide post S. C.

Anonymus.

ON Rule to shew Cause, why an Information in the Nature of a Quo Warranto should not go against certain Persons for claiming to be Burgesses of the Borough of Christchurch in the County of Southampton; the Attorney General said, that the Foundation of this Rule was, that they had not received the Sacrament, nor taken the Oaths within the Time limited; whereas he observed, that the Burgesses of this Town were only the Freemen of it; and therefore it cannot be requisite for them to go through these Ceremonies; because the several Statutes that relate to these Matters speak only of Offices of Profit or of Trust. The Court were of the same Opinion, and so discharged the Rule. And Judge Reynolds said, in the Cambridge Case, which he was of Counsel in, it was doubted, whether Common-Council Men were within these Statutes, though at last it was determined that they were.

What are such Persons, that are not bound to qualify within the several Statutes.

Spurling *and* Allen.

A Rule was made upon a Justice of Peace to answer the Matters of an Affidavit, for committing a Prisoner of the King's Bench to the County Gaol. Now his Counsel said, that Complaint was made to the Justice for a Breach of the Peace, and he could not commit him to the King's Bench; and therefore he was obliged to send him to the County-Gaol; and especially too in the present Case, this could not be a Fault in him, because the County-Gaol is within the Rules of the other Prison. But the Court said, that it was true indeed the Justice could not commit the Prisoner to the Marshal; but he might and ought to have charged him in Custody of the Marshal; and this is the common Case in Indictments. They observed too, that though in general a Person in the Rules of the Prison is considered to be within the Prison itself; yet in this Respect he cannot, because the Justice has taken him from

What Prison a Person is to be committed to.

the Cuſtody of the Marſhal, and put him under another; and conſequently he is guilty of an Eſcape. But that the Court ſaid, they had nothing to do with; they were only to conſider, that here was a Wrong done in taking a Perſon out of their Priſon; but yet as it appeared to be only a Miſtake in Judgment in the Juſtice, they would not make the Rule abſolute. However his Counſel conſented to pay the Marſhal the Coſts he was at in getting his Priſoner again, upon the Marſhal's agreeing not to bring an Action of Eſcape againſt him.

The King *and* The Inhabitants of St. Botolph's Aldgate.

What ſhall not be ſaid to be a good Order of Removal.

SErjeant Corbet took two Exceptions to an Order of Removal of ſome Children. One, that their Age was not mention'd. The other, that it was directed to the Overſeers, and not ſaid, to the Overſeers of the Poor. To the Firſt the Court ſaid, that it does not appear, but the Children may have got a new Settlement to themſelves; and this Exception has been often over-ruled. To the other, they ſaid, that there are no other Overſeers, but thoſe of the Poor.

The King *and* The Borough of Plymouth.

Vide ante 81.

ANother Mandamus was now moved for of the ſame Sort with that before; becauſe the Corporation was divided upon the Election they went to in Purſuance of the other Mandamus; ſo that it had no effect. The other Side ſaid, they ſhould make a Return to the firſt within a few Days, and therefore there was no Reaſon for the Court to grant it yet. However they made a Rule to ſhew Cauſe; but they ſaid, they could not grant it immediately, as they do in other Mandamus's; becauſe there muſt be a particular Day put into the Writ to require them to go to an Election on. And afterwards the Court made it abſolute.

The King *and* Roberts.

Vide the Caſe of Davie and Davie, ante 92.

THE Defendant was one of thoſe the Attachment was granted againſt, in the Caſe of Davie and Davie; and being now brought up upon it, he moved to be diſcharged; becauſe the Perſon, who was immediately injured, was dead. But the Court ſaid, the Offence he was charged with, was not a bare Injury to the Party, but a Contempt to the Court; and therefore not like the Caſe of a Perſon bound in Articles of the Peace; for there, when the Perſon, who prayed the Security, is dead, the ultimate Deſign of the Recogniſance is over. Upon which they ordered him to find Sureties or ſtand committed. But upon his offering to go before the Maſter, and the other Side conſenting, he was diſcharged.

Jones *and* Dale and others.

How far a Power ſhall be ſaid to be duly executed, or not.

THIS was an Ejectment. And the Caſe was, that one Charles Morgan was ſeiſed of the Lands in Queſtion in Fee, and levied a Fine of them to the Uſe of himſelf in Tail,

with ſeveral Remainders over, reſerving to himſelf a Power of appointing the Reſidue of the Uſes by Deed or Will, ſo as the ſame ſhould be ſealed and ſubſcribed by him in the Preſence of three Witneſſes. Now the Jury find, that he did make a Deviſe of the Lands by his Will, writ with his own Hand, which was ſealed in the Preſence of three Witneſſes; but then it was not ſubſcribed in their Preſence; but the Deviſor told them he had ſubſcribed the Will himſelf already (which the Jury find he really had) and ſo deſired them to put their Names to it, which they did. Now the Doubt referred to the Court was, whether this was a good Execution of the Power or not. The Court gave no Reſolution in this Caſe; yet all the Judges gave their ſeveral Opinions, that this Power was not well executed. For they ſaid, that the Subſcribing in the Preſence of the Witneſſes ſeemed to be as eſſential to the Execution as the Sealing before them. And Judge Reynolds ſaid, that he could not ſee, how the Deviſor's telling the Witneſſes, that he had ſubſcribed the Will, could be equivalent to his actual ſubſcribing it in their Preſence. Judge Page and Judge Probyn both admitted, that his Writing his Name juſt under the Will, (according to the proper Import of the word Subſcribing) was not neceſſary; for if it had been put at the Top, on the Side, or on the Back, it would have been all the ſame. To this Purpoſe Judge Page cited a Caſe, which he remembered, where a Man was indicted for forging and indorſing a Note; and it was held by all the Judges in Serjeants Inn, that his eraſing a Memorandum which was made in red Letters of Part of the Note paid off, which was at the Bottom of it, though he did not eraſe the Back of it, was ſufficient Evidence to ſupport the Indictment of Forging and Indorſing it. And this was even an Indictment of Felony upon the Statute of 5 Ann. c. 33. Theſe Points ſeemed to be the main ones, that were mentioned in the Argument of this Caſe, and ſo it ſtood over. Vide the next Caſe.

Jones *and* Dale.

MR. Fazakerly was now Counſel for the Plaintiff. He divided his Argument into two Parts; one as to the Power itſelf; the other as to the Execution of it. To the Power, he ſaid, the Words of it were; After the Determination of ſuch Eſtates I give my Lands to ſuch Perſon and Perſons, as I ſhall by any Deed or Deeds, Will or Wills ſealed and ſubſcribed in the Preſence of three Witneſſes declare, limit and appoint. Now he obſerved, that the Intent of the Party was evidently with him; and therefore as the other Side contended for a ſtrict literal Execution of an Authority in order to defeat that Intent; he ſhould contend for a literal Conſtruction of the Authority, in order to ſupport it; eſpecially too as it is the Conſtruction of one over a Perſon's own Eſtate. The Conſtruction he mentioned was by making a Break upon the Word ſubſcribed; and ſo, that the Intent ſhould be, that the Lands ſhould go to ſuch Perſons as he ſhould appoint in the Preſence of three Witneſſes by any Deed or Will ſealed and ſubſcribed. Now he obſerved, that according to this Conſtruction the Power was clearly executed; for Vide the former Caſe.

for though the Will was not ſubſcribed in the ſtrict derivative Senſe of the Word; yet there was a ſufficient Aſſent in Writing given to the Inſtrument, that it ſhould be his Will, by his atteſting it with his own Hand in this Manner, ſealed and delivered as the true Will of Charles Morgan, in the Preſence of us whoſe Names are underwritten. And the Writing of his Name itſelf in the Body of the Will was ſufficient. So is 3 Lev. 1. But however, he ſaid, he would follow the Counſel of the other Side in their own Way, and take the Conſtruction of the Power in the ſame Senſe as they contended for; and yet he hoped he ſhould be able to maintain, that the Power was well purſued. For he took Notice, that ſealed it was even in the Preſence of the Witneſſes; ſubſcribed it was, or what fully amounts to being ſo; and delivered in this Manner before them, as his Laſt Will and Teſtament. In Senſe therefore, he ſaid, the Power was complied with. And that theſe over a Man's own Eſtate need not be ſo according to the Letter of the Words, he cited ſeveral Caſes. Littleton's Rep. 23. A Copyholder ſurrenders to the Uſe of his Will, ſo as it be left in the Hands of one Moſs. The Will was not left in the Hands of Moſs, and yet it was held to be well enough. Moſs indeed was dead at the Time of the Making of the Will; but that he conceived could make no Difference; if, as the other Side contend for, Authorities muſt be taken according to the Words; for he might have Confidence in Moſs, and in no other Perſon, that he would keep his Will ſecurely. A Caſe too in Skinner 427. he relied upon. There a Man made a Settlement of his Lands, reſerving to himſelf a Power of making Leaſes, rendring Rent. A Leaſe was made without any ſuch Render, and yet held good. His laſt Authority upon this Head was out of Raymond 295. A Man ſettled his Lands to particular Uſes, with Power to revoke them by expreſs Words; he deviſes the Lands to other Uſes, and that was held a good Execution of the Power. Theſe Authorities, he ſaid, were a Proof, that, tho' a Perſon does not ſatisfy even the legal Effect of a Power, the Power may in ſome Caſes be well complied with. But in the preſent one the legal Effect is ſatisfied; for a Sealing is in Law a Signing, and a Signing is a Subſcription. Now that a Sealing does in Law amount to this, he relied upon the firſt Caſe in Lev. 3. where Sealing a Deviſe before three Witneſſes is held a Signing it within the Intent of the Statute of Frauds.

Mr. Wills was Counſel for the Defendant. To the firſt Point he argued, that all Inſtruments ought to receive a plain and obvious Conſtruction; and to conſtrue the Will in the preſent Caſe according to this Rule, muſt be to require, that the Witneſſes ſhould ſee it ſubſcribed. He ſaid too, that good Reaſon there might be for a Man's appointing, that an Act of this Sort ſhould be done in ſo ſolemn a Manner; for he might know himſelf to be of a Diſpoſition eaſy to be perſuaded to do Things of a ſudden; and therefore he might prudently put ſuch a Law upon himſelf. To the ſecond Point, he did not much contend, but the Writing of his Name in the Body of the Will might amount to a Subſcription; but yet he ſtrongly

urged, that this Writing ought to have been in the Presence of the Witnesses. For the Court is not to consider, whether the Act was done sufficiently deliberate; but the Circumstances of Deliberation, which the Party himself has fixed on, must be regarded. And here he desired to apply one Rule of Distinction, which might reconcile the Books upon this Subject. Wherever a Power, annexed to an Interest, requires the Execution of it by such a particular Instrument, it may well be executed by another Instrument, having the same Operation in Point of Law; but wherever a Power requires the Execution of it by such and such particular Circumstances, those Circumstances must be literally complied with. And good Reason there may be for this Distinction; for in the one Case the Court may be likely to judge what was the Reason for a Man's Tying himself up to such particular Forms; but the other is liable to great Uncertainties. Upon this Distinction, he said, he allowed the Case in Raymond, cited by the other Side, and he applied several others to prove it. Hob. 312. 10 Rep. 143. But especially that of my Lord Bale and Mountague lately resolved by all the Judges. A Power of Revocation my Lord Bale reserved to himself; but provided, that it should be signed by six Witnesses, three of which should be Peers. He went to Jamaica, where there were no Peers; and there made the Deed of Revocation, and got it signed by some of the principal Men of the Island; and yet it was held, that the Authority was not pursued. And there it was said by the Counsel, that my Lord Bale on Purpose put in this Ceremony, because he knew, he should be a good Deal influenced to revoke it, and yet intended that the Revocation should never take Effect; tho' in Appearance it might seem to the contrary. Then to the last Observation mentioned by the other Side, Mr. Wills answered, that subscribing a Will and sealing a Will were Acts in their Nature intirely different; and therefore the one could be no Satisfaction of the other. Accordingly prayed Judgment for the Defendant. But the Court said, they would take some Time to consider of it. 3 Lev. 87. 2 Ven. 218, 350. Salk. 688. 1 Vern. 83. 2 Vern. 69, 339.

Anonymus.

When a Scire facias is brought upon a Judgment, how far the Court will not give Leave that it shall be amended.

IN a Scire facias on a Judgment it was moved to amend on Payment of Costs, by putting in the Word Bill instead of Original. The Court said, the proper Motion was to quash it, but refused to amend it.

Dale *and* Rusted.

When a Scire facias is brought upon a Judgment, what shall be said to be such an Irregularity in suing it out as to be a Ground for setting it aside.

ON Motion for the Master's Report, of the Irregularity of a Scire facias upon a Judgment, he said the Case was, that an Executrix, who was the Defendant, gave a Letter of Attorney to confess a Judgment to the Plaintiff; this Judgment was accordingly signed, but never entred upon Record; yet afterwards the Defendant pleaded it in Bar of another Action. And now a Scire facias being taken upon it, the Question was, whether it was regular. Mr. Fazakerly objected, that it was; for the Court has a Power to give the Plaintiff Leave to enter

it up nunc pro tunc, and he said, they would do that, because the Defendant has already taken Advantage of it. But the Court observed, that the present Matter before them was only the Irregularity of this Scire facias; and clearly it is so, because there is no Judgment on Record to found it upon. Accordingly the Judgment on the Scire facias was set aside. 5 Mod. 88.

Anonymus.

How far the Court of King's Bench will not grant a Prohibition to the Grand Sessions of Wales.

MR. Draper moved for a Prohibition to stay Proceedings in the Great Sessions of Anglesey in the Principality of Wales, upon an Affidavit, that the Defendant Foulkes had not resided in Wales for these three Years last past above ten Days at a Time, nor in this County above four Days, and yet he was sued there in a Personal Action, but never appeared to it, nor was even so much as summoned. He cited a Case in Comberbatch 468. where, he said, the Court had granted a Motion of this Nature. That was an Action even concerning Land; a Bill was brought for the Discovery of a Deed relating to the Title of it; and yet upon such Affidavit, as in the present Case, the Court granted a Prohibition. But the Court took a Difference between Bills of Equity in those Courts, where the Remedy is only upon the Person, and Suits at Law, where the Remedy is likewise upon a Man's Property; for in the first Case, they did admit, that Prohibitions had gone, and that was the Reason for the Case cited; but never in the other. Then as to the Summons, they said, the Affidavit might well be understood of a personal one; and they knew very well, that the Method of Proceeding in those Courts was only by a general one, by Sticking up a Notice in Writing, at the Time their Courts are opened, of the Names of the Persons whom Suits are commenced against; so that if the Defendant was in Wales at the Time of this Summons so stuck up, the Proceedings were clearly regular. Accordingly they refused the Motion.

The King *and* Robinson.

Vide ante 97.

THE Defendant now informed the Court, that he had paid Mr. Chambers 400 l. by Way of Satisfaction of so much of the Execution as the Goods he rescued was subject to; and therefore he moved that he might have a Rule upon the Sheriff to make him a Bill of Sale of these Goods, upon Payment of the Residue of the Money due on the Appraisement. The Court thought this a reasonable Motion, so made a Rule upon the Sheriff and Mr. Chambers, to shew Cause to morrow, why he should not do it. And then they agreed to it.

Grandey *and* Wiltshire.

Vide ante 127.

MR. Gapper now said, that he had consulted Littleton's Dictionary; and there he found Strues rendred a Bundle or Heap of any Thing, a Bow or Rick of Hay, &c. and therefore as it may be used either in a general or particular Sense, the proper Use of the Anglice in this Case was to determine in which

of the Senſes the Party uſed it. Judge Reynolds ſaid, that this was a proper Rule; but yet in the preſent Caſe the Court agreed, that Strues was of one only Signification, and ſignified properly a Heap in general; and accordingly they arreſted the Judgment. Vide Sid. 60. Lev. 48.

SErjeant Darnel ſhewed now to the Court by Affidavit, that this Office was of a publick Nature, and the Buſineſs of it was to take Care that the Wood and Coal for the Uſe of the City of London be kept according to the proper Aſſiſe of it; and that he is an Officer, who is admitted by the Mayor and Aldermen of the City of London. He cited too a Precedent in which a Mandamus had been granted in a like Caſe, to reſtore a Man to the Office of Maſter-weigher of the King's Beam; and a Caſe allowed in Comberbatch 347. of the Office of Surveyor of the New-River. Upon theſe Precedents the Court put it off again to conſider of it a little longer. Vide Sid. 169. 2 Sid. 112. Vide ante 123.

Short *and* Scurry.

THE Defendant obtained a Rule for ſhewing Cauſe, why an Habere facias poſſeſſionem and a Capias ad Satisfaciendum ſhould not be quaſhed. The Exception to both was, that they were returnable die Martis prox' poſt Octabis Sancti Hillarii, which is out of Term. Another Exception too to the Habere was, that inſtead of the Words Georgius Secundus it was Georgius Rex. Mr. Reeves ſaid as the Gentlemen of the other Side were ſo ſharp in their Exceptions, he ſhould beg Leave to be ſharp in an Exception too; and that was to the Titling of the Affidavits, that they were in a Cauſe between Short and Scurray, whereas the true one was Short and Scurry. The Court allowed this Exception, and ſaid that no Indictment of Perjury could lie upon theſe Affidavits, as they are titled. And they ſaid that eadem ſonantia could not help it in this Caſe; and took a Diſtinction between different Parts of the ſame Record, and Affidavits in a Record; for in the laſt Caſe they will not allow of any Variance or Amendment, as the Puniſhment of ſwearing falſly is ſo ſevere. Accordingly diſcharged the Rule. How far an Affidavit ſhall not be ſaid to be duly titled.

Hick *and* Strong.

ONE Andrews had taken Compaſſion of three Fatherleſs Children, and brought them up for ſeveral Years together, and took Care too of a ſmall Eſtate that fell to them. One of theſe Children prov'd diſſolute, and aſſigned her Intereſt in theſe Lands to a Rat-catcher; who brought an Ejectment in the Common Pleas to recover it. The Court there made a Rule by Conſent, that the Proceedings in the Ejectment ſhould be ſtayed, and that Andrews ſhould retain the Land to his own Benefit, till he had reimburſed himſelf to the Value of 140 l. which he had laid out upon them. Notwithſtanding which this Rat-catcher brought a new Ejectment in this Court; and therefore Andrews moved the Court to ſtay the Proceedings, eſpecially How far the Court cannot ſtay Proceedings in an Ejectment, notwithſtanding ſome Appearance of equitable Circumſtances.

especially too as the Plaintiff was in Prison, and therefore taking an Attachment against him would signify nothing. But Judge Page observed, that if the Plaintiff had entred into any Agreement whatsoever not to commence a Suit here, this Court would not have staid the Proceedings; for they never do it, but where the Consent was made in a Cause here depending. Accordingly the Chief Justice (absent J. Reynolds and J. Probyn) said, that there was much Equity in the Case; but this Court has no Power to do it.

Shergold *and* Bostrick.

The Custom of London relating to Executors.

A Habeas Corpus cum causa was directed to the Mayor and Sheriffs of London. The Return to it was, that there is a Custom in the City, that if any Person in his Life-time be indebted to another Person within the City upon simple Contract, he may bring an Action of Debt against the Executor, and that this was the present Case. A Procedendo was now moved for. But Mr. Agar objected, that the Return was insufficient, both for the Uncertainty of it, and the Unreasonableness of the Custom. To the Uncertainty of it, no Courts are mentioned, where the Action may be brought; and therefore the City Courts have not given themselves a Jurisdiction. And nothing shall be intended to take away the general Relief of the Courts above. To the Unreasonableness of the Custom, he said, in the general Manner as it is returned, it must affect Strangers as well as Citizens; those that have no Benefit from the Body, as well as those that have. And it is not agreeable to Equity, that the Accident of a Contract's being made in a particular Place should subject an Executor to a particular Prejudice. He said too, that this was not the Case of Foreign Attachments; for there one Party must be a Member of the City; and then it is no Hardship, that another's contracting with him should give such other a little Inconvenience. Judge Reynolds and J. Probyn were not in Court, so the Chief Justice said, that it would be proper to move this again, and that Copies of the Return should be delivered to the Judges; but observed, that the Return must not be filed.

Vide post 142.

Wilson *and* Poulter.

Vide ante 77.

Serjeant Darnel came now and complained to the Court, that the Rule was drawn up by Consent, that the Plaintiff should have the 1000l. upon one Part of the Verdict, which must be intended, that he should have the Benefit of it by taking Execution of it presently; and that was the Foundation which made them willing to relinquish the Hopes of Benefit from the other Part of it; notwithstanding this the Defendant has brought a Writ of Error upon this Judgment, to hinder them of the Benefit even of this Part of the Verdict. For this Reason he hoped that the Court would either make the Defendant discontinue his Writ of Error; or else alter the Rule that was made before. But the Court observed, that you were contented to take Judgment upon this Part of the Verdict as it stood,

and were afraid to venture the Chance of losing this, in hopes of gaining the other; because you doubted, whether you could prove an Act of Bankrupcy at all; so that it is clear, the Defendant was under no Terms of being confined not to bring a Writ of Error. But because the Court said, that they thought it was fit and reasonable, that the whole should go through another Examination before the Jury, they made a Rule upon both Parties to attend to Morrow. Vide post 142.

The King *and* The Inhabitants of Barnstable.

How far the Court of King's Bench cannot give Relief in case of an unequal Rate.

SErjeant Chapel a few Days ago applied to the Court for a Mandamus to be directed to the Overseers of the Poor to make a Rate. The Court then ordered him to look for Precedents. And he now came and informed them, that he had found two, where the Court had granted a Mandamus to make an equal Rate. But that the Court refused to do; because they said, if the Rate should be unequal, the proper Remedy would be to appeal; and therefore the granting such a Mandamus as that would be to take from the Court, which ought to receive Appeals, the Effect of Appealing. And this, they said, was refused upon Debate in Dr. Butler's Case, relating to Sturbridge Fair. But they observed, that they might well grant a Mandamus to make a Rate in general; for this Court is the proper Jurisdiction to make Laws be put in Execution; but then, they said, an Affidavit must be produced that a Rate is wanting; and it then being confessed by the Counsel that the Affidavit only swore, that the Rate made was unequal and partial, the Court said, they could do nothing in it.

Anonymus.

How far the Court will not grant an Information in the Nature of a Quo Warranto against Persons for exercising the Power of making Freemen of it.

MR. Wills moved for an Information in the Nature of a Quo Warranto against several Persons for acting as Freemen of the City of Glocester, not residing there at the Time of their Election. The Point on which this Question turned was, whether the Corporation, that is the acting Part of the Body of of this City, can make Honorary Freemen. Now, he observed, that no Corporation can do this, unless they have a Prescription or a Clause in their Charter to support them in it. But in the present Case, though indeed they have sometimes complimented Noblemen and others of the first Distinction with this Privilege, yet that was only a Thing connived at, and can be no Warrant to them in what they have now done, making 119 Strangers Free at one instant. Besides too in this Corporation there are very particular Privileges given to the Freemen, and one above all in being Toll-free throughout the Kingdom; now by the same Way of Reasoning, as they may make 119 Free, they may make every Person in England so, and by this Means take away from the King this Part of the Revenue. But if they should claim any Colour of a Prescription to support them in what they have done from these few and uncommon Instances, the Charter of King Charles the Second which they accepted of, has clearly taken it from them.

by incorporating them by the Name of Cives, Reſidentes & Inhabitantes of this City. But the Court ſaid, that they were of Opinion, that every Corporation may make what Perſons they will Free of it, and this is an Incident belonging to them de jure, unleſs there is a Preſcription or expreſs Words in the Charter to the contrary, reſtraining them in ſome particular Caſes. The Court obſerved farther, that this Complaint was only of the imprudent Exerciſe of a Privilege, and not of the Illegality of it; and therefore this Application was not proper. They ſaid too, that the Charter could not make a Difference; for all Incorporations are in this Manner. Accordingly they refuſed even to make a Rule to ſhew Cauſe.

Anonymus.

Within what Time Officers of Corporations muſt take the Oaths of Allegiance.

MR. Reeves moved for a Mandamus to be directed to the late Mayor and Aldermen of Sudbury to go to the Election of a Mayor, in Purſuance of the Statute of 11 Geo. 1. the late Mayor not having taken the Oaths within three Months according to the Statute of 1 Geo. 1. Mr. Reeves ſaid, the late Mayor did indeed offer to take the Oaths at the Seſſions for the Town holden within that Time, but the Recorder ſhewed ſome Reaſon then that the Seſſions was not held properly, and ſo the Aſſembly was diſſolved. But at a Seſſions held after the three Months he did take them; but that he ſaid was not ſufficient. Accordingly the Court made a Rule to ſhew Cauſe. And Judge Reynolds made an Obſervation upon the different Penning of the Statute of 25 Car. 2. and this of 1 Geo. 1. for the Statute of Charles required indeed the Sacrament to be taken within three Months, but then it allowed the Oaths to be taken at the next Term or Seſſions after the three Months; but the Statute of 1 Geo 1. has taken away that Diſtinction.

The King *and* The Inhabitants of Abbotſlangley.

What ſhall be a good Settlement within 1 Jac. 2. 17.

ON Motion to quaſh an Order of Removal made by two Juſtices and an Order of Seſſions confirming it, the Counſel ſaid, that the Order of Removal was ſtated ſpecially, that one Croſsby took a Houſe and ſerved Pariſh Offices in the Pariſh of Aldenham, between the Statute of 1 Jac. 2. 17. and 3 & 4 W. & M. 11. and that the Juſtices removed him to the Pariſh of Abbotſlangley, being the Place of his former Settlement, adjudging him to have gained no Settlement ſince. The Exception taken to this Order was, that Aldenham was his laſt legal Settlement; for his ſerving Pariſh Offices there was taken upon the Statute of 1 Jac. to be equivalent to a Notice in Writing. To this Purpoſe the Caſe in Carthew 28. was relied on. The Court accordingly made a Rule to ſhew Cauſe.

Vide poſt S. C.

Gutton *and* Hall.

THE Notice of executing a Writ of Inquiry was given generally to be on such a Day, without mentioning the particular Hour. Upon which the Court made a Rule to shew Cause, why it should not be set aside, and staid the Proceedings.

The Notice which is requisite to be given of a Writ of Inquiry.

Anonymus.

THE Notice of signing Judgment for want of a Plea was left with the Defendant's Attorney upon a Sunday, which the Counsel said was irregular; and therefore he moved to set aside the Judgment. But the Court said, that this is not within the Statute of Car. 2. though if it had been upon the late Act of Parliament of Vexatious Arrests, they admitted it would; for then it would have been in the Nature of Process.

How far notice of signing Judgment may be given on a Sunday.

Champion *and* Scot.

UPON the Reference to the Master to see what was due upon a Bond, he reported that the Defendant was bound as Surety for one Lambart in a Bond of 100 l. which Lambart and he joined in; but after that Lambart gave another Bond solely to the same Person as they gave the other to. Lambart paid the Obligee 20 l. and 30 l. and took two Receipts of him in a general Manner only for Money due upon a Bond. Upon this Report the Court were of Opinion, that this Account was too intricate for the Master to look into, because it was not certain enough to which of these Bonds or in what Proportion these Receipts are to be applied. But they thought this Application more proper for Chancery.

What Matters the Courts of Law will not give Relief in, by Reason that they are more proper for Courts of Equity.

Anonymus.

MR. Wynn moved, that the Sheriff might amend his Return to a Distringas; because he had returned less Issues upon this, than upon a former. But the Court said, they could not do it, as the Interest of a third Person was concern'd; but the proper Method, they said, was to make a Rule upon him to return upon another Distringas double the Issues he had returned upon the former. And Judge Page said, in the Exchequer the Sheriff is not chargeable with these Issues, but the Person distrained.

What Issues are proper to be returned upon a Distringas.

Anonymus.

A Rule was moved for to inspect a Gaoler's publick Books. But the Court said, that the Books of a Gaoler are only private Memorandums, and therefore they could not do it. They said too, that a Gaoler is only a Servant to the Sheriff

What shall not be said to be publick Books.

riff, and therefore it was not proper for this Court to interpose in it.

The King *and* The Inhabitants of Benjoe.

Vide ante 91. MR. Lee came now to shew Cause, why the Order should not be quashed. He said, that these Statutes relating to Settlements have always received a benign and liberal Construction. The Statute of 13 & 14 Car. 2. 12. provides, that any Person may be removed from a Parish, he has not resided in for forty Days, unless he has rented there a Tenement of the Yearly Value of 10 l. yet it has been held, that a Person having a Freehold of ever so small a Value there, is within the Equity of that Exception. Upon the Statute of 1 Jac. 2. it has been allowed that Service is equivalent to a Notice. And upon that of 3 & 4 W. 3. a Hiring for a Year, and a Service for two half Years, has been held within the Reason of that Act. The Statute too relating to Certificate Persons says, that no Persons shall be obliged to have that Testimonial, who have taken a Tenement of 10 l. per Annum, or executed Offices within the Parish; yet a Surrender of a Copyhold to a Man in the Right of his Wife, has been thought sufficient. So likewise the Title to these Freehold or Copyhold Lands has been no more inquired into, than the Right which a Man has held them in; and therefore where a Man wrongfully built a Tenement upon the Lord's Waste, a Descent of that Tenement has been thought a good Qualification; because there's no Way of recovering that, but in a solemn Action. But besides this general Argument to induce the Court to this Opinion, he said, he thought there was something of a closer Proof of it; and that is, that before the Statute of 9 Geo. 1. it is clear, that the very building a House upon his own Land would have gained him a Settlement as well as the Purchase of the Land it self. Now he said, that this Act can, at the most, only take off the Effect of the Purchase, but the Building of the House must have its old Effect remaining. The Court seemed to think, that this Case deserved Consideration; so ordered it to be spoke to again the next Term.

The King *and* Cosins.

Vide ante 126. ON Rule to shew Cause, why an Information should not be granted in this Case, Mr. Fazacherly said, that he believed it was pretty uncommon to grant an Information, when a Civil Right is depending; but besides he observed, that he had Affidavits to produce by the Witnesses, that subscribed this Note, that there was no Condition annexed to it at the Time they signed their Names; and that it was by no Means probable, that a Condition should be joined to it afterwards; and likewise he said, he had an Affidavit of the Party himself which directly denied the Fact; so that there was only one Oath against another. But the Court said, if this Action had been brought against the Person, that gave the Note, they should have thought clearly an In-

Information ought not to go, because he has another way of saving himself from Prejudice, by denying it now to be his Note, and joining Issue upon it; but they did not see the Indorser had any such Relief; because it is not pretended but it was a general Note at the Time he signed it. Accordingly the Court made the Rule absolute.

Goodright *and* Wood.

ON a Motion for a Trial at Bar, the Court laid down two Rules, that they never grant these Trials merely for the Consequence of the Cause, though it be of ever so great a Value; nor ever for the Length of Examination, where 'tis of a very small Value; and in Ejectments the Rule has been not to allow them but where the Yearly Value of the Land in Question is 100 l. The Court said likewise that a general Swearing of the Length of a Cause, though there is Value too, will not be sufficient, unless there is a probable Foundation laid for them to believe it.

In what Cases Trials at Bar are proper to be directed.

Anonymus.

ON Rule to shew Cause, why a Rule should not be made upon the Gaoler of the Marshalsea to return a Habeas Corpus, his Counsel said, that the Prisoner was charged in an Action there under the Value of 5 l. and therefore by the Statute of 21 Jac. 1. 23. he is not removable up to the Courts at Westminster. But the Court said, that that Statute was only to be understood, that this Court shall not have Conusance in such Causes, but yet they would always require a Return; otherwise by setting up such a sham Action, their Jurisdiction might in a Manner be defeated. Accordingly they made the Rule absolute.

How far the Court will require a Return to be made to a Habeas Corpus.

Steers *and* Mitchel.

ONE of the Bail were taken in Execution, and now Execution was had against one of the Defendants; upon which Mr. Strange moved, that he might be discharged. The Court said, there was a very good Remedy for him by Audita Querela; and therefore they would not grant a Supersedeas, but upon his paying half the Money due upon the Judgment, which, as the Execution was taken only against him and another, he ought to do, but that being not complied with, the Court said, they would not interpose.

How far the Court will leave the Party to take his Remedy by Audita Querela.

Edmund *and* Thomas.

THE Defendant pleaded his Privilege, that he was an entering Clerk of Sir George Cooke, and made Affidavit, answer'd to his Plea, that he sollicited Causes in the Common Pleas. But on Rule to shew Cause, the Court set the Plea aside; for they said, he ought to have sworn, that he entred Causes in the Office, and so shewn, that he did Business in

How far a Plea of Privilege shall not be said to be well verified by Affidavit.

the Capacity of an Entring Clerk; but the Swearing that he ſollicits Buſineſs in that Court is a Thing of a different Nature.

Wilſon *and* Poulter.

Vide ante 136. THE Defendant would not conſent to any Thing, but inſiſted upon the Rule as it was drawn up. Upon which the Court ſaid, that in one Reſpect there is a Miſtake in the Rule; for it was pronounced by Conſent, but drawn up generally, accordingly they gave Orders, that it ſhould be diſcharged; for they ſaid, the Truth and Juſtice of the Caſe clearly required a new Trial for the whole.

Shergold *and* Boſtrick.

Vide ante 136. THIS Caſe was now argued again. And to the firſt Exception the Court was of Opinion, that as the Return is, no Procedendo ought to go; for the Cuſtom is ſet forth generally, that an Action of Debt will lie, which is to be intended in the Courts above, as well as in the City Courts. And it is a Rule, that where-ever theſe Courts can give as good Relief as the Courts below, they never ſend a Cauſe back again. To the other Mr. Moreton anſwered, that the Cauſe of Action aroſe in London, and there are many Caſes of this ſort, where their Cuſtom will bind Strangers. To this Purpoſe he cited Raſtall's Entries 161. where two Perſons were bound Sureties for another in London, a Recovery was had againſt one of them, and by the Cuſtom he brought his Action to have Contribution againſt the other; yet neither of thoſe were Free of the City. To the ſame Purpoſe was relied on 2 Lev. 166, and 1 Ven. 179, 180. And of this Opinion was all the Court. And then they ſaid, they would give Leave, that the Return might be amended as to the other Exception. But they obſerved, that then it muſt not yet be filed. And they took a Diſtinction too between Certioraries and Habeas Corpus's; for Certioraries bring up the Body of the Record itſelf; and therefore if they are once filed, the Record cannot go back; but Habeas Corpus's bring up only a Copy of it; and therefore though they are filed a Procedendo may be awarded. Sid. 108. Lev. 93. 1 Ven. 212. Salk. 352.

The King *and* Hayes.

Vide ante 32. THE Defendant now moved the Court that he might take Exceptions in Arreſt of Judgment. But the Counſel for the King objected, that this Motion ought to have been made long ago, within four Days after the Special Verdict given, or at leaſt within four Days after the Special Verdict perfected, by the Opinion of the Court. To the firſt Objection, the Court ſaid, this Motion cannot be made till the Verdict is perfected, becauſe till then the Priſoner is not convicted; and to the other they obſerved, that this Motion is allowable at any Time before Judgment; and therefore as the Judgment was not yet given, they ordered the Defendant's Counſel to go

on. The first Exception they took was to the Certiorari; that the Indictment was upon the Statute of 5 Eliz. 14. and therefore the Certiorari ought to have been to bring up such an Indictment; but the Certiorari in the present Case is only to bring up an Indictment of Forgery generally. The same Exception was taken too to the Distringas and the other Parts of the Process. And Mr. Masterman reported to the Court, that the Precedents constantly made that Difference; that if the Process is upon an Indictment on a Statute, it concludes contra formam Statut'; but if it is an Indictment at Common Law, the Process is general. And though a Day was given to the Counsel for the King to search for Precedents, they could not find one the other Way. But the Court said, that the Certiorari orders the Person, to whom it is directed, to send up omnia & singula Indictamenta, and therefore that is clearly good. Then to the Distringas the Form of it is de quibusdam transgressionibus, Contemptibus, falſ' Fabrication' indictatus existit; and therefore as Forgery is an Offence by Common Law and Statute Law both, they thought it must be well enough, though the Precedents happen to run with that Distinction; but indeed the Chief Justice said, if this Offence had been merely upon the Statute, that might be necessary. But then the Counsel objected farther, that it does not appear but the Prisoner might be charged with several Offences of Forgery; now the Distringas can only concern one, and therefore as it is general it must be intended to relate only to the Forgery at Common Law; so that if it should be admitted that the Certiorari was good, this cannot; for a Certiorari removes up all. But the Court gave one general Answer to this, that Process upon an Indictment shall be intended to be in Pursuance of the Indictment; and besides it does not appear that here are two Indictments. Upon which the Defendant's Counsel said, that they would take one more Exception, and that should be, that no Indictment will lie upon this Statute; for the Remedies the Statute has chalked out by express Words are Action, Bill or Information; and though there are the general Words (or otherwise according to the clear and due Course of the Laws of this Realm) yet they can only intend such Remedy, in which the Judgment mentioned by this Statute can properly be given; now they said, Damages were by no Means proper to be recovered in an Indictment, and therefore an Indictment cannot lie. This Objection the Counsel for the King said would more properly fall upon the Nature of the Judgment they should pray; for if they did not pray Damages, there would be nothing in it. But however they said, they did pray Damages and Costs too, and yet they hop'd the Indictment was proper. For as to the Damages, they said, the Jury ought to have given them; and this Defect of the Jury may be supplied by a Writ of Inquiry; and as to the Costs they said, the Master might tax them. But the Court said that they did not know in any Case, where they could not be given by the first Jury, Damages could be perfected by a Writ of Inquiry; and therefore they thought clearly Damages could not be given upon this Indictment. The same they thought too of Costs; for Costs shall not be given, but where Damages may. Then as to the Indictment itself, the Court

said

ſaid, in this Clauſe of the Statute where the Puniſhment is appointed, there are the Words (by any of the Ways or Means aforeſaid) now the Ways and Means are Action, &c. before mentioned, and they thought the general Words included the Indictment, provided Damages and Coſts were not inſiſted on. However the Counſel for the King were for conſidering of this a little longer; but the Court informing them the Priſoner would ſtill have Time to move in Arreſt of Judgment, they prayed Judgment preſently. Accordingly Mr. Juſtice Page pronounced, that the Defendant ſhould ſtand upon the Pillory at Charing-Croſs, have one of his Ears cut off whole, and be impriſoned for a Twelve Month. And after the Chief Juſtice ſaid, he did not know, but the Proſecutor might ſtill bring his Action for the Damages.

Anonymus.

How far the Court will not direct a View in an Indictment.

MR. King moved for a View in an Indictment of Treſpaſs; but the Court ſaid they did not think this was within the Statute; ſo they refuſed the Motion, as it was at the Suit of a private Proſecutor; though if the Suit had been carried on at the Expence of the King they would have done it. Vide 4 Ann. cap. 16. ſect. 8.

Bagwell *and* Jobſon.

Vide the next Caſe.

THE Plaintiff brought an Action of Debt upon a Bond, with a Condition for the Payment of a Bill of Law-Charges. And upon this the Defendant moved, that the Bill might be taxed. But upon the Conditions being read, and it ſeeming to be a ſpecial Condition of a particular Agreement between the Parties, the Court doubted, whether it could be done; but however made a Rule to ſhew Cauſe.

Bagwell *and* Jobſon.

Vide the Caſe before. How far the Court will direct or not, that an Attorney's Bill ſhall be taxed when a Security is given for the Payment of the Money.

MR. Lee came now to ſhew Cauſe, why the Rule ſhould not be abſolute. The Caſe being fully laid before the Court appeared to be thus; That a Mandamus was directed to the Trinity-houſe at Hull to reſtore the Plaintiff to be one of the Brothers of that Society; they were willing to make up the Matter, ſo agreed to reſtore him, and that the Defendant, who was one of the Brothers ſhould enter into a Bond to pay the Coſts of the Plaintiff's Attorney's Bill; the Defendant did not pay it, upon which the Plaintiff was forced to do it; and now he brought an Action upon this Bond; and made Affidavit, that he was informed and believed the Bill was reaſonable. The Queſtion now was, whether the Court ſhould order this Bill to be referred to the Maſter, and upon Payment of what was due ſtay the Proceedings. Mr. Fazakerly ſaid, that in the Caſe of Mertin and Thompſon he was informed the Court of Common Pleas granted a Motion of this Sort, whether the Defendant himſelf entred into ſuch an Agreement; and the Reaſon for that Caſe was, that the Defendant had put himſelf into the Place of the Plaintiff, and as the Plaintiff ſhould have this Privilege

the Defendant ſhall have it too. Now, he ſaid, he could not ſee, how the preſent Caſe differed from that. And though he admitted very willingly, that he could not bring Money into Court and ſtrike it out of the Declaration; yet he ſaid, he thought the Court had gone ſo far as to allow Proceedings being ſtayed, and taxing Bills upon ſuch Applications. But the Court ſaid, they could not allow of the Bill to be examined in this Manner. And Judge Page obſerved, that in no Way they could ſtay the Proceedings. For, he ſaid, in Actions of Debt upon Bond for a Sum certain, the Court had gone ſo far; but never where the Condition was for Performance of collateral Covenants; and the preſent Caſe was in Reaſon ſomething of that Sort. But however the Court adviſed the Plaintiff to go before the Maſter to ſave a Suit in Equity, which accordingly was agreed to.

Term. Paſchæ

2 Geo. II. 1729.

Goodright *and* Hart.

Vide ante 128.

SErjeant Darnel moved to ſet aſide a Judgment and Writ of Poſſeſſion, upon Account that a Rule for a Trial at Bar had been obtained laſt Term in this very Ejectment. But the Court ſaid, you have not got the Tenants to enter into a Rule to make themſelves Parties, and the Rule for the Trial at Bar was only proviſional in Caſe you did that, and therefore that Rule is now wholly ſet at large, and conſequently what the Plaintiff has done is very regular.

Vide poſt 150.

Boldiſer *and* Newens.

What ſhall be ſaid to be a good Aſſignment of a Bail-bond.

ON Motion to ſtay Proceedings againſt the Sheriffs of London, the Counſel ſaid, that the Plaintiff has taken an Aſſignment of the Bail-bond, and therefore the Proceedings are irregular. But it was obſerved of the other Side, that this Aſſignment was void in itſelf, becauſe the Statute requires that it ſhould be atteſted by the Sheriffs, and Brocas and Levet were both Sheriffs for this Year, and yet it was atteſted per Ricardum Brocas & Ricardum Brocas, which was wrong. Beſides too the Plaintiff's Counſel ſaid, the ſame Statute requires, that the Aſſignment ſhould have two Witneſſes to it; now in this Caſe, after the Witneſſes had put their Names to it, the Miſtake in the Atteſtation was raſed out and the Name Levet put in, ſo that now they ſaid, the right Aſſignment was never witneſſed at all; and therefore it was wrong too upon that Account. Accordingly the Court allowed the Plaintiff to go on in his Proceedings.

The King *and* Savage.

MR. Reeves moved for an Attachment againſt the Attorney for the Proſecutor for taking out an Attachment againſt the Defendant for not paying 5 l. in Purſuance of a Rule of Niſi prius, which he had entred into, and was made a Rule of this Court, whereas the Proſecutor himſelf ordered the Defendant not to pay the Money to the Attorney. It appeared too that the Defendant had paid the Proſecutor the Money before he was taken up upon the Attachment, and yet he was forced to give Bail to it below. The Court ſaid, they did not know an Attorney had any Power to receive Money agreed to be paid in ſuch a Manner, without an expreſs Authority from his Client; accordingly they made a Rule upon him to attend, tho' refuſed to grant an Attachment.

How far an Attorney has no Authority to receive a Sum of Money belonging to his Client, without an Order for that Purpoſe.

The King *and* Rouſe.

MR. Reeves moved, that an Order might be made upon Mr. Pember to let the Defendant have a Sight of the Venire and the other Proceſs. But Mr. Strange ſaid, the Defendant was convicted of Forgery, and therefore could move nothing without being preſent in Court. But the Court obſerved, that this was only a Complaint againſt an Officer for refuſing to let the Defendant have a Sight of what he had a Right to; and therefore the Motion was proper in the Manner it was made, and accordingly granted it.

How far a Perſon that is convicted of a Crime need not be preſent in Court at the Time he makes a Motion in that Proſecution. Vide poſt 148.

Walton *and* Leaſe.

IN an Action of Debt upon a Judgment for 33 s. had upon a Non pros. Serjeant Girdler moved to bring the Money into Court without Coſts, and that all Proceedings might be ſtaid; becauſe he ſaid, by the Statute of Glouceſter this Court has no Juriſdiction in Actions for ſo ſmall a Sum. He cited too two Caſes where he ſaid, the Court had made the like Rule upon his Motion; the firſt was Martin and Coke, Mich. 1718. which was an Action of Debt upon a Non pros. as this very Caſe is; the other, Sheppard and Tuff in Debt for Rent, and that was Hill. 1724. But the Court ſaid, the bringing in the principal Sum is an Allowance of their Juriſdiction, and the refuſing to bring in the Coſts is a Diſallowance of it; becauſe in all Caſes whatever where a Plaintiff has a Right to recover, he has a Right to recover with Coſts; and therefore the Motion is contradictory in itſelf. But upon bringing in the Coſts too they ſaid, they would ſtay the Proceedings. However the Counſel not agreeing to do that, nothing was done. 3 Mod. 275. Salk. 674.

What is the proper Manner of taking Advantage of the Statute of Glouceſter, confining the Courts of Weſtminſter-Hall not to have Actions brought in them under 5 l.

The King *and* Rowſe.

Vide ante 147.

WHEN a Man is convicted of Forgery or Perjury, the Court ſaid they never allow of any Motion to be made in Behalf of him, but upon his being brought into Court, tho' upon a Conviction for a Treſpaſs or Riot they do. 1 Ven. 210.

Naylor *and* Scot.

Ante 92.

THE Plaintiff having declared in Prohibition, and Verdict found for the Cuſtom, Mr. Bootle moved in Arreſt of Judgment, that the Cuſtom was void; and accordingly the Court

Vide poſt. S. C.

ordered Judgment to be ſtayed till the Poſtea brought in.

Anonymus.

How far in Debt for Rent Money may be brought into Court.

IN Debt for Rent Mr. Huſſey moved to bring Money into Court, and that it might be ſtruck out of the Declaration. And he cited the Caſe of Lyſſey and Jones, Paſ. 9 Ann. where in Covenant for Rent the Defendant brought in 61. and this Motion was allow'd. But the Court obſerv'd, that in ſuch Actions as theſe they never allow any Thing to be brought in leſs than the Sum which is declared for. And in that Caſe of Covenant they ſuppoſed the 61. was the Whole that was declared for. And beſides one of the Officers ſaid, that the Manner of drawing theſe Rules is always in the general Form, upon bringing in what is due, ſo that it could not appear by the Rule, but the Whole was brought in in that Caſe. Salk. 596.

The King *and* The Inhabitants of Abbots-Langley.

MR. Reeves came to ſhew Cauſe, why an Order of Seſſions confirming an Order of two Juſtices ſhould not be quaſh'd. The Caſe was ſpecially ſtated, that a Man having gained a Settlement at Abbots-Langley removed to Ordnam about forty-three Years ago, and there took a Houſe with the Knowledge of the Overſeers, as, he informed the Juſtices, he believed; afterwards kept an Ale-houſe for thirty-five or thirty-ſix Years there, which he had a Licence for; had five Children chriſtened by the Parſon of the Pariſh; was ſeated in a Pew by the Church-wardens; in K. James II.'s Time performed Watch and Ward; and work'd in the Highways or paid to the Surveyors. Upon his making Oath of theſe Facts before the Juſtices, they notwithſtanding made an Order to remove him to Abbots-Langley. But the Chief Juſtice being of this Pariſh, he ſaid he would give no Opinion, though he plainly intimated his Thoughts to be, that the Order was right. Judge Reynolds ſaid, that the whole Exception againſt the Order is founded upon a Conſtruction of the Statute of James II. cap. 17. and he ſaid it was true, that Caſes upon this Statute had gone ſo far as to allow of certain Acts to be equivalent to a Notice in Writing. And it is

plain the Parliament had followed this Conſtruction by allowing ſeveral Caſes ſtill to remain without requiring actual Notice upon the Statute of 3 & 4 Will. & Mar. cap. 12. The Caſe in Carthew 28. is ſo, and ſo are thoſe in Salk. 472, 476. but he thought the proper Reaſon to be given for theſe Caſes is not to explain the Words (Notice in Writing) in the Statute of Jac. to what is equivalent to it; but to conſider them as Caſes omitted out of that Statute, and left as they were before to the Statute of 13 & 14 Car. 2. cap. 12. But then he ſaid, he thought it might be a Queſtion, whether ſince that Statute of Will. all ſuch Liberty of Conſtruction is not taken away even in Caſes happening before that Stat. and whether thoſe ſhall not fall under the ſame Regulation as Caſes happening afterwards by the Parliament's declaring by that Statute what Meaning the Statute of Jac. always ought to have received. However taking this Caſe to be the ſame as if it had been to be determined immediately after the Statute of Jac. he ſaid he doubted, whether any of the Circumſtances in the preſent Caſe were ſtated ſtrong enough to make it excepted; becauſe the Times are not mentioned, when ſeveral of the Facts happened; ſo that it does not appear that they intervened between theſe Statutes. And as to that particular Fact of performing Watch and Ward, he ſaid, that would not do; becauſe the Officers that look to the Care of them are the Conſtables, by Way of preſerving the Peace; ſo that that Act does not at all ſhew, that the Overſeers had any ſufficient Notice of his being amongſt them. Then as to what is ſaid of his Informing the Court of Seſſions of his Taking a Houſe with the Knowledge of the Overſeers, nothing appears that the Juſtices credited him, and it is only ſet forth, that the Perſon himſelf believed it. This indeed, he ſaid, might be Evidence to the Court below, but nothing on which this Court can found a Judgment. Accordingly his Opinion was, that the Order ought to be confirmed, and ſo Judge Page agreed with him. But J. Probyn ſaid, that he thought this Caſe was plainly to be regarded as if it had been to be determined before the Statute of William, and then obſerved, that theſe Circumſtances ought to be conſidered, as happening in the ſame Time as the Order is in which they are related. If ſo, it is plain he hired the Houſe before the Statute of William; becauſe afterwards it is ſaid he performed Watch and Ward in K. James II.'s Time. Then as to the Belief of the Perſon, he ſaid, he did not ſee but this Court ought to make the ſame Judgment upon that Evidence as the Court of Seſſions ought. Accordingly upon the Judges not agreeing in Opinion, this Matter was put off to be argued again. Salk. 476, 473, 489.

Liſne *and* Lawrence.

MR. Fazakerly moved to ſet aſide a Verdict, becauſe it appeared upon the Poſtea, that a wrong Jury tried the Cauſe, a different ſet of Jurors being upon the Panel from what was annexed to the Diſtringas. But Mr. Huſſey objected, that the four Days for moving in Arreſt of Judgment were over, and this is a Motion of that Nature. But at leaſt he ſaid, he hoped, the

How far the Court will Arreſt a Judgment, notwithſtanding the four Days are expired.

Court would not ſtay any Thing if they ſhould make a Rule to ſhew Cauſe. But the Court obſerved, that the four Days are only to ſtay the Judgment abſolutely; but at any Time after that an Exception may be taken, as Amicus Curiæ to ſhew the Judgment ought not to be entred, if it is not entered already. They ſaid, this was not like the Caſe of moving for a new Trial. And ſo they ſtayed all Proceedings, and made a Rule to ſhew Cauſe.

Shergold *and* Boſtrick.

Vide ante 142.

MR. Reeves came now and ſhewed further Cauſe, why a Procedendo ought not to go. He ſaid, it was true indeed the Return was amended; but yet as it is now made, the Cuſtom is void in itſelf. The Cuſtom is ſet forth to be, that if any Perſon be indebted to another Perſon within the City upon ſimple Contract, Debt will lie againſt his Executors in the City Court. Now he obſerved that a Debt in one Part of England is a Debt in every other; ſo according to this Doctrine let a Debt be contracted where it will, if an Executor ſhould come up to Town, he would be anſwerable for a Debt here, which perhaps he would not be reſponſible for in any other Part of the Kingdom. He cited too a Caſe out of Hob. 175. where ſuch an unreaſonable Cuſtom as this was held void. Accordingly the Court delivered their Opinion, that the Cuſtom as it is here returned cannot be maintained. Upon which Mr. Moreton deſired to amend the Return again, and ſet forth, that the Debt was contracted in London. Judge Page at firſt doubted whether the Court would allow this without an Affidavit; but at laſt the Court agreed that it ſhould, upon a Caſe that was cited out of Carthew 74. but ſaid, as they had amended once already, they muſt pay the Coſts of this Motion.

Goodright *and* Hart and others.

Vide ante 128, 146. &c.

SErjeant Darnel came now and informed the Court that the Landlords did enter into a Rule to make themſelves Defendants in proper Time, and by that Act they were to be conſidered as Tenants of the Land; therefore he hoped that the ſigning Judgment againſt the caſual Ejector was irregular. But the Court ſaid, it is plain the actual Tenants were only to be conſidered as Tenants in the Action; for if after the Tenants and Landlords have made themſelves Defendants the Tenants ſhould upon the Trial confeſs the Action, Judgment will immediately go to recover the Poſſeſſion, and not ſtay to abide the Event of the Landlords Plea.

Anony-

Anonymus.

SErjeant Shepherd moved for a Habeas Corpus to be directed to the Warden of the Fleet to carry the Bodies of ſix of his Priſoners to give their Evidence againſt Huggins before the Grand Inqueſt at London. But as there was no Affidavit produced of their being material Witneſſes, the Court ſaid, they could not do it; for it is a Rule, that they never granted Habeas Corpus's ad Teſtificandum but upon Affidavit.

How far a Habeas Corpus ad Teſtificandum cannot be granted without Affidavit.

Sampſon and his Wife *and* Coke.

IN Debt on Bond made to the Wife dum ſola, the Defendant pleaded, quod non fuit Uxor, & hoc paratus eſt verificare; and only made Affidavit annex'd to it, that he believed the Plea was true. Upon which Serjeant Darnel moved to ſet it aſide; becauſe the Affidavit was uncertain; and becauſe the Concluſion of the Plea ought to have been to the Biſhop's Certificate. But the Court ſaid, that a Negative cannot be ſworn to in any other Manner; and they did not doubt, but upon ſtrong Circumſtances a Jury would find a Man guilty of Perjury upon ſuch an Affidavit. Then as to the Concluſion of the Plea, they obſerv'd, that Uxor aut non Uxor was proper for a Trial by the Country, as well as copulatus in Matrimonio. But if there was any Doubt upon that, the proper Way was to demur.

How far a Plea in Abatement ſhall be ſaid to be ſufficiently verified by Affidavit.

Philips *and* Knightley.

THE Counſel ſaid little more upon the ſecond Argument of this Caſe than they did upon the firſt. But the Court were clearly for the Defendant. They ſaid there was no Occaſion to give an Opinion as to the firſt Exception, whether the Award was good or not; becauſe the ſecond was plainly fatal. They obſerved, that the Defendant could give no Anſwer to the Aſſignment of the Breach; and therefore the Plaintiff muſt ſet it forth fully without any Thing of Uncertainty. Now it is only ſet out, that the Plaintiff was at the Place appointed and continued there between the Hours of 12; but what Part of the Time he ſtaid there is intirely uncertain. However they thought if the Plaintiff had been there the laſt Inſtant that might have been good, whether he ſtaid the whole Time there or not. But upon the Plaintiff's deſiring Leave to diſcontinue, the Court allowed it him. Lev. 189.

Vide ante 84.

Alardes *ver* Cambel and Sir John Williams. *Scacc.*

Vide ante 75.

THE Plaintiff not finding Relief againſt the Award in the Court of King's Bench brought his Bill in the Court of Exchequer againſt the then Plaintiffs and the Umpire, and prayed to be relieved againſt the Umpirage for two Reaſons; one, that it was agreed to be delivered only conditionally, in caſe Alardes, when he returned from Scotland, ſhould not lay before the Umpire ſufficient Reaſon to require a Re-examination, but in Fact was delivered abſolutely; and the Plaintiff now ſets forth in his Bill ſeveral Reaſons to induce a Re-examination, which he offered to Sir John Williams the Umpire. The other Reaſon was, that ſeveral Witneſſes on the Part of Alardes were not allowed of by the Umpire. Cambel pleaded in Bar to this Bill, that Sir John Williams made an abſolute and impartial Award according to the beſt of his Belief; but that the Umpirage was delivered above two Terms before the Bill filed, ſo that he was too late to take theſe Exceptions by a Proviſion in the Statute of 9 & 10 W. 3. 15. Sir John Williams put in an Anſwer to this Bill in a particular Manner, and ſet it forth with a great many Circumſtances. Upon this Caſe the Court delivered their Opinions upon ſeveral Points. The Principal one was, whether Courts of Equity are not confined by the Statute of William to allow of Exceptions to Awards within the Time preſcribed by the Act, as well as the Courts of Common Law? The Chief Baron ſaid, his Opinion was, that they were not. He obſerved, that before this Statute, Agreements made in any Cauſe depending in Courts of Law, and afterwards made Rules of thoſe Courts, had equally the Advantage of that ſpeedy Remedy, which now all extrajudicial Agreements may have upon this Act of Parliament. But yet he ſaid they were liable to be inſpected by Courts of Equity, whether they were not attended with Circumſtances of Fraud or Misbehaviour. And beſides, as the Law then ſtood, if thoſe Courts had inforced theſe Agreements by their Attachments; for proper Reaſons theſe Courts might have granted their Injunctions. This Statute has indeed made an Alteration as to the Courts of Equity in this Reſpect, and ſays in general, that no Injunction ſhall lie upon ſuch an Attachment; but a Bill to diſcover, whether there was Partiality in the Award or not, is left as it was before, and will not affect the Proceedings upon the Attachment. The Chief Baron cited ſeveral Caſes too, where Bills of this Nature have been allowed. A Cauſe in this Court between Mr. Reynells and his Servants. Mullins's Caſe for Carpenters Wages. And one of Mr. Browam, where a Submiſſion was made a Rule of Court in the Common Pleas, yet afterwards this Court examined into all the Circumſtances of the Award which related to the Partiality of it. But he ſaid the reſtrictive Words in the Act have one good Effect, that Exceptions for Partiality muſt be taken within the Time limited in thoſe Cauſes where the Submiſſion was made a Rule. The Chief Baron then ſaid, that upon the Reaſon and Authority of theſe Caſes he thought the main Objection was now got over; the next would not be of

How far Awards may be ſet aſide by a Court of Equity, notwithſtanding the Party does not file his Bill till after the Time which is preſcribed by the Statute of 9 & 10 W. 3. 15. is expired.

ſo much Difficulty, that the Submiſſion was made a Rule of Court after the Award made. For though indeed this has been doubted upon the Letter of the Act, yet the Reaſon of it extends to thoſe Awards that are before the Submiſſion is made a Rule of Court as well as Awards made after. And ſo this Point was ſettled in the King's Bench, and the conſtant Practice has been ſo afterwards. Thus far was ſpoken to the Subſtance of the Plea; but the Chief Baron objected then to the Form, that it ought to have anſwered particularly to the Circumſtances of Partiality aſſigned by the Bill. He allowed indeed, if the Bill had charged the Umpire with Partiality in general, the Plea as it is would have been a good Anſwer; but Circumſtances of Partiality in an Award are like Circumſtances of Fraud in other Caſes; being ſet forth ſpecially they require a ſpecial Anſwer. And he ſaid, if Iſſue was joined in the general Manner, as this Matter is pleaded, the Plaintiffs would be at Liberty to give in Evidence what Circumſtances of Partiality they ſhould think proper. He obſerved this was not like the Caſe of a Bill of Review or a Writ of Error, where ſeveral Errors and Exceptions may be taken, and In nullo eſt Erratum pleaded to the whole; for there all the Miſtakes appear upon a View of the Proceedings; but here it is left to a great Uncertainty according as the Interrogatories ſhall be drawn by the Parties. There might be an Objection farther made to this Plea, he ſaid, from the Award's being only averred to have been impartial according to the Defendant Cambel's Belief; however that he thought might be got over, conſidering that the Fact could not lie properly within his Knowledge. Upon the whole of this Matter, he ſaid, he was of Opinion, that the Plea ſhould be over-ruled; but if the reſt of the Barons thought it as well that the Plea ſhould ſtand for an Anſwer with Liberty of excepting to it, he ſhould not oppoſe it. Baron Hale and Cummins agreed with the Chief Baron in the two firſt Points; but Baron Carter differed in the Principal one. Baron Cummins and Hale agreed with one another in the third Point, but differed from the Chief Baron, and ſaid, they thought the Plea well enough as it was in Point of Form. But however the whole Court agreed, that the Plea ſhould ſtand for an Anſwer with Liberty of excepting to it.

Newton *and* Wibord.

How far an Amendment may be allowed after joining in Demurrer.

THIS was an Action upon a Promiſſory Note, and the Memorandum was of Mich. Term, though the Date of the Note was in the Middle of it. Upon which the Defendant demurred. The Plaintiff joining in Demurrer, Serjeant Baynes now moved, that the Roll and Paper Book might be made right according to the Bill filed, and be made a ſpecial Memorandum; and produced an Affidavit, that the Bill was filed with a ſpecial Memorandum. The Serjeant owned, that the Bill was fil'd after the Demurrer put in, and therefore he agreed he muſt pay Coſts, and the Defendant muſt have Liberty to plead de novo. And to ſupport his Motion he cited the Caſe of Walmeſley and Corey, Paſch. 2 Geo. 1. Mr. Strange ſaid, the ſame Thing was done

done in the Caſe of Calvert and the Count d'Eſthelley, where this was done even after a Verdict. And he cited too the Caſe of Ruſſel and Thorp. The Chief Juſtice ſaid too in Debt upon Bond againſt an Heir he knew an Amendment after Verdict in the moſt material Part, by putting in the Word Heirs. Accordingly the Motion was allowed. 5 Mod. 16. Salk. 48.

Anonymus.

Vide ante 135.

THE Common Serjeant came now to ſhew Cauſe, why the Rule for the Mandamus's going ſhould not be made abſolute. He ſaid, he muſt agree, that the Nature of the Office was pretty much the ſame as it had been repreſented by the other Side; but yet he obſerved that Turner was admitted into it only quamdiu ſe bene geſſerit. Notwithſtanding which he behaved himſelf very careleſsly in it, and upon that account was ſummoned before the Court of Aldermen to ſhew Cauſe, why he ſhould not be diſcharged. He was heard upon this Summons, but laid before the Court nothing Satisfactory to clear himſelf, and upon that they diſcharged him. Under this Sentence he has reſted a Twelve-Month; and therefore the Serjeant ſaid he hoped this was a ſufficient Anſwer to the Rule that was made. But the Court ſaid, this may be proper to come upon the Return; ſo made it abſolute.

Scot *and* Mayley.

Within what Time Bail ſhall be allowed to juſtify.

MR. Fazacherly moved to ſtay Proceedings on the Bail-Bond, which the Plaintiff had taken an Aſſignment of before the Time was out for juſtifying; for he ſaid the Defendant had put in Bail regularly at a Judge's Chamber, the Plaintiff excepted, and by the Rules of the Court they had four Days after Notice of the Exceptions to juſtify; but notwithſtanding this the Plaintiff took an Aſſignment of the Bail-Bond the fourth Day, which was irregular, and therefore their Juſtifying afterwards was well enough. He ſaid, this was like a Defendant's being ſerved with a four Days Rule to plead, he has all the fourth Day to plead in, excluſive of the Day of Service, and therefore the Plaintiff cannot ſign Judgment till the fifth Day. This Caſe he ſaid is different from an eight Days Notice of Trial; there he admitted the Plaintiff has a Right to carry on the Cauſe to Trial the eighth Day. The Reaſon for the Difference he obſerved was this; in the firſt Caſe there are diſtinct Acts to be done at different Times, one of which cannot be done till the other is omitted to be done; but in the other the Acts, though of different Perſons, are to concur at the ſame Inſtant. He obſerved too there was another Miſtake, that the Exceptions to the Bail were not entred in the Bail-Book. The firſt of theſe Objections the Court ſeemed to allow, ſo referred the Irregularity to the Maſter. The other they ſaid, would be good in the Common Pleas; but here they ſaid, where the Suit is by Original, it is not the Practice to do it. But afterwards they made a Rule, that the Exceptions ſhould always be entred in the Filazer's Book.

Anonymus.

How far the Court will grant a Mandamus to appoint Officers in Extraparochial Places.

UPON Serjeant Chappel's Motion the Court granted a Mandamus to certain Juſtices of Peace to appoint Church-wardens and Overſeers of the Poor in an extraparochial Place, upon an Affidavit, that there was much Occaſion for theſe Officers to make Rates to relieve the Poor.

Edmunds *and* Thomas.

How far the Court will ſet aſide a Verdict for a Variance between the Record of Niſi prius and the Copy of the Iſſue.

SErjeant Darnel moved to ſet aſide a Verdict for a materſal Variance that there was between the Copy of the Iſſue delivered and the Record of Niſi prius; the Declaration being in Aſſumpſit, and the Date of the Note appearing in the Record of Niſi prius, but not in the Copy of the Iſſue delivered. He ſaid, the Defendant relied upon this Miſtake, and therefore made no Defence at the Trial. The Court accordingly granted the Motion.

Goodtitle *and* Walton.

THIS Matter now coming on again, Mr. Strange owned he could not maintain that an Ejectment would lie of a Tenement; but yet he ſaid he ſhould deſire Time to ſee whether by releaſing the Damages he could not recover notwithſtanding. The Court ſaid it was clear too that the Declaration was uncertain; though they did remember a Caſe out of Ireland of an Ejectment of 15000 Acres of Mountain, which might ſeem as uncertain, but was held good; though that indeed was help'd by a Certificate from the Judges there, that 15000 Acres of Mountain had a certain Signification amongſt them. But they obſerved that in the preſent Caſe if the Tenementum had been laid with a vocat' ſuch a Houſe, it would as certainly have been good. They ſaid too, it might be proper to conſider of the Method Mr. Strange propoſed to help this, ſo put it off to another Day. 1 Ven. 49, 262, in Point. 1 Ven. 328.

Eskin *and* Cook.

How far Proceſs muſt appear not to iſſue out of Term Time.

IN an Action upon a Bail-Bond Mr. Strange moved in Arreſt of Judgment, that as the Latitat which the Bond was taken upon ſtands upon the Face of the Declaration, it is void; for it is ſaid, that the Plaintiff proſecuted the Latitat the 18th of July laſt, whereas the 18th of July was out of Term. But Mr. Reeves obſerved on the other Side, that it is not ſaid, that the Writ was teſted out of Term, and it is well known, that the Fact is ſo, that Writs are taken out of Term as well as in Term. He ſaid too, that this very Exception was taken in the Caſe of Walburn and Salkinſon, Sir Thomas Jones's Rep. 149. and diſallowed. But the Court anſwered, that they are bound as Judges to take Notice, that no Proceſs can Iſſue out of their Courts, but in Term Time; and in thoſe Caſes where the Fact is otherwiſe, the Proceſs is conſtantly teſted of the Term

Term precedent; they obſerved too, that all Pleadings muſt be according as the Operation of the Law is upon Facts, and not according as the Facts themſelves are; and therefore they thought the Declaration to be wrong; but upon the Authority of the Caſe cited, they ordered this Matter to ſtand over. And afterwards they ſaid, they doubted whether the Caſe cited was Law. Upon which the Plaintiff moved to diſcontinue.

Short *and* Scurry.

Vide ante 135.

THE Titling to the Affidavits was now made Right; and on Rule to ſhew Cauſe, why the Exceptions to the Writs ſhould not be allowed upon them, Mr. Reeves ſaid, that the Writs were teſted right, in the ſecond Year Geo. 2. and that anſwered one of the Exceptions to them. To the other he ſhould ſay but little. But then he ſaid, there has been another Exception taken ſince the firſt, that the Writs were not ſigned by Mr. Ventreſs's Mark; but he obſerved, that they had a Certificate from the proper Officer that now the Signing was put to them. But the Court ſaid they ought to have been ſigned before the Executing them, and it is puniſhable to ſign them afterwards. And they thought the ſecond Exception was not anſwered, but the firſt they ſaid nothing to; ſo ſet the Writs aſide.

Sole *and* Waller.

How far the Court will not allow a Perſon to withdraw his Plea.

What ſhall not be ſaid to be an Iſſuable Plea.

THE Plaintiff in this Caſe brought Covenant againſt the Defendant for not paying for certain Hops, which he had delivered to him, in purſuance to his Agreement. The Defendant did not plead in Time, and upon the Plaintiff's telling him therefore he would ſign Judgment, the Defendant agreed to plead an iſſuable Plea; but notwithſtanding he pleaded Non infregit conventionem generally, and upon that the Plaintiff demurred. The Defendant did not join in it; but now moved to amend. The Court ſaid, this is not an iſſuable Plea; for that is ſuch a one as will be good at all Events; now this is one, as will indeed be good after Verdict, but may be demurred for. To this Purpoſe the Caſe in Sid. 289. was cited. Accordingly as the Plaintiff had loſt an Aſſiſes by this Breach of the Defendant's Agreement, the Court ſaid, they would not allow the Defendant to withdraw his Plea, but obliged him to join in Demurrer.

Law *and* Wallis.

MR. Chute moved to ſet aſide a Nonſuit in Ejectment for there being material Variances between the Iſſue delivered and the Record, and for that Reaſon the Defendant did not appear at the Trial; but the Court ſaid, by your not appearing and confeſſing Leaſe, Entry and Ouſter, you are out of Court, and therefore cannot now make this Motion. But however they ſaid, as the Plaintiff muſt proceed againſt you now upon the

Execution, they did not ſee, but they might help you in this Way, ſo made a Rule to ſhew Cauſe why Proceedings ſhould not be ſtaid.

Law *and* Wallis.

MR. Parker came now to ſhew Cauſe, and ſaid that the Parties to this Ejectment were both out of Court, and therefore he did not ſee, that the Defendant could have any Benefit by this Application. And beſides he ſaid, the Court would not be willing to give it him; becauſe the Variances were totally immaterial. One he obſerved was, that the Iſſue is joined ult. the Plaintiff has declared, inſtead of prout in the Copy of the Iſſue, but in the Niſi prius Roll it is prout. Another that in the Copy of the Iſſue the Venire is hic ubicunque, but in the Niſi prius Roll it is ubicunque generally. To this Exception Mr. Taylor ſaid, that where indeed the Proceedings are by Bill the Venire does order the Jury to come hic apud Weſt'; but where it is by Original it is ubicunque generally; but hic ubicunque is a Contradiction; ſo that that muſt be a material Variance. The Chief Juſtice was not in Court; but Judge Page ſaid his Opinion was, that in theſe Caſes the Court would not conſider, whether the Variances were material or not; it was enough for them to ſee that there were Miſtakes in the Copy of the Iſſue, as no Defence is upon it. But to the other Point the Court all agreed, that the Rule ought to be made abſolute; for Ejectments are Creatures of their own; and therefore as the Plaintiff has not complied with the Intent of the Rule, which made him Party to the Suit, by Reaſon of the Variance he has made, the Court ſaid they would not let him have the Benefit of it.

The King *and* The Inhabitants of St. Matthew's in Ipſwich.

MR. Strange came now to ſhew Cauſe, why the Order of Seſſions ſhould not be quaſhed. He ſaid, there was Occaſion to ſay but little in the Defence of it; becauſe the very Point has been before determined in the Caſe of Eaſtwoday and Weſtwoday, Trin. 7 Geo. 1. For it was held that a Son leaving his Father after his full Age intirely ceaſes to be any Part of his Father's Family; and conſequently no new Settlement of his Father can any ways affect him. But however Mr. Fazacherly on the other Side ſaid, that the Reaſon of a Son's gaining his Father's Settlement upon his Birth is not, that he is Part of his Father's Family; for if it ſhould, then a Son could not gain a Settlement upon his Birth, if his Father had no Family. Now the contrary to that appears from the Caſe, where a Father dies before the Birth of his Son; yet ſtill he will have his Father's Settlement. He ſaid, if this was not the Reaſon of a Son's gaining a Settlement, it could not be the Reaſon of his changing it; and therefore if his Father's Settlement changes, and the Son has got

Vide ante 108.

no new Settlement of his own before the Change, his not continuing Part of the Family can be no Objection why his Settlement ſhould not change too, and conſequently, as in the preſent Caſe the Son does not appear to have gained a new Settlement ſince his leaving his Father, he ſhall be removed as Part of his Father's Family. Mr. Lee ſaid, that he thought the Caſe of St. Giles's Redding and The Inhabitants of Everſly Blackwater, was a good deal to this Purpoſe; for there it ſeem'd to be laid down by the Court in general, that a Son's Settlement varies with that of his Father's. But the Court ſaid, that they could not ſee what Foundation that Law could have of a Son's gaining his Father's Settlement, if not that of his being Part of the Family. And as to the Caſe of the Poſthumous Child, they ſaid, as to him the Family is conſidered as ſubſiſting. And to give an Anſwer to Mr. Lee's Caſe, the Chief Juſtice ſaid, he remembred the Children there were but of two Years old, ſo that they muſt be conſidered as Part of the Family. But Perſons of the Age of 21 may at their Liberty ſet up whatever new Family they will. Upon which Mr. Lee deſir'd then to take an Exception to the Form of this Order of Seſſions, for its beginning ad general' Seſſion' pacis tent' per adjornamen' without ſetting forth the Time when it was firſt holden. One of the Judges ſomething doubted, whether Leave could not be given to them to amend; but as this Exception was taken after the firſt Term that the Order was brought up, the Court agreed it could not be done. So that they ſaid if this Exception could not be got over, and none found to the Order of the Juſtices, the Pariſh of St. Matthew's in Ipſwich muſt at all Events be charged with this new Family, becauſe the Time for appealing is over. Accordingly they ordered this Matter to ſtand over. 1 Ven. 344. 6 Mod. 213.

The King *and* Wind.

What ſhall be a good Indictment for a Riot.

THIS was an Indictment for riotouſly taking two Water Engines; and now Serjeant Darnel moved in Arreſt of Judgment, that the Words Vi & Armis were not in it. He ſaid this Exception was allowed in the Caſe of The King and Watſon, 2 Keb. 193. But Mr. Lacy ſaid, that where-ever the Offence charged carries Force and Violence in the very Nature of it, the Words Vi & armis are not neceſſary; and here he obſerved, that the Offence was laid to be done riotouſly and tumultuouſly, and therefore it did ſo. He ſaid too, that this very Exception was over-ruled in 2 Lev. 221. And therefore the Court ordered it to ſtand over.

Shergold *and* Boſtrick.

THE Common Serjeant came now and informed the Court, that the Return was amended according to the laſt Exception; and therefore prayed a Procedendo. But Judge Page ſaid, that he thought that yet it was not made right; for he obſerved, that it was true indeed, that the Return had ſet out the Cuſtom to be, that where a Debt is contracted in London an Action of Debt will lie for it againſt the Executor in the City Courts; but then it ſays, that accordingly the Defendant was arreſted upon a Proceſs in an Action for Debt cujus tenor ſequitur in hæc uerba; and then ſets forth, that the Plaintiff's Teſtator was indebted to the Defendant in the Pariſh of St. Helen in London, and ſo being indebted conceſſiſſet ſolvere. Now he took Notice, that it does not at all appear by this, that the Debt in the preſent Caſe was contracted in London; and therefore the Court below has not given itſelf a Juriſdiction. But the Common Serjeant ſaid, that the conſtant Practice in the City Court has always been to declare in this ſhort Way; and in this it differs from all other inferiour Juriſdictions; ſo that if the Cauſe of Action ſhould happen not to have ariſen within their Juriſdiction, the Party ought to plead it. The Court accordingly all agreed at laſt that the Return was ſufficient; and upon that granted a Procedendo. Vide ante 142.

Bags *and* Thomſon.

ON a Reference to the Maſter, he reported a Rule of Practice to be, that where an Attorney of the Court is Defendant he ſhall have no Imparlance; but where he is Plaintiff the Defendant ſhall have an Imparlance. But the Court ſaid, that there was clear Reaſon for the firſt Part of the Rule; becauſe Attornies of the Court are always ſuppoſed to be there preſent; but there was no Reaſon for the other Part of it; and therefore did not think there could be ſuch a Rule. How far Imparlances are to be granted in Caſe of Attornies.

Naylor *and* Scot.

THE Poſtea being brought in, the Court made a Rule to ſhew Cauſe why the Judgment ſhould not be arreſted. And now Serjeant Cheſhire and Mr. Reeves came to ſhew Cauſe and ſaid, that the Words of the Cuſtom were, that every Houſekeeper having Child or Children born in the Pariſh of Wakefield in Yorkſhire, at the Time of the Churching of the Mother of the Child, or at the uſual Time after her Delivery, when ſhe ſhould be churched, have Time out of Mind paid 10d. to the Vicar for and in reſpect of ſuch Churching, or at the uſual Time when the Mother of ſuch Child ſhould be church'd. They obſerved, that the two great Objections againſt this Cuſtom were, that it is unreaſonable in itſelf, and uncertainly ſet forth. To the firſt they obſerved, that Religion requires that a Woman ſhould return Thanks to God in a publick Manner for ſo great a Deliverance, and therefore it is but fit, that he who aſſiſts her in ſuch Vide ante 148.

ſuch Office ſhould have ſome Requital. To the other they ſaid, that there are other Caſes, where theſe Courts allow of Eccleſiaſtical Courts to ſet forth Matters equally uncertain as in the preſent Caſe, even in Libels upon Cuſtoms; and yet have not granted their Prohibitions. To this Purpoſe they applied a Caſe, where a Libel was upon a Cuſtom, that the Farmers of ſuch a Town have always laid out 8 s. aut eo circiter, for Cakes and Ale in the Perambulation, and yet held good. Beſides they ſaid, if the Court was in doubt, whether the Proceedings in Courts below were uſually in ſo uncertain a Manner, the proper Method would be to write to them, that they may certify how their Proceedings are there. To this Purpoſe they applied a Caſe out of Palmer 296. where a Libel was for a Woman's not coming to be church'd in a Veil; upon a Prohibition's being moved for, the Court writ to the Archbiſhop to certify how the Canons in that Caſe were; and he accordingly certified the Canon to require it. They obſerved farther, that though indeed the Time of Women's Fitneſs to be church'd is unknown to our Courts, yet in thoſe it is well known; and therefore they might well have proceeded upon it below. The Canon Law ſays, that a Month is a reaſonable Time for Women's coming to be churched after their Deliverance, unleſs in Caſe of great Weakneſs. That Standard is the proper one to regulate this Cuſtom by, and therefore the Court below ought to be allowed to go on in their Proceedings. But the Court ſaid, they were of Opinion, that they were not to conſider of the Methods by which this Fee might be aſcertained, they were only to conſider, it was not certain as it ſtands upon the Libel, and therefore upon the Libel they ought not to ſuffer them to proceed; for they obſerved according to the other Doctrine, that this Matter may be made right in the future Parts of the Proceedings, they may refuſe to grant Prohibitions at any Time. But they ſaid, that the Rule they founded themſelves upon was ſettled in the Caſes of Wood and Hicks, and Whitel and Offley, where a Modus was ſet out imperfectly, and they granted a Prohibition. But the Court obſerved, that the proper Method in this Caſe would have been for the Plaintiff to have ſet forth in the Libel the proper Time when Women uſually are fit to be churched; and then have averred, that the Defendant's Wife was not churched within that Time. Upon the whole Matter the Court made the Rule abſolute for arreſting the Judgment. Salk. 332.

Hebeld *and* Thomas.

How far a Judgment ſhall be allowed to be entered up nunc pro tunc by Reaſon of the Record being loſt.

MR. Strange moved to file a Roll of a Judgment in Trin. Term 1720. as of that Term; upon Account of its being miſlayed; and produced an Affidavit, that the Judgment was ſigned and docketed in that Term. He ſaid, the Judgment was given upon a Letter of Attorney, and he likewiſe produced an Affidavit, that the Adminiſtratrix of the Party giving it was willing to conſent to this Roll's being entred up accordingly. He obſerved, that the Court had granted two Motions of this Nature before; one in Hill. 5 Geo. 1. King qui tam and Bolton,

that was a Judgment in Prohibition; a Writ of Error brought into Parliament; the Attorney was carrying the Original and Tranſcript in his Pocket to be examined, and the Attorney happened to have his Pocket pick'd of the Original; and the Court allowed it to be entred up de novo. The other was the Caſe of Needham and Grayno, Trin. 9 Geo. 1. and the Court granted the like Motion. The Court ſaid, they did not think the firſt of the Caſes came up to the preſent one; for there no Lands could be affected by the Judgment; and if it was not for the Judgment's being docketed in the preſent Caſe they certainly ſhould not do it; but however they were ſtill to take Care of the Creditors, and therefore for fear this might be ſome Trick in the Adminiſtratrix in her Conſenting to this, they made a Rule upon the Adminiſtratrix to give ſome Account of this Matter; and ordered the Docket-Book to be produced. Vide poſt 164.

Wyat *and* Wynkworth.

THE Declaration in Ejectment was delivered before the Eſſoin-Day of this Term, and Notice was given to the Defendant to appear of this Term; upon which Mr. Gapper moved, that the Defendant might plead the nert Term. The Court ſaid, the Rule in my Lord Chief Juſtice Holt's Time uſed to be, that the Notice ſhould be given to appear of the nert Term, and they thought that ought to be the Practice now; but however as the Notice is often in Fact given the other Way, they allowed the Motion. Salk. 257. The Notice which is requiſite to be given at the Foot of the Declaration in Ejectment.

The King *and* The Inhabitants of Roxenton.

THIS was an Order of Removal, which two Exceptions were taken to. One, that it removed ſeveral Children to a Settlement, which their Father had gained by living as a hired Servant with Lord Newport; and it does not appear but he might have been married at the Time he entred into his Service. The other, that ſome of the Children appeared to have been above ſeven Years old at the Time of the Removal, and it is not averred in the Order, that they had not gained a Settlement for themſelves; whereas they might have done it from their Age of Seven. The firſt Exception the Court did not allow; becauſe they would not intend, that he was married then; but for the other they at firſt thought it was good enough; becauſe the Order ſays, whereupon the Juſtices adjudged this to be the laſt Place of their Settlement; and ſo that ſeems an Intimation, that the Juſtices had taken into their Conſideration, that they had gained no other. But Serjeant Corbet ſaying, that this was only a general Concluſion from the Premiſſes, the Court was of that Opinion; ſo made a Rule to ſhew Cauſe, why the Order ſhould not be quaſhed as to them. The Certainty required in Orders of Removal in Reſpect of the Perſons that are removed. Vide poſt. S. C.

The King *and* Wind.

Vide ante 158.

SErjeant Darnel and Mr. Fazakerly came now and produced to the Court ſome more Caſes, where their Exception has been allowed. The chief Objection to it they ſaid was the Statute of 37 Hen. 8. cap. 8. but they obſerved, that the Preamble of the Statute only recited the Inconvenience, that was then as the Law ſtood, of Indictments laying the very Manner in which the Offence was done, viz. baculis & cultellis, gladiis & ſagittis, and of Men's being obliged to prove their Indictments in the very Manner in which they were laid; for this Reaſon the Statute has provided, that it ſhall not be neceſſary for Indictments to lay the Fact to be done vi & armis, viz. baculis & cultellis, &c. which is no Proof at all of the Statute deſigning to alter Indictments in making it unneceſſary to lay a Force in them at all; the only Intent of the Legiſlature ſeems to be, that it ſhall not be neceſſary to deſcribe the Force, and that the Party ſhall not be tied up to the Deſcription. They obſerved too, that it was plain the Statute has always been underſtood in this Manner from the conſtant Method of the Precedents that have been ſince; for they have always left out the Words baculis, &c. but retained the other of Vi & Armis. And this Point is ſettled with this very Diſtinction in 1 Ven. 265. They obſerv'd too, that in common Treſpaſſes the Vi & Armis was the very Circumſtance of the Fact which makes it indictable; for where a Treſpaſs is done peaceably by a Man's walking over another's Ground, a civil Action is the only Remedy; but the Force cauſes a Diſturbance of the Peace, and makes the Offence therefore indictable. The Counſel of the other Side ſaid, that they relied upon the Words of the Statute, and the Caſe they before cited, to ſhew that the Words Vi & armis are in no Caſe now neceſſary in an Indictment. However in the preſent Caſe it is clearly good, as the Offence is laid to be done riotoſe & routoſe; for that carries with it Force, and was good at Common Law. To this Purpoſe a Caſe in Cro. Jac. 345. was applied. And that of Smith and Bowen, where Vi & armis in an Appeal of Murder was held unneceſſary. And Mr. Maſterman ſaid, he remembred a Caſe determined about ſix Years ago, where inſultum fecit was held good without Vi & armis. The Chief Juſtice ſaid, he thought the Statute deſerved well to be conſidered, whether that was not the proper Conſtruction of it, which was contended for. But however upon the other Point the whole Court thought it clear, that the Indictment was good; ſo diſcharged the Rule for arreſting the Judgment. 2 Ven. 158. 6 Mod. 96.

The King *and* Woolſton.

How far the Temporal Courts ought to puniſh Offences againſt Religion.

FIVE ſeveral Informations were preferred againſt the Defendant by the Attorney General, for publiſhing five Blaſphemous Libels, wherein the Miracles of our Saviour were turned into Ridicule, and his Life and Converſation expoſed and vilified. His Counſel offered to move three Matters in Arreſt of Judgment. One, that the Book was not

writ againſt the Chriſtian Religion; the other, admitting it was, yet it could not be puniſhed by the Temporal Courts; but was a Matter innocent in itſelf, and lawful for every Man to do. The third, that the Statute of 9 W. & M. 32. had appointed a leſs Puniſhment for this Offence, than was at the Common Law, and by that Means had taken away the Puniſhment at the Common Law. But the ſecond of theſe Points the Court ſaid, they would not ſuffer to be argued; for the Chriſtian Religion is eſtabliſhed in this Kingdom; and therefore they would not allow any Books to be writ, which ſhould tend to alter that Eſtabliſhment. They obſerved too, that as the Chriſtian Religion was Part of the Law, whatever derided that, derided the Law, and conſequently muſt be an Offence againſt the Law; for the Laws are the only Means to preſerve the Peace and Order of every Government, and therefore whatever expoſes them prevents the Peace and Order of the Government to be kept. They ſaid the Caſe of The King and Taylor was exactly founded upon this Reaſon, as it is reported in 1 Ven. 293. and ſo was the Caſe of The Queen and Hall, where the buffooning the Trinity was held puniſhable by Information. This they ſaid was a Point, that carried with it ſuch clear Conviction in itſelf, that they refuſed to hear the Counſel give their Reaſons why they ſhould be heard to it. Upon which the Counſel began to ſpeak to the firſt Point. They ſaid, that the Intent of theſe Books were only to ſhew, that the Miracles of Jeſus were not to be taken in a literal Senſe; for as ſuch they were not great enough to prove his Divinity; but that they were to be underſtood in a Myſtical and Allegorical Meaning. But at moſt the Counſel obſerved, this Book could only be conſidered as ſtriking againſt one received Proof of his Meſſiaſhip, and not attacking Chriſtianity in general. To the third they ſaid, that before this Act the Court could inflict a diſcretionary Puniſhment, which might have been much greater than that preſcribed by the Statute; they ſaid, that the Intent of this Act might well be conſtrued to limit the Diſcretion of the Court, and by that Means take from the Court that Power of paſſing Judgments, which they had before; now they obſerved, that if the Power of paſſing the old Judgment was taken away, the Intent of the Parliament might well be conſtrued to be to take away the old Method of Proceeding by eſtabliſhing the new one. To the firſt of theſe Points the Court ſaid, they were of Opinion, that the attacking Chriſtianity in this Way was deſtroying the very Foundation of it; and though there were Profeſſions in the Book, that the Deſign of it was to eſtabliſh Chriſtianity upon a true Bottom, by conſidering theſe Narratives in Scripture as Emblematical and Prophetical, the Court ſaid, thoſe Profeſſions could not be credited; and the Rule is, allegatio contra factum non eſt admittenda. To the third Point, they obſerved, that this was againſt an eſtabliſhed Rule, which ſays, that a new Law inſtituting a new Puniſhment ſhall not take away the old one, unleſs it changes the Offence, and makes it of a different Nature. 1 Ven. 13.

Good-

Goodtitle *and* Walton.

Vide ante 155. MR. Strange ſaid, he believed he could not get over that Exception in the Manner he propoſed; and therefore ſaid, he conſented that the Judgment ſhould be arreſted.

Evans *and* Thomas.

Vide ante 161. THE Docket-Book being now produced, and there appearing a fair Entry of the Judgment, and upon the Counſel's ſaying he conſented for the Anminiſtratrix, the Court made the Rule abſolute for entring the Judgment up as of the precedent Term.

Term. Trin.

2 Geo. II. 1729.

The King *and* Robe and others.

When an Order is removed up by Certiorari, how far the Court is bound to give some Direction concerning it.

A Patent had been granted to the Defendant Robe to be Clerk of the Market within the Verge, and by Colour of it many Oppreſſions had been done to the People. Upon which the Juſtices of Middleſex at their Quarter-Seſſions made an Order upon him to produce his Patent, and upon hearing it read, they came to a Reſolution, that the Patent only gave the Defendant Robe Juriſdiction within the Inner Verge, and that his extending it into the Outer Verge was illegal. Upon the Juſtices delivering themſelves in this Way, and entering this into an Order of Court, Robe met with a good deal of Oppoſition in going on with what he had begun; and upon that preferred a Bill of Indictment at the Aſſizes againſt ſome Conſtables, and others that oppoſed him. The Juſtices at the Seſſions then made another Order, that they would ſupport the Conſtables in what they had done with the Publick Money of the County. Upon a Certiorari being granted to remove up theſe Orders Mr. Reeves mov'd to quaſh them; becauſe the Juſtices had undertaken to determine the Validity of a Patent in a Method that did not properly bring the Matter before them. He obſerved, that the proper Way would have been to have indicted Robe for Extortion, to have moved for an Information, or to have tried the Validity of the Patent in a Scire facias. But as to the firſt of theſe Orders the Court agreed, that it was merely a Matter of private Opinion about the Patent, and no Adjudication of any Fact to be done in Purſuance of it; and therefore they thought it was not properly an Order made by them, and need not have been ſent up in Return to the Certiorari. To the other of theſe Orders, they agreed, there was an Adjudication, and therefore, admitting it to have come properly before the Court, they allowed clearly, that they ought to affirm it or ſet it aſide. Before a Certiorari iſſues there may be Reaſons offered to the Court to prevent its going; but when it is gone, and an Order returned upon it in a proper Manner, it is neceſſary for this Court to do ſomething in it.

But whether the Order did come properly before the Court in the present Case, they were not so well agreed; for Judge Probyn said, it was removed at the Complaint of one who was not aggrieved by it; the Occupiers of the Land in the County are the only Persons that can suffer by it, and the Clerk of the Market is the only one complaining of it. And he thought it was a Rule, that this Court will not concern themselves, where Relief is sought for by one who has no Occasion for it. Judge Page seemed to incline too to the same Opinion. But the Chief Justice and Judge Reynolds said, that they thought it the Duty of this Court to keep inferiour Jurisdictions within their proper Bounds, let the Complaint be made by whom it will. They observed too, that the County were not blameable for joining in an Act to defend themselves against what was thought by them an Oppression; but whether the Method of Proceeding was justifiable in applying the County Money in this Way, they thought deserved to be considered of in a fuller Manner; and therefore made a Rule to shew Cause.

Vide post S.C.

The King *and* Lewis.

How far the Court will grant a Mandamus to Justices of Peace to take a Security.

ARticles of the Peace were exhibited against the Defendant in this Court; and upon an Affidavit being produced, that he was very infirm, and that his Life would be much endanger'd by coming up to Town to give Security, Mr. Strange mov'd that a Mandamus might be directed to three Justices of the County of Brecknock, where the Defendant resided, to take his Surety. He said this Motion had been allowed before, Michaelmas 6 Geo. 1. in the Case of Sir Edward Seymour. Judge Reynolds said, the same was done in a Northumberland Case a few Terms ago; and accordingly the Court granted it.

The King *and* Bambridge.

How far the Court will not Bail a Man in Case of Murder.

UPON a Habeas Corpus directed to the Keeper of Newgate he returned, that he detained the Body of the Defendant upon three several Commitments; one, an Order of the House of Commons, which required him to detain the Defendant till he should be discharged by further Order of that House; another, a Warrant upon an Indictment of Murder, which the Defendant had been since acquitted of; the third, a Warrant from Sir Edward Bellamy upon a Charge of Felony upon Oath for stealing Goods to the Value of 27 l. Mr. Strange mov'd now, that the Court would be pleased to bail him. To the first of these Causes of Detainer, he said, that the Parliament was prorogued; and therefore the Effect of the Commons Commitment was now determined. To the second he observed, that the Indictment of Murder was the Foundation for the Warrant; and therefore the Acquittal upon it must be the Reason for discharging it. To the third he took Notice, that an Act of Parliament had been made this last Sessions to disable the Defendant of holding the Place of Warden of the Fleet any longer than the fourteenth of June next, and to give his Majesty a Power of appointing one in his Room; and

the Act requires the Defendant forthwith to deliver up an Account of the Prisoners, with the Causes of their Commitment, to the Judges of the Common Pleas. And if he shall neglect or refuse so to do upon Request, the Statute says, he shall be guilty of Felony without Benefit of Clergy. Mr. Strange observed, that the Prisoner's Confinement would disable him to give that just Account that he ought to do, by his not having recourse to his private Papers; this he said, he was obliged to do within so short a Space as seven Days; and he produced an Affidavit too from the Prisoner, that he had applied to his Servants, that keep the Prison, and he could not get the Papers from them; and yet an exact Account is immediately required of the Prisoner upon Forfeiture of Life. For these Reasons, he said, he hoped, the Court would grant the Indulgence he moved for. But the Court said, that they did not see, that the perplexed Circumstances the Prisoner had brought himself into would be any Foundation for this Court to go out of their ordinary Course. However they said, they did not think the Defendant's Circumstances were so perplexed as they are represented; for to be sure the Intent of this Statute is to receive a natural Construction; and therefore if the Prisoner does the utmost that is in his Power to discover the State of the Gaol, undoubtedly the Intent of the Parliament will be well complied with. Be this as it will, they said, the Precedents of this Court must be their Rule to direct them in the Exercise of this supreme Act of Authority. And they did not know, that ever this Court had done it, but where the Crown was slack in their Prosecution, or it appeared, that an Appeal had been brought before the Indictment, where the Defendant was acquitted, or some other great moving Cause of the like Nature. Upon which they refused the Bail in the present Case, and ordered the Prisoner to be carried back, without making any Rule for that Purpose. Then Mr. Strange desired, that an Entry might be made, that he had made his Prayer within the first Week of the Term to be brought upon his Trial, for fear they should not be able to bring him up the first Day of the Sessions to the Old Bailey. The Chief Justice said, he did not see it was likely to be of Service to the Prisoner; but ordered it to be done, and then he was remanded. Vide 1 Ven. 330, 346. Salk. 103.

The King *and* Hayes.

MR. Filmer moved, that the Defendant might be allowed the Benefit of a Day-Rule, and he said, Motions of this Nature have been allowed, where a Person has been committed for a Contempt. But the Court said, it was Part of the Punishment, that was pronounced upon the Defendant, that he should lie in Prison for a Year, and that Time is not yet out; so that they could not do it. And in the Case of Landen Jones, the Court said too, they never granted these Motions in Contempts; and this was, when he made the like Motion with this.

Vide ante 48. How far the Court will not allow a Prisoner the Benefit of a Day-Rule.

The

The King *and* Croke.

What ſhall be a good Indictment of Forgery.

THE Defendant was convicted upon an Indictment of Forgery of falſe Deeds, founded upon the Statute of 5 Eliz. c. 14. His Counſel moved in Arreſt of Judgment, that the Indictment ſet forth, that Joſeph Garbet was ſeiſed of Lands in Fee in Right of his Wife, called Jawick, lying in Clackſton in the County of Eſſex, containing about 300 Acres; and that the Defendant, in the Name of Garbet and his Wife, forged a Bargain and Sale, by Way of Leaſe and Releaſe of a Park, called Jawick Park, containing about 300 Acres, be the ſame more or leſs, ſituate in the Pariſh aforeſaid, for the Conſideration of 4500 l. and all this was laid to be done with an Intent to diſturb the Freehold of Joſeph Garbet and his Wife. Now the Defendant's Exception to this Indictment was, that the Statute of Eliz. makes it neceſſary, that the Conveyance charged to be forged ſhould appear to affect the Freehold of ſome one; whereas in the preſent Caſe it does not; for that which is ſet forth to be diſturbed, is Garbet's Freehold in certain Lands; whereas the Conveyance charged with diſturbing it is a Conveyance of a Park; which is an Intereſt known to the Law under a particular Deſcription; whereas Land is an Intereſt under a general Denomination. They obſerved too, that it was true indeed the Quantity and Parcels of one were the ſame with the Quantity and Parcels of the other; but that they ſaid would ſignify nothing, the Things themſelves being in their own Nature different. But the Counſel for the King ſaid, that it was not material in this Caſe whether the Conveyance was ſet forth to be ſuch as to be able to affect the Lands upon a Title in an Ejectment; it was enough that the Conveyance was ſet forth to be ſuch as that a Court of Equity would have inforced it to bind the Land, if no Fraud had appeared in the procuring of it, and it had been conſidered as executed bona fide. Now that a Court of Equity would do this, they thought was manifeſt from other Inſtances. A Covenant is made to paſs all the Lands a Man has in ſuch a Town called White-acre; he makes a Conveyance of all his Lands called Black-acre; yet they ſubmitted it to be clear, that if he has no Lands called Black-acre, the Court of Equity will inforce this Conveyance, and decree a quiet Poſſeſſion in White-acre. So in the preſent Caſe, if there had been a precedent Agreement to paſs the Lands called Jawick, they thought it would be beyond Queſtion, that a Court of Equity would have inforced the preſent Conveyance; and they ſaid the Execution of the preſent Deed, as it ſtands upon the Face of it, equally intitles itſelf to the Aſſiſtance of ſuch a Court, as there appears to be a Conſideration paid of above 4000 l. This Poſition then being now to be admitted, that a Court of Equity will render effectual this Inſtrument, the Counſel offered ſome Arguments to ſhew, that the Conveyance was within the Words and Meaning of the Statute. They obſerved, that if this Proſecution had been at Common Law, the Offence charged in the Indictment would have been puniſhable as a Forgery beyond all Contradiction; for Forgery in general is the Act of

Counterfeiting another's Hand or Seal with an Intent to prejudice him; and whether it has that Effect or not, is immaterial. The present Statute has indeed made that a Circumstance necessary in order that the Offence may come within it. But let this be done in what Way it will, it is all the same, so that this Effect immediately results from the Act. They said immediately; for tho' such an Effect may consequentially follow, they allowed that would not be enough. As if a Bond is forged, which afterwards may happen to be put in Suit in a Court of Equity; the Lands of the Party may in the Event be affected with it, as upon an Order of Sequestration; yet they admitted such Forgery could not be within the Meaning of this Clause of the Statute. But they observed, that this Statute was still to receive that natural Construction they contended for; as other Statutes of Forgery have been construed in the like Way; and indeed it is a Penal Law, it is an Act restraining an infamous Offence. The Statute of 1 Hen. 5. which is in Raſtal's Edition, says, that whoever shall disturb another's Possession and Title in any Land shall be subject to an Action of Forgery of false Deeds; yet it has been held, that where a Conveyance of Land was forged, when he was out of Possession, it was within the Act, 3 Inst. 170. They said too, they allowed the Cases in Brook, pl. 11. and 19. Title Forgery of false Deeds, that in an Action of false Deeds upon this Statute of Hen. 5. it might be pleaded or given in Evidence, that the Plaintiff had no Interest in the Land at the Time of the Forgery; but they thought there was a great Deal of Difference between a Civil Suit, where the Party is to repair himself in Damages and a criminal Prosecution. But they observed, that for the Reasons mentioned before, here was too in the present Case a real Damage to the Party; upon which they prayed Judgment for the King. But the Court said, they did allow, that if the present Conveyance, as set forth in the Record, would give an equitable Right, it would clearly be within the Statute; for a Conveyance, which may be inforced by a Court of Equity is equally a Disturbance to a Man's Freehold, as a Conveyance, which may be inforced by a Court of Law. But they said, they were of Opinion, a Court of Equity could not inforce it; no more than if a Conveyance was of Black-acre for a valuable Consideration, a Court of Equity can make it be a Conveyance of White-acre. If indeed there had been a precedent Agreement set forth in the Deed to convey the Lands called Jawick; and the Execution of it had been as in the present Case; or any other Matter had been to have prevented the legal Operation of the Deed, when the Design of the Deed evidently discovered itself, the Court clearly allowed the Defect of it might have been supplied. But in the present one they thought the Interest charged to be conveyed, and the Conveyance itself, had no Kind of Relation to one another; so that at most a Court of Equity can consider it as a void Deed; and make the Party refund the Money. And as good Remedy as this may be had at Law; for taking this Deed to have been executed bona fide, an Action would clearly lie for so much Money received to the Party's Use. And

the Method to proceed against the Defendant in a criminal Way would be to indict him at Common Law. Upon which the whole Court delivered their Opinions, that the Defendant must be acquitted upon this Indictment, but however put the Matter off to be considered of a little longer. 1 Vern. 40. 2 Vent. 365.

Vide post. S. C.

Byrom *and* Baker.

How far in Debt for Rent the Court will not stay the Proceedings in a second Action, till the Costs of a Nonsuit in a former Action are paid.

IN Debt for Rent brought by an Executor, Mr. Reeves moved to stay Proceedings in this Action till the Plaintiff should pay the Costs in a former, which was for the same Cause. But it appearing, that this Action was for some new Rent accruing since that demanded in the former Action, as well as for the former Rent demanded in that Action, the Court said they could not do it; for it must appear by the Declarations, that both the Actions are exactly for the same Cause. They said farther, that it is not long since these Motions were allowed only in Ejectments. But what makes the present Case beyond all Dispute is, that the Court said, Executors never pay Costs upon Nonsuits.

Vide ante 42.

The King *and* Dr. Whaley.

How far a Traverse need not be taken in Quare Impedit.

THIS Case had been removed up by Writ of Error into the House of Lords; but it was discovered there, that the Writ of Error in this Court abated by the late King's Demise; and therefore the Judgments and Proceedings were wholly here irregular; upon which a new Writ of Error was forced to be brought. Mr. Reeves said, as the Matter had been so solemnly argued here before, he hoped the Court would not go into it again; but pronounce the same Judgment now, they gave before. But Mr. Bootle desiring to mention a Case or Two, which he thought would give farther Light to that Point about the Traverse, which he argued before; the Court allowed him to do it. One of his Cases was out of 2 Cro. 650. The Defendant there set forth his Title in a Quare Impedit, that he was Parson imparsonee of the Presentment of J. T. and for Title to the said J. T. said, that long Time before the Plaintiff any Thing had, the Prior of Okey was seised of the Advowson in Fee, and presented thereto J. G. and afterwards surrendred his Possessions to H. 8. that H. 8. died seised, and it descended to Ed. 6. from him to Queen Mary, from her to Queen Elizabeth, who died seised, and from her it descended to King James, who then was; that afterwards King James granted the next Avoidance to the said J. T. who presented the Defendant accordingly. The Plaintiff replies, that true it is, the Prior was seised in the Manner aforesaid, confesses the Surrender to H. 8. and the Descent to Ed. 6. but says, that that King by his Letters Patent granted the Advowson to Sir Tho. Wyat, who granted it to the Plaintiff, and then traverses the dying seised of Ed. 6. Upon which the Defendant demurs; because the Descents to the others were not traversed too. It was indeed allowed

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by the Court at that Time that the other Deſcents were not neceſſary to be traverſed; but the Argument Mr. Bootle made from it was, that the Traverſe of the Deſcent to Ed. 6. was allowed to be good. Now he obſerved, if that Traverſe was material, the only Reaſon could be, that the Plea of the Defendant was not ſufficiently confeſſed and avoided; and that could only be upon a Poſſibility, that Ed. 6. might have gained the Fee again, and therefore the Traverſe of the Deſcent was required in that Caſe. Equal Reaſon, he ſaid, there was to require it in the preſent one; for ſuch a Poſſibility there is in the preſent Caſe; for though King William did preſent, and the Preſentee was admitted, inſtituted and inducted, yet it might have happened, that the Preſentee would not have ſubſcribed the Articles; and by that Means the Preſentation had been conſidered as void; and the King would ſtill have had his Turn as before; for which Reaſon, he ſaid, this was a ſtronger Caſe than the Caſe cited. 5 Rep. 102. He ſaid too, there were other Caſes where a Traverſe ſeems unneceſſary, and yet the Law requires it. To this Purpoſe is Yelv. 115. where in Debt brought as Adminiſtrator to D. the Defendant pleads, that D. made A. his Executor, he muſt likewiſe traverſe, that D. died inteſtate. But the Court ſaid, that they ſtill continued their ſame Opinion they were of at firſt, that the Traverſe would be intirely immaterial in the preſent Caſe; for the Defendant has ſhewn enough to deſtroy the King's Title, and the Intendment of the Preſentee's not ſubſcribing the Articles is very remote. But in the Caſe cited out of Croke the Court ſaid they took the Reaſon for that to be, that the Defendant had alledged more than he need have done for his Title, and by that Means gave the Plaintiff Liberty to traverſe the Surpluſage or paſs it over as he thought proper. Then as to the other Caſe, they ſaid the Reaſon of it depended upon a poſitive Principle, that two Negatives inconſiſtent with one another will never make an Iſſue; accordingly they reverſed the Judgment in Ireland again. 1 Salk. 297.

Stent *and* Warwick & Ux'.

What ſhall be ſaid to be a good Judgment in an Ejectment.

UPON a Writ of Error out of the Common Pleas in an Ejectment, the Error aſſigned was, that the Count was upon two Demiſes by different Perſons for different Lands for different Numbers of Years; and yet the Judgment was quod recuperaret terminum ſuum prædictum in tenementis prædict'. But the Court ſaid, that ſhould be underſtood reddendo ſingula ſingulis. But they did allow, if the Lands had been the ſame, it would have been otherwiſe for the Uncertainty of what is to be recovered; accordingly affirmed the Judgment.

Roche

Roche *and* Hepman.

How far a Perſon, that is beyond Sea, ſhall not be barred by the Statute of Limitations.

IN an Action upon the Caſe for ſeveral Promiſes, the Defendant pleaded the Statute of Limitations. The Plaintiff replied that he was beyond Sea at the Time of the Promiſe, and that he brought his Action within ſix Years after his Return. Upon a Writ of Error out of the Common Pleas it was now debated, whether the Replication was good, or not. Mr. Reeves objected, that Aſſumpſits were within the Purview of the Statute, but not within the Proviſo; for the Proviſo enumerates all the Actions in which it relieves, but the preſent one is omitted. And he obſerved that the Judges have conſtrued this Statute according to the Words; and not according as the Meaning of it may be gathered by equitable Inferences. To this Purpoſe he applied a Caſe out of Show. 98. where the Defendant was beyond Sea at the Time of the Promiſe, ſo that the Plaintiff could not bring his Action againſt him; and yet it was held he was within the Intent of the Statute. This Caſe the Court ſaid, they clearly allowed, for the Plaintiff might have taken out an Original againſt the Defendant notwithſtanding he was beyond Sea. So that he was clearly not within the Relief of the Proviſo of this Act, as he had evidently another Way to help himſelf. However upon the Authority of the Caſes cited out of 2 Saund. 120. and 1 Cro. 245. they thought the preſent Caſe clearly within the Intent of the Proviſo; for it would be a ſtrange Thing, that the Statute ſhould give Relief in Actions for Words, where there are only two Years given to bring the Action in, and yet ſhould not give Relief in Aſſumpſits, where there are ſix Years given. Accordingly they affirmed the Judgment. Vide Stat. 4 Ann. cap. 16, 19.

The King *and* The Inhabitants of Rexam Regis.

How far the King's Bench will quaſh an Order relating to a Poor's Rate.

MR. Wynn moved, that an Order of Seſſions, repealing a Poor's Rate made by two Juſtices, might be quaſhed. The Exception he took to it was, that the Reaſon the Juſtices at the Seſſions went upon appeared to be imperfect; for it was, upon its appearing to us that the old Rate upon the Houſe was but 20 s. we therefore quaſh the new Rate appointing it to be 40 s. But the Court ſaid, that may be a good Reaſon or a bad one, according as the Circumſtances of the Caſe appeared to the Juſtices; for if the Houſe was improved double the Value it uſed to be of, it was certainly improper to ſet it aſide, becauſe the Rate was a very juſt one; but if the Houſe continued pretty much of the ſame Value it uſed to be of, it was undoubtedly right to repeal it. But at laſt it appearing, that the Juſtices appointed this Rate of 20 s. to be the perpetual Rate upon the Houſe; the Court ſaid, they thought it clearly bad; for a Rate muſt be of its own Nature variable; and therefore made a Rule to ſhew Cauſe. Salk. 526.

Vide poſt S. C.

Birch *and* Leek.

UPON a Writ of Error out of the Common Pleas in an Action of Treſpaſs, the general Errors were aſſign'd, want of an Original and Warrant of Attorney. A Certiorari to the Cuſtos Brevium to certify whether there was any Original of Hil. Term laſt, which was the Term of the Placita; he returned no Original of that Term. But upon another to certify whether there was one of Mich. Term preceding, he returned that there was, but with no Continuances. Upon which Mr. Filmer excepted, that as it was to be taken, that the Original was not continued down from one Term to another, it could not be conſidered as an Original in that Action. But beſides he ſaid, there was another Objection too to be made, admitting there were the Continuances, that there is a material Variance between the Writ and the Declaration; in that the Declaration is of a Treſpaſs in 1 June 12 Geo. 1. but the Writ is of a Treſpaſs contra pacem noſtram. But Mr. Reeves ſaid, as the Terms were contiguous he did not ſee any Reaſon for Continuances, but if there was Occaſion for any, the Court would Order a Certiorari to go of Courſe ad informandam Conſcientiam Curiæ to ſee whether there were any or not. The ſame he obſerved was done in the Caſe of Wynkworth and Clark, Trin. 4 Geo. 1. He allowed there was an Affidavit produced in that Caſe of there being actually Continuances; but he thought that could not be material. Then as to the Variance, he ſaid, even before the Statute for the Amendment of the Law, it was held to be well enough after a Verdict, though not upon a Demurrer, in the Caſe of Day and Muſket, 6 Mod. and he obſerved, that this Statute has given the ſame Relief upon a Judgment Nby il dicit as after a Verdict. The Court agreed as to the firſt Point, that an Affidavit could not be material in this Caſe, no more than where want of an Original is aſſigned for Error; and accordingly granted the Certiorari; and when this was returned they ſaid it would be proper to conſider of the other Point.

How far the Court will grant a Certiorari in order to certify Continuances.

Stent *and* Watkins.

THIS was a Motion upon the Act of Parliament paſſed the laſt Seſſions, relating to Perſons in Execution for a Sum under 100 l. The Caſe, which the Court delivered their Opinions upon, was, that the Defendant had been taken in Execution and eſcaped before the 29th of September laſt, and was out upon the Eſcape on that Day, but was ſince taken up upon an Eſcape Warrant; and whether he could have the Benefit either of the Act for the Inſolvent Debtors, or of the Act before mentioned, was the Queſtion. The Court was of Opinion, that he could have the Benefit of neither. Of the Debtors Act it is clear he could not; for that provides only for ſuch as were in actual Cuſtody on the 29th of September; and the other they ſaid was as clear; for now by Relation he is in upon the firſt Execution; and this is not conſidered as a new one ſince the 29th, which the Statute only extends to, but a Continuance

How far a Perſon ſhall not be allowed the Benefit of the Inſolvent Debtors Act.

tinuance of the old one. However the present Case did not appear to come out to be this; for it was said in general only, that he had escaped from Execution, but it did not appear, when that Execution first was, which he lay under. But that Case the Court said was equally improper for them to give Relief upon; because it ought to appear, that he was in Execution since. So the Court refused to do any Thing in it.

Swan *and* Wife.

How far the Court allows of Amendment without paying Costs.

THE Plaintiff had made a Mistake in the Copy of the Issue by leaving out the Words per Johannem Allen Attornatum suum. And the Court said, an Amendment of this Sort may be made without paying Costs.

The King *and* The Inhabitants of Rexam Regis.

Vide ante 172.

TWO Justices made an additional Assessment of two Pence in the Pound; and upon Appeal to the Sessions they vacated that Order but ordered themselves, that the Money already levied upon it should be paid over to the succeeding Overseers; whereas Mr. Wynn said, they ought to have ordered, that the Money should be repaid the Persons, whom it was levied upon. Accordingly the Court quashed this Part of the Order, and confirmed it as to the other Part.

Mole *and* Patson.

How far the Court will discharge a Person out of Execution, by Reason of a Defect in the Warrant.

A Writ of Execution was taken out upon a Judgment in the Common Pleas returnable in that Court; but by Mistake the Warrant made out by the Sheriff mentioned the Writ to be out of this Court. Upon this the Court discharged the Defendant out of Custody upon this Execution; for they said, the Warrant was what he was taken up upon, and that was wrong. But they observed, the proper Way of helping this Mistake would have been to have served the Defendant when he was in Custody with a true Writ of Execution out of the Common Pleas.

The King *and* The Inhabitants of Holiborn.

MOTION was made to quash an Order of two Justices, and an Order of Sessions confirming it. The Case was specially stated, That a Man rented a Farm of 12 l. per Annum and that Part of the Lands to the Value of 9 l. per Annum lay in one Parish, and that the other Part lay in another Parish. Upon which the Justices were of Opinion, that he gained no Settlement by this Means. Exception was now taken to the Orders upon this Account; because the Farm is considered as one intire Interest, and therefore, where the greatest Part of it is, there the Settlement shall be. Accordingly the Court made a Rule to shew Cause.

When Part of the Lands which a Person occupies, lie in one Parish, and Part in another, which of the Parishes his Settlement belongs to. Vide post S.C.

Hornby *and* Cornford.

THIS Matter coming on again, Mr. King desired of the Court, that the Defendant might have Liberty to replead; and he said a Repleader has been allowed after Argument upon a Demurrer. 3 Lev. 440. The Court said, they believed Repleaders were allowable after Argument. But they observed that the present Case was not properly intitled to a Repleader at any Time; for a Repleader is never awarded but where it clearly appears, that the Judgment ought to be given for a Man, but for some Default in Form it cannot. But if a Repleader should be allowed in the present Case, it ought to be allowed in every other, where the Defendant is guilty of the greatest Mistake in Substance. However the Case stood over to be argued again; because no Body was ready to speak to the Point, that was started in the former Argument. But afterwards the Plaintiff accepted an Offer of the conditional Sum with Costs; so nothing more was done.

Vide ante 104.

The King *and* The Inhabitants of Roxeter.

JUdge Reynolds at first declared his Unwillingness to confirm the Order as to the Father; because the Consequence would be, if it should happen, that these Children should not have gained any Settlement to themselves, they must be removed too from Shorebury to Roxeter, when the Truth of the Case possibly may be, that the Father himself ought not to be settled there. However at last the Court agreed, that Roxeter must be taken to be the Father's Settlement, and this is only a Consequence from it, that they must have the Children too, unless they have got a Settlement to themselves elsewhere. However as the Order was now made, they confirmed it only as to the Father and Mother, and quashed it as to the three Children.

Vide ante 161.

For-

Forteſcue Aland *and* Maſon.

Vide ante 100.

ON Rule to ſhew Cauſe, why the Writ of Erroꝛ ſhould not be amended upon the Statute of 5 Geo. 1. 13. Mꝛ. Bootle ſaid, that the Altering the Writ in the Exception taken would be to make it a Writ of Erroꝛ in the Cauſe, whereas it was none beforꝛe; and this he ſaid would not be Amending the Writ, but Forꝛming a new one, which the Statute does not extend to. He obſerved beſides, that this Miſtake of the Plaintiff had put them under a Neceſſity to make their Plea a vaſt deal longer than otherwiſe it would have needed to have been; forꝛ upon the Plaintiff's omitting to make Jonathan Maſon Tenant in Tail, they were forꝛced to ſet forꝛth the ſeveral Limitations in orꝛder to make out the Defendant's Title; forꝛ as Jonathan was made only Tenant forꝛ Life, the Defendant had not a Colour of Title. But now if the Plaintiff's Writ of Erroꝛ is made right in this Particular, all this Part of the Defendant's Plea that has been mentioned is made intirely impertinent; which he ſaid would be trifling with the Defendant in ſuch a Manner, that he hoped it ſhould not be allowed. But if it ſhould, at leaſt he hoped the Court would give the Defendant his Coſts. But the Court ſaid, that they thought this Caſe was plainly within the Woꝛds and Meaning of the Act; forꝛ they are, that Writs of Erroꝛ ſhall be amendable forꝛ any Variance oꝛ other Defect whatſoever. Now they obſerved, that the Writ of Erroꝛ in the King's Bench in Ireland ſet forꝛth, that Jonathan Maſon was Tenant in Tail, and that Writ of Erroꝛ is Part of the Recoꝛd ſent up; this Writ of Erroꝛ differs from that, and therefoꝛe there is a Variance in it directly within the Woꝛds of the Act. Then they ſaid, that the Defendant might have applied to have had this Miſtake rectified; and therefoꝛe it was his own Fault in being at this Expence in lengthning out his Plea. They were of Opinion likewiſe, that the Defendant was not intitled to his Coſts; forꝛ the Statute does not give any, and then they did not ſee, how they had Authoꝛity to do it. But indeed upon quaſhing Writs of Erroꝛ they do give Coſts, forꝛ the Statute forꝛ the Amendment of the Law has commanded them to do ſo.

Gurnel *and* Fawl.

ON Rule to ſhew Cauſe, why an Execution ſhould not be ſet aſide forꝛ its being made after an Allowance of a Writ of Erroꝛ in Parliament, Mꝛ. Reeves ſaid, that the Writ of Execution was ſealed beforꝛe the Writ of Erroꝛ taken out; and as Bail to it was not put in, it could not be a Superſedeas. But Mꝛ. Strange ſaid, the Writ of Erroꝛ is a Superſedeas from the Time of the Sealing it. The Court indeed allowed, where Bail is afterwards put in, the Writ of Erroꝛ is a Superſedeas by Relation from the very Sealing of it; but as Bail was not put in yet, the Time of the Service of the Execution was at preſent to be conſidered as regular. But where indeed no Bail

is to be put in, the Writ of Error is a Superſedeas from the very Sealing of it. The Court accordingly would have diſcharged the Rule; but it coming out, that the Writ of Execution was ſealed before Judgment, the Court ſaid, that was totally irregular; and it would be well for the Plaintiff that nothing more was done.

Goodright, on the Demiſe of Baker, *verſus* Sturdy.

How far the Court will not grant a new Writ of Execution.

THE Plaintiff in this Caſe had got Judgment, and taken out a Writ of Poſſeſſion; when the Sheriff came to execute it, the Tenants offered to attorn voluntarily; upon which the Sheriff did not execute his Proceſs; the Time of the Return of the Writ run out; and then the Tenants refuſed to attorn. Upon which Mr. Lee moved for a new Writ of Poſſeſſion; and relied upon the Caſe of Kingſdale and Man, Salk. 321. But the Court ſaid, that they never granted a new Writ of Poſſeſſion, but where it appeared upon Record, that the firſt Writ was prevented from being executed, by entring a Non miſit breve; or ſome other Evidence given, that the Effect of the Writ was immediately fruſtrated as ſoon as it was executed. Accordingly refuſed to grant this Writ, till ſuch an Entry ſhould be made. 2 Ven. 115. Salk. 321.

The King *and* The Pariſh of St. Stephenſon in the County of Bedford.

What ſhall not be ſaid to be a good Order of Removal, by Reaſon of its Uncertainty in deſcribing the Place from which the Removal is made. Vide poſt S. C.

THIS was an Order of Removal from the Pariſh of St. Peter's in Bedford to the Pariſh of St. Stephenſon made by the Juſtices for the Town of Bedford. Mr. Marſh took an Exception to the Order, for its being only ſaid in the Margin Villa de Bedford, without mentioning of what County. Now he obſerved that it was neceſſary to mention what County this Bedford lay in; becauſe the Appeal muſt be to the Juſtices of that County where it does lie. The Court accordingly made a Rule to ſhew Cauſe.

The King *and* Roebottom.

When a Perſon is brought up by Habeas Corpus, how far the Court will diſcharge him, by Reaſon of defects in the Commitment.

MOTION was made, that the Defendant, who was brought up by Habeas Corpus, might be bailed. She was committed for Forcibly detaining certain Goods, for being concerned in the ſtealing of them, and lending Money upon them, knowing them to be ſtolen. 'Twas now objected to the Commitment, that the Juſtice of Peace had no Power to commit for forcibly detaining Goods, though he has for forcibly taking them; and beſides, that the Commitment was imperfect in charging her with lending Money upon ſtolen Goods, knowing them to be ſtolen; though it was not illegal; for this is good Evidence of her receiving ſtolen Goods, knowing them to be ſtolen; and therefore ſhe ought to have been committed generally for that. The Court ſaid nothing to the firſt Objection; but to the ſecond they ſaid, that the Commitment muſt then be amended. They obſerved too, that there was no Place mentioned in

the Commitment, where the Goods were ſtolen; ſo that they could not know where to bind her over; and therefore the Commitment was bad too upon that Account. Accordingly they told the Juſtice, that he muſt charge the Priſoner with a new Commitment, and they would remand her. But then the Fact coming out, that the Defendant was only brought before the Juſtice as a Witneſs, to charge another with the Stealing of the Goods, and when ſhe was upon Oath, that the Juſtice examined her how ſhe came to lend Money upon them, when ſhe knew they were ſtolen; and, upon her confeſſing that ſhe did, committed her; the Court ſaid, that that was intirely illegal; for no Perſon ought to be examined upon Oath in any Manner whatever to charge himſelf criminally; and therefore though the firſt Queſtions were very proper as to her Knowledge of the Theft; yet they ſaid, this ought not to have been a Handle to the Examining her as to the others, by which ſhe herſelf was made criminal. Accordingly the Court diſcharged her.

Mathews *and* Spicer.

Vide ante 57.

SErjeants-Inn Hall in Chancery Lane. This was a Writ of Error upon a Judgment in the King's Bench. Lord Chief Juſtice Eyre ſaid, that he took it to be a Rule, that wherever there is a ſpecial Aſſignment of Errors, or a general one upon the Plea of In nullo eſt erratum, the Aſſignment muſt always be entred upon Record, before this Court will allow the Counſel to ſpeak to them. But he ſaid, according to his Paper-Book, there was no Aſſignment entred upon Record at all; and therefore he thought it would be irregular to proceed. The Chief Baron ſaid, that he believed the Practice had been to enter no Pleadings here upon the Writ of Error at all; and therefore however agreeable perhaps it would be to the Dignity of the Court to make a Rule, that the Pleadings upon the Writ of Error ſhould be entred upon Record for the Future, before this Court would hear Counſel ſpeak to them; yet he thought it would be hard, that the Parties now before them ſhould not be allowed to go on. Beſides he obſerved, that the preſent Court was not properly to be conſidered as the Court of Exchequer-Chamber; for they could not pronounce a final Judgment here; but that muſt be done at the Exchequer-Chamber at Weſtminſter: And therefore, as this was only a preparatory Meeting, he thought the Court might diſpence with that ſtrict Method of Proceeding here, and order the Aſſignment to be entred upon Record before they pronounce their Judgment at Weſtminſter. In the preſent Caſe beſides, he ſaid, there might be a particular Inconvenience; for if it ſhould be conſidered, that the Plaintiff has not yet aſſigned his Errors, the Defendant would have it in his Power to Non-pros the Plaintiff for not having aſſigned them; for the Time for Aſſigning them is out. But the reſt of the Judges and Barons agreed with the Chief Juſtice; for they ſaid in general, that all Proceedings upon Writs of Error are regularly entred upon Record before they are argued; and in this conſiſts the Difference between theſe Proceedings and the original ones. As this Rule is ſo plain and general, they were

of Opinion, that they ought to act according to it; and therefore however perhaps the more frequent Practice may have been, or the present Plaintiff may suffer an Inconvenience, the Court said, they thought that ought not to be regarded. Accordingly this Assignment being omitted upon Record, the Court refused to go on; and all the other Causes being the same, where some of the Assignments should have been generally entred, the others specially, the Court ordered them to be entred by such a Day, and so adjourned. 2 Cro. 119.

Roberts and others *versus* Mundford.

How far an Executor shall be intitled to an Imparlance.

THE Plaintiff marked his Latitat for so much Money for Goods sold and delivered to the Defendant's Testator, and declared for Part of the Sum for Goods sold and delivered to the Testator himself, Part for Goods sold and delivered to another upon the Testator's Account. Upon which Serjeant Eyres moved for an Imparlance. The Court seemed to think, that if the Declaration had been for Part of the Money for Goods sold and delivered to the Executor, and Part for Goods sold and delivered to the Testator, the Defendant would have been intitled to an Imparlance. But, as in the present Case both Debts accrued upon the Credit of the Testator, and therefore were both to be considered as his own Debts, the Court thought it was otherwise. And what Judge Page said confirmed it; for he observed, that a Contract of this Nature need not be reduced into Writing since the Statute of Frauds and Perjuries; so that it is plain it is not considered as a Promise to pay a Stranger's Debt, but meerly a Debt of the Party's own. However the Court made a Rule to shew Cause, as it was a Case of new Practice upon the special Latitats.

Vide post. S. C.

Dicks *and* Redding.

How far the Court will set aside a Judgment, notwithstanding it be regularly signed.

MR. Draper moved to set aside a Judgment, tho' regularly sign'd, upon Payment of Costs, Pleading the general Issue, and going to Trial as soon as the Plaintiff could have done, if he had not signed his Judgment. The Court said, they did not use to grant these Motions; but that they had lately altered their Rule; and therefore allowed the Motion to be regular enough. But as the Circumstances of the present Case were, they did not know but the Defendant might by this Means get the Term, and so there might be a Prejudice; however they said, they would grant the Motion in the present Case notwithstanding, if the Defendant would give Judgment in Debt in another Action, with a Release of Errors, and agree not to go into Equity. The Counsel desired Time to speak to his Client upon this Proposal; and the Court gave it him, as the Writ of Inquiry could not be executed till Saturday next. However the next Day, when the Counsel consented to the Proposal, the Court said, that they thought the Defendant had already shuffled and got more Time than he ought to have done; and therefore refused the Motion. And Judge Reynolds said, if they should

should go farther, than to allow these Motions, where the Party would have his Trial, as soon as he would have had regularly at first, their Dyers would rather be Decrees in Equity, than Judgments in Courts of Law. Salk. 402, 518.

Bellow *and* Pew.

How far the Court will stay Proceedings in an Action on bringing into Court what is bonâ fide due.

Vide post S. C.

THE Plaintiff had declared for 3 s. 2 d. ½. for Rent, and 97 s. upon a Mutuatus. Upon which Mr. Hervey said, that there was no Colour, that any Thing more was due than the 3 s. 2 d. ½. and the 97 s. was only added to make a Cause of it in this Court; he said, if this Practice was allowed, it would lead to a great Deal of Oppression; and therefore he moved, that upon bringing in the Money due upon the first Count with Costs, Proceedings might be stayed. The Court said, that they had never gone so far as to allow Money to be brought upon one Count; but however as this was such a Piece of Evasion, the Court made a Rule to shew Cause.

Guinel *and* Thomson.

When a Judgment is pleaded, how far it is requisite that a Note should be given of the Number-Roll of the Judgment.

MR. Jeffrys moved now, that the Rule might be absolute. It was to shew Cause, why the Defendant's Plea should not be rejected, unless he would give the Plaintiff a Note of the Number-Roll, which the Judgment was entred on, that he pleaded. The Master said too, it was a standing Rule of the Court, that a Plea of this Sort should never be received, without such a Note being given. The Court thought it was a very proper one, so made the Rule absolute.

Elford *and* Cating.

When a Person enters into a Rule to give material Evidence in a certain Place, what shall be said to be a Breach of it.

SIttings at Guildhall. In an Action upon a stated Account the Plaintiff was bound by Rule of Court to give material Evidence in London. The Evidence given was, that one of the most material Items was grown due there. But the Chief Just. said, that that was not enough, for the particular Items are now immaterial by the Account's being stated. However the Defendant's Counsel said, they could not have Benefit of this here; they must apply for a Breach of the Rule in another Place; so the Plaintiff had a Verdict.

Cripple *and* Evans.

When a Tender is pleaded, what Kind of Evidence shall be allowed in Cases of this Sort.

SIttings at Guildhall. This was an Action, where there were several Counts; the first upon a Note for 42 l. payable a Month after Demand; the second upon a Quantum meruit for Nursing the Defendant's Children; the third upon another Note, bearing the same Date, for the same Sum, and payable in the same Manner as the first; a fourth for Money laid out for the Defendant's Use. To the first of these Counts the Defendant pleaded a Tender; to the third Non Assumpsit; and to

the other Two, Nil debet. Mr. Kettelby for the Plaintiff said, that it was not incumbent upon them to prove the first Issue; but to prove the third, they would give in Evidence the Note itself; to the Second, they would prove, that Part of the Service was done before the Note given, and Part after; and to the Fourth, they would prove 4s. due. The Counsel of the other Side said, that if they should be able to prove a Tender upon the Note as laid in the first Count, it would not be enough for the Plaintiff to give in Evidence one Note to prove his third Count; but he must give in Evidence two distinct Notes, as they are under the same Description; for otherwise they said, the Note given in Evidence upon the third Count shall be intended the Note which the Tender is pleaded to. They said besides, that when it does not appear what Consideration a Note is given upon, it shall be intended to be given upon the Considerations then subsisting; and therefore as it does not appear upon what Consideration the present Note was given, it shall be intended to be given in Discharge of the Money that was then owing for Nursing. In Answer to the first of these Matters, Mr. Kettleby said, that the Plaintiff had admitted the Notes to be distinct by Pleading different Pleas to them; and to the other he said, that there was no Occasion to give in Evidence any Consideration of them; and therefore the Court were not to intend, that they were made upon this. However the Chief Justice observed, that these Notes must be intended to be the same; and it is a frequent Practice to lay the same Matter over in different Counts; and if the same Plea of a Tender had been made to both, the same Objection might have been made, that this Tender only respected one Note, whereas you say, there were several. To the other Point, he said, that where no Consideration appears upon a Note it must be intended to be given in Discharge of what appears to be then due. Thereupon the Jury gave their Verdict according to his Directions.

Boston *and* Forest.

IN Debt upon an Assignment of a Bail-Bond a general Demurrer was to the Declaration. The Exception that Mr. Strange took to it, was, that the Bail-Bond was for 410 l. whereas the Ac etiam was only for 400 l. Now he observed, that the Stat. of 13 Geo. 1. requires, that Bail shall be given to the Sheriff for no more than the Debt sworn to, and that appears by the Ac etiam; and as this is a general Law, he thought the Exception might be well taken in this Way. But Serjeant Chapel said on the other Side, that he had known Complaints to the Court of Common Pleas of Officers taking more Bail than the Sum sworn to, and they would not make any Rules upon them, where the Bail-Bond was pretty reasonable. The Court said, that they thought here were two Questions of considerable Difficulty; one whether the Statute intended to restrain the Sum contained in the Penalty of the Bond to the Sum sworn

What shall be said to be a good Bail-Bond.

to; or whether the Legiſlature conſidered Bail according to the legal Signification of the Word, and ſo to reſtrain the Sheriff only from taking double the Sum ſworn to, as a Security for the Debt. The other Queſtion was, admitting the Act of the Sheriff to have been illegal, whether the Bond ſhould be conſidered as void, or the Sheriff only puniſhable for taking it. To the firſt of the Queſtions the Court ſeemed to be in a good Deal of Doubt; but at laſt Judge Reynolds ſaid, that Bonds to the Sheriff are not given as a Security for the Debt, but only for the Party's Appearance; and therefore he could not ſee much Reaſon there was for the Statute, conſidering the Eſtimate of the Penalty of the Bond to be according to double the Sum; but he thought the proper Regulation of it was according to the very Sum ſworn to. And he ſaid, that before this Statute, he believed, it was a very common Thing for the Sheriff to take little more than the Sum contained in the Ac etiam. However, as to the other Queſtion, the Chief Juſtice as well as Judge Reynolds ſeemed to think it would be hard to avoid the Bond upon this Account. However the Court ordered theſe Matters to ſtand over.

Vide poſt 188.

Ellis *and* Moon.

What ſhall be ſaid to be a good ſetting out of an Aſſignment of a Term, in Pleading.

IN Covenant upon two Indentures, the Plaintiff ſet forth the Indentures of Demiſe between the Defendant and one Koſier, and that Koſier being ſo poſſeſſed poſtea totum Intereſſe, ſtatus, &c. devenit per aſſignation' to the Defendant. The Defendant pleads, that Koſier did not aſſign to him; & hoc petit quod inquiratur per Patriam. Iſſue being joined upon this, and Verdict found for the Plaintiff, it was moved in Arreſt of Judgment, that the Plaintiff had not averred, that Koſier did aſſign to the Defendant, and therefore the Iſſue joined upon this was a void Iſſue, being upon a Fact never controverted. Serjeant Chapel ſaid, that it was a Point unqueſtionable, that a general ſetting out of an Aſſignment of a Term by a Reverſioner per medias aſſignationes is good; and he obſerved, that the preſent Caſe was nothing more; and therefore the Defendant did wrong in tying the Plaintiff up in the Manner he did; and conſequently the Iſſue was void. But the Court ſaid, that they did not ſee, but they might take Aſſignation' for Aſſignationem, and if ſo, they would refer it to him, who was laſt poſſeſſed; then the Meaning might very well be, that Koſier was poſſeſſed, and from him the Terms came by Aſſignment, that is, he aſſigned, to the Defendant. However it ſtood over.

Vide poſt

Hetherington *and* Lowther.

How far the Court will not ſet aſide a Plea of Privilege.

THE Plaintiff was an Attorney of this Court, and ſued the Defendant by Writ of Privilege; the Defendant was an Attorney of the Court of Common Pleas, and he pleaded, that for that Reaſon he ought to be ſued no where elſe. Mr. Strange

ſaid, that no Rule was more known, than that where the Plaintiff and Defendant are both privileged Perſons, the Plaintiff's Privilege ſhall be allowed; and therefore he moved, that the Court would ſet the Plea aſide, as it was meerly Dilatory. The Court ſaid, that it has been a Queſtion formerly diſputed, whether ſuch a Plea was not good; and therefore to be ſure, they would not now ſet it aſide as frivolous. However if Mr. Strange could find any Caſes to warrant his Motion, they told him he might move it again.

Appleyard *and* Hay.

IN Debt upon Bond, the Defendant pleads, that the Condition was for Payment of 5 l. per Ann. for eight Years together, and avers, that he had a Commiſſion of Bankrupcy taken out againſt him, and after that, and before his Certificate ſigned, he gave this Bond to the Plaintiff for the Security of a greater Debt, to the Intent that the Plaintiff would ſign his Certificate. He pleads, that he conformed himſelf in all Things to the ſeveral Acts of Parliament relating to Bankrupcy, that his Certificate was ſigned, and demands Judgment if he ought, &c. The Plaintiff replies, and Traverſes, that the Defendant gave this Bond for the Security of a greater Debt, to the Intent that the Plaintiff would ſign his Certificate. Upon this, Iſſue is joined, and a Verdict for the Plaintiff in the Words of the Traverſe; and Judgment given accordingly in the Common Pleas. Error being now brought, Mr. Draper took two Exceptions; one that Debt would not lie till all the Days of Payment were over, and to this Purpoſe quoted C. L. 47. the other, that that Part of the Plea relating to the Bond's being given for the Security of a greater Debt was Surpluſage and intirely immaterial; that for that Reaſon the Plaintiff ought to have tied the Defendant up to the Proof of this by the Traverſe; and conſequently that the Verdict finding that this was not done with the Intent abovementioned, it was void likewiſe. The Court ſaid, that there was nothing in the firſt Objection; for Lord Coke is to be underſtood of a ſingle Bond, payable at different Times; and there indeed the Action cannot be brought till all the Days are over; becauſe the Duty is intire, and the ſeveral Payments are the ſeveral Deſcriptions of it; and therefore till all the Days are over it is not a complete Duty; and conſequently no Action till then can lie; but in the preſent Caſe the Duty is complete by the very Delivery of the Bond; and the Party only agrees, that he will bring no Action upon it, if ſuch Payments be made to him; but when there is a Default made in any of the Payments, he is no longer under a Reſtraint from bringing of his Action. Upon which Mr. Fazacherly begun to give an Anſwer to the ſecond Objection. He ſaid, he did allow, that it was not material, whether the Debt was greater or leſs, which the Bond was given to ſecure, or whether it was given to ſecure any Debt at all, but merely a voluntary Reward to induce the Plaintiff

Within what Time an Action may be brought upon a Bond.

to

to ſign the Certificate; but yet he thought, when the Defendant had averred the particular Conſideration, which the Bond was given upon, he was tied up to the Proof of it. And to this Purpoſe he applied the Caſe in Yelv. 195. Upon the whole Matter, the Court thought the Pleading right in the preſent Caſe, and accordingly affirmed the Judgment.

Liſne *and* Moody.

THIS was an Action of Treſpaſs for breaking into the Plaintiff's Houſe, and taking an unreaſonable Diſtreſs. The Jury gave 176l. Damages to the Plaintiff for the Diſtreſs, and 1 d. for breaking the Houſe. The Plaintiff releaſed the 1 d. and took Judgment for the Reſidue. A Writ of Error having been brought, Mr. Lee ſaid, that Treſpaſs would not lie for an unreaſonable Diſtreſs; for a Diſtreſs is given originally by the Agreement of the Party; and therefore the Abuſing that cannot make the firſt Act unlawful; but an Action upon the Caſe is the only Remedy. To this Purpoſe he applied 2 Inſt. 107. He obſerved too, that he did not know, that there was even that Remedy till the Statute of Marlbridge 4. and if that was ſo, he thought it was beyond Queſtion, that Treſpaſs could not lie by Conſtruction ſince; for the Statute ſays only, that the Perſon taking ſuch Diſtreſs ſhall be amerced, and in this Action he would be fined. And he thought a clear Argument might be made in Proof of this by a like Caſe in 3 Lev. 48. However Mr. Reeves ſaid, that he did not ſee, but Treſpaſs would lie merely for taking an unreaſonable Diſtreſs; for a Diſtreſs is given by the Authority of the Law, and the Abuſing that makes the whole Act illegal. To this Purpoſe he cited 6 Co. 46. He ſaid farther, that it was pretty clear, that there was a Remedy for this Oppreſſion at Common Law; and this appears by 13 Rep. 2. 11 Rep. 44. The Act done appears by theſe Caſes to have been illegal; and therefore as it was begun by the Authority of the Law, he thought the Conſequence muſt be, that it is rendered tortious from the beginning. But however, he ſaid, in the preſent Caſe there was a mere tortious Act of breaking the Houſe, diſtinct from the taking the Diſtreſs; and it appears ſo to be by there being ſeparate Damages given, and a Remittitur entered as to that; and if that was ſo, the Conſequence, he ſaid, was manifeſt, that the Unreaſonableneſs of the Diſtreſs may be well conſidered as laid in Aggravation of Damages. To this Purpoſe is Smith and Newman, Salk. 639. Dicks and Brookes, Trin. 3 Geo. 1. The Court ſaid, that they thought there was a clear Remedy for this Wrong by Action upon the Caſe; but they thought it as plain, that there was no Remedy by Treſpaſs. They obſerved, that a Diſtreſs was a Privilege given by the Law, that the Exceſſiveneſs of it was no new Act diſtinct from the former, but a Continuation, though unreaſonably ſo, of the old one. Then as to the Manner of laying the preſent Action the Court ſaid, they thought the Giſt of the Action was the unreaſonable Diſtreſs,

The Remedy for taking an unreaſonable Diſtreſs.

that the breaking of the House was only a Circumstance of taking it; and that it was highly improper to consider the Distress by Way of Aggravation to the Entry, and by that Means make the Entry the Principal. And the Chief Justice said, that he thought one Thing absolutely proved it; for there is no Pretence to say, but a Bar in this Action, admitting it had been the proper one, would have been a Bar to any Action for the Unreasonableness of the Distress; whereas if it had been laid only to aggravate the Damages it could not do so; because it is intirely uncertain, whether any Thing is given by the Jury upon that Account. However the Court ordered this Matter to be spoke to again, as it was a Writ of Error only upon a Judgment by Default. And the next Term the Court were of Opinion, that no Action of Trespass would lie. The Chief Justice said, that he did not know, but an Action upon the Case might lie at Common Law; but Judge Reynolds and J. Probin said in general in their Arguments, that they did not know there was any Remedy before the Statute. Accordingly the Judgment was reversed.

Ward *and* Baynam.

MR. Filmer moved to set aside a Judgment in a special Bill of Middlesex; because the Declaration was laid in London, and yet the Defendant was not allowed an Imparlance. And he said, he thought it a general Rule, that where the Writ is directed to the Sheriff of one County, and the Venue laid in another, the Defendant is intitled to imparle. Mr. Strange on the other Side said, that the Sheriffs of London and Middlesex were the same, and therefore this might differ from other Cases. But however the Party might have been intitled to an Imparlance, if he had regularly demanded it, he said, the Judgment ought not to be set aside, when he had omitted the Time for demanding it. The Court said, that in the present Case if this had been by special Original, it is a known Rule, the Defendant would have been intitled to an Imparlance; and the Design of special Bills is, that they should be upon the same Footing as special Originals. And as to this Application being after Judgment, they said, it was enough to shew that the Judgment was irregular. Accordingly the Court set the Judgment aside.

Where a Defendant shall be intitled to an Imparlance.

——— *and* Younger.

When a Writ of Execution is to be made out againſt an Eccleſiaſtical Perſon, whom the Writ muſt be directed to.

THE Sheriff of Wilts had returned upon a Fieri facias, that the Defendant was Eccleſiaſticus beneficiatus non habens laicum feodum. Upon which a Writ iſſued to the Dean of Sarum, who had a Peculiar, to ſequeſter the Goods upon the Defendant's Benefice. A Rule had been made upon him to return his Writ. But upon the Return's being inſufficient, and the Plaintiff finding that the Official claimed the Retorna brevium by a Patent from the Crown, he obtained a Rule upon the Official to make a Return, and accordingly gave him the Writ; but now the Official made a Return, and ſent up no Writ at all. Upon which Mr. Gapper moved now for an Attachment againſt him for a Contempt. But the Court ſaid, that the Rule, which the Plaintiff had obtained upon the Official to make this Return was irregular; for they ſaid their Writs could only be directed to the Biſhop, or the Peculiar, and they could not take Notice of any ſubordinate Officers in a Peculiar. Accordingly they diſcharged their firſt Rule upon the Official, and made a Peremptory one upon the Dean to make a Return; and they ſaid, he would find a Way to get the Writ from the Official.

Paterſon *and* Huddleſton.

What ſhall be a good Plea by an Executor.

DEBT upon an Obligation was brought againſt the Defendant as Executor. The Defendant pleads a Recovery againſt him already had in placito debiti, and that he had no Notice of this Bond at that Time, and that there was no more in his Hands than would ſatisfy this Recovery. Upon which the Plaintiff demurs. The Chief Juſtice ſaid, that he was of Opinion, that the Defendant's Plea might well be underſtood of a Recovery in Debt upon Bond, or other Matter of as high Nature; and if ſo, it was beyond Queſtion that the Plaintiff ought to be barred. But however the Court unanimouſly agreed that if the Plea was to be underſtood of a Recovery upon a ſimple Contract, the Recovery would be a good Bar, as the Defendant had no Notice of the Obligation. In this, they ſaid, conſiſts the Difference between Duties of a private Nature and Duties upon Record; for thoſe the Court did allow that Executors are bound to take Notice of at all Events, but theſe they need not, where a Suit is commenced againſt them to recover Debts of an inferiour Nature. They ſaid too, that there was no Occaſion that Executors ſhould hold out a Suit to the laſt, before they make ſuch Payments; but if an Action is taken out againſt them, it is the ſame. However the Court did allow, that if an Executor makes a voluntary Payment of a Debt by ſimple Contract where there are not Aſſets to ſatisfy the Bond-Debts, it is otherwiſe, though he has no Notice; for there are many Caſes, where a Man's voluntary Act ſhall prejudice him, where the Neceſſity of Law would not. Upon the whole Judgment was given for the Defendant.

Bellue *and* Pew.

MR. Forteſcue being retained to oppoſe the Motion before made, he deſired to know the Foundation upon which the Defendant's Counſel went, as he was not in Court at the Time the Rule was made for ſhewing Cauſe. Judge Reynolds explained it, but repreſented it in a more general Light than what I thought the Counſel put it upon before. He ſaid, he took the Foundation of the Motion to have been to prevent one of their Rules being evaded, which allowed Proceedings to be ſtaid in Debt and ſuch other certain Actions, upon bringing into Court what the Plaintiff had declared for with Intereſt and Coſts. And he ſaid, if in ſuch Caſes Proceedings were not allowed to be ſtaid upon one Count, by bringing into Court what is due upon that Count with Intereſt and Coſts, their Rule would be intirely rendered ineffectual. Salk. 596. Vide ante 180. Vide poſt.

Ruſh *and* Riggs.

A Motion was made to ſet aſide a Verdict for want of Notice of Trial; but it appearing that the Notice was given to him who had been concerned in the Cauſe, though the Attorney told the Plaintiff he would have nothing farther to do in it, the Court held the Notice to be regular; for the Court ſaid, he who was firſt concerned in the Cauſe ſhall be conſidered to continue Attorney in it, till Notice is given to the Plaintiff of another. Who ſhall be ſaid to be the Attorney in a Cauſe.

Patſon *and* Wilſon.

IN Debt upon a Recognizance againſt Bail, the Plaintiff ſets forth that a Bill was exhibited againſt one Selwood, and that the Defendant became Bail for him; the Plaintiff farther declares, that by that Record it ſet out, that Wilſon appeared, and that the Cauſe proceeded ſo far, that the Plaintiff obtained Judgment againſt Selwood; he ſays farther, that a Capias was taken out againſt Selwood, but he did not appear upon it; upon which the Bail was now ſued. Mr. Bootle the Younger took an Exception, that it appears by the Record, that Wilſon appeared inſtead of Selwood, which is a plain Error; and he ſaid, the Bail have no other Way of taking Advantage of this Miſtake but this upon Demurrer. However the Court over-ruled him; for they ſaid, this Error does not make the Record void, but voidable, and therefore till the Judgment is reverſed upon a Writ of Error, the Bail is liable; and accordingly gave Judgment for the Plaintiff. 2 Ven. 143. How far Bail are liable.

Langley

Langley *and* Pether.

What Things the Court of King's Bench may hold Plea in by original Writ.

IN an Aſſumpſit the Defendant demurred ſpecially, becauſe the Plaintiff had not declared againſt him in Cuſtodia Mareſcalli; and Mr. Kettleby ſaid, that no Original will lie in the King's Bench unleſs it is vi & armis, and therefore this Action would not lie here. To this Purpoſe he applied 2 Inſt. 23. 4 Inſt. 71, 76. Fitzh. N. B. 204. 1 Roll. 536. But Mr. Draper ſaid, that the Precedents have been ſo many, and eſpecially lately in this Way, that it would be a Thing of the moſt dangerous Conſequence, if this Exception was allowed. And beſides, he ſaid, that in the preſent Caſe the Defendant cannot be intitled to take it, becauſe he has not pleaded it to the Juriſdiction of the Court, but demurred in Bar. The Court ſaid, that they believed Precedents might be ſhewn ſo far back as Hen. 6.'s Time of this Court's holding original Juriſdiction in Aſſumpſits, and therefore they thought it was not fit for this Court to give Judgment now to the contrary for the unknown Confuſion that might attend it. A Thing of this Nature is only fit for the Exerciſe of the Parliament's Authority, who can confirm what already has been done, at the ſame Time that they Order the contrary for the Future. Accordingly gave Judgment for the Plaintiff.

Anonymus.

How far the Court will not quaſh a Writ of Error; but require the Party to plead to it.

MR. Kettleby moved to quaſh a Writ of Error for its being taken out above twenty Years ſince the Judgment, contrary to the Stat. of 10 & 11 Will. 3. But the Court ſaid, there are Exceptions in that Statute the ſame as are in that of Limitations in 21 Jac. 1. accordingly told him he muſt plead the Stat. to give the Plaintiff an Opportunity of taking Benefit of the Exception.

Boſton *and* Foreſt.

Vide ante 181.

MR. Fazakerly and Mr. Lee now made their Arguments upon this Caſe. Mr. Fazakerly ſaid, that he did not know, whether it would be neceſſary for him to endeavour to ſhew, that the Bond was void; becauſe the preſent Action was not brought by the Sheriff, but by the Plaintiff in the original Action. Now he obſerved, that the Plaintiff in the original Action could not intitle himſelf to this, but by bringing himſelf within the Terms of the Statute for the Amendment of the Law. This Statute indeed does allow of the Aſſignment of Bail-Bonds; but then it muſt be underſtood only of ſuch as are lawfully taken; and therefore if any Bond was given contrary to the Statute of Hen. 6. this Statute has always been conſtrued not to extend to it. Now the Statute of 12 Geo. 1. which the preſent Queſtion is upon, has only added ſome other Reſtrictions to theſe Bonds beſides thoſe required of them before. And therefore he ſaid, that it is equally neceſſary, that

a Bail-Bond ſhould be made in Purſuance of this Statute, to bring it within the Intent of the Statute for the Amendment of the Law, and that it ſhould be made in Purſuance of the firſt Statute. But that the preſent Bond was not within the Meaning of the laſt Statute, he ſaid, was plain; becauſe the Words of it are, that ſuch Bonds ſhall be for the Sum ſworn to be due and no more. And he obſerved that theſe Bonds were always given as a Security for the Appearance of the Party, and not as a Security for the Debt, and therefore there was no Colour that ſuch Bond ſhould be taken in double the Sum; and conſequently the Words (for the Sum) muſt be underſtood the ſame as if they had been (in the Sum). This Argument Mr. Fazakerly ſaid, was ſufficient to determine the preſent Queſtion; however to make it more clear, he offered a Reaſon to ſhew that the Caſe would have been the ſame, if the Action had been brought by the Sheriff himſelf; becauſe he had no Authority to take Bail at all in theſe Caſes at Common Law, and the Bonds he does take are only by the Authority of Parliament. Now, he ſaid, where theſe Bonds are not within theſe Statutes, they muſt be conſidered as unlawful Bonds; and then this Caſe muſt fall under a general Principle of the Common Law, that Securities taken unlawfully by any Officer under Colour of legal Authority are void in themſelves, (they being conſidered as taken by Extortion) and conſequently when they appear ſo upon Record the Party may demur generally, and demand whether he ſhall be required to give an Anſwer. To the firſt of theſe Objections, Mr. Lee ſaid, that the true Deſign of this Act of Parliament, which the Queſtion turns upon, was, to prevent Perſons being held to Bail by the Sheriff in the Sum the Action is brought for, which was the Practice then; and it has provided therefore, that no Perſon ſhould be held to Bail in any greater Sum, than the Plaintiff ſhould ſwear was his Due. Now he obſerved, that nothing could be a more natural Conſtruction upon this Act, than that as before the Bail taken by the Sheriff was for double the Sum in the Ac etiam; ſo now the Bail taken by him ſhould be for double the Sum ſworn to; and this, he ſaid, equally regulated the Sum as if it ſhould be exactly the ſame. To the ſecond Objection he ſaid, that there were Caſes where Acts were held to be illegal by Statute Law as well as the Common Law, and yet not allowed to be void, but puniſhable in a proper Manner; and to this Purpoſe he applied a Caſe in 2 Inſt. 131. Judge Page ſaid, that he thought it unqueſtionable, that the Bond was not aſſignable in the preſent Caſe, if it did not clearly comply with the Intent of this laſt Act of Parliament; but he thought it did for the Reaſon juſt before-mentioned by Mr. Lee, and compared it to the Caſe of the Ac etiam. The reſt of the Court were of Opinion, that the Bond was not within the Act, as the Intent of Bail-Bonds is not to ſecure the Debt, but the Appearance of the Party; and therefore whatever the Practice might have been before of the Sheriff's Taking double the Sum in the Ac etiam, they thought that was not a Regulation, which he was confined to by the Law, but meerly a volun-

tary one chose by himself to be a Guide to his Discretion; for before, if the Sheriff had held the Party to Bail in any Sum, he was only punishable for his Oppression, but the Bond could not be avoided. As this then is to be taken to be a Bond not within the Meaning of this last Statute, they thought it was not assignable, no more than a Bond not regulated according to the Restrictions of the first Act. However this Matter was ordered to stand over.

Vide post

Sir Henry Goring *and* Goring.

How far the obtaining a Trial at Bar is a Matter of Right and not of Favour.

ON Rule to shew Cause, why there should not be a Trial at Bar in this Case, the Counsel for the Plaintiff said, that the Defendant claimed as Heir at Law, and Devisee, but he was a Papist, and the Plaintiff was the Protestant Heir, and claim'd under the late Act in Relation to Papists. However they said, that there was great Reason to suspect there being Terms for Years secretly kept on Foot, and so the Plaintiff will be likely to be nonsuited. For which Reason they hoped the Court would not require this Trial to be at the Bar, unless the Defendant would enter into a Rule not to give such fraudulent Terms in Evidence. The Court said, here are the two general Reasons for Trials at Bar in the present Case, Length of Examination, and the Consequence of the Cause, and therefore they did not know they could put any Terms upon the Defendant in making this Rule. But the Court said, if the Counsel were apprehensive of what they suggest, the proper Application was in Chancery for a Discovery of these Deeds.

Hurs *and* Fenn.

How far the Court cannot make an Order upon an Officer of theirs, to refund Money which he has received.

THE Defendant was a Prisoner in the Counter, and intending to turn himself over to the King's Bench Prison gave the Marshal six Guineas in Hand upon his agreeing with him, that he should have the Benefit of the Rules; upon which Mr. Birch moved, that as the Defendant had altered his Thoughts of turning himself over, the Court would make a Rule upon the Marshal to refund the Money, as this was taken by Virtue of his Office. The Court said, that if this Money had been taken by the Marshal at the Time the Defendant was his Prisoner, for proper Reasons they would have made such Rule; but in the present Case they could not. The Chief Justice absent.

—— *and* Revel.

MR. Fazakerly moved for a Rule upon the Associate to give them a Copy of the Minutes of a Special Verdict. But the Court said, the Judge that tried the Cause is to settle the Special Verdict, and therefore the proper Way of Proceeding would be to take out a Summons to order the Associate to attend before the Judge; and if he does not attend upon it, then the Application will be necessary to be made to the Court. So rejected the Motion.

What is the proper Method to be taken in order to settle a special Verdict.

The King *and* Robe.

THE Order, upon which the former Rule was made, appeared now something different from what it did before. The first Part of it was a Declaration of the Justices Opinions, that the Patent only authorised the Defendant to be Clerk of the Market within ten Miles of the Place where the King constantly resides, and not within ten Miles of the Place where the King changes his Residence to for particular Times. Upon which they declared, that the Defendant exercised this Authority illegally at Uxbridge, and the Places thereabouts; and therefore they thought that Norwood the High Constable was to be justified in refusing to obey one of the Orders of the Defendant. Upon which they made an Order, that Money should be borrowed of the County-Treasurer to defend the Prosecution carried on by Robe against Norwood; and that it should be repaid out of certain Rents of Houses belonging to the County. Mr. Abney came now to shew Cause upon this Order; and he said he would not endeavour to maintain it, if it must be understood by the Order that the Money was to be repaid out of the County-Stock; because it is determined in Salk. 605. that the County-Stock is not to be applied to such Purposes; but he said, the County-Stock is that, which is in the Treasurer's Hands, collected by the Constables and paid over to him; and therefore it cannot be understood that it should be repaid out of that; but in fact, he said, the Money which is to re-imburse the Treasurer, is to arise out of the Rents of Houses, settled in Trustees for the Benefit of the Justices of the County of Middlesex; which Money, he said, is appointed to be disposed of by them upon such Occasions as they shall think proper. The Court said, if this Matter had appeared so specially upon the Order, they should certainly have thought the Order had been good; but as it is not, they must take it for publick Money not to be applied to such particular Purposes. However the Chief Justice said, that the Order might go back, and the Justices might amend it; but at last the Court agreed they could not; because the Term was over which the Order was brought up in. The Court then considered how much of this Order they should quash. They agreed, that they would not quash the first Part of it, tho' it was the Foundation of the other; because it is meer Matter of private Opinion; and if they should, it would only give the Defendant's Party occasion

Vide ante 165.

to

to triumph over the Juſtices unneceſſarily; whereas they ſaid, they thought it a laudable Deſign in the Juſtices to endeavour to correct the Abuſes, they believed, were made by theſe Patentees. However Judge Reynolds ſaid, that he did not ſee, but the next Part of the Order, which appointed the Money to be borrowed of the Treaſurer, amounted to an Order upon him to lend it; and therefore that ought to be quaſhed. But the Reſt of the Court did not think it had ſo extenſive a Meaning, and therefore would not quaſh that neither. However all the Court agreed in quaſhing the laſt Part.

Dr. Bently *and* The Biſhop of Ely.

The Conſtruction to be put upon Statutes of Colleges.

LAST Term Dr. Bently moved for a Prohibition upon a Citation exhibited againſt him by the Biſhop, as Viſitor of the Maſterſhip of Trinity College in Cambridge, at the Complaint of Mr. Johnſon, one of the junior Fellows of that College. The Citation ordered the Doctor to appear before the Biſhop at Ely-Houſe in Holborn to anſwer certain Articles, that ſhould be exhibited againſt him, for waſting the Revenue of the College, contrary to the fortieth Statute given them by Q. Elizabeth. This Statute provides in the Beginning of it againſt ſeveral great Offences, and ſays, if the Maſter ſhall commit any of them, he ſhall be twice admoniſhed by the Vice-Maſter and ſeven ſenior Fellows; and if he ſhall not reclaim after that, he ſhall be expelled the College by the Viſitor. Porro, ſays the Statute, if he ſhall waſte the Revenue of the College, be guilty of Hereſy, Murder, Treaſon, &c. he ſhall be expelled the College. Upon which the Doctor's Counſel ſaid, that the Word Porro connects both Parts of the Statute together, and therefore it ought to receive an uniform Conſtruction, that the Maſter ſhould be admoniſhed before the Biſhop proceeds to Expulſion. And upon that they founded their Motion then for a Prohibition. But the Court ſaid, that it would be a very unreaſonable Thing to ſuppoſe, that the Perſon that gave theſe Statutes ſhould deſign, that the Viſitor ſhould expel for theſe extraordinary Offences, and yet that he ſhould not do it, but upon two previous Admonitions. For this Reaſon, they ſaid, the Word Porro muſt intirely disjoin the two Sentences, and the one Part muſt not receive its Conſtruction from the other; upon which they refuſed the Motion. The Doctor's Counſel came now, and informed the Court, that the Biſhop had ſince exhibited his Articles, but that they differed very much from the Citation; and that all the Offences charged in them, were either collegiate Acts of the Body, which he could not be anſwerable for, or elſe they were ſuch, for which the Statutes have provided particularly other Penalties. His Counſel ſaid, that they had laid theſe Exceptions before the Biſhop, and had likewiſe pleaded the late general Pardon, but he had over-ruled the Whole; for which Reaſon they were obliged to apply to this Court again to grant them a Prohibition. The Counſel of the other Side ſaid, that if there ſhould be Reaſon to grant a Prohibition as to ſome of theſe Articles, there would be none, they believed, to

grant it as to all; however they must be obliged to go thro' every distinct Article, which were sixty-four in Number, and therefore they prayed a Day till next Term to shew Cause. They desired too they might have a Rule to inspect the publick Books of the College and take Copies of them at their own Expence; the Court accordingly made a Rule to shew Cause; for they said, wherever a Visitor proceeds contrary to his Citation; or inflicts different Penalties from what the Statutes prescribe, this Court always grants their Prohibitions. And they said, they would grant the other Rule, though there was no Consent. The Doctor's Counsel then desired, that they might have Liberty to amend their Suggestion in any Matters of Form, if they should think it proper. The Court said, they could not allow them to amend it in Substance, unless the other Side would consent; because by Amending it in Substance it would be a new Suggestion, and therefore there must be a new Motion for a Prohibition. However it would be for the Interest of the other Side to consent to allow them to amend in Substance as well as Form, if there should be occasion for it; for if this Suggestion should be bad, the Doctor's Counsel would certainly make another, and so it would be a Means only of keeping off the End of this Affair longer; and therefore the Court advised the Bishop's Counsel to agree to it; and they did so accordingly, and a Fortnight's Time was allowed the Dr. to amend his Suggestion.

Goodright *and* Sturdy.

MR. Reeves moved for a Rule upon the Sheriff to make a Warrant to his Bailiff to execute a Writ of Possession immediately, though it is returnable next Term; for he said, else the other Side would influence the Sheriff not to execute it till the very End of the Vacation, and by that Means they should lose all the Benefit of the Crop, that is now upon the Ground. But the Court in the first Place said, that the Sheriff might execute the Writ himself, if he had a Mind to it; and therefore to be sure they could not make a Rule upon him to order his Bailiff to do it; but besides, they said, the Sheriff has by Law all the Time to execute the Process till the Return of the Writ, and therefore they could not confine him to do it in a shorter Time. Serjeant Darnel then afterwards moved on the other Side, that the Sheriff might make a Return to his first Writ, that was returnable in Easter-Term last; for under Pretence, that he had not executed that Writ, the Court had granted this Writ, which Mr. Reeves had just now moved about. Now he said, this was only a double Piece of Oppression, and therefore, he hoped the Court would require this Return. Mr. Reeves said, that they ought to have had Notice given them of this Motion; for this is not a Motion of Course, as it would have been, if the Plaintiff had made it; but here the Defendant moves, that the Sheriff may make Return to the Plaintiff's Writ. But the Court said, it is a Matter that concerns themselves to have an Obedience made to their own Process, and accordingly granted the Serjeant's Motion.

Vide ante 177.

The Archbiſhop of Canterbury *and* The Maſter, Fellows and Scholars of Trinity-College in Cambridge.

The Time which the Court gives to ſhew Cauſe againſt a Mandamus.

MR. Lee moved for Time till the next Term to ſhew Cauſe upon a Rule, that had been made for a Mandamus to be directed to Trinity-College to admit a Librarian, upon the Appointment of the Archbiſhop, he having this Power given him by the Statutes of the College. He ſaid there would be a good Deal of Time neceſſary to be taken up in looking into ſeveral of theſe Statutes, to ſee whether the Biſhop had ſuch a Power or not; and the College were not ſerved with this Rule till Friday laſt. The Court ſaid, if this had been a Motion for Time to make a Return to a Mandamus, the Suggeſtion of Difficulty might have been very proper; but five Days Time was enough to ſhew Cauſe, why the Mandamus ſhould not go. They ſaid too, there can be no Prejudice to you by the going of the Mandamus; for if the Archbiſhop has not this Right, you will not be in Contempt by refuſing to obey it. But there may be a Prejudice to the other Side; for if the Archbiſhop has this Right, the Librarian ought to be admitted immediately, and receive the Profits of his Office; which if he is not admitted to now, he will have no Remedy for.

Bridge *and* Henly.

THE Plaintiff had filed a Bill in this Court in Hillary-Term was Twelve-month; but the Defendant being a Member of Parliament could not be made to appear till Hillary-Term laſt, though the Plaintiff had taken out a ſpecial Summons againſt him and three Diſtringas's; and then the Plaintiff could not declare againſt him, becauſe the Parliament was ſitting; but upon the Parliament's being prorogued the 14th of May, the Defendant was ſerved with a Declaration the 15th, which was four Days before the End of Eaſter-Term; and in Eaſter Vacation the Plaintiff ſigned his Judgment for Want of a Plea. Mr. Fazakerly had obtained a Rule for ſhewing Cauſe why this Judgment ſhould not be ſet aſide, for there not having been an Imparlance allowed the Defendant. Mr. Reeves now ſaid, that he thought the Judgment was regular; for the preſent Proceeding is upon the Statute of 12 Will. 3. cap. 3. and this Act has provided a new Way of Proceeding againſt Members of Parliament during their Time of Privilege; and he obſerved, that was by Way of Bill, in the ſame Manner as againſt Officers of the Court. And he ſaid, that where the Proceeding are by Way of Bill againſt an Officer he has not an Imparlance, if the Declaration is delivered before four Days of the End of a Term. He obſerved this is the conſtant Practice in the Common Pleas; and where you proceed by Venire, it has been the conſtant Practice in the Exchequer. He ſaid too, that ſince the late Rule made for regulating the Proceedings by ſpecial

Latitat in this Court in the ſame Manner as the Proceedings are by ſpecial Clauſum fregit in the Common Pleas, he thought it almoſt unqueſtionable, that the Proceedings here againſt Members of Parliament muſt be the ſame as they are in the Common Pleas; for a ſpecial Summons equally ſets forth the Cauſe of Action as a ſpecial Latitat; and therefore there's the ſame Reaſon there ſhould be equal Privileges. But the Court ſaid, as to the Proceedings in the Exchequer by Venire, that was an old Method of Proceeding peculiar to that Court, and no Argument could be drawn from that. They ſaid too, that till this Chancellor's Time, when he was Chief Juſtice of the Common Pleas, it was always taken for granted, that Imparlances were to be allowed in theſe Proceedings in that Court; becauſe the general Practice of that Court was to grant them; and this was the Reaſon, why till that Time the conſtant Method was to proceed in the Exchequer. But the Chancellor's obſerving, that they had a Way of Proceeding in that Court againſt their own Officers by Bill, and in thoſe Proceedings no Imparlance was allowed, the Court there thought it a natural Conſtruction upon the Act, that there ſhould be no Imparlance in theſe Proceedings neither; and by this means Buſineſs of this Sort came into that Court, as it was wholly almoſt in the Exchequer before. The Court then began to ſpeak of theſe Proceedings in the King's Bench; but they only ſaid in general, that till this new Rule, they thought an Imparlance was always neceſſary. Then as to the new Rule, the Court ſaid, it clearly could not extend to the preſent Caſe; becauſe the Bill was filed before it was made; and the Intention of it was only to concern Bills that ſhould be filed from that Time. However they ſaid, that if this Caſe had hapened ſince the new Rule, it would have been exactly as it is in the Common Pleas. Upon this the Court ſet aſide the Judgment.

Anonymus.

How far a Mandamus will lie to reſtore an Officer.

MR. Abney moved for a Mandamus to be directed to the Conſervators of Bedford Level to reſtore a Receiver. He ſaid they were incorporated by the Statute of 15 Car. 2. and they are required to appoint a Collector and Receiver; he informed the Court, that they were only Officers at Will; but the Foundation upon which he made this Motion, he ſaid, was, that the Receiver was not turned out by the Body. Accordingly the Court granted it.

The

The King *and* Harris and others.

The Method which the Court takes in Criminal Caſes in order to aſcertain the Identity of the Perſon.

SEveral Perſons of Brodeſly in Cornwall had been found guilty upon an Inforꝛmation foꝛ a Riot; the Chief Juſtice's Warrant had been directed to take up one of them; and one of that Name was bꝛought up the laſt Day of laſt Term upon it; but when it was moved, that the Court would paſs Sentence upon him, he made Affidavit, that he was not concerned in the Riot, that he never knew of any Inforꝛmation againſt him, that he did not appear at the Trial any other Ways than as an indifferent Spectatoꝛ; and that he never gave Authoꝛity to any Body to appear foꝛ him; and ſwoꝛe too, that there was another of the ſame Surname and Chriſtian Name both in the ſame Town with him. Upon which the Court then diſcharged him upon a Recognizance he entered into to appear the laſt Day of this Term; and made a Rule, that it ſhould be referred to Mꝛ. Bellamy to ſee, whether he was the ſame Man as was convicted oꝛ not. He was now called upon this Recognizance; and Mꝛ. Forteſcue pꝛayed he might be committed, upon one expꝛeſs Affidavit, that he was the ſame Perſon, and upon another from the Clerk in Court below, that he had Authoꝛity to appear from ſeveral of theſe Rioters, and that he verily believed this was one of them, but could not be certain. The Court ſaid, that they thought the Method they had oꝛdered this Matter to be put into was clearly the pꝛoper one; but however as this Perſon would not pꝛoceed in it, they gave their Opinions, that he was the Man; and accoꝛdingly committed him.

Rutter *and* Rexford and others.

How far the Court will allow a Judgment to be amended.

TReſpaſs had been bꝛought againſt ſeveral Defendants; all but one were found guilty; but by Miſtake one of their Names was left out in the Judgment. A Writ of Erroꝛ had been bꝛought, but Non-proſs'd, foꝛ the Erroꝛs being aſſigned corum domino rege, whereas they ought to have been aſſigned in Camera Scaccarii. Upon this Mꝛ. Draper moved, that the Judgment might be amended; and the Court allowed it.

The King *and* The Pariſh of St. Stephenſon in the County of Bedford.

Vide ante 177.

MR. Fazackerly came now to ſhew Cauſe why the Oꝛder of Juſtices ſhould not be quaſhed. He ſaid, he never knew this Exception allowed, only in the Caſe of Indictments; and he thought there was a particular Reaſon foꝛ that, which will not hold in the Caſe of Oꝛders of Seſſions. The Reaſon, he ſaid, was, that Indictments are not removed up to be quaſhed, but befoꝛe Trial of the Fact, whereas Oꝛders of Seſſions are never removed up till after; and theꝛefoꝛe, he obſerved, that it was neceſſary that the Place ſhould be certainly ſet foꝛth in an Indictment, that the Court may pꝛovide foꝛ the Trial of it; but there is nothing of this Reaſon in the pꝛeſent Caſe.

And as to the Objection about the Difficulty, that the Parties may lie under, by not knowing to the Juſtices of what County they are to appeal to; he ſaid, if they were ſenſible that they were aggrieved, it was their Buſineſs to inquire from whom the Grievance comes. But the Court ſaid, they thought it their Duty to ſee, that the Parties be not intangled with Difficulties no more than themſelves; and accordingly were going to quaſh the Order; but Mr. Fazackerly making then another Objection, that the Certiorari was directed to the Juſtices of the County of Bedford, to remove up all Orders made by them, whereas this Order was made by the Juſtices of the Town of Bedford, the Court ſaid, the Order was not properly removed before them, and therefore they did not do any Thing in it.

Anonymus.

How far the Court will not ſet aſide a Verdict for a Variance between the Record of Niſi prius and the Copy of the Iſſue.

MR. Lacey moved to ſet aſide a Verdict for a Variance between the Copy of the Iſſue and the Record of Niſi prius; in that the Copy of the Iſſue was made up as of Trin. Term Anno ſecundo Georgii Secundi, but the Record of Niſi prius was made up as of Trin. Term Anno ſecundo & tertio Georgii Secundi; and he ſaid, this Miſtake happened from the Beginning of the Term's falling in the ſecond Year of the King, and the End of the Term's falling in the Third, and no Defence upon this was made at the Trial. And J. Reynolds ſaid, he remembered a Verdict ſet aſide in the Common Pleas for the Copy of the Iſſue's being Magnæ Britanniæ, and the Record of Niſi prius Angliæ, Scotiæ, &c. However, Mr. Maſterman ſaid, that if this was a Miſtake, it would be in the Clerk of the Treaſury, and not in the Defendant's Attorney; for he always makes up the Stiles of the Record; but he ſaid beſides, that the conſtant Method of making up the Stiles of the Record in ſuch Caſes as this, is to make them up as in the preſent Caſe. Accordingly the Court refuſed to ſet the Verdict aſide.

Taſhburn *and* Kirſher.

How far the Court will not require a Perſon to give Security for paying the Coſts of Suit.

MR. Lee moved, that the Leſſor of the Plaintiff in Ejectment might give Security for the Payment of his Coſts, if they ſhould go againſt him, he living in Ireland. The Court ſaid, this is a common Motion in Equity; and even though the Plaintiff lives only in Scotland; but they never knew it done in a Court of Law.

Anonymus.

When an Action is brought by an Assignee of a Bail-Bond, upon what Terms the Court will stay Proceedings in such Action.

SErjeant Shepherd moved to stay Proceedings upon an Assignment of a Bail-Bond, upon entering into a Rule to plead the general Issue, taking Notice of Trial within Term, and giving Judgment upon the Bail-Bond to stand for a Security; and as this Case is, he said, the Plaintiff would have no Delay. The Court said, this Proposal must be understood of giving three Judgments upon the Bail-Bond, as there are three Persons jointly and severally bound in it; for there is no other Way in which the Intent of the Parties can be equally satisfied; because if an Action in treble the Sum should be brought against all three, and a Judgment had; that Judgment would survive from one to the other; and the Lien would not be reciprocal upon each of them and their Executors. But the Serjeant said, that the Costs of three Judgments would be too much, and therefore they chose rather, that the Plaintiff should go on.

Sir Thomas Calder *and* Ross.

How far an Action will not lie in England on a Matter arising in Scotland.

The Remedy for a Receiver.

The Remedy against Sequestrators.

A Scotch Lord had been attainted of Treason in the late Rebellion; but upon a Suit being commenced by his Creditors in the Court of Sessions to have Relief out of his Landed Estate, the Court there decreed, that it should be sequestred, and accordingly appointed the Plaintiff, being the Principal one, to be Receiver of the Profits. The Defendant had been Bailiff for some Time of this Estate; and upon the Plaintiff's meeting him at Edinborough, the Defendant acknowledged, that he was indebted to him in above 200 l. for the Profits he had received, and promised to pay him the Money, and offered to give him a Bond for it; but the Plaintiff would not accept of it; because he said, he should by that Means be answerable for this Money to the Creditors. The Defendant after this came into England with an Intent of going to the Bath; and upon that the Plaintiff arrested him here upon this Promise. And whether this Action was justifiable or not, was the Question before the Chief Justice at the Sittings at Guild-Hall. He said, that these Courts always ought to be cautious in allowing Proceedings here upon Matters arising between Persons who are governed by different Laws to prevent Confusion and Disorder between the Sentences of each Court. However, he observed, that the Courts of Law here have constantly given Relief upon general Matters of Contract, &c. where there is Relief given by the Laws of all Countries whatever. But in the present Case he took Notice, that this is not a Matter, which there is generally Relief for; because a Receiver appointed upon a Sequestration cannot recover the Profits by any Action, which were received by a Bailiff before a Sequestration granted; and if so, the Promise to pay this Money to such Receiver is void, being without a Consideration. He said, this was the constant Practice in the Court of Chancery; for the Receiver is only to gather in, and to bring it

before a Master. But he allowed indeed, if there had been an Order in the Sequestration, that the Receiver should make Distribution amongst himself and the Rest of the Creditors as the Effects should come in, that might have given him an Authority to act as the Owner of the Estate would, and consequently he would have had a good Action against the Bailiff upon this Promise. And this he observed was the constant Distinction in the Court of Chancery; and in such Case the Receiver is not accountable to a Master. And if this had been the Case he did not know, but the present Suit might have been proper here. But he said, that it appeared, that this was not so, not only from the Order of Sequestration itself; but was very probable too from the Plaintiff's refusing to accept the Bond, and the Reason he gave for it; for by this he discovered, that he did not think himself accountable to distribute amongst himself and the Rest of the Creditors; but answerable only to the Court. And upon this the Plaintiff was nonsuited.

Dale *and* Lubbock.

When an Action is brought against an Indorsee of a Bill of Exchange, what shall be good Evidence in such Action.

THIS was an Action brought by an Indorsee of a Bill of Exchange against an Indorsor, which had been drawn by one Mack Cleland upon one Mack Ceje. The first Part of the Evidence was to prove, that the Defendant indorsed this Note; now the Counsel could not do that directly; but the Evidence they offered as amounting to it was a Letter under the Defendant's Hand, wherein he writes to a Friend of his, that Mack Cleland had given him a Bill upon Mack Ceje, bearing Date such a Day, and payable to him or Order six Months after Date, and in all these Circumstances the Letter agreed with the Bill, though indeed there was no Sum mentioned in it, which the Bill was for. This the Counsel said was Evidence that the Defendant had the present Bill payable to him; then what they offered to shew, that he had indorsed it over, was a Confession from him himself, that he was come to Town to hasten on the Trial of an Action that was brought against him upon an Indorsement that he had made on a Bill of Exchange; and now the Counsel said, this very Cause was brought down by Proviso; so that it is strong Evidence that it is for the same Matter. The Chief Justice at the Sittings at Guild-Hall allowed this to be good Evidence of the Indorsement. And upon that the Counsel endeavoured to prove, that the Indorsee gave Notice to the Acceptor, that he must provide the Money before he commenced his Action against the Indorsor; and this he did by sending him a Letter of it. But they said, as the present Case was, there could be no Occasion of giving the Acceptor Notice at all; for the Indorsee took a Bond as a Security from the Acceptor of the Bill, that he should not receive any Prejudice from it; and therefore there is not that Reason for giving Notice to the Acceptor, before you come upon the Indorsor, as there is generally. But as to the first of these Points the Chief Justice said, he did not think the bare sending a Letter to the Post-House would be sufficient Evidence of Notice, without some further

further Proofs of the Acceptor's receiving it; and beſides he ſaid generally a perſonal Demand is expected. And as to the other of theſe Points Mr. Fazackerly ſaid, he did not think the Acceptance of a Bond would be ſufficient. For he obſerved, that in all Caſes where an Indorſor pays a Bill he has a Remedy over againſt the Acceptor; and now in this Caſe he has only an additional one; and as it is a known Thing, that the Remedy over upon the Note will not be ſufficient, he could not ſee how the Remedy over upon the Bond could. However, he ſaid, he did allow, that if the Acceptor had paid the Money upon the Bill to the Indorſor, that would have made the Defendant abſolutely liable. The Chief Juſtice ſaid, that this was a Point, that deſerved to be thought of, and therefore he directed the Jury to give a Verdict for the Plaintiff ſubject to his Opinion of this Point of Law.

Juny and his Wife *againſt* Glover.

When an Action is brought upon 22 & 23 Car. 2. cap. 9. ſect. 136. Which was made to prevent vexatious Suits, what ſhall be good Evidences in ſuch Action.

THIS was an Action on the Statute of 22 & 23 Car. 2. cap. 9. ſect. 136. for preventing frivolous Suits, and provides, that in Actions of Aſſault and Battery, &c. where the Damages given by the Jury do not exceed 12 d. no more Coſts than Damages ſhall be awarded to the Plaintiff; and if Judgment be entered for more, it ſhall be void, and the Defendant ſhall be intitled to an Action upon this Statute. Upon Not guilty pleaded, the Evidence given for the Plaintiff was merely the Copy of a Record, wherein the now Defendant in an Action of Aſſault againſt the now Plaintiff had recovered 1 s. Damages and 40 s. given by the Jury for Coſts, quæ dampna in toto ſe attingunt ad 41 s. And to prove the Damages, that the Plaintiff had ſuffered by the former Action, he produced the now Defendant's Attorney's Bill of Coſts, which a Witneſs ſwore he knew the Plaintiff had paid. Mr. Reeves and Mr. Wynn, of Counſel with the Defendant, gave nothing in Evidence; but only objected, that the Evidence given for the Plaintiff did not maintain the Declaration. For it is therein expreſsly laid, that the Defendant had brought the former Action with an Intent to vex and moleſt the Plaintiff. Now they obſerved, that there had been no Evidence given, that the Suit was vexatiouſly commenced. It appears, that there was a good Cauſe of Action, becauſe the Plaintiff recovered; and it does not appear, that the Suit was vexatious, becauſe the Jury have given but 1 s. for Damages. But beſides, they ſaid, they thought the mere Merits were intirely againſt the Plaintiff, for the Statute ſays only, that no more Coſts ſhall be awarded than Damages, where they are under 40 s. which can refer only to Coſts awarded by the Court de incremento; for the Jury can't be ſaid to award Coſts. And this has long ago been ſo determined in the Caſe of Page and Kirk, 2 Ven. 36. And the Practice has been accordingly ever ſince. The Counſel took Notice farther of two Variances, between the Record ſet out in hæc verba in the Niſi prius Roll, and the Copy of the Record produced. In the Niſi prius Roll it was averred, that the now Defendant brought the former Action per nomen Elizabethæ Vid. whereas in the Copy

of the Record it was entred Eliſabethæ Glover Vid. queritur, &c. though in the Memorandum it was agreeable to the Record of Niſi prius; but they ſaid, the Memorandum was only the Recital of the Bill, and not to be oppoſed to the Bill it ſelf in hæc verba. Serjeant Hawkins indeavoured to avoid this Variance, by ſaying, that the Memorandum is venit & profert in Cur', ſo that ſhe might firſt appear by the Name of Elizabeth Widow, and bring the Bill by the Name of Elizabeth Glover, Widow. But the Chief Juſtice ſaid, he did not know, there could be any other Appearance of a Plaintiff, than bringing the Bill in. The other Variance inſiſted upon, was, that in the End of the Declaration as ſet out in the Niſi prius Record in hæc verba, the, &c. is left out, for it concludes & inde producit ſectam. And it was obſerved, that this was very material; for the, &c. implies the whole of the Plaintiff's Demand, as in his C ſe his Damages, &c. Upon the whole the Chief Juſtice ſaid, that he thought this Caſe intirely depended upon the Conſtruction of the Statute of 22 & 23 Ch. 2. for though indeed the Plaintiff has averred the Suit to be vexatious, yet he thought the Plaintiff need not prove that by expreſs Evidence; becauſe if the Conſtruction the Plaintiff contends for be right, the Law conſiders the Suit vexatious. And as to that Matter he ſaid, his own private Opinion indeed was, that there was not ſufficient Reaſon to alter what has already been determined; but has he knew another Judge was of a different Opinion, he would conſider of it. And therefore ordered a Verdict to be given for the Plaintiff, ſubject to his Determination on this Point, as well as on the Variances. But then, he ſaid, there would be another Queſtion as to the Damages, which the Jury are to give. For though the Plaintiff has paid his Attorney his whole Bill, and ſo has inclusively paid the now Defendant's Attorney's Bill, by which Means he may be ſaid actually to have been damnified ſo much; yet poſſibly by Law a great Part of the Bill might have been ſtruck off upon a Taxation; and certainly therefore the Defendant who is a Stranger ſhall not be liable to Pay any more than the Plaintiff was obliged to. And upon this the Parties agreed, that a Verdict ſhould be given for the Plaintiff for the whole, but that he ſhould enter into a Rule to take Execution for no more than ſhould be due upon the Maſter's Taxation. Salk. 207, 208.

Sir Thomas Price and his Wife *ver.* Powel, Cornwal and others. Scacc.

When Marriage Articles are entered into, what kind of Settlements ſhall be directed by a Court of Equity to be made in purſuance of them.

SIR Thomas Powel entered into Articles of Agreement in 1693, by which he agreed to ſettle certain Lands to himſelf for Life, the Remainder to a Lady he then intended to marry for Life, the Remainder to Truſtees to preſerve contingent Intereſts, the Remainder to his firſt and other Sons in Tail Male of the Body of him and that Wife, the Remainder to the Heirs Male of the Body of him and any other Wife, the Remainder to the Heirs of the Body of the firſt Wife, with a Proviſo of 3000 l. to be raiſed out of the Eſtate for the Portion of the Daugh-

Daughters by the first Marriage. Sir Thomas Powel afterwards marries this Lady, and then suffers a Common Recovery. After this he dies leaving no Issue Male; and then Sir Thomas Price marries his only Daughter by the first Venter, who now join in bringing their Bill to set aside this Recovery, and pray that a Settlement may be made to the Issue Female of the first Marriage, and to the Heirs of their Bodies. The Counsel said, that they thought it a Case known in a Court of Equity, that where Marriage Articles are made and an Agreement thereby entered into to settle Lands upon the Husband for Life, the Remainder to the intended Wife, the Remainder to the Heirs Male of their Bodies, the Remainder to the Heirs of their Bodies generally, a Court of Equity will consider the Issue Male as Purchasers for a valuable Consideration, and in Consequence of that Decree the second Remainder to be to the Issue Male, and not to the Heirs Male; for such is the equitable Meaning of the Words, and a Court of Equity will mould the Settlement accordingly. The Counsel observed farther, that if this was so in the Case of the Male Issue, there was equal Reason it should be so in Case of the Females. And they said, they thought a stronger Case than this was very lately determined, the Name of it was West and Erresey. Articles had been made there to settle Lands upon a Man for Life without Impeachment of Waste, the Remainder to his intended Wife for Life, the Remainder to the Heirs Male of their Bodies, the Remainder to the Heirs of their Bodies generally. A Settlement was made before Marriage, reciting these Articles, to himself for Life without Impeachment of Waste, the Remainder to the intended Wife for Life, the Remainder to the first and other Sons in Tail Male, the Remainder to the Sons of the second Marriage in Tail Male, the Remainder to the Heirs of his Body by the first Wife. The Husband after this suffered a Recovery, and died leaving no Issue Male. West married a Daughter of that Marriage, and brought his Bill in this Court to set aside the Settlement for being made contrary to the Articles, though reciting that it was made in Pursuance of them, and farther prayed that a new Settlement might be directed to the Issue Female of that Marriage, and not by the general Words of the Heirs of that Marriage. This Court indeed dismissed the Bill; but upon an Appeal to the House of Lords they reversed the Decree, and ordered that a new Settlement should be made to the Issue Female in Pursuance of the Bill. The Chief Baron said, that he owned for his Part, he thought, there was a great deal of Difference between a Court of Equity's decreeing Lands to be settled to the Male Issue, and decreeing them to be settled to the Female; a Court of Equity might go so far as to consider the Issue Male Purchasers, for the evident Intent it is to be supposed the Party had, that his Estate should continue in his Name and Family; but no such Intent can be had in the other Case; and a very good Reason there is, that they should not be considered as Purchasers, that by this Means they might be kept under proper Obedience to their Father. And as to the Case cited, he said, the Resolution of superior Courts might controul per-

hays a Decree he ſhould be for making, but could never Influence his private Opinion. But be the general Laws of Courts of Equity in this Reſpect as they will, the whole Court unanimouſly agreed that as the Circumſtances of this Caſe are, the Daughters of the firſt Marriage cannot be conſidered Purchaſers; for there is a plain Difference in the Expreſſions in the Articles between the Limitation to the Sons of the firſt Marriage and the Limitation to the Daughters, and therefore there muſt be ſuppoſed a plain Difference in the Intent of the Parties. And eſpecially too if it be conſidered, that the Expreſſion as to the Daughters of the firſt Marriage and the Sons of the Second is the ſame; and there is no imaginable Foundation to think, that thoſe Sons ſhould be Purchaſers, who were by the ſecond Venter. They ſaid too, that there was a Proviſion made out of the Eſtate for a Portion to the Daughters, that the Articles were drawn by Sir Tho. Powel, who was a Gentleman at the Bar, and it could not be thought, but he well knew the legal Diſtinction between Heirs and Iſſue. They ſaid it deſerved ſomething to be conſidered, that the Articles were made above thirty Years ago, that many Conveyances had been made according to the legal Conſtruction of them ſince, and that therefore it would be a very dangerous Thing for this Court now to direct a Settlement to be made contrary to this legal Underſtanding of the Words. And the whole Court in general agreed, that they never knew a Court of Equity decree contrary to the legal Conſtruction of a Conveyance upon a ſuppoſed imaginary Intent of the Parties to the contrary. 2 Vern. 295. 1 Vern. 48. 2 Vern. 659, 671, 704.

Term.

Term. Mich.

3 Geo. II. 1729.

Caſtel *ver.* Bambridge and Corbet.

How far the Court will bail a Man in an Appeal of Murder.

Bambridge had been indicted for the Murder of the Plaintiff's Husband, and thereupon was acquitted at the Old Baily. Upon this the Plaintiff brought an Appeal againſt him by Original, and charged him with it whilſt he was there in Cuſtody, and made Corbet a Defendant with him in the Action. This was the Day of the Return of the Writ, and Bambridge was now brought up by Habeas Corpus, to which Writ the Sheriffs of London returned, that they took him in Cuſtody upon the Appeal, and brought him here accordingly; and to the Writ of Appeal they returned, that they had taken the Defendants Bodies, and that they remained in their Cuſtody. The Defendants Counſel moved now, that the Return to the Writ of Appeal might be filed, and that the Defendants might be bailed, for there being a material Fault in the Writ. The Writ recited, quia Maria Caſtel vidua fecerit vos ſecuros de clamore ſuo proſequendo per A. B. of ſuch a Place and T. D. of ſuch a Place; now the Counſel ſaid, that they had an Affidavit to produce from theſe very Perſons, that they had neither of them given theſe Pledges, and therefore the Sheriff had no Authority to take the Defendants in Cuſtody. They did allow that Security might be given to the Cuſtos Brevium in the Name of the King before the Iſſuing out of the Writ, and that would be ſufficient Warrant for him to iſſue it forth, equally as if the Security was given to the Sheriff; but they ſaid, one way or other real Pledges muſt be given, and there are two Forms of theſe Writs, which evidently ſhew it; one is, quia A. fecerit nos ſecuros; the other, ſi A. fecerit vos ſecuros. But the Counſel obſerved, that the Form of the preſent Writ was in neither Way, and therefore it was bad too upon that Account. They ſaid, they had taken theſe ſame Exceptions in the Court of Chancery, and applied for a Superſedeas upon this very Affidavit. But the Lord Chancellor told them, that fecerit might have a future Conſtruction and relate to the Sheriffs, and therefore they might take Advantage of this Exception more properly upon the Return. But the Court in the firſt Place ſaid, that they thought the Habeas Corpus wholly unneceſſary; for the Sheriffs of London were bound to bring the Defendants up to Weſtmin-

ſter upon the Return of the Writ of Appeal. They ſaid too, that the Sheriffs ought to have returned paratos habeo, and not remanent in Cuſtodia; and for this Contempt in not obeying their Writ, made a Rule for an Attachment, unleſs they had both the Defendants here upon it to morrow. Then as to the Exceptions to the Writ, they ſaid, the only Thing required by the Law was, that Pledges ſhould be found, and at preſent they are to take it for granted, that Pledges have been found, becauſe they thought the Word fecerit could only have a præterperfect Conſtruction; and they ſaid, they never knew, that a Fact ſuggeſted in a Writ could be falſified upon Motion. But however, they ſaid, if Pledges were not yet given, they certainly would permit them to be given now, nay even at any Time before Judgment; and that notwithſtanding the preſent Proceeding was by Original; for they could ſee no Difference in this Reſpect between its being by Original and its being by Bill, notwithſtanding the Counſel endeavoured to make one. The Court accordingly refuſing to grant the Motion upon this Foundation, the Appellant was ordered to come forth in Perſon, and have her Appearance recorded. The Sheriffs then amended their Return, and brought Corbet into Court too; upon which both the Defendants were brought to the Bar and there arraigned in French. The next Day the Appellant was called again, and then both Defendants put in a Plea of Not guilty upon double Stamps, which was required to be done, before the Court would receive it; and the Plea was read in French, and Iſſue joined in the ſame Manner. The Defendants then prayed a ſpeedy Trial; but the Court ſaid, there muſt be fifteen Days between the Teſte and Return of the Venire, and fifteen Days between the Teſte and Return of the Habeas Corpora, as the Fact is laid in London and the Proceeding is by Original; and the Appellant's Counſel would not Conſent to have the Original now quaſhed and to proceed by Bill. Upon which the Appellees prayed, that they might be bailed in the mean Time; and their Counſel cited the Caſe of Armſtrong and Liſle, Salk. 62. and many others, where the like had been done. But the Court ſaid, that Caſe by no means came up to this; for there the Defendant had been before convicted upon an Indictment and Clergy allowed; and that Caſe, they ſaid, was not within the Benefit of the Statute of 3 Hen. 7. c. 1. ſo that the Appeal was abſolutely barred. But however, they thought there was ſufficient Foundation ſtill to bail Bambridge; becauſe he had been already acquitted upon an Indictment, to the Satisfaction of the Judge who tried him; and where that is the Caſe, they thought this Court ought to give that regard to the Verdict of twelve Men, as to diſmiſs him upon his finding Sureties for his being amenable to them. But however, they ſaid, there was no ſuch favourable Circumſtances offered in Reſpect of Corbet; and therefore as it ſtands indifferent, whether he is guilty or not, they thought, this Court ought not to bail him; for their Diſcretion ought not to be influenced by Inclination or Will, but to be directed by former Precedents and Reſolutions; and they knew of none where this Court had gone ſo far. The Queſtion then was, how many Bail was ne-

ceſſary for Bambridge to give. The Court ſaid, that wherever a criminal Proceeding is originally againſt a Man on the Crown-ſide, or removed up there by Certiorari, the Court always require four Bail; but wherever the Proceeding is on the Civil-ſide, it is otherwiſe. And therefore they admitted, that if the Appeal had been lodged at either of the Seſſions in London that have intervened ſince the Acquittal, and been removed up by Certiorari, they ſhould have required four Perſons. But then when the Bail offered to juſtify, the Court ſaid, that there was no Bail-piece, and therefore they could not allow them, though it is otherwiſe on the Crown-ſide. But a Bail-piece being immediately ſent for, the Court ſaid it was their Duty to examine into the Circumſtances of the Bail, though they ſhould bind them Corpus pro Corpore. Accordingly they inſiſted, that they ſhould both juſtify in 1000 l. a-piece. And though it was objected againſt one of them, that he was already bound for Bambridge in a Recogniſance of 1000 l. yet the Court ſaid, as that was not broken, it ought to be conſidered as no Debt upon him. Upon this the Bail entred into a Recogniſance Body for Body, but in no Sum certain, that Bambridge ſhould appear in Perſon craſtino Animarum; and Corbet was committed to the Marſhal. 1 Salk. 62. 2 Mod. 264.

Feilders *ver.* The Biſhop of Wincheſter and others.

When a Bill is brought in Order to eſtabliſh a Cuſtom, how far the Court cannot eſtabliſh it by Reaſon that the Cuſtom proved by the Evidence materially differs from that which was ſet forth by the Bill.

Canc. A Bill was preferred in this Court to eſtabliſh a Cuſtom in a certain Manor, where the Plaintiff had Lands. The Bill ſet forth, that there was a Cuſtom Time out of Mind for certain Lands in that Manor, whereof the Lands in Queſtion were Parcel, to be leaſed out for three Lives, and that ſo ſoon as one of the Lives ſhould drop, the then Tenant had Liberty to add a new Life compounding for a Fine. The Defendants denied, that there was any ſuch Cuſtom. Upon the Hearing of the Cauſe the Plaintiff read ſeveral Depoſitions; but in all of them it appeared, that it was Part of the Cuſtom, that the Tenant ſhould put in this Claim within the three next Courts after the Determination of the firſt Life. Upon which the Lord Chancellor ſaid, that the Cuſtom appearing upon the Evidence materially differed from the Cuſtom ſet forth in the Bill, and therefore he could not decree for the Plaintiff. He ſaid, this was not like the Caſe, where a Right of Common is claimed, and Iſſue is joined, whether there is a Right or not; there indeed he did allow, if Evidence was given of a Right of Common, paying a certain Rent, that Evidence would maintain the Iſſue; for a Right of Common is proved. But here, he ſaid, the Queſtion was, whether there was ſuch a Cuſtom as the Plaintiff makes Title under, and no ſuch Cuſtom is proved; but one very differently deſcribed. There was another Rule of Evidence mentioned in this Cauſe, and that happened upon the Defendant's Counſel offering to read a Depoſition of one of the Plaintiff's Witneſſes taken in another Cauſe contradicting a Depoſition made by the ſame Witneſs in this Cauſe. But Mr. Lutwyche objected againſt the Reading of it, unleſs they could produce an Order

of Court which they had obtained before for the doing of it; for, he said, it was a Rule in this Court, never to read Depositions taken in another Cause, without express Leave obtained before for the doing of it. The Chancellor allowed, that in general that Rule was unquestionably Right; but he said, the End of Reading this Deposition would only go to the Credit of the Witness; and in such Case he had known it often allowed; which he accordingly did in this Case. But upon the Matter before-mentioned the Bill was dismissed. 1 Vern. 53.

Cromwell *ver.* Griffith and Prescot.

How far a Court of Equity gives Directions concerning the Marshalling of Assets

Canc. THE Plaintiff set forth in his Bill, that his Ancestor was seised of certain Copyhold Lands, which he had mortgaged to Prescot one of the Defendants, and at the same Time gave him a Bond for further Security; but by his Will made Griffith the other Defendant his Executor, and ordered him to discharge the Incumbrance, and at the same Time devised the Lands to the Plaintiff. The Plaintiff farther set forth, that Griffith did accordingly pay Part of this Money; and therefore prayed, that he might have the Possession of the Lands decreed to him upon his Payment of the Residue. The Defendant Griffith had obtained a Surrender of these Lands from Prescot upon lending him a Sum of Money; and that made him oppose the Bill by putting in an Answer, that there were several Debts owing by simple Contract, as well as this, and that no other Assets had come to his Hands, besides this Sum, which he had wholly paid to Prescot; whereas in Equity and good Conscience this Sum ought to have been distributed for the Benefit of the other Creditors as well as him; and therefore he had paid it in his own Wrong. Upon which he prayed, that these Lands might not be decreed to the Plaintiff, but upon going before a Master to see how much he had overpaid Prescot; and then if the Plaintiff would pay Prescot all that should be due to him, besides what he should have justly paid him, he was willing to surrender the Lands up to him. Lord Chancellor said, that it was true indeed where Bond-Creditors have satisfied themselves out of the Personal Estate, and there is not enough to satisfy the Creditors upon simple Contract, the Justice of a Court of Equity is such, that upon a Bill exhibited of this Matter by the inferior Creditors, they will relieve them out of the real Estate, so far as the superior Creditors might have had that Relief. But however, he said, the Payment itself would be good to the Bond-Creditors, and the Executor would be indemnified in making it. And therefore in the present Case, where the Mortgagee had a Bond for a farther Security, he said, the Payment of the Whole to him which came to the Executors was good; and accordingly decreed, that upon the Plaintiff's Payment of the Residue he should have the Land.

Maskell

Maskell Executor of —— *againſt* Lukee and others.

The Time for Payment of a Legacy.

Canc. A Woman made her Will, and left a Legacy of 200l. to Lukee, a Son of one of the Defendants, to be paid him at his Age of twenty-one Years. However he happened to die at his Age of eleven Years, and accordingly one of the Defendants, Lukee his Father, took out Adminiſtration to him, and libelled in the Eccleſiaſtical Court for this Legacy. The Plaintiff being afraid, that the Eccleſiaſtical Courts would order him to pay this Legacy immediately, whereas in Juſtice and Reaſon it ought not to be paid till the Time comes, when the Infant would have been of Age, if he had lived, made a Motion in this Court for an Injunction to ſtay the Party from proceeding in the Court below. This Matter had been mentioned before; and then Lord Chancellor ordered the Counſel to give Notice to the other Side, and to move it again. Upon which Dr. Sayer now attended and oppoſed the Motion with the Solicitor General. Mr. Lutwyche and Mr. Melmouth were Counſel for the Plaintiff; and they ſaid, the plain Intent of the Teſtatrix was, that the Infant ſhould have no Benefit of the Will till his coming of Age, and then he would have a Right to receive the bare 200l. without any Intereſt. They ſaid, if this was the Meaning of the Teſtatrix in Reſpect of the Infant, it muſt equally be her Meaning in reſpect of thoſe who repreſent him. Accordingly they ſaid, this Point was ſettled in a late Caſe in this Court, and affirmed upon an Appeal in the Houſe of Lords. And they ſaid, there was a plain Difference to be made between this Caſe, and that where Intereſt is to be paid from the Death of a Teſtator; there they allowed the Intent of the Will was to convey a preſent Benefit, and the Deſign of hindring him to have the Uſe of it was only that he might not do himſelf any Prejudice by having it in his preſent Diſpoſal. As this then is the Deſign of the Clauſe, and the Reaſon of that Caution ceaſes by his Dying before he comes of that Age, there is no Reaſon, that his Repreſentative ſhould be under that Confinement. However, they ſaid, they had Reaſon to fear the Eccleſiaſtical Courts would not conſider the Thing in this Light, and therefore they applied for an Injunction. The Counſel of the other Side tho' ſaid, that the Eccleſiaſtical Court had a Juriſdiction in this Caſe concurrent with this Court; and if the Party ſhould find himſelf aggrieved, his Relief would be proper only to the Delegates by Way of Appeal. Lord Chancellor was of the ſame Opinion, and accordingly refuſed the Motion. 1 Vern. 230, 27. 2 Vern. 9. 199.

Holt *and* Ward.

What ſhall be ſaid to be a Man's proper Addition.

THE Defendant was ſued by the Name of Nox Ward, Eſq; and pleaded in Abatement Letters Patent from the late King, by which he had the Office given him of Clarencieux King at Arms; and therefore demanded Judgment for his not being ſtiled Nox Ward Clarencieux. Mr. Strange ſaid, that this was

only the Name of his Office, like the Clerk of the Pells, &c. and as the Defendant had a good Name of Addition given him, he moved, that the Plea might be set aside. Accordingly the Court made a Rule to shew Cause to Morrow, 3 Cro. 224, 542. but afterwards discharged it, because there is something of Law in the Plea. Note; The Plea was by the Words, Creamus, coronamus & nomen imponimus Clarencieux Rex Heraldorum. Judge Page and Reynolds absent.

Fowler *and* Wathen, Administratrix.

How far the Court of King's Bench will order a Judge of an inferiour Court to answer the Matters of an Affidavit.

MR. Strange moved, that the Court would make a Rule upon the Plaintiff to answer the Matters of an Affidavit. The Plaintiff was an Attorney, and Steward of a Hundred Court, and yet encouraged one joint Cause of Action to be split into several Actions to give his Court a Jurisdiction; and this too was done, and Judgment accordingly, in the Vacation Time, when no Application could be made to this Court for a Prohibition. The Court said, that would else be the proper Thing to pray, but, as the Circumstances of the Case were, ordered the Plaintiff to answer the Matters of the Affidavit.

The Vill of Appelthwaite in the Parish of Windermore *ver.* The Vill of Hartsop and Batterdale in the Parish of Barton.

Whom an Order of Removal is proper to be directed to.

THIS was an Order of two Justices confirmed by the Sessions of the County of Westmorland. Mr. Reeves took an Exception to it for its being wrong directed. He said, there was a Clause in the Statute of 13 & 14 Car. 2. 12, 21. which provides, that the Vills in Westmorland, and some other large Counties in the North, shall take Care of their own Poor; and therefore this Order of Removal ought to have been directed to the Overseers of the Vill of Appelthwaite, whereas it is directed to the Overseers of the Parish of Windermore. And accordingly the Court made a Rule to shew Cause, why the Order should not be quashed. Salk. 123.

Vide post.

Anonymus.

How far the Court will not grant an Information for Usury.

When a Statute Prescribes a particular Method of recovering a Penalty, how far the Party cannot proceed by Way of Indictment.

MR. Theede moved for an Information against Cawket a Pawn-broker for taking six Pence a Pound per Month Interest; which he said, was extravagant Usury. The Court said, they thought there was nothing so enormous in this Offence, but what the common Method of Punishment would be sufficient for. But then Mr. Theede said, that the Statute of Usury allows the Penalty for Usury to be recovered by Information or Action, and that would be a Reason, why the Court should grant it. The Court said, that was to be understood only of an Information qui tam. And farther observed, that the Statute chalking out a particular Method of Proceeding for a new Offence was a farther Reason why the Court could

could not grant an Information; neither can the Party be so much as indicted. 1 Mod. 34. 4 Mod. 145.

Birch *and* Leek.

Vide ante S. C. 173.

UPON a Writ of Error on a Judgment given by Default in an Action of Trespass in the Common Pleas, Want of an Original was assigned for Error. A Certiorari was accordingly directed to the Custos Brevium, and he returned that there was no Original filed in the Term of the Placita. Upon Diminution alledged, a new Certiorari issued, and to that the Custos Brevium returned that there was an Original in placito prædicto of the Term precedent. In nullo est Erratum being now pleaded, Mr. Filmer took an Exception to the Writ returned, that it varied from the Declaration; for the Declaration was of a Trespass committed in the late King's Time, continued down to this King's; but the Original certified was of a Trespass contra pacem nostram, and tested likewise in this King's Time. And to make good this Exception he quoted a Case out of 2 Ven. 49. Then he said farther, that admitting the Original certified had been right in this Respect, yet it could not be taken to be an Original in this Cause, because there are no Continuances returned from the Term of which it is certified to the Term of the Placita; and he observed, that an Original not continued is as no Original. He took Notice likewise, that the present Judgment was given by Default, and therefore the Statute of Jeofails could not extend to it. Mr. Reeves on the other Side argued, that however specious the first Objection might be; because the Words contra pacem nostram may seem to be a Description of the Offence, and not thrown in barely to aggravate; yet, he said, at most the Description was imperfect, and not variant; for the Trespass declared of is a Trespass of this King's Time, though it is something more. He allowed, that the Trespass in the Original might have been described more agreeable to the Trespass in the Declaration by concluding contra pacem nostram, necnon contra pacem Georgii primi nuper Regis; but he observed, that the Want of this could never make the Original bad. To this Purpose is the Case in Syd. 253. and 6 Mod. 80. Mr. Reeves then said, that as he had answered the first Exception, he hoped he should give an Answer to the second. And that should be by quoting the Case of Rowning and Lord Cartwright, Hil. 3 Geo. 1. which he was of Counsel in, where this very Exception was taken, and over-ruled upon Debate. Accordingly the Roll was produced, which was 193, and found to be so. He said, the Reason of that Case was, that this Omission was only a Discontinuance, and Discontinuances are helped by the Statute for the Amendment of the Law after Judgment by Nil dicit, as well as after a Verdict. The Chief Justice said, that for his own Part he thought there was a good deal in the second Objection, because an Original not continued down has no Reference to this Cause any more than to any other; and therefore he did not see why the Return of the Officer should be regarded in this Respect, who has certified,

that it does belong to this Cauſe; for it can only be ſo accoꝛding to his Judgment, and the Judgment of their Officers is nothing to be regarded in a Matter of Law. But however as the Caſe cited was adjudged upon Argument, the Court ſaid, they would not over-rule it, and accoꝛdingly held the Oꝛiginal to be good, notwithſtanding the ſecond Exception; and upon the firſt it ſtood over. Salk. 267, 636.

Vide poſt S. C.

Anonymus.

UPON a Judgment referred to the Maſter, he repoꝛted, that a Pꝛiſoner in Cuſtody of the Marſhal was ſerved with a Declaration, but Rules were given him to plead befoꝛe Affidavit filed of ſuch Service. This, he ſaid, was irregular; but becauſe the Defendant had ſued out a Writ of Erroꝛ in Parliament, he doubted, whether he was not concluded from taking this Advantage of ſetting aſide the Judgment upon Motion. And the Court was of the ſame Opinion.

How far a Perſon cannot move to ſet aſide a Judgment after he has brought a Writ of Error.

Anonymus. *Scacc.*

A Man having got a Settlement in the Pariſh of A. and reſiding in the Pariſh of B. one of the Overſeers of the Pariſh of A. gave a Bond of Indemnity to the Pariſh of B. to induce them to let the Man continue there longer. Afterwards he became chargeable to the Pariſh of B. and got a Settlement by continuing there ſo long. The Bond upon this was put in Suit, and the Pariſh had a Verdict upon it. Upon which the Defendant pꝛeferred a Bill of Injunction to pꝛevent Execution of the Judgment, upon offering to pay the Plaintiffs what Loſs they had already ſuffered by this Man, and to let the Judgment ſtand foꝛ a Security foꝛ what they might afterwards ſuffer. Counſel came now to diſſolve the Injunction, and ſaid, that this Man has ſince had a great Family of Children, who have by this Means likewiſe a Settlement in this Pariſh, and the Man himſelf is dead, ſo that they obſerved, it would be unreaſonable to hinder the Plaintiffs taking Execution upon this Judgment, ſince by their Indulgence to the other Pariſh ſo great a Burden is ſettled upon themſelves. The Court ſaid, it was certainly unreaſonable on the other Hand, that the Plaintiffs ſhould have Execution of the Penalty, if they can have Juſtice done them in any other Way; the Method of doing that may be pꝛoper to be conſidered of, when the Cauſe is ſet down foꝛ a Hearing. And Baron Carter ſaid, he remembꝛed a Northampton Caſe of this Soꝛt befoꝛe the late Maſter of the Rolls, and he made an Dꝛder, that the Overſeer ſhould be reimburſed what Loſs he had ſuffered upon ſuch an Occaſion, by oꝛdering the Pariſh to make a Rate to relieve him. Accoꝛdingly the Injunction was oꝛdered to continue. 6 Mod. 97. Salk. 531.

How far a Court of Equity will relieve againſt a Penalty.

Deſ-

Desbrough *and* Crumbey. *Scacc.*

How far Sequeſtrators, have no Authority to ſell.

MR. Bumbery moved, that the Irregularity of a Sequeſtration might be referred to the Deputy, which was taken out againſt the Defendant for not appearing, by Reaſon of its being taken out ſooner than by the Courſe of the Court it could; and yet the Sequeſtrators had taken the Goods off the Premiſſes, and threatned to ſell them. The Chief Baron ſaid, that as to the carrying the Goods off the Premiſſes, it was clear the Sequeſtrators could do that; becauſe a Sequeſtration upon Mean Proceſs anſwers to a Diſtringas at Law. But however as to the ſelling them, the Court agreed in the preſent Caſe it could not be lawful; and ſaid, it had lately been ſettled upon Debate. And obſerved farther, that Courts of Equity could not authorize Sequeſtrators to ſell Goods even upon a Decree till Lord Stamford's Act, which makes Decrees in this Reſpect equivalent to a Judgment. And even now the Counſel ſaid, Sequeſtrators cannot ſell, but upon Leave of the Court. However the Court ſaid this was a Matter proper for them to conſider upon another Occaſion; and therefore only referred the Irregularity of the Sequeſtration as to the Point of Time to the Deputy.

The King *and* Hawks.

What ſhall be ſaid to be a good Conviction for Deer-ſtealing.

THIS was a Conviction for Deer-ſtealing; and Mr. Fazackerly took two Exceptions to it; one that it was ſaid, that the Defendant comparuit before the Juſtice, whereas it ſhould have been comparet; the other, that it was ſaid, & ſuperinde convictus eſt ſecundum formam Statut', without ſaying, & forisfaciat, &c. To the firſt he obſerved, that it was a Rule in all legal Proceedings, that the Fact muſt be laid as a preſent Tranſaction, and not delivered by Way of Narration of what is already paſt, or what ſhall afterwards be. This, he ſaid, was the Reaſon, why dedit Curiæ hic intelligi & informari has always been held to be wrong. To the ſecond he ſaid, he did allow, that the Juſtices need not apportion of Penalty; nay if they ſhould apportion it wrong, ſo far only, as they have given it wrong, this Court will ſet it aſide, but confirm it as to the Reſt. But he never knew, that this Court had gone ſo far, as to allow a Conviction to be good, where no Penalty at all was given; becauſe, for the Juſtices to ſay, that they convict the Defendant, without ſaying what he ſhall forfeit, would be like the Courts above pronouncing Judgment againſt a Man for an Offence, without ſaying what he ſhall ſuffer. And accordingly this Exception was allowed in the Caſe of The Queen and Serle, and in that of The Queen and Hilgrave, Hil. 2 Ann. He obſerved farther, that the preſent Caſe was much ſtronger than either of theſe; for here are two Statutes relating to the Game, one in the 13th of Car. 2. 10. the other in 3 & 4 W. & M. 10. which this Conviction may equally be grounded upon; and the Juſtices certainly ought to have aſcertained which of theſe Statutes was it, on which they proceeded; becauſe the Court would otherwiſe be

in Doubt, whether the Juſtices have kept within the due Circumſtances of Proceeding, which theſe Statutes have made neceſſary to a Conviction. To the firſt of theſe Objections Mr. Reeves anſwered; that it might be reaſonable perhaps, that Judgments ſhould be entred down as then immediately pronounced; becauſe they are conſidered as the immediate Acts of the Court; but the Appearance of the Defendant is very often ſome Length of Time before the Judgment, and therefore he thought, that that Fact might very well be related as of a paſt Time. He ſaid, that he himſelf took this Objection in the Caſe of The King and Hawkins, Mich. 3 Geo. 1. where it was ſaid in the Conviction, that the Defendant comparet & allocatus fuit, and the Court over-ruled it. To the ſecond he ſaid, that the Forfeiture is a Conſequence of Law upon the Conviction; it is what the King and the Informer have a Right to upon it, and therefore may very well be given here by the Court above. And he ſaid, he has often heard the Caſe of The Queen and Serle denied to be Law. He obſerved farther, that it was by no Means clear, that the Statute of Car. was not repealed by that of W. & M. for the laſt Statute recites the Penalty in the firſt being too ſmall for the Offence, and therefore gives a greater; which Act in all Reaſon and Senſe muſt be underſtood therefore to alter and annul the firſt, ſince it finds Fault with that, and muſt therefore be underſtood to appoint one Penalty in the Room of the other. The Court ſaid, that they thought this a juſt Obſervation upon the laſt Law. And as to the ſecond Objection, they could eaſily get over that; but they thought the firſt Objection has been ſo often allowed, that they muſt ſhake many Authorities, if it ſhould not prevail. But however it ſtood over. Salk. 378, 383. Vide poſt.

Hatton *and* Walker.

THE Defendant had pleaded the Statute of Limitations, but concluded his Plea, Unde petit Judicium ſed querens Actionem habere ſuam debeat, inſtead of ſi. The Plaintiff upon this demurred ſpecially. The Defendant being informed by his Counſel, that the Plea he ſigned was right, and not thinking that there could be ſuch a Miſtake in the Copy of the Plea delivered to the Clerk of the Papers, (though he did go to him to ſearch, but was informed it was miſlaid) joined in Demurrer. It happened tho' to appear upon farther Search, that the Copy of the Plea was wrong, and upon that Mr. Parker moved, that the Defendant might have Liberty to amend. A Rule was accordingly made to ſhew Cauſe. And now Mr. Kettleby ſaid, that the Demurrer was made a Record of the Court; for it was joined in the Vacation; and all Demurrers are ſent up and filed amongſt the Records before the Eſſoin-Day of the enſuing Term. He ſaid too, that there was nothing in this Caſe to amend by; that the Plea was of the Statute of Limitations, and therefore ought not to be favoured; and that the proper Way had been for the Plaintiff to have applied to a Judge to have had it amended, before he returned the Paper-Book. Upon which Mr. Parker anſwered, that he could have an Affidavit made, that

How far the Court will allow an Amendment after a joinder in Demurrer.

the Plea delivered by the Counsel was right; that it was only a Mistake in the Attorney to Copy it wrong; and he said he believed, that Precedents might be produced of a Counsel's Draught being sufficient Warrant to amend a Record by. The Rule was accordingly enlarged to another Day; and then he said, that Serjeant Baynes had informed him of a Case, the Name of it was Doyley and in this Court, where the like Motion had been granted. That was in Replevin, where it appeared by the Avowry upon Record, that the Distress was taken before the Rent was due. Serjeant Knot then informed the Court, that the Plea was drawn by him, and in his Draught it was right; and though there had been a Demurrer to the Avowry, and all upon Record as here, the Court gave Liberty to have the Avowry amended. The Court said, that if that Case was so, it was very material; and upon that gave farther Leave to have the Rule inlarged, in order that that Precedent might be found. 1 Cro. 144. 1 Salk. 48, 86, 87.

Vide post.

Farrers *and* Cook.

How far the Court will not allow an Amendment of the Bail-piece.

MOTION was made to amend the Bail-Piece, because by Mistake the Bail was given to an Action between Furrers and Cooke. But the Court said, that they could not do it but by Consent of the Bail.

Anonymus.

How far the Court will not allow Proceedings to be staid on bringing into Court what is bona fide due.

DEBT in this Case was brought upon a Bond of 200l. the Defendant had several Demands likewise upon the Plaintiff, so that upon the Balance there was but 25l. owing to him. Upon which Mr. Coningsby moved, that he might bring this Sum, that was due upon the Balance, into Court; and he said, he thought this Motion was within the Meaning of the late Statute. The Court said, that the Statute had prescribed only two particular Ways of Proceeding; one, by pleading the Matter of Account specially; the other, by giving the special Matter in Evidence upon the general Issue. They said, they could not allow of any other Way of Proceeding; and accordingly refused the Motion.

Stephens *and* Houghton.

Vide ante 128.

THIS Case coming on again in the Paper, Mr. Lee took several Exceptions to the Avowry; first, that it is laid indeed, that the Plaintiff was an Inhabitant within the Leet at the Time of the Offence committed; but it is not said he was an Inhabitant at the Time of the Distress taken. Accordingly he quoted Cro. Eliz. 698, where it is held to be necessary, that the Party should be an Inhabitant at the Time of the Offence committed; and he thought there was equal Reason, that he should be so at the Time of the Punishment inflicted upon him for committing it. The second Exception was, that it is said in the Avowry, that the Jury presented the Plaintiff for these several Offences; but it is not averred, that he actually

did them. He ſaid, this has been held neceſſary in Moor 75. and in Cro. Eliz. 885. and in Carthew 73. Lord Ch. Ju. Holt takes the Diſtinction between Replevin and Treſpaſs. In Treſpaſs the Defendant only juſtifies himſelf for what he has done, and there he need not therefore be ſo particular; but in Replevin he is an Actor; and his being a Bailiff in the preſent Caſe can make no Difference; for he is to have a Return, if his Avowry be right, equally as if he was Principal. His laſt Exception was the ſame with the Third, that was taken upon the former Argument, that the Amercement ought to have been aſſered by another Jury; and quoted 3 Lev. 19. in Point. Mr. Wynn anſwered to the firſt of theſe Exceptions, that the Plaintiff's being an Inhabitant within the Leet at the Time of the Offence done was enough to give that Court full Juriſdiction. To the ſecond he ſaid, that he thought the Defendant's Juſtifying himſelf under the Authority of the Proceſs of the Court below was a ſufficient Anſwer; for he is not to inquire whether the Proceſs iſſues out warrantably or not, but is obliged to obey it. And he quoted the Caſe of Marſh and Head, Mich. 3 Geo. 1. where this ſame Reaſon was given, why ſuch a Juſtification was good in Treſpaſs. Now, he ſaid, the Court's giving this particular Reaſon in the Caſe of Treſpaſs, was an Argument, that they thought the other common Reaſon of its being a Plea in Bar would not be ſufficient. If then there is this Diſtinction between a Man's Juſtifying in his own Right and Juſtifying by the Order of a Court in the Caſe of Treſpaſs, there is equal Reaſon, that there ſhould be this Diſtinction in the Caſe of Replevin. And accordingly he quoted the Caſe out of 3 Cro. 748. But beſides he obſerved that it was averred in general, licet ipſe de ſeparalibus Offenſis ſit culpabilis, and that was enough. To the third Exception he ſaid, that the Jury in this Caſe have ſet the Amercement; and therefore there was no Reaſon why another Jury ſhould aſſere it. To this Purpoſe he applied Lord Coke's Opinion in 8 Rep. 38. He ſaid, indeed he did allow Lord Hobart was of a contrary one in that Book 129. but he obſerved, that that Opinion was denied to be Law in the Caſe of Matthews and Carey, by Lord Chief Juſtice Holt and Mr. Juſtice Eyre. The Court was of Opinion as to the firſt Exception, that Mr. Wynn's Anſwer was ſatisfactory. To the ſecond they ſaid, they thought the Diſtinction between Treſpaſs and Replevin right. And they could not think the Averment by way of licet was ſufficiently traverſable. And beſides the Chief Juſtice ſaid, he thought the Averment was particularly bad in the preſent Caſe; becauſe the Avowry had laid ſeveral Preſentments, and ſeveral Amercements upon them, and yet but one Diſtreſs. Now he obſerved, that if this Averment ſhould be good, and the Plaintiff join Iſſue upon it, if the Avowant ſhould make one of his Preſentments good, he muſt have a Return awarded of the intire Diſtreſs, taking it to be rightly made in the preſent Caſe; whereas the Averments ought to have been particular and diſtinct; ſeveral Diſtreſſes likewiſe ought to have been made, and the particular Iſſues might have been joined upon them, and then the Avowant ought to have had a Return but pro tanto as the Avowry ſhould be good for. To

the

the laſt Exception the Court was of Opinion, as it was made, that Mr. Wynn had given an Anſwer to it; but they ſaid, the true Exception was, that this was a Preſentment in a Court Leet, and the Judgment therefore ought to have been in general ideo ſit in miſericordia as the Act of the Court, and then that Amercement rendered certain; whereas in the preſent Caſe there is no ſuch general Concluſion; but the Amercement is directly by the Jurors. This they ſaid was certainly wrong; and in this a Court Leet differs from a Court Baron. And accordingly for theſe Exceptions the Court gave Judgment for the Plaintiff. 1 Salk. 56, 107.

Webb *and* Plummer.

What Matter a Perſon ſhall not be allowed to aſſign for Error by Reaſon of its being contrary to the Record.

UPON a Writ of Error on a Judgment in the Common Pleas, the Plaintiff had aſſigned for Error, that another Perſon was made Defendant with him in the Original Action, and that he died before the Day of Niſi prius. To this the Defendant pleaded In nullo eſt Erratum. And now Mr. Strange argued for him, that upon the Poſtea it was entred that all the Parties to the Original Action appeared there, and therefore the Plaintiff was concluded from taking this Averment againſt the Record. To this Purpoſe he quoted Rolls 758. where the Error aſſigned was that one of the Tales and one returned upon the Principal Panel were the ſame Perſon, they being of the ſame Name. But the Court there ſaid, that as the Entry upon the Record was, that alii de circumſtantibus venerunt, viz. ſuch and ſuch, they would not allow the Averment of one of them being the ſame. The ſame Anſwer, he ſaid, was given to a like Error that was aſſigned in the Caſe of Held and Helbert, Hil. 12 Geo. 1. of one of the Jurors being not returned by the Sheriff. He did ſeem to intimate, that this was a little unlucky upon the Plaintiff here; becauſe in Truth the other Defendant did die before the Day of Niſi prius; and it could have done the Plaintiff no Service to have aſſigned for Errors his dying between the Day of Niſi prius and the Day in Bank; for that is helped by Statute. The Court was of the ſame Opinion; ſo affirmed the Judgment.

The King *and* Child.

How far the Court will allow a Perſon to be bailed, who is brought up by Habeas Corpus.

THE Defendant was committed by a Juſtice of Peace for raviſhing a Woman with Force and Threatning to kill her if ſhe made a Diſcovery. Mr. Fazackerly and Mr. Kettleby ſaid, that this Commitment was not certain enough to make the Offence Felony within the late Act of Parliament; for he ſaid Force was the very Git of the Offence, that made it ſo. Now, he ſaid, that every common Struggle with a Girl may be ſaid to be done with Force; but the Force within the Meaning of this Act of Parliament ought to be an extravagant Violence, and therefore ſhould be particularly deſcribed. They ſaid beſides, that they had ſeveral Affidavits to produce in Favour of the Party, and in Diſcredit of the Woman; and one in particular of a Man's being preſent at the ſame Time, who ſwore

that the Defendant only took a common indecent Liberty with her. They ſaid therefore, that they prayed the Defendant might be bailed; for the Habeas Corpus Act requires, that every Perſon ſhall be ſo, unleſs for Felony particularly deſcribed: The Court ſaid, that they thought the Commitment certain enough; but however upon hearing of the Affidavits, and the other Side's not attending, ordered the Defendant to bailed. And accordingly he was ſo; four Perſons entring into a Recogniſance in the Sum of 100 l. and he himſelf in the Sum of 200 l.

Ammurſt, Adminiſtrator of Lady Strode, *verſus* Litton, Maskall and Brooke.

Litton *ver.* Ammurſt, Maskall and Brooke.

How far a Mortgage ſhall be ſubject to a Redemption.

Canc. THESE two were croſs Cauſes, and came to be heard together at the ſame Time. The Deſign of each of the Bills was to have two mortgaged Terms aſſigned irredeemably. Theſe Cauſes had been heard before upon two Bills, and then the Chancellor decreed for Ammurſt. Afterwards the Chancellor was of Opinion for Litton; but gave the Counſel of the other Side Liberty to have a Re-hearing, which accordingly was appointed for to Day; and now the Lord Chief Juſtice and Mr. Juſtice Denton were preſent in Court. The Attorney General opened the Caſe as Counſel for Litton upon the Petition of Rehearing in this Manner. Sir George Stroude was ſeiſed of the Lands in Queſtion in Fee, and made two Mortgages for 1000 Years, and afterwards by his Will deviſed the Lands to his only Son Litton Litton in Tail Male, Remainder to Stroude Bedingfield for Life, and to his firſt and every other Son in Tail Male, ſo that he ſhould take upon him the Name of Stroude; and in Caſe he ſhould not, then to George Darnelly for Life, and to his firſt and every other Sons in Tail, ſo that he ſhould take upon him that Name, the Remainder to his own right Heirs. Sir George Stroude died, and then his Son Litton became ſeiſed; and being ſo ſeiſed made his Will in Writing, and ordered his Executors to pay off and diſcharge the ſaid Mortgages, and upon ſuch Payment appointed the Mortgagees to aſſign the mortgaged Leaſes to his honoured Mother Lady Stroude for her ſole Uſe and Benefit for the Remainder of the Terms. Theſe Mortgages were one of them for 1150 l. the other for 500 l. and both of the ſame Lands. Then in the ſame Will he gave my Lady 2000 l. in Money. And in the End of the Will he gives all his Lands, Tenements and Hereditaments both in Law and Equity to his Son and his Heirs, if his Wife ſhould happen to be with Child of one, and if it ſhould prove a Daughter, then he deviſed to ſuch Daughter 5000 l. to be paid out of the Rents and Profits of this Eſtate; and if he ſhould happen to die leaving no Son, then he deviſed all the ſaid Lands, &c. in Manner afore-mentioned to his Couſin Robinſon Litton and his Heirs for ever. Litton Litton died ſoon after his making this Will,

leaving no Iſſue, his Wife not being with Child. Stroude Bedingfield took upon him the Name of Stroude Stroude, and after the Death of Litton Litton died himſelf alſo without Iſſue. And now the Attorney ſaid, that the Prayer of his Bill was, that upon Payment of the two ſeveral Sums with Intereſt by the Executors of Litton Litton, the Mortgagees might be compelled to aſſign to Ammurſt the Adminiſtrator and late Husband of Lady Stroude, but redeemable by Robinſon Litton; and that upon Robinſon Litton's Payment of the Redemption-Money to the ſaid Ammurſt, the mortgaged Premiſſes might afterwards be aſſigned to him. The Attorney General ſaid, that he thought this Prayer was founded upon a natural Conſtruction of this Laſt Will. But he obſerved, that the other Side contended, that the Meaning was, that theſe Mortgages ſhould be intirely diſcharged, and that my Lady ſhould injoy theſe Terms of 1000 Years abſolutely if ſhe could; but if it ſhould have happened, that Litton Litton had Sons, or Stroude Stroude had Male Iſſue, and either of them ſhould have thought proper to have redeem'd, then at leaſt ſhe ſhould have the Remainder of theſe Terms after the Determination of their ſeveral Eſtates, irredeemable by thoſe that claimed as Heir to him. But the Attorney obſerved, that this was a ſtrained Conſtruction of the Will; for it was moſt highly probable at that Time, that one or other of them would have had Children, that ſome or other of them would have redeemed, and the Eſtate ſo redeemed by them might have continued in them always. At leaſt ſo much was probable, that the Terms redeemed by them would have continued in them ſo long as that neither my Lady Stroude nor any ſhe could have had any Kindneſs for, would have had Benefit by the Contingency. He then obſerved, that as the Benefit muſt be thought to be ſo very inconſiderable at that Time of the Will, it was highly unnatural to wreſt the Words to ſo foreign a Senſe; and he ſaid, the Contingencies falling unexpectedly could make no Difference in the Conſtruction of it. But he took Notice, that if the Words of the Will had been ever ſo expreſs, the Conſtruction contended for could not prevail according to the Rules of Law or Equity; for Lady Stroude would be poſſeſſed in Truſt and ſubject to the Redemption of Litton Litton and his Iſſue Male, and then to Stroude Stroude and his Male Iſſue; now he ſaid, the Proviſion afterwards of the Term to her own Uſe and Benefit muſt be abſolutely void. Every Mortgagee is conſidered as poſſeſſed in Truſt for the Mortgagor; becauſe he is obliged to give an Account of all the Profits he has received upon tendering the Redemption-Money with Intereſt; and the Conſequence of this is, that as my Lady muſt therefore have been deſigned at the Time of making the Will to have been poſſeſſed in Truſt, and accountable to theſe two Perſons and the Heirs of their Bodies, ſhe cannot afterwards have the Benefit of the Reſidue of the Intereſt to her own Uſe. This would be to create a Perpetuity in Chattels. Indeed he did allow, that the Caſes in Equity had gone ſo far as to allow of a Truſt of a Term being given to one for Life, the Remainder to A. and the Heirs of his Body, and if A. ſhall happen to die without Iſſue in the Life of B. then to B. and the Heirs of his Body; the Remainder to B. would

be good. And that was the Duke of Norfolk's Case, 1 Vern. 163. But the very Reason for that Case was; because the Contingency was confined to fall in the Life of B. or otherwise it would not be good. And that Case may well be maintained; because no more Persons can take before B. than if the Limitation to B. had been only after the Death of A. But, he said, in the present Case it would be no Answer to say, that there are no such Limitations of the Term in Trust; for if the legal Consequence of the Words must be such, it is the same Thing. The Solicitor General argued of the other Side, and said, that according to the Construction contended for by the Attorney, the mortgaged Terms must only be considered as given to Lady Stroude for the securing to her the Sums of 1150l. and 500l. Now Litton Litton has given her in the former Part of the Will 2000l. and can it be supposed likely, that he should have given her these three distinct Sums, when one of 3650l. would have done as well? To what Purpose too was it to order the Mortgages to be paid off, and assigned by the Mortgagees to Lady Stroude, if the Terms should equally continue incumbred in her Hands, as they were in the other's? This would be the most manifest impertinent Circuity; whereas the Devisor's Ordering, that the Mortgages should be discharged, naturally and plainly imports, that they should absolutely be dis-incumbered. And besides he orders, that the Remainders of the Terms shall be for the sole Use and Benefit of Lady Stroude; and if this does not import, that his Heir should not have them again, nothing can. And surely there's no Force in the Objection to say, that because it might have happened, that his Intent would not be able to be complied with so far as he designed, that therefore it shall not be complied with so far as it can. But in this Case in Fact it has happened, that it may be complied with in the Whole. And far from being unlikely was it, that his Intent would be able to be complied with in the Whole at first; for at the Time of the Devise Litton Litton had no Child; and Stroude Stroude was not married. But, he said, some Reliance might be made perhaps upon the general Words, which give all the Lands, Tenements and Hereditaments, which Litton had in Law or Equity, to Robinson; and here it might be objected, to what Purpose were all these Words put in, if nothing was meant to be given, but a dry Reversion expectant upon a Term of 1000 Years? He observed, that Robinson received ample Benefit by them; for he has thereby got an Estate in Possession in Hertfordshire of 2000l. per Annum; whereas this Estate is but 500l. Then as to the Attorney's second Objection the Solicitor said, that a Mortgagee's Interest is by no Means to be compared to the Limitation of a Trust Estate; for according to that Doctrine, if a Man's Estate was settled with several of these Remainders, he could not mortgage it, so as that the Remainder-Men could redeem it; for then the Mortgagee must be considered as possessed in Trust for the Mortgagor and the Remainder-Men; and there would be equally as strong an Objection against the Remainder-Men taking Advantage of their Trust, which the Attorney calls their Redemption, as

there

there is againſt the Mortgagee's in the preſent Caſe having the reſiduary Intereſt to his own Benefit. Lord Chancellor and the two Judges declared their Opinions upon the firſt Point, that the Meaning of the Will was only to aſſign the Mortgages as a Security for the two reſpective Sums, which the Teſtator intended to give his Mother. They thought the Words mortgaged Leaſes had a Reference to the Money, which the Leaſes were charged to ſatisfy, as well as to the legal Intereſt in the Leaſes themſelves. And farther obſerved, that the Words, pay off and diſcharge, might very well refer to the Diſcharge in the Hands of the firſt Mortgagees. They took Notice too, that the Aſſignments, being ordered to be made to the ſole Uſe and Benefit of Lady Stroude, could not poſſibly be underſtood of being intirely and as to all Perſons irredeemable; and therefore they thought the natural Meaning of thoſe Words was, that the Terms ſhould be aſſigned to her to raiſe the Money out of them, and that was a ſufficient Benefit. The Chief Juſtice ſaid too, that as this ſeemed to be the obvious Meaning of the Words, he thought it not immaterial, that in the laſt Clauſe of the Will to Robinſon Litton, the Words were not all other my Lands, &c. (which, if the Deviſor had intended to have given Lady Stroude the abſolute Terms, in all Probability would have been) but all my Lands, &c. which ſeems to imply ſtrongly, that he thought he had given none before. Accordingly the Court ſaid, that as they were of this Opinion as to the firſt Point, there was no Occaſion to ſay any Thing to the ſecond. Salk. 156, 225, 229. 1 Mod. 54. 1 Vern. 462.

Ellis *and* Moon.

Vide 182. SErjeant Belfield came now to ſhew Cauſe, why the Judgment ſhould not be arreſted. He ſaid, he did allow, that if the Plaintiff had ſet forth his Intereſt to have come to him per medias aſſignationes, the Iſſue would not have been good; but he thought, as the Words were, they might very well be underſtood, as the Defendant had taken them. At leaſt, he ſaid, he hoped the Iſſue could not be taken to be immaterial, but at the moſt imperfect, and therefore the Verdict would help it. But the Court ſaid, that upon Conſideration of the Words, they could not but underſtand them to be general, and therefore the Defendant did wrong in tying the Plaintiff up to one particular Senſe of them. They ſaid therefore they muſt take the Iſſue to be not material, and not only imperfect. Accordingly they awarded a Repleader.

Hatton *and* Walker.

Vide ante 213. MR. Parker informed the Court, that he had now found the Caſe he mentioned upon the laſt Motion. The Name of it was Brownjon and Doiley, Hill. 8 Ann. which he ſaid, if any Thing, was a ſtronger Caſe than this; for the Amendment was in a Point in Subſtance, by putting in the Word Sexcenteſimo inſtead

ſtead of the Word Septingenteſimo, where the Year of our Lord, which the Avowry juſtified in, was miſtaken; but beſides this the Record was even made a Concilium. And accordingly he produced both Rules; one, for making it a Concilium; the other for amending it. So upon his producing the original Draught under Counſel's Hand, which was right, and an Affidavit likewiſe, that it had not been altered ſince it came from his Hand, the Court allowed the Amendment in the preſent Caſe.

Brown *and* Gilbert.

THIS was a Proceeding by Way of ſpecial Latitat; but the Plaintiff had added a new Count; and therefore the Court ſaid, this was not within the Meaning of their new Rule. Accordingly would not tie the Defendant to plead within the four Days; but allowed him the ordinary Time. And the ſame they ſaid they did in the late Caſe of Roberts and Mounford. The Time which a Perſon ſhall be allowed to plead.

Anonymus.

MR. Strange moved to ſet aſide an Execution upon an Affirmance in the Exchequer of a Judgment, that had formerly been in this Court. The Objection that he made was, that the Capias was void; becauſe it recited, quod Recordum fuit nobis remiſſum; now he obſerved, that the Record itſelf of the Judgment in this Court never went into the Exchequer, and therefore it could not be ſaid to be ſent back. But Mr. Parker on the other Side ſaid, that when the Tranſcript is ſent back, it becomes a Record of this Court, and therefore it may be well ſaid, that the Record was ſent back; for that, which is now a Record, is ſent back. Accordingly he ſaid, that the Precedents in Theſaurus Brevium 42 and 51. were ſo. Upon which the Court allowed the Writ to be good. Salk. 261. When a Judgment of the Court of King's Bench is affirmed in the Exchequer-Chamber, what ſhall be a good Writ of Execution of ſuch Judgment.

Hilcock *and* Humphrys.

UPON a Reference to the Maſter of the Irregularity of the Countermand of a Notice of Trial, he reported, that the Countermand was within Time. And he ſaid four Days is only allowed for it, when the Cauſe is in Middleſex, ſix when it is in London. The Time for Countermanding a Notice of Trial.

Lewis *and* Lewis.

SErjeant Chapel came now to defend the Judgment below. He ſaid, that there are two Points proper to be conſidered upon this Record; 1ſt, Whether a Civil Action would lie at all for this Offence at Common Law, admitting the Plaintiff received any particular Damage by it; 2dly, Whether the Plaintiff had laid in his Declaration any particular Damage, that he did receive by it. He ſaid, as to the firſt Point, that he thought the Authority of 2 Inſt. 562. was fully with him; for it appears there upon the Recital of a Clauſe in the Statute of Vide 120.

Articuli ſuper Chartas, that there is a Remedy by Writ out of Chancery for ſuch an Offence, and Lord Coke ſays, that ſuch Clauſe in the Statute was affirmatory only of the Common Law. And in Fitzherbert's N. B. 172. a like Writ is for Champerty. He ſaid too, that there were other Caſes in the Law in Reaſon like this. In Marſh 81. and in Roll 100. In the laſt of which Places it is held, that if an Obligee raſes the Name of an Obligor out of a Bond, and puts in another Perſon's Name, and this Bond is put in Suit againſt this other Perſon, an Action upon the Caſe will lie, as well as an Indictment of Forgery. So likewiſe in Fitzh. N. B. 95. it is held, that if a Man plays with falſe Dice and wins, an Action upon the Caſe will lie for this falſe Deceit; and yet unqueſtionably this is an Offence indictable. Then as to the ſecond Point, he thought a particular Damage was expreſly laid; for the Declaration firſt of all ſets out, that the Defendant did imbrace Two of the Jury, and then concludes ratione quarum quidem illicitarum & nequiſſimarum ſollicitationum & imbrationum, the Jury gave their Verdict for the Plaintiff. But Mr. Reeves on the other Side argued, that however ſtrong the Authority of the 2 Inſt. may be, it is certain all the Writs of Champerty and Imbracery conclude contra formam Statuti, and that is a very ſtrong Argument, that theſe Writs would not lie otherwiſe. He ſaid, he was far from contending, but there are many Inſtances, where a civil Remedy will lie as well as a criminal Proſecution; but he obſerved, that the Queſtion was, whether a Statute giving a formed Remedy, in which no particular Damages are provided to be given, and all the Writs concluding againſt the Form of this Statute, was not an Argument, that there was no other Remedy by a Civil Action. Then to the ſecond Point he ſaid, that if any Remedy would lie for this Offence by Action at the Common Law, moſt certainly a particular Damage to the Party muſt be the Foundation of it. And therefore as a particular Damage is the Giſt of the Action, ſuch Damage ought to have been particularly and poſitively laid. Now the general Words ratione quarum, &c. are by no Means certain enough; no more, than if the Plaintiff had concluded, that the Defendant imbraced Two of the Jury ad damnum, &c. that would have been certain enough. He ſaid, that it by no Means appeared but the Jury would have given the ſame Verdict, if there had been no Imbracery. And indeed the Preſumption rather is, that the Verdict was according to Evidence, and that the Jury ought to have given the ſame. For otherwiſe the Plaintiff would have applied to have had the Verdict ſet aſide. And the Imbracery itſelf would have been ſufficient, whether the Verdict was agreeable to Evidence or not. Beſides he ſaid, as it appears upon the Record, there was barely a Verdict given, without any Judgment or Writ of Execution. For theſe Reaſons the Court rather inclined to this Opinion upon both Points; but however upon Serjeant Chapel's Requeſting it, they allowed it to ſtand over to be ſpoke to again.

Vide poſt

Cockerel *and* Brabant.

How far it is neceſſary to apply to a Judge for his Certificate, in order to have full Coſts, when the Damages are under 40 s.

IN an Action of Treſpaſs the Parties had entred into a Rule to try nothing but the mere Right, and that the Coſts ſhould abide the Event of the Trial. It happened that the Damages given were under 40 s. but yet the Plaintiff moved now, that he might be allowed full Coſts. The Court thought, that they had not ſufficient Foundation to allow full Coſts notwithſtanding; ſo refuſed the Motion; and ſaid, they muſt apply to the Judge to certify that the meer Right was tried.

Edgeworth *and* Smallridge.

Conſtruction upon the Statute of 23 H. 8. c. 9. relating to Citations.

DR. Andrews came now to ſhew Cauſe, why a Prohibition ſhould not go to the Dean of the Arches. He ſaid, the Caſe was, That a Woman made her Will and left bona notabilia, and appointed the Plaintiff Executor of it. This Will was proved in the Prerogative Court of Canterbury. The Teſtatrix bequeathed a Legacy of 100 l. to one Durell, and he dying Inteſtate the Adminiſtration of his Effects was committed to the Defendant Smallridge; who accordingly libelled againſt the Plaintiff for this Legacy in the Court of the Dean of the Arches. The Plaintiff had ſuggeſted, that he was an Inhabitant in a foreign Dioceſe, not belonging to the Archbiſhop of Canterbury; he pleaded likewiſe the Statute of 23 H. 8. c. 9. and ſubmitted it, whether he was obliged to anſwer the Defendant's Suit. And this Suggeſtion he made before Sentence. So that, the Dr. ſaid, the Queſtion proper for the Determination of this Court was, whether the Dean of the Arches was reſtrained from holding Plea in the preſent Suit within the Meaning of that Law. He obſerved, that by the antient Canons, the Archbiſhop of Canterbury had a peculiar Authority of calling any Perſons from whatever Parts of England he thought proper to anſwer all Eccleſiaſtical Matters that he ſhould require of them. This Authority had been long before exerciſed by the Popes, and was derived from them to theſe Archbiſhops; and this was called their legatine Juriſdiction. The Deſign of the preſent Act was to take this Authority from them; but yet it has ſtill allowed them the Exerciſe of this other Authority, which relates to the Probate of Teſtaments, for that is common with the Archbiſhop of York; and this Clauſe of the Statute has received a liberal, but true Conſtruction; for the Judges have allowed the Archbiſhop the Right of Adminiſtration likewiſe. The Doctor took Notice, that the Prerogative Court was ſuch, as its Authority was confined meerly to the Probate of Teſtaments and granting of Adminiſtration; the Court of the Dean of the Arches was that, where the ſubject Matter of thoſe Wills was determined; and therefore, he ſaid, the ſame Statute which allows the Archbiſhop the Probate of theſe Teſtaments, which can only be in the Prerogative Court, muſt neceſſarily be underſtood to allow him the Continuance of his Juriſdiction in Cauſes belonging to them, which can only be in the Court of the Dean of the Arches. He obſerved, that the

Common

Common Lawyers had ſometimes confounded in their Reports the Juriſdiction of theſe two Courts. And particularly 1 Cro. 97. in the Caſe of Smith and The Executors of Poyndreill, where a Suit upon a Will was ſaid to be in the Prerogative Court; whereas the Doctor ſaid, he had ordered Search to be made for that Caſe, and it was in the Court of the Dean of the Arches. He then obſerved, that as there was juſt Foundation for this Conſtruction upon the Act, there was likewiſe eſtabliſhed Authority for it in the Books. 1 Ven. 233. is in Point. And many other Inſtances are to be met with in the Books of Common Law, where they have allowed this Court to proceed in Caſes more extraordinary than this, where they have been once lawfully poſſeſſed of the Cauſe. As Hetley 47. 1 Cro. 483. 2 Rolls 18. 1 Cro. 339. Accordingly he prayed, that the Rule might be diſcharged. Mr. Reeves on the other Side argued, that they were upon the Words of a Statute; and he thought there was no Foundation for this Power from the Exception in it which the Dr. relied upon, for merely that beneficial Authority of proving Wills ſeems to be reſerved by the Exception, and not that Judicial one of deciding Cauſes upon it. Chancery, he ſaid, might properly have that Juriſdiction. And accordingly, he ſaid, this Point was determined in Godbolt 214. where a Prohibition was granted in a like Caſe. In Coke's Ent. 448. there is likewiſe a Precedent of a Prohibition in this very Caſe. He ſaid, that he did allow a Motion of this Nature could not be made but before Sentence; and in this a Prohibition upon the Statute differs from all other Prohibitions to the Eccleſiaſtical Courts; but he ſaid, that they had made their Application before Sentence; and therefore this could not be objected to them. The Court ſaid, that as to the laſt Thing mentioned by Mr. Reeves of this Motion's being requiſite to be made upon this Statute before Sentence, he was certainly right. Lord Chief Juſtice Holt declared, that no Perſon ſhould have Relief upon this Statute but by making his Application in the Time mentioned; and ſo the Law has conſtantly been held ſince. But however as to the Point in Queſtion the Court was of Opinion, that no Prohibition ought to go; for the Executor by proving the Will has admitted the Juriſdiction, and therefore ſhall not be ſuffered afterwards to come and diſallow it. Judge Reynolds ſaid, that he was of Opinion, that the Prerogative Court was only derived out of that of the Dean of the Arches for this particular Purpoſe of proving Wills; and accordingly the Court diſcharged their Rule.

Anonymus.

ONE Kimberley had been committed by Sir William Billers, a Juſtice of Peace, for marrying an Heireſs in Ireland againſt her Conſent, which Offence is made Felony without Benefit of Clergy by a Statute made in Ireland the 6th of the late Queen. And the Commitment ordered the Keeper of the Poultry Compter to detain him, till there ſhould be proper Means found out to convey him to Ireland to be tried. Mr. Fazackerly and Mr. Strange moved now, that he might be diſcharged. They ſaid, they did not ſee, that it could ever be juſtifiable at Common Law to ſend Perſons out of the Kingdom for Offences ſuppoſed to be committed in other Parts of the King's Dominions. For by the ſame Reaſon as it might have been done for a Capital Offence, it might have been done for any other Miſdemeanor. And they ſaid, it would have been a Thing of a moſt extraordinary Nature, that a Man might have been carried by Force out of this Kingdom to anſwer for a Battery abroad. They ſaid, they did not know any Proceſs there was by Law to convey a Man over; and if that was ſo, it would be a very difficult Thing to ſhew the Legality of it. Mr. Reeves on the other Side ſaid, that perhaps it might require ſometime to conſider the proper Means by which the Party might be ſent over in the preſent Caſe. He ſaid, one of the Secretaries of State had been applied to, to grant his Warrant to a Meſſenger for that Purpoſe; and he had ordered, that the Attorney General ſhould be attended by Counſel to ſee what could be done. But he obſerved, that it was a conſtant Practice before the Habeas Corpus Act to do it; that Act by no Means declares it to have been illegal, which is an Argument that it was not ſo; or elſe the Legiſlature would have done it, it is probable, when they ordered it ſhould be practiſed no longer for the future in common Miſdemeanours. And in Offences of a Capital Nature, there is an expreſs Proviſion in the Statute, which allows it to be continued. The Court ſaid, the Practice was certainly legal. In Colonel Lundy's Caſe, 2 Vent. 314. all the Judges were expreſsly of this Opinion, except three who were not preſent. And Serjeant Corbet mentioned a ſtronger Caſe than this in 3 Keb. 785. where a Man was ſent even to Portugal for a Murder, charged to have been by him committed there. However the Court ſaid it might be proper to be conſidered what might be the Method of ſending the Priſoner over. But they obſerved one Thing in Favour of him, that they would never ſuffer him to lie long in Cuſtody here, after a convenient Time for finding out the Means for ſending him over. However they ſaid, they thought at preſent the Juſtice of Peace had done but his Duty in making the Commitment in the Manner that he did. They ſaid, he was properly a Conſervator of the Peace; and it was no Objection to ſay, that the Offence was committed abroad, and therefore out of his Juriſdiction. For they ſaid, if a Man is charged with a Felony ſuppoſed to have been committed in Yorkſhire, the Juſtice of Peace in London

When an Offence is committed in Ireland, and the Perſon who committed it comes over into England, what Method may be taken to convey him into Ireland in Order that he may be puniſhed there for it

may certainly commit him to the County Gaol, which he has Authority over, and from thence the Party must be sent to the Prison of the proper County, to receive his Trial. And they said, the Defect of Jurisdiction over the Offence itself is equally the same in both Cases. So for these Reasons the Court thought proper to remand the Prisoner. But Mr. Strange then said, that he believed they should have Occasion in a few Days to lay before the Court some Affidavits upon the Circumstances of the Case to induce the Court to bail him; and therefore he prayed, that the Prisoner might be brought up again by Rule, without the Charge of a Habeas Corpus. But the Court said, that at present there had been no Fruit of their Habeas Corpus; and therefore as yet it was not regular to move, that the Prisoner might be brought up by Rule. 2 Skin. 163. Afterwards he was sent over by Order from one of the Secretaries of State.

Anonymus.

What shall not be said to be a good special Latitat.

MR. Strange moved to set aside a Judgment in an Action of Trespass, where the Proceedings had been upon the new Rule. But he observed, that the Writ of Latitat was only de transgressione & insultu; but the Declaration was de transgressione, insultu, & verberatione; upon which, he said, that the whole Cause of Action was not set forth in the Writ; for there may be a Trespass and Assault without a Battery. Mr. Taylor was of the other Side. But yet the Court set aside the Judgment. And, they said, if in Debt the Plaintiff's Bill should charge the Defendant with centum libris, quas ei debet & injuste detinet, that would not be enough, without setting forth a Bond, Arbitrament, or other special Cause in a general Manner, which the Debt grew due upon. The Master informed the Court, that that Way of setting forth the Cause of Action with a quas ei, &c. would be good in the Common Pleas; but the Court notwithstanding said, that was not within the Meaning of their Rule. Accordingly the Court set aside the Interlocutory Judgment, and told the Defendant's Counsel, that without Motion they had a Right to an Imparlance of Course.

The King *and* The Inhabitants of Risley.

How far an Order of one Justice of Peace cannot be made inconsistent with an Order of another Justice. Vide post.

A Man and his Family had been removed from the Parish of Dean to the Parish of Great Staunton, and afterwards without Appeal another Order was made, reciting that they were not settled in the Parish of Great Staunton, and therefore removed them to the Parish of Risley. Upon which, Mr. Lee moved, that this second Order might be quashed; and the Court accordingly made a Rule to shew Cause.

The King *and* The Churchwardens of the Parish of Wilkinton.

MR. Fazackerly moved as a Motion of Course for a Mandamus to be directed to the Churchwardens to make an equal Rate. But the Court said, they always expected an Affidavit in these Cases, which Mr. Fazackerly accordingly produced. But the Contents of it only were, that there had been an unequal Rate, and that Rate was quashed. The Court said, it does not appear, but the new Rate, that they will make, may be equal. Mr. Fazackerly said, that the Reason for his making his Motion in the Manner he did was not really upon a Complaint that the Churchwardens would make an unequal Rate. A Rate only he wanted. But he said, he chose to word his Motion in the Manner he did; because he believed the Rule must be drawn up so. And if it was drawn up only for a Rate in general; the other Side, when they should come to shew Cause, might object, that it was not made in Pursuance of the Words of the Statute. The Court said, that might be necessary; accordingly the Rule was ordered to be drawn up in that Manner for an equal Rate.

How far the Court will grant a Mandamus to require Persons to make an equal Rate for the Relief of the Poor.

Anonymus.

MR. Forteſcue moved for a Mandamus to be directed to the Mayor and Capital Burgeſſes of a particular Borough to go to the Election of one of the Capital Burgeſſes; and he ſaid, as the Circumſtances of the Caſe were, he hoped the Court would grant a Peremptory one directly; and accordingly, he ſaid, they had ſerved the Mayor with Notice, that they ſhould move in this Manner. The Counſel of the other Side ſaid, that this Motion was contrary to the Practice of the Court; and he ſaid, it was ſo far ſo, that the Court does not ſo much as grant a common Mandamus in Caſes of this Sort without making firſt of all a Rule to ſhew Cauſe. The Court ſaid, that the Counſel had each of them carried their Motions of their own ſide too far. For they ſaid, in the firſt Place it was clear, that a Mandamus could not go at all in ſuch Caſes as theſe without an Affidavit to ſhew the Occaſion for it. But then, they ſaid, they grant it directly. However in no Caſe they grant a peremptory one firſt.

How far the Court does not grant a peremptory Mandamus.

The King *and* The Inhabitants of Holiborn.

MR. Richardſon came now to ſhew Cauſe, why the Order ſhould not be quaſhed. He ſaid, the other Side had founded their Motion upon two Caſes in Point for them. One, that of St. John's Harford and the Pariſh of Amptwell, Mich. 8 Ann. the other, that of Southſidnam and the Pariſh of Lammerton. He ſaid, that the laſt cited Caſe happened firſt in Time. But he obſerved, that there was another Circumſtance in that Caſe, and that was, that the Party removed claimed

Vide ante 174.

claimed an Intereſt in the Lands as Adminiſtrator, but had not taken out Adminiſtration; and the Queſtion there was, whether this Intereſt, which he was in Poſſeſſion of, was ſufficient to gain the Party a Settlement. He ſaid, that the Court entered fully into that Queſtion, and determined, that the want of taking out the Letters of Adminiſtration made no Difference. He did allow, that the preſent Point is likewiſe reported to have been determined at the ſame Time. But he ſaid, as there was another Point for the Court to found their Reſolution upon, he ſubmitted it, that this was not ſo great an Authority. He then obſerved, that the Caſe of the Pariſh of Amptwell was founded upon this. And therefore, if this is not of great Authority, that cannot neither. He ſaid too, that he ordered the Rule to be ſearched for in that Caſe; and he could not find, that ever the Rule for ſhewing Cauſe was made abſolute. He then obſerved that the Words of the Statute of 13 & 14 Car. 2. 12. were fully of his Side; for they provide, that every Perſon ſhall be removable from any Pariſh, who does not Rent a Tenement there of ten Pounds per Ann. But Mr. Marſh ſaid, that he was of Counſel in the Caſe of the Pariſh of Amptwell in Lord Parker's Time, and it was ſettled upon Debate. Judge Reynolds ſaid too, that he thought the Objection thrown upon the Caſe of the Pariſh of Lammerton was of no Weight; for he ſaid, the Court could not have adjudged the Settlement there to have been where they did, but by determining the preſent Point as well as the other. Accordingly the Court was of Opinion, that the Order in the preſent Caſe ſhould be quaſhed. And Judge Probin ſaid, that where Lands, belonging to a Farm, lie in different Pariſhes, that Pariſh is to be charged with him where the Houſe is, which belongs to the Farm, and which he inhabits in.

Hetherington *and* Lowther.

Vide ante 182.

MR. Reeves had obtained a Rule a few Days ago for ſhewing Cauſe, why a Plea of Privilege againſt Privilege ſhould not be ſet aſide as frivolous. Mr. Strange came now to ſhew Cauſe, and ſaid, that the Plaintiff had ſued by Original, inſtead of Bill, and thereby had waived his Privilege, and therefore the Plea of the Defendant was really good. But beſides he obſerved, that he himſelf had made the ſame Motion laſt Term in the very Caſe Mr. Reeves now did, and the Court refuſed it. The Court ſaid, that they thought both the Reaſons were equally good for diſcharging the Rule; and accordingly did ſo.

The King *and* Tayler.

SErjeant Girdler moved to quash an Indictment, which charged the Defendant with being calumniatrix & communis pacis Perturbatrix. He said, he supposed this was intended to be an Indictment for a Scold; but he observed that Rixatrix was the technical Word for that Purpose. He said, the Case of The Queen and Saxbey, Mich. 6 Ann. was stronger than this. The Indictment there charged the Defendant with being communis Rixa pugnatrix. Serjeant Parker said there, that the Meaning of that charge was, that the Defendant was a common Fighter in her Scolding. But notwithstanding that Indictment was quashed. Mr. Moreton on the other Side argued, that there are many Cases, where a fixed Certainty in Expression seems equally necessary as in the present Case, and yet the Law will allow the Sense to be conveyed by various Expressions, so that they be equally significant to convey the Meaning. He observed, that the Statute of Forcible Entry requires, that the Party shall be actually expelled from his Freehold before he shall be within the Relief of that Law. The Meaning of which Expression naturally imports, that the Party shall by Force be first personally removed from it. Yet it has been held, that disseisiverunt is as good in an Indictment upon that Statute, as expulerunt. But certainly a Disseisin may be where a Person is off the Possession, an Expulsion, only where he is actually upon it. But the Court said, Rixatrix has been always held to be a Technical Word; they said too, that they did not think, the Meaning of the present Indictment was to express a Scold, but one that sows Slander and makes Disturbances; and then it is bad, for being too general; so accordingly quashed it.

How far the Court will quash an Indictment for Slander

Marwood *and* Dorrell.

FOUR Sisters had signed a joint Letter of Attorney to impower one Edmunds to bring an Ejectment and to appear for them. The Ejectment was accordingly brought upon two Demises, one of all the Sisters jointly, the other of two of them only. Upon this the Parties went to Trial, and a special Verdict was found. The Title upon the joint Demise and the Title upon the separate Demise was found exactly to be the same. And now the two Sisters, who were not concerned in the separate Demise, since signed an Instrument, purporting a Countermand; and thereby ordered their Attorney Edmunds to proceed no farther for them. Upon which Mr. Lee and Mr. Ward moved, that a Rule might be made upon him to shew Cause, why he proceeds any further against the Directions of his Clients. They said it was a joint Action, that the Plaintiffs were concerned in, and if one has a Mind to proceed no farther, the other cannot neither. They thought that there being a special Verdict in this Case could make no Difference; for it is common for Plaintiffs to non-pros themselves, or discontinue after it. Therefore if the other two Sisters should

When a Joint Ejectment is brought, how far one of the Plaintiffs has it in his Power to put a stop to it.

How far the Court will not inlarge the Term in an Ejectment.

think proper, they must bring a new Ejectment. The Court said, they thought it a little hard, that one Plaintiff should prejudice another in this Manner. And therefore Judge Reynolds told the Counsel, that if they thought a Countermand of this Sort would stop the Suit, they must plead it after the latter Continuance. But the Court thought to do nothing in it; however ordered a Rule to be made to shew Cause. Mr. Reeves then said, that he was Counsel of the other Side, and he hoped the Court would do nothing in this Matter. He said, the special Verdict was settled, and actually made a Concilium. And the Court now must judge upon the whole Record; the Verdict cannot be altered as to these two Sisters, and stand good as to the Rest, though the Title upon both Demises is the same. And he thought it a most extraordinary Thing, that one of the Parties should have a Power after this Length of Proceeding to render fruitless all that has been done hitherto, by such a Manner as revoking the Letter of Attorney. But he observed farther, that the Countermand itself has been procured from these two Sisters in a most extraordinary Manner. These two are professed Nuns abroad; this Ejectment has been founded upon a Statute in 11 & 12 Wil. against Papists; the original Letter of Attorney was freely and openly signed by them; a Priest has gon over from England, and told them that a Proceeding upon this Statute will be of terrible Consequence to the Roman Catholicks here; and these two Sisters were actually threatned by the Lady Abbess with being excommunicated if they did not sign the Countermand. He said that under these Apprehensions it was signed. And yet this Instrument is to set aside all the Proceedings. Mr. Lee then said, he believed it would not be necessary to pray, that the Proceedings may be staid as to the other Sisters; he said therefore that he desired, that that Part only of the special Verdict might be eraled, which related to the two Sisters he moved in Behalf of. He said, this Proceeding is in a feigned Suit, and therefore the Court might do it; and especially, because the Chief Justice tried the Cause, and therefore knows, that the Title upon both Demises is the very same; so that the other Sisters can suffer no prejudice. He said, Terms have been enlarged by the Court in these Ejectments, where otherwise they would run out. And therefore he hoped this Motion was but reasonable. Then as to the Manner of the Countermand's being got, he said, it was witnessed by a Person of Credit and Character now present; and therefore he hoped upon this Motion the Court would not enter into that. Mr. Ward said, that, as to what Judge Reynolds was pleased to mention of pleading this Matter after the latter Continuance, he was afraid, it could not be done; because the Countermand is only by the two Lessors of the Plaintiff, and not by the Plaintiff himself. The Court said, that considering the Circumstances in which the Countermand was obtained, it was clear, they ought to do nothing in it. But even if the Countermand had been obtained freely, they should have thought the same. They said they could not see they had Authority to alter the Verdict in any Respect. And

Judge Reynolds ſaid, that Terms may have been inlarged by the Court formerly; but the Rule now is, not to do it but by Conſent. So the Motion was denied. Salk. 257.

Forteſcue Aland *and* Maſon.

THE Plaintiff had ſet forth in his Writ of Error in the King's Bench in Ireland, that Henry Aland was ſeiſed of the Lands in Queſtion in Fee, and ſettled them upon Jonathan Aland in Tail Male, Remainder to the Plaintiff for Life, with ſeveral Remainders over. That Jonathan conveyed them to Dorryll and another; and that a Common Recovery was ſuffered, and Jonathan came in as Vouchee; that Jonathan died without Iſſue, that there were Errors in this Recovery, and therefore he brought his Writ to reverſe it. The Defendant pleads there, that Jonathan Aland was ſeiſed in Fee, that the Lands deſcended from him to his Daughter Anne, and from her they came to the Defendant, as her Son and Heir. He farther pleads, that he is within Age, and therefore prays, that the Parol may demur. Upon this Plea there is a general Demurrer. And the Court of King's Bench in Ireland allowed the Plea to be good. Serjeant Hawkins argued for the Plaintiff, and ſaid that he certainly muſt admit, that there are many Inſtances, where the Parol ſhall demur in the Caſe of Infants; but he ſaid that there were particular Inſtances too, where it ſhall not. In the Caſe of Attaint againſt Jurors, Writ of Deceit againſt Summoners, Quare Impedit, Writ of Dower, in none of theſe it ſhall. And he ſaid, the general Reaſon of theſe Caſes ſeems to be, that if the Parol ſhould demur, the Party perhaps might not have the Benefit of his Suit. And that Reaſon, he ſaid, held in the preſent Caſe, for the Plaintiff is only Tenant for Life; and it is by no Means unreaſonable to fear, that if the Plea ſhould demur for twenty Years, the Plaintiff would loſe his Right. And it by no means appears in the preſent Caſe, how young the Infant may be. That too is another Reaſon, why the Plea is not good; the Certainty of his Age ought to have been fixed, in order that a Writ of Reſummons may go, when he ſhall come to his proper Age for anſwering. He obſerved likewiſe, that the Infant ought to have ſhewn himſelf to have been Ter-tenant of the Land; for otherwiſe it does not appear, that he can be any ways prejudiced. He took Notice, that there was another Defect in the Defendant's Plea, in not ſhewing a Title to the Seiſin in Fee of Jonathan. He allowed that in general a Title need not be ſhewn to ſuch an Eſtate; but wherever a Plaintiff ſets forth, that ſuch a one was ſeiſed of a particular Eſtate only, and the Defendant pleads, that he was ſeiſed in Fee, he muſt either traverſe the Seiſin of the particular Eſtate, or elſe, if he admits it, muſt ſhew how the particular Eſtate came to be deſtroyed, and ſo make a Title to himſelf. He ſaid, the other Side might object perhaps, that the Plaintiff had done this himſelf by allowing the Common Recovery; but he obſerved, that that could not help the Defendant, for Jonathan came in as Vouchee,

Vide ante 100.

Vouchee, and then these Uses of the Recovery of Course go to the Tenant of the Præcipe, if there was no Deed declaring the Uses to the contrary. He said too, that this Plea of the Defendant's comes in after an Imparlance; and therefore it was bad upon that Account, for it is a meer Dilatory. Mr. Bootle on the other Side argued, that no Rule of Law was more universally true, than that where the Interest of an Infant, who is in by Descent, may be perpetually barred in any Action, he shall have his Plea of Infancy allowed, 9 Rep. 85. is expressly to that Purpose. And in the present Case he certainly may be so, for his whole Right depends upon the Common Recovery; and if that be reversed upon the Writ of Error, he is without Relief. He then said, the Plea of Infancy is pleaded, as the best of Precedents are. Rast. 26, 360, 362, is so. He allowed, that some few Instances were to be given of the Age being fixed in Certainty under a Scilicet; but that could be of no Significancy; for a Scilicet is never traversable, neither can it conclude the Party; and if a Resummons should be taken out at the Time he ought to come of Age, according as he has ascertained it by the Scilicet, he may vary from the Time, and plead it is not come yet. He then observed, that he has expressly shewn himself to be Tertenant; for he has conveyed to himself a direct Descent of the Fee from Jonathan. He took Notice likewise, that a Title was made to him under the Recovery; for nothing is more frequent, than for a Tenant in Tail to make a meer indifferent Person Tenant to the Præcipe; and it would be a very strange Thing, that he should have the Benefit of the Uses of the Recovery, rather than the Tenant in Tail himself, where there is an Omission of a Deed to declare the Uses. And to the last Objection he said, the Plaintiff should have applied to the King's Bench in Ireland, that they would not receive the Plea, or else should have demurred specially to it. The Court said that they would not give their Opinions at present; but said, if the Plea was rightly pleaded, they did not see but it was good. Judge Reynolds said, the only Instance of its not being allowed in a Writ of Dower, is where the Writ is Unde nihil habet. But they doubted, whether the Plea was rightly pleaded; for the Infant must shew he has an Interest to lose; and they did not see the Recovery could be taken to be to Jonathan's Use, as the Plaintiff has set it forth; for he says expressly, that Jonathan conveyed the Lands to two others. But they said, they thought there was still a greater Objection, in that there was no Tenant to the Præcipe at all; and therefore as it stands upon the Pleadings, the Plaintiff must have Title. However it stood over. 2 Cro. 392. 1 Ven. 358.

Vide post

Evan Price, Clerk, Chaplain of the Chapel of Bovington, *Plaintiff*, Iſaac Prat and others, Pariſhioners of the Pariſh-Church of Hemel-Hempſted in Hertfordſhire, *Defendants*.

How far Curates are obliged to take a Licence.

Scacc. THE Plaintiff ſet forth in his Bill, that the Chapel of Bovington is Parcel of the Vicarage of Hemel-Hempſted, that the Vicars for the Time being have always nominated the Chaplain; but that he being once nominated is in for Life, and not removable. The Bill farther ſet forth, that the ſmall Tithes of this Chapelry have always been paid to the Chaplain for the Time being. The Plaintiff farther ſets out, that one Cornelius Price was Vicar of the Pariſh aforeſaid, and by Deed appointed the Plaintiff Chaplain of the ſaid Chapelry. Accordingly he took a Licence from the Biſhop of the Dioceſe; and then Cornelius died; and Toping was made Vicar in his Room. The Plaintiff farther ſet forth, that upon the Solicitation of Toping, he took a new Appointment from him; and the Biſhop being tranſlated, took a new Licence from him too. And upon this he preferred his Bill againſt the Pariſhioners to have an Account of the ſmall Tithes for ſeveral Years paſt. The Defendants ſet forth in their Anſwer, that the Chaplains for the Time being are removable at Will; that Toping did accordingly remove the Plaintiff; and that the Demand of an Account for Tithes is only for Tithes ſuppoſed to be due ſince the Removal. The Cauſe was now ſet down for a Hearing. But the Court ſaid, that Toping ought to have been made Party to the Suit, and therefore they could do nothing in it without him. The Chief Baron obſerved too, that by the Common Law all Curates are removable at Pleaſure; by the Eccleſiaſtical Law they are for Life. And he and Mr. Baron Carter agreed, that a Curate cannot preſcribe for ſmall Tithes. The Chief Baron obſerved too, that every Curate muſt take a Licence, unleſs Fellows of Colleges, &c. And Mr. Baron Carter ſaid, that no Curate is obliged to take a new Licence upon a bare Tranſlation of a Biſhop; and that though this is frequently done, it has been complained of in Parliament.

Beetknife *and* Sir Herbert Packington.

The Notice to be given on executing a Writ of Inquiry.

THE Plaintiff had brought an Action againſt the Defendant for work done as a Coach-maker. Upon Judgment being by Default, Notice was given, that the Writ of Inquiry would be executed between the Hours of ten and eleven. The Defendant came to attend the Execution of it by Counſel within nine Minutes after ten, and then he was told the Execution was over. Upon which Mr. Wills moved, that the Judgment might be ſet aſide. But the Court ſaid, that the Defendant ought to have attended preciſely at ten; and that therefore they could do nothing in it. But then Mr. Wills ſaid, that here were

ten Counts in the Declaration; and therefore the Plaintiff must have begun before ten, to have ended so soon. And upon that the Court made a Rule to shew Cause.

Vide post

Hitlock *and* Umphrys.

What relates to Countermand of Notice of Trial.

THIS was a Cause set down for Trial in Middlesex. The Plaintiff had countermanded the Notice of Trial four Days before it was to be. But the Defendant had feed Counsel; and therefore Mr. Tudor moved a few Days ago for Costs. Mr. Clark informed the Court, that the Practice was to allow them. But the Court said, the Countermand was in Time; and they were sure the Court of Common Pleas never allowed them in such Cases. Mr. Masterman said too, that in the Crown-side the Countermand is only two Days before the Trial in Town Causes, four Days in Country ones; that is, where the Countermand is in such Case given in Town; but if the Countermand is given in the Country, there are but two Days neither. And he said, where the Countermand is thus regularly given, they never allow Costs. The Court upon this said, they would consider of this Matter a little longer. And now Mr. Tudor moving it again, they said they were of Opinion he could have no Costs, and made a Rule for the Future, that a Countermand of the Civil Side shall be just the same as it is of the Crown Side.

The King *and* Fisher.

What shall be said to be such a Trade as is within the Statute of 5 Eliz.

THIS was an Indictment against the Defendant for exercising the Trade of a Sail-maker, without having served a legal Apprenticeship. Serjeant Eyre moved in Arrest of Judgment, that the Business of making Sails is such as every Seaman knows, and therefore it was not within the Meaning of the Statute. He then said, that the Indictment charges the Defendant with having exercised this Trade for two and twenty Months, and the Verdict finds, that the Defendant used it pro duobus primis mensibus tantum. Now he observed, that it appears by this, that the Offence was committed above a Twelvemonth before the Indictment brought; and therefore the Indictment was brought too late. For the Offence was committed within a Corporation, and thereby the Corporation has a Right to the Penalty. But he observed, that though the King is not confined to bring his Information or prefer his Indictment within the Year; but if he brings it after, he will have a Right to have that Share of the Penalty, which belongs to him; yet he observed, that a Corporation cannot have the Benefit of the Penalty, if the Indictment is not preferred within the Year, no more than the Prosecutor himself. Besides he took Notice, that the Verdict was informal in convicting the Defendant as to the two Months, but not precisely acquitting him as to the Rest of the Time. Accordingly upon these Exceptions the Court ordered the Judgment to stay, till the other Side should move this Matter again. Salk. 611.

Bidwell *and* Lethbridge.

THE Plaintiff brings an Action of Covenant, and declares upon a Deed, wherein one Ham and the Defendant had covenanted to do certain Acts to the Plaintiff; and farther sets forth certain Acts, that he had covenanted to do to them. And in the End of the Declaration concludes, quod profert in Cur' factum prædict', cujus quidem altera pars sigillo ipsius Lethbridge fuit sigillat'. The Defendant had pleaded to this a sham Plea, and upon a Summons being taken out before a Judge, the Judge ordered the Plea to be set aside, and that the Defendant should plead an issuable Plea. Upon this the Defendant pleaded, quod prædictus Ham & Lethbridge non sigillarunt factum prædict'. And upon that the Plaintiff signed his Judgment. Upon the Master's Report the whole of this Matter came before the Court. And now Serjeant Belfield argued, that the Judgment was irregularly signed. He observed, that the Plaintiff had declared upon a joint Deed, and by that Means gave the Defendant a Liberty to traverse the Signing of this Deed by one of the Parties. For he said, that it was an established Rule, that every Deed must be pleaded according to the legal Effect of it, and not according to the Words it is formed in. For this Reason, he said, he hoped the Plea of the Defendant was strictly right; but if it was so bad, as that the Fault in it might have been taken Advantage of upon a Demurrer, he thought there was no Foundation for the Plaintiff to sign his Judgment, as if it was no Plea at all. But Mr. Draper on the other Side argued, that the Plaintiff could not have declared in any other Way than he did; the Words of the Deed were joint, and if the Plaintiff had declared upon a Deed made by Lethbridge only, it would have been bad. But he said, the Plaintiff had taken the true Method; he had declared upon a Deed, joint in Words, but such as in fact was only single; the Deed being signed by one of the Parties only. And this, he said, was declaring according to the legal Effect of it. And he observed, that 2 Roll. 22. was in Point, and quoted likewise the Case in 5 Rep. 23. Then as to the second Objection, he said, the Fact stated by the Master gave an Answer to it. The Judge ordered an issuable Plea to be given; the present Plea is as no Plea, because it is of a Matter by no Means material; and therefore not at all according to the Design of the Judge; and consequently the Plaintiff might sign his Judgment for want of one. The Court accordingly said, that these Answers to the Objections were sufficient; and therefore thought the Judgment was regular.

How far a Deed must be pleaded according to the Operation of the Law.

The

The King *and* Greenhill.

How far a Certiorari ſhall remove an Indictment relating to the Highways.

MR. Theede moved for a Certiorari to Hicks's Hall to remove an Indictment for not working in the Highways. The Court ſeemed at firſt to think, that the late Statute had taken away Certioraris in general for removing Indictments concerning the Highways. But Mr. Theede ſaid, that thoſe Statutes had indeed declared, that no Certiorari ſhould go upon Indictments founded on thoſe Statutes for not repairing the Highways, but he obſerved, that the preſent Indictment was founded upon the Statute of 2 & 3 Phil. & Mar. and thoſe Statutes have no Retroſpect to former Laws. Accordingly, he ſaid, Certioraris have before gon in the Caſe of The King and Coleman, Paſch. 12 Geo. 1. and in the Caſe of The King and Echard, Mich. 12 Geo. 1. And upon this the Court granted the Certiorari in the preſent Caſe.

The Attorney General, at the Relation of ſeveral Members of the Corporation of Liverpool, *againſt* Others of the ſaid Corporation.

How far a Court of Equity has a Right to make a Perſon account before them notwithſtanding there's another Method appointed for the paſſing ſuch Account.

Scacc. AN Information had been filed by the Attorney General againſt the Defendants to call them to an Account for a Miſapplication of the Revenue of the Corporation of Liverpool. At the Time the Defendants had obtained a Dedimus to take their Anſwer in the Country, the Relators had ſet forth to the Court, how that the governing Part of this Corporation had made an Order, that all Suits carried on or intended to be carried on relating to the Corporation ſhould be ſupported at the publick Charge and Expence of the Body. They produced Affidavits at that Time, that the governing Part of the Corporation were concerned in no Suits at the Time they made this Order, nor were they likely to be concerned in any; and that the Corporation therefore deſigned plainly by this Order, that the Defendants ſhould be ſupported by the publick Charge in the defending themſelves againſt the preſent Inquiry. The publick Money was in the Hands of the Defendants; but the governing Part of the Corporation were ſaid at that Time to have been concerned in this waſting of the Revenue equally with the Defendants themſelves. And therefore upon Debate the Court had granted an Injunction againſt the Defendants, to prevent the laying out any remaining Part of the Revenue, but for the common Advantage of the Body. The Defendants ſet forth in their Anſwer, that from the Time of the Corporation's making this Order no one Part of the Revenue had been diſpoſed of, but in a due and proper Manner; that it was an Order made to protect the Corporation againſt Suits, which the publick Body might be threatned with; and therefore their Counſel applied now, that the Injunction might be diſſolved. They ſaid, they thought it a general Rule, that the Court never grants an Injunction to ſtay Waſte, but upon an Affidavit of

Waſte's being actually committed. They ſubmitted it, that there was equal Reaſon in the preſent Caſe, that the Injunction ſhould not have gon at all; but at leaſt that now the Injunction ſhould be diſſolved, ſince the Defendants have ſworn by their Anſwer, that no Abuſe has been made of the Order. But they ſaid, they had ſomething to lay before the Court, to ſhew that the Information itſelf was abſolutely improper. A late Act of Parliament has paſſed, which appoints particular Juſtices of Peace to audit the Accounts of this Corporation; accordingly theſe Defendants have actually made up their Accounts before them frequently before the Filing of this Information; and therefore they ſubmitted it, that the King's Attorney General had no Authority to proceed againſt them in this Manner. But the Chief Baron ſaid, that the Order in the preſent Caſe did not barely provide, that all Suits ſhould be defended out of the publick Treaſure, which concerned the Body of the Corporation in general, but was drawn up in a much more extenſive Manner, that all Suits ſhould be defended at the publick Expence, which any Ways concerned the Corporation. He ſaid therefore, that according to this Order every Election of a particular Member is to be ſupported out of the common Stock; whereas by the Law of England every Member is to maintain his own Election at the Expence of his private Fortune. He obſerved therefore, that this was an Order directly tending to the Conſumption of the Revenue, and therefore it was proper for the King's ſupreme Courts to interpoſe and prevent it. He ſaid the King's Bench had done the ſame in a Cauſe or Two, which he had been formerly concerned in as Counſel. The Court there by Accident happened to take Notice, that a By-Law ſtated upon Affidavits was illegal; and upon Motion they made a Rule, that it ſhould not be put in Execution. In the Caſe of the Deviſes too Complaint was made, that pending a Cauſe relating to that Town, continual Diſturbances were committed; and the Court upon that granted a Rule, that the Peace of the Corporation ſhould be kept. Then to the ſecond Obſervation made, he obſerved, that if the Counſel had thought, that the Stating of this Account before the Juſtices authoriſed by the Act would hinder this Court from looking into the Irregularity of it, they ought to have pleaded this Matter in Bar; but it was a Rule, that the Court would never enter into a Matter of this Sort upon a Motion. He ſaid the only Method now was to take Advantage of it upon the Hearing of the Cauſe. But to ſpeak his Thoughts at preſent, he believed this Matter could never be material to them to prevent a Proſecution of this Nature. Indeed if the Corporation had called the Defendants to an Account, undoubtedly this Bar would be good. But he thought the Intent of the Act could never be to take from the King this extraordinary Act of Juriſdiction. Baron Carter declared, that he was of the ſame Opinion in both Points with the Chief Baron; and accordingly, there being no other Judge in Court, they ordered the Injunction to ſtay.

How far an Order made by a Corporation ſhall be ſaid to be illegal.

How far the Court may decree Reſtitution againſt Relators.

N. B. The Chief Baron ſaid, that if the Relators ſhould be found to have been concerned in this Miſapplication, they ſhould make no ſcruple of decreeing Reſtitution againſt them as well as the Defendants; as they frequently order Plaintiff and Defendant both to be examined upon Interrogatories.

Law *and* Davis and others.

What Words in a Will create an Eſtate-tail what for Life only.

IN an Ejectment for ſeveral Parcels of Lands the Jury finds a ſpecial Verdict, That Daniel Jevin was ſeiſed of the Lands in Queſtion in Fee, and had three Sons, Thomas, Richard and Benjamin; they find that he made his Will, and thereby reciting, that he had provided for his two elder Sons in his Life-time, deviſed the Lands in Queſtion in Manner following. As to one Parcel thereof, to Anne his Wife for Life, and after her Deceaſe to Benjamin and his Heirs lawfully begotten, that is to ſay, to his firſt, ſecond, third and every other Son, and the Heirs of their Bodies ſucceſſively, the firſt in Priority of Birth and Seniority of Age always to be preferred before the younger; and in Default of ſuch Iſſue, he reſerved the Remainder to his own right Heirs for ever. He then deviſed another Parcel of them to Anne his Wife for Life, the Remainder to Benjamin and the Heirs of his Body, viz. to the firſt, ſecond, and every other Son in Manner and Form as aforeſaid, reſerving the Reverſion to his own right Heirs. And in the ſame Manner of Expreſſion he deviſed five other Parcels of his Lands by diſtinct Clauſes in his Will. The Jury farther find, that Thomas, Richard and Benjamin died without Iſſue Male, and that only Richard left one Daughter, who married Fowler, and that they were Leſſors to the Plaintiff. They find likewiſe, that Anne died, and that afterwards Benjamin ſuffered diſtinct Recoveries of theſe ſeveral Parcels of Lands to Perſons under whom the Defendants claim ſeverally as Leſſees. The Queſtion upon this Verdict ſingly was, whether Benjamin had a Remainder in Tail deviſed to him, or barely an Intereſt for Life. Mr. Wills was Counſel for the Plaintiff, and begun to argue, that Benjamin had a bare Eſtate for Life. But the Court told him, that for the preſent they were pretty clearly of the ſame Opinion, and therefore ordered the Counſel of the other Side to proceed. Mr. Wilbraham then ſaid, that he believed it would be admitted to him, that if the Words had concluded before the viz. the Eſtate given would have been manifeſtly an Eſtate in Tail; and when the Words were ſo expreſs, he thought it would be a very difficult Thing for other Words to deſtroy the Senſe of them, whoſe only Buſineſs is to explain and correct the doubtful Meaning of them. To this purpoſe he applied Hob. 171. and Cro. Eliz. 248. But the Caſe he principally relied on was in 2 Ver. 451. A Man deviſed there the Reſidue of his perſonal Eſtate to be laid out in Lands, and that they ſhould be ſettled to William Legate for Life, and after his Deceaſe to the Heirs Male of the Body of the ſaid William, and the Heirs Male of the Body of every ſuch Heir Male, ſeverally and ſucceſſively, as they ſhould be in Priority of Birth and Seniority of Age. The Chancellor referred the

Conſideration of that Caſe to the Judges of the Common Pleas. Mr. Juſtice Tracy was of Opinion, that William had a bare Eſtate for Life; but the other three Judges thought he had an Eſtate-Tail, and the Chancellor decreed according to the Opinion of the three. Thus much he ſaid in relation to this Clauſe itſelf. But he made one Obſervation from all the ſeven Clauſes in the Will together, that in every one of them the Deviſor has given Anne an Eſtate for Life in the moſt plain and legal Words imaginable; and it cannot therefore be imagined, that he intended to give the ſame Eſtate to Benjamin; ſince he has uniformly expreſſed his Thoughts in Words intirely different, and ſuch, as he conceived, were in no ways imaginable to convey ſuch a Meaning. He ſaid, according to the Conſtruction contended for, Benjamin would not be able to make a Jointure, could not raiſe Six-pence for younger Children, nor cut down a Stick of Timber; and no Man could have expreſſed himſelf in the Manner the Deviſor has done, if this had been his Intention. But he ſaid, the Conſtruction he ſubmitted to the Court ſhould be, that the Words under the viz. ſhould reduce the general Deſcription of the Word, Heirs, in the firſt Part of the Clauſe, to ſignify Male Heirs; and ſo to give Benjamin an Eſtate in Tail Male. But the three Judges, J. Page abſent, ſaid, that they were clear of Opinion the Words under the viz. aſcertained the general Deſcription of the former, and explained the Meaning of the Teſtator to be, that Benjamin ſhould have a bare Eſtate for Life, the Remainder to his Sons in Tail. They thought the Caſe in Vernon diſtinguiſhable from this; for there the Words are by Way of Limitation; here the Words explain one another. Judge Reynolds ſaid too, that the Caſe in Cro. did not come up to this; for there the Deviſor intended, that the Son of S. ſhould take an Eſtate to himſelf and the Heirs of his Body, the Remainder to the Heirs of the Body of the Father, which would be a different Eſtate from his taking the whole as general Heir of the Body of his Father; accordingly the Court gave Judgment for the Plaintiff. Salk. 236.

Anonymus.

What Perſons are not intitled to have the Benefit of the late Act of Parliament relating to the diſcharge of Priſoners out of Cuſtody.

Mr. Kettleby moved upon the late Act of Parliament for diſcharging Priſoners out of Cuſtody, that a Perſon, who was charged in Execution upon the Penalty of a Bond for 203 l. might have the Benefit of this Act, in as much as he had paid all that was due upon it, but 63 l. and the Plaintiff himſelf had marked his Writ for no more; neither had he ſworn, that any more was due to him, when he held him to Bail. But the Court ſaid, that the Words of the Act are, that any Perſon charged in Execution under 100 l. ſhall have the Benefit of it; they are not, that any Perſon who ſhall be indebted under 100 l. ſhall have the Relief, and therefore they thought they had no Authority to interpoſe in this Caſe. Mr. Kettleby then prayed, that a Rule might be made upon the Plaintiff to ſhew Cauſe, why he charged the Defendant in Execution for more than was due. The Court refuſed that Motion too; for

for they said indeed, they do take Care that a Man shall levy no more than is due; but they thought the Plaintiff could not charge the Defendant in Execution at all, if he did not charge him for the whole Sum recovered.

Petrose *and* Best.

How far the Court will grant an Attachment against the Sheriff for delivering up a Replevin-Bond.

UPON the Defendants having taken a Distress, the Plaintiff gave Security to the Sheriff de retorno habendo, and then levied a Plaint in the Sheriff's Court; the Defendants demurred to it, and the Plaintiff had a Rule given him to join in Demurrer; but upon his not doing it, Judgment went against him by Default. The Goods were removed away, so that the Sheriff could not make a Return; but yet Affidavit was made, that he had given up the Replevin-bond to the Plaintiff's Attorney, who was one of the Co-obligors. For this Piece of Practice Mr. Forteſcue prayed, that the Court would make a Rule upon the Sheriff and the Attorney to answer the Matters of the Affidavit; and the Court accordingly granted his Motion. 2 Inst. 340.

Anonymus.

How far the Court will not grant an Information against a Person for Printing of a Will.

MR. Kettleby moved for an Information against the Printer of one of the News-Papers for inserting Mr. Hungerford's Will at full Length in one of the Journals. He said this was a Practice that might tend to great Confusion by discovering Men's private Affairs in their Families; and therefore upon that Account he made this Motion in Behalf of Mrs. Hungerford, the Widow of the deceased. But besides he said, this was a Practice that might tend much to the Prejudice of the Ecclesiastical Courts, if Copies of Men's Wills are allowed to be published in this extraordinary Manner; and he did not know, that those Courts had any Remedy over the Printer in such Case. He observed likewise, that he had a Copy of an Order made by the House of Peers 31 June 1721. that no Person from thenceforth should take upon him to print the Will of a Member of that House. The Court said, that it has been declared to be a Breach of Privilege to print the Will of a Peer; but they thought that was only a Privilege belonging to themselves. If the Party thought proper, they said she might proceed by Indictment; but they refused the present Motion.

Castle *and* Corbet.

Vide 204.

MR. Kettleby and Mr. Strange moved now, that the Defendant might be bailed, upon account of the Appellant's having been guilty of Delay in carrying on the Suit. They said, the Appellant might have taken out a Venire immediately after Issue joined, which was on the second Day of the Term; this Writ ought to be returnable within fifteen Days; she might immediately after the Return of that Writ have taken out a Writ of Nisi prius returnable within fifteen more; and by that Means the Trial might have come on at the Sittings

within the Term. But they had an Affidavit to produce, that they had searched the Offices, and found no Entry of a Writ of Venire being so much as taken out at all. They said likewise, they had no Copy of the Declaration given them, nor any Copy of the Issue; so that by this Practice, the Defendant is to lie in Custody all the Vacation; and yet in the first Instance he shewed his Desire of having a speedy Opportunity of clearing his Innocence, when he did not make use of the common Right he had of having a Copy of the Declaration, and making what Advantage he could of the Mistakes, that might be found in it. They said too, the Appellant had very near made a Discontinuance the other Day in her Suit against Mr. Bambridge; for when he was brought up to have his Appearance entred in Pursuance of his Recognizance in Crastino Animarum, the Appellant was not here; but they saw, we should take Advantage of it, and so they sent for her. Mr. Reeves and Mr. Lee argued on the other Side, and said, that as this Proceeding was by Original, the Process can be returnable only at the general Return-Days after the fifteen Days from the Teste. They said therefore that the first Return they could have had was Crastino Martini, the twelfth of this Month, so that they could not try the Defendant till the first Sittings in next Term, and then they should certainly do it. They said they could not see what was meant by no Entry's being made of the Venire; they said it was a known Thing, that the Venire is often taken out after the Trial is over. They observed, that the Declaration and Issue were both upon Record; they said the Defendant himself ought to have taken a Copy of them, and not have a Copy of them given him in a vindictive Suit of this Nature. But besides they said, if the Proceedings were not carried on with that Dispatch, as by Law they might have been, the present Suit was an Appeal, a Suit new and difficult; and therefore it was but Prudence in the Plaintiff to be cautious a little in the Proceedings. But this was by no Means a Foundation for the Defendant to be bailed; for there ought to be a visible Neglect in the Proceedings for the Defendant to intitle him to this Favour upon such an Account. The Court said it was certainly true, that the Process could be returnable only at the general Return-Days, and that Crastino Martini was the First; but they said the next Return-day the Nisi prius might have been returnable at, was Quindena Martini, and that was the twenty-sixth of this Month; so that this Cause might have been tried the Sittings within Term. They said the Venire must be taken out in a Suit by Appeal, and tested according to the Truth; and must likewise actually be returned before the Writ of Nisi prius. They said too it ought to be tested the Day that Issue is joined, that an Appeal is recens Prosecutio; and they did not know but the not having taken out the Venire then might be a Discontinuance. Mr. Strange upon this urged it, that it really was one; but the Court said, as the present Motion was only to bail the Defendant, they would not give their Opinions upon that Point. They observed likewise, that if the Process is returnable beyond the Time that is necessary, they would not say, that that would be a Discontinuance; but thus far was clear, it would

shew a Delay in the Suit, and would be a good Foundation to bail; and accordingly in the present Case they agreed, that the Defendant should be bailed. But the Bail-piece not being filled up, and the Master saying, that the last was settled according to Precedent, and that he could not upon his Memory say, what was the Form of it, the Court ordered the Defendant to be brought up again by Rule to morrow. Mr. Taylor, the Plaintiff's Attorney said, that he believed the Appellant need not have appeared to day as it was no Return-day, but only the Defendant moved to be brought up upon a particular Occasion; and therefore, he hoped, the Court would not think it necessary for her to come up to morrow; and the Court seemed to think she need not.

Vide post

The King *and* The Duke of Bedford and others.

When a Rule is granted for an Information in Nature of a Quo Warranto in what Manner the Rule must be drawn up.

MR. Lee came now to shew Cause upon a Rule that had been made against the Duke, to know by what Authority he claimed to be Governor of the Corporation of the Conservators of Bedford Level, and which was likewise made upon several other Defendants, to know why they claimed to be Bailiffs of that Company. He said he was prepared to answer the Ruler upon the Merits; but he had an Exception to take to the Manor in which the Rule itself was drawn up. He said the Name of the Corporation was intirely mistaken; the 15 Car. 2. cap. 17. has incorporated the Adventurers of this Level by the Name of the Governor, Bailiffs and Commonalty of the Company of the Conservators of the Great Level of the Fens; but the Stile of this Company, as drawn up in the Rule, is intirely different. The Court accordingly discharged the Rule; for they said there is no such Corporation as that described in the Rule. Indeed, they did allow, that it is frequent to draw up Rules for Quo Warranto's against the Borough of such a Place generally, without giving them their Name of Corporation. But there they said, there is such a Place as the Borough, but none as Bedford Level. Upon which Mr. Wills moved, that the Court would grant a new Rule against the Defendants, according to the true Description of this Corporation. But the Court said, there must be several Motions made against the several Defendants; and accordingly distinct Counsel moved against each of the Persons.

Andrews *and* Richards.

When an Attorney is present at the Time of executing a Warrant of Attorney to confess a Judgment, how far such Warrant of Attorney shall be good.

MR. Kettleby moved, that a Judgment might be set aside, that was entred up upon a Warrant of Attorney. One Reason for this Motion was, that the Letter of Attorney was obtained from the Defendant when he was drunk; the other, that he was under an Arrest, when he executed this Letter of Attorney, and yet no Attorney of the Court was present for the Defendant upon the Execution of it; but only one for the Plaintiff. The Court said, they did not think either of these Reasons sufficient to set aside the Judgment, as there was an Attorney present; for the late Rule has been not to set them

aſide, where there is any Attorney preſent; and Judge Reynolds ſaid, it is not material whether he is a ſworn Attorney or not; nay, it has been allowed to be good, if he is even Clerk to one. But the Chief Juſtice ſaid, in Lord Prat's Time the Rule was, that the Defendant ſhould have actually an Attorney concerned for him preſent. However the Court made a Rule upon the Plaintiff's Attorney to attend.

Hopkins *and* Sir Tho. Jones.

How far a Poſtea ſhall not be Evidence.

MR. Kettleby informed the Court, that the Plaintiff had obtained a Verdict in a Cauſe wherein he was Plaintiff againſt Rich, but that Rich immediately paid him the Money, and therefore Mr. Giles Taylor the Attorney never entred up the Judgment; he ſaid Hopkins had ſince commenced an Action againſt the preſent Defendant, and it would be neceſſary for this Defendant to have a Sight of the Poſtea upon the Trial. Therefore he moved, that Mr. Taylor might either attend with the Poſtea upon the Trial, or elſe that he might enter up Judgment upon it, and Satisfaction accordingly. But it came out, that the Suit between Hopkins and Rich was in the Common Pleas; and therefore the Court ſaid, the proper Application was there, to have the Judgment entred up; and therefore could do nothing in it. And as to the Poſtea itſelf, Judge Reynolds ſaid it was no Evidence.

Selwood *and* Methlyn.

What ſhall be ſaid to be a good Avowry.

ON a Writ of Error out of the Common Pleas in Replevin, upon Demurrer Judgment was given for the Avowant. Mr. Strange now took ſeveral Exceptions. He ſaid in the firſt Place, that the Defendant had ſet forth in his Avowry, that he was ſeiſed in Fee of a Houſe, and thereupon by Indenture between him and the Plaintiff demiſed the Houſe, with ſix Acres thereunto belonging, to the Plaintiff for a Term of Years yet to come. Now he obſerved, that the Avowry was imperfect in this Reſpect; for there ought to have been a Seiſin alledged of the ſix Acres, as well as the Houſe; and in that an Avowry differs from an Action of Debt. To this Purpoſe is the Caſe of Silley and Dalley in Salkeld, affirmed in the Houſe of Lords; and ſo are all the Precedents. His next Exception was, that the Avowant has ſet forth 75 l. to be due to him for two Years and a Half arrear; and yet when the Plaintiff has replied as to 24 l. Part of it, that it was not yet due; and the Defendant in his Rejoinder joins iſſue upon it; he himſelf afterwards enters a Nolle proſequi as to that 24 l. By this, he ſaid, it appears upon the Avowant's own ſhewing, that he has avowed for more than is due; and he obſerved, that a Diſtreſs is a Thing intire, and that therefore when the Defendant has abated his Avowry in Part, he has abated it in the Whole. His third Exception was, that the Judgment is to recover the 51 l. Reſidue pro valore bonorum that were diſtrained; now he ſaid, this Judgment could in no colourable Manner be maintained but upon the Statute of 17 Car. 2. cap. 7. which allows the Party to have Exe-

Execution of what shall be in arrear, instead of having a Retorno habendo; but he said that Statute would not maintain this Judgment neither; for it provides the Judgment shall be for the Arrears of Rent; but in the present Case it is 51 l. for the Value of the Goods. He said he did allow, that an Inquest indeed has found the Goods distrained to be but of the Value of 51 l. but he thought notwithstanding, that the Judgment was not exact enough according to the Words of the Act. The last Exception he took was, that as soon as the Demurrer is joined, an absolute Judgment is given, quod querens sit in misericordia; upon that a Writ of Inquiry goes, and then another absolute Judgment is given to recover the 51 l. Now, he said, this is contrary to all the Notions of Writs of Inquiry; for the Party ought to be present in Court at the Time the Writ of Inquiry is awarded; but here is a conclusive Judgment given first, and he is out of Court before the Writ of Inquiry issues. To the first of these Exceptions the Court said, they were of Opinion that this Demise being by Indenture estopped the Plaintiff to take this Exception; which they allowed would have been a good one, if the Demise had been in any other Manner. To the second Exception they said, that it was frequent for the Jury to find less due, than the Defendant has avowed for; but yet the Avowant has Judgment notwithstanding; and therefore they could not think that Exception material neither. As to the third Exception Serjeant Rabey said, that there was an Entry in 1 Saund. 195. exactly as this is. But the Court said, they did indeed think it pretty unintelligible, but however the Avowant might move to amend the Record of the Judgment in this respect in the Common Pleas, and then the Transcript might be set right here. And as to the last Exception the Court observed, that the first Judgment was only quod querens sit in misericordia, and that was at Common Law. The Statute has provided, that besides that a Writ of Inquiry shall go at the Prayer of the Avowant, and that a Judgment shall be given upon that to recover the Sum found to be due by the Inquest. They said this was merely additional to the Proceedings at Common Law, and the Statute did not intend to alter any Part of the other; and therefore they did not think it material, that the Plaintiff was out of Court upon the Awarding of the Writ. However the Court ordered this Matter to stand over.

Vide post.

Tiblin *and* Edson.

What shall be said to be a good Delivery of an Issue.

THE Defendant pleaded a Misnomer, and the Plaintiff joined Issue upon it. The Plaintiff delivered a Copy of the Issue with a Rule on the Margin to return it the fourth of November, but happened not to deliver it till the Tenth. The Defendant upon this took no Care to redeliver the Issue at all; and upon this the Plaintiff signed his Judgment. Mr. Parker moved now to set the Judgment aside. For a Rule given to return it on an impossible Day, is the same as no Rule at all. And it is not a good Delivery of the Issue, unless there is a Rule given. But Mr. Benton, the Clerk of the Declarations

ſaid, that this would be a good Reaſon, why he need not have accepted of it; but by his having accepted it he was obliged by the Rules of the Court to return it within four Days. Accordingly the Court held the Judgment to be regular.

Anonymus.

A Certiorari was moved for to be directed to two Juſtices of the Peace of the County of Southampton to remove a Conviction upon the Statute of 12 Car. 2. 23, 36. for not having paid the Exciſe. The Court ſaid, there were ſeveral Statutes which provided that Certioraries ſhould not go in theſe Caſes; and they doubted whether this was not one. But upon the Counſel's ſaying, that the Words of the Statute were only, that no Certiorari ſhould ſuperſede the Proceedings, he ſubmitted it, that a Certiorari might go notwithſtanding. And he obſerved, that where theſe Statutes intend that a Certiorari ſhall not go at all, the Words are much ſtronger. As the 9th of Ann. 11. provides, that no Certiorari ſhall be brought or allowed; and accordingly the Court made a Rule to ſhew Cauſe.

When a Conviction is made upon the Exciſe Laws, how far a Certiorari goes in ſuch ſort of Caſes.

Knute *and* Myonet.

A Rule had been made to ſhew Cauſe, why a Verdict ſhould not be ſet aſide for a Variance between the Copy of the Iſſue and the Copy of the Declaration delivered, there being no Defence. Serjeant Darnel now ſaid, that the Variance was for the Benefit of the Defendant; for the Copy of the Declaration laid the damnum to be to 1000l. but the Iſſue only to 500 l. But beſides, he obſerved, that the Niſi prius Roll was agreeable to the Copy of the Declaration; and in ſuch Caſe, he never knew any Complaint of this Nature made to ſet aſide the Verdict. And likewiſe he took Notice, that the Defendant had accepted of the Iſſue, and by that Means had waived all Benefit of this Nature. But the Court ſaid, that would be very hard to make a Defendant waive an Advantage of this Sort by accepting of the Iſſue, when he cannot know at the Time he does accept it what the Declaration perhaps is. They ſaid, they thought it a general Rule to ſet aſide a Verdict, where there is no Defence, upon theſe Exceptions, as well as upon a Variance between the Niſi prius Roll and the Copy of the Iſſue; and accordingly ſet the Verdict aſide.

How far the Court will ſet aſide a Verdict for a Variance between the Copy of the Declaration and the Copy of the Iſſue.

Anonymus.

How far the Court will not proceed in a ſummary Method relating to Attornies.

Scacc. MR. Fenwick moved, that a Promiſſory Note of 40 l. but not for Value received, given to an Attorney of this Court for Law Charges might be referred to the Deputy to ſee what was due upon it; and that upon Payment of what was due, Proceedings at Law in this Court might be ſtaid. He ſaid there was a direct Impoſition in obtaining the Note; and in Fact there was but 20 l. due to the Attorney, when the Defendant gave it. The Chief Baron ſaid, that if it had appeared upon the Face of the Note, that it was given for Law Charges, they might have done it; but here they could not; and the only Remedy is to take Advantage of this Impoſition upon the Trial, or to prefer a Bill. But Mr. Baron Carter ſeemed at firſt to think that it might upon Motion. And to this Purpoſe he mentioned Rhodes's Caſe in Chancery; where even a Bond and Judgment was given; and the Court looked into the whole upon Affidavits, and this even upon a Motion. But the Chief Baron ſaid, that that Caſe was between Attorney and Client; and there it might certainly be done; but here it was between an Attorney and a third Perſon. And accordingly the Court rejected the Motion; Baron Carter agreeing, that that might make the Difference.

Smith *and* Norton.

When a Rule is made on a Sheriff to bring in the Body, what is the proper Method to inforce a Rule of that ſort.

THE Sheriff had made a Return of cepi corpus, but would not bring in the Body. Upon which the Plaintiff had obtained ſeveral Rules upon the Sheriff to bring in the Body; but the Sheriff ſtill ſtood out in Contempt; and therefore the Plaintiff prayed now an Attachment againſt him. But the Court upon hearing the Rules read ſaid, there was not one peremptory Rule; and therefore the Motion for an Attachment was irregular at preſent. However upon Mr. Parker's deſiring then a peremptory Rule, the Court granted it. And in another Caſe they ſaid that Amercements only uſed to be the Method of inforcing theſe Rules, but lately they have granted Attachments.

Fuller *and* Barnes.

How far the Court cannot order an Attorney to enter Satisfaction upon the Roll.

THE Plaintiff had recovered Judgment in the Common Pleas, which on Writ of Error was affirmed in this Court. Upon that the Plaintiff began to proceed by Way of Scire facias againſt the Bail. The Defendant upon this moved the Court, that, upon bringing in the whole that was due, Proceedings might be ſtaid, and at the ſame Time produced an Affidavit, that the Plaintiff was already much over paid; upon which the Court made a Rule then to ſhew Cauſe. And now Mr. Parker ſaid, that the Plaintiff had commenced this ſubſequent Proceeding againſt the Bail in the Common Pleas;

and that therefore he ſubmitted it, that this Court could not ſtop the Proceedings. The Court was very much inclined that the Attorney for the Plaintiff ſhould waive this Right that he had by Law; but however he was reſolved not to conſent to it. Mr. Strange upon this prayed, that a Rule might be made upon him then to enter Satisfaction upon the Judgment here upon bringing in what the Maſter ſhould think due; and he ſaid, that he believed would induce the Court of Common Pleas to ſtay the Proceedings there. But ſo long as the Judgment here ſhould ſtand open, he was afraid the Court of Common Pleas would not ſtay the Proceedings; becauſe if they ſhould ſtay them, the Plaintiff would yet be at Liberty to proceed here; and they would certainly think, that it was as well for the Plaintiff to proceed in their Court as in this. Judge Reynolds ſaid, that the Court has often thought of making ſuch a Rule to order an Attorney to enter up Satisfaction, but he was afraid they could not do it. However the Court at laſt agreed to make a Rule upon the Attorney to ſhew Cauſe, why all Proceedings ſhould not be ſtaid upon the Judgment here, upon bringing in what was due; and that, they believed would have the ſame Influence upon the Common Pleas.

Holt *and* Ward.

MR. Strange having not been able to ſet aſide the Plea, that is mentioned before, upon Motion, thought proper to demur to it; and now the Demurrer was argued. He took Notice, that the preſent Proceeding was by Bill; and therefore there was no Pretence for the Defendant to have Advantage of this Plea upon the Statute of 1 Hen. 5. 5. of Additions. And he obſerved, that the preſent Title was nothing but an Addition to his Name; and by no Means ſtronger, than if the King ſhould create a Corporation, and appoint one by Name the Mayor of it, commanding that he ſhould be received as ſuch, and allowed and called ſo by all Perſons; yet he ſubmitted it, that if a Suit was againſt the Mayor within the Year by Bill in his private Capacity, it would not be a good Plea for him to ſay, that his Stile of Mayor was omitted. However, he ſaid, that was a much ſtronger Caſe, than where a Man is barely elected Mayor of a Town. Serjeant Chapel on the other Side obſerved, that there was occaſion for him to ſay very little, becauſe this Caſe was in Point determined for him in 3 Cro. 224. Though he did allow, that this Caſe is afterwards doubted in Page 542. in that Book. The Court held the Plea to be good in the preſent Caſe; and put it upon this, that the Title of Clarencieux is Part of the Defendant's Name, and not an Addition to it. But in the Caſe put of the Mayor, they ſaid, that was merely an Office; and therefore was not like the preſent Caſe. Accordingly Judgment was given, that the Writ ſhould abate. 1 Lev. 248.

Vide ante 208.

The

The King *and* ——

SOME Days ago, when Mr. Marſh was in Court, who was of Counſel with the Proſecutor, Mr. Lacy moved, that one of the Judges would be pleaſed to ſpeak to Lord Chief Juſtice Eyres, who tried the Cauſe, in order that the Defendant might ſubmit to a ſmall Fine. Accordingly Judge Probin reported, that Lord Chief Juſtice Eyres informed him, that it was an Indictment againſt the Defendant for oppoſing the Wardens of the Coopers Company in London, in taking away ſome Brewing Veſſels, which did not contain full Meaſure, and yet were uſed by the Defendant in his Trade of a Brewer. But that the Chief Juſtice informed him likewiſe, that it was an old obſolete Statute, which the Indictment was founded upon, namely, the Statute of 23 Hen. 8. 4, 7. and that it appeared doubtful to him upon the Trial, whether the Wardens could juſtify taking the Veſſels away, though they might burn them upon the Spot; and therefore that he thought the Defendant deſerved to have but a ſmall Fine ſet upon him. Serjeant Darnel and Mr. Marſh now ſaid, that the Law was a very uſeful and neceſſary one, and that it did not only give the Wardens of the Coopers Company of the City of London this Power, but extended likewiſe to the Chief Officers of every Corporation in England, and gave them the ſame Authority by the 9th Sect. in the Statute They ſaid likewiſe, that the Words were expreſs in giving the Wardens Power to take Veſſels away; and that this Proſecution was carried on for publick Example. The Court look'd upon the Statute; but ſaid they did not know where they ſhould end, if they ſhould allow a Judge's Report to be arraigned; and that if the Proſecutor had any Exceptions to the Judge's Directions upon the Trial, his Counſel ſhould have mentioned this when the Defendant moved before to have the Report of the Judge. Upon which Serjeant Darnel ſaid, that he was not in Court at the Time of the former Motion; and Mr. Marſh ſaid, though he was, yet they had had no Notice of the Motion; and therefore it was not his Buſineſs to ſay any Thing to it at that Time; and now without any Thing farther, but Notice that the Court will be moved, that the Defendant ſhould ſubmit to a ſmall Fine, the preſent Matter comes before the Court. So that the Counſel ſaid, they had had no Opportunity to apply to the Judge; and therefore moved, that they might have now Leave to apply to him; or at leaſt, that the Defendant might be obliged to talk with the Proſecutor, before he ſubmitted to a ſmall Fine; and the Attorney in the Cauſe ſaid, that he had applied to the Chief Juſtice at his Chamber, and that the Chief Juſtice told him he believed the Court would allow the Proſecutors their Coſts. The Court ſaid, that theſe Objections to the Report ſhould have been made before the Report was delivered; and Judge Probin ſaid, after that they would never allow a Judge to be attended again. The Court ſaid likewiſe, that a Defendant never talks with the Proſecutor after a Judge's Report; and they would

never hear one Part of the Report from a Judge of this Court, and another from any Body else. Accordingly set a Fine only of 6 s. 8 d. upon the Defendant.

Holmes & Ux' *and* Wood.

MR. Filmer now argued again for the Defendant, and said, that the single Question for the Opinion of the Court was, whether this Action would survive or not to the Wife. Now, he observed, that every Husband has a Right to the Benefit of the Skill and Labour of his Wife, and that she is to be considered in Law merely as a Servant to him; that therefore as the Consideration must be considered merely as moving from the Husband, the Husband solely can have the Benefit from it. Then as to the Exchequer-Chamber Case cited upon the former Argument, he said, later Resolutions have been against it; and to this Purpose he cited the Case of Buckley and Collier reported in 4 Mod. 156. and 1 Salk. 114. But besides, he said, the Plaintiffs must doubtless have been provided with the Husband's Money; that Part of the Consideration must therefore have wholly proceeded from the Husband; and consequently the Wife can by no Means have the Benefit of a Promise founded at least in Part upon the Husband's Act; to this Purpose he applied the Case in 2 Lev. 20. He said likewise, there was another Reason to be given, why the Wife ought not to have been joined with the Husband in the present Action; because the second Count has laid the Promise to be made to the Wife to pay the Husband for the Cure; and especially this must be bad, as intire Damages are given. But Mr. Reeves argued on the other Side, that the Skill and Labour of the Wife is personal to herself; and therefore sufficient to raise an Assumpsit for her Benefit; at least an express Assumpsit, if not an Assumpsit in Law. And he said, the Case in Salkeld is far from denying the Exchequer-Chamber Case to be Law; but indeed the very Distinction is there taken between an Assumpsit in Law, and an express Assumpsit. And in the Case of 4 Mod. the Exchequer-Chamber Case does not appear to have been cited. But besides this great Authority the same Point is settled likewise in 2 Cro. 205. And a Case equally strong with these is in 1 Rol. 32. Fosset and Childer, where a Man promised a Woman 10 l. in Case she would not oppose her Husband in levying of a Fine; and yet in Arrest of Judgment it was allowed, they might both join in bringing the Action. Then to the second Exception, he said, the Court will intend every Thing in Favour of a Verdict; and it may be supposed therefore, that the Wife procured the Plaintiffs of a Friend, and not with the Husband's Money. And he said the Case in 2 Lev. does not warrant the Exception; for there the Clothes that were torn, were laid to be her's, and consequently they must have been the Property of the Husband. Then as to the last Objection, Mr. Bootle junior, gave an Answer to it, that there are many Instances, where a Man can bring an Action upon an Assumpsit, and yet he can receive no Benefit from it; as if A. promises B to pay C. a Sum of Money, it has often been determined,

Vide 75.

termined, that B. may bring an Action upon this Assumpsit as well as C. The Chief Justice and Ju. Reynolds said, that for their own Part, they thought it a fundamental Rule, that a Husband had a Right to the Benefit of the Skill and Labour of the Wife, and that the Wife therefore could not support an Assumpsit upon it. And as to all the Points they inclined for the Plaintiff. However, Ju. Page absent, it stood over. Salk. 637. And afterwards in Easter Term Judgment was arrested.

The King *and* Acton.

When a Person is brought up by Habeas Corpus, how far the Court will not allow him to be bailed.

THE Defendant having been brought up by Habeas Corpus, it appeared upon the Commitment, that the Defendant was charged generally with the Murder of one Crane. Mr. Strange said, that he had got Copies of the Informations taken before the Justice at the Time of the Commitment, by which it would appear, that this Crane was a Prisoner to the Defendant, and that the only Foundation for committing the Defendant for murdering him was, that he put him into a Place, called the Strong hold, and by Occasion of that he died. He said, the Copies of these Informations were given by the Justice of Peace. But to shew, that the Unfitness of this Place could not be the Occasion of Crane's Death, they had Affidavits to produce, that the Defendant had already been indicted for the Murder of four other Persons, by putting them into this Place; it was fully proved, that they were all put in; but yet the Defendant has been already acquitted upon every one of them. But besides he observed, it was plain, there has been a Delay in this Prosecution; this Commitment bears Date the third of September; the Defendant has since been indicted and acquitted for all the other Facts; but has not yet been indicted for this. For which Reasons Mr. Strange moved, that the Court would allow the Defendant to be bailed. But the Court said, that it was a Proceeding intirely unprecedented to lay before them Copies of Informations of this Sort upon such an Occasion; that Evidence of this Sort was only to be laid before a Grand Jury; and therefore refused it to be read. They said too, that the Defendant had not yet lain long enough to intitle him to be bailed for Want of Prosecution; and therefore refused to bail him in the present Case. Salk. 104. Skin. 683.

How far Copies of Informations taken before a Justice of Peace shall not be allowed to be read.

The Vill of Appelthwaite in the Parish of Windermore *ver.* The Vill of Hartsop and Batterdale in the Parish of Barton.

Vide 209.

MR. Fazakerly came now to shew Cause. He said the Body of the Order recites only, that the last Settlement of the Persons removed is in Appelthwaite, and not said in the Vill of Appelthwaite; and therefore there was no Occasion to intend that Place to be a Vill; it might as well be a single House, going under that Name; and therefore it did not appear upon the

Order, that the Place is within the Act. But he said if he should admit, that Appelthwaite was a Hill, and that therefore the Hill need not to have received the Persons sent to them, as the Order was not directed to the Overseers of the Hill; yet when they had received them, he submitted it, whether they were not obliged to keep them. He said, if an Order was directed to the Parish of A. generally, and the Parish received the Persons so sent to them, he did not see why the Parish of A. were not bound to keep them, though the Order was not directed to the proper Officers. He observed, that it was a known Law, that if a Justice of Peace directs his Warrant to a private Person, and the Party, whom the Warrant concerns, submits to it, he cannot afterwards complain, that the Warrant was mis-directed. The Court said, that Appelthwaite cannot be intended to be a single House; for then the Order could not have charged that Place with the Receipt of the Poor. But they said it must be intended to be a Hill. They then observed, that the Parliament has appointed particular Persons, whom Orders shall be directed to; and that therefore every Mis-direction makes the Order bad in itself; and consequently no Acquiescence under it could make it good. Accordingly the Court made the Rule absolute for quashing the Orders. Salk. 176, 247.

Anonymus.

THE Plaintiff's Attorney sent the Paper-Book to the Defendant's Attorney, at Ten o'Clock at Night; and by Ten the next Morning the Defendant's Attorney joined in Demurrer, and came to the Plaintiff's Attorney to pay him for the Paper-Book. But the Plaintiff's Attorney said then, that he had sent his Clerk already to sign Judgment. However the Defendant's Attorney left the Money for the Paper-Book upon the Desk, though the other refused to accept it. And Mr. Benton informed the Plaintiff's Attorney, that he had signed his Judgment regularly; for the Defendant's Attorney was obliged to have joined in Demurrer that Night the Paper-Book was sent him, or at least very early the next Morning. But the Court thought the Judgment a little too Quick; accordingly referred it to the Master.

How far a Person shall not be allowed to sign Judgment for not paying for the Paper-Book.

Pulton and Heath *ver.* Farrar.

THE Defendant had a former Cause in this Court, wherein he was Plaintiff, and one Bateman Umphry Defendant; and in that he was served with Notice, that the present Plaintiffs, who were two Bailiffs, would justify as Bail; and one of them sent him a Letter, that if he had any Thing to say to them, they should be at the Coffee-house, next Westminster-Hall Gate the Morning they should justify. The Defendant attended the Motion accordingly; and as soon as they had justified, and the Defendant went out with them to Westminster-Hall Gate, they procured

How far a Person shall not be allowed to be arrested by Reason of his attending the Business of a Court.

procured him to be charged with an Action at their Suit of 100l. Upon this Matter the Defendant moved now, that the Plaintiffs might answer the Matters of the Defendant's Affidavit, for arresting the Defendant when he was attending the Business of this Court. And the Court made a Rule accordingly.

Birk *and* Leek.

Vide 210.

MR. Reeves now said, that this Case stood for the Resolution of the Court. The Chief Justice said, that they were of Opinion as to the first Exception, that there was no Variance between the Original and Declaration; and as to the second Exception, they relied upon the Case of Rowning and Lord Carteret. So affirmed the Judgment.

Anonymus.

How far a Mandamus will lie to admit a Register into an Office.

MR. Reeves moved for a Mandamus to be directed to Dr. Ward, Judge of one of the Archbishop's Courts of York, to admit a Deputy into the Office of Register. He said, the Office of Register was for Life, and exercisable by the Register himself or Deputy; the Custom of this Place has been, that the Deputy should be sworn in by the Judge of this Court, though the Deputy is only at Pleasure. He cited the Case of the Corporation of Bedford, where a Rule was made for shewing Cause a Term or two ago, why a Mandamus should not go to admit the Deputy-Recorder, and yet the Deputy was not for Life; Lord Bruce was the Recorder, and he indeed was for Life. Mr. Masterman said, that Case was so; accordingly the Court made a Rule to shew Cause; but they said, they must hear the other Side.

Vide post 294 - 380

Jones *and* Newbank.

How far the Court stays Proceedings on one Notice of Trial, till the Costs of a former one are paid.

MR. Kettleby moved yesterday, that a Rule might be made to stay the Plaintiff's Proceeding upon a second Notice of Trial, till he had paid the Costs of the former Notice. The Court said then, that the old Rule was to grant these Motions only in Ejectments; and upon that asked him what his Action was; but Mr. Kettleby not being instructed in it, the Court ordered him to move it again. He now said, that he had not yet seen his Attorney, and therefore could not inform the Court what the Action was; but he would suppose it to be an Assumpsit, one of the strongest Cases against him, and yet he submitted it, that by the Rules of the Court he was intitled to his Motion. He said the Court made the same Rule in the Case of Smith and Lideot, Pasch. 1 Geo. 2. The Court seemed inclined to think, that lately they had gone farther than the old Rule. But then they told Mr. Kettleby, he was still irregular in not having an Affidavit, that he had demanded the Costs of the Plaintiff.

Mr. Kettleby ſaid, it was true he had not ſuch an Affidavit, but he had one, that they had made ſtrict Search for the Plaintiff, and could not find that there was ſuch a Perſon in the World. Therefore he moved upon this Affidavit, that a Rule might be made upon the Attorney not to proceed without paying the Coſts of the former Nonſuit himſelf. The Court ſaid, ſuch Sort of Motions are frequent on the other Side of the Hall, but they did not know they had gone ſo far on this. Upon this Serjeant Girdler ſaid, that he himſelf was concerned in a Cauſe of Newman and Royce in Lord Chief Juſtice Prat's Time, where the Court made a Rule, that Proceedings upon the ſecond Notice of Trial ſhould be ſtaid, till the Plaintiff's Attorney paid the Coſts of the firſt; and this was done upon an Affidavit, that the Plaintiff was beyond Sea. Accordingly the Court made a Rule upon the Attorney to ſhew Cauſe. Vide poſt.

Caſtel *and* Bambridge and Corbet.

MR. Kettleby and Mr. Strange moved now, that the Defendants might be diſcharged for a Diſcontinuance in the Proſecution. The Writ of Appeal, they ſaid, was returnable the third Day in the Term; Iſſue joined of the ſecond Day, but entered as of the firſt; but yet they had an Affidavit to produce, which was made but two Days ago, that all this while they had not taken out a Venire. They ſaid, if the Fact was ſo, this was a Diſcontinuance; and the Caſe of Bradley and Banks reported in 2 Cro. 283. Yelv. 204. is in Point to this Purpoſe. Mr. Reeves on the other Side produced a Venire, teſted the firſt Day in Term, and returnable to Day, which was Quindena Martini. Mr. Kettleby and Mr. Strange then looked upon the Writ, and found upon the back of it, that the Writ was made out the 2d Month of our Sheriffalty; by this they ſaid it appeared the Writ was made out in the Month of November for the Sheriffs of London were appointed in October; and therefore here was a long unneceſſary Interval of Time between the Return of the Appeal and the making out the next immediate Proceſs. This farther appeared too, from the Venire's being under the Seal of the Court the twentieth of this Month. But the Court ſaid, the Caſes relied upon by no Means warranted the preſent Exception; for there the next Proceſs was teſted ſeven Days after the Return of the firſt. But here it is teſted the very ſame Day. And, they ſaid, no Inſtance could be given, they believed, where it was held, that the next Proceſs muſt be taken out actually the ſame Day with the Return of the firſt. The Defendant's Counſel then took an Objection, that at leaſt the Venire ought to be returned on the firſt proper Return-Day, and that was Craſtino Martini; but the preſent Writ is returnable Quindena Martini. Mr. Reeves anſwered to this, that there is a Precedent in Raſt. 47. exactly as this is, and upon that he relied. And upon a former Motion when a Complaint was made againſt the Appellant for not having had a Return of her Venire as ſoon as ſhe might, Mr. Taylor, the Attorney ſaid, that the Reaſon was, becauſe there was forced to be a Return of a great many Jurors upon the Panel. The Court ſaid, this was a Point, which very well deſerved to be ſpoke to, and there- Vide ante 204.

fore desired, they might be attended with Precedents, before they would give their Opinion. The Defendants thinking, that the arguing of this Point might be some Delay, desired rather to waive it, and go to Trial upon the Merits as soon as they could. But then their Counsel desired, that the Return to the Venire might be filed, as it was now in Court. But the Court said, the Venire was brought in by the Appellant's Attorney, and not by the Sheriff, for this particular Purpose, to shew, that they had not been negligent in the Proceeding; and besides the Sheriff has the whole Day to make his Return in, and they could not tell but he might have Occasion to alter it; accordingly the Court did nothing in it.

Vide post.

Selwood *and* Methlyn.

Vide ante 243.

THIS Cause came on now in the Paper again. The Defendant had obtained a Rule for shewing Cause in the Common Pleas for the Amendment; but the Court said, there was no Occasion to apply there any farther, they themselves could amend the Judgment as well, if there was any Occasion for it; and where a Judgment is for a Defendant they could even give a new one for the Plaintiff. This, they said, was determined in Sloper's Case. But in the present Case upon farther Consideration they thought the Judgment, as given, was good already; so affirmed the Judgment. 4 Mod. 127. 1 Salk. 53, 262, 401, 586, 632.

Kenfeild *and* Bambridge.

How far a particular Performance of a Condition must be set forth in Pleading.

IN Debt upon Bond, the Defendant craved Oyer of the Condition, which appeared to be, that whereas the Defendant had entred into a Society with certain other Persons, and a Chest belonging to the Society was lodged in the Defendant's Hands, if the Defendant should deliver up the Chest, when the Majority of the Society should demand it of him, then the Obligation should be void. And then pleads Performance of the Condition generally. To this Plea the Plaintiff demurs specially, because the particular Performance of the Condition was not set forth. And Mr. Fazackerly now demanded Judgment for him. Mr. Strange did not attempt to defend the Plea; but said, that the Defendant had not joined in Demurrer, and therefore the Court could not give Judgment. But Mr. Fazackerly said, that then they would sign their Judgment for want of a Joinder in Demurrer. But Mr. Strange said, that the Plaintiff could not do either; for it was his own Fault not to enter the & prædictus Defendens similiter, which it was his Business to have done. And then, he said, when the Paper-Book is delivered to the Defendant, and he will not stand to it, he must not redeliver it; and in that Case he did allow the Plaintiff might sign Judgment. The Court said, it was clear they could not give Judgment, either upon the Demurrer, or for want of joining in it. And as to the signing it, the Parties must do as they can. However the next Term this Cause stood in the Paper again, and then upon Mr. Fazackerly's praying Judgment, the Court gave it.

Pyle *and* Grant.

THIS was an Appeal of Murder; the Defendant had had Judgment of Death pronounced againſt him upon a former Indictment; but received the King's Pardon. Mr. Reeves upon a former Motion allowed, that his Majeſty's Pardon would not be a ſufficient Foundation for the Court to bail the Defendant; becauſe Acts of Mercy of this Sort are many Times ſhewn, though the Fact is palpably clear; but yet in the preſent Caſe, he hoped he ſhould be able to ſhew, that the Evidence, upon which the Priſoner was convicted, was to the Diſſatisfaction of the Judge who tried him; and that therefore would be a good Foundation for the Court to exerciſe this diſcretionary Power; and accordingly he moved, that one of the Judges would be pleaſed to ſpeak with Baron Commins, who tried the Priſoner, to report what the Evidence was. The Court allowed that he ſhould; and accordingly Judge Probin now ſtated the Evidence ſpecially as it was; and ſaid, that Baron Commins concluded upon the whole, that it was ſuch, as he thought the Jury would have acquitted the Priſoner upon; but yet when the Jury had brought him in guilty, he pronounced Sentence of Death againſt him, and ordered him to be executed within a Month; however, that he thought he might be bailed. But Judge Probin ſaid, that he asked the Baron, whether upon the whole he was ſatisfied or diſſatisfied with the Verdict; and he could get no farther Anſwer from him, than in the Manner he had mentioned. Mr. Reeves upon this, without any Thing farther, prayed, that the Defendant might be bailed. Mr. Forteſcue on the other Side ſaid, that he believed there were no Inſtances to be given, where the Court has bailed a Defendant in a Suit of this Nature, unleſs he had been acquitted upon an Indictment before, or elſe Delay or Malice could be ſhewn in the Proceedings upon the Appeal. He ſaid, the preſent Method of applying for a Judge's Report was very new; therefore he hoped upon that account, as well as becauſe it was at leaſt doubtful whether the Defendant was not guilty of Murder, that the Defendant ſhould not be admitted to bail. Mr. Reeves ſaid, that he ſhould make no Obſervations upon the Report, but leave it wholly to the Judgment of the Court. He ſaid, he would take it, as Mr. Forteſcue himſelf has allowed it, that the Caſe is doubtful; but he ſubmitted it, that that would be a Reaſon for the Court to bail in the preſent Caſe. He obſerved, if the Caſe had been, that the Fact was ſtated ſo upon the Appeal, as that it was doubtful, whether it was a Murder in the Defendant or not; and upon Demurrer the Court thought proper to conſider of it a little; that he ſubmitted it, would be a Reaſon to bail; and the preſent Caſe and that, he ſaid, were much the ſame. But beſides he took Notice, that the Writ of Appeal was returnable the firſt Day in Term; the Return did not come in till the Middle of it; all this while the Appellant never called for a Return; ſo that, he ſaid, there was a plain Delay in the Suit. But the Court ſaid, that the preſent Method is intirely new of applying for a Judge's Report in Caſes of this Nature

How far the Court will not bail a Perſon in an Appeal for Murder.

ture; and therefore they thought it ought to be used with a great deal of Caution; and in no case to be allowed, but where the Judge reports the Verdict to have been contrary to Evidence, or at least that he was not satisfied with the Verdict. Now, they said, he has not reported this, and his ordering the Prisoner for Execution is a Fact manifestly shewing, that he thought the Verdict right. The Chief Justice said for his own Part, that the Circumstances of the Evidence stated upon the Report would have induced him to have certified that he was not satisfied with the Verdict; but as the Judge would not affirm so much, the Court said, they did not think there was enough reported to bail the Prisoner. And as to the Demurrer, the Court said, they should not have thought that sufficient, unless the Court had been of Opinion for the Defendant, and the Appellant prayed a Day. Then to the last Matter, they said, the Defendant might have come in voluntarily the Day of the Return of the Appeal, and demanded the Plaintiff. So the Appellant might have come at the Day, and arraigned the Defendant; in either of which Cases the Court will pronounce Judgment, if the other Side does not appear. But in the present Case, the Defendant did not appear, no more than the Plaintiff; and therefore he could not take Advantage of this Matter. Accordingly the Court refused to bail the Defendant. 1 Salk. 64, 455.

Potter *and* Layer.

What shall be said to be a Will, what only a Deed of Appointment.

Canc. THE Widow of Christopher Layer being seised of certain Copyhold Lands surrendered them to the Use of herself for Life, with several Remainders over, subject nevertheless to be revoked, and new Uses to be declared by any Deed or Will that she should make, subscribed in the Presence of three Witnesses; sometime after she did execute an Instrument in the Presence of three Witnesses, and thereby limited the Uses to the Defendant and his Heirs after her Death, which Defendant was her Son and Heir. Soon after this she entered into Marriage Articles with the Plaintiff, and covenanted for herself and her Heirs to surrender the Lands in Question within two Years after the Marriage to the Use of the Plaintiff for Life, the Remainder to herself for Life, the Remainder to the Heirs of the Husband, and to do this by a proper Conveyance signed in the Presence of three Witnesses, according to her Power. The Marriage accordingly took Effect, and within the two Years she did make a Surrender accordingly by Deed subscribed in the Presence of two Witnesses; but this Surrender proved an ineffectual one. The Wife died; the Heir entred; and a former Bill was brought against him by the present Plaintiff to deliver up the Writings. In that Bill the Title he set up was under the Conveyance signed in the Presence of two Witnesses, as being a good Execution of the Power of Revocation; and waived the Surrender. The Defendant pleaded to that, that the Instrument subscribed in the Presence of three Witnesses was a Deed of Appointment in Favour of him; and that thereby the Power of Revocation was executed. And at the same

Time demurred likewiſe to the Bill, it appearing upon the Facs of it, that the Plaintiff had not a Title; his Conveyance being not executed with the proper Circumſtances. Accordingly that Bill was diſmiſſed. The Plaintiff now brought a new one, and the Prayer of this Bill was, that the Covenant in the Marriage Settlement might be carried into Execution; and that the Defendant might either be compelled to make an effectual Surrender to the Plaintiff by Deed ſubſcribed in the Preſence of other Witneſſes to the Uſes mentioned in the Covenant, or elſe that a ſufficient Security may be made to him in ſome other Way, as the Court ſhall appoint. The Defendant put in the ſame Plea as he did before, and likewiſe the ſame Demurrer. This Matter was argued now at the Chancellor's Houſe, and the Attorney General and Mr. Wills were Counſel for the Defendant, and the Sollicitor General and Mr. Lutwyche for the Plaintiff. As to the Plea the Plaintiff's Counſel urged, that the Inſtrument ſet up by the Defendant was a Will, and not a Deed of Appointment. And this, they ſaid, appeared by ſeveral Clauſes in it, as by its being called a Will, by Word Deviſe being uſed in it, and by appointing the Uſes to the Defendant after her Death. And a ſtronger Caſe of a Will was cited out of 1 Mod. 117. If this was ſo, they ſaid the Defendant then claimed merely as Heir at Law; and he muſt be bound according to the Intention of the Covenant to execute an effectual Conveyance. They ſaid they muſt allow, if a Perſon by any Conveyance executes a Power he has, and does not obſerve the proper Forms attending the Execution of it; a Conveyance of that Sort can no more be good in Equity, than it is at Law. But they obſerved it was manifeſt on the other Hand, that where a Covenant is made to execute a Power; and the Power is not duly executed in Purſuance of it, a Court of Equity will give Relief, and order the Party or his Repreſentatives to execute a Conveyance according to the proper Circumſtances required. And this they ſaid was Lord Coventry's Caſe. The Chancellor ſaid, the Matter of the Plea is proper to be conſidered upon the Hearing of the Cauſe, and then it will be proper to determine whether the Inſtrument is a Will or Deed of Appointment; accordingly ordered the Plea to ſtand for an Anſwer, and the Demurrer to be over-ruled.

Nightingale Executor of Sir Robert Nightingale *ver.* Dodd Executor of Chamberlayn.

How far a Perſon ſhall be a good Witneſs in Equity notwithſtanding an Objection of his being intereſted in the Cauſe.

Canc. ONE Bohun had been ſubpœna'd to anſwer certain Interrogatories in this Cauſe, whether he had any Dealings with Sir Robert Nightingale or Mr. Chamberlayn, and upon what Account thoſe Dealings were. Bohun demanded Judgment upon this, whether he was obliged to anſwer theſe Interrogatories; becauſe the Executor of Sir Robert Nightingale had before brought a Bill againſt Bohun, and by Decree Bohun was obliged to account with him, which account was now depending. Now Mr. Verney urged, that theſe Interrogatories plainly concerned the Witneſs in Intereſt; for he would be ob-

liged by this Means to confeſs the whole State of the Account between Sir Robert and him. And this he obſerved, was a direct Artifice; for in a former Cauſe Sir Robert's Executor brought his Bill jointly againſt Chamberlayn and Bohun; he could not there gain his Purpoſes upon Bohun; now the Executor brings a freſh Bill againſt Chamberlayn only, and drops Bohun, and thus by a Side Wind are theſe Matters, which Bohun had been examined to upon Interrogatories before to be examined into upon Interrogatories again. He obſerved that it was a ſettled Rule, that no Witneſs ſhould be examined to a Matter, that concerned himſelf in Intereſt. He did allow, that generally ſpeaking a Demurrer of this Nature muſt be verified by Affidavit; but there could be no Reaſon for it in this Caſe; becauſe the Matter of Fact appears upon the Records of the Court; and thoſe he hoped ſhould be allowed to read. He ſaid he did allow too, that a Witneſs could not refuſe anſwering, becauſe the Interrogatories are foreign and impertinent; but in the preſent Caſe, he thought there was a Neceſſity for doing it on Account of his being intereſted in the Queſtion. The Attorney General on the other Side ſaid, that it was not ſo much as once ſaid in the Witneſſes Demurrer, that it would be a Prejudice to him to anſwer; he only refers to the Acts of the Court, and appeals, whether it does not appear by them, that it muſt be to his Prejudice. He obſerved too, that every Demurrer muſt contain in itſelf ſufficient Matter, and is not to be ſupported by Matter dehors; he ſaid, by the ſame Way of Reaſoning that the Interrogatories in the other Cauſe might be read, the very Anſwer and all the other Proceedings might; and that would over-turn the conſtant Courſe and Method obſerved in Things of this Nature. Beſides in the preſent Caſe he ſaid, there really could come no Damage to the Witneſs; a general Queſtion is only asked him what Sort of Dealings he had with the Defendant or Sir Robert Nightingale, and not a particular one, what the Individuals of theſe Accounts were. Mr. Verney urged in his Reply, that the Witneſs muſt neceſſarily be obliged to diſcover the Individuals of his Dealings between Sir Robert and Mr. Chamberlayn. He ſaid, upon a Bill brought againſt a Man, he muſt allow, he would be obliged to anſwer upon Oath; but there he has the Aſſiſtance of Counſel to draw his Anſwer; whereas in the preſent Caſe he is intirely unguarded. The Chancellor ſaid, as to reading the Interrogatories in the other Cauſe, he thought he might well allow it; accordingly many of them were read. But as to the Demurrer at laſt he thought proper to over-rule it; and accordingly ordered the Witneſs to anſwer. But becauſe the Reaſon of this Caſe depends upon the particular Circumſtances of it, it may be neceſſary perhaps to mention the particular Circumſtances attending it. Sir Robert Nightingale going to the Eaſt-Indies, intruſted from Time to Time Chamberlayn and Bohun with ſeveral of his Effects. To have an Account of which his Executor after his Death brought his Bill againſt them both. Bohun brought his Croſs-Bill to have an Allowance for ſeveral Matters, which he had tranſacted for Sir Robert, and on both Cauſes he was decreed to account, and to deliver all Books and Papers relating

thereto on Oath before a Master, and to be examined on such Matters as the Master should think fit. Chamberlayn put in three insufficient Answers, and in his Fourth swore, that the Effects of Sir Robert Nightingale were so intermixed with his own, as that he could not possibly render an Account of them. The Chancellor on the Hearing of that Cause being of Opinion, that the Plaintiff could have no more from Chamberlayn than his positive Oath, unless he could by Witnesses ascertain the Effects of Sir Robert: the Plaintiff filed a Bill now against Dodd the Executor of Chamberlayn only, in order to have the Benefit of Bohun's Testimony against him. Now the Chancellor upon the Hearing of this Cause said, that it was a Right which the Plaintiff had to pursue the Effects of Sir Robert wheresoever he could find them; and that as he could get no Satisfaction from Chamberlayn by his Answer, it was a proper Question to ask Bohun, whether he had not received any Effects of Sir Robert Nightingale from Chamberlayn, and that this was allowable in Order to charge Chamberlayn, notwithstanding hereby Bohun might possibly charge himself. Salk. 283, 696. 1 Vern. 165.

The King *and* Hill.

How far the Court grants Informations against Bailiffs.

MR. Fortescue moved for an Information against a Bailiff for carrying a Person, whom he had under an Arrest, to an Ale-house against his Will; this being an Offence against the late Act of Parliament, pass'd in the last Sessions; and this he prayed notwithstanding the Process was out of the Common Pleas. He said, he did allow, that there was a Clause in the Statute, which gave the Party injured a Liberty to proceed in a summary Method, by Petition to the Court out of which the Process issues; but he submitted it, the Party had a Right to waive that Liberty, and to proceed in the ordinary Course of Justice notwithstanding. The Court said, that might be a Matter proper to be considered of; so made a Rule to shew Cause. 1 Salk. 45, 460. Vide post

Addey *and* Hutchinson.

What shall be said to be a Confession of an Error which is assigned upon Record.

THIS was a Writ of Error upon a Judgment in the Common Pleas; Want of an Original and Warrant of Attorney was assigned for Error. The Defendant came in gratis without any Process, and pleaded Instanter in nullo est erratum. Mr. Gill said, that by doing this the Defendant has confessed the Errors, for he has thereby prevented the Plaintiff from taking out a Certiorari to verify them. He said there were two Cases in Salkeld 267, 268. in Point to this Purpose. And therefore he hoped the Judgment should be reversed. Which the Court accordingly did. And the next Case being of the same Nature the Court reversed that Judgment likewise. 6 Mod. 206, 236.

Pyle

Pyle *and* Grant.

Vide 255.

MR. Reeves moved now, that there might be a Trial at Bar in this Caſe next Term. Mr. Forteſcue oppoſed it upon an Affidavit, that the Appellant's Circumſtances were ſo very ſmall, that he could not bear the Charge of it. He ſaid too, next Term was an iſſuable one; and therefore by the Rules of the Court, the Trial could not come on then. But the Court ſaid, the general Rule of the Court was, that Appeals ſhould be tried at the Bar. They did allow, they might be tried at Niſi prius; but in Experience they never knew one tried there. They ſaid Suits of this Nature are ſtiled in the Law-Books Suits of Revenge and not of Satisfaction; and therefore the Circumſtances of the Appellant were out of the Queſtion. In Bowen's Caſe and Slawterford's Caſe the Circumſtances of the Appellants were in all viſible Appearance exceeding low; but yet the Court there would not allow this Argument of any Weight; and both were tried at the Bar. The ſecond Inducement the Court thought likewiſe as immaterial as the Firſt; for in a Caſe of this Nature, they ſhould certainly allow the Trial to be next Term. Accordingly the Trial was appointed for that Time. The Court then began to conſider of a Day convenient for it. The Venire, they ſaid, muſt be teſted the firſt Day of this Term, when the Writ of Appeal was returnable, and not the Day the Parties appeared on. The Trial, Judge Reynolds ſaid, might be as ſoon as the Diſtringas is awarded and before the Return of it; but as the End of the Term was ſo near, the ſooneſt the Trial could be was the next Term, and the Diſtringas might be returnable the firſt Day of it. But the Court ſaid, that would be an inconvenient Day for the Trial; however they might adjourn the Jury from that Day to any other before the next Return. Accordingly Tueſday in next Term was agreed to be the Day. And in theſe Trials at Bar the Court ſaid, the Rule is always drawn up with a Clauſe, that the Jury ſhall be ſtruck by the Maſter, without any ſpecial Direction.

Shelton *and* Osborn.

What ſhall be ſaid to be a good Declaration in an Action brought againſt a Carrier.

THIS was a ſpecial Action upon the Caſe, wherein the Plaintiff declared, that whereas the Defendant had undertook to carry a Hare for him from ſuch a Place to ſuch a Place, he did carry it accordingly Part of the Way; but loſt it in the Carriage; which he ſaid to his Damage of 10 l. Upon Demurrer to the Declaration, Serjeant Hawkins took ſeveral Exceptions. The firſt he took was to the Giſt of the Action. He ſaid the Plaintiff had not declared, that the Defendant was a Carrier, and ſo by the general Cuſtom of the Realm was bound to convey ſafely the Goods he undertook to carry; in the preſent Caſe therefore it muſt be taken, that the Defendant was a mere private Perſon; but yet the Plaintiff has ſet forth no Conſideration, and therefore it appears upon the Face of the Declara-

tion, that the Promiſe was merely a Nudum pactum; and conſequently the Action would not lie. This he ſaid, went to the Subſtance of the Action; and therefore they had not ſhewn it ſpecially for Cauſe of Demurrer; he ſubmitted it therefore, that the Action could not have lain, if the Value of the Thing undertaken to be carried had been ever ſo great; but the Value of the preſent Thing was ſo inconſiderable in itſelf, that if a good Conſideration had been laid, no Action could have been brought in this Court. The other Exceptions he took, were ſpecially ſhewn for Cauſe of Demurrer. The firſt was upon an Admiſſion, that the Defendant was to be taken to be a common Carrier. As to that he ſaid, a late Act of Parliament for the Preſervation of the Game has made it unlawful for a Carrier to carry a Hare, unleſs he has a Certificate, that it was killed by one who was qualified; this therefore ought to have been laid in the Declaration, that the Defendant had ſuch a Certificate, or otherwiſe the Promiſe would be to do an unlawful Act. The other was, taking it either Way, that the Defendant was a Carrier or not. Now that was, that the Promiſe is only laid by Way of Recital; and therefore not traverſable. The Court ſaid, a common Carrier is bound by the Law of England to convey ſafely the Things delivered to him; and therefore without laying a general Cuſtom, he muſt begin to carry, as well as perform ſafely the Carriage of every Thing he has in Charge; and this without any expreſs Conſideration. An indifferent Perſon is not obliged without a Conſideration to enter upon the Carriage of Goods, he undertakes to convey, but if he does, he muſt perform it. This they ſaid, was the Caſe of Cogs and Barnet. And the Inconſiderableneſs of the Thing in itſelf could make no Difference as to an Action being brought in this Court; becauſe it might be attended with great Prejudice. They then obſerved, that the Statute does not make the Carriage illegal in itſelf without a Certificate; but only ſets a Penalty for it to be recovered in a proper Action. And as to the laſt Exception, they ſaid, the Promiſe was merely an Inducement to the Action, the Miſ-performance only the Foundation of it; and therefore Non Aſſumpſit could not be the Iſſue, but Not guilty. Accordingly J. Reynolds and J. Probyn being only in Court, Judgment was given for the Plaintiff. 1 Salk. 26.

The King *and* Buckall.

What ſhall not be ſaid to be a good Order of Baſtardy.

THIS was an Order of Baſtardy made by two Juſtices, confirmed by an Order of Seſſions. Mr. Strange took ſeveral Exceptions to it. In the firſt Place, he ſaid, the Order appointed the Sum of 2 s. to be paid weekly, till the Child ſhould come to the Age of twelve Years, without ſaying, if the Child ſhall be ſo long chargeable to the Pariſh. In the next Place it appoints, that the reputed Father ſhall pay 4 l. to the Overſeers for the Binding the Child out Apprentice, when it ſhall come to the Age above-mentioned; and does not ſay, if the Child ſhall Want it; ſo that though the Child ſhould be provided for in any other Way, the Sum muſt ſtill be paid to the Overſeers.

He then observed, that the Order did not appear to be made upon Complaint of the Parish. And his last Exception was, that the reputed Father is ordered immediately to find Security for the obeying these Orders. Mr. Strange then took Notice, that there was another Order of Sessions, which appointed an Attachment to go against the Defendant for having disobeyed the first; and he submitted it, that the Court of Sessions have no Authority to issue such Process. Mr. Yates and Mr. Prime argued on the other Side. To the first Exception they said they must allow, that the old Authorities do lay it down in general, that Orders of Bastardy, as well as other Orders relating to the Poor, must be under the Limitation mentioned; but the later Authorities have been, that Orders of Bastardy need not; and this they said was founded upon good Reason; for there cannot be any reasonable Intendment, that Bastards who have no kind of Kindred, will have Provision from any Body, till such an Age as is mentioned in the Order. To this Purpose the Cases of The King and Stoke, Hill. 2 Geo. 1. and The King and Street, Mich. 13 Geo. 1. were cited in Point. The second Exception too, they said may have been allowed formerly; but in 1 Ven. 366. it is expressly over-ruled by the Court. To the Third they said, the Statute of 18 Eliz. c. 3. which this Order is founded upon, does not require that the Parish should complain, but gives the Justices Power to make such Order, upon the Complaint of any other. They observed too, that this Statute authorises the Justices to make what other Appointment they in their Discretions shall think meet; and this they thought gave an Answer to the last Exception. And as to what is said upon the last Order, they observed, that though the Word Attachias was in, that was to be understood no more than a common Capias; but admitting that it was, it is laid down in Hawkins's Pleas of the Crown, that every Court of Record may grant an Attachment. The Court said they were of the same Opinion as to the Answers to the three first Exceptions; but they thought the two last Exceptions good. Accordingly quashed the first Order as to the last Exception, and the last Order as to the Whole of it, and confirmed the first Order as to the rest. Salk. 121, 122, 478, 480.

Poulton and Heath *ver.* Farrar.

Vide 251.

MR. Reeves came now to discharge the Rule; and said that he did allow the Court has gone so far as to release Persons from Arrests, which they have been taken upon when attending the Business of their own Suits; but he did not know, they had done this in any Cases, but where the Application was fresh before putting in of Bail; whereas in the present Case the Defendant put in Bail directly, and by that has submitted to the Jurisdiction of the Court. The Court said in the present Case the Plaintiffs had a plain Design in taking Advantage of the Defendant's Attendance upon his former Suit, and a premeditated Skeem in getting him here by the Letter one of them writ to him. Accordingly they thought the Attachment ought to go.

But upon the Plaintiffs agreeing, to deliver up the Bail-Bond, and pay the Coſts, the Court only ordered the Attachment to lie in the Maſter's Hands. Salk. 544.

The King *and* Robe.

A Perſon was brought before the Defendant, a Juſtice of Peace, for Suſpicion of Felony. He clearly acquitted himſelf of the Charge; and then inſiſted upon having Satisfaction of the Party, that made the Complaint. Upon which the Juſtice threatened to ſend him to Priſon, if he would not take an Oath, not to bring any Action. And tendred an Oath to the other not to indict the Perſon accuſed. Both Parties took the Oaths accordingly. Complaint was made of this to the Court; and they granted an Information againſt the Juſtice; notwithſtanding there was no Inſinuation offered of this being done out of any other View, than merely to make Peace between the Parties; but the Court ſaid, they would never ſuffer a Juſtice of Peace to compel a Perſon to take an Oath not to take Advantage of the Remedy, which the Law has given him.

How far the Court will grant an Information againſt a Juſtice of Peace for tendering an illegal Oath.

The King *and* The Lady Lawley.

AT the Sittings after laſt Term the Defendant was tried upon an Indictment for ſuborning a Witneſs not to appear at the Trial of one Japhet Croke. A great many Variances were then objected to have been between Croke's Indictment ſet forth upon Record in this Information, and Croke's Indictment given in Evidence. The Chief Juſtice did not chuſe to determine then whether the Variances were material or not; but a Rule was entred into by Conſent, that if a Verdict ſhould be given againſt the Defendant upon the Merits, it ſhould abide the Event of the Court's being of Opinion, whether or no the Objections were of Weight. Mr. Filmer moved this Morning, that the Rule might be inlarged till next Term; becauſe by Miſtake the Aſſociate refuſed to deliver the Poſtea to the Proſecutor; and it could not be got out of his Hands till upon Application the Chief Juſtice ordered him to deliver it; ſo that the Defendant had not had Time to have a Copy of it. Mr. Kettleby on the other Side ſaid, that this was in the Nature of a Motion for a new Trial, and that he ſaid could not be; becauſe the Defendant was not preſent in Court. Beſides he obſerved, that this Motion ought to have been within the four firſt Days of the Term; though he did allow, that a Defendant might move in Arreſt of Judgment at any Time before the Signing of it. The Court ſaid, this was only a Motion to inlarge a Rule; and therefore it was not neceſſary for her to be here. And Judge Reynolds ſaid in the Caſe of the Queen and Inchyn, Lord Lechmere indeavoured, when he was Counſel, to maintain the Diſtinction mentioned, but the Court there over-ruled it. However the Court ſaid, that they would not inlarge the Rule, unleſs the Counſel would ſhew to the Court, that ſome of the Objections

What ſhall be ſaid to be a good Indictment for Subornation of Perjury.

jections required Conſideration. The Counſel then ſaid, that one Objection was, that Croke's Indictment ſet forth upon Record was recited to have been found at Hicks's-Hall per duodecim Juratores; but upon the Evidence it appeared, that ſeventeen Perſons were upon the Jury, & non conſtat, but all agreed to find it. Another Exception they took, was, that in the Indictment given in Evidence Croke was charged with having forged a Leaſe for a Year, reſerving a Pepper-Corn, ſi legitime demandat foret; but in the recital of the Indictment the Reſervation is ſaid to be, ſi legitime demandat fuiſſet. To the firſt of theſe Exceptions the Court ſaid, that every Indictment founded by a Grand Jury is always ſaid to be found by twelve, though more are concerned in the finding it. But the other, they thought, deſerved more Conſideration. Accordingly they inlarged the Rule till next Term; but ordered a Copy of all the Exceptions, the Defendant's Counſel intended to take, to be delivered to the other Side a Fortnight before the End of the Vacation. Vide poſt.

The King *and* The Mayor and Aldermen, &c. of the Borough of Doncaſter.

How far a Corporation cannot deprive a Perſon of an Office.

UPON a Return to a Mandamus to reſtore one Scot to the Office of Capital Burgeſs, the Defendants ſet forth, that the Borough of Doncaſter was an antient Borough by Preſcription, and that they were incorporated by ſeveral Charters from King Edward 4. and James 1. and that at laſt they received a new Charter from King Charles 2. in which their Name of Corporation was ſettled to be, the Mayor, Aldermen, Capital Burgeſſes, and the reſt of the Burgeſſes of the ſaid Corporation. They farther ſet forth, that by this Charter the Mayor, Aldermen and Capital Burgeſſes were appointed the Common Council of the Borough; and that a Power was given them to make whatever Ordinances or By-Laws they in their Diſcretion ſhould think proper for the good Government of it. It was then ſet out in the Return, that the Charter appointed, that there ſhould be three Chamberlains, each of them to continue for three Years, and that a new Chamberlain ſhould be every Year ſucceſſively choſen. That fit Perſons were to be nominated by the Common Council out of the Capital Burgeſſes to ſtand Candidates for theſe Offices of Chamberlain; and that the Body at large were to elect which of them they thought proper for that Purpoſe. That the Office of Middle Chamberlain, was to take Care of the Revenue of the Corporation. They farther ſet forth, that Scot was a Capital Burgeſs and elected Chamberlain. That an Oath was adminiſtred to him, in purſuance of the Charter when he ſucceeded into the Truſt of Middle Chamberlain, that he would ſerve the Corporation with Faithfulneſs. They then ſet forth, that the Capital Burgeſſes were appointed by the Charter to hold their Offices quam diu ſe bene geſſerint, niſi debito modo fuerint amoti. They then return, that Scot behaved himſelf corruptly in his Office of Middle Chamberlain; that the Accounts he gave in to the Com-

mon Council were false; and mention particular Instances of it. At last they set forth, that he was summoned particularly to answer these Offences; and upon his not giving a sufficient Answer to the Charges alledged against him, the Common Council removed him out of the Corporation. Mr. Bootle argued, that this Return was insufficient. He said in the first Place, that he did not think, that the Charge alledged against Scot was sufficient to remove him from his Office, as Chamberlain. It was true, he did admit, that Scot was guilty of a Breach of Trust; but not such a one, as amounted to a Violation of his Oath. He said therefore, that he willingly allowed, that Scot might be called to account in a Civil Action, or punishable perhaps in a Criminal Prosecution; but he submitted it, it was not sufficient to deprive him of his Office. He said, an Offence of that degree must be the destroying the publick Evidences of the Corporation; acting directly contrary to the common Interest of the Society; or some other publick Offence of the same Nature. These he thought were the Offences necessary to a Deprivation; unless others could be objected against Scot, as Violations of a positive Part of his Oath; but the Oath, he said, was only in general; and therefore nothing could be infer'd from that. And to this Purpose he relied upon one of the Resolutions in Bagg's Case. However, he said, in the next Place he should submit, that a Breach of Trust in his Office of Chamberlain could be no Reason to deprive him of his Office of Capital Burgess. But whatever might be the Opinion of the Court upon these particulars he relied upon one Thing, which would clearly prove the Return to be bad, and that was, that the Common Council have no Authority to deprive at all. There's no express Power given by the Charter to any Persons to remove. The only Authority of this Sort therefore must be given by the Law; the Body at large then must have it in themselves; or if the Electors were distinct from the Body at large, they perhaps in some Cases might claim it, where there is a general Power given them by the Charter to make what Regulations they think proper for the Government of the Body. Besides, he said, the Body at large have no right to deprive a Person from his Office, till he is legally convicted of an Offence, unless they have a Power of this Sort given them by Charter or Prescription. And this, he said, was another Resolution in Bagg's Case, founded upon Magna Charta. And the Judges have always had so sacred a Regard to it; that in Styles 477. Rolls and Glyn, both Chief Justices, held a Return of this Sort to be insufficient, though it was set forth in it, that from Time to Time the Officers in the Corporation had been removeable. To the first of these Points the Court were of Opinion, that the Offence was sufficient to remove Scot from the Office of Chamberlain; as it was no collateral Matter, but what directly concerned the Office itself. To the second, they thought, it could not effect him in his Office of Capital Burgess; and this, though it had been a direct Breach of his Oath as Chamberlain. To the last, they said, the Common Council had no Authority to remove; though if they had been the sole Electors of Scot, they did allow, there

might have been a Foundation for there doing it from the general Authority given them of making Ordinances for the good of the Body. Accordingly granted a peremptory Mandamus.

The King *and* Woolston.

Vide 162. THE Attorney General now demanding Judgment against the Defendant, Mr. Worley strongly urg'd, that he might be allow'd to lay before the Court the Arguments he had prepar'd, to induce them to be of Opinion, that this was but a small Offence to Society in general, admitting it to be any at all. And this, he hop'd, was the proper time to lay these Matters before the Court, to induce them to impose a moderate Punishment upon the Prisoner. But the Court said, that where indeed the Nature and Circumstances of an Offence are not particularly set forth upon Record, they do allow the Defendant to go out of the Record, to set forth the Nature and Circumstances of it; and therefore when Judgment is demanded upon an Indictment of Battery, the Defendant's Council is constantly admitted to lay before the Court Affidavits concerning the Nature of it, or else to apply for the Judge's Report. But wherever the Nature and Circumstances of the Offence entirely appear upon the Record, the Court never suffers the Council of either side to harangue upon the Crime; but the Court is to judge upon it as it stands upon Record, and according to their Judgment upon it, the Sentence is to be pronounc'd. This, they said, is the constant Case of every Libel. The present Case was exactly the same with that. And therefore the Court directly pronounc'd Sentence, that upon the three first Informations for the three first Books, the Defendants should be fin'd 25 l. a-piece; for the last he should likewise pay the Sum of 25 l. and for that should lie in Prison a Year from henceforth; and then to continue in Prison for Life, unless he himself should be bound in a Recognizance of 2000 l. and two others in the Sum of 1000l. each, or four in the Sum of 500 l. each, with Condition for his good Behaviour during Life.

The King *and* The Inhabitants of Risley.

Vide 226. MR. Clark came now to shew Cause, and cited a Case in Comberbatch 266 in point. But Mr. Prime answer'd, that the later Cases have all gone the other way; and particularly rely'd upon several in Salk. 481, 488, 489. the Court accordingly declar'd themselves to be of that Opinion. Upon which Mr. Clark then took an Exception to the original Order, that it was for the removal of a Man and his Wife, and a Boy and a Girl. Now, he said, it does not appear, that these were the Children of the Man and the Wife. Mr. Prime said, that he believ'd that Exception could not be got over; however that would only make the Order bad as to the Children. Accordingly the Court confirm'd it as to the Man and his Wife, and quashed it as to the Children. Salk. 123.

Aſſignees of a Commiſſion of Bankruptcy againſt Lopes Alardes, Plaintiff, *ver.* Fenton, Defendant.

Guildhall. A Slumpſit was brought againſt the Defendant for 100 l. which he had received of the Bankrupt's Money. Upon the Evidence for the Defendant it appear'd, that 84 l. part of it was given by Alardes to the Defendant, a Month before he became a Bankrupt, to be bail for him in all Actions; and this Defendant was an Officer in the Poultry-Compter. The remaining 16 l. was given to the Defendant likewiſe about the ſame time to pay Alardes's Attorney what ſhould be due to him for Law-charges. The Defendant accordingly paid the Attorney his Bill, which came to eight Guineas, before Alardes became a Bankrupt; the 7 l. 12 s. remaining, was paid by the Defendant for ſeveral things belonging to the Suit, as putting in bail, &c. after the Act of Bankruptcy. Mr. Reeves objected for the Plaintiffs, that there was an Order made by the Common-Council of the City of London, that no Officer of either of the Compters ſhould be bail for any Perſon; and therefore that the 84 l. given to the Defendant, was upon a void Conſideration. Beſides he obſerv'd, this could have been given with no other Deſign but to defraud or delay the Creditors; and that was likewiſe another illegal Conſideration. And Mr. Fazakerly urg'd, that this Act amounted very near to an Act of Bankruptcy itſelf, within the Meaning of the Stat. of 21 Ja. 1. 19. And they both inſiſted, that the Payment of the 7 l. 12 s. was void; as being for the Benefit of the Bankrupt after the Act of Bankruptcy committed. The Chief Juſtice ſaid, that there was a ſtanding Order of the Court too, that no Attorney ſhould be bail in any Caſe; but the Practice has conſtantly been to admit Officers of the Compters, and Attornies too to be bail for People notwithſtanding. To the ſecond Point he was of Opinion, that the Conſideration was not fraudulent. But the laſt Objection he ſaid was fatal. Accordingly the Jury found a Verdict for the Plaintiff, and Damages 7 l. 12 s.

How far a Conſideration of a Promiſe ſhall not be ſaid to be illegal.

Roberts *and* Mountford.

Guildhall. THIS was an Action brought againſt the Defendant as Adminiſtratrix to one Mountfourtney; and ſeveral Counts were in the Declaration; one, wherein Mountfourtney was charg'd as principal Debtor; another, wherein he was charg'd as Security for another. Upon the Evidence, a Letter was produc'd under Mountfourtney's Hand, by which he certainly charg'd himſelf in one of the ways; but this Promiſe was to pay the Money at Lisbon within a Year; whereas the Declaration was to pay the Money generally. Upon this Mr. Fazakerly objected, that here was a material Variance; and the Promiſe as laid in the Declaration was much more to Mountfourtney's Diſadvantage, than that appearing upon the Evidence. He ſaid, as it is laid, the Defendant could not have pleaded a Tender

When an Action is brought upon a Promiſſory Note, how far the Evidence ſhall be ſaid to maintain the Declaration.

Tender at Lisbon, without pleading at the same time a Tender to the Person of the Plaintiff; but if the Promise had been set out justly, a Tender at the most notorious Place would have been sufficient. Besides, the Defendant might have agreed to pay a less Sum at any other Place in Satisfaction; but as the Promise is laid he could not. And he took Notice likewise, that the Difference of the Exchange of Money is often very considerable. Mr. Reeves's Answer to this Objection was, that the Plaintiff had declar'd generally upon the Promise, and not specially upon the Note; and therefore he readily admitted, that this Objection would have been fatal, if the Note had been declar'd upon; for the Note must be set out, as it really is; but in the present Case, he hop'd, the Objection was not material. The Chief Justice too was of Opinion, that it was not; but he gave another Reason, because the Promise was to indemnify the Plaintiff in trusting a third Person; now he observ'd, that the Plaintiff was already damnified; and therefore the Action was only brought to repair the Plaintiff in Damages. Now that, he said, need not be laid with so much certainty, as where the Action is to recover the thing itself. Therefore he thought, the Declaration was good enough; and if there had been any of those things, which the Defendant's Council had objected might have been, she ought to have set forth the Promise as in Truth it was; and then to be sure she would have had the Benefit of them. A Verdict was accordingly found for the Plaintiff. The Council then doubted a little, which Count they should take the Verdict upon. The Court said, they could not take it upon any Count in particular, unless the Evidence went to it. But at last the Council said, they would take the Verdict generally. Salk. 133.

Patterson *and* Col. St. Clair.

How far the Deposition of a Witness may be read, by reason that the Witness himself is in Scotland.

Guildhall. IN an Action upon a South-Sea Contract two Issues were directed to be try'd out of Chancery. The Defendant had deny'd the Contract in his Answer; and the Design of these Issues was to try, whether his Answer was true or not. A Deposition was offer'd now to be read, but Mr. Marsh objected to it, that the Witness ought to have given his Testimony upon Oath in Person. Mr. Reeves then produc'd another Witness, who swore that the first was in Scotland. And upon that the Court allow'd the Deposition to be read.

Way *and* Nickson.

How far an Action will not lie against a Person for commencing a former Action against him without any Reason.

Guildhall. THIS was an Action brought against the Defendant for having commenc'd a former Action against the present Plaintiff, wherein he was nonsuited; and this without any probable Cause. The Declaration laid, that the present Defendant commenc'd his former Action in order to distress the present Plaintiff, that he laid his Cause of Action to 36l. with a Design to hinder his Friends from being bail for him;

per quod his Friends refus'd to be bail for him, by Means of which he lay in Prison for seven Months. The former Action was brought for 36l. for Goods sold and delivered to the present Plaintiff upon his own Credit; tho' they were bought for the Benefit of his Master. And now two Witnesses swore positively, that the present Plaintiff did buy them purely upon his own Credit. But Mr. Reeves objected for the Defendant that the Action would not lie. He said it was most known and certain Law, that tho' a Person commences an Action against another without any probable Reason, merely thro' Malice to distress him, no Action will lie for such Injury done, unless it be attended with particular Damage to the Party. The Satisfaction appointed by the Law is a Recompence by Costs of Suit. The only Colour therefore for the Plaintiffs commencing this present Action, arises from the Damage he suffer'd by his Imprisonment. But that, he said, was not to be attributed to the present Defendant, but to the Plaintiff's Misfortune of wanting Friends. He said, if the Plaintiff in the former Action had held the Defendant to bail in a Sum vastly exceeding the Debt in demand, he must have allow'd, he would have been answerable for it in a separate Action; but the Sum, in which the former Defendant was held to bail in, did not exceed one Farthing the Sum now prov'd to be due, from the Master at least, if not from the Servant. He said the Sum now prov'd; for the present Defendant had not an Opportunity to prove it upon the former Trial; an Agreement being propos'd and almost entred into before the Trial came on, and upon that the now Defendant sent away his Witnesses then. The Chief Justice he did allow, did order the Trial to come on notwithstanding; because the present Plaintiff was then in Custody; and upon that the now Defendant was nonsuited. So that, he said, the present Plaintiff was not acquitted upon a full hearing of the Evidence on both Sides; but upon a Nonsuit; a Nonsuit too, the least blameable; not arising from any Negligence or Defect in the Proceedings, but from a mere Surprize. The Chief Justice said, that he was of Opinion, that the Imprisonment which the Plaintiff lay under in the former Action, was the Gist of present one; and he thought a just Foundation of it. He said too, he should have been of this same Opinion, tho' the Declaration had not laid, that the former Action was brought out of any Ill-will, to give the Plaintiff distress. Accordingly he directed the Jury to find for the Plaintiff, if they believ'd the two Witnesses swore false; but if they believ'd they swore true, to find for the Defendant. Upon which the Jury went out, and then brought in a Verdict for the Plaintiff to 30l. Salk. 14, 174.

Watlington *and* Wilkinſon, & al'.

Watlington *and* Brand.

How far the Statute of Limitations is a good Plea to a Bill in a Court of Equity.

Canc. THESE were two Cauſes, wherein the Defendants were charged with carrying on a Fraud in 1720. by drawing People into a Bubble, called the Orkney-Fiſhery. The Bills were brought to have a Diſcovery of this Fraud, and the Money refunded. The Defendants in the firſt Cauſe pleaded the Statute of Limitations in Bar to the Diſcovery; and by Way of Anſwer, ſet forth in particular, that there was no Fraud. The Defendant in the ſecond Cauſe ſet forth, that he was only Caſhier to the Proprietors, and barely as to that Part of the Bill, which required him to refund the Money the Adventurers had put into his Hands, pleaded the Statute of Limitations; and denied that he knew any Thing of Fraud or that he was one of the Managers; and for Anſwer ſaid, that he was willing to make a Diſcovery of any Thing he knew, and ready to account, if the Court ſhould be of Opinion, that he ought to do ſo. The Solicitor General was Counſel for the Defendants in the firſt Cauſe, and urged, that it was moſt known and certain, that if their had been no Fraud ſuggeſted in the Bill, the Plaintiffs could not come into a Court of Equity and pray Relief, when they had ſtayed too late for having any in the Courts of Law. And as to the Foundation of Fraud, it was diſcovered from the very firſt, and there was equal Reaſon, that a Complaint of this Sort ſhould be confined to be made within the Time limited by the Statute, as any other. And this, he ſaid, was clearly allowed in Lord Warrington's Caſe, that was lately before the Houſe of Lords and the Judges required to attend in it. But the great Debate in that Caſe was, if a Fraud ſhould happen to be deteſted after ſix Years, whether the Party was too late to apply for Relief. The Houſe of Lords were indeed of Opinion, that the Party was not too late in that Caſe; but the Difficulty they had upon them in getting over that Point, was a full Argument, that they well were ſatisfied, that he would be too late in the other. Lord Chancellor ſaid, that this was a Matter which well deſerved ſome Conſideration; but thought clearly, that this Plea could not be a Bar to the Plaintiff's requiring a Diſcovery of the Fraud; and then indeed it might be proper to conſider whether the Plaintiff knew of it ſo ſoon, as to have been obliged to have brought his Bill before. Accordingly his Lordſhip ordered, that the Plea ſhould ſtand for an Anſwer with Liberty to except. However to the Plea of the Defendant in the ſecond Cauſe, the Attorney General ſaid, that he hoped it ſhould be directly allowed for a Bar. He ſaid, it was not pleaded in Bar of a Diſcovery, but merely to the refunding the Money to the Adventurers, upon account of the Defendant's being only a common Caſhier or Banker to the Proprietors, without knowing any thing of a Fraud in the Deſign. This, he

ſaid, was expreſsly ſworn by the Anſwer. The Court ſaid, that if this was Truth, moſt certainly the Plea would be good; but however it would be proper to be fully conſidered of upon the Hearing; and accordingly ordered this Plea likewiſe to ſtand for an Anſwer, &c. Salk. 424.

Vaughan *ver.* Guy & al'.

Chancellor's Houſe. THE Plaintiff brought his Bill againſt the Defendants as Executors of one Webſter, partly for Money received to his Uſe, partly for Buſineſs done as an Attorney, and ſet forth in that the Will directed the Executors to pay this Money. Neither of the Defendants put in any Anſwer; and Guy only pleaded in Bar the Statute of Limitations. The Sollicitor General and Mr. Lutwyche argued for the Defendants, that though Part of the ſix Years run in the Time of the Teſtator and Part in the Time of the Executors, that could be no Objection to the Plaintiff's being bound by this Statute. The only Matter the Plaintiff relies upon to diſtinguiſh his from the ordinary Caſe is, that the Will has directed the Teſtator's Debts to be paid, that this is a Debt as well as any other; and in this Caſe eſpecially it muſt have been his Meaning, that it ſhould have been paid, becauſe at the Time the Teſtator died the Debts could not have been barred. But the Counſel urged, it was true indeed, where a Will directs, that Lands ſhould be ſold for the Payment of a Man's Debts, theſe Debts as well as any other, ſhall have the Benefit of the Sale; but in the preſent Caſe the Direction to the Executors is in nothing particular, and differs in no reſpect from what the Law would imply without it. And the Sollicitor ſaid, the Argument, which is drawn for the Plaintiff from the Teſtator's dying before the Time was out for the Payment of the Debt, and the Inference made uſe of from this, that he muſt have deſigned this Debt ſhould have been paid, as well as the reſt, directly turns the other Way; becauſe it cannot be ſuppoſed in this Caſe, that he had any Thing particular in his Thoughts. But if the Teſtator had lived beyond the Time when this Debt was demandable, a favourable Argument might have been drawn for the Plaintiff, that the Teſtator's intent was to provide in this Way for the Payment. Mr. Lutwyche obſerved too, that formerly it has been made a doubt of, whether Attornies and Sollicitors are bound to bring their Actions for their Fees within the Time limited by the Statute for ordinary Caſes, becauſe their Demand appears upon Record; but this Matter has often been over-ruled ſince; and the Chancellor ſaid, it was ſo by Lord Chief Juſtice Holt. Mr. Lutwyche concluded by ſaying, that the principal Point in the preſent Caſe had been expreſsly determined by the Maſter of the Rolls, and confirmed by Lord Macclesfield. The Chancellor ſaid, that however proper the Subſtance of the Plea might be, the Defendants could have no Benefit of it as it

When a Bill is brought againſt two Executors, how far a Plea of one of them cannot be allowed of.

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is pleaded; because it is a Plea of one of the Executors only, and the other has not so much as put in his Answer. Executors indeed may sever in pleading, but both must say something. And this, he said, was a settled Rule in Law and Equity, unless upon the Statute of 9 Edward 3. where it is provided, that if one Executor does not appear upon the Grand Distress, Judgment shall pass however upon the Plea of the other. Accordingly the Plea was over-ruled with Liberty to have the Benefit of the Statute of the Limitations upon the Hearing of the Cause. Salk. 154. 1 Mod. 246. 5 Mod. 243. Salk. 278, 312.

Bourke *and* Bridgeman.

How far a Plea of a stated Account shall be good in a Court of Equity.

Chancellor's House. THE Plaintiff brought his Bill to have an Account of such Part of the Personal Estate of one Alexander Dempster, as was not comprised in a stated Account. The Defendant pleaded the stated Account in Bar. The Attorney General defended the Plea. He said, the Account was agreed to be made of all Matters concerning this Personal Estate, which the Parties mutually claimed a Right to by the Statute of Distributions; accordingly the Account was made up and settled; and yet the Plaintiff would now come and demand a Discovery of particular Items supposed not to be comprised in it, but still at the same Time allow the Account to be rightly taken. He observed, that this was contrary to the common Notion of Proceeding. Either the Items must be denied in particular by falsifying them, or saying they were not allowed, or else a Surcharge must be brought in. But in the present Case neither of these Ways is taken; so that the Plaintiff would unravel the Account without pointing out one Error in it. Accordingly the Chancellor said this must not be suffered, and therefore the Plea was allowed. 1 Vern. 179, 180.

Heaton *and* Hugell.

How far a Person shall not be allowed to redeem a Mortgage by Reason of the length of Time.

Chancellor's House. THE Plaintiff brought his Bill to have the Benefit of an Equity of Redemption of a Mortgage, which was made in 1699, and upon which the Defendant entered and took Possession in 1703. The Defendant pleaded his Continuance in Possession for 23 Years, and hoped therefore that the Bill should be dismissed, which was brought in 1726. The Chancellor said, a Statute has provided, that no Person shall bring an Ejectment after having been out of Possession 20 Years, and unless the Circumstances are particular he thought that a good Rule to guide this Court in Redemption of Mortgages; so the Plea was allowed. 2 Vern. 377, 419.

Term. Hill.

3 Geo. II. 1729.

The King *and* The Duke of Bedford and others.

MR. Huſſey moved to have Inſpection of the Publick Books of the Corporation of Bedford Level. The Court ſaid, at preſent the Time was not out for making the Rule abſolute for granting the Information; and that it did not therefore as yet appear but the Proſecutor might be a common Informer, who had a Mind only to unravel the Secrets of the Corporation; and upon that Account they refuſed to grant this Motion in Behalf of the Proſecutor, till their ſhould be ſome Evidence laid before them, that the Parties proſecuting were intereſted in the Corporation. The next Day Mr. Huſſey produced the Affidavits, which the Original Rule was made upon for granting the Quo Warranto; and by them it did appear, that the Parties proſecuting were Parties in Intereſt. He cited two ſeveral Precedents, where the Court had granted Rules of this Nature on Behalf of ſuch Proſecutors before the Original Rule made abſolute; and particularly he mentioned thoſe of The King and Hughes, and Appleby's Caſe. The Court accordingly granted the Motion. Vide 242.

Jones *and* Newbank.

MR. Kettleby now produced an Affidavit, that they had demanded the Plaintiff's Place of Abode of the Attorney, and likewiſe the Coſts of the former Notice of Trial; but that the Attorney had denied to comply with either of the Requeſts; upon which he moved, that either the Attorney might pay the Coſts of the former Notice of Trial, or Proceedings might be ſtaid. Judge Reynolds ſaid that he thought the proper Motion was, that Service upon the Attorney might be good Service. And accordingly the Court made that Rule. Vide 252.

When Debt is brought upon a Recognizance againſt Bail after a Writ of Error is brought upon the Principal Judgment, upon what Terms the Court will ſtay Proceedings in ſuch Action.

Williams *and* Elms.

DEBT upon a Recogniſance of Bail was brought after Writ of Error allowed upon the Principal Judgment. Mr. Marſh ſaid, that it was true the Writ of Error was no Superſedeas in this Action; but yet in the Caſe of Arthur and Myonet, the Court ſtayed the Proceedings againſt the Bail upon their entring into a Rule to ſurrender the Principal in four Days after Affirmance of the Judgment, or pay the Condemnation-money. And therefore he prayed the like Rule in this Caſe; which the Court granted.

The King *and* The Lady Lawley.

Vide 263.

SErjeant Eyres moved now for a new Trial upon account of the Variances. The other Side inſiſted, that the Defendant ought to be here in Perſon. But to that he anſwered, that theſe Variances were inſiſted upon at the Trial, that the Counſel for the Defendant would then have deſired a Special Verdict, but the Chief Juſtice propoſed, that if the Jury ſhould convict the Defendant upon the Merits, ſhe ſhould ſtill have Liberty of taking Advantage of the Variances upon Motion. He ſaid therefore, that they ought not in this Way to loſe any Advantage, which they would have had a Right to, if the Verdict had been ſpecial; and if it had been ſo, no doubt of it the Defendant would not have been obliged to appear in Perſon; and ſo was the Caſe of The King and Hayes. The Court ſaid, that was certainly true; but the Chief Juſtice obſerved, that no Mention was made at the Trial of a Special Verdict. And they all agreed, that it was a general Rule, that wherever a Defendant is convicted of an Offence, for which, if he was preſent at the Time of the Conviction, they would commit him, in all ſuch Caſes the Court requires his being preſent, if he would move for a new Trial or take Advantage of any Exception. And Judge Reynolds ſaid, he remembred a Caſe, where a Perſon was committed, even upon a Conviction for a Libel. Accordingly the Court refuſed the Motion at preſent.

Robinſon *and* Noble.

How far a Citizen of London cannot imploy a Foreigner to work in his Buſineſs.

Vide poſt

MR. Common Serjeant moved for a Procedendo in an Action of Debt upon a By-Law of the City of London, which reſtrains Citizens from ſetting Foreigners at work after Notice. He ſaid this By-Law has already been allowed in two Caſes; one in that of Player and Pettit, Sid. 269. the other in that of Robinſon and Parker laſt Term in the Common Pleas. Accordingly the Court made a Rule to ſhew Cauſe.

Caſtel *and* Bambridge.

THE Trial in this Caſe was to come on at the Sittings on Monday next. Mr. Kettleby and Mr. Strange moved for a Rule upon Mr. Tanner, an Officer at the Old Baily, to attend at the Trial with the Inqueſt and the other Proceedings taken by the Coroner, when he ſat upon the Body of the Appellant's Husband. A Copy of the Indictment, they ſaid, they had no right to, as the Charge was a Charge of Murder; and therefore, unleſs they could obtain the Rule they prayed for, they did not know, what Remedy they could have. In other Caſes the Party has the Benefit of Records by taking Copies of them; and where Copies of Records are ſuggeſted to be made up wrong upon Writs of Error out of the Common Pleas, the Court orders the Officer to attend in Perſon with them. The Judges too of this Court, they ſaid, were always in Commiſſion at the Old Baily; and that they thought a farther Reaſon, why the Court might particularly grant the Motion in the preſent Caſe. The Court ſaid, the Attorney General no doubt of it, might let them have the Benefit of the Proceedings before the Coroner; but they did not ſee how this Court had any Thing to do with an Officer at the Old Baily. And as to the Inſtance mentioned of the Officer of the Common Pleas, the Court ſaid, the Reaſon for that was, that there is a ſuppoſed Contempt in diſobeying the Writ directed to him to certify the Record below. The Defendant's Counſel then prayed, that a Rule might be made upon Mr. Cotton, the Clerk of the Papers to attend with the publick Books of the Fleet-Priſon. They ſaid they doubted, the Common Pleas would not aſſiſt them with ſuch a Rule, as the Cauſe was in this Court. The Court ſaid, they did not think Gaoler's Books were publick ones; but if any Rule of this Sort could be made, they thought the Common Pleas was the propereſt Court to make it in. In an Action for Fees, this Court would not make ſuch a Rule, tho' the Common Pleas might. At laſt the Counſel moved for a Rule upon Mr. Clark to attend with the Writ of Appeal. But the Court ſaid, by Law they had a Right to have a Copy of it; ſo that Part of the Motion was refuſed likewiſe. Vide 240. Vide poſt.

The King *and* Gohaire.

IN an Information filed in the Attorney General's Name, for Beating a Cuſtom-houſe Officer, the Proſecutor had given Notice of Trial, but not countermanded it, till the Defendant had retained his Counſel, and was ready to attend; upon which Mr. Kettleby moved for Coſts. But Mr. Maſterman informed the Court, that in Informations of this Nature, where the King's Name is more than barely made uſe of, the Crown never receives nor pays Coſts. Accordingly the Court refuſed the Motion. When an Information is brought, how far the Proſecutor ſhall not pay Coſts.

Pyle

Pyle *and* Grant.

Vide 255, 260.

THIS was the Day appointed for the Trial at the Bar; and accordingly Serjeant Chappel moved for the Defendant, that the Appellant might be called. He said that he had Affidavits to produce, that the Appellant had not all this while so much as demanded the Freeholder's Book of the Under-Sheriff or his Agent above; and yet a Trial at Bar was expressly appointed for to Day. Mr. Forteſcue on the other Side said, that they had an Affidavit to produce, that they had demanded them of the late High Sheriff, but that he refuſed to give them, becauſe he was juſt going out of his Office; that they had demanded them likewiſe of the preſent High Sheriff; but that he refuſed to deliver them, becauſe he was not ſworn into his Office. Therefore he prayed, that there might be a farther Day given to the Parties to appear. The Court ſaid, that the Appellant is by Law demandable on every Day that is given him to appear by Writ or by the Roll; but that they could not record the Nonſuit, becauſe the Venire was not produced, nor the Roll in Court. They ſaid, there might be Reaſon to think, that the Entries were not properly made up upon the Roll no more than a proper Care taken to prepare for Trial; and therefore they made a Rule, that no Entries of this Sort ſhould be ſupplied. They ſaid likewiſe, that at preſent there was ſufficient Reaſon to bail the Defendant for the affected Delay; and accordingly took his own Recogniſance in 500 l. on the Civil Side to the Appellant himſelf to appear on the laſt Day of the Term.

Blunket *and* Freeman.

How far an Elegit may be amended.

MR. Kettleby came to ſhew Cauſe, why an Elegit ſhould not be amended, which recited the Judgment to be Georgii nuper Regis, whereas it ſhould be anno Regni noſtri. He ſaid, that whatever Power the Court might have of amending Writs of Execution, yet he hoped the Court would not do it, as this Caſe was circumſtanced, becauſe the Defendant had not only got Poſſeſſion upon the Elegit, but had actually brought an Ejectment. Mr. Strange ſaid, that that was the very Reaſon, why they wanted the Amendment; becauſe as this Writ was, they could not maintain their Ejectment. Accordingly the Court made the Rule abſolute; becauſe there was the very Judgment produced, which warranted the Amendment.

Myonet *and* Broom.

How far a Defendant ſhall not be allowed to make a Waiver in Prejudice of his Bail.

MR. Reeves moved to ſtay Proceedings againſt Bail, for there having been a Non pros' waived in the original Action to the Prejudice of the preſent Defendant. The Court ſaid, if the Non pros' was irregular, the Bail was bound by the Waiver; becauſe the Party only did that voluntarily, which

the Court would have compelled him to have done; but if the Non pros was regular, there was an End of the Action as to the Bail; and consequently the Agreement of the Parties could not continue it as to them. Upon which the Court made a Rule to shew Cause. Vide post

The King *and* Munroe.

What shall be said to be a good Indictment for exercising a Trade without having served an Apprenticeship.

MR. Yates moved to quash an Indictment for exercising the Trade of a Baker, the Defendant not having served a legal Apprenticeship. The Exception he took to it was, that the Trade was not laid to be used infra Regnum Angliæ at the Time of the Act. The Court said, the Trade of a Baker was within the Words of the Act; and no Averment of the Trade's being used at the Time of the Act is necessary, but where the Trade only falls within the general Conclusion of the Clause at last.

Hatton *and* Hatton.

How far a Suit will not lie in the Ecclesiastical Court for a Distribution of an Intestate's Estate. Vide post

MR. Strange moved for a Prohibition to be directed to the Prerogative Court of the Archbishop of Canterbury, for their holding Plea there upon a Libel against an Executor for Distribution; and cited the Case of Petit and Smith. J. Reynolds said, Bills of this Sort were allowed in Chancery; but the Court granted a Rule to shew Cause. 2 Vern. 648, 650, 737.

Holt *and* Ward.

Vide ante 247.

MR. Birch moved to plead double, Infancy in the Plaintiff and Non Assumpsit. He said, as this Case was Infancy in the Promisee would make the Promise without Remedy, as much as Infancy in the Promisor; because the Consideration of the Defendant's being bound by his Promise of Marriage to the Plaintiff, was, that the Plaintiff was bound by her Promise of Marriage to the Defendant. The Court said, it might be proper to be considered of, how far the Plea was good. But granted the Motion.

Way *and* Nickson.

Vide ante 268.

MR. Reeves moved for a new Trial, for the Verdict's being against Evidence. He said, that there were two Witnesses, that swore directly for the Defendant, that he had a good Cause of Action in the former Suit against the Plaintiff; and that was enough to make that Suit not frivolous nor vexatious; whether the Witnesses swore false or not. The Jury indeed are Judges of the Fact, whether the Witnesses did swear false; but the Court are Judges of the Law; whether, admitting they did so, the Action is malicious. The Chief Justice reported the Fact to be so; and he and the Rest of the Court agreed, that

the first Action could not be said to be malicious; and accordingly the Court granted a new Trial.

The King *and* Saunders.

When an Indictment is found at the Sessions, What shall not be said to be a good Caption of such Indictment.

MOtion was made to quash an Indictment, try'd at the Quarter-Sessions, for the Caption's being wrong; it being ad generalem Quarterialem Sessionem Pacis, without saying per adjornamentum. The Case of the King and Walker was cited, which was an Order of Sessions; and there this Exception was allow'd. The Court said, in Orders of Removal, no doubt of it this Exception is fatal; because the Statute requires, that the Order should be adjourn'd by Appeal to next Quarter-Sessions. But they did not think, this same Thing was necessary to be laid in Indictments. However upon Mr. Abney's saying (who was not concern'd in the Cause) that he did not know, but the Statute of Hen. V. which appoints Quarter-Sessions, might by Construction require, that they should be kept on by Adjournment from one to the other; the Court said, the Caption would certainly have been good, if it had been ad generalem Sessionem generally; but as it was, they would consider of it; and accordingly made a Rule to shew Cause.

Townsend *and* Brown and others.

What shall be said to be a waiver of special Bail.

MR. Lee came to shew Cause upon a Rule, why Proceedings upon a Bail-Bond should not be staid in two Actions. The first he said was a joint Action, wherein three were Defendants, who were Partners in Trade. In that the Plaintiff had taken an Assignment of the Bail-Bond, because only Brown had given special Bail, and the others had not appear'd. The second Action was against two of the same Defendants, and an Assignment of the Bail-Bond was taken in that likewise, for want of Bail's being given above at all. But Mr. Fazakerly on the other side said, that in the first Action the Proceedings were intirely irregular, because all the Defendants had not appear'd, and the Suit was by Bill; and it is a certain Rule, that a Party must be in Custodia Mareschalli, before he can be declar'd against in that Way. Indeed where the Proceeding is by Original, some of the Defendants may be proceeded against by Outlawry; and when they are outlaw'd, the Proceedings are regular against the other upon the original Action. So that, he said, the Delivery of the Declaration to Brown's Attorney in the Name of all the Defendants, must be intirely ineffectual as to carrying on the Proceedings in the Cause; but yet that Act must be a waiver of Bail above being to be put in; for it actually supposes it to have been done already. Then as to the second Action Mr. Fazakerley said, that the two Defendants were Bankrupts at the Time that Bail was given to the Sheriff; that the Plaintiff had actually come in as a Creditor under the Commission; and therefore the Court would not suffer him to take his Remedy at the same Time against the Bail. The Court accordingly

cordingly made the Rule absolute in the first Action, and said, that special Bail was clearly waiv'd; but yet that they should consider the Acceptance of the Declaration by Brown's Attorney so far an Agreement to appear for all the Defendants, as to make him find common Bail accordingly. But as to the second Action, they thought the Affidavit was not positive enough as to the Fact; so enlarg'd the Rule for a Day or two.

Anonymus.

MR. Fenwick mov'd for an Information in the Nature of a Quo Warranto against one Watkinson, for taking upon him the Office of Petit-Constable, and against several others for chusing him. He said, a Matter of Right was in dispute; the Inhabitants of the Town claiming this Privilege of nominating Constables, as of common Right; Lord Molineux, as Lord of the Manor. But the Court said, no doubt of it, the King has a Right to call any one to Account by his Writ of Quo-Warranto, for exercising any Publick-Office, be it ever so small; yet we don't use to grant Informations in the Nature of them for such inferior Offices. And Judge Page said, that he did not know, the Court had ever gone so far as to grant them against High-Constables. They said however, they would grant a Mandamus to swear in the Person nominated on a proper Affidavit. And accordingly Mr. Fenwick said, he would get such a one.

How far the Court will not grant an Information in Nature of a Quo-Warranto, for exercising an Office by reason of the smallness of the Office.

Hornby *and* Cornford.

THE last time this Matter came on a Rule was made by Consent, that the Defendant should bring into Court what Sum the Master should appoint, and that all Proceedings should stay. Mr. Draper produc'd now an Affidavit, that the Defendant had been serv'd with the Rule of Court, and Appointment of the Master to bring 54 l. into Court, but had neglected to bring in any Money at all; and therefore he mov'd, that the Plaintiff might be at Liberty to sign his Judgment. But the Court said, at present they were not so clear of Opinion for the Plaintiff, and therefore could not give Judgment without hearing the Matter again. The direct way they said, was to inforce the Rule by Attachment; but that they could not do neither without Affidavit of personal Service.

Vide ante 175.

Brown *and* Kendal.

IN an Action of Covenant, wherein there were two Counts, one for Rent, the other for Repairs, Mr. Draper mov'd to bring the last three Quarters Rent into Court, and that Proceedings might be staid upon that Count. He said, that more Rent indeed was due, but not from the Defendant; for he was only Assignee from that time; and cited the Case of Risley and Jones,

How far the Court will stay Proceedings in an Action on bringing into Court what's bona fide due.

Jones, Paſ. 9. of the late Queen, where the ſame Rule was made. The Court would not make that Rule; but upon Debate they made another, that upon bringing into Court what Rent was demanded, it ſhould be referr'd to the Maſter to ſee what was due by the Defendant, and that upon payment of that with Coſts, all Proceedings ſhould be ſtaid upon that Count.

Juſtice *and* Jones.

How far a Mandamus will lie to the Eccleſiaſtical Court to grant Probate of a Will.

MR. Reeves and Mr. Lee mov'd for a Mandamus to be directed to Dr. Betteſworth, Judge of the Prerogative Court of Canterbury, to grant a Probate of the Will of Lord Londonderry, upon an Affidavit, that the Judge had refuſed to grant it, till there ſhould be a Commiſſion of Appraiſement executed, A Caſe in Raymond, 235, was cited, where the like Motion was granted. Accordingly the Court granted it in the preſent Caſe, without making a Rule to ſhew Cauſe for the Inconvenience of a Delay in a Matter of this Nature.

The King *and* the Duke of Bedford and others.

Vide ante 242.

THE Defendants came now to ſhew Cauſe, why the Rule ſhould not be made abſolute for the Information. Mr. Lee ſaid, that the granting of theſe Informations in the Nature of Quo Warrantos, was diſcretionary in the Court, as well as the granting of any other. In the Caſe of The King and Grant, an Information was mov'd for againſt an Officer of a Corporation, for not having renounc'd the ſolemn League and Covenant, and refus'd by the Court, becauſe 'twas after ſome length of Time. For the ſame Reaſon another Information of the like Nature was refus'd in the Caſe of the King and the Town of Bridgwater, where an Officer had omitted taking the Oaths in a proper Time; ſo that, he ſaid, the Circumſtances of the Caſe will be the Guide to the Court's Direction. The Complaint againſt the Duke was, that after he was elected Governor, the Oath of Office was adminiſtred to him in an illegal Manner, and yet under that Oath he preſided, and acted as Governor. His Election was in the Fen-Office, as the Statute requires; but his Oath was adminiſtred to him in Brown's Coffee-Houſe in Mitre-Court. The Statute requires, that the ſix Bailiffs, or one of them, ſhall adminiſter it; but inſtead of their doing it, when the Duke required it of him, they all endeavour'd to get out of the Room, as ſoon as he appear'd, but the Door was ſhut againſt them; and yet the Regiſter took upon himſelf to adminiſter it. As ſoon as the Duke was thus ſworn in, he went back into the Fen-Office, and there the Aſſembly proceeded to chooſe the other Defendants as ſix new Bailiffs, the Duke preſiding as Governor. The Council clearly allow'd, that the Validity of this Oath muſt determine the Election of the Bailiffs as well as the Governor's; becauſe the Act requires, that the Governor, or one of the Bailiffs ſhall be preſent. None of the Bailiffs were agreed on both ſides,

and the Governor is incapable of acting, till he is duly sworn. But they insisted, that the manner of administring the Oath, was in itself but Form only, required by the Act; and its being administred before the Bailiffs, was in Substance the same as being administred by them. The Bailiffs too had Notice given them to be at the Fen-Office, that being the most proper Place to have had the Oath administred in; but that Place is not required by the Act for this Purpose, and consequently the Exception as to the Place cannot be material. The Council urg'd too, that an Objection of this sort comes very improperly from the Bailiffs, because the Statute requires them to be present to administer the Oath, they are bound to do this by their own Oath they take themselves, when they enter into their Office; and yet at this Time voluntarily absented themselves. Another Objection, they said, has been made, that the Duke was an Infant when he was elected. But this, 'twas answer'd, would have little weight with the Court, because 1. Cro. 557. 'tis expressly held, that an Infant may be a Mayor. Members of both Houses of Parliament might have been so at Common-Law. And the Reason for these Cases is, that Officers of this Sort act only in Trust, and by the Appointment of others, and 'twas their Folly to choose them. They urg'd besides, that the present Corporation was only appointed for the Preservation of a Tract of Ground, a Matter of private Property, wherein the Exercise of Justice, or the Protection of the Publick Peace of the Kingdom was not concern'd; and that was a Reason why, they said, it was to be doubted, whether even a Quo Warranto would lie. In the Case of a Warrener or a Steward of a Court-Baron it does not. The first was the Case of Sir William Lowther; the other concerning the Manor of Holton in Lancashire. The Council urg'd at last, that there was however good Reason to be given why the Court should not exercise this Authority, admitting that they could by Law; because, there were no Persons competitors with the Duke. Where indeed two Persons contend for an Office, 'tis necessary, that the Court should interpose, that the People may know which Officer they are to obey; but in the present Case, they submitted it would be enough to leave the King to lay Claim to his Right by his Quo Warranto. The Court were however of Opinion, that the Information ought to go. They said, it has often been determin'd, that where an Oath is administred in the Presence of a Mayor, against the Mayor's Consent, that Oath is illegally administred, and the Party shall not have the Benefit of it. They could not see the least Foundation to think, that an Oath administred against the Bailiffs Consent, tho' in the Presence of the Bailiffs, could be said to be administred by the Bailiffs; and they should have thought it all one, if the Act had requir'd only that the Oath should be administred before them. Informations of this Nature, they said, were not discretionary; because the Parties interested have no other Remedy, tho' the King has. And in all Cases they are granted, unless where an Omission of an Oath or such sort of Thing is complained of after twenty or thirty Years, which perhaps there are no Memorials of. They said, they could not see, that any Case could require an Information

more than this, where a Tract of Land of 95000 Acres is invested in a Corporation; and where they have Power to give Rules and Ordinances concerning the Land of Occupiers of 300000. In the Case of a Steward of a Court-Baron they allow'd an Information of this sort would not lie, because that is an Office of a private Nature; but in that same Case cited, they said, an Information was granted for the Office of Steward of a Court-Leet; because that concerns the Publick. The Objection as to the Minority of the Duke, they allow'd, was not material. However, for the Reasons beforemention'd, the Court made the Rule absolute as to the Duke; and the other Defendants entred into a Rule, that their Elections should abide the Event of the Validity of his, to save the Expence of several Informations going.

Ashley *and* Seagrave.

How far the Court of King's Bench will punish the Officers belonging to inferior Courts.

MR. Kettleby came to shew Cause upon a Rule that was made upon the Defendant's Attorney to answer the Matters of an Affidavit. He said the Cause was not in this Court, but in the Marshalsea; and therefore this Court would not interpose, but leave it to that Jurisdiction to correct the Misbehaviour of Attornies, in Causes depending before them. The Chief Justice said, that this Court constantly exercises its Jurisdiction, in correcting the Misbehaviour of Officers in all inferior Jurisdictions. However, J. Probyn observ'd, that the Affidavits, upon which the former Rule was made, were wrong titled, as being made in a Cause depending in this Court; whereas they ought not to have been titled at all. Accordingly the Court discharg'd the former Rule; and said, the Title of the Affidavits must be struck out, and they must be sworn over again.

Woolaston *and* Vaughan.

The Method which the Court takes of enforcing Process into a Liberty.

MR. Theede mov'd to make absolute a Rule, that had been obtain'd at the Side-bar, for the Bailiff of Cashio in Hertfordshire, to return his Warrant, which the Sheriff had directed to him, to be executed within the Liberty. The Court at first doubted, whether the former Rule was rightly made; however they said, they usually grant such Rules upon the Bailiff of West. And if a Sheriff returns quod Mandavi Ballivo, & nullum mihi dedit responsum; the next Process is a non omittas. Accordingly they made the Rule absolute; tho' the Sheriff had not made his Return to the first Writ. For they said, they ought to know why their first Writ was not executed.

Gifford *and* Letchmere.

How far the Court will not change a Venue.

IN an Action against a Lighterman for loosing Goods in conveying them from London into Middlesex, Mr. Strange mov'd, that the Venue might be chang'd, upon an Affidavit, that the Goods, if any where, were lost in Middlesex. But the Court said, that it appear'd upon this very Affidavit, that the Plaintiff was bound to give material Evidence in London, where he had laid his Action; and therefore refus'd the Motion. The Court said besides, that the Defendant had pleaded; and therefore the Motion was wrong upon that Account too.

The Town of Pool *and* ——

How far the Court will not change the Venue, by Reason of an Exception to the Sheriffs being interested in the Cause.

IN this Case likewise Mr. Hussey mov'd to change the Venue into the County of Dorset, upon an Affidavit, that the Action was for some small Town-duties, wherein the Inhabitants were so much interested, that they were afraid, they could not have an impartial Trial in the Town itself. He said, that the Sheriff was Member of the Corporation, and that was another Reason, why the Court would not grant the Motion. The Court said, that the first Reason has constantly been disallow'd, unless in Lord Shaftsbury's Case, which has always been complain'd of. And as to the last Reason, they said, the proper Method then was to enter this upon the Roll, and pray a Writ to the Coroner. Skin. 40.

Townsend *and* Brown and others.

Vide ante 278.

MR. Fazakerly now mov'd again to make the Rule absolute in the second Action. But before Mr. Lee began to give his Answer, 'twas discover'd that the Bail-Bond bore Date a Day in January was Twelve-month before Hilary Term began, and the Writ itself was returnable the last Day of that Term; so that the Court said, upon this State of the Case, the Bond itself appear'd to have been given wrong. Accordingly they made the Rule absolute for staying Proceedings upon it directly.

Anonymus.

How far the Court allows Bail to justify, without putting any Terms upon the Defendant.

IN a Motion to justify Bail, Mr. Marsh said, that he should not oppose the doing it; but that the Defendant had frequently given them Notice of Motion, or puting in Sham-bail; and when the Council attended to oppose it, the Defendant would not go on upon the Notice. For which Reason he hop'd, that the Defendant should pay Costs before the Bail should be allow'd to justify. And this, he said, was a common Motion in the Common-Pleas. J. Reynolds and J. Probyn said, that they knew of no such

Terms

Terms, when they attended there; and Costs were not allow'd.

Wilson *and* Poulter.

Vide ante 142.

THERE having been a new Trial had, and another Case more fully stated for the Opinion of the Court, wherein it was admitted, that the Defendant knew of the Act of Bankruptcy, the Matter was again shortly argu'd. The Court were unanimous, that the Affirmance of the Conversion in part was an Affirmance of it in the whole, and therefore the Plaintiff could not recover upon the second Count. And they seem'd to think it something doubtful, whether even the changing this Money into the South-Sea and East-India Bonds was a Conversion. However there was no Occasion to give any Opinion as to that Point. So upon the first Count only the Plaintiff had Judgment.

Short *and* Scurry.

Vide ante 156.

THE Defendant having obtain'd a Rule for Restitution, Mr. Taylor inform'd the Court, that the Plaintiff had run away and left the Key of the House with his Wife, and that she did not live in it, but actually refus'd to deliver Possession. Upon which he mov'd for an Attachment against her. The Court said, that they saw no Reason, why the Defendant could not break open the Door and put himself into Possession; for which Reason they refus'd the Motion. Ex relata.

Myonet *and* Broom.

Vide ante 276.

MR. Kettleby now came to shew Cause. He said, this Matter was originally in Chancery, an Issue at Law was directed, and the Plaintiff fail'd in his Recovery there, not upon the Merits, which was the Quantum of what was due, but upon a collateral Point. When the Parties went back into Chancery, the Court there order'd the Defendant to waive the Benefit of this Nonsuit; and to go to Trial again upon the same Record. He said, that the Parties did go again to Trial, that a Verdict was had against the Defendant upon the Merits, that Judgment was enter'd accordingly; and that now therefore the Proceedings against the Bail were regular. But this Court was of Opinion, that the Nonsuit being regular upon the first Trial, the Bail were thereby properly discharged; and that now therefore the Proceedings against them were irregular; upon which the Rule was made absolute.

The King *and* The Inhabitants of Abbots-Langley.

THE Court now were clear of Opinion, that the Order of Removal was good. They said, they could never see any Reason for allowing constructive Notices upon the Statute of James; and therefore confirmed the Order. Vide ante 148.

The King *and* Kendal.

MR. Floyd came to shew Cause upon a Rule, that had been obtained for quashing an Indictment for exercising a Trade, without having served an Apprenticeship. The Exceptions that Mr. Thomson had taken to it were first, that the Indictment was in the Borough of Colchester, and no County laid, wherein that Borough is; and secondly, that the Indictment only charges in general, that the Defendant exercised this Trade the first Year of the present King, without saying in what Month of the Year it was. Now, he said, the Act of Parliament gives so much a Month Forfeiture for the Time the Offence is committed, and therefore it was material for the Indictment to have charged how many Months the Defendant exercised it. The Court said, the first Exception was clearly fatal, and therefore made the Rule absolute. What shall not be a good Indictment for exercising a Trade without having served an Apprenticeship.

The King *and* The Archbishop of Armagh and Dr. Whaley.

YEsterday Serjeant Hawkins obtained a Rule to shew Cause, why a Warrant of Attorney should not be taken off the File, which was filed for the Defendant in the Action here, since he had brought a Writ of Error in Parliament, and assigned the Want of an Original for Error there. Mr. Reeves and Mr. Fazakerly came now to shew Cause, and said, that the Fact stated upon the Defendant's Affidavit was, that on the twenty-sixth of January last, after they had brought their Writ of Error in Parliament, the Defendant Whaley went into the Office of the Custos Brevium, and saw there a Warrant of Attorney to Mr. Monday lying upon the Table, but was not then filed, and that on the twenty-eighth the Defendants assigned the Want of Warrant of Attorney for Error; and had accordingly taken out a Certiorari. The Counsel for the King observed in the first Place, that it was undoubtedly the constant Practice of the Court for the Plaintiff in Error to file a Warrant of Attorney for the Defendant, and that even after a Writ of Error, brought by the same Defendant in a superior Court. The Foundation of which is, that where the Defendant in Error pleads In nullo est erratum, he pays 2 s. 4 d. 2 s. for the Plea, and 4 d. for the Warrant of Attorney, by which Act he impowers the Plaintiff in Error to file it. Therefore if the Warrant of Attorney was filed Vide ante 170.

before the assigning the Want of it for Error, undoubtedly Mr. Saunders, who appeared for the King as Plaintiff in Error here, was justifiable in filing it. They said it was intirely uncertain upon the Doctor's Affidavit, whether the Warrant of Attorney was not filed before the twenty-eighth; he has sworn indeed, it was not filed the Twenty-sixth, he has sworn too, it was since filed; but whether before or after the Twenty-eighth is not certain, and therefore, they said, it does not lie upon them to ascertain this Fact and make out that it was filed before; upon this State of the Case, they observed, there was no occasion to enter into the Complaint; because the Complaint is in itself imperfect. But however they urged, that the very bringing the Warrant of Attorney into the Office was making it a Record before the Filing it. To this Purpose Mr. Fazakerly cited the Case of Cock and Baker, where a Writ of Error was brought upon a Judgment in the Common Pleas. Want of Original was assigned for Error. The Officer certified there was none. But upon its appearing on Affidavit, that the Original was in the Office, tho' not filed, the Court committed the Officer for his false Return. In the Case of Bynn and Conyers, the Court of Chancery was of Opinion, that a Plea was a Matter of Record from the bringing it into the Office, before filing. And so they said, was the constant Practice of all Affidavits being read before there being filed; yet without Doubt they are considered as Records before they are read. Serjeant Hawkins on the other Side argued, that whatever the Practice might be to omit the filing Instruments of this Sort after they are brought into the Office, yet the Law has declared the Act of Filing to be the Act that makes them Records. He said, he thought this evident from the constant Motion that is made to file Orders and Indictments, that are removed up by Certiorari. Before this Motion, they may be sent down at any Time, but afterwards they cannot. The Court desired to be informed by the Custos Brevium in the first Place, whether the Warrant of Attorney was filed before the twenty-eighth of January, or not; but upon his not being able to give them Satisfaction as to that Time, they desired to know of him farther, whether these Instruments were constantly considered as Records by their coming into the Office, before the Filing. He informed them, that they constantly were, and that he never knew one of them taken back or altered, after it was brought in. Mr. Clark said, that he had always the same Notion of a Declaration in his Office, and Mr. Masterman said the same of an Indictment, that was brought into his. And the Clerks in general said, that Judgments of any Term are not made Rolls of that Term, till just before the Essoin-day of the next. The Court said, that it appears now not to be material, whether the Warrant of Attorney was filed before the Twenty-eighth or not, but that Instruments of this Nature are Records from there being brought into the Office. They observed too, that there was a clear Difference between these Instances, and those, where Records are removed up by Certiorari. They cannot be sent down, after they are Records of this Court, and for this Reason it is, that the Court is so cautious in admitting them to be Records; and requires,

that the Filing ſhall be upon Motion. Accordingly they diſcharged the Rule. Saund. 249.

The King *and* The Lady Lawley.

THE Defendant's Counſel opened now their Exceptions in order to obtain a new Trial. The firſt was the ſame with the laſt, that was taken upon the former Argument. The ſecond, that in the Indictment produced in Evidence, the Words were & Juratores præſentant, but in the Information they were & quod Jur' prædict' per Sacramentum prædict' ulterius præſentat' fuiſſet; whereas the Counſel ſaid, the Word per was left out. The Third, that contrafecit was uſed inſtead of the word controfecit; and yet they urged controfecit was a technical Word. The Fourth, the Information charged the Defendant with ſeducing the Witneſs from the Trial ſcient', that he was a material Evidence. Now ſcient' they ſaid was to be underſtood Scienter, which makes it Nonſence. The Fifth, that tamquam verum ſcriptum was uſed inſtead of the Word tanquam. The laſt Objection was, that the Indictment charged Japhet Crooke with forging a Writing, purporting a Deed to be made between ſuch and ſuch Parties; the Information only, with forging a Deed ſuppoſed to be made between thoſe Parties. In Anſwer to the firſt of theſe Exceptions, which was mentioned before, the Court ſaid, that they thought the præterimperfect Tenſe neceſſary to be uſed in the firſt Indictment, as it would have been, if the Party had declared upon the Leaſe, but in the Information, they thought the præterpluperfect Tenſe could only be uſed, becauſe the Import of this Part of it gives only an hiſtorical Relation of a Fact that had happened before. To the ſecond they ſaid they would underſtand the Contraction of Jur' to ſignify Juratoribus, and obſerved there were no certain Rules to be given for Contractions, but they were to be governed merely by the Senſe of the Party. The Third, they ſaid, was over-ruled in Ward's Caſe. To the Fourth, they ſaid, they would underſtand the Scient' to ſignify ſciente. To the Fifth, they obſerved, that tamquam was an old Word, and ſignified the ſame as tanquam. And to the laſt, they thought the Charges were exactly of the ſame Nature. The Counſel then deſired Leave to move in Arreſt of Judgment. The Exception that was firſt taken, was, that the Information only charged, that the Defendant ſcient', that Japhet Crooke was indicted for Forgery, but did not aver, that he actually was indicted; whereas the Counſel inſiſted, that the Information ought to have concluded with a prout patet per Recordum. The ſecond Exception was, that it was not ſet forth in the Information, that the Defendant pleaded or was ready to go to Trial upon the Indictment, whereas, they ſaid, that was the material Part of the Charge, which made it an Offence. The firſt of theſe Exceptions the Court thought there was a good Deal of Weight in. But as to the Second, they ſaid, it was an Offence to give any Obſtruction to a Cauſe that is in a legal Courſe of Proſecution; and that it is being before or after Pleading was a Matter proper only to be offered in Aggravation

Vide ante 263, 274.

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tion or Mitigation of the Punishment. The Counsel then for the Defendant prayed, that she might be bailed for the present and not committed. The King's Counsel opposed it, because they had no Notice of the Bail. But the Chief Justice said, for his own Part he was inclinable to give Judgment for the Defendant; the Counsel for the King desire Time to answer this Exception; and therefore, said, the Court would certainly Bail her. Accordingly she gave her own Recognizance for 200 l. and four Bail by Consent in 100 l.

Forteſcue Aland *and* Maſon.

Vide ante 176.

MR. Reeves now argued for the Plaintiff. His Argument as much the same with that of Serjeant Hawkins before. But the Court said, that they had considered of the Exceptions taken to the Plea of the Parol's Demurring, and they certainly should have allowed, that the Plea would not have been well pleaded in the Case of any other Person, but where an Infant prays that the Parol may demur. But, they said, in such a Plea the Party need only shew he is Ter-tenant by Descent, and likewise an Infant; and all other Formalities of pleading are excused him. For the very Import of the Plea is, that he is not able to make the Defence; and it would be absurd therefore, that the Court should require the same Strictness as if he did make one. However Mr. Reeves then said, that he should submit it, the Infant had not so much as made himself Ter-tenant by any certain Averment; and that this was necessary in this Case especially, because the Sheriff had returned upon the Writ of Summons other Persons Ter-tenants, and not the Defendant. But the Court said, that the alledging a Seisin in Fee in Jonathan, and a Descent from him by the Daughter of Jonathan was a sufficient Averment of his own Seisin; and the Return of the Sheriff was not material. Accordingly the Judgment in Ireland was affirmed.

Crowl *and* Rogers.

How far the Court will not grant an Attachment againſt Bail.

MOTION was made for an Attachment against a Man for voluntarily joining himself with one of the Bail below, and giving Bail above with the other Person without the Defendant's Privity, and after that surrendering him in discharge of himself. The Court said, it was undoubtedly justifiable in the Bail below to enter himself Bail above without the Defendant's Consent; and they thought it as clear, that he might procure another Person to be Bail with him. They said, if a Stranger should join himself as Bail without the Privity of the Bail below, they should certainly grant an Attachment against him; but in the present Case, they must take it, that by his going along with the Bail below, and entring himself Bail at the same Time with him, he did it by the Request of the Bail; and accordingly refused to make any Rule.

Harman *and* Delaney.

MR. Fazakerly and Mr. Strange came to ſhew Cauſe upon a Rule, that had been obtained for arreſting Judgment in an Action upon the Caſe for a Libel. The Action was founded upon an Advertiſement in a News-Paper. The firſt Exception that had been taken, was, that the Advertiſement was no Libel. The other, admitting it was, that the Libel was not ſet forth in the Declaration with ſufficient certainty. The Declaration ſet forth, that the Plaintiff had acquired a conſiderable Skill in making Short-Guns, that he had made one of two Foot ſix Inches in Barrel for the Prince of Wales, and that it was ſo much approved of, that he obtained a Patent to be his Highneſs's Gunſmith. Upon this the Plaintiff farther laid in his Declaration, that on the 28th of December laſt an Advertiſement was put out of his having had this Honour, and thereby it was declared to the World, that his Guns of two Foot ſix Inches in Barrel, would carry farther than any other Perſon's Guns of a Foot longer in Barrel. Upon which it was charged that on the 4th of January after, the Defendant put out an Advertiſement inter alia to this Purpoſe. Whereas there was an Account lately in the Craftſman, of Mr. Harman's making Guns of two Foot ſix Inches in Barrel, this is to adviſe all Gentlemen to be cautious. The ſaid Gunſmith not daring to engage with any other Artiſt in Town, nor ever did he make any Experiment, but out of a Leather-Gun, as Gentlemen may be informed at the Croſs-Guns in Long-Acre. The Declaration ſet forth, that this Place was the Defendant's Place of Habitation; and that by Reaſon of theſe Words the Plaintiff had loſt ſeveral Cuſtomers. The Counſel for the Plaintiff to the firſt Objection inſiſted, that nothing would be incumbent upon them to ſhew, but only that the Words were a general Reflection upon the Plaintiff in his Skill and Trade, and not barely an Anſwer to the Plaintiff's Advertiſement of his Superiority in Skill. They took Notice, that the Charge upon the Plaintiff in not daring to engage with any other Artiſt in Town was not confined to his not daring to engage with any other Artiſt in making theſe particular Sort of Guns, but extended generally to his not daring to engage with any Artiſt in Town in making Guns at all. But beſides the Counſel took Notice, that the ſpecial Damage, which the Plaintiff has laid, would give him a Cauſe of Action, though the Advertiſement itſelf ſhould not be thought Libelous. Then as to the Uncertainty of laying the Charge, they ſaid, this conſtant Form was uſed, in Informations the moſt Criminal, and of the moſt Treaſonable Nature; and therefore without Queſtion it would be good in a Declaration of this Sort. Mr. Reeves and Mr. Edward Bootle argued on the other Side; and inſiſted, that thoſe general Words ought in all proper Conſtruction to be confined to the Senſe of the particular Words going before, and to the Senſe of the particular Words following after. And as to the Matter of Damages, they ſaid, the Loſs of Cuſtomers was only a neceſſary

What ſhall be ſaid to be a Libel.

Conſequence from the Advertiſement; and therefore could not be conſidered as ſpecial and particular Damage. To this Purpoſe Mr. Bootle applied a Caſe out of 2 Lutw. 295. Then as to the Uncertainty of laying the Libel, Mr. Bootle ſaid, that it was true indeed this Method of ſetting forth the Import of them was allowable, where the Words are ſuch, as they are not capable of receiving an innocent Conſtruction from any other Expreſſions attending them. But where the Words are in themſelves doubtful, he ſubmitted it, the ſetting out the whole in hæc verba was neceſſary. And to this Purpoſe he cited a Caſe in Carthew 407. as he ſaid, in Point. The Chief Juſtice and Judge Probyn were of Opinion, that the ſingle Queſtion upon which the firſt Point turns was, whether the Import of this Advertiſement was a Reflection upon the Plaintiff's want of Skill in general, or whether it was an Anſwer only to the former Advertiſement. In the one Caſe the Intent of the Advertiſement muſt be to ſhew he is not equal to any in the Trade; in the other, to ſhew, he is not ſuperior to every one. However Judge Page doubted, whether as this Declaration is laid, and has there has been a general Verdict for the Plaintiff, the Plaintiff ought not to recover, though the Anſwer to the firſt Advertiſement ſhould be thought particular. He ſaid, the firſt was not laid to be publiſhed by the Plaintiff, and it does not appear, but it might have been publiſhed even by the Defendant himſelf. And he ſaid, this would certainly be a Thing of dangerous Conſequence, if once it ſhould be advanced for Law, that a Man might publiſh an Advertiſement in Compliment to another, and then preſently after write another Advertiſement in Anſwer to it. However the Court in general agreed, that it would be proper to conſider, what was the Senſe of this Advertiſement a little longer; and therefore ordered a Copy of the Words to be made out and brought to them at their Chambers. To the ſecond Obſervation, the Court agreed, that no ſpecial Damage was laid; that the Damage, whatever it is, was a common and ordinary Effect from the Paper; and that though it had not been ſpecially laid, it might have been given in Evidence. But Judge Page ſaid, if the Declaration had been laid, that by this Means the Plaintiff had loſt the Cuſtom of J. S. in particular, that would have been a ſpecial Damage clearly. To the other Point none of the Judges delivered their Opinion. So a Rule was made for ſtaying the Judgment till theſe Queſtions ſhould be farther ſpoke to.

Vide Poſt.

Juſtice

Juſtice *and* Jones.

MR. Reeves mov'd for a Rule upon Dr. Betteſworth, to return his Writ of Mandamus, the Return being out Yeſterday. But Mr. Strange ſaid, the conſtant Practice in theſe Caſes is only to grant a four Day's Rule. But the Court ſaid, they knew of no ſuch Practice; accordingly order'd the Writ to be return'd in two Days. The Courſe of Proceedings in order to inforce a Mandamus.

The King *and* Robinſon.

MR. Filmer mov'd to quaſh an Indictment at the Quarter-Seſſions for the Town of Saffron-Walden. The firſt Exception that he took was, that the Indictment charg'd the Defendant with keeping falſum Pondus Angliæ, a Pound Weight, whereas Pondus ſignifies Weight in general only. The ſecond, that the Names of the Jury are not return'd upon the Caption. The laſt, that the Juſtices have not Juriſdiction of this Offence; but the Leet has properly Conuſance of it. The Court ſaid, that theſe might be proper Exceptions to be taken upon Demurrer; but they thought this too great an Offence to quaſh an Indictment for. How far the Court will not quaſh an Indictment for a Cheat.

Dunmol *and* Aldworth.

IN Debt on Bond the Plaintiff's Name appear'd upon Oyer to be Dunmal; and for this Variance the Defendant demurred ſpecially, and the Plaintiff join'd in Demurrer. Mr. Gapper argu'd for the Defendant, that however ſmall the Variation may be in the different ways of ſetting out a Perſon's Name, yet that Variation is fatal, if it be ſpecially ſhewn for Cauſe of Demurrer. And he ſaid, there were Authorities in the Books to juſtify this Rule. In Brooks's Abridgment, Title miſnomer, Longwot and Longwat were held material Variances. In Cr. Eliz. an Outlawry was revers'd, for the Defendant's Name being laid to be Elred in the Original and Eldred in the Capias. And rather a ſtronger Caſe was cited in that, where Walwyn and Walweyn were held material Variations. So Hil. 2. of his preſent Majeſty, Scurray and Scurry were held the ſame. But Mr. Strange inſiſted on the other Side, that the Reſolutions upon this Head have been both Ways, and therefore the Court will give their Judgment according to the Reaſon of the Thing. In the Caſe of Fen and Alſton, Mic. 5. of the late King, Debt upon Bond was brought by one of the Name of Samuel; upon Oyer 'twas Samul; but the Court ſaid in that Caſe they would read Samul for Samuel. Mich. 6. of the ſame King, in the Caſe of Aylebury and Wallby, the Defendant's Place of Abode was deſcribed in the Declaration by an alias dict' nuper de Waltham-Abbey, but upon Oyer by an alias dict' nuper de Waltham-Abby, and held immaterial. Trin. 2. of the preſent What ſhall not be ſaid to be a Variance in a Perſon's Name.

ſent King, Uleskelf and Ulleskelf were held the ſame. So was Baxxter and Baxter, 3 H. 4. 4. He cited too 1 Keb. 105. The Court ſeem'd to think, that the Variance between Longwot and Longwat was direcly the ſame with the preſent Caſe. And Judge Reynolds ſaid, that however ſuch a Variance might be got over in ſetting out another's Name, he thought the Court could hardly go ſo far, where 'tis in a Man's own Name. The Court agreed, that the only Reaſon for the Caſe of Fen and Alſton muſt be, that Samul might be read as a Contraction for Samuel. However they thought proper, that this Matter ſhould ſtand over.

Vide poſt.

—— *and* Munſon.

What ſhall be ſaid to be a good Modus.

Canc. THIS was a Bill brought to eſtabliſh a Modus. The Bill ſet forth, that there was a Cuſtom in the Pariſh of Burr, that all Perſons occupying Paſture and Meadow there, ſhould be diſcharg'd of Tithes in kind, by paying 4 d. an Acre, unleſs they were Inhabitants of that Pariſh, or of the Pariſh of —— The Plaintiffs were Occupiers of Paſture and Meadow Ground in this Pariſh, but Inhabitants in the Pariſh of Wintthorp. And whether this Modus was good or not was the Queſtion. The Defendant's Council objected, that the Modus was uncertain, and entirely depending upon the Will of the Occupiers; and beſides they ſaid, it was moſt unreaſonable, that Foreigners ſhould be preferr'd before the Inhabitants. They obſerv'd, that it would greatly encourage a diſpeopling in the Pariſh, which was of all things to be diſcountenanc'd. And cited a Caſe in Lev. 116. which is reported too in Keble, where this very Point is determined, and that between the ſame Parties in Intereſt as are at preſent. But the Attorney General and Mr. Wills on the other Side argu'd, that every Modus ſuppoſes in itſelf a Contract; and therefore unleſs this Contract would be void, tho' written Evidence could be produced of it, this Modus ſhall not neither, tho' it carries with it only preſumptive Evidence of there being ſuch a Contract. Now they obſerv'd, this Modus would undoubtedly have been good, if it had been general, without diſtinction of Perſons; and how can the Defendant complain, when the Reſtriction, that is introduc'd, is merely for his Benefit? They obſerv'd, that however ſtrong the Authority of the Caſe cited may be, there were other Caſes of as great Authority, direcly of the other Side of the Queſtion. To this Purpoſe Mr. Crew, who was of the ſame Side, cited Rot. 1548. Hil. 16. Ch. 1. in the Common-Pleas. The Caſe of Bigger, Vicar of Eaſtwen, againſt Luddel in the Exchequer, which was Trin. 12. Ch. 2. Mich. 2. Will. & Mary. Blaxton and Langton in the ſame Court. Mr. Wills farther urg'd too, that if there ſhould be any Fraud or Colluſion in this Caſe, a Court of Equity would relieve, as it does in all other. And to this Purpoſe he applied two Caſes in 1 Lev. 99. and More 913. Judge Reynolds and Judge Forteſcue aſſiſted the Chancellor in determining this Queſtion. They all unanimouſly agreed, that Modus's were real Compoſitions by Parſon, Patron, and Ordinary, the written Evidence of which is loſt; but the Law preſumes

there was such by the long uninterrupted Usage. Undoubtedly they said, there would have been no Dispute about this Modus, if it had been without Restrictions; and as the Restriction is for the Benefit of the Parson, they thought the Restriction could make no Difference. They all allow'd however, that something must be due from the Modus, and that too every Year; for as no Prescription can be in a non decimando generally, and at all Times; so neither can it be for so long a Time as a Year together. They seem'd to allow too, that a Modus would not be good, where it depends upon the Will of the Occupiers, whether it should be more or less. But here they said, the Rule for the Payment of this Modus is as certain, as the Rule for Payment of any other Modus possibly can be; the only Variation is as to the Persons paying the Modus, and that, they said, was never an Objection. The Authority of the Case in Keeble, they said, was to be suspected; or at least 'tis probable, that a Prohibition was obtain'd in some other Court; otherwise it cannot be supposed, that the Parson of this same Parish would have contented himself with receiving the Modus of the Outliers ever since that Time, which the Case is reported of. Accordingly the Chancellor was going to decree for the Modus, but tho' the Proof was very clear to support it, he gave the Defendant's Counsel a Day to talk with their Client, whether they would have the Modus tried or not; as it did concern the Inheritance.

Note; The Court unanimously agreed, that the same Land may at one Time pay Tithe in kind, at another Time a Modus, where there are different Circumstances; the only Thing essential to a Modus is, that the same Land should not pay Tithe in kind and a Modus both, where there are the same Circumstances.

The King *and* Lady Lawley.

MR. Reeves and several other Council came now to answer the first Exception in Arrest of Judgment, which the Court thought, there was a good deal of Weight in before. They said, they must allow, that every material Point must be laid with so much Certainty in an Indictment, as that a Traverse may be taken upon that Point; but this, they said, is no more than is requisite in Declarations; and therefore the Rule of one and the other in this Respect they hop'd would be the same. They said, it would be easy to mention Cases, where even implied Averments have been allow'd to Points, that are very material. And to this Purpose, they cited Dyer 304. 2 Lev. 50. and a Case in Arnold 367. where a Tenant for Life made a Lease for three Years, and the Lessee brought an Ejectment. He only laid in his Declaration, that Termino nondum finito, he was ejected; but yet that was held a sufficient Averment of the Tenant for Life's being living. They observed besides in the present Case, that the Sciente is direatly traverseable; a Licet is held to be so in a Case in Plowden; and many Instances might be produc'd to shew, that Sciente is in Law as direct an Averment, as quod scivit. They said farther, that many of the best Pre- Vide ante 263.

cedents were directly as this is. Tremayne 156, 143, 144 and 155. But they relied chiefly upon two Cases in those Entries, one in Page 174, the other in 175, the Case of The King and Brooks. The first of which Cases, they took to be directly as the present Case. The Defendant there was indicted, that he bene sciente, that Mary Parker was not at a Convent, perswaded her to swear she was. Judgment indeed was arrested there; but this not so much as mentioned as an Exception. Then as to the other Part of the Objection about the Conclusion, with a prout patet per Recordium, they had look'd into the Precedents of Indictments for Perjury, where such Conclusion was necessary, if any where; but they could not find, that any one of them scarce did conclude so. But Mr. Fazakerly, and some others of Counsel on the other Side argued, that however certain enough this might be in a Declaration, and however strong the Inference might be, that if the Defendant knew there was such an Indictment, as that against Crooke, such an Indictment there must have been; yet the Law requires, that every material Fact in an Indictment should be set out with positive and express, and not argumentative Certainty. To this Purpose a very strong Case was cited of The King and Knight, Salk. 375. and The King and Crouft, Trin. 10. of his late Majesty. The Indictment there set forth, that quod cum the Defendant had been before indicted and convicted at the Sessions, he had disobeyed the Sessions Order. This Indictment was demurred to, and held to be bad, merely for the Uncertainty; and yet every Day's Experience shews, that quod cum is good in a Declaration. They said, however, that they might admit, if the Information had concluded with a prout patet, this might have made the other Part of the Sentence sufficiently certain; because there the Record is referred to, which proves itself. And, they said, the Record in these Cases ought to be the Trial; which gives a Reason for the second Part of the Objection; why this Conclusion is necessary. The Court said nothing to this Part of the Objection; but to the other, they at present thought, that there were Cases to be found in the Books, which lay it down as an express Rule, that no Inference can be allow'd of in a material Part of an Indictment, however certain and necessary, that Inference may be the Inference in the present Case, they agreed it was as certain and direct, as any Inference possibly can be; and that sciente was as strong as quod scivit, but at present they doubted the Resolutions in the Books would not allow it. If this was so, they said, the Forms of extrajudicial Precedents were not to be regarded. However they thought proper it should be farther considered of.

Vide post.

The King *and* Dr. Ward.

Vide ante 252.

MR. Wills came to shew Cause, why the Rule should not be made absolute. He said, the State of the Fact was, that Sharp had this Office granted to him for Life, exercendum per se vel sufficientem Deputatum. Shaw had been formerly appointed Deputy to him, but was deprived by the Archbishop for Misbehaviour. An Appeal upon this was brought before the Delegates; and they granted an Inhibition to the Defendant, that he

he ſhould ſwear no Perſon in as Deputy, till that Suit ſhould be determined. Sharp indeed has thought proper ſince to withdraw his Deputation from Shaw, and has appointed Dryden his Deputy, in whoſe Behalf the Application is now made. He ſaid, upon this State of the Caſe he ſubmitted it this Court would not interpoſe, for the Uncertainty the Defendant muſt lie under in knowing which Juriſdiction he muſt obey. So the Court refuſed to grant a Mandamus to the Biſhop of London, in the Diſpute between Dr. Macrow and Mr. Vincent, Mich. 13. of the late King; by Reaſon the Cauſe was then depending in the Exchequer. However he farther urg'd, that this Court had no Juriſdiction to grant Mandamus's in Caſe of Officers belonging to the Eccleſiaſtical Courts. In Shower 219. 'tis held a Mandamus does not lie to admit a Proctor; and in Keeble 615. expreſs that it does not lie to admit a Regiſter himſelf. But no Foundation there was to think it would lie for a Deputy, even to a Temporal Office. So is 1 Lev. 306. And Shower 253. Mr. Lee and Mr. Strange on the other Side argued, that they ſhould admit perhaps, that a Mandamus would not lie for a Proctor; the Authority in Cart. 160. is ſo; the Reaſon poſſibly of which may be, that Proctors are Members of the Society of Doctors-Commons, and are in the Nature ſomething of Fellows of Colleges. But Hill. 1726, a Mandamus was granted in the Caſe of a Paraton General, and a Trial upon that was actually had before the Chief Juſtice. They ſaid too, that they ſhould allow, that the 134th Canon, that was made in King James I's Time, gave Biſhops a Power to ſuſpend Eccleſiaſtical Officers, and put others in their Room during the Suſpenſion; but they can have no Authority to deprive, but this Court will grant Mandamus's. Then as to the Complaint being made in Behalf of a Deputy, they ſaid, the Principal himſelf in this Caſe applied for the Mandamus in Behalf of his Deputy; and this Anſwer eaſes the Objection in Lev. 306. which Caſe is reported rather in their Favour in 1 Ven. 110. The Court ſaid, that the ſingle Queſtion in this Caſe was, whether the Office was proper to grant a Mandamus for; if ſo, the Inhibition by the Delegates was without Authority; and therefore they ſhould certainly interpoſe. They ſaid, Mandamus's have been granted even in Caſe of Officers at Will, and that too to require the Parties themſelves to reſtore them who turned them out, notwithſtanding they might the next Inſtant remove them abſolutely. That, they ſaid, was the very Caſe of Serjeant Whitacre. He was Recorder at Will; the Town of Ipſwich illegally removed him; a Mandamus was granted to reſtore him; and immediately after they obey'd the Writ, they depriv'd him again. For which Reaſon Judge Reynolds ſaid his Opinion was, that the Mandamus would lie in Behalf of the Deputy himſelf, as the Party had no other Remedy. The Court ſaid, at leaſt this was a doubtful Matter; and therefore granted the Mandamus, that they might have the Benefit of this upon the Return.

Robinſon

Robinſon *and* Noble.

Vide ante 274.

MR. Reeves and Mr. Strange now came to ſhew Cauſe. They ſaid, that the By-Law, as ſet forth upon the Return to the Habeas Corpus, was too general; it being, that no Freeman of the City ſhall imploy another as Journeyman, unleſs ſuch Journeyman be free of the City too; and this without any Exception, whether there be ſufficient Journeymen Freemen within the City or not. And, they ſaid, in Truth the Fact was ſo, that there are ſeveral hundred Journeymen imployed in this Trade of a Shoe-maker, more than there are Freemen to work in it. Mr. Strange then took another Objection, that the Cuſtom ſet forth upon the Return is, that no Perſon occupying any Trade or Myſtery, who is free of the City, ſhall imploy any Foreigner; but the By-Law ſet forth is, that no Freeman in general ſhall imploy ſuch Perſon. They ſaid, the By-Law here is more extenſive than the Cuſtom; whereas the By-Law cannot be ſupported without the Cuſtom. The Court agreed, that there being not a ſufficient Number of Journeymen-Freemen within the City, might be a ſufficient Juſtification for the Defendant to plead to the Action brought againſt him upon the By-Law; and Judge Page ſaid, he believed, he might take Advantage of this Matter in Evidence upon the general Iſſue of Nil debet. But they thought, this was no Objection to the By-Law itſelf. And in the Caſe of the Free-Porters of the City of London, they ſaid, nothing of this was ſet out upon the Return of their being a ſufficient Number of Free-Porters. But however, the ſecond Objection they thought had a good deal of Weight in it.

Vide poſt.

So this Matter was ordered to ſtand over.

Harcourt *and* Ballard.

The Time which a privileg'd Per- is bound to declare in.

A Judgment having been referred to the Maſter for Irregularity, he reported, that the Suit was by Writ of Privilege, brought by an Officer of this Court; but he did not declare till within a Term after the Writ was returnable. However he ſigned his Judgment for Want of the Defendant's Pleading within four Days after. This the Maſter reported to be irregular, for by not declaring immediately, he waived the Advantage he might otherwiſe have had. Accordingly the Court ſet the Judgment aſide.

The King *and* Hill.

Vide ante 259.

MR. Reeves now coming to ſhew Cauſe, the Court was of Opinion, that tho' this was an Offence before the Act of Parliament, yet the Intent of the Legiſlature was, that the Offender ſhould be puniſhed only in a ſummary Method, by applying to the Court where the Offence was committed; and therefore refuſed to interpoſe their Authority by Information.

Ragg *and* King.

A Rule having been made to ſhew Cauſe, why a Prohibition ſhould not go to the Admiralty-Court, in a Suit there for Wages brought by a Maſter and Boatſwain of a Ship; Dr. Henchman and Mr. Birch came to diſcharge it. The Court ſaid, that this Matter has been fully ſettled in the Caſe of King and Player, that the Admiralty-Court has no Juriſdiction in decreeing Wages for a Maſter of a Ship, where the Contract is upon Land; and therefore made the Rule abſolute as to the Maſter, and diſcharged it as to the Boatſwain.

How far the Admiralty-Court has no Juriſdiction in Caſe of Wages belonging to the Maſter of a Ship.

The King *and* the Inhabitants of Sabridgeworth.

MR. Lee moved to quaſh an Order of Removal, made by two Juſtices, and confirmed by an Order of Seſſions. A ſpecial Caſe was ſtated upon the Order, that a Father had made a Surrender of a Copyhold Eſtate, lying in the Pariſh of Sabridgeworth, of the Value of 25 s. per Annum, to the Uſe of his eldeſt Son and his Heirs; and upon that the Son went and liv'd there; which the Juſtices adjudged not to be a good Settlement; and accordingly removed him to the Place of Settlement he had gained before. Mr. Lee inſiſted, that this Caſe was not within the Proviſion of the Stat. of 9 Geo. 1. which provides, that no Perſon ſhall gain a Settlement by purchaſing any Tenement, unleſs ſuch Purchaſe be of the Value of 30 l. He ſaid, this was a voluntary Proviſion in Conſideration of natural Affection, and therefore not within the Reaſon of that Act of Parliament. He ſaid beſides, that if this Land had deſcended to the Son, this would have gain'd him a Settlement, within the Words of the Act. And that he took to be much the ſame, as the preſent Caſe. But the Court ſaid, that the Intent of this Statute was to prevent Perſons gaining Settlements, who were any ways likely to be chargeable; and therefore provided, that they ſhould be able to lay out in a Purchaſe 30 l. They ſaid therefore, that the Intent of the Parliament muſt be to prevent Perſons gaining a Settlement, merely by a voluntary Gift of Land under that Value. Upon which Mr. Lee then took an Exception to the firſt Order for its being for Removal of a Man, his Wife and four Children, without ſaying, that they were his Children. But the Court over-ruled that Exception too. Accordingly confirm'd both Orders.

What ſhall not be a good Settlement, within 9 Geo. 1.

Anonymus.

What relates to changing of Venues.

THE Defendant had obtained a Rule for changing the Venue; and now after Iſſue joined, Mr. Gapper moved, that the Plaintiff might have his Venue changed back again upon entring into the common Rule to give material Evidence in the County, where he had at firſt laid it. But the Court ſaid, that the Rule upon the Plaintiff and Defendant in theſe Caſes is mutual, that a Venue cannot be changed one way or the other after Delivery or Acceptance of a Plea. And the Plaintiff, they ſaid, is under no Difficulty by this Means; becauſe the Defendant is obliged to ſerve the Plaintiff with the Rule for changing the Venue, before he delivers his Plea; and that is ſufficient Notice to the Plaintiff to move to have it changed back again, before he accepts the Plea.

The King *and* Martha Bryan.

How far a Cheat ſhall not be ſaid to be Indictable.

MR. Fazakerly moved in Arreſt of Judgment in an Indictment for a Cheat. The Fact charged by the Indictment, was, that the Defendant came to one Mr. Langley's, a Tradeſman, to take up Silks for the Queen by a pretended Order from the Counteſs of Pomfret. The Counſel inſiſted, that this was not an Offence indictable, as no falſe Tokens were uſed; and to this Purpoſe cited Salk. 379. 6 Mod. 105, 311. and they ſaid, there was a ſtronger Caſe, then theſe in Jones, where the Party was actually impoſed upon, by delivering his Goods, and yet the Offence held not to be Indictable. They ſaid, this was farther prov'd by the Statute of 33 H. 8. c. 1. which gives a particular Puniſhment, where Offenders of this Sort uſe falſe Tokens, but takes no Notice of ſuch Offenders, where they uſe none. Mr. Reeves was of the other Side, but ſaid, he was not prepared to anſwer this Objection at preſent; ſo the Matter was ordered to ſtand over.

Vide poſt.

The King *and* Dr. Betteſworth.

Vide ante

DR. Betteſworth now returned to the Mandamus, that the Law and Practice of the Eccleſiaſtical Courts was conſtantly to grant theſe Commiſſions at the Requeſt of any Creditor, upon his entring a Caveat againſt the Probate of the Will. Mr. Wills and Mr. Strange argued, that this Return was good. They ſaid, Commiſſions of this Nature were for the Benefit of the Creditors; for by this Means they have a ſure Account of the Effects to their Satisfaction; whereas otherwiſe they have only the Executor's own Oath as to the Truth of the Inventory. But the Court declared, that they would not ſuffer Commiſſions of this Sort to delay the Probate of Wills; becauſe till Probate the Executor has no le-

gal Power of gathering in the Effects, and in the mean Time the Effects of the Teſtator may be all waſted. And Judge Page obſerved, that Mandamus's have been allowed to inforce the granting of a Probate of a Will, where the Eccleſiaſtical Court inſiſted upon Caution; and that though the Executor was a Bankrupt. Commiſſions of this Sort are taken out at the Expence of the Aſſets, and not at the Creditors Charge; and they thought them of dangerous Conſequence to delay a Probate. Judge Reynolds ſaid, that where a Will is under a Litigation, Commiſſions of this Sort are reaſonable to protect the Eſtate; but here they put a Stop to a Man's enjoying the Benefit of a Right, which the Teſtator himſelf has given him. Mr. Strange then excepted to the Mandamus, that it only recited, that Lord Londonderry died at St. Chriſtophers, leaving bona & catalla in Weſt', and ſeveral other Places; and upon that commanded the Archbiſhop of Canterbury to grant the Probate of the Will; but did not ſet out that theſe Places were within the Province of Canterbury. And Weſt', he ſaid, was a diſtinct Juriſdiction, and not Part of the Dioceſe of London; and the Court could not take Notice, that it was Part of the Province of Canterbury. But beſides, he obſerved, that the Probate of the Teſtaments of all Perſons dying in the Foreign Plantations belongs to the Biſhop of London. But the Court ſaid, that it was reſolved in the Caſe of Adams againſt the Ter-tenants of Savage, that they are bound to take Notice under what Eccleſiaſtical Juriſdiction they ſit. And they ſaid, that it was true indeed, where a Perſon dies beyond Sea, leaving no Goods, here the Biſhop of London grants the Probate of the Will, but where there are Goods are in a Dioceſe here as well as in the Foreign Plaintations the Archbiſhop has a right of Probate. Accordingly the Court granted a peremptory Mandamus, 6 Mod. 134. The Court by Way of a ſecond Anſwer to this Exception ſaid, that the Judge by his Return had admitted his exerciſing a Juriſdiction in the Probate of the preſent Will; and therefore they ſhould not ſuffer him to except againſt his having Authority to prove it. 3 Cro. 106.

The King *and* The Overſeers of the Pariſh of Canton.

When a Mandamus is directed to Overſeers to make a Rate what ſhall be ſaid to be a good Return to it.

IN a Return to a Mandamus directed to the Defendants to make a Rate for the Relief of the Poor, they ſet forth, that an Order was made upon them by the Seſſions to make ſuch Rate; but that Order appeared to be bad upon the Face of it; then they conclude, that virtute Ordinis prædict', they made a Rate accordingly. Exception was taken to this Return, that it appears the Overſeers acted without Authority, and therefore that the Retutn was bad. But the Court ſaid, that Overſeers have an Authority to make ſuch Rate themſelves without an Order from the Juſtices; and therefore the Return was held to be good.

The

The King *and* Hawkes.

Vide ante 212.

MR. Fazakerly now argued this Case again, and relied upon the same Exceptions he took before. But the Court were now of Opinion that the first Exception might be got over. They said, comparuit being coupled with an allocutus est has in Law Latin a present Signification, like a consideratum est, which must have that Sense, or else their Judgments would be all bad. But however they thought the second Exception could not be got over; the Conviction of the Justices is nothing but in the Nature of a Verdict, which finds the Fact; and therefore they ought to have went on, and given the Judgment likewise. They did allow, that it was not necessary for the Justices to apportion the Penalty, but it is necessary for them to give Judgment that the Defendant shall forfeit the Penalty. The Court mentioned too the Observation, that was made before of the last Statutes repealing the first by Construction; and said, they were of the same Opinion. Accordingly the Court quashed the Conviction.

The Mayor of Basingstoke *and* Bonner.

How far one Court will discharge an Attorney of another upon common Bail.

IN Debt for Rent brought against the Defendant, who was an Attorney of the Common Pleas, Mr. Abney moved he might be discharged upon common Bail, and produced his Certificate. He said there are Cases in 1 Mod. 10. and Salk. 544. where Attornies of this Court have been discharged upon common Bail; and in 2 Mod. 182. and lately in the Common Pleas in Baresby's Case, where Attornies of one Court have been discharged upon common Bail in the other. The Court said, if the Certificate had not been produced, they would not have discharged him barely upon Affidavits; but as the Certificate was produced, they did; because the Defendant might immediately plead to the the Jurisdiction; and discharge himself of the Suit intirely.

Sowter *and* Bradfeild.

How far Books of Account shall not be allowed to be Evidence.

Lent Assises. IN an Action for Goods sold and delivered a Day-Book and Ledger was offered to be given in Evidence in Proof of the Goods being delivered. And the Case of Lord Cobham was cited by Mr. Lee, which was lately depending in the Exchequer, where a Book was allowed to be given in Evidence wherein Entries were made by a Steward of a Modus being paid in discharge of Tithes. But Mr. Baron Carter said, in that Case the Steward was dead, and as his Evidence would have been allowed, if he had been living. So the Book shall after his Death. So in the Case of Sir Stephen Evans in the Exchequer, likewise Entries were made by a Book-Keeper to charge the Defendant,

and that Book was allowed too in Evidence. But in the present Case the Books were kept by the Shop-keeper himself, and therefore the Court would not suffer them to be read.

Hawkes *and* King.

The same Assises. IN an Action of Trover brought against an Inn-keeper for a Horse, he pleaded Not guilty. And upon Evidence he shewed, that the Horse continued in the Inn so long, that he had eat more Hay and Corn, than he was worth; and upon this the Defendant got the Horse appraised, and took him himself at the Price he was appraised at. The Judge said in this Action the Defendant could have pleaded nothing, but Not guilty; but whether this Evidence would maintain such Issue, he thought was a Question, that deserved Consideration. He said, the Custom of the City of London would undoubtedly warrant an Inn-keeper to appraise and sell a Horse in the present Circumstances, and he thought that he could follow no better Rule than that. But yet in the present Case the Defendant could not justify what he did; because he took the Horse to himself. Salk. 654.

The Remedies which the Law allows an Inn-keeper.

Pitkern *and* Ellis.

The same Assises. IN an Action of Trespass brought by a Parson against the Executor of his Predecessor for Dilapidations, it was held by the Court, that it was incumbent upon the Plaintiff to prove his declaring his Assent to the Articles, and his taking the Oaths, inasmuch as he was complete Parson, but in February last. And the Court would not suffer any Proof to be offered of his having taken the Oaths, but Matter of Record. However the Judge said, it was not necessary to prove Institution and Induction. And the Reason for this Distinction is, that in the first Case an Act of Parliament has declared the Church to be void, where these Ceremonies are not performed, in the other not. The Judge observed farther, that even this is not necessary to be proved where the Parson has been in for several Years. And this is the constant Practice in the Exchequer.

How far a Parson must prove his declaring his Assent to the Articles of the Church of England.

Goody *and* Moseley.

Same Assises. IN an Action for Money laid out to Defendant's Use, it was held upon Evidence, that a promissory Note given to the Plaintiff's Testator to allow a young Student at Cambridge 20 l. per Annum, would not maintain the Declaration; though it appeared the Testator had laid out this Sum yearly for the Defendant, because the Defendant refused to do it himself.

When an Action is brought for Money laid out to the Defendant's Use, what shall be good Evidence to support such Action.

Odel *and* King.

How far a Leſſee for Years cannot maintain Treſpaſs for cutting down of Trees.

Same Aſſiſes. IN Treſpaſs brought by the Plaintiff for cutting down his Trees, the Plaintiff was nonſuited, becauſe it appeared, that he was only Leſſee. Tho' the Judge ſaid, it was held in the Duke of Somerſet's Caſe, that Treſpaſs would lie in ſuch Caſe by Copyholder againſt his Lord. Salk. 638.

Anonymus.

When an Action is brought for Words, how far the Plaintiff ſhall not be allowed to give ſpecial Damage in Evidence.

Same Aſſiſes. IN an Action for Words, importing a Charge of Felony, ſpoken of the Defendant, who was a Trader in the Country, Mr. Lee, who was Counſel for the Plaintiff, would have given Evidence of ſpecial Damage neceſſarily reſulting from the Words, though not particularly laid in the Declaration. To this Purpoſe he cited the Caſe of Harman and Delaney determined laſt Term in the King's Bench. But the Court refuſed this Evidence, and ſaid it was never allowed, but in an Action for Words, ſpoke againſt a young Woman, where there is the general Concluſion in the Declaration of alia enormia ei intulit. There indeed the Court does allow of Evidence of her Loſs of Marriage, becauſe that is opprobria loqui. Sid. 225.

The King *and* How.

What ſhall be only Manſlaughter.

Same Aſſiſes. IN an Indictment for Murder it was laid down by the Court as a Principle of Law, that wherever a Man ſtrikes another without Authority, and upon that the other kills him, ſuch Offence is only Manſlaughter. And the Court ſaid, that this has been carried ſo far, as to be but Manſlaughter, even where a Man's Horſe is only ſtruck firſt. Upon this Rule of Law the Court accordingly directed the Jury to acquit the Defendant of Murder. The Court ſaid likewiſe in this Caſe, that the Counſel for the King had no right to reply, and accordingly refuſed to allow them to do it. The Jury upon this brought the Defendant in guilty only of Manſlaughter; and then the Defendant prayed his Clergy. The Counſel for the King then offered to arraign the Defendant upon an Indictment of Manſlaughter only. Upon which the Court told the Priſoner at the Bar, he muſt plead auterfoits acquit prout patet per recordum. The Court obſerved farther, that the very Prayer of Clergy was a Bar to any Appeal. But they would conſider, whether it was neceſſary for the Defendant to read or not. And upon looking into the Statute of Will. & Mar. relating to the Clergy, the Court was of Opinion, that in no Caſe the Reading is neceſſary.

Term. Hill. 2 Geo. II. 1728.

Pitt *and* Norman.

At the Sittings in London.

IN an Action for Money, which certain East-India Goods were sold for at Auction, the Plaintiff in his Declaration set forth Part of the Articles of Sale in hæc verba, but not the Whole. Upon which Mr. Kettleby took an Exception, that there was a Variance between the Declaration and the Evidence. And the Chief Justice at Nisi prius in Guild-Hall allowed of the Exception. He said too, that a Person cannot declare upon a general Agreement and give in Evidence a special one. Accordingly the Plaintiff was nonsuited. 3 Lev. 50.

How far a Person cannot declare upon a general Agreement, and give in Evidence a special one.

Coleman *and* Sayer.

THE Plaintiff brought an Action against the Defendant, as Indorser of an Inland-Bill of Exchange, which was drawn by Holt upon Mead, a Banker in London, payable six Days after Sight. One of the Questions that fell out upon the Evidence, was, whether the Day of Sight is to be reckoned one of the Six, admitting first, that three Days of Grace are allowable in Inland-Bills of Exchange at all; and another, whether the three Days Grace are allowable by the Custom of London, as well where a Bill is payable at certain Days after Sight, as well as where it is payable upon Sight. To the first of these Questions, the Chief Justice at the Sittings in Guild-Hall, said, that the Day of Sight is to be taken exclusive; for the Law will not allow of Fractions in a Day; and to the other he said, the Days of Grace were allowable in one Case, as well as the other. The other Matter then came into Debate, whether three Days of Grace in certain are allowable upon Inland-Bills as well as upon Foreign ones, or whether only a reasonable Time. The Common Serjeant and the Foreman of the Jury said, that the constant Practice in the City was to allow them in one Case, as well as the other. Upon which the Chief Justice said, that then he would not alter it; though he observed, that he remembred two Cases, one in Lord Chief Justice Kelynge's Time, the other in Lord Holt's, where they were both of Opinion, that in Inland-Bills it is only a reasonable Time; and what that is the Jury ought to determine. These three Points were mentioned, because if the Court had been of another Opinion as to any one of them, the Plaintiff must have clearly been nonsuited; for it fell out upon the Evidence to be proved, that the Accepter of this Bill went off the second Day after

Within what Time a Bill of Exchange shall be said to be payable.

after the three Days of Grace were over; and the Bill was not noted within that Time. But however, even as this Case was, the Chief Justice was of Opinion, the Indorser was not liable, and accordingly the Plaintiff was nonsuited. Lutw. 1593.

Peron *and* Frone.

When an Action is brought upon a Policy of Assurance how far the Evidence shall be said to maintain the Declaration.

Sittings at Guild-Hall. THIS was an Action upon a Policy of Assurance, that did not run with Interest, and no Interest. Now it happened, that three Persons had a joint Interest in a Ship and Cargo, and one of them sent to the Plaintiff to desire him to get such a Part of the Cargo insured, which accordingly he did in his own Name, and then indorsed upon the Back of the Policy, that it was in Trust for the Person, that gave him this Authority. Yet notwithstanding this he brought his Action upon the Policy generally, without setting forth any particular Manner in which he had a Right to bring it. And this whole Matter being discovered upon the Evidence the Common Serjeant said, he hoped the Plaintiff could not recover. For such a general Way of declaring would be a Means of letting in Fraud, if so remote a Matter as this might be allowed in Evidence. Yet he did admit, that Point of this very Sort fell out upon a Trial before the Lord Chief Justice Eyre, and that was reserved to be spoke to at his Lordship's Chamber, and he was of Counsel in it, but it was over-ruled. The Chief Justice now said, that he had a great Regard for that Opinion; but otherwise he should have thought there had been a good Deal in the Exception; yet as it had been over-ruled so lately, he allowed the Evidence now. And accordingly a Verdict was given for the Plaintiff.

The King *and* Clerk.

What shall be said to be a Libel.

THIS was an Information, tried before the Chief Justice at the Sittings in London, which charged the Defendant with Printing and Publishing an infamous Libel, call'd Mist's Weekly Journal, wherein the King's Title to the Crown was openly struck at, his Legitimacy called in Question, and the Persons of several of the Royal Family scandalously traduced under borrowed Names; by representing the late King under the Name of Merewits, his present Majesty under that of Esreff, the Queen under that of Sultana; and at the same Time drawing a beautiful Character of the Pretender by the Name of the young Sophi, and setting forth the Tyranny and Subjection all Englishmen lay under, by representing us under the Name of the Persians. The Charge against the Defendant was for maliciously and traiterously printing off one of these Papers in particular; but the Evidence produced was, that he acted merely as a Servant to the Printer, and his Business was only to clap down the Press; and few or no Circumstances were offered of his knowing the Import of the Paper, or being conscious of doing any Thing illegal. Upon which Serjeant Hawkins took two Exceptions

tions in his Argument for the Defendant; one, that this Paper ought by no Means to be thought a Libel upon the Royal Family; because the Characters that are here drawn, are by no Means agreeable to the Persons supposed to be represented; but if any Thing relating to them intirely opposite to what each are known to deserve; the other, that the Evidence against the Defendant by no Means comes up to the Charge; for the Fact is charged to be attended with a malicious and traiterous Design, whereas nothing comes out upon the Proof, but that it was done thro' Ignorance, and in Obedience to his Master's Authority. But the Attorney General answered to the first of these Objections, that it lies upon the Counsel for the King only to shew, that this Construction, which they've put upon the Paper, is such, as the Generality of Readers must take it in according to the obvious and natural Sense of it; and if upon the Hearing of the Paper read the Jury are of that Opinion, they are bound in their Consciences to find the Defendant guilty. And to the other the Sollicitor General observed, that if they could have given Evidence of express Malice, this Fact would have been Treason within the Statute of 6 Ann. cap. 7. but as it is, the Charge is only for printing and publishing a seditious Libel, and consequently the Circumstances of Malice are intirely immaterial. The Chief Justice accordingly agreed the Law to be so, and said, that in Dr. Brown's Case even Irony was held to be a Libel. So the Jury found the Defendant guilty.

The King *and* Knell.

THIS was an Information of the same Sort with the former. The Evidence against the Defendant was, that there were two Servants of Mr. Mist, whose Business it was to put the Letters in Order for Readiness to print them off, that the Defendant was one of them, and that this Work was called Composing for the Press. The Defendant and the other accordingly composed together the Printing off this Piece of Persian History, and one took one Column of it downwards, and the other, the other of it. Upon this Evidence Serjeant Hawkins objected, that whatever Interpretation the Whole of this Paper might receive taken together, yet taken separately according to the Shares, which these two Persons had in it, the Part, which the Defendant composed, can by no Means receive such a Construction, and therefore he necessarily must be acquitted. Mr. Kettleby too took another Objection, that the Defendant was charged, quod libellum impressit & publicavit & imprimi & publicari causavit, whereas by the Evidence on the Part of the Crown it appears, that Composing is only previously necessary to the pressing off, and consequently as the Defendant is only proved to have composed, he cannot be found guilty of pressing off, which according to the general Notion of the Word carries with it the same Idea as Printing. And therefore, he said, the Information had not charged the Defendant with a proper Fact. The Counsel for the Defendant objected farther, that no Evidence was offered of a Publication of

Against what Person an Information may be brought for a Libel.

this Libel, and therefore clearly as to that Part he ought to be acquitted. And besides they said, the Information charges two Offences in distinct and separate Parts of it; one of printing this particular Libel set out in hæc verba; the other of printing a Libel generally; and therefore as to the last Charge, as no Evidence was given of two Offences, the Jury ought at least to acquit the Defendant. To the first Objection the Attorney answered, that this pretended History was a Thing intire, one Part had a Dependance upon the other, and therefore he that is guilty of any one Part, must be guilty of the Whole. To the second, he said, he would agree, that if this was a Civil Suit, an Action brought against the Defendant for Printing without Authority to the Damage of a particular Person, the Evidence given here would not make the Defendant answerable; for he would have appeared to have acted merely as a Servant; and therefore as he had assisted in one Branch only of Printing and not in the Whole, he could not be subject to such an Action. But the present Case, he said, was in a Matter of a criminal Nature, where an Accessory in Part is principal in the Whole; and therefore as the Defendant assisted in the Composing, which was a Circumstance essentially necessary to their being any Printing, he by that Act evidently made himself concerned in the Whole. Besides he said too, composing was taking a Copy of a Libel in Types and Figures, and that would make the Defendant a Publisher; for it has often been determined, that the taking of a Copy of a Libel was an Act of Publication. And this, he said, gave an Answer to the third Objection. And to the last he observed, that laying Informations in this Way was begun in the Lord Chief Justice Holt's Time, and it was done out of Caution for fear they should not succeed in the particular laying of the Fact. The Chief Justice agreed with the Attorney in all but the Act of Publication; but he thought that was merely a Circumstance of Printing; and accordingly directed the Jury to acquit the Defendant as to the Publication; but if they believed the Evidence, to find him guilty of the Printing; and the Jury did so.

The King *and* Nutt.

Against what Person an Information cannot be brought for a Libel.

THE Defendant was indicted likewise for being another of these Publishers of this treasonable Libel. But the Evidence against her was only, that she kept a Pamphlet-Shop, and that there the Libel was sold; but no Evidence was offered to prove her knowing of its being bought in or sold out; nay she proved, that her House where she lived was a Mile from off the Shop, and that she had been bed-riden there for a long Time; so that the Presumption was on the other Hand, that she really knew nothing of it. Upon which Mr. Kettleby said, he hoped upon this Evidence the Defendant must be acquitted; for though indeed the Act of a Servant may charge a Mistress in a Civil Suit, yet it was by no Means reasonable it should charge her in a criminal Prosecution. He observed too, that that Rule could certainly not hold in all Cases, that all those, through whose

Hands a Libel goes, are Publiſhers of it, if they do not diſcover it; for a Poſt-Boy that carries a Libel in the common Packet, can certainly not be puniſhable, as aſſiſting to the Crime. The Chief Juſtice ſaid, that the Caſe of the Poſt-boy was not at preſent in Queſtion, and therefore there was no occaſion to ſay any Thing to it. But he obſerved, that if a Servant carries a Libel for his Maſter, he certainly is anſwerable for what he does, though he cannot ſo much as write or read. But however the preſent Caſe, the Chief Juſtice ſaid has been expreſly determined, that the Maſter of a Shop is anſwerable for whatever Books are ſold there. However the Jury thought it a hard Caſe; and therefore refuſed to do any Thing elſe, than find the Circumſtances ſpecially, that were given in Evidence before them. But the Attorney General ſaid, that theſe Circumſtances were only Matters proper to induce the Jury to find the Defendant guilty of a Publication, and not ſuitable to a Special Verdict; for they are only Evidences of a Fact. And therefore he propoſed to the Jury, that they ſhould give a general Verdict, and that the Defendant's Counſel ſhould make a Bill of Exceptions to the Directions the Court gave to find the Defendant guilty. But Mr. Kettleby ſaid, that it has been doubted upon theſe Words in the Statute of Weſtminſter, proponat billam Exceptionis, whether The King is within the Benefit of the Act, it being unworthy of him to propoſe a Bill; but at leaſt he ſaid, it was not ſo proper a Method as the other. But the Court ſaid, that though this has been doubted, yet in Misdemeanors it has been allowed, and is frequent in the Exchequer upon Penal Statutes. But however the Jury were unwilling to do any Thing more, than what they had declared before; and therefore, as it was ſomething of a hard Caſe too upon the Defendant, the Attorney General conſented to withdraw a Juror. Lev. 68.

Term Paſch. 2 Geo. II. 1729.

How far Liberty ſhall not be given to bring Money into Court, but upon pleading the General Iſſue.

Anonymus.

C. B. SErjeant Beyfield moved to bring Money into Court, and that they might plead Non Aſſumpſit infra ſex annos. But the Court ſaid, that they never allow theſe Motions, but upon pleading the General Iſſue.

Berry *and* Burk.

When Debt is brought upon a Judgment pending a Writ of Error, upon what Terms the Court will ſtay Proceedings in ſuch Action.

C. B. SErjeant Baynes moved, that the Court would make a Rule for ſtaying Execution after Judgment ſhould be had in an Action of Debt, that was brought upon a Judgment of this Court pending a Writ of Error. But the Court ſaid, that the old Way in theſe Caſes was to give an Imparlance; but in the Caſe of Jackſon and Ducket, Hill. 13 Geo. 1. the Court conſidered upon this Matter, and thought the beſt Way was, to have the Defendant give Judgment in the ſecond Action; and accordingly the Counſel agreed to do ſo, and upon that the Court ordered the Execution to be ſtaid. 2 Ven. 261.

Griffith *and* Bernley and his Wife.

How far the Court will not diſcharge a Wife out of Execution.

C. B. IN an Action againſt the Defendants upon a Contract of the Wife dum Sola, the Bail ſurrendered them in Diſcharge of themſelves. Upon which Serjeant Cummins moved, that the Wife might be diſcharged. And cited 1 Lev. 217. where upon mean Proceſs ſuch Motion was allowed. To the ſame Purpoſe he applied a Caſe in 51 of the ſame Book, where an Execution was taken againſt Baron and Feme by Colluſion of the Huſband, and there the Wife was diſcharg'd. So upon an Outlawry againſt Huſband and Wife, if ſhe is taken, ſhe ſhall be releaſed out of Cuſtody. But the Court ſaid, theſe were Caſes of Fraud and mean Proceſs, and in them it is ſo; but they ſeemed to think in Caſe of an Execution it might be otherwiſe; and ſo here upon a Surrender, becauſe the Words of the Recogniſance are, that if Judgment be given againſt the Defendants, they ſhall be ſurrendered. But however this Matter was ordered to ſtand over to another Day.

Hawkes *and* Trisbey.

C. B. SErjeant Belfield moved to ſet aſide a Non pros ſigned before the Eſſoin-Day of Mich. Term, whereas the Writ was returnable only in Eaſter Term. The Chief Juſtice told him, he ſuppoſed the Defendant had given Rules to declare, and demanded a Declaration, and therefore the Non pros' was regular after the ſecond Term. And ſo he ſaid this Practice was ſettled in the Caſes of Moſes and Richardſon, Paſch. 3 Geo. 1. But he obſerv'd, that giving Rules to declare and calling for a Declaration, are as neceſſary in ſigning Non pros in this Court, as giving Rules to plead; and calling for a Plea is neceſſary to aſſigning Judgment for want of Plea in the King's-Bench.

How far a Non pros' ſhall be ſaid to be regular.

Baker *and* Johnſon.

C. B. IN Replevins the Defendant avowed for Damage-feaſant, the Plaintiff replied a Tender of Amends after the Taking. And now Serjeant Chappel moved in Arreſt of Judgment, for the Tender's not being pleaded to before the Impounding. He ſaid this is determined to be bad upon a General Demurrer in Lutwych 1596. And therefore he thought it might be taken Advantage of as well in this Way. The Chief Juſtice ſaid, that Caſe was certainly Law, and Pilkington's Caſe, 5 Coke, is to this Purpoſe; but he obſerved, that the Defendant had joined Iſſue upon the Sufficiency of Amends; and by that Means had waived all Advantage as to the Irregularity of the Tender. But he owned, that if this Action had been in Treſpaſs, it would have been otherwiſe, even upon a General Demurrer; for the Statute of James 1. ſays in general, that a Tender of Amends may be well pleaded in Treſpaſs before the Action brought.

When a Tender of Amends is pleaded in Bar to an Avowry for Damage-feaſant, how far a Defect in ſuch Plea cannot be taken Advantage of, on a Motion in Arreſt of Judgment.

Flowers *and* his Wife againſt Goſs.

C. B. SErjeant Eyres moved to ſet aſide a Plea, becauſe it only anſwered Part of the Declaration, and ſaid nothing to the other Part. Which the Court accordingly did; for they ſaid, if the Plaintiff ſhould join Iſſue upon it, it would be a Diſcontinuance in him; and they would not allow a Defendant to ſhuffle off a Term or two in this Way by a Demurrer. And after this the ſame Counſel moved to amend his Declaration without paying Coſts, as there was at this Time no Plea, and ſo they made a Rule to ſhew Cauſe.

How far the Court will ſet aſide a Plea upon Motion.

Lady Mary Herbert and Lady Karrington, *ver.* Kentilion and More.

How far a Court of Equity will put off a Trial's being had on Affidavits being laid before them that ſome of the Parties to the Suit were married.

Scac. THE Plaintiffs had preferred a Bill for the getting up two Notes of very large Sums, which they had given the Defendants, upon a Suggeſtion, that the whole that was due upon them had been paid. The Cauſe had proceeded ſo far, that Iſſue was joined upon that Fact, and a Trial ready to be had at the Bar. The Defendants came now and laid before the Court ſeveral Affidavits to induce them to believe, that Lady Mary Herbert was married to Mr. Gage at the Time of the Bill preferred, and that Lady Karrington was then married to Mr. Mackenſy; ſo that all that had been done in the Cauſe already was entirely void; and therefore their Counſel hoped that the Court would not let the Plaintiffs proceed at preſent any farther, till this Matter could be examined into fully upon Interrogatories. The Queſtion now was, whether the Court ſhould ſtay the Trial upon ſuch an Application. The Chief Baron ſaid his Opinion was, that it might be a Thing of dangerous Conſequence to allow of a Motion of this Nature, merely upon Affidavits; but that this Matter ought to have been ſuggeſted upon the Roll, or at leaſt a Bill ought to have been filed, ſetting forth this Matter in a full and proper Manner. This he objected to the Method of this Application. But then he ſaid farther, that he thought it unneceſſary to be made at all, as the Circumſtances of this Caſe have been. For the Gentlemen, who are ſaid now to have been privately married to theſe Ladies, have appeared all along in the Cauſe aſſiſting them in it; ſo that tho' there was nothing farther, he thought a Court of Equity would hardly allow them at any Time afterwards to come and tell the Court, they have been giving Judgment in a Cauſe to no Purpoſe. But he ſaid upon theſe Affidavits Rules have been made upon them, to give an Anſwer to what is alledged in them, and they have given us no Anſwer as to the Fact, only told us with theſe Ladies, that this is not a proper Foundation to ſtay the Trial upon. So that he ſaid, he was of Opinion, the Defendants might go on very ſecurely. But Baron Carter and Baron Cummins ſaid, that they were of Opinion, that the Trial might be ſtaid upon Affidavits of this Nature properly enough; for they believed upon what had been laid before them, that the Ladies were married; and the putting this Point to be determined upon Interrogatories, might likely end the Suit ſooner, than the Method in which the Cauſe was in already. Accordingly a Rule was made for putting off the Trial, upon the Defendants conſenting that the Teſtimony of the Witneſſes, which the Plaintiffs had ſent for from France, might be taken before a Judge, and Payment of Coſts. 1 Ver. 57.

Anonymus.

Scac. THE Defendant was ſued as Adminiſtrator Durante minore ætate. And on Rule to ſhew Cauſe, the Court allowed him to Plead four Pleas to the ſame Matter; non Aſſumpſit, non Aſſumpſit infra ſex Annos, plene adminiſtravit, & quod Infans ultra annos ſeptem decim natus fuit.

How far the Court will allow a Defendant to plead four Pleas.

Anonymus.

MR. Huſſey moved to change the Venue in an Aſſumpſit which he ſaid the Plaintiff, who was an Attorney, had laid in London, upon an Affidavit that the Cauſe of Action, if any, aroſe in Devon. But the Court ſaid, that an Attorney has a Right to lay the Cauſe of Action in Middleſex, and therefore they obſerved, it was neceſſary in theſe Motions, that it ſhould appear the Venue was not laid there. Upon which Mr. Huſſey produced a Copy of the Declaration, by which, he ſaid, it appeared the Venue was laid in London. But the Court ſaid, that an Affidavit ought to be annexed to it, by which it may appear it was a true Copy; for they ſaid indeed, in common Caſes they allow Venues to be changed, let the Cauſe of Action be lain any where, and therefore do not require any Affidavit that the Venue was not laid in a particular County; yet in the Caſe of an Attorney, as he has a Right to lay the Action in Middleſex, they muſt.

How far an Affidavit is neceſſary to be produced on a Motion to change a Venue.

Ux *and* Haid.

Canc. THIS was a Bill brought to eſtabliſh a Modus. The Cuſtom ſet out was, that all the Occupiers of Land, inhabiting in ſuch a Pariſh, have Time out of Mind been diſcharged of paying Tithes for the Herbage of all barren and unprofitable Cattle due to the Vicar, by making into Hay all the Tithe-Grals due to the Rector. The Sollicitor-General and Mr. Wills were of Counſel for the Defendant. They ſaid that the Modus has been by no Means proved; for the Witneſſes have only ſworn, that the Pariſhioners have always made the Tithe-Grals into Hay, and that they have been diſcharged of paying Tithe of Herbage for Time immemorial; but they have no where ſaid, that they have been diſcharged of this for that Reaſon. So that they ſaid, as it ſtands here, it is a mere Non decimando. But beſides they obſerved, that the Witneſſes of their Side ſwear, that the Outliers have paid Tithe of Hay Time out of Mind, as well as the Inhabitants; but yet it is not pretended, that the Outliers are diſcharged of the Tithe of Herbage; by which it is plain, that the Reaſon ſuggeſted cannot be the Reaſon. They went on farther and ſaid, that the Modus too is void in itſelf; for every Modus muſt increaſe in Value, in Proportion as that Thing does, which it is to be a Diſcharge of.

How far a Modus ſhall not be good by Reaſon of its amounting to Non Decimando.

When a Bill is brought to eſtabliſh a Modus, how far the Court will refuſe to do it, by Reaſon that the Modus, which is proved by the Evidence, materially differs from that which is ſet forth by the Bill.

of. Therefore they ſaid, it has been determined lately in the Exchequer, that if a Modus is in a Pariſh, that the Pariſhioners ſhall pay ſuch a Sum of Money in certain for all Apples growing in their Orchards, and they make new Orchards, the Modus ſhall not indeed extend to them. But if the Modus was to pay ſo many Buſhels out of every Orchard, and new Orchards are made, the Court of Exchequer allowed, that the Modus ſhould extend to the new ones. Whereas according to the Doctrine in the preſent Caſe, let the Herbage increaſe ever ſo much, the Modus muſt continue as it was at firſt. And beſides they ſaid, this may give Occaſion to much Fraud; for not only tho' the Herbage ſhould much increaſe, but if there ſhould be a Contrivance in the Pariſh, that the Tithe-Grals ſhould much decreaſe, the Vicar muſt ſtill be contented with what is left him. They ſaid too, that this was more hard upon the Vicar, becauſe he receives no Benefit by the Modus. And beſides it is a known Thing all over England, that in Fact Tithe-Hay is always paid without any Conſideration, tho' perhaps in ſtrict Law, Tithe-Grals is what is only demandable. Lord Chancellor then made his Decree, and ſaid, that the Vicar's receiving no Benefit by this Modus, did not any Ways influence him; becauſe the Vicarage is derived out of the Rectory; and therefore if the Rector would gain by it, it is the ſame Thing. But however, he ſaid, he thought the Rector would not, and that it was a mere Non decimando. And beſides, he ſaid, the Modus is clearly not maintained by the Witneſſes for the Objection, that has been firſt made to it. Accordingly diſmiſſed the Bill. Salk. 554.

In the Argument of this Caſe Mr. Wills ſaid, he would not lay it down for Law, that Tithes of Hay are demandable of common Right; but he obſerved, that there was ſome colourable Proof that it was, in that the Decima Garbarum & Fœni, and not the Decima Graminis, is conſtantly demanded in all the old Records. But Lord Chancellor ſaid, that it was determined in one Reynell's Caſe in King James 1. Time, which was a Devonſhire Caſe, that only Tithe-Grals is due of common Right.

Ayneſworth *and* Wood

When an Action is brought againſt a Man for ſeducing an Apprentice, what ſhall be good Evidence to ſupport ſuch Action.

Sittings at Guildhall. THE Declaration charged the Defendant quod Apprenticiarium Querentis retinuit & eundem negotiatus fuit, knowing that he had Run away from his Maſter; by which Means the Apprentice was encouraged to keep from him. But the Chief Juſtice ſaid, he did not think ſuch an Action would lie; but the proper Remedy was by Way of Action for ſo much Money paid to the Plaintiff's Apprentice, in Wrong to the Plaintiff. Upon looking farther then into the Declaration it appeared, that it charged the Defendant quod detinuit & cuſtodivit the Apprentice. Now the Evidence produced was, that the Defendant frequently ſent Work to him; and tho' this was not an actual Detainer and keeping, yet the Influence of Gain was ſuch upon the Apprentice, that the Counſel ſaid, it amounted to a Detainer in Law. They ſaid it was like unreaſonable Threats

and Fears put upon an Apprentice, the Effect and Conſequence is a Detainer from the Maſter; and therefore they did not ſee, why ſuch an Action would not lie. The Chief Juſtice ſaid, in the Caſe put, a ſpecial Action upon the Caſe would only lie, and in the preſent Caſe the Action mentioned before; ſo the Plaintiff was nonſuited. 2 Lev. 63.

Clay *verſ.* Simpſon and Wood.

The Duchy Chamber. MR. Lee informed the Court, that Queen Dowager Katherine, in 1704. by Letters Patent under the Duchy Seal, granted to the Defendant Simpſon, the Stewardſhip of the Honour of Pomfret in Yorkſhire, for Thirty-five Years; that the Plaintiff has obtained a Grant of this ſame Office by Letters Patent, dated in December laſt, ſo that there is a Diſpute between the two Patentees about the Right to this Office; he ſaid, that this was a Cauſe wherein the King's Revenue was concerned, and therefore he moved the Court, that they would make an Order upon Wood, who is Simpſon's Deputy, to bring into Court all Books and Papers belonging to this Office, to the End, that the Court might appoint a Perſon proper to exerciſe the Office during the Suit, in Order that the Revenue may be ſecured. He ſaid, there were Precedents to be produced, where this Court had proceeded in this Manner upon Motion and giving Notice, as they have now done, tho' no Cauſe has been depending at the Time, no more than in the preſent Caſe. To this Purpoſe a Precedent was read, Term. Mich. 1697. Kingſton and Aſhton. The Defendant there claimed a Grant of a Stewardſhip of one of the King's Manors, under Lord Molineux, who pretended to have had a Grant by Letters Patent of it in Fee. But not being able to produce them, the Court made a Rule upon him to bring the Books and Rolls into Court, and that the Plaintiff ſhould be put into Poſſeſſion who had Letters Patent, which he produced of the Office; and for the Defendant's not obeying this Order, the Court granted an Attachment. Some other Precedents were produced to the ſame Purpoſe. The Chief Baron and Mr. Baron Cummins were the Judges, Aſſiſtants to the Court; and they ſaid, that theſe were Precedents of the Courts having made Rules of this Sort, where it appeared, that the Perſon in Poſſeſſion of the Office had not the Right; ſo poſſibly if great Doubt had been ſhewn to the Court in the preſent Caſe, which of the two Perſons had the Right, they might have proceeded in the like ſummary Way; and for the ſecuring of the Revenue, the Court of Exchequer acts ſomething in the ſame Way; but in the preſent Caſe there does not appear any Reaſon to the Court to think, that the Defendant has not the Right as well as the Poſſeſſion; for the ſecond Letters Patent might have been granted tho' Miſinformation. And therefore the Court did nothing upon the Motion.

When a Right to an Office which relates to the Revenue is in Queſtion, how far the Court will not make an Order for producing the Books relating to that Office.

The King *and* Longbotom and Petteris.

What shall be said to be a good Indictment for Subornation of Perjury.

How far different Offences cannot be joined in one Indictment.

Vide post

MR. Strange moved to quash an Indictment of Subornation of Perjury at the Suit of the Prosecutor. One of the Exceptions to it was, that it charged the Defendants & utrumque eorum with suborning four Witnesses & utrumque eorum to give Evidence against one Hayes and his Brother upon an Indictment of Forgery. He said, these were several Charges of several Offences, and yet contained in one Indictment. Accordingly he cited the Case of Giles and Gwyn and others, where an Indictment was held bad for this very Reason. It charged the Defendants there & utrumque eorum with exercising a Trade and not having served an Apprenticeship. He observed too, there was another Exception to this Indictment for its charging the Witnesses with swearing falsly that Hayes and his Brother were guilty of the Forgery, which is too general. Accordingly the Court made a Rule to shew Cause.

Flaningant *and* Adey.

When Debt is brought against Bail what is the Course of Proceeding in such Action.

C. B. IN Debt against Bail the Court said the Writ must lie in the Office four Days, as well as where the Proceedings are by Scire facias. So they observed too, must the Capias against the Principal in order to charge the Bail. And this was agreed to be the Practice of the King's Bench as well as of this Court. But however the Court said, this was only an Indulgence given by the Practice of the Court, and not by the Law; for the Condition of the Recognisance requires the Defendant to pay the Condemnation Money or else to surrender his Body; now the Surrender of his Body is understood upon the Return of the Capias, and therefore he ought to do it then at all Events. This is the Reason too, they observed, why a Surrender after cannot be pleaded by the Bail, though it be before the Process against them. But by the Practice of the Court, they will stay the Proceedings against Bail, if the Surrender be before the Return of the second Scire Facias. 1 Ven. 262. Salk. 599, 602.

Anonymus.

How far the Court will not direct that Service upon the Clerk in Court shall be good Service.

Canc. ONE Mr. Maynard was made Defendant in an Original Cause in this Court; and upon one of the Defendant's dying, the Cause was forced to be revived. Upon an Affidavit now that Mr. Maynard was gone into Ireland, Mr. Lutwyche moved, that Service of a Subpœna upon his Clerk in Court might be good Service upon him to make him appear to this Bill of Revivor. And he said he remembred a like Motion was made in the Case of George Hunter, who went over to Barbadoes. Lord Chancellor said, as that was so far

of it might be proper in that Caſe, but refuſed to do it here till Affidavit firſt made of Endeavours to ſerve him there.

Howard *ver.* Newman and Wood.

Sittings at Guild-hall. THE Mother of one Hicks employed the Plaintiff, who was an Attorney, to take out a Commiſſion of Bankruptcy againſt her Son, ſhe being a Principal Creditor to him; and this was done out of Affection to her Son, in order to ſet him up a clear Man in the World again. But at the ſame Time that ſhe gave theſe Inſtructions to the Plaintiff, ſhe told him, he muſt not expect to be paid by her, but muſt be ſatisfied out of the Effects of the Bankrupt. The Attorney accordingly laid out ſeveral Sums of Money in procuring this Commiſſion before Aſſignees could be appointed, and when they were nominated, and had agreed to take upon them this Truſt by ſetting their Hands as Parties to the Deed, he was at other Charges too. Upon which he now brought his Action againſt the Defendants as Aſſignees to be ſatisfied for the Whole which he had laid out. It appearing now upon the Face of the Evidence as it ſtood at preſent, that the Aſſignees had not received Effects enough of the Bankrupt in the Whole to anſwer ſo much as the Bill of the Attorney, nor were likely to do ſo; a Doubt aroſe, whether the Attorney ſhould come upon the Aſſignees at all; or at moſt for any more than the Attorney had laid out after they had accepted the Aſſignment; for they could not be ſuppoſed to agree to any more than they themſelves were privy to. But the Counſel obſerved, that as the Effects of the Bankrupt are not likely to anſwer this Demand; and as the taking out of the Commiſſion by the Mother was not in an Adverſary way to get in her Debt, but out of Friendſhip and Affection to her Son, to the Prejudice perhaps of many of the Creditors, ſhe ought to be anſwerable to the Attorney. The Fact appearing thus, the Chief Juſtice ſaid, it was true indeed the Attorney ought to be ſatisfied firſt for procuring the Commiſſion; but yet he thought too that would be ſomething of a hard Caſe that the Aſſignees ſhould be any farther liable than the Effects amounted to. But then it coming out upon farther Examination, that the Effects were appraiſed to more than the Bill came to, though the Aſſignees have not got them into their actual Poſſeſſion, the Court ſaid, the Plaintiff's Demand was clearly good againſt them; becauſe they had a right to get them where-ever they can find them. But yet there was another Point upon which the Chief Juſtice ſaid he thought the Plaintiff muſt be nonſuited; becauſe the Statute of 3 Jac. 1. requires that every Attorney ſhall deliver a Bill ſigned with his own Hand, before he commences a Suit for Fees; now in the preſent Caſe it appeared, that the Warrant of Arreſt was made out before a Tender of a Bill; for the Bailiff firſt ſhewed the Defendants the Bill and demanded the Money, and upon refuſal immediately arreſted them. Now the Chief Juſtice ſaid, he was of Opinion the Suit began by taking out the

When an Attorney ſues out a Commiſſion of Bankruptcy, againſt whom he muſt take his Remedy to recover the Expences of ſuing out the Commiſſion.

the firſt Proceſs, which muſt be intended to be before the Warrant made out; and therefore the Tender after was void. And this Opinion the Chief Juſtice was of, notwithſtanding two Objections made by the Counſel; one that a Taking out a Commiſſion was not a Suit within the Act; the other, that a Court ought not to go out of the Record for the Commencment of the Suit; and upon the Face of the Record, the Suit appears to be of Michaelmas Term laſt, and the Tender of the Bill was the 17th of October. So upon the the Whole of this Matter the Parties agreed the Plaintiff ſhould have the whole Bill paid him without Coſts. 1 Ven. 135, 370. 2 Ven. 174. 6 Mod. 309.

How far an Attorney is bound to deliver in his Bill before he commences his Action.

Note, The Caſe of Godfrey and Clerk was cited to be determined upon full Debate in the Common Pleas, that the Attorney muſt deliver in his Bill before he begins his Suit, though before that it was a common Thing for an Attorney to deliver in his Bill at the Time pending the Suit. 1 Salk. 86.

King *and* Hammerton,

The Conſtruction of Submiſſion to Arbitration.

Sittings at Guild-Hall. IN Debt upon Bond with Condition for Performance of an Award, the Submiſſion appeared to be of all Matters in Difference to certain Arbitrators. The Chief Juſtice ſaid, that the Arbitrators were bound to make their Award upon all Matters between the Parties, which had been laid before them, though there was not the general Concluſion of it Ita quod fiat de omnibus præmiſſis. And the Arbitrators having overlooked ſome Matters that were laid before them in the preſent Caſe, the Jury accordingly gave a Verdict for the Defendant, and found, that the Award was void.

Dicks *and* Sidney.

When an Action is brought for Goods ſold and delivered, what ſhall be good Evidence to ſupport ſuch Action.

Sittings at Guild-Hall. THIS was an Action brought for Goods ſold and delivered. The Evidence on the Part of the Plaintiff was, that he ſent down certain Parcels of Goods to the Defendant, who was a Country Trader, by the Carrier; that the Defendant took in one of the Parcels, but refuſed to take the other; and upon that the Carrier was forced to bring them back again, and not knowing who brought them to the Ware-houſe, the Goods lay there till this Time. And the Defendant gave no Notice of this Refuſal to the Plaintiff. The Doubt now was, whether the Acceptance of Part, without giving Notice of the Refuſal of the other Part ſhould be taken for Evidence that the Defendant gave an Order for the Whole, till the Defendant ſhould give Evidence to the Contrary. Some of the Jury informed the Court, this was their Notion in Trade that it did ſo; and the Chief Juſtice likewiſe thought it was reaſonable. Upon which the Jury gave a Verdict for the Plaintiff.

Paxton *and* Sharpe.

Sittings at Guild-Hall. IN an Action for Words the Plaintiff laid in his Declaration, that there was a certain Diſcourſe between the Defendant and ſome others of one Jenkins's breaking, and upon that the Defendant ſaid of the Plaintiff, he will be the next. Evidence was now given, that by Means of theſe Words, the Plaintiff had ſeveral of his Creditors immediately upon him to demand their Debts; and that he had ſuffered much in his Trade by this Report. Upon which one of the Counſel objected, that as there was no ſpecial Damage laid in the Declaration, this Evidence ought not to be admitted. But the Court ſaid, that a Man's having his Creditors come upon him, and his ſuffering in his Trade, are only the natural Conſequences of a Report of this Nature, and therefore may be well allowed for Evidence in this Action. But then another Objection was made, that the ſubſtantial Part of the Words was not literally proved; and the Common Serjeant obſerved, that though indeed in the Matters of Aggravation, which the Words are laid to be attended with, the Courts had not of late gone ſo far as to keep the Plaintiff up to the Letter of his Declaration; yet he never knew, but in the ſubſtantial Part they had. Now in the preſent Caſe he obſerved, that the Declaration had laid the Colloquium to be of Jenkins's breaking, and the Words thereupon were, that the Plaintiff would be the next in a little Time; which was directly affirming that the Plaintiff would break in a little Time; now he obſerved, that the Evidence only was, that Jenkins was ſerved with an Execution, and upon that the Diſcourſe was, that he was gone off; and thereupon the Defendant ſaid the Plaintiff would be the next; which is, that he would go off next. Now he ſaid a going off or abſconding was properly only what would ſubject a Man to a Statute of Bankruptcy, and not make him a real one; for in order to that a Statute muſt really be taken out. The Chief Juſtice accordingly ſaid, that he thought too the Words were not ſufficiently proved; and upon that the Plaintiff was nonſuited. Salk. 661. Skin. 333.

When an Action is brought for Words, what ſhall not be ſaid to be good Evidence to ſupport ſuch Action.

Term. Trin.

2 Geo. II. 1729.

Pit *and* Lady Claverinth.

How far a Waggon-way ſhall not be ſaid to be reſerved.

Canc. ONE Wray was ſeiſed of a Manor in the North, in which there was a great Waſte called Tanfield-Moor, and ſold it about Thirty Years ago, reſerving to himſelf and his Heirs a convenient Way-Leave, ſuch as he and his Heirs ſhould think proper, for the Carriage of Coals thro' this Waſte, from certain Coal-Works of his to the River Tyne. There was an Invention found out about Twenty Years before, which was uſed pretty much in the North at the Time this Manor was ſold, of making Waggon-ways for the more eaſy Carriage of Coals, which was done by levelling Ground from one Place to another, and then laying Planks into it, for making a more eaſy and ſhort Conveyance of it. The Defendant was Leſſee of ſome Coal-Works under the Heirs of Wray, and by Virtue of the Power in the Reſervation, ſhe made a Waggon-way for her Coals, upon which the Plaintiff preferred his Bill againſt her. The Chancellor upon hearing of the Cauſe, made a decretal Order, by which it was referred to the Barons of the Exchequer, to have their Opinion, whether a Waggon-way was within the Reſervation of a Way-Leave. Upon this Matter's coming before the Court of Exchequer, the Chief Baron declared, that he had never ſeen a Waggon-way in the North, and the reſt of the Barons owned, that tho' they had ſeen them, they had very imperfect Notions of what they were; and thereupon they ordered the Plaintiff's Counſel to move the Lord Chancellor, to give them Leave to lay before the Court of Exchequer thoſe Depoſitions they had made, explaining the Nature of a Waggon-way; for they ſaid, it was impoſſible for them to give an Opinion upon this Queſtion, till they ſhould have this Evidence before them. This Motion being now made, Lord Chancellor ſaid, that he was afraid, leſt by giving this Liberty of ſeeing what a Waggon-way was, he ſhould give the Court of Exchequer an Opportunity of ſeeing what this Waggon-way was that had been made; by which Means there might be

Danger of their determining, whether the preſent Waggon-way, made in the Manner that it was, was within the Reſervation; which he ſaid would be againſt the Deſign and Meaning of the Reference. He obſerved too, that it was far from being impracticable for them to determine this Queſtion without this Aſſiſtance; for they ought to determine it in the ſame Manner they would have done, if this Queſtion had fell out in a Cauſe depending before them. He ſaid farther, for his own Part, he thought it was far from a difficult Queſtion, whether it was leſs Prejudice to the Soil to make a Way in this Manner, than that ſuch heavy Carriages ſhould be dragged all over the Moor, ſometimes in one Part of it, ſometimes in another; and this, he ſaid, was all the Point before them. He took Notice too, that it was a Thing, which the Judges were bound to de jure to give their Opinions upon a Caſe ſent to them by this Court. Accordingly his Lordſhip would do nothing in the Motion. Afterwards the Barons gave their Opinions, that a Waggon-way was not reſerved.

Bernado *and* Duran.

Canc. AN Order of Reference had been made to one of the Maſters to ſettle what was due upon the Balance between the Plaintiff and Defendant. The Defendant gave in his Charge, and took out four Summons's to attend the Maſter, and upon the Bottom of the two laſt the Maſter had writ, that he would proceed ex parte, if the Plaintiff would not bring in his Counter-charge. The Plaintiff neglected them all; but yet the Defendant was ſo fair, as to tell the Maſter, he conſented 2000 l. ſhould be ſtruck off from the Account he brought in, as Allowances for the Counter-charge of the Plaintiff, which he made Oath was all that the Plaintiff could ſet up as a Demand againſt him; and the Maſter accordingly did allow it, and reported, that upon the Balance thus made up, there was 899 l. due to the Defendant. However Lord Chancellor ſet this Report aſide, but without Coſts; for he ſaid, the Maſter had no Authority to make this Report ex parte, till there was firſt obtained an Order from the Court to do it.

How far a Maſter in Chancery cannot make a Report ex parte till he has Leave given him by the Court to do ſo.

Drake

Drake and his Wife and Criſp *ver.* Hopkins.

When a Tender is made, who ſhall have the Benefit of it.

Scac. THE Defendant had entered into Articles of Agreement with the Anceſtor of the Plaintiffs, for the Purchaſe of an Eſtate in December, 1719. A Mortgage of 6000l. being diſcovered upon it ſoon after; the Defendant tendered him the Money with Intereſt in May 1720. which the Mortgagee did not accept till May 1724. And the Eſtate was not found to be in ſo good a Condition as was expected. Upon a Bill's being brought however in this Court for a ſpecifick Performance of the Agreement, one Queſtion fell into Debate, whether the Intereſt ſaved for the four Years by the Tender of the Money due upon the Mortgage, ſhould be for the Benefit of the Plaintiff, or for the Benefit of the Defendant. Another Queſtion was, whether the Defendant ſhould be accountable only for the mean Profits he had received from the Time of the Tender, or for Intereſt of 5 per Cent. for the Purchaſe-Money from that Time. The Barons were of Opinion upon the firſt Queſtion, that he ought to have the Benefit of the Act who did it; and to the ſecond, they thought he could not be accountable for the mean Profits, for that would be contradictory to the Decreeing him a Purchaſer from the Time of the Tender; and from that Time he ought to be conſidered ſo in Equity; for he actually made Leaſes of the Land after that, and received the Profits; but they thought the natural Method of charging the Defendant, was to make him account for 5 per Cent. which was the common Intereſt of Money for moſt of the Time.

Wilſon *and* Charleſworth.

How far the Court will order a Vacatur to be enter'd upon a Judgment.

THE Plaintiff had recovered in an Aſſumpſit 12l. 10s. for Damages, 40s. for Coſts, and 13l. 10s. more by Way of incrementum, which in the whole amounted to 28l. The Plaintiff afterwards intended to take out Execution, but to her Surpriſe found, that Satisfaction had been entred upon Record upon a Warrant of Attorney under her own Hand. Upon this ſhe applied to the Court for a Rule upon the Defendant, whom the Warrant of Attorney was ſuppoſed to have been given to, and likewiſe upon two others who were ſubſcribed Witneſſes to it, to attend; which accordingly they did. They each of them made expreſs Affidavits, that they ſaw the Plaintiff ſubſcribe her Name to it, and ſeal and deliver it as her Act and Deed. But upon Examination of them ſeparately viva voce, they contradicted themſelves in ſeveral material Circumſtances; and the Court was ſatisfied they were concerned in forging this Authority, and in conſpiring together to defraud the Plaintiff of her Judgment. Upon which Mr. Kettleby prayed, that a Vacatur might be entered upon Record, that the Defendant and theſe pretended Witneſſes might be committed upon the Plaintiff's entering into a Recogniſance to proſecute them; and that the Warrant of At-

torney might be depoſited into the Hands of the Officer to be an Evidence againſt them upon the Trial. The Court ſaid, that ſince the Plaintiff has offered to be bound in ſuch a Recogniſance, they had now no ſcruple with themſelves about committing the Defendant and his Witneſſes. Accordingly upon the Plaintiff's entring into ſuch a Recogniſance, the Court ordered a Tipſtaff to take them; inſtantly vacated the Entry of Satisfaction with Coſts, and ordered the Warrant of Attorney to be delivered into their Officers Hands. Beſides the Court obſerved, that if there was not much Reaſon to ſuſpect a Fraud of this Sort, they ſhould have thought the Judgment ought to be vacated for another Reaſon; becauſe the Warrant of Attorney was to enter up Satisfaction in a Judgment of 12 l. 10 s. whereas there really was no ſuch Judgment; for in the Whole the Judgment was for 28 l.

Wynn *and* ——

What ſhall not be ſaid to be ſuch a Proceeding by Special Latitat as to hinder the Defendant from having an Imparlance.

THE Plaintiff took out a ſpecial Latitat in January laſt, but did not file his Declaration till within four Days before the End of Eaſter Term. Upon which the Counſel moved for an Imparlance, as the Plaintiff had not made uſe of his ſpecial Latitat as he ought, but delivered his Declaration of a ſubſequent Term; and by that Means the Latitat was to be conſidered as a common one. The Court accordingly made a Rule to ſhew Cauſe.

Roberts and others *ver.* Munford.

How far a Defendant ſhall be intitled to an Imparlance.

MR. Reeves came now to ſhew Cauſe. But Serjeant Eyres making it appear, that one of the Counts was for ſo much Money, which the Teſtator engaged to pay for certain Goods that had been delivered to a Stranger, if the Stranger himſelf ſhould not pay for them, the Court ſaid that was merely a Promiſe coming in Aid of the Credit of the other, and therefore was to be conſidered as a Promiſe upon the Stranger's Account, and not a Duty of the Teſtator's own; and therefore it could not be included within the Meaning of the Ac etiam; and accordingly granted an Imparlance.

Brown *and* Hatch.

When an Action is brought upon a Special Agreement, how far the Evidence ſhall be ſaid to ſupport it.

Sittings at Guild-Hall. THE Plaintiff brought his Action upon a Special Agreement entred into by the Defendant, whoſe Brother was in Execution in the Fleet for Running of Goods. The Agreement given in Evidence upon the opening of the Cauſe was only verbal, that the Plaintiff ſhould endeavour to procure the Defendant's Brother a Pardon, and that in Conſideration of this the Defendant ſhould give the Plaintiff 1000 l. if he ſucceeded, and what his Labour was worth if he ſhould not. The Defendant upon this pro-

duced a Bond of 2000 l. in Evidence, with Condition that the Defendant should give the Plaintiff and one Mrs. Hattenville 1000 l. if the Pardon should be procured in six Months. This Bond indeed was since cancelled; but the Counsel said it drowned the first Agreement; and an Agreement is in its own Nature a Thing intire, and therefore it shall not be intended, that one Part of it was put into Writing, and the other not. The Plaintiff however desired to give farther Evidence that the Intent of the Bond was only to reduce one Part of the Agreement into Writing, as it was the Chief, and to bring Mrs. Hattenville to Witness this. The Defendant's Counsel objected against her Evidence as she was one of the Co-obligees, and therefore interested with the Plaintiff. However the Court allowed the Plaintiff to give both these Matters in Evidence.

Myonet *and* Broome.

How far an Attorney's Clerk may maintain an Action for Business done during his Clerkship.

Sittings in London. THIS was an Action brought by the Plaintiff for Law-charges in Business done when he was Clerk with an Attorney; but there was a Covenant in the Articles, that he should not practice during his Clerkship. Mr. Kettleby objected for the Defendant, that the Service of the Clerk must be for the Benefit of his Master; and therefore that this Action ought to have been brought by the Master only. He said, he thought this to be like another Case very well known, that whatever Money an Apprentice earns of another, that other must be accountable for it to the Master, if the Earning is in the Way of the Trade the Apprentice is bound to; for the Master has a Right to the whole Profit of the Business. In the Course of the Evidence this Objection had been hinted at once or twice before, and then the Chief Justice said, that he thought this Action would lie for the Clerk notwithstanding; and the Master must take his Remedy by Way of Action of Covenant against the Clerk. But Mr. Kettleby's stating the Objection now more fully to the Chief Justice, ordered him to prove what he could. Upon which he produced the Articles, and said, that it would appear by Comparing the Dates of them, and the Time laid in the Declaration when the Service was done, that it was performed during the Clerkship. But the Court would not allow them to be read; because the Articles were not duly proved; for the Witnesses to them were alive, and the Defendant had not taken the proper Means, that might have been used in procuring them to have been subpœna'd; and as those were the proper Persons to prove them, the Chief Justice said, he would not allow others to prove their Hands; but where the proper Witnesses could not be procured. Accordingly a Verdict was given for the Plaintiff.

Bilbey *and* Lee.

Term. Hill. 1727.

THE Plaintiff had brought his Action as Executor in the Debet & Detinet. Upon which the Defendant demurred generally. But the Court said, this could not be taken Advantage of upon a general Demurrer; as it has been determined before in Lev. 250.

How far the bringing an Action in the Debet and Detinet, instead of the Detinet only, cannot be taken Advantage of upon a general Demurrer.

Boote and his Wife *against* Cooper.

Term. Trin. 1729.

AN Action of Debt was brought upon a Judgment pending a Writ of Error; and yet the Defendant's Bail had entred into the Rule to surrender the Party or pay the Money, if the Judgment should be affirmed. Upon which Mr. Thede moved to stay the Proceedings. And the Court accordingly granted it; for they said the Proceedings on in a fresh Action were plainly vexatious after this Security entred into by the Rule; because if the Judgment should be affirmed, there is immediate Remedy against the Bail upon the Rule. And this was the Intent of the Rule, when it was made in the Case of Arthur and Myre. But the Court refused to grant Costs; because the Proceedings in the Action first were regular.

How far the Court will not allow an Action of Debt to be brought upon a Judgment pending a Writ of Error.

Anonymus.

Term. Hill. 1728.

MR. Wynn moved, that the Sheriff might mend his Return to a Distringas; because he had returned less Issues upon this, than upon a former. But the Court said, they could not do it, as the Interest of a third Person was concerned; but the proper Method, they said, was to make a Rule upon him to return upon another Distringas double the Issues he had returned upon the former. And Justice Page said, in the Exchequer the Sheriff is not chargeable with these Issues, but the Person distrained.

What Issues are proper to be returned upon a Distringas.

Feilders *ver.* The Bishop of Winchester, and others.

Term. Mich. 1729.

Canc. A Bill was preferred in this Court to establish a Custom in a certain Manor, where the Plaintiff had Lands. The Bill set forth that there was a Custom Time out of Mind for certain Lands in that Manor, whereof the Lands in Question were Parcel, to be leased out for three Lives, and that so soon as one of the Lives should drop, the then Tenant had a Liberty to add a new Life, compounding for a Fine. The Defendants denied, that there was any such Custom. Upon the Hearing of the Cause the Plaintiff read several Depositions; but in all of them it appeared, that it was

How far Depositions in one Cause cannot be read in another without producing an Order for that Purpose.

was Part of the Custom, that the Tenant should put in this Claim within the Three next Courts after the Determination of the first Life. Upon which the Lord Chancellor said, that the Custom appearing upon the Evidence materially differed from the Custom set forth in the Bill, and therefore he could not decree for the Plaintiff. He said, this was not like the Case, where a Right of Common is claimed, and Issue is joined, whether there is a Right or not; there indeed he did allow, if Evidence was given of a Right of Common, paying a certain Rent, that Evidence would maintain the Issue; for a Right of Common is proved. But here, he said, the Question was, whether there was such a Custom as the Plaintiff makes Title under, and no such Custom is proved; but one very differently described. There was another Rule of Evidence, mentioned in this Cause, and that happened upon the Defendant's Counsel offering to read a Deposition of one of the Plaintiff's Witnesses taken in another Cause contradicting a Deposition made by the same Witness in this Cause. But Mr. Lutwyche objected against the Reading of it, unless they could produce an Order of Court which they had obtained before for the doing of it; for, he said, it was a Rule in this Court, never to read Depositions taken in another Cause, without express Leave obtained before for the doing of it. Lord Chancellor allowed, that in general that Rule was unquestionably Right; but he said, the End of Reading this Deposition would only go to the Credit of the Witness; and in such Case he had known it often allowed; which he accordingly did in this Case. But upon the Matter before-mentioned the Bill was dismissed. 1 Vern. 53.

Term. Paſchæ

3 Geo. II. 1730.

Tully *and* Sparks.

A Rule had been obtained laſt Term by Mr. Harper, to ſhew Cauſe, why a Judgment of this Court, removed up into the Exchequer-Chamber by Writ of Error, ſhould not be amended, by adding the Words ex aſſenſu Querentis to the Coſts and Damages. Mr. Joſling coming now to ſhew Cauſe, he relied upon two Points; one, that the Record itſelf, on which the Judgment was entered, was removed up into the Exchequer-Chamber; and therefore that this Court had nothing before them to amend; by the other, admitting the Record to be before them, that ſtill a Fault of this Sort was not amendable. In Proof of the firſt of theſe Points, he relied upon the Statute of 27 Eliz. which gives the Exchequer-Chamber Juriſdiction; and he ſaid, that Act has provided by expreſs Words, that the Record itſelf, and not a bare Tranſcript, ſhall be removed before the Juſtices and Barons. The Writ of Error requires the ſame Thing, and has Words equally expreſſive as that directed to the Judges of the Common Pleas, which undoubtedly does. To the ſecond Point, he ſaid, that at the Time the Rule was obtained, the Counſel relied upon the Statute of 16 & 17 Car. 2. to ſupport their Motion. But he obſerved, that that Statute only mentions ſuch particular Faults, where the Coſts only are omitted to be given ex aſſenſu, and not where the Coſts and Damages both are. The Court were of the ſame Opinion as to the firſt Point, ſo far, as that the Record is removed up into the Exchequer-Chamber, and not what is in Conſideration of Law a bare Tranſcript of one; and that the preſent Caſe was exactly the ſame with Writs of Error upon Judgments in the Common Pleas. But yet, they ſaid, the very original Roll, upon which the Judgment is entered, in none of theſe Caſes is removed; which appears from the conſtant Practice of alledging Diminution. The ſecond Point they ſaid, was a Matter of more Difficulty. The Chief Juſtice and Judge Reynolds were of Opinion, that the preſent Caſe was not within the Relief of this Statute; but Judge Page and Judge Probyn were of Opinion that it was; and within the Meaning of the Proviſo, which relates to Coſts, as the Damages and Coſts both are here equally given by the Court; but at leaſt, that it was with-

Vide Trin.

in the general Proviſion of the laſt Words of this Clauſe in the Statute, which ſays, or other Fault of the like Nature. Upon which the Court ordered this ſecond Point to be ſpoke to again.

Vide poſt.

The King *and* Childers.

What ſhall not be ſaid to be a good Order of Baſtardy.

ON a Rule to ſhew Cauſe, why an Order of Seſſions, confirming an Order of two Juſtices for the Relief of a Baſtard-Child, ſhould not be quaſhed; Mr. Reeves took an Exception to it, that it was not directly adjudged, that the Child was born in the Pariſh of Staplehurſt, and yet the Order requires the Defendant to pay the Sum of 45 s. to the Churchwardens of that Pariſh to reimburſe them. The Counſel of the other Side anſwered, that it does ſufficiently appear in the Order, that the Child was born there; for it adjudges, that the Defendant ſhould pay this Sum for the Charges the Pariſh of Staplehurſt were at upon Account of the Woman's Lying-in there. And that it need not appear by expreſs Words, they cited the Caſe out of 1 Ven. 336. But Mr. Reeves ſaid, that it was adjudged in the Caſe of The King and Godfrey, Trin. 10 Geo. 1. that this muſt appear by an expreſs Averment. And to the ſame Purpoſe he relied upon the Caſe of the Queen and Lord Altham, 6 Anne. The Court ſaid, that they do not allow of Inferences to give the Juſtices Juriſdiction, and accordingly quaſhed both the Orders.

Boſton *and* Foreſt.

Vide 188.

MR. Strange now moved for the Judgment of the Court. They ſaid, that ſince this Cauſe has been depending here, there have been Actions of the ſame Sort, both in the Common Pleas and Exchequer, wherein this ſame Point has come in Queſtion; both of which Courts have been of Opinion, that Bail-Bonds may be taken in double the Sum contained in the Ac etiam. All the Court, except Judge Page, ſaid, that in their Private Opinion they were not ſatisfied with the Reaſons of theſe Reſolutions; however that there might be a Uniformity in the Judgments, they were willing to give Judgment for the Plaintiff; eſpecially too, becauſe when Actions come here by Original, the Party will have an Opportunity of bringing a Writ of Error immediately in Parliament; and then this Queſtion may be finally ſettled at leſs Expence. Accordingly that Judgment was given.

Baynes

Baynes *and* Foreſt.

MR. Wynn moved to make a Rule abſolute for quaſhing a Scire Facias to revive a Judgment. The Exception he took to it was, that it was returnable coram nobis, without ſaying ubicunque, or ſo much as apud Weſt'. The Court ſaid, they thought the coram nobis might ſupply the ubicunque; but not the other Fault, and accordingly made the Rule abſolute. Sid. 80, 81. 1 Ven. 46.

What ſhall not be ſaid to be a good Scire Facias to revive a Judgment.

The Mayor of Baſingſtoke *and* Bonner.

MR. Strange now came to diſcharge the former Rule. He ſaid, the principal Authority relied on by the other Side, was Long's Caſe, 2 Mod. 181. but that does not come up to the preſent one; becauſe there the Defendant was attending the Buſineſs of the Court of Common Pleas; and therefore it was an Abuſe of the Proceſs of the Court of King's Bench to arreſt him. But there is nothing of this in the preſent Caſe. For which Reaſon he inſiſted, that the Defendant ought to plead his Privilege, and not be diſcharged in this Summary Way. On the other Side Mr. Abney argued, that it was true indeed where a Matter goes to the Juriſdiction of the Court they will always require a Defendant to plead it, but not ſo, where a Defendant waives the Benefit of pleading to the Juriſdiction. However the Court were of Opinion, that they ought not to try upon Motion, whether a Defendant is an Attorney of another Court or not; and accordingly diſcharged their former Rule.

Vide 500.

Anonymus.

MR. Gapper moved for an Information againſt the Churchwardens of the Pariſh of Lincanton, for making a falſe Return to a Mandamus, which required them to make an equal Rate for the Relief of the Poor. And the Court accordingly made a Rule to ſhew Cauſe. 6 Mod. 152. Salk. 374.

How far the Court will grant an Information for making an undue Return to a Mandamus. Vide poſt.

The King *and* Saunders.

ON a Rule to ſhew Cauſe, why an Indictment for exerciſing a Trade contrary to the Statute of 5 Eliz. ſhould not be quaſhed, the Exception taken by Mr. Strange was, that the Caption of it was wrong, in that the Indictment was ſaid to be taken at the General Quarter-Seſſions held at Briſtol by Adjournment, without ſaying from whence that Adjournment was; and without that, he ſaid, it does not appear the Seſſions was held in right Time; whereas a Statute has provided, that thoſe Seſſions ſhall only be held at particular ſtated Times. And to

What ſhall not be a good Caption of an Indictment.

to this Purpoſe he quoted the Caſe of The King and Walker, Mich. 10 Geo. 1. where the Caption of an Indictment upon this very Statute was ad Seſſionem tent' apud Kendal per Adjornament' without ſaying from whence, and quaſhed for this very Reaſon. He cited likewiſe the Caſe of The King and The Inhabitants of the Pariſh of St. Matthew's, Ipſwich, where this ſame Exception was allowed. The Court were of Opinion, that in Reaſon there ſeemed to be a plain Diſtinction between the preſent Caſe and that of St. Matthew's in Ipſwich; becauſe that was an Appeal from an Order of Removal; and an Act of Parliament requires, that ſuch Appeal ſhould be at Quarter-Seſſions only; but in the preſent Caſe the Indictment would have been good, tho' found at a General Seſſions only; and ſuch Seſſions may be held at any Time. However, becauſe of the Authority of Walker's Caſe, which was ſaid to have been ſettled upon Debate, the Court quaſhed the Indictment in the preſent Caſe. Soon after the Caſe of The King and Fiſher came on, and Serjeant Eyres moved to quaſh this Indictment too, which was upon the ſame Statute, for the ſame Exception. The Court had ſtill ſome Doubts with them upon this Exception; upon which Mr. Fazakerly took another to it, that the Fact charged in the Indictment appeared to have been committed after the firſt Seſſions muſt have been held, and all Facts muſt relate to the firſt Day of the Seſſions. But the Court denied this was ſo, where there was a Day of Adjournment, for there they relate to that Day only. For which Reaſon, if a Felony happens to be committed after the Aſſizes begun, the Court will require a ſpecial Memorandum to be entered, a new Grand-Jury to be ſworn, and the Criminal tried that ſame Aſſizes. Accordingly they quaſhed this Indictment likewiſe.

Cowworth *and* Throuſtout.

How far the Court will require a Man to aſſign his Errors within a certain Time.

IN a Writ of Error quod coram vobis Motion was made, that a Rule might be made upon the Plaintiff in Error, to aſſign his Errors within a ſhort Day. The Caſe of Bret and Rigden was cited, where the Court made the ſame Rule. Accordingly the Court made a Rule, that the Plaintiff ſhould aſſign his Errors within four Days.

Nipper *and* Hobbs.

How far a Writ muſt be Returnable on a Day certain, and not on a common Return Day.

UPON a Writ of Error out of the Common-Pleas, where the Judgment was by Default, Mr. Wynn took an Exception, that the Proceeding was againſt a Philazer by Bill, and yet the Writ of Enquiry was returnable at a common Return-Day; wherers in theſe Caſes he ſaid, the Returns ought to be at a Day certain. He ſaid, in the Caſe of Silk and Hill, Paſch. 11 Geo. 1. an Exception of this Sort was taken, and held not to be amendable. The Court ſaid, they would enquire how the Practice was in the Common Pleas; ſo this Matter ſtood over.

The Archbiſhop of Armagh and Dr. Whaley *againſt* The King.

THIS Matter came now before the Houſe of Lords upon a Writ of Error. All the Judges, that were at that Time preſent, being Ten in Number, together with the Law-Lords, eleven Biſhops were of Opinion the Judgment ſhould be affirmed. But the reſt of the Lords, being ſeven in Majority, reverſed the Judgment. The ſingle Point went upon was, that the Death of Dr. Drelincourt, being admitted and inſtituted into this Rectory, barred the King's Turn. And this they thought they were not concluded from determining, notwithſtanding the Pleadings. Vide ante 285.

Hatton *and* Hatton.

DR. Sayer now came to diſcharge the Rule. He cited many Opinions in the Civil Law-Writers, and likewiſe in Books of Equity to ſhew, that Executors were only conſidered as Truſtees for the Reſiduum. But the Court ſaid, however this Notion may have obtained in Chancery, where Executors have had a Legacy left them, yet even there it has not gone ſo far, where they have had none. However in no Caſe they ſaid, would this Court ſuffer the Eccleſiaſtical Courts to call an Executor to an Account for the Reſiduum; and before the Statute of Diſtributions, they would not ſuffer this even in Caſe of an Adminiſtrator. And that they ſaid, was one chief Occaſion of the Statute, as appears by a very long Caſe at the End of Raymond's Reports. Accordingly they made the Rule abſolute. Vide ante 277.

Lewis *and* Bowles.

THIS was a Proceeding by ſpecial Latitat upon a Bottomree Bond for 30000 l. Mr. Strange moved to have an Imparlance, becauſe the Plaintiff's Writ had not the uſual Form de placito quod reddat, &c. He ſaid likewiſe, that they have joined two Perſons as Defendants in this Writ, and yet they are upon intire different Cauſes of Action. And as a farther Inducement he took Notice, the Sum in Demand was very large; and that the Defendant was very lately come from beyond Sea, ſo that he had not Time to look into his Accounts, to give an Anſwer to this Matter. By Way of Anſwer to theſe Matters the Court in the firſt Place ſaid, they knew of no ſet Form that was neceſſary. They took Notice farther, that by the ancient Law and Uſage of the Court, a Man might always have joined ſeveral Defendants in the ſame Latitat to bring them into Court, tho' he ſhould declare againſt them in different Suits; and that this new Practice is founded upon the old; and therefore in this Reſpect the Latitat was right. And to the laſt Matter they obſerved, What ſhall be ſaid to be a good Special Latitat.

ſerved, there might be the more Danger of the Defendant's going to Sea again. Accordingly refuſed the Motion.

Anonymus.

How far a Perſon ſhall not be intitled to an Imparlance.

MR. Gapper likewiſe moved for an Imparlance; becauſe in the Latitat the Plaintiff had mentioned only one Battery; but in the Declaration he had counted of Eleven. The Court ſaid, they would intend them one and the ſame, tho' laid over different Ways; and therefore refuſed the Motion. But they ſaid, this was more clear, becauſe he allowed the Batteries were laid upon one and the ſame Day.

Anonymus.

The Certainty required in an Affidavit concerning the Delivery of a Declaration in Ejectment.

IN a Motion for Judgment in Ejectment the Plaintiff produced an Affidavit, that he had delivered a Copy of the Declaration to him, that was Tenant in Poſſeſſion, as he was informed and believed. The Court ſaid, this was a Fact in the Plaintiff's own Knowledge, where the Defendant was certainly in Poſſeſſion; and therefore required a poſitive Affidavit.

Mynyard *and* Seymour.

The Time which a Perſon ſhall be required to make a Return in a Certiorari.

UPON a Writ of Error on a Judgment in the Court of Marlborough, and the general Errors aſſigned, Motion was made for Time to return the Certiorari, till the next Court, which would be held on Wedneſday; and none had yet been holden ſince the Certiorari went down. The Court ſaid, this Certiorari might well be returned without holding a Court; and accordingly refuſed the Motion.

Lewis *and* Lewis.

Vide ante 221.

THIS Matter coming on again to be argued, the Court continued clearly of their former Opinion upon the firſt Point; but upon the Second they all were now of a different one. And accordingly pronounced Judgment Niſi.

Anonymus.

How far the Court will grant an Information againſt a Perſon for making a falſe Certificate.

MR. Abney moved for an Information againſt one Draper for procuring a Certificate to be made of his Wife's being alive, tho' ſhe was in Fact dead, in Order to receive half a Year's Annuity ſuppoſed to be due at the Exchequer. Accordingly as this was a Cheat of a Publick Nature, the Court made a Rule to ſhew Cauſe. And afterwards it was made abſolute.

Taylor *and* ——

How far the Court will not allow an Amendment of a Declaration, unleſs the other Side conſents to it.

IN an Action of Debt brought by an Aſſignee of the Reverſion, the Plaintiff had omitted to ſet forth in his Declaration, that the Aſſignment was made de Præmiſſis; and had only declared of an Aſſignment generally; to this there had been a Demurrer, and a Concilium made up. Serjeant Girdler now came, and moved to have Liberty to amend the Declaration in this Reſpect; and the other Side conſented to it. But the Court ordered the Rule expreſly to be drawn up by Conſent, and not otherwiſe; for they thought it an Amendment in Subſtance.

The King *and* Bryan.

Vide ante 298.

MR. Reeves and Serjeant Darnel now came to ſhew Cauſe. To the Authorities cited, they ſaid, that three indeed were mentioned upon the former Argument; but one and the ſame Caſe is reported in two of the Books; ſo that in Fact there were but two Authorities. And beſides they obſerved, that the principal Caſe, reported in two of the Books could not be Law; for there this Notion is carried ſo far, as not to be an Offence indictable, tho' the Goods are actually delivered. But beſides, they ſaid, admitting that Caſe might be Law, yet there is a Remedy undoubtedly by Action; whereas in the preſent Caſe there is none. They farther took Notice, that the preſent Fraud that was carried on, was upon a Tradeſman; and that they ſubmitted it was a farther Argument in their Favour; becauſe the Publick was by this Means concerned. The Chief Juſtice ſaid for his Part, he thought, the Caſe, which is reported in thoſe two Books, could not be Law; but tho' it might not be Law in the general Manner, as laid down, yet ſtill it was a good Authority at leaſt for the preſent Opinion. And he thought he ſaid, the Caſe, the Counſel of the other Side would have made of it, was a very ſtrange one; that true indeed it ſhall not be indictable, where the Goods are received, but it ſhall, where they are not. He ſaid farther, that this being in the Caſe of a Tradeſman, could make no difference in Point of Law, tho' it might make the Caſe a little more compaſſionate. Accordingly the Court arreſted the Judgment. Lev. 146.

Anonymus.

The Remedies which are proper to be taken in Diſputes ariſing between Attornies and their Clerks.

MR. Kettleby moved in a Complaint between one Allen and his Clerk, that Mr. Allen might refund ſo much of the Money, as he had received with his Clerk, as the Court ſhould think proper. But the Court ſaid in theſe Caſes, the proper Motion is to have it referred to the Maſter, to ſee what he thinks proper ſhould be refunded; and ſo they made the ſame Rule in Shaler's Caſe, which accordingly was done here.

Balaam

Balaam *and* Mathews.

How far a Perſon ſhall be allowed to conclude to the Country.

IN an Action upon a Promiſſory Note for 30l. the Defendant pleaded, that the Money was lent upon a uſurious Contract, whereby it was agreed, that the Defendant ſhould pay 45 s. for the Uſe of this Money for three Months, and that he ſhould give a Note for the ſame. To this the Plaintiff replies, that the Contract was fair and juſt abſque hoc, that he has agreed that he ſhould receive 45 s. for the ſaid Intereſt & hoc petit quod inquiratur per patriam; to which there was a Demurrer; and the Cauſe ſhewn, that the Traverſe ſhould have concluded with an Averment. To ſupport this Demurrer Mr. Taylor argued, that it is a general Rule in pleading, that every Traverſe muſt conclude with a hoc paratus; and he ſaid, there was no Occaſion to produce Authority to ſupport this. He took Notice farther, that the Replication was Wrong in another Reſpect; that the Plaintiff had traverſed the Agreements being, that he ſhould receive 45 s. without ſaying modo & forma; ſo by this Means the Defendant was tied up to prove the particular Sum; whereas any Sum above the ſtatuable Intereſt would have done as well for the Defendant. To this Purpoſe he applied the Caſe of Coleman and Stockden, Hill. 8 Geo. 1. there an Action was brought upon a Bond for a very great Sum of Money; the Defendant pleads, that 1500l. Part of the Money was won at Gaming, the Plaintiff replies that that Sum of 1500l. was not, and concludes to the Country. To this Replication there was a Demurrer, and the Replication held bad for this very Exception. On the other Side Mr. Benny inſiſted, that this Traverſe puts the whole Matter in Iſſue, and whenever it does ſo, the Party may conclude to the Country; for in Fact it is a compiete Negative to the Defendant's Affirmative, and ſo a good Iſſue. To this Purpoſe he cited a Caſe out of Salk. 4. in point. And in Lutwyche 1459. this is carried ſo far, as to make it a good Iſſue even where the Traverſe is Special. For there an Action of Falſe Impriſonment was brought againſt a Bailiff, who juſtified by a Warrant from the Sheriff; the Plaintiff replies, that the Defendant impriſoned him de injuria ſua propria abſque tali warranto, & hoc petit quod inquiratur per Patriam. To this there was a Demurrer and the Iſſue held good. To the ſecond Point, he ſaid, that the Defendant had ſet forth a ſpecial Agreement; which he would have been obliged ſtrictly to have proved upon Evidence, and conſequently the Traverſe was right in this Reſpect. Which Reaſon, he obſerved, diſtinguiſhed this Caſe from that cited on the other Side; for there if any Part of that Sum, above 100l. had been proved to have been won at Play upon Evidence, that Evidence would have maintained the Iſſue; as bringing the Caſe within the Statute, there being no ſpecial Agreement. He then took an Exception to the Form of the Defendant's Plea, that the Statute of Ann. which this Action was founded upon, ſays, that whoever ſhall agree to give above 5 per Cent. from

such a Day, the Contract shall be void. Now the pleading ought to have been, that after this Day, scilicet on the Day mentioned in the Plea, this usurious Contract was. To this Purpose, he cited several Entries, and particularly out of 1 Brown 204. Whereas the Defendant has pleaded only, that on that particular Day it was so agreed. To this last Observation nothing was said. To the second the Court was of Opinion the Traverse was good. But to the first, the Court thought this Matter pretty doubtful. They said, they could see no sensible Distinction between its being a special Traverse and a general one. And as there are two express Authorities that this pleading is good, they did not see, but though the Note for 45 s. is not traversed, the Conclusion to the Country might be right. However this Matter stood over. Vide post

Holt *and* Ward.

THIS Matter now came on upon a Demurrer to the Plea of Infancy. Serjeant Chappel argued, that the Plaintiff could not take Advantage upon this Promise, and cited a Case out of Carter 233. where it is held, that though there be Remedy in the Ecclesiastical Courts to inforce the Promise of Marriage on the Infant's Part, yet that will not be a sufficient Consideration for the Temporal Courts to make the Promise obligatory. But however, he said, that might be a Matter more proper to be argued by the Civil Lawyers, whether their Law will inforce such Promises or not. Judge Page said, that he doubted very much, whether their Law could inforce them, and said, he thought he remembred a Case, where the Distinction was taken between Contracts per Verba de præsenti, and Contracts per Verba de futuro, that those of the first Sort they may inforce, those of the second Sort they cannot. If this was so the Court agreed, there would be an End of the Question. But if it was not, and the Ecclesiastical Courts would inforce the one Sort as well as the other, they all then declared their Opinion to be, that here would be a good Remedy, and this notwithstanding the Authority of the Case cited. Several Cases however were cited by Mr. Strange, and particularly out of 1 Mod. 25. and 1 Sid. 32. to shew, that in general, Infants may take Advantage of Contracts made with them; but Serjeant Chappel gave them this general Answer, that they are all, where the Consideration is executed. This Matter was accordingly ordered to be spoke to again. Vide ante 277. Vide post.

Sweetapple *and* Goodfellow.

How far a Perſon cannot take out a Capias againſt the Principal pending a Writ of Error, in order to charge the Bail.

ON Rule to ſhew Cauſe, why Proceedings againſt Bail ſhould not be ſtaid, for the Capias being taken out againſt the Principal, and Non eſt inventus returned after Writ of Error brought, Mr. Kettleby ſaid, that he ſubmitted a Capias might be taken out for this particular Purpoſe, becauſe the Bail cannot be charged without it; and he obſerved, that the Proceedings againſt the Bail is a Suit intirely different from the Proceedings againſt the Principal. He ſaid it was conſtantly practiſed to proceed in ſuch collateral Action, notwithſtanding an Injunction to ſtay Proceedings in the original One; and he thought a Writ of Error did not differ in this Reſpect. The Chief Juſtice owned, that he thought there was a Caſe about 4 Ann. in this Court, the Name of it was Perkins and Woolaſton, where a Motion of this Sort was made; and yet ſuch Proceeding held to be regular. However becauſe he could not think ſuch Opinion could be maintained for Law, he agreed with the Reſt of the Court, that the Rule ſhould be made abſolute; which accordingly was ſo done.

Everard *and* Needen.

How far the Court will allow of an Amendment after a Writ of Error.

IN a Writ of Error out of the Common Pleas, Mr. Strange moved to amend their Declaration, there being a general Memorandum, and yet the Cauſe of Action appearing to have aroſe after the Term began. The Terms upon which he made this Motion were, that if the Plaintiff in Error ſhould upon this not proceed, they might pay him Coſts; if he ſhould proceed, they might not. And theſe Terms, he ſaid, have been allowed in a former Caſe, which the Court granted; but ſaid, there muſt be a Bill filed to warrant the Amendment.

Short *and* Scurrey.

Vide ante 156.

THE Plaintiff's Writ of Execution having been ſet aſide and a Rule made for Reſtitution, the Plaintiff offered to give the Defendant Reſtitution in purſuance of it; but however the Defendant would not then accept of it, and upon that the Plaintiff took out a new Writ of Execution, and got a Return made accordingly. However the Defendant had obtained a Rule to ſhew Cauſe for an Attachment, but upon the Matter thus appearing to be only a Contrivance of the Defendant to defeat the Plaintiff of having a quiet Poſſeſſion, the Court diſcharged the Rule with Coſts.

Tulley *and* Sparks.

THIS Matter now came on to be argued again. The Form of the Judgment as entred upon Record was, Ideo conſideratum eſt, quod querens recuperet debitum præd'ct', necnon viginti & duas libras, quas ſuſtinuit tam occaſione dilationis debiti præ-dict quam pro cuſtagiis nunc hic adjudicat'. The Amendment prayed was, that the Words ex aſſenſu Querentis might be inſerted between the Words nunc hic and adjudicat'. The Chief Juſtice, now, as well as Judge Reynolds upon the former Argument declared, they thought the Defendant could not take Advantage of this Error, and therefore that the Amendment was unneceſſary; but however the whole Court now in general agreed that the Amendment ſhould be made, and gave Rule accordingly.

Vide ante 110.

How far a Judgment may be amended.

The King *and* Herle.

MOTION was made for an Attachment againſt a Proſecutor for Non-payment of Coſts for not going on to Trial to an Executor of a Perſon indicted, in purſuance of a Rule made, when the Perſon indicted was living. The Court ſaid, they could not yet grant that Motion, becauſe none has been before made on Behalf of the Executor; however the made a Rule upon the Proſecutor to ſhew Cauſe, why he ſhould not pay the Money. And then, they ſaid, they muſt ſee the Probate of the Will.

How far Coſts ſhall be paid to an Executor.

Wilcox *and* Huggins.

IN an Action upon a Promiſſory Note, brought by the Plaintiff as Executor of an Executrix, the Defendant pleaded the Statute of Limitations. The Plaintiff replies that within the 6 Years, viz. in Trin. 11 Geo. 1. the Executrix took out a Latitat, upon which a Non miſit breve was entred, and Continuances made till her Death, which was in 1725. and that afterwards ſome Time in this laſt Year he himſelf took out another Latitat. To this the Defendant demurrs generally. Mr. Reeves now endeavoured to ſupport the Plaintiff's Replication. He ſaid he ſhould ſubmit it, that whenever a Perſon enters an Action within the Time provided by the Statute of Limitations, that of itſelf prevents the Effect of the Statute at all Times after. And in the Argument of the Caſe of Kinſay and Hayward, Lutwyche 256. Lord Chief Juſtice Treby was of that Opinion. He ſaid beſides, that the firſt Executor could not have continued this Suit farther by Journeys Accounts; becauſe that will not lie, where there is only one Plaintiff and one Defendant, and the Death of the Party abates it. So that, he ſaid, unleſs what has been done be allowed to be ſufficient, the Plaintiff muſt loſe a juſt Debt, and that merely by the Act of God.

How far the Entering of an Action ſhall prevent the Effect of the Limitation.

He

He then took Notice farther, that whenever a Man's ſelf is provided for out of the Statute, it is a general Rule, his Executor muſt be ſo too. To which purpoſe he applied the Caſe of Hemmings and Holiday, Paſch. 2 Geo. 1. There a Man was beyond Sea at the Time of the Promiſe made him, and died beyond Sea; held by the Court, that the Executor was not confined to any Time in bringing the Action. The Chief Juſtice allowed that Caſe, and ſaid, the Caſe of Fines goes upon the ſame Reaſon. But he ſaid, the Judgment in the Caſe of Kinſay and Hayward before cited was reverſed in this Court, that reverſal affirmed in Parliament; which reverſal he took to be directly the preſent Caſe. However this Matter was ordered to be ſpoke to again.

Vide poſt

Loyd *and* Baldinſton.

What ſhall not be ſaid to be a Diſcontinuance in Pleading.

IN an Action upon ſeveral Promiſes the Defendant pleads, he was in Cuſtody December 29, 1728, and ſo would take Advantage of the late Act of Indemnity. The Plaintiff replies, that after the 29th of December 1708. ſupradict, he had eſcaped for thirty Days, and ſo would bring the Defendant within the Exception in the Statute. Upon this here is a general Demurrer. And Exception now taken that there was a Diſcontinuance, which might be taken Advantage of in this Manner, notwithſtanding the Statute for the Amendment of the Law. But the Court thought, that the Word ſupradict might be well referred to the 29th of December, and ſo the 1708 ſurpluſage.

Darbey *and* Reydock.

What ſhall ſhall not be ſaid to be a good Declaration in an Action upon a Bail-Bond.

IN Debt upon a Bail Bond, the Plaintiff declares that a Proceſs iſſued out of the Palace Court, and that by Vertue of it the Defendant was arreſted in Weſt'; upon which the Defendant gave this Bond for his Deliverance. The Defendant pleads the Statute of 23 Hen. 6. and ſhews many particulars in which the Bond is void by Virtue of it. Upon this the Plaintiff demurs generally. Mr. Benny now took an Exception to the Declaration, that Weſt' does not appear to be within the Juriſdiction of the Palace-Court, and of Conſequence this Bond cannot be taken to be upon that Statute, but at Common Law; and therefore the Plea was not good. To ſupport this Exception he cited Dyer 120. Lutw. 680. The Court ſeemed to think there was a good deal of Weight in it; and therefore gave Judgment for the Defendant unleſs Cauſe the ſecond Day of the next Term. 1 Cro. 309.

Dutton *and* Staples.

IN an Action upon ſeveral Promiſes, the Plaintiff declared in one Count for 500 l. due on a Promiſſory Note; and the Defendant pleaded 497 l. 10 s. given in Satisfaction, which the Plaintiff accepted. The Plaintiff replies, and traverſes that he received this leſs Sum in Satisfaction. To which the Defendant demurs. The Exception taken by Mr. Acherley was, that this Traverſe was not good, inaſmuch as the Defendant's Plea was not the giving a collateral Thing in Satisfaction, but a leſs Sum in diſcharge of a greater. If this had been a collateral Matter, he ſaid, he ſhould have admitted, that the Plaintiff has it in his Election to traverſe either the giving or receiving in Satisfaction; and ſo far is the Authority of the Caſe in Salk. 627. but he ſubmitted it, that Caſe goes no farther. The Court however thought there was no reaſonable Diſtinction between the Caſes. And the Chief Juſtice ſaid beſides, that he thought the Plea itſelf ill in Subſtance; becauſe in general a leſs Sum cannot be pleaded in Satisfaction of a greater. The Defendant's Counſel tho' to this ſaid, that in Aſſumpſit only Damages were recoverable; and therefore this Plea was good in this Action, as it would have been in Treſpaſs. However Judgment was given for the Plaintiff, Niſi, before the End of the Term.

What ſhall be ſaid to be a good Plea of an Accord with Satisfaction.

The King *and* Clendon.

IN an Indictment for an Aſſault and Battery committed upon Two, Mr. Fazakerly moved in Arreſt of Judgment, that here ought to have been ſeveral Indictments, as well as in ſuch Caſe there muſt have been diſtinct Actions. The Court accordingly made a Rule to ſhew Cauſe; and afterwards made it abſolute.

How far different Offences cannot be joined in one Indictment.

Smith *and* Horner.

A Rule had been obtained by the Plaintiff in Error to quaſh his own Writ of Error, which was taken out in the Name of himſelf and another, who were Co-Defendants, in the original Action upon an Affidavit, that the other Defendant died before Verdict. Mr. Reeves moved now to diſcharge this Rule. And in the firſt Place, he ſaid, that he never knew Writs of Error quaſhed, but for Errors appearing on the Face of them. But the preſent Writ of Error is right upon the Face of it; and yet the Plaintiff in Error would quaſh his own Writ for Matter dehors, and for ſuch Matter too, which no Body but himſelf ought to ſuffer for being miſtaken in. But beſides, he ſaid, the Party is eſtopped by his own Writ of Error from taking

How far the Court will quaſh a Writ of Error.

taking this Exception; for by ſuing out the Writ of Error in the other's Name as well as his own, he has by that Act averred upon Record, that the other was alive at that Time. He took Notice farther, that this was now a whole Year, ſince the ſuing out this Writ, the Plaintiff in Error could not all this Time be driven to aſſign his Errors, and a Rule actually given to Non pros' him, if he did not aſſign by ſuch a Day; which Rule could not be obtained, till after Default made upon two Scire Facias's; and yet after this Delay, the Plaintiff now comes to obtain a Favour of the Court. Mr. Fazakerly on the other Side ſaid, that Inſtances might be produced of the Court's quaſhing Writs of Error, for Errors not appearing upon the Face of them; to this Purpoſe he cited the Caſe of Talloway and Dakey. There were ſeveral Plaintiffs in Error, the one died before Aſſignment of Errors; in which Caſe the Writ was held to be abated, and the Court quaſhed it. He ſaid farther, that the Plaintiff in Error had but of late diſcovered this Miſtake, and if the Court would not quaſh this Writ, and by that Means give the Party Liberty to take out a new One, there was no Way left for taking Advantage of the Error in the Judgment. The Court ſaid, if there was no other Way of the Plaintiff's in Error taking Advantage of this Miſtake in the Judgment, they would not help him out in this. But they ſaid there was, and therefore they thought the Writ was properly ordered to be quaſhed.

The King *and* Herle.

Vide ante 335.

MR. Filmer now came to ſhew Cauſe, and ſaid, that the Executor had no Right to theſe Coſts; becauſe they were not taxed in the Life of the Teſtator. He ſaid, it was a ſettled Rule on the Civil Side of the Court, that an Executor ſhould not have Coſts owing to the Teſtator, unleſs they were taxed in the Teſtator's Life-time; and he ſubmitted it, there was equal Reaſon, this ſhould be the Practice on the Crown Side. Mr. Fazakerly would have diſtinguiſhed theſe two Caſes, by ſaying in the one Coſts is Part of the Judgment, not in the other. The Court ſaid, this was the undoubted Practice on the Civil Side, and they did not ſee, but there was as much Reaſon, it ſhould be ſo on the Crown Side, but enlarged the Rule, becauſe the Maſter of the Crown Side was not in Court. 3 Mod. 282. 3 Lev. 275.

Metſ-

Metſcoffen *and* Gunner.

MR. Draper moved for Leave of the Court to charge a Perſon with an Action, who was in Cuſtody upon an Attainder on the Black Act, but under a Repꝛieve. The Court ſaid, if the Party had been only in Cuſtody, upon a bare Indictment, a Judge might grant ſuch Motion at his Chamber. But on the other Hand, they ſaid, if this had been in Caſe of a common Attainder of Felony, they ſhould have thought even this Court could not grant the Motion; becauſe if they ſhould, it would be an Eſcape in the Sheriff to tranſpoꝛt him. However in the pꝛeſent Caſe the Chief Juſtice ſaid, he ſtill did not know, but this Motion might be pꝛoper, becauſe the Black Act has ſaved the Goods to the Party; and foꝛ that Reaſon he thought his Goods might be liable perhaps in this Way. But yet the Court refuſed to make any Rule upon this Motion. 3 Cro. 214.

When a Perſon is in Cuſtody for an Attainder of Felony, how far the Court will not allow him to be charged with an Action.

Term. Trin.

3 Geo. II. 1730.

Bickley *and* Bickley.

How far the Court will not ſet aſide a Verdict for a Variance between the Record of the Niſi prius, and the Copy of the Iſſue.

MR. Draper moved to ſet aſide a Verdict for a Variance between the Copy of the Iſſue, and the Declaration delivered, there being no Defence made at the Trial. The Action was a Quantum meruit for board, and the Variance inſiſted upon was, that in the Iſſue it was laid, that the Money was not paid; in the Declaration, that it was paid. But the Court ſaid, that they refuſed this ſame Motion laſt Term; becauſe the Variance was, between the Declaration and the Iſſue, and not the Niſi prius Roll and the Iſſue. The Chief Juſtice ſaid, he took the Reaſon for this Diſtinction to be; that the Party had waived this Benefit of a Variance by accepting of the Copy of the Iſſue. The Caſe here referred to, was the Caſe of Bradford and More; the Variance there was, that in the Declaration it was laid, & prædictus Henricus, but in the Copy of the Iſſue it was laid, & Henricus generally. Mr. Marſh in that Caſe obtained a Rule to ſhew Cauſe, why the Verdict ſhould not be ſet aſide, though the Court inclined againſt him; and when Mr. Kettleby came to diſcharge the Rule he mentioned, the Caſe of Comes and Lord Tankerville, in Point, againſt Mr. Marſh; and upon that the Motion was there waived upon a Propoſal. However in the preſent Caſe for another Reaſon the Court made a Rule to ſhew Cauſe.

Dutton and his Wife *againſt* Staples.

What ſhall be a good Declaration on a Note within 3 Ann. c. 9.

IN an Action upon a promiſſory Note, Mr. Acherley moved in Arreſt of Judgment, that the Plaintiff had declared upon the Statute of 3 Ann. c. 9. which provides, that a Man ſhall have the ſame Remedy upon a promiſſory Note, as upon a Bill of Exchange, and therefore he ought to declare in the ſame Manner upon both. Now in Actions upon Bills of Exchange it has been determined, that it is not enough, barely to ſet forth, that a Bill of Exchange was drawn, but the Party ought to conclude, & ſic indebitatus exiſtens ſuper ſe aſſumpſit; ſo as to

alledge an expreſs Promiſe. And for the ſame Reaſon he urged, that it is not enough for the Plaintiff to ſet forth here, that the Defendant fecit notam promiſſoriam; but he ought to go on and make the ſame Concluſion, as is aforementioned, otherwiſe he ſaid, the Iſſue could only be Non fecit notam promiſſoriam; and not, Non Aſſumpſit, as the conſtant Method in theſe Caſes is. Now in the preſent Declaration, he ſaid, this Concluſion is wholly omitted. Mr. Lee on the other Side anſwered, that this very Exception was expreſly over-ruled in the Caſe of Conyers and Lowther. And the Court were of the ſame Opinion. Judge Page ſaid, that this Matter has been doubted even in the Caſe of a Bill of Exchange, though now it is ſettled; but the Reaſon for that he took to be, that a Bill of Exchange is only an Order upon a third Perſon to pay; and no expreſs Promiſe at all; whereas in the preſent Caſe there is.

Metſcoffen *and* Gunner.

MR. Wheete now moved this Matter again. He ſaid, the Defendant lay in Cuſtody under a Repreive, upon Condition he would procure himſelf to be tranſported. He took Notice in the firſt Place, that if this Motion ſhould be granted, and the Sheriff tranſport him notwithſtanding, he would not be anſwerable in an Action for an Eſcape. But if there was any Doubt about this Point, the Plaintiff, he ſaid, was willing to enter into a Rule not to charge the Defendant's Perſon. The Chief Juſtice ſaid, it was his Opinion, he would be anſwerable for the Eſcape; and the entring into ſuch a Rule would not be a legal Bar to the Charging the Defendant's Perſon. However the Court thought proper to make a Rule to ſhew Cauſe, why the Defendant ſhould not be ſerved with a Copy of a Writ; and then upon his not filing Bail, the Plaintiff ſhould have Liberty to file common Bail for him. Vide ante 339. Vide poſt

Cole *and* Buckland.

MR. Filmer moved to ſtay Proceedings againſt the Bail in the original Action after Notice of a Writ of Error allowed, upon entring into the Rule, that was made in the Caſe of Arthur and Myonet. Mr. Birch objected, that this Motion was now too late; becauſe the ſecond Scire facias was returnable laſt Day in Eaſter Term; and therefore as the Bail had certainly been too late to ſurrender the Principal in diſcharge of themſelves, in Caſe there had been no Writ of Error; he thought, that there was equal Reaſon, that the Bail ſhould now be too late to come for this other Favour, when there is a Writ of Error; for the Intent of this Rule of Arthur and Myonet ſeems only to give the Bail a Power to have the Proceedings againſt them ſtayed; as the Principal has a Power to ſtay Proceedings againſt himſelf, upon the Bail's entring into a Rule to do that upon the Affirmance of the Judgment, which at the Time of the Motion by the Rules of the Court they had a Right then

How far the Court will ſtay Proceedings againſt Bail after a Writ of Error is brought.

to do, which is surrendring the Principal. Mr. Filmer said, that in the Case of Aldridge and Snowden, this Motion was indeed refused after Judgment against the Bail; but he took the Sense of the Court at that Time to have been, that this Motion was proper at any Time before. And upon that the Court made a Rule to shew Cause.

Vide post

The King *and* Charlesworth.

Vide ante 320.

THIS was an Information for Forgery of a Judgment; and the Judgment was set out to have been given in Easter Term; whereas upon the Face of it, it appeared to have been given in Hillary, and docketted in Easter Term. Upon which Mr. Lacy moved, that the Information might be amended in this Respect, though the Cause was to come on to Trial this Afternoon. In the Case of The King and Payne about four Years ago, for Printing the True Briton, he remembred a Motion of this Sort was made just before the Cause came on to Trial; and there the Mistake was in certain Variances, that were made in setting out the Libel. The Court said, that small Amendments, not in Substance, they have known frequently, made just before a Cause comes on; so the same has been done at a Judge's Chamber in Vacation, but in the present Case they said the Amendment would be in Substance; altering the Gist of the Information; and therefore they thought it could hardly be done. However, upon Mr. Masterman's saying the Precedents of Amendments of this Sort were very strong, they made a Rule to shew Cause. And because the Trial was to come on this Afternoon, and the other Side would not consent to put it off, the Chief Justice sat as a Judge of Nisi prius as soon as the Court was up; and adjourned that Court immediately to another Day.

Balaam *and* Matthews.

Vide ante 332.

THIS Matter now came on again. And the Court were full of Opinion, that the Conclusion to the Country was wrong; because the Traverse had an Inducement to it. They said, there were two Ways of Pleading, either to deny directly what the other has said, and then conclude to the Country; or to give some colourable Inducement to the Denial, and then conclude with an Averment. The Chief Justice said, this was a general Principle in Pleading, unless where the Plaintiff replies De injuria sua propria, absque tali causa; and the Reason for that Exception is, that there the Pleading is known to amount to the General Issue. For which Reason, he said, this Exception does not hold even in the Case of a De injuria sua propria, where the Traverse is particular, as Absque tali Warranto. And accordingly in Proof of this general Rule of Pleading; Judge Page cited two Precedents, one in Rastal 689. the other in Liber placitandi 156. where a Pleading is of a usurious Contract, and the Replication denies it with an Inducement; yet the Conclu-

ſion is to the Country. However the Exception to the Defendant's Plea was now more fully ſet out than it was before; and the Reaſon given, why the Setting out the Agreement as of ſuch a Day, without ſaying poſt confectionem Statut', was bad, was, becauſe the Party might vary the Date of the Agreement in Evidence, and might upon this Iſſue prove ſuch Agreement before the Statute. But the Anſwer to this Exception was given by Mr. Fazakerly; that though the Court would allow the Party upon Evidence to vary from the Date of the Agreement; yet they would not allow him to vary ſo far, as to give in Evidence an Agreement before the Statute; and the Time when this Statute commenced the Court are bound to take Notice of, becauſe it is a general One. This Obſervation was allowed for an Anſwer; and upon that the Plaintiff moved to diſcontinue, and that without Coſts, becauſe ſhe was an Adminiſtratrix, which the Court allowed; though Mr. Fazakerly urged, that when an Adminiſtratrix comes for a Favour ſhe ſhall pay Coſts.

Tully *and* Sparks.

MR. Harper now produced the Record removed up into the Exchequer-Chamber, and moved that it might be amended by the Roll of this Court, that had been before amended; which the Court granted. And the Chief Juſtice ſaid, that the Roll of this Court could not be carried into the Exchequer, to have had the Amendment made there. Vide ante 325.

Bickley *and* Bickley.

THE Cauſe, upon which the former Rule was obtained, was, that the Damages were exceſſive. The Damages given were 300 l. 100 l. per Annum for three Years, only for bare Lodging and Diet for himſelf without a Servant. The Witneſſes indeed did ſwear the Plaintiff deſerved as much; but they were only the Plaintiff's Servants; and therefore not ſo proper Judges. And upon this Mr. Lee now moved, that the Rule might be abſolute. Mr. Marſh on the other Side objected, that the Verdict was exactly according to Evidence; that the Defendant offered no Evidence to leſſen the Damages ſworn to; and therefore the preſent Motion was irregular. He ſaid beſides, the Defendant had actually preferred a Bill in Equity to be relieved againſt this Verdict; and that was another Reaſon, why this Court would do nothing in it. The Chief Juſtice ſaid, if there had been a ſpecial Agreement the Servants would have been proper Evidence of that; but he did not think, they were ſo fit Judges in the preſent Caſe. Accordingly the Court granted a new Trial. Vide ante 340.

Wright

Wright *and* York.

How far a Perſon ſhall be intitled to an Imparlance.

ON Rule to ſhew Cauſe, why a Judgment ſhould not be ſet aſide, that was ſigned upon the new Rule relating to Caſes, where the Cauſe of Action is ſet out in the Writ. The Exception taken was, that the Writ was in the Detinet only; but the Declaration in the Debet and Detinet; and therefore by the Rules of the Court they were intitled to an Imparlance. But it was objected by the other Side, that the Defendant had demanded Oyer; and thereby had waived the Benefit of an Imparlance. However the Court ſaid, they knew of no ſuch Rule; and accordingly ſet the Judgment aſide.

Bland *and* Perry.

After what Length of Time bail may be allowed to ſurrender the Principal.

What ſhall be a good Scire facias againſt Bail.

MR. Harvey moved, that Proceedings upon a Scire facias againſt Bail might be ſtayed, upon an Affidavit, that the Bail were ſerved with the Scire facias but the Day before it was returnable, and they ſurrendred the Principal the Day after the Return. But Mr. Strange on the other Side anſwered, that the Writ was left in the Office four Days; and upon two Nihils no other Notice is requiſite; but upon Judgment's being againſt the Principal, the Bail are bound to ſearch. The Court thought this Practice hard; and upon that they inquired of the Maſter, whether it was conſtantly obſerved. The Maſter reported, that it was; and ſaid, that formerly this uſed to be more hard upon the Bail; for upon two Nihils returned, the firſt and ſecond Scire facias uſed to be taken out both together; and there was no certain Time for either's Lying in the Office. But now, he ſaid, this is otherwiſe; and beſides, as nigh as can be, there muſt be the ſame Time for the Return of the one Scire facias as the other; the one muſt be ſeven the other eight Days, and not one Four and the other Eleven. The Court however declared, that this Practice might be dangerous; and ſaid, it was harder, than where two Nihils are returned; for there the Party has his Remedy againſt the Sheriff; but here the Sheriff may execute his Writ on the Day of the Return. They obſerved farther, that this was more hard in this Court; becauſe the Scire facias's can only go to the Sheriffs of Middleſex, let the Cauſe of Action ariſe in any County; but in the Common Pleas they go to the Sheriffs of the proper one. Accordingly the Proceedings were ſtayed.

The King *and* Charleſworth.

Vide ante 342.

SErjeant Girdler now came to ſhew Cauſe. But upon the Authority of the Caſe in 3 Lev. 347. the Court made the Rule abſolute; and that without Liberty to plead de novo, or giving Coſts, as the Proſecutrix ſued in forma Pauperis. The Counſel however inſiſted, that then ſhe ſhould be diſpaupered; and likewiſe that an Affidavit ought to be made, that this Fault was

Vitium clerici. The Court ſaid, that where indeed a Pauper countermands Notice of Trial, or is guilty of ſuch other Delay, theſe have been Inſtances of his being diſpauper'd; but the preſent Miſtake was only an ordinary Fault. And as to the Affidavit, the Rule in the Caſe of The King and Symonds, 10 Geo. 1. was produced, where an Amendment was made in ſetting out the Date of an Act of Parliament; and no ſuch Terms as theſe were required.

The King *and* Lewis

THE Defendant had obtained a Rule about a Year ago for a Mandamus, to be directed to certain Juſtices of Peace, to take his Recogniſance upon Articles of the Peace being ſworn againſt him, having at that Time produced an Affidavit of his being very weak and infirm. Mr. Strange moved now, that the Recogniſance might be diſcharged, without making his perſonal Appearance upon a like Affidavit with the former. And his Motion was allowed. Vide 166.

Cole *and* Buckland.

THIS Matter coming on again, the Court were of Opinion the Bail were too late for this Motion after the Return of the ſecond Scire facias. They ſaid, in the Caſe of Aldridge and Snowden, Lord Chief Juſtice Prat was indeed of Opinion, that the Bail might come at any Time before Judgment; but the three other Juges at that Time differed with him in Opinion. However Mr. Birch ſaid, that upon the Bail's giving Judgment in the Scire facias, he was willing to conſent, that the Execution ſhould be ſtaid, till the Writ of Error was determined. And accordingly thoſe Terms were agreed to. Vide 341.

Anonymus.

MR. Reeves came to ſhew Cauſe, why an Information in the Nature of a Quo Warranto ſhould not go againſt a Perſon for exerciſing the Office of Bridge-Maſter in the Borough of Bridgenorth. There was a Day appointed by the Charter for the Election of this Officer; and by the Conſtitution he was to hold this Office for four Years. Upon the Face of the Affidavits, on which the Rule was founded, the Populace had choſe this Perſon without any Colour of Authority. And upon that the Court ſaid, that tho' this Perſon was Officer de Facto, the Corporation might have went to a new Election the next Charter-Day, without applying to this Court to remove him. Indeed where an Officer has continued for ſeveral Years, they allowed this to be otherwiſe. But as the preſent Caſe was, they diſcharged the Rule.

How far the Court will not grant an Information in Nature of a Quo-Warranto, in order to try the Validity of a Perſon's Election.

The King *and* Whych.

How far an Affirmation of a Quaker ſhall not be good Evidence upon an Information.

IN an Information againſt two Perſons for a Misdemeanour, an Affirmation of a Quaker was offered to be read. But the Court obſerved, that the Affirmation of ſuch Perſon is never allowed in Evidence in a criminal Proſecution; and therefore refuſed its being read in this Caſe.

The King *and* Taylor.

How far the Court will not grant an Information againſt the Juſtice of Peace.

ON Rule to ſhew Cauſe, why an Information ſhould not go againſt the Defendant, the Chief Matter of Complaint againſt him was, for that upon Complaint being made to him, as a Juſtice of Peace, that a certain Perſon had ſtole ſome Bonds belonging to another as Adminiſtratrix, he committed him; whereas it is known Law, that this was not Felony till the late Act of Parliament; and this Offence was before that Act. For which Reaſon it was ſaid, this Commitment was intirely illegal. The Court however refuſed to make the Rule abſolute, tho' they ſaid, this was certainly a great Misdemeanour in the Juſtice.

Anonymus.

How far a Plaintiff ſhall be allowed to ſign Judgment, notwithſtanding a Plea is put in to his Action.

A Perſon came and hired Lodgings of another by the Name of John Coke; and in an Action brought for the Money againſt him by the Name of John Coke, he pleaded quod Edwardus Maxwell qui arreſtat' fuit per Nomen Johannis Coke non Aſſumpſit. Upon which Serjeant Darnel moved, that the Plaintiff might have Liberty to ſtrike out the Name Edward Maxwell, and enter the Plea as the General Iſſue. Judge Page and Judge Probyn were only in Court. And Judge Page ſaid, that he thought the Plaintiff might ſign Judgment; but refuſed to grant the Motion.

Smith *and* Capt. ——

How far the Court will put off a Trial, by Reaſon of the Abſence of a Witneſs.

ON Motion to put off a Trial for a material Witneſs being beyond Sea, who was Witneſs to a Deed, Mr Bootle, jun. ſaid, that this might be proved by Parity of Hands. The Chief Juſtice denied it, becauſe the Delivery of a Deed muſt be proved; and upon that Mr. Bootle ſaid, it was only an ordinary Writing. But the Court ſaid, it was all the ſame; and upon this the Motion was granted.

The King *and* Stoughton.

What ſhall be a good Indictment for ſtopping of a High-way.

IN an Indictment for ſtopping up a Way, an Exception was taken to it for Uncertainty, in that the Defendant was charged quod unam ſepem levavit vel levari cauſavit; and that he continued the Nuſance for ſeveral Months. The Caſe of The King and Stocker, 5 Mod. 137. was cited in Point; and likewiſe that of The King and Brereton, Mich. 11 Geo. 1. where libellum ſcripſit ſeu ſcribi cauſavit was held bad. The Chief Juſtice ſaid, that he remembered that Caſe was argued fully; but did not know, that ever final Judgment was given; and was afraid, if that ſhould be allowed, many Judgments would be reverſed. However Mr. Maſterman ſaid, the Form of theſe Indictments is only quod libellum ſcripſit & ſcribi cauſavit, and not aut. And Mr Fazakerly ſaid, that he remembered the pronouncing final Judgment in that Caſe. The Counſel of the other Side tho' endeavoured to ſupply the Defect in this Part of the Indictment, by another Part of it; where the Nuſance is laid to be continued. And cited the Caſe of The King and Ward, where, he ſaid, the Defendant was charged in one Part of the Indictment with forging a Receipt, in the other with publiſhing it; the Forgery was laid imperfectly; but yet the Court held, he might be convicted for the Publication. The Court ſaid, they did not think, theſe Caſes were alike; becauſe there the Forgery and Publication were laid as diſtinct Facts in different Parts of the Indictment; but here one Fact is laid only as a Continuance of the other in the ſame Part of it. However this Matter was ordered to ſtand over.

Mills *and* King.

What ſhall be a good Declaration in Actions upon a Bail-Bond.

IN an Action brought by the Plaintiff as Aſſignee of a Bail-Bond, the Defendant pleaded a frivolous Plea; and upon that there was a Demurrer. Mr. Agar now took an Exception to the Declaration, that the Plaintiff had not ſet forth the Time, when the Bill of Middleſex, which the Bail-Bond was given upon, was taken out; and he ſaid, theſe Writs have no Teſte, and therefore the Time for ſuing it out is neceſſary to be ſet out. For by that it would appear, what Time there was for the Return; and if there was a Term intervening, the Writ was a void Writ; and of Conſequence the Bail-Bond taken without Authority. The Court ſaid, that the Defendant has pleaded quod bene & verum eſt, he was arreſted by this Writ; which ſhews, that the Writ was not void; for if it was, he could not have been arreſted by it. Beſides, they ſaid, if there was ſuch a Fault in the Writ, the Defendant ought to have ſhewn it in his Plea. Accordingly Judgment was given for the Plaintiff.

Benſon

Benſon *and* Olive.

How far a Deed may be read in Evidence, by Reaſon of the Length of Time ſince it was made, notwithſtanding no Proof is given of the Execution of it.

Scac. UPON a Re-hearing in a Suit for Tithes, the Defendant relied upon a Diſcharge under the Statutes for the Diſſolution of the Monaſteries. Upon Evidence the Plaintiff produced a Decree, made in Charles II's Time in this very Court, whereby the Right to the Tithes of theſe Lands was eſtabliſhed. The Counſel of the other Side oppoſed the reading this Decree, till the Plaintiff ſhould prove, that the Defendant claimed under the Parties privy to this Decree. And the whole Court was unanimous in this Opinion. Accordingly upon the Plaintiff's not being able to give this Evidence, the Decree was not allowed to be read. Afterwards in the Courſe of the Evidence, a Deed was offered to be produced, that bore Date thirty-eight Years ago, and that of itſelf, without proving the Witneſſes to it were dead. Baron Carter however was of Opinion, that this Deed ſhould not prove itſelf, without giving this previous Evidence. But the reſt of the Court delivered their Opinions to the contrary. They ſaid it was certain, that according to common Senſe and Reaſon, a Deed may be ſo old, as ſuch previous Evidence muſt be unneceſſary; and in general they took it, that forty Years was allowed to be the Rule. But however the Courts have never tied themſelves up ſtrictly to that Rule; but 39, 38, nay 35, has been allowed the ſame. And Baron Thompſon ſaid, the ſame Thing holds in a Bond, twenty Years is there the general Rule for Preſumption of Payment, but Sixteen has ſometimes been admitted. Accordingly this Deed was allowed in Evidence, without proving the Witneſſes to be dead.

Holt *and* Ward.

Vide ante 333.

THIS Queſtion now came on again upon that ſingle Point, whether if Ward had not ſince been married to another Woman, the Eccleſiaſtical Courts could have ſo far enforced this Contract, as to have compelled the Plaintiff to have perfected it, tho' ſhe was under Age at the Time ſhe engaged in it. Dr. Hinchman appeared now for her, and argued, that by their Law ſhe might. He ſaid, it was expreſly admitted by the Pleadings, that at the Time of the Contract ſhe was of ſuch an Age, as if the Parties themſelves had perfected the Contract, the Contract could never have been diſſolved. And farther he laid it down for certain Law, that if the Contract had been per verba de præſenti, their Courts would have enforced the Solemnization of it. And a Solemnization of Matrimony he ſaid, was not a Matter of Form only, but ſo very material, as for Want of it the Biſhop muſt certify the Children to be Baſtards. The Method of the Eccleſiaſtical Courts exacting this Solemnization, he ſaid, muſt be by excommunicating the Infant, if ſhe diſobey'd the Sentence. He went on farther and obſerv'd, that their Law was equally known and certain, that if the Contract de futuro had been entered into by both Parties, when of full Age, their

Courts would have carried it into Execution. And as this Contract would have been good, if carried into Execution by the Parties themselves, he submitted it there was equal Reason, that their Courts should carry it into Execution under the present Circumstances. The Authority of their Books, he said, was general, that these Contracts might be enforced. And to this Purpose he relied upon Swinburn, Title Espousals, Par. 17. Dr. Straan on the other Side argued, and said, that he did allow, that if the Contract had been per verba de præsenti, the Infant would have been compelled to have solemnized it in the Face of the Church. But said, there was no Instance to be met with in their Law, of a Contract per verba de futuro being carried into Execution by Ecclesiastical Censures, tho' both Parties were even of full Age at the Time of the making it. That there have been many Suits commenced for this Purpose he willingly allowed; but said, those Courts had never interfered farther, than to persuade and advise the Parties to compleat their Engagement. In the very same Paragraph before quoted he observed, the Words of the Author were, monendi potius quam cogendi. In the 100th Canon in 1603, he said, it was expressly provided, that no Children shall contract Marriage under Age, but with the Consent of their Parents. No Consent of this Sort appears in the present Case. And therefore it would be very strange, that such a Contract should be enforced. In the Case of verba de præsenti, he said, the Contract itself was absolutely a Marriage de Facto. And therefore it was nothing wonderful, that it should be required to be publickly solemnized. But he took Notice, that it was so contrary to the Nature of Matrimony (which is supposed to be a State of mutual Good-Will and friendly Society) to be carried into Execution by Force; that, if it was so done, he submitted it the Marriage would be null and void. The Court thought there were considerable Doubts of each Side of the Question; so the Matter was ordered to stand over. Vide post.

Wilcox *and* Huggins.

MR. Birch now argued for the Plaintiff, and principally relied upon the Case in Carth. 355. There an Action was brought by an Administratrix, and the Statute of Limitations pleaded. The Plaintiff replies, that it was true indeed it was above six Years from the Cause of Action; but farther says, that the Intestate died within six Years, and Administration was not committed to the Plaintiff till after; and that from the Time of Administration committed, there was not six Years. To this the Defendant demurred; but the Court gave Judgment for the Plaintiff; and held, that an Administratrix has six Years to commence her Action from the Time of Administration committed, unless the Intestate was himself barred. However the Court said, that they continued of their former Opinion. And the Reason they gave was, that wherever a Person enters an Action to save the Benefit of the Statute of Limitations, his Executor must recently sue out a fresh Writ; or otherwise the Vide ante 335.

Benefit of the Statute is loſt. They ſaid, they were far from thinking, but if there was any lawful Impediment given to the Probate of the Teſtament, the Executor would have Time given to ſue out this Writ as ſoon as reaſonably he could after the Probate. But then they ſaid, this Impediment muſt certainly be ſhewn in pleading, which is not done in the preſent Caſe. To allow Continuances at all upon theſe Statutes of Limitations, they obſerved, was a favourable Conſtruction upon them, tho' they thought a juſt One. But certainly it muſt be neceſſary, that the Whole muſt appear to be as near as poſſible a continued Proceeding. When the Party himſelf dies, the Suit cannot ſtrictly be continued; but yet that Breach muſt be made up as ſoon as can be by commencing a freſh Action. Accordingly the Court ſaid, this was ſettled in the Caſe of Kemſay and Hayward, mentioned upon the former Argument. Mr. Fazakerly ſaid, the ſame Point was ſoon after adjudged in the Caſe of Beſt and Bretelon; and afterwards in the Caſe of Morſon and Plucket, Trin. 2 Geo. 1. However the Court ordered this Matter to ſtand over.

Vide poſt.

The King *and* Huggins.

The Conſequence of a Priſoner's being retaken upon a freſh Purſuit.

Scac. IN an Information brought in the Exchequer againſt the Defendant for the voluntary Eſcape of one Boys, who was in Execution for 25000 l. the Defendant pleaded, that he eſcaped without his Privity, and that he was retaken upon a freſh Purſuit. To which the Attorney General replied, that the Eſcape was voluntary, abſque hoc, that it was without his Privity. Iſſue being joined upon this Fact, a ſpecial Verdict was found, that the Defendant's Turnkey let him eſcape voluntarily; but that it was without the Privity of the Defendant, and that he was brought into Priſon again; and then the Jury make a general Concluſion; that if the Court ſhall be of Opinion, that a voluntary Eſcape of the Turnkey is a voluntary Eſcape of the Jailor, they find for the King; if not, for the Defendant. Mr. Bootle argued for the King, that this Verdict maintained the Information. He ſaid the Rule, which he ſhould found his Argument upon, was, that the Act of a Servant, when done in that Capacity as a Servant, is always to be imputed the Act of the Maſter. With this Qualification, he ſaid, all the Caſes, which might be objected of the other Side, might be anſwered. And that the Turnkey was acting in this Capacity as a Servant, he ſaid, was manifeſt. His Office was to look after the Priſoners, and to have the Cuſtody of them; the Cuſtody of them he then had; and a Breach of his Duty, as having the Cuſtody of them, he was guilty of. The Servant himſelf could not neither be anſwerable to the King; the King's Remedy is only againſt the Principal; and ſo is the expreſs Authority of 1 Ven. 238. Serjeant Darnel on the other Side argued, and ſaid, he ſhould readily allow, that if freſh Purſuit had not been made, the Jailor himſelf would have been reſponſible. But when the Party is taken upon freſh Purſuit, he ſaid, The King had now the ſame Security for his Debt, as he had before; and there-

fore, he ſubmitted it, there was no Reaſon the Defendant ſhould ſuffer. He put the Caſe, that the Jailor and Turnkey were together in Company with the Priſoner; the Priſoner eſcapes by the Connivance of the Turnkey; but no one ſurely would think, that the Jailor could not retake him. In Doctor and Student, 237. there is an expreſs Caſe put, of a Man's being in Cuſtody for Debt and Felony both, and eſcaping with the Privity of the Turnkey; yet held, that the Jailor himſelf ſhould be fined; but the Turnkey anſwerable capitally for the Felony. If this Caſe was Law, he ſaid, it plainly ſhewed, that for the ſame Eſcape the Turnkey might be anſwerable, as for a voluntary one; the Jailor, as for a negligent One. And if this Rule would hold in criminal Convictions, he ſubmitted it, there was equal Reaſon to ſay it would in Civil Actions. Had the Officer, ſuffering the Eſcape, been Deputy to the Jailor inſtead of Servant, he ſaid, he ſhould have allowed, that no freſh Purſuit could have been material; the whole Office is veſted in him, and he it is, whom the Law takes Notice of. But the preſent Caſe differed much from that; and there is no Reaſon to ſay, that the Servant's Act ſhould be imputed to the Maſter, unleſs a Stranger was thereby prejudiced. And to prove this Doctrine expreſly, he relied upon the Caſe in Salk. 441. He then took an Exception to the Information, that by Law it was not maintainable. An Action upon the Caſe for an Eſcape, he ſaid, at Common Law was the only Remedy; Debt is given by the Statute of 1 Ric. 2. c. 12. and this Information is only in the Nature of an Action of Debt. But he ſubmitted it, that the King was not within the Proviſion of that Statute; and this, he ſaid, appeared by the Penning of it. The Court ſaid, that they thought, there were conſiderable Difficulties attending this Queſtion, but their preſent Opinion was, that the Defendant was not anſwerable. That he would have been ſo, they clearly agreed, if the Priſoner had not been taken again; but as the King had really ſuffered no Prejudice, they thought it would be hard to make the Defendant anſwerable. As to the Information itſelf, the Chief Baron ſaid, it was indeed merely in the Nature of an Action of Debt; but yet he thought it maintainable for the King, not ſo much upon the Statute of Ric. 2. as upon the Statute 13 Edw. 1. c. 11. However Baron Cummins ſaid, that there was ſome Difficulty ſtuck with him upon the finding of the Special Verdict, in that it was not ſo much as mentioned in the Verdict, that there was a freſh Purſuit and Re-taking; and he doubted at preſent, whether the general Concluſion could help it. It was ſaid then by the Defendant's Counſel, that this Matter was fully proved upon the Trial, and was propoſed to be found by the Jury at that Time; but the Court then ſaid, that it was not material to find it. Upon which the Counſel ſubmitted it, that the Verdict might be amended, if this Exception ſhould be thought material. But Baron Thompſon ſaid, that could not be done, unleſs the Minutes of the Special Verdict would warrant the Amendment. Upon the Whole, the Court thought this Matter proper to be conſidered of more fully.

Thruſt-

Thurſtout *and* Holdfaſt

How far an Ejectment will not lie in Weſtminſter-Hall of Lands in a County Palatine.

LAdy Lawley cauſed ſeveral Declarations in Ejectment to be delivered to the Tenants of Lady Faulconbridge in the County Palatine of Cheſter. And now before Judgment had been moved for againſt the Tenant in Poſſeſſion, Mr. Kettleby moved in Behalf of Lady Faulconbridge, that the Proceedings might be ſtaid, on an Affidavit that the Tenants were all Inhabitants within the County Palatine. He ſaid, if they ſhould enter into the common Rule, they would be prevented from pleading any Matter to the Juriſdiction of the Court; becauſe Defendants are thereby bound to inſiſt only on the Merits. And therefore he did not know any other Way in theſe feigned Suits, than to move to ſtay the Proceedings. Mr. Fazakerly oppoſed the Motion, and ſaid, he apprehended, this Court has Juriſdiction in Ejectments for Lands lying in a County Palatine; where the Parties are not reſiant within the County Palatine. He allowed, that in all real Actions, where the Proceeding is by Summons on the Land, the Courts at Weſtminſter have no Juriſdiction; becauſe it manifeſtly appears, the Courts within the County Palatine can do the Party Juſtice. But he ſubmitted it, where the Proceedings muſt be againſt the Perſon, thoſe Courts have not Juriſdiction, where the Party is not reſiant therein. And therefore, he ſaid, in Ejectments, where feigned Names are made uſe of, and there can be no ſuch Perſons, inhabiting in the Counties Palatine, or any where elſe, this Court muſt have a concurrent Juriſdiction; unleſs it be laid down for Law, that the Courts at Weſtminſter have no Juriſdiction, where it appears, the Lands lie within a County Palatine. But if that be ſo, there is no Occaſion for an Affidavit to ſtay the Proceedings; this Matter may as well be taken Advantage of in Arreſt of Judgment, or upon a Writ of Error. But that this cannot be done, appears expreſly by the Caſe of Davis and Stringer, Carthew 354. 5 Mod. 143. where it is determined, that it muſt be pleaded, that the Parties lives within the Juriſdiction. He ſaid too, that it was determined about ten Years ago in the Caſe of Acton and Tanner upon a Writ of Error in the Exchequer Chamber, that Treſpaſs Quare clauſum fregit of Lands in a County Palatine would lie in this Court. And beſides this very Action of Ejectment was held to lie in the Exchequer in the Earl of Derby's Caſe for the Manor of Latham in the County Palatine of Lancaſter, which was ſettled after ſeveral Arguments. And it is certain, that if this Court can give Judgment, they can award Execution. For which Reaſon it is the conſtant Practice to award Writs of Elegit into a County Palatine on Judgments given in this Court. The Court thought this a Matter of too great Conſequence to be determined on a Motion. They ſaid, a Fine or Recovery ſuffered of Lands in a County Palatine is void; as alſo every Judgment in a real Action. They did not think, that the Caſe of the Clauſum fregit came up to this Caſe, becauſe there Damages only are recovered

covered, whereas in Ejectment the very Land itself is. And though it has been the Practice to bring Ejectments in the Court of Exchequer; yet perhaps there may be a Difference between the Practice of the two Courts; though they said, at present they could not see upon what Foundation the Practice in the Court of Exchequer was maintained. However that this Matter might come on in a more solemn Manner, they said, the Tenants in Possession might appear and plead, what they thought proper.

The King *and* The Parish of Lyncanton.

MR. Hussey came now to discharge the Rule. He said in general that it was a pretty extraordinary Method of Proceeding to grant Informations against Church-wardens and Overseers for making unequal Rates. The Parliament, he said, had prescribed an Appeal for the proper Remedy. But besides he observed, that has the present Case was, it was something more particular. An Appeal had actually been to the Justices at the Sessions, and they confirmed the Rate in this very Respect, as thinking it equal; but only ordered certain other Persons to be rated, whose Names had been omitted. The Church-wardens in pursuance of this Order have made a new Rate, in which the Names of those other Persons are inserted; but the Rate in other respects is exactly as it was before; and yet the Church-wardens are here complained against, as having acted criminally. The Court said, that the Rate, that is now made is a new one, from which an Appeal may be by Law; and they thought that the only proper Remedy. Accordingly discharged the former Rule. Vide ante 327.

Everard *and* Eding.

MR. Amerose came now to shew Cause upon the former Rule, and said, that he hoped the Court would not make it absolute, without giving their Side Liberty to plead de novo in the original Action. However upon their owning, that the Writ of Error was brought merely for the Mistake mentioned before, the Court made the Rule absolute without putting those Terms upon the Defendant. Vide ante 334.

Northey and Sheers

UPON a Reference having been made of an Attorney's Bill to be taxed, the Question was, whether an Attachment should go directly, or only a Rule to shew Cause. Mr. Strange urged, that the Intent of the Parliament was, that an Attachment should go immediately, and compared this to the common Case of Costs. He said too, that upon the late Act of Parliament, which requires a peremptory Mandamus to go forthwith, it has been held, that a Writ of Error shall be no Supersedeas; and he thought, the present Case was something like that. The

How far it is necessary that a Rule should be made to shew Cause before an Attachment can issue.

Court ſaid, that the Words of the Act are, that an Attachment ſhall go according to the Courſe of the Court. Now, they ſaid, that in all other Caſes, except Coſts for not going on to Trial, or ſuch ſlight Motions, they do make a Rule to ſhew Cauſe; and therefore did ſo in the preſent Caſe.

The King *and* The Inhabitants of Weſtwell,

How far a Perſon ſhall not be ſaid to gain a Settlement by living as a Servant in a Pariſh.

ON Rule to ſhew Cauſe, why an Order of Removal ſhould not be quaſhed, the Caſe was ſpecially ſtated, that A. was hired to live with B. from ſix Weeks after Michaelmas to Michaelmas following; and before his Time was out he offered to live with B. for another Year from that Michaelmas Day, if he would give him 4 l. per Annum. But that Propoſal not being agreed to, he went away on Michaelmas Day. Three Days after the Maſter agreed to give him the Money, and then immediately A. entered upon the ſecond Service, and lived with B. till the Michaelmas after. The Juſtices upon this adjudged A. to have got a good Settlement by this Service. But the Court made the Rule abſolute for quaſhing the Order.

Stonehouſe *and* Mallins.

Within what Time a Retaking muſt muſt be upon a freſh purſuit.

IN an Action of Debt for an Eſcape of one Farrar, who was in Execution in the Marſhalſea; the Plaintiff declares, that he recovered againſt him in the Common Pleas, and that he was in Execution upon that Judgment in the Marſhalſea; but that the Defendant voluntarily let him eſcape. The Defendant pleads, that the Eſcape was involuntary; and that he retook the Priſoner upon freſh Purſuit. Upon this the Plaintiff demurs, and ſhews for Cauſe, that the Retaking appeared to be after the Action commenced. Mr. Marſh now argued for the Defendant, and inſiſted, that there was no certain Time limited by Law for a Retaking upon freſh Purſuit; a reaſonable Time is given to the Gaoler; and that reaſonable Time muſt vary according to the Circumſtances of each particular Caſe, which the Court are the proper Judges of. That there was no particular Time preſcribed for a Retaking upon freſh Purſuit, provided it was done before the Action brought, was known and certain. In a Caſe in the Year-Books it is held, that a Retaking upon freſh Purſuit may be made ſeven Years after the Eſcape. And he ſubmitted it, that there was no reaſonable Diſtinction between the preſent Caſe and that. He then took an Exception to the Action itſelf, that as it muſt be taken upon the Defendant's Plea, by Law it would not lie. The Defendant has pleaded, that the Eſcape was involuntary; the Plaintiff has not traverſed this, that therefore muſt now be taken as for Fact; and the ſame as it had appeared upon the Plaintiff's own Declaration. Now he ſaid, he ſhould ſubmit it, that upon the Statute of 1 Ric. 2. c. 12. no Action of Debt would lie for an Eſcape, that was involuntary. And laſtly he excepted to the Form of the Declaration, that the Plaintiff had not ſet forth, that he had recovered in the

Common Pleas per judicium; but only, that he had recovered there generally. And for this he relied upon the Case of Jones and Pope, 1 Sid. 306. in point. To the first of these Objections the Court said, it has been so often resolved, that the Retaking must be before the Action brought, that they would not enter into the Argument of that Point now. The Case in 1 Jones 144. is express, and so is the Case of 2 Cro. 657. The second Objection the Chief Justice said, he thought, there was a good deal of Weight in; but Mr. Reeves, who was of Counsel for the Plaintiff, submitted it, that there was not; because the known Distinction taken is; that an Action upon the Case lies only for Escapes upon mean Process; Debt for Escapes upon Process in Execution. However the Court in general agreed, that as the Plea is bad, this Exception can by no means be taken Advantage of; because the Plaintiff had admitted nothing, as the Matter of the Plea is wrong. And if this had been upon a general Demurrer, they said, it would have been all the same. To the last Exception the Chief Justice said, this same Case of Jones and Pope is reported in 1 Saund. and he did not think, there was such an Exception, as this, there; and the Court in general agreed it could not be Law. Accordingly the Court gave Judgment for the Plaintiff Nisi, before the End of the Term.

Crew *and* Daniel.

When a Plaintiff declares against a Prisoner in Custody, what shall be a good Declaration of that Sort.

IN Debt upon Bond the Plaintiff declared against the Defendant, as in Custody, upon the Statute of 4 & 5 W. & M. c. 21. but did not set forth in his Declaration, that the Defendant was in Custody at his Suit. And for this Reason there was a general Demurrer to the Declaration. To support this Demurrer Mr. Parker relied upon the Case of Morrice and Watkins, Trin. 9 Geo. 1. in point. But Mr. Robinson on the other Side argued, that there was indeed Rule given that way Nisi in that Case; but afterwards that Rule was discharged; and Judgment given for the Plaintiff. The Chief Justice said, that he thought this Exception was very material; because the Intent of the Statute seems only to be, that a Person should have this Liberty of declaring against another, where he is in Custody at his Suit; and not at the Suit of a third Person. And Judge Page observed, that this must be the Intent of the Parliament; because otherwise a Man would have a Power to declare against another, without ever taking out a Writ against him. And this Method of Proceeding he thought was established as a general one for all the Courts, in Imitation of a Practice something of the same Sort, that was before in this Court. Accordingly notwithstanding the Case cited the Court gave Rule for Judgment against the Plaintiff Nisi on Monday. On which Day Mr. Robinson informed the Court, that he had searched the Record in the Case cited, and shewn it to Mr. Parker, and that Judgment was at last given for the Plaintiff. Accordingly, the Chief Justice absent, the Court gave the same Rule here.

Beech

Beech *and* Parker.

On what Day a Writ of Enquiry is not proper to be made returnable.

UPON Writ of Error on a Judgment by Nil dicit out of the Common Pleas. Exception was taken to the Writ of Enquiry, that it appeared to be returnable a Die Sanctæ Trinitatis in Tres Septimanas, which was on a Sunday, but that it was executed the Day after the Return, which was on the Monday. The Counsel did admit, that Monday was the Day of the Return for the Purpose of the Sheriff's delivering the Writ into Court, but Sunday was to be considered the Day of the Return for all other Purposes. Accordingly the Court reversed the Judgment upon the Authority of the Case of Harvey and Broad, 6 Mod. 148.

Southouse *and* Newen.

What shall be said to be a good Return in a Writ of Elegit.

SErjeant Chappel came to discharge a Rule for quashing a Return to a Writ of Elegit, of there being no Goods nor any Lands. The Exception taken to the Return was, that the Sheriff could not Return no Lands, without taking an Inquest for that Purpose; and therefore it ought to have appeared upon the Return, that there was an Inquest. Serjeant Chappel said, that if there had been Lands, and those Lands to be delivered, he did allow, such Inquest was necessary; because there the Words of the Writ are express, that the Lands should be delivered per Inquisitionem; but where there are no Lands, the Words of the Writ do not at all require this. And in such Case the Writ is only in the Nature of a common Fieri facias; and therefore, he said, as to the Delivery of Goods only upon such Writ, it is never required that there should be an Inquest. Accordingly the Court discharged the Rule.

Metscoffen *and* Gunner.

Vide ante 341.

MOTION was now made to discharge the former Rule, upon Account of its giving the Plaintiff Liberty to charge the Defendant in Custody with a Copy of the Writ. Now according to this Rule the Counsel said, it would be an Escape in the Sheriff to transport the Defendant. The Court said it was not their Intention it should be so. Accordingly discharged that Rule, and ordered the Officer to draw up another Rule in this Form, that the Plaintiff should have Liberty to charge the Defendant, in Custody, with a Copy of a Writ.

Fuller *and* Josling.

IT had been moved on Behalf of Mr. Josling, as Executor, that a Judgment, given upon a Warrant of Attorney by his Testatrix, might be set aside for its being entred up after the Party's Death. Upon a Reference of this Irregularity to the Master he reported the Fact to be that the Attorney had delivered him the Non sum informatus the 16th of April last, the Testatrix died the 18th; and that he signed the Judgment the 22d; all which was done in Easter Term last. And now the Question was, whether this Judgment was regular or not. Mr. Fazakerly argued for the Defendant, and insisted, that by the same Reason, as this Judgment would be good, which was signed two Days after the Party died, this Judgment would have been good, though signed at the End of the Vacation. And he submitted it, that this might be of dangerous Consequence to Executors, for by Payment of Debts due by Bond or simple Contract immediately upon the Death of the Testator, which the respective Creditors would have a right at that Time to have paid them, any Executor might be subject to a Devastavit. And to prevent Mischiefs of this Nature, he said, that Clause in the Statute of Frauds and Perjuries was made, which provides, that Judgments shall have no Relation, but to the Time of the Signing. If that was so, he said, he submitted it, the present Judgment was clearly bad. All Authorities, he observed, in their own Nature determine by the Death of the Party. They are, and must be revocable at any Time during the Life of the Parties; and Death is of it self a constant Revocation. To which Purpose he applied a Case out of 1 Ven. 310. and another out of Salk. 399. But the Court declared their Opinion to be, that all Judgments continued to have relation since the Statute as to the Parties themselves, and their Representatives, in the same Manner, as they did before the Act as to every Body else. And therefore the Inconvenience of a Devastavit, was not to be regarded. Then as to what was observed upon Authorities in general, they said, was not applicable to the present Case of a Warrant of Attorney to confess a Judgment. These, they observed, were Authorities coupled with an Interest, and therefore not to be compared in Reason to naked Powers. For which Reason the Chief Justice said, he thought the Party himself could not revoke it; and that therefore the Death of the Party would not be so far a Revocation in Law, but that the Judgment might be well entred up upon it at any Time before the next Precedent Term. And to this Purpose the Court relied the Case of Oats and Woodward, Salk. 87. as being in Point. However the Court said, they would not give their final Opinion upon this Matter now; but in the mean Time made a Rule upon the Sheriff to deliver over to the Defendant the Goods he had taken in Execution on a Judgment of the Penalty of a Bond, upon the Defendant's bringing into Court what Money the Master should appoint.

Within what Time a Judgment upon a Warrant of Attorney must be entered up.

Vide post.

Fuller *and* Josling.

How far a Court of Law does not relieve againſt Judgments entered upon a Warrant of Attorney, but leaves the Party to take his Remedy in Equity.

MR. Fazakerly moved, that it might be referred to the Maſter to ſee what was due upon a Judgment, that had been given upon a Warrant of Attorney, as an Indemnity to two Perſons being Security for another upon her taking out Adminiſtration to her Husband; and farther prayed, that Execution might be ſtayed in the Sheriff's Hands in the mean Time. He ſaid, that this Judgment appears to have been confeſs'd upon Terms at the Time of the Confeſſing it; and whenever the Terms are precedent to the Judgment, he ſubmitted it, this Court will always take Care, that they are complied with; tho' he did allow, that when there is a ſubſequent Agreement, this Court has no Juriſdiction. And to this Purpoſe he applied a Caſe out of Salk. 400. in Point. The Court ſaid, that wherever thoſe Terms are, that the Party ſhall do one or more determinate Acts, they do indeed refer ſuch Judgments to the Maſter; but wherever the Terms conſiſt of uncertain Acts, they never do it. Upon which the Counſel then prayed, that it might be referred to the Maſter to ſee, whether there was one Penny due; and if it ſhould come out upon the Report, that there was, they would then willingly apply to another Court for Relief; or at leaſt, they hoped, the Money ſhould be ſtayed in the Sheriff's Hands in the mean Time, till they could have Relief in another Place. But the Court refuſed to grant this Part of the Motion likewiſe.

The King *and* Huggins.

How far the Court will not bail a Man who is indicted for Murder.

THIS was a Special Verdict found upon an Indictment of Murder, and removed up into this Court by Certiorari from the Old Baily. The Indictment charged the Defendant, that he being Warden of the Fleet, and one James Barnes, Servant of the Defendant, and imployed by him in the Care of the Priſoners, the ſaid Barnes exiſtens Perſona crudelis Naturæ & immanis Diſpoſitionis, did on the firſt of November, 12 Geo. 1. makes an Aſſault on one Edward Arne, then being a Priſoner in the ſaid Priſon, & felonice & ex malitia ſua præcogitata, did then and there againſt the Will of the ſaid Arne, convey him into a certain Room in the ſaid Priſon, re-enter ædificat', and did there detain him for the Space of ſix Weeks, abſque ſolamine Ignis, nec non ſine aliqua Matula, Anglice, a Chamber-Pot, Scaphio, Anglice, a Cloſe-Stool, vel aliqua alia hujuſmodi Utenſili (Parietibus prædict' Romeæ confect' de lateribus, Anglice Bricks, Cement', Anglice Mortar, valde humidis exiſtentibus, ac Romea prædict' ſituata exiſtent' ſuper communem ſuer' Priſon' prædict' & juxta locum ubi ſordes & fimus Priſonæ prædict', necnon excrementum Priſonariorum prædict' adtunc uſualiter poſit' fuerunt, ratione quorum Romea prædict' adtunc valde inſalubris, & Vita alicujus perſonæ in eadem detent' valde periculos' extitit). The Indictment farther charged, that the ſaid Barnes and Huggins knew that the Room ſic ut præfertur ſcituat' fuit,

fuit, and that the ſaid Arne per duriſiem impriſonamenti prædict', became ſick, and languiſhed from the 7th of November to the 31ſt of December following, and then died. And that the Defendant, exiſtens perſona crudelis Naturæ & immanis Diſpoſitionis erga Priſonarios in eadem Priſona diverſis diebus & vicibus felonice & ex malitia ſua præcogitata fuit præſens, auxilians & manutenens prædictum Edvardum Barnes ad prædictum Edvardum Arne ſic ut præfertur felonice murdrand'. To this Indictment the Defendant having pleaded Not guilty, the Jury find a Special Verdict. That the Defendant was created Warden of the Fleet by Letters Patent of the late Queen, and acted as ſuch. That one Tho. Gibbons was appointed his Deputy, and acted as ſuch, and that the ſaid Barnes mentioned in the Indictment, was Servant of the ſaid Gibbons, and imployed by him to take Care of the Priſoners. They find, that the ſaid Barnes did detain the ſaid Arne in the ſaid Room abſque ſolamine Ignis, &c. as mentioned in the Indictment. That the ſaid Room was ſituated in the Manner mentioned in the Indictment, and that the ſaid Defendants knew, that it was ſo ſituated. They find, that the Defendant Ad ſpacium quindecim Dierum ad minus ante obitum prædict' Edvardi Arne knew, that the ſaid Room recenter ædificat' fuiſſet, quodq; Parietes ejuſdem Romeæ de lateribus, Anglice Bricks, & Cement' Anglice Mortar, adtunc valde humid' fuerunt, Anglice were damp. They find, that the ſaid Arne, per duritiem Impriſonamenti & Detentionis prædict', became ſick on the 10th of September, and ſo languiſhed till the 20th of October, and then died. They farther find, that during the ſaid Impriſonment per ſpacium quindecim dierum ad minus ante mortem prædict' Edvardi Arne Defendens fuit ſemel præſens apud Romeam prædict', and ſaw the ſaid Arne ſub duritiem Impriſonamenti prædict' ac adtunc & ibidem ſeipſum avertit, Anglice turned away, and the ſaid Barnes locked the Door. They find laſtly, that the Defendant ſometimes acted as Warden, during the Time that Gibbons was his Deputy. But whether upon the whole Matter the Defendant is guilty of the Felony and Murder in the ſaid Indictment they pray the Diſcretion of the Court. This Matter was now argued at the Bar by Mr. Wills on Behalf of the Crown, and by Serjeant Eyres on Behalf of the Priſoner. Mr. Wills in his Argument endeavoured to ſhew, that as the Facts are found in the Special Verdict, it appears, that Barnes was guilty of Murder. He had the immediate Care of the Priſoners under his Charge, tho' his Cruelty and Oppreſſion one of them died, and therefore he muſt be anſwerable for his Death. The general Rule in the Law-Books, he ſaid, is laid down to be, that whenever a Perſon does an unlawful Act, and by Means of that the Death of another is occaſioned, ſuch Perſon is anſwerable capitally for the Murder. In 3 Inſt. 56. it is held, that if a Perſon ſhoots at a Deer in another's Park, and the Owner is accidentally killed by the Shot, this is Murder. He did allow, that this particular Caſe is denied to be Law in Hale's Pleas of the Crown; but there is another Caſe in the ſame Inſt. 57. that never has been denied; and which equally makes for his Purpoſe. A Man there is ſuppoſed to be throwing a Stone over a Wall, as People are walking by from Church, with an Intention

tion only of frightning them; one of the Company is killed there by the Fall of the Stone, this is Murder. In Palmer 545. A Case is put of two Constables in different Parishes disputing about a Ballard-Child, which of the Parishes the Child belong to; upon this the Child is thrown backwards and forwards continually from the one Parish to the other, and by these frequent Removals the Child dies, this is held to be Murder in the Constables. In Hale's Pleas of the Crown 53. it is held, that if a Woman carries her Child into an Orchard, and while it is left there a Kite flies by, and kills it, this is Murder in the Mother of the Child. As these Authorities had made this Part of his Argument so clear, he said he would now endeavour to shew, that the Defendant himself must be equally answerable. Upon the Face of the Indictment, he said, the Charge against the one and the other was equally strong; the one is charged with committing the Act of Murder, the other with being present and assisting to it. For which Reason he spent no Time upon this Head; but indeavoured to shew in the last Place, that this must be the same upon the Special Verdict. The Indictment charges, that Barnes confined his Prisoner under such Hardships, as occasioned his Death; the Verdict finds, that the Defendant was present, and saw the Prisoner under these Hardships. It was in the Defendant's Power to have released the Prisoner out of them; it was his peculiar Office and Duty to have done it; and then the Rule of Law and Reason is, that Qui non vetat fieri, quod potest, jubet. Serjeant Eyres on the other Side argued, and said, that he should not dispute, but the Fact found in the Special Verdict was Murder in Barnes; he should not deny neither, but the Fact charged in the Indictment was Murder in the Defendant; but he submitted it, that the Fact found in the Verdict was not. He said, in Special Verdicts nothing must be regarded, but what is found to be fact; and not what is barely Evidence of it. Those Circumstances were proper to be laid before the Jury below to have induced perhaps them in their Consciences to have found the Fact, that the Defendant was assisting to the Death of his Prisoner; but those Circumstances are to be rejected now, and the Court is only to judge upon the Fact, as found by the Jury. In Civil Cases this is frequently laid down. Circumstances of Fraud are always rejected out of a Verdict; and the Court only considers, whether Fraud or not is found by the Jury. If there had been Fraud, the Court is to conclude the Jury would have found it; and therefore in the present Case, he said, he should submit it, that if all the particular Circumstances of the Defendant's knowing, that the Chamber was situated over the common Sewer, of his knowing, that the Prisoner was confined without a Chamber-pot or other Convenience, had been found in the Verdict, as well as the other of his knowing the Walls to be damp; yet these Circumstances must be rejected out of the Verdict. But, he said, there was no occasion to rely upon this; those other Circumstances, which are the most material ones, are not found; it is only found, that he knew the Walls were damp; that is but one Part of the Hardship; and therefore no Foundation to say

the Defendant ſhould be anſwerable for his Priſoner's Death; who died under the whole Hardſhip, and not Part of it. The Court were of the ſame Opinion as to the two firſt Points, that the Fact found in the Verdict was Murder in Barnes; and the Fact charged in the Indictment, Murder in the Defendant. But before they entred into the principal Queſtion, they had a Doubt, whether there muſt not go a Venire de novo upon the uncertain finding of the Jury, that the Defendant was preſent per ſpacium quindecim Dierum ante mortem of his Priſoner. They ſaid, the common Senſe of thoſe Words was, that he was preſent there the whole fifteen Days; but they obſerved, that that could not be the Senſe; becauſe it is found in the Verdict immediately afterwards, that the Defendant avertit ſeipſum, and the Door was lock'd. But the Attorney General to this anſwered, that there were the Words Ad minus in; and then the Meaning of the Sentence is directly fixed, that the Defendant ſaw his Priſoner at leaſt fifteen Days before his Death. Accordingly the Court thought this a ſufficient Anſwer. But otherwiſe, they ſaid, the Caſe of The King and Keet, Mich. 1697. was a very material one to ſhew a Venire de novo ſhould go. There the Defendant was indicted for Killing his Servant, who refuſed ſending him the Key of his Garden. It was a Doubt upon that Verdict, whether the Maſter appeared to have ſtruck the Servant firſt, or the Servant the Maſter. The Reaſon for that Doubt's being thought material was, that there had been formerly an Opinion of eleven Judges againſt one, that it could not be murder, where the Party deceaſed ſtruck firſt. But that Caſe has ſince been held otherwiſe in the Lord Chief Juſtice Holt's Time. Two Judges however were of Opinion in that Caſe, that the Facts ſhould be taken in the Order that they were laid in the Indictment, two of a contrary Opinion; but yet they all agreed, a Venire ſhould go. To the principal Queſtion then all the Court delivered their preſent Opinion to be, that the Fact as found in the Verdict was not Murder in the Defendant. They did not declare what their Opinions would have been, if all the Circumſtances had been found upon the Defendant; but they thought the per Duritiem impriſonamenti prædict' could never include them all. However the Court ordered an ulterius Concilium to be entred, and ſaid, that where a ſpecial Verdict is removed from the Old Baily, the uſual Method is to take the Opinion of all the Judges; becauſe they are all in the Commiſſion there. The Defendant's Counſel then prayed he might be bailed. They ſubmitted it, that upon theſe Special Verdicts it is the conſtant Practice to do it, unleſs the Court is clear upon the Verdict, that the Defendant is at leaſt guilty of Manſlaughter. And this, they ſaid, would be an Anſwer to the Court's refuſing Bail in the Caſe of The King and Keet before-mentioned, and the Caſe in Salk. 61. But the Court ſaid, this Point in the Caſe of The King and Keet was debated ſolemnly; and there the Court declared their Reaſon for refuſing Bail to be, that the Matter was depending upon a Special Verdict. And for this Reaſon they refuſed it in the preſent Caſe. The Defendant then deſired, he might be turned over from Newgate to the Marſhalſea. The Court refuſed that too, till he produced an Affidavit of his

Vide poſt.

Health being endangered by the Cloſeneſs of that Priſon; but upon his doing that, they did make ſuch Rule; tho' ſaid, he muſt ſtill be kept under ſtrict Confinement.

Goodman *and* Goodright.

How far the Court will give a Man Leave to take out Execution pending a Writ of Error.

MR. Reeves moved that the Defendant in Error might have Liberty to take out Execution, one of the Plaintiffs in Error being dead. Mr. Filmer on the other Side ſaid, that the Defendant in Error muſt take out a Scire facias, before he can have Execution; and for this Purpoſe relied upon the Caſe of Spenſer and Woodward, Yel. 208. The Court ſaid, that they would not now conſider that Matter; but made a Rule, that it ſhould be no Contempt in the Defendant to take out Execution, notwithſtanding the Writ of Errors. And Mr. Reeves privately ſaid, that this Caſe in Yelv. was not Law.

Anonymus.

How far a Non pros' ſhall be ſaid to be regular.

THE Irregularity of a Non pros' having been referred to the Maſter, he reported the Fact to be, that the Defendant was taken in Cuſtody upon mean Proceſs; but that he had no Notice of a Declaration within two Terms; and upon that the Defendant ſigned his Non pros'; tho' in Fact, he ſaid, a Declaration was regularly filed in the Office. The Court ſaid, that if the Party will plead, and by that Means admit Notice, it is certainly good; but otherwiſe they thought Notice requiſite; accordingly granted a Superſedeas; and ſaid, the Non pros' was regular.

Anonymus.

How far the Court will not ſuperſede a Writ of Mandamus, but will require a Return to be made to it.

MOTION was made to ſuperſede a Writ of Mandamus, requiring the Judge of the Prerogative Court to grant Adminiſtration, and was founded upon an Affidavit, that Adminiſtration was granted before the Writ taken out. But the Court ſaid, this Matter muſt be returned.

The Duke of Montague *and* Burroughs.

When an Action is brought upon a Note of Hand, how far an Injunction is proper to be granted, in Order to ſtay the Proceedings in it.

Seac. THE Defendant here was Plaintiff in two Actions, one of which was upon a Bond, the other upon a promiſſory Note. The preſent Plaintiff had upon this obtained an Injunction, ſurmiſing an Account; and now upon Bill and Anſwer, the Caſe appeared to be, that ſome Years ago the Duke gave this Bond to the Defendant, and ſome Time after, being Colonel of the firſt Regiment of Dragoons, ſold the Agency of this Regiment to the Defendant, but made him find Security to Account with him for ſome Profits concerning it. Soon after the Duke reſigned his Commiſſion, and the Defendant

upon this complaining that he must be turned out, the Duke gave him this promissory Note. A Sum of 500 l. was borrowed upon the Credit of it of one Lisle. The Defendant acknowledged in his Answer, that there was this Account, but believed he had fully accounted. But whether upon the whole Matter the Injunction should stay, was the Question. The Chief Baron declared his Opinion to be very clear, that as to the Action upon the Bond, the Injunction ought to be dissolved; because the Matter of Account has no kind of Relation towards it. As to the Note, he thought that not so plain; because the Note does seem to relate to the same Matter as the Account. The Account related to the Agency; and so does the Note. But yet, he said, as nothing of this appears upon the Face of the Note, and as Money has actually been lent upon it, as being a negotiable one, he inclined to be of Opinion, that the Injunction ought to be dissolved as to this Action too. Baron Carter differed with him in Opinion as to the second Point; but the two other Barons agreed with him in both. However upon the Duke's offering to pay Mr. Lisle his 500 l. upon the Note, the Court ordered the Injunction to stay as to this Action.

The King *and* Charlesworth.

THE Defendant having been surrendered by his Bail in an Action pending in the Court of Common Pleas, prayed a Habeas Corpus to bring him up, that he might have Liberty to move for a new Trial upon his Information. But the Court said, their Rule is never to grant a Habeas Corpus on the Crown-Side, but where they have something to charge the Party with; now in this Case they had nothing; because the Defendant had in every Thing complied with his Recognisance, and carried the Record down to Trial. In the Civil-Side, they said, they could not grant a Habeas Corpus, unless there is a Cause in Court; and for this Reason they intimated, the Defendant must enter an Action against himself; which accordingly the Defendant did; and the next Day was brought up by Habeas Corpus. And then would have entered into his Exceptions for the new Trial. But the Court said, they believed, by the Rules of the Court this could not be done, till the other Defendant Cox appeared. However, they would consider of this Matter a little longer. And as to the present Defendant's bringing himself by Habeas Corpus in this Way, they said, if it was complained of, that this was only a fictitious Suit, this Practice would not do. And in the Case of Sellers and Bowes, the Chief Justice said, the Court actually entered into this Fact, and upon its appearing to be a feigned Suit, the Court sent the Party back again. Vide ante 342.

King

King *and* The Manucaptors of Seagrave.

When a Scire facias is taken out againſt Bail, the Time that is requiſite that it ſhould lie in the Office.

UPON the Irregularity of a Scire facias againſt Bail's being referred to the Maſter, he repoꝛted, that a Scire feci was returned upon it; but that it did not lie in the Office four Days befoꝛe the Return. And whether this was requiſite oꝛ not, was the Queſtion. Mꝛ. Reeves and Mꝛ. Prime argued, that it was not, and relied upon a Caſe in Salk. 599. in Point. However the other Side ſaid, they had two Caſes directly with them later than this in Salk. one was that of Olgar and Staples, Trin. 1724. the other that of Gilbert and Billingſley. The Maſter ſaid too, that in the Book of Practice left him by his Father, there is no Diſtinction between two Nihils and a Scire feci in this Reſpect; and conſtant Experience is, that each of the Scire facias's muſt lie in the Office four Days, where two Nihils are returned. The Court thought this the moſt reaſonable; but however oꝛdered this Matter to be farther inquired into.

Harding *and* Pitcroft.

How far the Court will not ſet aſide an Award.

MR. Fazakerly moved to ſet aſide an Award, made by three Foꝛemen of a Jury, whereby 50 l. was only awarded foꝛ Damages and Coſts; upon an Affidavit, that two of the Arbitratoꝛs declared ſince the making the Award, that they underſtood it, that the Attoꝛnies of both Sides were each of them to agree about the Coſts attending the Suit, and that they only meant ſuch Coſts, as the Party was at otherwiſe. He ſaid beſides, that he had known ſometimes the Court has oꝛdered Arbitratoꝛs to attend. Mꝛ. Juſtice Page ſaid, that he had known the ſame Thing, but never, unleſs the Arbitratoꝛs were charged with ſome ill Practice. However in the preſent Caſe the Court ſaid, they thought, this would be a Matter of dangerous Conſequence, if they ſhould allow an Award to be overturned foꝛ ſomething, which part of the Arbitratoꝛs has declared about it. Indeed, they ſaid, if all the Arbitratos would come befoꝛe the Court, and declare, their Meaning was miſtaken in the dꝛawing up the Award, that might be ſome Reaſon foꝛ the Court's Interpoſing.

King *and* Morrice.

When an Action is brought againſt a Sheriff for a falſe Return, what is good Evidence to ſupport ſuch Action.

IN an Action foꝛ a falſe Return, the Plaintiff declared, that he recovered 206 l. of Alexander Urket, and that the Sheriff of Middleſex directed his Warrant to the Defendant, as High-Bailiff of Weſtminſter, to levy this Money, which he had recovered of the ſaid Alexander Urket, unde præfat' Alexander convictus eſt. The Defendant returned upon the Back of the Warrant nulla bona, ultra 1 l. within his Bailiwick. Foꝛ this falſe Return the preſent Action was bꝛought. Upon the Evidence at the Trial this Warrant was pꝛoduced, but there was a Blank left foꝛ the

Name of Alexander Urket, so that the Warrant required the Defendant to levy this 206 l. quas Carolus King recuperasset versus nobody, unde convictus est. A Verdict was however given for the Plaintiff, subject to the Opinion of the Court upon this Variance. Mr. Wynn argued that this Variance was material. He said, as this Warrant is, the Defendant would have been punishable if he had levied this Money of Urket's Effects, provided he had had any in his Bailiwick. The Warrant, he said, was illegal upon the Face of it, to require an Officer to levy the Money upon A. which B. has recovered, without saying, that B. has recovered of A. If this was so, he submitted it, the Officer could not be answerable for making this Return, whether the Return be true or false. For that would be to punish an Officer, when he does not execute a Writ, which if he did execute, he would be punishable likewise. Mr. Fazakerly on the other Side argued and said, that if the Name of a Stranger had been filled up in the Blank, he did allow Mr. Wynn's Argument would hold. But as the Warrant now is, he submitted it, it could have no other reasonable Construction, but that the Money was recovered of Urket. And resembled this Case to another, that is well known, of a Grant being made between A. and B. of certain Lands; habendum to B. and his Heirs. This Grant is clearly good; and yet the Lands were not said in the Premisses to be granted to B. The Chief Justice did allow this Case; and in the present Case too inclined to think, that the Warrant was good, and would support the Declaration. He said, in the present Case, the Warrant is not set out in hæc verba in the Declaration, only the Substance of it; and he thought, this might be taken to be the plain Substance and Meaning of it. However the Court ordered Copies to be given them of the Warrant and likewise of the Declaration; so this Matter was ordered to stand over. Vide post.

Thrustout *and* Holdfast.

MR. Kettleby now moved, that the Defendants might have Liberty to plead, that the Tenants in Possession are residing within the County Palatine of Lancaster. He said, this is the constant Method of Pleading, where Lands are antient Demesne; and therefore, he hoped, it should be allowed in the present Case. This Motion he made a few Days before the End of the Term; and the Reason for his doing it then was; because, he said, on the last Day of the Term it is frequent to move for Judgment in Ejectment; and then they should be too late. Mr. Fazakerly on the other Side insisted, that in Ejectments, according to the new Method of Proceeding, the Defendant can plead nothing, but the General Issue. But if this Matter, which is now desired to be pleaded, was pleaded; he submitted it, it could not be material; because this Court has a concurrent Jurisdiction in these Actions, which he conceived to be but personal. He said, it might be difficult perhaps to bring Cases directly adjudged in this particular Action Vide ante 152.

of an Ejectment. But in the Case of Amner and Acton, Hill. 5 Geo. 1. an Ejectment was actually brought in this Court of Lands lying in a County Palatine; Judgment obtained and executed; and the Parties intirely submitted to it. However the Court declared, that they did not think an Ejectment to be a mere personal Action; accordingly gave the Defendants Leave to plead the Matter they requested. 3 Cro. 854.

Cases ruled at the Summer Assises upon the *Norfolk* Circuit.

Baxter *and* Baxter.

When the Statute of Limitations is pleaded in Bar to an Assumpsit, how far Payment may be given in Evidence in support of such Plea.

IN an Action upon the Case the Defendant pleaded the Statute of Limitations; and now offered to give in Evidence, Payment before the six Years begun. Chief Justice Eyres allowed this, and said, that he thought the general Rule was, that as Payment might be given in Evidence upon the General Issue, so it might upon Non Assumpsit infra sex annos. And Mr. Prime observed, that when Motions are made in the King's Bench for Liberty to plead Non Assumpsit and Non Assumpsit infra sex annos, the Court constantly says, they could never see any Reason for them; because what will be Evidence upon one Issue will be Evidence upon the other.

Tong *and* Harrison.

When an Action is brought by one Person against another for lying with his Wife, what shall be good Evidence to support such Action.

IN an Action of Trespass for Breaking the Plaintiff's House at St. Ives, and Lying with the Plaintiff's Wife there, upon Evidence it appeared, that the Plaintiff's House was at Hertford in this County. Upon which Serjeant Raby objected, that the Plaintiff had failed in his Declaration; and cited the Case of The Queen and Cranage, Salk. 385. He said farther, that the Gist of this Action was the Breaking of the House, and the Lying with the Plaintiff's Wife only added in Aggravation of Damages. And compared this to the Case of Lying with a Man's Maid-Servant, wherein it has been determined, an Action will not lie merely for that, though that Matter may be given in Evidence consequentially. But Mr. Gatwood insisted on the other Hand, that there was a Difference in this Respect between Lying with a Man's Wife, and Lying with a Man's Maid-Servant; and that the Lying with the Plaintiff's Wife was in the present Case the Gist of the Action; and consequently the present Objection not material. Judge Denton too was of the same Opinion. And so this Matter was ruled accordingly.

The King *and* Morrice.

When a Perſon is indicted upon the Statute of 5 Eliz. for exerciſing the Trade without having ſerved an Apprenticeſhip, how far the Defendant's having in fact exerciſed the Indictment.

IN an Indictment upon the Statute of 5 Elizabeth, for exerciſing the Trade of a Grocer, without having ſerved a legal Apprenticeſhip; the Defendant offered to give Evidence of his having exerciſed this Trade for ſeven Years, as being Matter Tantamount to his having ſerved an Apprenticeſhip for that Time. Chief Juſtice Eyres did allow, that the Caſes had gone ſo far, as to allow a Wife's living in the Shop with her Husband for ſeven Years to be equivalent to an Apprenticeſhip; but thought the preſent Caſe not ſtrong enough to comply with the Meaning of the Statute. Accordingly the Evidence was diſallowed.

Trade for ſeven Years will not be ſufficient Evidence to acquit him upon ſuch Indictment.

Durrant *and* Durrant.

What ſhall be a good Execution of a Will within the Statute of Frauds and Perjuries.

UPON an Iſſue directed out of Chancery, wherein the Queſtion was, whether a Man was Compos or not at the Time of executing his Will, it was held by the Chief Juſtice, that it was not neceſſary; that all the Witneſſes to the Will ſhould ſee it executed. If one of them ſaw it executed, and the others were preſent, he ſaid, it would be ſufficient.

Burnet *and* Coby.

What Words in a Will convey an Eſtate-tail, and not for Life only.

UPON the Trial of the Iſſue in this Cauſe, the Queſtion was, what Eſtate the Words in a Will conveyed, which were theſe following; I deviſe my Lands to A. for Life, and after his Deceaſe the Remainder to the Heirs Male of the Body of A. and to the Heirs Male of ſuch Iſſue Male. The Chief Juſtice was of Opinion, that they conveyed an Eſtate-tail to A. and ſaid, that the ſettled Diſtinction was, where the Word Heir is in the ſingular Number, and a Limitation made to the Iſſue of ſuch Heir, the Word Heir is conſidered as a Word of Purchaſe, and a Deſcriptio Perſonæ; but whereever the Word Heirs is in the Plural Number, and a Limitation made to the Iſſue of ſuch Heirs; the Word Heirs is conſidered as a Word of Deſcent, and not of Purchaſe.

Term. Mich.

4 Geo. II. 1730.

Chairman *and* Edwards.

How far Money cannot be brought into Court in an Action founded upon a Tort.

IN an Action of Treſpaſs, brought for the mean Profits, after a Recovery in an Ejectment, Mr. Hatſel moved to bring Money into Court, and that it might be ſtruck out of the Declaration. But the Court ſaid, this was an Action founded upon a Tort, and therefore refuſed the Motion.

Andrews *and* Dingley.

How far the Court will quaſh a ſpecial Capias.

SErjeant Darnel moved, that a ſpecial Capias might be quaſhed, for the Cauſe of Action appearing upon the Face of the Writ to be after the Teſte; and likewiſe for the Writ's being ſigned by Mr. Ventris, whereas it ought to have been ſigned, by the Filazer, as the Action was commenced by Original. The Court ſaid, that they thought the ſecond clearly an Objection, and as to the firſt, they ſaid, there muſt be a Method of taking Advantage of it; ſo made a Rule to ſhew Cauſe.

Vide poſt

Palmer *and* Wadbroke.

How far Inconſiſtent Pleas ſhall not be allowed of without an Affidavit that one of them is true.

MR. Robinſon moved to plead double in an Action of Treſpaſs, Not guilty, and a ſpecial Juſtification. The Court thought, that as theſe Pleas were inconſiſtent, they were not to be allowed; however as the Chief Juſtice was not in Court, they gave him Liberty to move this Matter again. And then he cited the Caſe of Smith and Smallwood, Mich. 2 Geo. 2. when this very Motion was allowed. But Mr. Strange on the other Side quoted a great Variety of Caſes, where theſe Motions had been expreſly refuſed; particularly thoſe of Filch and Miller, 11 Anne. Anthony and Williams, Trin. 4 Geo. 1. Allen and Jacobs, Paſch. 7 Geo. 1. Woolly and Somers, Trin 12 Geo. 1. and Hale and Oaldam the ſame Term. The Court ſaid, that they believed, they had gone ſo far as to allow theſe inconſiſtent Pleas, where an Executor is concerned, but that too upon an Affidavit. However thought, they never ought to do it otherwiſe. Accordingly refuſed the Motion.

Golbeir *and* Colſon.

MR. Strange moved, that the Bail taken by the Sheriff, might have Liberty to enter themſelves Bail above, inaſmuch as the Defendant refuſed to appear himſelf, or to ſuffer any Body to appear for him. Accordingly the Court allowed this; becauſe there appeared to be a plain Deſign in the Defendant to charge the Bail. However the Court would not allow the Bail to juſtify themſelves; as a Judge had not ſigned the Bail-piece at his Chamber.

How far Bail which are taken by the Sheriff ſhall be at Liberty to enter themſelves Bail above.

Andrews *and* Dingley.

THIS Matter coming on again, the Court declared, that the Quaſhing a Writ was a Matter merely of Favour. And as to the firſt Objection, they thought it not ſufficient to induce them to quaſh the Capias in the preſent Caſe; becauſe it was agreed on both Sides, that the Party was not arreſted upon it, till after the Cauſe of Action. And farther, they obſerved, that Writs taken out in a Vacation are conſtantly teſted of the precedent Term. They ſaid therefore, that the only Method of taking Advantage of this Fault, if there was any, muſt be upon Oyer. And there it is neceſſary, that the Party muſt appear, tho' it muſt be a Special Appearance only; whereas, in the preſent Motion it was neceſſary, that he ſhould not. As to the ſecond Objection they ſaid, it received this Anſwer, that the Writ was marked with the Stamp of the Filazer, and that was the only material Thing. Accordingly the Court diſcharged the Rule.

Vide ante 368.

Mayle *and* Brackville.

MR. Marſh moved, that the Nonſuit in this Caſe might be ſet aſide, which was obtained upon a ſuppoſed Miſtake, that the Cauſe of Action was laid undecimo Regis nunc, whereas it was objected at the Trial, that the Cauſe of Action ought to have been laid undecimo Georgii Regis primi. For he ſaid in Truth the Action was commenced 12 Geo. 1. And though the Record was made up the Third of his preſent Majeſty by the Entry being De termino Sanctæ Trinitatis Georgii Regis ſecundi tertio; yet the Memorandum was, that the Plaintiff queritur duodecimo of the late King. He ſaid, it was true indeed, that this Anſwer to the Exception was not diſcovered, till the Nonſuit was recorded. But yet it was as true, that it was diſcovered immediately after the Nonſuit was recorded; and upon that the Judge ordered the Defendant's Witneſſes to be ſent for; but then truly they were told, that the Witneſſes could not be found. Upon which he moved, that the Nonſuit might be ſet aſide; or at leaſt, that the Court would give ſmall Coſts; for the Statute of 23 Hen. 8. c. 15. which allows Coſts in theſe

How far the Court cannot ſet aſide a Nonſuit.

Cases, trusts the Court with a Power of giving them according to their Discretion. But the Court were of Opinion, that they had no Authority to set aside a Nonsuit; and they said, the Court of Common Pleas declared themselves to be of the same Opinion in a Case, that was lately before them. Then as to the second Point, they said, the Courts of Law never moderate or inlarge Costs according to their Discretion, as Courts of Equity do. However they made a Rule for shewing Cause, and then inlarged it. But afterwards they thought proper to discharge it; because the Plaintiff would not consent.

Anonymus.

How far a Mandamus lies to grant Administration durante minori ætate.

MR. Reeves moved for a Mandamus to be directed to the Judge of the Prerogative Court to grant Administration to one Smith durante minori ætate of two Children. He said the Case was, that a Man had left these two Children, who were Infants; and that Smith was their Grandfather. Smith had applied for Administration durante minori ætate in the Prerogative Court, and had actually given Security to bring in an Inventory and distribute according to the Statute. The Judge of the Prerogative Court had declared him to be a proper Person; but yet had thought proper to insist, that Smith should give farther Security to divide the Effects in equal Proportions amongst the Creditors. Mr. Reeves submitted it, that these were Terms contrary to Law; and therefore as the Judge of the Prerogative Court had offered to grant Smith Administration, upon his complying with these Terms; he hoped, the Judge should be compelled to grant it without them. The Court declared, that they were apprehensive, the Ecclesiastical Courts had a discretionary Power of granting Administration durante minore ætate, still remaining in them. And therefore they might qualify it, as they thought proper. However the Chief Justice said, his Opinion was, that they might be compelled to grant such Administration to some Body. And as it was a Matter of Difficulty, they made a Rule to shew Cause.

Vide post

—— *and* The Earl of Ferrars.

How far a Trial at Bar may be in an issuable Term.

ON Motion for a Trial at Bar next Term, though it was an issuable one; the Court said, that Lord Chancellor had declared to them, that if the Court could not dispence with their Rule against trying Causes at the Bar in this Term, he must and would decree the Issue against the Earl pro confesso. And upon that they said, they would dispence with it; which they accordingly did.

Smith *and* Horner.

ON Rule to ſhew Cauſe, why an Execution ſhould not be ſet aſide for its having been executed after Allowance of a Writ of Error; Mr. Reeves ſaid, that the preſent Writ of Error was void; and conſequently could be no Superſedeas. The Fact he ſaid was, that there had been formerly a Writ of Error upon this Judgment in the Common Pleas; but quaſhed upon the Plaintiff in Error's own Motion. Now he has thought proper to bring another Writ of Error upon the ſame Judgment, as of a Judgment likewiſe in that Court; whereas Mr. Reeves inſiſted, it ought to have been a Writ of Error, quod coram vobis. The Court ſaid, the ſingle Queſtion here was, whether the Record below was tranſcribed or not, before the Quaſhing of the firſt Writ of Error; for if it was, undoubtedly the Writ of Error ought to have been quod coram vobis; as was ſettled in the Caſe of Cowper and Ginger in this Court, founded upon the Caſe of Walter and Stokoe. Upon that the Court thought proper to refer this Fact to be inquired of by the Maſter. Vide ante 337.

Dale *and* Homes.

MR. Robinſon moved to ſet aſide a Verdict for a Variance between the Copy of the Iſſue and the Record of Niſi prius; in that the Venire in the Copy of the Iſſue was returnable at a Day certain; but the Venire in the Record of Niſi prius was returnable at a general Return-day. He ſaid, that there was likewiſe another Fault in the Copy of the Iſſue, in that the Word duodecim Jurator' was omitted. And for theſe Miſtakes there was no Defence made at the Trial. Serjeant Chappel on the other Side inſiſted, that the Venire was no Part of the Iſſue, nor the Duodecim neither; and therefore as the Defence could not be applied to any Part of theſe Matters, it could not be material. And to this very Point he quoted an expreſs Caſe of Baſtard and Barclet determined laſt Term in the Common Pleas. Accordingly the Court diſcharged the Rule, that they had made for ſhewing Cauſe.

How far the Court will not ſet aſide a Verdict for a Variance between the Record of Niſi prius and the Copy of the Iſſue.

Anonymus.

ONE Mary Harvey being brought up from the Gate-houſe by Habeas Corpus, it appeared upon the Return, that ſhe had been committed by the Quarter-Seſſions of Middleſex, for contemptuous Words ſpoken of the Juſtices in open Court. And now ſhe moved, that ſhe might either be bailed or diſcharged, upon account of her having lain in Priſon for four Months for this Offence, and a Seſſions intervening, where ſhe had made a Submiſſion; but yet the Juſtices ordered her to be remanded. As to the Matter of Diſcharging her, the Court ſaid, that they did not know, whether ſhe had lain long enough; and that it was

When a Perſon is committed for a Contempt, how far the Court will not bail him in ſuch Sort of Caſes.

was proper, she should make farther Submission to the Justices. And as to the Bailing, they said, this Commitment was a Conviction, and they had no Power to bail in such Cases. And this Point Judge Lee said, was settled in Yates's Case in the Common Pleas; and Mr. Masterman said, the like was held in the Case of the Town of Queenborough. There appeared then to be three Indictments produced against her, found in this Court; and upon that the Court turned her over to the Marshalsea charged with these likewise.

Belgrave *and* Thompson.

The Certainty required in declaring in an Action of Trespass.

UPON a Writ of Error on a Judgment by Default in the Common Pleas in an Action of Trespass, Mr. Reeves took an Exception to the Declaration, that it charged the Defendant with taking Quinquaginta pecias Materiæ quadrat', Anglice Square-Timber, which was too uncertain; for Materia signifies any Sort of Matter whatever; and besides there is a proper Latin Word for Timber, which is Maremium. He said farther, that it was necessary for the Plaintiff to have set forth, how much of one Sort of Timber the Defendant had taken, and how much of another. And upon these Exceptions he obtained a Rule, that this Matter should be farther considered of. But now Mr. Fazakerly came and cited other Cases, where Declarations have been as loose as the present one, and yet they have been held good. Particularly he mentioned, a Case upon his Motion, where so many Pecias ligni, Anglice Ends of Board was held good; and yet there may be many Sorts of Ends of Boards. Then to the second Exception he said, it was true indeed the Number of Pieces was requisite to be mentioned; but never the Nature of them; for that would make great Prolixity in Pleading. Besides he took Notice, that the Statute for the Amendment of the Law had extended all the Statute of Jeofails after Verdict to Judgments by Default; and therefore there could be no Doubt of this Matter at this Day. The Court said, that they had consulted Littleton's Dictionary, and had found Materia to be a proper Word for Timber; and that would put the chief Matter in Dispute beyond Question. And as to the other Matter, they thought it not material; accordingly affirmed the Judgment.

Anonymus.

When a Scire facias is brought against Bail, how far several Pleas may be pleaded by the Defendant without Summons and Severance.

IN a Scire facias against Bail, the Plaintiff had demanded severally of the Bail, why the distinct Sums recovered by the Judgment should not be respectively levied of their Lands and Tenements. And upon this Mr. Draper moved, that the Defendants might have Liberty to plead severally, because several Recoveries are prayed against the Defendants. Accordingly the Court allowed the Motion.

The King *and* Bell.

MR. Forteſcue and Mr. Kettleby moved to diſcharge a Rule, for the Inſpection of publick Books in the Corporation of Marlborough. They ſaid, there had only been a Rule made for ſhewing Cauſe, why an Information ſhould not be granted againſt the Defendant for exerciſing the Office of Burgeſs in this Borough; ſo that at preſent there was no Cauſe in Court; for the Entring into a Recogniſance on the Part of the Proſecutor makes it ſuch a one; and that is never done till the Rule made abſolute. They ſaid farther, tho' the Information ſhould be granted; and even there if it appears by the Recogniſance, that a common Informer only proſecutes, the Court would never ſuffer this Motion. Mr. Kettleby ſaid farther, that he did admit, that in ſome Caſes the Court had gone ſo far, as to grant Rules for theſe Inſpections before making the Rule abſolute for the Information; but he remembred particularly in the Diſpute between Alderman Brocas and Alderman Baylis, this Motion was expreſly refuſed. He then obſerved, that the Rule was drawn up in ſuch an expenſive Manner in the preſent Caſe, as he believed was beyond all Kind of precedent. For it was to have Inſpection of all publick Books, Records, Entries and Papers. The Court ſaid in the Caſe of Bedford Level, the Diſtinction was ſettled, between where a common Informer appears to be Proſecutor, and where the Party intereſted; and they remembred in the preſent Caſe, that the Rule for ſhewing Cauſe upon the Information was made at the Complaint of a Party intereſted; then as to the Form of this Rule, Mr. Maſterman ſaid, that they have not been of a long Date; but from the Time of their being firſt granted, they have always been drawn up in this Manner. Accordingly the Court refuſed the Motion.

At what Time the Court grants their Rules for inſpecting Books of a Corporation.

Rixon *and* Francis.

MR. Agar moved, that the Proceedings againſt Bail might be ſtayed on the Scire facias, pending a Writ of Error on the principal Judgment, upon entring into the Rule of Arthur and Myonet, to ſurrender the Principal, or pay the Condemnation-money within four Days after the Judgment ſhould be affirmed. Mr. Robinſon on the other Side objected, that Judgment was had upon the Scire facias; and therefore this Motion was now too late; and he ſaid, in the Caſe of Cole and Buckland, this Motion was refuſed, only becauſe the ſecond Scire facias was returned. The Court ſaid, that was certainly true; but yet they had conſidered on this Matter, and were reſolved to extend this Rule of Arthur and Myonet to the preſent Caſe; only upon this Difference, that as the Bail have not now the Liberty to ſurrender the Principal; ſo they ſhall not have their Election to ſurrender him, or pay the Condemnation-money, but ſhall be expreſly Bound to pay the Condemnation-money in Caſe the Judgment be affirmed. And likewiſe the Court required the Bail ſhould pay the Coſts

How far the Court ſtays Proceedings againſt Bail pending a Writ of Error.

of the Scire facias, and the Chief Justice said, that there was Reason to carry these Motions as far as can be; because it is much to be doubted, whether, in Case the principal Judgment be reversed, the Bail may not relieve themselves by an Audita Querela. Accordingly upon Mr. Agar's Consenting to these Terms the Court granted the Motion.

Anonymus.

When a Judgment is set aside, how far the Party need not declare De novo.

A former Judgment having been set aside for Irregularity, Mr. Umphrevil moved, that a second Judgment might be so likewise, for there having been no new Declaration delivered. But the Court said, the former Judgment might have been set aside for some Irregularity in not calling for a Plea. Accordingly refused the Motion; for, they said, their Rule was, that the Party shall go back and amend no farther than his Irregularity has begun from.

Lopes Henrices *ver.* Frances & Perata.

How far Service upon one Defendant shall not be good Service upon another.

Scacc. MR. Brown moved, that Service upon one of these Defendants might be Service upon the others, upon Account of their being joint Dealings and Transactions between them. The Court said, where indeed one Defendant leaves the Management of the Cause to the other, Service upon one Defendant is allowed good Service upon the other, by the Practice of Chancery as well as this Court. But in the present Case, the Transactions between one Defendant and the other related to Matters of a different Nature. So refused the Motion.

Worley *and* Glover.

What shall be said to be a good Service of a Copy of a Writ.

MR. Strange moved to set aside a Judgment that had been obtained on the Proceeding upon the Foot of the late Act of Parliament for discharging the Persons of poor Creditors. He said the Act requires, that the Defendant should be served with a Copy of the Writ; which Service of the Copy must be intended to be made as the Service of the Copies of all other Things are; viz. at the same Time to shew the Party the Original; but in the present Case that was omitted. He said besides that the Copy of the Writ was bad too in Point of Form, upon Account of the Return being prox post septimanas Sancti Mich. without saying how many Weeks; so that the Defendant had as yet Time to appear, and a great Deal longer. The Court were of Opinion as to the first Point, that the Objection was not material; because the Act of Parliament has thought proper to require only a Service of the Copy of a Writ; and with a Copy the Defendant was served. However upon the other Exception the Judgment was referred to the Master.

Anonymus.

PROHIBITION was moved for to be directed to the Conſiſtory Court of York, to ſtay there Proceedings in a Suit for the Payment of a Rate, upon a Suggeſtion that the Party's Lands did not lie in that Pariſh where the Rate was made of; which Matter they had pleaded below; but ſtill the Courts there went on Proceeding; and ſo would try the Bounds of Pariſhes. The Court ſaid, that the Party ought not only to have pleaded, that the Lands did not lie within that Pariſh, but that they lay within ſome other; for non conſtat upon this Plea, that the Party has any Lands; and if ſo, this would be Matter proper for Appeal. However as the Counſel ſaid the Fact was, that the Lands lay in the next adjoining Pariſh; the Court made a Rule to ſhew Cauſe.

How far a Prohibition lies to ſtay Proceedings in the Eccleſiaſtical Court in a Suit for the Payment of a Rate.

Vide poſt.

Black *and* ——

SErjeant Girdler moved to ſtay Proceedings, which were carried on upon the late Act of Parliament, which allows Service of a Copy of a Writ to be good Service, upon Account of the Copy of the Writ, as well as the Writ itſelf, being void; there being the material Words left out, ſi inventus ſit in Balliva tua. The Court ſaid, they did not think this would make them void; ſo refuſed the Motion.

What ſhall not be ſaid to be a void Writ.

Mytton *and* Peacock.

MR. Strange moved for an Imparlance, upon a Proceeding on the new Rule by ſpecial Latitat, for the Declaration's being for more than was contained in the Writ; and yet when this Matter had been laid before a Judge, the Plaintiff took out a Summons likewiſe, and got his Declaration amended. But Mr. Strange ſubmitted it, it was a Declaration within the Rule but from the Time of the Amendment; accordingly the Court made a Rule to ſhew Cauſe.

What ſhall be ſaid to be a good Proceeding by ſpecial Latitat.

Winter *and* Snow.

MOTION was made, that the Plaintiff in this Caſe might be diſpaupered, for his having been nonſuited in a former Action. But becauſe the Nonſuit appeared to be only upon a Slip, the Action being in Trover, and the Demand appearing upon Evidence to be made after the Teſte of the Original, tho' in Fact before the ſuing of it out; the Court diſcharged the Rule, that had been made for ſhewing Cauſe.

When a Perſon is admitted in forma pauperis, how far the Court will not diſpauper him.

Williams

Williams *and* Promittee.

The Forms which are required in Judgments.

IN a Writ of Error on a Judgment in the Common Pleas upon an Action of Debt upon a Bond, Mr. Strange took an Exception, that before the pronouncing Judgment, that a Day is given by the Record to the Parties hic usque in Octabis crastino Purificationis; and then without saying Ad quem diem, &c. Judgment is immediately given with an Ideo consideratum est. So that Judgment is pronounced, when the Parties were out of Court upon an Adjournment. The Court said, this was certainly not right; however the Court would not reverse the Judgment, but ordered the Matter to stand over, that the Parties might have Liberty to move below to amend; and afterwards it was amended and the Judgment affirmed.

Mallory *and* Jenings.

How far the Want of a Writ of Enquiry may not be assigned for Error.

IN a Writ of Error on a Judgment by Default in the Common Pleas in an Action upon the Case on several Promises, Want of a Writ of Enquiry was assigned for Error; and Mr. Reeves submitted it, that this was an Error not helped by the Statute of Jeofails. He said, the Statute for the Amendment of the Law had helped Judgments by Default in no other Cases, but where Verdicts were aided by the former Statute; but he said, there could be no Writ of Enquiry where there is a Verdict; and therefore as the Want of that could not be intended to be cured in a Judgment by Verdict; so it could not be intended to be cured in a Judgment by Default. But the Chief Justice said, that the Stat. of 18 Eliz. helps the Want of all original and judicial Writs after a Verdict; and therefore by the Statute of the Amendment of the Law, referring to this as well as all other Statutes of Jeofails, this Case must be helped likewise. Besides the Chief Justice said, it is certain Writs of Enquiry may come in Aid of Verdicts in some Cases. And Judge Lee observed, that this very Point in Question was determined in the Case of Isles and Pit, Trin. 11 Geo. 1. and in the Case of Morgan and Houseman, Pasch. 3 Geo. 1. Accordingly Judgment was affirmed.

Hisham *and* Rhodes.

How far the Court will not proceed in a summary Method against an Officer of the Court.

MR. Kettleby moved, that a Bond and Judgment given to the Marshal for the Security of the Rules might be delivered up, upon an Account of the Terms of the Bond and Judgment having been complied with. But the Court said, tho' the Marshal is an Officer of this Court, they should not interfere in a summary Way in a Matter of this Nature, which would be, to try possibly a long Dispute, whether the Terms were broken or not. They compared this Case to that of a Sheriff's taking a Bond, supposed to be against the Stat. of 23 H. 6.

which Matter, they ſaid, they certainly would not determine upon a Motion.

Speak *ver.* Born, & al'.

DR. Andrews came to ſhew Cauſe, why a Prohibition ſhould not be directed to the Commiſſary of St. Paul's, to ſtay Proceedings in a Suit depending before him, that was commenced by the preſent Defendants as Church-wardens of the Pariſh of St. Giles's Cripplegate, to compel Speak, the Plaintiff here, to take a Licence from the Ordinary, in order to qualify him for acting as Deputy to one Mr. Venn, appointed Clerk according to the Canon. He ſaid, there were two Points, that would properly fall out in this Enquiry; one, whether a Clerk of a Pariſh can make a Deputy; the other, admitting that he may, whether ſuch Deputy be obliged to take a Licence. To the firſt of theſe Points, he ſaid, he ſhould ſubmit it, that a Pariſh Clerk could not make a Deputy. The Exerciſe of this Office, he ſaid, related to Matters merely Eccleſiaſtical, and therefore the Office could only be conſidered to be Eccleſiaſtical; eſpecially when ſuch Office is ſupplied by a Parſon, as this Caſe is. The Conſequence of which, he ſaid was, that ſuch Officer could not make a Deputy. For the Rule of the Civil and Canon Law is, that all Perſons ſhall exerciſe their Offices themſelves in proper Perſon, and not call in Aid the Aſſiſtance of another. To the other Point, he ſaid, he did allow that there was no expreſs Canon, which required theſe Officers, that even act in Perſon as Pariſh-Clerks to take a Licence. But the Canons in 1603 do appoint the Biſhop to be Præordinator omnium; and the Conſtruction of this Canon has been, that Clerks of Pariſhes ſhall be under the Regulation of the Biſhop, and ſhall take Licences. He ſaid then, that as this was reaſonable that the Clerks themſelves ſhould take Licences, there was equal Reaſon that their Deputies ſhould do ſo too. Mr. Reeves on the other Side urged, that this Office was conſidered in Law, as temporal; and to this Purpoſe quoted 13 Rep. 70. 18 Edw. 3. 27. Marſh. 101. 1 Keb. 286. And if this Point was ſo, he ſaid, he ſhould ſubmit it, as one Conſequence, that the Clerk might make a Deputy; it is determined that a Conſtable may, and ſo of all other Officers, that are miniſterial; and as another Conſequence, that there is no Occaſion for a Licence. The Court ſaid, that they at preſent inclined to think, that the ſettled Diſtinction was, that this Office is conſidered as temporal, when the Clerk is nominated by the Pariſh under Cuſtom; but ſpiritual, when nominated by the Parſon, according to the Canon. However the Court thought proper to grant the Prohibition, that the Parties might declare in it; and gave a Week for this Purpoſe, tho' Serjeant Chappel ſaid, that four Days was the uſual Time.

How far the Deputy of a Clerk of a Pariſh is obliged to take a Licence.

Hanmere *and* Elleſmere.

How far a Perſon ſhall gain a Settlement by a Service.

MR. Fazakerly moved to quaſh an Order of Removal, wherein the Fact was ſpecially ſtated, that a Man was hired for three Quarters of a Year, and lived as Servant for that Time in Elleſmere, and then continued on upon another Hiring for a Year, and lived upon that Hiring for one Quarter. But upon this Matter, the Juſtices adjudged that he gained no Settlement at Elleſmere, ſo removed him to his former Settlement at Hanmer. He ſaid there were many Caſes, where ſuch Hiring and Service has been adjudged a good Settlement. And the Court ſaid, this was not a Matter now proper to be made a Queſtion of; ſo made a Rule to ſhew Cauſe. And afterwards made it abſolute.

Williams *and* Seagrave.

Vide ante 364.

THIS Matter coming on again, Mr. Strange inſiſted, that there was not only as much Reaſon that the Scire facias ſhould lie in the Office four Days before the Return, where there is a Return made of Scire feci, as where there is a Return made of two Nihils; but he ſubmitted it, that the Practice of the Court might be proved to be ſo. To which Purpoſe he cited the Caſe of Obryan and Fraſier, Mich. 12 Geo. 1. There the Doubt was, whether the Writ of Scire facias might be executed the Day it was returnable. In that Caſe, it was held it might; and the Reaſon for it which he took the Court gave at that Time was, becauſe the Scire facias muſt lie in the Office four Days. He ſaid too, that this very Reaſon the Court went upon in the Caſe of Land and Perry. And beſides, he ſaid, they had a Certificate to produce of many of the antienteſt Practiſers, that they always took the Practice to be ſo. Accordingly the Court made a Rule, that Proceedings upon the Scire facias ſhould be ſtaid.

Mytton *and* Peacock.

Vide ante 375.

THIS Matter coming on again, Mr. Filmer ſaid, that the eſtabliſhed Rule of the Court was, that upon an Amendment the Plaintiff ſhall have his Election of paying Coſts or giving an Imparlance; and in this Caſe the Plaintiff choſe rather to pay Coſts. But Mr. Fazakerly on the other Side argued, that the Declaration amended was to be conſidered as the Declaration in the Cauſe, but from the Time of the Amendment, and as that was after the ſecond general Return-day in the Term, they were therefore intitled to an Imparlance by the antient Practice of the Court. But the Court ſaid, it is certain a Declaration amended is conſidered as the Declaration in the Cauſe from the Time of the firſt Delivery; and that that appears from the conſtant Practice, that if a Declaration is delivered before the Eſſoin-day of the Term, and afterwards amended,

the Defendant is obliged to plead the ſame Term. Accordingly the Court diſcharged the Rule.

Anonymus.

When an Information is moved for againſt a Juſtice of Peace, how far Notice need not be given of the Motion.

MR. Waller moved for an Information againſt one Richards, a Juſtice of Peace in Wales for a violent Battery. Judge Probyn at firſt thought it requiſite, that there ſhould have been Notice given of the Motion; but as it was a Complaint againſt the Juſtice out of the Execution of his Office, the Court thought it not neceſſary, ſo made a Rule to ſhew Cauſe. Chief Juſtice and Judge Page abſent.

Anonymus.

How far the Court will grant an Information for a Challenge.

MR. Harper moved for an Information againſt one Winter for a Challenge to fight at Long-Sword, tho' given only by Word of Mouth. And accordingly the Court made a Rule to ſhew Cauſe. And ſome Time before in this Term, Motion was made for an Information againſt Col. Onſlow for a Challenge in Writing. There the Words of the Challenge were inſerted in the Affidavit verbatim; but the Court refuſed to grant a Rule to ſhew Cauſe, till the Letter was annexed to the Affidavit.

Dupleſes *and* Thorp.

How far the Court does not change the Venue in an Action of Debt for Rent.

ON Rule to ſhew Cauſe, why a Venue ſhould not be changed, Mr. Bootle, jun. ſaid, that the Action was in Debt for Rent, and therefore the Court would not do it. But Mr. Marſh on the other Side ſubmitted it, that as the Circumſtances of this Caſe were, they would. Becauſe here the Action was brought upon a parol Demiſe, and not laid in the County where the Lands are. But the Court ſaid, that they thought the Rule in general was, that the Venue is never changed in any Action of Debt for Rent. They appealed too to Mr. Reeves, whether the Rule was not ſo; who declared, that ſo he always underſtood it. Accordingly they diſcharged the Rule.

Curland *and* Leeland.

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How far a Perſon ſhall gain a Settlement by ſerving an Apprenticeſhip.

MR. Fazakerly moved to quaſh an Order of Seſſions, confirming an Order of two Juſtices. The Fact was ſpecially ſtated upon the Order, that one Somner lived as an Apprentice in the Pariſh of Curland, and when he had ſerved out good Part of his Time there, entered into an Indenture of Apprenticeſhip; and then ſerved out the whole of his Time; but it happened, that the Indenture was not ſtamped, nor the Money due for the

the Stamps ever paid. Upon this Fact ſo ſtated, the Juſtices of the Seſſions, which were for the County of Lancaſter, ordered the Opinion of the Judge of Aſſize to be taken; and accordingly Mr. Juſtice Forteſcue delivered his Opinion to be, that Somner had got a good Settlement by the ſerving his Apprenticeſhip; upon which the Juſtices of the Seſſions made their Order accordingly. However Mr. Fazakerly ſaid, he ſhould ſubmit it, that this Service ſhould not be ſufficient. He ſaid, the Act of 3 & 4 Will. & Mary is the Statute, which allows Services by an Apprenticeſhip to be equivalent to Notice in Writing. But that Statute requires the Apprenticeſhip to be by Indenture; which muſt be underſtood to be an effectual Indenture; now the Statute of 8 Anne 9, 39. declares, that ſuch Indenture ſhall be void, and intirely ineffectual, where the Duty is not paid, or the Indenture ſtamped. Accordingly the Court made a Rule to ſhew Cauſe.

Vide poſt.

The King *and* Dr. Ward.

Vide ante 252, 294.

THIS Matter now coming on to be argued upon the Return to the Mandamus, Mr. Strange opened it to be, that the Office of Regiſter was granted to Dr. Sharp and another for Life, and to the Survivor of them, that the other Grantee died, and thereupon Dr. Sharp appointed one Shaw his Deputy; that Articles were exhibited againſt Shaw in the Court of the Archbiſhop of York, in Order to deprive him; and that thereupon it was proceeded ſo far, as that Shaw was ſuſpended for five Years. The Return then ſet forth a Canon, which impowers the Archbiſhop to appoint a Deputy in the Room of the Perſon ſo ſuſpended for, one, two, three or four Months, or longer; and that accordingly the Archbiſhop had appointed one in the mean Time. The Return then ſet forth, that the Day before the Suſpenſion, Shaw reſigned his Deputation; and thereupon Dr. Sharp appointed Dryden his Deputy, who is the Perſon on whoſe Behalf the Mandamus was granted. It was farther alledged, that an Appeal was brought upon this Sentence of Suſpenſion before the Delegates, which remains yet undetermined, and that an Inhibition was directed to the Commiſſary from the Archbiſhop, to admit no one pending the Appeal; and that for theſe Reaſons the Commiſſary could not admit the Party now complaining. Mr. Strange ſaid, that two Points might be proper to be inquired into; one, whether a Mandamus would lie in this Caſe at all; the other, admitting that it would, whether the Return to the preſent Mandamus be ſufficient. To the firſt of theſe Points he ſaid, he ſhould admit, that a Mandamus would not lie on the Application of the Deputy himſelf; the Authority of the Caſe in Lev. 307. is ſo; and the Reaſon for that Caſe is, becauſe the Authority of the Deputy is revocable at the Will of the Perſon making him his Deputy; but yet he ſaid, it was as certain, that a Mandamus would lie on the Application of the Party making him his Deputy; becauſe his Freehold is concerned in Intereſt; and ſo is the expreſs Authority not only of the Caſe laſt mentioned, but likewiſe of Ven. 110. To the ſecond Point he obſerved, that the Nature of a Mandamus was not to eſtabliſh a Right, but

barely to put a Man into Poſſeſſion; and therefore there are many Things which would be material, if the Matter of Right had come in Queſtion, which cannot be material in the preſent Caſe. Accordingly he ſaid, it has been held, that a Non fuit electus is no Return to a Mandamus. So in the Caſe of The King and Sympſon, Mic. 11 Geo. 1. where a Writ was directed to Swear in Church-wardens, it was held to be no Return, that an Inhibition came from the Biſhop of London to prevent his doing it. To conſider then the Subſtance of what appears upon the preſent Return, he ſaid, it was manifeſt, that the Party ought to be admitted. The Canon indeed does allow the Biſhop to ſupply an Office upon a Suſpenſion of a Deputy; but this can be underſtood no longer, than the Officer omits doing it himſelf. But the Officer has actually appointed another Deputy in the preſent Caſe; and therefore that Deputy ought to be admitted. Mr. Filmer on the other Side urged, that the Mandamus would not lie. He ſaid, it certainly would not for a Proctor; ſo is 3 Mod. 332. and in 6 Mod. 18. it is expreſly ſaid by Lord Chief Juſtice Holt, that tho' theſe Writs had been granted in ſome Caſes, he thought they had been granted minus rite. However he ſaid, he ſhould ſubmit it, that the preſent Mandamus at leaſt ought to be ſuperſeded; becauſe it is not alledged in the Mandamus, that the Commiſſary is the proper Officer to admit a Deputy-Regiſter. And in all the Entries he could find, this Form is conſtantly obſerved. Mr. Strange by Way of Reply ſubmitted it; that the Party had waived this Exception, by not ſuggeſting this in his Return. And beſides, he ſaid, in the Writ itſelf there were the Words, Tu tamen non habens rationabilem cauſam, to refuſe Admittance, have refuſed to do it; which he thought would ſupply it. The Chief Juſtice ſaid, as to the Caſe of The King and Sympſon, he did remember that Exception; but he thought the Point was ruled upon another Matter, that the Perſon appeared to claim an Office at Colcheſter; and that the Biſhop of London had granted this Inhibition; but it did not appear, that Colcheſter was within his Dioceſe. The Court upon the two firſt Points inclined to grant a peremptory Mandamus; but they thought the Third, about the Form of the Writ, deſerved to be conſidered of. So ordered Precedents to be ſearched. Vide poſt

Anonymus.

How far the Court will grant an Information againſt a Sheriff's Officer.

ON Rule to ſhew Cauſe, why an Information ſhould not be granted againſt one Mr. Baldwyn, who was Deputy to the High-Bailiff of Weſtminſter, for entering into the Houſe of a Gentleman in a moſt outragious Manner, miſtaking it for Col. Charters's, who had been convicted for Felony. Mr. Wynn ſaid, that he had Affidavits to produce, which directly denied, that Mr. Baldwyn was any Thing concerned in it. But the Court ſaid, for that Reaſon this Matter ought to be tried. Accordingly made the Rule abſolute. But the laſt Day of the Term, on Rule to ſhew Cauſe for an Information for an Aſſault, the

Chief Juſtice and Judge Lee ſaid, they do not make Rules of this Sort abſolute when the Fact is denied; and upon that diſcharged that Rule.

Anonymus.

How far any Plea in Bar ſhall be ſaid to be an Iſſuable one.

MR. Theede moved to ſet aſide a Plea for its not being agreeable to one of the Judge's Directions. The Judge had given Leave at his Chamber, that a Judgment ſhould be ſet aſide, upon the Defendant's paying Coſts, pleading an iſſuable Plea, and accepting ſhort Notice of Trial. But the Plea, which the Defendant had put in was, that the Plaintiff's Teſtator was convicted at the Old Baily for Felony. Upon which Mr. Theede objected, that there was no Manner of Colour of Truth in this Plea, and beſides the Intent of the Judge's Rule was, that the Defendant ſhould plead the General Iſſue; for which Reaſons, he hoped, his Motion ſhould be allowed. But the Court ſaid, that any Plea in Bar was within the Meaning of the Rule; accordingly refuſed the Motion.

Verden *and* Lord Berclet.

How far the Court will not give a Man time to put in his Anſwer till he has entred his Appearance.

Scac. MOTION was made for Time to put in the Defendant's Anſwer, though the Defendant had not appeared, upon account of their being no Attachment taken out againſt him for his not appearing, ſo not in contempt. The Court agreed, that the ancient Practice uſed to be ſo; but of late for about theſe ſix Year the Officer informed them, the Practice conſtantly was, to refuſe theſe Motions, till the Party ſhould enter his Appearance, in ſuch Caſes, where the Party did not appear in Time, equally as upon an Attachment. And upon that the Court refuſed the Motion in the preſent Caſe.

Wilcox *and* Huggins.

Vide ante 349.

SErjeant Hawkins now argued for the Defendant, and Serjeant Chappel for the Plaintiff; Serjeant Chappel ſaid, that he ſhould ſubmit it, that the Conſtruction upon this Statute has been ſettled to be, that where a Creditor enters his Action within ſix Years after the Debt contracted, he thereby obtains another ſix Years for his Executor, as well as himſelf. And to this purpoſe he quoted the Caſe of Lethbridge and others Adminiſtrators of Richards againſt Chapman and his Wife, Mich. 3 Geo. 2. in the Common Pleas. The Statute of Limitations was there pleaded; and the Plaintiffs replied, that Richards, who was an Attorney of that Court, proſecuted a Writ of Privilege, Mich. 8 Geo. 1. which was continued down till Hill. 11 Geo. 1. and the 9th of November following Richards died. The Adminiſtrators did not commence their Suit, till Mich. 13 Geo. 1. It appeared upon the Face of

the Face of the Declaration too, that Administration was committed to the Plaintiffs above a Year before the Commencement of their Suit. And yet held by the whole Court, that this Case was out of the Statute of Limitations; and accordingly Judgment given for the Plaintiff. And the Court at that Time gave this Reason for the Judgment; that where-ever an Intestate has begun his Action within Time, the Administrator shall always have six Years. He said, if this was so, he submitted it, there was equal Reason, that when an Executor commences his Action in due Time, his Executor likewise shall have another six Years. And so when their is no default in the first Person, every Executor shall have six Years in his own Time. But Serjeant Hawkins on the other Side argued, that every Debt, that an Executor sues for, is to be sued for, as a Debt of the Testator, and not as a Debt of his own; and therefore there was good Reason, that the Testator should be answerable for that Part of the Delay in suing for his Debt, which incurred in his own Time; and that Delay should run on and be continued in the Time of the Executor. The general Authority of the Books, he said, was express to this Purpose; and accordingly cited Lutw. 256, 261. He said too, it was well known that the Action commenced by the Testator must be continued down to the Time of the Declaring; in order to shew, that it was commenced to save the Benefit of the Statute. He observed then, that there was equal Reason, that the Executor should make his Action to be a Continuance of the Testator's, as near as possible; which must be done by commencing it in reasonable Time; and that may be before Probate; though he cannot indeed proceed in it till after; because he must produce the Probate into Court to intitle him to declare on it. The Court declared, that, unless it was for the Authority of the Case determined in the Common Pleas, they should have been pretty clear of Opinion, that the Time incurred in the Life of the Testator must go on in the Time of the Executor. They seemed to agree too, that the Action commenced by the Executor must be brought in reasonable Time, in order to make it as near as can be a Continuance of the Testator's. But what that reasonable Time was, they owned themselves to be in Doubt. The Chief Justice said in Lutw. 256. some of the Judges thought, that would be a reasonable Time in this Case, which is held to be so in the Case of purchasing a Writ by Journeys Accounts. But Judge Lee said, he should think a Year to be a reasonable Time in the present Case; because the same Statute has appointed that to be the Time in another much like the present Case; where it has appointed, that within that Time a Man shall commence a fresh Action; when it happens, that the Judgment in the first is reversed upon a Writ of Error. However they ordered this Matter to stand over. Vide post

Lewis

Lewis *and* Lewis.

Vide ante 330.

MR. Fazakerly now argued for the Plaintiff in Error; and said, he should submit it for a general Rule, that no Action would lie for what is done in a Course of judicial Proceeding; unless there be special Damage attending it. And the Reason for that, he said, was, because the Court will take upon themselves to correct those Misdemeanours. But in the present Case, he submitted it, that there could be no Colour for this Action. For if the Verdict in the Original Action was right, the Party was not injured; and if the Verdict was wrong he has a good Remedy by Attaint. Besides he said, it does not appear upon this Declaration, that the Judgment was given in the Former; and then it was certain, this Action was brought too soon. To support this general Learning he said, many Cases might be cited. Particularly he mentioned that in 2 Cro. 601. and Hatton 11. in which last Book it is held, that an Action will not lie for giving false Evidence. So neither will it lie for putting in false Bail according to the Case cited by Doderidge in the same Place in Cro. before-mentioned. He said likewise, it was known and certain, that no Action would lie for a malitious Prosecution, till the Judgment given in the Original Action. But besides, he said, there was a Fault in the Declaration, which made the Action clearly bad. The Declaration sets forth the Proceeding in the former Cause, and the Verdict being given for the Plaintiff, and then goes on and says, that the Plaintiff there Præmissorum non ignarus imbraced the Jury, ratione quarum quidem sollicitationum the Jury gave a Verdict for the Plaintiff. Now he observed, that the Præmissorum included the Verdict as well as the other Part of the Proceedings; and if a Verdict was given before the Imbracery, the Imbracery could be no Offence whatsoever. Mr. Filmer on the other Side argued, and said, that on the last Argument the Court were of Opinion with Mr. Fazakerly on the same Point, which he now argued; but the Matter which stuck with the Court at that Time was, whether the Ratione, &c. was a sufficient Averment of special Damage. And therefore he should confine himself to that. He said, if an Action is brought by a young Woman for Words, per quod Maritagium amisit; the per quod is a sufficient Averment, and that, though the per quod is the Jit of the Action, so that the Action will not lie without it. He said too, this was the same of a Virtute cujus, or a Prætextu quorum; and in general, he said, he did not know, that there was any particular Words, which the Law required as necessary to describe an Averment by. He said, he did not know, there was any Occasion for him to say any Thing farther; but if it was doubted whether this Action would lie, though there was not special Damage, he said, many Cases might be cited. To this Purpose he quoted 5 Ed. 4. 126. cited in 4 Rep. 18. where it is held, that if a Man forges a Note, an Action will lie even before a Conviction of the Forgery. So likewise it is held, that if an Attorney enters Judgment for the Plaintiff where the Court orders a Non pros', an Action

will lie. The Court ſaid, that they were in no doubt, but the Action would lie, if the ſpecial Damage was ſufficiently averred. And at preſent they thought the Averment was ſufficient; eſpecially after Verdict. However ordered this Matter farther to ſtand over.

Taſh *and* Dupree.

ON a Writ of Error upon a Judgment by Default in the Common Pleas, Mr. Reeves took an Exception, that it did not appear by the Return to the Writ of Inquiry, that the Inqueſt was taken before the Sheriff, it is only ſaid, that the Inqueſt was taken per duodecim, &c. which can only relate to the Jurors, and not to the Perſons before whom the Jurors gave their Verdict. The Court ſaid, that in theſe Entries made upon Record there are only ſhort Recitals made of ſuch Part of the Proceedings; that therefore they thought the, &c. might include this; and if this did not appear upon the Return, they ſhould have brought the Return up by Certiorari; as is done in the Caſe of Originals. Accordingly the Court affirmed the Judgment.

What ſhall be ſaid to be a good Return to a Writ of Inquiry.

The King *and* The Corporation of Newcaſtle upon Tine.

MR. Reeves moved to diſcharge a Rule for an Attachment againſt the late Mayor and ſome others, for not returning a Writ of Mandamus, upon account of its being only mentioned in the Affidavit, that certain Perſons, of the ſame Name with the late Mayor, and theſe others, were ſerved with the Rule to return the Mandamus; but not ſaid, that they were the Perſons againſt whom the Mandamus was granted firſt of all. And the Court ſeemed to be of this Opinion; otherwiſe they ſaid, the Party making the Affidavit could not be indicted for Perjury. And they ſaid, they thought this Objection might now be made, though they did not ſhew Cauſe upon the Rule. However at laſt this Objection was waived, and the Return put in.

The Certainty required in an Affidavit which is made uſe of in order to have an Attachment for neglecting to make the Return to a Mandamus.

The King *and* Norris.

A Rule having been granted to ſhew Cauſe why a Mandamus ſhould not be directed to the Mayor of Newcaſtle to ſwear in certain Perſons Freemen of that Corporation, Mr. Fenwick now moved to diſcharge it, upon account of their Freedoms not being regularly given them. He ſaid, the Charter required, that the Preſence of the Mayor ſhould be neceſſary at all corporate Aſſemblies; but in the preſent Caſe the Mayor diſſolved the Aſſembly, as ſoon as the Liſt was given in of theſe Perſons Names, before they were admitted to their Freedoms; and therefore he ſubmitted it, that their Admiſſion was irregular. But the Court ſaid, it is very true, that no new Buſineſs can

What Things may be done by a Corporation in the Abſence of the Mayor.

be propoſed in the Abſence of ſuch Officer; but the Aſſembly has always a Right to proceed in the Buſineſs, that was begun, when he was preſent. Accordingly they made the Rule abſolute.

Raſtwell *and* Griffith.

How far a Perſon cannot ſign Judgment for not paying for the Copy of the Iſſue.

UPON the Maſter's Report of the Irregularity of a Judgment, the Caſe appeared to be, that the Plaintiff had ſigned his Judgment for not paying for the Copy of the Iſſue, but yet he had demanded 2 s. more for the Copy of the Iſſue, than was really due upon it. The Court ſaid, that the Plaintiff's Demand in theſe Caſes ought to be ſtrictly according to the juſt Fees, and the Demand ought to be formally entred upon the Copy of the Iſſue. And therefore, though the Defendant had tendred no Money at all, the Court ſet the Judgment aſide.

Richardſon *and* Chancey.

The Remedies upon an Award.

THE Proceedings upon an Attachment for the Breach of an Award having been referred to the Maſter for Irregularity, he reported the Caſe to be, that the Plaintiff had obtained Judgment in Debt upon the Arbitration-Bond, and that ſome Evidence was laid before him, that the Plaintiff had actually taken the Defendant in Execution, at the ſame Time, that he is now proceeding upon the Attachment. Mr. Coningsbey however ſubmitted it, that this Proceeding was regular, and inſtanced the Caſe of a Man's bringing an Action of Covenant upon a Mortgage, and bringing an Ejectment at the ſame Time. And ſaid too, that the Point in Queſtion is determined in Salk. 73. The Court ſaid, that they certainly would not ſuffer the Party to take both of theſe Executions at the ſame Time; tho' perhaps taking Judgment in the Action of Debt might be conſiſtent with the preſent Proceedings. And upon that referred this Matter to be farther inquired into by the Maſter.

Doo *and* Hunt.

How far Proceedings in an Ejectment will not be regular without the Conſent of the Tenant.

THE Irregularity of a Judgment in Ejectment having been referred to the Maſter, he reported the Fact to be, that the Landlord had given Authority to an Attorney to appear for the Tenants, which he did accordingly, but without the Tenant's Privity; upon which the Court ſet the Judgment aſide; and ordered the Attorney to pay Coſts; and ſaid farther, that even the Landlord himſelf could not make himſelf a Party to the Suit, till the Tenants had appeared, but upon a Suppoſition, that the Tenants will appear; for he is only to defend the Poſſeſſion with them.

Phillips *and* Knightley.

THIS Matter coming on again to be argued upon another Record, wherein there was the ſame Order of Pleading, and a Demurrer to the Replication; Mr. Fazakerly relied upon that ſingle Objection to the Award, that the Arbitrators had not put an End to the Action between Marſhall and the Plaintiff; but had only given the Plaintiff an Action of Covenant againſt Marſhall, in Caſe he ſhould proceed in it. Mr. Draper however ſubmitted it on the other Hand, that the Award was good enough. In Roll's Abridg. 548. and 1 Cro. 541. he ſaid, it is held, that if two Perſons are Co-obligors and Defendants in an Action, and enter into Bonds of Submiſſion, and the Arbitrators award, that the one Obligor ſhall acquit the other of the Bond due to the Stranger; this Award is good; tho' the Obligee may immediately put the Bond in Suit againſt both Obligors; and conſequently the other Obligor may immediately be moleſted. He cited 1 Mod. 9. to the ſame Purpoſe. He ſaid beſides, that in 1 Roll. 249. it is held, that Arbitrators may award, that one Man ſhall enter into a Bond to pay Money to another, and not directly to pay it. And in 2 Cro. 400. 'tis held, that where an Award was made, that all Matters in Difference ſhould be determined, except what related to ſuch a Bond; but that that ſhould ſtand in force; ſuch Award was good; and yet there all Differences were not determined. So he ſaid, it was a known Rule, that Arbitrators may appoint Coſts to be taxed by an Officer of the Court. And for theſe Reaſons he ſubmitted it, that the Award was good. But Mr. Fazakerly, by Way of Reply, anſwered, that as to the Caſes firſt cited, the Arbitrators had awarded all that was in their Power; but in the preſent Caſe they have not. And as to the Caſe in Rolle 249. he obſerved, that it is beyond Diſpute, Arbitrators may appoint Money to be paid at a future Day; and conſequently may require Security to be given for it in the mean Time. So the Caſe in 2 Cro. he ſaid, that the Arbitrators did make their Award concerning the Bond, as well as concerning the other Differences; and awarded, that that ſhould ſtand as a good Security; which is making a Determination of that Matter as well as the others. And to the laſt Caſe he took Notice, that Arbitrators cannot be ſuppoſed to be the proper Judges of Coſts of Suit; and it is for that Reaſon, Arbitrators are allowed the Aſſiſtance of one of the Officers of the Court. The whole Court declared their Opinions to be, that the Award could not be maintained. The Reaſon which the Chief Juſtice gave, was; that if Marſhall ſhould proceed in his Action, ſuch Proceeding would not be ſo much a Breach of the Award, as of the Covenant. But the Reaſon, which the Three other Judges gave, was, that the Covenant requires Marſhall to indemnify the Plaintiff againſt all Coſts and Damages, which ſhall attend the other Action. But thoſe Damages cannot be aſcertained, but by a Jury in a ſecond Action; and therefore there is plainly no End put to all the Differences. However the Court order'd this Matter to ſtand over.

Vide ante 84.

Vide poſt

Dr.

Dr. Bently qui tam *and* The Biſhop of Ely.

Vide ante 192.

THIS Matter now coming on to be argued upon Demurrer to the Prohibition, Mr. Harper, as Counſel for the Biſhop, ſaid, that he hoped upon the whole Record a Conſultation ſhould be awarded. He obſerved, that there were two previous Queſtions, which it would be proper to have the Opinion of the Court upon, before they entred into the general Inquiry about the ſubject Matter of the Articles exhibited againſt the Doctor; one, whether the Dr. can be anſwerable ſingly for ſuch of the Facts, as the Articles charge him to have committed jointly in Concurrence with the Body of the College; the other, whether the Dr. can plead the general Act of Grace made the 7th of the late King in Bar to the preſent Inquiry. For both theſe Matters the Dr. has relied upon in his Replication, and to that Replication the Biſhop has demurred. To the firſt of theſe Matters he obſerved, that wherever a College ſubject themſelves to the Cenſures of the Viſitor for an Act, which the College have jointly concurred in; ſuch Cenſures can only be inflicted upon them in their private Capacity. For a Viſitor's Power never reaches to a Suſpenſion or Deprivation of the Franchiſes of the Corporation; ſince that would be to give the Viſitor a Power of Deſtroying the Corporation itſelf. He ſaid, if this was ſo, the Conduct of each particular Member might be inquired into, how far he aſſiſted in this collegiate Act. If he did aſſiſt, he deſerved to be puniſhed; if he did not aſſiſt, he deſerved to be diſcharged. To this Purpoſe the Caſe was put of a Corporation's Setting their common Seal to a Bond, with Condition, that ſuch a Perſon committed Murder; where undoubtedly each individual Member, who gave his Aſſent to the Act, would be indictable for the Offence. To the ſecond Point he obſerved, that the Act of Grace was only a General Pardon of all ſuch Crimes, not particularly excepted, as the King might pardon by expreſs Words. And therefore ſuch Crimes could only be intended to be forgiven, which might be puniſhed by Indictment, and were Crimes againſt the State. But Statute of Colleges are only the Rules for the Government of a private Family; and therefore Offences againſt thoſe Statutes cannot be ſuppoſed to be taken into the Conſideration of the Legiſlature in paſſing the preſent Law. Accordingly the Court delivered their Opinions as to both Points, that they could be no Bar to the Biſhop's Viſitation. However they ſaid, they had a Doubt amongſt themſelves, whether there did not appear to be ſuch a Fault in the Proceedings, as would make it to be to no Purpoſe to go on any farther. They ſaid, the Biſhop's Citation has been upon the Statute of 40 Eliz. but in the Plea the Biſhop has averred, that King Edw. 6. has made the Biſhops of Ely, for the Time being, Viſitors of the College; and therefore it is to be doubted, whether the Stat. of Eliz. are not void. For which Reaſon a Day was given to ſpeak to this Queſtion. And then Mr. Harper came again, and argued, that the Statute of Eliz. might be well maintained. He ſaid, it was a Point not

clearly known, whether the Statute of Edw. 6. had appointed the Biſhops of Ely for the Time being, Viſitors of this College for ever; the Words of the Statute being only, Epiſcopus Elienſis Viſitator ſit. He ſaid, it was not a certain Thing, that thoſe Words would bind the King's Succeſſors; and it might be a Queſtion, whether the Conſtruction of them would not more properly be, that the then Biſhop of Ely ſhould be Viſitor, or the Biſhops of Ely for the Time being during the Life of that King only. He ſaid however, that he muſt allow, that the other Conſtruction of the Words might more properly be maintained; becauſe about the ſame Time, that theſe Statutes were made, in 15 Hen. 7. 1. b. it was held, that a Prior's Succeſſor might take Advantage of a Licence to purchaſe in Mortmain made by the Crown to the Prior himſelf; tho' the Licence was not made to the Prior and his Succeſſors. But tho' he ſhould admit this Point to be ſo, he ſaid, he ſhould ſubmit it, that the Statutes of Eliz. are good notwithſtanding; and what he would rely upon in Proof of this ſhould be, that in all Royal Foundations the Kings of England for the Time being, have a Prerogative of giving new Statutes with the Conſent of the College, and that tho' a general Viſitor is appointed; eſpecially, where ſuch Viſitor conſents to the Statute, and acts under the Authority of them. He ſaid, this was like the Caſe of all Corporations. The King indeed cannot give a new Charter, unleſs the Body accepts it; but if the Body does accept it; the Charter is well given. The Authority of the Books he owned was very rare in the particular Inſtance of the Statutes of Colleges. But what he would offer as an Evidence of this Prerogative was, that almoſt all the King's of England from the Time of Edw. 6. have in Fact given new Statutes to this College, beſides Queen Elizabeth; which might be proved by producing them to the Court under the Great Seal. And this has not only been the Caſe of this College; but, he believed, of all the Royal Foundations in both Univerſities. And this, he ſaid, he hoped would be admitted as a Proof of a Right; eſpecially when not one Reſolution has been offered of the Practice being illegal. Dr. Hinchman beſides ſaid, it was ſettled in the Caſe of Univerſity College in Oxford, that, where the King, who founds a College, dies, without giving any Statutes any of the King's Succeſſors for the Time being, may give at different Times what different Statutes they think proper. And it may be doubted, whether the Heirs of a private Founder can do this. The Court inclined to their former Opinion, that Qu. Eliz. Statutes were void, notwithſtanding what had been ſaid; however ordered this Matter to ſtand farther over. Vide poſt

The Biſhop of London and Lewen *againſt* The Mercer's Company.

Conſtruction upon the Statute of 22 Car. 2. c. 11. ſec. 63. relating to the Union of Churches in London.

IN a Writ of Error upon a Judgment in a Quare Impedit, that had been brought in the Common Pleas, for a Diſturbance in a Preſentation to the Church of St. Mary Colchurch within the City of London, Serjeant Chappel opened the Caſe to be; that

the Plaintiffs had ſet forth in their Declaration, how that the Church of St. Mary Mildred in the Poultry, and the Church of St. Mary Colchurch, were two antient Churches within the City of London; and burned down by the great Fire. They then ſet forth the Act of 22 Car. 2. c. 11. ſect. 63. for rebuilding the City, by which it is provided, that theſe two Churches ſhall be united together, amongſt ſeveral other, which there is the ſame Proviſion made for. And then the 68th Clauſe of the Act is ſet forth, which ſays, that of thoſe Churches that are united by this Act, the Patron of ſuch Church ſhall firſt preſent after the Fire, which was of the greateſt Endowment before it. The Plaintiffs then ſet forth, that the Church of St. Mary Mildred was of the greateſt Value at the Time of the Fire, and that the King was Patron of the ſaid Church at the Time aforeſaid; by which he, the Plaintiff, preſented ſoon after the Fire; that were Patrons of the Church of St. Mary Colchurch, by which it now belongs to them to preſent. The Biſhop claimed nothing in the Church, but as Ordinary. The Defendant Lewen pleaded, that long before the Mercer's Company any Thing had, the Hoſpital of St. Thomas of Acorn was ſeiſed of the Church of Colchurch, as Impropriators in Fee, that this Hoſpital was diſſolved in the Time of Hen. 8. and ſo the Church came to the Crown, and from the Crown was granted to the Mercer's Company before the Fire. Abſque hoc, that the Mercer's Company were Patrons of the ſaid Church at the Time of the Fire. Upon this Fact iſſue was joined; and the Jury found a Verdict for the Plaintiffs. But Serjeant Chappel ſaid, he ſhould ſubmit it, that the Fact, upon which the Iſſue was tried, was a Fact by no Means material; for whether the Church was an Impropriation at the Time of the Fire, or whether it was a Preſentation, it was exactly the ſame Caſe. The Intent of the Act could never be, that by the Uniting the two Churches, the Benefit of filling up one ſhould be loſt. And to this Purpoſe he begged Leave to apply a Caſe out of 3 Lev. 435. the Judgment indeed of the Court of King's Bench and Common Pleas, he did allow, was againſt him; but thoſe Judgments were reverſed in the Houſe of Lords. He ſaid then, that if this was to be admitted, that the Iſſue was joined upon a Point not material; the Conſequence was clear and manifeſt, that the Perſon, for whom the Iſſue was found, cannot have Judgment. To which Purpoſe he relied upon the Caſe of Broome and Woodward, two Terms ago in the Common Pleas. In Treſpaſs ſome of the Defendants juſtified there under a Diſtreſs for Rent; and in their Plea ſet forth an Appraiſement in the Preſence of the Headborough of the Liberty of the Rolls, loco Conſtabular'; but yet upon the Face of their Plea it appeared there was a Conſtable. The Plaintiff there replied De injuria ſua propria, abſque tali cauſa. And Verdict was for the Defendant, but that Verdict was not allowed by Reaſon of its being Inſufficient. Serjeant Chappel did allow, that in the preſent Caſe this Objection was made at the Trial before the Chief Juſtice of the Common Pleas, and he over-ruled it; he did allow likewiſe, that this Objection was over-ruled by the Court, when a new Trial was moved for upon the Foundation of it; but yet, he hoped, that this Court would conſider it, as an Objection

of Weight, and reverse the Judgment upon it. The Court said, that the Intent of the Parliament seemed clear to design only to ascertain, how the Turn should commence. However thought this a Matter proper to stand over. Vide post

Dr. Gouch *and* The Bishop of London.

DR. Hinchman came to shew Cause, why a Prohibition should not go to the Arches, to stay the Bishop of London from Proceeding in a Suit began there, for a Pension due from Dr. Gouch, as Archdeacon of Essex. He said the Libel had set forth, that the Archdeacons of Essex for the Time being had for many Years used exterior Jurisdiction in granting Probate of Wills, and Letters of Administration; and that in Consideration of this there became due a yearly Pension from the Archdeacons of Essex to the Bishops of London; which Pension, as the Libel sets forth, the Archdeacons of Essex tenentur solvere. So that, he said, the Libel only charged, that there was such a Right, without setting out any particular Manner, in which the Right became due. He then observed, that there were Schedules annexed to the Libel of Extracts out of Registers, and other antient Writings, wherein Notice was taken, that such a Pension was ex antiquo debit' & de jure consuet'. But neither in these, he said, was there any Mention made, how the Pension became due; only that in Fact it was due, and that it was an antient Payment. He took Notice, that the setting out these Proofs was according to the constant Proceeding of their Courts; and indeed no other Proof can be allowed, but what is set out in this Way; and this is called the Subsidium Probationis. However he observed, that Dr. Gouch had thought proper to plead, that no such Pension was due Time out of Mind; and upon this has obtained a Rule to shew Cause for a Prohibition. But Dr. Hinchman said, he hoped, it should be discharged. He said, the Authority of the Books was clear, that the Ecclesiastical Courts may hold Plea of a Pension, even by Prescription, if such Prescription is not controverted; and so is 2 Inst. 491. and Salk. 58. But in the present Case he observed, that the Bishop had not set out any Title to his Pension, much less had he set out any prescriptive One; and therefore the Dr.'s Plea was bad in controverting such Prescription. He said, it might be objected possibly, that it was necessary, that a Title should be set forth; but if that should be admitted to be necessary, the Want of such Matter could only be taken Advantage of upon an Appeal, and not upon a Prohibition; for the Force of such Objection only is, that the Proceedings are inverso ordine. But Mr. Reeves on the other Side argued, that tho' the Drs. Rule was right, that the Ecclesiastical Courts may hold Plea of a Pension, where the Title is by Prescription; yet it was a Rule equally known, that where such Prescription is denied, a Prohibition shall go pro defectu Triationis. The Forms of the present Proceedings, he said, were drawn in a very artful Manner, in order, that this settled Distinction of Law might be evaded. He said, it was not pretended by the Bishop, that any

How far a Prohibition shall not go in a Suit for a Pension.

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Compoſition could be found, by which this Right was to be ſupported. The only Title then could be a Preſcription. The Biſhop, he ſaid, was unwilling, that ſuch a Title ſhould be tried by a Jury; and therefore has taken this Method to ſet forth no Title at all in his Libel. He was forced however to diſcover his Title in the Schedules annexed to the Libel; and that appears to be founded merely upon Uſage. The Doctor, he ſaid, has himſelf admitted, that the Words of the Extracts are, that the Penſion was ex antiquo debit' & de jure conſuet'; but he obſerved, that there was an Award ſet out likewiſe, by which this Matter would more evidently appear; for there it is expreſly ſaid, that the Penſion was due Time out of Mind. To the Matter ſo appearing upon the Libel, and the Schedules annexed to it, the Defendant has pleaded, that there was no ſuch Uſage. The Eccleſiaſtical Court, he ſaid, has received this Plea; and by that have admitted it to be a proper one. Accordingly he hoped the Prohibition ſhould ſtand. The Court ſaid, if this Right was once founded upon a Compoſition, it would be hard, that they ſhould ſtop the Eccleſiaſtical Court from Proceeding, becauſe the Compoſition is loſt. The Words in the Extracts out of the Regiſters, and even in the Award, they ſaid, were only general Expreſſions, that the Payment had been anciently made; and therefore it did not appear to them, that the Suit was founded upon ſuch a Title, as the Common-Law calls a Preſcription. If the Libel was too general for want of a Title to the Penſion being aſcertained, they ſaid, the proper Remedy was by Way of Appeal. And accordingly diſcharged the Rule for the Prohibition.

Porter *and* Jones.

The Time for ſuing out a Teſtatum.

ON Rule to ſhew Cauſe, why a Teſtatum capias ad Satisfaciendum ſhould not be quaſhed, Mr. Strange ſaid, that two Exceptions had been taken to it; one, that there was no Capias directed to the Sheriffs of Middleſex, before the ſuing out of the Teſtatum; the other, that the Money had been levied upon an Elegit, before the ſuing out of this Writ. But in anſwer to the firſt of theſe Objections, he obſerved, that it was ſettled about three Years ago, in the Caſe of Stone and Stone, that the Capias in Middleſex, and the Teſtatum capias might be taken out both together. And to the ſecond Objection, he ſaid, that there was no Return to the Elegit upon the File, and therefore there could be no Notice taken of what was done upon that; and it was not the ſuing out of the Elegit, but the Execution of it, which would be a Bar to the Capias ad Satisfaciendum. But Mr. Reeves on the other Side ſaid, that poſſibly the Act of ſuing out of the Elegit would be no Bar to the Capias (tho' Serjeant Chappel, who was of the ſame Side, cited the Opinion of Lord Coke, 2 Cro. 339. that even that would) but yet he ſaid, that this Court would certainly never ſuffer a Man to take a double Satisfaction, becauſe by Accident the firſt Writ might be loſt, or ſome other Thing might hinder, that the Return to the firſt Writ could not be filed. But the Court ſaid, that the Defendant ought to have

moved, that the Return to the Elegit might be filed. However thought it proper, that this Matter should go before the Master to see what was done upon the Elegit.

Anonymus.

ONE Mary Freeman was brought up by Habeas Corpus, from the Work-house, where she was committed to Hard Labour, as taken upon a privy Search, for being an idle and disorderly Person, without Bail and Mainprise, there to remain, till the next Quarter-Sessions. Upon this she moved either to be bailed or discharged. And because the Court conceived it to be a Matter of Difficulty, they appointed a Day, in which it should be particularly spoke to. And now Mr. Strange argued, that the Commitment could not be maintained. The only Statute, he said, which there seemed to be any Colour to found this Commitment upon, was the Stat. 7 Jac. 1. c. 4. and the material Clause in that Stat. was the 5th Sect. But, he said, the whole of this Sect. he submitted it, was repealed by 29th Sect. of the Stat. of 12 Anne Stat. 2. c. 23. and therefore this Commitment could not be maintained in the very Substance of it. But however that might be, he said, there were great Exceptions, that might be taken to the Form. In the first Place, he said, it no where appears in the Commitment, that the Persons signing it were Justices of the Peace. He observed if this was to be taken to be a bare Commitment, he should submit it, that this Objection would be fatal. In the Case of The Queen and Clark, the Defendant was committed for taking up Money upon Bills on the Victualling-Office, that were counterfeited; and the Defendant was discharged in that Case; because it did not appear, that Sir Thomas Withers, who committed him, was a Justice of Peace. He said, in the Case of The King and Rainsford, Mich. 3 Geo. 1. this Case of The Queen and Clark was cited, and the Defendant discharged upon the same Exception. But however he insisted, that this Commitment was to be taken to be a Conviction, and then this Exception would unquestionably be good. And to shew, that this must be a Conviction, he thought, there was Occasion to use no farther Argument, than to consider the Severity of the Punishment, namely, that she is ordered to be kept to hard Labour, without Bail or Mainprise, to the next Quarter-Sessions. He then observed, that the Form of this Commitment was bad upon another Account, for the Facts being not set out in the Commitment, which proved her to be an idle and disorderly Person. And to shew, that Commitments were bad, for this Reason he applied the Case in Vaughan 135. He said likewise, that it no where appears upon the Commitment, that there was any Warrant to found the privy Search upon. And if this was to be taken to be a Conviction, that would be a most clear Exception. And besides he observed the Time, which the Justices have ordered her to lie under this Commitment, is by no Means warranted by this Statute. And therefore for these Reasons he hoped, she should be discharged. Mr. Reeves and Serjeant Darnel argued

What shall be said to be a good Commitment.

on the other Side, and ſaid, that they ſhould ſubmit it, that the Commitment was good both in Form and Subſtance. They ſaid, they were by no Means for allowing, that this Commitment can only be maintained upon 7 Jac. they thought it well might upon the 6th Sect. of the Stat. of 12 Anne beforementioned. This Section indeed ſpeaks only of Rogues and Vagabonds; but a Woman, who is idle and diſorderly, might well come under the Deſcription of a Rogue. And ſo is Dalton 23. 209. But if this ſhould be given up, they obſerved the Commitment might ſtrictly be maintained upon the Stat. of 7 Jac. They ſaid, it muſt be allowed, that this Part of the 5th Sect. of the Statute of Jac. relating to the privy Search only was repealed in the Manner, that has been mentioned. But that was only one Method the Juſtices have of taking Notice of theſe Sort of People; the Juſtices may ſend for them by their particular Warrant, or they may have them before them in other Ways; and then they may put in Execution this Clauſe of the Statute. To the firſt Objection then that had been taken to the Form of the Commitment, they obſerved, that this was to be taken to be a bare Commitment. They did allow, that if the Statute had required the Perſon ſo committed to undergo the Puniſhment of being whipped, ſuch Commitment would be a Conviction. But where the Puniſhment is only hard Labour, it is otherwiſe. And to this Purpoſe they applied an expreſs Caſe out of Sid. 281. But beſides they obſerved, that if this was a Conviction, it ought to have been brought up by Certiorari; and there is no other Method of taking Advantage of Errors in Matters of that Nature. And then, if this was to be conſidered but a bare Commitment, there was no Colour for the Exception that has been taken. In all Warrants, that are ſigned by the Judges or the Secretaries of State, there is no Notice taken of their Offices. But beſides, if this was a Fault in itſelf, it was helped by the Return, for the Return ſets forth that they were Juſtices, and there were ten of them in Number. And to ſhew, that the Return would cure this, the Caſe in 1 Show. 182. was cited, and likewiſe the Caſe of The King and Gibſon, Paſch. 1715, in which laſt Caſe the Defendant was committed for not paſſing his Accounts; an Exception there was taken, that it did not appear upon the Commitment, that one of the Juſtices was of the Quorum. That Exception would clearly have been bad, tho' even in a Commitment, if the Fault could not have been cured; but there it was held, that it was cured by the Return. To the ſecond Exception in Point of Form, they ſaid, the Words of the Commitment were according to the Direction given by Lord Coke, in his Comment upon this Statute, 2 Inſt. 730. The third Exception they ſaid would be anſwered by conſidering, that this was no Conviction. And as to the laſt in reſpect of the Time, which ſhe is to lay under the Commitment, they ſaid, a much greater Objection would have been taken, if no Time had been mentioned; for then it would have been a Commitment for Life, and clearly bad. But they ſaid, the preſent Time might be juſtified for two Reaſons; one, that it is in itſelf a very moderate Portion of Time; the other, that the 6th Sect. of the Statute of Anne

beforementioned, has prescribed this Time in another Instance; which might be a good Direction to the Justices in this. The Court declared their Opinions to be, that this Commitment could not be maintained upon the Statute of Anne; for that Statute describes only one particular Sort of idle Persons; but the Commitment is of the present Person, as being an idle Person in general. However they thought it might be well maintained upon the Statute of Jac. They said, the Statute has in the Beginning of it provided, that Work-houses shall be erected by the Justices, where idle and disorderly Persons shall be sent; and if no more had been said, they should have thought it reasonable, that the Justices should have a Power to commit to them. But besides the Words, which gives them a Power to commit such idle and disorderly Persons as are brought before them upon a privy Search, there are these general Words, That the Justices shall commit those that are brought to them at other Times. And they thought, the Intent of the 29th Sect. in the Statute of Anne only was, that there should be no more such privy Searches, as the Statute of Jac. appointed; but the Act directs, that there shall be another privy Search. As to the first Objection in Point of Form, they said, they thought this a bare Commitment with Punishment; and in such Case it could not be necessary, that the Commitment should be signed. To the Case of The Queen and Clark, they observed, there was a manifest Fault in that Commitment, for its not being said, that the Defendant knew, that the Bill was forged; and therefore that Case could not be of much Authority. And as to the Case of The King and Rainsford, they said, that was a Conviction for Keeping an Alehouse; and therefore that could not be material neither. For in those Cases, they said, it undoubtedly must appear upon the Face of the Commitment to be signed. But however they inclined to be of Opinion, that if this was a Fault in itself the Return could not cure it. To the three last Exceptions they thought, the Counsel against the Prisoner had given a clear Answer to them. The three puisny Judges likewise observed each of them something in particular. Judge Page said, that the Commitments to these inferior Prisons, used in general to be thought to be illegal, and particularly those to New-Prison; but because the Walls of the County Gaols were found to be too small for the Prisoners, those Prisons were considered by the Judges, as part of the County Gaols; and upon that it is, that the Commission of General Gaol-Delivery extends to them. But yet he thought, no one could commit to these Work-houses, but the Justices of the Peace. He then observed some Thing in relation to these idle and disorderly Persons, that he thought at Common Law they might be bound over to their Good Behaviour. Judge Probyn observed, that this Warrant would have been good upon this Statute, even tho' the Words, relating to hard Labour, had been left out, and upon such general Commitment of the Defendant, as being an idle and disorderly Person, the Gaoler would have been justified in inflicting the Punishment. And Judge Lee said, that he was of Opinion, that any Constable, as well as Justice of Peace, might have committed an idle

and

and diſorderly Perſon before this Statute, if he did not find Surety for his Good Behaviour; and ſo is the expreſs Authority of 13 Hen. 7. 10. And he obſerved, that the Direction in the Act, that ſuch Perſons ſhould be kept to hard Labour, is not properly for Puniſhment, but for the mutual Benefit of the Publick, and the Perſons committed, that they ſhould live by their own Induſtry. Accordingly the Court ordered the Priſoner to be remanded. And the next Day the Chief Juſtice ſaid, that he had ſince conſidered of this Caſe, and in looking over his Notes, had found a Commitment worded exactly as the preſent one was, in one Part of it, and in that Part held good. The Name of the Caſe was The King and Symonds, Mich. 13 Will. 3. The Defendant was committed there by one Parry to New-Priſon, as an idle and diſorderly Perſon; becauſe he was found in a ſuſpected Bawdy Houſe. The Court held there, that if the Commitment had been in general, it would have been good. However upon an Affidavit of the Fact, he was committed to the King's Bench Priſon. He ſaid likewiſe, that there was another Caſe very material to be mentioned, relating to another Point in the former Argument; and that was the Caſe of The Queen and Elderton, Hill. 2 Anne, there the Warrant did not appear to be ſigned by one, who was a Juſtice; held, that that was not material to appear upon the Face of the Warrant; but yet, that the Officer muſt return this upon the Habeas Corpus.

The King *and* Huggins.

Vide 338.

THE Chief Juſtice now delivered the Reſolution of all the Judges of England upon this Special Verdict, that had been argued before them. He ſaid, they were all of Opinion clearly, that the Fact, charged in the Indictment, and found by the Verdict againſt Barnes, was Murder in him. They were likewiſe of Opinion, that the Fact, charged in the Indictment againſt Huggins, was Murder in him; but upon the Fact found in the Verdict, they agreed unanimouſly, that he ſhould be diſcharged. The Objections that had been made by the Counſel for the King, he ſaid, chiefly were, that the Defendant had the Care of the Priſoners entruſted to his Charge by the Patent, that was given him of his Office of Warden by the late Queen; and it was his Duty to have looked over them. The Counſel obſerved likewiſe, that tho' he had made a Deputation of his Office, yet the Jury have found, that he was once preſent within the Space of fifteen Days before the Death of the deceaſed; and then the Rule of Law holds, that in Præſentia majoris ceſſat poteſtas minoris. They took Notice, that the Verdict had found an actual Privity to the Dureſs in the Priſoner at the Bar, by finding, that he ſaw the deceaſed ſub duritie Impriſonamenti prædict'. That ſuch Privity, barely was ſufficient in a Perſon, whoſe Duty it was to have relieved him, they ſaid, was manifeſt from thoſe Caſes which had been put, of a Nurſe laying a Child in an Orchard under ſome Beans, and a Kite's flying by and killing it, where the Nurſe is undoubtedly guilty of

Murder. And the Counsel cited a much stronger Case than this, out of Staundeford 17. and Crompton 24. where the Case is put of a Man's keeping a Beast, knowing it to be apt to do Mischief, and the Beast getting out, without the Knowledge of the Owner, and killing another; in that Case this is held to be Murder in the Owner. The Chief Justice said, that he thought these Objections might receive a plain Answer. He observed in the first Place, that the Prisoner had appointed Gibbons his Deputy, by an express Clause in his Patent, which impowers him to make a Deputy. And when a Deputy was so appointed, he said, it was no Business in Huggins to take any Care of the Prisoners; and the whole Power over the Prisoners was in the Deputy, till re-assumed by the Principal. But he did not think, that ever a casual View of the Prisoners, would be a sufficient Act to declare the Principal's Intent to re-assume this Authority. No more, than in the Case of a Disseisee's coming to Dine with the Disseisor, that Act shall amount to a revesting of the Estate in him. But it must be such an Act, as discovers the Principal's Intent to execute his Office in Person. To the other Objection then that had been made, that an actual Privity to the Dures was found in Huggins, he said, all the Judges had concurred in Opinion, that they could take the Sense of that Clause in the Verdict only to be, that Huggins saw Arne, who was under those Circumstances of Dures, and not that he saw any of the Circumstances of Dures, which Arne lay under. This was the Sense, he said, which they understood this Part of the Verdict in. Tho' there was another Clause in the Verdict, which found express Privity to one Part of the Dures, which was, that he knew the Walls were damp; but even there it is not found, that he knew the Room was dangerous to live in. Neither is it found, that Arne complained to Huggins; but if that Fact had been found, the Chief Justice said it might have been another Question, and that it might have been a different Case in Huggins, from what it would have been in a mere Stranger, according to Key. 113. However all the Judges declared, that they would only judge upon the Facts found in the Special Verdict, and not what was Evidence of them. And so in the Case of The King and Plummer, Key. 111. all the Judges of England declared, that there the Facts found would have been sufficient Evidence to the Jury, to have found the Defendant guilty of Murder. But the Court would not judge upon that. And the Case of Malice, the Chief Justice said, was a Case peculiar to itself; for there the Law declares, what Facts are malicious and what are not. The Chief Justice then observed, that the Case of the Nurse, that has been cited, must be agreed to be Law. But he thought, there might be a strong Objection made to the next Case cited by the Counsel. He said, he should have allowed, that if the Beast had been a Lion, or any other Thing wild and savage by Nature, in the Case put, it would have been Murder in him that kept it. But as the Beast is supposed only to have grown mischievous by Habit, he thought it a hard Strain. Tho', he said, he should well allow, it would have been Manslaughter. The Chief Justice then observed, that the Counsel of the King

had made another Point, which it would have been neceſſary for the Judges to have given their Opinions upon, in Caſe the Verdict had been uncertain, viz. whether a Venire de novo could be awarded. He ſaid, the Counſel did not pretend to find any one Authority in the Books for its going in a capital Caſe, but the Opinion of Lord Chief Juſtice Holt, in the Caſe of The King and Keet, which is reported in Keyling; yet there a Venire de novo did not go. And this Caſe of The King and Keet is cited by Lord Chief Juſtice Holt, in the Caſe of The King and Plummer before-mentioned; where there was the greateſt Reaſon for a Venire de novo going, if it poſſibly could go in any capital Caſe; becauſe if the Fact had been aſcertained one Way, it would have been Manſlaughter; in the other Way, it would have been Murder. Yet there no Notice is taken of this ſuppoſed former Opinion. Nor is a Venire de novo ſo much as propoſed going. Accordingly he ſaid, all the Judges had delivered their ſeveral Thoughts to be, that if the Verdict had been uncertain, a Venire de novo would not have lain. But they ſaid, there was no Occaſion to deliver a Reſolution about it. However the Chief Juſtice ſaid, in Informations and barely criminal Proſecutions by Indictment, it is very poſſible, a Venire de novo may lie. And ſo is the Authority of 6 Rep. 14. b. Accordingly upon the whole Matter the Priſoner was ordered to be diſcharged.

Anonymus.

How far Commiſſioners of Bankrupcy have no Authority to commit.

ONE Soloman Nathan had been brought up a few Days ago upon a Return to a Habeas Corpus; and becauſe the Court thought, there was ſome Matter of Difficulty in the Commitment, he was ordered to be brought up again to Day. And now upon the Return the Commitment appeared to be by the Commiſſioners of Bankrupcy, for that the Priſoner had notoriouſly prevaricated upon his Examination in anſwering ſuch Interrogatories, as had been exhibited to him, relating to his Eſtate, by which it appeared, that he had ſent great Part of his Effects beyond Sea. And upon that the Commiſſioners had committed him to Priſon, till he ſhould make full Diſcovery of his Effects. Mr. Fazakerly and Mr. Strange now inſiſted, that this was a bad Commitment. The only Statute that gives any Colour for it, is the Statute of 1 Jac. 1. 15. 8. But that Sect. only ſays, that in Caſe the Bankrupt ſhall refuſe to anſwer, or ſhall not fully anſwer ſuch Interrogatories, as ſhall be adminiſtered to him by the Commiſſioners, they ſhall have a Power to commit him, till he ſhall better conform himſelf. Now the Words in the preſent Commitment are only, That the Bankrupt has notoriouſly prevaricated, which are Words of a very looſe Signification. And indeed it appears, that at laſt he did anſwer; for it is ſaid, that by his prevaricating, it was diſcovered, that he had ſent great Part of his Effects beyond Sea. Beſides it was ſaid, that the Interrogatories ought to have appeared to have been in Writing; that it might be ſeen, whether they were proper; and indeed it is to be ſuſpected, that their Examination was not proper; for it is not ſaid, upon ſuch

ſuch Examination touching his Eſtate; but only in the Courſe of his Examination in general. The Counſel took Notice farther, that the Time of the Commitment was wrong; for he is committed, till he ſhall make full Diſcovery of his Effects; whereas that perhaps may be impoſſible. And ſuppoſe, he was committed for not giving an Account of one Thing; yet he muſt lie, till he gives an Account of all. Whereas the Words of the Act ought to have been ſtrictly adhered to in this Reſpect. And to this Purpoſe two Caſes were cited out of Salk. 348, 351. The Court were of Opinion, that the Return was bad, for each of theſe Exceptions. They ſaid, Prevaricating was anſwering backwards and forwards, though at laſt the Party comes to a ſettled Anſwer. But if that was the Caſe of the Priſoner, it was not the Intent of the Parliament, that he ſhould be committed. Then as to the Interrogatories, the Court were of Opinion, that ſuch of the Queſtions, which the Bankrupt refuſed to anſwer to or anſwer not fully to, ſhould be reduced into Writing, before the Commiſſioners could commit him, and then they ought to demand his Anſwer. And ſo Judge Page ſaid was Lord Holt's Opinion in the Caſe of The King and Tracey, the beginning of King William's Time. And the Reaſon that he gave was, becauſe then it will appear, whether the Queſtions were proper, and if one of them were improper, he ſaid, the Priſoner ſhould be diſcharged. So in the Caſe of a Woman of the City of Briſtol, who became a Bankrupt, Lord Holt ſaid, that upon Requeſt of the Party, he ought to have a Copy of the Articles. The Chief Juſtice ſaid too, that he thought, the Anſwer to theſe particular Queſtions ought to be taken down in Writing. And Judge Lee obſerved, that he thought the Interrogatory, upon which the Party is committed, ought to be ſet out particularly; though he ſaid, he would not give an Opinion as to that Point. They ſaid too, that they thought, the Time of the Commitment was wrong. And the Court ſaid, that it was intimated upon the former Motion, how the Priſoner might ſtill be continued upon his Impriſonment, by charging him with a new Commitment. But then Serjeant Hawkins ſubmitted it, that it appeared upon the Face of the Return, that the Bankrupt was guilty of Felony; for the concealing one's Effects in ſuch Caſes is made ſo by the Statute of 21 Jac. 19. And therefore he hoped the Priſoner ſhould only be bailed, and not diſcharged, according to the Caſe of Bethel, Salk. 348. But the Court ſaid, this appears only by Way of Recital; and therefore they diſcharged the Priſoner from this Commitment; and remanded him, charged with other Actions, that he was brought up upon.

Cur-

Curland *and* Leeland.

Vide ante 379.

THIS Matter now coming on again, Mr. Paunsford ſubmitted it, that the Apprentice gained his Settlement, notwithſtanding the Statute of Ann. He ſaid, his ſerving an Apprenticeſhip forty Days gained him a Settlement under the Statute of Car. Now the Statute of Ann. does not require that theſe Indentures, ſhall be inrolled and ſtamped, but within three Months after the making of them. And therefore the omitting to do this at a Time, after the Party has gained a Settlement, ſhall not have this Retroſpect to defeat that, which was once valid and eſtabliſhed. The Chief Juſtice and Judge Page declared for their own Parts, that they thought, the Words of the Act too ſtrong to be got over; but Judge Probyn and Judge Lee ſeemed to think, that there is a ſubſequent Expreſſion in this Clauſe, qualifying the general Words. However it ſtood over.

Vide poſt

The King *and* Kelloway.

The Manner of Bail's pleading Satisfaction by the Principal.

Scac. IN a Scire facias upon a Recogniſance againſt Bail, which they entred into, conditioned, that the Defendants in the Principal Action ſhould pay ſuch a Sum to the King and to the Informer; the Bail pleaded, that the Principal ſatisfecit the King and the Informer, without ſhewing how; and upon this the Attorney General demurred. Now the Counſel for the King objected, that this Plea involves two Matters, Matter of Record, and Matter in Païs; and the King can only be ſatisfied by Record; and therefore it was ill, for not having diſtinct Concluſions. They ſaid farther, that this being in the Caſe of Bail could make no Difference; for in the ſame Way, that Bail may know, that the Recogniſance was ſatisfied, they may know in what Manner it was ſatisfied. And of this Opinion was all the Court.

Blunt *and* Blunt.

How far an amended Bill ſhall be conſidered as a new Bill.

Scac. MR. Wilbraham moved, that the Defendant might ſtand committed for putting in five inſufficient Anſwers. But it appeared, that the Plaintiff amended his Bill, before the two laſt came in; and therefore the Court ſaid, the Motion was too early. For an amended Bill is as a new Bill.

The King *and* Hill.

IN a Writ of Error upon a Judgment in an Indictment of Felony, two Errors amongſt others were aſſigned; one, that it did not appear, that the Jury were returned by the Sheriff of the County; the other, that the Judgment was given againſt one Hall. The Attorney General ſaid, that theſe were Errors in Law, and therefore he could not confeſs them; though it is frequent to do ſo upon an Outlawry. However he had an Authority from the King not to oppoſe the Reverſal of the Judgment, if the Court ſhould think proper to do it. Accordingly the Court ſaid, that theſe were manifeſt Errors; and upon that reverſed the Judgment.

How far the Court will reverſe a Judgment in an Indictment for Felony.

Ball *and* Fitzgerald.

ON Rule to ſhew Cauſe why the Defendant ſhould not be diſcharged out of Cuſtody for being a Servant to an Ambaſſador; Mr. Reeves ſaid, that the Words of the Affidavit, upon which the Rule was made only were, that he was hired in Quality of a Domeſtick Servant to the Ambaſſador, and did what Services he required of him. But he objected, that it was not ſworn, that he actually ſerved the Ambaſſador in the Capacity he was hired in. And beſides he ſaid, the Defendant has ſtiled himſelf Apothecary in the Affidavit; and by an expreſs Clauſe in the Act, which gives Protection to Ambaſſadors Servants, no one is intitled to ſuch Protection, who is liable to an Act of Bankrupcy. The Attorney General on the other Side ſaid, that by the Defendant's ſtiling himſelf Apothecary, it does not appear, that he was any Thing more, than a Journeyman, and in ſuch Caſe he would not be liable to become Bankrupt. And as to the other Objection, he ſubmitted it, that the Affidavit was certain enough. But the Court ſaid, it was neceſſary, that the Defendant ſhould have ſworn, that he actually ſerved in the Capacity he was hired. And upon that diſcharged the Rule.

How far an Affidavit ſhall be ſaid to be ſufficient or not to diſcharge a Perſon out of Cuſtody on account of his being a Servant of an Ambaſſador.

The King *and* Shipton.

THE Attorney General ſaid, that he came to pray Judgment againſt the Defendant, for Beating a Cuſtom-houſe Officer; but was afraid, the Court could not be prepared to ſet a ſuitable Fine; becauſe the late Chief Baron, who was now dead, tried the Cauſe, and ſo there could be no Report of a Judge. However propoſed to the Court, that one of the Judges might be attended with the Notes, that the late Chief Baron took at the Trial. The Court ſaid, that they thought that to be a dangerous Method; and believed the only Method could be to have Affidavits produced on both Sides. And this Method Judge Lee ſaid, was taken in Lord Pratt's Time.

How far the Court will be convinced of Facts by Affidavit, by Reaſon of the Death of the Judge.

The King *and* Strudwick.

How far the Court grants a Habeas Corpus returnable immediate licet languidus.

UPON a Return to a Habeas Corpus, directed to the Warden of the Fleet, that the Priſoner was languidus, Mr. Peer Williams produced two Affidavits from Apothecaries, ſworn to Day, that the Priſoner might ſafely be brought up; and therefore moved for another Habeas Corpus, returnable immediate licet Languidus; in order, that he might be charged in Cuſtody with an Excommunicato capiendo. Mr. Yates on the other Side produced an Affidavit, ſworn yeſterday, that the Priſoner's Life would be in danger if he was brought up. The Court ſaid, that this Affidavit was by no Means of ſo much Weight, as the other two; and therefore granted the Motion. Upon which he was immediately brought up. And the Excommunicato capiendo was read, directed to the Sheriffs of London. Accordingly the Court ſaid he muſt be committed to Newgate; for that is the Sheriffs of London's Priſon. But then an Habeas Corpus was produced out of the Common Pleas to charge him with Actions in that Court; upon which he was remanded.

Anonymus.

Whom a Mandamus may be directed to.

A Mandamus was moved for to be directed to the late Clerk of the Blackſmith's Company in London, to deliver over to the preſent Officer all Publick Books of the Company to the preſent Officer. In the Caſe of the Town-Clerk of Scarborough it was ſaid, a Mandamus of this Sort was directed to his Widow. Upon that the Court ſaid, that in the Caſe of menial Officers of a Corporation, they never grant theſe Motions; but in the preſent Caſe they did it.

Anonymus.

How far a Mandamus will not lie to compel a Perſon to grant a Licence.

MOTION was made for a Mandamus to be directed to the Juſtices of Peace for Worceſter, to grant a Licence to a Victualler to ſell Ale. Affidavits were offered to be produced, of the Juſtices declaring, that they would grant no Licences to any of the Inhabitants, who ſigned a Petition to the Parliament for erecting a Work-houſe there; and that the Perſon, on whoſe Behalf the Motion was now made, had been a Victualler in the Town for above thirty-five Years. The Court ſaid, that they never new a Motion of this Sort granted; but if there was ſuch a Grievance, as is mentioned, another Sort of Motion would be more proper.

Anonymus.

MOTION was made, that an eight Day Rule might be inlarged for executing a Writ of Inquiry in Town upon Account of the Defendant's living above 100 Miles off in the Country. But the Court refused the Motion; because the Defendant appeared to be an Attorney of the Court; and by that was supposed to be always attending here. The Course of Proceeding in Actions brought against an Attorney.

Buller *and* Lusitano.

MR. Fazakerly moved to have Liberty to take out Execution, notwithstanding a Writ of Error, upon account of their having been another Writ of Error in the same Court, abated by Marriage. And he said, the Distinction was between the second Writ of Error being brought in the same Court, and in another. To which Purpose the Cases of 1 Mod. 285. Ven. 100. and the same Book 313. were cited. The Case of Walter and Stokoe, it was said, was the same. Accordingly the Court gave him Liberty to do it. How far the Court gives Liberty to take out Execution pending a Writ of Error.

Williams *and* Ogle & al' Manucaptors of Seagrave.

ON Rule to shew Cause, why a Demurrer should not be accepted in a Scire facias against Bail; the Case was, that in setting out the Judgment in the Scire facias, wherein Seagrave was the Defendant, his Name was set out by calling him Segrave; and upon that the Bail pleaded Nul tiel Record. To this the Plaintiff joined Issue; and farther said in his Replication, that the Person mentioned in the Judgment, and the Person against whom the Scire facias was brought, was one and the same Person; for the Addition of which Words the Defendant had demurred specially. But on shewing Cause upon the Rule, it was said, that the Defendant had accepted the Paper-Book; and therefore he was too late in demurring. However Mr. Draper urged, that the Paper-Book was delivered back and refused within four Days; and therefore that the Demurrer was regular. It was insisted on the other Side, that these four Days are only allowed in Pleas of the General Issue, and not in Pleas of Nul tiel Record. The Court said nothing as to this Point; but declared, that the Demurrer was frivolous, because those additional Words in the Replication were only Surplusage. Accordingly the Motion was refused. Vide ante 378.

Fuller *and* Josling, Executor of Lady Twisden.

Vide ante 358.

THIS Matter now coming on again, it was insisted by the Defendant's Counsel, that Letters of Attorney to enter up Judgments are bear naked Authorities, not coupled with an Interest, and to this Purpose they cited Ven. 319. in Point. And the Consequence of this, they said, was, that the present one must determine by the Death of the Party. They did allow, that the Case of Oats and Woodward was pretty strong against them. But yet they observed, that two Cases in Salk. 117. and 319. might be cited in Answer to that Authority; where it is held, that a Warrant of Attorney to confess a Judgment given by a Feme sole is countermanded by her Marrying. Besides it was said, that in the Case of Oats and Woodward the Judgment was set aside for another Irregularity; for not bringing in the Record before the Essoin-day of the subsequent Term; and therefore it was not necessary in that Case to have determined the other Point. But Mr. Reeves and Mr. Filmer on the other Side argued; and not only relied upon the Case of Oats and Woodward; but cited the Case of Sir John Parsons and Hill, Mich. 13 Will. 3. as being very material for them. The Defendant died there in the Vacation after Judgment. A Writ of Execution was taken out immediately after his Death, tested of the precedent Term, when he was living. On Motion to set aside this Execution, the Court held it to be regular; and that there was no Occasion for a Scire facias to revive the Judgment. Accordingly in the present Case the Court held the Judgment to be regular. They declared, that by the Course of the Court, all Matters entered up of any Part of a Term or of a Vacation following, shall have relation to the first Day of the Term. And therefore by the Record the Judgment in the present Case appears to be a Judgment, when Lady Twisden was living. A Warrant of Attorney to confess a Judgment is undoubtedly revocable in itself, either by the Act of the Law or by the Act of the Party; but by the Record Judgment appears to have been given, whilst the Authority was subsisting. The Chief Justice observed too, that the Case of Oats and Woodward was a full Authority to this Purpose. For, he said, he well remembred, that the Court clearly gave their Opinion upon that Point, which relates to the present Case, before the other Matter was stirred, And as to the Cases cited out of Salkeld, that a Warrant of Attorney given by a Feme sole to confess a Judgment is countermanded by her Marriage, he said, he took them not to be Law in such Cases, where by the Course of the Court Judgment can be entered up so, as to be a Judgment at the Time, when she was sole. Accordingly upon the whole Matter the Court refused to set aside the Judgment.

Term. Hill.

4 Geo. II. 1730.

Edwards and the Sword-blade Company *againſt* Dempſey.

MR. Reeves moved, that a Writ of Error, brought upon a Judgment in Ireland, might be amended, by Striking out the Name of one of the Plaintiffs in it. The Caſe was, that the Action was brought in the Court below againſt one Sir Francis Edwards and the Sword-blade Company for a Matter, which it appeared by the Record the Defendants were Jointenants in. Sir Francis died, and yet Mary Edwards, as Heir to him, joined in the Writ of Error with the other Defendant. Upon which Mr. Reeves founded this Motion on the Statute of 5 Geo. 1. c. 13. He ſaid, he did allow, that before this Statute the Court always refuſed to amend Writs of Error on the Part of the Perſon bringing it; becauſe the Amendment tended to the reverſing a Judgment. But this Statute requires, that all Writs of Error ſhall be amended in any Matters, wherein the Writ of Error varies from the Record below. And in the preſent Caſe the Writ of Error does ſo; becauſe Mary Edwards has joined in it, as Heir to Sir Francis; whereas it appears by the Record below, that ſhe ought not to have done it. The Chief Juſtice ſaid notwithſtanding, that there are ſome Caſes even now, wherein Writs of Error ſhall not be amended; and mentioned a late one in this Court, where Judgment was againſt Two, and the Writ of Error brought by one; held not to be amendable. However the Court made a Rule to ſhew Cauſe. Vide poſt

How far a Writ of Error is proper to be amended.

The King *and* Wiſeman.

MOTION was made to ſuperſede a Writ of Mandamus, for it is being drawn up different from the Rule, which it was granted upon. The Form of the Rule was, that a Mandamus ſhould be directed to the Defendant to require him to deliver over to one Martin, that was newly choſe into the Office of Town-Clerk in his Room, all publick Books of the Black-Smith's Company; but the Form of the Mandamus was, that the Defendant ſhould deliver over to the Company all ſuch Books. Mr. Strange on the other Side ſaid, that according to

Vide ante 402.

his Memory the Rule was moved for in the Form which the Mandamus is drawn up in; and therefore he prayed, that the Rule might be amended. He said too, that the Office of Town-Clerk in the present Case is an Office at Will only; and therefore undoubtedly the Mandamus ought to be drawn up in the Manner that it is. The Court said, the Mandamus must be drawn up according to the Form of the Rule; and the amending the Rule will not make the Mandamus right, which was wrong at first. Accordingly superseded the Mandamus, though they did agree, that as the Town-Clerk in the present Case was not a fixed Officer, the Mandamus must be drawn up in the Form, which this was.

Anonymus.

How far a Person shall not be allowed to compound a Prosecution.

MR. Filmer moved, that a Judgment, signed by Default in an Information, might be set aside, for its being entred up contrary to the Agreement of the Parties. The Fact was, that an Information had been granted against the Party for signing a Certificate, that such a Person was alive, when in Fact he was dead, by which the Million-Bank were defrauded in paying Sums of Money in Pursuance of it. However upon Application to the Company they agreed, that in Case the Defendant would appear and pay all the Costs, no farther Proceedings should be had upon the Information. The Defendant accordingly did appear, and offered to pay all the Costs; and then the Company talked of new Proposals, that the Defendant should procure a Pardon; and because the Defendant insisted upon the first Agreement, they signed their Judgment. Upon this State of the Case, the Court said they were of Opinion, that the Agreement was illegal; in that a Prosecutor can by no Means justify the making up a Prosecution. But if the Agreement had been a valid Agreement, they would never have assisted in stifling the Proceedings upon such an Information; but would have left the Parties to their ordinary Remedy by Way of Action, for the Breach of it.

Anonymus.

How far the Court will not direct, that two Causes of Action shall be join'd in one.

MR. Wright moved, that two distinct Actions of False Imprisonment, brought against a Bailiff and another for executing the same Process, might be joined together. He did allow, that he knew of no express Rule which the Court had ever made of this Sort, where the Actions are brought against distinct Persons, though they frequently do it, where distinct Actions are brought against the same. But yet, he said, in the Case of Johnson and Kirby, Trin. 4 Geo. 1. a Thing of this very Nature was proposed by the Court, and consented to. A Man there had brought two Actions of False Imprisonment against a Justice of Peace and a Person executing the Justice's Process. The principal Point indeed in that Case was, that the Defendants prayed, that the Plaintiff might be dispaupered. The Court

were of Opinion, that ſuch Motion was too late; becauſe Iſſue was joined. But yet they propoſed at that Time, as a Matter more beneficial to the Defendants, that the Plaintiff ſhould conſent to join both Actions in one, and he did ſo. The Court ſaid, that they believed no Rule of this Sort had ever been made; and therefore refuſed to make ſuch a one in the preſent Caſe.

The King *and* The Bailiffs of Ipſwich.

How far the Court will not ſuperſede a Writ of Mandamus.

SErjeant Chappel moved, that a Writ of Mandamus might be ſuperſeded, which required the late Bailiffs to ſwear Sir William Barker and another, into the Office of Bailiffs of this Corporation; for that there ought to have been ſeveral Writs of Mandamus, requiring each of them to be ſworn in diſtinctly. He ſaid, in the Caſe of the Borough of Andover this was held to be directly neceſſary, where Quo Warranto's were moved for upon Account of certain Perſons illegally executing the Offices of Aldermen there. It was urged farther, that the Caſe might be, that one of theſe Perſons were duly elected, the other not; and yet if this Writ is good, both muſt be ſworn in upon it; to which Purpoſe was cited a Caſe in Salk. 434. in Point. And beſides it was inſiſted, that this very Writ of Mandamus admits the Offices of Bailiffs to be diſtinct; becauſe the Word Ballivi is uſed all through the Writ in the plural Number. The Court ſaid, that they took it, the Office of Bailiffs of this Corporation was but one Office; and if ſo, it was certain there ought to be but one Writ of Mandamus. And this diſtinguiſhes the preſent Caſe from that of the Borough of Andover. However they ſaid, it was a Rule with them, never to ſuperſede a Writ, but for a manifeſt Fault in it. Accordingly refuſed doing it in the preſent Caſe.

Decoſta *and* Cartwright.

How far the Court gives Liberty to plead double.

IN an Action brought againſt the Defendant who was Poſtmaſter, for loſing certain Jewels, that were ſent by the Poſt, the Defendant's Counſel moved, that he might be at Liberty to plead double, Not guilty, and the Statute of Limitations. The Chief Juſtice ſaid, it is common to allow the Pleas of Non Aſſumpſit and Non Aſſumpſit infra ſex annos; but the preſent Caſe was not exactly like that; and therefore only made a Rule to ſhew Cauſe.

Vide poſt 412.

The King *and* The Inhabitants of King's-Fare.

How far a Perſon does not gain a Settlement by paying to the Poor's Rates.

MR. Reeves came to ſhew Cauſe, why an Order of Seſſions, quaſhing an Order of two Juſtices, ſhould not be quaſhed itſelf. The Caſe, he ſaid, was ſpecially ſtated, that one Benjamin Foſter's rented a Tenement for three Years, of the yearly Value of 11 l. 10 s. in the Pariſh of King's-Fare, and paid all Taxes there in his own Right, but the Name of Richard Coates, that

that rented the Tenement before, was continued in the Books of Rates. Upon this State of the Fact the two Justices were of Opinion, that Fosters gained no Settlement in this Parish; the Sessions differed in Opinion, and accordingly sent him there; and which of their two Opinions was right, was the present Question. Mr. Reeves said, he did allow, that the Words of the Statute of 3 & 4 Will. & Mar. 11. do seem to require, that a Person, renting a Tenement under 10l. per Ann. should be charged to the Taxes as well as pay them, before he shall gain a Settlement by such Payment. But he submitted it, that if such House was only rated, and not the Person living in it, yet by Payment of the Taxes, such Person would thereby gain a Settlement. And he said, it would be a Thing of the most dangerous Consequence, that Officers of Parishes should be able to hinder Persons gaining Settlements, by leaving their Names out of their Parish-Books. If this then was not absolutely necessary, he said, the present Case was attended with the strongest Circumstances, that any Case could be attended with; because it is expressly stated, that Fosters paid the publick Taxes and Levies to the Parish-Officers for three Years together in his own Right. But the Chief Justice said, it is not stated, that the Officers knew, he paid them in his own Right; they might possibly have thought he paid in Right of the former Occupier; and consequently the receiving the Taxes of him, could by no Means be sufficient. And Judge Page observed, that tho' Foster's Name had been entred in the Book; yet that would not be sufficient at this Day; because a late Statute has provided, that Notice shall be publickly read in the Church of all such Persons coming into Parishes, before they shall gain Settlements by contributing to such publick Charges. Accordingly the Court ordered, that the Order of Sessions, quashing the Order of two Justices, should be quashed itself.

The Dutchess of Marlborough *and* Whitmore.

How far the Court will give Liberty that a Declaration may be amended.

IN an Action upon a promissory Note, after Issue joined, Mr. Reeves moved, that the Declaration might be amended, by laying the Promise to be made to the present Dutchess, whereas in the Declaration it is laid to be made to the late Duke, and the Action brought by the Dutchess, as Executrix to him. He said, all was in Paper, and therefore he hoped, this Motion was not too late. The Court said, that this was a very special Amendment; because it would alter the very Nature of the Action; and therefore only made a Rule to shew Cause, tho' Notice was given of the Motion.

Vide post

The King *and* The Inhabitants of Gonerſale.

MR. Fazakerly moved to quaſh ſeveral Orders of Juſtices of Peace. The firſt was in this Form. Weſt-Riding in the County of York. To the Church-wardens and Overſeers of Aſtwick in the ſaid Riding, to remove, and to the Church-wardens and Overſeers of Gonerſale in the North-Riding to receive. Whereas Complaint has been made unto us, two of his Majeſty's Juſtices of the Peace, Quorum unus, for the ſaid Riding, by the Church-wardens and Overſeers of Aſtwick in the ſaid Riding, &c. The Exception taken by him was, that it no where appears that the Complaint was made to the Juſtices of the Weſt-Riding; and as the Complaint appears to have been made by Perſons of the Weſt-Riding, it ought to have appeared, that the Juſtices, to whom the Complaint was made, were likewiſe of that Riding. For the Ridings in Yorkſhire are taken Notice of in the Law, to be equall diſtinct as Counties. But he obſerved, that according to the Rules of ſtrict Conſtruction, the Juſtices appear to have been of the North-Riding. For the firſt Words, ſaid Riding, in the ſecond Clauſe, are Words of Reference; and conſequently muſt relate to the laſt Antecedent, which was, the North-Riding. Mr. Reeves on the other Side anſwered, that thoſe Words of Reference ought to relate to the Words Weſt-Riding in the Margin. But the Court were of Opinion, that the Conſtruction, which Mr. Fazakerly put upon the Words, was the proper Conſtruction; and accordingly quaſhed the Order. The Objection then that he took, to the other of theſe Orders, depended principally upon the Times in which the ſeveral Orders appeared to have been made. The Order that has been ſpoke of, was made on the eighth of October, 1724. which was for the Removal of the Wife and Children only of one Auſtin Stonan. On the twenty-eighth of April, 1727, an Order was made for the Removal of Auſtin Stonan himſelf ſingly, from Meldix to Aſtwick; and upon an Appeal, this Order was confirmed on the thirtieth of April, 1728. And in Purſuance of this Order, another was made by two Juſtices on the fourteenth of September, 1728, for the Removal of the Wife and Children of this Stonan, to the Place where Stonan was laſt ſent. Notwithſtanding which three laſt Orders, ſo made in Purſuance one of the other, another has been made by two Juſtices, ninth November, 1728. which only recites the firſt Order, and ſends the whole Family to Gonerſale accordingly. Now Mr. Fazakerly ſubmitted it, that this was irregular; becauſe the laſt Order, confirmed by the Seſſions, was the Order, which theſe Juſtices ſhould have abided by; and tho' at the Time of making that Order, there was another Order actually in force, yet, conſidering how long a Space of Time there was between theſe two Orders, it might juſtly be intended, that from the Time of the firſt Order, the Parties had acquired a ſubſequent Settlement. But Mr. Reeves anſwered, that the firſt Order was confirmed at the Seſſions; and therefore it ought to have been expreſly adjudged in the ſecond Order, that he had gained a

The Forms which are to be obſerved in Orders of Removal.

ſubſequent Settlement. Accordingly the Court ſaid, that this very Point was determined about two Years ago. And therefore the Court quaſhed all the Orders.

Anonymus.

How far a Prohibition lies to the Admiralty Court in a Suit againſt Owners of Ships.

Vide poſt.

SErjeant Chappel moved for a Prohibition to be directed to the Court of Admiralty, to ſtay their Proceedings in a Suit for arreſting a Ship, till one Part-owner ſhould find Security to the other to anſwer his Share in it; the one being willing that the Ship ſhould go a Voyage, the other not. And this very Motion appears to have been allowed in Carth. 27. Paſch. 1 Will. & Mar. The Court ſaid, it was certain, that at that Time Prohibitions were granted in theſe Caſes, but ſince theſe Courts have been allowed to proceed; however made a Rule to ſhew Cauſe.

Williams *and* The Manucaptors of Seagrave.

Vide 364, 378, 403.

THIS Matter now coming on upon the Plea of Nul tiel Record, Mr. Draper argued, that however immaterial a Variance may be in a Perſon's Name, yet, when ſuch Variance appears upon the Record, it may be taken Advantage of. But if that was not ſo between the Parties themſelves, yet where a third Perſon is to be charged, any Variance certainly may. And even between the Parties themſelves it is certain, that if a Bond had been given by the Name of Segrave, and an Action brought upon it by the Name of Seagrave, the Plaintiff muſt have been nonſuited. And to this Purpoſe he mentioned a known Caſe at Niſi prius, that if a Perſon declares in Debt upon Bond againſt Peter alias dict' John; and upon Evidence the Bond appears to be given by the Name of John, the Plaintiff fails in his Declaration. But on the other Side a Caſe was cited out of Kelynge, where Marten and Martin were held immaterial Variances, even upon an Indictment of High-Treaſon. The Court ſaid, that they took the Rule to be general, that wherever the Words have the ſame Sound, thoſe Variances cannot be taken Advantage of. And therefore, where a Writ of Error varies in ſuch Reſpect from the Record below, they thought it muſt clearly remove it up. They did allow, that in the Caſe of Dunmol and Aldworth, the Court were of Opinion that Dummol and Dummal were material Variances; but the Chief Juſtice ſaid, that he thought, thoſe Sounds were by no Means the ſame. Accordingly the Court gave Judgment for the Plaintiff.

Yarp *and* Plea.

How far the Court will give the Plaintiff Liberty or not to change his Venue. Vide poſt.

MOTION was made, that the Plaintiff might have Liberty to amend his Declaration by changing the Venue after Plea pleaded; and the Court accordingly made a Rule to ſhew Cauſe.

Neeve *and* Debart.

How far the Court cannot ſtay Execution on the Defendant's paying what is bona fide due.

AFTER Judgment upon a promiſſory Note, Mr. Agar moved, that it might be referred to the Maſter to ſee what was due, and that upon the Defendant's paying that, Execution might be ſtaid. But as this was after Judgment, the Court were of Opinion, they could not do it.

The King *and* Dr. Ward.

MR. Strange now argued again to maintain the Mandamus. He ſaid, he would firſt conſider the Objection, that had been made to the Form of it; for if this Writ was not good in that Reſpect, it would be to no Purpoſe to conſider, whether the Writ would lie at all or not. The Objection to the Form, he ſaid, was, that it is no where mentioned in the Writ, that Dr. Ward was the proper Perſon to admit Mr. Dryden. He did allow, that expreſly this was no where mentioned; but impliedly he ſaid, it was ſtrongly. For Notice is taken in the Writ, that Application was made to the Doctor to admit Mr. Dryden; but that he Minus juſte refuſed; and this is laid to be In Contemptum Domini Regis. Now he obſerved, that this was impoſſible to be applied to the Doctor, unleſs he had been the Perſon, who was bound to admit him. Beſides he took Notice, that the Writ does not abſolutely require the Defendant to admit him; but if he does not, to ſhew the Reaſon for his Refuſal. This Matter then would have been a proper Reaſon to have returned, that he was not the Perſon, who by Law was bound to admit him. But inſtead of this he has returned, that he was inhibited by the Archbiſhop; which is a ſtrong Confeſſion, that otherwiſe he ſhould have thought himſelf bound to have done it. He obſerved farther, that there were many Precedents in Tremayne, where ſuch expreſs Words are omitted; and beſides this is omitted in Ven. 110. which is a Precedent of a Caſe directly in Point for the Subſtance likewiſe of this Mandamus. But Mr. Filmer argued on the other Side, and ſaid, that beſides this Fault that has been mentioned, there is another Fault in the Writ, in that it is not mentioned, that Dryden offered himſelf to the Doctor to be ſworn. And the Return, he ſaid, could not help theſe Faults; to which Purpoſe he applied the Caſe of The King and Doncaſter. The Court ſaid, that it was undoubtedly certain, that both theſe Matters muſt be ſet out in the Mandamus expreſly, or by Implication; but they thought, the firſt was for the Reaſons that have been mentioned; and they thought the ſecond was, becauſe it is alledged in the Writ, that Dryden ſæpius ſe obtulit, and Dr. Ward refuſed him; ſo that it cannot be intended, but Dryden tendered himſelf to the Doctor. And as to the Caſe of The King and Doncaſter, they ſuppoſed, there were ſome material Miſtakes in the Name of the Corporation, or other Faults of the like Nature; accordingly the Court agreed, that the Form of the Writ was good. Mr. Strange then went

Vide 252, 294, 280.

on

on to the Substance of this Writ, and made two Points; one, whether it would lie for Dr. Sharp on the Behalf of Mr. Dryden, in Respect of Mr. Dryden's being only a Deputy at Will; the other, in Respect of its being an Ecclesiastical Office. To the first of these Points he relied upon Ven. 110. And as to the second he cited Dr. Sherlock's Case, where a Mandamus was granted to install him into a Prebend. The Court declared their Opinion, that the Case in Ven. was in Point for the first Question; and as to the second, they would not determine in general in what Cases it lay for Ecclesiastical Officers; but granted a peremptory Mandamus unless Cause.

Note; That Mr. Strange again mentioned that Non fuit electus was no Return to a Mandamus; cited the Case of The King and Sympson, Mich. 11 Geo. 1. where this Point was determined. But the Chief Justice said, that in the Case of The King and Harwood, Trin. the same Year, that Case was denied to be Law; and he took it clearly that it was not.

Decosta *and* Cartwright.

Vide 407.

MR. Reeves came now to shew Cause, why the Defendant should not have Liberty to plead these two Pleas; and said, that they were directly inconsistent one with the other; for which very Reason the Common Pleas refused allowing such about a Term or two ago. The Court agreed, that the Common Pleas had refused such Motions for this Reason; but thought the Practice of this Court was to allow them. Accordingly the Rule was made absolute.

Newcam *and* Higgs.

How far a Prohibition will not lie to the Ecclesiastical Court in a Suit for Deprivation.

ON Rule to shew Cause why a Prohibition should not be directed to stay Proceedings in the Ecclesiastical Court, in a Suit depending there against a Clerk to deprive him for Offences of a temporal Nature, Mr. Reeves said, he should submit it, that the Ecclesiastical Courts had a Right to proceed as to Deprivation, tho' not to Punishment. For the Clerk came in by Nomination of the Parson, and not by Election of the Parish; and therefore was to be considered, as an Ecclesiastical Officer. And upon this very Distinction, he said, the Court went, in the Case of Townsend and Thorpe. Serjeant Birch on the other Side argued, that the Case cited was not in Point to the present Question. For there the Defendant was convicted upon an Indictment for the Crime he was deprived; but here the Ecclesiastical Courts must try the Crimes themselves. And he did submit it, that a Conviction upon a legal Trial by a Jury, was as necessary to a Deprivation in these Cases, as it is to a Deprivation of an Officer in a Corporation. The Offences then, that the Defendant was charged with, he said, were keeping a disorderly House, Poching, and Drunkenness, which since the Statute they have no Conusance of. The Court said, that in the Case of Townsend and Thorp it

was true, that the Defendant was tried upon the Indictment; but that was only by Conſent of the Parties; for, as the Caſe came before the Court, nothing of that appeared upon Record; tho' it did appear, that he was proceeded againſt in the Eccleſiaſtical Courts pending the Indictment. And the Court obſerved farther, that in the Caſe of Carliſle it was determined, that a Conviction upon an Indictment is not neceſſary, before a Man can be deprived of a temporal Office, where the Offences charged upon him are againſt the Duty of his Office. And that was the preſent Caſe. Accordingly the Court diſcharged the Rule, as to Deprivation, but let it ſtand, as to Puniſhment.

Manning *and* Rooke.

How far a Warrant of Attorney may be filed after an interlocutory Judgment.

ON a Writ of Error upon a Judgment in the Common Pleas, the Error aſſigned was Want of a Warrant of Attorney. A Certiorari upon this was taken out, and the Chief Juſtice returned, that there was no Warrant of Attorney filed on the Term of the Placita, nor before interlocutory Judgment; but that there was before final Judgment. And now it was objected, that this was erroneous. But Mr. Parker on the other Side argued, that this was no Error; and cited the Caſe of Loke and Colwood. The Placita there was of Hill. Term; no Warrant of Attorney of that Term; but there was one of Mich. Term, and held to be no Error. So in the Caſe of the Dutch Weſt-India Company and Henrice, Trin. 2 Geo. 2. the firſt Scire facias was in Hill. Term; no Warrant of Attorney of that Term; an alias Scire facias in Eaſter Term; and a Warrant of Attorney of that Term; held to be regular. But Mr. Robinſon anſwered, that in the preſent Caſe the Party was out of Court, before the Warrant of Attorney filed; and therefore the Caſes cited did not come up to the preſent one. The Court ſaid, that the material Point to be conſidered of was, whether a Warrant of Attorney for Appearance is neceſſary to be filed at the Time of Appearance; and as the Caſes cited were in Point to ſhew, that this was not neceſſary; they thought the Circumſtance of the Warrant's being filed after interlocutory Judgment was not material. Accordingly affirmed the Judgment.

The King *and* Lome.

How far an Indictment will not lie againſt a Perſon for refuſing to take upon himſelf the Office of Conſtable. Vide poſt.

THE Defendant had been indicted for refuſing to exerciſe the Office of Conſtable, which he was choſe into according to the Cuſtom of the City of London. And now Mr. Abney moved in Arreſt of Judgment, that no ſuch Indictment would lie. He ſaid in the Caſe of The Queen and Dacey, Hill. 10 Anne, and in an Anonymus Caſe, Paſch. 11 Anne, two Indictments of this Sort were quaſhed. And accordingly the Court made a Rule to ſhew Cauſe.

The King *and* Hoare.

How far a By-Law ſhall be intended.

ON Rule to ſhew Cauſe, why an Inforꝛmation in the Nature of a Quo Warranto ſhould not go againſt the Defendant foꝛ exerciſing the Office of Warden of the Town of Hull; Mꝛ. Fazakerly ſaid, that the Conſtitution conſiſted of two Wardens, Elder Bꝛethꝛen, Younger Bꝛethꝛen, and Aſſiſtants, and was appointed ſo by Charter in 1638. He did allow, that this Charter pꝛovided, that the Warden ſhould be choſen by the Body at large out of the Inhabitants. But ſo long as any Traces can be had of their Pꝛoceedings, the Uſage has conſtantly been, that the Wardens foꝛ the Time being, the Elder Bꝛethꝛen and ſix Aſſiſtants, ſhould nominate four of the Inhabitants, as Candidates foꝛ the ſucceeding Wardenſhip, a ꝛeaſonable Time befoꝛe the Election; and that the Election ſhould be by the Body at large out of theſe Candidates ſo appointed. The Defendant was appointed as Candidate, and elected afterwards by the Body in the Manner that has been mentioned. And theꝛefoꝛe the ſingle Queſtion would be, whether a By-Law ſhould not be intended to ſuppoꝛt this conſtant Uſage, accoꝛding to 4 Rep. 78. He did allow, that Caſe was not ſo ſtrong as the pꝛeſent one; becauſe there the Number of the Electoꝛs was only confined; but here the Number of Perſons capable of being elected. Howeveꝛ Mꝛ. Crowle, who was of the ſame Side with him, cited two Caſes, that ſeem to come up exactly to the pꝛeſent one; one was, that of Barber and Poper, Trin. 6 Geo. 1. The Queſtion there ꝛelated to a Capital Buꝛgeſs of the Town of Macclesfield. The Charter pꝛovided, that the Capital Buꝛgeſſes ſhould be choſen out of the Capital Buꝛgeſſes. A Uſage there was, and only foꝛ fifty Yeaꝛs, that the Common Buꝛgeſſes ſhould nominate four of the Capital Buꝛgeſſes, and ſuch Uſage was held good. The other Caſe was that of The Queen and Horner, 11 Anne. The Queſtion there ꝛelated to a Mayoꝛ of the Town of Marlborough; there was a Uſage of the ſame Nature; and held, that a By-Law ſhould be ſuppoſed. Mꝛ. Reeves on the other Side anſwered, that when the Motion was oꝛiginally made, the Counſel foꝛ it relied ſingly upon the Charter. This Uſage, that is ſuppoſed, they had no Oppoꝛtunity of denying; and theꝛefoꝛe the Rule foꝛ the Inforꝛmation ought to be made abſolute, that the Fact may be tried. The Court ſaid, if the Fact was admitted, they believed, there would be a good deal of Difficulty to maintain the Uſage; but howeveꝛ to avoid Expence to the Parties, they thought the beſt Way would be to give the Counſel foꝛ the King a Day to anſweꝛ the Affidavits; and if the Fact ſhould then be admitted, to take the Opinion of the Court upon the agreed State of it. Accoꝛdingly inlarged the Rule.

Yark *and* Keet.

MR. Prime now came to ſhew Cauſe, and ſaid, that the Iſſue had been made up, and Notice of Trial given, though afterwards countermanded. And therefore he ſubmitted it, the Motion for changing the Venue was now too late. But Judge Page and Judge Lee, being only in Court, made the Rule abſolute. Vide ante 410.

The King *and* The Inhabitants of Preſton.

UPON an Order of Removal the Caſe was ſpecially ſtated, that a Servant was hired for a Year, and before the End of his Service, two Inhabitants offered him two Guineas, if he would get rid of his Service and leave the Pariſh; according he received the Money, left his Service ſeven Days before the Year was up, and 9 s. was deducted out of his Wages; and upon that the Pariſh-Officers paid the two Guineas to the two Inhabitants. Upon this State of the Caſe Mr. Yates ſubmitted it, that here was a manifeſt Fraud, appearing upon the Face of the Order; and therefore moved, that the Order might be quaſhed, which adjudged this to be no good Settlement. Accordingly Judge Page and Judge Lee, being only in Court, made a Rule to ſhew Cauſe. How far a Perſon gains a Settlement by his living in a Pariſh as a Servant.

The King *and* Whight.

THE Defendant had been convicted at the Old Baily upon an Indictment founded on 18 Eliz. 5. for compounding a Proſecution; and upon moving in Arreſt of Judgment, the Chief Baron and Judge Probyn, who ſat there in the Commiſſion, declared, the Exceptions were of ſuch a Weight as deſerved to be conſidered in this Court upon a Certiorari; upon which Mr. Kettleby now moved for one, and the Court accordingly granted it. How far the Court grants a Certiorari to the Old Baily.

Dymock *and* Chandler.

SErjeant Chappel now moved, that the Rule might be made abſolute upon Affidavit of Service, and no Cauſe ſhewn to the Contrary. However the Chief Juſtice ſaid, that he was very unwilling to make it abſolute; for that he remembered three Caſes later then that cited out of Carthew; where the Court declared their Opinion, that the Admiralty-Court had Juriſdiction in theſe Suits. The firſt was that of Plumtree, 9 W. 3. The ſecond determined a Term or two after in the Common Pleas. And the third was that of Legrave and Hedges, 7 Anne, in this Court. There were eight Part-owners of a Ship, ſix Vide ante 410.

ſix had a Mind ſhe ſhould go out, two not; a Recogniſance was given by the Six by Way of Security to the Two in the Admiralty-Court, a Libel there upon that Recogniſance; and the whole Court declared their Opinion, that the Suit was regular, however granted the Prohibition, upon Terms, that they would declare in it; but ſeeing the Opinion of the Court, he believed they did not proceed in it. Then as to the Caſe cited out of Carthew, he ſaid, if there was any ſuch Reſolution it appears to be a ſudden one; and one Thing is very ſtrange in the Report of it, that Lord Chief Juſtice Holt is made to ſay, that an Action upon the Caſe would lie for one Part-owner againſt the other for fitting out the Ship againſt the other's Conſent. Serjeant Chappel then ſaid, that they had actually tendered Security to the Party himſelf, and he had refuſed accepting it. The Court ſaid, if Security ſhould be tendered to the Court and they refuſed accepting it, that might be a Reaſon poſſibly of granting a Prohibition; accordingly for the preſent inlarged the Rule.

The King *and* Huggins.

Vide ante 350.

Scac. MR. Fazakerly now argued for the King, and inſiſted chiefly on the Caſe of Savage and Becham, reported in 3 Cro. 293. and in Moor 597. The Court however (Baron Commins abſent) declared their Opinion, that a voluntary Eſcape of a Gaoler's Turnkey, could not be imputed as a voluntary Eſcape in the Gaoler himſelf; but he would be anſwerable on ſuch Account only as for a negligent One; for which Reaſon they thought the Priſoner Boy's well in Execution again at the Suit of the Crown. And as to the Queſtion, whether this Information could be maintained, they thought it well might on the Statute of Weſtminſter 2. before-mentioned. However, as there were other Counſel deſired to ſpeak to the Caſe for the King, this Matter was adjourned farther to another Day. And afterwards in Hill. Term following the Court gave Judgment for the Defendant.

The King *and* Heath.

The Conſtruction of Charters concerning what Perſons are qualified to be elected Members of a Corporation.

ON Rule to ſhew Cauſe, why an Information in the Nature of Quo Warranto ſhould not go againſt the Defendant for taking upon him the Office of Common Council-man of the City of Exeter, the Caſe was, that the City of Exeter was incorporated in 3 Car. 1. and the Charter provided, that de cætero in perpetuum the Common Council ſhould be elected de diſcretioribus Civibus & Inhabitantibus Civitatis prædict'; and further ordered that in Caſe any Freeman of the City ſhould refuſe to execute any of the Offices within the ſaid City he ſhould be grievouſly puniſhed. The Defendant was elected into the Office of Common Council-man, being a Freeman but not an Inhabitant; and whether this was regular, was the Queſtion, Mr. Fazakerly ſaid, that in general it muſt be allowed to him, that

where the Inhabitants of a Town are incorporated, and no Provision made out of whom the Officers of the Corporation shall be elected, they may be elected out of the Freemen at large as well as the Inhabitants; and so was it determined in the Case of the Town of Hertford, and likewise in the Case of one Powel for the Town of Brecknock. The Difficulty then in this Case arises from the Words of the Charter, which seem to make Inhabitancy a necessary Qualification to a Common Council-man. But as to that he thought the Words might well be construed by Way of Direction to the Electors, as pointing out what would generally be most proper, rather than by Way of Restriction, as making this absolutely necessary. To which Purpose the Case was cited of the Borough of Truro, where there was a Clause, that the Aldermen should be annuatim eligendi; the first Sense, that has been mentioned, was put upon these Words and not the other. But what would effectually determine this Question, it was said was the subsequent Clause in the Charter, whereby all the Freemen, inhabiting or not inhabiting, are required to be punished in Case they do not execute the Offices within the Corporation. The Court said, that the Charter has provided expressly in many other Instances, that Elections shall be out of the Freemen at large, as well as those inhabiting within the City; and therefore they thought, the Construction of this subsequent Clause might well be construed reddendo singula singulis, that the Freemen at large should be punished for refusing to execute those Offices, which they are capable of; that the Freemen, Inhabitants, should only be punished for refusing to execute those Offices, they are so. And as to the Words Civibus & Inhabitantibus, they thought, both Qualifications must concur in the same Person, and that the Words must be construed by Way of Restriction. Accordingly the Rule was made absolute.

Anonymus.

What Persons shall not be allowed to become Bail for another.

IN a Motion of Mr. Taylor to justify Bail, a Serjeant at Mace offered himself as one. But the Court said, the Court of Common Pleas had lately resolved not to admit any such Officer for Bail, and this Court had come in to the same Resolution; accordingly he was refused.

Sir Joſeph Jekyll *againſt* Crump.

How far a Court of Equity will ſet aſide a Plea, by Reaſon of its not being verified by Affidavit.

Canc. A Scire facias had been taken out of the Petty-Bag againſt Ter-tenants. The Defendant pleaded, that he was Leſſee for Years only, and not Tenant of the Freehold. Mr. Fazakerly moved, that this Plea might be ſet aſide, as being in Abatement, and not verified by Affidavit. Mr. Agar on the other Side urged, that ſuch Scire facias could only be brought againſt Tenants of the Freehold; and therefore the Plea was to the Subſtance of the Writ. But Lord Chancellor ſet the Plea aſide; and gave the Defendant three Days to plead in Bar or demur.

The Dutcheſs of Marlborough *and* Whitmore.

Vide ante 408.

THIS Matter coming on again, the Counſel for the Plaintiff inſiſted, that the Nature of the Action would not be altered by the Amendment. For the Action, as it is, is brought in Right of the Teſtator, and ſo it would be, if the Amendment was allowed. And this Amendment, they ſaid, they were under a Neceſſity to apply for by Reaſon of the Defendant's Plea; and not for any Fault in themſelves. They urged farther, that in the Caſe of Bearcroft againſt the Hundred of Burnham, 3 Lev. 347. there was as great an Amendment as this; and that after Iſſue joined. The Court accordingly declared their Opinion to be, that the Nature of the Action would not be altered by the Amendment; and thereupon allowed it to be made. And Judge Lee ſaid, that he took the Rule to be, that all Amendments are allowable, unleſs adding a ſecond Count, whilſt the Matter is in Paper.

King *and* Morrice.

Vide ante 364.

THIS Matter now coming on again, Mr. Fazakerly argued, that the Plaintiff's Evidence had ſupported his Declaration. That the Warrant in the preſent Caſe was ſuch a one as the Bailiff was juſtifiable in executing, he ſaid, was clear; and to this Purpoſe he relied upon the Caſe in 2 Cro. 288. If this was ſo, the ſingle Queſtion would be, whether the Plaintiff ought not to have declared upon the Warrant according as the Form of the Warrant was, or whether ſuch a general Declaration, as in the preſent Caſe, would be ſufficient. That ſuch a general Declaration would be ſufficient, and that the Evidence does not vary from it, he ſaid, many Caſes might be cited. One he particularly remembred, which Sir Clement Werg was Counſel in of one Side, and he himſelf of the other. The Plaintiff there declared upon a Note, as Indorſee to him or Order. Upon Evidence the Note appeared to have been indorſed to the Plaintiff only, without ſaying to him or Order; and yet it was held, that the Evidence maintained the Declaration.

tion. In the Caſe of Biſhop and Morgan, Hill. 8. of the late Queen, upon Oyer the Bond appeared to have been given to Richard ſolvendum eidem Ricardo Biſhop; and the Declaration was of a Bond to Richard Biſhop; yet held to be ſufficient. So Mich. 10 Geo. 1. in the Caſe of Lord Viſcount Say and Seal, an Indenture was produced in Evidence between Lord Say and Seal of the firſt Part, one Knight of the ſecond Part, and one Johnſon of the third Part; which witneſſed, that for barring an Eſtate-tail had granted to Knight, without ſaying who had granted, to the Intent, that Johnſon ſhould bring a Writ of Entry againſt him. The Queſtion there was, whether the Name of Lord Say and Seal ſhould be ſupplied, and held it might. So Serjeant Darnel cited a Caſe, where a Will was produced at a Trial at Bar, witneſſing, that a certain Parcel of Lands were deviſed to A. and his Iſſue, and another Parcel of Lands to B. and his Iſſue, and in Caſe they die with Iſſue, then to another. The Court ordered their Officer in that Caſe to read it, and he read it without Iſſue; and held good. Accordingly they ſaid, that in the preſent Caſe the Blank in the Warrant ſhould be ſupplied, or the Word verſus rejected, as being inſenſible; and therefore they hoped, the Evidence well ſupported the Declaration. The Court thought this a Matter of ſome Difficulty; and therefore it was adjourned for farther Conſideration. Vide poſt

Strudwick *and* Fiſher.

MR. Reeves moved, that a Writ of Error in the Exchequer-Chamber might be quaſhed, and that the Plaintiff might be at Liberty to take out Execution. He ſaid, he muſt allow, that the Writ of Error was brought regularly; but as ſoon as it was brought, an Agreement was entred into, that all Proceedings upon it ſhould be ſtayed; this Agreement by Conſent was made a Rule of this Court; and a Releaſe of Errors actually given; notwithſtanding which the Defendant here has not diſcharged his Writ of Error, ſo that the Plaintiff cannot take out Execution. Judge Page and J. Lee, being only in Court, ſaid, that they doubted, whether they had any Authority to quaſh a Writ of Error in the Exchequer-Chamber; they ſaid farther, that they believed, they could not grant an Attachment againſt the Defendant for continuing his Writ of Error; but ſaid, they took it, ſuch Continuance might ſo far be conſidered a Contempt of the Court, as to be a ſufficient Foundation to make a Rule upon to ſhew Cauſe, why he ſhould not quaſh his own Writ of Error. Accordingly made ſuch a Rule. What Court muſt be applied to in order to quaſh a Writ of Error.

Duple-

Dupleſes *and* Chalk.

How far the Court does not ſet aſide a Trial for a Variance between the Record of Niſi prius, and the Copy of the Iſſue.

IN Debt for Rent the Plaintiff had four Counts in his Declaration; each for 38 l. and the general Demand at laſt was 152 l. but by Miſtake the Concluſion of the firſt Count was, unde actio accrevit habere 38 l. parcell. 76. which was but half the groſs Sum. However the Copy of the Iſſue was Right, viz. unde Actio accrevit habere 38 l. parcel. 152 l. For this Variance Mr. Marſh moved, that the Court would grant a new Trial, there having been no Defence made at the former. And cited the Caſe of Knute and Myonet . The Court ſaid, they were of Opinion, that the preſent Variance was in a Place immaterial; becauſe it is only a falſe Concluſion; and like the Caſe, where a viz. is contrary to the Premiſſes. And of late all the Judges have come to a Determination, not to ſet aſide Trials for immaterial Miſtakes. Accordingly the Court ſet aſide the Rule, which they had before made for ſhewing Cauſe, why the Trial ſhould not be ſet aſide.

Lepege *and* Pompylion.

In what Sort of Action Liberty is given, that Money ſhall be brought into Court, and ſtruck out of the Declaration.

IN Debt upon an Emiſſet for Goods bought, where the Party had declared according to the Cuſtom of the City of London, and which was removed up here by Habeas Corpus, Motion was made, that Money might be brought into Court, and be ſtruck out of the Declaration. And this was likened to the Caſe of an Indebitatus Aſſumpſit. Accordingly the Court made a Rule to ſhew Cauſe.

Denbury *and* Perew.

How far the Court will not diſcharge a Perſon upon common Bail.

THE Defendant had been diſcharged out of Cuſtody by a Judgment in one of the Courts of Ireland upon an Act of Parliament, that paſſed the laſt Seſſions there for ordering poor Priſoners to be releaſed out of Cuſtody. Notwithſtanding which he was ſince arreſted here by the ſame Perſon, and for the ſame Cauſe of Action. Upon which Mr. Draper moved, that this Court would diſcharge him upon common Bail. For that he ſubmitted it, this Court would pay regard to the Judgments in all foreign Countries whatſoever. The Court ſaid, this was a proper Rule in the Admiralty-Juriſdictions; becauſe that Law is in all Places the ſame. But the municipal Laws of diſtinct Countries vary; and therefore they would not ſay, whether there was any Method, that could be taken in this Kingdom to make that Judgment credited here. However this, they ſaid, was certain, that the Defendant could not be diſcharged on Motion upon it. For till the late Act of Parliament, that paſſed

here, they could not have done that in any of such Cases; and that Act does not extend to any Case happening out of England. Accordingly the Motion was refused.

The South-Sea Company *and* Crimes.

MR. Fazakerly moved for a Special Jury upon the late Act of Parliament, and that the Venire might be directed to one of the Coroners, the Sheriff and the other Coroner having Stock in the Company; and this Matter had been suggested on the Roll. He prayed farther, that the Freeholder's Book might be brought before Mr. Benton; because the Matter was concerned for the Defendant, and Mr. Ventris had Stock in the Company, and Mr. Benton was the next Officer of the Court to them Two. Accordingly the Court made a Rule to shew Cause.

Where the Venire shall be directed to the Coroner.

Edwards *and* Dempsey.

MR. Fazakerly now came to shew Cause, and said, that he should submit it, that in Case a Defendant's Name was prayed to be added as Plaintiff in the Writ of Error, there would be no pretence to say, that such Amendments should be allowable; and urged, that there was equal Reason, that no Plaintiff in Error's Name could be struck out, for in either of these Cases the very Nature of the Writ is altered. And this, he said, was the Reason, why in the Case of Smith and Horner, fol. 337. it was not so much as offered, that the Writ should be amended. He said besides, that this Rule to shew Cause was still more extraordinary; because it was ordered in it, that the very Assignment of Errors in the Name of Mary Edwards should be amended likewise. But the Court said, that in the present Case the Error appears upon the Record; for it is set out in the Writ, that Sir Francis was dead; and likewise the Judgment is recited, by which it appears, that Mary Edwards has no Interest. And they took it to be a general Rule in Construction upon this Act, that all Errors might be amended in the Writ, where they appeared upon the Record. They were of Opinion too, that no other Defects could be amended; for though in the Statute there are those general Words, or other Defect; yet they thought, they might well be confined by the subsequent Words, and made agreeable to the Record. And this, they said, gave an Answer to the Case of Smith and Horner; for there the Error did not appear upon the Record. And Judge Page said, that this Defect could not be helped by Summons and Severance of Mary Edwards; for that can only be, where two must join in a Writ of Error for Conformity, and one refuses to proceed. Then as to amending of the Assignment of Errors, it was said, all was in Paper; and therefore that might clearly be done, as a Consequence of the other.

Vide ante 405.

Grove *and* Drag.

How far the Court will not change a Venue.

ON Rule to ſhew Cauſe, why the Venue ſhould not be changed from London to Southampton, upon an Affidavit, that the Cauſe of Action, if any, aroſe there; Serjeant Chappel ſaid, that the Action related to ſome Duties, which the Plaintiff claimed as Leſſee of the Mayor of Southampton, and which all the neighbouring Towns were affected by; for which Reaſon they were afraid, they could not have an equal Trial there; and therefore hoped the Venue ſhould continue where it was. The Court ſaid, that Salisbury was the moſt proper Place then, that the Venue ſhould be in, as being the next adjoining County in the ſame Circuit. However made a Rule to ſhew Cauſe, why the laſt Rule ſhould not be diſcharged. And then upon Mr. Forteſcue's ſhewing, that the Duties were exceedingly trivial, and that only the Sea-Port Towns in the County were effected by them, the Rule was diſcharged.

Ferrars *and* Lovelane.

How far a Tenant ſhall be allowed to betray the Poſſeſſion.

MR. Marſh moved, that a Tenant, who was ſerved with a Declaration in Ejectment might ſhew Cauſe, why he ſhould not ſuffer himſelf to be made Defendant upon being offered ſufficient Indemnity; for that there was apparent Colluſion between him and the Plaintiff to deliver up the Poſſeſſion. At leaſt, he ſaid, he hoped, the Court would make a Rule, that the Landlord might have Liberty to make himſelf Defendant in the Room of the Tenant. The Court ſaid, that they never heard of any ſuch Motion before; and therefore refuſed to make any Rule. But gave Leave, that this Matter might be moved again, becauſe the Court was not full.

Harwood *and* Lovelane.

How far the Court does not ſtay Proceedings in an Ejectment by Reaſon of the Death of the Tenant.

MR. Strange moved, that Proceedings in an Ejectment might be ſtayed upon Account of there being no Tenant now alive, whom the Declaration was ſerved upon. He ſaid it was true, that the Declaration was ſerved upon Three; but Lovelane, the only Tenant, is now dead; and the Two others were but Servants to him. He ſaid, they had Affidavits to produce of this Matter; and this Method they took to be a proper one to lay the Matter before the Court; becauſe it is an Irregularity in Proceeding. He ſaid, it would be no Objection that this Motion was made before Appearance of the Defendants; for even Trials at Bar have been granted in theſe Actions before ſuch Time. And there was good Reaſon to be given for this; becauſe it is known, that theſe Motions for Judgment in Ejectment in Country-Cauſes are not made, till the laſt Day in Term; and then it might be too late to apply in this Manner. But the Court ſaid, that Motions for Judg-

ment in Ejectment are never obtained, but upon an Affidavit of Service of the Declaration on the Tenants in Poſſeſſion. And if it was once allowed, that a Fact of this Nature might be controverted upon Service of a Declaration, the Court would always try the Poſſeſſion upon Affidavits, before Motion for Judgment in Ejectment. For which Reaſon the Court ſaid, if the Fact was ſo, that theſe two Perſons, that have been ſerved, were not Tenants in Poſſeſſion, this Motion would be proper to be made, after the Plaintiff ſhall have got Poſſeſſion on the Habere facias Poſſeſſionem; for then they certainly would ſet the Execution aſide. However, as the Ch. Juſtice and Judge Lee were only in Court, a Rule was made to ſhew Cauſe. But afterwards it was diſcharged.

Woolaſton *and* Walker.

How far an Adminiſtration cannot be granted pendente lite of two Perſons claiming as Executors. Vide poſt

IN a Writ of Error on a Judgment in the Common Pleas, where the Action was brought by an Adminiſtrator pendente lite of two Perſons claiming as Executors, the Error aſſigned was, that ſuch Adminiſtration cannot be by Law; and a Caſe was cited by Mr. Fazakerly out of Moor 636. in Point. Accordingly the Court ordered this Matter to ſtand over.

Bateman *and* Fowler.

How far a Fact may be laid by a Quod cum in a Declaration.

IN a Writ of Error on a Judgment in the Common Pleas in an Action of Aſſault and Battery, the Error aſſigned was, that the Fact is laid in the Declaration by Way of Recital only by a Quod cum. But Serjeant Chappel on the other Side anſwered, that in the Writ it is expreſly ſet forth, and in the Common Pleas the Writ is part of the Declaration. And cited 2 Cro. 536, 537. Sid. 150, 187. Lutw. 1509. The Caſe of Clerk and Lucas, Mich. 2 Geo. 2. and the Caſe of Rogers and Gibs laſt Eaſter Term, both determined in the Common Pleas, adjudged in Point. However the Court ordered this Matter to ſtand over.

Vide poſt

Tucker *and* Mackerſton.

How far the Court will diſcharge a Defendant in an Appeal.

THE Defendant was brought up yeſterday upon the Return of a Writ of Appeal, and Serjeant Corbet moved, that he might be diſcharged, as the Plaintiff did not appear to count againſt him, or at leaſt, that he might be bailed, as they had given Notice to the Plaintiff, that the Court would be moved, that he ſhould be bailed. Accordingly the Court ordered the Plaintiff to be called; but would not even Bail the Defendant; becauſe they would conſider, whether there were not the four Days of Grace in this Action, as well as in others for the Parties to appear in. Accordingly ordered him to be brought up to Day. And now Judge Lee ſaid, it appears by 4 Mod. 99. that the Parties have four Days to appear in. For which

which Reaſon he was remanded to be brought up again the laſt Day of the Term. And then, becauſe the Appellant was not ready to count againſt him, he was diſcharged.

The King *and* Dr. Betteſworth.

How far a Mandamus lies to grant Adminiſtration.

A Mandamus had been granted to require the Defendant to grant Adminiſtration to John Cullam, of the Goods of Jane his late Wife deceaſed. And now the Defendant returned, that before Marriage an Indenture was made, by which the Husband agreed, that the Wife ſhould have a Power of Diſpoſing of all her Freehold and Leaſehold Eſtates to whatever Perſons ſhe ſhould think proper, by any Deed or Will executed in the Preſence of three Witneſſes. The Return farther ſet forth, that Jane did make her Will, executed in the Preſence of three Witneſſes, and thereby gave all the Premiſſes above-mentioned to her Mother and her Heirs, and likewiſe made her ſole Executrix. It was likewiſe returned, that the Will was proved accordingly; and for that Reaſon, Adminiſtration could not be granted to the Husband. Mr. Fazakerly now objected to the Return, that this Inſtrument could not be conſidered as a Will, but only as an Appointment of Uſes in Purſuance of a Power. And for that Reaſon the Probate was void; and to this Purpoſe cited Mod. 211. But if it ſhould be admitted to be a Will, yet it could only be a Will of her Freehold and Leaſehold Eſtates; and therefore Adminiſtration ought to be granted to the Husband of the Reſt of her Goods remaining. But Mr. Reeves on the other Side argued, that theſe Inſtruments are properly Wills; and relied upon the Caſe in 2 Mod. 170. And then if this is to be conſidered as a Will, ſo as to diſpoſe of Part of her Effects, this Mandamus is ſatisfied; for this Mandamus requires the Defendant to grant Adminiſtration of all her Effects. And therefore a different Mandamus ought to go. The Chief Juſtice was ſomething doubtful in Opinion, whether this Inſtrument ſhould be conſidered as an Appointment only or not; though inclined to think, that it ſhould, principally upon Mr. Fazakerly's afterwards reminding him of a Caſe, which was determined before him, when he was one of the Lords Commiſſioners. There a Copyhold Eſtate was ſurrendred to the Uſe of a Will; and held, that this Inſtrument need not be executed according to the Forms of Wills required by the Statute of Frauds. However he was clear of Opinion, that the Defendant ought to have granted Adminiſtration of the Reſt of the Goods in Purſuance to this Mandamus. Judge Page ſaid, he thought, this Inſtrument could only be conſidered as an Appointment. And mentioned a Caſe, that happened at Bury Aſſiſes. There a Perſon had been to adviſe with him how to plead in a Caſe of this Nature. He adviſed him to plead, no Will. Iſſue upon this was taken, and came down to be tried at Bury; and the Judge held clearly, that this could be no Will. Judge Lee was of the ſame Opinion, and mentioned a Caſe in Salk. 313. full in Point. However as to the other Point, they thought there was no doubt to be made, but the Mandamus ought

to have been obeyed. Accordingly a peremptory Mandamus was granted, unless Cause before the End of the Term.

The King *and* Dr. Bettesworth.

MR. Fazakerly now came to shew Cause, and said, that the Ecclesiastical Courts had an undoubted Jurisdiction in judging, who was the fittest Person to grant such Administration to. And as to the Terms, he said, they were greatly misrepresented; for they only were, that the Assets should equally be distributed to satisfy the simple-contract Debts, after the other Debts paid. Mr. Taylor on the other Side said, that he should submit it, the Ecclesiastical Courts had not that Discretion of judging of the Fitness of such Person, as has been mentioned. Indeed he did allow, that on the Statute of Car. 2. it has been held, that Administration cannot be granted to an Infant; because that Statute requires, that every Administrator shall give a Bond to make a just Distribution of the Assets. But he insisted, that then the Statute of Edw. 3. takes Place. And that Statute provides, that Administration shall be granted to the next and most lawful Friend to the Deceased. Now in the present Case after the Infant, that is Smith the Grandfather. And in Godolphin's Orphan's Legacy 231. this is held to be expressly necessary. However the Court said, that they were of Opinion, that such Administrator is only to be considered a Trustee of the Assets, without having any profitable Interest; and therefore the Ecclesiastical Courts had the proper Right of Judging of the Fitness of such Person. Then as to the Terms, they said, the only Relief could be a Prohibition, and not a Mandamus. But Judge Page said, he did think, they might be relieved upon a Prohibition. For an Executor or Administrator has a Right to prefer one Debt in Payment before another in equal Degree. And of Debts, that are in such Degree, one Debt may in Conscience be paid before another. However the Rule for granting the Mandamus was discharged.

Vide ante 370.

The King *and* Stowton.

MR. Fazakerly took several Exceptions to an Indictment for a Nusance. In the first Place, he said, the Indictment appeared to be taken at the Quarter-Sessions, and it was not sufficiently set forth, that they were Justices of Peace, before whom the Indictment was taken; for the Caption is only, Ad generalem Quarterial' Sessionis Pacis tent' coram Custodibus Pacis, necnon Justiciariis ipsius Regis ad diversas felon' & transgression' audiend' & terminand'. Now, he observed, that Custodes pacis is a Description of a Constable as properly as of a Justice of Peace. And as to the other Part of the Description, that only is of Justices of Oyer and Terminer; and though Justices of Peace at the Sessions have generally a Commission of Oyer and Terminer; yet as Justices of Oyer and Terminer they have no Right to hold a Quarter-Sessions. He then observed, that the Description

What shall be said to be a good Indictment for a Nusance.

ſcription of the Way, which the Nuſance is ſuppoſed to be done to, was not ſufficient; for it is only ſaid to be, communis antiqua Via pro omnibus ſubditis Domini Regis ad eundum & redeundem; whereas it ſhould have been expreſly ſet out to be Regia Via. And beſides, he ſaid, the Nuſance was uncertainly ſet forth; for the Words are, Quod ſepem levavit ſeu levari cauſavit. He did allow, that it was afterwards laid with ſufficient Certainty, that he continued the Nuſance; but that could only be an Omiſſion to pull it down; but an Omiſſion to pull that down, which does not appear to have been his Duty to have pulled down, could not poſſibly be any Offence. And by Way of Authority to ſupport this laſt Exception he cited Salk. 371. and the Caſe of The King and Brereton for publiſhing a Libel, where an Exception of the ſame Nature was taken and allowed; and in that Caſe another of The King and Stocker was cited and relied upon. The Chief Juſtice thought the firſt Exception good; but was not ſo certain as to the others. Judge Page thought all the Exceptions good. Judge Lee inclined more particularly, that the laſt was good. However this Matter ſtood over. And afterwards in the next Term the Court arreſted the Judgment for the Exception, as to the Uncertainty; but thought the Caption of the Indictment good.

Ray *and* ——

Vide ante 375.

SErjeant Eyres now came to ſhew Cauſe, and ſaid, that the Defendant below had not ſo much as pleaded, that he had not Lands in this Pariſh. For the Libel charged, that he had Lands lying in this Pariſh, rated at 5 s. and 6 d. and that he had refuſed paying this Rate; now he has pleaded, that he has no Lands, lying in this Pariſh, rated at this Rate. But this is far from alledging, that he has no Lands at all in this Pariſh; it is rather a direct Confeſſion, that he has ſome; and only a Denial, that they are ſet at this particular Rate. And certainly this is a Matter, proper for the Eccleſiaſtical Courts to inquire into; accordingly they have done ſo, and by their Sentence relieved him as to 6 s. For which Reaſon the Court diſcharged the Rule.

The King *and* The Inhabitants of Sympſon.

The Settlement of Children.

ON an Appeal from an Order of Removal, made by two Juſtices, of a Man and his Children from the Pariſh of Sympſon to the Pariſh of Layton in the County of Bucks, the Seſſions confirmed the Order as to the Father, and diſcharged it as to the Children. Mr. Fazakerly now ſaid, that it appears upon the Face of the Order of two Juſtices, that the eldeſt of the Children is but nine Years old, ſome of them eight, and the other not above Six; that therefore they could in no Ways be ſuppoſed to have got a Settlement for themſelves; and conſequently the Order of the Seſſions, which ſeparated the Father from his Children, muſt be bad. The Court ſaid, it was poſſible, the Children might have been bound out Apprentices to Huſbandry;

for they did not know, that any Law had fixed the Age of Children for that Purpose. However made a Rule to shew Cause. Vide post

The King *and* The Inhabitants of Preston.

THE Court were now of Opinion, that no Fraud could be collected upon these Facts stated in the Order. Upon which Mr. Yates took an Exception to the Form of the Order of two Justices for that the County of Glocester, which the Complaint was made in, was only laid in the Margin and not in the Body of the Order. The Court said, that this Exception must be allowed, and remembred, it was so determined in the Case of The King and Austin. In that Case Mr. Masterman was asked, whether the County was necessary to be laid in the Body of an Order, as well as in the Body of an Indictment; and he declared, it was. Accordingly the Court quashed the Order of two Justices, and the Order of Sessions confirming it. Vide ante 415.

The King *and* Catherel.

THE Defendant had been convicted before certain Justices of Peace, that were appointed Trustees of a Turn-pike from Kensington to Fulham, for not accounting for certain Profits, belonging to the Turn-pike, which he had received, as Collector; and now Serjeant Darnel moved, that the Conviction might be quashed. He said, it was founded on a Statute, made in the 12 Geo. 1. which appoints certain Justices of Peace Trustees of this Turn-pike, and requires an Account to be regularly taken once a Month, before them or any Seven of them that shall be present. The Act farther provides, that any two Justices then present shall have a Power of Administring an Oath to the Collector to answer such Questions relating to the Account, as shall be asked him; and in Case the Collector shall refuse taking it, he shall be committed till he does take it, and till he Accounts likewise for the Money, that shall be in his Hands. The Conviction, he said, recited, that the Defendant had refused taking this Oath, though administred by Mr. Blackerby and Mr. Marriot, two of the Justices appointed by the Trustees for that Purpose; and thereupon he was ordered to be committed till he should take the said Oath, and likewise till he should render, verum, accuratum & perfectum Compotum, and pay over the Money he has in his Hands. The Serjeant now argued, that this was a bad Conviction. He said, it by no Means appeared in this Conviction, but the Defendant might have taken this Oath from the Hands of two other of the Justices then present; and that would have satisfied the Words and Meaning of the Act, as much as if he had taken it from the Hands of those two Justices, which the Body of the Trustees appointed. He observed farther, that the Sum ought to have been ascertained, which he is to account for. And if it be objected, that that cannot be known, till he has taken the Oath for answering such Questions, as shall be asked him relating to the Account; What shall be said to be a good Conviction upon the Acts relating to the Turn-pike.

Account; the Defendant then ought to have been convicted only of not taking the Oath. And indeed a Conviction of these two Facts is in itself inconsistent; for how can the Defendant be required to pay over what is in his Hands, till it is ascertained by his Oath, that there is any thing? Mr. Abney on the other Side answered, that this Conviction has followed the Words of the Statute; and therefore finding Fault with the Conviction, is finding Fault with the Statute. But indeed other Statutes are exactly in the same Words; and to this Purpose mentioned that of 22 Hen. 8. 5. And in Carth. 152. the Distinction is taken between Convictions at Common Law and Convictions upon Statute. Convictions at Common Law are till the Party shall be discharged by due Course of Law; Convictions upon Statute must follow the Words of it. However, he said, in Case the Return is bad, the Court may give leave, that it may be amended. And to this Purpose he relied upon the Cases in Cro. 533, 539. Salk. 106. and that of The King and Parmenteer and Laceer, Hill. 7 Geo. 1. That was a Conviction upon the Statute of Gaming; and it being a Commitment in Execution, the Court said, the Return should be amended. The Court said, that this Conviction had certainly followed the Words of the Statute, but they thought, not the Intent. For the Intent of the Statute must certainly have been, that the Defendant should not be committed, till he pays over the Money he has in his Hands, before it is first ascertained, that there is any. And therefore they inclined to think the Conviction was bad. But however they thought proper, that this Matter should stand over to another Day; and refused to Bail the Defendant in the mean Time; because they thought him guilty of a great Offence.

Vide post.

Baynes *and* Forest.

What shall be said to be such a Variance as may be taAdvantage of on a Plea of Nul tiel Record.

IN a Scire facias upon a Judgment, the Defendant had pleaded Nul tiel Record; and now Mr. Thomson acknowledged, that there did seem to be a Variance between the Scire facias and the Record of the Judgment; but yet considering what it was, he moved that it might be marked, that there was such a Record. For the Judgment, he said, was given upon two Promises, but in the Scire facias it is cujusdam Promissionis & Assumptionis. Now he did agree, that in the Scire facias there seemed to be but one Promise; but in Order to reconcile this Variance, he submitted it, that the Word cujusdam might first be applied to the Word Promission, and after to the Word Assumption; or else, that the Word cujusdam might be rejected. The Court however were of Opinion, that this was a fatal Variance; and therefore there was held to be a Failure of the Record. Upon which he presently after moved, that the Scire facias might be amended. But the Court said, the Record has now been tried; and therefore this Motion was certainly too late. However gave leave that the Scire facias might be quashed upon Payment of Costs.

Main *and* Somner.

IN Debt upon Bond Mr. Pilſworth moved, that upon bring- How far the Court will ſtay Proceedings in Debt upon Bond.
ing in what was due upon the Condition with Coſts, all Proceedings might be ſtaid. The Court at firſt doubted, whether this could be done within the Intent of 4 & 5 Ann. 16 (13) as the whole conditional Sum was not offered to be brought in. However at laſt they granted the Motion. And were the rather inclined to do ſo; becauſe the ſtaying Proceedings in this Action would be no Bar to another.

Farrars *and* Lovelane.

MR. Marſh now moved this Matter again. But Judge Page ſaid, he remembred a Motion of the ſame Nature with the firſt Part of this, made by Serjeant Hall in the Caſe of one Breeman, and it was refuſed. Accordingly the Court agreed, that it clearly muſt be refuſed in the preſent one. And were of the ſame Opinion as to the ſecond Part of it. However made a Rule now, that the Landlord might have Liberty to add himſelf a Defendant with the Tenant, in Order that, if the Tenant could be influenced upon to make himſelf Defendant, he might not be at Liberty to give up the Poſſeſſion at his Pleaſure. Vide ante 432.

Goodtitle *and* Davis.

A Motion was made for Judgment in Ejectment, upon an Affidavit of Service of the Declaration on the Tenant in Poſſeſſion; as the Plaintiff was informed and believed. He ſaid, he muſt allow, that ſuch an Affidavit would not have been certain enough in ordinary Caſes; but this was an Ejectment of a Night-Houſe, which no Body comes into all the Day, and it is difficult to know, who the Tenant is. The Court ſaid, that then the Plaintiff muſt proceed in the old Way, by ſealing a Leaſe upon the Premiſſes. And Judge Page ſaid, he remembered once an Affidavit made of Service of a Declaration on a Sexton in an Ejectment for a Chapel, and the Court there were of Opinion it would not do. Accordingly the Motion was refuſed. The Certainty required in an Affidavit of Service of a Declaration in Ejectment.

Anonymus.

IN an Information in the Nature of a Quo Warranto, relating to a Common Council Man of the Borough of Marlborough, Motion was made, that the Clerk of the Common Council might attend at the Trial with the Common Council Books, upon an Affidavit, that there were many Interlineations in one of the Books. The other Side objected, that theſe Motions How far the Court will direct that a Perſon ſhall attend with a Corporation Book at the Trial.

Motions are never allowed, but in Cases of Razures. And in those Cases neither there is only a Rule made, that the proper Officer shall attend with the particular Book so supposed to be ras'd. Besides it was said, it did not appear, that the Town-Clerk was the proper Officer. And indeed, if the Court should be of Opinion, that the Books should be produced at the Trial, the Method would be to Subpœna the Party, and give him Notice to attend with the Books at the Trial. The Court said, there was the same Reasons for allowing these Rules in the Case of Interlineations, as in the Case of Razures. However they said, it is certain that Book only need be attended with at the Trial, that is supposed to be razed. Accordingly made a Rule, that the proper Officer should attend with that Book.

The King *and* Whight.

Vide ante 415.

MR. Kettleby now said, that the principal Objection to this Indictment against the Defendant was, that he was only Attorney for the Prosecutor in the Information, and so it is set forth in the Indictment, and therefore was not within the Meaning of the Act. But the Court said, as this was a Matter of Difficulty, they certainly would not enter into it the last Day of the Term. Upon which Mr. Kettleby prayed, that the Defendant might be bailed. The Court said, that regularly speaking, where a corporal Punishment is to be inflicted, they do not Bail after Conviction. Accordingly refused it.

Johnson *against* Warren & al'.

How far a Court of Equity will set aside an Award for Matter dehors.

AT the setting down of Exchequer Causes in Serjeant's-Inn. On a Bill brought for setting aside an Award, the Defendants acknowledged in their Answer, that Part of the Sum awarded to be paid, was for Matter subsequent to the Submission. Upon which Mr. Peere Williams, as Counsel for the Plaintiff said, that tho' indeed Courts of Law cannot enter into Matters dehors to set aside an Award, yet Courts of Equity may. And to shew how far Courts of Equity had carried this Matter, he cited 2 Vern. 514. There, he said, it was determined in the first Place, that when a Reference is made to three or two of them, and the two make their Award without consulting the third, that Award is void. Another Reason given for setting aside the Award in that Case was, that the Attorney in the Cause drew it up. Baron Carter said, he was Counsel in that Case, but did not remember the second Point was determined; and believed, if that Notion should once prevail, many Awards might be set aside. However the Court (the Chief Baron absent) clearly agreed, that this Award was void for the Reason abovementioned. But because the awarding this Part of the Sum appeared to be through a meer Mistake, and the substantial Part of the Award was clearly fair and proper, the Court proposed, that the Parties should agree, that the Award should be confirmed; the whole Sum awarded paid by the Plaintiff,

and each Side ſtand by his own Coſts; which they did accordingly.

Whitehead *and* Harriſon.

AT the ſetting down of Exchequer Cauſes in Serjeant's-Inn. An Ejectment having been brought of Lands, which Sequeſtrators had got Poſſeſſion of, a Bill was brought to revive the Sequeſtration, and likewiſe an Injunction prayed to ſtay Proceedings in the Ejectment. Mr. Ward now moved, that the Sequeſtration might be revived. He did allow, that the Sequeſtration was taken partly upon Copyhold Lands, partly upon Freehold, and that the Defendant in the original Suit was dead. But yet he ſubmitted it, the Sequeſtration was proper to be revived in the Hands of the Heir as to the whole Lands. He confeſſed, that this was a Sequeſtration on a Decree, and that ſuch Sequeſtrations were but of late Date. They began in the Time of Lord Nottingham, in the Court of Chancery; and not allowed in this Court, till the fourteenth of June, 1687. in the Caſe of Fountain and Wavers. He confeſſed likewiſe, that they did abate by the Death of the Party; but yet, he ſaid, as to the Freehold, it was certain it might be revived. And as to the Copyhold he ſubmitted it, the Law was the ſame. For it is well known, that this Proceſs runs upon theſe Lands, tho' the Common Law Proceſs of Elegit does not. The Court ſaid, that tho' it was true, Sequeſtrations run upon Copyhold; yet it was to be doubted, whether it could be revived in the Hands of the Heir to ſuch Lands. For if it ſhould, the Heir would not take up thoſe Lands; and then the Lord would be without a Tenant. For which Reaſon they ordered the Injunction to continue only as to the Freehold Lands, and diſſolved it as to the Copyhold, with Liberty to apply to the Court again.

How far a Court of Equity will direct that a Sequeſtration ſhall be revived.

Adams *and* Hutton.

Lent Aſſiſes. IN an Action of Trover, brought for a certain Quantity of Barly, it appeared upon the Plaintiff's own Evidence, that the Barly was delivered by the Plaintiff to the Defendant to be made into Malt. Upon which Judge Page declared, that Trover would not lie for the Barly, becauſe it was delivered for another Purpoſe, to be made into Malt. He ſaid too, that it would not lie for the Malt; becauſe it did not appear that any Tender was made of the Money due for making the Barley into Malt. Accordingly the Plaintiff was nonſuited.

Of what Things an Action of Trover muſt be brought.

Hunt

Hunt *and* Gouch.

How far a Perſon ſhall not be bound to prove that Title in Evidence which he lays in the Declaration.

Lent Aſſiſes. IN an Action upon the Caſe, brought by a Commoner againſt the Lord, for digging Coney-boroughs upon the Common, to the Detriment of the Commoner, the Plaintiff ſet forth a ſpecial Title to the Common in his Declaration; but could not ſupport that Title upon Evidence. Upon which Serjeant Urlyn objected, that the Plaintiff had failed in his Evidence; but the Court held the Evidence to be ſufficient; for in this Action the Title to the Common is not in Queſtion, but the Prejudice done to it.

Barnes *and* Ranſom.

How far an Indorſement ſhall be good Evidence.

Lent Aſſiſes. IN an Action brought upon a Note which carried Intereſt, and dated Feb. 1718-19, the Defendant pleaded the Statute of Limitations. And now upon Evidence the Plaintiff offered to produce an Indorſement, witneſſing Intereſt to have been paid till 1728. Upon which the Defendant's Counſel objected, that this Indorſement was writ with the Plaintiff's own Hand; and therefore could be no Evidence of a freſh Acknowledgment of this Promiſe, in Order to bind the Defendant. But the Court ſaid, in the Caſe of Lord Barrington and Serle laſt Term in the Houſe of Lords, all the Judges of England gave their Opinion, that ſuch Indorſement was Evidence in Caſe of a Bond, which the Statute of Limitations was pleaded to. Accordingly allowed this as Evidence in the preſent Caſe. Serjeant Urlyn then objected, that the Note was not properly declared upon, by ſetting it out to be a Note in 1718; whereas it appears to be a Note in 1718-19. But this Objection was over-ruled likewiſe.

Legh *and* Stannard.

What ſhall not be good Evidence of the Copy of a Judgment.

Lent Aſſiſes. IN an Action of Treſpaſs for the mean Profits after a Recovery in an Ejectment, it was objected upon Evidence, that the Judgment was not ſufficiently proved, inaſmuch as the Witneſs only ſwore it was a true Copy, without being able to prove out of what Office the Copy was taken. Judge Page ſaid, in Lord Chief Juſtice Holt's Time he remembred a Caſe, where an Anſwer in Chancery was produced in Evidence; and tho' the Witneſs ſwore, the Copy of the Anſwer was taken out of the Six Clerk's Office, yet, becauſe he could not ſwear who the very Six Clerk was he had the Copy from, the Plaintiff was nonſuited; and accordingly he was ſo in the preſent Caſe.

Spink *and* Hare.

When an Action is brought upon an Attorney's Bill, what Evidence muſt be given in Order to ſupport ſuch Action.

Lent Aſſiſes. IN an Action brought by an Adminiſtrator to recover an Attorney's Bill, it was objected at Bury Aſſizes, that Evidence ought to be given of the Bill's being tendred to the Defendant before the commencing of the Action. But Judge Page held it not material; accordingly no Evidence of that Sort was produced.

Tinmore *and* Wallis.

When an Action is brought againſt a Stake-holder, what Evidence the Defendant ſhall not be allowed to give.

Lent Aſſiſes. IN an Action brought againſt a Stake-holder upon a Wager ſuppoſed to be laid, that Col. Negus and Mr. Cornelius would be choſen Bailiffs of the Town of Ipſwich by the eighth of Sept. laſt, and ſwore in the twenty-ninth of that Month; the Defendant offered to give Evidence, that Col. Negus and Mr. Cornelius were not duly elected. But the Court declared, they would not ſuffer ſuch Evidence in this collateral Action; no more than a Title to an Eſtate ſhall be tried in an Action of Treſpaſs. Mr. Proctor then objected, that the Plaintiff was too ſoon in bringing this Action; becauſe a Mandamus was now depending to try the Right of this Election in. But notwithſtanding this, the Court directed the Jury to find for the Plaintiff. And obſerved farther, that in theſe Actions brought againſt Stake-holders, the moſt convenient Method for them is to bring the Money into Court; and then let the Parties intereſted go on with the Diſpute at their own Expence. However, the principal Queſtion, whether ſuch Evidence ſhould be allowed or not, was ſaved as a Point to be made a Caſe of.

Coleman qui tam *againſt* The Inhabitants of Loes.

When an Action is brought upon the Statute of Hue and Cry, what Evidence the Plaintiff muſt give in Order to ſupport it.

Lent Aſſiſes. IN an Action upon the Statute of Hue and Cry, the Husband declared of a Robbery committed on his Wife. And now upon Evidence Judge Page declared his Opinion to be, that the Husband ought to have went with his Wife before the Juſtice, and made Oath of his having loſt this Money; and thought this Caſe diſtinguiſhable from that of a Servant's being robbed of his Maſter's Money. There indeed he did allow, the Maſter need not make ſuch Oath; becauſe the Servant or Maſter may either of them bring the Action at their Election; and the Servant may declare of his own Money being taken away, becauſe of the ſpecial Property that he had in it. However he allowed the Plaintiff to proceed in his Evidence; and afterwards a Verdict was given for him, ſubject to the Court's Opinion as to this Point.

Salter qui tam *againſt* The Inhabitants of Colnes.

How far the Judge of Aſſiſe muſt proceed to a Cauſe, notwithſtanding an Objection taken to the Writ of Niſi Prius.

Lent Aſſiſes. IN an Action upon the Statute of Hue and Cry, Serjeant Urlyn objected, that the Venire was awarded on the Roll to require the Jury to come out of a particular Hundred, but the Writ of Niſi prius ordered them to come out of a different one; for which Reaſon he ſubmitted it, that the Writ of Niſi prius was wrong; and conſequently the Court had no Authority to proceed in trying the Cauſe. But the Court ſaid, that the Roll of Niſi prius is only a Tranſcript of the Record above; and they would intend the Writ of Niſi prius to be agreeable to the Record above. Beſides they ſaid, this Fault might certainly be amended; and mentioned Sir John Barnard's Caſe, where even the Name of one of the Defendants was omitted; this Fault objected at the Trial by Judge Page himſelf, when he was Counſel; yet the Court ordered them there to proceed; and this Fault was amended above. Serjeant Urlyn then made another Objection, that the Place mentioned in the Declaration, where the Plaintiff alledged that he gave Notice of the Robbery in, varied from the Place proved upon Evidence. And he ſubmitted it, this was a local Action; and conſequently the Variance was material. But the Court ſaid, the Place proved upon Evidence, appeared to be within the Neighbourhood of the Place where the Robbery was committed, and the Place mentioned in the Declaration, is alledged to be no more than in the Neighbourhood; for which Reaſon this Variance was held to be immaterial. But then the Court ſaid, it was incumbent upon the Plaintiff to prove, that he had deſcribed the Perſon robbing him; and this Conſtruction has always been made upon the Act; otherwiſe the Country would not know how to purſue him. However, they would not ſuffer a Queſtion ſo particular to be asked the Plaintiff, and becauſe he did not ſwear to this Fact in giving an Anſwer to the general Queſtion, whether he did any Thing more, than give Notice that he was robbed, he was immediately nonſuited.

Stavers *and* Parker.

How far an Action of Trover will lie againſt an Inn-keeper.

Lent Aſſiſes. IN an Action of Trover brought againſt an Inn-keeper by a Gueſt, Mr. Prime objected, that this Action would not lie, but an Action upon the Caſe on the Cuſtom of the Realm, relating to Inn-keepers. However as there was a Demand of the Goods proved, and likewiſe a Refuſal, the Court held, that this Action will lie; and accordingly the Plaintiff had a Verdict.

Term. Paſchæ

4 Geo. II. 1730.

The King *and* The Inhabitants of Simpſon.

MR. Pilſworth now came to ſhew Cauſe, why an Order of Seſſions ſhould not be quaſhed. The Caſe was, that two Juſtices had made an Order for the Removal of one Allen, together with his Daughter and two Sons, from the Pariſh of Monton to the Pariſh of The Age of the Daughter appeared upon the Face of this Order, to be nine Years; the Age of one of the Sons to be eight, and the Age of the other to be ſix. Upon an Appeal to the Seſſions, they quaſhed the Order as to the Father, and confirmed it as to the Children. Upon which Mr. Fazakerly had objected on a former Motion, that the Children appeared to be of ſuch tender Years, that they could not have got a Settlement for themſelves; for which Reaſon their Settlement muſt have been, where their Father's Settlement was; and conſequently the Seſſions did wrong in quaſhing the Order of two Juſtices only as to the Father; whereas they ought to have quaſhed it as to the Children likewiſe. To this Objection Mr. Pilſworth anſwered, that it is true indeed the Order of Seſſions has recited the Whole of the Order of two Juſtices, and has not contradicted in expreſs Words any one Fact alledged in that Order; but yet, as the Court of Seſſions has confirmed the Order as to the Children, he ſubmitted it this Court would intend, that Evidence was laid before the Seſſions, that the Children were not of ſuch tender Age; but were of ſuch an Age as they might have gained a Settlement to themſelves, and that they actually did ſo. And therefore he put the Caſe of a Matter of Law ariſing from certain Facts ſtated in an Order of two Juſtices; the Seſſions recite that Order, and adjudge the Party's Settlement to be different from what it would be if the Facts ſtated in the original Order were true. Yet there if the Order of Seſſions barely recites what the Order of two Juſtices was, without ſaying how the Facts appeared to them, this Court will intend, that the Facts appeared different to the Seſſions from what they did to the two Juſtices. Accordingly in the principal Caſe the Court declared themſelves to be of the ſame Opinion; and therefore diſcharged the Rule.

Vide ante 426.

The

The King *and* The Inhabitants of Moltſworth.

How far a Perſon gains a Settlement by living as a Servant.

MR. Reeves moved, that an Order of two Juſtices might be quaſhed, which was made for the Removal of a certain poor Perſon from the Pariſh of Goring to the Pariſh of Moltſworth. The Caſe, as ſtated in the Order, was, that this Man had gained a Settlement in the Pariſh of Moltſworth; but afterwards let himſelf for a Year, and ſerved for that Year, to two Perſons, that were Partners in a Boat, in the Pariſh of Goring. But it was farther ſtated in the Order that this Man did not live in the whole Year forty Days in the Pariſh of Goring; but plied with the Boat in divers other Pariſhes. Notwithſtanding which Mr. Reeves ſaid, he ſhould ſubmit it, that this Perſon's Settlement was in the Pariſh of Goring. He did agree, it has been reſolved, that if a Perſon lets himſelf in a particular Pariſh to go a Shipboard, and he accordingly does go without ſerving forty Days in that Pariſh, ſuch Service will not gain him a Settlement. But he ſubmitted it, that Caſe did not come up to the preſent one; becauſe there it appears, the Intent of the Parties was, that the Pariſh, where he was hired in, ſhould have no Benefit of his Service; but here the Servant was bound only to ply with his Boat from this Pariſh to other Pariſhes thereabouts; and therefore, though in Fact he might not have reſided for forty Days within that Pariſh; yet that was only accidental; and conſequently the Servant gained a good Settlement by ſuch Service. Beſides he ſaid, he ſhould ſubmit it, that the Conſtruction of this Part of the Order, which finds, that he did not ſerve for forty Days in this Pariſh, might very well be, that he did not ſerve for forty Days together. And then unqueſtionably this would be a good Settlement. The Court however were of Opinion, that this Order muſt be underſtood to mean, that the Servant did not reſide in this Pariſh for forty Days in the Whole at any different Times within the Year. And then they ſaid, their Opinion was, that this was not a good Settlement. Accordingly confirmed the Order.

The King *and* Hemingway.

How far the Court of King's Bench will grant an Information againſt a Steward of a Court-Baron

ON Rule to ſhew Cauſe, why an Information ſhould not be granted againſt the Defendant, as Under-Steward to the Archbiſhop of York of his Manor of Otley in that County, for ſoliciting a Jury at a Court-Baron and Cuſtomary-Court holden there to preſent the Dying ſeiſed of ſuch a one twenty-three Years ago of certain Copyhold Lands, and then diſcharging that Jury becauſe they would not find this, and ſwearing another for this particular Purpoſe; who accordingly did find ſuch dying ſeiſed; though Oath was made upon the former Motion, that ſuch finding was falſe; for the Party himſelf did not die but ſeventeen Years ago; Mr. Fazakerly now ſaid, that he hoped, the Rule ſhould be diſcharged. He ſubmitted it,

that by Law a Steward may ſwear a ſecond Jury, when the firſt Jury refuſes to find ſuch Things, which their Oath obliges them to inquire into. But in this Caſe there were two particular Reaſons for doing it; one, becauſe the Foreman in the firſt Jury was a Party intereſted in the Queſtion; the other, becauſe the Jury, charged with this Preſentment, conſiſted of Freeholders, as well as Copyholders; whereas the Law requires, that Copyholders only ſhall preſent the Death of Copyholders. And this is the peculiar Buſineſs of the Cuſtomary Court; whereas the Freeholders only are the Perſons concerned in Matters relating to the Court-Baron. And therefore he inſiſted, that as there were diſtinct Courts kept at this Time; there ought to have been diſtinct Juries. The Chief Juſtice ſaid, he did believe indeed, that according to the antient Law, there were always ſeperate Juries in theſe Caſes; but of late Years the Practice has been ſo univerſal to join them together, that the Freeholders muſt be intended to ſpeak to ſuch Things as relate to the Court-Baron, and the Copyholders to ſuch Things, as relate to the Cuſtomary Court. Then as to the Foreman's being a Party intereſted, he ſaid, there was a new of the Jury without him, and therefore that Reaſon could not be ſufficient for changing the Jury. However in general, he ſaid, he took it, that it would be a Thing of dangerous Conſequence to allow a Steward to ſolicit a Jury to find any Thing againſt their Conſciences; and upon their Refuſal to do it, to ſwear a new Jury. Accordingly the Court made the Rule abſolute for granting the Information.

Binmore *and* Bowler.

When a Perſon who has eſcaped is retaken, what Priſon he ſhall be commited to.

MR. Agar had obtained a Rule, that a Perſon taken on an Eſcape Warrant and committed to Newgate, might be re-delivered to the Marſhal in Execution, upon Account of his having eſcaped upon a Day Rule. But now Motion was made, that that Rule might be diſcharged upon an Affidavit, that he was not out upon a Day Rule, when he did eſcape; and accordingly the Court granted the Motion.

Dawes *and* Daſey.

Within what Time Judgments ought to be entered upon the Roll.

ON Motion to ſet aſide an Execution for the Judgment's not being entered upon the Roll, though it was two Years ſince the Signing of it, the Court ſaid, that a Rule was made in Lord Chief Juſtice Holt's Time, that Judgments ſhould be entred up in convenient Time; and accordingly made a Rule to ſhew Cauſe.

Lyns *and* Anſtil.

How far the Court will not diſcharges a Perſon upon common Bail.

MR. Thede, moved, that the Defendant might be diſchatged upon Common Bail, upon account of its not being aſcertained in the Affidavit, which the Indorſement of the Writ was made by, what was the particular Cauſe of Action, but only in general, that ſo much was due to the Plaintiff. But the Fact came out to be, that after this Indorſement was made, a ſecond Affidavit was filed of the particular Cauſe of Action, before any Warrant for Arreſt was made out, and therefore the Court thought this ſufficiently within the Intent of the Statute of 12 Geo. 1. becauſe this Affidavit was made before the Party could poſſibly be at any Prejudice. And for this Reaſon the Motion was diſallowed.

Harman *and* Delaney.

Vide ante 289.

THIS Matter now coming on again, the ſingle Queſtion that was argued, was, whether the Words were libellous or not. The Counſel agreed on both Sides, that many Words are libellous, when put into Writing, which would not be actionable, if ſpoke only in looſe Diſcourſe. Particularly Caſes were cited to this Purpoſe out of Moor 627. and Skin. 124. They agreed farther, that in Libels there is no Occaſion to lay a ſpecial Damage. But the Point which they differed in was, whether the Words in the Advertiſement were to be confined to the Plaintiff's Skill in making thoſe ſhort Guns, or whether they extended to his Skill in his Trade in general. The Court were of Opinion, that thoſe Words viz. The ſaid Gunſmith not daring to engage with any Artiſt in Town, were to be taken in the general Senſe, as they were ſeperated from the reſt of the Sentence by the Word nor; accordingly gave Judgment for the Plaintiff.

Butler *and* Lord Montgomery.

How far the Court will not give a Defendant Liberty to withdraw his Plea.

IN an Action upon a Bill of Exchange Mr. Strange moved, that the Defendant might have Liberty to withdraw a Special Plea of a uſurious Contract, and plead the General Iſſue. But becauſe this was an Iſſue that was to be tried at the Bar this Term, and if the Special Plea was withdrawn and the General Iſſue pleaded, a new Motion muſt be made for a Trial at Bar after Iſſue joined upon this ſecond Plea, ſo that this Trial muſt neceſſarily be put off to Mich. Term, the Court refuſed the Motion.

Horn *and* Mullins.

AN Action of Eſcape having been brought againſt the Marſhal for diſcharging a poor Perſon out of Cuſtody, though in Obedience to a Rule of this Court made 2 Geo. 2. Mr. Strange moved, that all Proceedings in this Action might be ſtay'd. He ſaid, the Statute has expreſly provided, that no Gaoler ſhall be anſwerable for the Eſcape of ſuch Perſon ſo diſcharged, and that, he hoped, was a ſufficient Foundation for this Motion. Accordingly the Court made a Rule to ſhew Cauſe.

How far the Court will ſtay proceedings in an Action of Eſcape.

The Biſhop of London and Lewen *ver.* The Mercers-Company.

MR. Reeves now argued for the Plaintiff in Error. He ſaid, before he would enter into the Merits of the Queſtion, whether the Mercer's Company had any Right of ſupplying this Church at all, he would conſider another Queſtion, whether it is poſſible they can have Judgment upon this Record, be their general Right of preſenting good or not. And this Objection, he ſaid, he founded, partly upon its not being laid in the Declaration, that the Church was vacant at the Time of the firſt Preſentation by the Company after the Fire, and Partly, upon its not being laid there, that the Preſentee was inſtituted and inducted. And if that was ſo, the Change of all the Turns would be altered; and whereas according to the Plaintiff's Computation their Turn now is come; it would really be the King's Turn, who was Patron of St. Mary Mildred's at the Time of the making of the Act. He did agree, that the Defendant in the Inducement to his Traverſe has admitted, that this Preſentee of the King was inſtituted and inducted; but it has been often ruled, that ſuch Admiſſion in a Defendant's Plea, can cure no Fault in ſubſtance in the Plaintiff's Declaration. And to this Purpoſe he cited 7 Rep. 24. and 8 Rep. 120. b. He then proceeded to the Merits of the Principal Queſtion; in ſpeaking to which he conſidered the Nature of an Impropriation. He ſaid, the King, the Ordinary and the Patron muſt join in the making it, according to Plow. 508. b. The Impropriator is perpetual Incumbent; and if the Impropriator ſhould preſent; the Impropriation would not only be thereby deſtroyed, but the Original Patron, who conſented to the Impropriation, would be reſtored to his Right of Patronage; as is reſolved in the ſame Book 501. and Hob. 308. The Advowſon or Right of Patronage is conſidered in Law diſtinct from the Impropriation, and ſuſpended ſo long as the Impropriation ſubſiſts; and therefore in Hob. 304. it is held, that during this Time by a Grant of the Advowſon, neither the Advowſon nor Impropriation will paſs. The Concluſion of which Argument, he ſaid, was, that the Plaintiffs could have no Right to this Preſentation. He ſaid, it was objected indeed upon

Vide ante 389.

upon the former Argument, that this was a Donative, and not an Impropriation; but there was no Pretence to conſider this ſo; becauſe it is ſtated in the Defendant's Plea, that the Plaintiffs and thoſe, whom they claim under, have all along received the Profits of the Church to their own Uſe. An Impropriation is without doubt taken notice of by the Law to be a valuable Intereſt in the Impropriator; even an Advowſon has been lately held to be Aſſets in the Hands of the Heir upon a Bill brought in the Court of Chancery; and that Decree was affirmed upon an Appeal to the Houſe of Lords. But in the Caſe of a Donative the Incumbent has the whole Profits to himſelf. Mr. Strange on the other Side argued, and ſaid, he did allow, that poſſibly the firſt Preſentation cannot be taken to be ſatisfying a Turn; and therefore he muſt allow, that when the King preſented next, he preſented in the Company's Turn; but what he inſiſted upon was, that then he ought not to preſent in his own Turn likewiſe. He owned, that before the Statute of 7 Ann. 18. this was otherwiſe; but he ſaid, that Statute has given a Quare Impedit, though a Man does not preſent in his Turn; and by that allows his Turn may be taken upon the next Avoidance. Then as to the Principal Point, he ſubmitted it, that the Intent of the Statute of Car. was, that in whatever Manner theſe Churches had been ſupplied before, from thence forward the two Churches united into one, ſhould be preſented unto Turn by Turn. And to this purpoſe he cited the Caſe of Kirk and Car, Hil. 3 Geo. 1. which was determined in this Court upon a Writ of Error on a Judgment in the King's Bench in Ireland. There the Church of St. Mican had been a Donative, belonging to the Dean and Chapter of Dublin; an Act paſſed in that Kingdom for dividing this Church into three Pariſhes, reſerving the Right of Preſentation to the Dean and Chapter. The Queſtion there was debated upon a Bill of Exceptions, whether theſe three Churches ſhould be preſentable or donative. The Court below was of Opinion they were preſentable; this Court was of the ſame Opinion; and both Judgments were affirmed upon a Writ of Error in the Houſe of Lords. The whole Court inclined to be of Opinion, that in the preſent Caſe the firſt Exception was good; and thought the Statute of Ann. made no Difference; for they took it, that Statute related only to permanent Rights, and not to ſuch as varied by Turns. But as to the other Exception the Court differed in Opinion. The Chief Juſtice and Judge Page declared their preſent Thoughts to be, that the Company could not preſent. Judge Probyn ſeemed to think, that though the Company could not preſent, yet they might ſupply the Church after the making of the Statute in the ſame Manner, as they did before. Judge Lee was of Opinion, that they might preſent. So far, he ſaid, ſeemed to him clear, that the Church was not always to be filled up by the King. If the Statute could not be conſtrued, that the Company ſhould preſent, he thought, the Original Patron would have right to do it. But rather than the Original Patron ſhould have his Right revived to him (which if the Statute had not intervened, the Impropriators might have kept him out for ever from exer-

How far an Advowſon ſhall be Aſſets.

riſing) he inclined to think, the Conſtruction upon the Statute might be, that the Impropriators ſhould preſent. However this Matter was ordered to ſtand over. Vide poſt.

Blackford *and* Hudſon.

IN an Action of Trover the Plaintiff had deſcribed the Parcels of Goods in the Niſi prius Roll different from what he had in the Copy of the Iſſue; upon which the Plaintiff had obtained a Rule to ſhew Cauſe, why the Niſi prius Roll ſhould not be amended by the Copy of the Iſſue. Serjeant Eyres now ſhewed for Cauſe, that the Plaintiff muſt have ſomething by him, which he made the Copy of the Iſſue from; and therefore there was no Occaſion, that he ſhould have this Aſſiſtance from the Defendant. However the Court (Chief Juſtice abſent) made the Rule abſolute. By what it is that the Court directs that the Niſi pruis Roll ſhall be amended.

Cartee *and* Handerſon.

MR. Moreton moved in a Writ of Error out of Ireland, that the Defendant in Error might rejoin within four Days, or that the Cauſe might be ſet down in the Paper. And the Motion was granted. When a Writ of Error is brought upon a Judgment in Ireland, how far the Court will require the Defendant to rejoin within a ſhort Day.

The King *and* Crooke.

THIS Matter now coming on to be argued again, Serjeant Darnel ſubmitted it, that in all Indictments, founded upon this Part of the Statute of 5 Eliz. on which the Defendant is indicted, it is neceſſary to be ſet forth in the Body of the Indictment, how and by what Poſſibility the Conveyance forged can effect the Freehold of another one. In Indictments for High Treaſon it is a known Rule, that the Overt Act muſt be laid in the Indictment; the Statute of Edw. 3. requires only that there ſhall be an Overt Act; but yet the Conſtruction has always been, as has been mentioned; which is an Argument that the Law is ſo in other Caſes. And indeed it would be of dangerous Conſequence, to ſay that an Indictment upon this Branch of the Statute would be good, if it only charged, that the Defendant forged a Conveyance of the Freehold of another, with an Intention to moleſt it. If this be ſo, the Queſtion for the Conſideration of the Court, he ſaid, would be whether this Conveyance of a Park, called Jawick-Park, can poſſibly moleſt the Freehold of Lands called Jawick. He ſubmitted it, that it could not no more, than if the Lands lay in different Counties. He inſiſted farther, that the Court cannot take Notice, but there may be ſuch a Place as Jawick-Park; the Defendant may afterwards be puniſhed for forging a Conveyance of that Place; and conſequently, if he be puniſhed Vide ante 168.

niſhed upon this Indictment, he may be puniſhed twice for the ſame Offence. He did agree, that if a Bargain and Sale had been forged without Inrollment, or a Releaſe without a Leaſe, this would have been within the Intent of the Act; becauſe in the firſt Caſe the Conveyance is good for ſix Months; and in the other Caſe a Court of Equity would ſupply the Defect of the Conveyance; but in the preſent Caſe, as no Agreement appears upon the Record, relating to Lands called Jawick, it is impoſſible a Court of Equity could decree, that Garbet ſhould make a Conveyance of thoſe Lands, any more than of any other Lands. He then obſerved, that there was another Exception taken at the Trial, and that was, that Garbet ought to appear actually to have been damnified; for the Statute ſays, that the Party in ſuch Caſe ſhall have his Coſts; and this Exception, he hoped, the Court would conſider of likewiſe. The Chief Juſtice ſaid, that this Cauſe was tried before him, and he well remembered Evidence was given of Terms of Propoſal being actually made between Crook and Garbet relating to the Lands called Jawick; and that the Defendant forged this Conveyance only to borrow a Sum of Money upon it by Way of Mortgage, of one Hawkins, which he accordingly did. And if this had been ſtated in the Indictment, he ſhould have thought it beyond Queſtion, that this would have been an Offence within the Clauſe of the Statute, that has been mentioned. However even as the Fact was laid, the whole Court declared their Opinions, that the Indictment was ſufficient; and put it upon this Principle, that it is not neceſſary to appear upon the Face of the Indictment, how the Fact charged did tend to the End deſigned; it is enough to ſay, it does not appear, that the Party could not have that Intention. In theſe Caſes the Jury and not the Court are the proper Judges of a Man's Intent. Which appears from the Common Forms of an Indictment of Burglary; which only is, that A. broke the Houſe of B. in the Night with Intent to commit Felony. However the Court ſaid, they would not give a final Opinion till the End of the Term.

Vide poſt

The King *and* Catherel.

Vide ante 427.

THE Court now declared their Opinions, that the Conviction was bad, and for this Reaſon, becauſe it orders, that the Defendant ſhall lay in Cuſtody, till he pays, what ſhall be found due upon the Account, and it does not appear, what that Sum may be, ſo that this may be a Commitment for Life. They ſaid, it was true indeed, the Words of the Conviction were, that he ſhould be committed, till he accounted and ſhould pay the Money, that ſhould be due; but by being bad in Part it is bad in the Whole. Mr. Abney then prayed that they might have Liberty to amend their Conviction; and cited the Caſe of The King and Parmenteer where the ſame was done. But the Court ſaid, the Record is actually filed in this Court; and therefore they could not do it; though they did agree, that when the Record is juſt come in, they do allow it. He then

then hoped, that the Defendant ſhould only be bailed, and not diſcharged. But the Court ſaid, this is a Commitment in Execution; and therefore they had no Authority to bail him. Accordingly he was diſcharged.

Sharter *and* Crimſton.

MR. Lacey moved, that Proceedings might be ſtaid on a Scire facias againſt Bail, a Writ of Error being brought on the Principal Judgment, and that without entring into the Rule of Arthur and Myonet, the Scire facias being not yet returnable. The Court ſaid, they did not know, this made any Difference; and therefore refuſed the Motion, but upon thoſe Terms. How far the Court will ſtay Proceedings againſt Bail pending a Writ of Error.

The King *and* The Inhabitants of Utoxeter.

ON Rule to ſhew Cauſe, why ſome Poor Rates ſhould not be quaſhed, Mr. Abney took an Exception to them, that they were ſtanding Rates, and for that Reaſon were bad. To which purpoſe the Caſe of The King and The Inhabitants of Ordley, and the Caſe of the Pariſh of St. Dunſtans were cited in Point. But Mr. Fazakerly on the other Side ſaid, that theſe Rates were not ſtanding Rates, to provide that each Pariſh ſhould pay yearly ſuch a particular Sum; but only, that when the Pariſh of Utoxeter ſhould pay ſuch a Sum, the other Pariſhes that were mentioned in the Orders ſhould pay ſuch a one; and ſo that Proportion ſhould be obſerved. Beſides he took Notice, that theſe Orders have conſtantly been obeyed from 1655. and in that Year the firſt of them was ſettled; and only for that preſent Year; and that too in purſuance of a voluntary Agreement, that had been made by theſe Pariſhes. He ſaid beſides, that he apprehended, the Court have always refuſed granting Certiorari's to remove this kind of Orders; to prevent Pariſhes being put into Diſturbances by theſe Contentions. To this Purpoſe he mentioned the Caſe of the Town of Marlborough, Trin. 10 Ann. where indeed a Certiorari did remove up a Poors Rate; but the Court ſaid, if they had known, what the Order had been, before the Certiorari's going, it ſhould not have went. And in the Caſe of the Pariſh of Hackney it was expreſly refuſed. The Court ſaid nothing to this Objection about the Certiorari lying; but declared, that theſe Rates ought not to be ſuffered, upon Account of the Value of the Inhabitants in Pariſhes frequently changing; and that this Agreement of the then Inhabitants was intirely void to bind their Succeſſors. For which Reaſon the firſt Order though only for a Year was quaſhed, as being made upon a void Agreement. And the other Orders were all quaſhed; becauſe they ſettled a fix'd Proportion for ever. How far a Poor's Rate ſhall be ſaid to be bad.

The

The King *and* Wellen.

The Manner of executing Proceſs within the Liberties of Dover.

A Rule having been granted for an Attachment againſt the Defendant, as Regiſter of Dover, for not bringing in the Body of a Priſoner, in Purſuance of a Rule made upon him for that Purpoſe, after a Return of Cepi Corpus, the Attorney General now moved, that it might be diſcharged. He ſaid, the Conſtable of Dover has both a military and civil Juriſdiction, and he is the immediate Officer to this Court. The Conſtable has a Lieutenant or Deputy in his military Juriſdiction; and a Regiſter or Deputy in his Civil. He has likewiſe a Court of Admiralty and Equity; and the Regiſter has the Keeping of the Seal, which is fixed to all Sorts of Proceſs. The Regiſter likewiſe makes out Warrants for executing this Proceſs, and likewiſe makes out the Returns. But he ſaid, the Regiſter has no Power over the Bodies of the Priſoners; the Boder or Marſhal has the Cuſtody of them. So that at moſt the Regiſter can be conſidered, but in Part Deputy to the Conſtable in his civil Juriſdiction; the Boder is Deputy to him in the other Part of it. For which Reaſon he ſubmitted it, this Caſe was by no Means like that of a Sheriff and Under-ſheriff; for there the Under-ſheriff has the Whole of the Sheriff's Authority; and ſuch Deputation cannot be divided. The Conſequence of which, he ſaid, was, that the Rule was not rightly made upon the Regiſter to bring in the Body; and therefore he hoped, the Rule for the Attachment ſhould be diſcharged. But the Court ſaid, the Boder did not ſeem to be a proper Perſon to make this Rule upon; becauſe he is only in the Nature of a Gaoler. And againſt the Conſtable they would not grant this Attachment; becauſe, though they might do it; yet as he is the principal Officer, they always do grant them in ſuch Caſe againſt his Deputy. They did agree, that in all theſe Caſes the Rule is made upon the principal Officer for doing the Act; and ſo it is in the Caſe of a Sheriff; but yet there is a Clauſe in the Rule, that Service upon the Inferior Officer ſhall be good Service. The Queſtion then to be conſidered was, whether the Regiſter in this Caſe is to be looked upon, as the inferior Officer. They ſaid, he makes out Warrants to execute all Proceſs, that is directed to him; he makes out the Returns to all ſuch Proceſs; and therefore they thought, he was ſufficiently within the Deſcription of an inferior Officer. And Judge Page ſaid, he thought, the Acceptance of the Seal from the Conſtable made him a ſufficient Deputy. However the Court ſaid, if they had not ſo much Reaſon for granting the Attachment againſt him; yet, as he omitted to ſhew this Matter upon the Rule, that was made on him for ſhewing Cauſe, why he ſhould not bring in the Body, they ſaid, they would certainly grant the Attachment againſt him. Accordingly the Court refuſed diſcharging the Rule; but upon the Defendant's Conſenting to go before the Maſter, they ordered it to lie in the Officer's Hands for a Week.

The King *and* The Inhabitants of Handſworth.

ON Rule to ſhew Cauſe, why a Certiorari ſhould not be quaſhed, which was granted for removing up an Indictment for not repairing a Bridge out of the Quarter-Seſſions, Serjeant Corbet ſaid, that this Rule for ſhewing Cauſe was obtained upon the Statute of 1 Ann. 18. (5) But the preſent Indictment was againſt the Inhabitants of a Pariſh; by which it appeared a Trial of Right may come in Queſtion; and therefore he ſubmitted it, this Caſe was not within the Meaning of that Clauſe in the Statute. He ſaid, the whole of this Statute was founded upon a former one of 22 Hen. 8. 5. but he inſiſted that Statute could not be conſtrued to give the Seſſions a Juriſdiction, when the Juſtices of the Seſſions muſt be Parties intereſted. And he ſaid, he very well remembered, Certiorari's have been granted in theſe Caſes; though he did allow, they were not granted upon Debate. And particularly he mentioned the Caſe of The King and The Inhabitants of Mitcham in Surry, on his own Motion. He ſaid beſides, that the preſent Indictment was actually removed up; and therefore that, he hoped, would be a farther Reaſon for diſcharging the Rule. The Court ſaid, the ſecond Reaſon did not ſeem to them ſufficient to diſcharge the Rule upon; but the firſt did. And accordingly the Rule for ſhewing Cauſe was diſcharged.

How far a Certiorari lies to remove an Indictment for not repairing a Bridge.

The King *and* Lady Blunt.

MR. Fazakerly and Mr. Strange moved for a Certiorari to be directed to the Old Baily, to remove up an Indictment of Perjury againſt the Defendant. The Indictment was exhibited by a Son againſt his Mother-in-Law without any Foundation, for putting a falſe Anſwer in the Court of Exchequer; the Defendant was a Lady of great Reputation and of 20000l. Fortune; and therefore they hoped, ſhe ſhould be tried in this Court. They did agree, theſe Motions have been often refuſed; and the Reaſon generally given is, that all the Judges are in Commiſſion at the Old Baily; but it is well known, that the Judges ſit there only in Turns; and generally do not go down after the capital Offenders are tried; ſo that it is probable no Judge will ſit there, when this Indictment comes on. Beſides they ſaid, it uſually happens, that there are two Seſſions at the Old Baily in a Vacation; one, as ſoon as the Term is over, the other, before the Beginning of the next; but in this Vacation there will be but one. They obſerved farther, that it is certain, in many Caſes theſe Certiorari's have been granted. It was done in the Caſe of Sir Humphry Mackworth. And Mr. Strange ſaid, according to his Note of it, that was an Indictment againſt the Defendant for ſetting the Seal of the Mine-Adventurers Company without Authority, and not an Indictment of Forgery, as ſometimes that Caſe has been cited to be. The Defendant there inſiſted, that he had a Right to ſet the Seal of the Com-

How far a Certiorari does not lie to the Old Baily.

pany; and for that very Reason, because a Matter of Right was to be tried, the Court granted there a Certiorari. In the Dispute between Sir Solomon Swale and Mr. Mariott, Mr. Fazakerly said, the Indictment of Mr. Mariott for Perjury was removed up from the Old Baily, singly upon Account of Mr. Mariott's Reputation. And they both said in the Case of The King and Wells, Pasch. 9. of the late King, an Indictment of Forgery was removed up for that same Reason. The Court said, they did believe Certiorari's may have been granted in these Cases for such Reasons; but they did think them Reasons very improper for Courts of Justice to act upon. And as they were certain, Certiorari's have been much oftner refused, when these Reasons have been offered, they thought fit to refuse granting it in the present Case.

Jones *and* Ross.

How far the particular Instances wherein the Party wants to amend need not be specified.

MR. Wynn came to shew Cause upon a Rule, that had been obtained, for amending a Record, removed up into the Exchequer-Chamber, by a Bill as filed in this Court. And the Cause, that he shewed, was, that the particular Amendments were not recited in the Rule, nor any Notice given of them at the Time of the Service of the Rule. But the Court said, that indeed in Motions to amend Declarations this is necessary; because there is nothing in certain to amend by; but here there is a Bill filed of Record; and by that it is certain, what Amendments can be made. Accordingly the Rule was made absolute.

Norman *and* George.

Vide ante

UPON a Writ of Error out of the Common Pleas in an Action of Trespass and Battery, Mr. Gapper assigned for Error, that the Fact was not laid with sufficient Certainty in the Declaration; but only by Way of Recital with a Quod cum. In the Case of Rudge and Onoch, 5 Geo. 1. he said, Judgment was arrested after Verdict in a Suit by Bill in this Court upon this very Exception. In the Case of Onyon and Shore, Hill. 11 Geo. 1. that too was in Trespass and Battery; there were two Counts in the Declaration; in one the Fact was laid positive; in the other with a Cumq; etiam; and upon intire Damages given, Judgment was arrested in this Court. And the same was done in the Case of Gritton and Franchlyn, Trin. 13 Geo. 1. And in the Case of Brigs and Sheriff, Cro. Eliz. 507. this was held bad in the Common Pleas. But Mr. Strange on the other Side argued; and said, that he did agree, that in all Suits in this Court, and likewise in Suits by Bill in the Common Pleas; this Exception would be fatal. But in the Common Pleas, where the Suit is by Original, the Writ is considered as Part of the Declaration; and therefore as the Fact is not denied to be laid with sufficient Certainty in the Writ, he submitted it, that would Cure the uncertain laying of it in the other Part of the

Declaration. That the Writ is conſidered there as Part of the Declaration, ſeemed plain to him from various Expreſſions in the Declaration, as alia enormia, &c. contra Pacem, &c. ad grave Damnum, &c. which muſt have been too ſhort, if the Declaration was conſidered there, as the only Thing, which the Party is to anſwer. Then for Authority he relied upon Sid. 150, 187. and Lutw. 1509, And he ſaid, he was informed, this very Exception was moved in Arreſt of Judgment in the Common Pleas; and the Court over-ruled it; though he did agree, one of the Judges was of a different Opinion. The Chief Juſtice ſaid, he did believe, there had been two or three Caſes of this Sort, where this Motion has prevailed of the Writs being conſidered there as Part of the Declaration; but none of theſe Caſes, that he ever knew, came at any Time into this Court. And he ſaid, he muſt own, he always thought, that the Declaration was the Charge, which the Party is obliged to anſwer. And he ſaid, what he thought fully proved this to be the Caſe even in the Common Pleas is, that when a Variance is alledged for Error between the Writ and Declaration, the Party muſt pray Oyer of the Writ and bring the very Writ up by Certiorari. And the Reaſon for this given by Lord Holt was, that the Writ is only recited in the Declaration. And to ſhew that an Omiſſion in a Declaration cannot be ſupplied by Matter in the Writ, even in the Common Pleas, he cited Cro. Car. 407. where Vi & Armis was in the Writ, but left out of the Declaration, and held bad. Judge Page and J. Probyn were of the ſame Opinion. But Judge Lee ſaid, he had a Note of the Caſe of Bagnes and King, Mich. 13 Will. 3. where vi & armis was in the Writ, and omitted out of the Declaration; and after Judgment by Default the Court held this to be good. And he ſaid in that Caſe, the Caſe out of Lutw. mentioned now by Mr. Strange was cited. He ſaid farther, that as this Motion has prevailed in the Common Pleas he was for affirming the Judgment. However the Matter ſtood over.

Vide poſt

Marſhal *and* Carleton.

What ſhall be ſaid to be a Plea in Bar, what in Abatement.

IN an Action brought againſt the Defendant for a Devaſtavit of his Wife; the Defendant pleaded, quod petit Judicium de Billa, for that it was not ſaid in the Bill, that ſhe was Adminiſtrator of her former Husband; and concludes his Plea, quod Billa caſſetur. To this the Plaintiff replies, quod ab actione ſuâ præcludi non debeat, and ſo demurs in Bar; and a Joinder in Demurrer. Mr. Acherly for the Plaintiff objected, that there was no Fact alledged in the Plea, which the Plaintiff could take Iſſue upon; and for that Reaſon he was juſtified in Demurring. But Mr. Reeves on the other Side argued and ſaid, that he did agree, wherever a Defendant begins his Plea with a petit Judicium de Narratione, or concludes it ſo, the Plea is a Plea in Bar; but in the preſent Caſe the Beginning and Concluſion is both to the Bill; and therefore this was a Plea in Abatement. The Plaintiff conſequently did wrong in demurring in Bar; for by that Means he has made a Diſcontinuance; and accordingly he prayed

prayed Judgment for the Defendant. And by way of Authority cited Salk. 218. The Chief Juſtice agreed with Mr. Reeves, that his Diſtinction between a Plea in Bar and a Plea in Abatement was right; however ordered this Matter to ſtand over.

Vide poſt

Hilly *and* Polhill.

What ſhall not be ſaid to be a good Declaration in Debt upon an Award.

IN Debt upon an Award the Plaintiff declared, that the Defendant had given his Bond to ſtand to the Award of J. S. and that J. S. awarded, that the Defendant ſhould pay the Plaintiff ſuch a Sum at the Cock and Pye in Darſon; but that the Defendant did not come there. The Defendant prays Oyer of the Bond, and of the Award; and upon Oyer the Award recited, that there had been ſeveral Controverſies between the Plaintiff and Defendant; particularly one relating to the preſent Matter, and another relating to a different Matter; and the Concluſion of the Submiſſion was, that all Matters in difference were thereby referred to the ſaid Arbitrator, ita quod he made his Arbitration of them all by ſuch a Day. The Determination then upon the Award was, that the Defendant ſhould pay the Plaintiff the Sum in Queſtion, that the Plaintiff ſhould pay the Defendant 1 s. and thereupon mutual Releaſes were ordered to be given. And this Award appeared to have been made within the proper Time. The Defendant upon this demurs generally to the Declaration. And now Mr. Filmer argued, that the Demurrer might be well maintained. He ſaid, he ſhould ſubmit it, that as this Action of Debt was brought upon the Award, and not upon the Bond, the Plaintiff ought to have ſet forth in his Declaration, that he had ſubmitted himſelf to ſtand the Award, in Order to ſhew, that both Parties were reciprocally obliged to perform it. But as the preſent Declaration is drawn, the Plaintiff does not at all appear to have been bound; there is no Remedy therefore, that the Defendant has for the 1 s. awarded to him; and till that is done, no Releaſes are to be given of either Side. The Court thought there was a good deal of Weight in this Exception. However the Matter was ordered to ſtand over.

Vide poſt.

The King *and* The Inhabitants of Stilton.

The Certainty required in deſcribing the Children of a Perſon that is removed. Vide poſt

AN Exception was taken to an Order of two Juſtices, for that it was made for the Removal of a Man, his Wife and one Child, without aſcertaining the Child to belong to the Man and his Wife. And accordingly the Court made a Rule to ſhew Cauſe, why the Order ſhould not be quaſhed as to the Child.

The King *and* Morrice.

What ſhall be ſaid to be a good Caption of an Indictment.

IN an Indictment for exerciſing a Trade contrary to the Statute of 5 Eliz. Mr. Hopkins moved in Arreſt of Judgment, that this was an Indictment taken at the Quarter-Seſſions, and it was not ſaid in the Caption, that the Jury who found it, were

adtunc & ibidem onerat'; only in general, that they were onerat'. And for Authority cited 2 Keble 583, 610. 1 Ven. 60. and 1 Mod. 26. Mr. Fazakerly on the other Side did allow, that many ſuch Exceptions as theſe, were thought fatal formerly; but of late the Judges have got over them. Particularly he ſaid, it has been allowed to be a good Exception to an Indictment taken at the Seſſions, that the Juſtices did none of them appear to be of the Quorum, but in Sid. 367. that Exception appears to have been diſallowed. The ſame is of the Exception of the Want of proborum & legalium hominum. So it has been formerly held to be a good Exception, that the Names of the Jurors were omitted, but that Exception has of late Years been over-ruled. The Court did agree, that the Exceptions cited, have been of late diſallowed; but never knew the preſent one to be ſo. Accordingly the Judgment was arreſted.

Staniford *and* Ayſelby and others.

ON Rule to ſhew Cauſe, why a Verdict ſhould not be ſet aſide, and the Defendant, who was Attorney in the Cauſe, as well as one of the Parties, anſwer the Matters of an Affidavit for raſing the Niſi prius Roll. Mr. Marſh ſubmitted it to the Court, that the Raſure was entirely in an immaterial Place. The Action was in Replevin; and the Defendant avowed pro redditu unius Anni Anglice one Year's Rent ſolubil exiſtent'. He did allow, the Defendant ſtruck out the Word ſolubil and inſerted the Words in aretro. But if this ſhould be a Foundation to grant an Attachment againſt the Defendant, there could be none to ſet aſide the Verdict, the Evidence upon one Iſſue and the other being neceſſarily the ſame. But the Court ſaid, they would not enter into the Conſideration, whether the Raſure altered the Iſſue or not. Accordingly made the Rule abſolute with Coſts.

The Remedies for eraſing a Record.

Anonymus.

MR. Draper moved to make a Rule abſolute for quaſhing the Plaintiff's Writ of Error; and that with Coſts. But the Chief Juſtice ſaid, he well remembred the Caſe of one Atwood, who brought ſeven or eight Writs of Error, which were all quaſhed; and yet no Coſts given. Accordingly none was given in this Caſe.

When a Writ of Error is quaſhed, how far no Coſts ſhall be ordered to be paid.

Anonymus.

MR. Cooke moved for Liberty to charge a Man in Execution, who was in Cuſtody at the Gate-Houſe for a Criminal Offence. The Chief Juſtice at firſt doubted, whether they could make ſuch a Rule. However upon talking with the Maſter, the Court at laſt gave Liberty to do it.

When a Perſon is in Cuſtody for a Criminal Offence, how far he may be directed to be charged with a Civil Action.

Anonymus.

How far several Offences must be joined in one Information.

MR. Hopkins moved for several Informations against different People for a grievous Battery; but the Court said, in these Cases all the Offenders are joined in one Information.

Haynes *and* Bennet.

How far Liberty shall be given to amend without Payment of Costs.

SErjeant Baynes moved for Liberty to amend a Record by the Bill filed, in making it a special Memorandum; and that without Payment of Costs, or Liberty to plead de novo. He did agree, that the Declaration in this Case had been delivered generally. He did agree too, that the Defendant had demurred generally, but yet he submitted it, if the Defendant did demur for this Exception to the Declaration, it was his Folly to do it; because he knew, the Plaintiff might amend; and if he did not demur for this Reason, there was no Occasion for any of these Terms being put upon the Plaintiff. And he said, he remembred this Point was expressly determined for him in the Case of Walmesley and Cosey, Pasch. 2 Geo. 1. But the Court said, it is known to be every Day's Practice, that these Terms are constantly put. And one of the Officers informed the Court, that when a Declaration is delivered with a general Memorandum, they have no Authority to make up the Record with a special One, tho' there be a Bill filed with a special one, and the Court said, the Plaintiff may make such a Mistake in the Declaration, on Purpose to draw the Defendant into a Demurrer. And therefore they would not grant this Motion but upon those Terms.

Speak qui tam *and* Born.

Vide 377.

THE Plaintiff having declared in Prohibition, this Matter now came on again upon Demurrer to the Defendant's Plea. And for the Plaintiff Serjeant Eyres argued, that there were divers Authorities in the Books, which declared a Clerk to be a temporal Officer; particularly he cited Palmer 379, and 2 Cro. 670. And no Distinction taken as to the Manner of his coming in. But if that Point was to be given up, still upon the general Nomination of the Parson, he has an Estate for Life in the Office; and then this Court has a Right to grant its Prohibitions, and prevent the Spiritual Courts from depriving such Officer. And to this Purpose he cited 2 Brownlow 11. in the Case of a Chancellor of a Diocese; and so it is in the Case of a Register. He insisted farther, that the Ecclesiastical Courts had no Authority to require a Clerk to take a Licence. Serjeant Chappel submitted it on the other Side, that whatever the Authority of the old Books may be, that the Office of Clerk is temporal in its own Nature; yet he said, of late the Court

has taken a Diſtinction between the Manner of his coming into the Office. And this appeared from the Caſe of Townſend and Thorpe, where this Court allowed the Spiritual Court to proceed in depriving a Clerk, where he was nominated by the Parſon; which they would not have done, had he been elected by the Pariſh. He then obſerved, that the Nature of this Office made it unfit, that it ſhould be ſupplied by a Deputy. Perſonal Qualifications are required in a Clerk, by the 91ſt Canon in 1603. He muſt be twenty Years of Age; able to write and read; and of a competent Underſtanding in Singing, if it may ſo be. And Gibſon in his Conſtruction upon that Canon ſays, they were originally Aſſiſtants to the Miniſter. He took Notice too, that in general theſe inferior Officers cannot make Deputies. A Conſtable cannot but in Caſe of extreme Sickneſs or Infancy, or where a Woman is appointed by Cuſtom. So is 2 Keb. 309, 355. Then as to the taking a Licence, he did agree, he knew no direct Authority for it; but a Lecturer is certainly obliged to do it; and he ſubmitted it, this Caſe was within the ſame Reaſon with that. The Chief Juſtice ſaid, that he never remembred any expreſs Reſolution, that a Clerk was a temporal Officer. And as to the Caſe of Townſend and Thorp he owned, he was at preſent not ſufficiently certain, what that Caſe went upon. But as to the Licence, he queſtioned much, whether it was neceſſary. J. Probyn ſaid, he thought he well remembred, the Caſe of Townſend and Thorpe went upon that ſingle Point, that the Clerk there was abſolutely an unfit Perſon to execute the Office; and therefore this Court would not hinder the Eccleſiaſtical Courts depriving him; as this Court had no Method of doing it themſelves; and he thought, the Court then made no ſort of Diſtinction between the different Methods of a Clerk coming in. And as a farther Caſe to ſhew, that in general a Clerk of a Pariſh is conſidered a temporal Officer; he cited the Opinion of Lord Holt, 6 Mod. 253. Judge Lee likewiſe cited a Caſe out of Salk. 536. where it is held, that a Clerk of a Pariſh, tho' nominated by the Parſon, gains a Settlement, within the Statute of 9 & 10 W. & M. as executing a temporal Office. And as to a Lecturer's taking a Licence, he ſaid, that is wholly by Statute. Judge Page too inclined to think, he was in all Caſes to be conſidered a temporal Officer. However this Matter ſtood over. Vide poſt.

Dr. Bently qui tam *and* The Biſhop of Ely.

THIS Matter coming now on to be argued again, Dr. Henchman ſpoke to the Objection ſtarted by the Court, in relation to the Statute of Eliz. He ſaid, in the preſent Caſe the Founder of this College was King Hen. 8. he gave no Statutes; the Conſequence of which was, that his Succeſſor King Edw. 6. might. For, as by Law the Right of Viſitation deſcended to him over this College; ſo he might declare to the College, by what Rules they ſhould be viſited. But then he ſubmitted it to the Court, as a Queſtion deſerving their Conſideration, whether the Heir of the Founder, that is, the Heir of him, whom Vide 192.

whom the Law declares to be the Viſitor, can do any Thing more, than oblige himſelf and the College to obſerve thoſe Rules during his Time. For no Part of the College Revenue came from him; therefore he can put no other Laws upon the College, but ſuch as he has neceſſarily a Power of doing by the Viſitatorial Power deſcending upon him, which is barely for his Life. And this is known to be the Caſe of every appointed Viſitor. Injunctions they may grant during their own Times; but thoſe Injunctions will not bind their Succeſſors. Therefore he inſiſted, that the Biſhops of Ely for the Time being, could exerciſe this Right of Viſitation in the Room and Place of Edw. 6. during the Reign of Edw. 6. only. And conſequently the Biſhop's Right of Viſitation in the preſent Caſe, is under a new Appointment by Queen Elizabeth. Mr. Harper argued of the ſame Side, but made Uſe of a different Train of Thought, from what the Doctor did, that argued before him. He admitted, that the Statute of Edw. 6. in appointing a Viſitor, were binding Statutes upon himſelf and his Poſterity. No one yet ever doubted, but an Heir of a Founder, might give Statutes for the Government of the College, which would be binding upon his Heirs for ever, where the Founder himſelf omitted to give any; therefore he ſaw no Reaſon, but he might give Statutes relating to the Right of Viſitation. And conſequently the Right over the College, as Heir to the Founder; and the Right over the College as an appointed Viſitor, are Rights intirely different. If this then is to be admitted, that Edw. 6. might appoint a Viſitor for ever, he ſaid, the Words in the Statute of Edw. 6. would plainly convey ſuch a Right. The Words indeed are only Epiſcopus Elienſis Viſitator ſit. But they relate, not to the Perſon of the then Biſhop of Ely, but to the Biſhops of Ely for the Time being, by the Name of their Office. He then inſiſted upon it, that the Statute of 40 Eliz. had no Intent to confine this Right of Viſitation over the Maſter only; the Words of the Statute not being ſpecialis Viſitator; but Viſitator ſpecialiter admiſſus by the Statute of Edw. 6. And he obſerved, that the Citation likewiſe was not by the Biſhop, as ſpecial Viſitor of the Maſter, but according to the Statute of 40 Eliz. But however, he ſaid, tho' he did think it manifeſt, that the Biſhop of Ely ſubſiſted general Viſitor under the Statute of Edw. 6. yet he ſubmitted it, that the Statute given by Queen Elizabeth, were good; as they related only to the Government of the College, and did but explain the Statute of Edw. 6. But admitting, that they had been contradictory, yet he inſiſted, they might be well maintained; as the College have thought fit to accept of them. In this Reſpect he compared the preſent Caſe to that of every Corporation, that is appointed for the publick Government of a Town. The King indeed cannot compel them to take a new Charter from him; but if they do accept it, ſuch Acceptance ſhall bind them and their Succeſſors. And as to what is ſaid in Skinner 513. he ſubmitted it, that was very conſiſtent with this Notion, He did allow, it was ſaid there, that after a Founder has made Statutes, he cannot give the College new ones; but that might be well underſtood, that he cannot impoſe new Statutes upon them; and by no

Means intimates, that the Body cannot conſent to new ones. And he apprehended ſuch Acceptance might be of ſo much Influence, as in the preſent Caſe even to have taken away the Right of Viſitation from the Biſhop of Ely, if the King and the College had thought proper; for this Right did not accrue from any Grant of the King to him; but merely from an Act done between two Strangers. And therefore this Caſe falls within the common Rule of quodlibet diſſolvitur eodem modo quo contrahitur. What he had hitherto ſaid, he obſerved, related to Colleges of private Foundations, as well as thoſe of Royal Ones. Authorities he had none to lay before the Court; neither did the other Side pretend to any. But that this Power of adding new Statutes by the Heirs of a Royal Founder, has been conſtantly exerciſed, he ſaid, was notorious in Practice; and that, he hoped, would be allowed to be ſome Evidence of a Right, according to the Caſe in 2 Cro. 45. The Court ſaid, they were very clear of Opinion, that the Words Epiſcopus Elienſis Viſitator ſit extended to the Biſhops Succeſſors for ever. And therefore that Point they would not conſider of any farther. They ſaid likewiſe, they did believe in Fact the Kings of England have given Statutes to other Colleges, beſides thoſe of their own Foundations. So likewiſe Mandamus's have been granted to admit Fellows of Colleges. But Judge Page ſaid, that was done only in thoſe Times, when Colleges were conſidered as Eccleſiaſtical Foundations; and ſo the Crown exerciſed this Power, as Head of the Church. Judge Lee ſaid likewiſe, that he did not take this Caſe to be any Thing like that of publick Corporations. For there the King exerciſes this Power with the Conſent of the Corporation, as being entruſted with the publick Government himſelf. They all agreed, that the general Queſtion, that had been ſpoke to, was a Matter of great Conſequence and Difficulty. And therefore it was ordered to ſtand over for the Opinion of the Court. Vide poſt.

Ball *and* Knipe.

UPON a Writ of Error on a Judgment in the Court of Briſtol, given in an Action brought upon a Policy of Aſſurance, Mr. Reeves aſſigned for Error in the firſt Place, that the Court below had granted a Tales de Circumſtantibus; whereas the Statute allows of this only in Trials by Niſi prius. The Words of the Record are; Ideo ſecundum Conſuetudinem Civitatis prædict' ad requiſitionem querentis alii de Circumſtantibus jurat'; quorum Nomina apponuntur ſecundum formam Statut' in hoc caſu, &c. In Anſwer to this Exception Mr. Filmer ſaid, that a Cuſtom of this Sort would be good; and this is laid to be ſecundum Conſuetudinem. But Mr. Reeves obſerved, that this Anſwer was not ſufficient, in the firſt Place, becauſe the Uſage is laid to be of the City; whereas it ſhould have been of the Court; and in the next Place, becauſe the Court appears to have had its Juriſdiction within Time of Memory. For the Stile of the Court is, ſecundum legem Mercatoriam ac ſecundum conſuetudinem Uſitatam infra dictam Civitatem, ac etiam ſecundum diverſas Libertates per di-

What Courts have a Right to grant a Tales de Circumſtantibus.

What ſhall be a good Declaration in an Action brought upon a Policy of Aſſurance.

verſas Literas Patentes. He ſaid beſides, that the Plaintiff had laid no Cauſe of Action in the Declaration; and this may be aſſigned for Error, tho' in the preſent Caſe there was a Verdict. The Exception, which he principally relied upon to this Purpoſe was, that no Time was aſcertained in the Policy of Aſſurance, as it is ſet forth in the Declaration, from which the Hazard of the Ship was warranted; for it is only ſaid, Incipient' Periclitamine ſuper prædict', Anglice . So the Ship is ſaid to be Oneris Anglice, Tons, without ſaying what Burthen the Ship was of. Likewiſe the Ship is ſaid to be warranted, Mancipi vel non Mancipi Anglice, Intereſt or no Intereſt. But the Word Mancipium has a very different Signification from that of Intereſt. Then he ſaid, the Danger inſured againſt was to be ſuffered hic, and not ſaid upon the Sea or in the Voyage. The Court ſaid, that at preſent they took the Anſwer to the firſt Exception to be ſufficient; and that it was not avoided by any Thing Mr. Reeves had ſaid; for the Court is held for the City; and therefore the Uſage of the City is the Uſage of the Court. And they thought the mentioning the Letters Patent related only to ſuch Liberties, as were added by them. Then to the ſecond Exception, they thought the Policy of Aſſurance might be well intended to take Effect from the making of it. That was 26 Feb. The Ship is ſaid to have ſet Sail the ſame Day, and then the Words ſuper prædict' muſt refer to that Day. To the two next Exceptions, the Court did not think, they could be taken Advantage of after Verdict. And they thought, the laſt Exception could not make the Policy of Aſſurance void. However this Matter ſtood over.

Vide poſt.

Coke *and* Chapnes.

The Remedy for an Eſcape.

IN an Action upon the Caſe brought by the Plaintiff qui tam, &c. againſt the Sheriff of Derby, for an Eſcape of one Darford, taken upon a Capias Utlegatum in mean Proceſs. Mr. Gapper had obtained a Rule to ſhew Cauſe for arreſting the Judgment, for that he inſiſted the Action would not lie. Mr. Draper came now to ſhew Cauſe, and mentioned two Caſes, one in Cro. El. 652. the other in Cro. Jac. 360. where this Action had lain. And he ſaid in Lutw. 122. it is determined, this Action will lie for an Eſcape on an Excommunitato capiendo in mean Proceſs. But Debt he did agree would not upon the Statute of Rich. 2. Mr. Gapper on the other Side ſaid, that the Plaintiff is at the End of his Suit, when the Defendant is taken upon a Capias Utlegatum in mean Proceſs, and muſt begin his Action de novo; for which Reaſon, he ſubmitted it, that the Eſcape was no Prejudice to the Plaintiff. And to this Purpoſe he cited 13 H. 4. 1. Then in Anſwer to the firſt of theſe Caſes, cited on the other Side, he ſaid, it did not appear, whether the Capias Utlegatum was in mean Proceſs or not; and as to the ſecond, he ſaid, this Exception was not taken. Judge Page ſaid, upon an Application to the Court of Exchequer, they would Order the Defendant's Goods in this Caſe, that have been taken upon the Capias Utlegatum, to be aſſigned over to the Plaintiff. And the Court

thought the Plaintiff ſuffered an Injury by this Eſcape. Accordingly gave Judgment for the Plaintiff.

The Mayor of the City of London *and* Swinland.

ON Rule to ſhew Cauſe, why the Defendant, who was Collector of the Orphan's Tax, ſhould not have Inſpection of the Publick Books relating to the Orphan's Tax, and take Copies of them at his own Expence, Mr. Moreton ſaid, that the Chamberlain, in whoſe Cuſtody theſe Books are, was willing, that the Defendant ſhould take Copies of thoſe Parts of them, which any Ways related to him. But ſubmitted it, he had no Right to take Copies of the whole, nor of ſuch Parts of them, as did not relate to him. Accordingly he apprehended, that the Rule that had been drawn up, was too general. Mr. Bickland on the other Side argued, that this was the common Form, which all theſe Rules are drawn up in. However the Court (Chief Juſtice abſent) ſaid, that the Rule ſhould not be ſo general; and accordingly made it, that the Defendant ſhould have Inſpection of all the Books, which related to this Tax; and take Copies only of ſuch Part, as concerned himſelf.

When a Rule is made for the Inſpection of Books, in what Form it is to be drawn up.

Holt *and* Ward.

THIS Matter was now argued by Dr. Andrews on the Part of the Plaintiff, and Dr. Sayer on the Part of the Defendant. Dr. Andrews ſaid, that the Queſtion that has been ſo long before the Court, was ſingly this, whether the Defendant could have had any Redreſs in the Eccleſiaſtical Courts againſt the Plaintiff, in Caſe ſhe had refuſed compleating this Engagement on her Part, and he had been willing to have compleated it on his. This, he ſaid, was the State of the Queſtion; and he obſerved, it has come before the Court in two Ways; one, a Caſe made at the Trial upon the Plea of the general Iſſue; the other a Demurrer to another Plea of the Defendant, viz. Infancy in the Plaintiff. Upon the Record it is confeſſed, that the Plaintiff was above the Age of Conſent to Marriage; it is confeſſed likewiſe, that the Defendant promiſed to marry the Plaintiff, before the End of May in a certain Year; that this Promiſe was founded upon a mutual One on her Part to marry him; and it is likewiſe agreed, that it was fully proved upon the Trial, that her Mother, who was her Guardian, as her Father was dead, was privy and conſenting to this Engagement. And according to the Civil Law, he took Notice it was a general Rule, that an Infant was bound by all Promiſes made on his Part, which his Curator conſents to. But in Contracts of Marriage, their Law allows of Infants in a peculiar Manner to act for themſelves. In other Caſes it is a general Rule, that no Suit can be inſtituted againſt them, but they muſt defend it by their Guardians; but in Suits for Solemnization of Marriage, the Law diſpenſes with this. To this Purpoſe he mentioned the Caſe of Cole and Coventry, which came before

Vide ante 348.

Dr.

Dr. Oxenton as Judge of the Court of Arches, on an Appeal in the Beginning of King William's Time. Coventry had inſtituted a Suit for Solemnization of Marriage; and upon an Appeal it was objected, that he was a Minor, and had inſtituted his Suit without a Guardian; but it was held that the Suit was well inſtituted notwithſtanding. He ſaid, he did own, that that Suit was founded upon a Contract of Marriage per verba de præſenti; but he did believe, that no Inſtance could be mentioned of any Suit being eſtabliſhed upon a Contract per verba de futuro within the Memory of any Practiſer. Notwithſtanding this, he ſaid, the Authority in their Books is various, that ſuch Suits may well be brought. The Manner of inforcing this Suit, he did agree, was not ſo certain. In ſome Books it is intimated, that the Court can only inflict Penance upon the Party pro læſiona fidei; but in others it is ſaid, that they may decree a ſpecifick Execution of the Promiſe; and the Conſequence of diſobeying ſuch Decree, is Excommunication. And for Authority he cited Swinburn, Sect. 17. Tit. the Effect of Eſpouſals No. 1. Covorubius de ſponſalibus, Cap. 4. No. 2. Page 120. 5 Mod. 412. Modern Caſes 115. On the other Side Dr. Sayer argued, and ſaid, it muſt be agreed to him, that the Diſtinction taken between a Contract per verba de præſenti & per verba de futuro is purely by the Canon Law. But by that Law a Contract of Marriage per verba de præſenti is an actual Marriage; and therefore he might well agree the Caſe of Cole and Coventry before cited. He ſaid, he did agree farther, that in Contracts per verba de futuro, where the Party has confirmed ſuch Contract by an Oath, the Courts have ſometimes interpoſed, and inflicted Penance upon the Party for the Breach of it. But in Prynn, Tit. De Sponſalibus, the Caſe is put of a Man and Woman's entring into ſuch Promiſe and the Man's going beyond Sea; and held expreſly, that the Woman is free to marry another Man. He ſaid likewiſe, that he ſubmitted it to be contrary to the very Nature of Matrimony to decree a ſpecifick Performance of ſuch Contracts. And if the Man, that has entred into ſuch an Engagement, ſhould take to Wife another Woman, he ſaid, it was beyond all Queſtion, that their Courts could not annul the Marriage actually entered into, and decree a Solemnization of the Marriage only contracted for. The Court ſaid, that they deſired now ſome farther Light into this Queſtion to be given them by the Common Lawyers; and therefore this Matter was ordered to ſtand over to be ſpoke to by them.

Vide poſt.

The King *and* The Inhabitants of Melton.

MOTION was made to quaſh an Order of Seſſions, diſcharging an Order of two Juſtices, for the Removal of the Widow of John Coke and ſeveral Children. John Coke removed himſelf with his Family from the Pariſh of Stapleford with a Certificate, and lived in a Vill within the Pariſh of Milton, which Vill maintained its own Poor, and occupied there a Tenement of 3 l. per Annum. and at the ſame Time rented a Tenement of 40 l. per Annum in the Pariſh at large. The two Juſtices were of Opinion, this gained a Settlement in the Pariſh of Milton; and the Motion now made was, that the Order of Seſſions, diſcharging that Order, might be itſelf diſcharged. And the Court made a Rule to ſhew Cauſe. How far a Perſon ſhall gain a Settlement in a Vill. Vide poſt

Philips *and* Knightley.

THIS Matter coming on again, Serjeant Eyres argued, that the Award was neither final nor certain, for in the firſt Place it does not put an End to the Controverſy then ſubſiſting; and in the next Place, it is uncertain what the Coſts of that Action are. But Mr. Reeves on the other Side ſubmitted it, that it is not neceſſary, that an End ſhould be put to the Controverſy by the Award itſelf; it is enough, that the Award puts the Matter into a Method of being ended. To this Purpoſe he cited the Caſe in 1 Cro. 541. And obſerved, that the Caſe in Carth. 378. is not at all againſt this; for there the only Thing determined is, that in Award to make general Releaſes, the Award does not put an End to the Controverſies, and therefore cannot be pleaded in Bar to any Actions brought upon them, but the Releaſes may. And beſides it was ſaid, that the Arbitrators could not have awarded the Party in this Caſe to have diſcontinued his Action; for it is brought on Behalf of himſelf and the Poor of the Pariſh. Then as to the Matter of Coſts, he did agree, if the Award had been, that the Party ſhall pay ſuch Coſts, as ſhall be tared by a Stranger, that would not have been good; but here it is, that the Party ſhall pay the Coſts of ſuch a Suit in general; and theſe may be tared by the Officer of the Court. The Chief Juſtice, Judge Probyn and Judge Lee were of this Opinion. But Judge Page doubted. He did agree, that an Award, that one of the Parties ſhould give to the other a Bond for ſuch a Sum, would be good; but he did not know, that a Bond awarded to be given, that one of the Parties ſhall do a collateral Act would be ſo. And as to the Matter of Coſts, he did agree, that if it had been expreſſed in the Award, that the Maſter ſhould tax the Coſts, that would have been ſufficient; but as it is left in general, he thought it not ſo. Accordingly the Court ordered this Matter to be put into the Paper again the laſt Paper-Day of the Term for the Reſolution of the Court. Vide ante 387. Vide poſt

Davis *and* Johnſon.

How far the Rule of Law is that an Heir at Law ſhall not be diſinherited by a Will, without a neceſſary Implication.

THIS was a Matter, which came before the Court upon a Caſe made at the Trial in an Ejectment. The Doubt aroſe upon the Conſtruction of a Will of one Matthew Trig. The Will recited, that his Wife Rebecca was with Child, and took Notice likewiſe of the great Care ſhe had taken of him in his Illneſs; and then provided, that if ſhe ſhould be delivered of a Son, that Son ſhould have the Moiety of his real Eſtate at his Age of 21, and if ſhe ſhould be delivered of a Daughter, that Daughter ſhould have the ſame. And as to the other Moiety, after the Death of his ſaid Wife, he gave the ſame to his Brother Thomas Trig, and his Siſter Mary Hogland for their Lives, if they ſhould be living at the Time of her Death, and if they ſhould not, then to his Brothers and Siſters Children. And then the Will went on and provided, that if the ſaid Rebecca ſhould be delivered of no Child alive, or if ſuch Child ſhould die before the Age of 21, then he gave his whole real Eſtate to the ſaid Rebecca for Life. The Teſtator died in 1691, and Rebecca was afterwards delivered of a Daughter, who came to the Age of 21. The Daughter was Heir at Law to her Father, as well as Deviſee. Rebecca makes a Feoffment of that Moiety, deviſed to the Teſtator's Brother and Siſter after her Deceaſe, to the Defendant. And now in an Ejectment brought by the Plaintiff on a joint and ſeveral Demiſe of this Moiety from the Daughter and the Brother's and Siſter's Children (the Brother and Siſter dying in the Life of Rebecca and after the Feoffment made by her) the Queſtion was in the firſt Place, whether Rebecca had an Eſtate for Life in this Moiety at the Time of the Feoffment; and in the ſecond Place, admitting that ſhe had, whether the Intereſt to the Brothers and Siſters Children was a contingent Remainder, ſo as it might be deſtroyed by the Feoffment, or whether they took by way of Executory Deviſe. Serjeant Skinner argued for the Defendant, and ſaid, he ſubmitted it, Rebecca had clearly an Eſtate for Life. He did agree, that the Caſes had gone ſo far in Favour of Heirs at Law as to allow, that if Lands are deviſed to a Stranger after the Death of a Man's Wife, the Wife ſhall have nothing by this Deviſe; but the Lands ſhall deſcend to the Heir, till the Death of the Wife happens. But he did apprehend, the Caſes had never gone ſo far, as to allow the Lands to deſcend to the Heir in ſuch Caſe, where there is an expreſs Deviſe of a Moiety to the Heir. The Court ſaid, that they did agree, that an Heir may be diſinherited by Words of Implication, where ſuch Implication is neceſſary to make the Words of the Teſtator take Effect. And therefore it muſt be allowed, that if Lands are deviſed to the Heir at Law, after the Death of another, that other takes an Eſtate for Life. But where-ever the Implication is not abſolutely neceſſary, the Rule of Law is eſtabliſhed and certain, that the Heir ſhall not be diſinherited of any Part. And in the preſent Caſe the Implication is not ſo; for the Deviſor might well intend,

that this Moiety ſhould deſcend to his Heir during the Life of his Wife; and that the other Moiety ſhould come to him by Purchaſe under the Will. The Court ſaid farther, that the determining this Point would determine both; for if Rebecca had not an Eſtate for Life, it is certain her Feoffment could not diſturb the Intereſt limited to the Brother's and Siſter's Children. Accordingly they refuſed to hear any farther Argument; but gave Judgment for the Plaintiff.

The King *and* The Lady Lawley.

THIS Matter coming now on to be argued again, Serjeant Hawkins ſaid, that he believed, he might rely upon it, that Sciens was not a ſufficient Allegation, that the Defendant knew of the former Indictment againſt Croke; and for this he cited 5 Rep. 122. in the Inſtance of dans mortale Vulnus, where that is held to be inſufficient. But if he ſhould give up that Point, ſtill he ſubmitted it, that it was not enough for this Indictment to charge, that the Defendant knew that an Indictment was found againſt Croke, which Indictment, it was ſaid, is in the following Words, and ſo that Indictment recited Verbatim; but it ought to have been averred, that there was ſuch Indictment. To this purpoſe the Caſe of The King and Tracey, was cited out of 6 Mod. 31. There the Defendant, who was a Juſtice of Peace, was indicted for procuring another Juſtice to refuſe Bail in a Caſe, which was bailable. Two Exceptions were there taken; one, for that it was not averred in the Indictment, that Bail was refuſed; the other, that it was not averred, that Bail was offered. And the Judgment arreſted upon theſe Exceptions. But the Serjeant farther argued that there was another material Reaſon, why this Fact ought to have been averred, which is, that if it had, the Recital of this other Indictment muſt have concluded prout patet per Recordum; and by that Means the Defendant would have had a Right of pleading Nul tiel Record. And ſo is Raſt. 145. in the Caſe of a Decies tantum. But by this Indictment's being in that general Manner as it is, this Concluſion is quite omitted, and ſo the Party prevented of ſuch a Trial, which by Law ſhe was intitled to. Mr. Marſh ſpoke too of the ſame Side, but confined himſelf to ſome Authorities in the Law, relating to the Word Sciens. And for this purpoſe he cited 4 Rep. 18. b. where the Reaſon given, why Sciens ad Mordendum oves, &c. is not traverſable, is, becauſe it is not a ſufficient Allegation, upon which a Traverſe can be taken. He relied too upon a Caſe in 2 Bulſt. 292. There in Replevin the Plaintiff replied an Acceptance of Rent by the Aſſignee from the Avowant, Sciens that he was Aſſignee. And yet held, that the Allegation was not inſufficiently laid. Mr. Reeves on the other Side argued, and ſaid, he ſhould ſubmit it, that no more certainty is required in an Indictment, than is in a Declaration. And ſo the Rule is laid down in the Caſe before cited out of 5 Rep. Then that this would be good in the Caſe of a Declaration, he thought, was beyond all Queſtion. For as to the Caſe cited out of 4 Rep. that

Vide ante 287.

that he ſubmitted it, depended upon a particular Reaſon; and not upon the Reaſon mentioned in that Report. The Reaſon clearly, he ſaid, was, becauſe the Traverſing that Fact would be pleading a Plea; which amounted to the General Iſſue. Then as to the Recital of the former Indictment not concluding prout patet per Recordum; he took it to be a poſitive Rule, that this was never neceſſary in Indictments. And the Reaſon is, becauſe that Fact muſt always be proved upon Evidence; whereas in Declarations, that may happen to be otherwiſe by particular Pleading. He ſaid, the various Precedents cited upon the former Argument ſhewed this to be the Law; and he took it, in Indictments for receiving ſtolen Goods, never any Thing more is alledged than that the Defendant knew the Goods to be ſtolen. So Mr. Strange ſaid, in the Appendix to the State Trials, there is an expreſs Precedent of this being ſufficient even in an Indictment of High Treaſon. That was in the Caſe of The King and Hayes, Mich. 36 Car. 2. The Defendant there was indicted, for that he, knowing Sir Thomas Armſtrong was indicted of High Treaſon remitted him Money. This Exception indeed was not taken there; but the Defendants was acquitted upon the Evidence. The Chief Juſtice ſaid, that the Reaſon given by Mr. Reeves for the Caſe of the Sciens canem, &c. was certainly the right Reaſon; and he was of Opinion, the Sciens was ſufficient in this Caſe. He ſaid, he principally relied upon the Authority of the various Precedents, that have been cited. And as to the Recital's concluding with prout patet, he took it not to be neceſſary in Indictments. He did agree the Caſe of the Decies tantum; but that, he ſaid, is an Action. Judge Page declared himſelf to be of the ſame Opinion; and ſaid, he took it, the Sciens was ſtronger laid, than if it had been quod ſciebat; for this participle ſpeaks of the preſent Time, whereas the quod ſciebat would not. Judge Probyn ſaid, he thought the ſame, and cited a Caſe out of Sid. 183. And Judge Lee ſaid, he remembred a particular one to this Purpoſe, which was that of The King and Logwyn, Paſch. 3 Geo. 1. The Defendant there was indicted, for that he being Chancellor & ſciens that ſuch a one had proved a Will in the Prerogative Court colore Officii compelled him to prove it again in his Court. Serjeant Pengelly moved in Arreſt of Judgment, that it was not enough to charge the Defendant with knowing this; but it ought to have charged him with knowing it judicially. Lord Chief Juſtice Parker, ſaid, that the Words, knowing it, was as ſtrong as, an Averment, that he did know it, and it muſt be ſuppoſed he knew it, by ſeeing the Seal in that Caſe, two of the other Judges were of the ſame Opinion; and he never knew, that any Thing more was done upon that Exception. Accordingly in the preſent Caſe the Court gave Judgment for the King.

The King *and* Crooke.

THE Defendant being now brought up again, the Court declared, that they were unanimous in Opinion, that the Defendant's Crime was within the Clauſe of the Statute of Eliz. that has been mentioned. For the plain Words of this Clauſe are, that whoever forges a Deed with an Intent of Diſturbing the Freehold of another, ſhall ſuffer the Penalty of it; though he does not actually charge or diſturb it. Accordingly Judgment was pronounced for the King. Vide ante 168.

Wilmot *and* Allen.

ON Rule to ſhew Cauſe, why an Attachment ſhould not go againſt the Defendant for not performing an Award, Mr. Fazakerly produced Affidavits to explain the Nature of the Submiſſion, in order to ſhew that the Arbitrators had went beyond their Authority, and that they had acted corruptly in making their Award. He ſaid, he was well apprehenſive, that it would be objected againſt him, that this Submiſſion was made a Rule of Court in Purſuance of the Statute of King William, and therefore no Objection could be made as to Corruption, as the Time appointed by the Statute for this Purpoſe was long ſince elapſed. But he did ſubmit it, that this Objection may at any Time be made in ſhewing Cauſe againſt an Attachment; though he did agree, it muſt be made before the End of the next Term after the Award, when the Objection is made uſe of to ſet aſide the Award. And in Purſuance of this Diſtinction, he ſaid, many Caſes have been determined. In the Caſe of Merry and Edwards, in Lord Macclesfield's Time, he laid down the Rule to be, that where an Award is ſubſiſting by Rule of Court at Common Law, the Party comes too early to object to the Award for any Cauſe, till an Attachment moved for; but where it is made in Purſuance of the Act, the Party muſt apply the next Term after the making it, if he would move to ſet it aſide for Corruption in the Arbitrators; however that he may at any Time ſhew this for Cauſe on Motion for an Attachment. The ſame Rule of Diſtinction in Relation to Awards made on the Statute was laid down, he ſaid, in the Caſes of Whild and Kneeves, Mic. 10 Ann. of Bird and Pye, Mich. 9 Geo. 1. and Swanton and Fair, Hill. the ſame Year. He ſaid likewiſe, that the Arbitrators had allowed Letters to be produced in Evidence before them, writ by the Party himſelf, whom they made their Award in Favour of. And that he ſubmitted it was another Reaſon for ſetting it aſide. The Court ſaid, that they did not think either of theſe Facts ſufficiently made out, of charging the Arbitrators with going beyond their Authority, or with Corruption in executing it. And therefore there was no Occaſion to give an Opinion upon this Diſtinction, that has been offered. Then as to the laſt Exception, they thought the Arbitrators had a Right to make uſe of whatever

When an Attachment is moved for, for not performing an Award, what Matters may be offered againſt the Granting it.

Evidence they required to inform and ſettle their Judgments. Accordingly the Court made the Rule abſolute for granting the Attachment.

Gardiner *and* Merret.

How far two Names ſhall be ſaid to be materially different from one another.

UPON a Writ of Error on a Judgment of the Court of Common Pleas in an Action of Aſſault and Battery, Want of an Original was aſſigned for Error, and now an Original was certified, wherein Merret was Plaintiff, whereas in the Placita he is all along named Merrot; upon which Mr. Gapper inſiſted, that this was a material Variance. Mr. Robinſon on the other Side argued, that theſe Names were eadem ſonantia; and therefore this was no Exception at all. But at leaſt, he ſaid, the Plaintiff in Error could not take Advantage of this; for his Writ of Error is the ſame as the Original. However, if the Court ſhould be of Opinion againſt him in both theſe Points, he deſired, this Matter might ſtand over, that they might have Liberty to apply to the Court of Common Pleas, to ſee, if this could not be amended. The Court ſaid, that they thought, the Variance was material; and mentioned a like Caſe in this Court, where Dunmol and Dunmal were held to be ſo. Then as to the Writ of Error being ſo too, they ſaid, for the ſame Reaſon, that this was a material Variance between the Original and the Placita, it muſt be ſo too, between the Writ of Error, and the Record; and conſequently the Record is not rightly removed up; for which Reaſon they could by no Means affirm the Judgment. However they declared their Opinions to be, that they might ex officio amend the Writ of Error by the Stat. of 5 Geo. 1. 13. without Application of either Party. For the Stat. ſays, every Writ of Error, varying from the Record, may and ſhall be amended by the Court, into which the Record is removed. Indeed they did agree, that in ordinary Caſes it is uſual for the Court not to do this, ex officio, but for the Party to apply for it. But the Reaſon for thoſe Caſes was, that the Party comes and informs the Court, that there is a Miſtake in the Writ of Error, before the Record is removed up before them; and conſequently before the Court can know it themſelves. But here they ſee it judicially. They declared likewiſe, that the Plaintiff in Error does not pay Coſts upon this Statute for the Amendment. And Mr. Monday ſaid, the Practice muſt have been ſo ever ſince the Statute; becauſe it is known, that the Amendment is made in Court inſtanter upon pronouncing the Rule. Accordingly the Court ordered the Amendment without Coſts in the preſent Caſe; and gave Rule for the Cauſe to ſtand farther over, that the Party might have Liberty to apply to the Common Pleas, to ſee, if he could have his Original amended.

How far the Court will amend a Writ of Error ex officio.

How far Coſts ſhall not be paid upon the Amendment of a Writ of Error.

Vide poſt.

Philips *and* Knightley.

THIS Matter coming on again, Judge Page declared himſelf to continue of the ſame Opinion, as he was of before, in the two principal Queſtions. He did agree, that he had found Reaſon to alter it in one of the Caſes he had put before; and that was, in Relation to the Bond. And he did allow, if the Arbitrators had awarded, that Marſhall ſhould give a Bond to the Plaintiff to indemnify him in the Suit depending, that would have been good. For there the Arbitrators have aſcertained the Penalty, as the Conſequence of his not doing it. And tho' indeed by executing this Bond, the Party's Remedy upon the Arbitration-Bond is gone; yet there ſubſiſts as good a Remedy upon this Bond, as there was upon the other. But in the preſent Caſe, by executing the Deed of Covenant, the Party's Remedy upon the Arbitration-Bond is gone, and there is only a Remedy upon the Covenant left in the Room of it; which is a Satisfaction in Damages only to be given by a Jury. And he thought the Caſe in 2 Saund. 292. as ſtrong a Caſe, as the preſent one. Then as to the other Point in relation to Coſts, he thought the Caſe of Winter and Garlick, Salk. 75. full in ſupport of his Opinion. And in the Caſe of Sebley and Ruſſell, Mich. 9 Will. 3. where the Diſpute was, how far Arbitrators might aſſign Part of their Authority to be executed by another, he remembred well, Lord Holt laid it down, that they could in no Caſe, but where they referred Coſts to be taxed by the Maſter. The Reſt of the Court declared their Opinions to be different in both Points. Judge Lee in particular ſaid, that his Notion was, that Arbitrators are only bound to make as good an End of the Matters referred to them, as the Nature of them will admit of. So far indeed to be ſure, he ſaid, they are bound to do; or elſe the Award will be void. And therefore he did agree, that if the Award had been, that Marſhall ſhould be nonſuited in that Action, that would not have been ſufficient. But no further they can be bound to do. And therefore the Arbitrators could not poſſibly award, that Marſhall ſhould diſcontinue the Suit, which he had brought on Behalf of himſelf and the Poor of the Pariſh; for that would be to diveſt an Intereſt out of the Poor of the Pariſh, which was veſted in them by the Commencing the Action. Then as to the Matter of Coſts, he ſaid, to be ſure the Arbitrators could not refer the Coſts to be taxed by a Stranger; but when the Award is only in general, that the Party ſhall be indemnified from the Coſts of ſuch a Suit, he thought that was ſufficient, and that the Court might order the Officer to tax them. To this Purpoſe, he ſaid, was the Caſe of Eaſtland and Franks in this Court. There an Exception was taken to an Award, for its ordering the Party to pay ſuch Coſts, as the Maſter ſhould or ought to tax; which it was ſaid, was uncertain. But the Court held the Award to be good enough; and the Reaſon given was, that there was no Occaſion for an expreſs Reference to the Maſter. So, he ſaid, he remembred well, there was a Caſe to the ſame Purpoſe in Cro. Car.

Vide ante 457.

Car. but he could not indeed think of the Name of it. Accordingly the Court gave Judgment for the Plaintiff.

Fiſher *and* Hughes.

The Form of a Judgment to be given in an Ejectment.

IN a Writ of Error on a Judgment in Ejectment out of one of the Grand Seſſions in Wales, Mr. Strange ſaid, that the Plaintiff had declared on three ſeveral Demiſes of one and the ſame Tenement; and had a Verdict for him upon one Demiſe, and againſt him upon the other. But the Form of the Judgment was, Ideo conſideratum eſt, quod Querens recuperet Terminum ſuum prædictum upon one of the Demiſes; & quoad cætera præmiſſa, quod defendens eat inde ſine die. Upon which Mr. Strange objected, that the Word præmiſſa muſt relate to the Tenement; and as there is but one Tenement mentioned, here is Judgment given, that the Plaintiff ſhall recover it, and likewiſe, that he ſhall be barred of it. And this, he ſaid, was intirely owing to the Plaintiff's not laying his Demiſes to be of different Tenements; as the common Form in theſe Caſes is, by Way of alia Tenementa. The Court thought there was a good Deal of Weight in the Objection; ſo ordered this Matter to ſtand over.

Vide poſt.

Anonymus.

How far the Court of Exchequer will grant a Writ of Delivery of a Ship.

Scac. MR. Ward moved for a Writ of Delivery of a Ship, that was ſeiſed the 29th of April laſt, upon Account of the Writ of Appraiſement being not returned this Term; ſo that the Proſecutor had been guilty of a manifeſt Delay. The Attorney General objected on the other Hand, that the Ship might be ſubject to be burned; and therefore this Motion was irregular. Baron Carter ſaid, if this Motion was proper in itſelf, he thought at leaſt it was made too early; for he took the Rule to be, that this Writ could not be granted, till the Party was delayed of a Trial. But the reſt of the Court declared, they thought, any apparent Delay on the Part of the Crown was a ſufficient Reaſon to grant it. And as to what was ſaid in relation to the Ship's being ſubject poſſibly to be burned, they obſerved, that upon the granting theſe Writs, there is always a Recogniſance given; and in that Recogniſance there is a ſpecial Proviſion, in Caſe the Ship be ſubject to be burned. Accordingly the Writ was granted upon thoſe Terms of the Parties entring into ſuch Recogniſance.

The King *and* The Inhabitants of Melton.

MR. Abney now came to ſhew Cauſe, and ſaid, he did agree, if this Caſe had ſubſiſted upon the Statute of 13 & 14 Car. 2. this Renting would have gained a good Settlement; but as it depends upon the Statute of 9 & 10 W. 3. 11. he ſubmitted it, that it could not; for the Words in that laſt Statute are, that no Perſon, coming into a Pariſh with a Certificate, ſhall gain a Settlement there, unleſs he rents a Tenement of 10 l. per Annum, or executes an annual Office in ſuch Pariſh. Now the Word ſuch muſt be applied to the Renting the Tenement, as well as the Executing the Office; and if ſo, the Renting the Tenement muſt be in ſuch Pariſh, where he comes with the Certificate. Mr. Reeves on the other Side ſaid, that he remembred a Caſe, which was determined upon Debate, where the Reſolution of the Court was, that the Words in this Statute and thoſe in the Statute of Car. 2. ſhould receive the ſame Conſtruction. That Caſe was Mich. 9 Geo. 1. and the Diſpute there was between the Pariſh of St. John's, and the Pariſh of Annwell. Accordingly the Court declared themſelves to be of the ſame Opinion; and Judge Lee ſaid, he thought, the Word ſuch, that has been relied on, might well be confined to the executing Offices. Upon which Mr. Abney took an Exception to the Order of two Juſtices, for its removing the Wife of John Coke and ſix Children, without aſcertaining the Names of the ſix Children, or ſaying, that they were her ſix Children. And in the Caſe of The King and Alders, Mich. 8 Geo. 1. which was an Order of Removal of a Woman and a Baſtard-Child, he remembred both theſe Exceptions taken, and the Order quaſhed upon them. In Anſwer to this Mr. Reeves ſaid, that he well agreed, that the complaining Part of the Order was, as has been mentioned; but in the Adjudication-part it is ſaid, that they were her Children; and therefore he hoped that was ſufficient. However the Court were of Opinion, that this was neceſſary to be in the complaining Part; for upon that the Adjudication-part is founded. And accordingly they quaſhed the Order of Seſſions in the Whole, and the Order of two Juſtices as to the Children; but confirmed it as to the Wife. Vide 457.

The King *and* The Inhabitants of Stilton.

THIS Matter coming on again, the Exception by Mr. Filmer ſeemed to be, that the Name of the Child was not mentioned; and not that it was not ſaid, it was their Child. The other Side inſiſted, that Mr. Filmer did not cite any Authority to ſhew, that this Exception was ever allowed. The Chief Juſtice ſaid, if this was the firſt Caſe in which it was ever taken, he thought it ought to be allowed. And accordingly the Court made the Rule abſolute for quaſhing the Order as to the Child. Vide 445

The Inhabitants of Courland *and* The Inhabitants of Leeland.

Vide ante 379.

MR. Fazakerly now moved for the Opinion of the Court, and they all declared it unanimously to be, that the Indenture was void to this Purpose of gaining a Settlement, as well as all other Purposes whatever. And accordingly quashed the Order of Sessions, and confirmed the Order of two Justices.

Stock *and* Bell.

How far the Court will not give Leave for the Inspection of Books.

MR. Floyer moved for Inspection of a Contract, entred in the Books belonging to Greenwich Hospital, and signed by a Workman, who was obliged to bring an Action upon it. But Judge Lee said, he remembred a Motion of this Sort refused not long ago, even in the Case of Books belonging to Church-wardens; as a private Right was only concerned. Accordingly the Court refused the Motion in the present Case.

Anonymus.

How far it is necessary to give a Rule to reply.

MR. Morley moved to set aside a Judgment in Replevin, for the Party's not being served with the Rule to reply, but having only an English Notice given of the Rule. Mr. Dawson on the other Side submitted it, that it is enough to enter the Rules for pleading in the Officer's Book. But that at least the Court would not set aside the Judgment, as the Party had fair Notice, that there was a Rule given in the Book to reply. However the Court thought this a plain Irregularity; and accordingly set the Judgment aside.

The King *and* The Bishop of Chester and others.

How far Liberty shall be given to enter up a Judgment Nunc pro tunc.

MR. Fazakerly moved for Liberty to enter up a Judgment of Reversal, pronounced by the House of Peers so long ago as 10 W. 3. which was given upon a Judgment of this Court, affirming a Judgment of the Common Pleas in a Writ of Quare Impedit, wherein the King was Plaintiff, and in whose Favour the Courts below pronounced their Judgment. He said, he must own, that the Application was a very late one; but it was occasioned, by its not being discovered till very lately, that this Judgment of Reversal was not entered up. However if the Court could be fully satisfied, that there was such a Judgment pronounced, in all Conscience the Parties ought to have the Benefit of it. And in order to satisfy the Court of this, he produced the Transcript of the Record of this Court removed up into the House of Peers, which was signed by Lord Chief Justice Holt's own Hand; and likewise a Copy of the Judgment of Reversal, taken out of the Records, belonging

ing to that House. He said, till the last Assizes at York they had never Occasion to make Use of it; but then a Record came down to Trial there, wherein the Trustees of Lady Stapleford claimed a Right to present alternatively, together with the Heir of one Mr. Peirce, who claimed as Patron of the whole Church in the former Quare Impedit. He said, they had given Notice of this Motion to the Attorney General who appeared for the King in that Suit; and therefore he hoped the Motion should be allowed. The Attorney General said, that he had Instructions to submit the Whole of this Matter intirely to the Discretion of the Court. Upon which the Court said, that they ought in this Case to proceed with some Caution; and before they would give Directions in a Matter of this Nature, they would have all the Parties before the Court, whom they thought, could possibly be affected by this Judgment. And therefore they thought, that Notice should be given of this to the Trustees of Lady Stapleford, and likewise to the Bishop of Chester. The Chief Justice said, he has known Judgments refused to be entered up when the Parties applied late; because that Purchaser might be affected. However the Court made a Rule to shew Cause in this Case, but ordered Service to be made of it upon all Parties who could be supposed to be interested in the Judgment.

Goodright, on the Demise of the Duke of Chandois *versus* Jennings.

When a Writ of Error quod coram vobis is brought

How far the Court will confine a Person to assign his Errors within a short Day.

IN a Writ of Error quod coram vobis upon a Judgment in Ejectment, Motion was made, that the Plaintiff in Error might assign his Errors within a short Day; and accordingly the Court gave but a Week.

Ithers *and* Woodhouse.

When a Writ of Error is brought upon a Judgment in Ireland, how far the Court will require the Party to assign his Errors within a short Day.

IN a Writ of Error on a Judgment in Ireland, Mr. Parker moved that a Rule might be made upon the Plaintiff in Error to assign his Errors within a short Day; and accordingly the Court granted the Motion.

Woolaston *and* Walker.

Vide ante 423.

THIS Action appeared to have been brought by an Administrator De bonis non pendente lite concerning the Probate of a Will, by an Executor. And now Serjeant Chappel argued, that no such Administration could be by Law; and relied principally upon the Case cited on the former Argument, which is reported in Moor and cited in Godolphin's Legacy 167. But admitting it might, yet no such Administrator could bring an Action. At Common Law, the Ordinary himself could not, 2 Inst. 398. and undoubtedly therefore no Person, receiving the Deceased's Goods by his Authority could. The only Founda-

tion

tion therefore, upon which certain Adminiſtrators can do this at this Day, is the Statute of Edw. 3. but there are no Words in that Statute extending to theſe ſort of Adminiſtrators. But in anſwer to the firſt of theſe Points, Mr. Parker cited 4 Mod. 14. 6 Mod. 304. and Salk. 42. And as to the ſecond, he ſaid it is allowed in 5 Rep. 29. that Adminiſtrators Durante minore Ætate may bring Actions; and in the Book before cited of 6 Mod. 304. that Adminiſtrators durante abſentia may; and therefore he ſubmitted it, there was equal Reaſon, that theſe Adminiſtrators may. But he ſaid beſides, it does not appear by this Declaration, that the firſt Will was ever proved, and if ſo, it cannot be proved now that Executor is dead. And conſequently upon the Matter the firſt Perſon died Inteſtate. If this was ſo, it was clear the preſent Plaintiff might bring this Action; for it was never denied, but the Ordinary might grant Letters of Adminiſtration pendente lite concerning the Right of Adminiſtration. The Court ſaid, that it was undoubtedly true, that no Will can be proved after the Death of an Executor. But they thought in the preſent Caſe the Probate ſhall be intended; becauſe this is an Adminiſtration de bonis non. Then as to the other Points the Chief Juſtice with Judge Page and Mr. Juſtice Probyn ſeemed pretty clear of Opinion to affirm the Judgment. But Judge Lee doubted, upon the Authority of a Caſe in Carthew 153. where it is expreſly reſolved, that ſuch Adminiſtration is void. Upon this the Matter was ordered to ſtand over.

Vide poſt.

Marſhal *and* Charleton.

Vide ante 447.

THIS Matter coming on in the Paper again, Mr. Acherly ſaid, he ſubmitted it, that Billa & Narratio in this Court were the ſame thing. The Words of one and the other do not vary a Letter; and therefore he hoped, the Plea of the Defendant was in Bar. But if that ſhould be given up, he ſubmitted it, the Plea as a Plea in Abatement, was badly pleaded. For it is after a full Defence. The Party begins his Plea with a venit & defendit vim & injuriam quando, &c. and then ſays, petit judicium de Billa. And to this he cited Show. 443. But if this Point ſhould be againſt him likewiſe, he ſaid, this at moſt could be only a Diſcontinuance in the Plaintiff, and he hoped there ſhould be no Coſts. The Court ſaid that they had found Authorities over and over in the Books, that this was a Plea in Abatement; and therefore would not allow that Point to be farther argued. To the ſecond Point Mr. Reeves had taken a Diſtinction by Way of Anſwer; and ſaid, he did agree, that if this had been a Plea to the Juriſdiction of the Court, or to the Diſability of the Perſon of the Plaintiff, the Plea would have been begun wrong; but as the Subſtance of this Plea is, he hoped, this Beginning of it would not make it bad. However the Court ſaid, this might be proper to be conſidered of; and therefore would not give any Opinion about it at preſent. But the Chief Juſtice ſaid, if this Plea was imperfectly pleaded, though there was a Diſcontinuance in the Plain-

Plaintiff, he believed Judgment muſt ſtill be for him, and a Reſpondeas Ouſter awarded. To this Purpoſe he cited the Caſe of Bonner and Hall, Hill. 9 W. 3. Rot. 558. The Defendant there pleaded, an Action depending in the Common Pleas for the ſame Matter, but pleaded his Plea wrong; the Plaintiff replied, no ſuch Action depending, and concluded in Bar; upon this the Defendant demurred in Abatement, and the Plaintiff joined in Demurrer. In that Caſe it was inſiſted for the Defendant, that the Plaintiff had diſcontinued his Suit; and therefore there could be no Judgment awarded, Quod Reſpondeas Ouſter. And the Caſe of Biſs and Harcourt was cited, where the Defendant pleaded an Attainder of the Plaintiff in Abatement; the Plaintiff replied a Pardon, and concluded in Bar, to which there was a Demurrer; and held to be a Diſcontinuance. Upon which Lord Holt took the Diſtinction between where the Defendant's Plea is bad, and where not; and accordingly gave Judgment Quod Reſpondeas Ouſter. And in the Caſe of Lug and Godwyn, Mich. 10 W. 3. the ſame Diſtinction was taken. Then as to the Matter of Coſts, the Chief Juſtice ſaid, if the Diſtinction that he had mentioned, was not to be allowed in this Caſe, here was an abſolute Diſcontinuance in the Proceedings. For which Reaſon there could be no Judgment given at all; and conſequently no Coſts againſt the Plaintiff. But if he prayed Leave of the Court to diſcontinue; then he muſt pay Coſts. However the Plaintiff did not do that. For which Reaſon this Matter was ordered to ſtand farther over. Vide poſt

Grace *and* Higham.

IN an Action upon a Promiſſory Note, brought by an Indorſee againſt an Indorſor, the Defendant pleaded a Certificate upon a Commiſſion of Bankrupcy in Bar. But upon Evidence it appeared that the Certificate was made upon a joint Commiſſion of Bankrupcy taken out againſt the Defendant and his Brother, who were Partners in Trade. And whether this Evidence ſupported the Iſſue, was a Queſtion, that came now before the Court, upon a Caſe made at the Trial. Mr. Strange argued, that it did not; and ſaid, that the only Statute, that the Defendant could put their Caſe upon, was 5 Geo. 1. 24, (14). The Words are, That any Perſon or Perſons, who ſhall become a Bankrupt, and purſue the Terms of that Clauſe, may plead, that he, ſhe or they became Bankrupts to any Action, that ſhall be brought againſt them for Matter ariſing before their Bankrupcy. But he ſubmitted, that thoſe Words might well be conſtrued, reddendo ſingula ſingulis, viz. he or ſhe ſhall be diſcharged upon a Commiſſion ſeparately taken out againſt him or her; and they, that is, joint Debtors ſhall be diſcharged upon a Commiſſion jointly taken out againſt them. And if the Intent of the Parliament had been otherwiſe, the Words would have been explained in this Manner, againſt them or either of them. But what he urged, determined this Conſtruction, was, that he ſubmitted it, the ſeparate Creditors could not be let in to have any Part

What will be good Evidence relating to Bankrupcy.

of the Eſtate upon the joint Commiſſion. But Mr. Fazakerly argued on the other Side; and ſaid, he apprehended, the ſeparate Creditors to each Bankrupt might be let in upon the joint Commiſſion; though he did allow, that they ſhould have no Share of the Bankrupt's Effects, till the joint Creditors ſhould be all ſatisfied. In fact, he ſaid, every Act of Bankrupcy is Perſonal to a Man's ſelf; and properly ſpeaking there is no ſuch Thing as an Act of Bankrupcy joint with another. And he apprehended it to be known and certain, that if one Partner only becomes a Bankrupt, the joint Eſtate ſhall be divided in ſuch Caſe, as well as the ſeparate One. In the Caſe of Mackenſon and Parker, 23 December 1728. a Petition came on before the Lord Chancellor, on the Behalf of Peter Delamot. There was a ſeparate Commiſſion taken out againſt Parker only; and a Petition by a Creditor on the Partnerſhip-Eſtate. The Order pronounced was, that the Partnerſhip-Eſtate ſhould be divided amongſt the Parnerſhip-Creditors in the firſt Place; and if there ſhould be any Surplus of this Eſtate due to the Bankrupt, that that Surplus together with his ſeparate Eſtate ſhould be divided amongſt his ſeparate Creditors; that on the other Hand the ſeparate Eſtate ſhould in the firſt Place be divided amongſt the ſeparate Creditors, and if there ſhould be any Surplus from that, that that Surplus together with the Partnerſhip-Eſtate ſhould be divided among the Partnerſhip-Creditors. And he ſaid, in the very Caſe of the two Highams a Petition was preferred before the Lord Chancellor 22 April 1729, on the Behalf one Horſey, a Creditor on the ſeparate Eſtate of this Defendant. And there, though this very joint Commiſſion was depending, the Chancellor ordered, that the ſeparate Creditors might prove their Debts from Higham, ſenior, and be admitted Creditors; but the Partnerſhip-Eſtate ſhould be divided in the firſt Place amongſt the Partnerſhip-Creditors. And another Caſe in 2 Ver. 706. was cited to the ſame Purpoſe. The Court thought this a Matter proper to be conſidered of farther; and accordingly it was put off to another Day.

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