REPORTS
OF
CASES
ADJUDGED in the
Court of King's Bench,
FROM THE
Third Year of King JAMES the Second,
to the Twelfth Year of King WILLIAM the Third.

By *THOMAS CARTHEW*,
late Serjeant at LAW.

With two TABLES, *the one of the* Names of the Cases, *the other of the* Principal Matters *therein contained.*

Publiſhed by his Son *THOMAS CARTHEW*,
of the *Inner Temple*, Eſq;

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To the Right Honourable

PETER

Lord KING,

Baron of OCKHAM,

Lord HIGH CHANCELLOR of

GREAT BRITAIN.

MY LORD,

I Preſume to beg your Lordſhip's Patronage for this Volume of Reports collected by my late Father Serjeant *Carthew*, not only from the exalted Poſt in which your Lordſhip juſtly preſides over the Laws of *England*, or from your Lordſhip's well known Humanity and Eaſineſs of Acceſs; tho' both ſufficient Motives of themſelves; but likewiſe becauſe I am well aſſured the Reporter himſelf, who had the Happineſs to be very much

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DE

Term. Sanct. Trin.

3 Jac. II. in Banco Regis.

Rogers *verſus* Mayhoe. Hill. 2 & 3 Jac. II. Rot. 126.

THE Plaintiff brought an Action of Debt on a Judgment obtained in B. R. and the Defendant pleaded in Bar, that he ante diem impetrationis Billæ prædictæ had brought a Writ of Error on that Judgment which was ſtill depending; and upon a Demurrer to this Plea it was adjudged, that this Matter could not be pleaded in Bar, tho' it might be pleaded in Abatement, as may be ſeen in the Caſe next following; and thereupon the Plaintiff had Judgment.

Writ of Error depending, cannot be pleaded in Bar to an Action of Debt on a Judgment.

Aby *verſus* Buxton. Hill. 2 & 3 Jac. II. Rot. 116.

THIS was likewiſe an Action of Debt on a Judgment had in B. R. and the Defendant pleaded in Abatement, that he ante diem, &c. had brought a Writ of Error on that Judgment which was ſtill depending, and upon a Demurrer to that Plea, it was adjudged that the Writ ſhould abate.

Where it was pleaded in Abatement.

The Reporter makes a Quære in this laſt Caſe, and refers to the Caſe of Rottenhoffer *verſus* Lenthall, where

it was adjudged to the contrary, (viz.) that a Writ of Error depending is no good Plea to an Action of Debt on a Judgment; and cited a * Case where, in an Action of Debt on a Judgment, the Defendant pleaded a Writ of Error depending, neither in Abatement, nor in Bar, but concluded his Plea thus, (viz.) Petit, &c. if he should be compelled to make any farther Answer, pending that Writ of Error, and this was adjudged ill; and the Defendant was ruled to answer over.

* Rowley *versus* Royston. Trin. 7 Will. B. R. Rot. 590. Dyer 32. Cro. El. 557. 2 Vent. 261. 3 Lev. 396. Raym. 100. 1 Mod. 121. Sid. 236.

Doyley *versus* Walker. Hill. 2 & 3 Jac. II. Rot.

SCire Facias against an Executor (upon a Judgment in Ejectment against his Testator) quare plenariam possessionem, &c. & Executionem de damnis, &c. habere non debet, the Defendant pleaded a frivolous Plea, to which the Plaintiff demurred.

And now the Counsel for the Defendant waived the Plea, and took Exceptions to the Writ, (viz.) because the Defendant who was Executor is not named, or set forth in the Writ; to be Tertenant of the Lands recovered; and it shall not be intended that he was, because a Defendant in Ejectment is always supposed to be a Disseisor, and that by his Death the Lands descend to his Heir at Law; and therefore for Default of this Allegation, the Plaintiff cannot have Judgment for the Possession, or Damages, because the Writ being not good for Part, is bad for the Whole.

Curia. The Court inclined to that Opinion, which the Plaintiff perceiving, brought a new Writ of Sci' fa', and mended the Fault.

But the Reporter was of Opinion, that the Plaintiff in this Case might pray to have Execution, &c. (suo periculo) and for this see 3 Cro. 872. so where a Sci' fa' is brought to have Execution of Seisin, &c. upon a Judgment in a real Action, and the Tenant is warned, and pleads Non-Tenure.

Renew

Renew *verſus* Axton. Hill. 2 & 3 Jac. II. Rot. 708.

THIS was a ſpecial Action on the Caſe on a Bill of Exchange brought by the Indorſee againſt the Drawer.

Statute of Limitations, a good Plea to an Action brought on a Bill of Exchange.

The Defendant Proteſtando, that the ſaid Bill of Exchange did not concern Merchandize between Merchants, their Factors or Servants, pro placito quod ipſe non aſſumpſit ſuper ſe infra ſex annos, &c.

The Plaintiff demurred to this Plea, ſuppoſing a Bill of Exchange to be a Specialty, and ſo not within the Statute of Limitations; but the Court was of another Opinion, (viz.) that it was a good Plea, and ſo gave Judgment for the Defendant.

Dickens *verſus* Greenvill. Hill. 21 & 22 Car. II. Rot. 1107.

IN Ejectment a ſpecial Verdict was found, which depended in Argument until Eaſter-Term, 3 Jac. 2. at which Time the Term ſet forth by the Plaintiff in his Declaration expired; and thereupon the Court was moved for a Rule to enlarge the Term, and the Defendant was required to conſent, which he refuſing, the Court, upon producing ſeveral ancient Rules made in ſuch Caſes, did * enlarge the Term, without the Conſent of the Defendant.

In Ejectment, the Term expired; pending the Action, a Rule was made to enlarge * See the Caſe of Hutchins it. *ver.* Baſſet *contra.*

Smith *verſus* Tonſtall. Hill. 2 & 3 Jac. II. Rot. 69.

IN a ſpecial Action on the Caſe, the Plaintiff declared as Adminiſtrator durante minore ætate of R. S. Executor of the laſt Will and Teſtament of R. S. his Father, ſetting forth, that the Teſtator R. S. in his Life-Time had obtained a Judgment for 100 l. againſt W. S. who was likewiſe indebted to the Teſtator in another 100 l. for Rent; and that after the Death of the ſaid Teſtator, the Plaintiff had Judgment on a Scire facias to have

Action will lie againſt the Defendant for confeſſing a Judgment by Fraud.

Execution, &c. and that he intending to take out Execution, and alſo to bring an Action of Debt for the Rent in Arrear, (the ſaid W. S. being then poſſeſſed of Goods and Chattels ſufficient to diſcharge the Whole) which being very well known to the Defendant, he of his Malice and Covin with the ſaid W. S. did conſpire to defeat the Plaintiff of his Execution, and of recovering the Money for Rent Arrear, procured the ſaid W. S. to confeſs a Judgment for 160 l. (of ſuch a Term) to one W. N. ubi revera the ſaid W. S. did not owe any Thing to the ſaid W. N and that he ſued out Execution upon this feigned Judgment, by Virtue whereof he ſeiſed all the Goods and Chattels of the ſaid W. S. which he eſloined to Places unknown, and converted to his own Uſe, by Reaſon whereof the Plaintiff loſt his Debt.

The Defendant demurred to this Declaration for Matter in Law, ſuppoſing that this Action would not lie; but it was adjudged that the Action would lie, and thereupon the Defendant Tonſtall brought a Writ of Error in Parliament, where the Judgment was affirmed.

Fortune *verſus* Manucaptors of Davis. Hill. 2 & 3 Jac. II. Rot. 73.

Incertainty in a Replication makes it ill.

SCire Facias upon a Judgment obtained againſt Davis (the Principal) to have Execution againſt his Bail, who plead Executio non, &c. quia dicunt quod ante emanationem prædicti primi Brevis de Scire facias, and before the Iſſuing forth alicujus Brevis of Ca. ſa. againſt the Principal, he (the Principal) died; & hoc, &c.

* See 6 H. 7. 6. how ſuch a Traverſe ought to be taken.

The Plaintiff replied, that the Principal is living, (viz.) at H. in the County of, &c. and * traverſed, that he died before the Iſſuing forth of any Ca. ſa. and upon a Demurrer to this Replication it was objected, that the Plaintiff had traverſed the Death of the Principal ante emanationem præd' Brevis de Ca. ſa. when there was no ſuch Writ ſet forth by the Defendants in their Plea; but only a general Allegation, (viz.) ante emanationem alicujus Brevis de Ca. ſa. which is incertain; therefore the Plaintiff in his Replication ought to have ſet forth the certain Time when the Ca. ſa. iſſued againſt the Principal; and that the Sheriff returned non eſt inventus; like

Debt on a Bond for Performance of Covenants in an Indenture; the Defendant cannot plead Performance generally without setting forth the Indenture.

And for this Reason the Replication was adjudged ill; and the Court being ready to give Judgment, the Plaintiff prayed Leave to discontinue, which was granted. Curia.

Evans *versus* Cramlington. Pasch. 2 Jac. II. Rot. 192.

THIS was a special Action on the Case brought upon a Bill of Exchange; which was thus: The Defendant Cramlington drew a Bill of Exchange for 500 l. upon one Rider, payable at 25 Days Sight to one Price, or Order, for the Use of one Calvert; Price endorsed this Bill to the Plaintiff Evans, which was accepted by Rider, but he did not pay the Money on the Day; and thereupon the Plaintiff Evans who was the Endorsee brought this Action against Cramlington the Drawer. 2 Vent. 309. S. C. Action on a Bill of Exchange against the Drawer brought by the Endorsee.

The Defendant Cramlington (after Oyer of the Bill) pleaded that Calvert (who was named the Cestui que Use in the Bill) was an Officer in the Excise, and indebted to the King in such a Sum, and that upon an Exchequer Process at the Suit of the King, this 500 l. was extended in his Hands.

And upon a Demurrer to this Plea, there were two Points made:

1. Whether by the Words of the Bill, Calvert had such an Interest in the Money, that before it was paid to Price, or Order, it might be extended as the proper Goods of Calvert, for his Debt due to the King; or whether he had only an equitable Right to receive and have the Money after it was paid to Price.

2. Whether Price had such an Interest in the Money by the Words of this Bill, that he might lawfully indorse and assign it to another by the Custom of Merchants; or whether he had only a bare Authority to receive it for the Use of Calvert.

And afterwards in Easter-Term, 1 Will. it was adjudged by the Chief Justice Holt and the Court for the Plaintiff; because Calvert had only an equitable Interest, and not a lawful one, to have the Money; for he could not maintain an Action on this Bill against Rider.

Besides

Beſides the Endorſement of it by Price to Evans, (the Plaintiff) was for Value received of the Plaintiff by Price, and ſo he received that very Money to which Calvert had an Equity; and therefore he was reſponſible in Equity to him; but the Sum demanded by the Plaintiff Evans is not that Sum, but another due to him for Value received, in which Sum Calvert was not concerned; and for theſe Reaſons the Money now in Demand was not extendable; and therefore this Plea was adjudged ill.

Afterwards the Defendant brought a Writ of Error in the Exchequer-Chamber upon this Judgment, and in Eaſter-Term, 2 Will. &c. the Judgment was affirmed.

The King *verſus* Baker.

The Court of King's Bench never gives Judgment upon a Conviction in another Court.

THE Defendant was indicted and convicted at Kingſton upon Hull, for ſpeaking ſeditious Words, &c. and the Proceedings being removed into B. R. by Certiorari, the Court was moved to give Judgment.

But this Motion was oppoſed, becauſe it was irregular, for the Court of King's Bench never gives Judgment upon a Conviction in another Court; but the Practice is, if, (after Iſſue joined in another Court) and the Indictment is removed, the Party is always admitted to waive the Iſſue below, and to plead de novo, and to go to a Trial upon an Iſſue joined in this Court.

The Court directed a new Trial, and Baker was found guilty by a ſecond Verdict.

Jefferies, Mayor of London, *verſus* Watkyns. Hill. 3 Jac. II. Rot.

3 Mod. 161. S. C. A Fault in the Declaration cured by the Verdict.

AN Action upon the Cuſtom of London againſt the Defendant being no Freeman, but a Merchant Stranger, for not weighing Goods, &c. at the common Beam.

After a Verdict (but againſt Evidence) for the Plaintiff, it was moved in Arreſt of Judgment, that the Plaintiff had ſet forth in his Declaration a Cuſtom, that in Conſideration the Mayor, &c. and their Predeceſſors at their proper Charge had maintained a Common Beam

Time out of Mind for weighing Goods, and Servants to attend, &c. all foreign Merchants, who should import any Goods or Merchandize to be sold by Weight, usi fuerunt to bring them to this Beam to be weighed, and to pay so much for every Hundred Weight; and assigned for Breach, that the Defendant at such a Time had imported so many Barrels of Raisins, &c. which he had sold without bringing them to the Beam to be weiged.

Now the Objection was, that the Plaintiffs had not well applied the Custom to the present Case; because they did not aver that the Barrels of Raisins thus imported were such Goods as were sold by Weight; for the Sale of Goods not usually sold by Weight, is no Breach of the Custom, upon which this Declaration was founded. Yelvert. 30. 2 Cro. 220. 406. 2 Brownl. 177. March 12. 2 Sand. 175. Sid. 202, 203.

It was likewise objected, that the Plaintiffs had not alledged, that the Defendant had not paid the customary Toll for weighing; for if he had paid it secundum ratam, it had been good to discharge him from the Formality of weighing at their Beam.

But three Judges against Justice Allibon were of Opinion, that these Faults were cured by the Verdict.

Chorley *versus* Haslewood, on the Crown-side. Pasch. 3 Jac. II. Rot. 260.

ERROR to reverse an Outlawry in B. R. and the Error was assigned per Attornatum, without a special Rule of Court for that Purpose; and this being objected against the Writ, a Difference was taken to maintain the Practice, (viz.) where the Error appears upon the Face of the Record, it may be assigned well enough per Attornatum, and to prove it there was a Case cited, 4 Leon. 22. but no Opinion was given in the principal Case. Error to reverse an Outlawry was assigned *per Attornatum*, not good.

Hacket *versus* Herne. Mich. 36 Car. II. B. R. Rot. 214.

IN an Action of Debt on a Mutuatus, brought in the Common Pleas by Herne against Father and Son, the Plaintiff had Judgment against both; and now the Son alone 3 Mod. 134. S. C. Judgment against several, and a Writ of Error by one, not good.

alone brought a Writ of Error in B. R. and upon a Demurrer to the Writ, it was quashed, because both of them ought to join in this Writ; and if one of them should refuse, he should be summoned and severed: Now where there is Judgment against several, if one alone should be permitted to bring a Writ of Error, this * Inconveniency must necessarily ensue, (viz.) that every Defendant might bring a Writ of Error by himself, and by that Means delay the Plaintiff from his Execution for a long Time; and from having any Benefit of his Judgment, tho' it might be affirmed once, or oftner.

* Yel. 208. 2 Cro. 93, 94. 3 Cro. 324.

Lake *versus* Raw. Trin. 3 Jac. II. Rot.

Executor pleaded, that his Testator entered into a Bond, but did not say *pro vero & justo debito*, yet good.

DEBT against an Executor, who pleaded, That his Testator entered into a Bond in such a Penalty to T. S. conditioned to pay so much Money, which was not yet paid, beyond which he had not Assets.

To this Plea the Plaintiff demurred specially, and shewed for Cause, that the Defendant did not aver (as he ought) that the Bond was entered into by the Testator pro vero & justo debito.

2 Cro. 8. 55, 630. S. C.

But the Court held the Plea good without such an Averment; for it shall be intended the Bond was given for a just Debt, and the Obligation it self shall be sufficient to charge the Executor, tho' he had not received any Money of the Testator's.

Trevelian *versus* Seccomb. Trin. 3 Jac. II. B. R. Rot. 788.

Plea of ten Outlawries in Disability is double, because the Plaintiff is as well disabled by one Outlawry as by the other Nine.

THE Defendant pleaded ten Outlawries of the Plaintiff on mean Process, in Disability of his Action now brought, and prayed Judgment if any Answer ought to be made whilst those Outlawries are unreversed.

The Plaintiff demurred, for that this Plea was double, and the Cause depended in Court till Michaelmas

Term, Anno 1 Will. when it was argued, that the Plea was not double; for this is in Nature of a Plea in Abatement, in which Sort of Pleas ſeveral diſtinct Matters may be alledged; and therefore Duplicity is not a good Exception to a Plea in Abatement.

Beſides there is a Diverſity between a Plea in Bar, and in Abatement as to Duplicity in Pleading; for in a Plea in Bar, Duplicity of Matter makes the whole Void; but 'tis not ſo in a Plea in Abatement, and for this Purpoſe the Caſes in the * Margin were cited.

* 1 Inſt. 304. 4 H. 6. 16. a.

But the Court anſwered there was a Difference between a Plea of an Outlawry in Diſability, and other Pleas in Abatement; and that this Plea was ill for Duplicity, becauſe the Plaintiff is diſabled as well by one Outlawry, as by all the other Nine, to which ſeveral Anſwers are required, and afterwards Judgment was given, that the Defendant ſhould anſwer over for Duplicity.

Sanders *verſus* Huſſey. Trin. 8 Will. in C. B. Rot. 466. but adjudged in Michaelmas Term following.

IN Replevin for taking his Cattle, &c. the Defendant avowed the Taking, for that he tempore quo, &c. ſeiſitus fuit, and was ſtill ſeiſed of the Place where, &c. and for that the Cattle were there Damage-feſant, he took them, &c.

2 Lutw. 1231. S. C. where *ſeiſitus fuit* generally without ſhewing of what Eſtate is not good.

The Plaintiff demurred ſpecially, and ſhewed the Incertainty of the Avoury, for Cauſe of Demurrer; for that the Defendant did not ſet forth of what Eſtate he was ſeiſed either in Fee-ſimple, Fee-tail, or for Life, &c. but only a general Seiſin which is not traverſable; and this was adjudged ill, and held for Subſtance; thereupon the Defendant prayed Leave to amend upon Payment of Coſts; to which the Plaintiff conſented. Vid. poſtea Scilly *verſus* Dally. S. P.

Langford *verſus* Webber. Hill. 2 & 3 Jac. II. B. R. Rot. 965.

IN Treſpaſs for taking and impounding his Horſe in the Pariſh of Brattan Clobelly in Cornwall, ſine rationabili cauſa, &c.

3 Mod. 132. S. C. In a Juſtification for a Treſpaſs, the Defendant pleaded, that T. S. *poſſeſſionatus fuit* without ſhewing any Title, not good.

The Defendant juſtified, for that one T. S. tempore quo, &c. legitimè poſſeſſionatus fuit; and yet was poſſeſſed of and in a certain Cloſe of him the ſaid T. S. called Hayes in Bratton, &c. aforeſaid, and for that the ſaid Horſe eodem tempore, &c. was there Damage-feaſant, the Defendant as Servants to the ſaid T. S. and by his command took and impounded the Horſe as he lawfully might, &c.

And upon a Demurrer to the Plea, it was argued for the Plaintiff, that it was ill; becauſe the Defendant had not made any Title to T. S. of this Cloſe; for 'tis a Rule in Pleading, that in all Juſtifications for Treſpaſſes, the Defendant in his Bar always makes ſuch a Title to himſelf to the Lands in which the Treſpaſs is ſuppoſed to be done, that it may be traverſed by the Plaintiff; and upon which an Iſſue may be taken, &c. but in this Caſe the Defendant had only pleaded generally, that W. S. was poſſeſſed; and the Poſſeſſion being not traverſable, the Plaintiff cannot make any Anſwer to it.

Econtra for the Defendant.

On the other Side it was argued, that the Bar was good, becauſe the Plaintiff might reply de injuria ſua propria, or he might confeſs, and avoid the Poſſeſſion by Pleading ſome ſpecial Matter, &c. beſides in Actions of Treſpaſs, a Man may defend himſelf meerly upon the Poſſeſſion which is a good Bar to every Man who hath not a better Title; and 'tis generally admitted, that the Plaintiff may maintain an Action of Treſpaſs meerly upon his Poſſeſſion; therefore what Reaſon can be given, why a Man may maintain an Action on his Poſſeſſion, and cannot defend himſelf in an Action brought againſt him upon ſuch Poſſeſſion; but Judgment was given, that the Bar was ill.

* Seale *verſ.* Binion. 2 Mod. 70.

* Trin. 27 Car. 2. in C. B. Rot. 1702. the like Juſtification in Treſpaſs for taking his Cattle; and upon a Demurrer it was adjudged good without ſhewing any other Title than the Poſſeſſion, and a Copy of the Record was now produced in Court.

DE

Term. Sanct. Mich.

Anno 3 Jac. II. in B. R. 1687.

Jennings *verſ.* Hankyn. Trin. 2 Jac. II. Rot. 121.

DEBT on a Bond againſt the Defendant as Executor, and in the Margin of the Declaration the County was written thus: Cheſter, ſſ. And the Plaintiff declared upon a Bond made by the Defendant's Teſtator, ſealed and delivered apud Tarvin in Com. prædict', &c.

2 Lev. 121. S. C. 1 Vent. 263. S. C. Plea to the Juriſdiction muſt come in Time, for if the Defendant pleads in Chief, that Advantage is loſt.

The Defendant pleaded plene adminiſtravit, and at the Trial the Plaintiff had a Verdict and Judgment.

And now it was moved in Arreſt of Judgment, that all the Proceedings were coram non judice, becauſe it appeared upon the Face of the Record, that the Bond was made at a Place within the Juriſdiction of the County Palatine of Cheſter, ſo that by the Plaintiff's own ſhewing, this Court hath no Juriſdiction of this Cauſe; for local Actions cannot be maintained in any other Places but in the County Palatine where they ariſe; and tho' this Action is not local in its Nature, yet the Plaintiff having made it ſo in his Declaration, he hath thereby barred himſelf to have an Action in this Court.

Curia. To which it was answered, and so adjudged by the Court, that the Defendant had lost that Advantage which he might have, if he had not pleaded in Chief, for he ought to have come in Time and pleaded to the Jurisdiction, &c. but now he is forecloſed to say any Thing againſt it, having admitted the Jurisdiction by pleading in Chief; for this Court is not like one of a limited Jurisdiction, holding Plea of a Cauſe ariſing without, for in ſuch Caſe all is void, as coram non judice; but 'tis of an univerſal Jurisdiction and Superintendency, and the County Palatine it ſelf was derived out of the Crown, therefore 'tis ſubordinate and not at all exempted, and ſo differs from that Caſe where the Plaintiff declared on a Bond, and ſet forth that it was made at Bourdeaux in France, for in ſuch Caſe this Court never had any Jurisdiction, becauſe the Matter did ariſe in a foreign Nation.

Beſides the Plaintiff declared againſt the Defendant as in cuſtodia Mareſchalli, ſo that it appears he was out of the County Palatine, and therefore there would be a Failure of Juſtice if he had no Remedy in this Court.

Nota, That in Trinity Term, 1689, there was the like Caſe in this Court between Smith *verſus* Septon; and the like Exception was taken in Arreſt of Judgment, but the Plaintiff had Judgment upon the ſame Reaſon; and in that Caſe this of Jennings was cited, and held to be good Law.

Parkyns *verſus* Titus. Mich. 2 Jac. II. Rot. 122.

3 Mod. 132. S. C. 3 Lev. 255. S. C.

ERror of a Judgment in C. B. where the Caſe was thus: ſſ. In Treſpaſs for entering his Cloſe and treading down his Graſs; the Defendant pleaded, that the Place where, &c. is two Acres of Land, which is the Freehold of the Defendant and of the Earl of Eſſex, and that he (the Defendant) in his own Right, and as Bailiff of the ſaid Earl, juſtified the Entring, &c.

Cuſtom to pay ſo much for a Fine for an Admittance to a Copyhold, as the Land is really worth *per* Acre at the Time of the Admittance, is good.

The Plaintiff replied, that the ſaid two Acres of Land are, and Time out of Mind were, Parcel of the Manor of B. and demiſed and demiſable by Copy of Court-Roll, of which Manor unde, &c. the Defendant and the ſaid Earl are, & eodem tempore quo, &c. were ſeiſed in Fee, and that they by their Steward at ſuch a Court held on ſuch a

Day, had granted to the Plaintiff, amongſt other Lands, the ſaid two Acres in Fee by Copy of Court-Roll, ad voluntatem Dominorum ſecundum cons', &c. and that he was admitted, &c. and entered and was poſſeſſed, and that the Defendant committed the Treſpaſs with his Cattle, prout, &c.

The Defendant rejoined quod bene & verum eſt, that the ſaid two Acres are Parcel of the Manor of B. and that they were granted to the Plaintiff in Fee by Copy, prout, &c. but he farther ſaith, that all the Lands in the ſaid Copy, at the Time of the Grant, were of the yearly Value of 28 l. and that the ſaid Plaintiffs, by their Steward, had ſet a Fine of 35 l. upon the Admittance of this Defendant; and avers, that the ſame was a reaſonable Fine, and that for Non-payment thereof he entered for a Forfeiture.

The Plaintiff ſurrejoined Proteſtando, that the 35 l. was not a reaſonable Fine, &c. pro placito he ſaith, that Time out of Mind there had been a Cuſtom in the ſaid Manor, that any Perſon or Perſons who ſhould be admitted Tenant or Tenants to any cuſtomary Lands or Tenements held of the ſaid Manor by Copy of Court-Roll, ſhould pay and have uſed and ought to pay to the Lord or Lords of the ſaid Manor for the Time being, for a Fine, for the Admittance to ſuch cuſtomary Lands and Tenements, tantam denariorum ſummam quantam terræ vel tenementa valebant per Annum tempore talis admiſſionis & non amplius, and that the Lands, &c. were of the Value but of 28 l. per Annum, at the Time the Plaintiff was admitted, which 28 l. he tendered to the Defendant himſelf, being then in Court; but he refuſed to accept it.

The Defendant demurred, pretending that this was a frivolous Cuſtom, and not good for the Incertainty, becauſe the Value of the Land is always incertain, ſometimes of a greater and ſometimes of a leſs Value, and ſo there cannot be any Certainty of the Sum which the Lord is to have for a Fine; but 'tis in the Power of the Tenant to make the Fine of a very low Value by not cultivating the Land.

Then an Objection was made as to the Form of Pleading, (viz.) that the Plaintiff had not aſſigned any certain Time for the Value of the Lands; he only ſets forth, that they were of the Value of 28 l. per Ann. tempore admiſſionis, which laſt Words muſt be applied to the Payment of the Money, and not to the Value of the Land.

But

But the Judgment was affirmed, and this was adjudged a good and reaſonable Cuſtom; and a Judgment was cited in Point in the Lord Ch. Juſt. Hale's Common-Place Book, in the Library at Lincolns-Inn, Tit. Copyhold, and the Form of Pleading was likewiſe held good.

Jefferies *verſus* Snow. Trin. 3 Jac. II. Rot. 675.

Treſpaſs againſt *Will. Snow*, Bart. who pleaded in Abatement, that he was a Knight and Baronet, and good.

TReſpaſs againſt the Defendant by the Name of William Snow, Baronet, who pleaded in Abatement, that at the Time of the Bill purchaſed, he was and yet is a Knight and Baronet; and becauſe he is not called Knight as well as Baronet, he prayed Judgment, &c.

And upon a Demurrer to this Plea, the Court ſeeming to be of Opinion that it was good; the Plaintiff prayed Leave to amend, and had it.

Hull's *Caſe*.

Whether Quit-Rents ought to be taxed to the Poor.

MR. Hull, a Gentleman at the Bar, being choſen Overſeer of the Poor of the Pariſh of Stoke Nayland in Suffolk, made a Rate, in which he charged the Quit-Rent of ſeveral Manors within the Pariſh, in Proportion to the yearly Value thereof, which Rate was tendered to two Juſtices of the Peace to ſign, but they refuſed becauſe the Quit-Rents ought not to be taxed; whereupon the Overſeer, upon Application to this Court, obtained a Rule to enforce the Juſtices to ſign it, which was ſtrongly oppoſed, becauſe no Inſtance could be given that ever the Quit-Rents were charged, but the Court ordered the Rate to be ſigned, and a Warrant to diſtrain; ſo that if any Perſon thought himſelf aggrieved, he might replevy, and the Matter in Law brought in Queſtion.

The King *verſus* Darby.

Information for defamatory Words ſpoken of a Juſtice of Peace.

AN Information was exhibited againſt the Defendant Darby, an Attorney of the Common Pleas, for ſpeaking ſcandalous and reproachful Words of Sir John Key, Knight of the Shire for the County of York, and a Juſtice of Peace, *&c.* concerning his ſaid Office of a Juſtice of the Peace, and the Exerciſing thereof.

And upon a Demurrer to this Information, it was argued, that it would not lie for ſcandalous Words ſpoken only of a particular Perſon; becauſe he might have an Action on the Caſe to recompence him in Damages; 'tis true ſuch a Proceeding might be warranted for Libels, or for diſperſing Defamatory Letters, becauſe by ſuch Means the publick Peace might be diſturbed, and Diſcords fomented amongſt Neighbours which might at laſt be a publick Injury; but there is no ſuch Thing alledged in this Caſe, only Words in common Diſcourſe, for which an Action on the Caſe might lie, but no Information.

On the other Side, it was inſiſted, that this Information was founded on ſufficient Matter; becauſe this Proſecution is not only as it reſpects the Perſon of Sir John Key; but it relates to him as he is a publick Magiſtrate, and one who is ſubordinate to the Government; and therefore ſuch Defamatory Words are a Reproach to the ſupreme Governor by whom Magiſtrates are intruſted; and from whom they derive their Authority; and it will not be denied, but that Words reflecting on the publick Government, are puniſhable at the Suit of the King by an Information. Econtra. 4 Rep. 13. 5 Rep. 125. 3 Inſt. 174. Palm. 454.

And for this Reaſon the Court held, that an Information would lie; and thereupon gave Judgment againſt the Defendant, and fined him an Hundred Marks.

Caſe in Chancery.

THE Mother having two Daughters A. and B. made her Will, and thereby deviſed 200 l. to her Daughter B. to be laid out (by her Truſtees in the Will named) in Lands, and to be ſettled to the Uſe of the ſaid B. and the Heirs of her Body; and if ſhe died without Iſſue, then to the Uſe of the Children of A. (who then had Iſſue the Plaintiff, and the Mother of the Defendant;) but before the Money was laid out in a Purchaſe, B. died without Iſſue; and then the Truſtees laid out the 200 l. in a Purchaſe of Lands, and ſettled the ſame on the Plaintiff, and on the Mother of the Defendant jointly in Fee according to the Will, (they being the Children of A.) and they jointly enjoyed the ſame for ſome Time; and then the Mother of the Defendant died before any Severance was made of this joint Eſtate. Jointenants, &c. the Survivor ſhall have the Whole, after the Death of the other before Severance.

And

And now the Queſtion was, whether the Defendant ſhould have her Mother's Moiety, or whether the Plaintiff ſhould have the whole by Survivorſhip; and it was decreed, that the Plaintiff ſhould have the Whole.

Where the Survivor ſhall have no Benefit.

And here the following Caſe was put, (viz.) 500 l. a-piece is deviſed to two Legatees; and afterwards they took a Mortgage jointly to both of them, for ſecuring the Payment of their Legacies with Intereſt; and there one of them died; it was held, that the other ſhall have nothing by Survivorſhip, becauſe in this Caſe the Mortgagees were Truſtees for each other; and the Mortgage which is only as a Security makes no Alteration in the Caſe.

And in the Principal Caſe it was held, that if the Money had not been actually laid out in a Purchaſe, the Defendant would have been entitled to a Moiety thereof; for in ſuch Caſe there ſhould be no Survivorſhip. Quod nota.

Goring *verſus* Deering.

3 Mod. 156. S. C. Where the Defendant was indicted for Murder, and found guilty of Manſlaughter, and demanded the Book, tho' he did not read, this is a good Bar to an Appeal.

IN an Appeal of Murder, the Defendant pleaded a ſpecial Bar, (viz.) that at another Time he was indicted for the Murder of the ſame Perſon in the Appeal mentioned; and that at a Seſſions held on ſuch a Day, and in ſuch a Year at the Old Baily in London, for the County of Middleſex, he was arraigned and tried for the ſaid Murder, and found Not guilty, but guilty of Manſlaughter, and averred, that he is the ſame Perſon, and the ſame Crime; and that he is a Clerk, and able to read, and was able ſo to do at the Time of the Verdict found, and that he then demanded the Book, and that he was always ready to read, when it ſhould be required of him; & hoc, &c.

And upon a Demurrer to this Plea, it was argued, that it was not good, and no Bar to the Appeal; becauſe by the * Statute 'tis enacted, that the Acquittal of the Party, &c. and the Benefit of the Clergy not being had, &c. ſhall be no Bar to the Proſecution of an Appeal by the Wife or next Heir, within a Year and a Day, &c.

* 3 H. 7. c. 1.

So that by this Statute the Common Law is altered, for now Autrefoits acquit or convict is no good Plea to an Appeal of Murder, unleſs the Clergy be firſt had; but 'tis otherwiſe in an Appeal of Rape or Robbery, becauſe the Statute doth not mention thoſe Crimes.

Now in this Case, the Defendant hath not pleaded, that he had his Clergy allowed, or that he performed it; and therefore his Plea is ill, and it shall never be in the Power of a Clerk convicted to demand his Clergy when he will; but he ought to stay till the Court demands of him what he hath to say for himself why Judgment, &c. shall not be given against him; and then, and not before is the proper Time for him to pray his Clergy to be allowed, and the Demanding the Benefit thereof before that Time, or to alledge that he is ready to read, signifies nothing. Staundf. 106, 206. And. 68. 3 Inst. 131. Hob. 288. W. Jones 284.

But it was argued on the other Side, that the Defendant having a Right to the Benefit of his Clergy; 'tis the same Thing in Effect as if he had actually performed it; and the Court is not to * delay the Clerk from this Benefit; and the Entry of the Demand of the Court what the Prisoner hath to say for himself, &c. is meerly Form; therefore the Clerk being always ready to read; but the Book not being tendered to him, 'tis a Remittance to his Privilege without an actual Reading. *Econtra.* * Holcroft's Case. 4 Rep. 46. Co. Ent. 53, 54. S. C.

Then an Objection was made to this Appeal for the Incertainty thereof; because the Fact was alledged to be Circa the eleventh Hour; whereas the Statute of * Gloucester is peremptory, that the very Hour shall be named; sed non allocatur; for all the Precedents are in this Form. * Cap. 11. Anno 9. Ed. 1.

Another Objection was, that here was no Venue laid; for by the same Statute of Glouceſter 'tis enacted, that the Town where the Fact was done shall be expressed; and here it was alledged to be apud parochiam de M. &c. but a Parish is not a Town or Vill, for it may contain one or more Vills; and this Statute is to be construed literally, because it was made in Favour of Life. Adjournatur. See the Case next following. Staundf. 80. 1 Leon. 170.

Penrose *versus* Welch *and* Power.

THIS was likewise an Appeal of Murder, and the Defendant pleaded as above, only he omitted, That he demanded the Book to perform his Clergy; but they pleaded, that they were Clerks, and then and still are ready to read. Where the Court cannot delay the granting the Benefit of Clergy.

And now the like Exception was made to this Plea as in Deering's Case, and moreover, that before the Statute 3 H. 7. after a Conviction of Manslaughter upon an Indictment, the Court might very well delay the Allowance of the Clergy for a Year and a Day, until the Appeal might be tried.

'Tis true if the Court demands of the Party what he hath to say, &c. and then he prayeth the Benefit of his Clergy, in such Case the Court cannot delay it, by a Curia advisare vult; but if he demands the Benefit of his Clergy himself, before he is asked by the Court what he hath to say, &c. there he may be delayed.

Econtra. The Counsel for the Defendant made the like Answer as in the Case above; and moreover that at Common Law Autrefoits convict of Manslaughter was a good Plea, in Bar to an Appeal, but by the Statute 3 H. 7. the Law was altered as to that Point; for now Autrefoits convict of Manslaughter is no good Plea, unless Clergy had been allowed; so that the only Point in this Case depends upon the Construction of the Words in that Statute; and that is whether the Court hath Power to delay the Granting the Benefit of the Clergy; and it was insisted that they had not; but that if the Party convict is a Clerk, and ready to read, the Benefit of Clergy must accrew to him without doing more; and to prove this Matter the Statute 25 Ed. 3. c. 5. was cited by which 'tis enacted, That a Clerk shall be arraigned of all his Offences at once; and Holcroft's Case was cited to prove, that at Common Law the Court had not Power to delay the Party when he demanded the Benefit of his Clergy, which before the Statute of H. 8. was allowable even upon a Conviction of Murder or Felony.

'Tis true if the Confession of the Offence appears on Record, there Clergy was not allowed at Common Law; and the Reason of Purgation by Clergy, is because the Party may be innocent notwithstanding the Verdict; but he cannot be so where he confessed the Offence.

Rodney

Rodney *verſus* Strode & al'. 1 & 2 Jac. II.

UPON a Verdict againſt the Defendants at Dorcheſter Lent-Aſſiſes, Judgment was given in Michaelmas-Term following. 3 Mod. 101. S. C.

The Caſe was: In Treſpaſs and Falſe Impriſonment and Impoſing the Crime of Treaſon on the Plaintiff, *&c.* this Action was brought againſt the Defendant Mr. Strode of Lincolns-Inn, and againſt Pemberton his Clerk, and againſt another who confeſſed the Action; but the Defendant Strode, and his Clerk, pleaded jointly Not guilty, and the Jury found them guilty jointly, and aſſeſſed the Damages ſeverally, (viz.) as to Strode 1000 l. and as to his Clerk 50 l. and likewiſe 50 l. as to him who confeſſed the Action; and then the Plaintiff entered a Nolle proſequi as to the Clerk, and to the other who confeſſed the Action, and took his Judgment only againſt Strode for 1000 l. who now moved in Arreſt of Judgment: And the Queſtion was, if the Entry of this Nolle proſequi had cured the Fault in the Verdict as to the Aſſeſſing the Damages ſeverally, or whether a Nolle proſequi againſt thoſe two Defendants before Judgment was in Nature of a Releaſe, and ſo a Diſcharge to all. Treſpaſs againſt Three, the Jury found them all jointly guilty but ſevered the Damages, then the Plaintiff entered a *Nolle proſequi* as to Two of the Defendants; this cured the Fault in the Verdict.

And it was argued for the Defendant, that a Nolle proſequi before Judgment is a Releaſe of all, and * Hob. f. 70. was cited as an Authority in Point: Which was Treſpaſs againſt Three; one of them pleaded Not guilty, and the other Two juſtified; the Plaintiff replied, and the Defendant demurred to the Replication; but before any Judgment was given on the Demurrer, the Iſſue was tried and found againſt him who pleaded Not guilty, and thereupon Judgment was had againſt him; and then the Plaintiff entered a Nolle proſequi as to the Two who had juſtified; and they all brought a Writ of Error in the Exchequer-Chamber, and aſſigned for Error, that the Nolle proſequi was a Diſcharge to them all, which is very true, if it had been before Judgment, and admitted to be ſo by the Counſel for the Plaintiff; but here Judgment was given againſt him who pleaded Not guilty, therefore there was an End of the Action as to him; and there being no Judgment againſt the other Two, therefore they were not diſcharged by the Nolle proſequi. * Parker *ver.* Lawrence. Cro. Car. 173, 239. Walſh *ver.* Biſhop. S. P. 1 Roll. Rep. 233. S. C. See 2 Roll. Abr. 134. the Caſe of *Lawrence* and *Parker* reported otherwiſe than in *Hob.*

But this Verdict is vicious in it ſelf, and therefore can never charge the Defendant Strode, and cannot be cured by the Entry of a Nolle proſequi, or by a Releaſe of the Damages; now this Verdict is ill, becauſe where the Defendants are charged with a joint Treſpaſs, and the Jury find them all guilty at the ſame Time, they ought not to ſever the Damages.

4 Rep. 56. Heydon's Caſe.

As to the Caſe of Walſh *verſus* Biſhop, 'tis not like the preſent Caſe, becauſe there the Defendants ſevered in their Plea, and ſo they did in the Caſe of Lawrence *verſus* Parker; for one pleaded the general Iſſue, and the other juſtified; and 'tis ſo in all Caſes where a Remittitur is entered as to one, and Judgment taken againſt another joint Treſpaſſer; their Pleas are always ſeveral, and not joint, as in this Caſe they are.

But notwithſtanding the Plaintiff had Judgment, and thereupon a Writ of Error was brought; and it was argued for the Plaintiff in Error, that this Verdict was void and repugnant, becauſe the Jury found the Defendants guilty de præmiſſis, (i. e.) equally guilty, and afterwards they ſevered the Damages, by Reaſon whereof one was made more guilty than the other; and it was laid down for a Rule in Law, that what the Plaintiff had laid joint in his Declaration, the Jury could not ſever in their Verdict; and the Caſe of Whorewood *verſus* Jackſon was now cited, which was lately adjudged in the C. B. it was Trover againſt two Defendants, who pleaded jointly Not guilty, and the Jury found them guilty de præmiſſis, and afterwards ſevered the Damages; and this was held an ill Verdict, tho' 'tis contrary to Cro. Car. 54. where it was held, that upon ſuch a joint Plea in Trover, the Jury might find one guilty of Part to ſuch a Value, and another to ſuch a Value, and ſever the Damages.

Econtra to ſupport the Verdict.

On the other Side it was argued, that the Defect of this Verdict was cured by the Nolle proſequi, and 'tis very reaſonable it ſhould be ſo, becauſe the Plaintiff might bring his Action againſt the Defendant jointly or ſeverally; therefore after * Verdict he ought to have the like Election as to the Damages.

* Raſt. Ent. 127. *a.* 583, 654. Roll. Abr. 784.

Now this Verdict having found the Defendants guilty, and Damages aſſeſſed to 1000 l. thoſe Damages ſhall be applied to all the Defendants, and therefore the finding Damages over as to 50 l. is Surpluſage, and ſhall not hurt the Verdict.

Cro. Car. 192.

* In Pilford's Caſe, the Plaintiff declared in Treſpaſs to his Damage of 40 l. and at the Trial the Jury aſſeſſed Damages to 49 l. and 20 s. Coſts, and at the Day in Bank he releaſed 9 l. Part of the Damages, and had Judgment for 40 l. and 10 l. Coſts de incremento; and this was held good; ſo that a Verdict which is quaſhable may be made good by Matter ex poſt facto. * 10 Rep. 115. Roll's 1 Part 363. 3 Bulſt. 174.

Now ſeveral Caſes were cited to prove, that a Nolle proſequi as to one before Judgment, is no Diſcharge to the reſt; all which may be ſeen in the Margin. 44 Ed. 3. 24. and 36. b. 22 Lib. Aſſis, pl. 59. 5 H. 5. 1.

15 Ed. 4. 26. 11 H. 7. 6. Co. Ent. 287, 650. 1 Roll. Rep. 395. 2 Roll. Abr. 104. Style 299.

And the Caſe of Trebarefoot *verſus* Greenvay, late adjudged in B. R. and affirmed in Error, is a Caſe in Point, which was thus, (viz.) Treſpaſs and Falſe Impriſonment was brought againſt three Defendants; two of them pleaded Not guilty, the other juſtified, &c. and upon the Trial the Jury found them all guilty jointly, and aſſeſſed Damages ſeverally, (viz.) 20 l. as to him who juſtified, and 200 l. as to the other Two who pleaded Not guilty; and the Plaintiff entered a Nolle proſequi as to him who juſtified, and took Judgment againſt the other Two for 200 l. and the ſame Objection was made in that Caſe as now; but notwithſtanding the Plaintiff had Judgment in B. R. which was affirmed in Error, for it was held that the Entry of the Nolle proſequi had cured the Defect of that Verdict.

And thereupon the Plaintiff in the principal Caſe had Judgment in B. R. which was likewiſe affirmed in Error in the Exchequer-Chamber; and afterwards in Eaſter-Term 1 Willi', Mr. Strode brought a Writ of Error in Parliament, where the Judgment was likewiſe affirmed.

DE

Term. Sanct. Hill.

Anno 3 & 4 Jac. II. B. R.

Herring *verſus* Brown.

1 Vent. 371. S. C.

Where the Levying a Fine ſhall deſtroy the Power of Revocation.

ERROR in the Exchequer-Chamber to reverſe a Judgment given in B. R.

ſſ. In a ſpecial Verdict in Ejectment, the Caſe was, Sir John Williams being ſeiſed in Fee of the Lands now in Queſtion, made a voluntary Settlement thereof, (viz.) to A. and B. and their Heirs, to the Uſe of himſelf for Life, Remainder in Tail to his Brother Sir Maurice Williams, with a Power of Revocation, *&c.*

Afterwards in Trinity-Term, *&c.* Sir John levied a Fine, and by a Deed made between him and the ſaid Sir Maurice and others, bearing Date a Month after the ſaid Term, it was declared, that whereas a Fine was levied, &c. and that at the Time of the Levying thereof, it was conſented and agreed unto by all the Parties to the ſaid Deed, that the ſaid Fine ſhould be to the Uſe of the ſaid Sir John and his Heirs.

And now the principal Objection was, that Sir John Williams, by Levying this Fine, without any Declaration of the Uſes precedent to the Levying it, had extinguiſhed his Power of Revocation, and forfeited his Eſtate for Life, for that the Deed ſubſequent to the Fine was ineffectual, becauſe there was an intermediate Time between the perfecting the Fine and the Date of the Deed, in which the

Forfeiture did attach, and the Power was extinguiſhed; and if ſo, then no ſubſequent Act could purge the Forfeiture which was once attached, nor revive the Power which was extinguiſhed; and for theſe Reaſons, and upon the Authority of * Digg's Caſe, and † Albany's Caſe, it was adjudged in B. R. that by leving the Fine, Sir John had extinguiſhed this Power of Revocation; and that the ſubſequent Declaration of the Uſes was of no Effect. * 1 Rep. 173. † 1 Rep. 111.

But this Judgment was reverſed by ſix Judges againſt two, for the Reaſons following, (viz.) That all Deeds ought to be conſtrued according to the Intention of the Parties; and that in the preſent Caſe the Intention of Sir John Williams, and the Parties to the Deed, plainly appeared by this ſubſequent Declaration of the Uſes of this Fine. Deeds ought to be governed by the Intention of Parties.

That the ſaid Sir John had ſomething more than a naked Authority, for he had an Authority veſted with Intereſt; and therefore 'tis not within the common Caſe of a meer Authority, which is always to be ſtrictly taken.

That Powers of Revocation ought to be favourably conſtrued, and very largely for the Benefit of the Parties; and in this Caſe Sir John Williams was more than an ordinary Tenant for Life; for if an Eſtate is granted to one for Life, who afterwards levies a Fine *ſur cogniſance de droit*, and declares the Uſes to himſelf for Life, Remainder to the Grantor or Leſſor, this is a Forfeiture; becauſe he had only a particular Eſtate by the Grant of another Perſon; and therefore is not to be favoured in any Act which he doth to diſinherit ſuch Perſon.

But in the principal Caſe, the Eſtate firſt moved from Sir John Williams, and the Conveyance was Voluntary; and therefore it would be very hard to expound Things ſo as he who once had the ſole Intereſt of the Eſtate, ſhould

* This was a Covenant to ſtand ſeiſed with a Power of Revocation by Deed to be enrolled; afterwards by Deed dated 20 *Sept.* 13 *Eliz.* and enrolled in *Michaelmas-Term* following, *Digg's revoked* the firſt Deed, and declared new Uſes; and in the ſame Term he levied a Fine, *&c.* adjudged that the Fine levied before the Enrollment, which was before the Revocation, had extinguiſhed that Power. Digg's Caſe.

† Feoffment of two Acres to the Uſe of *A.* for Life; Remainder to *C.* in Tail; Remainder to *D.* in Fee, Proviſo if *E.* ſhould die without Iſſue, that then *A.* in the Preſence of four Witneſſes might revoke, *&c.* and declare new Uſes; *A.* made a Feoffment of one of the Acres to *F.* and afterwards in the Preſence of four Witneſſes, revoked the firſt Uſes, and limited new Uſes; adjudged that by the Feoffment the Power to revoke and to limit new Uſes, was extinguiſhed. Albany's Caſe.

by

by this voluntary Settlement extinguish all the Right he had to it.

2 Rep. 74, 75. 2 Roll. Abr. 394. 2 Cro. 512.

Besides the Fine and the subsequent Deed declaring the Uses thereof, are but one and the same Conveyance, and both together are an Execution, and not an Extinguishment of the Power; for it is agreed, that a Fine alone without a Deed, declaring the Uses, had extinguished it; but 'tis not so where there is a Deed to declare the Intention of the Parties at the Time of the levying thereof; and tho' the Date of this Deed is subsequent to the Fine, for no other Reason, but because the Fine ought to relate to the precedent Term, tho' in Truth it might be levied in the Vacation, and so the Deed might be executed at the same Time the Fine was acknowledged; therefore it would be unreasonable to make a Forfeiture or Extinguishment of a Right meerly by Relation, which is but fictio juris.

But Justice Lutwich was clear in Opinion, that the Power of Revocation was extinguished by this Fine, and he put these two Cases, (viz.) if a Power of Revocation is annexed to an Estate for Life, and that Estate determines before the Power is executed, by that Means the Power is extinguished.

That when ever a Fine *sur cognisance de droit* is levied, *aliquid operatur immediatè*, and an Estate passes from one to another *indilatè* upon the perfecting thereof; therefore in the principal Case immediately upon levying the Fine, an Estate in Fee passed to the Cognisor; and the particular Estate for Life was determined; so that 'tis an Extinguishment, or a Forfeiture, which no subsequent Act can purge; but that the Defendant who claims as Heir to Sir Maurice Williams was estopped by the Deed found by the Jury, and by the Fine, to say, that it is a Forfeiture, because his Ancestor Sir Maurice Williams was one of the Cognisees; and the Jury found that the subsequent Deed was made between the said Sir John Williams, and Sir Maurice, and others, reciting that it was agreed by all Parties thereunto at the Time of the Fine levied, that it should be to those of Sir John in Fee; and for that Reason he was of Opinion that the Judgment ought to be reversed.

2 Lev. 149. S. C. Raym. 239. S. C. 1 Vent. 279. S. C.

And in this Case was cited the Case of Wigson *versus* Garret, when Hale was Chief Justice, which was thus:

A Man made a voluntary Settlement with a Power of Revocation, ſo as it was in Writing atteſted by three Witneſſes; afterwards by Indenture atteſted as aforeſaid, he covenanted to levy a Fine which was levied accordingly; and this was adjudged a good Revocation, and purſuant to his Power; for though the Indenture alone would not make it ſo, becauſe the Uſes referred to a Thing to come, and the Fine alone was rather an Extinguiſhment, than a Revocation, yet both together were ſufficient to revoke it; for, as the Chief Juſtice ſaid, Juncta juvant.

DE

Term. Paſchæ.

1 Will. & Mariæ B. R.

From this Term all the Caſes reported here were adjudged when Sir John Holt *was Chief Juſtice of the King's Bench.*

Andrews *verſus* Sir Robert Clerke.

ANdrews levied a Plaint in the Sheriffs Courts in London, and upon the uſual Suggeſtion, that one T. S. (the Garniſhee) was Debtor to the Defendant, a foreign Attachment was awarded to attach that Debt in the Hands of T. S. which was accordingly done; and then a Diletur was entered, which is in Nature of an Imparlance in that Court.

Upon a Foreign Attachment, the Garniſhee pleaded to the Juriſdiction of the Sheriffs Court; but it was over-ruled.

Afterwards T. S. (the Garniſhee) pleaded to the Juriſdiction, ſetting forth that the Cauſe of Debt due from him to the Defendant Sir Robert Clerke, and the Contract on which it was founded, did ariſe, and was made at H. in the County of Middleſex, extra juriſdictionem Curiæ; and this Plea being over-ruled; it was now moved (in behalf of T. S. the Garniſhee) for a Prohibition to the Sheriffs Court aforeſaid, ſuggeſting the ſaid Matter, (viz.) that the Cauſe of Action did ariſe extra juriſdictionem, &c. but the Prohibition was denied; becauſe the Debt always follows the Perſon of the Debtor; and 'tis not material where it was contracted, eſpecially as to this Purpoſe of foreign Attachments; for it was always the Cuſtom in London to attach Debts upon Bills of Exchange, and Goldſmith's Notes, &c. if the Goldſmith who gave the Note, or the Perſon to whom the Bill is directed, liveth within the City, without any reſpect had to the Place where the Debt was contracted.

In this Caſe it was held clearly, that admitting the Plea thus pleaded by the Garniſhee to the Juriſdiction of the Sheriffs Court was good in Matter; yet it ought not to be allowed in this Caſe, becauſe it came too late, (viz.) after a Diletur entered; for Pleas to the Juriſdiction muſt always be pleaded primo die.

And it was agreed by all, that a foreign Attachment in London, is to no other Purpoſe, but to compel an Appearance of the Defendant in the Action; for if he appear within a Year and a Day, and put in Bail to the Action, the Garniſhee is diſcharged, but without Bail they will not accept an Appearance.

Knight *verſus* Berry.

Proceedings in the Admiralty, where the greater Part of the Owners are oppoſed by the Leſſor in the Ship's going a Voyage.

PRohibition to the Court of Admiralty, ſuggeſting that they held Plea between the Parties for Matter ariſing upon the Land, and ſo out of their Juriſdiction: The Caſe was thus:

ſ. There were ſeveral Part-owners of a Ship, and the major Part of them agreed to ſend her in a Voyage to Sea, but the reſt diſagreed; whereupon the greater Number (according to the common Uſage in ſuch Caſes) ſuggeſt in the Admiralty-Court the Diſagreement of their Part-

Partners, and then (according to their Uſage there) they order certain Perſons to appraiſe the Ship, who accordingly ſet a Value thereon; and then the major Part who agreed to the Voyage, enter into a Recognizance, wherein they bind themſelves jointly and ſeverally to the diſagreeing Partners, in a Sum proportionable to their Shares, according to the Value ſet by the Appraiſers, &c. which is uſually done in that Court, to ſecure the Shares in the Ship of thoſe who diſagree to the Voyage againſt all Adventures.

Afterwards Berry, one of the diſagreeing Partners, takes out a Sci. fa. upon ſuch a Recognizance entered into by Knight, and Sentence was had againſt him in the Admiralty Court, from which he appealed to the King in Chancery, and a Commiſſion of Delegates was actually taken out. Hardres 473.

And Knight now moved for a Prohibition, for that ſince that Court had no Juriſdiction in this Caſe, all was done coram non judice.

It was argued for Berry, that this Courſe had been allowed and practiſed in that Court for ſeveral Years, in all Caſes, where the leſſer Number of Partners diſſent to a Voyage propoſed by the major Part, and that the Legality of ſuch Proceeding was never yet doubted, and great Inconvenience would enſue to Traders, if there was no Means for the major Part of the Owners to redreſs themſelves as to their own Shares, againſt the Obſtinacy of a leſſer Number diſagreeing; for by that Means the Ship would lie idle, and be of no Uſe, when ſhe ſhould be in a Voyage for the Benefit of Trade.

But the whole Court was of Opinion, that the Admiralty had no Conuſance of this Matter, and therefore all that was done, was coram non judice, and thereupon a Prohibition was granted. Curia.

And the Chief Juſtice Holt held clearly, that the major Number of Partners were not without a proper Remedy at Law, for that an Action againſt the leſſer Number might be framed upon the ſpecial Matter, ſetting forth, that quod cum by the Law and Cuſtom of this Realm, if ſeveral Partners be of a Ship, and the major Part agree to ſend her on a certain Voyage, &c. and the leſſer Number diſſent, &c. that the Agreement of the greater Number ſhall bind the reſt, and ſo bring the particular Caſe within this Cuſtom, by ſhewing the Partnerſhip and the Agreement of the Plaintiffs (the greater Number) and the Diſagreement of

the Defendants, the leſſer Number, &c. per quod the Profits of the Voyage were loſt, ad damnum, &c.

The King *verſus* The Pariſh of *St. Peter in Malden*, and the Pariſh of *Hebridge in Eſſex.*

Aſſeſſing a poor Man to the Pariſh-Rates, amounts to Notice in Writing.

ſſ. THE Caſe, (viz.) one Paine and his Family, who dwelt in the Pariſh of Hebridge, came from thence into the Pariſh of St. Peter in Malden, where he rented an Houſe of 3 l. per Annum, and was proportionably aſſeſſed by the Pariſh-Officers to their Pariſh-Rates of Church and Poor, which he duly paid; and having lived there one Year and an Half, he died, leaving a Poor and indigent Family.

The Juſtices of Peace, at their Quarter-Seſſions, reciting the whole Matter ſpecially in their Order, (on Purpoſe to bring it fairly to Judgment) and that no Notice was given in Writing by the ſaid Paine to the Pariſh-Officers, according to the Letter of the Statute; they ordered, that the Family ſhould continue at St. Peter's Pariſh, and that the Officers ſhould allow them ſo much for their Maintenance.

This Order was removed into B. R. by Certiorari, and it was now moved to quaſh it, becauſe Notice in Writing ought to be given purſuant to the Statute, &c. otherwiſe this Man could not be ſettled in the Pariſh of St. Peter; and by the Order it ſelf it appears, that no ſuch Notice was given.

Curia. But the Court confirmed the Order, for that the Pariſh-Officers had Notice ſufficient within the Intent of the Statute, tho' not within the Letter, becauſe the Aſſeſſing this Man to the Pariſh Rates, and receiving the Money aſſeſſed is a ſufficient Evidence, that they knew he was an Inhabitant there, and the Meaning of the Statute is no other.

Gerard *verſus* Danby.

Where Judgment is had upon a Bond conditioned for Payment of Money only, a Writ of Error is no *Superſedeas*, unleſs the Plaintiff in Error put in Bail.

ERROR of a Judgment in C. B. in an Action of Debt on a Bond, with a Condition to perform Covenants in an Indenture, and amongſt the reſt one was for Payment of Money, and the other were collateral; and the Breach aſſigned was, for not paying the Money.

The Defendant pleaded the Statute of Uſury; and now it was moved, that the Plaintiff in Error might put in Bail according to the Statute * 3 Jac. by which 'tis enacted, that a Writ of Error ſhall be no *Superſedeas* to a Judgment given upon a Bond, with a Condition for Payment of Money only, *&c.* unleſs the Plaintiff in the Writ of Error put in Bail, *&c.* in double the Sum, *&c.* to proſecute the Writ with Effect. * 3 Jac. c. 8.

But per Holt Chief Juſtice, This Caſe is not within the Statute, for that relates to Judgments given upon Bonds, with a Condition for Payment of Money only; but the Condition in the preſent Caſe is not only for Payment of Money, but to do collateral Acts; 'tis true, the Breach aſſigned is for Non-payment of Money; and therefore the Caſe upon the Pleading is the ſame as if the Condition of the Bond had been for Payment of Money only; but yet this Writ of Error was allowed without Bail. *See* 1 Lev. 117.

Pepys *verſus* Low. Mich. 4 Jac. B. R. Rot. 540. *but adjudged in* Eaſter-Term, 1 Willi'.

THE Plaintiff as Aſſignee of the Commiſſioners of Bankruptcy of T. S. a Trader brought a ſpecial Aſſumpſit againſt Lowe, one of the Debtors of the ſaid T. S. in which he declared, that the ſaid T. S. was a Trader, and indebted to the Plaintiff, and that the Defendant was indebted to T. S. for Goods ſold and delivered, and that afterwards, (viz.) on ſuch a Day in ſuch a Year, the ſaid T. S. manifeſte devenit decoctor (Anglice, a Bankrupt) infra intentionem ſeparal. ſtatut. in hujuſmodi caſu edit. & proviſ. vel un. eorum, then he ſets forth a Commiſſion of Bankruptcy directed to ſuch Perſons, &c. and that the Commiſſioners had by Indenture, &c. aſſigned this particular Debt to the Plaintiff, and that in Conſideration of the Premiſſes the Defendant promiſed to pay, &c. but had not done it, by Reaſon whereof the Plaintiff was damnified. In a ſpecial Action on the Caſe brought by the Plaintiff as Aſſignee of the Commiſſioners of Bankrupt, he need not ſhew how the Perſon became Bankrupt.

Upon a Demurrer to this Declaration it was objected, that it was ill and incertain, becauſe the Plaintiff had not ſhewed how T. S. became a Bankrupt, (viz.) either by keeping cloſe within his Houſe, by ſuffering himſelf to be arreſted, or by ſome other Marks or Circumſtances deſcribed in the * Statute of Bankruptcy: And this was compared to the Caſes of Simony, in which the Perſon who pleads Simony in another, ought always to ſhew in certain how, * 13 Eliz. cap. 7.

how, and in what Manner he is guilty of Simony, and not generally, that he is ſimoniacus.

Curia. But it was adjudged, that a Declaration in this general Form was good and certain enough, and that there was a Difference between Caſes upon the Statutes of Bankruptcy, and Caſes upon the Statute againſt * Simony; for in the Statutes of Bankruptcy, the Word Bankrupt is mentioned, (viz.) he who is a Trader and doth ſo and ſo ſhall be a Bankrupt, but in the Statute againſt Simony that Word is not mentioned, for 'tis only ſaid, that the Perſon corruptly taking any Benefice, *&c.* ſhall be adjudged a Perſon diſabled in the Law to have or enjoy ſuch Benefice; beſides, the Plaintiff in this Action is altogether a Stranger to the Bankrupt, and therefore it doth not lie within his Knowledge how, or in what Manner he became a Bankrupt.

* 31 Eliz. cap. 6.

Judgment for the Plaintiff.

Obrian *verſus* Ramm. Mich. 3 Jac. II. B. R. Rot. 192. *Judgment in* Eaſter-Term, 1 Willi'.

3 Mod. 186. S. C.

ERROR of a Judgment given in the Court of Common Pleas in Ireland, and affirmed in B. R. there the Caſe was:

Judgment againſt a Feme ſole, who afterwards married, and then the Plantiff brought a *Sci.fa.* againſt Husband and Wife, and had Judgment againſt them, to have Execution, and then the Wife died, the Husband ſhall be liable.

ſt. Judgment in Debt was obtained by Ramm againſt a Feme ſole, who afterwards married the Plaintiff Sir Donald Obrian, and then Ramm brought a Sci. fa. on that Judgment in B. C. in Ireland, againſt Husband and Wife, to have Execution thereof; and after two Nihils returned, Judgment was had againſt them to have Execution, and a Year and a Day expired before any Execution was executed, and then the Wife died; and afterwards Ramm brought another Sci. fa. againſt the Husband alone, to have Execution of the ſaid Judgment.

The Defendant Obrian, (the Husband) pleaded a frivolous Plea, to which the Plaintiff demurred, and Judgment was given for Ramm in C. B. in Ireland, which was affirmed in B. R. there; and now a Writ of Error was brought in the Court of the King's Bench here, and the Error aſſigned was Matter in Law, (viz.) that Obrian (the Huſband) was not liable to an Execution upon this Judgment after the Death of his Wife, becauſe he was chargeable meerly upon her Account, and in Reſpect to her only during the Time of the Coverture; and the Judgment on the Sci.

fa. to have Execution againſt Husband and Wife doth not alter the Caſe; for that Judgment amounts to nothing more than a Liberty to take out Execution after the Year and the Day expired, which Liberty is given by the Statute; for at Common Law after the Year and a Day expired, no Execution could be had but only an Action of Debt on the Judgment; and the Reverſal of the firſt Judgment is likewiſe a Reverſal of the Judgment in the Scire facias; and therefore ſuch Judgment will not bind the Husband in any other manner than he was bound before, (i. e.) during the Coverture.

But the Court was of another Opinion, (viz.) that the Judgment on the Scire facias againſt Husband and Wife, had altered the Caſe, and made the Husband liable. Moor 299. 3 Cro. 216. F. N. B. 122 a.

So the Judgment was affirmed.

Beak *verſus* Tyrrell.

IN Trover for a Ship, &c. the Defendant pleaded ſpecially, that he was the King's Servant, and Captain, and Governor of ſuch a Man of War, (but did not ſet forth any Commiſſion) and that he ſeiſed the Ship mentioned in the Declaration as a Prize, (but did not ſet forth any Cauſe of Forfeiture by which ſhe became a Prize) and that he carried the Ship to the Port of Sally in the Eaſt-Indies; and pleaded generally, that the Admiralty-Court there gave Sentence againſt the Ship as Prize, & hoc, &c. unde, &c. and upon a Demurrer to this Plea, the Exceptions following were taken. 3 Mod. 194. S. C. Trover for a Ship; the Defendant pleaded, that he took her as a Prize, and that by a Sentence in the Admiralty, ſhe was condemned, &c.

(1.) The Defendant had pleaded, that he was an Officer to the King, but did not ſet forth any Letters Patent, or Commiſſion under Seal; and a Man cannot have ſuch an Authority without a Commiſſion.

To which it was anſwered and reſolved, that 'tis not neceſſary, that every Captain of a Man of War ſhould be conſtituted by a Commiſſion under Seal; becauſe the King may give him that Authority by a Warrant ſubſcribed only; beſides this is a Matter traverſable, and therefore the Plaintiff might have traverſed the Truth of this Fact if he would; but now 'tis admitted to be true by the Demurrer.

(2.) The ſecond Objection was, that the Defendant did not ſet forth in his Plea any Cauſe of Forfeiture by which this

this Ship (being a Ship of the Subjects) might become a Prize; for according to common Intendment, the Goods of one Subject cannot be a Prize to another Subject; because a Prize is properly ſomething taken on the High Sea from a common Enemy againſt whom War is declared; and the Goods of a Natural-born Subject cannot be Prize without ſome ſpecial Cauſe alledged.

(3.) The third Exception was, that the Defendant had not ſet forth for what the Sentence was given, or who was the Judge of the Court of Admiralty, who gave Sentence, and to whom ſuch Court did belong; for he did not ſhew that it was the King's Court, or the Court of any other foreign Prince, ſo that the Plea is altogether incertain.

To both which laſt Exceptions it was anſwered, and ſo reſolved, that it was neceſſary for the Defendant to ſhew ſome ſpecial Cauſe for which the Ship became a Prize; and that he ought to ſhew who was the Judge that gave Sentence, and to whom that Court of Admiralty did belong; and for theſe Faults the Plea was adjudged inſufficient.

And in the Argument of this Caſe, the Court cited a Caſe which happened in the Wars between the French and the Dutch.

The Court of *B. R.* will give Credit to a Sentence given in the Court of Admiralty in *France.*

If. An Engliſh Ship was taken by a French Man of War under Colour of a Dutchman, and carried into France, and there condemned by their Court of Admiralty as a Dutch Prize; afterwards an Engliſh Merchant bought this Ship of the French-Men, and brought her into England, where the right Owner brought an Action of Trover for the Ship againſt the Purchaſer; and all this Matter being found ſpecially, the Defendant had Judgment; becauſe the Ship being legally condemned as Dutch Prize, this Court will give Credit to the Sentence of the Court of Admiralty in France; and take it to be according to Right, and will not examine their Proceedings; for it would be very inconvenient if one Kingdom ſhould by peculiar Laws correct the Judgments and Proceedings of the Courts of another Kingdom.

Vanacre *verſus* Spleen, in B. R.

UPON a Motion for Prohibition in the Caſe of one Tiler *verſus* Mantell, Juſtice Dolben cited the Caſe of Vanacre as followeth:

Libel againſt the Defendant for not repairing Part of the Church-Wall, which by Cuſtom he was bound to do; a Prohibition was granted after Sentence, becauſe a Cuſtom is not triable in that Court.

ff. Spleen the Church-warden of D. libelled in the Spiritual Court againſt Vanacre for not repairing Part of the Church-Wall, wherein he ſet forth, that Vanacre was ſeiſed of ſuch a Manor, &c. and that the Lords thereof for the Time being, were by Cuſtom immemorial bound to repair that Part of the Wall ratione tenuræ; Vanacre denied the Cuſtom in that Court, and Sentence was given againſt him; whereupon he moved B. R. for a Prohibition, ſuggeſting the Statute 23 H. 8. and that he was cited out of his proper Dioceſe, &c. intending therefore, that all was void, and coram non judice, but the Prohibition was denied, becauſe Vanacre by Pleading to the Libel, had admitted the Juriſdiction of the Court; and the Statute 23 H. 8. doth not take away the Juriſdiction of all Matters ariſing out of the Dioceſe; but only gives him who lives out of the Dioceſe, a new Privilege of Pleading to the Juriſdiction, which Benefit of Pleading if neglected, and the Party ſuffers a Sentence to be given againſt him there, the ſaid Statute will not ſerve him for a Prohibition afterwards to that Court, whoſe Juriſdiction he hath already admitted.

23 H. 8. c. 9.

But in that Caſe, upon View of the Libel, it appeared, that the Ground thereof was a * Cuſtom ratione tenuræ; therefore it was held clearly by the Court, that a Cuſtom was not triable in the Spiritual Court; and this Libel having no other Foundation, the Eccleſiaſtical Court could have no Conuſance thereof, till the Cuſtom was tried at Law; and for that Reaſon a Prohibition was granted to try it, which was afterwards tried and found againſt Vanacre; and thereupon a Conſultation awarded.

* Libel upon a Cuſtom to pay the Church-wardens 20 *l.* for every Corps buried in the Body of the Church; upon denying the Cuſtom, a Prohibition granted. 1 Vent. 274.

And ſo Note a Difference, that if upon the Face of the Libel, it appears, that the Spiritual Court can have no Conuſance of the Cauſe ut ſupra, or if it appears, that the Party cited, is an Inhabitant at a Place out of the Dio-

See 2 Roll. Abr. 287. pl. 52. 308. pl. 20. 307. pl. 18. Reg. 50. B.

ceſe, there the Libel is Felo de ſe, and in ſuch Caſes the Sentence makes no Alteration; but 'tis otherwiſe where no ſuch Thing appears on the Libel.

And in the Caſe of Tyler and Mantell before-mentioned, it was ſaid by the Counſel at the Bar, that it appeared upon the Face of the Libel (which was for opprobrious Words ſpoken) that Tyler was cited out of the Dioceſe of London, in which Sentence was given, for he was named in the Libel to live at D. in Hampſhire, and there the Fact was laid; whereas 'tis very well known, that D. in Hampſhire, is within the Dioceſe of Wincheſter, and not in the Dioceſe of London, and Affidavits were offered of that Matter.

But it was anſwered by the Court, that they could not take any Notice within what Dioceſe D. in Hampſhire was, for they could not ex officio take Notice of the Limits of Biſhopricks; but they ſhould now take it to be within the proper Dioceſe.

Nota, The Caſe between Brockman and Fagg, Trin. 2 Will. B. R. was the very ſame, ſ. Libel for not repairing Part of a Church-yard Wall, which by Cuſtom, &c. he was obliged to repair, and the Cuſtom was denied, and Sentence againſt the Defendant; but a * Prohibition granted.

* 13 Rep. 567.

DE

Term. Sanct. Trin.

1 Willi. & Mariæ, in B. R.

Lea *verſus* Libb. Hill. 2 & 3 Jac. II. B. R. Rot. 497.

Shower 68. S. C. 3 Mod. 262. S. C. A Will atteſted by 2 Witneſſes, and afterwards the Teſtator made a Codicil atteſted by 2 Witneſſes, which he declared ſhould be Part of his Will, yet both together will not make a good Will.

UPON a ſpecial Verdict in Ejectment, the Caſe was as followeth:

ff. Thomas Denham by his Laſt Will and Teſtament in Writing deviſed, that his Lands ſhould be ſold by his Executors for the Payment of his Debts, which Will he ſigned and publiſhed in the Preſence of two Witneſſes, (viz.) Richard Woodroffe and John Barnes, who ſubſcribed and atteſted the Will in the Preſence of the Teſtator and no other Perſon but theſe two Witneſſes.

And about a Year afterwards the ſaid Tho. Denham made another Writing, by which he revoked a Legacy given by his Will, and gave another new Legacy; and moreover declared, that his Intent was, that his Will ſhould be ratified and confirmed in all Things, except what he had altered by that Writing, and that this Codicil ſhould be accepted and taken as Parcel of his Laſt Will, which Codicil he ſigned and publiſhed in the Preſence of two Witneſſes only, (viz.) in the Preſence of John Barnes

and James Head, which two Witneſſes atteſted and ſubſcribed this Codicil in the Preſence of the Teſtator, and no other Perſon ſubſcribed the ſame.

And that at the Time of making the Codicil, there was neither the firſt Will, nor the ſaid Richard Woodroffe (the other Witneſs) there preſent, but abſent in another Place, and that the Codicil was always ſeparate and never annexed to the Will; and that Mary Denham (the Leſſor of the Plaintiff) was Couſin and Heir of the Teſtator, and that the Defendant was the Leſſee of the Executor of the Teſtator Tho. Denham.

And the ſole Queſtion was, Whether by this Will ſigned and atteſted, ut ſupra, the Lands were well deviſed within the Statute 29 Car. 2. or not.

29 Car. 2. cap. 3.

It was argued, that the Will was void as to the Deviſe of the Lands, for that the Statute is expreſs, That every Will which is not atteſted and ſubſcribed in the Preſence of the Teſtator by three or four credible Witneſſes, ſhall be utterly void as to a Deviſe of Lands; and the Circumſtances preſcribed by this Statute concerning Wills of Lands being not obſerved in this Caſe, as it plainly appears by the Verdict, the Deviſe is void; and the Lands muſt deſcend to the Heir at Law, and therefore the Plaintiff hath a good Title.

Econtra.

It was argued on the other Side, that the Making this Codicil was a new Publication of the Will; and 'tis not material, Whether it was affixed to the Will, or not; for a Will is good, tho' 'tis in Two looſe Sheets of Paper, and 'tis ſtill but one Will; ſo in this Caſe, tho' the Codicil was not actually annexed to the Will, yet they both make but one Will in Law, and one is not entire without the other, but both together make the Will.

Therefore if the Will and Codicil are but one, and not diſtinct Wills, the Words of the Statute are literally purſued, for then there are three Witneſſes who ſubſcribed and atteſted the Codicil, which is Part of the Will, and the Will it ſelf, (viz.) Woodroffe, Barnes and Head; and ſo the whole Will, which conſiſts in both the Writings, was atteſted and ſubſcribed by three Witneſſes, in the Preſence of the Teſtator, which is all that is required by the Statute.

Now ſuppoſe that the Teſtator, by a Writing, deviſeth Lands, which is atteſted only by two Witneſſes and afterwards publiſhes that Writing as his Laſt Will, in the Preſence of a third Witneſs, who ſubſcribes that Will in the

Presence of the Testator; this is certainly a good Will to pass the Lands; to which Justice Dolben agreed; but Holt Ch. Just. denied it.

And the Court held in the principal Case, that the Will was void; 'tis true, the Intent of the Statute was to prevent Fraud; but tho' no Fraud or Suspicion of Fraud appears in this Case, yet the Statute hath prescribed a certain Method, which every one ought to pursue to prevent Fraud; therefore every good Man who would have the Benefit of the Statute, ought to pursue the Means therein prescribed, which was not done in this Case, because James Head, who was Witness only to the Codicil, could not therefore be a Witness to the Signing the Will by the Testator, which is required by the Statute. Curia.

And Holt Ch. Just. argued, that if Lands had been devised by the Codicil, such Devise had been certainly void, not being sufficiently attested, because one of the Witnesses who subscribed the Will, (viz.) Woodroffe, was in no wise concerned touching the Codicil; so on the other Side, Head, who only subscribed the Codicil, could not be a Witness to the Will which he never saw.

Afterwards in Michaelmas-Term following, this Case was argued again, and it was said in Behalf of the Plaintiff, that this Controversy depending upon the Construction of a Clause in the Statute of Frauds, (which is a new Statute) there could not be many Cases cited, neither was there Occasion to cite any, because the Words are plain and express; it was agreed, that if the Devise had stood singly upon the Will, it had been void; and then the Codicil being imperfect in it self, could not aid the Deficiency of the Will, especially since the Jury found, that the Codicil was never annexed to the Will; and that this being in the Case of an Heir at Law, it should be favoured.

It was argued (as before) for the Defendant, that both these Writings made but one Will, and this Ground was laid down in Cases of Wills, (viz.) that a Man might make his Will in several Writings, and at several Times; and if a Will is written in three several Sheets of Paper not tacked together, and subscribed by three Witnesses severally, (viz.) one Name to each Sheet, this is a good Will within the Statute, to which Justice Dolben agreed. Econtra.

So if these loose Sheets of Paper are wrap'd up in a clean Sheet, and the Witnesses subscribe their Names to that clean Sheet, this is a good Attesting the Will. 2 Cro. 144.

A Will

A Will is thus defined, (viz.) 'tis a Declaration of the Mind (either by Word or Writing) in diſpoſing an Eſtate, and to take Place after the Death of the Teſtator; and this is called a Will; now in ſeveral Caſes two Things will make that good, which ſingly and by it ſelf would not be ſo; as for Inſtance; in the Caſe of Wigton and Garrett, in this Court, in the Time of Chief Juſtice Hale, where one had a Power of Revocation, ſo it was made by a Deed atteſted by three Witneſſes, and afterwards by an Indenture atteſted by three Witneſſes, he covenanted to levy a Fine to ſuch Uſes, which was levied accordingly; now in that Caſe neither the Deed or the Fine ſingly was a ſufficient Revocation, but both together were ſufficient.

So here both the Writings make but one Will, and the one aids the Deficiency of the other.

But Holt Ch. Juſt. held that this Will was void, becauſe it was not ſigned by the Teſtator in the Preſence of three Witneſſes; for tho' the Words of the Statute are not expreſs as to the Signing in the Preſence, yet they amount to as much: For the Words are, that the Will muſt be ſigned by the Deviſor, and atteſted by three or four Witneſſes, ſo that 'tis plain the Witneſſes muſt prove the Signing the Will, otherwiſe 'tis imperfect, and they cannot prove it unleſs they were preſent; ſo that 'tis the ſame Thing as if the Words had been, that the Will muſt be ſigned in the Preſence of three Witneſſes.

And afterwards in Hillary-Term, 1 & 2 Willi', the ſaid Chief Juſtice delivered the Opinion of the Court, that the Will and the Codicil together were not ſufficient to paſs the Lands, for the Statute of Frauds is expreſs, that there ought to be three Witneſſes to every Will by which Lands are deviſed; and alſo that the Teſtator ſign the Will in the Preſence of three Witneſſes; and there were neither of theſe Circumſtances in the principal Caſe, and therefore they could not contradict the Statute.

Judgment for the Plaintiff.

Harriſon *verſus* Auſtin. Trin. 3 Jac. II. B. R. Rot. 997.

3 Mod. 237. S. C. Where an informal Deed ſhall paſs an Eſtate by Way of Covenant to ſtand ſeiſed.

UPON a ſpecial Verdict in Ejectment, the Caſe was, (viz.) Thomas Winchurſt being ſeiſed in Fee of the Lands in Queſtion, made a Deed-Poll in theſe Words following:

ff. To all Chriſtian People, *&c.* Know ye that I having no Iſſue, and in Caſe I die without Iſſue of my Body lawfully begotten, that then my Lands, *&c.* may remain and continue in my Blood and Kindred of me *Thomas Winchurſt*; and for the natural Love and Affection I bare unto my loving Niece *Sarah Stokes*, the Wife of *John Stokes*, as alſo for divers other Conſiderations, have given, granted and confirmed, and in and by theſe Preſents, do give, grant and confirm unto my ſaid Niece *Sarah Stokes*, all my Lands, *&c.* to the Uſe and Uſes herein after-mentioned, and to no other Uſes or Purpoſes whatſoever; that is to ſay, To have and to hold all the ſaid Lands to the Uſe and Behoof of me the ſaid *Thomas Winchurſt*, for the Time of my natural Life; and after my Deceaſe, to the Uſe of the ſaid *Sarah Stokes* my Niece, and to the Heirs of her Body lawfully begotten; and for Default of ſuch Iſſue, to the right Heirs of me the ſaid *Thomas Winchurſt*. *In Witneſs*, &c.

Nota, This Deed was not executed by any Livery, &c. but afterwards the ſaid Thomas Winchurſt made a Feoffment of all his Lands, to the Uſe of the Defendant Auſtin; and then Stokes and his Wife entered upon Auſtin the Feoffee as for a Forfeiture accrued to them by the Feoffment made by Winchurſt, who was only Tenant for Life (as they intended) and made a Leaſe to the Plaintiff in Ejectment.

And it was argued for him, that this Deed ſhall be taken as a Covenant to ſtand ſeiſed; for all Conſtructions of Deeds muſt be ſuch ut Res Valeat, and the Intent of the Parties muſt be obſerved as near as poſſibly it may: Now here it plainly appears, that the Intent of Tho. Winchurſt was, that Sarah Stokes ſhould have an Eſtate-Tail, and if this Deed ſhould not be conſtrued as a Covenant to ſtand ſeiſed, then ſhe will have no other Eſtate but a meer Poſſibility, (viz.) for her own Life, if ſhe ſhould ſurvive Thomas Winchurſt; for an Uſe raiſed out of an Eſtate for Life, cannot continue after the Eſtate is determined out of which it was raiſed; ſo that by ſuch a Conſtruction the plain Intention of this Deed would be altogether ſubverted. For the Plaintiff.

'Tis true this Deed is not Formal, but the Informality will not hinder its Operation by way of Covenant to ſtand ſeiſed. 1 Inſt. 49. Poph. 49. Roll. 2 Part 786.

1 Mod. 176. *Croſſing* verſus *Scudamore*

But

Econtra. But it was argued for the Defendant, that by this Deed the Intent of Winchurſt appeared to be, that he deſigned Sarah Stokes ſhould take nothing if he had Iſſue of his Body; for the Words are, ff. In Caſe I ſhall die without Iſſue of my Body, then, &c. and therefore it would be a very hard Conſtruction if upon ſuch a voluntary Conſideration, this Eſtate ſhould be expounded to paſs as a Remainder after his Death to the ſaid Sarah in Tail; tho' his Intent appeared, that Sarah ſhould have nothing, unleſs ſhe died without Iſſue of his Body.

Now the Purport of this Deed was, that it was the Intent of Winchurſt, that the Eſtate ſhould paſs by way of Tranſmutation of Poſſeſſion, and not by way of Covenant to ſtand ſeiſed; and if ſo, then Sarah had an Eſtate for Life; and Winchurſt by his Entry was only Tenant at Will, and ſuch a Tenant cannot commit a Forfeiture.

The Habendum in this Deed being contradictory to the Premiſſes, ſhall be rejected, and the Premiſſes purſued, and many Caſes were cited in which it had been held, that if the Words in a Deed ſhewed the Intent to paſs an Eſtate by the Common Law, it ſhall never be conſtrued to paſs by way of Uſe.

But the Parties agreeing amongſt themſelves, a Motion was made concerning the Coſts of Suits for the Plaintiff; and upon hearing of Counſel on both Sides, and reading the Rule of Court which had been voluntarily entered into upon the Agreement; it was ordered, that the Plaintiff ſhould have 10 l. Coſts; and then the Court declared, that they were all of Opinion for the Plaintiff, (viz.) that the Conſideration and the Deed it ſelf were ſufficient to raiſe an Uſe in Remainder in Tail to the ſaid Sarah Stokes by way of Covenant to ſtand ſeiſed.

Moſeley *verſus* Cocks.

Upon a Writ of Error, the Plaintiff did not ſue forth a *Sci' fa' ad audiend' Errores* in Time.

THE Plaintiff brought a Writ of Error upon a Judgment obtained againſt him; and afterwards the Record was removed into B. R. he for ſome Time neglected to ſue out a Scire facias ad audiend' Errores; whereupon the Plaintiff in the original Action ſued out a Sci' fa' quare executionem non habet; and upon two Nihils returned had Judgment, and Execution executed.

2

And

And now the Plaintiff in Error moved to ſet aſide this Judgment on the Sci. fa. becauſe his Errors were aſſigned on the Record; but upon Examination it appeared, that they were aſſigned in a private Manner without any Notice given to the Defendant in Error.

And the Chief Juſtice Holt declared, that the Parties upon the Removal of the Record by the Writ of Error, have no Day in Court given to either of them; wherefore if the Plaintiff in Error delay to ſue forth his Sci. fa. ad audiend. Errores, the Defendant hath no way to compel him, but by ſuing out a Sci. fa. quare Executionem non, &c. and if upon ſuch a Sci. fa. the Plaintiff in Error doth not plead that his Errors are aſſigned; but ſuffer Judgment to paſs upon two Nihils, no Errors afterwards aſſigned ſhall prevent Execution.

Nota, The uſual Practice is, that the Defendant in the Writ of Error, by Conſent, doth voluntarily take Notice of the Aſſignment of Errors, and this Conſent is teſtified by his Pleading in nullo eſt Erratum; and there is no Occaſion for a Sci. fa. ad audiend. Errores.

King *verſus* Dilliſton. Trin. 1 Jac. II. C. B. Rot. 1322. See now the Statute 9 Geo. c. 29.

1 Lutw. 765. S. C. 3 Mod. 221. S. C. Salk. 386. S. C.

ERROR of a Judgment in the Common Pleas, upon a ſpecial Verdict in Ejectment, in which the Caſe was thus:

An Infant who is entitled to be admitted to a Copyhold Eſtate, forfeits it, if he is not admitted after three Proclamations.

ſi. The Lands in Queſtion were Copyhold held of the Manor of Swefling Campſey in Suffolk, of which Henry Warner and his Wife, in Right of his ſaid Wife, were ſeiſed for the Life of the Wife, Remainder to John Ballett in Fee.

That the Cuſtom of the ſaid Manor was, that every Surrender which is made ſecundum conſuetudinem out of Court, ſhall be preſented by the Homage at the next Court to be held for the ſaid Manor; and that upon ſuch a Preſentment, Proclamation had been uſually made, and ſo for three Courts next following; and if upon the third Proclamation, no Perſon came to be admitted, &c. that then the Lord of the Manor ſhould ſeiſe the Lands as forfeited.

That Henry Warner and his Wife, and John Ballett joined in a Surrender of these Lands out of Court, to the Use of Robert Freeman in Fee; but that after the said Surrender, and before the next Court, the said Robert Freeman died, and that John Freeman is his Son and Heir, an Infant, and within Age, and that he had a Right to be admitted.

And that afterwards at the next Court, this Surrender was presented by the Homage, and Proclamations were made in three Courts next following, and no Person came to be admitted; and therefore the Steward of the said Manor issued out a Precept to the Bailiff, to seise the said Lands into the Hands of the Lord, which was done accordingly; and they find that A. C. is Lord of the said Manor, and that he entered on the Lands as forfeited ex causâ prædictâ, and made a Lease thereof to the Plaintiff; and that Judgment was given in the Common Pleas for the Defendant; and the Record being removed by Writ of Error into B. R. it was argued for the Plaintiff in Error.

That Custom is the Life of all Copyhold Estates, and that if the customary Tenants break the Customs of the Ma-
4 Rep. 21. nor, they are no more than Tenants at Will.

That the Admittance of a Copyholder is for the Benefit of the Lord, and not of the Tenant; and that it would be unreasonable if the Obstinacy of a Tenant should be prejudicial to the Lord who is in no Fault; and it would be a great Prejudice to the Lord, if in this case the Infant should not be obliged by this Custom, for he may die, and the Right descend to another Infant, and for a long Time; so that by such Means the Lord may be deprived of the Profits of his Inheritance, (viz.) the Fines upon Admittances.

8 Rep. 99. That this Case differs from Sir Rich. Letchford's, for in that Case he who had the Right by Descent was beyond Sea at the Time when the Proclamations were made; but in this Case the Infant is the Heir of the Surrenderee, who
* Jones 319. 2 Cro. 226. died before Admittance; and is a * Purchaser, and the Purchase is not compleat till he is admitted.

And the Attorney General Treby who argued for the Plaintiff, told the Court, that he had seen an ancient Manuscript of Sir Richard Letchford's Case, in which 'tis reported, that he had actually seised the Lands, and taken the Profits thereof to his own Use, quousque he who was beyond Sea should come and be admitted.

So

So in this Case, after the Infant had made Default, the Lord might enter and take the Profits to his own Use as a Penalty, quousq; the Infant should come and be admitted; and this Course will not be prejudicial to him, because he may have the Lands at any Time when he will be admitted; and 'tis not reasonable that the Lord should lose all the Services of his Tenant without any Manner of Recompence, and here he hath no Tenant to do any Services.

Several Cases were cited, in which Infants were obliged to observe Circumstances, even upon the Penalty of forfeiting their Estates; as where an Infant breaks a Condition annexed to his Estate, or commits Waste, in such Cases 'tis a Forfeiture notwithstanding the Infancy. Whittingham's *Case*, Lib. 8. 44. Latch 199. 2 Roll. Rep. 72. 1 Leon. 100.

On the other Side it was argued, that Infants are always exempted out of general Customs which create Forfeitures; and for an Authority in Point, Sir Richard Letchford's Case was cited, where it was held, that an Infant beyond Sea, or in Prison, is not within this general Custom, for in such Cases the Law implies an Exception. *Econtra* for the Defendant.

That there is a Difference between this Case and Conditions annexed to Estates at Common Law, for in the last Case transit cum onere, and therefore if the Infant will have the Estate, he must observe the Condition upon which it was granted; but in the principal Case there is no Condition annexed to the Infant's Estate.

In Michaelmas-Term following it was argued again for the Plaintiff, and said, that the Nature of a Surrender afforded a good Reason to support his Title; for a Surrender is to no other Purpose, but to give a Fine to the Lord, and that is the only Intention of the Custom to surrender and admit. For the Plaintiff.

'Tis not contended in this Case that the Infant should forfeit his Lands for ever, but only the * Profits thereof till he is admitted; so that the Infant is obliged by the Custom, but not upon the Penalty of forfeiting his Inheritance (as others are), but upon the Forfeiture of the Profits quousq; and so Letchford's Case is good Law, and warrants this Case quoad the Profits. * 2 Cro. 226.

An Infant shall be compelled to attorn upon a Writ of per quæ servitia; and if it had been found to be the Custom, that the Lord might seise the Profits upon the Default of the Infant's Admittance, this had been a good † Custom; 'tis true, the Verdict found that the Lord † Cro. Eliz. 351.

might enter generally for a Forfeiture; but that doth not conclude him from claiming the Profits only; as it was
* 3 Cro. 879. 1 Leon. 1. 1 Inſt. 111. 2 Leon. 209. ſaid in * Butler and Baker's Caſe, (viz.) If a Man diſtrain claiming ſuch a Duty, yet he may avow for another Duty; and the Authorities in the Margin were cited for the Plaintiff; and that Paſch. 29 Car. 2. between Bettilee and the Merchant-Adventurers, it had been adjudged, that the Cuſtom of Foreign Attachment is good in a Corporation, tho' a Body Politick cannot be committed for a Default, according to the Words of the Cuſtom.

Econtra for the Defendant. The Counſel who argued for the Defendant took Exception to the Verdict, (viz.) that the Finding the Cuſtom was not good, for 'tis only found, that the Lord upon ſuch Default had uſed to ſeiſe, but did not ſay how, or to whoſe Uſe, as by Diſtreſs, or for a Forfeiture of the Lands, or the Profits thereof; and that there is a Difference between an Infant who is Heir by Deſcent, and an Infant Purchaſer quoad the Cuſtom, for in the firſt Caſe the Lord wants his Tenant to perform his Services; but in the other Caſe the Surrenderor continues Tenant till the Admittance of the Surrendree.

Beſides, in this Caſe the Surrendree cannot forfeit any Thing, becauſe he had nothing to forfeit; and the Surrenderor cannot forfeit, becauſe the Surrender was lawful, and he was in no manner of Fault; and the Lord had no Injury done to him, becauſe the Surrenderor ſtill continued his Tenant; and the Defendant in this Caſe doth not claim the Lands as a Purchaſer, for when he is admitted, he will be in by Deſcent, becauſe the Surrender was made
Style 46. 2 Sid. 61. to his Father, and his Heirs, where the Word Heirs is a Limitation, and not a Word of Purchaſe, and the Lord may lawfully make a Guardian to the Infant, and ſo admit him by Guardian, and that will entitle him to a Fine; and Whittingham's Caſe differs from this, for there the Infant had committed a wrongful Act, (viz.) he made a Feoffment in Fee, which was executed by Livery by Attorney, and therefore he ought to be puniſhed as he was; and
† Plowd. 359. the Caſe in the † Margin was cited as an Authority in Point.

But by the Opinion of three Judges, the Judgment was affirmed, the Ch. Juſtice Holt being of another Opinion, (viz.) That it was a Forfeiture by the Surrenderor, becauſe he had ſurrendered his Eſtate to one who would

not be admitted, and this Forfeiture ſhall have no Reſpect to the Infant.

That if a cuſtomary Heir by Deſcent will not come in after three Proclamations, to be admitted, the Lord might enter and take the Profits to his own Uſe * quouſq; and he compared this Caſe to a Tenure in Chivalry, where the Lord is to have the Guardianſhip of the Infant quouſq; ſo where an Infant Copyholder makes a Leaſe without Licenſe, this is a temporary Forfeiture, for which the Lord may ſeiſe, &c. quouſq; the Infant ſhall re-enter and avoid the Leaſe; ſo if an Infant Leſſee for Life makes a Feoffment, this is likewiſe a temporary Forfeiture, quouſq; the Re-entry of the Infant. * 1 Lev. 63, 64.

The Judgment affirmed by Three againſt one.

Chetham *verſus* Sleigh. Mich. 1 Jac. II. Rot. 96.

ERROR of a Judgment in the Court of Common Pleas on a Formedon in Remainder, the Caſe was thus: 3 Lev. 67. S. C.

ſſ. Formedon in Remainder againſt the Tenant, who was admitted by Attorney to plead to Iſſue; and on the Day of Niſi prius an Eſſoin was caſt for the Tenant, which was challenged by the Demandant, and thereupon the Tenant demurred, and the Eſſoin was adjourned to a certain Day in another Term; and a ſpecial Imparlance was taken to that Day, at which Day the Tenant appeared by his Attorney, and the Appearance was entered on Record, and the Eſſoin was quaſhed, by the Opinion of the whole Court, becauſe the Tenant in this Cauſe could not be eſſoined when he was admitted by Attorney to plead, and ſo he is out of Court, but 'tis otherwiſe where the Attorney is removed, and his Removal appears on Record; and thereupon the Demandant prayed Judgment final againſt the Tenant, and Judgment was given quod recuperet ſeiſinam, upon which Judgment Error was brought in B. R. Error of a Judgment in a *Formedon* in Remainder, &c.

And it was argued for the Plaintiff in the Writ of Error, that the Eſſoin being quaſhed for Inſufficiency, it ſhall turn to a Default of the Tenant, and thereupon a Petit Cape ought to be awarded againſt him to ſave his Default; and if he doth not come in upon the Return thereof, nor For the Plaintiff.

nor shew any Cause to save his Default, then final Judgment shall be given; but no Judgment at all before the Return of the Petit Cape.

* 40 Ed. 3. 19. *b.* 1 Ed. 3. pl. 1, 2. 2 Ed. 4. 15, 16. 11 H. 4. 87. 9 H. 5. 12.

And the Cases in the * Margin were cited to prove, that an Essoin challenged, adjourned, and adjudged against him for whom it was cast, shall turn to a Default, upon which a Petit Cape shall be awarded, and not a Judgment final.

Dyer 115, 341, 353. 11 Rep. 39. 1 Cro. 517. W. Jones 412. 1 Roll. Abr. 797. Kelw. 41. 3 H. 4. 4.

Moreover this Diversity was taken, that upon the Default of the Tenant at a certain Day given by a special Imparlance, a Petit Cape shall be awarded, if upon such special Imparlance the Tenant is out of Court, and not demandable till the Day appointed; but 'tis not so upon a Default on a general Imparlance, without any certain Day, for there the Tenant is supposed to be in Court, and demandable at all Times; therefore if he make Default upon any Demand, Judgment final shall be given, because this is a Departure in Despite of the Court; and to this Purpose is the Practise and Entry of all Common Recoveries, (viz.) After the Vouchee hath entered into Warranty and pleaded to the Disseisin, &c. the Demandant petit licentiam interloquendi & habet, &c. & postea ad eodem Termino idem (the Demandant) revenit in Curia, and the Tenant being solemniter exactus non venit sed in contemptum Curiæ recessit, &c. Ideo consideratum, &c. quod recuperet.

Yelv. 211. 2 Cro. 292. 1 Bulst. 159, 161. 5 Rep. 86, Penrin's *Case*. 1 Inst. 295. *b.* 9 H. 6. 58. *b.* 10 H. 6. 24. *a.* 12 H. 7. 10. *b.*

Afterwards, in Michaelmas-Term following, it was farther argued for the Plaintiff, that an Essoin is in Nature of an Excuse for the Non-appearance of the Party at a Day given, and a *Default is the Non-appearance at that Day; and that there are two Sorts of Defaults, the one before and the other after Appearance; there is also another Default, but improperly so called, (viz.) where upon a general Imparlance the Party makes Default when he is demanded; now this is a Departure in Despite of the Court, upon which Judgment final shall not be given, but a Grand Cape upon a Default before Appearance, and a Petit Cape upon a Default after Appearance; and so it ought to be in this Case.

* See 1 *Inst.* 259. *b.* where the several Excuses to save a Default are enumerated; and 1 *Inst.* 134. *b.* what great Favour is shewn to the Possessors of Lands, whereby to maintain their Possession.

Besides no Person shall be received at any Time to save his Default, but upon the Return of a Process; and therefore the Entry, that the Tenant was demanded, is insignificant; because he can make no Answer till the Petit Cape is returned; for if the contrary should be allowed then a Feme, or a Reversioner would have no Time to be received to defend their Right upon the Default of the Tenant. 7 H. 4. 14 a.

There is a Difference between an Imparlance to a certain Day, and a general Imparlance; for upon Default at the Day, a Petit Cape shall only be awarded; but in the last Case Judgment Final shall be given, because 'tis a Departure in Despite of the Court.

And the Reason is, because the Term is accounted in Law but as one Day; and therefore he cannot appear, and likewise make Default in one Day.

The Cases cited in the Margin are to prove, that in a Writ of Right, where the Issue is joined upon the meer Right, a Default after such Issue joined is Final; but the Principal Case was upon a Formedon, and so there is a Diversity. 10 H. 6. 7. 7 H. 4. 19. Dyer 98. 5 Rep. 85. 2 Cro. 219. 2 Sand. 46. 1 Inst. 294.

It was argued for the Defendant, that this Essoin was illegal, and 'tis admitted, that it turned to a Default; and that it being at the Day of Nisi prius makes it different from the common Cases of this Nature; and the Cases in the Margin were cited to prove, that a Default is Final after Issue joined; and that the Judgment shall not be Final upon a Default at the Day of adjouring the Essoin, if the Party will waive his Essoin; but if he will stand to the arguing it, and the Essoin is adjudged insufficient, 'tis otherwise. *Contra* for the Defendant in Error. Fitz. Abr. 151, 152, 294. Dyer 56. 1 Inst. 295. Co. Entr. 171. 2 Cro. 35. 2 Sand. 45.

This Case was argued again in Hillary-Term, Anno 1 & 2 Willi' & Mariæ, and for the Plaintiff in Error it was farther argued, that the Challenge of the Essoin was ill, because it is not averred, that the Tenant's Attorney non fuit amotus; for the Form of Entries in such Cases is so.

It was agreed, that in a Writ of Right, if the Issue is joined on the mere Right, and then the Tenant makes Default, Judgment Final shall be given, which is against the Resolution in Penrin's Case; but 'tis not so, if the Issue is joined upon a collateral Matter; and after the Tenant hath made Default in a Writ of Right, the Petit Cape shall be awarded; and to prove this Matter; the Authorities in the * Margin were cited. Rast. Entr. 584, 585. 21 Ed. 4, 5. 2 H. 5. 3. 11. 11 H. 4. 87. 14 H. 4. 16. Keilw. 135. * 39 H. 6. 16, 17.

1 Inst. 294. F. N. B. 12. a. Dyer 301, 302. Co. Ent. 182. Bro. Tit. Droit, pl 4.

Then

Then an Objection was made to the Continuance by Curia adviſare vult, which was from 15 Trin. to Octab. Hillarii, omitting all Michaelmas-Term, and therefore 'tis a Diſcontinuance, and the Caſes in the * Margin were cited to prove this Omiſſion to be a Diſcontinuance.

* Roll. 1. Abr. 484. Bendl. 147, 151.
3 Cro. 619. Stiles 209, 389.

Contra for the Defendant.

It was farther argued for the Defendant, that it was not neceſſary to aver in the Entry of the Challenge of the Eſſoin, that the Attorney was not amotus, it being only Matter of Form which ought to come on the other Side; as where a Fine is pleaded, 'tis not neceſſary to aver, that the Cogniſor was not an Infant, nor in Priſon, nor beyond Sea, at the Time of the Fine levied; for if the Fact is ſo, it ought to come on the other Side; and as to this Point the Court was of that Opinion.

And it was farther ſaid, that by a Judgment on a Default in a Writ of Right, the Tenant is not concluded; for he may bring a Writ of Right (if he hath any) upon the Statute of Weſt. 2. cap. 4. and the Caſes in the * Margin were cited for Authorities in Point; and for the Reaſons aforeſaid, it was concluded by the Counſel, that Judgment in this Caſe was well given without any Regard had to a Petit Cape.

See Bract. 366. 2 Inſt. 349. * 12 H. 4. 14. b. 14 H. 4. 12. 14. 21 Aſſ. pl. 17.
Regiſter 114. *a.* F. N. B. 99. 2 Cro. 35. 2 Sand. 45.

Holt Chief Juſtice held, that the Entry of the Challenge was good without the Negative Averment, that the Attorney non fuit amotus, and to prove it, he cited the Caſes in the * Margin; and as to the Continuances, and the Adjournment of the Eſſoin from Trinity to Hillary Term, omitting Michaelmas-Term, this may be done by Virtue of the Statute † 32 H. 8. by which 'tis enacted, That the Juſtices of the King's Courts of Record may aſſign ſpecial Days of Return, in ſuch Caſes and Proceſſes as have uſed to have ſpecial Days aſſigned.

* Co. Ent. 225. 1 Cro. 500.

† 32 H. 8. cap. 21.

Curia.

And all the Court agreed, that the Judgment in the principal Caſe ſhould be affirmed, for this Reaſon, (viz) becauſe the Tenant upon the Challenge of the Eſſoin had demurred; and alſo appeared at the Day of the Adjournment of the Eſſoin, to juſtify his Demurrer, and ſo had betaken himſelf wholly to that Juſtification, by which he had peremp-

peremptorily waved and refused the Advantage of saving his Default; and therefore they held, that this Default after the Demurrer and Appearance was not savable; and if so, it would be in vain to award a Petit Cape to save a Default which was not to be saved.

But if the Essoin had been quashed upon the Challenge without any Demurrer of the Tenant, in such Case they were clear in Opinion, that a Petit Cape ought to be awarded, and not Judgment of Seisin; but that was not the Case at Bar, which differs from all the Cases cited, where upon a Default after Issue joined, a Petit Cape had been awarded.

And thereupon the Judgment of the Court of Common Pleas was affirmed.

Brook *versus* Cock.

DEBT upon an Escape against the Sheriffs of London, in which the Plaintiff declared in the Debet and detinet, as followeth: Shower 57.

Ss. That the Plaintiff, alias per nomen Eliz. Brook executricis test'i T. S. levied a Plaint in the Sheriffs Court against one J. N. and had Judgment to recover so much for Debt and Damages; and to execute this Judgment, she sued out a Ca. sa. by Virtue whereof J. N. was taken, and in Custody of the Defendants, and that they permitted him to escape, the Plaintiff being not satisfied. Where an Executor brings an Action in the Right of the Testator, it must be in the *Detinet* only.

The Exception to this Declaration was, that the Action was brought in the Right of the Testator, and whatever should be recovered, would be Assets in the Hands of the Plaintiff as Executrix; and therefore the Action ought to be brought in the * Detinet only; because the Judgment appears to be had in the Right of the Testator; and to prove this Matter, the Authorities in the † Margin were cited in Point. † 2 Cro. 545. Hob. 264. Rast. Ent. 170. a. Cro. El. 326.

But on the other Side, the Counsel endeavoured to shew a Difference between the Cases cited, and this at Bar; because in this Case the Plaintiff had counted generally, and not as Executor, (viz.) Eliz. Brook queritur de Econtra.

* *Nota*, The Precedent in *Rastal* 170. *a.* agrees with the Declaration in this Case, yet there it was the *Detinet* only.

See *Sid.* 379. Debt against an Administrator in the *Debet* and *detinet*; and adjudged that it was aided by the Statute 16 *Car.* 2. *cap.* 8. Sid. 342. 4 Rep. 35. *Plater's* Case. 5 Rep. *Walcot's* Case fo. 36. *contra.* 1 Lev. 224.

T. Cook, &c. de placito quod reddat ei ſo much, quas ei debet & injuſte detinet, ſo that ſhe declared in her own Right, and though ſhe farther declared, that ſhe had recovered in the Sheriffs Court per nomen E. B. Executricis, &c. this is Surpluſage, and not neceſſary to be inſerted; and therefore the Verdict and Recovery ſhall be taken to be in her own Right, and if ſo, the Action is well brought in the Debet and Detinet.

Curia. But the Court was of another Opinion, (viz.) that it was not neceſſary for the Plaintiff to name her ſelf Executrix in the Title of this Action; but that it was abſolutely neceſſary, that in declaring upon the Recovery ſhe ought to alledge as it was in Fact, (viz. as Executrix) otherwiſe there would be a Variance in the Record, and this very Action ought to purſue the very ſame Courſe with
20 H. 6. 5, 6. the firſt, for 'tis meerly in the Right of the Teſtator.

Lydcott *verſus* Willows.

4 Mod. 229. S. C.
2 Vent. 285. S. C.

ERROR in the Exchequer-Chamber upon a Judgment in B. R. the Caſe was,

Deviſe of an Houſe to one for Life, and all his Meſſuages, &c. to his Heirs for ever; adjudged that the Reverſion in Fee of the Houſe paſſed.

If. The Teſtator being ſeiſed in Fee, deviſed ſuch an Houſe by Name to T. S. and E. G. and the Survivor of them, for their Lives; and afterwards by a general Clauſe in the ſame Will, he deviſed All his Meſſuages, Lands, Tenements and Hereditaments whatſoever in the Kingdom of England, (not above diſpoſed of) to J. N. and his Heirs for ever; and the Court of King's Bench held, that by this general Clauſe the Reverſion of the Houſe deviſed to T. S. and E. G. for Life, did not paſs, and gave Judgment accordingly.

The Serjeant adds a Nota, that theſe were King James's Judges.

For upon the firſt opening this Cauſe to the preſent Court, 1 Will. it was held, that the Reverſion paſſed; and afterwards Mich. 1 Will. the Caſe was moved again, where the Deviſe was, ut ſupra, to two, and the Survivor, for Life, and to enable his Wife (whom he made Executrix) to pay his Debts and Legacies, he deviſed to her all his Lands, Tenements and Hereditaments (not diſpoſed of) to hold to her and her Heirs for ever; he alſo deviſed to his Heir at Law 20 l. per ann. ſo that having taken Notice of him, the Intent was more apparent, that his Wife ſhould have the Reverſion in Fee of the Houſe.

Allen 28. cited to be in Point.

Whereupon all the Judges and Barons were of one Opinion, (viz.) that the Reverſion in Fee paſſed by thoſe Words.

The Judgment was reverſed.

Brown *verſus* Farndell *and* Shore. Paſ. 1 Willi' & Mariæ, B. R. Rot. 90.

Shower 25. The Siſter of the Half-Blood ſhall have an equal Diſtribution with a Brother of the whole Blood.

THE Caſe was, one Brown (who was Brother of the whole Blood to the Plaintiff Brown) died Inteſtate, and without Iſſue, and the Wife of Farndell, one of the Defendants, was his Siſter of the Half-Blood, and Adminiſtration of all the Goods of the Inteſtate was committed to Brown the Plaintiff; and afterwards within the Year, after the Death of the Inteſtate; and before any Diſtribution of the Goods, &c. the Wife of Farndell died, and thereupon he libelled in the Spiritual Court (before Dr. Shore) to have Letters of Adminiſtration granted to him of Part and Share of the Goods of Brown the Inteſtate, which belonged to his Wife in her Life-time, as his Siſter of the Half-Blood, according to the * Diſtribution of Inteſtates Eſtates, and thereupon Brown moved for a Prohibition; and a Rule was made for a Prohibition, and that the Plaintiff ſhould declare upon it to have the Matter in Law come in Judgment.

*22,23 Car. 2. cap. 10.

And accordingly Brown (the Plaintiff) declared and ſet forth all this Matter, and the Statute of Diſtribution of Inteſtates Eſtates, and particularly that Paragraph by which the Manner of Diſtribution amongſt Collaterals is directed; and alſo that Paragraph by which 'tis enacted, that no Diſtribution ſhall be made till a Year is fully expired after the Death of the Inteſtate; and moreover ſuggeſted, that the Conſtruction of the Statutes belonged to the King in his Temporal Courts, and not to the Spiritual Court, and that the Defendant, notwithſtanding, &c. had proceeded there, &c.

And upon a Demurrer to this Declaration, two Points were made, argued and adjudged.

(1.) Whether the Siſter of the Half-Blood to the Inteſtate ſhould have an equal Diſtribution with the Brother of the whole Blood.

1 Mod. *cited and allowed for good Law.* 2 Mod. 205. 1 Vent. 307. T. Jones 93.

And it was adjudged that ſhe ſhould; for the Words of the Statute are, to every of the next of Kindred of the Inteſtate, who are in equal Degree, and the Siſter of the

Half-Blood is in equal Degree of Kindred to the Inteſtate with the Brother of the whole Blood, for the one is his Siſter and the other his Brother.

(2.) The ſecond Point was upon Conſtruction of that Paragraph by which 'tis enacted, that no Diſtribution ſhall be until after one Year after the Inteſtate's Death; if any Right or Intereſt is veſted and fixed in the Parties, who are entitled to any Shares before Diſtribution is actually made; or whether 'tis wholly in Contingency, in which they had nothing at preſent, but only a Poſſibility if they ſurvive the Year.

And as to this Point it was adjudged by all the Court, that an Intereſt was veſted and fixed in the Parties entitled to have any Shares immediately after the Death of the Inteſtate, and the Statute doth not make any Suſpenſion or Condition precedent to the Intereſt of the Parties, for that Clauſe is meerly for the Benefit of Creditors, and doth not relate to the Intereſt of the Parties, &c.

And the Court held this Statute to be in Nature of a Will, for all Perſons who ſhould die Inteſtate, and therefore they reſembled this Caſe to that of a Reſiduary Legatee; for if ſuch a Legatee die before the Debts are ſatisfied, ſo that it doth not appear to how much the Surplus will amount; yet the Executor or Adminiſtrator of ſuch a Legatee ſhall have the whole Reſidue, &c. which remains over, &c. and not the Executor of the firſt Teſtator.

1 Leon. 277. Dyer 59. So in the Caſe where a Sum of Money is bequeathed to T. S. to be paid when he is of the Age of twenty-one Years, and he dies before that Time, his Executor ſhall have the Legacy.

So in the principal Caſe an Intereſt was veſted in the Wife of Farndell, immediately upon the Death of Brown the Inteſtate; and therefore, tho' ſhe died before the Time of Payment, yet the Adminiſtrator of the Inteſtate ſhall have no Benefit thereof, for it ſhall go to the Adminiſtrator of the Wife; and Farndell her Husband having the Right of Adminiſtration to her, the Suit in the Spiritual Court is proper for him to have it granted.

Thereupon a Conſultation was granted.

Nota, In the Argument of this Caſe it was held, that if a Man dies Inteſtate, leaving only one Child, that ſuch Child is within the Statute of Diſtribution, and that 'tis not caſus omiſſus.

Simpſon *verſus* Merrill & al'. Mich. 4 Jac. II. B. R. Rot. 370.

TReſpaſs for Breaking his Houſe and Taking away his Goods; there was Judgment againſt ſome of the Defendants by Default, and the other juſtified, for that the Hundred of D. &c. is an antient Hundred, and that a Court from three Weeks to three Weeks, Time out of Mind, had been held within this Hundred, and that before the Treſpaſs, &c. King Charles the Second was ſeiſed of this Hundred in Fee, in jure Coronæ, &c. and long before the Time, &c. made a Leaſe thereof by Letters Patents, to Katherine, now Queen Dowager, for Life; and that before the Treſpaſs, (viz.) on ſuch a Day, and at ſuch a Court, the Plaintiff entered a Plaint there againſt T. S. (one of the Defendants) in Treſpaſs upon the Caſe, upon which Plaint, * Taliter proceſſum fuit in eadem Curia ſecundum conſuetudinem Curiæ quod poſtea ſcilicet ad Curiam, on ſuch a Day, ſecundum conſ. &c. conſideratum fuit per eandem Curiam quod prædict. T. S. recuperet againſt the now Plaintiff 9 s. 4 d. pro miſ. & cuſtagiis ſuis, quia the Plaintiff non proſecutus fuit querelam ſuam prædictam ſuper quo judicio præceptum emanat. fuit ſub ſigillo Roberti Domini Ferrers Seneſchalli Curiæ prædict. ſigillat. ſecundum conſ. eidem Merrill Ballivo & miniſtro Curiæ, &c. direct. per quod mandatum fuit, &c. quod levari faceret the aforeſaid 9 s. 4 d. on the Goods of the Plaintiff, whereupon he, on the Day and Year in the Declaration mentioned, entered into the Houſe of the Plaintiff, the Doors being open, &c. and within the Juriſdiction of the Court, and took the Goods to the Value of 9 s. 4 d. and afterwards at another Court, &c. he returned his Precept ſerved, and the other Defendant came in Aid, &c.

2 Lutw. 1369. S. C. Judgment in an inferior Court pleaded by *Taliter proceſſum fuit*, good.

* This ſhort Way of Pleading of a Judgment in an Hundred-Court, held good. 2 Lev. 81. See 3 Lev. 403. which was a Juſtification in Treſpaſs where it was pleaded, that the Plaintiff was indebted to *T. S.* within the Juriſdiction of the Court of Record of *Bury St. Edmonds*, and that for Recovery of the ſaid Debt, *T. S. implacitaſſet* the Plaintiff in that Court, & *invenit pleg. de proſ. &c. Taliterque ſuperinde proceſſum fuit*, that *poſtea, &c.* he obtained Judgment; this was held good upon a Demurrer.

And upon a Demurrer to this Plea it was objected againſt it, that ſuch a general Pleading of a Judgment in an inferior Court, and not of Record, by Way of Taliter proceſſum fuit, is not good, but that the Defendant ought to ſet forth all the Proceedings in certain, for the Pleading by

12 H. 6. 3. *b.* Co. Ent. 87. 2 Mod. 102, 195.

by (A) a Taliter proceſſum fuit, is only allowable where Judgment is obtained in a ſuperior Court at Weſtminſter, or at leaſt in an inferior Court of Record, and not an inferior Court not of (B) Record, for the Court of B. R. hath very little Regard to the Proceedings of thoſe Paper-Courts; therefore their Proceedings ought to be ſet forth, that this Court might judge whether they are regular, or not, for they are traverſable, and it ſhall be tried by a Jury.

(2.) It was likewiſe objected, that the Defendant had not ſet forth how the Lord Ferrars came to be Steward of this Court, ſo that no Authority is alledged in him ſufficient to award a (C) Precept.

22 Aſſis pl. 72. 4 H. 6. 17. 7 H. 4. 17. Old. Ent. 167. Noy 17.

(3.) And laſtly, it was objected, that a (D) Levari facias doth not lie to execute a Judgment given in an Hundred-Court; for the Proceſs to Execution there, is a Diſtringas in infinitum. Adjournatur.

Orbell *verſus* Ward. Hill. 3 & 4 Jac. II. Rot. 1018.

3 Mod. 267. S. C. 1 Salk. 59. S. C.

In an Appeal of Murder, the Defendant cannot plead *per Attornatum*, for 'tis a Diſcontinuance.

IN an Appeal of Murder brought by the Wife for the Murder of her Husband Iſaac Orbell, the original Writ of Appeal was in this Form:

ſſ. Georgius Ward nuper de Paroch. Sancti Jacobi Weſtmon' in Com. Middleſex attachiatus fuit, &c.

The Defendant in propria perſona venit, and demanded Oyer of the Writ and the Return, which was entered in hæc verba, and the Return was thus endorſed: Executio iſtius Brevis patet in quadam ſchedula annex': Reſponſ. Baſil Firebraſſe Mil. & Johannis Parſons Mil. Vic. Com. præd. the Schedule was thus:

ſſ. Ego B. F. & J. P. Vic. Com. præd. Domino Regi humillime certifico quod ego attachiavi prædict. G. Ward ſecundum

(A) This ſhort Way of pleading Judgments in an *Hundred-Court*, held good. 2 *Lev.* 81. *Co. Ent.* 87. See *Yelv.* 67. 2 *Mod.* 102, 195.

(B) Adjudged, that this general Way of Pleading the Proceedings in a Court not of Record, is ill upon a Demurrer. 2 *Vent.* 100.

(C) Adjudged ill, becauſe not ſet forth by whom the Precept was awarded, and that it was likewiſe ill, becauſe not ſhewn that the Cauſe of Action did ariſe within the Juriſdiction: *Sed Quære* of this laſt Objection.

(D) In 2 *Lev.* 81, 82. it was held, that this Proceſs of *Levari facias* was good, and that by a *Diſtringas* in ſome of the old Books, a *Levari* is intended.

exigentiam Brevis prædict' & habui corpus ſuum in Cuſtodia mea until ſuch a Day, on which an Habeas Corpus was directed to me, &c. whereupon I brought the Body, &c. before the Chief Juſtice, &c. at his Chamber in Serjeants-Inn, and the ſaid Chief Juſtice took the Body, &c. from me, and diſcharged me thereof, by Reaſon whereof I cannot have it here, &c.

Nota, The Sheriffs Names were not ſubſcribed to the Return, Quibus lectis & auditis prædict' G. Ward per Chriſtophorum Guiſe attorn' ſuum venit & defend', &c. & petit judicium de Brevi prædict', becauſe he is named in the Writ G. Ward de paroch' ſancti Jacobi Weſtm' in Com' Midd' ubi revera & in facto there is ſuch a Pariſh as the Pariſh of St. James infra libertatem Weſtm', but no Pariſh or Place known by the Name of St. James Weſtminſter alone, prout, &c. & hoc, &c. unde petit judicium de Brevi; but did not plead over to the Felony, as is uſual in ſuch Caſes.

And upon a Demurrer it was objected, that a Defendant in an Appeal could not plead per Attornatum; but always ought to appear and plead in propriâ perſonâ. 2 Inſt. 313.

To which it was anſwered, that the Defendant did appear in propria perſona, and the Entry is ſo before he demanded Oyer; therefore the following Words, (viz.) per Chriſtophorum Guiſe attornatum ſuum are Surpluſage and void; ſo that the Pleading is then in propria perſona. 2 Sand. 95.

(2.) It was objected, that the Defendant had not pleaded over to the Felony, which he ought to do; and that he ought not to conclude in Abatement without ſaying more, as he had done in this Caſe; and ſo are all the Precedents in Raſtall and Coke's Entries, where the Defendants in Appeal plead Matter in Abatement. 3 Cro. 699. Yel. 12, 13.

To which it was anſwered, and firſt it was admitted, that it was uſual to plead over to the Felony in ſuch Caſes, but 'tis not neceſſary, ſo that for Default thereof the other Plea ſhould be ill; for 'tis but reaſonable that the Defendant in this Caſe, where Life is concerned, ſhould have the ſame Privilege that all other Defendants have in civil Actions, and for Authorities in this Matter the Caſes in the * Margin were cited. * Broke Appeal 66. Co. Ent. Tit. Appeal.

It was farther objected, that the Return of this Writ was inſufficient as entered on Record, for the Default of the Sheriffs Names ſubſcribed; for the Words, Reſponſ. B. F. & E. P. vic', &c. on the Back of the Writ, are not ſuf-

ſufficient; but their Names ought to be ſubſcribed within the Return it ſelf, (viz.) at the Bottom of the Schedule, which is ſtrictly required by the Statute of * York, by which 'tis enacted, that the Sheriffs ſhall ſet their Names to their Return, in Pain to be grievouſly amerced to the King's Uſe.

* 12 Ed. 2. cap. 5.

Curia. The Chief Juſtice held, that upon ſuch a Plea in Abatement without Pleading over to the Felony, the Court ought to have been moved to enforce the Defendant to plead over, or at leaſt the Plea ſhould be refuſed; but that the Plea in the principal Caſe was not ill upon a Demurrer, that the Defendant is not obliged in this Caſe to plead over the Felony, no more than a Defendant in an Appeal, who pleads a ſpecial Bar as a Releaſe, or Autrefoits acquit; and it was adjudged in Parliament, in a Caſe where the Defendant pleaded a Pardon in Bar, that it was not neceſſary to plead over to the Felony; and it was held in this Caſe, that if a ſpecial Bar is adjudged againſt the Defendant, he ſhall not be concluded by it, but he ſhall afterwards have Liberty to plead over to the Felony.

That the Pleading by Attorney was a Diſcontinuance; for in this Caſe, the Defendant could not make an Attorney; and therefore this is a Plea by a Stranger, and in Effect 'tis no Plea; and therefore ought not to be received by the Appellant; but the Plaintiff ought to move the Court for Judgment againſt the Defendant; for 'tis as if he had ſtood Mute, and ſo the Appellant ought to do in Caſe the Appellee plead in Abatement, and doth not plead over to the Felony; but the Plea being accepted by the Plaintiff; 'tis therefore good without Pleading over, &c.

And ſo is the Return of the Schedule without the Names of the Sheriffs ſubſcribed; for their Names on the Back of the Writ is ſufficient.

That a Diſcontinuance in this Action is peremptory to the Plaintiff, and ſo Judgment was given, that the Writ ſhould abate.

4

Jordan

Jordan *verſus* Powell. Trin. 4 Jac. II. B. R. Rot. 595.

Action by an Attorney, the Defendant pleaded the Statute, that the Plaintiff had not delivered in a Bill of Charges ſigned by him; *per Curiam* the Statute extends only to Fees for Counſel.

THE Caſe was, ſi. The Plaintiff (per Tho. Hancock) his Attorney, brought his Action againſt the Defendant, and declared in Aſſumpſit upon three Promiſes; the firſt was in Conſideration of Work done, and for proſecuting and defending ſeveral Suits in B. R. C. B. and in Chancery, by the Plaintiff (as Solicitor, &c.) at the Requeſt of the Defendant; the Second was upon an executory Conſideration to proſecute and defend Suits, and alledging a Performance; and the Third was upon a general Inſimul computaſſet.

The Defendant pleaded ſpecially, (viz.) That if thoſe Promiſes, or any of them, were made by the Defendant to the Plaintiff, prout, &c. they were made that the Plaintiff ſhould be his Attorney and Solicitor for proſecuting and defending all Suits in the Courts at Weſtminſter, & non aliter; and he likewiſe pleaded the Statute 3 Jac. 1. by which 'tis enacted, That an Attorney or Solicitor ſhall not be allowed any Fees laid out for Counſel or otherwiſe, unleſs he have Tickets thereof ſigned by the Hand of them that receive ſuch Fees; and he ſhall alſo give unto his Client true Bills of all the Charges of Suit under his own Hand, before he can charge his Client with Payment thereof; and avered that the Plaintiff had not delivered to him any Bill of Charges, *&c.* ſubſcribed with his own Hand.

3 Jac. 1. cap. 7.

And upon a Demurrer to this Plea the Plaintiff had Judgment without any Argument, becauſe the Statute extends only to Money due for Fees; and here the Defendant had pleaded generally to all the Promiſes laid in the Declaration, and one of them being an Inſimul computaſſet, in which other Money may be included; and ſo if the Defendant would have the Benefit of the Statute, he ought to have pleaded, quoad the two firſt Promiſes, and not generally to all, as he had done.

Judgment for the Plaintiff.

The King *verſus* Martin.

Seſſions confirmed a Poor-Rate, but did not ſet forth, that it came to them by an Appeal.

THE Quarter-Seſſions in Devonſhire made an Order, reciting, that the Overſeers of the Poor of ſuch a Pariſh, had made a Rate by particular Aſſeſſments on the Inhabitants, for the Maintenance of the Poor of that Pariſh for a Year, by which Order they confirmed that Rate; but there was no Recital of any Appeal to them in Seſſions from an Order of two Juſtices, to whom the original Juriſdiction of confirming Rates for the Poor is given by the Statute 43 Eliz. cap. 2.

Now this Order of Seſſions being removed into B. R. it was moved to quaſh it; for that they had taken upon themſelves beyond their Juriſdiction, (viz.) the original Conuſance of Rates to the Poor, with which they have nothing to do, but upon an Appeal, and therefore this Order is void.

Econtra.

But on the other Side, the original Rate made by the Overſeers was produced, and it appeared to be actually ſigned by two Juſtices, and Martin's Appeal to the Seſſions endorſed thereon; and ſome Affidavits were read of the Truth of that Matter, notwithſtanding no Mention was made thereof in the Order of Seſſions, urging alſo, that Martin, who removed the Order, was a litigious Perſon, and refuſed to pay any Proportion towards the Relief of the Poor.

But the Court quaſhed the Order, becauſe by the Statute the original Juriſdiction in this Matter is given to the two next Juſtices; and the Seſſions have no Power, but upon an Appeal of the Party grieved, and therefore 'tis neceſſary that the Appeal ſhould be mentioned in the Seſſions Order, otherwiſe it muſt be taken, that they acted without any Power; and no collateral Averments in Affidavits can help this Defect, becauſe the Authority of the Seſſions muſt appear in the Order it ſelf.

Boſon *verſ.* Sandford. Hill. 1 & 2 Jac. II. B. R. Rot. 302.

3 Lev. 268. S. C. 3 Mod. 321. S. C. 2 Salk. 440. where Goods

IN a ſpecial Verdict, &c. the Caſe was thus:

If. Boſon being a Mercer in Exceſter, brought a ſpecial Action of Treſpaſs on the Caſe againſt Sandford, and Se-

S. C. Action may be brought either againſt the Maſter or Owners of a Ship are taken to freight, and damaged.

ben others, being Part-Owners of a Ship, in which Goods and Merchandize were uſually tranſported from London to the Port of Topſam near Exceſter, and declared as followeth:

ſſ. Quod cum Joſephus Boſon (on ſuch a Day and Year) at London in ſuch a Pariſh and Ward deliberaſſet & oneraſſet, Anglice, had laden on Board, in & ſuper quandam Navem, vocat. le Companies Adventure of Exon. unde ipſe idem Willielmus Sandford (and the Seven others) adtunc & ibidem fuerunt proprietarii ac in qua quidem Nave bona & mercimonia perſonarum carriationem inde requiren' communiter carriat. & tranſportat. fuerunt pro rationabili naulo & ſallario diverſa bona & mercimonia ipſius Joſephi Boſon (viz.) Viginti & duas pecias ſerici undulat. Anglice, Camlets, (and divers other Merchandizes in particular) ad valentiam 100 l. in bono ordine & bene conditionat. a London prædict. uſq; ad portum Topſham in Com. Devon. in nave illa pro eodem Joſepho Boſon (periculis marium exceptis) ſalvo tranſportand. pro rationabili naulo & ſalario per ipſum Joſephum Boſon eiſdem Willo' Sandford (and the Seven others) pro hujuſmodi carriation. & tranſportation. eorundum ſolvend. & iidem Will'us Sandford (and ſeven others) eadem bona & mercimonia ipſius Joſephi Boſon in nave prædict. ſub cuſtodia ſua ex cauſa prædicta tunc & ibidem habuerunt & receperunt, & ad illa tranſportand. in nave prædicta in forma prædict. ſuper ſe ſuſceperunt prædicti tamen Will'us Sandford (and the Seven others) officium ſuum in ea parte minime curantes ſed machinan. & fraudulenter intenden. eundem Joſephum Boſon in hac parte injurare decipere & defraudare licet periclis marium non impedit ſed navis prædict. ad portum de Topſham prædict. in tecto arrivavit bona & merchandiſa prædict. in tali bono ordine & bene conditionat. qual. eadem fuerunt tempore deliberationis & onerationis inde in & ſuper navem prædict. eidem Joſepho Boſon non deliberaverunt ſed bona & merchandiſa prædict. tam negligenter & improvide locaverunt & cuſtodiverunt in nave prædict. in Viagio prædict. quod in defectu ipſorum Willi' Sandford (and the Seven others) & ſervien. ſuorum bona & merchandiſa illa per aquas maritimas in eadem nave venien. madefacta ſpoliat. & damnificat. fuerunt & nullius valoris ſive uſus eidem Joſepho devener. Idemq; Joſephus diverſa grandia Lucra commoda & proficua quæ ipſe cum bonis & merchandiſis prædictis vendend. liciteq; barginaſand. acquirere & lucrare potuiſſet totaliter perdidit & amiſit unde idem Joſephus Boſon

dicit quod ipſe deteriorat. eſt & damnum habet ad Valentiam 150l. & inde producit ſectam, &c.

The Defendants pleaded jointly Not guilty, and the Jury found a ſpecial Verdict to the Effect following:

ſi. They find, that Joſeph Boſon, in the Year and Place aforeſaid, did deliver and load in and upon the Ship called, &c. in the ſaid Declaration mentioned, of which Ship the ſaid William Sandford, and the Seven others, were then and there Partners; they find that in this Ship the Goods of Perſons requiring Carriage had been uſually carried for a reaſonable Salary, and that the Plaintiff delivered the Goods in the Declaration mentioned on board the Ship in good Condition, and that they were to be tranſported ſafely from London to Topſham, for a Salary to be paid by the Plaintiff to the Defendants, upon which Account the Goods were received into the Ship.

They find that one Daniel Hurd was Maſter of the ſaid Ship, and the Goods were delivered to him, none of the Defendants being then preſent; they find that there were ſeveral other Partners of the ſaid Ship, (viz. &c.) at the Time the Goods in the Declaration mentioned were put on board; they find that the Plaintiff did not know, but was always ignorant who were the other Partners.

They find that the Ship arrived ſafely at Topſham, without any Danger of the Sea, and that the Goods were ſpoil'd by Negligence modo & forma prout, &c.

They find that the Defendant, and the other Partners, have been always ready in the ſaid Ship to tranſport Merchandizes from London to Topſham and back again, for a Salary, according to the Rate of 16 s. per Tun-Weight, and that the ſaid Daniel Hurd, who was Maſter of the ſaid Ship, had only ſix Pounds for every Voyage, for his Wages of the Defendant, and the other Owners, and ſo concluded ſpecially.

There were two Points made in arguing this ſpecial Verdict.

(1.) Whether the Verdict had * abated the Bill by finding there were ſeveral other Partners of the Ship not named, &c.

(2.) The ſecond was, Whether the Plaintiff had miſtaken his Action, having brought it againſt the Owners of the Ship, when only the Maſter is chargeable.

As to the firſt Point it was argued, that the Defendants had loſt that Advantage which they might have had by their Pleading

* 26 H. 8. 5. Where Matter is pleadable in Abatement, the Party loſes the Benefit of it, if he pleads to Iſſue.

Pleading to this Action, because they did not plead the Matter in Abatement; and as for that Purpose, the Case was compared to an Action against one Executor where there are more; if that one Executor doth not plead that Matter in Abatement, but pleads to the Action, he shall never have the Advantage of such a Plea afterwards; so where Trespass is brought by one Jointenant, or by one Tenant in Common, and the Defendant pleads to the Action, and the Jury finds specially, that another (not named) is Jointenant or Tenant in Common with the Plaintiff, yet he shall have Judgment, notwithstanding the Writ at first was abateable; and so it was adjudged in the † Cases cited in the Margin; so where an Action of Debt is brought on a joint Bond, against one of the Obligors; and upon Non est factum pleaded, the Jury find that T. S. (then living) was jointly bound with the Defendant, yet the Plaintiff shall have Judgment.

† Cro. Eliz. 554. Moor 466. 1 Mod. 102.

'Tis true, if this Matter had been pleaded in Time, it would have abated the Writ; and so it was adjudged in * Whelpdale's Case, for which Reasons it was insisted, that the Defendant had lost that Advantage by Pleading to the Action.

* Rep. 119. a. 2 Cro. 152. Stead *versus* Moon.

(2.) 'Tis to be considered what Relation there is between a Master and a Servant, for the Jurors have found, that Daniel Hurd, Master of the Ship, was only Servant to the Defendant for a certain Salary, and to shew the strict and reciprocal Relation between them, the Cases in the [a] Margin were cited; and how the Acts of the Servant will [b] affect the Master; and to prove that the Master is chargeable for the Contracts of his Servant, the Cases likewise in the [c] Margin were cited:

[a] 11 H. 6. 16. 21 H. 7. 39, 40.

[b] Dyer 161. 2 Cro. 47. Dr. & Stud. 137.

[c] Plowd. 11. Litt. Rep. 374. 3 Cro. 711. 12 H. 8. 46. 9 H. 6. 53.

Which Cases were applied to the principal Case; for Hurd, the Master of the Ship, was the Defendant's Servant, and his Labour was for their Benefit, and by Consequence his Negligence ought to be to their Loss; and 'tis agreeable to Reason, that the Defendants, who were to receive and to have the Advantage of the Freight-Money, should be charged with safe Keeping the Goods.

Besides this is a mixt Action, (viz.) for a Malefeazance, and for Matter quasi ex contractu with the Owners, who had imposed a certain Rate, according to the Weight, &c. for

for tranſporting the Goods, and that the (A) Owners ought to bring the Action for the Freight-Money, and not the Maſter, therefore the Party ought to bring the Action againſt the Owners, for ſuch Actions are always reciprocal.

Then it was argued from the Inconvenience, if the Servants of Carriers ſhould be chargeable with the Goods, and their Maſters ſhould not be chargeable to the Parties in an Action; for if this ſhould be Law, no Man would entruſt any Thing of Value in the Hands of Servants, who are generally poor Men, ſo that by this Means it would be very prejudicial to trade, in carrying Goods from one Place to another.

Contra for the Defendants. It was inſiſted, that Maſters are not liable to the Contracts of their Servants, unleſs they are nonſolvent; now this Action is founded only on the Contract, which is entire, and made with all the Owners, therefore the Action brought againſt ſome of them is abated by the Verdict; for 'tis not the ſame Contract as alledged in the Declaration; as for Inſtance, in an Aſſumpſit againſt two Defendants, if the Jury find the Promiſe was made by Three, the Writ is abated; for the Promiſe of Three is another Promiſe than that made by Two.

Curia. As to the ſecond Point it was adjudged, that the Action was well brought againſt the Owners, and the Caſe of * Morſe *verſus* Sluce was cited, which was adjudged when Hale was Chief Juſtice, and it was thus, (viz.) The like Action was brought againſt the Maſter of a Ship; and upon a ſpecial Verdict found, the Objection was, that the Action would not lie againſt the Maſter, but againſt the Owner; but it was adjudged that the Action was well brought againſt the Maſter, becauſe it was found by the Verdict, that he had uſed to receive Money for Freight, and to make Contracts for tranſporting Goods, therefore in ſuch a ſpecial Caſe the Action lies againſt the Maſter; but it was never doubted, but that it would lie againſt the Owners, for 'tis founded ex quaſi contractu by Implication of Law; and 'tis a Rule in Law, that in all Caſes where the Action is founded upon Matter ex quaſi contractu, it ought to be

* Raym. 220. S. C. 1 Mod. Rep. 85. S. C. 1 Vent. 190, 238. S. C. Sid. 36. S. C.

Fry v. Marſh, *Lent Aſſizes in* Devon. 2 Willi. & Mariæ (A) One *Fry* was Owner of a Ship, and brought an *Indebitatus Aſſumpſit* for Freight-Money, for importing Goods from *Bourdeaux* to *Topſham*; and upon an Objection, that the Action ought to be brought by the Maſter, and not by the Owner, *Holt Ch. Juſt.* held clearly, that the Action might be brought by either.

joint againſt all Parties; and for Authorities in this Point the Caſes in the * Margin were cited.

* Noy 135. 2 Saund. 345. 1 Roll. Abr. 921. Hob. 260. Hutt. 121. 1 Mod. 198. 2 Vent. 151.

And the Chief Juſtice, and two other Judges held, that the joint Partnerſhip was not pleadable in Abatement by the Defendants, becauſe it would amount to the general Iſſue; but that if it was pleadable in Abatement, the Defendants had loſt their Time of Pleading it, and Judgment ought to be given for the Plaintiff.

And the Chief Juſtice ſaid, that it was at the Election of the Plaintiff, either to bring his Action againſt the Maſter or againſt the Owners; and ſo in Caſe of Mariners Wages, the Action lies againſt either Maſter or Owners; and the Maſter or Owners may maintain an Action for Freight-Money, unleſs ſome of the Owners diſagree to the Voyage, for by that Means they are exempted from the Action; and in the principal Caſe he held, that if the Ship had been employed only by the Defendants, tho' there might be others who had a joint Intereſt with them, yet the Action was maintainable by them, without naming the other.

7 H. 7. 8. Palm. 523. 3 Cro. 369.

Judgment was given for the Plaintiff.

In arguing this Caſe, that between * Blackburne and Grove was cited, which was thus: ſſ. Tenant in Common of Lands, brought an Action of Trover in his own Name alone, for cutting down Trees and carrying them away: The Defendant pleaded to Iſſue, and in a ſpecial Verdict it was found, that the Plaintiff was Tenant in Common with T. S. not named; yet the Plaintiff had Judgment, becauſe this was Matter pleadable in Abatement.

* Trin. 24 Car. 2. B. R. Rot. 1216.

Ailoffe *verſus* Scrimpſhire.

THIS Caſe was argued and adjudged in this Term: ſſ. The Plaintiff, Sir Benjamin Ayloffe, brought an Action of Debt againſt the Defendant, upon a Bond for the Payment of 500 l. and upon Oyer of the Bond, and the Condition thereof, it appeared to be for the Payment of a leſs Sum, (viz.) 250 l. at a certain Day, and thereupon the Defendant pleaded, actio non, &c. becauſe the Plaintiff poſt confectionem ſcripti obligatorii prædict. ac poſt denarii prædicti devenerunt debit. & ſolubil. eidem (the Plaintiff) de

Defeaſance, where 'tis pleadable in Bar, where not.

de prædict. (the Defendant) & ante exhibitionem billæ prædict. (viz.) on ſuch a Day ipſe idem (the Plaintiff) per quoddam factum ſuum convenit & conceſſit to and with the Defendant, quod ipſe idem, the Plaintiff, ad aliquod tempus vel tempora extunc in poſterum pro & durante Termino 99 Annorum, a die datus ejuſdem facti, &c. non ſectaret proſequeretur implicitaret vel perturbaret corpus perſonam vel ſtatum, Anglice, the Eſtate, ipſius (the Defendant) hæred. executorum vel adminiſtratorum ſuorum vel alicujus eorum vel ratione aliquarum ſummæ vel ſummarum monetæ debiti vel debitorum, Anglice, Duties, vel demand. quorumcunq; ei adtunc debit. vel ſolubil. Anglice, owing, vel per ipſum (the Plaintiff) demandabil. de vel a præfat. (the Defendant) & hoc, &c. & unde, &c.

* 21 H. 7. 24. 30, 31. 7 H. 6. 44. *a.* 26 H. 8. 9, 10. Cro. Eliz. 352, 623. Hob. 88. 1 Saund. 320.

And upon a Demurrer to this Plea it was inſiſted for the Defendant, that this Defeaſance, by which the Action is ſuſpended for the Time therein limited, is pleadable in Bar; and to avoid Circuity of Action; and the Caſes in the * Margin were cited as Authorities in this Point.

† 3 H. 6. 18. *b.* 26. *b.* 1 Inſt. 207, 291. Cro. El. 755. 2 Saund. 47, 48.

Holt Chief Juſtice, &c. That an Obligation is defeaſable as well after the Condition is broken as before, and as to that Point the Caſes in the † Margin were cited.

Cro. El. 352. 1 Roll. 939.

And the Court thus diſtinguiſhed, (viz.) that where the Covenant is, that the Obligee ſhall not put the Bond in Suit at any Time, ſuch Covenant is pleadable in Bar as a Releaſe, becauſe in Effect it is ſo; but where the Covenant is, that it ſhall not be put in Suit for a certain Time limited in the Deed; this is only a Covenant, and for a Breach thereof an Action is maintainable; but 'tis not pleadable in Bar to the Bond.

See poſt. Carvell *ver.* Edwards.

Nota, In the Argument of this Caſe it was allowed by all, that a Letter of Licenſe containing the Words following, (viz.) That if the Creditor ſue, &c. within ſuch a Time, that his Debt ſhall be forfeited, ſuch Licenſe is pleadable in Bar; therefore in the principal Caſe, the Covenant being temporary and limited to a certain Time, and there being no Words in the Deed of Defeaſance to make the Debt forfeited; upon a Suit commenced, &c. the Court was clear in Opinion, it was not pleadable in Bar; but that an Action of Covenant was his proper Remedy.

Judgment for the Plaintiff.

Incledon & al' *verſ.* Burges. Paſ. 4 Jac. II. B. R.

TRESPASS againſt the Defendant, in which the Plaintiff declared for a Treſpaſs for Eating his Graſs, and for digging and carrying Turf and Stone in a certain Place called Trenſhoe Down. 2 Salk. 636. Where the Omiſſion of *contra pacem* is not cured by a Verdict.

The Defendant juſtified by a Preſcription, in which he ſet forth, that long before the ſuppoſed Treſpaſs, &c. one Chicheſter was ſeiſed of a Meſſuage or Tenement called Tottiſcomb, and of 100 Acres of Land, Parcel of the ſaid Tenement; and that the ſaid Chicheſter, and all thoſe whoſe Eſtate he had, uſed Time out of Mind to have Common in the Place where, &c. for all their Cattle Levant and Couchant upon the ſaid Tenement, and alſo to have Common of Turbary to burn in the ſaid Houſe, and alſo a Privilege to dig Stones in the Place where, &c. for the neceſſary Repair of the ſaid Meſſuage, as appertaining to the aforeſaid Meſſuage or Tenement, and ſo made a Title to the Meſſuage, &c. under a Leaſe thereof for Years made by the ſaid Chicheſter, diu ante, &c. and ſo juſtified the Eating the Graſs with his Cattle Levant and Couchant, &c. and digging the Turf to burn in the ſaid Houſe; and as to the Digging the Stones, &c. that they were digged and uſed, and he had employed them in and upon the aforeſaid Tenements, for the neceſſary Reparation thereof, & hoc & unde.

The Plaintiffs replied de injuria ſua propria, and traverſed the Preſcription aforeſaid, as it was pleaded in Bar.

The Defendant rejoined by Way of Eſtoppel, that the Plaintiffs ought not to be admitted to the ſaid Averment and Traverſe, becauſe the Plaintiff Incledon had autrefoits brought an Action of Treſpaſs againſt the ſame Defendant, for a Treſpaſs done in the ſame Place; and the Defendant juſtified, as now by Preſcription for Common of Paſture, Turbary, and for digging Stones, ut ſupra, and the Plaintiffs then replied, de injuria ſua propria, ut ſupra, and traverſed the Preſcription, and thereupon Iſſue was joined, and a Verdict was found for the Defendant Burges, and the Record was ſet forth in certain; and averred, that it was the ſame Title, and that this Incledon and the Incledon in the other Action are one and the ſame Perſon, and that the now Defendant, and in the other Action, is the ſame Perſon, and ſo concludes by Way of Eſtoppel by the Verdict.

And upon a general Demurrer to this Replication, an Exception was taken to the Plea in Bar, (viz.) for that the Defendant had prescribed to dig Stones to repair the House, and had justified the Digging for repairing the aforesaid Tenement, so that he varied in his Prescription, and had not brought his Case within it; for a Tenement comprehends more than a Messuage, and he ought not to employ the Stones to repair the Hedges, which are Parcel of the Tenement, because his Prescription is confined to the Messuage only.

* 18 Ed. 4. 16, 17. Dyer 39. *b.* Cro. El. 825. *between* Strutfeild *and* Somerset. 3 Cro. 708. Hob. 17. 1 Sid. 10.

To which it was answered, that the Fault of this Plea was cured by the Replication, because the Plaintiff had not demurred to it, nor taken any Advantage thereof in Pleading; and the Authorities in the * Margin were cited to prove, that the Fault of the Bar may be cured by the Replication.

But the Court being inclinable, that this Defect was not helped by the Replication, because upon the Pleadings it shall be taken, that the Stones were employed upon all the Tenement generally; thereupon the Counsel for the Defendant objected against the Declaration, (viz.) that the Commencement of the Trespass was alledged to be in the Reign of Car. 2. continuando unto the Day of the Bill purchased, which was in the Reign of Jac. 2. and the Conclusion of the Declaration was, contra pacem Domini Regis nunc, when it ought to be, contra pacem dictorum nuper Regis Car. 2. & dicti Regis nunc; for the Words contra pacem are properly applicable to the Commencement of the Trespass, (viz.) to the Clausum fregit, and not to the Continuando.

2 Ed. 4. 24. *a.* 4 H. 6. 4. Yelv. 66. 2 Cro. 377.

To which it was answered, that this was only Form, and that the Statute 27 Eliz. is, that upon a general Demurrer Judgment shall be given, notwithstanding any Want of Form; and in this Case the Demurrer was general; and the Case in the † Margin was cited to prove this was meerly Matter of Form.

27 Eliz. c. 5.

† Baskervill's *Case in* Hob.

It appears by the last Statute of * Jeofails, that the Clause contra pacem was not meer Form, because by that Statute the Want of those Words was aided by a Verdict, which is a good Argument, that before that Statute was made, it was a Jeofail, not to be cured by any former Statutes of Jeofails, which in general Words cured Want of Form after a Verdict; so that 'tis Substance, and not within the Statute 27 Eliz. and the Court was of that Opinion, and so gave Judgment that the Plaintiff Nil capiat per Billam.

* 16 & 17 Car. 2.

But nota 1 Sid. 253. the like Exception was taken upon a general Demurrer, and adjudged meerly Form; but this Caſe was not cited by the Counſel, or remembered by the Court.

As to the Matter in Law, (viz.) the Eſtoppel, the Court gave no Opinion, but Judgment was given for the Defendant, ut ſupra.

Maſon *verſus* Abdy. Mich. 3 Jac. II. B. R. Rot. 575.

DEBT upon Bond, the Condition whereof was, that whereas the above-named John Maſon, at the Requeſt of the above-bounden John Abdy, had lent and paid unto him the principal Sum of 300 l. on Adventure upon the natural Life of Robert Abdy, for the Time herein after ſpecified; if therefore the ſaid Robert Abdy, at the End of three Months Kalendary, commencing from the Date hereof, do and ſhall well and truly pay, or cauſe to be paid, unto the abovеſaid John Maſon, his Executors or Adminiſtrators, the Sum of 22 l. 10 s. being the Premium for the ſaid Adventure of the ſaid Principal for three Months; and afterwards, at the End of ſix Months, commencing as aforeſaid, or at any Time ſooner, do pay as aforeſaid, the ſaid principal Sum of 300 l. with other Premium, for the farther Adventure of the ſame, according to the Rate of Six-pence each Pound per Month, for all ſuch Time whatſoever as ſhall be expired and ſpent, at ſuch aſſigned Time of Payment; or if before ſuch aſſigned Time or Times of Payment, and within the ſaid ſix Months, the ſaid *Robert Abdy* ſhall depart this natural Life, that then this preſent Obligation ſhall be void. What ſhall be an uſurious Contract.

Quibus lectis & auditis, the ſaid Robert Abdy dicit, &c. quod actio non, &c. becauſe on the ſame Day, Year and Place in the Declaration mentioned corrupte & contra formam Statuti in hujuſmodi caſu nuper edit. & proviſ. agreatum fuit inter prædict. Johannem & eundem Robertum quod prædict. Johannes accommodaret eidem Roberto ſummam 300 l. & daret diem pro ſolutione inde per ſpacium trium menſium Calendar. ſed non ultra ſex menſium a prædicto die quodq; præd. Robertus ſolveret, &c. (here recite the whole Agreement and Condition, inſerting the ſeveral Sums to be pro lucro & intereſſe differendo & dando diem pro ſolutione prædict. 300 l. uſq; ad ſuch a Day prout in the Con-

dition; (omitting the Clauſe, that if the Defendant ſhould die within ſix Months, &c.) Et ulterius prædict. Robertus dicit quod ipſe prædict. Robertus prædicto tempore agreamenti necnon ſcripti obligatorii fact. fuit in plena vita & ſalute & infra ætatem 38 Annorum, (viz. at ſuch a Place) & in nullo periculo vitæ ſuæ amittend. Quodq; ad evitand. ſtatutum prædict. & pro ſecura ſolutione ſummarum denariorum prædict. in conditione præd. ſpecificat. ad tempus ibidem affix. ſcriptum prædict. cum conditione prædict. apud Paroch. & Wardam prædict. trahi & ſcribi per prædictum Johannem cauſat. fuit pro ipſo prædicto Roberto ſigilland. ac ſuperinde præd. Robertus pro ſolutione tam præd. 22 l. 10 s. pro lucro intereſſe & pro differendo & dando diem ſolutionis prædict. 300 l. per prædictum ſpacium trium menſium, quam prædict. principal. ſummam & præd. al. denar. (as in the Condition) prædict. ſcriptum Obligatorium hic in Curia prolat. de pœnali ſumma 600 l. cum prædicta conditione pro ſolutione præd. 22 l. 10 s. & prædict. 300 l. & prædict. al. denar. modo & forma ſupramentionat. in performatione & complement. & ſecundum formam & effectum corrupti agreamenti ill. ſigillavit & ut factum ſuum deliberavit, & idem Robertus ulterius dicit quod præd. 22 l. 10 s. pro intereſſe, Anglice, the Loan, pro differendo & dando diem ſolutionis præd, 300 l. ut præfertur excedunt ratam ſex librarum pro intereſſe, Anglice, the Loan, pro differendo & dando diem ſolutionis Centum librarum pro uno anno per quod ſcriptum obligatorium prædict. vigore ſtatuti prædict. in hujuſmodi caſu inde nuper edit. & proviſ. vacuum & nullius vigoris in lege exiſtit & hoc & unde.

And upon a general Demurrer to this Plea, it was argued upon all the Caſes of Uſury cited by the Counſel; and adjudged, that this was an uſurious Contract within the Stat. 12 Car. 2. cap. 13. for it was held, that if ſuch an Evaſion of the Statute ſhould be allowed, upon Pretence, that the Principal was in Hazard for three Months, upon ſuch a colourable Contingency, that a Man who was in full Health might die within three or ſix Months, the Statute would be of little Uſe; and if ſuch a Contingency of the Death of a Man ſhould prevent the Uſury, it will follow, that Contingencies might be extended to the Death of Two, Three, or more; and that this Caſe is not like thoſe of Bottomry-Bonds, becauſe in thoſe Caſes there are ſeveral deſperate Contingencies of the Wind, Seas, and Enemies, which Bonds are regarded in reſpect to Trade.

The Defendant had Judgment.

DE

Term. Sanct. Mich.

Anno 1 Willi. & Mariæ in B. R.

Watſon *verſus* Clerke.

Where the Steward of an inferior Court muſt return a *Habeas Corpus* directed to him.

IN this Caſe it was held by Holt Ch. Juſt. that where an Habeas Corpus is directed to an inferior Court, of which an utter Barriſter is Steward, and in Fact the Iſſue in the Plaint was not joined more than ſix Months after the Appearance of the Defendants there; ſo that by the Statute 21 Jac. the Steward had Liberty to proceed notwithſtanding, and without the Allowance of the Writ; yet in this Caſe the Steward is bound to return the Writ with the ſpecial Matter, otherwiſe he ſhall be in Contempt; and ſo it was conſtantly ruled in B. R. when Hale was Chief Juſtice.

21 Jac. 1. cap. 23.

Boſworth *verſus* Ridgley.

Profert hic in Curia literas Teſtamentarias.

SCire facias by Executors, upon a Judgment obtained by the Teſtator; and upon a general Demurrer it was inſiſted, that the Practiſe of this Court in ſuch Caſes is, that the Plaintiffs in the Scire facias ſhould inſert this Clauſe, (viz.) Profert hic in Curia literas Teſtamentarias, &c. which being omitted, the Writ is not good.

To which it was anſwered, that the Practiſe is to inſert that Clauſe at the Concluſion, and not in the Middle of the Writ; and here 'tis inſerted at the Concluſion.

1 Saund. 249. 2 Saund. 401.

But

Curia. But the Court held both Forms to be good, and that in the C. B. this Clause is always inserted in the End.

Judgment for the Plaintiff.

Bradshaw *versus* Swanton.

Prohibition will not lie where there is a Composition for Tithes.

PRohibition to the Consistory-Court of Durham, where the Libel was for Subtraction of Tithes; the Suggestion now was, that a verbal Composition was made between the Plaintiff and the Defendant, for all Manner of Tithes for two Years; and the Libel was for Tithes arising within the said Time; and a Difference was now taken between a Composition for Life and for Years, for in the first Case a Prohibition lies, but not where the Composition is for Life; and to prove this, the Cases in the * Margin were cited.

* Yelv. 94. 2 Cro. 137. Cro. Eliz. 188, 249.

F.N.B.43,44. 41. G. 2 Roll. Abr. 63. Litt. Rep. 155. Hob. 176. 2 Cro. 668. *See* Reg. 38, 39.

To which the Chief Justice answered, and so it was resolved, that tho' several Books tell us, that a Prohibition would lie where the Composition is for Years; and where the Difference is taken ut supra; yet the Law for several Years past hath been clearly taken, that no Prohibition will lie upon any Composition, whether for Life or Years, for any Tithes; and therefore the proper Remedy is to appeal to the Arches, if the Consistory-Court should refuse a Plea of Composition.

In this Case a Prohibition was denied, quod nota.

Hammond *versus* Pursell.

Writ of Inquiry returnable a Day after the Term, but executed within the Term, amendable.

A Writ of Inquiry was returnable die Veneris prox. post Crastino Ascensionis Domini, which was a Day out of Term, but it was executed within the Term, and Damages found for the Plaintiff; and upon a Writ of Error brought, the Matter before-mentioned was assigned for Error in the Exchequer-Chamber; and now it was moved to amend the Return of the Writ.

Holt Ch. Just. If the Award of the Writ of Inquiry on the Roll is good, the Writ it self shall be amended by the Roll; so if the Writ was good, and the Award was ill, it shall be amended by the Writ; but in this Case both were defective.

Then the Counſel for the Plaintiff in Error inſiſted, that the Default in this Caſe was the Act of the Court it ſelf, which can never be amended.

But the Court inclined to amend it.

Young *verſus The Inhabitants of the Hundred of* Tolſcomb *and* Mudbury *in* Dorſetſhire.

THIS was an Action upon the Statute of Hue and Cry for a Robbery, in which the Plaintiff declared, Quod quædam perſonæ ignotæ, &c. apud quendam locum ex auſtrali parte cujuſdam Januæ vocat. Fair Mile-Gate, infra parochiam de Toldſcomb & Mudbury in Com. præd. & infra hundred. de Toldſcomb & Mudbury in Com. Dorſet prædict. vi & armis aſſaulted him (the Plaintiff), and robbed him of ſo much Money. 3 Mod. 258. S. C. Declaration upon the Statute of Robbery, and did not ſay it was in the Highway, good.

Upon Not guilty pleaded, the Plaintiff had a Verdict, and it was now moved in Arreſt of Judgment, for a Fault in the Declaration, the Robbery being not laid to be done in any Highway, but generally, (viz.) apud quendam locum (ut ſupra) ſo that for what it appears to the contrary, it might be done in an Houſe or Garden, or in a Wood, for which the Hundred is not chargeable; for the Inhabitants of the Hundred are only obliged to guard the Roads; and all the Precedents are, that a particular Place is ſhewn in the Highway. Cro. El. 753.

But it was adjudged that the Declaration was good, eſpecially after a Verdict; for it ſhall be intended that this was given in Evidence at the Trial, otherwiſe the Plaintiff would have been Nonſuit; and they held, that without the Help of a Verdict this Declaration had been good; for the Highway is not mentioned in any of the old Precedents in Raſtal's Entries; 'tis true, in the * new Precedents 'tis mentioned. * 2 Saund. 374.

Beſides, the Declaration is as good without any Averment, that the Robbery was done in the Highway, as 'tis without any Averment, that it was done in the Day-time, and not in the Night; for ſuch an Averment was never yet ſeen in any Precedent.

The Plaintiff had Judgment.

The

The King *verſus* Bonny.

3 Mod. 238. S. C. 1 Salk. 190. S. C. Inquiſition upon a *Melius inquirendum* is traverſable, but not an Inquiſition *ſuper viſum Corporis.*

UPON a Motion for a Melius Inquirendum upon the Death of B. who was Felo de ſe above two Years before this Motion; and after two Inqueſts had been made by the Coroner ſuper viſum Corporis, upon both which Inqueſts he was found to be Non compos; it was now ſuggeſted, that one of thoſe Inqueſts was quaſhed for a Fault, and the other, which now ſubſiſts, was obtained by Practice, becauſe the Jurors were named at the Inſtance of Bonny, the Adminiſtrator; and Affidavits were produced to prove it; beſides, the Practice is apparent by Taking the ſecond Inquiſition before the Coroner, ſuper viſum Corporis, which Body had been buried above a Year, and ſo was putrified; and therefore (admitting it was not by Practice) ſuch an extraordinary Courſe ought not to be taken.

Thereupon the Court ſuſpecting the Coroner had misbehaved himſelf, made a Rule for him to attend, and accordingly in Hillary-Term following he appeared in Court, and made Oath, that he took the laſt Inquiſition ſuper viſum Corporis, of his own Accord; but upon the Application of the Lord Almoner ſo to do, whereupon he applied himſelf to the Attorney General for his Advice, who told him that he might do it, and thereupon he took the Inquiſition without the Inſtance of Bonny, &c. and the Court was ſatisfied with this Account of the Matter, and that there was no Practice by the Coroner, and ſo a Melius inquirendum was denied.

Nota, It was agreed by all, that it was not to be juſtified to take the Body out of the Grave after it had been buried above a Year, for it was a common Nuſance and inſufferable; therefore where the Inquiſition had been quaſhed ſuper viſum Corporis a long Time after the Death, a Melius inquirendum might have been granted, but not another Inquiſition ſuper viſum, &c. but factum valet quod fieri non debet.

* 3 Mod. 80. Nota, In this Caſe, that of the * King and Heatherſall was cited, which was thus: ſi. An Inquiſition was taken before the Coroner ſuper viſum Corporis, which was returned and filed; and the Lady Dorſet moved for a Melius inquirendum upon ſeveral Suggeſtions of ill Practice, but

it was denied, becauſe after the Inquiſition is returned and filed, no Melius inquirendum ſhall be granted, ſo long as that Inquiſition is in Force, and not quaſhed, for ſuch an Inquiſition is not traverſable; but an Inquiſition upon a Melius inquirendum may be traverſed, becauſe 'tis not taken ſuper viſum Corporis; and this was agreed by the Court to be good Law.

Matthews *verſus* Carey. Paſ. 3 Jac. II. B. R. Rot. 320.

IN Treſpaſs for Taking his ſilver Tankard, and detaining it until the Plaintiff ſhould pay 5 l.

The Defendant pleaded, that the City and Liberty of Weſtminſter is an antient City and Liberty, and that Time out of Mind there had been a Court Leet held there, and that the Plaintiff was a Reſiant in the ſaid City, &c. and that at ſuch a Court held there on ſuch a Day, the Jury preſented, that the Plaintiff (being a Chandler) melted and diſſolved in his Houſe (infra Juriſdictionem, &c.) great Quantities of ſtinking Tallow, which putrified and infected the Air, ad commune nocumentum ligeorum, &c. and thereupon he was amerced and affeered to 5 l. and that the Defendant, as Bailiff of the Liberty, &c. & per mandatum of the Dean and Chapter of Weſtminſter, Proprietors of the ſame, diſtrained the ſilver Tankard to levy the Amerciament, but did not ſet forth any Authority by Virtue of any Precept or Warrant from the Steward of the Court and Liberty, *&c.* to diſtrain, *&c.* neither did he aver in facto, that the Plaintiff did melt ſtinking Tallow.

Juſtification in Treſpaſs for diſtraining, *&c.* is ill, becauſe the Defendant did not ſet forth, that it was by a Warrant from the Dean and Chapter, *&c.*

The Plaintiff replied de injuria ſua propria, and traverſed, that he had melted ſtinking Tallow in the aforeſaid Houſe, prout, &c.

And upon a Demurrer to this Replication, a Difference was taken between a Preſentment, where the Freehold was concerned, or not; for one is traverſable, but the other is not; and therefore the Preſentment in the principal Caſe, not at all concerning the Freehold, is not traverſable; and to prove this Difference, the Caſes in the * Margin were cited.

* 5 H. 7. 3. *b.* Bro. Tit. Preſentment in Court 5, 15. 41 Ed. 3. 26, 27. 45 Ed. 3. 8. *b.*

Holt Ch. Juſtice held, that it was very clear, that in Replevin the Preſentment is traverſable, becauſe that is an Action founded on the meer Right; but it may be doubtful,

Whether 'tis ſo in a Juſtification in an Action of Treſpaſs, as here, becauſe 'tis by an inferior Officer by Way of Excuſe; therefore whether the Preſentment is good, or not, true or falſe, 'tis ſtill ſufficient to excuſe him from the Treſpaſs.

1 Leon. 242. Moor 75. Raym. 182. 2 Vent. 35.

And Juſtice Dolben cited a Caſe between Lewis and Hart in C. B of his own Knowledge, which was Debt for an Amerciament in a Court-Leet, for a Nuſance brought by the Lord of a Manor; the Defendant pleaded, and traverſed the Fact of the Preſentment, as here; and it was adjudged, that it might be traverſed; to which Holt Ch. Juſtice agreed, becauſe 'tis upon the ſame Reaſon with a Replevin, ut ſupra.

2 Cro. 582.

Afterwards the Court inclined, that the Traverſe in the principal Caſe was well taken, for they held that Preſentments in the Quarter-Seſſions of the Peace, and even in B. R. are traverſable; and if 'tis ſo in Courts ſuperior to the Leet, a fortiori it muſt be ſo in Preſentments at the Leet.

Beſides, if this Preſentment ſhould be removed by Certiorari into B. R. 'tis clear that 'tis traverſable.

At another Day, the Counſel for the Plaintiff perceiving the Opinion of the Court to be againſt him, they objected againſt the Plea, becauſe the Defendant had juſtified as Bailiff to the Dean and Chapter, without ſhewing any Warrant to diſtrain, for a Bailiff cannot by Law diſtrain for an Amerciament, without a Warrant from the Steward; and ſuch Warrant or * Precept ought to be particularly alledged in the Juſtification; the Plea is likewiſe ill, becauſe the Defendant did not aver in facto, that the Plaintiff did melt ſtinking Tallow.

* Moor 573. Cro. El. 698.

Holt Ch. Juſtice took theſe Differences between a Juſtification in Treſpaſs (as in this Caſe) and an Avowry for an Amerciament in a Court-Leet; for in the Juſtification for a Treſpaſs, 'tis abſolutely neceſſary for the Defendant to ſet forth a Warrant or Precept, &c. but 'tis not neceſſary for him to aver the Matter of the Preſentment, becauſe his Plea is only in Excuſe.

But in an Avowry he ought to aver in facto, that the Plaintiff committed the Crime for which he was amerced, without ſhewing any Authority to diſtrain, becauſe he is an Actor; and a Replevin is an Action founded on the Right, and therefore in ſuch Action the Command is not † traverſable.

† 26 H. 8. 8. Cro. Eliz. 14.

At last the Court were all of Opinion, that the Justification or Bar was ill, because the Defendant had not set forth any Warrant or Precept from the Steward of the Court, for his Authority to distrain, and that the Allegation in his Plea, that he distrained per Mandatum of the Dean and Chapter, &c. is frivolous, for a Bailiff cannot distrain by that Means, nor otherwise than by Virtue of a Precept directed to him by the Steward of the Court; for which Reason

The Plaintiff had Judgment.

Watson *versus* Clerke.

A Plaint in Trespass on the Case was entered in one of the Counters of the Sheriffs of London against Watson; and before any Declaration was delivered to him, an Habeas Corpus cum causa was brought to remove it into B. R. and it was returned generally, that at such a Court Venit (Clerke) & affirmavit quandam quærelam (*versus* Watson) in placito transgr. super casum ad damnum 500 l. unde exitus inter partes junct. existit & adhuc pendet indiscuss. &c.

Where an Action is founded on the Custom of *London*, and removed by *Habeas Corpus*, a *Procedendo* shall be allowed.

And now it was moved for a Procedendo, upon a Suggestion, that the Action was commenced in the aforesaid Court for scandalous Words spoken of Clerke by Watson, (viz.) for calling her Whore, which is actionable there by the Custom of London, but not elsewhere; therefore if a Procedendo should be denied, Clerke would lose her Action; and moreover by this Means all such Actions would be destroyed and lost against the Custom; and an Affidavit was produced, wherein Clerke deposed, that the only Cause of Action was ut supra.

And a Difference was taken between an Action brought on a By-Law, and removed here into B. R. and an Action brought on the Custom of London; for in the Case of the By-Law, the special Matter of such Law ought in certain to be returned upon the Habeas Corpus, &c. otherwise the Court cannot take Notice of such a private Law; but 'tis not so in an Action founded on a Custom of London, because the Court ex Officio will take Notice of those Customs.

But the Court did not allow this Distinction, and Holt Ch. Justice said, that it doth not appear by this Return, what was the Cause of Action, that the Declaration it self ought to be returned upon the Habeas Corpus, and then the Curia

Court would ſee what was the Cauſe, &c. and if the Writ was delivered before the Plaintiff had declared, yet he ought immediately to enter his Declaration, that it be returned upon the Habeas Corpus, ſo that the Cauſe of Action might appear to the Court; and that all the Proceedings ought to be returned in this Caſe as well as in an Action upon a By-Law.

Afterwards, the Court conſidering that the Action would be loſt, if a Procedendo ſhould be granted, they allowed the Officer to amend the Return of this Habeas Corpus, and to make it ſpecial, ut ſupra.

And thereupon a Procedendo was granted.

Salter *verſus* Kidgly. Trin. 1 Willi' & Mariæ, B. R. Rot. 349.

One who is no Party to a Deed may covenant with another who is a Party.

IN Covenant, &c. The Plaintiff declared quod (the Defendant) per quoddam ſcriptum factum (at ſuch a Day and Place) cujus alteram partem ſigillo ipſius Kidgley ſigillat. & hic in Curia prolat. reciting as followeth: Imprimis, (here all the Deed was recited) and the Breach aſſigned was, that one Rock had not paid Rent to the Plaintiff.

The Defendant craved Oyer of the Deed, which was entered in hæc verba, and it was to the Effect following, (viz.) Articles of Agreement made between *John Salter*, of the one Part, and *Charles Rock*, of the ſame County, Baker, (but did not ſay of the other Part) as followeth: Imprimis, That the ſaid *John Salter* doth for himſelf, his Heirs and Aſſigns, ſet and let one Houſe or Tenement, called, *&c.* unto the ſaid *Charles Rock*, for the yearly Rent of, *&c.* payable quarterly: And whereas the aforeſaid *Charles Rock* hath agreed, and taken the Houſe aforeſaid, paying the Rent quarterly, and leaving it in good Repair; and that the ſaid Rent may be ſatisfied, as aforeſaid, be it known unto all Men, that I *John Kydley* do covenant for my ſelf, *&c.* on the Behalf of the ſaid *Charles Rock*, that is to ſay, that the ſaid *Charles Rock* ſhall pay the Rent and perform the other Covenants, *&c.* reciting them particularly, &c. which Deed was ſealed by Rock and Kydley; and after Oyer, the Defendant demurred generally.

And it was argued for him, that he was not bound by this Covenant, becauſe he was not a Party to the Deed; and 'tis a Rule in Law, that he who is not a Party to the

Deed, can neither give or take any Thing by it, &c. except 'tis by Way of Remainder, which is not this Caſe; and for Authorities in Point, the Caſes in the * Margin were cited.

* 3 Cro. 56. 2 Inſt. 673. 2 Roll. Abr. 220. 2 Lev. 74.

2 Cro. 359. 1 Inſt. 352. Roll. 72. *See* 3 Lev. 138.

It was argued for the Plaintiff, that this Deed was in Nature of two Deeds upon one and the ſame Piece of Parchment, (which might very well be, as it was agreed on all Sides) and therefore the Defendant ſhall be obliged by it; and it doth not appear in this Caſe, whether the Deed was indented, or not; ſo that if 'tis taken as a Deed of the firſt Perſon, and a Stranger, he may be very well obliged by ſuch a Deed to have any Thing performed as a Fidejuſſor, which in former Days was a cuſtomary Form; and to prove this ſee the Caſes in the † Margin.

† 40 Ed. 3. 5. Fitz. Abr. Tit. Oblig. 16. F.N.B. 146. B.

Alſo one who is not a Party to the Deed may be made an Attorney by the Deed it ſelf, to make Livery and Seiſin upon a Feoffment. 1 Inſt. 52. b. and where an Attorney is made by a Deed, to which he is a Stranger, the Deed it ſelf may be by Indenture as well as by Deed-Poll.

3 Cro. 905. Noy 49. *b.*

Holt Ch. Juſtice held, that one Party to a Deed could not covenant with another, who was no Party, but a meer Stranger to it; but one who is no Party to a Deed may covenant with another who is a Party, and thereby oblige himſelf by Sealing the Deed.

Reg. 165 *b.*

The Court was clear in Opinion, that the Action did lie againſt the Defendant upon this Deed.

The *Lord Lovelace*'s Caſe.

THE Lord Lovelace being Chief Juſtice in Eyre of all the King's Foreſts, &c. upon Oath made before him by T. S. one of the under Officers of the Foreſt of Dean, that A. B. and C. had killed ſeveral Does, and cut and felled Wood and Trees growing in the Foreſt, granted a Warrant under the Seal of his Office out of Court, directed to a Meſſenger to take the aforeſaid Perſons, by Virtue whereof he did take them into Cuſtody, and there kept them thirty Days; afterwards they removed themſelves into B. R. by Habeas Corpus, upon which all this Matter was returned.

Warrant of the Chief Juſtice in Eyre, directed to a *Meſſenger*, is not good.

And

And now it was argued for the Plaintiffs in the Habeas Corpus, that the Chief Juſtice in Eyre had no Power to grant a Warrant to take the Body of any Man upon ſuch an Information, ut ſupra; for the * Statute is expreſs, that no Man ſhall be taken or impriſoned for Vert or Veniſon, if he is not taken in the Manner, &c. or firſt indicted, &c. and for other Authorities in this Point, the Caſes in the † Margin were cited.

* 1 Ed. 3. cap. 8.

† Reg. fo. 8. *b.* F. N. B. 67.

But admitting that the Chief Juſtice in Eyre had an Authority to make this Warrant; yet it being directed to a wrong Perſon, the Taking is unlawful, for the Warrants of ſuch Chief Juſtice ought to be directed to one of the Officers of the Foreſt, and there is no ſuch Officer in the Foreſt as a Meſſenger; and this Caſe reſembles that of a Juſtice of the Peace, who cannot direct his Warrant to his Servant, or to any other Perſon whatſoever, but to the Conſtable or Pariſh-Officers; therefore this Commitment was wrongful.

Econtra. It was argued on the other Side, that the Complaint made by the Statute 1 Ed. 3. was altogether againſt miniſterial Officers of the Foreſt, and not one Word therein concerning the Chief Juſtice in Eyre, therefore his Authority is not reſtrained by that Statute; and moreover it was the conſtant Practiſe in former Days, to grant Warrants ut ſupra, and the antient Practiſe is always the beſt Expoſitor of old Laws; and it would be very inconvenient for the King, if the Law ſhould be, that a Warrant cannot be granted before the Offender is preſented, becauſe upon the firſt Notice thereof the Criminal might fly, and ſo eſcape unpuniſhed; and this Caſe was likewiſe reſembled by the Counſel to that of Juſtices of Peace and Conſtables, who may lawfully take Criminals in the Fact; and Juſtices of Peace may grant their Warrants upon Information, and before any Indictment, to apprehend them.

Curia. But the Court was of Opinion, that the Caſes were not parallel, becauſe the Authority of Juſtices of Peace and Conſtables is expreſs by the Statute to apprehend Malefactors; but in the principal Caſe, the Statute 1 Ed. 3. is expreſs to the contrary, and for the Reaſons aforeſaid, but eſpecially for that the Warrant was directed to a Meſſenger, when no Officer of the Foreſt is known by that Name, this Commitment was held unlawful, and all the Parties were diſcharged by Rule of Court.

Nota, It was agreed by three Judges in their Argument of this Case, that Taking in the Manner was, when a Man was taken in the very Fact, or ready to do it, as with his Bow bent, or ready to slip his Dogs, or with his Hands bloody, and that finding Timber of the Forest in a Man's Possession, (viz.) in his Yard (as was the Case of one of the Persons committed) was not a Taking in the Manner within the Statute aforesaid; but the Chief Justice doubted as to that Matter, but all agreed that the Taking upon a fresh Pursuit was a Taking in the Manner.

What is Taking in the Manner.

Eccleston *versus* Petty *alias* Speke.

THIS was a Trial at Bar in Ejectment, wherein the Title of the Plaintiff was as Heir at Law to the Lady Speke, who died seised in Fee of the Lands in Question; and to prove his Pedigree in order to make out his Title as Heir, &c. he offered an Answer in Chancery, made by the Defendant Speke (when he was an Infant) per Guardianum, in which Answer the Pedigree was confessed.

3 Mod. 259. S. C. Shower 89. S. C. Where an Infant answers *per Guardianum*, he is not concluded by any Matter in such Answer.

But the Counsel for Speke opposed the Reading this Answer, because it was made upon the Oath of the Guardian, and not of the Infant himself, and therefore not to be allowed as Evidence against him; for the Effect of an Infant's Answer to a Bill in Chancery, is to no other Purpose than to make proper Parties, so as to have an Opportunity to take Depositions, and to examine Witnesses to prove the Matter in Question; and an Infant is never concluded by any Matter contained in his Answer per Guardianum.

But the Court being doubtful Justice Eyres went to the Court of Common Pleas then sitting, to know the Opinion of the Judges of that Court in this Point; and they were all of Opinion, that the Answer of the Infant was no Evidence against him, and therefore it ought not to be read; to which the Court agreed, and so it was rejected.

Then it was offered in Evidence viva voce, that at a Trial in Ejectment between Sir William Gerrard and the now Defendant, for Parcel of the Lands now in Question, the Defendant produced a Deed of Release, which had a Clause in it to prove the Pedigree.

What shall be admitted for Evidence, what not.

But it was objected, that this Evidence ought not to be allowed, because the now Plaintiff was not Party to that Suit

Suit in which the Releaſe was produced, & Res inter alios acta non nocet; and another Reaſon was given, why this ſhould not be Evidence, becauſe it ought to be mutual, but the Court will not permit the Counſel for the Defendant to give ſuch Evidence; and it was compared to the Caſe of Depoſitions taken to perpetuate the Teſtimony of Witneſſes, if afterwards a Witneſs ſhould die; yet the Depoſitions ſhall not be Evidence, but only between the Parties to the Suit.

Curia. But the Court held this to be good Evidence, and it differs from the Caſes put, for here the Defendant might give that very Deed in Evidence, if he would; and 'tis reaſonable, that the Plaintiff ſhould have the ſame Advantage to prove it viva voce, and the rather, becauſe the Defendant hath the Deed in his Cuſtody, and might diſprove the Witneſs, if he ſwore falſly.

But the Pedigree being proved, the Caſe was thus for the Defendant: ſ. The Lady Speke, about two Years ſince, had, by her Will in Writing now produced, deviſed theſe Lands to the Defendant.

A ſecond Will ſhall not revoke the firſt, if the ſecond is not a good Will in Law, but void. But the Plaintiff, in order to ſet aſide that Will, produced another Will ſubſequent to the firſt, ſubſcribed by three Witneſſes, by which Will the Lady Speke had likewiſe deviſed theſe Lands to the Defendant; and it was proved by the very Witneſſes to this Will, that the Teſtatrix did ſign it in their Preſence, but that they did not ſubſcribe it in her Preſence, for that ſhe ſigned it in her Bed-chamber, and they ſubſcribed it in the Hall; and it was poſitively proved, that it was not poſſible to ſee from her Chamber what they did at the Table in the Hall, there being a Paſſage, or eight or ten turning Stairs between thoſe Places; it was alſo proved, that the Teſtatrix continued in her Chamber all that Time the Witneſſes were ſubſcribing.

Whereupon it was inſiſted for the Plaintiff, that tho' this laſt Writing was not a Will ſufficient to paſs Lands, according to the Circumſtances required by the Statute, by which 'tis expreſly enjoined, that the Witneſſes muſt ſubſcribe in the Preſence of the Teſtatrix; yet it was a Deed of Revocation ſufficiently executed within the ſixth Paragraph of the Statute; for as to a Revocation, 'tis not required by the Statute, that the Witneſſes ſhould ſubſcribe in the Preſence of the Party revoking, ſo that by this Deed the firſt Will is revoked; and if ſo, then the Lands muſt deſcend to the Leſſor of the Plaintiff.

But the Court was of another Opinion, (viz.) that as to the Deviſe of Lands, the later Will was void for the Defect before-mentioned; but they held clearly, that it would not operate ſo as to be a Revocation of the Will, becauſe that would be contrary to the apparent Intent of the Teſtatrix; for 'tis plain ſhe deſigned it to be her Will (and not to be a Revocation) becauſe it bears the Title of her Will. Curia.

Now the ſixth Paragraph of the Statute concerning Revocations is, That a Will ſhall not be revoked, unleſs by ſome Will or Writing atteſted by three Witneſſes, *&c.* which muſt be intended, that if the Revocation is by Will, it muſt be ſuch a Will ſo qualified as in the former Paragraph, (viz.) A Will ſigned and ſubſcribed in the Preſence, &c. which this was not, therefore it cannot be a Revocation by Will; and it plainly appears, that the Teſtatrix never intended this Writing to be a Revocation, but by making it her Laſt Will, which 'tis not, becauſe 'tis void.

Nota, In this Caſe Sir Geo. Sheers's Caſe was cited and allowed, &c. which was adjudged in the Court of Common Pleas, and it was thus:

ſſ. Sir George Sheers being ſick in Bed, made his Will, which he ſigned in the Preſence of three Witneſſes, but he being very ill, the Witneſſes withdrew into a Gallery, and there ſubſcribed it, between which Gallery and the Bed-chamber where the Teſtator lay, there was a Lobby with glaſs Doors, and the Glaſs broken in ſome Places; and it was proved that the Teſtator might ſee from his Bed where he lay (thro' the Lobby and the broken Glaſs-Windows) the Table in the Gallery where the Witneſſes ſubſcribed their Names; and this was adjudged a good Will to paſs Lands within the Intent of the Statute, for it ſhall be deemed to be ſubſcribed in his Preſence, as far as a Man may ſee in an Houſe.

Nota alſo, That in Speke's Caſe it was held by the Court arguendo, that this Statute had not taken away Revocations of Laſt Wills by Acts in Law, as if the Teſtator ſhould afterwards make a Feoffment contrary to the Will, or any other Act inconſiſtent with it; but that ſuch Revocations remain as they were before the making this Statute.

Judgment for the Defendant Speke.

Sarsfeild *verſus* Witherly.

See the Report and Entry of this Caſe.

2 Vent. 293. Bill of Exchange drawn by one who is not a Merchant but a Gentleman, makes him liable upon the Cuſtom, &c.

THIS was a ſpecial Action on the Caſe founded upon a Bill of Exchange drawn in France by the Defendant (the Son of Dr. Witherly) upon his Father here, in which the Plaintiff laid the Cuſtom too general, (viz.) Between Merchants & alias perſonas ibidem reſidentes & negotiantes, &c. and that the Defendant was a Merchant, and drew the Bill; and he ſet forth, that the Bill was proteſted, per quod, &c.

The Defendant pleaded ſpecially, that he is a Gentleman, and Son and Heir of Sir Tho. Witherly, and traverſed, that he was a Merchant; and upon a Demurrer to this Plea the Defendant had Judgment in B. R. and upon a Writ of Error brought in the Exchequer-Chamber,

Cro. El. 201.

It was argued for the Plaintiff in Error, that a Conſideration of a Promiſe is never traverſable, nor allowed to be traverſed; but 'tis the Promiſe it ſelf which is traverſable; and that it was always held, that in theſe Caſes of Bills of Exchange, that the very Act of Drawing a Bill makes the Drawer a Merchant, within the Cuſtom, as to a ſpecial Purpoſe to make him reſponſible to the Party upon Non-payment; and therefore he is concluded to ſay the contrary in an Action brought againſt him upon ſuch Bill.

Econtra.

This Declaration is ſpecial, and in many Caſes the Matter may be ſpecially traverſed, which probably might have been given in Evidence upon the general Iſſue pleaded; (to which the Court inclined) moreover the Cuſtom of Merchants (as to drawing Bills) never extends to any who are not Merchants; for if the Cuſtom ſhould be ſo general as the Plaintiff hath ſet forth in this Declaration, (viz.) between all Perſons negotiantes, then 'tis not Cuſtom but Common Law, and if ſo the Declaration is not good, becauſe 'tis ſpecial.

Curia.

1 Roll. Rep. 43, 401.

But the Court held it to be reaſonable, that the Defendant ſhould have Liberty to traverſe the ſpecial Matter, becauſe the Declaration was ſpecial; and a Difference was taken between a Conſideration of a Promiſe which is executed, and a Conſideration which is executory; for the one is not traverſable, but the other is.

At laſt, upon Conſideration had of the Inconveniencies which might enſue, and the Suſpicion which might encreaſe

amongſt foreign Merchants, upon Bills of Exchange, if Perſons who took upon themſelves to draw ſuch Bills ſhould not be liable to the Payment thereof; they all agreed that the Judgment ſhould be reverſed.

Carter *verſus* Dowriſh. Hill. 3 & 4 Jac. II. B. R. Rot. 836.

ERROR of a Judgment in B. R. in an Action of Covenant, which was to pay all Bills of Exchange, which one T. S. his (the Defendant's) Factor ſhould draw on him (the Defendant) payable to the Plaintiff, or Order; the Breach aſſigned was, that the ſaid T. S. had drawn a Bill of Exchange for 400 l. upon the Defendant, payable to the Plaintiff, or Order, and that the Defendant had accepted the ſaid Bill, but refuſed to pay the Money, &c. 3 Mod. 226. In a Declaration the Cuſtom of Merchants ought to be ſet forth, but 'tis otherwiſe in a Plea.

The Defendant pleaded, that the Plaintiff Secundum conſuetudinem mercatoriam had endorſed the ſaid Bill to one I. N. who endorſed it to I. D. and that he (the Defendant) had paid 100 l. Part thereof to the ſaid I. D. and tendered the Reſidue to him, which he refuſed to accept.

And upon a Demurrer to this Plea the Plaintiff had Judgment in B. R. becauſe the Defendant did not ſet forth in his Bar ſpecially, what the Cuſtom of Merchants was, for upon ſuch a general Allegation ut ſupra, the Court will not take Notice ex Officio, what the Cuſtom is.

And now upon Error brought in B. R. the Court ſeemed to be of another Opinion, (viz.) that they ought ex officio, to take Notice of the Law of Merchants, becauſe 'tis Part of the Law of the Land; and eſpecially they ought to take Notice of this Cuſtom concerning Bills of Exchange, becauſe 'tis the moſt General amongſt all their Cuſtoms; and moreover, that the Courts of Law have, ex officio, in ſeveral Caſes, taken Notice de lege mercatoria; as for Inſtance, of the Law of * Survivorſhip amongſt joint Merchants, and likewiſe of ſcandalous Words ſpoken of them in reſpect to their Trade; ſo they held this Plea good, being general, ut ſupra; but probably it might have been otherwiſe in a Declaration on a Bill of Exchange; for there the Plaintiff ſhould ſet forth what is the Cuſtom of Merchants. Curia. Yelv. 136. * The Survivor has no Right.

The Judgment was reverſed.

Heblethwait *verſus* Palms.

3 Lev. 133. S. C. 3 Mod. 48. S. C. In Treſpaſs, &c. a Declaration is good upon the Poſſeſſion againſt a Wrong-doer.

IN an Action on the Caſe for diverting a Water-courſe, the Plaintiff declared, that the Defendant malitioſe, &c. infregit a certain Mill-dam, & perinde did divert the Water-courſe ab antiquo & ſolito Curſu erga the Corn-mill of the Plaintiff, by Reaſon whereof he loſt the Profits of his ſaid Mill; but did not ſet forth that the Water uſed to turn his Mill, or that he had any other Profit thereof, or that the Water-courſe was Antiquus aquæ Curſus, &c.

The Defendant pleaded ſpecially, that he is and was ſeiſed of ſuch a Piece of Land upon which the Dam was erected, and by which the Water had uſed to run to his own Mill, which was lately burnt down, by Reaſon whereof he had no Manner of Uſe for the Water, and therefore he broke the Dam prout ei bene licuit.

There was a frivolous Replication and Rejoinder, and thereupon the Plaintiff demurred; but the Diſpute was only concerning the Sufficiency of the Declaration and the Bar.

It was argued for the Plaintiff in Error, that the Declaration in the original Action was not good, becauſe the Plaintiff did not ſet forth, that his Mill was an antient Mill, nor did he preſcribe to have a Water-courſe, or ſhew that he had any Benefit by it; for all that he alledged was, that the Water runned towards his Mill, and not that it turned the Mill, or did any other Service.

Beſides he did not poſitively alledge, that there was an antient Water-courſe, (ſo that a Traverſe might be taken of that Matter) but only under the Perinde, for he ſet forth, that the Defendant broke the Dam, & perinde did divert the Water-courſe ex antiquo & ſolito curſu, which is no Affirmance or Averment that might be traverſed; therefore this is not like the Caſes in our Books, where in ſuch Actions 'tis laid, that the Water currere debuiſſet & conſuevit to ſuch a Mill, for theſe Words amount to a Preſcription.

But here the Plaintiff had only ſhewn, that the Defendant had diverted the Water-courſe out of its antient Channel, but did not pretend that the Dam which was broken, and by which the Water did run, was upon his own Land, but founded his Action meerly upon diverting the Water-courſe, without ſhewing he had any Benefit by the Water,

therefore the Damages laid under the per quod, are to no Purpose.

As to the Plea, it was good, because it set forth the Truth of the Matter, and the Defendant had no Means to traverse the Antiquity of the Plaintiff's Mill, or of the Water-course.

On the other Side it was argued, that the Bar was ill, for 'tis nothing but a collateral Story, and no direct Answer to the Declaration, and at most 'tis only argumentative; and the Court inclining to that Opinion, the Dispute rested wholly upon the Sufficiency of the Declaration; and it was argued that the Declaration was good upon the Possession alone, without any other Matter, for prima facie, that is sufficient to maintain an Action of Trespass against a Wrong doer; for in several Cases where a Man hath the Possession, tho' he hath no Property in the Goods, he may have Trespass, &c. Econtra. Palm. 200. *See* Lutterell's *Case*, 4 Rep.

This Action is of the same Nature with an Action of Trespass, and therefore good upon the Possession only, and that the Words ab antiquo & solito cursu, amount to as much as if it had been said de jure currere debuisset & consuevisset.

The Judgment was affirmed, but Holt Ch. Justice said, that if the Cause had been tried before him, the Plaintiff should have proved his Mill to be an antient Mill, otherwise he should have been nonsuit. Curia.

And Justice Dolben cited a Case between * Hart and Bassett, adjudged Anno 23 Car. 2. which was an Action for Stopping an usual and convenient Way to his (the Plaintiff's) Land; and this Declaration was held good, without shewing a Title. * T. Jones 157.

Lewis *versus* Weeks.

IN an Action of Debt upon a Judgment in an Hundred-Court, the Plaintiff declared quod cum (the Plaintiff on such a Day) apud W. in Com. Somerset ad Curiam hundred. de Norton Ferrers coram sectatoribus (without naming them) ejusdem Curiæ ad tunc & ibidem tent. secundum consuet. ejusdem Curiæ a tempore cujus contrarium, &c. recuperavit versus (the Defendant) 3 l. 3 s. tam pro damnis suis quam pro mis. & custagiis suis, &c. unde convict. est prout per memorandum ejusdem Curiæ plenius liquet & apparet

Debt upon a Judgment in an inferior Court in which the Plaintiff declared, that at such a Court *coram sectatoribus*, without naming them; 'tis ill, but cured by Verdict.

paret ac Judicium prædict. adhuc in ſuo pleno robore & effectu exiſtit minime reverſat', &c. per quod actio accrevit, &c.

Upon Nil debet pleaded, the Parties were at Iſſue, and there was a Verdict for the Plaintiff; and now the Defendant moved in Arreſt of Judgment, for that the Declaration was too general, becauſe where the Plaintiff recovers in a Court not of Record, the Declaration ought to be ſpecial, ſetting forth all the Proceedings in certain, that this Court may be appriſed of their Juriſdiction, and alſo of the Regularity of their Proceedings.

And there is always ſome Difference in declaring in an Action of Debt upon a Judgment had in a Court of Record, and upon a Judgment obtained in a Court not of Record; for in the firſt Caſe 'tis ſufficient to declare generally, ut ſupra; but in the laſt Caſe, the Declaration always ought to be ſpecial; and in the principal Caſe, the Action being founded on a Judgment obtained in the Hundred-Court, which is not a Court of Record; and the Declaration being too general, 'tis therefore ill.

Then it was objected, that the Plaintiff in his Declaration had not named the Suitors as he ought, becauſe they are the Judges of this Court, and that for theſe Reaſons the Declaration was ill.

Yelv. 16, 17. Holt Ch. Juſtice ſaid, that he never knew any good Reaſon for that Diſtinction in declaring on a Judgment had in a Court of Record, and in a Court not of Record; 'tis true, a Diſtinction hath been made, but without any Reaſon; but in this Caſe he held, that the Declaration was too general and conciſe; for at leaſt he ought to have ſet forth the Names of the Suitors, who were the Judges.

But at laſt it was adjudged, that theſe Defects were cured by the Verdict; and that it ſhall be intended, that all this Matter was given in Evidence at the Trial.

So the Plaintiff had Judgment.

Stephens *verſus* Etherick.

After a Verdict on a Writ of Inquiry the Plaintiff cannot diſcontinue if the Defendant will not conſent.

IN Covenant brought by the Father of an Apprentice upon the Indenture of Apprenticeſhip; there was Judgment by Default againſt the Defendant (the Maſter); upon a Writ of Inquiry very ſmall Damages were given, with which the Plaintiff being not ſatisfied, moved for Leave to

diſcontinue the Action; to which the Court anſwered, that they had no Power to give ſuch Leave, without the Conſent of the Defendant, which in this Caſe he refuſed.

But the Counſel for the Plaintiff inſiſted, that the Court had Power to give Leave to diſcontinue, without the Conſent of the Plaintiff, becauſe the Award of the Writ of Inquiry on the Roll is no other than a Rule of Court, and no Judgment; and 'tis clear, that after a ſpecial Verdict found for the Plaintiff he may diſcontinue; and this was laid down for a Rule, (viz.) where-ever a Writ is abateable by the Death of the Plaintiff, there he may diſcontinue without the Aſſent of the Defendant. 11 Rep. Metcalfe's *Caſe*. 1 Saund. 23.

On the other Side it was ſaid, that the Award of the Writ of Inquiry on the Roll was ſuch a Judgment, that afterwards the Plaintiff could not diſcontinue, becauſe the Defendant is out of Court, and hath no Day in Court, and therefore the Suit is determined; and an Action which is determined cannot be diſcontinued. Econtra. Raſt. Entr. 144. Dyer 195. Sid. 16. Saund. 37.

Holt Ch. Juſtice, 'Tis certain that the Action may be diſcontinued by the Aſſent of the Defendant, and that even after a Verdict it may be diſcontinued by ſuch Aſſent, and that there was no Difference (in Reſpect to the Diſcontinuance) between a Verdict upon Iſſue joined and a Verdict upon a Writ of Inquiry; and it was held, that the Plaintiff could not by Law diſcontinue, without the Aſſent of the Defendant. Curia.

Skinner *verſus* Kilby. Trin. 1 Will. & Mar. B. R. Rot. 833.

IN an Action of Covenant upon a Leaſe for Years of a Mill, rendring Rent, the Breaches following were aſſigned. Upon a Negative and an Affirmative, if the Defendant concludes his Plea in Bar and not to the Country, 'tis ill, of which Advantage may be taken upon a general Demurrer.

1. The Plaintiff in Fact ſaith, that 20 l. for the Rent of the Premiſſes for ſeven Years, ended at ſuch a Day, were in arrear, and not paid to the Plaintiff.

2. Another Breach was, that the Defendant had permitted the Mill to be uncovered, and out of Repair.

3. The Third was, for that the Defendant had not delivered up the Premiſſes to the Plaintiff, at the End of the Term, ſecundum formam Indenturæ.

The Defendant pleaded as to the firſt Breach in Non-payment of Rent, that he from Time to Time, at the ſeveral

veral Days of Payment, had paid the Rent to the Plaintiff, Et hoc paratus eſt verificare.

And as to the Repairing, he pleaded, that it was ſufficiently in Repair, and concludes likewiſe as before, Et hoc paratus eſt verificare.

And as to the not yielding up the Poſſeſſion, he pleaded, that before the End of the Term, (viz. on ſuch a Day) quidam T. S. habens bonum jus & titulum ad molendinum prædict. in & ſuper molendinum prædict. intravit & ipſum (the Defendant) a poſſeſſione inde expulit & amovit & adhuc extratenet & hoc ſimiliter paratus eſt verificare unde petit judicium ſi, &c.

And upon a general Demurrer to this Plea it was objected, that it was ill for two Cauſes; the one was, becauſe the Defendant had pleaded, that he paid the Rent, which is a direct Affirmative to the Negative in the Declaration, that he had not paid the Rent, &c. and ſo is his Plea as to the Repairs, (viz.) that the Mill was in Repair, which is a direct Affirmative to the Negative in the Declaration, that it was not in Repair, and therefore the Defendant ought to have concluded to the Country, and not in Bar to the Action with hoc paratus eſt verificare; for 'tis a Rule in Pleading, that upon the firſt Affirmative and Negative, and ſo econtra, an Iſſue ought to be joined; otherwiſe the Pleading may be in infinitum; now here was an Affirmative and a Negative, and yet the Defendant concluded in Bar thereof, as to that Part, 'tis ill.

* 2 Lev. 37. 3 Lev. 325. It was *Virtute dimiſſionis ei inde fact. ante confectionem Indenturæ, &c.* This was held good without ſhewing by whom the Demiſe was made.

Then the Pleading the Expulſion in Form, as aforeſaid, is ill, (viz.) * Quod T. S. habens bonum jus & titulum intravit, &c. which is too general, incertain and inſufficient; for he ought to ſhew, that T. S. had a Title paramount and ſuperior to the Leſſor, who granted this Leaſe to the Defendant; for 'tis probable that he might have a good Title under the Defendant himſelf, by Aſſignment of the Term, and therefore that can be no good Cauſe of Excuſe.

Lib. 4. 80. *Noke's* Caſe, where the Plea was, that ſuch a Perſon recovered by Verdict, is not good, without ſhewing that the Recoveror had an elder Title.

4 Rep. 80. *b.* 2 Saund. 178, 179.

The Counſel for the Defendant thus diſtinguiſhed, viz. that where an Affirmative came after a Negative, there Iſſue ought not to be joined, but ought to be left on the other Side; but where the Affirmative was firſt, and the Negative came after, there it ought to be joined.

But the Ch. Juſtice Holt never heard of ſuch a Diſtinction, and therefore gave little Regard to it; but for the Reaſons and Defects, ut ſupra, the Court held the Plea to be ill in Subſtance, and therefore Advantage might be taken upon it on a general Demurrer.

Judgment for the Plaintiff.

Wilkyns *verſus* Wilkyns.

IN Aſſumpſit, &c. the Declaration was quod cum the Plaintiff, on ſuch a Day, was poſſeſſed of Goods and Chattels contained in a certain Box; and alſo of 4 Hat-caſes, to the Value of 50 l. in the Whole; and whereas the Defendant, at the ſame Time, was Maſter of a Ship called the Fortune of London, and about to take a Voyage from thence to Jamaica; the Defendant in Conſ. that the Plaintiff, at the Requeſt of the Defendant, had delivered to him the aforeſaid Goods; he the ſaid Defendant promiſed to diſpoſe the Goods, and to render an Account thereof to the Plaintiff at his (the Defendant's) Return, &c. from his Voyage; but that the ſaid Defendant not regarding his Promiſe non diſpoſuit bona & catalla nec ad aliquod tempus after his Return, &c. dedit aliquem computum inde, altho' often required, &c.

1 Salk. 9. Where an *Aſſumpſit* lies, and not an Action of Account.

The Defendant pleaded in Abatement proteſtando, that the Goods delivered were not of that Value prout, &c. pro pl'ito petit judicium de Billa, for that he on the Day and Year aforeſaid, was the Plaintiff's Bailiff, de prædictis bonis & catallis ad merchandizand. and to render an Account of the Profits to the Plaintiff prout ſuperius per billam prædict. plene apparet; and therefore the Plaintiff ought to have brought an Action of Account againſt the Defendant, and not a Bill of Treſpaſs on the Caſe, & hoc, &c.

Dyer 20. 1 Inſt. 172. 1 Roll. Rep. 52.

And upon a Demurrer to this Plea, three Judges were of Opinion, that this Action would lie, becauſe it was brought upon an expreſs Promiſe, and not upon a Promiſe by Implication.

But Holt Ch. Juſtice doubted, and told the Plaintiff that he would not permit him to give all the Account in Evidence, or to enter into the Particulars thereof, but that he ſhould direct his Proof only as to the Damages which he had ſuſtained for not accounting according to the Promiſe, for he would not ravel into an Account in ſuch Actions.

Nota, The Trial was to be before him at the Sittings, and a Rule was made, that the Defendant ſhould anſwer over.

Croſſe *verſus* Gardner.

3 Mod. 261. Caſe for falſly affirming the Goods to be his own, when they were the proper Goods of another, without ſaying *Sciens* they were the Goods of another, good.

CASE, &c. in which the Plaintiff declared quod cum (on ſuch a Day) colloquium fuit between the Plaintiff and the Defendant, concerning the Buying and Selling two Oxen, which the Defendant then had in his Poſſeſſion, and he (the Defendant) adtunc & ibidem falſo & malitioſe affirmabat, that thoſe Oxen were his (the Defendant's) proper Goods, to which the Plaintiff giving Credit, bought the ſaid Oxen of the Defendant for ſo much Money, when in Truth the ſaid Oxen then were the proper Goods of T. S. and that he the ſaid T. S. poſtea, &c. lawfully recovered the ſaid Oxen from the Plaintiff, and licet (the Defendant) ſæpius requiſit. fuit, yet he refuſed to give the Plaintiff Satisfaction for the ſame.

Upon Not guilty pleaded, the Parties were at Iſſue, and the Plaintiff had a Verdict; and now it was moved in Arreſt of Judgment, that the Declaration was ill, and that this Action would not lie, becauſe the Plaintiff had not laid in his Declaration, that the Defendant (Sciens that theſe were the Oxen of T. S.) did affirm them to be his Oxen.

Beſides, he did not alledge this to be done deceptive, neither did he ſet forth any Warranty, but generally, that the Defendant did affirm theſe to be his (the Defendant's) Oxen, which is not ſufficient to maintain this Action, becauſe a Man may be miſtaken in his Property and Right to a Thing, without any Fraud or ill Intent.

2 Cro. 196, 387, 469, 470.

Curia. But the Court was clear in Opinion (upon Conſideration of this Declaration) that the Action would lie upon a bare Affirmation, ut ſupra; and that this Caſe differed from the Books cited, becauſe here the Plaintiff had no Means to know to whom the Property of theſe Oxen did belong, but only by the Poſſeſſion; and to prove that this Action would lie, the Authorities in the * Margin were cited.

* Yel. 20, 40. 2 Cro. 474. in Point. 1 Roll. Abr. 91. Sid. 146. 1 Lev. 102.

Judgment for the Plaintiff.

Shuttleworth *verſus* Garnett. Trin. 4 Jac. II. B. R. Rot. 965.

3 Mod. 239. S. C. 3 Lev. 262. S. C. *Aſſumpſit* lies for a Fine of held Debt to

THE Caſe, *ſſ.* Catherine Shuttleworth, Widow and Adminiſtratrix of the Goods of Sir Richard Shuttleworth, her late Husband, brought an Action on the Caſe

a Copyholder, and not Debt, by three Judges; *contra*, *Holt* Ch. Juſtice, who be the proper Action.

againſt Garnett, and declared after this Manner, (viz.) quod cum (the Defendant) in vita prædict' R. S. (the Inteſtate) exiſten' tenen' quorund' Cuſtomar' ten'torum Parcel of the Manor of D. which Manor præd' Ric'o ut filio & hæredi J. S. Ar' patris ſui defunct' deſcendiſſet indebitat' fuit eidem R. S. in 40 l. pro rationabili & cuſtomar' fine debit' & ſolubil' eidem R S. ſuper mortem prædict' J. S. pro tementis prædictis quæ tunc tenuit de prædict' J. S. ut de manerio ſuo prædict' per fidelitatem reddit' & ſolvend' rationabilem finem upon the Death of every Lord of the ſaid Manor, to be ſet at the Will of the Heir of every ſuch Lord, & per eundem R. S. in vita ſua poſt mortem prædict' J. S. patris ſui ſupra prædict' (the Defendant) debito modo ſecundum conſuetud' manerii impoſit' Et ſic indebitat' exiſten' ipſe idem (the Defendant) on ſuch a Day and Year) ſuper ſe aſſumpſit & eidem (the Inteſtate) fideliter promiſit ſolvere, the ſaid 40 l. which he had not paid, per quod, &c.

Upon non aſſumpſit pleaded the Parties were at Iſſue, and the Plaintiff had a Verdict, and now it was moved in Arreſt of Judgment, that this Action would not lie, it being for a Fine, which is an Inheritance, and ſavours of the Realty; for 'tis Parcel of the Tenure of the Lands, which plainly appears by the Declaration it ſelf; and 'tis clear that an Action of Debt will not lie for a Rent-Service, which is an Inheritance, and where Debt will not lie this Action is not maintainable.

Holt Chief Juſtice was of Opinion, that the Adminiſtratrix might bring an Action of Debt, and that it was her proper Remedy; but an Aſſumpſit is an Action of an inferior Nature; and if it will lie for this Duty, then the Duty it ſelf is in its Nature inferior to a Debt on a Bond, which Debt muſt therefore be paid by an Executor before this Duty; but this would be very ſtrange, becauſe the Fine iſſues out of the Lands, and is meerly in the Realty. Curia.

He likewiſe held, that Debt would not lie for a Quit-Rent iſſuing out of a Copyhold, but Eyre Juſtice doubted of that Matter, and cited * Ognell"s Caſe, and Yel. 135. that a Quit-Rent is not within the Statute 32 H. 8. cap. 37. and therefore an Executor cannot bring an Action of Debt for the Arrears; and the ſaid Judge farther ſaid, that this Duty was of the ſame Nature as a (A) Relief for which an Aſſumpſit will lie, and for the ſame Reaſon it will lie * 4 Rep. 49.

(A) Debt will not lie unleſs by his Executors. 1 *Inſt.* 47. *B.*
Debt will not lie for a Relief by the Lord himſelf. 1 *Inſt* 162. *B.* 4 *Rep.* 49. *B.*

* Cro. 102. 2 Leon. 179. 2 Cro. 595. W. Jones 329.

for this Duty; and for this Purpose the Cases in the * Margin were cited.

Nota, It was admitted by all, that Debt would lie for a Fine upon an Admittance to a Copyhold.

† 1 Vent. 298.

And in arguing this Case, that of the † Lord Mayor of London and Goree was cited, which was lately adjudged in B. R. which was an Assumpsit for a Sum certain due for Scavage, (which is a certain and customary Duty for all Goods and Merchandizes imported in London) and there it was adjudged, that the Action would lie notwithstanding the Duty was the Inheritance of the Lord Mayor, &c.

To which Holt Chief Justice replied, that the Cases were not parallel, for the Duty of Scavage doth arise out of Things in the Personality; but the Duty in the principal Case issued out of the Realty.

But Judgment was given for the Plaintiff by three Judges against the Opinion of the Chief Justice.

Parkinson's *Case*.

3 Mod. 265.

MAndamus to restore Parkinson to a Fellowship in Lincoln-College in Oxford, who was actually possessed of the Freehold of his Fellowship there, but was expelled.

Mandamus denied to restore a Fellow of a College.

Resolved by all the Court, that a Mandamus should not be granted to restore a Fellow or Member of any College of Scholars or Physick, because those are private Foundations, and governed by particular Laws of the Founders; for which Reason this Court cannot take Notice of their private Ordinances.

Besides every Fellow of a College when he is admitted to a Fellowship, he accepts it under such a Condition, that he shall submit to the Government of the Visitor of that College; and that if any Injury is done to him by an inferior Officer, his Remedy is by way of Appeal to the Visitor; for this Court hath no Power to intermeddle; and the Lord Chief Justice Hale was always of that Opinion.

The Law is the same in Case of an Hospital, and Dr. Merrick's Case who was one of the College of Physicians, was adjudged accordingly, and so was Ayloffe's Case.

* 1 Mod. 82. 1 Lev. 23, 65. 2 Lev. 14. Raym. 56, 94, 100. Sid. 94, 152, 346.

And Holt Chief Justice cited * Appleford's Case, which was a Mandamus to restore him to a Fellowship of New-College; the Return was, &c. That by the Founder's Laws they might expel any one who had committed an enormous Crime;

Crime; and that Appleford had committed an enormous Crime, and therefore they expelled him; that he appealed to the Visitor who was the Bishop of Winchester, who confirmed the Expulsion; and concluded to the Jurisdiction of the Court; and this was held a good Return, though it did not mention what manner of Crime Appleford had committed, so that it might appear whether he was lawfully expelled or not; for it was not necessary to mention the Crime, because the Court had no Authority to intermeddle with it.

And the Chief Justice said, that the Colleges in the Universities were Lay-Corporations, and that the Founders, their Heirs and Successors, are Visitors; but where the Corporations are Spiritual, there the Bishop of the Diocese is Visitor.

Brandlin *versus* Millbank.

DEBT against the Defendant as Heir, who pleaded in Bar, that T. S. who was likewise jointly and severally bound with his Ancestor had paid the Money; the Plaintiff replied non solvit, upon which they were at Issue; and the Plaintiff had a Verdict, and general Judgment in C. B. and now upon a Writ of Error in B. R. it was insisted for the Plaintiff in Error, that the Judgment against the Heir in this Case ought to be special, (viz.) of the † Lands descended, and not general as here.

Debt against an Heir and a general Judgment was given him, and good.

† 1 Cro. 436. Poph. 153. W. Jones 88.

But on the other Side it was said, that this Point was well settled in * Davis and Pepy's Case, with which the Register agreed.

*Plow. 440. a. Regist. 140. a.

The Court referred to Roll's Abr. Tit. Heir, where it was full in this Point; and that there were several Judgments recited, and likewise if a special Judgment should be given, in such Case, it would be Error; and a Distinction was made between Debt and a Sci. fa. against the Heir upon a Judgment had against his Ancestor; for if in a Sci. fa. the Heir plead a false Plea, and 'tis found against him, yet the Judgment shall be of the Lands descended only, for the Execution in such Case shall be upon the first Judgment against the Ancestor, and not upon the Judgment in the Sci. fa. quod habeat Executionem, because such Judgment did not alter or enlarge the first Judgment; and so it was adjudged in the Case of * Bowyer *versus* Rivett.

Curia.

* Poph. 193, 153. 1 Cro 296. 3 Bulst. 317. W. Jones 87.

The Judgment general was affirmed.

The

The King *verſus* Fairfax.

3 Mod. 269.

CErtiorari to remove an Order of Seſſions, by which the Order of two Juſtices was confirmed upon the Application of the Overſeers of the Poor, for putting an Apprentice upon Fairfax againſt his Will.

Juſtices have Power to Place an Apprentice in Husbandry againſt the Conſent of the Maſter, but not a Tradeſman.

Nota, This was a general Order without mentioning what Trade or Profeſſion Fairfax uſed; and now it was moved to quaſh it, becauſe the Juſtices had not Power by the Statute 5 or 43 Eliz. to impoſe an Apprentice on another againſt his Will; for by the firſt Statute the Juſtices have only Power to bind poor Children to Husbandry; but by the later Statute they may bind them to Trades, and for that Purpoſe they have Power to raiſe a Stock by way of Aſſeſſment upon the Pariſh, of which there would be no Occaſion, if they had Power to bind them out without * Money, and the Statute 1 Jac. 1. cap. 25. par. 3. was cited, and that there was no other Statute concerning the Diſpoſing and Proviſion for the Poor; and that neither of theſe Statutes gave ſuch an arbitrary Power to the Juſtices of Peace as to Place an Apprentice on a Maſter without his Conſent; and that it would be very inconvenient if Houſekeepers ſhould not have Liberty to chooſe their own Servants; for then a Thief, a Leper, or an Enemy might be impoſed on them.

* This is now remedied by the Statute.

That the Reſolutions of the Judges, as mentioned in Dalton, were not their Reſolutions, as Juſtice Twiſden often declared in his Life-Time, to which Juſtice Dolben now replied, that they were the Reſolutions of the Judges, and good Law.

Econtra.

* Raym. 65, 66. The King *ver.* Gilliflower.

Thoſe who argued for the Order very much relied upon the Judgment in that Caſe reported by * Raym. which was the very like Caſe now in Queſtion; and Sir Bulſtrode Whitlock's Annals fol. 16. was cited in Point, and that the conſtant Practice all over England, had been according to this Order.

Curia.

Holt Chief Juſtice was againſt the Order, and was clear in Opinion, that the Juſtices of Peace had not ſuch a Power.

But the other three Judges againſt him, upon this Difference, (viz.) that Juſtices of Peace cannot impoſe an Apprentice on any Tradeſman againſt his Conſent; but

muſt aſſeſs and raiſe Money to bind him out; but that they had Power to impoſe an Apprentice in Husbandry at their Diſcretion, whether the Husbandman conſented, or not.

However, becauſe it was not ſet forth in this Order, that Fairfax was an Husbandman, or that the Apprentice was bound to Husbandry, ſo that it might appear he was not bound to any Trade; this Order was quaſhed.

Duppa *verſus* Gerrard.

SIR Tho. Duppa, and others, Gentlemen Ushers, and daily Waiters to the King, brought an Aſſumpſit againſt the Defendant, in which they declared, that all Gentlemen Ushers, daily Waiters, &c. Time out of Mind, had uſed to have a Fee of 5 l. of every Perſon who voluntarily accepted the Honour of Knighthood; and that the Defendant (on ſuch a Day) had voluntarily accepted Knighthood, and thereupon became indebted to them in 5 l. and in Conſideration thereof (on ſuch a Day) had promiſed to pay the Money, which he had not performed.

Aſſumpſit lies for a Fee of 5 *l.* due from any Perſon who accepts to be knighted.

And upon a Demurrer to this Declaration, it was adjudged, that this Action would lie for this Duty, and thereupon the Plaintiffs had Judgment.

Chettle *verſus* Lees. Trin. 1 Willi' & Mariæ, B. R. Rot. 107.

IN Treſpaſs for Breaking his Cloſe, &c. the Declaration was of Eaſter-Term laſt paſt, which began on the 17th Day of April, and the Treſpaſs was laid to be done in October before, (viz. in the 4th Year of K. James II.) per quod he loſt the Profits of his Lands to the 1ſt Day of May enſuing (which was after the Beginning of Eaſter-Term) to which the Declaration did relate, as it appears ſupra, ſo that the Per quod did extend to a Time after the Commencement of the Action; and the Declaration was concluded contra pacem nuper Dom. Regis & Dom. Regis nunc, &c.

4 Mod. 6. S. C. Where the Concluſion of Plea *contra pacem* is meer Surpluſage.

The Defendant pleaded a frivolous Bar, to which the Plaintiff demurred; and it was inſiſted for the Defendant, that the Declaration was ill, for that the Plaintiff had declared for Damages unto a Time after the Action commenced,

ced, which ought not to be, and had concluded his Declaration ill; for it should be contra pacem nuper Domini Regis only, there being no Continuando of any Trespass laid in the Time of the present King; and so is the Case 2 Cro. 377. in Point.

Econtra for the Plaintiff.

On the other Side it was said, that the Default in the Per quod, and also the Conclusion of the Declaration, (viz.) contra pacem Domini Regis nunc, were Surplusage, and therefore shall not vitiate the Declaration. See 2 Cro. 377, in Point.

Holt Ch. Justice told the Defendant's Counsel, that they came too soon for the first Exception, because the Jury might cure that Fault by a separate Verdict, (viz.) quoad the Trespass in the Month of October to the 17th of April, they assess Damages to so much, and the Plaintiff might release the Residue; but if the Verdict had been general, this would have been a good Exception afterwards; and the Court held that Clause contra pacem Domini Regis nunc, meerly Surplusage, and therefore shall not prejudice that Matter, which without it was sufficient.

The Plaintiff had Judgment, the Bar being frivolous.

Rawlinson *versus* Oriett *and* Benson. Pasch. 1 Will. & Mar. B. R. Rot. 281.

Trespass against Two, who both pleaded in Abatement another Action of Trespass depending against one alone.

TRespass, &c. against two Defendants, who both plead in Abatement of the Bill, for that the Plaintiff had another Bill of Trespass here depending, against the Defendant Benson alone, for the same Trespass; and so petit judicium of this Bill pending the other.

And upon a Demurrer to this Plea it was objected, that it was ill; for if 'tis any Plea, 'tis only for Benson, one of the Defendants, and not for both; and for this Purpose the Cases of Misnosmer of one of the Defendants were cited, which cannot be pleaded by the other joint Defendants, because it abates the Writ quoad him who was misnamed, as it hath been often adjudged.

Econtra.

* Hob. 137, 250. Winch Ent. 892, 893.

It was argued that the Plea was good and well pleaded, and shall abate the whole Bill; and for Authorities in Point, the Cases in the * Margin were cited.

And Justice Eyre cited a Case in Cro. Eliz. 667. which he held to be the same in Reason with the present Case,

only that was a Plea in Bar, and not in Abatement as this is.

Holt Ch. Juſtice dubitabat, but the other three Judges inclined, that the Plea was good as to both the Defendants.

Broad *verſus* Piper.

PArſon Piper libelled in the conſiſtory Court of Exon. againſt one Broad for a Mortuary; and now it was moved for a Prohibition, upon ſuggeſting the Statute 21 H. 8. cap. 6. concerning Mortuaries, alledging alſo, that there is no peculiar Cuſtom within the Pariſh of, &c. to have Mortuaries; and that a Prohibition will lie in ſuch Caſe. See Cro. Eliz. 151. 3 Mod. 268. Prohibition after Sentence for a Mortuary.

On the other Side, that the Plaintiff in this Prohibition came too late, becauſe it was after Sentence given in the Spiritual Court; and as to the Matter in Law, it was argued, that a Prohibition would not lie in this Caſe, becauſe a Mortuary is meerly of Spiritual Cogniſance, of which this Court hath no Juriſdiction; and for this Purpoſe the Caſes in the * Margin were cited. Econtra. * Cro. Car. 237. *Stat. Articuli Cleri. Stat. Circumſpecte Agatis.* Raſt. Ent. 484. Sid. 263.

Moreover, a Prohibition ſhall not be granted after Sentence, except it appears that the Spiritual Court had no Juriſdiction of the Cauſe; nay, it will not lie after Sentence, where it would lie before; and for this Purpoſe the Caſes likewiſe in the † Margin were cited. † 2 Roll.Abr. 318. Hob. 79.

The Court, upon the whole Matter, was doubtful, Whether a Prohibition would lie for a Mortuary; therefore, for ſettling this Point, they adviſed the Defendant to accept of a Declaration upon the Prohibition; and thereupon to demur, that the Matter might be ſolemnly debated.

Coleman *verſus* Sherwin.

IN Covenant, the Plaintiff declared, quod cum per quoddam ſcriptum factum tam ſigillo ipſius (Sherwyn) quam ſigillis quorundam Edvardi Dover & Johannis Enſfeild ſigillat. agreat. fuit per & inter partes prædict. & teſtatum exiſtit quod prædict. Sherwyn Dover & Enſfeild in conſideratione redditus reſervat. dimiſiſſent conceſſiſſent & ad firmam tradidiſſent & uterq; eorum dimiſiſſet, &c. ſuch Lands for ſeven Years, and the Plaintiff proteſtando, that he 1 Salk. 137. S. C. Shower 79. S. C. Where a Covenant in Law ſhall be joint, where not.

had performed all the Covenants on his Part, &c. the Defendant had not performed any on his Part, & in facto dicit quod the Defendant Sherwyn and one Heyward, by his Command, after the Demiſe, entered on the Lands demiſed, and turned the Plaintiff out of Poſſeſſion, & ulterius in facto dicit, that neither Sherwyn, Dover or Ensfeild, nec aliquis eorum fuerunt vel fuit ſeiſit. de terris, &c. tempore dimiſſionis nec habuerunt nec aliquis eorum habuit any lawful Power to demiſe, &c. but that one William Ensfeild was ſeiſed in Fee of the Premiſſes before the Leaſe made, &c.

Co. Ent. 111, 112.

The Defendant, after Oyer of the Deed (which was a Deed-Poll) pleaded thus: ff. Proteſtando, that (the Defendant) did not enter into the Land demiſed, nor was poſſeſſed thereof, pro placito dicit, that Sherwyn, Dover and Ensfeild were ſeiſed in Fee, &c. at the Time of the Demiſe, and had lawful Power to make the Leaſe, ut ſupra, (viz.) apud D. &c. Abſq; hoc, that Sherwyn & Heyward per ejus mandatum, after the Demiſe, &c. entered on the Lands, or turned the Plaintiff out of Poſſeſſion, and abſq; hoc, that the ſaid William Ensfeild was ſeiſed in Fee of the aforeſaid Lands, as the Plaintiff had declared, Et hoc paratus eſt verificare.

And upon a ſpecial Demurrer, for that the Defendant had traverſed Matter not traverſable;

Holt Ch. Juſtice, upon opening the Matter, ſaid, that this Action was brought on a * Covenant in Law made by the Word Conceſſi; and it appears here, that the Demiſe was a joint Demiſe made by the Defendant to Sherwyn, Dover and Ensfeild, and therefore this Covenant implied by Law, ought regularly to be joint.

* 1 Roll.Abr. 520. Hob. Holder v. Taylour's *Caſe*.

Curia. Sed per Curiam: In ſuch a particular Caſe as this is, where one of the Leſſors had actually done Wrong by his Entry on the Leſſee, without the Aſſent of the others; the Covenant in Law ſhall not be taken to be joint, ſo as to charge the other Leſſors with this perſonal Wrong of their Companion; for 'tis unreaſonable, that the Innocent ſhould be puniſhed with the Guilty; therefore as to that Breach, (viz) the Entry of Sherwyn, and turning the Plaintiff out of Poſſeſſion, the Action is well brought againſt him alone.

But as to the Two other Breaches aſſigned in the Declaration, this Action of Covenant ought to be brought againſt the Leſſors, for as to that Purpoſe the Covenant in Law is

joint, and not ſeveral; for in ſuch Caſe there is no particular perſonal Tort done by one more than the other; and if ſeveral Actions ſhould be permitted in ſuch Caſes, the Plaintiff would recover Damages two or three Times for the ſame Thing.

Croſſe *verſus* Hunt. In C. B.

DEBT upon a Specialty for 200 l. which was to this Effect:

Where a Traverſe upon a Travers ſhall be good.

ſt. That the Defendant did declare from his Heart before God, That he had taken the Plaintiff to be his Wife, as ſhe had taken him for her Husband; and the more to confirm the ſaid Plaintiff, that he had no deſign but to perform his promiſe aforeſaid, he (the ſaid Defendant) obliged himſelf by the ſame Deed to pay unto the Plaintiff 200 l. if he ſhould happen to be ſo baſe as to be worſe than his Word, and that if he did not pay it when demanded, ſhe (the Plaintiff) ſhould have good Right to ſue and recover it by Law, *&c.*

The Breach aſſigned was, that ſhe had tendered herſelf to marry the Defendant, but that he refuſed, and afterwards married another Woman, per quod actio accrevit, &c.

The Defendant pleaded, that he after the Making the aforeſaid Writing obtulit ſe to marry the Plaintiff, and ſhe refuſed, abſq; hoc, that he refuſed to take her for his Wife before ſhe had refuſed to take him for her Husband.

The Plaintiff replied, that ſhe tendered her ſelf to marry the Defendant, and he refuſed, abſque hoc, that the Defendant offered himſelf to marry the Plaintiff, & hoc, &c.

And upon a Demurrer to this Replication, it was inſiſted for the Defendant, that the Traverſe in it was ill, becauſe ſhe had traverſed that which was the Inducement of the Traverſe in the Bar; ſo that 'tis a Traverſe upon a Traverſe which the Law will not allow.

Beſides the Words of this Deed are in preſenti, and not executory, but declaratory of an Act executed.

Econtra for the Plaintiff.

On the other Side it was argued, that the Words in this Deed are ſufficient to create a Contract; and that of the higheſt Nature, for God is called as a Witneſs to it; and theſe Words cannot import any other Senſe, but only a Contract to marry the Plaintiff.

That the Traverſe in the Bar is ill, becauſe 'tis too large, for the Defendant had traverſed more than was alledged in the Declaration.

ſſ. Abſque hoc, That he had refuſed to take the Plaintiff for his Wife before ſhe had refuſed to take him for her Husband; ſo that he intended to make this Circumſtance of Time Parcel of the Iſſue; whereas there is no ſuch Circumſtance alledged in the Declaration, nor any Affirmation, that the Defendant had refuſed before the Plaintiff had refuſed; and therefore becauſe the Traverſe in the Bar was idle and frivilous, the Plaintiff might well traverſe the Subſtance of the Matter of the Bar; and of this Opinion was the Court as well to the Pleading, as to the Matter in Law.

Judgment for the Plaintiff.

Smith *verſus* Pierce. Trin. 3 Jac. II. B. R. Rot. 1160.

Where a Term for Years ſhall be barred by a Fine, where not.

IN a ſpecial Verdict in Ejectment the Caſe was thus;

ſſ. The Jury find that Robert Basket was ſeiſed in Fee of the Lands now in Queſtion; and by his laſt Will he deviſed the ſame to ſix Truſtees for 99 Years, to the Intent and Purpoſe to pay all his Debts and Legacies; which being paid, then to remain to his Brother John Basket in Tail; Proviſo that if the ſaid John, or his Heirs Males ſhould take upon them to pay the ſaid Debts and Legacies, or ſecure them to be paid, that then upon the Tender of 10 s. to the ſaid Truſtees they ſhould aſſign all their Intereſt, &c. to him.

The Teſtator died, and John Basket entered with the Aſſent of all the Truſtees, and ſold Parcel of the Lands, and with the Money paid all the Debts and Legacies, excepting 18 l. Legacy ſtill unpaid, and never demanded.

Afterwards the ſaid John Basket made a Leaſe of the Lands ſeverally to diſtinct Tenants, and during theſe Under-Leaſes, the ſaid John Basket and his Wife by Indenture covenanted to levy a Fine of the Premiſſes to the Uſe of himſelf for Life, then to the Uſe of his Wife for Life, then to his right Heirs for ever; and afterwards a Fine was levied accordingly; then John Basket died ſeiſed, and his Wife ſurvived, and entered, and was ſeiſed, and ſo continued for eight Years, and then ſhe died.

They find that there was not any Entry or Claim made by the Truſtees, during the Lives of John Basket and his Wife, and that Elizabeth the Wife of the Defendant Peirce is the Daughter and Heir of the ſaid John Basket, and that ſhe entered, and that afterwards the ſurviving Truſtees entered on her, and aſſigned their Intereſt to one Adams who is the Leſſor of the Plaintiff.

Thoſe who argued for the Plaintiff made this ſingle Queſtion, (viz.) Whether the Term for 99 Years was bared by this Fine and Nonclaim; and thereupon the only diſputable Point was, whether this Term was deveſted or diſplaced by the Entry of John Basket the Deviſee in Remainder, or by any other Act, Matter or Thing by him done or permitted to be done after his Entry; for if the Eſtate of this Term was not turned to a Right at the Time of the Fine levied, it muſt be admitted, that the Fine was no Bar, as it was adjudged in the Caſes in the * Margin. For the Plaintiff. *9 Rep. 104. in *Margaret Podger's* Caſe. 10 Rep. 96. *Seymour's* Caſe.

And it was argued that the Entry of John Basket was not ſuch an Entry, which would diſplace the Term, &c. becauſe the Jury found that it was with the Conſent of all the Truſtees of the Term; and an Entry by the Conſent of the Parties makes a Tenancy at Will, and if ſo, then John Basket by his Entry became Tenant at Will to the Truſtees.

That the Mortgagor is Tenant at Will to the Mortgagee paying the Intereſt, and tho' he makes Under-Leaſes, or a Settlement upon the Marriage of his Son, and thereupon levies a Fine, and the five Years paſs without any Claim; yet if he continue to pay the Intereſt, this Fine ſhall not affect the Mortgagee. Sid. 460.

The Caſes in the † Margin were likewiſe cited to prove that an Entry (where the Aſſent of the Parties appears) makes only a Tenancy at Will, and not a Diſſeiſin, but only at the * Election of the Leſſor, and not of the Leſſee at Will. † Cro. Car. 302. W. Jones 315. Litt. ſect. 70. * Dyer 61, 62, 173. 2 Roll. Rep. 285.

Now the Bargain and Sale of Parcel, &c. made by John Basket, ut ſupra, deveſted nothing, becauſe ſuch a Conveyance conſiſts only in Contract, and nothing more paſſes but what the Bargainor had a Right to ſell; then as to the Making the Under-Leaſes, nothing is deveſted thereby, becauſe there appears to be no ill Intent in John Basket; and 'tis the Intent of the Parties that makes the Tort, and if the making theſe Under-Leaſes ſhould be taken

ken to be a Deveſting, then the Under-Tenants will be Tort-feſors nolens volens.

1 Leon. 121. Lateh. 23, 57. 1 Roll. Abr. 661. Litt. ſect. 588. 3 Rep. 77. *Farmer's* Caſe. 2 Bulſt. 138, 139. Sid. 458.

Moreover, he who enters on Lands and claims nothing but for Years is not a Diſſeiſor, but at the Election of the right Owner, and not at the Election of him who made the Entry.

Econtra for the Defendant.

It was argued for the Defendant, that this Fine was a Bar to the Term both within the Words and the Intention of the Statute 4 H. 7. and alſo upon the Authority of ſeveral Caſes adjudged upon that Statute, out of which there are but three Savings.

1. Firſt where the Party who had a Right to Claim, is under any Incapacity as a Feme-Covert, or an Infant, *&c.*

(2.) Where the Fine is levied by Fraud, &c. & partes finis nil habuerunt.

(3.) Where the Eſtate was not turned to a Right at the Time of the Fine levied.

But there are none of theſe Circumſtances in the principal Caſe, for quoad the Incapacity, &c. 'tis not pretended but that John Basket was capable, &c. then quoad the Jury having not found any Fraud, none ſhall be intended, for fraus non eſt preſumenda.

And as to the Eſtate being not turned into a Right, it was argued, that a Fine is in Nature of a Feoffment on Record; and 'tis to all Purpoſes equivalent to a Feoffment, and therefore this Fine had transferred as well the Eſtate at Will as the Remainder; for a Fine cannot operate by Fractions to bar one Eſtate, and not another of the ſame Coguiſor, and of the ſame Lands.

Moreover, if nothing which the ſaid John Basket had done in his Life-Time, ſhall be taken as a Diſſeiſin, ſo as to deveſt this Term; yet it would be very ſtrange if the Entry of his Widow who came in as a Purchaſer, and claimed the Freehold, and enjoy'd it for her Life, if this ſhould not be a Diſplacing the Term; for if it ſhould not, the Term can never be diſplaced; but if the Entry of the Widow turned the Term to * a Right, then the Law is clear for the Defendant, becauſe the five Years Nonclaim paſſed in her Life-Time, as 'tis expreſly found by the Jury.

* Cro. Car. 78. Sid. 458, 459. Freeman's Caſe in Point.

Holt

Holt Ch. Juſtice. Where a Term is attending on an Inheritance, and the Leſſor or Purchaſer levies or accepts a Fine of the Lands, the Truſtees of the Term are thereby barred, and can never afterwards claim any Thing; but yet the Term is not ſo barred, but that puiſne Incumbrances may be let in upon the Purchaſer; for a Fine ſhall bar no Eſtates but thoſe which were intended by the Parties to be barred.

Adjournatur.

DE

Term. Sanct. Hill.

Anno 2 Willi' & Mariæ, B. R.

Whitehall *verſus* Squire. Trin. 4 Jac. II. B. R. Rot. 664.

IN a ſpecial Verdict in Trover, the Caſe was thus: ſſ. One Matthews died Inteſtate in London, and the Defendant Squire being related to him, and hearing of his Death, requeſted the Plaintiff to provide for his Funeral, and that he (the Defendant) would re-imburſe him.

2 Mod. 276. S. C. 1 Salk. 295. S. C. In Trover, what ſhall be a Converſion, what not.

The Plaintiff, in Purſuance of the ſaid Requeſt, buried the Inteſtate Matthews; and it was found by a Jury, that the reaſonable Charges of the Funeral was 23 l. afterwards

wards the Plaintiff and the Defendant came to an Account, and Squire, the Defendant, delivered a Gelding to the Plaintiff, which was the Horſe of the Inteſtate Matthews, and this was to be in Satisfaction of Part of the Charges, which the Plaintiff accepted as ſuch; but afterwards he adminiſtered to the ſaid Inteſtate, and brought an Action of Trover againſt Squire, for the aforeſaid Gelding ſo delivered and accepted, as aforeſaid.

And the Queſtion was, Whether this Sale and Delivery of the Horſe was a Converſion, or not.

Holt Ch. Juſtice held, that this Action of Trover was good, for all that can be objected againſt it is, that the Plaintiff was Particeps criminis, but that makes no Difference; for 'tis clear, that if a Stranger, who is a third Perſon, had taken out Letters of Adminiſtration, the Action would lie againſt the Defendant by ſuch an Adminiſtrator, notwithſtanding all the Dealings between Whitehall and Squire; and there is no Reaſon that this Caſe ſhould differ, becauſe now the Plaintiff is as a third Perſon, and being Adminiſtrator, he ſues, and ſhall recover in the Right of the Inteſtate.

And he held it for Law, that where Trover is brought by a rightful Executor or Adminiſtrator againſt an Executor de ſon tort, he cannot plead Payment of Debts, &c. to the Value, &c. or that he hath given the Goods, &c. in Satisfaction of the Debts, becauſe no Man ought to obtrude himſelf upon the Office of another; nevertheleſs, upon the general Iſſue pleaded, ſuch Payments ſhall be recouped in Damages, as where the Diſſeiſor hath paid the chief Rent, &c. that ſhall be recouped to him in the Damages in Aſſiſe brought againſt him by the Diſſeiſee.

But in an Action by a Creditor againſt an Executor de ſon tort, the Defendant may plead Plene adminiſtravit, and give in Evidence the Payment of juſt Debts, but he cannot retain a juſt Debt to himſelf.

Two other Judges were of a contrary Opinion in the principal Caſe, (viz) that the Plaintiff cannot maintain this Action, becauſe 'tis directly againſt his own Agreement and Contract, and the Plaintiff himſelf is Particeps criminis, if any Thing is done amiſs; wherefore 'tis not reaſonable that he ſhould be allowed to bring an Action againſt the Defendant, for doing a Thing to which he not only conſented, but jointly acted therein with the Defendant; for he

did no more but only deliver the house, and the Plaintiff accepted and received, and still retains it.

Judgment for the Defendant.

Panton *versus Tertenants of* Hall. Trin. 1 Will. & Mar. B. R. Rot. 130.

THomas Panton obtained a Judgment, Trin. 17 Car. 2. in B R. against Benedict and John Hall, for 1500 l. and 41. 16 s. Damages; afterwards, (viz.) Anno 1 Jac. 2. Benedict Hall died, and before Execution executed, Thomas Panton died Intestate, and Dorothy Panton (the Plaintiff) administered and brought a Sci. fa. against the Heir and Tertenants of Benedict Hall, to have Execution of the Judgment, which Sci. fa. was directed to the Sheriffs of London, and returnable in mense Paschæ, 4 Jac. 2. upon which a Nihil was returned.

2 Salk. 598. Where the Judgment is joint against Two, and one of them dies before Execution, the *Sci. fa.* ought to be joint against both.

Thereupon a Testatum, that Benedict Hall had an Heir and Tertenants in the Counties of Gloceſter and Bucks, two ſeveral Sci. fa's were ſued out, one directed to the Sheriff of G. and the other to the Sheriff of B. and both returnable die Veneris prox. poſt tres Trinitatis.

The Sheriff of Glouceſter returned Henry Hall, the Heir of Benedict Hall, warned, and alſo A. B. C. D. tenentibus omnium terrarum & tenementorum prædicti Benedicti in E. F. G. H. in Balliva ſua die quo judicium reddit. fuit aut aliquo tempore poſtea.

Nota the Generality of this Return *quoad* the Parcels of the Lands: And ſee in Co. Ent. 621. *a* Herne 326. 2 Brownl. pl. 392. the like Returngood.

The Sheriff of Bucks returned, that he warned A. Tertenant of ſuch Lands, &c. in particular, &c.

Some of the Tertenants appeared by T. C. their Attorney, * & defend. vim & injuriam, &c. & petunt judicium de brevibus de Sci. fa. prædict. for that it was not commanded the Sheriff of Glouceſter, by either of the ſaid Writs to warn the ſaid John Hall therein mentioned, unde pet. quod brevia prædict. caſſentur, &c. The like Plea by A. the Tertenant in Bucks.

* This is not formal upon a *Sci. fa quod nota.*

Co. Ent. 620.

The Plaintiff replied, that per aliqua prælegat. &c. brevia prædicta caſſari non debent, for that at another Time, (viz.) on ſuch a Day in Michaelmas-Term, anno 4 Jac. 2. the Plaintiff proſecuted a Writ of Sci. fa. upon the aforeſaid Judgment againſt the ſaid John Hall, and afterwards an Alias Sci. fa. &c. and two Nihils were returned, &c. whereupon the Plaintiff had Judgment to have Execution

against him by Default, ſed quod * ceſſat emanatio executionis inde quoad terras & tenementa ipſius Johan. Hall in ea parte habend. quouſq; pl'itum inter ipſam (the Plaintiff) & hæred. & terrarum tenen. prædicti Benedicti terminaretur, and that thereupon the Plaintiff prayed a Writ of Sci. fa. against the Heir and Tertenants of the ſaid Benedict, & ei concedebatur, &c. prout per Recordum, &c. plenius apparet & hoc, &c. unde petit judicium & quod (the Defendants) ad prædicta brevia de Sci. fa. ulterius reſpondeant & profert hic in Curia literas adminiſtrationis.

* Ceſſat Executio quoad terras, &c. quouſq;.

Nota the Concluſion of the Plea and of the Replication, for they differ, and are not apt the one for the other.

And upon a general Demurrer to this Replication, it was argued for the Defendant, that this Writ ought to be quaſhed, becauſe it was not awarded againſt John Hall, the ſurviving Cogniſee of the Judgment who ought to be joined with the Defendants, for the Judgment and the original Writ or Proceſs was joint, and therefore the Execution ought alſo to be joint, for all Executions ought to purſue the Nature of the Original; and the Caſes in the † Margin were cited, that the Sci. fa. in this Caſe ought to be joint.

† Bro. Execution 10. 34 H. 6. 33. Fitz. Execution 22, 59, 259. 15 H. 7. 6. 1 Roll. Abr. 888. Allen 21.

Moreover, the Sci. fa. in this Caſe ought to be awarded againſt Benedict Hall and John Hall; and upon the Return thereof by the Sheriff, &c. that Benedict was dead, and that John nichil habet, &c. then the Plaintiff might well have a Sci. fa. againſt the Heir and Tertenants of Benedict Hall alone, for the Return of the firſt Writ of Sci. fa. had ſhewn ſufficient Matter of Severance of the Proceſs; and to warrant this Courſe of Proceeding, the Caſe in the * Margin was cited.

* Fitz. Execution 78, 100, 106.

Then the following Exceptions were taken againſt the Return of the Sheriff of Glouceſter, (viz.) That by ſuch a general Return the Tenants would be concluded to ſay, that ſuch a One is Tenant of another Parcel of the Land, and not ſummoned; and ſo the Law would be ſubverted, which directs that all the Tenants ſhould be equally charg'd, as 'tis adjudged in Sir William Herbert's Caſe.

Lib. 3.

Beſides, there are no negative Words in this Return, (viz. Et ſunt nullæ aliæ terræ vel tenementa) but this laſt Exception was over-ruled.

See Co. Ent. 619. *b.*

Econtra for the Plaintiff.

It was argued on the other Side for the Plaintiff, that the Law was clear, that all the perſonal Charge ſhall ſurvive againſt John Hall alone, which was agreed on all Sides (tho' the Authorities in the * Margin are quite contrary); but in Raym. 26. it was held, that all the Perſonalty ſurvives; and ſo is Sir William Herbert's Caſe, and 2 Saund. 50. and at Common Law no Execution was to

* Yelv. 208.

be againſt the Realty, and the Statute which gave the Elegit did not bar the prior Remedy at Common Law upon the Perſonalty; and where a Judgment is had againſt one who dies before Execution, a Sci. fa. will not lie againſt his Heir and Tertenants until a Nichil is returned againſt his Executor, and ſo are the Caſes in the * Margin. * 7 H. 4. 31. *a.*

46 Ed. 3. 29. *b.* 19 Ric. 2. 163. Bro. Stat. Mer. 43. 17 Ed. 2. 139. 24 Ed. 3. 28. 18 Ed. 3. 142. 33 Ed. 3. 162. 7 Ric. 2. 46. *But* Dyer 207. Reg. Jud. 57. *b.* contra, 1 Lev. 30.

And here the Perſonalty ſurviving, the Remedy to recover it muſt ſurvive, and it was never yet ſeen, that a Sci. fa. iſſued to charge the Lands of any Man diſtinct from the Perſonalty; therefore in this Caſe the Sci. fa. againſt John Hall was to revive the Judgment, for which Purpoſe it was not neceſſary or proper to join the Tertenants of Benedict Hall; but the Judgment being now revived, this Sci. fa. againſt his Tertenants is now proper.

And as to the Exceptions to the Return, the Caſes in the * Margin were cited. * Co. Ent. 621, 622. Hern 326. 2 Brownl. Placito 392.

But the Court held that the Return made by the Sheriff of Glouceſter, was inſufficient for the Reaſons ſupra; they held likewiſe, that the Sci. fa. ought to be joint againſt John Hall the Survivor, and alſo againſt the Heir and Tertenants of Benedict Hall, becauſe the Judgment was joint, &c. Curia.

And Holt Chief Juſtice ſaid, this was a judicial Writ, and might be framed upon the ſubject Matter, and the Form he propoſed was thus:

If. That the Writ ſhould be againſt John Hall, to ſhew Cauſe why the Plaintiff ſhould not have Execution againſt him de Bonis & catallis, and of the Moiety of his Lands, and againſt the Heir and Tertenants of Benedict Hall, to ſhew cauſe why (the Plaintiff) ſhould not have Execution of the Moiety of the Lands of the ſaid Benedict Hall, without mentioning any Goods; quod nota.

And the Writ ſupra was quaſhed.

Lambert *verſus* Thurſton. Hill. 2 W. & M. B. R. Rot. 686.

3 Mod. 275.

IN Treſpaſs by Way of Original, the Plaintiff declared in this Form.

Treſpaſs *vi & armis* may be brought in *B. R.* where the Damages are laid under 40 *s.* but not Treſpaſs generally.

ſſ. T. S. attachiatus fuit ad reſpondendum C. L. de placito tranſgreſſionis & unde idem C. per W. W. attorn' ſuum queritur quod prædict' T. S. (on ſuch a Day, &c.) vi & armis clauſum ſuum apud H. fregit, &c. and concluded ad damnum ipſius C. 20 s.

And upon a general Demurrer to the Declaration, it was objected, that it appears upon the very Face of the Record, that this Court hath no Juriſdiction of the Cauſe; for 'tis expreſly enacted by the Statute of * Gloucester, that the Superior Courts ſhall not hold Plea of any Treſpaſs under the Value of 40 s.

* 6 E. 1. c. 8.

2 Inſt. 312.
14 H. 8. 15.
* 2 Inſt. 311.

To which it was anſwered, that this was an Action of Treſpaſs, vi & armis, of which no inferior Court can hold Plea, and ſo is the Opinion of my Lord * Coke expreſly; and therefore the Word Treſpaſs in the Statute of Glouceſter muſt be intended a Treſpaſs without Force, of which this Court cannot hold Plea unleſs the Damages are above 40 s. but if Treſpaſſes vi & armis are not puniſhable here when the Damages are under 40 s. they would be puniſhed no where; for it appears, that ſuch Treſpaſſes with Force are not maintainable in an inferior Court, becauſe a Fine cannot be aſſeſſed there, for which Reaſon this Exception was diſallowed.

(2.) The ſecond Exception was, that the Declaration was ill, becauſe the Action was not brought by Bill, but by Original; and the original Writ was not ſet forth at large in the Declaration, as it ought, for 'tis the common Courſe in the Court of C. B. where they always proceed by way of Original; and in this Court likewiſe when the Action is by Writ, and the Plaintiff in his Declaration had generally ſet forth, that the Defendant Attachiatus fuit ad reſpondendum (to the Plaintiff) de placito tranſgreſſionis ſuper Caſum without ſaying more; this is ill.

I

To

To which it was anſwered, that this Objection had been often made, and as often over-ruled, and held that this ſummary Way of declaring, &c. in Treſpaſs upon an Original, is good.

Thereupon Judgment was given for the Plaintiff; quod nota.

Cotton *verſus* Johnſon.

IN this Caſe the Cauſe of Action appeared by the Declaration to ariſe in Ely, which is a County Palatine, and that the Cauſe was tried in Cambridgeſhire; and after a Verdict, &c. it was moved in Arreſt of Judgment, that this was a Miſtrial.

1 Salk. 183. S. C. *Ely* is not a *County Palatine*, but Royal Franchiſe.

But per Curiam * Ely is not a County Palatine, but only a Royal Franchiſe; and therefore the Defendant cannot plead to the Juriſdiction of this Court, (viz.) that the Lands, &c. or the Cauſe of Action are, or did ariſe in Ely, for that is only particular to a County Palatine which Ely is not; for the Biſhop of Ely can only demand Cogniſance of Pleas, which is all the Franchiſe he hath as to this Purpoſe.

* 2 Inſt. 223. 9 H. 7. 12. 4 Inſt. 244.

And ſuch are the Franchiſes of the Cinque Ports which are the ſame with this of Ely; and 'tis uſual for Appeals of Murder to be brought in this Court when the Fact was committed in either of theſe Franchiſes, and the Trials here concerning Lands in Ely are good; but 'tis not ſo where the Lands lie in a County Palatine.

It was held alſo in this Caſe, that tho' the Jury ought to have been de Vicineto de Ely, and the Trial was in Cambridgeſhire where the Bill was brought, this Jeofaile was helped by * the Statute.

Jeofaile cured by the Statute.

* 16 & 17 Car. 2. c. 8.

The Plaintiff had Judgment.

Swift *verſus* Heath. Hill. 2 Jac. II. B. R. Rot. 1189.

UPON a ſpecial Verdict the Caſe appeared to be as followeth:

Where he who had the Reverſion in Tail expectant upon the Death of Tenant for Life, made a Feoffment by the Conſent of Tenant for Life; this is no Diſcontinuance, becauſe he had no Freehold.

ſſ. A. had Iſſue B. and being ſeiſed of Lands, &c. to him, and to his Wife, and to the Heirs of the Body of A. Remainder over, &c. he and his Wife join in a Leaſe for Years not warranted by the Statute, &c. then A. died, and D. his Widow married again; then B. the Iſſue of A. who was but ſixteen Years old, and who had the Reverſion in Tail after the Death of the Wife, made a Feoffment with Livery by his own Hands to the Leſſee for Years in Poſſeſſion, by and with the Conſent of the Husband and Wife, Tenant for Life, &c. and the Queſtion was, whether this Feoffment and Livery made by B. as aforeſaid, (who had only the Reverſion in Tail expectant upon the Determination of the Eſtate for Life, and made by and with the Conſent of Tenant for Life, who had the immediate Reverſion,) did work any Diſcontinuance of the Remainder over, &c. under which the Plaintiff claimed.

Curia. And per Curiam, it was no Diſcontinuance of the Remainder over, becauſe B. who made the Feoffment had only a Reverſion in Tail expectant upon an Eſtate for Life, and ſo no Freehold in him at the Time he made this Feoffment; and 'tis a Maxim in Law, that he who hath no Freehold in the Land cannot by any Means diſcontinue the Eſtates therein, and for this Purpoſe the Caſes in the * Margin were cited.

* Owen 66. Rol. Abr. Tit. *Feoffment* 661. Dyer 251. 18 Ed. 4. 2. Perk. ſect. 615.

But then it was inſiſted, that the Verdict expreſly found that the Husband and Wife who were Tenants for Life, and had the Freehold in them, or one of them, did conſent to the making this Feoffment, which expreſs Conſent ſhall amount in Law to a Surrender of their Eſtate to him in Reverſion; and if ſo, then B. had the Freehold in him by ſuch Surrender, and by Conſequence this Feoffment made by him after he had the Freehold, is a Diſcontinuance.

Curia. To which it was anſwered, and ſo reſolved by the Court, that this naked Conſent of the Tenant for Life, that B. ſhould make the Feoffment, did not amount to a Surrender of the Eſtate for Life; wherefore it was adjudged, that the Feoffment made no Diſcontinuance, and thereupon the Plaintiff had Judgment.

Huggins *verſus* Wiſeman.

Where Infancy was pleaded, and the Plaintiff replied, that it was for Neceſſaries generally, ſuch Replication is good.

ASſumpſit for Labour and Medicines in curing the Defendant of a Diſtemper, &c. who pleaded infra ætatem viginti & unius Annorum; the Plaintiff replied it was for Neceſſaries generally; and upon a Demurrer to this

Replication it was objected, that the Plaintiff had not aſſigned in certain, how, or in what Manner the Medicines were neceſſary; but it was adjudged, that the Replication in this general Form was good.

The Plaintiff had Judgment.

DE

Term. Paſchæ.

2 Will. & Mariæ B. R.

The Earl of Pembroke's *Caſe.*

M. PHILIP Earl of Pembroke being Tenant in Tail of ſeveral Manors and Lands in Wales, ſuffered a Common Recovery thereof in the Grand Seſſions there, by which he barred all the Remainders over, &c. and died, leaving Iſſue only one Daughter, now an Infant.

Upon a Writ of Error to reverſe a Common Recovery, there muſt be a *Scire facias* againſt the Tertenants.

The preſent Earl, to whom theſe Manors and Lands would have remained (if no Recovery had been ſuffered) brought a Writ of Error to reverſe the Recovery, and ſued out a Sci. fa. againſt him, who was the nominal Demandant in the Writ of Entry, &c. upon which this Recovery was ſuffered, who was returned ſummoned, &c. and the Plaintiff aſſigned Errors, and the Defendant pleads In nullo eſt erratum; all which was entered.

And

And now it was moved in Behalf of the Infant Daughter, that the Plaintiff might be compelled to sue out a Sci. fa. against the Tertenants as well as against the Demandant; and that it was necessary for him so to do, because the Tertenants ought not to be put out of Possession without any Warning to defend themselves, for they may have a Release to plead; and for this Purpose the Cases in the * Margin were cited; and a Case was cited in this Court between Juxon and Booth, where the Proceedings in a like Writ of Error were set aside for Want of a Sci. fa. against the Tertenants.

* Dyer 321. Cro. El. 739. Bridgm. 69. Moor 524. Co. Ent. 233. *b.* in the Case of a Fine.

Econtra. On the other Side it was said, that the Awarding a Sci. fa. in such Cases was only discretionary, and not stricti juris; and so it was held in this Court in † Wynn and Lloyd's Case; but the Circumstance of the present Case is extraordinary, for this Infant Daughter is the Tertenant of all the Lands; wherefore if a Sci. fa. goes out against the Tertenants, she will be returned Tertenant, &c. and thereupon they on the other Side will enter the Prayer that the Parol may demur during her Nonage, which will greatly delay the Plaintiff, for this Infant may die, and the Lands may remain to another Infant; wherefore the Discretion of the Court in this Case will incline for the Plaintiff.

† Sid. 213. Raym. 16, 55, 70, 96. 1 Lev. 146.

And farther it was offered by the Counsel for the Plaintiff to consent, that the Infant should be admitted to plead what she thought fit, so as she would come in and take no Advantage of her Infancy.

Holt Ch. Justice. The Granting a Sci. fa. in such Cases against the Tertenants is discretionary, and not stricti Juris; but yet it hath been the constant Course of this Court to grant it, therefore he was of Opinion not to depart from that which had been the usual Course of the Court; tho' it was admitted by all, that this was an extraordinary Case, for they all knew how this Recovery had been contrived by the late Lord Chancellor Jefferies, whose Son married this Infant, and who now claims under this Recovery.

But the Court awarded a Sci. fa. against the Tertenants, quod nota, like Law in Error to reverse a * Fine.

* Co. Ent. 233. *b.*

Drake *verſus* Cooper & al'.

TReſpaſs quare vi & armis, the Defendants entered his Cloſe containing 100 Acres, &c. (in which a Fair, Time out of Mind, had been kept on Michaelmas-Day) & adtunc & ibidem fregerunt & divulſer' divers Booths, &c. ibidem erect. by the Plaintiff, for expoſing Wares and Merchandiſes to Sale there, brought by Perſons thither reſorting, nec non eo quod (theſe Defendants) adtunc & ibidem impediverunt & diſturbaverunt the Plaintiff in erecting other new Booths, &c. for the Sale of Merchandiſe, by Reaſon whereof the Plaintiff loſt all the Profits of Piccage and Stallage.

Where ſeveral and diſtinct Things may be joined in one Declaration.

Upon Not guilty pleaded, the Plaintiff had a Verdict, and now it was objected in Arreſt of Judgment againſt the Declaration, that the latter Part thereof, (viz.) The Diſturbance in Building new Booths ſounds altogether in Caſe and not in Treſpaſs, and therefore 'tis incompatible with the firſt Part of the Declaration, which is Treſpaſs vi & armis; for theſe ſeveral Matters require ſeveral Judgments againſt the Defendants, (viz.) the firſt is a Capiatur, but the laſt is only a Miſericordia, and therefore cannot be joined in one Declaration.

Sed per Curiam non allocatur; for the Diſturbance, &c. is laid only in Conſequence of the firſt Treſpaſs, &c. and 'tis of the ſame Effect as a Per quod in a Declaration, which is often uſed in Actions of Treſpaſs vi & armis, to let in the conſequential Damages, &c. and one Plea goes to the Whole; for if the Defendant had pleaded a Licenſe from the Plaintiff to enter the Cloſe, that would have been a good Juſtification of the Treſpaſs; quod nota.

Judgment for the Plaintiff.

Venables *verſus* Daffe.

UPON a Motion in Arreſt of Judgment, for that this Action was brought by Bill, and the Entry on the Record, &c. was with a general Memorandum: *ſſ.* Memorandum quod alias ſcil't Term. Sanct. Mich. And the Plaintiff declared, that the Defendant falſo & malitioſe on ſuch a Day, &c. indicted the Plaintiff for keeping a Bawdy-houſe, upon which Indictment he (the Plaintiff) was ar-

Where the Cauſe of Action did ariſe after the Term began.

raigned and tried, &c. Et inde legitimo modo acquietatus, (viz.) on ſuch a Day at the Seſſions held in the Old Baily, &c. which Day of Acquittal was by the Plaintiff's own ſhewing after Michaelmas-Term began, of which Term the Bill was:

So that this Action was brought before the Cauſe of Action accrewed, for the Bill and the Declaration relate to the firſt Day of Michaelmas-Term, and the Acquittal, which was the Cauſe of this Action, or at leaſt the Conſummation of that Cauſe appears to be on a ſubſequent Day in that Term; therefore if the Plaintiff would have maintained his Action for this Matter ariſing within the ſame Term, the Entry ought to be with a Special Memoradum, (*viz.*) Quod alias ſcil't die Veneris (or any other Day) prox. poſt tres ſeptimanas Sanct. * Michaelis, as the Caſe ſhould require, ſo that the Cauſe of Action might appear to be before the Action brought.

* *Or* Menſe Michaelis.

Econtra. To which it was anſwered by the Plaintiff's Counſel, that the Verdict had cured this Fault; for after a Verdict the Court will intend and take the Bill to have Relation to the laſt Day of the Term, and not to the firſt, ut Res magis valeat.

Curia. But the Court was another Opinion, (viz.) that the Bill and the Declaration were ill for this Fault; for it appears that the Plaintiff had no Cauſe of Action on the † firſt Day of Michaelmas-Term, to which Day the Declaration muſt neceſſarily relate; for the Term is in Law but as * one Day.

† Sid. 373, 432 contra.

* 2 Cro. 384.

† Hill. 27 Car. 2. Rot. 1591. 2 Lev. 141. And Holt Ch. Juſtice cited a Caſe between † Hutchinſon and Thomas, in the Time of Hale Ch. Juſtice, where, after Verdict it appeared, that the Cauſe of Action accrewed on a Day after the Term began, in which the Action was brought; and the Bill was of the Term, with a general Memorandum, as in this Caſe; and it was adjudged, that the Bill did relate to the firſt Day of the Term, and therefore that Judgment was arreſted; and ſo it was in the principal Caſe; but it hath been held good if Bail was filed after the Term began.

2 Lev. 13, 176. Sid. 432.

The King *verſus Inhabitants of the* Hermitage.

Where 'tis not neceſſary to ſet forth what Eſtate a Man hath. UPON a Writ on the Statute of Weſtm. 2. for improving Commons, and againſt throwing down Incloſures, it was returned, Qui dicunt ſuper ſacram. ſuum

quod prædict' T. S. (in the Inquiſition named) 1 die Auguſti anno 3 Jac. 2. & ſemper poſtea hucuſque intereſſ. fuit & adhuc intereſſ. exiſtit pro remanere cujuſdem Termini 31. annorum adtunc & adhuc ventur' & inexpirat' de & in quodam vaſto ſive Communia communiter vocat' Hermitage Common, continen' per eſtimationem 300 Acras ſcituat' jacen' & exiſten' in paroch' de H. in Com' prædict' parcel' maner' de F. in eodem Com' ac etiam parcel' ducatus Cornub' Quodque ipſe idem T. S. ſic ut prefertur intereſſe exiſten' poſtea, videl't, (on ſuch a Day) prædictum vaſtum ſive Commun' cum ſepib' foſſatis & repagul' incluſit & quod poſtea (viz. on ſuch a Day) malefactores ignoti ſepes, &c. diruper', &c.

The Exception taken to this finding of the Jury, and the Return of the Inquiſition was, for that they find and return, that T. S. intereſſ. fuit & exiſtit in the ſaid Waſte or Common for a Term of Thirty-one Years, adtunc & adtunc ventur' & inexpirat'; which is too general and incertain, becauſe it doth not appear what Right or Eſtate the ſaid T. S. had in the ſaid Waſte; for the Statute hath theſe Words, (viz.) He who hath Right to improve; and for ought appears to the contrary the ſaid T. S. might have only a Right to the Herbage of this Waſte; or he may be only a Commoner, and ſo might have no Right to encloſe; and ſo not within this Statute.

To which it was anſwered, and ſo reſolved per Curiam, that ex vi termini the Words import, that T. S. had an Intereſt in the Land of this Waſte, and not in the Herbage alone.

And Holt Chief Juſtice held, that he who had only the Herbage might encloſe, therefore this Return was held * good; for that it was not neceſſary to ſet forth what Eſtate the Party had.

Keilw. 159. B. * Cro. Car. 280, 440, 580. In theſe Caſes the Eſtate of the Party is not ſet forth.

Meredith *verſus* Allen. Hill. 2 Willi. B. R. Rot. 20.

DEBT upon a Bond for 300 l. the Defendant prayed Oyer of the Condition which was thus, ſ. If the Ship called the Crown of London, do and ſhall ſail from the River Thames to Bourdeaux in France, thence to Genoa, thence to any Part of the Streights without Deviation, (the Dangers of the Seas excepted) and from thence

1 Salk. 138. S. C. Where the Breach of a Condition, need not be aſſigned.

return directly to the ſaid River Thames before the End of 15 Months, &c. and the Defendant do and ſhall pay to the Plaintiff 180l. within 20 Days after the Return of the ſaid Ship, into the ſaid River Thames, or at the Expiration of 15 Months, which ſhall firſt and next happen; or if the ſaid Ship ſhall be inevitably loſt in the ſaid Voyage, then the Bond to be void.

Then he pleaded, that the Ship ſailed to Alexandria in the Streights, and in her Return home, ſhe was caſt away, and drowned.

The Plaintiff replied, that ſhe was not caſt away or drowned modo & forma & hoc petit qd inquirat' p patriam.

To the Replication, the Defendant demurred ſpecially, and ſhewed for Cauſe, that the Plaintiff had not aſſigned any Breach of the Condition in his Replication; and therefore it was inſiſted, that it was ill, for that very Reaſon, like the common Caſe of Debt upon Bond, for Performance of an Award, the Defendant pleads no Award made; the Plaintiff cannot join Iſſue upon ſuch Plea without ſhewing an Award, and a Breach thereof, by which the Plaintiff may be entitled to this Action; and for an Authority in Point the Caſe in the * Margin was cited, which was Debt on a Bond with the like Condition as in the principal Caſe, and there it was adjudged, that the Plaintiff muſt aſſign a Breach in his Replication.

* Hayman *verſ.* Gerrard. 1 *Sand.* 102. now denied to be Law. Curia.

But the Court was of a contrary Opinion, for they held that the Replication in the Caſe at Bar was ſufficient without aſſigning any Breach of the Condition therein; that they of their own Knowledge were ſatisfied; that the Caſe of Hayman and Gerrard was not Law, nor taken to be ſo at the Bar at the Time when the Judgment in that Caſe was given.

Yel. 24, 25. 78, 79. 3 Cro. 320. 1 Lev. 54, 55. 3 Lev. 17.

And moreover, that the Aſſignment of the Breach of a Condition, &c. in the Replication was not neceſſary, but only in that ſingle Caſe of Debt on a Bond for Performance of an Award.

Nota, The Plea in this Caſe was ill; ſed per Curiam, if it had been good, the Replication likewiſe had been good without Aſſignment of any Breach; quod nota.

Murgatroid *verſus* Law. Hill. 2 W. & M. B. R. Rot. 126.

A Preſcription pleaded againſt a Preſcription, is not good without a Traverſe.

IN an Action on the Caſe for diverting a Water-courſe, the Plaintiff declared, quod 1 Junii an. 4 Jac. 2. & ſemper

poſtea hucuſq; legitime ſeiſit' fuiſſet & adhuc ſeiſit' exiſtit (in Right of his Wife) de & in quodam meſſuag' vocat' B. jacen' in M. in Com', &c. Cumq; quidem communis aquæ Curſus curren' a quodam loco vocat' T. in M. præd' in & trans quædam clauſa vocat' Black Acre, & White Acre jacen', &c. in M. uſq; ad meſſuagium præd' vocat' B. a tempore cujus memoria hominum non exiſtit currere conſuevit & adhuc currere debuit, by which the Plaintiff had great Benefit as well for watering his Cattle, as for the Uſe of his Houſe, of which the Defendant non ignarus ſed machinan' & fraudulenter intenden' to deprive the Plaintiff of the Profit of the Water, quoddam foſſatum in clauſis præd' fodit & fecit cujus prætextu tota Aqua & curſus Aquæ præd' a meſſuagio præd' diverſa fuit & abinde hucuſq; diverſa exiſtit per quod the Plaintiff had loſt all the Profit, &c.

The Defendant pleaded in Bar, quod clauſa præd' vocat' Black Acre & White Acre diſtant per magn' ſpacium, (viz.) per dimidium unius milliaris a meſſuagio præd' vocat' B. inter quæ quidem clauſa & idem meſſuagium ſunt ſeparales terræ & tenementa diverſor' perſonar' ſcituat' & jacen' per & trans quæ tenementa præd' aquæ curſus decurrere oportet antequam ad meſſuag' ill' advenire poteſt, and proteſtando, that in Summer-Time the ſaid Water-courſe could not run to the ſaid Houſe by Reaſon of the Drought, pro placito dicit, that he is ſeiſed in Fee of the ſaid two Cloſes; and that he and all thoſe whoſe Eſtate he had therein, had Time out of Mind uſed ac legitime potuerunt adaquare averia ſua in eiſdem clauſis depaſcen' ex aqua aquæ curſus præd' ibidem; and alſo for the Conveniency of Watering, foſſat' in clauſis præd' effodere & facere quotieſcunq; occaſio fuit & pro eo (the Defendant) quoddam parvum foſſatum juxta the Water-courſe in clauſis prædict' for the convenient watering his Cattle in the ſaid Cloſes, ſicut occaſio tunc fuit, &c. fecit, &c. prout licuit.

And upon a general Demurrer, this Plea was adjudged ill, becauſe the Defendant had neither confeſſed and avoided nor traverſed the Matter alledged in the Declaration, (viz.) the Diverting the Water-courſe; ſo the Declaration was not anſwered.

Moreover, all the Subſtance and Colour of this Plea in Bar, is a Preſcription to make a Ditch in his (the Defendant's) own Lands; and the Declaration is likewiſe founded on a Preſcription, and one Preſcription pleaded againſt another is not good without a Traverſe.

But

But the Court held, that upon the general Iſſue pleaded, it had been proved, that the Water did not always run to the Plaintiff's Houſe, but that it was uſually dried up in the Summer, or drank up by the Cattle of the Defendant; in ſuch Caſe the Plaintiff would have failed of his Preſcription.

The Plaintiff had Judgment.

The Church-wardens of *Northampton*'s Caſe.

Mandamus to ſwear two Church-wardens choſen by the Pariſhioners who of common Right are to make the Election.

MAndamus to ſwear two Church-wardens choſen by the Pariſhioners of the Pariſh of St. Giles, in the Town of Northampton; the Caſe was,

ſſ. The Vicar of that Pariſh for the Time being, hath uſually choſen one of the Church-wardens, but at this Time he was under a Deprivation for not taking the Oaths to King William and Queen Mary, and the Church was vacant; whereupon the Pariſhoners proceeded to the Election of two Church-wardens, and preſented them to be ſworn; but the Regiſter of the Conſiſtory Court being a Friend to the Vicar, refuſed to ſwear them, unleſs that Perſon whom the late Vicar approved be nominated for one.

Holt Chief Juſtice. Of common Right, the Chooſing Church-wardens belongs to the Pariſhioners; 'tis true in ſome Places, the Incumbent chooſes one, but that is only by Uſage; and the Canon concerning the chooſing Church-wardens is not regarded by the Common Law; this was the Opinion of the Lord Chief Baron Hale, as may be ſeen in the Caſe cited in the Margin.

Hardres 378.

The Mandamus was granted.

Knight *and* Donning *verſus* Cole & ux'. Mich. 1 Will. & Mariæ B. R. Rot. 516.

3 Mod. 277. 3 Lev. 273. Releaſe by one as Executor, is no Bar to a Demand which he hath in his own Right.

THE Plaintiffs brought a Sci. fa. againſt Cole and his Wife, in which they ſet forth, that Sir John Knight, William Eyre, Eſq; and John Knight, Eſq; had lately in the Court of King's Bench, and in the Reign of King Charles II. recovered by Bill againſt one John Lawford, Eſq; 6000 l. and 161. 3 s. 4 s. for Damages, and that afterwards Sir John Knight and William Eyre died; and John

John Knight ſurvived, who made his Will, and thereby conſtituted John Kent, Tho. Knight and William Donning, Executors, and died, the Debt and Damages upon the ſaid Judgment not being ſatisfied, &c. that John Kent and the Plaintiffs proved the ſaid Will; and afterwards John Kent died, and the Plaintiffs ſurvived, and then the ſaid John Lawford made his Will in Writing, and made the Wife of the Defendant Cole, his Executrix, and died, the Debt, &c. not being ſatisfied; that the Executrix proved Lawford's Will, per quod the Plaintiffs being the ſurviving Executors of John Knight, who was the ſurviving Recoveror, pray Execution againſt the Defendant Cole and his Wife, the Executrix of Lawford, the Recoveree, de bonis Teſtatoris, &c.

The Defendants appear and plead, that before the Exhibiting this Writ of Sci. fa. (viz. on ſuch a Day) the ſaid William Donning (one of the Plaintiffs) by his Deed of Releaſe now produced, cognovit ſe habere recept. ſuper diem dat. relaxationis prædict. de & ab præfat. Tho. Cole & Maria Uxore ejus executricis teſti. & ult. voluntatis Johannis Lawford Ar. defunct. ſummam quinq; librarum exiſten. legatum, Anglice, a Legacy, dat. præfat. Willo. Donning per præfatum Johannem Lawford in & per Teſtamentum & ult. voluntatem ſuam & proinde prædict. W. Donning remiſit & relaxavit præfat. Thomæ Cole & Mariæ Ux. ejus de & ab eodem legato, Anglice, Legacy, & de & ab omnibus actionibus ſectis & demandis quibuſcunq; quæ prædict. W. Donning habuiſſet vel tunc habuit verſus prædict. Tho. Cole & Mariam Uxorem ejus Executores & Adminiſtratores vel Executores vel Adminiſtratores prædict. Johannis Lawford defunct. pro aliquibus materia vel cauſa quibuſcunq; a principio mundi uſq; dat. ejuſdem ſcripti Relaxationis unde petit Judicium ſi, &c.

And upon a general Demurrer to this Plea it was inſiſted for the Plaintiff, that it appears by this Releaſe it ſelf, that it only related to this Legacy of 5 l. the Words being, (viz.) Upon the Receipt of 5 l. Legacy; and it was never intended, that it ſhould have ſo general an Operation as to diſcharge the Judgment; and ſeveral Caſes were cited to prove, that general Words * ſubſequent, &c. in Covenants, &c. have been adjudged to be reſtrained by particular Words antecedent. For the Plaintiff.

* Dyer 242. 255. Hob. 275.

Moreover, It hath been adjudged of late, that where a particular Cauſe or a Conſideration is mentioned in a Releaſe, 2 Roll. Abr. 409. Hetley 15. Sid. 141.

2 Lev. 215. 3 Lev. 273.

leaſe, it ſhall reſtrain the general Words following, which are only Words of Courſe.

Econtra for the Defendant.

On the other Side, Altham's Caſe, 8 Rep. was cited, and the Rule then taken was relied on, (viz.) That antecedent general Words ſhall be reſtrained by particular Words following, but not econtra; but if general Words follow particular Words, they ſhall be taken in the largeſt Senſe, for otherwiſe the general Words would be inſignificant and void; and the Words of a Deed ought not to be rejected and made uſeleſs, as long as they may be reduced to good Senſe, and are not repugnant in themſelves.

2 Roll. Abr. 404.

Curia.

But it was reſolved by the Court ſeriatim, that this Releaſe was no Bar to this Suit; firſt, for that the Words are, All Actions, Suits and Demands which Donning had againſt the Defendants generally, but no Mention of releaſing any Suit which he had in Right of his Executorſhip; therefore thoſe Words ſhall not extend to any Demand he had in that Capacity, (viz.) As Executor, but only to ſuch Demands which he had in his own Right; for if an Executor grants Omnia bona ſua, the Goods which he had as Executor, will not paſs, unleſs upon this Diverſity, (viz.) where the Grantor had no other Goods but as Executor, for in ſuch Caſe thoſe Goods ſhall paſs, ut res valeat.

29 Ed. 3. 26.

1 Leon. 263. 3 Cro. 6.

So where a Manor is in the Hands of an Executor, and he grants all his Intereſt in the Manor, the Manor it ſelf will paſs.

1 Lev. 99, 100, 272. Sid. 141.

Now in the principal Caſe, Donning releaſed all Demands generally; but it appears, that he at that very Time had one Demand in his own Right, (viz.) the Legacy of 5 l. therefore nothing is releaſed which he had as Executor; for 'tis in Reaſon the ſame with the Grant of Omnia bona, &c. ſupra.

Beſides, the Intent of the Parties plainly appears to the contrary, the particular Conſideration being mentioned; and the Intent is always to be obſerved, as well in Releaſes as in other Deeds.

For theſe Reaſons the Plaintiff had Judgment.

Cooke's *Caſe*.

The Defendant pleaded his Pardon for a Murder; it ought not to be allowed without a Writ of Allowance.

THIS Cooke was outlawed for Murder, and brought a Writ of Error to reverſe it, which being done, he was forthwith arraigned, and pleaded his Pardon under the

Great Seal, in which there was no Obſtante for his not finding Sureties for his Good Behaviour.

Holt Ch. Juſtice. The Pardon ought not to be allowed without a Writ of Allowance directed to the Judges of this Court out of Chancery, teſtifying that he hath found Sureties before the Coroner and Sheriff, &c. according to the * Statute, by which 'tis enacted, that he who hath a Pardon of Felony, ſhall within three Months after ſuch Pardon, find Sureties before the Sheriff and Coroner, for the Good Behaviour, which ſhall within three Weeks after the three Months, be returned into the Chancery, under the Seals of the ſaid Sheriff and Coroner; and if the Party give no ſuch Security, the Pardon ſhall be void.

* 10 Ed. 3. c. 3. Weſtm. 2. *Now repealed by the Statute* 5 & 6 W. & M. cap. 13.

But by the other Judges, the Pardon ought now to be allowed without any Writ of Allowance, becauſe the Party hath three Months given by the Statute, after the Pardon, to find Sureties, under the Penalty, that his Pardon ſhall be void, if he doth not do it.

Nota, That afterwards, in the ſame Term, the Writ of Allowance was brought into Court; and upon Prayer, &c. it was recorded under the Pardon.

Barnes *verſus* Bulwer.

Where the Plaintiff in Error need not give a Recognizance.

IT was moved for a Superſedeas to a Writ of Error upon a Judgment in Ejectment, for that the Plaintiff in Error had not given his own † Recognizance to the Defendant, that if the Judgment is affirmed, &c. he will pay the Coſts and Damages, &c.

† 16 & 17 Car. 2. c. 8.

To which it was anſwered, that he (the Plaintiff in Error) had found two ſufficient Men to be his Bail, who were bound in a Recognizance, &c. by which the Intent, tho' not the Letter of this Statute, was ſatisfied; and the Party himſelf lives in the remote Parts of this Kingdom.

The Court held, that the Intent of this Statute was for the Security of the Party Defendant in the Writ of Error, which Intent is hereby fully obſerved, becauſe the Bail already given is better than his own Recognizance; and this hath been the conſtant Practiſe of all the Courts, &c. ever ſince the Statute was made, becauſe of the Inconvenience of the Parties coming from remote Parts.

The Superſedeas was allowed.

Where an Infant is Executor alone, he cannot ſue *per Attornatum.* Shower Rep. S. C. Salk. 205. S. C. 4 Mod. 7. S. C.

Coan *verſus* Bowles & al'. Paſ. 4 Jac. II. B. R. Rot. 521.

REplevin in C. B. againſt A. B. and C. they all per T. S. attorn. ſuum ven. & defend. vim & injuriam, &c. and made Conuſance as Bailiffs to I. N. Damage-feaſant; and at the Trial the Plaintiff was nonſuit, and the Defendants had Judgment de retorn. habend'.

2 Cro. 441, 442. 3 Cro. 521, 541.

Thereupon a Writ of Erroꝛ was brought, and the Erroꝛ aſſigned was, foꝛ that A. one of the Defendants, was an Infant, and yet had appeared and pleaded by Attorney.

To which it was anſwered, that this was not erroneous, becauſe Judgment was given foꝛ the Infant, which is foꝛ his Benefit; and alſo in this Caſe the Defendants made Conuſance in auter droit, and all thꝛee of them make but one Bailiff; 'tis like the Caſe where an Infant and one of full Age are made Executoꝛs; in ſuch Caſe the Infant, with the other Executoꝛs, may ſue * per Attornatum, becauſe 'tis in the Right of another. Adjournatur.

* 1 Roll.Abr. 288. 3 Cro. 377, 424. 2 Saund. 212, 213.

At another Day it was argued, that an Infant can neveꝛ appear per Attornatum, noꝛ in propria perſona ſua, but always per Guardianum oꝛ Prochein Amy; neither can an Infant be an Attorney foꝛ another, 1 H. 5. 6. and if he is made Executoꝛ, he ought to ſue per † Guardianum, as may appear by the Caſes cited in the Margin, all which are againſt the Opinion in 2 Saund. 213.

22 H. 6. 31. F. N. B. 27. 2 Inſt. 261. 2 Cro. 303. Bridgm. 73, 74. † 3 Cro. 5. 521. 3 Bulſt. 108. Style 318.

Econtra.

It was granted on the other Side, that if the Infant in this Caſe, and the others, was meerly Defendant, his Appearance by Attorney had been Erroꝛ; but it was inſiſted, that this being in Replevin, the Avowants are in Nature of Plaintiffs, and this foꝛ thꝛee Reaſons:

1. They are called Actors, which is a Term in the Civil Law, and ſignifies Plaintiffs.

2. They ſhall have Judgment de retorn. habend. and Damages as Plaintiffs.

3. The Plaintiff might plead in Abatement of the Avowry, thereforꝛe 'tis in Nature of an Action.

Beſides, as to this Point, there is no Difference between Executors and Bailiffs, foꝛ both act in the Right of another; and it hath been adjudged, that where an * Infant

*2 Saund. 213

Executor is Plaintiff, he may ſue with other Executors per Attornatum; and by the ſame Reaſon the Bailiffs in this Caſe may ſue per Attornatum, tho' one of them is an Infant.

Holt Chief Juſtice. Where an Infant is Executor alone, he cannot ſue per Attornatum, for if he do, he ſhall be amerced pro falſo clamore; but where he is joined with others of full Age, 'tis otherwiſe; becauſe thoſe of full Age have Authority to diſpoſe all their Aſſets without the Aſſent of the Infant; and this is the Reaſon of the Difference between an Infant Plaintiff and Defendant, in 2 Sand. 212. and 'tis a good Rule, that where any Matter may be pleaded in * Abatement, it ſhall never be aſſigned for Error, and in this Caſe the Plaintiff in Replevin might have pleaded Infancy in Abatement of the Cogniſance. Curia. * 48 Ed. 3. 10 b. 1 Roll. Abr. 782. 3 H. 4. 6.

At another Day, (viz.) in Michaelmas-Term, 2 W. & M. this Caſe was argued ſeriatim by the Bench; and they all agreed, that the Judgment ſhould be affirmed, but upon different Reaſons, three of the Judges being for the Affirmance, becauſe the Defendants are in auter Droit, and they all make but as one Bailiff; and that the Diſability of the Servant ſhall not prejudice the Maſter, and they agreed, that the Caſe of * Executors is the ſame in Reaſon with the preſent Caſe; they agreed likewiſe, that there is a Difference where the Infant is Plaintiff, and where he is Defendant; and that an Avowant is in Nature of a Plaintiff, and ſo are the Bailiffs who make Conuſance, &c. and in the † 1 Inſt. it was doubted whether an Avowant was ſuch a Defendant as was within the Statute for Payment of Coſts, becauſe he is eſteemed to be a Plaintiff; and that where an Infant is ſole Executor, he cannot ſue per Attornatum; to which Holt Chief Juſtice agreed; but if ſuch an Infant Executor recover per Attornatum, his Appearance is no Error, but 'tis otherwiſe where he is condemned in the Action; and one of the Judges was of Opinion, that this Matter might be aſſigned for * Error, tho' it was pleadable in Abatement of the Conuſance. * 1 Roll. Abr. 288. 3 Cro. 378. 2 Cro. 441. † 1 Inſt. 303. 1 Cro. 504. * 2 Cro. 5. 1 Roll. Abr. 781, 783.

But Holt Chief Juſtice held, that this Appearance of the Infant was irregular, for he ought to plead per guardianum, and the Joyning the other Defendants with him, ſignified nothing ſo as to charge the Infant; for if the Judgment paſs againſt him, it ſhall be for the Damages de bonis propriis, and he ſhall be amerced; therefore where he is joined, or where he is ſingle, there is no manner of

Difference in Reaſon, for in both Caſes the Loſs is the ſame, if Judgment is againſt him.

The Caſe of ſeveral Executors where one is an Infant, is founded upon another Reaſon, (viz.) upon Neceſſity; for 'tis abſolutely neceſſary, that all who are appointed Executors by the Will, ſhould be made Parties to the Action; and where there are ſeveral Executors, the Act of one ſhall conclude his Companion; and therefore the general Appearance per Attornatum is good for all of them; and he denied, that the Reaſon was, becauſe they were in auter Droit.

And that in this Caſe, the Infant was not compellable to be joined with the other, for he might have been ſevered; ſo the Reaſon is not the ſame.

'Tis a Rule, that what may be aſſigned for Error ſhall never be pleaded in Abatement. 17E.3.70. *b.* 48 Ed. 3. 10. *b.* Cro. El.853, 541. Bade *verſus* Starkey. 1 Roll. Abr. 782.

And he laid down this to be a general Rule, (viz.) that a Man ſhall never aſſign that for Error which he might plead in Abatement; for it ſhall be accounted his Folly to neglect the Time of taking that Exception; therefore if a Feme Covert bring an Action in her own Name per Attornatum; and the Defendant pleads in Bar to the Action, he ſhall never afterwards aſſign the Coverture for Error; therefore ſince the Plaintiff in this Caſe was eſtopped by his own Admiſſion to aſſign the Infancy for Error, he held that the Judgment ought to be affirmed.

Rawlins *verſus* Vincent. Hill. 2 W. & M. B. R. Rot. 793.

Breach of Covenant where 'tis well aſſigned in the Words of the Indenture.

DEBT upon Bond for Performance of Covenants in an Indenture, in which amongſt other Things the Defendant covenanted, that Nicholas Barbone his Executors or Aſſigns ſhould, on or before the 25th Day of September next following, make out a good Title in Law and Equity, to the Satisfaction of the ſaid William Rawlins, his Heirs or Aſſigns, or to his or their Counſel learned in the Law, in and to ſeveral Meſſuages, &c. ſituate in Eagle-Street in the Pariſh of St. Andrew, Holborn, and to every of them with their Appurtenances, and to the Fee-ſimple, and the Inheritance thereof, that then, &c. then he pleaded, that Nicholas Barbone was living, and that he the Defendant had performed all the Covenants on his Part to be performed, &c.

The Plaintiff replied, and ſhewed the Breach in the Negative, in the very Words of the Indenture, (viz.) that the ſaid Nicholas Barbone upon or before the 25th Day of September, &c. nec ad aliquod tempus poſtea hucuſque non demonſtravit bonum titulum in lege & equitate ad ſatisfactionem prædicti Willi' Rawlins vel ejus conſilii in & ad ſeparalia meſſuagia prædict' nec alicui eorum cum pertin' nec ad feodum vel hæreditatem eorundem.

The Defendant rejoins, that the ſaid William Rawlins a tempore confectionis Indenturæ præd' hucuſq; pacifice & quiete habuit & tenuit & gaviſus fuit præd' meſſuagia, &c. without any lawful Moleſtation or Diſturbance by any Perſon whatſoever, diſcharged of all Incumbrances.

And upon a general Demurrer to this Rejoinder, two Things were reſolved; firſt, that the Rejoinder was ill, becauſe it was no Anſwer to the Breach aſſigned in the Replication.

(2.) That the Replication was good, and the Breach of Covenant well aſſigned; for the Words of the Indenture were purſued, tho' it was objected, that the Words of the Covenant were in the Diſjunctive, (viz.) to ſatisfy the Plaintiff, or his Counſel; and therefore it was objected, that the Plaintiff ought to ſhew, that ſuch a one was his Counſel, of which the Defendant had Notice, &c. and then ſhew the Breach, for not ſatisfying him, nor his Counſel, for (as it was ſaid) that the Defendant had his Election, whether to ſatisfy the Plaintiff, or his Counſel; but that he could not ſatisfy the Counſel before he knew who he was.

To which it was anſwered, and ſo reſolved by the Court, that all this Matter ought to come on the Part of the Defendant in his Rejoinder, &c. if the Truth had been ſo, for prima facie the Breach being aſſigned in the very Words of the Indenture, ſuch an Aſſignment is good. 1 Mod 223.

The Plaintiff had Judgment.

Biſſe

Biſſe *verſus* Harcourt. 3 Mod. 280. *a Caſe between the ſame Parties, but to another Purpoſe, which ſee* poſtea.

An Attorney or Officer of *B. R.* hath no Privilege to alter a *Venue* where he is Defendant, *aliter* where he is Plaintiff.

MR. Harcourt, the Secondary of the Crown-Office, was Defendant in two Actions brought againſt him, and laid in the proper Counties where the Cauſe of Action did ariſe; and it was now moved to alter the Venue, and that the Trial might be in Middleſex, by Reaſon of the Defendant's Privilege, he being one of the Clerks of B. R. and his Attendance neceſſary and requiſite here; and a Rule made in Andrew Loder's Caſe was now produced, who being one of the Clerks of this Office, had this Privilege allowed.

But the Court denied the Motion in the principal Caſe, becauſe Harcourt was the Defendant in thoſe Actions; and that an Attorney or Officer of the Court where he is Defendant hath no Privilege concerning the Venue; but where he is Plaintiff, he hath the Privilege to lay his Action in Middleſex, and out of the proper County; and the Venue ſhall not be charged upon the Common Affidavit by Reaſon of his Privilege; and Juſtice Dolben remembered a Cauſe where the Venue was altered upon Affidavit, tho' an Attorney was Plaintiff; becauſe the Matter did ariſe, and all the Witneſſes lived in remote Parts of the Kingdom.

Kellow *verſus* Rowden. Trin. 2 Jac. II. B. R. Rot. 796.

3 Mod. 253. S. C. 3 Lev. 286. S. C. Reverſion expectant on an Eſtate Tail, is not Aſſets to charge the Heir.

THE Caſe, ſi. W. Kellow Executor of E. Kellow, brought an Action of Debt on a Bond againſt Richard Rowden, the Son and Heir of John Rowden the Elder, his Father; and declared upon a Bond of 120l. made by the Father of the Defendant, to the Teſtator of the Plaintiff.

The Defendant pleaded Riens per deſcent de prædicto Johanne Rowden patre ſuo on the Day of the Writ purchaſed, nor at any Time afterwards, upon which they were at Iſſue.

And the Jury found a ſpecial Verdict to this Effect:

ſſ. That John Rowden, the Father of the Obligor, had Iſſue Charles Rowden his eldeſt Son, and Richard Rowden the Defendant, his ſecond Son; and that he (the Father) was ſeiſed in Fee of an Houſe and ten Acres of Land, which he ſettled by Deed, to the Uſe of himſelf for Life, Remainder to his eldeſt Son Charles Rowden in Tail, Remainder to his own right Heirs, and died; that Charles Rowden was ſeiſed in Tail, with a Remainder in Fee expectant, &c. and that he had Iſſue one John Rowden, and died; and that he the ſaid John Rowden, the Grandſon, was ſeiſed, ut ſupra, and afterwards died without Iſſue, after whoſe Death the Premiſſes deſcended to the Defendant Richard Rowden, in Fee, as Heir to the ſaid John Rowden the Grandſon, and alſo Heir of John Rowden the Obligor, by Virtue whereof he entered and was ſeiſed, &c. on the Day of the Writ, &c.

The ſole Doubt upon this ſpecial Verdict was, Whether upon the Matter thus found the Declaration was good, or not, becauſe the Plaintiff had declared againſt the Defendant as immediate Heir of the Obligor, without mentioning the intermediate Deſcents.

And it was argued, that this Declaration ought to have been ſpecial, ſhewing how the Defendant became Heir to the Obligor; for here the Defendant took the Lands as immediate Heir to John Rowden the Grandſon, and his Nephew, and as mediate Heir to the Obligor; and therefore the meſne Deſcents ought to be ſet forth in the Declaration, to charge the Defendant with this Debt; and for Authorities in this Point, the Caſes in the * Margin were cited, and Jenks's Caſe in Point.

* F.N.B.220. 2 Roll. Abr. 400, 709. 3 Cro. 24.

Dyer 366. *a.* W. Jones 462. Cro. Car. 151. Jenks's *Caſe in Point.* Dyer 308, 368. 40 Ed. 3. 10. Plowd. 441. Broke Deſcent 14, 30. 1 Cro. 412. W. Jones 361. Regiſt. 240. *b.* 2 Cro. 161. 3 Cro. 24. 1 Cro. 543. Dyer 9. 1 Inſt. 239. *b.*

On the other Side it was argued, that there was a great Difference between Jenks's Caſe and this; for in Jenks's Caſe, the Lands deſcended in Fee-ſimple in Poſſeſſion to the Son of the Obligor, who afterwards died without Iſſue, and then the Lands deſcended to the Defendant in that Action, as Uncle and Heir to his Nephew; but in this Caſe the Brother and Nephew were ſeiſed of the Fee-ſimple only in Reverſion, expectant upon the Determination of the Eſtate-tail, and not of any Fee-ſimple in Poſſeſſion; and this Reverſion was not Aſſets in their Hands, by which Charles or John Rowden his Son, might be charged with this Debt;

Econtra for the Plaintiff.

Debt; and for this Purpoſe the Caſes in the * Margin were cited.

* 3 Cro. 350. 6 Rep. 42. *in* Mildmay's *Caſe, and* 58. *b. in* Brediman's *Caſe.*

This Caſe was compared to that of poſſeſſio fratris, &c. where the Father had a Son and a Daughter by one Venter, and a Son by another Venter, and made a Leaſe for Life, or Gift in Tail, and died; and afterwards, during the Continuance of either of thoſe Eſtates, the Son by the firſt Venter died; in ſuch Caſe, the Son by the ſecond Venter, and not the Daughter by the firſt, ſhall inherit, becauſe her Brother had no actual Seiſin of the Inheritance.

1 Inſt. 14,15.

And this Caſe was now put, (viz.) if Lands deſcend to an Heir, who dies before any actual Entry made, by Reaſon whereof the Lands deſcend to another Heir; thoſe Lands ſhall not be recovered in Value by a Warranty made of other Lands by the firſt Heir, becauſe he had only a Seiſin in Law, as 'tis expreſſly proved 1 Inſt. 239.

Nota; per Holt Ch. Juſtice, this laſt Caſe was denied to be Law. Then the Counſel for the Plaintiff proceeded, (viz.) That the Iſſue in this Caſe was, Whether the Defendant had Aſſets by Deſcent from the Obligor; and 'tis proved by the Verdict that he had; and it appears likewiſe that he had no Aſſets charged with this Debt of his Brother, nor of his Nephew, for neither of them ever had any Aſſets chargeable; and if they had no Aſſets, then by Conſequence the Defendant could not have any Aſſets from them.

See 3 Rep. 42. *a.* Ratcliff's *Caſe.* 8 Rep. 88. Buckmere's *Caſe.*

For the Plaintiff.

Upon this firſt Argument, the Court inclining for the Defendant, it was argued again for the Plaintiff, that it was a Principle in Law, that every one who claims Lands as Heir, ought to make himſelf Heir to him who was laſt ſeiſed, therefore if the Defendant in this Caſe had demanded theſe Lands, he ought to have made himſelf Heir to his Father, and not to his Nephew, becauſe he was not actually ſeiſed of the Fee-ſimple, for he had only the Reverſion, which by his Death would have been extinct and gone. And the Defendant had a Fee-ſimple in Poſſeſſion, which his Nephew and Brother never had, therefore he had nothing by Deſcent from them; and it was agreed, that if the Defendant's Nephew had been actually ſeiſed of the Fee-ſimple (as in Jenks's Caſe) the Declaration ought to have been ſpecial.

Litt. Sect. 3. 1 Inſt. 11,12, 14. 8 Ed. 3. 13. 8 Aſſiſ. pl. 6. 2 Ed. 3. 8. 1 Cro. 524, 543. W. Jones 456.

For the Defendant.

For the Defendant it was ſaid, that the Brother and Nephew had ſuch a Seiſin of the Reverſion that they might alien or charge it after the Determination of the Eſtate-tail; moreover, that if Debt ſhould be brought againſt an Heir, who had nothing but a Reverſion in Fee expectant upon the Determination of an Eſtate-tail, in ſuch Caſe the uſual Courſe is to plead ſpecially, (viz.) That he had nothing præter ut ſupra, and thereupon the Plaintiff might pray and have Judgment cum acciderit. 2 Mod. 50, 51.

Curia.

But per Holt Ch. Juſtice: The Declaration is good, and thereupon the Plaintiff had Judgment againſt the Opinion of Juſtice Eyres; but it was agreed by all, that a Reverſion expectant upon an Eſtate-tail is not Aſſets to charge the Heir upon the general Iſſue Riens per Deſcent.

Dyer 371.

But by Holt Ch. Juſtice: A Reverſion expectant upon the Determination of an Eſtate for Life, is quaſi Aſſets, and ought to be pleaded ſpecially by the Heir; and the Plaintiff in ſuch Caſe may take Judgment of it cum acciderit; quod nota.

Brunetti *verſus* Lewen. Trin. 4 Jac. II. B. R. Rot. 185.

1 Lutw. 196. S. C.

After a Verdict a Thing ſhall be intended to be done, tho' not certainly ſet forth in the Declaration.

THE Caſe, ſt. Abraham Henriques Valentini, reſiding in Leghorn in Italy, drew four Bills of Exchange, all of the ſame Date, and for one and the ſame Sum of Money, the Second to be paid if the Firſt was not, and ſo on, according to the Cuſtom of Merchants, and all directed to James Abendano, to pay to Francis Brunetti (the Plaintiff) 500 Pieces of Eight, at Uſance, &c.

The firſt Bill was preſented to Abendano, who refuſed to accept it, whereupon that Bill was proteſted before a Notary Publick, for Non-payment, according to Cuſtom, &c.

Thereupon the Defendant Lewin having Notice of the Proteſt, he, for the Honour of Abraham Henriques, the Drawer, ſubſcribed a Note, by which he undertook the Payment of the Money on the Day of the Bills returned, if not paid by Abendano.

Upon which Brunetti (the Plaintiff) endorſed this ſecond Bill for Value received, unto Alvarez de Coſta, and he in like Manner to Menuel de Vega, and he to Angelo Rezzi-

 uico,

nico, and he to Jacob Argas, and he to Jeranimo Parenzi, all for Value received.

At the Day of the Return, Abendano ſtill refuſed to accept the Bills; whereupon another Proteſt was made on the ſecond Bill ſo endorſed, as aforeſaid, by the Perſons before-mentioned.

Thereupon Peter Antonio Brunetti and Lucas Antonio Brunetti hearing of this laſt Proteſt, pay the Money pro Honore of Francis Brunetti (the firſt Endorſer) but doth not ſay that he paid it to Jeranimo Parenzi, the laſt Endorſee; and of all this Matter, Lewin the Defendant had Notice, who had ſubſcribed, &c. pro honore of Abraham Henriques, the Drawer, and ſo he became chargeable to the Plaintiff for ſo much, for whoſe Honour the Money was paid, and who ſtands liable for ſo much to his Friend, who paid it, and this by the Cuſtom of Merchants; and for Non-payment this ſpecial Aſſumpſit was brought, ſetting forth all the ſaid Matter.

Upon Non Aſſumpſit pleaded, the Plaintiff had a Verdict and Judgment, and thereupon a Writ of Error was brought in the Exchequer-Chamber, and there the only Error inſiſted on was, for that the Declaration did not ſet forth in certain, to whom Peter Antonio Brunetti and Lucas Antonio Brunetti had paid the Money; for 'tis only ſaid generally, that they ſolverent the aforeſaid 500 Pieces of Eight, but not to whom in particular; and ſo it might be paid to another, and not to Parenzi, the laſt Endorſee, to whom alone it was due; and if ſo, the Defendant ſtill remains liable to him.

Curia. Sed per Curiam: After a Verdict, as in this Caſe, it ſhall be intended, that the Money was paid to the right Party, eſpecially ſince 'tis laid to be paid ex parte of the Plaintiff, which could not be, if it had been paid to a Stranger; wherefore the Judgment was affirmed.

Nota: The ſame Exception was taken in B. R. in Arreſt of Judgment, but diſallowed; whereupon this Writ of Error was brought.

The Judgment affirmed.

Nightingale *and* Fowles *verſus* Bridges. Mich. 1 W. & M. Rol. 397.

IN Trover the Plaintiffs declared, quod cum (they on ſuch a Day) poſſeſſionat' fuerunt de bonis & catallis ſequen', (viz.) de una nave vocat' the James Frigat, oneris 130 Doliorum & de decem bombardis Anglice Guns, cum omnibus Armamentis apparat' torment' funibus municon' proviſion' ſclopis limbis & al' ſuppeditament' eidem navi ſpectan' ſive pertinen', &c. Where inſenſible Words ſhall be helped by a Verdict.

Upon Not guilty pleaded, the Plaintiff had a Verdict and Damages; and it was now moved in Arreſt of Judgment, for that the Declaration is too general, and altogether incertain of what Nature the Goods and Chattels were; and therefore it was impoſſible for the Defendant to make any direct Anſwer to it, or to know to what Matter he ſhould make Defence at the Trial; and thereupon Judgment was ſtayed till next Term.

Afterwards in Trinity-Term another Objection was made to the Declaration, for that the Plaintiff had declared inter alia, that he was poſſeſſed de Quingent' ponder' librat' of ſuch a Commodity, &c. whereas ponder' librat' is inſenſible, for Pondus is Latin for a Weight, and librat' is weighed, and for this the Caſes in the Margin were cited in Point. 2 Roll. Abr. 247. Latch. 216.

But the Plaintiff had Judgment; for as to the firſt Objection the Declaration is certain enough, for the whole Sentence is reſtrained by the laſt Words, eidem navi ſpectan', and it would be endleſs to ſet forth every Particular in a Ship; and as to the ſecond Exception, that the Words were inſenſible, 'tis helped by the Verdict, and the Damages ſhall be intended to be given for that which is well laid. Curia. 2 Cro. 669. Cro. Car. 33. Stiles 358. Sid. 98, 263.

The Earl of Salisbury's *Caſe.*

HE was brought from the Tower by Habeas Corpus, and being at the Bar, his Caſe was thus: A general Pardon muſt be pleaded with the uſual Averments.

If. He was by the Convention which was afterwards turned into a Parliament Anno 1 W. & M. impeached by the Commons for High Treaſon, for being reconciled to

the Church of Rome, contrary to the Statute in that Caſe made and provided; and upon this Impeachment he was committed to the Tower by the Houſe of Peers, and there continued till the Parliament was diſſolved, and a new Parliament called, and now (after a long Seſſions) adjourned for two Months.

The Counſel for the Earl moved, that he might be diſcharged upon the new Act of Oblivion which paſſed in the laſt Seſſions of Parliament wherein neither his Crime nor his Perſon were excepted, but clearly within the Act of Pardon.

But per Curiam: Notice cannot be taken of this Act of Pardon, unleſs 'tis pleaded with the Averments, becauſe there are ſeveral Exceptions in it both as to Crimes and Perſons; therefore 'tis neceſſary that the Party who would have the Benefit thereof, ſhould aver himſelf by Plea capable of ſuch Benefit; and not excepted therein, as 'tis ruled in Plowden, and other Books; and here the Lord at the Bar cannot plead this Pardon, becauſe there is nothing before the * Court, upon which to Ground ſuch Plea.

Plowd. 484. *b.* 401. 8 Rep. 68. 4 H. 7. 8. Raſt. Ent. 665. *a.*

* But *quære* whether he might not plead it in Diſcharge of the Matter returned by the *Habeas Corpus*, and enter it as the ſame Roll.

Then it was moved, that he might be bailed, and for that Purpoſe the Lord Danby's Caſe was cited, who was bailed, tho' committed by the Peers in Parliament, as in this Caſe; and the Earl of Shaftsbury's Caſe was likewiſe mentioned.

Sed per curiam: The E. of Salisbury was not bailed, becauſe there was a very ſhort Adjournment of the preſent Parliament, and that is the proper Place for him to make Application to be bailed.

A Commitment by the Houſe of Peers; the Perſon ſhall not be bailed, tho' the Parliament is diſſolved.

That the chief Reaſon for bailing the Lord Danby was, becauſe the then Parliament were prorogued, and the Time incertain for their Meeting again; and ſo no Proſpect of an Opportunity to apply himſelf that Way, beſides he was denied to be bailed by ſeveral Judges of the Court of B. R. until the Chief Juſtice Jefferies came in.

And the Court cited the L. Stafford's Caſe, who was committed by the Houſe of Peers, and notwithſtanding that Parliament was diſſolved by which he was committed; yet he was continued a Priſoner, and afterwards tried upon the ſame Impeachment, convicted and executed, which fully proves, that Commitments by the Peers in Parliament, are not

made void by the Prorogation or Diſſolution of the ſame Parliament.

Beſides, the Lord Danby was bailed to appear at the next Seſſions of Parliament, which was an Affirmance of the Commitment, and a plain Proof of the Opinion of the Court at that Time, that the Commitment was not avoided or diſcharged by the Prorogation of the Parliament.

And for theſe Reaſons the Lord Salisbury was remanded to the Tower.

Of Pleading a Tender.

Nota: Per Ch. Juſtice Holt, in an Argument upon pleading a Tender, (viz.) that where a Tender and Refuſal is pleaded either on a ſingle Bill, or other ſimple Specialty, the Defendant need not conclude in Bar to the Action, but only in Diſcharge of the Damages; for in this Caſe the Tender is not a Diſcharge to the Action, or to the Payment of the Money which is ſtill due notwithſtanding the Tender; for that is only to excuſe the Damages.

But where Tender and Refuſal is pleaded in an Action for a Penalty on a Bond with a Condition to pay a leſſer Sum, there the Defendant muſt conclude in Bar to the Action; becauſe a Tender of a leſs Sum on the Day had diſcharged the Penalty; and therefore 'tis a good Bar to the Action brought for the Penalty; quod nota.

Nota alſo, that in both the ſaid Caſes the Pleader ought to conclude with a profert hic in Curia.

Mordant *verſus* Thorold. Hill. 2. W. & M. B. R. Rot. 340.

THE Caſe, ſt. Anna Maria Thorold, Widow in the Reign of Jac. 2. obtained a Judgment in Dower in C. B. againſt Sir John Thorold; and this was for a third Part of ſeveral Manors, Meſſuages, Lands, Tenements and Hereditaments in Lincolnſhire; upon which Judgment Sir John Thorold brought a Writ of Error in B. R. where it was affirmed; and then Anna Maria, &c. died inteſtate, and Adminiſtration of her Goods, &c. was granted to the Plaintiff Mordant.

3 Lev. 275. S. C. 1 Salk. 252. S. C. *Sci' fa'* brought by an Adminiſtrator on a Judgment in *Dower, &c.*

Afterwards the ſaid Mordant as Adminiſtrator, &c. brought a Sci' fa' in B. R. reciting this Matter; and that the ſaid Sir John Thorold might ſhew Cauſe quare (the Plaintiff) non habet tant' denarios quant' media proficua præd' tertiæ partis maneriorum, &c. quant' damna per aliquid vaſtum in eiſdem tertiis partibus commiſſa poſt primum judicium

cium

cium præd' reddit' & ante affirmationem judicii illius ſe extendunt & miſ. & cuſtagia occaſione præd' Brevis de Errore corrigend' appoſit' juxta formam * ſtatuti in hujuſmodi caſu inde edit' & provis', &c.

* No Execution ſhall be ſtayed by a Writ of Error after Verdict and Judgment in *Dower*, unleſs the Plaintiff in Error become bound to the Defendant to pay Damages and Coſts of Suit, if the Judgment is affirmed, 16 & 17 *Car.* 2. *cap.* 8.

The Defendant pleaded, that nulli denarii adjudicat' fuerunt præfat' Annæ Mariæ in vita ſua pro mediis proficuis præd' tertiæ partis maneriorum, &c. vel pro mediis proficuis alicujus inde parcell' nec aliqua damna pro aliquo vaſto in eiſdem tertiis partibus commiſſ. nec aliqua miſſ. vel cuſtagia occaſione præd' Brevis de Errore corrigend' & hoc parat' eſt verificare, &c. unde petit judicium ſi executio, &c. of any Money for any ſuch mean Profits, or any Damage for any Waſte, or of any Coſts, habere debeat.

For the Plaintiff.

And upon a general Demurrer to this Plea, it was afterwards argued in Trinity-Term for the Plaintiff, that this Statute was made to remedy the Miſchief, (viz.) that the Demandants in Dower, notwithſtanding that they had got Judgment, were delay'd of Execution, and by that Means loſt the Profits of the Lands, tho' the Judgment was affirmed, which was a very great Encouragement to the Tenants in Dower to bring Writs of Error without any manner of Cauſe.

Now for the Prevention thereof, it was enacted by this Statute, That the Plaintiff in Error ſhould enter into a Recogniſance to anſwer for the mean Profits, &c. which Recogniſance creates a certain Duty, though incertain as to the Quantum, and veſts as a Duty eo inſtanti that he entered into the Recogniſance, and this to the Demandant in the Action; and if ſo, then by Conſequence it ſhall come to the Executors or Adminiſtrators as other Duties do; and here the Adminiſtrator took a proper Courſe to aſcertain this Duty, (viz.) in the firſt Place to revive the Judgment by Sci. fa. and after he had got Judgment to have Execution for ſo much as the mean Profits amounted unto, then to proſecute a Writ of Inquiry of the Quantum; and after the Inquiſition was returned, and the Duty aſcertained, then to execute the Recogniſance, which Recogniſance is in Nature of a Covenant to anſwer the mean Profits; and therefore the Death of the Party ſhall not fruſtrate its Effect.

On the other Side it was argued for the Defendant, that the Taking the mean Profits after the firſt Judgment, was a perſonal Tort, and in Nature of a Treſpaſs, & actio perſonalis moritur cum perſona: And here is a Sci. fa. brought by an Adminiſtrator, where there was no Judgment for any Damages given to the Inteſtate, which is a Thing never ſeen before. For the Defendant.

There is a Caſe in * Sid. where the Demandant in Dower had Judgment by Default, and a Writ of Inquiry of Damages, and then a Writ of Error was brought, pending which Writ the Tenant in the firſt Action died; and in a Sci. fa. againſt his Heir to have Execution of the Damages, it was adjudged againſt the Plaintiff in the Sci. fa. becauſe at that very Time when the Tenant died, the Judgment was compleat only as to the Lands, but not to the Damages; and this Caſe was upon the Statute of † Merton, which gives Damages, (viz.) The Value of her Dower from her Husband's Death to the Time of Recovery of her Dower; and as to this Matter, there is no Difference between a Sci. fa. for Damages upon the Statute of Merton, and upon the Statute 16, 17 Car. 2. for in both Caſes the Judgment quoad the Damages, ought to be compleat in the Life-time of the Parties. * Alewayes v. Roberts. Sid. 188. † 20 H. 3. cap. 1.

And the Court was of that Opinion.

And Holt Ch. Juſtice gave another Reaſon, (viz.) That the Judgment which was given in this Caſe was altogether in the Realty, and an Adminiſtrator cannot have Execution of any Judgment, but only in the Perſonalty. Curia.

Judgment quod querens nil capiat.

Giles *verſus* Hooper. Hill. 2 Will. & Mar. B. R. Rot.

THE Caſe, ſi. Leaſe for Years, rendring 80 l. per Annum Rent, free and clear from all Manner of Taxes, Charges and Impoſitions whatſoever. Leaſe for Years, rendring Rent, free of all Taxes, the Word *Render* makes a Covenant, and the Leſſor is diſcharged from all Taxes.

Adjudged (abſente Holt Ch. Juſtice) that the Render made a Covenant, and that the Words above-mentioned extend to diſcharge the Leſſor from Payment of all Land-Taxes lately impoſed by Act of Parliament, and long after the Commencement of this Leaſe; and that the Leſſee is bound to pay the whole Rent, without any Manner of Deduction for any old or new Charge or Impoſition whatſoever.

Rottenhoffer

Plea in Abatement, not good. Mich. 5 W. *the like Judgment between* Greenvill *v.* Dighton, *upon the like Plea.* *See* Dyer 32. *a.* 3 Cro. 537. 1 Mod. Rep. 121. Sid. 236.

Rottenhoffer *verſus* Lenthall *the Marſhall.* Paſ. 2 Will. & Mar. B. R. Rot. 355.

AN Action of Debt upon Eſcape brought againſt the Marſhal, in which the Plaintiff had a Verdict and Judgment; and in an Action of Debt brought upon that Judgment, the Defendant pleaded, that he brought a Writ of Error on the ſame adhuc dependen. & indiſcuſſ. and concluded in Abatement, (viz.) Si reſpondere compelli debeat, &c.

2 Vent. 261. And upon a general Demurrer to this Plea, it was adjudged ill; ſo the Defendant was ruled to anſwer over.

Hall *verſus* Wybourn. Mich. 1 Will. & Mar. B. R. Rot. 671.

3 Mod. 311. S. C. 2 Salk. 420. S. C. Plea of the Statute of Limitations, where good, where not.

THE Caſe, ſſ. Aſſumpſit for Wares ſold, &c. The Defendant pleaded Non Aſſumpſit infra ſex annos.

The Plaintiff replied, that he (the Defendant) tempore promiſſion. & aſſumptionis in narratione prædict. ſuperius ſpecificat. fuit commorans & reſiden. in partibus ultra mare ſcilicet apud Guinea extra Angliam & extra ligeantiam Domini Regis & Dominæ Reginæ nunc, & ibidem continuavit uſq; (ſuch a Day) &c. quo die & non antea & poſt. promiſſion. & aſſumption. prædict. (the Defendant) voluntarie rediit & retornavit in hoc regnum (viz.) apud L. in parochia & Warda prædict. quodq; prædicta Billa ipſius (the Plaintiff) exhibita fuit verſus præfat. (the Defendant) pro prædicta cauſa actionis in eadem Billa ſpecificat. infra unum Annum prox. poſt prædict. reditum ipſius (the Defendant) in Anglia ſcil't prædicto Termino Sanctæ Trin. &c.

* 21 Jac. 1. cap. 16. And upon a general Demurrer to this Replication, the only Doubt was, Whether the Statute of * Limitations was a good Bar to this Action, the Defendant being beyond Sea for all that Time; and it was argued that it ſhould, becauſe the Plaintiff had neglected his proper Remedy by not Filing an Original, and proſecuting the Defendant to an Outlawry, which, tho' it ſhall be reverſed after his Return; yet the Plaintiff might have brought another Original by Journies Accounts, and thereby take Advantage of his firſt Writ.

Alſo the Plaintiff might have ſued out a Latitat, and continued it to the Time the Defendant returned, but he (the Plaintiff) had not done any Thing, and is therefore barred by the Statute; for 'tis clear he is not within any of the Savings thereof.

And a Caſe was cited in C. B. when Bridgman was Chief Juſtice, and it was between Sir Geo. Binion and Evelin in Aſſumpſit for Wares ſold, &c. the Defendant pleaded Non Aſſumpſit infra ſex annos; the Plaintiff replied, that from the Time of the Promiſe, &c. to ſuch a Day, the Defendant was a Member of Parliament, and then the Civil Wars began and continued till ſuch a Day, and that he brought his Action within ſix Years after the War ended; and upon a Demurrer it was adjudged for the Defendant, and that the Replication was ill, becauſe the Plaintiff ought to have filed an Original, which is no Breach of Privilege, tho' the Defendant was a Member of Parliament; Quod nota.

Filing an Original is no Breach of Privilege of Parliament.

It was inſiſted on the other Side for the Plaintiff, that if this Matter will not help him, then the Defendant will have Benefit by his own Laches, for he may ſtay beyond Sea as long as he will, and this Court hath no Juriſdiction over him till he returns; for tho' it may hold Plea for Matters done beyond Sea, yet that muſt be intended when the Defendant is within the Realm; for 'tis the Preſence of the Party which gives Juriſdiction, and is the Occaſion of the Suit.

For the Plaintiff.

Cro. Car. 245, 333. W. Jones 252.

Beſides, this Caſe is within the Equity of the Saving in the Statute, but the Defendant had Judgment; and in Purſuance of this Judgment it was held in the Caſe cited in the Margin, that where an Action was brought on a Bill of Exchange, and the Defendant pleaded Non Aſſumpſit infra ſex annos; and the Plaintiff replied, that the Defendant was all that Time out of the Realm; this Replication was adjudged ill.

Chevely *v.* Bond. Hill. 3 W. & M. B. R. Rot. 307.

Judgment for the Defendant.

Biſſe *verſus* Harecourt. Hill. 1 Will. & Mar. B. R. Rot. 217.

ASSUMPSIT for 400 l. againſt Harecourt, the Secondary of the Crown-Office, who pleaded in Diſability of the Plaintiff, (viz.) That before the Bill purchaſed, (viz.) on ſuch a Day at Wells, in the County of Somerſet, before the

The Defendant concluded his Plea in Diſability, and the Plaintiff his Replication in Bar; the Whole is diſcontinued.

the Ch. Juſtice Jefferies, the Plaintiff was indicted for High Treaſon againſt King James II. and was convicted thereof upon his own Confeſſion; and by the Judgment of the Juſtices was attainted, &c. and ſo he (the Defendant) demanded Judgment if he ad Billam, &c. * reſpondere compelli debeat.

* It ought to be *Et hoc, &c. per Recordum, &c.*

The Plaintiff replied Proteſtando, that the Plea was inſufficient, pro pl'ito dicit quod repelli non debet quia dicit, that before the Promiſe, King James II. by Letters Patent, exemplified under the Great Seal of the King and Queen, had pardoned the Treaſon and the Attainder, quam quidem exemplificationem idem (the Plaintiff) profert hic in Curia, &c. and concluded in this Form, Unde petit Judicium & damna ſua occaſione non performationis aſſumption. & promiſſ. prædict. ſibi adjudicari, &c.

For the Defendant.

And upon a general Demurrer it was objected againſt this Replication, that it was not ſufficient to plead and ſhew the Exemplification of the Pardon, &c. but that the Plaintiff ought to produce the Pardon it ſelf under the Great Seal, becauſe the Exemplification of a Pardon is not within the Statute † 13 Eliz.

† 13 Eliz. c. 6.

* 5 Rep. 53.

But * Page's Caſe being contrary in Point, this Exception was over-ruled.

2. The Concluſion of this Replication is ill, becauſe it prays Damages occaſione non performationis, &c. and upon a Reſpondeat ouſter, no Damages are given, therefore he ought to conclude thus: *ſſ.* Et petit judicium ſi, &c. reſpondere compelli non debeat & quod (the Defendant) ad Billam ſuam prædict. reſpondeat.

Co. Ent. 248. *a.*

For the Plaintiff.

On the other Side it was alledged for the Plaintiff, that in the Entries cited in the † Margin, Replications to Pleas in Abatement are concluded as this:

† Co. Ent. 160. *a.* Raſt. Ent. 663. *a.* 681. *b.*

But it was reſolved by the Court, that this improper Concluſion of the Replication made it ill, for all the Pleading was diſcontinued, becauſe the Plea was in Diſability, and ſo concluded; and the Replication was concluded as a Plea in Bar, and ſo no Manner of Anſwer to the Plea, but a Replication at large, and as none at all; ſo that all is diſcontinued for Default of a Replication; but if it had been concluded generally, (viz.) Petit judicium ſi, &c. that might have been good.

2 Lev. 142. Yelv. 117, 137, 138. *See* Poſtea Carter *ver.* Davis.

So the Rule of Court was, that the Plea was diſcontinued, and not that the Bill ſhall abate; Quod nota.

Co. Lib. 4. 62. *a.*

Hele *verſus* Foot. Paſch. 2 W. & M. B. R. Rot. 325.

IN Replevin for taking his Cattle in quodam loco vocat' S. in Plimpton St. Mary in Devonſhire. Judgment that the Writ ſhould abate, and for what Reaſon.

The Defendant pleaded, that he took the Cattle in quodam loco vocat' D. in Plimpton, &c. and traverſed, that he took them in S. prout, &c. and pro retorn' habend' he made Conuſance as Bailiff to George Parker, who was ſeiſed in Fee of the ſaid Place called D. who demiſed it to T. S. rendring Rent for a certain Number of Years, and that for Rent Arrear he diſtrained as Bailiff to the ſaid George Parker.

The Plaintiff replied Proteſtando, that the ſaid George Parker did not demiſe the ſaid Place called D. to the ſaid T. S. prout, he traverſed, that the ſaid George Parker was ſeiſed of the Place called D. in Fee at the Time of the Demiſe.

And upon a general Demurrer to this Replication,

Holt Chief Juſtice, at the firſt Opening the Cauſe, held, that all the Pleadings were diſcontinued, becauſe there was no Anſwer to the Plea and Traverſe, which are in Abatement of the Writ; and that the Plaintiff had nothing to do with the Matter alledged pro retorno habend', but ought to have maintained his Writ by taking Iſſue upon the Traverſe in the Plea; and therefore becauſe the Defendant had demurred, and the Plaintiff joined in Demurrer, all is diſcontinued, and the Defendant ſhall have no other Judgment as it was held in * Herlakenden's Caſe. 7 H. 6. 5. *a.* Yel. 5, 6. 65. 1 Sand. 338. *4 Rep. 62. *a.*

Moreover, the Defendants in this Caſe ought not to have demurred, but ſhould have taken Judgment as by nil dicit, becauſe this Replication is as none; and ſo he concluded, that all was diſcontinued; and therefore the Defendant could not have Judgment pro retorn' habend'.

But the other Judges held, that the Judgment ſhould be, that the Writ ſhall Abate, and that the Defendant ſhould have a Retorn' habend', becauſe he had demurred to the Plea in the ſame Term; and the Chief Juſtice would not oppoſe them in this Matter; and therefore the Judgment was, that the Writ ſhould abate; quod nota. 7 H. 6. 5. Plowd. Com. 138. Yel. 38. 2 Cro. 27.

DE

Term. Sanct. Trin.

2 Willi. & Mariæ, in B. R.

Rice *verſus* Langford. Hill. 3 Jac. II. Rot. 1059.

A Fine with a Grant and Render, alters the Quality of the Eſtate.

UPON a ſpecial Verdict in Ejectment, the Caſe was to this Effect:

ſt. A. being ſeiſed in Fee of the Lands in Queſtion as Heir at Law ex parte materna, he and his Wife levied a Fine, &c. ſur cogniſance de droit, &c. to B. and C. and by the ſame Fine they granted and rendered the ſame Lands to A. and his Wife in Tail, Remainder to the Right Heirs of A.

Afterwards A. and his Wife died without Iſſue, and without any Heir ex parte materna of A. and the Defendant claimed as Heir at Law to A. ex parte paterna; and the Leſſors of the Plaintiff being Lords of the Fee claimed by Eſcheat.

The ſole Queſtion was, if A. took a new Eſtate by this Fine with a Grant and Render, or whether he was in again of his old Eſtate which was ex parte materna, and in the Argument of this Caſe it was agreed by all, that if the Fine had been levied generally without any Render, or without any Uſes declared, the reſulting Uſe which would have devolved on the Cogniſor, would have been the old Uſe in the ſame Quality as it was before.

So if the Uſe of this Fine had been declared or limited to the Conuſor and his Heirs, the Quality of the Eſtate would not have been altered thereby, but the Lands would have deſcended in the ſame Manner as if no Fine had been levied, (viz.) if it was ex parte materna then to the Heirs ex parte materna, and not to the Heirs ex parte paterna, & ſic e converſo. 3 Lev. 406.

And it was inſiſted for the Plaintiff in this Caſe, that nothing in Fact paſſed to the Cogniſees, but only in Form, and all the Eſtate moved from the Cogniſor; for, if in ſuch Caſe the Cogniſee had been a Feme Covert, ſhe ſhould not have been examined, and the Widow of ſuch a Cogniſee would not have been endowed. For the Plaintiff.

Moreover, the Eſtate of the Cogniſees is only an Eſtate quouſque, as in the common Caſe where an Uſe is limited to A. quouſque ſuch a Marriage ſhall take Effect, &c. and to maintain this Opinion, the Caſes in the * Margin were cited. * 5 E. 4. 17. 8 H. 4. 12. 1 Inſt. 12, 13. Dyer 11. 3 Leon. 1. Rol. Abr. 676.

But it was anſwered, and ſo reſolved by the Court, that this Caſe was different from all Caſes put upon Uſes; whether they are Uſes reſulting or Expreſs; for there the Uſe which at Common Law was only a Truſt, came in Place of an Eſtate, and always retained the ſame Quality with the Eſtate. 2 Rep. 73. The Lord *Cromwell's* Caſe.

And in Caſe of a Truſt at Common Law, if a Man was ſeiſed ex parte materna, and made a Feoffment without any Conſideration, the Truſt reſulted to the Feoffor, and was of the ſame Quality with the Eſtate; but yet if the Feoffee reinfeoffed the Ceſtui que Truſt, the Nature of the Eſtate was altered, and it ſhall deſcend to the Heir ex parte paterna, for he could not enfeoff the Ceſtui que Truſt to him and his Heirs, ex parte materna, becauſe there was no ſuch Limitation of the Inheritance in him. 3 Lev. 406.

But it was reſolved, that this Caſe of the Fine with Grant and Render is all one in Effect as a Feoffment and Reinfeoffment; and by Conſequence the Quality of the Eſtate is altered, and ſo it ſhall deſcend to the Heir ex parte paterna; and to prove this, the Caſes in the * Margin were cited. * 1 Inſt. 76. *b.* 3 Cro 727, 792. 6 Rep. 63. Sir *Moyle Finch's* Caſe.

It was likewiſe ſaid, that a Warranty might be annexed to a Fine with Grant and Render, as it was reſolved in 3 Cro. 17. Co. Ent. 579. a.

And for theſe Reaſons the Defendant had Judgment.

Shotter

Shotter *verſus* Friend. Hill. 2 W. & M. B. R. Rot. 39.

2 Salk. 547. Prohibition to the Spiritual Court for denying a Proof by one Witneſs, as to the Payment of a Legacy.

PRohibition to the Spiritual Court in which the Plaintiff declared to this Effect:

ſſ. That one John Friend made his laſt Will, and bequeathed a Legacy of 10 l. to Mary Friend, and made the Wife of Shotter Executrix, and died; the Plaintiff paid the Legacy to Mary Friend, who afterwards died inteſtate; and the Defendant as her Adminiſtrator libelled againſt the Plaintiff for this Legacy of 10 l. to which he alledged in that Court by way of Plea, that he had paid the ſaid Legacy to Mary Friend in her Life-Time, which Payment he offered to prove by one credible Witneſs; but the Court refuſed the Plea, becauſe one Witneſs per ſe is not ſufficient by their Law to prove any Matter of Fact.

The Defendant pleaded, that before the Prohibition was brought and delivered, Sentence was given in the Spiritual Court againſt the Plaintiff.

And upon a Demurrer to this Plea, it was inſiſted for the Plaintiff, that 'tis a Maxim in Law, that where the Common and the Eccleſiaſtical Law differ, the Common Law ſhall always be preferred; and that thoſe Laws differ in ſeveral Points concerning Evidence; for by that Law the Father cannot be a Witneſs where the Son is a Party, & econtra; ſo in the Caſe at Bar the Proof of the Fact by one Witneſs is not good by their Law, but 'tis otherwiſe at Common Law; for 'tis reaſonable, that the Proof, which is good for Payment of a Debt, ſhould be likewiſe ſufficient for Payment of a Legacy.

Moreover upon ſuch ſingle Proof, the Plaintiff would have Relief in Chancery, and for the ſame Reaſon ſhall have a Prohibition here, and the Caſes in the * Margin were cited, to prove that Prohibitions have been granted in Caſes of this Nature.

* 3 Cro. 88. 666. Moor 413, 907.

1 Rol. Rep. 12. 2 Rol. Rep. 42. 439, 490. Hob. 247. Yel. 92. 2 Rol. Abr. 299. Latch. 117, 217. 3 Bulſt. 242. Hutton 22. Poph. 59. Hob. 188.

Now, ſuppoſing a Teſtator owed Money upon Bond to the Value of the Aſſets, and he had deviſed ſeveral Legacies by his Will; and this Bond is proved by one Witneſs, and the Legatees libel againſt the Executors, who

plead this Bond in that Court, and they diſallow the Plea, becauſe the Bond is proved by one Witneſs alone; in this Caſe, if a Prohibition ſhould not go, that Court would compel the Executor to pay the Legacies; and yet he (the Executor) would be chargeable to the Obligee, for as to him the Payment of the Legacy would be a Devaſtavit.

It cannot be denied, but that the Spiritual Court hath Cogniſance of the original Cauſe, which, in this Caſe, is the Legacy, and therefore they ſhall have Cogniſance of all the * Incidents and Dependencies thereon; beſides, one Witneſs is not concluſive Evidence at Common Law, but only Evidence to induce the Jury to find the Matter. Econtra. * 2 Roll. Abr. 298, 299. Hob. 12. 12 Rep. 65. Hetley 87. 2 Inſt. 608. Linw. 174. Sid. 161. 1 Inſt. 6. b.

But in Michaelmas-Term, anno 2 W. & M. it was argued and reſolved by all the Court ſeriatim, that a Prohibition ſhould go; and firſt it was allowed, that regularly where the Spiritual Court hath Cogniſance of the Principal, they ſhall have Cogniſance of the Incidents and Acceſſaries; but if the Incident is a Matter meerly temporal, they muſt proceed there according to the Courſe of the Common Law, and not ſecundum jus Eccleſiaſticum; for if they do, a Prohibition will be granted; as for Inſtance; in the Caſe of a Nuncupative Will, which is meerly Spiritual, (and ſuch a Will is none in their Law, unleſs proved by Two Witneſſes at leaſt) no Prohibition ſhall go, though they diſallow the Will, becauſe proved by one Witneſs, and no more, for that Court hath Cogniſance of the Probate of Wills; but yet if a Revocation of ſuch Will is pleaded there, and proved by one Witneſs, and they refuſe the Plea for Want of ſufficient Proof, a Prohibition ſhall go; Quod nota. Yelv. 92.

So where a Suit is brought in that Court for Subſtraction of Tithes, which is of Spiritual Conuſance; and the Defendant pleads there, that he had ſet out the Tithes, which he proved by one Witneſs, but they refuſed to allow the Plea, becauſe the Defendant had not given the Parſon Notice of ſetting out the Tithes; yet upon ſuggeſting this Matter, a Prohibition ſhall go, becauſe Notice is not requiſite by the Common Law; therefore if they will proceed upon ſuch an Incident, according to the Eccleſiaſtal Law, they ſhall be prohibited.

But it was agreed, that a Suggeſtion that the Spiritual Court objected as to the Credibility of a Witneſs, is not a ſufficient Ground for a Prohibition, for they are the proper Judges

Judges of the Credit of a Witneſs; likewiſe 'tis not a ſufficient Ground for a Prohibition, to ſuggeſt that the Plaintiff had only one Witneſs to prove the Fact, unleſs he alledge, that he offered ſuch Proof, and it was refuſed for Inſufficiency.

Cro. Eliz. 88.

* 1 Vent. 291.

And a Caſe was now remembered between * Richardſon and Desberow, adjudged in this Court, when Hale was Ch. Juſtice, which was the ſame with the Caſe at Bar, and likewiſe after Sentence; and yet a Prohibition was granted.

4 Rep. 301. F.N.B. 97. B. 33 H. 6. 8. 1 Inſt. 6.

And Holt Ch. Juſtice held, that it was not neceſſary in any Caſe at Common Law, that a Proof of Matter of Fact ſhould be made by more than one Witneſs; for a ſingle Teſtimony of one credible Witneſs was ſufficient to prove any Fact; and that the Authorities cited in 1 Inſt. 6. b. did not Warrant that Opinion, which was there founded on them.

The Plaintiff had Judgment for a Prohibition.

Rudd *verſus* Berkenhead. Hill. 1 & 2 Will. & Mar. B. R. Rot. 164.

The Statute of Limitations pleaded to an Action for Attorney's Fees.

ASSUMPSIT for Fees due to an Attorney, the Defendant pleaded Non Aſſumpſit infra ſex Annos.

The Plaintiff replied, that on ſuch a Day, two Years before he had ſued out an Attachment of Privilege againſt the Defendant, upon which Writ, Taliter proceſſum fuit, that the Defendant (on ſuch a Day) in Hillary-Term, anno 2 Willi. &c. appeared, and the Plaintiff declared againſt him modo & forma, &c.

And upon a Demurrer to this Replication it was held ill, becauſe the Plaintiff did not ſet forth any Continuance of this Writ of Attachment (per vic. non miſit breve) which was ſued out above two Years ago; for 'tis impoſſible that the Defendant ſhould appear in Hillary-Term, Anno 2 Will. to a Writ returnable two Years before, and no other Writ is ſet forth by the Plaintiff.

But if the Plaintiff, after the Taliter proceſſum fuit, had ſhewn the laſt Attachment, and the Return thereof, upon which in Truth the Defendant did appear, it had been well enough, without ſhewing any of the Continuances.

Thereupon the Plaintiff moved to diſcontinue; which was granted.

Ryding *verſus* Edwin *and* Fleet Vic. London. Mich. 1 Will. & Mar. B. R. Rot. 30.

THE Caſe, ſi. A Priſoner in Wood-ſtreet Counter, upon meſne Proceſs, on a Plaint levied againſt him, &c. eſcaped, upon which the Plaintiff brought an Action againſt both the Sheriffs of London.

Upon an Eſcape out of one of the Counters, the Action muſt be brought againſt both the Sheriffs.

And upon a Demurrer to the Declaration, the only Queſtion was, Whether this Action was maintainable againſt both the Sheriffs, or whether it ought to be brought againſt Edwin alone; for the Plaint was levied before him, and the Priſoner eſcaped out of his * Counter, and by his Negligence alone.

* 3 Cro. 185. 1 Roll. Abr. 806.

'Tis true, the Caſes cited in the Margin prove, that the Action ſhould be brought againſt one of the Sheriffs alone, but the modern Precedents are otherwiſe, ſeveral ſuch Precedents being now produced, where the Action was brought againſt both Sheriffs; and in † Co. Ent. it appears upon the Return of an Habeas Corpus, that both the Sheriffs have the Cuſtody of all the Priſoners in both the Counters, and by Conſequence this Action is well brought.

† Co. Entr. 436.

Aſhcomb *verſus The Hundred of* Elthorn. Hill. 2 Will. & Mar. B. R. Rot. 901.

THIS was an Action upon the Statute of Hue and Cry, and upon a ſpecial Verdict found, the Caſe appeared to be thus:

3 Mod. 287. S. C. 2 Salk. 613. S. C.

The Plaintiff ſent T. S. his Servant to Smithfield Market with fat Cattle, where he ſold them for 108 l. and ſealed up 106 l. in four Bags, and delivered them to I. N. a Quaker, who travelled with him towards home, and they were both robbed within this Hundred, (viz.) The Quaker was robbed of 106 l. and the Servant of 40 s. and now the Plaintiff (whoſe Money it was) brought this Action for 108 l.

Where a Servant is robbed, and not in the Preſence of his Maſter, the Servant may bring the Action upon the Statute; but if in the Preſence of his Maſter, then the Maſter may bring the Action.

That T. S. the Servant only made Oath of the Robbery within twenty Days, &c. according to the Statute, but that the Quaker had not made any Oath, &c.

The Queſtion was, Whether this Oath made by the Servant alone, without the Oath of the Quaker, who refuſed

to ſwear, was ſufficient for the Maſter to maintain this Action upon the * Statute, &c.

* 27 Eliz. cap. 13.

And in Michaelmas Term following it was adjudged by the whole Court for the Plaintiff, as to the 40s. taken from T. S. his Servant, but againſt him as to the 106 l. taken from the Quaker, who would not ſwear; the Court being of Opinion, that the Statute aforeſaid, which enjoins the Oath, was made meerly for the Benefit of the Hundreds, who were oppreſſed by pretended Robberies, and therefore the Court would not depart from the expreſs Words of that Statute.

Where the Judgment muſt be entered with ſeveral Damages.

Nota; On the back Side of the Diſtringas, the Entry of the Verdict as to the Damages was entire, (viz.) pro damnis 17 l. but it was ordered, that the Judgment ſhould be entered with ſeveral Damages; for that the Ch. Juſtice, who tried the Cauſe, directed it ſhould be ſo at the Trial, and that the Aſſociate was miſtaken by Entring it in that Manner.

2 Roll. Abr. 681. Style 156. 1 Leon. 323. 2 Brownl. 10.

And Holt Ch. Juſtice declared, that T. S. the Servant, who delivered the 106 l. to the Quaker, and was preſent at the Robbery, might well maintain the Action in his own Name for all the Money, and that his own Oath would be ſufficient, and that he might declare upon the Taking away the Money from the Quaker, as his Servant (who in Truth was ſo for this Time).

Nota; This Advice of the Ch. Juſtice was obſerved in another Action brought for the 106 l. taken from the Quaker.

And in the Arguing of the Caſe aforeſaid, one Jones's Caſe was cited, which was adjudged in B. R. in Michaelmas-Term 1658, which was thus:

Jones *verſus Hundred of* Bromley.

ſſ. Jones, and his Wife and Servant, travelling together, were all robbed of his Money, and Jones alone brought the Action for the whole Money againſt the Hundred, as well for what was taken from his Wife and Servant, as from his own Perſon; and he alone, without his Wife or Servant, made Oath of the Robbery; all which Matter being found on a ſpecial Verdict, it was adjudged, that his Oath alone was ſufficient, within the Intent of the Statute; and altho' it was farther found, that the Servant of Jones, who was robbed with his Maſter, knew one of the Robbers (whoſe Name was Lenoe) yet Jones had his Judgment; Quod nota.

And Holt Ch. Juſtice remembered another Caſe tried before him at the Sittings in Weſtminſter after laſt Eaſter-

Term, between Bird and the Hundred of Oſſulſtone, where the Evidence was thus: Bird *v. Hundred of* Oſſulſtone.

ſſ. That Bird was a Laceman of Colliton in Devonſhire, and coming to London with his Servant, they left the uſual great Road between Brentford and Hammerſmith, and rode through a By-Lane near Serjeant Maynard's Houſe, to avoid the Duſt; and in that Lane the Servant was robbed in the Preſence of his Maſter of a Box of Lace which was behind him, on the Back of the Horſe to the Value of 1200 l. and Bird the Maſter alone made Oath of the Robbery, and brought the Action; and he (the Chief Juſtice) was of Opinion, that the Oath by the Maſter alone was ſufficient, becauſe he (the Maſter) being preſent, the Goods were in his Poſſeſſion, for the Poſſeſſion of the Servant in the Preſence of his Maſter is his (the Maſter's) Poſſeſſion, and that was the Reaſon of Jones's Caſe ſupra; and Bird recovered a Thouſand Pounds, and had Execution.

Brickwood *an Attorney verſus* Fanſhaw. Hill. 1 W. & M. B. R. Rot. 1150.

ASſumpſit for Attornies Fees, in which the Plaintiff declared ſpecially upon a Proſecution of a Writ of Habeas Corpus cum cauſa, to remove a Plaint levied againſt the Defendant Fanſhaw by one T. S. in an inferior Court, (viz.) Malden Court in Eſſex, and alſo for defending in that Suit after it was removed here in B. R.

The Statute concerning Attornies and their Fees, doth not extend to Fees for proſecuting in inferior Courts.

The Defendant pleaded the Statute * 3 Jac. by which 'tis enacted, That an Attorney ſhall not be allowed any Fees laid out for Counſel, unleſs he have Tickets thereof ſigned by the Hands of them who receive ſuch Fees; and avers that the Plaintiff had not produced to him (the Defendant) any Tickets for the Fees of Counſel, &c. under their Hands as he ought. * 3 Jac. 1. cap. 7.

And upon a Demurrer to this Plea the Plaintiff had Judgment, becauſe this Statute did not extend to Matters tranſacted in inferior Courts, but only to Suits in the Courts of Weſtminſter-Hall; Quod nota.

Gold & al' *verſus* Strode.

3 Mod. 324. S. C. Where Adminiſtration is granted by a Peculiar, where there are *Bona notabilia*, 'tis not void, but voidable.

THE Caſe, ſt. A. obtained a Judgment in B. R againſt B. and then died Inteſtate, and the Plaintiffs took out Adminiſtration by an inferior Ordinary, (viz.) the Archdeacon of Bridgwater, and brought a Scire facias upon that Judgment, upon which they had Judgment to have Execution, and thereupon a Ca. ſa. iſſued againſt B. upon which he was taken, and in Cuſtody of the Defendant, who was Sheriff, &c. and afterwards eſcaped, upon which the Plaintiffs brought an Action of Debt againſt the Defendant nuper Vic. &c.

Upon Nil debet pleaded the Parties were at Iſſue, and a Verdict was found for the Plaintiffs.

And now it was moved in Arreſt of Judgment, for that it appears in the Declaration, upon the Plaintiff's own Shewing, that this Adminiſtration was granted to them by a peculiar Juriſdiction, whereas it likewiſe appeared, that the Inteſtate had Bona notabilia in another Dioceſe, (viz.) This Judgment at Weſtminſter; for which Reaſon this Adminiſtration granted by a peculiar Juriſdiction, (*viz.*) by the Archdeacon, is meerly void; and if ſo, then the Judgment obtained upon this Scire facias is utterly void; and then an Action of Eſcape will not lie againſt the Sheriff for the Eſcape of a Priſoner taken upon a void Judgment; for if there is no Judgment againſt B. then there is no Cauſe to detain him in Priſon.

5 Rep. Prince's *Caſe* 29. 10 H. 7. 16, 18, 19.

1 Roll. Abr. 810. 2 Bulſt. 62, 63.

Curia. To which it was anſwered and ſo reſolved, that this Matter was only Error, of which the Sheriffs could not take Advantage in an Action for an Eſcape brought againſt him; and the Difference is where the Judgment is meerly void, and where 'tis only erroneous; and this depends upon another Diſtinction, (viz.) where the Court in which the Judgment was obtained had Cogniſance of the Cauſe, and where not; for in the firſt Caſe, if the Plaintiff obtain a Judgment, and by his own Shewing had no Cauſe of Action; yet becauſe the Court had Juriſdiction of the Cauſe, this is only an erroneous, and not a void Judgment; but 'tis otherwiſe where the Court had no Juriſdiction of the Cauſe.

21 Ed. 4. 23. *b.* 1 Roll. Abr. 809, 910. Moor 274. 2 Cro. 3. But in the principal Caſe, the Court had Conuſance of the Cauſe, and therefore the Matter alledged ſupra is only Error.

Nota; It was agreed in this Caſe, that the Judgment obtained in the Court at Weſtminſter made Bona notabilia, tho' the Action upon which it was obtained was laid in Dorſetſhire, becauſe the Record was at Weſtminſter.

Nota alſo, that the Plaintiffs in their Declaration had ſhewed all the Proceedings to the Judgment upon the Sci. fa. at large, by Reaſon whereof the Letters of Adminiſtration, and by whom granted, plainly appeared by their own Folly in declaring; for the Court held clearly, that the Plaintiffs in this Action againſt a Sheriff, might declare briefly upon the Judgment in the Sci. fa. without ſhewing the gradual Proceedings at Length, as is uſually done in an Action of Debt on a Judgment; Quod nota.

Woolridge *verſus* Cloberry. Mich. 4 Jac. II. B. R. Rot. 15.

ERROR upon a Judgment in C. B. in an Action on the Caſe for diverting a Water-courſe, brought againſt ſix Defendants.

They all pleaded jointly Not guilty; thereupon a Ve. fa. was awarded, and a Diſtringas with a Niſi prius; but before the Day of the Niſi prius, T. S. one of the Defendants, died; afterwards the Plaintiff had a Verdict, and Judgment was entered againſt all the ſix Defendants, (viz.) Againſt T. S. who was dead, ut ſupra, together with the Survivors.

Six Defendants, and before the Day of *Niſi prius* one died, and Judgment was entered againſt all Six; this is ill.

Thereupon all the Survivors brought a Writ of Error, and aſſign the Death of T. S and the Judgment aforeſaid, for Error; and the Judgment was reverſed as to all of them; for in ſuch Caſe the Plaintiff ought to make a ſpecial Entry of the Death of T. S. with Nihil ulterius verſus eum fiat, and then to take Judgment only againſt the Survivors, and not againſt him who was dead.

Newton *verſus* Trigg. Mich. 1 Jac. II. B. R. Rot. 226.

3 Mod. 326. S. C.
3 Lev. 309. S. C.
1 Salk. 109. S. C.

IN Treſpaſs for Taking his Goods, &c. Upon Not guilty pleaded, a ſpecial Verdict was found to this Effect:

ſt. That the Plaintiff was a Citizen of London and a Common Inn-keeper, and bought all his Proviſions and ſold

Inn-keeper not a Trader within the Statute of Bankrupts.

ſold them again in his Inn, per quod he got his Livelihood, and that he had built a Ship and had a Share therein, and alſo 500 l. Stock upon the ſaid Ship ad merchandizand'; but it was not found, that he traded therewith, or that he any wiſe traded in the Ship; and that a Statute of Bankrupt had been taken out againſt him, and that he was declared a Bankrupt, and that the Goods now in Queſtion were the Plaintiff's Goods, and aſſigned to the Defendant by the Commiſſioners of the Statute of Bankruptcy.

The only Queſtion was, Whether upon the Matter thus found, the Plaintiff was a Trader within the Statutes of Bankruptcy.

For the Plaintiff. And it was argued for him, (viz. for the Plaintiff) that an Inn-keeper is not like a Trade, becauſe he is obliged to

Dyer 158. b. entertain all Travellers; and if he refuſe, without good Cauſe, an Action lies againſt him.

Beſides, certain Rates and Prices are and may be impo-

2 Cro. 609. ſed upon all his Commodities; and if he extort any unreaſonable Rates, he may be indicted, ſo that he hath not the Freedom of Trade, (viz.) of making the beſt Advantage of his Commodities, but is reſtrained contrary to the common Liberty of all Traders in general.

All his Profits ariſe by four ſeveral Means, as follow:

1. For Lodgings; and as to that Matter, Reſpect is to be had to the Charge of his Furniture.

2. His Kitchen, where his Servants, Inſtruments, and the wearing his Linen, are to be conſidered.

3. His Cellar, which is generally rented by a Tapſter at a certain yearly Sum.

4. His Stables, where 'tis not only the Hay and Oats which are to be conſidered, but his Servants, Houſe-room and Attendants; ſo he is in no Sort like a Tradeſman, who may chooſe his own Chapmen, and ſet his own Price on his Goods, and is not under any Obligation to find Houſe-Room, Furniture or Attendance.

Cro. Car. 549. March 34. W. Jones 437. An Inn-keeper makes no precedent Contract, as Tradeſmen do in their Way of Trade, but utters Commodities to his Gueſts, as he is bound to do.

As for his having Part of a Ship, that will not make

1 Sid. 411. him a Bankrupt, unleſs he traded therein, for having Part of it doth not make him a Trader within the Sta-

tutes of Bankruptcy; and as to the Stock, 'tis not found that he bought or sold any Thing therewith; both which Circumstances are necessary to make a Bankrupt. 2 Roll. Abr. 84. 2 Cro. 585. 1 Cro. 31.

Afterwards in Trinity-Term, 3 W. & M. it was adjudged by the whole Court for the Plaintiff; and it was resolved by all, that the Building and having a Share in a Ship, is no more than if a Man hath a Share in a Barge or a Coach which are let to Hire, &c. and that his having some Stock in a Ship doth not make him a Merchant, because 'tis frequent for Persons to adventure some particular Things in such a Ship, for such a Voyage, but that will not make them Traders within the Statutes, &c. for by those Statutes professed Merchants are only meant, or such who are in constant Trading. Curia. 1 Cro. 282. Sid. 411. 1 Roll. Abr. 84. 2 Roll. Abr. 84, 85, 345. March 35. 2 Roll. Rep. 342. Hutt. 100.

And now * Sir Tho. Littleton's Case was remember'd, who was Victualler of the Navy, and by that Means contracted many Debts; yet because this was an Undertaking for a particular and special Purpose, and not general; therefore 'tis not within the Statutes of Bankrupts. * 1 Vent. 270.

Besides, an Inn-keeper buys to sell only in his own Inn, and not elsewhere, which is not a general Buying and Selling, so as to make him a Trader, and that a School-master, who boards several Scholars in his House, might as well be a Bankrupt for that Reason as an Inn-keeper, because their Buying and Selling are much of the same Nature; but it hath been adjudged, that the Keeping a Boarding-School is not a Trade within these Statutes; and that none are Traders but such who live by the meer Advance of the Value of a Commodity; and an Inn-keeper is not by the Law taken Notice of as a Trader, for in the Register he is called Communis Hospitator, and Inns are no more than great Ale-houses, and are within the Statutes concerning Ale-houses, and that an Inn-keeper is no more a Trader than a Sutler to an Army, or a Steward to an Inn of Court, who deals only with particular Persons, and to particular Purposes; and for these Reasons it was adjudged, that an Inn-keeper, as such, could not be a Bankrupt. 2 Bulst. 109.

Judgment for the Plaintiff.

Quilter *versus* Newton.

IN a Prohibition, the Case was, that Newton, one of the Church-wardens of St. Buttolphs, London, libelled against Quilter for Stopping the Church-door and Windows Suggestion for a Prohibition, not good.

dows by Sheds, &c. built (as he ſuppoſed) upon Part of the Church-yard.

And now it was moved for a Prohibition upon a Suggeſtion, that the Conuſance of Lay Fees appertains to the Temporal Courts, and that Sir Cha. Humphrevile was ſeiſed in Fee of a Meſſuage and Curtilage near the Church-yard, as of his Lay Fee, and that he demiſed the ſame to Quilter, &c. and that Newton had libelled againſt him for Building upon the Church-yard, ubi revera the Sheds, *&c.* were not built upon any Part of the Church-yard, but upon a Lay Fee; and this was held a good Suggeſtion, becauſe it was averred, that the Sheds did not ſtand upon any Part of the Church-yard.

Sed nota; per Curiam, A Prohibition ſhall not be granted to any Suit in the Spiritual Court for any Nuſance, or other Matter done in the Church-yard, upon a Suggeſtion, that the Church-yard is a Lay Fee, for a Muſance there is properly of Eccleſiaſtical Conuſance.

* Ogden *v.* Wiſeman. Paſ. 28 Car. 2. B. R.

And in debating the Caſe ſupra, * another Caſe was mentioned, which was adjudged in B. R. when Hale was Chief Juſtice; and the Copy of the Prohibition was now produced, which was concerning the ſame Matter in the ſame Place; and the Church-wardens libelled, and Ogden ſuggeſted, ut ſupra, only he did not aver, that the Structures were not built upon any Part of the Church-yard, but only that it was the Lay Fee of Sir Cha. Humphrevile; and thereupon a Prohibition Niſi was granted, and the then Rule of Court was now produced.

But the Court held that Caſe to paſs ſub ſilentio, without any Debate, for it was not remembered by any, and they held this Kind of Suggeſtion was inſufficient cauſa qua ſupra.

The Mayor and Church-wardens of *Northampton*'s Caſe.

Warrant of Commitment ill concluded.

THE Mayor of Northampton committed the Church-wardens for refuſing to account before him, and the Warrant of Commitment concluded in the common Form, (viz.) until they be duly diſcharged according to Law; and all this appearing upon the Return of an Habeas Corpus, the Court held the Commitment void, becauſe the Warrant ought to have been thus concluded, (viz.) there to remain

main until he ſhall account, as the Statute 43. cap. 2. doth appoint.

And the Difference is where a Man is committed as a Criminal, and where only for Contumacy (as in this Caſe) in refuſing to do a Thing required, &c. for in the firſt Caſe, the Commitment muſt be until diſcharged according to Law; but in the later, until he comply, and perform the Thing required; for in that Caſe he ſhall not lie till a Seſſions, but ſhall be diſcharged upon the Performance of his Duty.

Mich. 8 *Willi.* One *Bracy* was committed by Commiſſioners of the Statute of Bankrupts, for refuſing to anſwer, and they con-

Wherefore the Churchwardens were diſcharged by Rule of Court; quod nota.

cluded their Warrant, (*viz.*) *Until he conform himſelf to our Authority, and be thence delivered by due Courſe of Law*; and upon the Return of an *Habeas Corpus* he was diſcharged, becauſe this Concluſion was not purſuant to the Statute of Bankrupts; and the Mayor of *Northampton*'s Caſe was cited for an Authority.

Frederick *verſus* Hook.

DEBT upon Bond as Adminiſtrator to the Lady Frederick; the Defendant prayed Oyer of the Letters of Adminiſtration, by which it appeared, that the Plaintiff was a ſpecial Adminiſtrator quoad this Bond only pendente lite concerning the Laſt Will of the ſaid Lady.

Adminiſtration granted *pendente lite*, where 'tis good, where not.

And thereupon the Defendant pleaded in Abatement, that the Lady Frederick made her Will, and thereby conſtituted the Plaintiff her Executor, and that the Plaintiff Suſcepit ſuper ſe onus Executionis teſtamenti præd. unde ex quo the Plaintiff brought this Action as Adminiſtrator, and not as Executor, petit judicium de billa, &c.

And upon a Demurrer to this Plea, the Court held, that an Adminiſtration pendente lite concerning a Will, was utterly void, and that the Difference is thus, (viz.) Where there is a Controverſy in the Spiritual Court concerning the Right of Adminiſtration, and where 'tis concerning a Will, as in this Caſe; for in the firſt Caſe, an Adminiſtration granted pendente lite is good; but 'tis otherwiſe where the Controverſy is concerning a Will; for he who comes in under a Will, ſhall avoid all that which an Adminiſtrator can do; and a Caſe was cited * Trin. 24 Car. 2. B. R. which was Trover brought by the Plaintiff for the Converſion of his Goods; and upon Not guilty pleaded, there was a ſpecial Verdict found, that the Plaintiff was the Executor named in the Will of T. S. whoſe Goods

* 3 Keeble 54. Smith *verſus* Smith.

they were, and that the Defendant had Adminiſtration granted to him of the Goods of the ſaid T. S. pendente lite concerning the Will, and there it was adjudged for the Plaintiff, becauſe the Adminiſtration was meerly void upon the Diſtinction ſupra.

Nota; per Curiam, An Executor may maintain Trover in his own Name before the Seiſure of the Goods, or Probate of the Will; but in the principal Caſe the Plaintiff did not proceed any farther

DE

Term. Sanct. Mich.

Anno 2 Willi. & Mariæ in B. R.

Burchett *verſus* Durdant.

T. Jones 99. 1 Vent. 334. 2 Vent. 311. 2 Lev. 232. Raym. 330. *By the Name of* Jones *ver.* Richardſon.

WRIT of Error in Parliament upon a Judgment given in the Exchequer-Chamber, which was in Affirmance of a Judgment in Ejectment brought by Durdant againſt Burchett in B. R. The Caſe being on a Deviſe in hæc verba:

Where a Remainder ſhall veſt preſently, where not.

Ff. I give unto *John Higden*, and his Heirs, during the Life only of *Robert Durdant*, my Lands in *D.* upon Truſt, to ſuffer the ſaid *Robert Durdant*, during his Life, to receive the Rents and Profits, (the ſaid Robert Durdant committing no Waſte) and after the Deceaſe of the ſaid *Robert Durdant*,

I do give the ſaid Lands unto the Heirs Male of the Body of him the ſaid *Robert Durdant*, now living, and to ſuch other Heirs Male and Female as he ſhall hereafter happen to have of his Body, *&c.*

Now, at the Time of this Deviſe, and at the Death of the Teſtator, the aforeſaid Robert Durdant had only one Son named *George Durdant*, and then living.

After the Death of the ſaid Teſtator, he the ſaid John Higden and Robert Durdant, join in a Feoffment and Fine of the Premiſſes to Burchett, the Plaintiff, in the Writ of Error; and the Defendant in the ſaid Writ was Leſſee of the Son and Heir of George Durdant.

The general Queſtion was, Whether George Durdant, the Son of Robert, took a preſent Remainder in Tail by this Will as a Purchaſer, and ſo veſted in him immediately upon the Death of the Teſtator, or elſe a contingent Remainder, (viz.) if he happened to ſurvive his Father Robert Durdant; for if ſo, then it was barred by the Fine and Feoffment ſupra, becauſe the Remainder could not commence at the Time of the Determination of the particular Eſtate, as in the common Caſe of Remainders limited to the right Heirs of I. S. and the particular Eſtate determines living I. S.

But all the three Courts, (viz.) of King's Bench, * Exchequer-Chamber, and Parliament, held clearly, that it was a Remainder veſted in George Durdant immediately upon the Death of the Teſtator, and that the Words in the Will, now living, were a ſufficient Deſcription of the Perſon of George Durdant, and that the other Words, (viz.) Unto the Heirs Male of the Body of Robert Durdant, did not only help to make up the Deſcription of the Perſon of George, but were a good Limitation of an Eſtate-tail to him, as in the Caſe ſupra, where 'tis limited to the right Heirs of I. S. there the Word Heirs ſerves not only to deſcribe the Perſon, but to limit the Eſtate. * 2 Vent. 311.

Wherefore the two former Judgments were now again affirmed; and there was the like Judgment in Parliament concerning Part of the ſame Lands ſo deviſed as aforeſaid; and it was in Ejectment between † Jones and Richardſon, another Purchaſer of Parcel, under Higden and Robert Durdant. † 2 Lev. 232. Raym. 330.

The King, *&c. verſus* Champion.

UPON a Certiorari to remove the Order of two Juſtices, and upon the Return thereof it appeared to be an Order to compel Champion to pay Wages, recited to be due to a Day-Labourer, not retained by the Year, according to the Statute 5 Eliz. and it was held clearly by the Court, that this Order was void, becauſe the Juſtices of Peace have no Authority concerning the Wages of Servants, but only of ſuch who are hired by the Year, according to the Statute, and who are hired in the Service of Husbandry, which not appearing in this Order, as it ought, it was therefore quaſhed, for the Statute takes no Notice of any other Service; and the Juſtices have no Power concerning Wages, but what is given by that Stat.

Hanſon *verſus* Leverſedge. Hill. 1 & 2 Will. & Mar. C. B. Rot. 1471.

2 Vent. 242. S. C. Where a parol Award is not good for the Incertainty.

THE Caſe, ſi. Debt upon Bond for Performance of an Award, the Submiſſion was, ſo as the Award be made in Writing, or by Word of Mouth, by ſuch a Day, &c.

The Defendant pleaded no Award made.

The Plaintiff replied ſpecially, (viz.) That before and at the Time of the Submiſſion, there was a Suit depending between him and the Defendant, for ſcandalous Words ſpoken by the Defendant, of him the Plaintiff; and that the Arbitrators did by Word award, that the Defendant ſhould pay to the Plaintiff twelve Guineas, and all ſuch Sums of Money as the Plaintiff had laid out or expended in and about the Proſecution of the * Plea aforeſaid, and afterwards, that they ſhould ſign general Releaſes, &c. and the Plaintiff averred, that he had expended 11 l. in the Proſecution of the ſaid Plea, of which the Defendant had Notice, &c. but notwithſtanding he refuſed the Payment, &c.

*Nota, There was not any Plea named before.

For the Defendant.

And upon a Demurrer to this Replication, it was inſiſted for the Defendant, that this Award was void for the Incertainty thereof, for an Award by Word ought to be as certain as an Award in Writing; now, if this had been in Writing, the Plaintiff could not have helped the Incer-

tainty by his Averment, that there was a Suit depending when no such Thing is mentioned in the Award it self.

Moreover, This Award is incertain in another Respect, (viz.) for that 'tis for the Defendant to pay all such Sums of Money which the Plaintiff had expended in the Suit, and it doth not appear how much was spent, and no Person is assigned to reduce it to any Certainty; but if it had been to pay all the Costs of Suit, that might have been good, because there is a proper Officer to tax the Costs.

Besides, the scandalous Words for which the Action was brought ought to have been set forth in certain in the very Body of the Award, that the Court might judge whether they were actionable, or not. 1 Sid. 12.

But it was said on the other Side, that the Words Expences and Costs are all one, and that in this Award the Expences shall be intended Costs of Suit, ; and as to the Incertainty of the Sums expended, the Defendant might have traversed the Quantum of the Expences, if the Demand had been unreasonable. For the Plaintiff. 1 Cro. 383. 1 Roll. 221.

The Ch. Justice Pollexfen held, that the Award had made an End of the Suit, so that the Court had no Authority to tax the Costs; therefore, after the Award, no Judgment could be given as to that Matter, because then there was no Suit depending, and so it would make no Manner of Difference, if the Word Costs had been inserted in the Award instead of the Word Expences; but here the Plaintiff had ascertained the Expences by his own Averment, that he had expended so much, &c. which the Defendant might have traversed if he would. Curia.

As for setting forth the scandalous Words in the Award, 'tis not necessary, no more than to set forth a Title in it upon a Suit for Lands, because the Arbitrators are Judices facti, and the Court will not enquire into their Reasons; therefore, tho' the Suit should happen to be without any just Cause, yet the Award will be good.

Besides, in all parol Awards, 'tis sufficient to shew the Substance, tho' not in the same numerical Words; for the Court will not hold the Witnesses to the express Words of the Arbitrators.

But per Curiam, If this Award had been in Writing, it would have been void, because no Averment dehors would have been allowed to make it certain; but 'tis not so in a parol Award; quod nota.

Judgment for the Plaintiff.

Dicken

Dicken *verſus* Greenville.

Writ of Error on a Judgment *in Curia noſtra, viz. Jac.* 2. when all the Proceedings were in the Reign of *Car.* 2. 'tis a Variance incurable.

UPON a ſpecial Verdict in Eſtreat all the Proceedings appeared to be in the Reign of Car. 2. but the Caſe was argued and adjudged in the Reign of Jac. 2. but the Judgment was entered upon the original Roll, which was a Roll of Car. 2.

Upon this Judgment a Writ of Error was brought in the Exchequer-Chamber, reciting as followeth:

ſſ. Jacobus ſecundus Dei Gratia, &c. Quia in Recordo & proceſſu ac etiam in redditione judicii Loquelæ quæ fuit in Curia noſtra coram nobis per billam ſine brevi noſtro, &c.

Upon this Writ of Error the Judgment was reverſed in the Exchequer-Chamber, and the Tranſcript of the Record ſent back to this Court; whereupon the Plaintiff moved, that the Court would give Judgment for him.

Thereupon the Counſel for the Defendant ſhewed the Variance ſupra, and ſaid, that there was no ſuch Record in B. R. as was mentioned in the Writ of Error, &c. upon which the Proceedings had been in the Exchequer-Chamber; for the Judgment which the Defendant had obtained againſt the Plaintiff was upon a Loquela in the Reign of Car. 2. and not in the Court of Jac. 2. and this was held an incurable Fault, and thereupon the Plaintiff brought another Writ of Error, &c.

Reusby *verſus* Manning. Trin. 2 Will. & Mar. Rot. &c. *But adjudged in this Term.*

3 Mod. 330. S. C. Breach of an Award, where well aſſigned.

DEBT upon Bond for Performance of an Award, Ita quod the Award be made and ready to be delivered to the Parties in Difference, or to ſuch of them who ſhould deſire the ſame by ſuch a Time, &c.

The Defendant pleaded no Award made.

The Plaintiff replied, that the Arbitrators within the Time, &c. made their Award in Writing, which he ſet forth at large, and aſſigned the Breach, &c. but did not ſay, that the Award was ready to be delivered to the Parties, according to the Words of the Submiſſion ſupra.

And for this Fault the Defendant demurred, becauſe the Submiſſion was conditional Ita quod, &c. and this Condi-

tion ought to be perfoꝛmed by the Arbitratoꝛs, otherwiſe their Award would not oblige the Parties; and here the Plaintiff ought to ſhew, that all the Condition was perfoꝛmed, otherwiſe he hath no Cauſe of Action, and therefoꝛe in a * Caſe adjudged in this Court 27 Car. 2. the ſame Exception was taken and allowed.

* Jenkinſon *verſus* Allen. 5 Rep. 103. 2 Cro. 577. 2 Saund. 73, 188.

And Juſtice Dolben cited a † Caſe in the Common Pleas when he was at the Bar, where the Submiſſion was conditional, with an Ita quod the Award be made in Writing, to be delivered to the Parties, &c. and it was pleaded, that the Arbitratoꝛs did make an Award under their Hands and Seals, and ready to be delivered to the Parties, and in that Caſe the Exception was, that it was not expreſly averred, that the Award was made in Writing, as it was required by the Submiſſion; but it was not allowed, becauſe it muſt neceſſarily be intended, it was in Writing, it being pleaded to be under the Hands and Seals of the Arbitratoꝛs; but Hale, who was then Ch. Juſtice of C. B. doubted.

† Fuller *ver.* Lane.

But in the pꝛincipal Caſe the Plaintiff had Judgment foꝛ the Reaſon given in Cro. Car. 541. (viz.) That it ſhall neceſſarily be intended, that the Award which was in Writing was ready to be delivered to the Parties; and likewiſe foꝛ this Reaſon, (viz.) becauſe the Award ought to be ready to be delivered when any of the Parties required it; and it doth not appear that it was required by any of them; and therefoꝛe 'tis not requiſite it ſhould be delivered befoꝛe any Requeſt.

The Plaintiff had Judgment.

Thursby *verſus* Helbert. Mich. 2 Will. & Mar. B. R. Rot. 435.

DEBT upon Bond foꝛ Perfoꝛmance of an Award. The Defendant pleaded, no Award made.

3 Mod. 272. Where the Award was of one Side, where not.

The Plaintiff replied, and ſet foꝛth the Award, which was, that the Defendant, with good and ſufficient Security, to the good Liking of the Plaintiff, ſhould give a Bond in the Penalty of 300 l. conditioned foꝛ Payment of 150 l. to the Plaintiff, at oꝛ befoꝛe ſuch a Day; and upon Delivery of ſuch Bond, each to releaſe the other; and the Plaintiff aſſigned the Breach ſpecially, (viz.) that the Defendant had not given his own Bond of 300 l. foꝛ the Payment of 150 l.

150 l. upon which they were at Iſſue, and the Plaintiff had a Verdict.

And now it was moved in Arreſt of Judgment, that this Award was void, becauſe it was only of one Side, for it was void quoad the Security to be given, becauſe the Sureties were Strangers to the Submiſſion; and then, tho' the Award may be good, ſo as to oblige the Defendant to give his own Bond, yet no Releaſe is awarded for the Plaintiff to make, but upon the Delivery of a Bond with Sureties, and that being void quoad the Securities; and there being no Releaſe to be given, but upon the Delivery of a Bond with Surety, by Conſequence nothing is awarded on the Part of the Plaintiff, for he can never be compelled to releaſe.

1 Roll. Abr. 259.

Curia. But per Curiam, Judgment was given for the Plaintiff, becauſe the Defendant was bound to give his own Bond, tho' the Award was void quoad the Sureties, and that as ſoon as the Defendant had delivered his ſingle Bond, the Plaintiff was compellable to make a Releaſe, for the Sureties were to be to the good Liking of the Plaintiff; and 'tis probable he might approve the ſingle Bond of the Defendant for his Security; and this was the principal Reaſon why,

Judgment was given for the Plaintiff.

Williams *verſus* W. Harriſon *and* R. Harriſon.

Infancy, a good Plea in Bar againſt a Bill of Exchange.

IN an Action on the Caſe brought by the Plaintiff againſt the Defendants, being Merchants, according to the Cuſtom of Merchants, upon a Bill of Exchange drawn by them, and proteſted: R. Harriſon, one of the Defendants, pleaded Infancy in Bar, &c.

And upon a Demurrer to this Plea, ſuppoſing that Infancy was no Bar to this Action founded on the Cuſtom of Merchants.

Curia. The Court, without Argument, over-ruled the Demurrer, for they clearly held, that Infancy was a good Bar notwithſtanding the Cuſtom; for here the Infant is a Trader, and the Bill of Exchange was drawn in Courſe of Trade, and not for any Neceſſaries; ſo Judgment was entered, that the Plaintiff Nil capiat per Billam *verſus* R. Harriſon.

And Holt Ch. Juſtice cited a * Caſe, that where an Infant keeps a Common Inn, yet an Action on the Caſe upon the Cuſtom of Inns will not lie againſt him, which is ſtronger than the principal Caſe. 1 Roll. Abr. fo. 2.

The King and Queen *verſus* Moor.

MOOR being a Citizen of London, had a Country-houſe in the Pariſh of Hornſey, where he uſually dwelt in the Summer-ſeaſon, and thereupon he was choſen by the Pariſhioners to be one of the Overſeers of the Poor of that Pariſh; and upon his Appeal to the Quarter-Seſſions an Order was made to diſcharge him from this Office, in which Order the two next Juſtices of the Peace were required to appoint another Man in his Room. A Citizen of *London*, who lived in the Summer in the Country, was choſe Overſeer of the Poor there, not good.

This Order being removed into B. R. by Certiorari, it was now moved, that it might be quaſhed, becauſe the Seſſions had nothing to do in this Matter; for the * Statute gives no Appeal in this Caſe, but is poſitive that the two next Juſtices ſhall appoint, &c. * 43 Eliz.

Holt Ch. Juſtice was of that Opinion, (viz.) that an Appeal would not lie: Eyre Juſtice doubted.

But becauſe this Order did not recite, that Moor was appointed Overſeer by the two next Juſtices, therefore it was not quaſhed, for the Court held, that no Body was hurt by the Order, for that it did not appear that Moor was legally choſen Overſeer, therefore the Order did not affect any Body.

But the Court ſeemed to diſcountenance the Pariſh in chuſing ſuch a Man Overſeer, who was reſident there but only for ſome Part of the Summer, and was actually an Inhabitant of another Pariſh in London.

Newcomb *verſus* Harvey.

THE Plaintiff being Leſſee for Years, aſſigned over his whole Term, by Indenture, to the Defendant, rendring Rent, and an Action of Debt was now brought for the Rent in arrear. Where Debt may be brought for Rent, tho' the Plaintiff hath no Reverſion.

The Defendant pleaded Non conceſſit & hoc, &c.

And upon a Demurrer to this Plea, it was objected in Behalf of the Defendant, that this Action would not lie,

 becauſe

because the Sum reserved was not properly any Rent, but a Sum in gross, the Plaintiff having assigned over his whole Term, and by Consequence had no Reversion, and therefore the Action ought to be for a Sum in gross upon the Contract, (and not Debt for Rent) and that would not lie till the last Day expires.

Curia. To which it was answered, and so resolved per Curiam, that this is a Rent, tho' the Plaintiff had no Reversion; for

2 Mod. 174. 1 Vent. 242. if a Rent is reserved upon a Feoffment in Fee, there is no Reversion in the Feoffor; but yet this is a Rent, and recoverable by the Name of a Rent upon the Contract, and so it shall be in the principal Case.

Moreover, if the Defendant had assigned over the Term

Nota, A Termor surrendered to the Lessor, without Deed, rendring Rent; and it was adjudged, that this was recoverable, as Rent, and that it was not a Sum in gross. 1 Vent. 242, 272. 2 Lev. 80. to another, an Action of Debt would lie for the Plaintiff against the second Assignee.

The Plaintiff had Judgment.

Hobbs qui tam, &c. *versus* Young. Hill. 1 & 2 Will. & Mar. B. R. Rot. 129.

3 Mod. 313. S. C. 2 Salk. 610. S. C. * 5 Eliz. cap. 4. He is a Trader within the Statute who exercises a Trade by his Servants, and never bound Apprentice himself.

THE Case, ff. An Action was brought against the Defendant upon the Statute † 5 Eliz. for using the Trade of a Clothier, not having been Apprentice to that Trade, and a special Verdict was found to this Effect:

ff. That Young was a Turkey Merchant, and exported great Quantities of English Cloth into the Levant, and that for this Purpose only he hired several Cloth-workers (who had all been Apprentices to the same Trade), and kept also a Master-Workman of that Trade to inspect their Work, and that by these Men he made great Quantities of English Cloth, all which he transported; and that he (the said Young) kept a Dye-house, and hired Men of that Trade to dye his own Cloths, and no other, &c.

The Question was, Whether this Case was within the Intent of the Statute, so as to restrain the Defendant to exercise a Trade by his Servants, to which he himself had never been an Apprentice; for tho' he did nothing about the Work, yet he had all the Profit, and those Tradesmen who did the Work had no Gain by the Trade.

Holt Ch. Justice, in the Argument of this Case, cited a Case upon this Statute prosecuted by the Horners Compa-

ny, againſt a Comb-maker in London, for uſing the Trade of an Horner, (viz.) in preſſing Horn for making Combs, which Preſſing did not belong to their Trade; and this was adjudged a Breach of the Statute; for a Horner is a particular Trade, and a very antient Company in London.

And per Curiam, this Statute doth not reſtrain a Man from uſing ſeveral Trades, ſo as he had been an Apprentice to all; wherefore it indemnifies all Petty Chapmen in little Towns and Villages, becauſe their Maſters kept the ſame mix'd Trades there before them; and for this Purpoſe a Caſe was cited, and now allowed for Law, that where an Action was brought on this Statute, and upon Not guilty pleaded, it appeared, that the Defendant's Father kept the ſame Trade, and that he (the Defendant) for ſeveral Years, had been employed by his Father therein; it was held, that he might lawfully uſe that Trade, for that he had been quaſi an Apprentice to it, which was ſufficient to ſatisfy the Statute.

Afterwards, in Trinity-Term, 3 Will. & Mar. it was adjudged per Holt Ch. Juſtice, and two other Judges, for the Plaintiff,

That it had been very much controverted, Whether this Statute hath abrogated the particular Cuſtoms concerning Trades in particular Towns and Villages; but that the better Opinion was, that the Statute had not abrogated thoſe Cuſtoms; that the Widow of a Tradeſman cannot continue her Husband's Trade, unleſs by Cuſtom of the Place, or that ſhe her ſelf had been bred to * the ſame Trade; but they all agreed, that the Uſing a Trade in a private Family, for the Uſe of the ſame Family, and not to ſell, was not within the Statute.

1 Cro. 347, 499, 516. 2 Bulſt. 187, 191. Noy 5. Hutt. 131. 8 Rep. 130. Hob. 211. 11 Rep. 54. *See* 1 Jac. 2. cap. 22. 2 Saund. 112.

* *Quære*, For the common Opinion is otherwiſe, for that the Wife ſerves as an Apprentice.

And per Holt Ch. Juſtice, If it had been found that the Defendant exerciſed this Trade by himſelf, it had been within the Statute, tho' it was for his own Merchandiſe only, and that the doing it by his Servants is doing it by himſelf, and the Workmen are no Traders, but his Servants, for he only is properly the Tradeſman who hath the Benefit of the Trade, and not he who is the Hireling, for he hath nothing either in the Gain or Loſs; and he held, that if a Coach-maker keeps Servants to make his Wheels, and Workmen to curry his own Leather, this is againſt

the Statute, becauſe 'tis he only who receives all the Profits of the ſeveral Trades, and the Wheelwright, and the Currier, are but his Servants.

And if a Man keeps Journeymen Shoe-makers to make Shoes for Tranſportation; this is an Exerciſing the Trade of a Shoe-maker within this Statute.

But Dolben Juſtice was of a contrary Opinion.

Bradburn *verſus* Kennerdale. Mich. 4 Jac. II. Rot. 640.

3 Mod. 318. In Avowry where the Plea is not good for Want of a Traverſe.

ERROR of a Judgment in the County Palatine of Cheſter, in Replevin brought for the Taking a Cow in a Place called Shippen.

The Defendant made Conuſance as Bailiff to Sir Peter Warburton, for that he (Sir Peter) tempore quo, &c. was ſeiſed of the Manor of Aſley (of which the Place where, &c. is, and Time out of Mind was Parcel), in his Demeſne, as of Fee, &c. and that he, the Defendant, as Bailiff, &c. took the Cow, &c. Damage-feaſant.

The Plaintiff replied in Bar to the Conuſance, that bene & verum eſt, that Sir Peter Warburton, tempore quo, &c. was ſeiſed of the Manor of Aſley aforeſaid, in dominico ſuo ut de feodo, ſed diu ante prædict' tempus quo, &c. Sir George Warburton was ſeiſed in Fee of the ſaid Manor (whoſe Heir the ſaid Sir Peter Warburton is), and of a Meſſuage adtunc parcell. ejuſdem Manerii, of which Meſſuage the Place where, &c. tunc & adhuc eſt parcell. and being ſo ſeiſed, the ſaid Sir George, before the Taking the ſaid Cow, (viz) On ſuch a Day made a Leaſe of the ſaid Meſſuage, unde, &c. to one T. S. for three Lives, and that afterwards T. S. died, and T. B. entered, and was ſeiſed as Occupant, and made a Leaſe for one Year unto the Plaintiff, &c. per quod, &c.

To this Replication there was a Demurrer in this Form:

ff. Quod placitum præd. ſuperius replicando placitat. minus ſufficien. &c. and concludes Unde petit judicium & damna ſua, &c. but did not pray any Return, and Judgment was there given for the Avowant; and that he ſhould have a Return, &c. and that for a Fault in the Bar, which was the Want of a Traverſe.

And now it was argued by the Counſel for the Plaintiff in Error.

1. That the Bar was good without a Traverſe, becauſe by the Bar all the Matter of the Conuſance was ſufficiently confeſſed and avoided, (viz.) That Sir Peter Warburton was ſeiſed of the Manor, &c. and that the Place where, &c. was Parcel thereof; for the Eſtate now claimed was only for Life, and the Reverſion thereof always continued Parcel of the Manor; and therefore the Matter which is confeſſed and avoided ſhould never be traverſed.

And the Seiſin in dominico ſuo of the Place where, &c. is not traverſable, becauſe 'tis not a poſitive Affirmation, but only alledged Argumentative, (viz.) as 'tis Parcel of the Manor.

Another Error was, that the Commencement of this Conuſance was informal and ill, for he did not ſhew, that the Place where * continebat ſo much; for ſo are all the Precedents. but this was held to be only Form. * Yelv. 146.

Another Error was, that the Defendant had Judgment for a Retorn. habend. without making any Prayer for ſuch a Return.

Another Error was, that the Commencement of the Demurrer was informal, (viz.) in this Word Replicando placitat, for 'tis not a Replication but a Bar; and ſo there being no Anſwer to the Bar, the Cauſe is diſcontinued.

Beſides, it was alledged, that admitting a Traverſe is neceſſary, yet it was aided by this general Demurrer. 1 Lev. 44.

But in Hillary-Term following it was adjudged by the Court, that the Bar was ill for want of a Traverſe; that the Place where was Parcel of the Manor tempore captionis; for tho' it was granted, that the Reverſion of the Locus in quo remained Parcel of the Manor after the Demiſe for three Lives; yet the Place it ſelf, and the Freehold were ſevered by the Demiſe, and by Conſequence they were not Parcel of the Manor tempore quo, &c. therefore the Plaintiff ought to have traverſed that which the Defendant had affirmed, (viz.) That the Locus in quo was Parcel of the Manor of A. tempore quo, &c. Curia. 28 H. 6. 5. 1 Bulſt. 48. Dyer 134. Bro. Compromiſe. pl. 79. 1 Cro. 494. W. Jones 402, 492. Owen 51.

And as to this Matter, there is a Difference between Replevin and Treſpaſs; and the Court held, that the Seiſin in dominico of the Place where, &c. was not traverſable; for 'tis not expreſſly alledged in the Conuſance, that Sir Peter, &c. was ſeiſed in Dominico of the Place where, but only by Conſequence, as it was Parcel of the Manor of Aſley, of which he (Sir P. W.) was ſeiſed in Dominico; therefore if he had traverſed the Seiſin, it muſt have been of all the Manor.

Beſides

2 Bulſt. 226. 1 Roll. 264.

Beſides it was held, that the Default of a neceſſary Traverſe is Subſtance, and not aided by a general Demurrer; likewiſe, if a Traverſe is too narrow and ſhort of the Matter traverſable, this is Subſtance; but where a Traverſe is meerly Surpluſage, and not neceſſary; as where one traverſes a Thing which he had before confeſſed and avoided, that is meerly Form, and aided upon a general Demurrer; for the other Party might traverſe that Traverſe, and alſo the Inducement to it.

Long quinto Ed. 4. 100. Hob. 81. 2 Vent. 212.

As concerning the Occupancy, per Holt Ch. Juſtice, the Title under the Occupant was good, for the * Statute did not take away all Occupancy, but transferred it to Executors; and he held that B. the Leſſor of the Plaintiff, was Executor de ſon tort by his Entry on the Lands, becauſe the aforeſaid Statute made it Aſſets.

* 29 Car. 2. cap. 3.

The Judgment was affirmed.

Edmundſon *verſus* Walker.

Prohibition not granted to the Admiralty, without Refuſal of a Plea.

UPON a Motion for a Prohibition to the Admiralty, the Caſe was:

If. That a Ship and the Furniture thereof were arreſted and condemned in the Admiralty Court. to be ſold to pay the Mariners Wages; and afterwards the Defendant Walker, as Executor to the Maſter of the Ship, exhibited an Allegation ex abundanti upon the Sentence in that Court, and Condemnation as aforeſaid, wherein he alledged, that Edmundſon had in his Cuſtody ſeveral Sails belonging to the ſaid Ship, and that he had refuſed to deliver them to the Martial of the Court, after Monition given, &c. and therefore prayed an Attachment, which was accordingly awarded againſt him (Edmundſon) to arreſt and impriſon him quouſq; he ſhould deliver the Sails; and he was arreſted and brought into that Court, but pleaded nothing, only refuſed to deliver the Sails.

That the Plaintiff had ſuggeſted for a Prohibition no other Matter, but that before the Seiſure of the Ship, one T. S. was Proprietor of certain Sails (naming them) and was indebted to the Plaintiff in 400l. and for that Debt pawned the Sails to him quouſq; &c. and that the Money is not paid to the Plaintiff.

See Hildebrand's *Caſe*. 1 Roll. Rep. 285. 1 Roll. Abr. 532. N° 40.

And it was inſiſted, that this Matter was a good Plea in the Admiralty-Court, and ought to have been pleaded there; and that there is no Cauſe for a Prohibition until

the Plea is refuſed by that Court, which the Plaintiff hath not ſuggeſted.

And the Court was of that Opinion, that the Admiralty had not meddled in any Thing but where they had a proper Juriſdiction; for it did not appear by the Suggeſtion, that Edmundſon had made any Claim of Property in that Court, and therefore there was no Reaſon to prohibit them; but if he had offered a Plea of this Matter in that Court, and they had refuſed to allow it, and ſtill had proceeded againſt him, this would have been a good Ground for a Prohibition; and afterwards the Suggeſtion being mended, by adding a Refuſal of this Plea, a Prohibition was granted; quod nota. Curia.

Chetle *verſus* Lees.

THIS was a Motion to amend a Judgment by ſtriking out Capiatur and inſerting Miſericordia; and a Writ of Error being brought on this Judgment, and pending the ſaid Writ, this Motion was made to amend the Judgment.

4 Mod. 6. 2 Lev. 22. The Entry of a *Miſericordia* inſtead of *Capiatur*, not amended.

And now two Rules were produced, one between * Linch and Lucy, when Pemberton was Ch. Juſtice, where the Judgment was amended in this Point, (viz.) by the Entry of a Miſericordia inſtead of a Capiatur; and the other Rule was between † Cook and Grimes, where Miſericordia was ſtruck out, and a Capiatur inſerted, by the Direction of the Court.

* Mich. 34 Car. 2. Rot. 486.

† 36 Car. 2. Rot. 314.

And Holt Ch. Juſtice remember'd a Caſe between Chapman and Gale, where the Judgment againſt an Executor was general; and upon a Motion, the Words following were added De bonis teſtatoris levand'.

But in the principal Caſe, the Court would make no Rule to amend.

DE

DE

Term. Sanct. Hill.

2 & 3 Willi' & Mariæ, B. R.

Prohuſt's *Caſe*.

Mandamus not granted to reſtore a Fellow of a College, without appealing to a Viſitor.

MAndamus to reſtore Prohuſt to the Place of Chaplain of All-Souls College in Oxon, being turned out by the Warden of that College.

And it was granted upon Suggeſtion, that the Archbiſhop of Canterbury was Viſitor of the College, and the See being now Vacant by the Deprivation of the Archbiſhop, by Virtue of the Act of Parliament which enjoins the Oath of Allegiance; and for that Prohuſt had no other Remedy, becauſe the Dean and Chapter of Canterbury, who are Guardians of the Spiritualty ſede vacante, have refuſed to intermeddle with this viſitatorial Power by Way of Appeal.

Raym. 31, 100, 101. Sid. 71.

But at another Day, it was ſhewn in Behalf of the College, that the Dean and Chapter of Canterbury, and not the Archbiſhop, are Viſitors of this College, becauſe they were created, and ſtand inſtead of the Prior and Convent of Canterbury, who were Viſitors heretofore; and farther, that they were ready to hear the Appeal.

Thereupon the Court diſcharged the firſt Rule, and ordered Prohuſt to apply himſelf by Way of Appeal.

Lee's *Case.*

LEE, one of the Proctors of Doctors Commons, moved for a Mandamus to reſtore him to his Office of Proctor, ſuggeſting, that the Dean of the Arches had made an Order to bar him from practiſing there, until he ſubmitted to ſuch an Aſſeſſment (which he ſuggeſted to be unreaſonable) and until farther Order, &c. and the Mandamus was granted de bene eſſe only.

3 Mod. 332. 3 Lev. 309. *Mandamus* will not lie to reſtore a Proctor to his Office.

And thereupon it was returned, that the Doctors and Proctors were a voluntary Society, &c. and that the Archbiſhop of Canterbury had uſed to viſit them, and to redreſs all Gravamina ariſing amongſt them, by Way of Appeal, and that they uſed to aſſeſs all the Doctors and Proctors towards common Charges, and that Lee was aſſeſſed 10 s. to a common Charge, which he refuſed to pay; and moreover, that ſuch an Archbiſhop made an Order, that no Proctor ſhould commence a Suit until after he had conſulted a Doctor, and that Lee commenced ſuch a Suit, &c. without Advice, per quod, &c.

And it was argued, that a Mandamus muſt neceſſarily lie in this Caſe, otherwiſe the Party grieved would be without Remedy, for that no Aſſiſe would lie of this Office.

And it may be a Queſtion, Whether an Action on the Caſe will lie; but admitting that it will, yet it may be defective, becauſe a Jury may not well compute the Damages in Proportion to the Loſs of a Man's Livelihood.

A Mandamus will lie in this Caſe as well as for an Attorney of an inferior Court, becauſe this is an Officer of a more publick Concern.

As to the Viſitor, 'tis abſurd to ſay, that the Archbiſhop is Viſitor of his own Court; for the Dean of the Arches is but the Archbiſhop's Deputy, and therefore Lee cannot * Appeal, becauſe that would be to appeal from the Archbiſhop to the Archbiſhop, or at leaſt from the Deputy to the Principal.

* 4 Inſt. 319. contra. *Such an Appeal is given by Statute* 24 H. 8. cap. 12.

It was argued for the Doctors, that the Archbiſhop had only the Conſtitution of the Dean of the Arches, but that the Dean was not his Deputy, nor can the Archbiſhop ſit there, or turn him out; 'tis like the Rector of a College in the Univerſity, who is always conſtituted by the Viſitor; but when he is once in, he is not a Deputy, but

hath a diſtinct Authority, and an Appeal lies from him to the Viſitor.

Curia. After Debate the Court ſeemed to incline, that a Mandamus would lie in this Caſe as well as for an Attorney; but that which was moſt doubted, was concerning the Viſitor; for they agreed, that if Lee might properly Appeal to the Archbiſhop as Viſitor, then he could have no Remedy in this Court.

Afterwards, in Trinity-Term, anno 3 Will. this Caſe was argued again, and then the Court agreed, that no * Appeal could be made from the Dean of the Arches to the Archbiſhop, becauſe it was one and the ſame; but yet no Mandamus would lie, becauſe this was an Eccleſiaſtical Office, and a Matter properly and only cogniſable in that Court; and that the Temporal Courts are not to intermeddle or inquire into this Sentence, or into the Proceedings in any Matters whereof they have a proper Juriſdiction, but are to give Credit thereunto; Quod nota.

* Stat. 24 H. 8. cap. 12. Expreſly to the contrary, but this Statute was not mentioned.

Lambert's *Caſe*.

Return to a *Mandamus*, not good. MAndamus to admit him to the Office of Regiſter of the Archdeacon of Salisbury, ſuggeſting, that he was debite electus, and placed into the ſaid Office.

The Return was, that Lambert nunquam fuit debite electus, and placed into the Office.

And now an Exception was taken to the Word Debite in this Return, upon the Authority of the Caſes reported in Sid. 209, 210. Sed non allocatur; for the Return anſwers the Suggeſtion in the Writ; but that it had been better to have made a general Return, (viz.) Nunquam fuit electus in officium, without ſaying debite.

Kemp *verſus* Andrews. Mich. 2 Will. & Mar. B. R. Rot. 289.

3 Lev. 290. An Executor cannot be jointly ſued with another. TRover, &c. for certain Goods, of which the Plaintiff and A. and B. were jointly poſſeſſed, and loſt them, and that the Defendant found them, and that afterwards the ſaid A. and B. died, and the Plaintiff ſurvived, and then the Defendant converted them to his own Uſe.

The Defendant pleaded, that the Plaintiff and A. and B. were Joint Merchants, and that they were poſſeſſed of theſe Goods as Merchants, and that by the Law of the Land there is no Survivorſhip between Joint Merchants, and concluded in Bar.

See 2 Lev. 188, 228. the Bill was abated, it being by the Survivor alone.

And upon Demurrer to this Plea, it was argued, that this Action is well brought by the Survivor alone, becauſe the Action muſt neceſſarily * ſurvive, tho' the Intereſt doth not; otherwiſe there would be a Failure of Juſtice, becauſe the Survivor and the Executors of thoſe who were dead cannot join in the Action, for that their Rights are of ſeveral Natures, and there muſt be ſeveral Judgments.

* 3 Leon. 354. 1 Inſt. 21. Reg. 135. *a.* 2 Sand. 124. *b.*

Beſides 'tis clear, that this is not a Plea in Bar, as 'tis pleaded here, and of that Opinion was the whole Court; and ſo the principal Point, viz. the Gift of the Action was not adjudged.

But there is a parallel Caſe between † Hall and Huffam, where the Executor was joined, and the Matter ſupra pleaded in Abatement, and held a good Plea.

† 2 Lev. 228. That an Executor cannot be jointly ſued with another, becauſe he is to be charged *de bonis Teſtatoris*, and the other *de bonis propriis*.

Rich Sir Peter *verſus* Pilkington, *Lord Mayor of* London.

ACTION on the Caſe for a falſe Return of a Mandamus, in which Action the Plaintiff declared, that he was lawfully elected into the Office of Chamberlain of London, and that the Defendant refuſed to admit him into that Office; whereupon he brought a Mandamus directed to the Defendant, and the Aldermen, &c. and the Defendant returned, that the Plaintiff nunquam fuit Electus to the ſaid Office, ubi revera he was lawfully elected by the Majority, &c.

After a Plea in Abatement, there muſt be no Exceptions to the Declaration.

The Defendant pleaded in Abatement, that the Mayor and Aldermen of London are a Corporation, and that all of them in their judicial Capacity in a Court of Aldermen jointly made the ſaid Return; and thereupon prayed Judgment of the Bill brought againſt the Mayor alone.

And upon a Demurrer to this Plea, it was adjudged ill, for this Action is founded on a Tort, and therefore it may be either joint or ſeveral, at the Election of the Party, as in Treſpaſs, &c.

But it was objected, that the Mandamus was directed to all, (viz.) to the Mayor and Aldermen, &c. and therefore it would be injurious to the Mayor, for it might be, that he voted for the Plaintiff against the Return, and was over-ruled by the Majority to make this Return.

To which it was answered, and so resolved by the Court, that the Mayor and Aldermen are not a Corporation, but they are a Court, which is nothing to this Purpose.

And as to the other Matter, if the Fact is so, that the Defendant was over-ruled by the Majority, and contrary to his Will, this would have been Evidence upon Not guilty pleaded, and being proved, the Plaintiff would have been Nonsuit.

Then the Counsel for the Defendant would have taken Exceptions to the Declaration, but the Court would not allow it; because here was a Plea in Abatement, to which the Plaintiff might have demurred; and for that Reason he shall never take Exceptions to the Declaration; to which the Counsel replied, that it appeared by the Plaintiff's own Shewing, that he had no Cause of Action at the Time when this Action was brought.

For the Return of the pluries Mandamus is laid to be after the Beginning of Michaelmas-Term, and the Memorandum of the Bill is entered generally of that Term; and that this was such a Fault, that they might shew as Amicus Curiæ; and thereupon the Plaintiff prayed to amend, which was granted, and Judgment was given; quod respondeat ouster.

Clobery *versus Bishop of* Exon.

The Plaintiff cast an Essoin, and had a Day till such a Day; but did not say *idem datus est* to the Defendant, which is Error.

QUare Impedit in C. B. and at the Return of the Summons the Sheriff returned, that the Bishop was summoned, and the Entry on Record was, that the Bishop appeared on the Day per T. S. attorn' suum & quod fecit se essoniri, &c. & habuit diem per essonium suum usque such a Day, ad quem diem Episcopus comperuit, and the Plaintiff primo die placiti exactus made Default; and thereupon Judgment of Nonsuit was against the Plaintiff.

And upon a Writ of Error brought the following Errors were assigned.

First, That this Essoin was absurd, because the Defendant appeared at the same Time, and the Nature of an Essoin is to excuse an Appearance.

(2.) That there was no idem dies datus to the Plaintiff upon this Eſſoin, and for that Reaſon 'tis diſcontinued.

(3.) That the Plaintiff was demanded primo die placiti, whereas it ought to have been quarto die poſt, for he is not demandable before that Time.

'Tis very true, that an Eſſoin after Appearance is abſurd, but that cannot be aſſigned for Error, becauſe 'tis only Dilatory, and the Granting a Dilatory when it ought not to be granted is no Error; but 'tis otherwiſe to deny it when 'tis grantable. See Beecher's Caſe: They all agreed, that there ought to have been idem dies datus to the Plaintiff; and per Holt Chief Juſtice, that as to the Demand primo die placiti, the Difference is thus; that the Defendant or Tenant is not demandable, but upon the Quarto die poſt, but the Plaintiff may be demanded primo die placiti, and for Non-appearance may be nonſuited. Curia.

And the Court held, that this was a Nonſuit before Appearance, and therefore would be no Bar in another Action; the Judgment was reverſed for the ſecond Error.

Sir Thomas Earle's *Caſe.*

Objections to the Return of a *Mandamus* to reſtore a Man to the Office of a Common Council-Man of *Briſtol.*

MAndamus to be reſtored to the Office of Common Council-Man of the City of Briſtol, and upon the Pluries the Mayor and Burgeſſes of that City made this Return.

ſt. That Briſtol was an ancient Borough Time out of Mind, and the Burgeſſes and Inhabitants were a Body corporate, by the Name of the Mayor and Burgeſſes of the Vill of Briſtol, until the fifth Day of June, Anno 34 H. 8. when that King erected the Borough into a City, and thereby granted that from thenceforth it ſhould be a Body corporate, by the Name of the Mayor, Burgeſſes, and Commonalty of the City of Briſtol; and that Time out of Mind in the old Borough, and now City aforeſaid, there hath been a Mayor and Council conſiſting at leaſt of Forty Burghers, beſides the Mayor, and that he for the Time being, and the Council, or the greater Part of them, had during all that Time uſed for any reaſonable Cauſe to diſplace any one of the Council aforeſaid, as often as Occaſion required, and in his ſtead ſo diſplaced to chooſe another of the Inhabitants and Burghers.

And

And that every Perſon choſen to be of the ſaid Council, have for all the Time aforeſaid uſed, before his Admiſſion into the Office, to take an Oath before the Mayor for the Time being, That he will be true and faithful to the King, his Heirs and Succeſſors, and to the Mayor and Common Council of the City; and that he will come upon the Mayor's Summons to the Guild-Hall, and to any other Place within the Franchiſe of the City, unleſs he hath a reaſonable Cauſe to the contrary; and that he ſhall give Counſel according to his Knowledge, and not give any partial Counſel for any Favour or Affection in any Matters concerning the Mayor and Commonalty, or the common Profits of the City; and that he ſhall keep ſecret all Matters ſecretly debated amongſt them, and which ought to be kept ſecret, and ſhall maintain to his Power the common Profit of the City, and ſhall give the beſt of his Counſel concerning the ſame without Favour or Affection.

That Sir Tho. Earle was (on ſuch a Day) choſen Common Council-Man, and took the Oath aforeſaid, and was admitted accordingly, and for Cauſe of Amotion, they certified three Things.

(1.) That he not weighing his Oath aforeſaid, nor regarding the common Profit of the City, but deſigning to draw one Sir Richard Hart (then Mayor) and other good Citizens into the Diſpleaſure of the King and Queen, on ſuch a Day fabricavit & ſcripſit quandam Epiſtolam to the Earl of Shrewsbury then Secretary of State, in which Letter inter alia mendacia & contumelias charged on the ſaid Mayor, he the ſaid Sir Tho. Earle charged the ſaid Mayor with Subornation of a wicked Fellow to ſwear any Thing in which he ſhould be inſtructed, and thereby the ſaid Secretary of State would have great Trouble whilſt Arthur Hart continued Mayor; and that thoſe Citizens which were of the Mayor's Party were zealous Jacobites; and that the ſaid Mayor intended to baffle the next Election for Members of Parliament, ubi revera the ſaid Sir Richard Hart is a true and faithful Subject of the King and Queen, and never guilty of any Subornation.

(2.) That Thomas Earle on ſuch a Day, when the Mayor and Aldermen were on the Tolſey-Court in Diſcharge of their Office, riotoſe & manu forti cum magna multitudine hominum entered, and inſolently threatned the ſaid Mayor and Aldermen for bailing one Francis Moor, who was committed

mitted for ſeditious Words, and that the Clamour and Riot was ſo great, that the Mayor and Aldermen there preſent were in Fear of their Lives, and thereby forced to remand the ſaid Fra. Moor to the Gaol after they had bailed him, ubi revera the ſaid Francis was bailable by Law.

(3.) That the ſaid Sir Tho. Earle, and others of the Common Council, on ſuch a Day, in their military Capacity, as Deputy-Lieutenants, did require the Common Council-Book to be brought before the Earl of Macclesfield, Lord-Lieutenant of the ſaid City, with an Intention to make an Accuſation againſt the ſaid Hart, then Mayor, &c. and to betray the Secrets of the City, and to reflect upon the Government thereof, and to draw in Queſtion the Proceedings of the Mayor and Council, before a Perſon who had no Conuſance of the Matters, contra Officii ſui debitum & contra ſacramentum ſuum.

And they farther certify, that the aforeſaid Matters were reduced into Writing in three Articles againſt the ſaid Sir Tho. Earle; and that at a Common Council held ſuch a Day before Sir John Knight, then Mayor of the ſaid City, the Articles aforeſaid were produced and read; the ſaid Sir Tho. Earle, then and there being preſent, ſuper quo an Order was made by the Mayor and Common Council of the City aforeſaid, that the ſaid Sir Tho. Earle ſhould have a Copy of the ſaid Articles, and ſhould make an Anſwer to them at the next Council Day; and afterwards at a Common Council held on ſuch a Day before the ſame Mayor, another Order was made, that the ſaid Sir Tho. Earle ſhould have farther Day to anſwer until the next Council-Day after:

And that at the ſaid next Council-Day, held on ſuch a Day before the ſaid Mayor, the ſaid Sir Tho. Earle was requeſted by the Mayor and Council to anſwer the Matters in the ſaid Articles alledged; and becauſe the ſaid Sir Tho. Earle (then appearing) made no ſufficient Anſwer thereunto, it was then and there ordered by the ſaid Mayor and Council of the ſaid City, that the ſaid Sir Tho. Earle ſhould be amoved and diſcharged of his ſaid Office, and for the Cauſes aforeſaid they cannot reſtore him.

(1.) It was objected, that this Return was inſufficient as to the firſt Article, (viz.) That the Matter therein contained is no Ground for a Diſfranchiſement, or if it was, 'tis not ſufficiently alledged; for 'tis only ſaid, that Sir Tho. Earle wrote ſuch a Letter, but not that it was ever ſent abroad

Objection to the Return.

abroad or publiſhed; and the Writing alone, if never publiſhed, cannot be any Scandal.

(2.) Then as to the ſecond Article, 'tis altogether incertain, for 'tis only alledged generally, that he threatned the Mayor and Aldermen; and it doth not appear by the Return, that there are any Aldermen in Briſtol, or that he uſed any Force in particular, and the Conſequence alledged is very trivial, (viz.) the Occaſioning a ſeditious Fellow, bailable (as they pretend), to be remanded to Gaol.

(3.) The third Article is more trivial, for nothing more is pretended by it than a Requeſt made by Sir Tho. Earle to bring the Common Council-Book before the Lord Lieutenant, ea intentione, &c. which Requeſt was never granted; and for ought it appears to the contrary, this Requeſt might have been made by the Majority of the Common Council; and all that Matter which follows theſe Words ea intentione, as they have laid it, is no more than an Innuendo, which makes nothing to the Purpoſe.

Then it was inſiſted, that there cannot be any Cauſe to diſfranchiſe a Member of a Corporation, unleſs it be for ſuch a Thing done, which works to the Deſtruction of the Body Corporate, or to the Deſtruction of the Liberties and Privileges thereof, and not any perſonal Offence of one Member to another.

11 Rep. Bagg's *Caſe*.

And of the ſame Opinion was the whole Court; whereupon Sir Tho. Earle had a peremptory Mandamus to reſtore him, the Cauſes returned being altogether inſufficient to remove him.

Alſtone *verſus* Hutchinſon.

Treſpaſs for carrying away his Goods; the Defendant juſtified as in his Freehold, no good Plea.

TReſpaſs for Taking and Carrying away his Trees.

The Defendant pleaded the common Bar, (viz.) That the Place where the Treſpaſs was ſuppoſed to be done, is his (the Defendant's) Freehold, and ſo juſtifies as in his Freehold, &c.

5 H. 6. 28. *b.* 19 H. 6. 20. *a.* 2 Cro. 141.

And upon a Demurrer to this Plea it was adjudged ill, for this is no Plea to a Treſpaſs de bonis aſportatis, but peculiar only and proper to a Treſpaſs quare clauſum fregit; quod nota.

Tovey *verſus* Pitcher. Mich. 2 Will. & Mar. Coke's Office
in C. B. Rot. 309.

COvenant, &c. by a Leſſor againſt the Aſſignee of the Executrix of the Leſſee, in which the Plaintiff declared, that he was poſſeſſed of two Meſſuages in the Pariſh of St. Martin in the Fields, for a long Term of Years, and that he made an Underleaſe thereof to one Richard Gill for 21 Years, rendring ſuch an yearly Rent, and that by the ſame Deed he the aforeſaid Rich. Gill did, for himſelf and his Aſſigns, covenant to pay the Rent, that the ſaid Rich. Gill did by his Laſt Will conſtitute Suſan Gill to be his Executrix, and died, and that ſhe was poſſeſſed as Executrix, and afterwards aſſigned over her whole Eſtate to the Defendant, who entered and was poſſeſſed; and the Breach now aſſigned, was for Non-payment of Rent in arrear, and accrewed after the Aſſignment of the Term.

3 Lev. 295. S. C. 2 Vent. 234. S. C. 4 Mod. 71. S. C. Shower 340. S. C. Covenant will not lie againſt the Aſſignee of the Executrix of the Leſſee.

The Defendant pleaded in Bar, that before any Rent was due and payable, (viz. On ſuch a Day) he had granted and aſſigned all his Term and Eſtate to one James Mott, by Virtue whereof he entered, and was poſſeſſed for the Reſidue of the ſaid Term.

And upon a Demurrer to this Plea, the only Point was, Whether this Aſſignment of the Term, without any Notice given to the Plaintiff, ſhall bar him from this Action, or whether the Defendant ſhall ſtill continue chargeable, until the Plaintiff hath Notice of the Aſſignment; for it was agreed by all, that this was a good Bar, if the Plaintiff had any Notice of the Aſſignment over, &c.

But the Court was divided, (viz.) Pollexfen Ch. Juſt. and Rokeby held clearly, that the Defendant ought in his Plea to have ſet forth Notice given to the Plaintiff of this Aſſignment, otherwiſe this Inconvenience would enſue, (viz.) The Leſſor would be defeated of his Action of Covenant; for by ſuch ſecret Aſſignments he may never find the Tenant of the Lands againſt whom to bring his Action.

Therefore 'tis convenient, that where a Termor aſſigns and would diſcharge himſelf of the Covenant, that he ought to give Notice thereof to him in Reverſion, and for this Purpoſe the Caſes in the * Margin were cited.

* 1 Bulſt. 44. Roll. Rep. 314.

2 Ed. 4. 3. 3 Cro. 64. 2 And. 90. 3 Leon. 95. 2 Cro. 334, 392, 398. Raym. 162, 303. Sid. 338.

But Juſtice Ventris and Powell were of a contrary Opinion, (viz.) That the Plaintiff was bound to take Notice of the Aſſignment, *&c.* at his Peril, becauſe this Action is founded meerly upon the Privity of * Eſtate, and not upon any Privity of Contract; and here by the Aſſignment over of the Term, all the Privity of Eſtate between the Plaintiff and the Defendant is gone and deſtroyed ipſo facto, and by Conſequence this Action which depended on ſuch a Privity is alſo gone; and if ſo, then this Bar is good, without alledging any Notice given to the Plaintiff.

* 5 Rep. 16. Spencer's *Caſe.*

The Court being thus divided, the Cauſe was adjourned to Eaſter-Term following, before which Time Juſtice Ventris died, and afterwards, (viz.) in Eaſter-Term, the Plaintiff had Judgment by the Opinion of two Judges, as aforeſaid.

But upon a Writ of Error on this Judgment in Eaſter-Term, 4 Willielmi, per Holt Ch. Juſtice and Two more, the aforeſaid Judgment was reverſed: Upon the Point in Law, they being of Opinion, that the Aſſignee was not bound to give Notice to the Leſſor, but that the Aſſignment was compleat without Notice, and by Conſequence the Defendant was diſcharged of all the Rent accrewed after the Aſſignment.

See 3 Lev. 233. Covenant againſt the Leſſee after Aſſignment of his Term, brought upon an expreſs Covenant for Non-payment of Rent, and held good; and that the Accepting the Aſſignee as Tenant, did not hurt.

Bennett *verſus* Gandy.

Bargain and Sale, nothing paſſes before Enrollment.

IN Ejectment brought by the Aſſignees of Commiſſioners of Bankrupt, upon the Bankruptcy of Alderman Backwell of London, in which theſe Aſſignees were Leſſors of the Plaintiff in Ejectment; and a ſpecial Verdict being found, which was now to be argued:

The Attorney General Trevor interrupted the arguing it, for that the Verdict had abated the Declaration; for it appeared by the Verdict, that the Demiſe to the Plaintiff, upon which this Ejectment was brought, was made by the Aſſignees of the Bankrupt before the Enrollment of the Bargain and Sale, by which the Commiſſioners had aſſigned the Lands to the Leſſors of the Plaintiff; and tho' the Enrollment

rollment of a Deed ſhall relate to the Delivery of the ſame Deed to avoid Meſne Incumbrances; yet every Bargain and Sale before Enrollment is void, and cannot be made good by any Relation, becauſe the Bargainee hath no Eſtate before Enrollment, and if ſo, he could not grant any Eſtate; and here it appears, that the Leſſors of the Plaintiff had not any Title at the Time of the Demiſe, upon which the Plaintiff declared. 2 Cro. 52, 408. Cro. Car. 109. Hob. 136.

And the Court held this to be a fatal Exception, and thereupon the Arguing this Cauſe was rejected; then the Court was moved for Leave to amend the Declaration by altering the Time of the Demiſe, ſed non allocatur, for if the Time was altered, this would make it a new Demiſe. The like Judgment in Point was given in a ſpecial Verdict. 1 Vent. 360.

Coan *verſus* Bowles.

THE Plaintiff in Replevin was Nonſuit, and upon a Writ of Error brought in B. R. the Judgment was affirmed; and now the Court was moved, that the Defendant in the Writ of Error might have Coſts upon the Statute pro dilatione Executionis, &c. for tho' the Writ of Error was brought by the Plaintiff in the original Action of Replevin, yet the Avowant is as much a Plaintiff as he, and had a Judgment for a Retorn' habend', the Execution of which Judgment was delayed by this Writ of Error, &c. and therefore not like the Caſes where the Plaintiffs in other Actions bring Writs of Error, for here is no Delay of Execution, becauſe the Defendant had no Judgment. When the Avowant ſhall not have Coſts upon a Writ of Error. Cro. Car. 401, 425, 533. March 28.

But adjudged per Curiam, that the Defendant in the principal Caſe ſhould not have Coſts, becauſe he is not within the Letter of any of the Statutes, which Statutes ſhall never be extended beyond the Letter, but ſhall be taken ſtrictly, becauſe Coſts are in Nature of a Penalty. Curia.

And per Holt Chief Juſtice. In an Avowry for an Amerciament, if the Plaintiff is nonſuited, or there is a Verdict againſt him, yet the Avowant ſhall not have Coſts.

Philips *verſus* Bury; *otherwiſe Doctor* Bury's *Caſe.*

Judgment given in *B. R.* for the Defendant which was reverſed on a Writ of Error in Parliament; the new Judgment muſt be given there, and not in *B. R.*

THE Doctor being Rector of Exceſter-College in Oxford, was deprived by the Biſhop of Exon' as Viſitor, &c. and one Painter choſen to ſucceed him in that Rectorſhip, but the Doctor keeping Poſſeſſion of the Rector's Lodgings in the College, an Ejectment was brought, in which the Plaintiff declared generally upon a Demiſe of the Rector and Scholars of the College, &c.

And now the Court was moved in behalf of Dr. Bury, that the Declaration might be altered; for certainly a Leaſe made by the Rector and Scholars generally is not good; and here 'tis intended to try the Right to the Rectorſhip, which can never be done upon this Declaration.

Whereupon the Court ordered, that the Declaration ſhould be altered, and that the Demiſe ſhould be laid to be made by Painter Rector of Exceſter-College, and the Scholars of the ſame:

And that the Defendant might plead ſpecially, ſetting forth, that he is and was Rector, &c. at the Time of the Demiſe, and traverſe that Painter was Rector tempore dimiſſionis fact', and by this Means the Right of the Rectorſhip would come in Queſtion.

Afterwards in Michaelmas-Term, Anno 6 Willi' upon a ſpecial Verdict found in Ejectment, Judgment was given in B. R. againſt the Plaintiff Painter; and upon this Judgment a Writ of Error was brought in Parliament, (the Suit being in B. R. by original, and not by Bill) and there the Judgment of B. R. was reverſed, and the Record of the Reverſal being remitted into B. R. it was moved for the Plaintiff (Painter) that the Court of King's Bench would give a new Judgment, (viz.) Quod quer' recuperet; and for this the Caſe of * Faldo and Ridge was cited; and it was inſiſted, that unleſs the Court would give ſuch Judgment, there would be a Failure of Juſtice; for that the Houſe of Lords had only a Tranſcript of the Record, and had no Rolls to enter any Judgments.

* Yelv. 75. 2 Cro. 206. 2 Roll. Abr. 774.

But per Curiam, this cannot be done; for it would be abſurd for this Court to give a new Judgment contrary to that which they had already given; and that it belonged to

to the ſame Court to give the new Judgment, where the former Judgment was reverſed.

And in the Caſe of Faldo and Ridge ſupra, the Court of Exchequer-Chamber, after the Reverſal, &c. gave Judgment, quod quer' recuperet, &c. but becauſe they wanted Power to award a Writ of Inquiry which was neceſſary in that Caſe, being on a Demurrer; therefore it was ſent back into B. R. for the Execution of that Writ, and thereupon to give final Judgment for him.

But 'tis otherwiſe where the Judgment is againſt the Plaintiff in B. R. upon a ſpecial Verdict, and that Judgment reverſed in the Exchequer-Chamber, for in that Caſe there being no Writ of Inquiry requiſite, the Court of Exchequer-Chamber doth not only give Judgment of Reverſal, but a compleat Judgment for the Plaintiff in the Action, (viz.) quod recuperet, &c. and for this Diverſity the Caſes in the * Margin were cited. * Dyer 343, 373. 4 Inſt. 72. Yelv. 118. F. N. B. 19. d. 2 Sand. 224, 234, 235.

And hereupon the Court of B. R. was of Opinion, that they could not give a new Judgment in this Caſe.

Afterwards the Plaintiff reſorted to the Parliament again, and there upon Debate in the Houſe of Lords, a new Judgment was given quod quer' recuperet, which was entered up accordingly, and executed.

The City of London *verſus* Clerke, *a Maltman.*

IN an Action on the Caſe, the Plaintiffs preſcribed to have a Farthing for every Quarter of Malt brought by any of the Weſt-Country Barges to London. Where a Verdict ſhall be given in Evidence againſt one who was neither Party or Privy to the Suit.

Upon the general Iſſue pleaded, there was a Trial at Bar, at which Trial the Plaintiffs offered in Evidence four ſeveral Verdicts obtained at the Niſi prius againſt four Weſt-Country Maltſters; and it was debated whether theſe Verdicts ſhould be admitted as Evidence againſt the Defendant who was neither Party or Privy to thoſe Records.

And per Curiam, they ſhall be given in Evidence, for 'tis as reaſonable, that a Recovery againſt a Stranger ſhould be given in Evidence, as Payment of the Duty ſhould be proved by other Strangers, which was never yet doubted; and thereupon this Evidence was admitted.

And per Holt Chief Juſtice. If a Lord of a Manor claims Suit of his Tenants ad molendinum by Cuſtom, &c. and in an Action recovers againſt one Tenant, that Recovery may

may be given in Evidence in a like Action to be brought againſt other Tenants upon the Reaſon ſupra, unleſs the Defendant can ſhew any Covin or Colluſion between the Parties in the firſt Action, &c. quod nota.

Barker *verſus* Damer. Hill. 1 & 2 W. & M. B. R. Rot. 635.

3 Mod. 336. S. C. Salk. 80. S.C. Shower 191. S. C. Action of Debt for Rent againſt an Aſſignee of a Term is local, and ſo is an Action of Covenant againſt ſuch an Aſſignee, becauſe 'tis founded on the Privity of Eſtate.

COvenant, &c. upon an Indenture of Leaſe of Lands in Ireland, which was now brought by the Grantee of the Reverſion againſt the Aſſignee of the Leſſee upon an expreſs Covenant for Payment of Rent reſerved to be paid at London, and the Breach aſſigned was for Non-payment of Rent.

The Defendant pleaded to the Juriſdiction, (viz.) that the Lands demiſed, and out of which the Rent is reſerved lay in the Kingdom of Ireland, &c. and upon a Demurrer to this Plea,

It was argued for the Plaintiff, that there was an expreſs Covenant to pay the Money in London, upon which Covenant this Action is grounded; therefore ſince the Payment is to be made here, that alone without any Thing more will be ſufficient to draw the whole to the Juriſdiction of the King's Court here; like the common Caſe where Part is done upon the Land, and Part upon the Sea, that which is done on the Land, is ſufficient to draw the whole Juriſdiction from the Admiralty, to the Courts of Common Law.

Beſides, it appearing by the Bill, that the Defendant is in Cuſtodia Mareſchalli, that will be enough to give Juriſdiction to this Court, and if this Court hath not Juriſdiction, there will be a Failure of Juſtice, becauſe the Perſon remains here in England, when his Lands are in Ireland; ſo that the Plaintiff cannot have his Action in Ireland, for Want of the Perſon, nor here for Want of the Lands; which will be very inconvenient.

If it ſhould be doubted whether an Action of Covenant will lie againſt the Aſſignee of a Leſſee (after the Term is determined) upon an expreſs Covenant, the Caſes in the * Margin prove that it will; and this ſhews that the Action is not founded alone upon the Privity of Eſtate, but that it hath a Reſpect to the † expreſs Contract.

* 2 And. 138. Sid. 157.
† Noy 142. 2 Cro. 142. 1 Inſt. 26. 2 Roll. Abr. 571. 3 Keb. 150.

This Action brought by the Grantee of the Reverſion against the Aſſignee of the Term, is in its Nature local, becauſe 'tis founded meerly on the Privity of Eſtate, for by the Aſſignment of the Term, the Privity of Contract was wholly determined. Econtra.

'Tis adjudged in ſeveral of our Books, that an Action of Debt for Rent againſt an Aſſignee of a Term, is local, and will lie no where, but in that County where the Lands are. Cro. Car. 183. Latch 197. W. Jones 43. Hob. 37.

And the ſame Reaſon holds in Covenant againſt the Aſſignee; for this Action as well as that of Debt is maintainable only upon the Privity of Eſtate, and the Defendant is meerly charged thereby, becauſe 'tis a Covenant which runs with the Land; for if it had been a collateral Covenant, the Aſſignee would not have been bound by it, and that proves the Action is local only with Reſpect to the Land.

Nota; It was agreed by all, that the * Grantee of a Reverſion may maintain an Action of Covenant againſt the Leſſee himſelf, as well in the County where the Demiſe was made, as in the County where the Lands lie, becauſe the Privity of Contract between the Leſſor and the Leſſee is transferred to the Grantee of the Reverſion by the Statute of H. 8, &c. * 3 Lev. 233. ſeems to the contrary. 1 Saund. 238. 3 Lev. 154. 1 Saund. 240.

The Court inclined againſt the Plaintiff, for that they did not apprehend any Difference (as to this Purpoſe) between an Action of Covenant and Debt.

Cudmore *verſus* Honywood. Mich. 2 Will. & Mar. B. R. Rot.

IN an Action of Debt for a Pain aſſeſſed in a Court-Baron, and now brought by the Lord of a Manor againſt the Defendant, who was a Copyholder of Inheritance; the Plaintiff declared, that he is, and for twenty Years laſt paſt, hath been Lord of the Manor of Coggeſhall in Eſſex, and ſeiſed in Fee thereof; and that the Defendant is, and on the firſt Day of May, 1688. and before was, one of the cuſtomary Tenants of the ſaid Manor, (viz.) of a cuſtomary Meſſuage in the Pariſh of Morkeſhall in the County aforeſaid, Parcel of the Manor aforeſaid, and held by Copy of Court-Roll of the ſaid Manor in his Demeſne as of Fee, at the Will of the Lord, according to the Cuſtom of the Manor: Action of Debt will not lie by a Lord of a Manor againſt his Copyhold Tenant, for a Pain aſſeſſed by the Homage for an Encroachment on the Waſte.

Manor: And whereas the Defendant, on the ſaid firſt Day of May, unto the 8th Day of September, 1690. had continued and maintained an Encroachment upon the Waſte of the Plaintiff, Lord of the Manor in the Pariſh aforeſaid, and within the ſaid Manor nuper antea fact', by the Erection of 7 Perches of Pales and Plantation of Whitethorne Hedge, before the ſaid cuſtomary Meſſuage, per quod at the Court-Baron of the Plaintiff, Lord of the Manor aforeſaid, held ſuch a Day at the ſaid Manor before A. B. C. Suitors of the ſaid Court, by the Homage of the Manor, then and there impanelled and ſworn, (viz.) I. D. T. N. and R. S. præſentat. fuit, that the Defendant had continued and maintained the Encroachment aforeſaid; and the ſaid Homage then and there in the ſame Court, according to the Cuſtom within the ſaid Manor, Time out of Mind, &c. impoſuerunt pœnam 5 l. in & ſuper (the Defendant) per eum Domino Manerii prædict. ſolvend. niſi ipſe (the Defendant) before ſuch a Day ſhould remove the Encroachment, vel aliter (with the Plaintiff) Domino Manerii præd. in ea parte agrearet, of which the Defendant had Notice indilate, (viz.) on the ſame Day; and the Plaintiff in facto dicit, that the Defendant hath not removed the Encroachment aforeſaid, but that he hath maintained and continued the ſame, nec cum eodem (the Plaintiff) Domino Manerii præd. in ea parte aliqualiter agreavit per quod 5 l. prædict. became forfeit and payable to the Plaintiff, by Reaſon whereof actio accrevit, &c.

Preſentment by the Homage.

The Defendant pleaded Nil debet per legem, but at the Day aſſigned for performing his Law, he made Default.

And now it was moved in Arreſt of Judgment, that this Action would not lie, becauſe 'tis againſt Law to aſſeſs ſuch an unreaſonable Pain upon any Tenant for a private Treſpaſs againſt the Lord; for in ſuch Caſe he ought to take his Remedy by Way of Action, and not to have it preſented as a Nuſance; beſides, he ought to have laid a Uſage Time out of Mind for him, &c. ſo to do, becauſe 'tis againſt common Right.

1 Lev. 242.

For the Plaintiff.

But for the Plaintiff it was inſiſted, that this was the common Uſage throughout the Realm, and that it was one of the Articles with which the Homage are charged, (viz.) To inquire of Encroachments and Concealments, as appears by the Books cited in the * Margin.

* Kitchin 55, 57. 12 H. 4. 8. b. F.N.B. 75. E.

And Co. Entr. 118. was cited to maintain this Action, where there is a Precedent of the like Nature.

Bro. Leet 37. 1 Roll. Abr. 544.

The Court ſeemed to incline againſt the Action.

DE

Term. Paſchæ.

3 Will. & Mariæ B. R.

Treverton *verſus* Hicks.

REplevin, in which the Plaintiff declared, that the Defendant unjuſtly took and detained two Mares and twenty Sheep of him (the Plaintiff) apud St. Merrin, in the County of Cornwall, in quodam loco ibidem vocat. the Croſs-Park. Pleadings in Replevin, not good.

The Defendant, as Bailiff to one Edward Arundell, made Conuſance of the Taking, &c. in this Manner:

ſſ. That the Place where, &c. continebat in ſe viginti acras terræ quodq; diu ante prædictum tempus quo, &c. quidam Marcus Silly Ar. fuit ſeiſitus de & in quibuſdam Meſſuagiis terris & tenementis jacen. & exiſten. in St. Minver St. Breock St. Ervan & St. Merrin prædict. & alibi in prædict. Com. Cornub. unde prædictus locus in quo, &c. eſt & prædicto tempore quo, &c. necnon a tempore cujus contrarii memoria hominum non exiſtit fuit parcell. in dominico ſuo ut de feodo; and being ſo ſeiſed, granted by Deed a Rent-charge of 20 l. per Annum to the ſaid Arundell, during his Life, out of all his Lands and Tenements, with a Clauſe of Diſtreſs; and the Rent being in arrear, &c. he diſtrained, &c.

The Plaintiff pleads in Bar, proteſting againſt the Grant; he traverſed, that the Locus in quo, &c. is Parcel of the Lands and Tenements lying in the ſeveral Pariſhes & alibi verbatim, as 'tis in the Conuſance, and thereupon

the Defendant tendered an Iſſue, (viz.) That the Locus in quo, &c. is Parcel of the Lands, &c. modo & forma as he alledged.

For the Plaintiff. And upon a general Demurrer it was objected in the Behalf of the Plaintiff againſt this Conuſance, for that the Plaintiff and Defendant did not agree in the Place where the Cattle were taken; for the Plaintiff ſays it was in the Croſs-Park in St. Merrin; but the Defendant ſays, that the Locus in quo, &c. was Parcel of divers Meſſuages, Lands and Tenements lying in ſeveral Pariſhes, ut ſupra, and therefore he ought to traverſe the Suppoſal in the Declaration, becauſe it amounts to a Plea in Abatement, (viz.) of the Taking in another Place; for in * Replevin both the Will and the Place where, &c. are traverſable.

* Hob. 16.

Another Exception was, that the Defendant did not diſtinguiſh the particular Lands and Tenements, and in what ſingle Pariſh they ſeverally lay, of which the Locus in quo was Parcel, ſo that a ſingle Iſſue might ariſe; but had pleaded generally, that it was Parcel of Lands lying in ſeveral Pariſhes; and the Iſſue being Parcel or not Parcel, which is local, there wants a certain † Venue to try it.

† 2 Cro. 261. Moor *verſus* Hawkins. Yelv. 181.

Curia. But per Curiam, as to the firſt Exception the Conuſance is good, becauſe in that Matter the Defendant agreed with the Plaintiff, by his ſaying, that the Place where the Cattle were ſuppoſed to be taken is twenty Acres of Land.

And as to the ſecond Exception, three Judges held, that the Pleading was well, for the Locus in quo ſhall be taken to be Parcel of the Lands in St. Merrin only, and the Venue ſhall ariſe from thence.

But Holt Ch. Juſtice was of a contrary Opinion, and that it was incertain and ill pleaded, and contrary to all the Forms in ſuch Caſes; and he took another Exception to it, becauſe it was laid, that the Locus in quo is and was Time out of Mind Parcel of the Lands of Mark Silly, which is impoſſible, for no one Man can have Lands Time out of Mind.

And hereupon the Defendant perceiving the Opinion of the Court to incline againſt him, prayed Leave to amend his Conuſance, which was granted, and the Plaintiff to have Liberty to anſwer de novo.

Carter *verſus* Davis. Hill. 2 & 3 W. & M. Rot. 128.

IN an Action on the Caſe, the Plaintiff declared upon two Promiſes, &c. Salk. 218.

The Defendant pleaded quoad the firſt Promiſe non aſſumpſit generally, and quoad the other Promiſe, he pleaded a frivolous Plea, and concluded in Abatement, (viz.) petit judicium de Billa; thereupon the Plaintiff demurred in Form as to a Plea in Bar, and ſo concludes with petit judicium & damna ſua.

The Defendant joins in Demurrer, and concludes likewiſe in Bar; & per Curiam, the whole Plea is diſcontinued, becauſe the Demurrer in Bar was no Anſwer to the Plea in Abatement, and a Diſcontinuance of Part, is a Diſcontinuance of the Whole; and the Rule was, that all was diſcontinued.

Crofts *verſus* Harris. Paſch. 3 W. & M. Rot.

THE Plaintiff declared upon three Aſſumpſits, whereof two were ſpecial. An Award pleaded to ſeveral *Aſſumpſits* good, and not good.

1ſt. That the Defendant being indebted to the Plaintiff in ſuch a Sum, he inconſideratione inde promiſed to ſhip ſuch a Quantity of Cotton-Wool at Antegoe, and conſign it to the Plaintiff; and alſo whereas he was indebted to the Plaintiff in ſuch other Sum, for Wares and Merchandizes ſold and delivered, he in conſideratione inde promiſed to pay the Money to the Plaintiff, if he (the Defendant) did not ſhip and conſign ſo much Cotton-Wool to the Plaintiff, &c. and the third Promiſe was upon a general indebitatus aſſumpſit, for Wares, &c. ſold and delivered.

The Defendant pleaded generally as to all, (viz.) That ſince the ſaid Promiſes, he and the Plaintiff had ſubmitted themſelves, and all Matters, &c. to Arbitrators, who made their Award, which he ſet forth in his Plea, and concluded in Bar, without alledging that he (the Defendant) had performed the Award on his Part.

And upon a Demurrer to the Bar, it appeared that the Award was particular as to the Cotton-Wool, and not of any other Matter, and as to that likewiſe it was but conditional, and therefore void.

And in arguing this Caſe, the following Diverſities were taken by the Court to be Law.

1ſt. That an Award without Performance is a good Bar to an * Action on the Caſe, if the Parties have mutual Remedies againſt each other to compel the Execution of the Matters awarded; but 'tis otherwiſe if there are no mutual Remedies to † enforce the Performance, &c.

* The Action on the Caſe for the ſame Matter.

† Dyer 75. b. Hob. 49, 50. 20 H. 6. 12. b. 6 H. 7. 11. b. Raym. 450.

(2.) That the Award now pleaded; being but conditional, and therefore void, and by Conſequence the Plaintiff having no Remedy to enforce the Performance, 'tis no Bar to his Action.

(3.) This Award being particular and only concerning the Cotton-Wool, the Defendant ſhould have pleaded it in Bar only of thoſe Promiſes concerning the ſaid Wool, and not in Bar of a general Indebitatus aſſumpſit for Wares ſold, but he ſhould have pleaded non aſſumpſit as to that Promiſe, becauſe the Award did not extend to it.

But if this Award had been general, and a good Award, the Defendant might have pleaded it in Bar of all the Promiſes generally, as here he had done; and that ſuch Plea would not have amounted to the general Iſſue, becauſe the Defendant, by pleading the Award after the Promiſes made, had admitted the Plaintiff to have Cauſe of Action upon the Promiſes; but that he was barred by the Award, and an Admiſſion even of a Colour of Action is ſufficient to prevent the Pleading to amount to the general Iſſue.

The Plaintiff had Judgment.

Willett *verſus* Tydy. Paſch. 3 W. & M. B. R. Rot.

Where an Officer diſtraining for Taxes, is ſued he ſhall have treble Coſts.

THIS was a ſpecial Action on the Caſe brought againſt the Defendant, wherein the Plaintiff declared, that the Defendant (who was Collector of the Taxes) had diſtrained Twenty Lambs of him (the Plaintiff) for Nineteen Shillings due to the King, &c. and that the Defendant might have ſold thoſe Lambs to T. S. for Forty Shillings, yet he Deceptive ſold them for Thirty-five Shillings, and kept the Overplus of the Money, and farther declared upon a general Indebitatus Aſſumpſit, for Sixteen Shillings, as ſo much Money received by him (the Defendant) to the Plaintiff's Uſe.

The Defendant quoad the firſt Part of this Declaration pleaded Not guilty, and quoad the Promiſe he pleads non aſſumpſit.

Nota; It was agreed by all, that this Action on the Caſe, and the Aſſumpſit were * inconſiſtent, and the Defendant might have demurred to the Declaration; for it required a different and double Anſwer.

* *Trover* and *Aſſumpſit* are ill, tho' the Defendant was acquitted of the *Trover*. 3 Lev. 99.

But the Cauſe being tried, and a Verdict for the Defendant, the Inconſiſtency of the Action could not come in Queſtion; but it was now moved for treble Coſts upon the Statute 1 Willi.

Sed per Curiam, the firſt Part of the Declaration will not draw treble Coſts, becauſe the Action was not for diſtraining for the Tax, for that was admitted to be good, but for not ſelling the Diſtreſs at the beſt Price; and for detaining the Overplus after it was ſold, which is neither within the Letter or Intent of the Statute; for that reſpects ſuch Matters only which are done by the Officers in levying the Tax, according to the Courſe of Law, and not to any collateral Matters of Fraud as in this Caſe. 2 Lev. 250.

But becauſe the Plaintiff had alſo declared upon a general indebitatus aſſumpſit, for ſo much Money in certain, and the Judge of Aſſiſe had certified on the Poſtea, that the Defendant's Juſtification as to all was as Collector of the Royal Aid, by Virtue of the Statute 1 Willi. therefore for that Reaſon only the Court was of Opinion, that the Defendant ſhould have treble Coſts; ſecus if the Action had been ſingle upon the firſt Matter only.

Temple *verſus* Killingworth.

CASE, &c. in which the Plaintiff declared, that the Defendant at ſuch a Time had maliciouſly levied a Plaint in London, and proſecuted the Plaintiff thereon, ubi revera the Cauſe of Action did ariſe in D. in Kent, out of the Juriſdiction of the Court of London.

Caſe for proſecuting a Plaint in *London*, when the Cauſe of Action did ariſe out of the Juriſdiction; this ought to have been pleaded, and if the Plea had been refuſed, then a Prohibition would have been granted; ſo Caſe would not lie.

Upon Not guilty pleaded the Parties were at Iſſue, and the Plaintiff had a Verdict; and now it was moved in Arreſt of Judgment, that an Action would not lie upon this Matter,

Matter, for that the Plaintiff might have pleaded it to the Juriſdiction of the Court, and if they had refuſed ſuch Plea, he might have ſuggeſted the whole Matter; and thereupon a Prohibition would have been granted either by this Court, or by the Court of Common Pleas, according to the common Practice now in Uſe.

Holt Chief Juſtice and the Court inclined to that Opinion, and thereupon the Judgment was ſtay'd until the Plaintiff ſhould move it again; and afterwards it was moved for Judgment, and the Caſes in the * Margin were cited to maintain this Action.

* Hob. 205. 2 Cro. 667. 3 Cro. 628, 836. Stat. 3 Ed. 1. cap. 38. Regiſter 98. *F. N. B.* 45. *f.* 1 Sand. 221. 1 [illegible] 463. 4 Rep. 14. *b.* Keilway 106. *a.* 10 Rep. *the Caſe of the* Marſhalſea. Fitz. Abr. Eſtoppel 18. 7 H. 6. 45. 1 Vent. 369. Hudſon *verſus* Cook. Trin. 27 Car. 2. Smith *verſus* Fuller.

But the Court was not ſatisfied with the Action.

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Term. Sanct. Trin.

3 Willi. & Mariæ, in B. R.

Paine *verſus* Partrich. Paſch. 2 W. & M. B. R. Rot. 43.

CASE, &c. in which the Plaintiff declared, That the Vill of Littleport in the Iſle of Ely was an antient Vill, Time out of Mind, and for all that Time within the ſaid Vill there had been an antient River called Wilney River, and an antient Paſſage over the ſame to the North-eaſt Side of the ſaid Vill, pro tranſitu & tranſportatione ſubditorum hujus regni Angliæ trans & ultra Rivum illum tranſire volen. from a Place called Ferry-lane, to a Place called Adventurous Bank, on the other Side of the River antrorſum ſive retrorſum ad eorum libitum for the Paſſage of Horſes, &c. and that the Paſſage aforeſaid, for all the Time aforeſaid, to ſuch a Day, had been in a Ferry-boat maintained by the Proprietors and Occupiers of the Paſſage, and that they and the Keepers thereof had, for all the Time aforeſaid, uſed to receive of all Subjects paſſing over the ſaid River (other than of the Inhabitants of Littleport, dwelling in the antient Meſſuages or Cottages there) reaſonable Rates for Toll, (viz.) one Half-penny for a Man and Horſe; and whereas within the ſaid Vill there was an antient Cuſtom, Time out of Mind, that every Inhabitant of the ſaid Vill in any antient Meſſuage or Cottage there abiding habuer. & habere conſuever. a toto tempore prædicto

3 Mod. 289. 1 Salk. 12. 2 Salk. 718. Caſe will not lie againſt the Defendant for not keeping a Ferry-boat where he had built a Bridge to paſs over the River.

dicto libertatem tranſeundi the aforeſaid River at the ſaid Paſſage pro ſeipſis equis, &c. ad libitum ſuum ſine aliqua ſolutione quacunq; Cumq; etiam the Plaintiff is an Inhabitant, &c. and ought to have Liberty of the ſaid Paſſage, &c. and that the Defendant præmiſſorum non ignarus, but contriving to deprive the Plaintiff of the ſaid Liberty (the Defendant being Proprietor, Occupier and Keeper of the ſaid Paſſage) had not maintained any Ferry-boat at the ſaid Paſſage, ſed ill. facere recuſavit licet (per the Plaintiff) requiſit', &c. by Reaſon whereof the Plaintiff from ſuch a Time to ſuch a Time, had loſt the Liberty of Paſſage contra conſuetudinem prædict. & ad damnum, &c.

The Defendant pleaded, that he, at his own Coſts, had built a Bridge over the ſaid River at the Paſſage aforeſaid, where all People might paſs over with more Eaſe and Safety; and that after the Building the ſaid Bridge, he had always kept it in good Repair, and for that Reaſon he had neglected to keep a Ferry-boat prout ei bene licuit.

The Plaintiff replied, that he was hindered of his Paſſage contra conſuetud. prædict.

And upon a Demurrer to this Replication it was argued for the Defendant, that this is a good temporary Bar, (viz.) for all the Time that the Bridge is kept in Repair; but that when the Bridge decays, the Paſſage ſhall revive.

Cuſtom, whether reaſonable, or not.

That this Cuſtom is unreaſonable and againſt Law, becauſe 'tis ſuch a Charge upon the Defendant, which cannot have any lawful Commencement; and 'tis ſuch a Charge which can never be diſcharged, as 'tis pleaded by Way of local Cuſtom; for if all the Inhabitants join in a Releaſe, it will not bar their Succeſſors; therefore 'tis ſuch an extraordinary Charge, that it cannot poſſibly be diſcharged; for which Reaſon the Inhabitants ought to have preſcribed in their Meſſuages in Fee; and for this the Caſes in the * Margin were cited.

* Bro. Preſcription 76. F. N. B. 258. 1 Roll. Abr. 559. 1 Leon. 142. 5 H. 7. 9. 2 Ed. 4. 24. 27 H. 8. 27. a. Roll. Rep. 289.

Beſides, here the Plaintiff preſcribed tranſire ad libitum, which is too general, becauſe the Defendant by ſuch a Preſcription is obliged to carry him (the Plaintiff) over the River at Midnight, which being very unreaſonable, therefore the Cuſtom ought to be confined to ſeaſonable Hours.

To which it was anſwered, that the Expreſſion ad libitum is the ſame with the uſual Clauſe, Omni Anno & omni tempore Annì, in Caſe of a Common claimed by Preſcription.

And it was argued for the Plaintiff, that this is an Easement, and every Easement is a Charge; as for Instance; a Way over another Man's Lands is a Charge upon the Lands; so a Custom to grind at a Lord's Mill Toll-free is an actual Charge, as in this Case, tho' in 18 Ed. 4. 3. it was held a good Custom. For the Plaintiff. Every Easement is a Charge on some Body. 18 Ed. 4. 19.

That the Grounds of Customs (as Littleton observes) is not to be searched into too nicely, for some of them are good, tho' they could never have any reasonable Commencement, but Usage hath wrought it self into a Law. Regist. 153. b. F.N.B. 124. A. 1 Cro. Baker v. Berriman.

Holt Ch. Justice. This is a good Custom and well pleaded, and quoad the Custom, the Cases in the * Margin were cited; and that the Manner of Pleading ad libitum suum is good. See Rast. Ent. 617. b. 3 Cro. 441, 664. 1 Cro. 419. * 1 Leon. 142. 1 Inst. 113. 12 H. 8. 5. 1 Cro. 418. 18 Ed. 4. 3. 1 Roll. Abr. 216. 3 Cro. 746. 1 Roll. 56.

And per Gregory Justice, The Inhabitants of a Hill, tho' they are only Tenants at Will, may, by Virtue of a † local Custom, claim an Easement; and they all agreed, that a Passage over the Water was of the same Nature as a * Highway, and that a Ferry is for the common good. † 15 Ed. 4. 29. 18 Ed. 4. 3. Hob. 118. Dyer 71. * 13 Rep. 33. 2 Inst. 30. 1 Cro. 132. 22 H. 6. 44.

(2.) Adjudged that the Plea in Bar is ill, for the Defendant cannot alter the Passage with a License from the King, upon an Inquisition returned on a Writ ad quod damnum, for the Subjects have no Right to pass over the Bridge without the Leave of the Defendant; 'tis the like Case of a new Way assigned or laid out, which will not justify the Stoppage of the old Way. 1 Cro. 266.

(3.) Resolved, that the Plaintiff cannot have this Action, because the Ground of it is for a common Nusance, for which an Action will not lie, unless there is some special Damage alledged, or where the Party grieved can have no other Remedy; but in this Case the Plaintiff had not declared upon any particular Damage, but generally, that he had lost the Liberty of the Passage, &c. and therefore this Action will not lie; and chiefly to avoid Multiplicity of Actions; for by the same Reason that it may be brought by the Plaintiff, it may be maintainable by every Person passing that Way; and for Authorities in this Point, the Cases in the † Margin were cited. Action will not lie for a common Nusance. † 1 Inst. 56. 5 Rep. 72. 3 Cro. 664. Moor 180. 13 H. 7. 26.

And per Holt Ch. Justice, This Custom upon which this Action is brought, consists only in Discharge of Payment of Toll, and not in any Right of Passage by the Inhabi- Custom, where it consists in Discharge.

tants; for it appears to be a very antient Paſſage for all People, and the Inhabitants of Littleport had not the Paſſage quatenus Inhabitants, but as the King's Subjects, for 'tis a common Paſſage.

Alſo this Cuſtom did not conſiſt in compelling the Defendant to keep a Ferry-boat, becauſe he is obliged to do it without any Cuſtom of the Will; therefore it plainly appears that this Cuſtom conſiſts meerly in Diſcharge; and it was never doubted, but that ſuch Cuſtoms are good.

18 Ed. 4. 3. b.
1 Cro. 418.
1 Roll. Abr. 553.

Beſides, this Charge on the Defendant is not without ſome Recompence, for he hath Toll of all People, except the Inhabitants of Littleport; like the Caſe in 3 Cro. 569. where it was adjudged, that having the Tithes was a ſufficient Recompence to charge the Parſon with Keeping a common Bull or Boar.

And as concerning ſpecial Damages ſufficient to maintain an Action on the Caſe, it was reſolved, that if a Highway is ſo ſtopped, that a Man is delayed in his Journey a little While, and by Reaſon thereof he is damnified, or ſome important Affair neglected; this is not ſuch a ſpecial Damage for which an Action on the Caſe will lie; but a particular Damage to maintain this Action ought to be direct, and not conſequential; as for Inſtance; the Loſs of his Horſe, or by ſome corporal Hurt, in falling into a Trench in the Highway.

Beſides, if the Defendant had extorted any Money of the Plaintiff, or of any other Inhabitant of Littleport, for Toll for his Paſſage over the River, in ſuch Caſe an Action would have laid for Taking the Money contrary to the Cuſtom, becauſe there is no other Remedy, as it was adjudged in the Caſe of the Inhabitants of Southwark, cited in 1 Inſt. fo. 56. a.

Judgment was given for the Defendant, that the Action would not lie.

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Term. Sanct. Mich.

Anno 3 Willi. & Mariæ in B. R.

Beake *verſus* Kent. Trin. 3 W. & M. B. R. Rot. 377.

ASSUMPSIT againſt the Defendant as Executrix to John Kent.

The Defendant pleaded in Bar three ſeveral Judgments obtained againſt her as Executrix upon three ſeveral Bonds, at the Suit of three Perſons, and that ſhe had Aſſets in her Hands only to the Value of 5 s. liable to thoſe ſeveral Judgments.

4 Mod. 63. Where an Executrix pleaded ſeveral Judgments, and that ſhe had not Aſſets *ultra*, good.

The Plaintiff replied ſeparately to each Judgment, (viz.) that one Half of the Money recovered on each Bond, was more than was juſtly due from the Teſtator; and that the Plaintiff in each Action was willing and had offered to accept the other Moiety of the Defendant in Diſcharge of the Whole, and upon Payment thereof to releaſe the ſeveral Judgments, and that the Defendant had ſufficient Aſſets ultra thoſe Judgments were ſatisfied to pay the Plaintiff, and concludes ſeverally after Pleading the Matters as aforeſaid, (viz.) that the Defendant judicia prædicta deceptive & ea intentione ad defraudandum & decipiendum the Plaintiff, had kept the ſaid Judgments on Foot.

The Defendant rejoined generally maintaining her Bar, that ſhe had not Aſſets ultra, and traverſed quod ipſa prædicta

dicta (the Defendant) deceptive & ea intentione ad defraudandum & decipiend' (the Plaintiff) de damnis ſuis prædict' de judiciis prædict' ſeu eorum alteri exon erari ſeu relaxari diſtulit & adhuc differt aut judicia prædict' ſeu eorum alterum in ſuis robore & vigore permanere adhuc permittit ad defraudand' & decipiend' (the Plaintiff) de damnis ſuis prædict' modo & forma prout, &c.

And upon a Demurrer to this Rejoinder, it was ſhewed for Cauſe, that the Defendant ought to have rejoined ſeverally to every Judgment, and not to include all three Judgments in one general Traverſe; becauſe it muſt be a great Diſadvantage to the Plaintiff to take Iſſue thereon, for if he ſhould join Iſſue upon the Fraud in all the Judgments, and if one ſhould be found not to be kept on Foot by Fraud, the Iſſue would be againſt him; and on the other Hand it would be no good Iſſue to plead generally, that judicia prædict' ſive eorum alterum was continued by Fraud; and therefore it was inferred, that the Defendant ought to have made * ſeveral Traverſes.

*1 Roll. Abr. 802. 2 Cro. 625.

Sed per Curiam, the Rejoinder is good, becauſe the Traverſe was, That all or any of the Judgments were kept on Foot by Fraud; and if Iſſue had been joined, that all the Judgments were kept on Foot by Fraud, and it had been found, that one of them alone had been kept, &c. by Fraud, this Iſſue had been found for the Plaintiff, becauſe the Plea was falſe in Part, and for that Reaſon the whole is falſe; therefore this general Form of Pleading could be no Diſadvantage to the Plaintiff, (as is pretended) for he might have taken Iſſue, that all were continued by Fraud, or elſe he might have ſingled out one of the Judgments, and taken Iſſue upon that alone.

11 H. 6. 54. Dyer 181. 3 Cro. 139. 9 Rep. 108. Sid. 39. 2 Sand. 50.

The Plaintiff ſeeing the Opinion of the Court, prayed Leave to diſcontinue, which was granted.

Killigrew *verſus* Sayer. Trin. 1 W. & M. C. B. Rot. 365.

2 Vent. 79. In an Action of Covenant on Articles, the Breach is not well aſſigned.

THE Caſe, ſ. Sir William Killigrew the Plaintiff being Vice-Chamberlain to Katherine Queen Dowager, it was agreed between him and the Defendant Sayer by certain Articles under Hand and Seal, for the Sale of the ſaid Office, by and with the Conſent of the Queen, and that the Plaintiff, during his Life, by the Agreement of the De-

Defendant and the Conſent of the Queen ſhould hold, have, enjoy and receive all the Profits of the ſaid Office as fully as the Plaintiff then enjoyed the ſame, (viz.) the yearly Penſion of 200 l. to be paid by the Queen during the Life of the Plaintiff, and his yearly new Year's Gift of 120 l. for his Life, and alſo the yearly Fee and Livery being 66 l. per ann. and alſo the Salary and Board Wages out of the Cofferer's Office, being 130 l. per ann. amounting in all to the Sum of 516 l per ann. or thereabouts, all which I the ſaid George Sayer do engage my ſelf, that the ſaid Sir William ſhall enjoy and receive during his Life; and that I will receive no Part thereof until after the Death of the ſaid Sir William Killigrew.

Upon theſe Articles, an Action of Covenant was brought, in which the Plaintiff ſet forth the whole Agreement in his Declaration, and averred, that the Queen did conſent to all Things therein contained, and that he in Performance thereof did ſurrender the ſaid Office into the Hands of the Queen, and that the Defendant by his (the Plaintiff's) Procurement was admitted thereto, & officium illud una cum proficuis eidem officio ſpectan' & pertinen' abinde hucuſq; tenuit & gaviſus fuit & adhuc tenet, and 750 l. of the Salary and Board Wages belonging to the ſaid Office for 6 Years, ending at Mich. 1688. ad feſtum illud ſecund' conventionem & Agreament' præd' Georgii Sayer præd' Will' Killigrew ſolubiles devenerunt & ſolvi debuerunt quas quidem 750 l. aut aliquam inde denarium idem Will'us non recepit & præd' Georgius licet ſepius requiſit', &c. eidem Will'o nondum ſolvit ſed ill' ei ſolvere, &c.

The Defendant pleaded, that he hath always hitherto permitted the Plaintiff to receive yearly all the Profits of the ſaid Office according to the ſaid Agreement, abſq; hoc quod præd' Georgius a tempore confectionis ſcripti agreamenti præd' hucuſq; aliqua proficua præd' officio Vicecamerarii prædict' pertinen' vel ſpectan' recepit vel gaviſus fuit & hoc, &c.

Upon a Demurrer to this Plea, the Defendant had Judgment in C. B. that this was a good Bar to the Action; and now upon a Writ of Error brought in B. R. upon that Judgment, it was inſiſted for the Plaintiff, that the Plea was no Anſwer to the Breach laid in the Declaration, for that was, that * 750 l. was in Arrear, and that the Defendant had not paid it; but the Traverſe was, that the Defendant had not received any Thing, which is no Anſwer to the Breach.

* 3 Brownl. Entr. 57. 3 Cro. 914. Vaugh 191. Sid. 178.

To

Econtra for the Defendant.

To which it was answered for the Defendant, that the Matter on which the Plaintiff insisted was frivolous, and no Breach of the Agreement, because the Defendant did not oblige himself to pay the Fees, but only that he would not receive any of them, but permit the Plaintiff to enjoy them; and for ought appears to the contrary, the Plaintiff might have received them if he would, for he hath not alledged, that he demanded them of the Queen, or done any Thing towards the Receiving them; and therefore if there was nothing more in the Declaration which amounted to a Breach, it would have been ill in it self.

But the Counsel for the Plaintiff in the original Action insisted, that the Allegation in the Declaration, (viz.) that the Defendant had held and enjoyed the said Office, together with the Profits thereunto belonging, was Matter of Breach, and positively alledged; and therefore ought to be answered, and the Plea is a direct Traverse of this Matter, which is the Breach if any at all is alledged.

But per Holt Ch. Justice, and Justice Eyre, there is no Breach alledged in this Declaration; and therefore the Judgment quod placitum sufficiens, &c. ought to be reversed, and a new Judgment given quod narratio insufficiens in lege existit; and then the Plaintiff may begin again.

Two other Judges of a contrary Opinion, (viz.) for affirming the Judgment as it was: Nota; the Court of Common Pleas was of Opinion, that this Agreement did not bind the Defendant Sayer to pay the Money, because it was only, that he would not receive any of the Profits.

Sed Holt Ch. Justice, and Eyre doubted of that Matter, but they all agreed, that the Plaintiff must shew for Breach, that he could not receive the Money of the Queen.

The King *versus* Gately.

5 Mod. 138. S. C. Salk. 471. S. C. Sessions cannot make an Order to discharge an Apprentice. * 5 Eliz. c. 4. par. 35.

UPON a Motion to quash an Order of Sessions made for the Discharging one Green an Apprentice from his Apprenticeship to one Gately, upon the Statute * 5 Eliz. there were two Exceptions made to the Order.

(1.) That it appeared to be an original Order made at the Sessions, whereas by the Statute the Parties in such Cases ought first to apply themselves to a Justice of Peace, and if he cannot compound the Matter, then he is to bind the

the Maſter to appear at the next Seſſions; but by this Order it doth not appear that any Application was made to the Juſtice, as directed by the Statute, &c.

(2.) This Order is not under the Seals of the Juſtices, which is expreſly required by the Statute. 1 Saund. 315.

And per Curiam, both theſe are material Defects in the Order, and therefore it was quaſhed.

The King *verſus* Rowe.

A Mandamus being granted to reſtore John Rowe to the Office of Sword-bearer of the City of Briſtol; upon the Pluries the Mayor and Burgeſſes make this Return, ſetting forth the Cauſe of the Amotion, &c. And farther, that on ſuch a Day, before the Mandamus, &c. the ſaid John Rowe was, amongſt others, indicted for High Treaſon, & quod taliter ſuperinde proceſſum fuit, that on ſuch a Day, &c. the ſaid Rowe was outlawed, which Outlawry remains ſtill in full Force, by Reaſon whereof he is perſona inhabilis to have the ſaid Office. *Mandamus, &c.* Where the Court will not judicially take Notice of the Reverſal of an Outlawry.

And now it was moved for a peremptory Mandamus, for that the firſt Part of the Return was not ſufficient, &c. and as to the Outlawry, the Record of the Reverſal thereof was now produced, which was upon a Writ of Error in B. R. ſince the Return of the Mandamus; and it was inſiſted, that by this Reverſal the Diſability was removed, and that the Court, upon View of their own Record, would ex officio take Notice of the Reverſal of the Outlawry, becauſe in this Caſe the Party had no Day in Court to plead it.

But the Court would not take Notice upon View of the Record, that this was the ſame Indictment and the ſame John Rowe who was returned outlawed, for this Reverſal might be of another Outlawry upon another Indictment, and by another Perſon of the ſame Name; and it muſt appear judicially to the Court, that the Inability is removed, before the Court will grant a peremptory Mandamus; therefore they adviſed Rowe to take out a new Mandamus, and therein to recite the Outlawry, and the Reverſal thereof; which was accordingly done. Curia.

3

Blake

Blake & al' *verſus* Gell. Mich. 1 *or* 2 Will. & Mar. B. R. Rot. 146.

Nothing ſhall be aſſigned for Error which might have been pleaded to the Action.

SCire facias upon a Judgment againſt T. S. iſſued againſt his Tertenants of his Lands, &c. and on a Scire feci returned againſt ſeveral of them, they came in and pleaded, that E. G. is another Tertenant, &c. and not ſummoned, and then a ſecond Sci. fa. iſſued againſt the ſaid E. G. who was returned Tertenant, and that he was an Infant under Age, &c. whereupon the Parole demurred for Infancy; and afterwards the ſaid E. G. attain'd to his full Age, and then the Plaintiff in the original Action proſecutes a Reſummons againſt all the Tertenants aforeſaid; and the Sheriff returned them all ſummoned by Name; and there was Judgment on the Scire facias, by Default, againſt all of them.

And now upon a Writ of Error brought on that Judgment, the Error aſſigned in Fact was, that E. S. (one of the Tertenants returned upon the Sci. fa. and alſo one who was returned to be ſummoned upon the Writ of Reſummons) was dead, before the Day of the Return of the ſaid Writ.

And in this Writ of Error all the ſurviving Tertenants, and alſo R. S. Son and Heir of E. S. deceaſed, joined; and in the Writ all this Matter was ſet forth, and the Title of R. S. as Heir by Deſcent; and the Error was aſſigned by all of them jointly.

And upon a Demurrer two Objections were made againſt this Writ of Error.

(1.) That the Writ would not lie, becauſe of the Laches of the Plaintiff himſelf, for he might have pleaded it upon the Return of the Writ of Reſummons, and having neglected that Opportunity, he ſhall never after aſſign the ſame Matter for Error; for 'tis a Rule, that nothing ſhall be aſſigned for Error which the Party might have pleaded to the Action, and had a proper Time ſo to do; and to prove this the Caſes in the * Margin were cited.

* 3 Cro. 25. 2 Cro. 507, 547. F. N. B. 104. 3 Cro. 739.

(2.) That in this Caſe there were ſeveral Writs of Sci. fa. ut ſupra, and therefore the Plaintiffs cannot all join in one Writ of Error; and it hath been adjudged, that where ſeveral Writs of Sci. fa. iſſue againſt ſeveral Tertenants in ſeveral Counties, upon one and the ſame

Judgment; those returned upon the one Writ cannot take Advantage of any Error in the Proceedings on the other Writs, for the Actions are several; and so it was adjudged in † Angell and Cooper's Case.

† 1 Cro. 517. Cro. Car. 372.

But per Curiam, it was adjudged that the Writ was well brought, and the Error well assigned; and as to the first Objection it was answered, that the Plaintiff had no Time to plead the Matter; for by the Death of E. S. (one of the Tertenants) before the Return of the Writ of Resummons, all the Proceedings on the Sci. fa. were discontinued, and the Parties out of Court, and so had no Time to plead any Thing afterwards; and the Death of one Tertenant puts the Whole without Day; and for that Holt Ch. Justice cited the Cases in the Margin.

Discontinuance by the Death of one of the Tertenants.

Keilw. 69. Fitz. Abr. Tit. Error, pl. 7.

And as to the second Objection, the Difference is, where the several Writs of Sci. fa. issue into several Counties, there the Law is ut supra; but in the principal Case, the last Sci. fa. is only supplemental to the first, and then both make but one Action.

And for these Reasons the Court gave Judgment for the Plaintiff in the Writ of Error, and said, that the Defendant Gell must bring a new Sci. fa. against the Tertenants, for the old Writ was put without Day causa qua supra.

DE

Term. Sanct. Hill.

3 Willi' & Mariæ, B. R.

Cudlip *verſus* Rundle. Trin. 2 Will. & Mar. B. R. Rot. 646.

4 Mod. 11. S. C. 1 Cro. 187. Exception in a Deed, where 'tis good.

CASE, &c. wherein the Plaintiff declared, that he was poſſeſſed 5 die Martii, anno 36 Car. 2. of an Houſe in Taviſtock in the County of Devon, pro quodam termino annorum tunc & adhuc ventur. and being ſo poſſeſſed, demiſed the ſaid Houſe by Indenture to the Defendant for ſeven Years, by Virtue whereof the Defendant entered and was poſſeſſed; and being ſo poſſeſſed, and the Plaintiff likewiſe poſſeſſed of the Reverſion, pro & durante termino prædicto primo mentionat. the Defendant on ſuch a Day ignem ſuum in domo ſua prædicta tam negligenter & improvide cuſtodivit quod domus illa totaliter combuſt' & ruinat. fuit, &c.

The Defendant pleaded, that the Plaintiff Non demiſit per indenturam prædict. modo & forma prout, &c. and thereupon they were at Iſſue; and by a ſpecial Verdict it was found, that the Plaintiff did demiſe by Indenture to the Defendant, a Meſſuage or Tenement called Ugbeare in Taviſtock, together with all Out-houſes, Edifices and Buildings, except one Houſe called the New-houſe, for the Uſe only of the Plaintiff's Father, the Plaintiff himſelf, and for their Wives and Families to live in if they pleaſe, but not to be let to any other Perſon whatſoever, and at all

Times when they ſhould not live there, to be uſed by the Defendant, to have and to hold the Premiſſes before demiſed, (except as before accepted) to the Defendant for ſeven Years, &c. and at the Time when the Fire happened all this New Houſe was in the Poſſeſſion of the Defendant, (except one Room which was in the Poſſeſſion of the Plantiff,) and that the Fire broke out in that Part which was in the Poſſeſſion of the Defendant, which burnt down all the New Houſe, and no more, and concluded Si videtur Curiæ, that the Plaintiff dimiſit modo & forma, then he demiſed & ſi non, &c.

The Points which were made upon this ſpecial Verdict were;

(1.) Whether this Action will lie by the Leſſee for Years againſt his Under-tenant.

(2.) If the Verdict hath found ſufficient to maintain the Iſſue.

For the Plaintiff.

As to the firſt Point, it was argued for the Plaintiff, that the Action would lie, becauſe he is anſwerable over in Waſte brought by his own Leſſor; and the Difference is where the Plaintiff hath the Inheritance, and where he is only a Reverſioner for Life or Years; ſo in the firſt Caſe this Action will not lie; but it will in the laſt Caſe cauſa qua ſupra, and according to this Difference there are many Caſes cited as in the * Margin, unto all which the Court agreed; and therefore the Counſel for the Defendant did not controvert this Point.

* 3 Cro. 461. 1 Cro. 187. 5 Rep. 13. Hern Pleader 161. W. Jones 224. 3 Lev 359.

But then the principal and only Doubt was upon the Words of this Exception in the Indenture, (viz.) Whether by the ſpecial Exception ut ſupra, the New Houſe was wholly excepted, or whether it did paſs by the Demiſe.

Now as to that Matter, it was argued, that this Exception was no more than a Privilege reſerved to the Plaintiff to uſe the New Houſe for ſuch a particular Purpoſe as is expreſſed in the Demiſe; and that the Intention of the Party appears by the Negative Words, (viz.) not to be let to any other.

If it ſhould be taken to be only a Tenancy at Will in the Defendant, yet that would be ſufficient to maintain the Declaration, becauſe the Subſtance is found, (viz.) the Demiſe by the Plaintiff to the Defendant, and the † Variance between the Terms ſhall not hurt.

† 2 Cro 321, 328. 3 Cro. 40. 1 Inſt. 281. b. 2 Roll. Abr. 707. Hob. 72. Owen 91. 1 Lev. 68.

It was argued for the Defendant, that the New Houſe was totally excepted out of the Demiſe for 7 Years; for theſe Words (for the Uſe, &c.) are only Words of Deſcription and Form, and do not qualify the precedent Part of the Exception.

Besides if it should be taken to be a Tenancy at Will in the Defendant, yet the * Variance between the Declaration and Verdict is Fatal.

* 2 Roll. Abr. 709. Dyer 260.

Curia. Sed per Curiam, By those Words in the Exception, the New House was accepted for 7 Years, and that the Defendant was Tenant at Will of the New House, and that the Issue was found against the Plaintiff; for he had declared upon an absolute Lease for 7 Years, and the Verdict hath found it a Lease at Will, and so 'tis not a Demise modo & forma as the Plaintiff had declared, for that this is a Variance in Substance, and not in Form only; and they all agreed, that if the Plaintiff had declared against the Defendant as Tenant at Will, the Action would lie, and the Plaintiff must have recovered; but here the Variance is Fatal, and therefore Judgment was given, quod quer' nil capiat per Billam.

Henderson *versus* Foster.

Debt on Bond for 30 and 6 *l.* the Condition was for Payment of 18 *l.* good.

DEBT upon Bond pro triginta & sex libris.

The Defendant demanded Oyer of the Bond only, and it was entered accordingly, and it was in sex triginta libris, and then the Defendant pleaded this Variance in Abatement.

The Plaintiff made an Entry of a Prayer on the Roll, that the Condition of the Bond might likewise be entered, and thereupon the Condition was entered in hæc verba, which was for the Payment of 18 l. and then demurred to the Plea, and the Defendant joined in Demurrer.

And it was adjudged, that this was no Variance, for that sex triginta and triginta & sex had one and the same Signification; therefore Judgment against the Defendant to answer over.

Knight *versus* Symms.

1 Salk. 254 S. C. 4 Mod. 97. S. C. Ejectment for 5 Closes of Land, Arable and Pasture, not good without distinguishing how many of the one and the other. Moor 702. Owen 18. S[illegible] 202.

IN Ejectment the Plaintiff declared for five Closes of Land Arable and Pasture, called Long Furlongs, containing ten Acres.

Upon Not guilty pleaded, the Plaintiff had a Verdict; and it was moved in Arrest of Judgment, that the Declaration was ill, because the Quantity and Quality of the Lands were not distinguished and ascertained; for the Plaintiff ought to have set forth how many Acres of arable Land, and how many of Pasture distinctly, so as the Sheriff might certainly know what to deliver upon the habere facias possessionem. And

11 Rep. 55. Cro. Car. 414. 2 Cro. Wicks *ver.* Sparrow *in Point.* 2 Cro. 654. 1 Cro. 555.

And for this Reaſon the Declaration was held ill, and the Judgment ſet aſide.

Nota; Per Holt Ch. Juſtice, a Writ of Error will lie on a Judgment in Ejectment quod recuperet, &c. before a Writ of Inquiry executed, for that is only as to the Damages. 3 Cro. 635.

Glover *verſus* Cope. Paſch. 3 W. & M. B. R. Rot. 267.

IN an Action of Covenant, and the Breach aſſigned for Want of Repairs, the Caſe was thus:

If. Copyholder in Fee made a Leaſe for Years, and afterwards ſurrendered the Reverſion to A. B. who ſurrendered likewiſe to the Plaintiff; and the Defendant who was the Leſſee aſſigned his Term to T. S. before any Action brought; and after the Aſſignment of this Term, the Plaintiff who was the ſecond Surrendree of the Reverſion brought this Action of Covenant againſt the Defendant, the original Leſſee, upon his expreſs Covenant to repair, &c.

4 Mod. 80. S. C. 3 Lev. 326. S. C. 1 Salk. 185. S. C. The Surrender of the Reverſion of Copyhold Lands may maintain an Action againſt the Leſſee, upon an expreſs Covenant to repair. 32 Hen. 8. cap. 34.

And upon a Demurrer to the Declaration the only Queſtion was, Whether the Surrendree of Copyhold Lands is a Perſon within the Purview of the Statute 32 H. 8. ſo as to enable him to maintain this Action againſt the Leſſee, by Reaſon of the Privity of Conttract transferred to him by Force of that Statute, as a Grantee of a Reverſion might at Common Law; or whether Copyhold Lands are within the Meaning of that Act, it being formerly held they were not. 3 Cro. 24. Platt *verſus* Plomer. Hob. 176.

And after two ſolemn Arguments at the Bar, it was adjudged, per Holt Chief Juſtice and the Court, for the Plaintiff, (viz.) That the Grantee of the Reverſion of Copyhold Lands was within the Intention and the Equity of that Statute, which is a remedial Law, and of great and univerſal Uſe, and abſolutely neceſſary as well for Copyholders as others; and that by this Conſtruction of the Statute, no Prejudice can ariſe to the Lords of Copyhold Manors; and the only Reaſon why Copyhold Lands have been adjudged not to be within the Purview of other Statutes which contain general Words, is becauſe of the Reſpect to the Lord's Prejudice.

Quod nota; for this is the firſt Caſe which ever was adjudged upon this Point.

Walwyn *verſus* Smith. Trin. 3 W. & M. B. R. Rot. 631.

4 Mod. 86. S. C. 1 Salk. 177. S. C. Diſcontinuance of Proceſs is cured by a Verdict.

WRIT of Error on a Judgment in an inferior Court of Record, and the Error aſſigned was a long Diſcontinuance of the Plea which appeared on the Record it ſelf; for after the Plaint entered, and the Appearance of the Defendant, &c. there was no dies datus nor any Court returned to be held in a Quarter of a Year together; but the Entry was, that upon ſuch a Day (ſo long after) the Parties came into Court, & ſuperinde, &c.

Curia. Sed per Curiam, This being after a Verdict, the Diſcontinuance is cured by the Statute of Jeofails, which Statutes do extend to inferior Courts of Record.

The like Judgment was given in this Term, in a Writ of Error between Boſon and Phyler, where a Diſcontinuance was aſſigned for Error after a Verdict and Judgment in the Court of the City of Exon; and the Judgment was affirmed in both Caſes.

Boſon *verſus* Phyler.

Exceptions on a Writ of Error brought on a Judgment in an inferior Court. * Co. Ent. 315. Raſt. Ent. 168. Dyer 262. *b.*

WRIT of Error on a Judgment in Trover obtained in the Court at Exon, and the general Error aſſigned; the Counſel for the Plaintiff in Error aſſigned theſe Errors ore tenus.

(1.) That the Proceſs throughout is directed to the Serjeants at Mace generally, not naming them by their * proper Names, as they ought; ſed non allocatur.

(2.) That the Proceſs of Attachment againſt the Defendant was returned thus, (viz) nihil habet ubi ſummon' poteſt, and thereupon a Capias was awarded againſt him, which is irregular; for the Return of an Attachment is nil habet ubi attachiari poteſt nec eſt inventus in eadem; therefore ſince this Return was inſufficient, the Court ought to have awarded an Alias Attachment, and not a Capias; for 'tis the Return of the Attachment, and not the Award thereof which muſt warrant the Capias; for that ſhall not iſſue, but where it appears by the Return of the preceding Proceſs, that the firſt Proceſs was ineffectual, which doth not appear by this Return; and therefore the Capias is uſed in this Caſe as the firſt Proceſs, which is ill, becauſe 'tis a Miſawarding of Proceſs, and that is Error even after a Verdict; ſed non allocatur.

1 Roll. Abr. 680. Yel. 158.

3 (3.) They

(3.) They had not returned any Cuſtom to warrant the Uſe of a Capias in Proceſs, for that is given by the * Statute, which doth not extend to inferior Courts; and all the † Precedents in the like Caſes ſhew an Uſage Time out of Mind.

* 19 H. 7. cap. 9.

† Raſt. Entr. 169.

Sed non allocatur; For the Court held that both theſe Errors were cured by the Appearance of the Defendant, for thereby all mean Proceſs was out of Doors, &c.

(4.) That the Entry of all the Continuances by Li. Io. was generally ad quem quidem prox. Cur. venit, &c. without ſaying coram * quibus tent. as it ought to be; ſed non allocatur; for that the dies datus was ſpecial to a Day certain, naming before whom the next Court was to be held, and ſo need not be repeated upon the Appearance.

* Raſt. Ent. 168. Co. Ent. 314.

(5.) For that the Judgment was Ideo conceſſum eſt per eoſdem Ballivos in eadem Curia, when it ought to be Ideo conceſſum eſt per Curiam; ſed non allocatur; for both Ways are good, it being ſaid before, that it was done in Court.

(6.) That there was a Diſcontinuance; ſed per Curiam, that is helped by the Statute of Jeofails, it being after Verdict.

The Judgment was affirmed.

Tallant *verſus* Germyn.

THE Defendant pleaded Miſnoſmer in Abatement in this Form:

Miſnoſmer, not well pleaded in Abatement.

Et prædict. J. Germyn (with an n at the End) venit & defend. &c. & dicit, that his Name is Germy (without an n) and not Germyn, prout, &c. and upon a Demurrer to this Plea it was adjudged againſt him; for that he had admitted his Name to be Germyn, by his appearing and making Defence by that Name.

But if he would have taken Advantage of the Miſnoſmer, he ſhould have pleaded in this Manner:

Et prædict. Johannes Germy qui per nomen J. Germyn ſuperius implacitatur venit & dicit quod, &c. and for this Default, Judgment that the Defendant ſhould anſwer over.

Raſt. 49. b.

Stokeld

Stokeld *verſus* Collingſon.

Action brought by a Commiſſioner to take the Depoſitions of Witneſſes for his Labour.

ACtion on the Caſe on ſeveral Promiſes, the firſt was ſpecial, (viz.) Whereas the Plaintiff, at the Inſtance of the Defendant, ſerved as a Commiſſioner for the Defendant, in a certain Suit depending between him and T. S. in the Exchequer; the Defendant, in conſideratione inde, promiſed to pay the Plaintiff as much as he ſhould deſerve for his Labour and Pains therein; the other were general Promiſes in the common Form, &c.

After a Verdict for the Plaintiff and entire Damages given, it was objected, that ſuch Damages ought not to have been given, becauſe the ſpecial Promiſe was void, for that a Commiſſioner extraordinary ad examinandum teſtes, either in the Court of Chancery or Exchequer, was an Officer of the Court, in whom a Truſt and Confidence was repoſed by the Commiſſion, and ought not to be at the Nomination of the Parties, and therefore the Plaintiff in the Execution of the Commiſſion, did no more than what was his Duty, for which he ought not to be rewarded by the Party, becauſe it looks like Bribery.

1 Roll. Abr. 16.
2 Roll. Rep. 103.
Latch 55.
Noy 76.
1 Inſt. 156.

But adjudged per totam Curiam, that this Action well lies upon this Matter; for tho' a Commiſſioner is an Officer of the Court, yet they cannot compel him to attend againſt his Will, and therefore the Parties are to take Care to name ſuch Perſons who will ſerve therein; and 'tis reaſonable that it ſhould be at the Charge of him for whom he officiates.

The Plaintiff had Judgment.

Page *verſus* Wats.

Adminiſtrator ſued upon a Promiſe of the Inteſtate, pleaded two Bonds, and concluded with *Plene adminiſtravit.*

ASſumpſit againſt the Defendant, as Adminiſtrator, upon a Promiſe made by the Inteſtate.

The Defendant pleaded two ſeveral Bonds in Bar, and concluded his Plea with a general Plene adminiſtravit, without confeſſing any Aſſets to be in his Hands.

The Plaintiff replied ſpecially, that the Defendant had Aſſets ſufficient, beſides what would ſatisfy the ſaid two Bonds.

And upon a Demurrer to this Replication, per Curiam, the general Concluſion of the Plea in Bar hath waived the ſpecial Matter of the Bonds, therefore the Plaintiff ſhould likewiſe have replied generally, and not ſpecially, ut ſupra.

But no Counſel appearing for the Defendant, and the Iſſue offered being for his Advantage, and he refuſing it;

The Plaintiff had Judgment.

Tucker *verſus* Hodges. Trin. 3 Will. & Mar. B. R. Rot. 465.

IN Replevin, &c. the Defendant made Conuſance as Baliff to A. B. and C. for Rent arrear of a Fee-farm, and ſets out a Title from the Crown by a Grant from the Lord Hawley, and the reſt of the Truſtees for King Car. 2. named in the Statute for diſpoſing Fee-farm Rents, according to the Proviſion thereof.

Where all the Aſſignments of a Leaſe for Years ought to be ſet forth in the Pleadings.

The Plaintiff replies, that before King Car. 2. had any Thing in the Rent, &c. King Jac. 1. was ſeiſed in Fee of the Place where, and by his Letters Patents (the Exemplification whereof, as far as it concerned this Matter only, was ſhewn forth, and good) granted it to Sir Fra. Bacon and others, for ninety-nine Years abſq; aliquo inde reddendo, whoſe Eſtate, Title and Intereſt therein per diverſas medias aſſignationes devenit cuidam Thomæ Northmore, who being poſſeſſed, &c. demiſed the ſame to him at Will, &c.

And upon a general Demurrer to this Replication, it was adjudged, that the Bar was ill, becauſe the Defendant had not ſet forth all the mean Aſſignments as he ought in his Plea at large, for he claims under them, and muſt be privy thereunto; and the Difference is, that where the Party pleading derives an Eſtate to his Adverſary, under which he doth not claim any Thing, there ſuch general Pleading is ſufficient, becauſe he hath no Means to know another Man's Title; but 'tis otherwiſe where he himſelf claims under it; quod nota.

Judgment for the Avowant.

Carvell *Executor of* Dodſworth *verſus* Edwards. Trin. 3 Will. & Mar. B. R. Rot. 349.

Where a Letter of Licenſe is a Defeaſance, and pleadable in Bar.

DEBT upon Bond, and likewiſe upon a Judgment due to the Teſtator Dodſworth.

The Defendant pleaded in Bar Letters of Licenſe under the Hand and Seal of the Teſtator, which were made between the Defendant and his Creditors, to which the Teſtator was a Party, reciting, that whereas the Defendant had a Right in ſuch a Houſe; and it was thereby agreed, that he ſhould give Power to the Teſtator to ſell the ſame, and to divide the Money in Proportion amongſt the Creditors as far as it would reach; and that upon Receipt of ſuch their Proportions, every of the ſaid Creditors ſhould give the Defendant a Releaſe of all Matters, &c. before the Agreement: And it was farther agreed, that in the mean While, and until the ſaid Houſe ſhould be ſold, and from thenceforth after the ſaid William Edwards ſhall not be ſued or proſecuted at Law, or his Perſon or Goods moleſted by any of the ſaid Creditors named in the ſaid Articles, for any Thing paſt, ſub pœna reliction. & exonerationis debiti vel debitorum talium perſonarum, as ſhall ſo ſue or proſecute, &c.

The Plaintiff made a frivolous Replication, and upon a Demurrer to it, two Objections were made to the Plea; firſt, that this Matter in the Letter of Licenſe conſiſted only in Covenant, upon which an Action might be maintained, but it cannot be pleaded in Bar to the preſent Action.

* 9 Rep. 52. Noy 5. Dyer 65. 3 Cro. 398. 27 H. 8. 16. Bro. Stat. Merch. 43. 1 Roll. Rep. 68.

(2.) That this is a perſonal Lien of the Teſtator only, for his Executors are not named; and it being a Penalty, 'tis the ſame in Nature with a Condition; and perſonal Conditions will never extend to Executors, unleſs expreſly named; and to prove that Matter the Caſes in the * Margin were cited.

† 1 Inſt. 236, 274. *b.* 21 H. 7. 23, 24. 2 Roll. Abr. 403. 2 Bulſt. 95, 290. Bridgm. 117. 1 And. 307. 3 Cro. 352.

It was argued for the Defendant, that this is a Releaſe and no Covenant, and the Words of the Deed are general not to ſue at any Time, which amounts to a Releaſe; and this Difference is taken in the Books, (viz.) where the Reſtraint is only for a certain Time, and where 'tis not to ſue at all; in the firſt Caſe 'tis a Covenant, but in the latter 'tis a Releaſe; and to prove this, the Caſes in the † Margin were cited.

But per Holt Ch. Juſtice, this is a Defeaſance, and no Releaſe, and he cited Moor 811. and the whole Court were of that Opinion, and that it being a good Defeaſance is pleadable in Bar.

See Antea between Ayloffe and Sckrimpſhaw, the ſame Point.

Leech *verſus* Thompſon. Paſch. 3 W. & M. B. R. Rot. 221.

WRIT of Error on a Judgment in a ſpecial Verdict in C. B. where the Caſe upon the Pleadings was as followeth:

Surrender by Tenant for Life to him in Remainder, not good without the actual Aſſent of the Surrendree.

ff. One Simon Leech was ſeiſed of the Lands in Queſtion for Life, Remainder to his firſt, ſecond and third Son, &c. in Tail, Remainder to Sir Simon Leech, (the Plaintiff in Error) in Fee.

Simon Leech (the Tenant for Life) before he had any Iſſue born, ſealed and executed a Deed purporting a Surrender of all his Eſtate, &c. unto Sir Simon the Remainder Man, which Deed he (the Tenant for Life) delivered to T. S. as his Deed, for the Uſe of Sir Simon Leech; but it was found, that afterwards the ſaid Tenant for Life continued in Poſſeſſion as formerly for 5 Years, and that the ſaid Sir Simon Leech did not know of the ſaid Deed of Surrender until ſuch a Day, which was 5 Years after it was executed; and that then he agreed and conſented to the ſame and not before; and it was farther found, that within the ſaid 5 Years, and before Sir Simon Leech had actually conſented to the ſaid Surrender, the ſaid Simon Leech (the Tenant for Life) had a Son born, who was now the Leſſor of the Plaintiff in Ejectment.

The Queſtion was, whether this Surrender was compleat in Law before Sir Simon Leech, who was to take thereby, had actually aſſented thereto; for if ſo, then the contingent Remainders were deſtroyed, becauſe the particular Eſtate upon which they depended was determined and gone before the Remainder could commence.

But if the Delivery of the Deed was only a Beginning of the Surrender, and an actual Aſſent of Sir Simon Leech was neceſſary to compleat it, then the particular Eſtate was not deſtroyed until ſuch Aſſent made, before which Time the Contingency happened, and the Remainder actually veſted in the Son the Leſſor of the Plaintiff, and then Sir Simon's Aſ-

ſent came too late; for by the veſting of the Remainder in the Son, all Poſſibility of a Surrender by the Tenant for Life, to the mediate Remainder Man in Fee was taken away.

And after ſeveral Arguments in C. B. it was adjudged for the Plaintiff, (viz.) that the Surrender was not compleat by the Delivery of the Deed; but that an actual Aſſent of the Surrendree was abſolutely neceſſary to compleat it, and till ſuch Aſſent nothing paſſeth out of the Surrenderor, and then by Conſequence the Birth of the Son between the Delivery and the Aſſent of the Surrendree, did deſtroy the Poſſibility of the Surrender, and no Relation of Time can make it good.

But Juſtice Ventris was of a contrary Opinion, (viz.) That the Law will intend an Aſſent in the Surrendree, becauſe the Surrender was for his Benefit; and that immediately upon the Delivery of the Deed, the Eſtate paſſed out of the Tenant for Life, and veſted in Sir Simon Leech, and that in ſuch Caſes the Eſtate doth not remain in the Surrenderor, until the Aſſent of the Surrendree, but paſſeth immediately, and veſteth in him until an actual Diſaſſent.

But the Judgment was affirmed by the whole Court of B. R. for the Reaſons ſupra.

The King, *&c. verſus Inhabitants of* Hornſey.

Preſentment upon View of a Juſtice of Peace, that a Way is out of Repair.

ONE Buck a Juſtice of Peace of Middleſex, preſented the Inhabitants of Hornſey, in the County of Middleſex, at the Quarter-Seſſions, upon his own View, for not repairing the Highways leading to Hornſey, which Preſentment being removed by Certiorari into B. R. the Defendants pleaded Not guilty, and the Cauſe was tried before Holt Chief Juſtice, at the Sittings in Middleſex, and the Jury found a ſpecial Verdict, (viz.) That the Way was out of Repair, but that it was not a Highway, but a private Way.

2 Lev. 112. Et per Holt Chief Juſtice, the Verdict is againſt the Defendants, becauſe they pleaded Not guilty, upon which Iſſue it cannot be given in Evidence, that 'tis no Highway, but that Matter ought to have been pleaded ſpecially.

And he held, that where a Juſtice of Peace preſents an Highway upon his View, to be out of Repair, there

there the Parties are eſtopped to plead, that it is in Repair.

But the other Judges were againſt him in both Points; for they held this Matter might be given in Evidence upon the general Iſſue, and that the Parties might traverſe the Non-Repairing, tho' the Preſentment was upon View; for that cannot be a greater Eſtoppel, than the Finding of a Grand Jury who are upon Oath.

But the whole Court agreed, and ſaid it was ſo adjudged by Hale Chief Juſtice, that if the Defendants plead ſpecially to ſuch a Preſentment, (viz.) that they ought not to repair it, they muſt likewiſe ſhew who ought to repair, or elſe the Plea will be ill. 1 Sid. 140.

Hawkins *verſus* Cook.

IN a Prohibition the Caſe was, Cook libelled in the Spiritual Court againſt Hawkins, for Defamatory Words ſpoken in London, (viz.) Thou hadſt a Baſtard after thy Husband's Death, and Sentence was given there againſt Hawkins, from which he appealed, and now moved for a Prohibition, ſuggeſting that the Words are actionable by the Cuſtom of London. Libel for ſcandalous Words ſpoken in *London.*

The Court doubted whether a Prohibition ſhould be granted after Sentence; and yet per Curiam, Cook notwithſtanding the Sentence may bring an Action in London for the ſame Words, to which the Sentence cannot be pleaded in Bar; and by this Means the Party may be doubly puniſhed for one and the ſame Thing; Curia adviſare vult. 2 Roll. Abr. 319.

Jones *verſus* Bew.

UPON a Trial at Bar on an Iſſue directed out of Chancery, the Caſe was; Office of a Commiſſary granted to two *conjunctim & diviſim*, good.

If. That the Predeceſſor of the preſent Biſhop of Landaffe, did by Deed grant the Office of Chancellor or Commiſſary of that Dioceſe unto one Loyd, and to Dr. Jones (the Plaintiff) to hold the ſame Conjunctim & diviſim to them, and to the Survivor of them.

It was agreed by the Counſel on both Sides, and made a Part of the Caſe, that this Office had been anciently and uſually

uſually granted to two conjunctim & diviſim, and to the Survivor of them, which appeared by ſeveral old Grants now produced at this Trial; and now Loyd being dead, Dr. Jones claimed this Office by Virtue of this Grant by Survivorſhip.

But Dr. Bew the preſent Biſhop of Landaff refuſed Jones, and granted this Office to his Son Mr. Bew, who was ſued by Jones, &c.

And the only Queſtion was, whether this (being a judicial Office) could be granted to two Conjunctim & diviſim.

After ſeveral Arguments, it was adjudged, that this was a good Grant, and the principal Reaſon of the Judgment was, becauſe of the long and conſtant Uſage, and the Offices of moſt of the Biſhopricks in England, are and have been conſtantly ſo granted, (viz.) to two Conjunctim & diviſim, &c.

The King *verſus* Warrington.

4 Mod. 65. S. C. 1 Salk. 144. S. C. Where there are two Sheriffs, and one a Party, the *Venire facias* may be directed to the other.

INformation againſt one of the Sheriffs of the City and County of Cheſter, where by their Charter they have two Sheriffs; upon Not guilty pleaded a Suggeſtion was made on the Roll, (viz.) that the Defendant is one of the Sheriffs of the City; and therefore prayed a Venire facias to be directed to his Companion the other Sheriff only, which was done, and he returned the Jury, and a Verdict was had againſt the Defendant.

And now it was moved in Arreſt of Judgment upon the Miſawarding the Venire facias, for that in this Caſe, it ought to have been directed to the Coroners, and not to the other Sheriff, becauſe thoſe two make but one Officer, and for this Purpoſe the Caſes in the * Margin were cited.

* Brownl. Brevia Judicial' 396.

2 Brownl. Ent. 44. 14 H. 4. 34. 10 H. 4. 9. Bro. Return. 42. 1 Roll. Abr. 492. 8 H. 6. 12. 1 Cro. 138. Stile 342. 36 H. 6. 1. 8 H. 6. 26. Plowd. 382.

But on the other Side it was ſaid, that in the Caſes of Bethell, Sheriff of London, againſt Harvey, and of Rich, Sheriff of London, againſt Player, the Venires were directed to the other Sheriff alone, (viz.) in the firſt Caſe, to Sheriff Corniſh alone, and in the other Caſe to Sheriff North alone, and the ſame Exception taken in both Caſes, but over-ruled.

And at another Day Paſch. 4 Will. it was adjudged by the whole Court, that the Venire facias was well awarded.

Judgment againſt the Defendants. Gum-

Gumble *verſus* Falkingham.

Modus as to the Tithes of a Water-mill.

IN a Prohibition the Caſe was, (viz.) Falkingham, Rector of H. libelled in the Conſiſtory-Court of the Biſhop of E. for Tithes of two Mills, the one a Water-mill and the other a Wind-mill, and this Demand was of predial Tithes, (viz.) The tenth Toll-diſh.

Gumble pleaded a Modus of 2 s. 6 d. as to the Water-mill; and as to the Wind-mill, if any Tithes ought to be paid, it ought to be perſonal Tithes, (viz.) The Tenth of the Profits, and not the tenth Toll-diſh.

Falkingham the Rector, by Way of additional Libel, as they call it, replies, that as to the Water-mill, Gumble had added a Pair of new Stones to that Mill, and by that Means the Modus was deſtroyed; and as to the Wind-mill, he replied, that by the Canon Law, and by the Law of this Land, it ought to pay predial, and not perſonal Tithes; and thereupon that Court proceeded againſt Gumble.

And now it was moved for a Prohibition, ſuggeſting a Modus as to the Water-mill, ut ſupra, and as to the Wind-mill, he ſet forth the Statute of Ed. 6. concerning Tithes, (viz.) That Tithes ought not to be demanded if not antiently paid, *&c.* and farther, that if any Tithes were due for a Mill, they are only perſonal Tithes out of the clear Profits of the Mill, and not the tenth Toll-diſh, as was demanded.

In the arguing this Caſe, two Queſtions were made:

(1.) Whether the Modus for the Water-mill was deſtroyed by the Addition of another Pair of Stones under the ſame Roof.

(2.) The other Queſtion upon which the great Doubt did ariſe was, what Kind of Tithes ought to be paid out of a titheable Mill; if only perſonal Tithes, (viz.) The Tenth of the clear Gain, or elſe predial Tithes, (viz.) The Tenth of all the Income in general.

And the Caſes in the * Margin were cited for the Prohibition, and for the Continuance of the Modus.

* 2 Roll. Abr. 652. 12 Rep. 36.

1 Roll. Abr. 641, 652, 656. 4 Rep. Lutterell's *Caſe*. Contra Sir Tho. Pope's *Caſe*. F.N.B. 51. H. 2 Roll. Rep. 84. 1 Roll. Rep. 405. 2 Inſt. 490, 621, 652. 2 Cro. 429. 1 Brownl. 31.

Et

Et per Curiam, the Modus is not deſtroyed by the Addition of the new Pair of Stones; but as to the other Matter they doubted, and therefore a Prohibition was granted generally, on Purpoſe that the Point may come before them upon a Declaration and Demurrer to it, ſo that the Matter might receive a ſolemn Determination by the Court.

Mallacke qui tam, &c. *verſus* Speering.

Debt upon the Statute for ſelling Wine without Licenſe.

DEBT upon the Statute 12 Car. cap. 25. for ſelling Wine without a Licenſe; the Plaintiff began his Declaration by Way of Recital.

* *Quod cum* in an Action of Aſſault and Battery is ill, and Judgment reverſed. 2 Lev. 206.

ſſ. Pro eo videlicet * quod cum the Defendant at ſeveral Times, between ſuch a Day and ſuch a Day, had ſold Wines by Retail by the Pint, to Perſons unknown, (viz.) ſix Pints of Port and ſix Pints of Claret, &c. all which Wine was ſold to be drank and conſumed in the Defendant's Houſe, he (the Defendant) for all that Time being not authoriſed or enabled in the Manner and Form as the Statute in that Caſe made doth preſcribe and appoint, contra formam Statuti, per quod actio accrevit, &c.

Where the Declaration is not poſitive, but by Way of Recital *Quod cum*, &c.

Upon the general Iſſue pleaded, there was a Verdict for the Plaintiff; and now it was moved in Arreſt of Judgment, that the Declaration is not poſitive, but by Way of Recital only, and ſo doth not directly charge the Defendant with the Crime intended.

Sed per Curiam, The Plaintiff had Judgment, for all the Precedents in the like Caſes are after this Manner, as in Debt upon the Statute of Tithes, &c.

Inducement to the Action.

Moreover, This is an Action of Debt wherein the Offence is only an Inducement to the Action; for 'tis the Non-payment of the Penalty which is the original Cauſe.

†Co. Ent. 161. 2 Cro. 362, 437. 2 Saund. 319.

So in a Declaration on a Bond it was quod cum the Defendant bound himſelf; and for this the Precedents in the † Margin were cited.

Jefferies *verſus* Legendra.

3 Lev. 320. S. C. 4 Mod. 58. S. C. 2 Salk. 443. S. C.

CASE, &c. upon a Policy of Aſſurance, wherein all the Words were in the uſual Form, excepting only in the Concluſion theſe Words were added:

ff. The Ship warranted to depart with Convoy.

Upon the general Iſſue pleaded, the Jury found a ſpecial Verdict, (viz.) That the Ship did depart from the Port of London (which was the Place from which ſhe ſet out) in Company of the Convoy intended, and ſailed together with the Convoy as far as the Iſle of Wight, in Purſuance of her Voyage towards Cadiz; and there they were ſeparated by Streſs of Weather, that the Convoy put into Torbay, and the inſured Ship into the Port of Fowey in Cornwall; that three Days afterwards the Wind ſetting Right to bring the Convoy down the River, the Maſter of the inſured Ship ſailed out of Fowey on Purpoſe to meet the Convoy, but it did not come; and then the inſured Ship was ſeiſed with another Storm, ſo that ſhe could not return from whence ſhe came, but was driven upon the French Coaſt, and there taken by the Enemy, &c. Special Verdict in an Action on the Caſe on a Policy of Aſſurance.

After ſeveral Arguments of this ſpecial Verdict, the Plaintiff had Judgment per totam Curiam, and their principal Reaſon was, becauſe there was no Manner of Negleſt, or other Default found in the Maſter of the Ship; but it appeared he had done all his Power to keep Company with the Convoy; and 'tis expreſly found, that he departed with Convoy from his firſt Port, which anſwers the Words of the Policy; but it would have been otherwiſe if any Fraud or Neglect had been found in the Maſter of the inſured Ship after his Departure, notwithſtanding he departed out of the firſt Port with Convoy; for the Meaning of the Words (warranted to depart with Convoy) are, that the inſured Ship ſhould keep Company with the Convoy, the whole Voyage, if poſſible.

Sir James Smith's *Caſe*.

MAndamus to reſtore him to the Place of Alderman of the City of London; upon the Return thereof Serjeant Pemberton thus argued for him: *Mandamus* to reſtore him to the Place of Alderman of the City of *London*.

ff. That a Corporation is an artificial Body compoſed of divers conſtituent Members ad inſtar Corporis humani, and that the Ligaments of this Body politick or artificial Body, are the Franchiſes and Liberties thereof, which bind and unite all its Members together, and the whole Frame and Eſſence of the Corporation conſiſt therein; and when a Quo warranto is brought againſt a Corpora- The Definition of a Corporation

tion, the Writ calls it a Franchiſe, which it is very properly.

2 Ed. 4. 5, 6. That every Grant of a Franchiſe hath a Condition tacitly annexed to it by Law, the Breach of which Condition will abſolutely determine the Grant.

That there are ſeveral Judgments in Quo warranto, and this appears in the Books cited in the * Margin on ſeveral Occaſions.

* 2 Ed. 3. 28. 15 Ed. 4. 7. 2 Inſt. 282. Yelv. 190. Co. Ent. 527.

That a Judgment in a Quo warranto quod capiantur amounts to the ſame Thing as a Judgment quod capiuntur in the Indicative Mood, like the Judgment in Debt quod recuperet, which is the ſame with quod recuperat, which appears by the Form of the Entries, and by the Caſes cited in the † Margin.

† Raſt. Ent. 54. Co. Ent. 538, 559. 9 Rep. 98. 15 Ed. 4. 7. Ryley 277. Maynard's Ed. 2. 16, 24.

And that by the Judgment againſt the Corporation, (viz.) That it be ſeiſed into the King's Hands, the Body politick is diſſolved.

This is only Part of the Argument of the Serjeant; cætera deſiderantur.

DE

Term. Paſchæ.

4 Will. & Mariæ B. R.

Bruges *verſus* Searle, & al'.

IN Treſpaſs for impounding his Sheep, the Defendant juſtified Damage-feaſant in his Freehold.

The Plaintiff replies, and preſcribes for Common of Paſture in the Place where, &c. for all his Sheep Levant and Couchant on his Tenement in Edisborough as appurtenant to his ſaid Tenement. Preſcription for Common of Paſture for Sheep, good.

And Iſſue being taken upon the Preſcription, there was a ſpecial Verdict to this Effect, (viz.) That the Plaintiff had Common of Paſture there, for all his Sheep prout (the Plaintiff) interius placitando allegavit ſed iidem Juratores ulterius dicunt, that the Plaintiff hath Common there as well for all other Cattle Levant and Couchant on his Tenement, as for Sheep, as appurtenant to his ſaid Tenement, &c.

The Queſtion was, Whether the Plaintiff had not failed in his Preſcription for Common of Sheep only, when he had Common for all other Cattle likewiſe, for a Preſcription is an entire Thing, and cannot be divided, as the Plaintiff hath done in this Caſe.

But per Curiam, this is a general Verdict for the Plaintiff, becauſe the Jury have found, that the Plaintiff had Common, &c. prout allegavit, and all the Matter found afterwards is Surpluſage and void. 2 Lev. 253. 3 Cro. 722.

Nevertheleſs as to the Doubt intended, the Court being willing to ſettle it, delivered their Opinion, (viz.) that upon the whole Matter, the Verdict was found for the Plaintiff, for that the Action was only for impounding Sheep; and therefore the Plaintiff might well abridge his Preſcription as to them only, ſince nothing elſe was in Diſpute; and the finding that he had Common for other Cattle, doth not falſify his Preſcription, but ſtands well with it.

1 Brownl. 177. Thorogood *ver.* Johnſon.

The Plaintiff had Judgment.

The King *verſus* James *and* Thomas.

The Copies of *Affidavits* taken before a Commiſſioner are good Evidence to prove a Perjury, without the Commiſſioner being preſent at the Aſſiſes.

INformation againſt the Defendants for Perjury, for that they ſwore by Affidavits filed on Record in the Common Pleas, and taken before the Commiſſioners in the Country, that they were never arreſted at the Suit of T. S. who had brought an Action againſt them in that Court, and had Judgment by Default, and a Writ of Inquiry executed, all which they ſet aſide upon the ſaid Affidavits.

At the Aſſiſes before Juſtice Eyre in the Oxford Circuit, the Copies of theſe Affidavits were proved to be examined by the Originals on the File, and were produced in Evidence by the Proſecutor.

Againſt which it was objected, that it was no Evidence, unleſs the Commiſſioner who gave the Oath was preſent to prove that the Defendants were the ſame Perſons who made Affidavit before him; and thereupon this Queſtion was adjourned for the Opinion of the Court.

Et per totam Curiam, the Copies ſupra are Evidence ſufficient without the Commiſſioner who adminiſtred the Oath, for otherwiſe ſuch a Perjury might be unpuniſhable.

Ferrers *verſus* Miller. Hill. 3 W. & M. B. R. Rot. 693.

1 Salk. 217. In Ejectment and ancient Demeſne, pleaded, the Defendant need not ſay *defendit vim & injuriam.*

IN Ejectment, &c. the Defendant pleaded that the Lands in the Declaration, &c. are ancient Demeſne, in this Form.

ff. Et præd' (the Defendant) per T. S. attorn' ſuum venit & dicit quod tent' prædict' cum pertin' tenentur de T. C. ut de manerio ſuo de A. in Com' præd' quod quidem maneri-

um eſt & a tempore cujus contrarium memoria hominum non exiſtit fuit de antiquo dominico coronæ Dom' Reg' quodq; tent' præd' cum pertinentiis a toto tempore ſupradicto placitat' & placitabilia fuerunt per parvum breve Dom' Regis de Recto in curia manerii præd' & non alibi, &c. & hoc, &c. 1 Brownl. 57.

The Plaintiff demurred ſpecially, for that the Defendant had not made himſelf a Party to the Suit, which he ought to do by adding the Clauſe (defend' vim & injuriam ſuam) and relied on Littleton, Sect. 199. 1 Inſt. 127. and Brownl. Tit. defence.

Note; the Word quando muſt always be left out.

But per three Judges, the Plea is well without defendit vim & injuriam, for it is to the Juriſdiction of the Court, and moſt of the Precedents are ſo, without making any Defence, and ſo is the Record of * Alden's Caſe. * 5 Rep.

Sed per Holt Ch. Juſtice, the Plaintiff is not obliged to take the Plea without the Defence, as in the Caſe where an Outlawry is pleaded in Non-ability, the Plaintiff may refuſe the Plea, unleſs Proceſs is annexed; but having accepted it, he cannot afterwards demur for that Cauſe.

Judgment for the Defendant.

The King *verſus Inhabitants of* Colliton.

UPON a Certiorari to remove an Order, it appeared to be thus: Exceptions to an Order of Seſſions for ſettling a poor Man.

1ſt. Two Juſtices of Peace, &c. reciting, that upon hearing the Pariſhioners of Honiton, Axmiſter and Colliton concerning the laſt Settlement of one Hurley (then reſiding in Honiton) it appeared to them, that the ſaid Hurley was laſt legally ſettled at Axmiſter; therefore they order him to be removed thither, from which Order Axmiſter appealed to the Quarter-Seſſions, where the Order was repealed, and the Seſſions farther ordered, that the ſaid Hurley ſhould be removed to Colliton as being legally ſettled there; but their Order did not recite, that Colliton was heard upon the Appeal.

And now it was moved to quaſh the laſt Part of this Order of Seſſions, firſt becauſe it was an original Order as to Colliton, and ſo they are deprived of an Appeal which is given by the Statute; and the Seſſions ought only to have vacated the firſt Order, and not to have any Order on Colliton; for by this Means Colliton is charged without any Remedy, notwithſtanding they could make it appear, that Hurley That it was an original Order.

Hurley had a later Settlement in any other Pariſh whatſoever, for that this Order of Seſſions is poſitive upon them.

Sed non allocatur; becauſe it appears, that Colliton was a Party to the firſt Order made by the two Juſtices, and ſo by Conſequence to the Appeal; wherefore the Seſſions might well ſettle him upon them, becauſe by the Appeal Colliton was before the Seſſions; ſecus if Colliton had not been a Party to the original Order, but mere Strangers; for then the Seſſions could not charge them as not being before the Court.

That it did not appear, that the Man was likely to be chargeable.

(2.) The next Exception was, that it did not appear by either of the Orders, that Hurley was likely to be chargeable to the Pariſh.

Sed non allocatur; for this is an Order of Seſſions grounded on a Complaint concerning a Settlement by another Order, and thereby it ſhall be intended, that Hurley was likely to be chargeable, becauſe of the Controverſy between the Pariſhes; but 'tis otherwiſe in an original Order, for there it muſt appear, that the Party was likely to be chargeable; but here the original Order was vacated, therefore it cannot concern Colliton.

That the Caption of the Order was not returned.

(3.) The next Exception was, That there was no Caption of this Order returned, for that here was only the Stile of the Seſſions on the Top, but it was not ſaid, that ordinatum fuit prout ſequitur, &c. but the Order was diſtinct without Relation to the Stile.

That it was ſaid, *ad Quarterialem Seſſionem.*

Sed non allocatur, but held to be well enough.

(4.) The fourth Exception was, that the Stile was ad generalem Seſſionem, &c. but did not ſay Quarterialem, and the Statute is expreſs, directing the Appeal before the Juſtices at their Quarter Seſſions; and this being a new Law, and a new Juriſdiction, ought to be literally purſued.

And Holt Chief Juſtice was of that Opinion, and two Juſtices contra; therefore it was adjourned to ſearch for Precedents, and upon Search, they were found to be both Ways, and almoſt equally in Number.

The King *verſus Inhabitants of* Hartfield.

Upon an Order of two Juſtices to remove a poor Man, he may appeal to the Seſſions as well as the Pariſh.

TWO Juſtices of Peace made an Order to remove Nicholas Wells from the Pariſh of Hartfield to the Pariſh of Framfield, from which Order Wells the Party himſelf,

ſelf, and not the Pariſh, appealed; and thereupon the Seſſions made an Order to return him to the Pariſh of Hartfield, from whence he was removed; but they did not by any expreſs Words vacate the firſt Order.

It was now objected, that the Party himſelf cannot appeal, becauſe the Appeal is given only to the Pariſh aggrieved, and not to the Party removed.

Sed non allocatur; for per totam Curiam, the Party may appeal as well as the Pariſh.

(2.) The next Exception was, that this is an original Order of Seſſions; and beſides, it doth not vacate the firſt Order, for the Seſſions is only to vacate or affirm the firſt Order, and not to make a new Order:

And Holt Ch. Juſtice was of that Opinion, but two Judges againſt him, for that the Seſſions Order doth vacate the Order of the two Juſtices by Implication, becauſe it orders the contrary, and that is ſufficient in this Caſe; and upon their Opinion the Order was confirmed.

The Seſſions Order doth vacate the Order of two Juſtices by Implication.

The King *verſus* Berry.

INdictment upon the Statute 5 Eliz. for exerciſing a Trade in a Borough, not being bound Apprentice to it; and upon a Certiorari to remove it into B. R. the Mayor made this Return, (viz.) Humillime certifico quod ad Seſſionem pacis, &c. per juratores præſentatum exiſtit quod billa ſequens eſt vera, (viz.) Quod prædict. Berry did exercise, &c. omitting the Clauſe Juratores pro Domino Rege præſentant quod, &c.

Return of a *Certiorari* to remove an Indictment for exerciſing a Trade, not being bound Apprentice, not good.

The firſt Exception was, that Billa ſequens eſt vera is naught; ſed non allocatur as to that Part of the Return.

(2.) Exception was, that here is no Bill at all; for 'tis not ſaid that it was preſented by the Jury.

Sed per Curiam, this is no Return to the Certiorari, for the Writ commands to return an Indictment; but this is none, therefore they could not quaſh it, neither would they ſuffer this Return to be filed, becauſe it was inſufficient, wherefore the Mayor was ordered to amend the Return: Et per Curiam, a Return quod humillime certifico, is not good.

Jones

Jones *verſus* Hill. Trin. 1 Will. in C. B. *in* Winford's *Office.*

3 Lev. 206. Caſe by a Vicar for Dilapidations, good.

ACtion on the Caſe by the Succeſſor of a Vicar brought againſt his Predeceſſor for Dilapidations, who by Taking a ſecond Benefice with Cure, &c. had loſt this Vicarage; upon Not guilty pleaded, the Plaintiff had a Verdict; and it was now moved in Arreſt of Judgment, that this Action would not lie, but that the proper Remedy was in the Spiritual Court.

Godolp. 173, 249. 3 Bulſt. 91, 92, 153. 2 Bulſt. 227.

But after a long Debate the Plaintiff had Judgment; theſe Caſes in the Margin were cited. 11 Rep. 49, 72. Trin. 12 H. 7. Rot. 69. Paſ. 13 H. 8. Rot. 126. Hill. 15 H. 8. Rot. 306. Hill. 15 Jac. Rot. 474.

Furſden *verſus* Moor. Hill. 3 Will. & Mar. B. R. Rot. 364.

2 Vent. 214. The Report of this Caſe in C. B.

WRIT of Error on a Judgment in Ejectment in C. B. the Caſe was thus:

In Ejectment upon two Demiſes and one *Habendum*, good, *reddendo ſingula ſingulis.*

ſi. In Ejectment the Plaintiff declared upon two Demiſes of ſeveral Lands by ſeveral Parties, but laid only one Habendum, (viz.) Habendum tenementa prædicta, ſo demiſed by the aforeſaid ſeveral Parties for ſeven Years; and ſays in his Declaration, that the Defendant entered into all the aforeſaid Tenements, & ipſum (the Plaintiff) a firma ſua prædicta (in the ſingular Number) ejecit expulit & amovit.

The Error aſſigned was, that the Declaration was ill for Want of another Habendum, for that the Verdict is general; and 'tis incertain to which Demiſe this ſingle habendum relates.

But per Curiam 'tis well enough, reddendo ſingula ſingulis.

Laver *verſus* Hobbs.

Where the Plaintiff ſhall have full Coſts, where not, the Damages being under 40 *s.*

TReſpaſs, &c. Herbam depaſcendo & ſolum & fundum carucis ſubvertend. & in ſolo fodendo & cum terra inde project. aquæ curſum ſuum obſtupand. per quod clauſum ſuum inundat. fuit, &c.

Upon Not guilty pleaded, the Plaintiff had a Verdict and 2 d. Damages; and the Secondary refuſing to tax any Coſts more than the Damages, it was now moved, that the Plaintiff might have full Coſts, as in other Caſes.

Et per Curiam, Upon View of the * Statute, the Plaintiff ſhall not have full Coſts in this Caſe, for that it was within the very Words of the reſtraining Clauſe, which allows no more Coſts than Damages, if the Damages are under 40 s. quod nota.

*22,23 Car. 2. cap. 9. per 149. Cro. Car. 163, 307.

But in the Caſe of Colethurſt and Hayes. Hill. 5 Will. B. R. Rot. 374. which was Treſpaſs for Chaſing his Sheep, and that he (the Defendant) ad loca ignota eos abduxit & elongavit; after a Verdict for the Plaintiff and 2 d. Damages, he had his full Coſts upon a Motion, principally upon the Word Abduxit, which is the ſame in Signification with Aſportavit.

And ſee Raym. 487. Treſpaſs for throwing down Stalls in a Market, full Coſts per Curiam, tho' the Damages were under 40 s.

Jones *verſus* Bow.

UPON a Trial at Bar in Ejectment, the ſole Queſtion was, if Sir Robert Carr was actually married to Iſabella Jones, by whom he had Iſſue, and under whom the Plaintiff claims.

The Plaintiff was not allowed to prove a Marriage, there being a Sentence in the Spiritual Court, that the Parties were not married, and the Temporal Courts will give Credit to ſuch Sentence whilſt it ſtands in Force.

The Defendant, by Way of Anticipation to the Evidence, which the Plaintiff was about to give, moved the Court, that the Plaintiff ought not to be allowed to prove a Marriage between them, becauſe there was a Sentence in the Arches, upon a Suit brought againſt her cauſa jactationis maritagii; by which it was decreed, that there was no Marriage between them, but that they were free one of another, and that they might marry ſeparately, which they afterwards did.

And this Sentence was now offered in Evidence by the Defendant's Counſel, as a Bar to conclude the Plaintiff from any Proof of the Marriage, unleſs he could ſhew that the ſame was repealed.

And upon Debate the Court were all of Opinion, that this Sentence, whilſt unrepealed, was concluſive againſt all Matters precedent, and that the Temporal Courts muſt

give Credit to it until 'tis reverſed, it being a Matter of meer Spiritual Conuſance.

And hereupon the Plaintiff was nonſuit.

Chevely *verſus* Bond. Hill. 1 Will. & Mar. B. R. Rot. 307.

4 Mod. 105. Statute of Limitations pleaded to an Action on a Bill of Exchange brought againſt the Drawer.

ACtion on the Caſe on a Bill of Exchange brought againſt the Drawer; the Defendant pleaded, that the Cauſe of Action did not accrue at any Time within ſix Years ante exhibitionem Billæ.

The Plaintiff replied, that he and the Defendant are and were Merchants, and that this Bill of Exchange was upon Account between them, concerning Merchandiſe; and farther, that the Defendant was beyond Sea, (viz.) In Barbadoes, for all the Time after the Cauſe of Action accrewed, until ſuch a Day when he returned, and that he commenced his Action within two Years after he returned to England.

There was a frivolous Reſoinder and Surrejoinder, and thereupon a Demurrer; and in this Caſe it was adjudged as followeth:

*21 Jac. c. 16. Antea Renew v. Axton, the like Judgment.

First, That Bills of Exchange for Value received are not ſuch Matters of Account as are intended by the Exception in the * Statute of Limitations.

Mod. Rep. 70. 71, 269, 270. 1 Sid. 465.

(2.) That by the Exception in the Statute concerning Merchants Accounts, no other Actions are excepted but Actions of Accounts.

See Cro. Car. 334. *See* Hall *v.* Wibank antea.

(3.) That the Defendant's being beyond Sea was no Excuſe, becauſe the Plaintiff might have filed an Original againſt him, or taken out a Latitat. See the Statute 4 & 5 Annæ.

The King *verſus* Roberts.

In an Information, the Offences muſt not be accumulated, but a ſingle Offence ought to be laid and made certain.

IN an Information againſt Roberts the Ferry-man, over the River Mency, which parts Angleſea from Carnarvonſhire in Wales; it was laid generally, (viz.) That this was an antient Ferry Time out of Mind, and that 1 d. was the uſual Rate for the Paſſage of a Man and Horſe, 7 d. for 20 Cattle, 2 d. for 20 Sheep, &c. and that Roberts being the common Ferry-man between 7 Septembris,

Anno 2. and the Day of exhibiting this Information, injuſte oppreſſive & deceptive cepit & extorſit de diverſis ligeis & ſubditis Domini Regis ignotis to the Attorney General, paſſing that Way, diverſas denariorum ſummas exceden' antiquam Ratam & pretium pro paſſagio & tranſportatione ſuis & averiorum ſuorum, videl't, pro paſſagio & tranſportatione cujuſlibet perſonæ cum equo ſuo 2 d. & pro quibuſlibet 20 Catallis 2 s. & ſic ſecund' ratam prædict' pro majori vel minori numero averiorum, &c. 2 Roll. Abr. 88. 1 Cro. 314. 2 Cro. 365, 609. 1 Lev. 38. *were cited for the Proſecutor.*

Upon Not guilty pleaded the Defendant was found guilty, and now it was moved in Arreſt of Judgment, that the Information was too general and incertain, becauſe it did not alledge, that any particular Perſon, or any certain Number of Cattle were ferried over within the Time laid in the Information, neither did it mention any particular Perſon from whom the extorted Rates were taken, which it ought to do, that the ſingle Offence might certainly appear before the Court. 1 Cro. 380. 2 Leon. 38, 39.

And after great Deliberation, the whole Court was of that Opinion; and per Holt Chief Juſtice, in every ſuch Information, a ſingle Offence ought to be laid and aſcertained, becauſe every Extortion from every particular Perſon is a ſeparate and diſtinct Offence; and therefore they ought not to be accumulated under a general Charge, as 'tis done in this Caſe, becauſe each Offence requires a ſeparate and diſtinct Puniſhment according to the Quantity of the Offence; and 'tis not poſſible for the Court to proportion the Fine or other Puniſhment to it, unleſs 'tis ſingly and certainly laid. 1 Cro. 438. 1 Sid. 91.

'Tis true all Informations of the Exchequer are general as this is, but the Reaſon is, becauſe they are for certain Penalties.

Judgment was arreſted.

Vaughan *verſus* Lewis.

THIS was a ſpecial Action on the Caſe, brought againſt the Defendant for a falſe Return of a Mandamus, for admitting and ſwearing the Plaintiff Bailiff of New Radnor in Wales; in which the Plaintiff declared, that the Borough of New Radnor was an ancient Borough Time out of Mind, and that he (the Plaintiff) on the firſt Day of October, Anno 3 W. & M. was, according to Objection to the Return of a *Mandamus* to admit and ſwear the Plaintiff Bailiff of a Corporation.

the Cuſtom there uſed, choſen Bailiff of the ſaid Borough; then he ſets forth the Mandamus directed to the Bailiff, Aldermen and Burgeſſes of the ſaid Borough, and avers, that the Defendant was at that Time an Alderman, and that it belonged to him to ſwear the Plaintiff; but that he (the Defendant) in nomine of the Bailiff, Aldermen and Burgeſſes of the ſaid Borough, cauſed a falſe Return to be made thereto, (viz.) That the Plaintiff was never elected Bailiff, ubi revera, &c. per quod, &c.

This Cauſe was tried before Holt Chief Juſtice, at the Sittings in Middleſex, and at the Trial, the following Objections were made by the Counſel for the Defendant.

(1.) It appeared by the Charter produced, That this was no Borough Time out of Mind, as 'tis laid in the Declaration; for the Charter was granted by Queen Elizabeth, and they were incorporated thereby by the Name of Bailiff, Aldermen and Burgeſſes, which was a new Name then given; ſo that the Plaintiff cannot be choſen according to Cuſtom Time out of Mind, as he hath alledged.

Sed non allocatur; for the Charter recites, That this was an ancient Borough, and for ought appears the Charter is but a Confirmation, and not a Deſtruction of their ancient Cuſtoms.

(2.) The next Objection was, That it appeared upon the Evidence, that the Plaintiff was choſen 29 7ber Anno 3. and not upon the firſt Day of October, as 'tis alledged in the Declaration; and 'tis laid, that he was elected ſecundum conſuetudinem on the firſt Day of October, which is not ſo, becauſe the Cuſtom to chooſe, &c. is upon the 29 Day of 7ber, and ſo the Plaintiff hath failed in the Cuſtom, for the Day is Parcel thereof.

Sed non allocatur; becauſe the Day is not material, for that the Plaintiff hath proved himſelf to be choſen upon the cuſtomary Day, (viz.) 29 7ber; ſo the Day in the Declaration is but Form, and being laid before the Action brought 'tis well enough; but it had been otherwiſe, if the Plaintiff had laid the right Day in his Declaration, and had proved himſelf choſen upon a wrong Day, for there he would have failed of the Cuſtom; but here he hath proved himſelf duely choſen before the Action brought; ſo that there is a Difference where the Election is wrong, but the Day laid Right, and where the Election is Right, and the Day laid Wrong.

(3.) The next Objection was, (viz.) It was alledged, that the Defendant cauſed the falſe Return to be made in nomine of the Bailiff, Aldermen, &c. but the Defendant proved, that it was by Conſent of ſix other of the Corporation; therefore the Action ought to be joint, and not ſeveral.

Sed non allocatur; becauſe he could not prove that this Conſent was in a legal Common Council, or that others of the Corporation were ſummoned thereto.

Then the Plaintiff was put to prove that the Defendant cauſed the Return to be made, which he did in this Manner, (viz.) He proved that the Defendant was perſonally ſerved with an Alias mandamus; and that he told the Perſon who ſerved him with that Writ, that he would take Care a Return ſhould be made; and farther two Rules of Court were produced, (viz.) one for an Attachment againſt the Defendant for not making a Return, and the other to diſcharge that Rule for an Attachment upon Payment of Coſts, and appearing to the Action, &c.

And this was admitted to be good Proof as to that Matter, and the Plaintiff had a Verdict.

But there was the following Clauſe in this Charter, (viz.) That any Officer in futuro to be choſen, &c. non diutius remanebit in officio, &c. quam infra burgum præd' vel libertat' & franchefias inde cum tota familia inhabitabit, &c. and it appearing, that the Plaintiff, when he was choſen one of the Common Council, (out of which the Bailiff muſt be choſen) was a Foreigner, it was pretended, that his Office of Common Council-Man was void by this Clauſe, and ſo not qualified to be elected Bailiff.

This Matter was reſerved and referred to the Opinion of Holt Chief Juſtice, who declared his Opinion was for the Plaintiff, and that this Clauſe was declaratory of the Common Law; and that the not inhabiting infra the Borough, &c. was a good Cauſe to remove a Member; but that it did not ipſo facto determine his Office without an actual Amoval; and moreover, that the Defendant ought to have returned this ſpecial Matter, and not as he had done, (viz.) nunquam fuit electus.

Not dwelling within a Borough, is a good Cauſe to remove a Man, but it doth not determine his Office.

Jentreer *verſus* Jenkins.

IN an Action of Treſpaſs, &c. the Defendant after full Defence made, (viz.) Venit & defendit vim & injuriam quando, &c. pleaded that the Plaintiff was an Alien, &c. And

Where the Defendant *venit & defendit vim & injuriam*, and muſt omit *quando, &c.*

And upon a Demurrer to this Plea, it was held ill, becauſe the Defendant after he had made a full Defence by the Words quando, &c. cannot plead in Diſability, that the Plaintiff is an Alien born, &c. but that in ſuch Caſe he ought to go no farther in his Defence than venit & defendit vim & injur', omitting Quando, becauſe by that Word the Defendant hath admitted, that the Plaintiff hath a Capacity to ſue; and to prove this Matter, the Caſes in the * Margin were cited.

* Litt. Sect. 195. 1 Inſt. 127. *b.* Bro. *Defence* 217. Raſt. Ent. 252. *b.*

Bridges *verſus* Horner.

In Treſpaſs with a *Continuando*, where 'tis well laid.

TReſpaſs, &c. upon Not guilty pleaded, there was a Verdict for the Plaintiff; and it was moved in Arreſt of Judgment, that the Declaration was ill; for it was for erecting and continuing 300 Perches of Stone Wall on the Soil of the Plaintiff, 2 April' Anno 2 W. & M. tranſgreſſion' præd' quoad continuation' muri præd' a 20 die Februarii Anno primo W. & M. uſq; diem exhibitionis Billæ continuando, ſo that the Continuance is laid for one Year before the Commencement of the Treſpaſs, and entire Damages being given, all is void.

Sed non allocatur; for this Continuando being for a Time before the Commencement of the Treſpaſs, is ſenſleſs and void, and it cannot be intended, that any Damages were given for that Matter, which in its ſelf is void; therefore the Plaintiff had Judgment.

The Corporation of Plymouth *verſus* Collings.

In Debt for a certain Penalty, the Plaintiff ſhall have Coſts.

DEBT for a Penalty of twenty Pounds, brought by the Corporation qui tam, &c. upon a private Act of Parliament concerning the New River Water brought to Plymouth; the Action was brought againſt Collings for diverting the Water-courſe contrary to the Statute.

9 H. 6. 66. *b.* 14 H. 6. 13. Cro. Car. 559. 10 Rep. 115. 2 Cro. 70. Co. Ent. 163, 164. 3 Lev. 374.

Upon nil debet pleaded, the Plaintiffs had a Verdict at the Aſſiſes; and the Queſtion now was, Whether they ſhould have Coſts upon a Recovery on this new and penal Statute; and after Deliberation it was held per totam Curiam, the Plaintiffs ſhall have Coſts, becauſe here was a certain Penalty given to certain Perſons, and ſo within the Rule

Rule for Coſts; but 'tis otherwiſe where the Penalty is incertain, or where 'tis given to a common Informer; and ſo it was adjudged upon a Recovery on a private Act of Parliament between the * Corporation of Cutlers and Ruſlin, that the Plaintiffs ſhould have Coſts, becauſe the Penalty was given to a certain Perſon; but 'tis otherwiſe where given to an Informer.

* Mich. 5 Willi. B. R.

Pett *verſus Inhabitants of* Wingfeild.

Whether the Juſtices have Power to place an Apprentice with the Executor of his Maſter.

UPON a Certiorari to remove an Order of Seſſions, the Caſe appeared to be thus, (viz.) A. B. was bound Apprentice to T. S. according to the Statute, who died within the Term, and having made his Laſt Will, did thereby conſtitute Pett to be his Executor, who refuſed to receive this Apprentice, and thereupon the Seſſions made an Order upon Pett, to take and receive the Apprentice, and to maintain him for the Reſidue of the Term.

1 Sid. 216.

The Queſtion was, Whether the Juſtices of Peace have any ſuch Power as to compel an Executor to provide for the Apprentice of his Teſtator, when it doth not appear that he had Aſſets, and in Caſe of an Order (as this is) the Executor hath no Remedy; but if it had been in the Caſe of Covenant, there the Executor might have pleaded Plene adminiſtravit, and ſo helped himſelf.

And the Court inclined againſt the Power of the Juſtices; ſed adjournatur.

The King *verſus* Rogers.

Upon a Conviction for Deer-ſtealing, the Execution ſhall be by *Fieri facias.*

CONviction before a Juſtice of Peace upon the Statute againſt Deer-ſtealing, removed into B. R. by Certiorari, and confirmed by the Court; and now it was moved for Execution againſt Rogers upon this Conviction, and he had it by a Fieri facias; and if the Sheriff ſhould return nulla Bona, then a Capias againſt the Body; quod nota; and ſee the Statute 13 Car. 2. cap. 10.

Buſh

Buſh *verſus* Coles.

Where an Exception in a Leaſe ſhall amount to a Reſervation.

COvenant againſt the Aſſignee of the Leſſee upon an Indenture, by which the Plaintiff demiſed a certain Meſſuage to the Leſſee for ſo many Years (excepting ſuch a Room), with free Liberty of Paſſage, Ingreſs, Egreſs and Regreſs, thro' ſuch other Rooms of the demiſed Premiſſes, unto the Room excepted, &c.

The Leſſee aſſigned the Premiſſes, &c. and the Aſſignee ſtopp'd the Paſſage, &c. and this was aſſigned for Breach of the Covenant.

And after Argument it was reſolved per totam Curiam, that this Exception amounted to a Reſervation, it being a Thing newly created, and not in eſſe before, (viz.) a Way or Paſſage.

Now upon a Reſervation an Action of Covenant will lie, as where Rent is reſerved Covenant will lie upon the Words of Reſervation, without any expreſs Words of Covenant.

Cro. Eliz. 657. Moor 553.

The Plaintiff had Judgment.

Chapman *verſus* Derby. Hill. 3 Will. & Mar. B. R. Rot. 156.

Aſſumpſit, and the Promiſe well laid.

ERROR of a Judgment in C. B. in an Aſſumpſit, wherein the Plaintiff declared as Adminiſtrator to T. S. and ſets forth, that the Defendant Indebitatus fuit eidem (the Plaintiff) in ſo much Money, by him (the Defendant) received to the Plaintiff's Uſe, as Adminiſtrator of T. S. and objected, that the Promiſe was ill laid.

2 Saund. 207. *See* poſtea Curry *verſus* Stephenſon. S. P.

Sed non allocatur; ſo the Judgment was affirmed.

Culliford *verſus* Blandford.

* 23 H. 6. cap. 15. Action upon the Statute for a falſe Return of a Member of Parliament.

THIS was an Action upon the Statute * 23 H. 6. brought againſt the Mayor of Dorcheſter, for a falſe Return of Sir Robert Rapier to be a Burgeſs for that Place, whereas Mr. Trenchard was duly elected to ſerve in Parliament.

The Action was brought in B. R. by Bill, by a common Informer qui tam, &c. for the Penalty of 40 l. after the Time given by the Statute to the Party choſen, and not returned, was elapſed.

And at the Trial at the Niſi prius, a Caſe was made and ſtated for the Opinion of the Court of B. R. by which it appeared, that this Return was made 3 March, Anno 2 Willi. and that the Bill was not filed within a Year after the Return; but that the Latitat, which was the Proceſs on which the Defendant appeared, was ſued out within the Year after the Offence committed; and hereupon two Queſtions were made.

(1.) If this Informer, to whom all the Penalty is given by the ſaid Statute 23 H. 6. is ſuch an Informer as is intended by the Statute * 31 Eliz. which reſtrains Informers to exhibit their Actions within a certain Time, (viz.) where the Penalty is given to the King, then it muſt be brought within two Years; and if to the King and Party, then it muſt be brought within one Year after the Offence committed. * 31 Eliz. cap. 5.

(2.) If he ſhould be taken to be an Informer within the Statute 31 Eliz. then whether the Suing out a Latitat within the Year is a ſufficient Commencement of the Action within the Meaning and Proviſo of that Statute.

And as to the firſt Queſtion, Juſtice G. Eyre was clear of Opinion, that this was Caſus omiſſus out of the Statute 31 Eliz. becauſe here the Penalty was given neither to the King alone, nor to the King and Party, but to the Party himſelf alone, and therefore he held that this Action might be maintained after the Year; but Juſtice Dolben doubted, &c.

Sed per Holt Ch. Juſtice, There is a Difference where the Penalty is given to the Party alone, and none to the King; for in ſuch Caſe 'tis clearly out of the Statute 31 Eliz. but here by the Statute 23 H. 6. there is a Penalty of 40 l. given to the King, as well as 40 l. to the Party grieved; 'tis true, they are ſeparate, but that makes no great Difference from a joint Penalty to the King and to the Party; for upon this Statute of 23 H. 6. the Party might have brought his Action qui tam, &c. for 80 l. and the King ſhould have a Moiety; but the other Judges doubted of that Matter.

As to the 2d Queſtion, three Judges held clearly, that the Suing out a Latitat within the Year, was a ſufficient Commencement of the Suit to ſave the Limitation of

Time, becauſe the Latitat is the Original of B. R. and may be continued on Record as an original Writ, &c. and it hath been adjudged, that the Suing out a Latitat within the Time, is ſufficient to prevent the Incurring of the Statute of Limitations.

Noy 71. 11 Rep. 65. b. Cro. Eliz. 138. 1 Sid. 53, 60.

Sed per Holt Ch. Juſtice, This Action is for a Penalty given by a Statute, for which the Plaintiff might have brought an Action of Debt by Original in this Court, becauſe the Statute gives the Action; and there is a Difference between a Civil Action and an Action given by a Statute; for in the firſt Caſe the Suing out a Latitat within the Time, and continuing it afterwards will be ſufficient; but in the other Caſe, if the Party proceeds by Bill, he ought to file his Bill within Time, that it may appear ſo to be upon the Record it ſelf.

But the Plaintiff had Judgment, and afterwards a Writ of Error was brought.

Parker *verſus* Harris. Mich. 3 Will. & Mar. B. R. Rot. 27.

4 Mod. 76. 2 Vent. 249, 270, 272. 1 Salk. 262. Reſervation of Rent *ſecundum ratam* of 18 *l. per Annum*, is a void Reſervation.

ERROR of a Judgment in C. B. where the Caſe was as followeth:

Ff. Harris brought an Action of Debt againſt Parker, and declared upon two Demiſes of one Meſſuage, two Gardens, &c. and laid the firſt Demiſe 1 May, 35 Car. 2. of the Premiſſes ſituate, lying and being in & ſuper acclivitatem de Hampſted (Anglice, the Riſe of Hampſted-hill) Habendum for ſeven Years, from 25 March before, rendring 18 l. per Annum Rent, payable quarterly, and laid the ſecond Demiſe de al. meſſuagio ſcituat. ut ſupra, upon the ſame 25 March, Anno 35 Car. 2. Habendum ad voluntatem & quamdiu ambabus partibus placuerit reddendo the Rent or Sum of lawful Money of England, ad ratam, Anglice, after the Rate of 18 l. per Annum, during the Continuance of the ſaid Demiſe laſt mentioned, and for 99 l. Rent arrear upon the ſeveral Demiſes, &c. this Action was now brought.

The Defendant pleaded, that tempore dimiſſion. prædict. ſuperius fieri ſuppoſit. the Plaintiff nil habuit in tenementis prædictis cum pertinen. unde ſupponitur dimiſſion. ill. fieri & hoc, &c.

The Plaintiff replied, quod diu ante tempora prædict. ſeparal. dimiſſionum, &c. ſcilicet 13 die Novemb. Anno 26 Car. 2.

Car. 2. the Lord Wotton demiſed to Harris, one Piece or Parcel of Land, together with an ancient Meſſuage and Barn thereon, being in Hampſted prædict' in Com' prædict', unde the Premiſſes in the Declaration are Parcel, Habendum for 41 Years, (the Lord Wotton adtunc & ibidem haben' plenam poteſtatem jus & titulum to make the ſaid Demiſe for 41 Years,) per quod the Plaintiff entered, and was poſſeſſed, and being ſo poſſeſſed 1 die Maii ann. 35 Car. 2. dimiſit ten'ta prædicta in narratione mentionat' modo & forma prout ſuperius narravit * & hoc parat' eſt verificare unde petit judicium.

* *Nota* he ought to have concluded to the Country.

Upon a general Demurrer to this Replication, the Plaintiff had Judgment in the C. B. and now the Errors aſſigned were as follow:

1ſt. That the Reſervation of the Rent upon the ſecond Demiſe, (viz.) ſecundum ratam 18 l. per ann. was a void Reſervation, becauſe it would be a Means to multiply Actions without Number, for that the Leſſee might bring an Action of Debt for Rent for every Hour, there being no certain Time or Day appointed for Payment.

(2.) That the Venue laid, (viz.) ſuper acclivitatem de Hampſted Hill is naught, becauſe acclivitas is not a Place from whence any Venue can ariſe.

Acclivitas is not a Place from which a *Venue* may ariſe.

And afterwards in Michaelmas-Term following, the Judgment was reverſed for the Errors aforeſaid, but more eſpecially for the firſt Error; for the Court held ſuch a general Reſervation of Rent to be void for the Reaſons ſupra.

But then it was inſiſted for the Plaintiff, That the Judgment might be reverſed quoad the ſecond Demiſe only, and that it might be affirmed quoad the firſt Demiſe which was well laid.

A Judgment is an entire Thing, and cannot be reverſed or affirmed in Part.

Sed per Curiam, the Judgment is an entire Thing, and therefore it could not be reverſed in Part, and affirmed in Part; but if 'tis erroneous as to any Part, the entire Judgment muſt be reverſed; and ſo it was in this Caſe.

11 Rep Godfry's *Caſe*. Moor 283.

Rogers *verſus* Cook.

THE Plaintiff brought an Action on the Caſe as Adminiſtrator, and declared on 4 ſeveral Promiſes, of which 3 were laid to be made to the Inteſtate, and the 4th was a general inſimul computaſſet between the Plaintiff and the Defendant, of Matters in the Plaintiff's own Right.

1 Salk. 10. What Things cannot be joined in one and the ſame Action.

The Defendant after an Imparlance pleaded a frivolous Plea in Abatement, and thereupon the Plaintiff demurred.

And upon opening the Cauſe, the Court ex officio abated the Bill, for that it appeared on the Record it ſelf, that the ſeveral Demands in the Declaration were incompatible, and would not be joined in one and the ſame Action, for it requires ſeveral Judgments, and of diſtinct Natures.

Howard *verſus* Pitt. Trin. 4 Willi.

1 Salk. 261. Where a Writ of Error in the Exchequer-Chamber was abated by the Death of the Plaintiffs in the Writ, a *Remittitur* muſt be entered, otherwiſe the Plaintiff muſt ſue forth a *Sci. fa.*

TReſpaſs againſt five Defendants, and likewiſe againſt Pitt, and the Plaintiff recovered 1500 l. Damages; the Defendants within the Year brought a Writ of Error in the Exchequer-Chamber, which depended there almoſt three Years, and within that Time three of the Plaintiffs in Error died, ſo that the Writ of Error was abated; and thereupon the Plaintiff Howard immediately took out a ſpecial Capias (reciting the Matter aforeſaid) againſt Pitt and the other two who ſurvived; and thereupon Pitt was taken in Execution.

And now the Court was moved for a Superſedeas to the ſpecial Capias, for that the Proceſs was irregular.

(1.) Becauſe the Ca. ſa. contains in it ſelf ſufficient Matter to found a Superſedeas, for it recites the Judgment to be obtained three Years paſt againſt the Defendant Pitt and five others, and that a Writ of Error was brought on that Judgment, and that three of the five Plaintiffs in Error were dead, by which the Writ of Error abated; and that Pitt and the other two ſurvived, ſo the Execution went againſt them, &c.

Now by this it appears, that the Plaintiff ought to ſue out a Scire facias to revive this Judgment before he can take out any Execution thereon, becauſe he hath ſhewn that the Judgment was obtained almoſt three Years ſince.

See *Iſam's* Caſe in *Moor.* 2 Inſt. 471. Sid. 351

(2.) The Ca. ſa. ought to be joint againſt all ſix Defendants, becauſe the Judgment is joint, or at leaſt a Sci' fa' ought to be ſued againſt the Survivors.

Where the Court of Exchequer muſt enter a *Remittitur*, where not.

(3.) That no Execution can go out of this Court, becauſe there is no Remittitur entered on Record; and until ſuch Remittitur is entered, the Record remains in the Exchequer-Chamber, notwithſtanding the Abatement of the Writ of Error, and by Conſequence this Execution is without Warrant, for there is no Record of any Judgment now remaining in this Court.

On

On the other Side it was ſaid there was no Occaſion of entring a Remittitur, becauſe the Writ of Error being abated by the Death of three of the Plaintiffs in Error, there was nothing of that Matter remaining in the Exchequer-Chamber; and that there is a Difference in the Practice where ſuch a Writ of Error is diſcontinued, and where 'tis abated by Death; for in the firſt Caſe 'tis uſual to enter a Remittitur, becauſe the Diſcontinuance is Matter which appears to the Court of Exchequer-Chamber; but the Death of the Parties doth not, and therefore in ſuch Caſe, that Court will not enter any Remittitur upon their Record; and this was compared to a Writ of Error in Parliament, which by the Diſſolution thereof is abated; and this Court may proceed to Execution afterwards without any * Remittitur.

Econtra.

1 And. 144. 2 And. 142.

* Hob. 68. Latch. 59. W. Jones 66. 1 Roll. 19. Noy 150. Moor 361.

Adjudged that the Execution in this Caſe may be taken out without any Sci. fa. to revive the Judgment, becauſe the Defendants had continued the Suit by bringing a Writ of Error, and the Plaintiff was within the Year after the Abatement of the Writ of Error, and as to that Matter the Caſes in the † Margin were cited.

† 15 H. 7. 16. *b.* 1 Roll. Abr. 899. 4 Leon. 197. 2 Cro. 364. Yel. 7. 3 Cro 891.

That 'tis neceſſary a Remittitur ſhould be entered to warrant the Execution from B. R. and a Day was given to the Plaintiff to procure it to be entered; for if it appeared in the Record, that a Remittitur was entered, the Court would not examine into the Time of its Entry; Quod nota.

At another Day the Plaintiff informed the Court that he could not procure the Clerk of the Errors to enter a Remittitur, and therefore it was moved, that tho' the Execution is erroneous, yet that the Court would not ſuperſede it, but put the Defendant to his new Writ of Error, as in Winch, Rep. 100.

Sed per Curiam, Unleſs a Remittitur is entered, the Plaintiff muſt ſue out a Sci. fa. Adjournatur.

Frederick *verſus* Gosfright. Trin. 4. W. & M. B. R.

DEBT upon a Bond of a Thouſand Pounds, conditioned to pay Five Hundred Pounds on the 10th Day of March 1684.

Where Acceptance in Satisfaction is not well pleaded, unleſs the Defendant pleads, he gave it in Satisfaction.

The

The Defendant pleaded in Bar, That poſt confectionem ſcripti obligatorii prædict' & ante prædictum decimum diem Martii in conditione prædict' ſpecificat' ſcil't 20 die Septembris, &c. ipſe idem (the Defendant) ſolvit eidem (the Plaintiff) 100 l. in parte ſatisfactionis denariorum præd' in conditione prædicta ſpecificat' & idem (the Plaintiff) adtunc & ibidem habuit & acceptavit de & ab eodem (the Defendant) diverſa mercimonia & merchandiſas per ipſum (the Defendant) pro eodem (the Plaintiff) ante tempus illud empt' & provis. in plena ſatisfactione & exoneratione reſidui denariorum prædict'.

See *Pine's* Caſe. 5 Rep.

And upon a Demurrer to this Plea it was adjudged ill, becauſe the Defendant did not plead, that he gave the Wares in full Satisfaction, but only that the Plaintiff accepted them in full Satisfaction, which cannot be, unleſs the Defendant gave them for that Purpoſe.

Felldown *verſus* Beale. Paſch. 4 Willi. B. R. Rot. 208.

The Union of Churches is, at Common Law, a Conſolidation of the Tithes, but the Boundaries continue as before the *Union*.

UPON a Declaration in a Prohibition, and a Demurrer thereunto, the Caſe appeared to be thus:

ſſ. That the Pariſh Churches of St. Maurice and St. Mary Kalendar in the City of Wincheſter were united concurrentibus hiis, &c. by the Statute 17 Car. 2. cap. 3. and the Church of St. Maurice appointed to be the præſentative Church; afterwards the Pariſh-Church of St. Mary Kalendar was demoliſhed, and Houſes built on the Ground where that Church ſtood.

The Plaintiff Felldown was an Inhabitant within the Limits of the old Pariſh of St. Mary Kalendar, and not within the Limits of the Pariſh of St. Maurice; and now the Queſtion was upon a Libel exhibited againſt Felldown in the Conſiſtory Court of Wincheſter, for refuſing to contribute to the Repairs of the Church of St. Maurice; and upon a Demurrer to a Declaration on a Prohibition, Whether this Union of Churches was ſuch an Union of the Pariſhes, ſo as to make thoſe who were Inhabitants within the Limits of St. Mary Kalendar, and without the old Bounds of St. Maurice, chargeable and contributory to the Repairs of the Church of St. Maurice.

And it was argued for the Plaintiff, that an Union of Churches intended no more at Common Law than a Conſolidation of the Tithes, but that the Bounds thereof continued diſtinct as before the Union; for an Union is always with Reſpect to and for the Benefit of the Parſon, and not to confound the Diſtinction of Pariſhes, but that they ſhall remain * ſeparate to all Purpoſes, notwithſtanding the Union; and beſides, 'tis provided by the ſaid Statute 17 Car. 2. that the Pariſhes ſhall remain ſeparate.

* 40 Ed. 3. 8. 12 H. 8. 8. b. 50 Ed. 3. 27. Hob. 67. Dyer 259. W. Jones 182. F. N. B. 39. 3 Cro. 500, 720. 1 Cro. 429.

But on the other Side it was argued, that this was a different Caſe from that in Hob. 67. for that was where both Churches were in Being, and ſo remained after the Union; but here one Church was demoliſhed and gone, ſo that if the Plaintiff ſhould not be contributory to the Repairs of the Church of St. Maurice, where he hath all Parochial Privileges, (viz.) a Seat in Nave Eccleſiæ, Chriſtning, Burial, &c. he will be diſcharged from a Contribution to the Repairs of any Church whatſoever; and † 'tis unreaſonable that he ſhould have the Benefit of the Church in Conjunction with the reſt of the Pariſhioners, and at their Charge.

† 32 H. 6. 22. 2 Inſt. 489. Poph. 197.

And therefore the Proviſo in the Statute 17 Car. 2. muſt be intended to extend only to ſuch Caſes where both Churches remain and are in Being after the Union; and if ſo, then 'tis not reaſonable that the Pariſhioners of one Church ſhould contribute to the Repairs of the other Church, becauſe they are chargeable to the Repairs of their own Church.

But the Court inclined to continue the Prohibition for the Reaſons ſupra.

The King *verſus Inhabitants of* Hermitage & al'.

AT a Trial at Bar in B. R. Hill. 3 W. & M. the Caſe was:

Where a Preſcription was pleaded, and the Defendant failed in it.

If. A Diſtringas and Inquiſition was returned at the Proſecution of one Micoe, upon the Statute of Weſtm. for throwing down Encloſures nocanter; and by the Inquiſition it was found, that 100 Perches of Hedge, 100 Perches of Pale, 10 Stiles, and 20 Gates of the Incloſure of 300 Acres of Land, called Hermitage Common in Dorſetſhire, were deſtroyed, and that Micoe the Proſecutor had a Term for Years therein, and was thereby damnified 360 l. and farther,

Cro. Car. 280, 439, 580. 1 Mod. 66. Sid. 107. 1 Lev. 108, of the Pleading and Iſſue.

farther, that the Villages of Hermitage, Holneſt, Hilvill, Hartley, Mintern Magna and Midlemarſh were the Vills next adjacent.

Thereupon the Inhabitants of theſe Villages appeared and pleaded thus:

(1.) ff. The Vill of Holneſt pleaded, that A. and B. the Servants of the Proſecutor, committed this Fact ſecretly, and with the Privity and Colluſion of their Maſter the Proſecutor, and traverſed, that Malefactores ignoti did it prout in the Inquiſition, and Iſſue was taken upon this Traverſe.

(2.) The Inhabitants of Hermitage pleaded, that the Manor of Fordington in Dorſetſhire is Parcel of the Demeſnes of the Dutchy of Cornwall, and that the King, &c. was ſeiſed of that Manor in Fee, as Parcel of the ſaid Dutchy, and that Hermitage Common in qua, &c. was Parcel of the ſaid Manor; and that all the Tenants of any Tenements held of the ſaid Manor, lying in the Vill of Hermitage, have Time out of Mind had Common of Paſture for all their Cattle levant and couchant, &c. at all Times of the Year, in Hermitage Common, and that the Proſecutor de ſon tort had incloſed it, ſo as they could not enter, &c. and had not left them ſufficient Common; and Iſſue was taken upon this Preſcription modo & forma, &c.

(3.) The Inhabitants of Hillvill and Hartley join in their Plea, which was much the ſame as pleaded by Holneſt, and Iſſue thereon, ut ſupra.

(4.) The Inhabitants of Mintern and Midlemarſh likewiſe join in their Plea, that the aforeſaid A. and B. the Servants of the Proſecutor, did the Fact, and that an Indictment was preferred againſt them at the Quarter-Seſſions, within a Year after it was done, which Indictment was found, and that the Proſecutor had Notice of it.

To this Plea there was a Demurrer.

(5.) Then they all join and plead, that the Damages found by the Inquiſition are unreaſonable and exceſſive, and that Micoe the Proſecutor did not ſuſtain Damages in ea parte ultra quinq; libras & de hoc pon. ſe ſuper patriam, &c.

And upon Evidence at the Bar, theſe Things appeared.

Firſt, That all the Tenements in Hermitage, unto which the Common of Paſture was claimed, were heretofore Parcel of the Abbey of Sarum, and that by the Diſſo-

lution of that Abbey the ſame came to H. 8. before the Birth of Ed. 6. ſo that the Dutchy of Cornwall was likewiſe at the ſame Time in the Poſſeſſion of H. 8. for Want of a Duke of Cornwall; and hereby an Unity of Poſſeſſion, both of the Tenements to which the Common of Paſture appertained, and alſo of Hermitage Common, the Place where the Common of Paſture was to be had, was at that Time in King H. 8.

And it likewiſe appeared, that the Tenements in Hermitage were granted to the ſeveral Tenants after the Unity of Poſſeſſion; and hereupon the Counſel for the Proſecutor inſiſted, that by this Unity the Preſcription was deſtroyed, and the Common of Paſture quite extinct.

But after much Debate it was unanimouſly reſolved per Holt Ch. Juſtice, and the whole Court, that this was not ſuch an Unity of Poſſeſſion as would deſtroy the Preſcription; for though King H. 8. had an Eſtate in Fee in the Lands a qua, and alſo in the Lands in qua, yet he had not as perdurable an Eſtate in one as he had in the other; for the Quality of the Eſtates differed, becauſe in the Manor of Fordington, which was Parcel of the Dutchy of Cornwall, and in Hermitage Common in qua, &c. which was Parcel of that Manor, King H. 8. had only a Fee determinable on the Birth of a Duke of Cornwall, which is a baſe Fee; but in the Tenements in Hermitage, Parcel of the Abbey a qua, he had a pure Fee-ſimple indeterminable jure Coronæ, and therefore an Unity of ſuch Eſtates works no Extinguiſhment; for where an Unity of Poſſeſſion doth extinguiſh a preſcriptive Right, 'tis requiſite that the Party ſhould have an Eſtate in the Lands a qua, and in the Lands in qua, equal in Duration, Quality, and all other Circumſtances of Right.

Farther, upon Evidence it appeared, that the Tenants of Tenements in Hermitage, had Time out of Mind, Common of Paſture in Hermitage Common for all their Cattle levant and couchant, &c. at all Times in the Year (Sheep only excepted for a certain Time).

And upon this it was reſolved by the Court, that they had failed in their Preſcription, and that the Evidence would not maintain the Plea, for that was for Common for all Cattle, &c. at all Times in the Year, when by the Evidence it appears, that Sheep were excepted for ſome Time in the Year; therefore the Preſcription ought to have been ſpecially pleaded, with this Exception.

It alſo appeared upon the Evidence, that no more than 3 Perches of Hedge and Fence, and 9 Gates, and 3 Stiles were deſtroyed and pulled down, tho' the Inquiſition had found 100 Perches, and 20 Gates, and 10 Stiles pulled down.

But per Curiam, this Matter cannot be inquired into, becauſe the Defendant had not traverſed the Number, and ſo that was not in Iſſue; quod nota; for it was an Overſight in the Pleader.

Upon the whole Matter, the Jury gave their Verdict for the Proſecutor, becauſe the Defendant had failed in his Preſcription for Common, which was the principal Matter relied on, and 20 l. Damages againſt the Defendants; and thereupon a Writ went out againſt them to levy the Fences, and to repair, &c.

But this Verdict was more beneficial to the Defendants than if it had been found for them, becauſe the Proſecutor paid the Jury 65 l. who came up from Dorſetſhire in very bad Weather, and the Repairs which the Defendants were to make good would not amount to 10 l. and by a Rule of Court Niſi prius, Coſts were to be paid by both Sides by Conſent.

Quære, If any Coſts ought to be paid by the Defendants in this ſpecial Caſe, for the Statute of Weſtminſter doth not mention any Coſts, and this is upon Traverſes of Inquiſitions: This Point was ſtarted and moved to the Court, but no Reſolution thereon, becauſe the Court held that the Parties were concluded by the aforeſaid Rule made by Conſent.

DE

Term. Sanct. Trin.

4 Willi. & Mariæ, B. R.

Butcher *verſus* Porter. Hill. 4 W. & M. B. R. Rot. 292.

WRIT of Error upon a Judgment in Replevin, in Windſor Court, where the Defendant had pleaded in Bar, that the Property of the Goods taken was in a Stranger, and not in the Plaintiff.

1 Salk. 94. Plea of Property of Goods in a Stranger well pleaded in Bar, and not in Abatement.

To this Plea there was a Demurrer, ſuppoſing it ought to have been pleaded in Abatement, and not in Bar, and the Judgment was there given, that the Plea was good.

And now the Plaintiff in Error objected, that the Judgment given in Windſor Court, was informal and naught, it being quod querens nil capiat per narrationem ſuam, inſtead of querelam ſuam.

(2.) Exception was, That the Judgment was partial and defective, for it was only, that querens ſit in miſericordia, when it ought to be quod querens & * plegii ſui de proſequendo ſint in miſericordia.

* *Nota*, The Judgment was Right, for the Pledges are only Sureties to the King, for the Plaintiff's Amerciament, and ought not to be amerced themſelves. 4 Inſt. 180, 596 Plowd. 274. *The Precedents are both Ways.* Raſt. Ent. 557. *a.* 562. 570. Co. Ent. 589, 591, 595. *a.*

(3.) Exception, That this Plea of Property in a Stranger, is a Plea in Abatement, and not in Bar, or at leaſt

if good in Bar, the Defendant ſhould have made an Avowry pro Retorn' habend' which he hath not done, and for this the Caſes in the * Margin were cited.

*2 Roll. Abr. 433. 9 H. 6. 4. Bro Retorn' Aver' placito 1, 3. 31. 39 H. 6. 35. 3 H. 6. 3.

(4.) Exception, It appears upon the Record, that the Plaint was levied before the Taking the Goods; and therefore the Judgment ought to have been againſt the Plaintiff, quia querela inſufficien' in Lege, and not quia placitum ſufficiens, &c.

Sed per Curiam, as to the firſt and laſt Exceptions they are good, and the Judgment for the Reaſons ſupra is erroneous; and therefore the Court would have reverſed it, but that ſuch Reverſal would be no Advantage to the Plaintiff, becauſe upon the Reverſal of an erroneous Judgment, this Court muſt give ſuch a proper Judgment as they ought to have given below, which is, that the Plaint ſhall abate, and that the Defendant have a Return of the Goods, and this becauſe it appears, that the Plaint was levied before the Plaintiff had any Cauſe of Action.

As to the ſecond Exception the Court did not take any Notice of it.

And as to the third Exception they held, That the Plea was well pleaded in Bar; and Holt Chief Juſtice remembered a Caſe adjudged between * Wildman and North, wherein the Defendant in Replevin pleaded Property in himſelf, in Bar to the Action, and there per Hale Chief Juſtice, it ought to be ſo pleaded, and not in Abatement; and farther, that ſuch Plea in Property in himſelf, did not amount to the general Iſſue of non cepit.

* Vent. 249. S. C. 2 Lev. 92. S. C.

And it was agreed in that Caſe by the whole Court, that Property in a Stranger might be pleaded either in Bar or Abatement at the Election of the Pleader.

Reſolved in the Caſe at Bar, That where the Defendant, in Replevin pleads Property in himſelf, or in a Stranger, there he need not make any Avowry pro Retorn' habend', becauſe the Plea it ſelf doth comprehend good Cauſe for a Return, ſince the Plaintiff hath no Property.

And the Difference is where the Plea goes to the very Point of the Writ as here, and where 'tis only collateral Matter, as Priſt in auter lieu, for there a Suggeſtion muſt be made in Nature of an Avowry pro Retorn' habend', becauſe the Plea in it ſelf doth not contain any Matter for a Return, for tho' it may be true, yet the Taking may be tortious.

2 Cro. 519. 2 Roll. Rep. 64.

The Judgment ſupra was reverſed, and a new * Judgment given, (viz) that the Plaint ſhould abate, and that the Defendant ſhould have a Return, &c. Quod nota.

* See the Form of ſuch a Judgment in *Raſt. Ent.* 57c. a.

Gree *verſus* Oliver. 4 W. & M.

THIS was an Ejectment tried before Holt Ch. Juſtice, at the Aſſiſes in Exon' upon the Demiſe of Anthony Mapowder, and upon the Evidence, the Caſe was as followeth: Where the Heir was ſued on a Bond of his Anceſtor.

ſſ. Iſaac Burch the Father died ſeiſed in Fee of the Lands now in Queſtion, after whoſe Death Anth. Mapowder, the Leſſor of the Plaintiff, filed an original Writ upon a Bond of 800 l. againſt Iſaac Burch his Son and Heir, and had Judgment thereon in Trin. Term, 2 Jac. 2. by Default; and thereupon a general Elegit iſſued againſt all the Lands and Tenements of Iſaac Burch the Son and Heir, by which a Moiety of all his Lands in general were extended and delivered to Mapowder, which was his Title.

The Title of the Defendant was likewiſe by a Judgment obtained upon a Bill filed in B. R. in Hill. Term, 1 & 2 Jac. 2. which was precedent to the Judgment of the Leſſor of the Plaintiff; and this was upon a Bond for 100 l. to which the Heir pleaded Riens per deſcent præter the Lands in Queſtion; and thereupon Oliver the now Defendant took his ſpecial Judgment againſt the Aſſets confeſſed by the Heir; but this was ſubſequent to Mapowder's Judgment, (viz.) in Trinity-Term, ann. 3 Jac. 2. and hereupon the now Defendant Oliver had an Extendi facias of the whole Lands in Queſtion, and was put in Poſſeſſion of the whole by the Sheriff.

And upon this Evidence the Queſtion was;

ſſ. If a Judgment againſt an Heir upon Aſſets confeſſed, ſhall bind the Lands from the Time of the Judgment given only, or elſe ſhall relate to the Time of the original Writ or Bill filed.

And per Holt Ch. Juſtice, This ſpecial Judgment againſt the Aſſets only, ſhall have Relation unto, and bind from the Time of the Filing the original Writ or Bill. 1 Mod. 153. *not Law.*

That the Filing a Bill in B. R. was as effectual for this Purpoſe as an original Writ; therefore the Defendant Oliver's Bill being precedent to the Judgment of Mapowder (Leſſor of the Plaintiff,) his Title muſt have the Precedency, for Mapowder could give no Account of the Time of filing his Original.

But admitting Mapowder's original Writ was actually filed before Oliver the Defendant's Bill, yet his (the Defendant's)

dant's) Title will be good againſt Mapowder, becauſe the Judgment under which he (Mapowder) claims, is a general Judgment againſt the Heir; and the Execution a general and common Execution by Elegit, and not againſt the Aſſets only by way of Extent.

And ſuch a general Judgment will not operate by way of Relation to the Original, but binds only in common Caſes from the Time of the Judgment given.

The Plaintiff was Nonſuit.

Holman *verſus* Exton. Exon *Summer Aſſiſes*, 4 W. & M. coram Holt *Chief Juſtice*.

If a Perſon abſents himſelf for 7 Years, and no Proof can be made, that he is alive, he ſhall be preſumed to be Dead.

IN Ejectment the Caſe was thus:

Sr. John Gifford was ſeiſed in Fee of the Lands in Queſtion, and made a Leaſe in Reverſion to Lewis Davells for 99 Years to commence after the Deaths, or other ſooner Determination of the Eſtates of John Davells the Father, and John Davells the Son, who had then a Leaſe in Poſſeſſion for 99 Years, if they or either of them ſo long lived.

The Plaintiff poſitively proved the Death of John Davells the Son; but as to the Father, the Proof was, that he had been reputed Dead, and no Body had heard of him for 15 Years laſt paſt.

And upon an Objection, that this laſt Proof was inſufficient, it was held clearly by Holt Ch. Juſtice, upon the Peruſal of the * Statute, by which 'tis enacted, That if any Perſons, for whoſe Lives Eſtates are granted, abſent themſelves 7 Years together, and no evident Proof be made of their Lives in any Action commenced by the Leſſors or Reverſioners for Recovery of the Tenements, they ſhall be accounted as Dead; that this Caſe is within that Statute, becauſe Lewis Davells the Leſſor of the Plaintiff had a Term in Reverſion in the Lands, and ſo was a Reverſioner within the very Letter of the Statute, and he held that a Remainder Man was within the Equity of that Law.

19. Car. 2. cap. 6.

Wherefore in the preſent Caſe, the Defendant being not able to prove that John Davells the Father was alive at any Time within ſeven Years laſt paſt,

The Plaintiff had a Verdict.

DE

Term. Sanct. Mich.

Anno 4 Willi. & Mariæ in B. R.

Hilman & Ux. *verſus* Hore. Trin. 4 Will. & Mar. in B. R. Rot. .

DEBT for Rent, in which the Plaintiff declared upon a Leaſe by Indenture made between the Plaintiff and the Defendant, upon the 29th Day of January, Anno 36 Car. 2. Habendum for forty Years, to commence from the 3d Day of May next before the Date, &c. rendring Rent, by Virtue of which Leaſe the Defendant entered and was poſſeſſed, &c. and for ſix Years Rent in arrear this Action was now brought. Where the Party ſhall be eſtopped, where not.

The Defendant pleaded in Bar, that before the Making the Leaſe in the Declaration ſet forth, the Plaintiffs (being poſſeſſed of the Premiſſes for a Term of ninety-nine Years) made a Leaſe thereof by Indenture, (viz.) 3 Maii, 35 Car. 2. unto one William Northmore for forty Years, to commence preſently, by Virtue of which Leaſe, the ſaid Northmore, (before any Rent became due on the Leaſe, in the Declaration ſet forth, (viz.) 1 die Maii, Anno 36 Car. 2.) entered, and was poſſeſſed, and alledged in Fact, that the ſaid Leaſe made to Northmore, was ſtill in Being, and not determined, by Reaſon whereof ſhe (the Defendant) ſtood liable to the Action of Northmore, for all the Iſſues and Profits of the Premiſſes by her had and received.

And upon a general Demurrer to this Plea, the Queſtion was:

Whether

Whether the Defendant was eſtopped by the Indenture to plead this Plea; and it was inſiſted for her, that ſhe was not eſtopped, becauſe it appeared on Record, that an Intereſt did paſs to her by this Indenture from the Plaintiffs, (viz.) a good Leaſe in Reverſion for one Year, after thirty-nine Years (which was the Reſidue of Northmore's Term) determined; and that it is a Maxim in Law, that a Deed cannot operate two ſeveral Ways, (viz.) by paſſing an Intereſt, and alſo by Concluſion; but that if any Intereſt paſſes by the Deed, the Eſtoppel is taken away; and for this Purpoſe the Caſes in the * Margin were cited.

* 1 Inſt. 47. *b.* Cro. Eliz. 700. Brereton *v.* Evans.

Sed per Curiam, The Defendant is eſtopped to plead the Matters ſupra; and there is a Difference where the Indenture immediately paſſeth ſuch an Intereſt as was intended by the Parties; and afterwards by ſome Matter ex poſt facto, that Intereſt is determined by an Extinguiſhment of the Eſtate of the Leſſor, out of which the Leaſe was derived; there the Parties are not eſtopped to ſhew the ſpecial Matter.

Or in Caſe where a Leaſe is made to A. for forty Years, who enters, and the Leſſor enters and turns him out, and then makes a Leaſe of forty Years to B. who enters, and then A. the firſt Leſſee re-enters, and both theſe Leaſes are by Indenture; in this Caſe B. in an Action of Debt brought againſt him for Rent reſerved on his Leaſe, may plead the whole Truth, and is not eſtopped; becauſe ſuch an Intereſt paſſed by the Indenture as was intended, (viz.) a Term for forty Years; but the Leſſor's Eſtate, out of which that Intereſt was derived, being by Diſſeiſin, was by the Re-entry of A. determined, and by Conſequence ſo was the Term out of which it was derived.

1 Leon. 33, 59. Plowd. 421. *b.* 433. Smith *v.* Stapleton.

Nota; In the Caſe at Bar, if the Leaſe to the Defendant had been by Deed Poll, or by Parol, the Plea ſupra had been a good Bar.

Chapman & al' *verſus* Butcher. Mich. 4 Will. & Mar. B. R. *See* antea Porter *verſus* Butcher.

The Condition of a Bond in Replevin, good.

THE Plaintiffs being late Bailiffs of the Borough of New Windſor, brought an Action of Debt on a Bond of 200 l. againſt the Defendant, who craved Oyer of the Bond and Condition, upon which it appeared to be a Bond taken by the ſaid Bailiffs of; and from the Defendant and one Piles, upon a Replevin.

The Condition was, that if the above-bounden *John Butcher*, do and ſhall proſecute and follow, with Effect, his Suit commenced in the Court of Record of the Borough of *New Windſor*, againſt *Thomas Porter*, for the unjuſtly Taking and Detaining the Goods and Chattels of the ſaid *John Butcher*, (*viz.*) at *New Windſor*, within the Juriſdiction of this Court, and do and ſhall make Return of the ſaid Goods and Chattels, if a Return thereof ſhall be adjudged by Law againſt him, then this preſent Obligation to be void, or elſe, *&c.*

And after Oyer the Defendant pleaded, that he had proſecuted the Suit in the Court of Windſor, with Effect, ita quod judicium ſuperinde habitum fuit, but that he (the Defendant) brought a Writ of Error thereon in B. R. where the Judgment was reverſed, as by the Record it appears.

The Plaintiff replied Proteſtando, that the Defendant did not proſecute his Suit with Effect, pro placito dicit, that the Judgment below was, that Porter, the Defendant, ſhould have a Return, and that before any Return was made, the Defendant brought a Writ of Error, upon which the Judgment was reverſed; but that it was then farther adjudged by this Court, that the Plaint in New Windſor Court ſhould abate, and that the aforeſaid Porter ſhould have a Return irrepleviable.

And upon a Demurrer to this Replication it was objected, that this was an unlawful Bond, becauſe the Bailiffs ought to have taken Pledges, and not a Bond.

But admitting the Bond to be good, yet the Condition doth not extend to any Judgment of Return' Habend. in any Court, but only in Windſor Court, where the Plaint was levied, and the Judgment of that Court is now reverſed.

Sed per Curiam, This is a lawful Bond, and 'tis the common Courſe, even at this Day, to take ſuch Bonds, and the Condition is well penned, all the Words being general; the firſt Part is, if he proſecute his Suit commenced, with Effect, in the Court of Windſor, which Words are not bound up to a Proſecution only in that Court, but extend to the Proſecution of a Writ of Error in B. R. for that is a Part of the Suit commenced below.

And the latter Words are as general, (viz.) And do make Return, *&c.* if a Return be adjudged by Law, ſo as 'tis not confined to the Judgment of any particular Court; and for theſe Reaſons,

The Plaintiffs had Judgment.

Sir Simon Leech's *Case*, antea.

3 Lev. 284. 2 Vent. 199, the Case and his Argument.

ONE Leech was Tenant for Life, Remainder to his first Son in Tail, Remainder to Sir Simon Leech in Fee; the Tenant for Life (before the Birth of any Son) executed a Deed of Surrender of all his Estate and Title, &c. to Sir Simon Leech, and delivered this Deed to T. S. to the Use of Sir Simon; and all this was done without the Knowledge of Sir Simon.

Afterwards Leech, the Tenant for Life, had a Son, after the Birth of which Son, and five Years after the Deed of Surrender was executed, and not before, Sir Simon Leech having Notice of the said Surrender, accepted it, and assented to it; all which was found by a special Verdict in Ejectment, brought by the Son of Leech, Tenant for Life, against Sir Simon Leech.

The Action being in the C. B. three Judges, after several Arguments, gave Judgment for the Plaintiff, for they held that the Consent of the Surrendree is absolutely necessary to every Surrender, and that before such Assent nothing passeth out of the Surrenderor; and therefore in this Case, the Birth of the Son happening between the Delivery of the Deed and the Assent of the Surrendree, the Surrender it self was defeated by the vesting of the contingent Remainder, so that the subsequent Assent of the Surrendree signified nothing, because at that Time the Tenancy for Life could not be surrendered to the remote Remainderman, because of the mean Estate vested.

But Justice Ventris was of a contrary Opinion, for he held, that by the Delivery of the Deed the Estate passed to, and vested immediately in Sir Simon Leech, and should wait there till his Dissent, and not remain with the Surrenderor till he (the Surrendree) should assent; for the Law will intend the Assent of the Surrendree, because 'tis for his Benefit.

But the Plaintiff had Judgment by the Opinion of the other 3 Judges, upon which Judgment a Writ of Error was brought in B. R. and the Judgment was affirmed una voce.

And afterwards a Writ of Error was brought in Parliament, and there this Judgment was reversed, notwithstanding all the Opinions of the Judges Assistants for affirming the Judgment, except the Chief Baron Atkyns, who was for reversing it.

Buckley & ux' *verſus* Collier. Mich. 4 W. & M. B. R. Rot. 20.

INdebitatus aſſumpſit by Husband and Wife, in which they declare that the Defendant indebitatus fuit to them (the Plaintiffs) in ſuch a Sum of Money for Periwig-maker's Work done by the Wife, at the Requeſt of the Defendant, and concludes ad damnum ipſorum, &c. 4 Mod. 156. Where the Action ought to be brought by the Huſband alone.

The Defendant pleaded a frivolous Plea, to which the Plaintiff demurred; and the Queſtion was, Whether this Action was well brought by Husband and Wife, or whether it ought to be by the Husband alone.

It was inſiſted, that they ought to join in this Caſe, becauſe the Cauſe of Action did ariſe from the particular Skill of the Wife in making Periwigs, and for which ſhe might have an Action after the Death of her Husband, and for that Purpoſe the Caſes in the * Margin were cited. * 2 Cro. 77. Cro. El. 61, 96. Cro. Car. 439. 2 Sid. 128.

To which it was anſwered, and ſo reſolved, that this Caſe differs from thoſe cited, becauſe thoſe are upon ſpecial Promiſes made to the Wife only, and therefore in ſuch Caſes the Wife muſt be a Party to the Action; but here the Action is upon a general Indebitatus aſſumpſit on a Promiſe implied by Law; but that the Law will not in this Caſe imply any Promiſe to the Wife, for ſhe is a Servant to the Husband, who is at all the Charge in providing Materials, as Hair, &c. to carry on the Trade of Periwig Making; therefore he ought to have the Recompence, ſo that the Law implies the Promiſe was made to him only; quod nota.

Judgment quod querens nil capiat.

Bartlett *verſus* Vinor.

ASſumpſit, &c. in which the Plaintiff declared, That the Defendant in Conſideration that the Plaintiff would procure 15000 l. to be lent to the King, &c. upon an Act of Parliament for the Pound-Rate, in the Name of the Defendant, or of ſuch other Perſon as he (the Defendant) ſhould agree to, he (the Defendant) would pay unto the Plaintiff 600 l. and the Plaintiff avers, that he procured 15000 l. to be lent to the King, &c. by Sir Walter Plummer, in the Name of Sir Walter Plummer, by Agreement of the Defendant, and now this * Action was brought for the 600 l. Where the Conſideration of a Promiſe was neither uſurious or extorſive. * Yelv. 87. Hutt. 56. 1 Cro. 461. 2 Roll. Rep. 103. Stile 412.

Upon non aſſumpſit pleaded, the Plaintiff had a Verdict, and it was moved in Arreſt of Judgment, that the Conſideration of this Promiſe was extorſive and uſurious, and by Conſequence unlawful, or at leaſt, that this was Brocage, and ſo prohibited by the laſt Statute againſt Uſury.

But after Debate it was reſolved per Curiam, that this Conſideration was neither extorſive or uſurious, neither was it Brocage within the Intent of that Statute; for here neither the Borrower or the Lender was to pay the 600 l. Præmium, but a third Perſon.

And per Holt Chief Juſtice, If A. owes B. 100 l. who demands his Money, and A. acquaints him, that he hath not the Money ready, but is deſirous to pay it if B. can procure it to be lent by any other Perſon; and thereupon B. having preſent Occaſion for his Money contracts with C. that if he will lend A. 100 l. he will give him 10 l. and hereupon C. lends the Money, and the Debt is paid to B. this is a good and lawful Contract between B. and C. for B. hath Benefit by it.

And the Plaintiff had Judgment.

Nota; The Truth of the Fact was, Vinor (as Executor to Sir Robert Vinor) had a conſiderable Sum of Money in the Exchequer, which being a Debt of King Charles II. was ſomewhat deſperate; and now by procuring this 15000 l. to be lent to King William, the Defendant had Tallies for 6000 l. of his old Debt, and this being proved at the Trial, it made the Conſideration better.

Every Contract made for any Thing prohibited by a Statute is void, though the Statute only inflicts a Penalty.

Nota; Per Holt Ch. Juſtice, every Contract made for or about any Matter or Thing which is prohibited and made unlawful by any Statute, is a void Contract, tho' the Statute it ſelf doth not mention that it ſhall be ſo, but only inflicts a Penalty on the Offender, becauſe a Penalty implies a Prohibition, tho' there are no prohibitory Words in the Statute.

As for Inſtance; In the Caſe of Simony, the Statute only inflicts a Penalty by Way of Forfeiture, but doth not mention any avoiding of the ſimoniacal Contract; yet it hath been always held, that ſuch Contracts being againſt Law are void.

So he held, that if a Scrivener contracts for more than five Shillings for procuring the Loan of 100 l. ſuch Contract is void.

Baker

Baker *verſus* Lade. Trin. 3 W. & M. B. R. Rot. 268.

IN Replevin, &c. the Defendant made Conuſance for Arrears of a Rent-Charge, and ſet forth that one Robert Lade was ſeiſed in Fee of the locus in quo, &c. and by Indenture granted a Rent-Charge in Fee to Nicholas Marſh, who deviſed it to his Son Rich. Marſh in Fee, who by Deed indented, in Conſideration of natural Love, and of 5 s. in Money to him paid by his Son Nich. Marſh, dedit & conceſſit prædicto Nich. Marſh filio & hæredibus ſuis the aforeſaid Rent, as by Indenture produced it appears, Quæ quidem conceſſio ult. mentionat. nullo attornamento nec alia executione ſuperinde facta exiſten. præter ſolam ſigillation. & deliberationem inde operavit per viam conventionis prædict. Rich. Marſh ſtare ſeiſit' ad uſum in eadem conceſſione mentionat. per quod & vigore ſtatuti in uſibus, &c. the ſaid Nich. Marſh the Son was ſeiſed of the ſaid Rent-Charge in Fee, and the Defendant as his Bailiff diſtrained for Rent Arrear.

2 Vent. 145, 150, 160. 3 Lev. 291. 4 Mod. 149. Where a Deed is pleaded as a Grant, and no Attornment of the Tenant,' tis ill.

And upon a Demurrer to this Plea in C. B. the Defendant had Judgment in this Form, (viz). Quod querens nil capiat, &c. & quod Defendens eat inde ſine die & quod habeat Retorn. averiorum prædict. detinend ſibi irreplegiabile in perpetuum & ſuper hoc prædict. (the Defendant) per ſtatutum, &c. petit breve ad inquirend' &c. concerning the Arrears of the Rent, and the Value of the Cattle, according to the Oxford Act, and thereupon Judgment, &c.

And upon a Writ of Error brought in B. R. the firſt Error was aſſigned ore tenus, (viz.) That the Avowry was ill in the Pleading the Conveyance of the Rent from Richard Marſh to his Son Nicholas Marſh, it being quod dedit & conceſſit, which is by way of Grant, to which the Attornment of the Tenant is neceſſary; and there being no Attornment alledged, therefore 'tis a void Grant.

That 'tis an idle Allegation, for the Defendant to ſay, that this Deed operates by way of Covenant to ſtand ſeiſed, for though a Deed may operate ſeveral Ways, and 'tis in the Election of the Party to uſe ſuch a Deed according to any particular Operation for his Purpoſe; yet

pet the Deed muſt be pleaded as ſuch a Conveyance properly, which works for his Purpoſe; and therefore in this Caſe the Defendant ſhould have pleaded this Deed, as a Deed of Covenant to ſtand ſeiſed, and not as a Deed of Grant; for every Deed muſt be pleaded expreſſly according to its Operation, and not according to the Words at large.

11 H. 6. 28. b. 4 Inſt. 111, 112. 2 Leon. 121. *See* poſtea Oſman *ver.* Sheafe.

(2.) The ſecond Error was, That the Judgment is double, (viz.) one at common Law, and the other by the new Statute; and in this Caſe where the Avowant proceeds on the Statute, and hath Judgment, there ought not to be any Judgment de Retorn' habend', for that is the Judgment at Common Law.

Sed per Curiam, the Statute doth not alter the Judgment at Common Law, but only gives a farther Remedy, ſo as to that Point the Judgment is well given.

But it was reſolved, that the Judgment was erroneous in the Matter aſſigned for the firſt Error; for that the Defendant had pleaded this Deed as a Grant, and had not ſhewn any Attornment of the Tertenant; for if the Plaintiff had taken Iſſue upon Conceſſit, the Defendant could not have maintained it by the Covenant to ſtand ſeiſed, and for that Error only the Judgment was reverſed.

And a new Judgment was given by the Court for the Plaintiff in Replevin, (viz.) quod recuperet damna, &c. as it ought to be, where the Plaintiff in the Action brings a Writ of Error; but 'tis otherwiſe where the Defendant in the original Action brings a Writ of Error, for in ſuch Caſe 'tis quod judicium reverſetur.

Blackman *verſus* Cobbet. Mich. 3 W. & M. *in* C. B. Rot. 456. *reverſed* Trin. 5 W. & M. *in* B. R.

Action on two Promiſes, and entire Damages when one of the Promiſes was void.

WRIT of Error on a Judgment in C. B. on an Action on the Caſe upon two ſeveral Promiſes by Cobbet the Plaintiff in the original Action againſt Blackman as Adminiſtrator to T. S.

The Defendant pleaded plene Adminiſtravit, and a Verdict was found againſt him, and now it was aſſigned for Error, that entire Damages were given upon the two Promiſes, whereof one was void, for that it was laid as followeth:

ff. In Conſideration that the Plaintiff had ſold a Mare to the Inteſtate, he promiſed to pay the Plaintiff tantam denariorum ſummam quantam Equa prædicta rationabiliter habere meruit, and then avers in Fact, quod Equa prædicta rationabiliter habere meruit 8 l. which is abſurd to ſay, that the Mare deſerved to have ſo much Money, and therefore this Promiſe is void.

And the Court was of this Opinion, wherefore the Judgment was reverſed.

Fontzell *verſus* Burrows. Paſ. 5 Will. & Mar. B. R. Rot. 99 vel 100.

THIS was an Action on the Caſe upon a Goldſmith's Note, brought by the Indorſee againſt the Drawer for twenty Guineas; and the Breach of the Promiſe aſſigned was for Non-payment de prædictis peciis Auri vocat. Guineas generally, and did not alledge the Value thereof.

In an Action of Debt for ſo many Guineas, the Value muſt be aſcertained; otherwiſe in an Action on the Caſe for Damages.

And upon a Demurrer to the Declaration, the Defendant aſſigned for Cauſe, that no Value was ſet on the Guineas, which ought to be, becauſe they are an uncertain Coin.

Sed per Curiam, The Declaration is good, becauſe the Action is brought for Damages, and the Value of the Guineas may be given in Evidence to the Jury.

But if it had been an Action of Debt for ſo many Guineas, there the Value of them muſt be ſet forth in the Declaration, ſo as to aſcertain the Debt.

Judgment for the Plaintiff.

Huckle *verſus* Wye.

COvenant againſt Wye as Aſſignee of one Searle, in which the Plaintiff declared upon a Demiſe of Lands by Indenture for thirty Years, made by the Anceſtor of the Plaintiff (whoſe Heir he is) unto Searle, virtute cujus Searle entered and was poſſeſſed, & ſic inde poſſeſſionat. exiſten. tenementa prædicta cum pertin. ſuperius dimiſ. ante finem termini prædicti ſcilicet tali die, &c. ad manus & poſſeſſion. (of the Defendant) per medias aſſignationes devenerunt virtute quarum quidem aſſignationum præd. (the Defendant) in tenementis prædict. intravit & fuit inde poſſeſſionat. pro reſiduo

Infant, where he muſt ſue *per Guardianum*.

reſiduo termini 30 Annorum prædict. tunc ventur. & inexpirat. &c.

There was Judgment againſt the Defendant by Default, and upon the Return of the Writ of Inquiry, it was moved in Arreſt of Judgment:

(1.) That the Plaintiff being an Infant, had ſued by his Guardian, but the Entry on the Roll was no more, but per T. S. guardianum ſuum, omitting the Clauſe ad hoc per Curiam ſpecialiter admiſſ. as the common Courſe is, and as it ought to be here.

Sed per Curiam, The Entry is ſufficient, for in Fact, if the Guardian was not admitted by the Court, a Writ of Error lies, &c.

Venue, where it need not be laid.

(2.) There is no Venue laid where the Aſſignments were made:

Sed per Curiam, There is no Need of laying any Venue, becauſe an Aſſignment is always intended to be made on the Lands aſſigned.

Pleading an Aſſignment of a Leaſe, not good.

(3.) The Declaration will not maintain this Action againſt the Defendant, becauſe it was not ſhewn, that he (the Defendant) was Aſſignee of the Term of Searle the Leſſee, but only that the Tenements came to the Defendant by Aſſignment, which might be an Aſſignment of another Eſtate than this Term of Searle; and the Words Virtute quarum, &c. will not help it, for thoſe are only by Way of Inference, and not traverſable, and ſuch a Concluſion which is not warranted by the Premiſſes.

Et per Curiam, This is a material Exception, &c.

DE

Term. Sanct. Hill.

4 Willi' & Mariæ, B. R.

Symonds *verſus* Cudmore.

IN a ſpecial Verdict in Ejectment, the Caſe was as followeth:

ſſ. Sir Nicholas Martin was Tenant for Life of a Meſſuage, &c. in the City of Exceſter, with a Power to make a Leaſe of the ſame for three Lives; or for any Term of Years determinable upon the Death of three Perſons only, Remainder to William Martin his Son and Heir in Tail, Remainder in Fee to the right Heirs of Sir Nicholas, who in Purſuance of the ſaid Power, made a Leaſe of the Premiſſes to Clement Weſtcomb for 99 Years, if A. B. and C. or either of them ſhould ſo long live.

4 Mod. S. C. 1 Salk. 338. S. C. Tenant in Tail, Remainder in Fee, levied a Fine, &c.

Sir Nicholas died, and William Martin, his Son and Heir, being ſeiſed in Tail of the Reverſion, after the Determination of that Eſtate for Years, and with a Remainder in Fee to himſelf as right Heir to Sir Nicholas, did by Deed, reciting the former Leaſe of ninety-nine Years, and alſo that A. B. C. were then living, leaſe the Reverſion to Elizabeth Weſtcomb for ninety nine Years, if G. or W. or either of them ſhould ſo long live, to commence after the Determination of the firſt Leaſe made by Sir Nicholas.

Afterwards, and during the Continuance of the firſt Leaſe, William Martin died, and the Reverſion aforeſaid deſcended to Nicholas Martin Eſq; the Son and Heir of William Martin; which Nicholas being ſo ſeiſed, (viz.) in

Tail, with a Remainder in Fee, levied a Fine thereof to Carew and St. Aubin, with Proclamations, &c. to the Uſe of the ſaid Nicholas and his Heirs, to enable him to make a Marriage-Settlement.

Afterwards, the firſt Leaſe made by Sir Nicholas the Grandfather, determined, and then the Term and Intereſt of Elizabeth Weſtcomb, by the ſecond Leaſe made by William Martin, the Father of the Coniſor, was aſſigned to the Defendant Cudmore, who entered, and thereupon Nicholas Martin the Son (and the Leſſor of the Plaintiff) reentered, and made a Leaſe to the Plaintiff.

The ſingle Queſtion was, If Nicholas Martin, the Son and Heir in Tail of William Martin, might now avoid this Leaſe of the Reverſion made by his Father, who was Tenant in Tail, with a Remainder in Fee, ut ſupra, or elſe, Whether Nicholas the Son (and Leſſor of the Plaintiff) by levying the Fine, had deſtroyed his Power and Election to avoid the Leaſe, ſo as now he was concluded during the Term.

And after ſeveral Arguments, the following Points were agreed and reſolved by the whole Court.

(1.) That this Leaſe for ninety-nine Years in Reverſion made by William Martin the Father, was not within the Power reſerved, becauſe the Premiſſes were charged by that Leaſe for five Lives, whereas the Power extended to Three, and no more.

Dyer 51. *b.* 1 Inſt. 46. *b.* (2.) That this reverſionary Leaſe was not void in its Creation, but only voidable by the Iſſue in Tail.

Dyer 279. 2 Cro. 458. (3.) If Tenant in Tail make a Leaſe of any of the Lands entailed to commence after his Death; this is a void Leaſe ab initio.

Cro. Car. 103. Hutt. 96. 1 Rep. 47. (4.) When William Martin, the Father, made this reverſionary Leaſe, it iſſued out of both his Eſtates, (viz.) as well out of the Remainder in Fee as out of his Eſtate-tail.

(5.) That this Fine with Proclamations hath not only barred, but extinguiſhed the Eſtate-tail, as much to all Intents as if Tenant in Tail had died without Iſſue; for otherwiſe the Coniſee muſt have two diſtinct Eſtates in Fee, (viz.) a baſe Fee determinable upon the Death of the Tenant in Tail, without Iſſue, and alſo an abſolute Fee; which is very abſurd; and therefore the greater Fee, which is abſolute, ſhall ſwallow up the baſe Fee, and be conſolidated into one entire Eſtate; and to prove this, the Caſes in the * Margin were cited.

* 2 Leon. 37. 3 Rep. 51. *b.* 2 Cro. 689. 1 Cro. 478. Hob. 258. Dyer 115. Plowd. 560. 1 Rep. 49. *b.* 2 Bulſt. 45. W. Jones 33.

(6.) That this Eſtate-Tail being extinguiſhed by the Fine, the reverſionary Leaſe is a good and unavoidable Leaſe, iſſuing out of the Remainder in Fee, which the Leſſor William Martin had at the Time of the Leaſe made.

(7.) That the Power or Election which the Iſſue in Tail had of avoiding this Leaſe, was deſtroyed by the Fine, becauſe the Eſtate-Tail being extinguiſhed by it, the Fee-ſimple was let into Poſſeſſion.

But in other collateral Matters, Holt Chief Juſtice differed from the other Judges.

For firſt the other Judges held, that if William Martin the Father at the Time he made this Leaſe, had been only Tenant in Tail, without the Remainder in Fee, in ſuch Caſe the Cogniſee ſhould not avoid the Leaſe, becauſe the Power of avoiding ſuch Charges was annexed to the Eſtate-Tail, and reſts in Privity thereof, being given to the Iſſue by the Statute de Donis, and is not transferrable by the Iſſue to the Cogniſee, or to any Stranger; but 'tis as a Power of Revocation which is determined by changing or deſtroying the Eſtate to which 'tis annexed.

(2.) That ſuch a future Leaſe is not become meerly void by the Death of the Tenant in Tail, (the Leſſor) before the Commencement of the Leaſe; but that after the Death of the Tenant in Tail, it is voidable only by ſome Act of the Iſſue in Tail; and Juſtice Eyre held, that admitting ſuch Leaſe was void by the Death of the Leſſor ut ſupra, yet the Fine had made it unavoidable by the Cogniſee.

But this ſeems abſurd, that a Thing once abſolutely void, ſhould be made good by any Matter ex poſt facto.

And Holt Chief Juſtice held the contrary in both Points, for firſt he held it clear, that if William Martin the Leſſor had been barely Tenant in Tail without any Remainder in Fee, that then the Cogniſee or Feoffee of the Iſſue in Tail might avoid this Leaſe; for he held, that by the Death of the Tenant in Tail before the future Intereſt could commence, the ſame would become void ipſo facto as to the Leſſee, for when the Leſſor (Tenant in Tail) dies before the Leaſe is to begin, 'tis the ſame in Reaſon as where Tenant in Tail makes a Leaſe to begin after his Death, which is admitted to be void ab initio.

For upon the Death of Tenant in Tail, the Eſtate deſcends to the Iſſue, and he is in paramount the future Intereſt; and the Leſſee in that Caſe (before the Commencement of the Leaſe) hath only a Right or Poſſibility of an

Eſtate, which by the Death of the Tenant in Tail (before that Right is to veſt as an Eſtate) is extinct and gone.

And he put this Difference between the Circumſtances and Ceremonies neceſſary to the Deveſting an Eſtate out of another, and where 'tis only to veſt an Eſtate which is vacant, and not to deveſt any other Perſon; for in the firſt Caſe the Law requires, that an Entry be made, or at leaſt a continual Claim where the Entry is perilous, because of the Alteration of the Poſſeſſion.

1 Inſt. 218. 4 Rep. 53.

But in the laſt Caſe the Law doth that Office for the Party, and veſts the Eſtate in him without any Ceremony; ſo in the principal Caſe when Tenant in Tail died before the Commencement of the future Leaſe, the Law veſts the Reverſion in Tail in the Iſſue immediately by Deſcent, and he ſhall not be put to enter, for then he would be a Treſpaſſer to the Leſſee in Poſſeſſion; and it would be abſurd to claim, becauſe the Reverſion was only in himſelf.

And the Chief Juſtice argued, that if Tenant in Tail of a Reverſion granted it in Fee, this would be void by the Death of the Grantor; but that the Iſſue in Tail might by his own Admittance (as by bringing a Formedon againſt the Grantee) cauſe it to have an Exiſtence afterwards.

Lit. ſect. 680. 3 Rep. 84, 85.

And that where a bare Tenant in Tail makes a future Leaſe, and dies before 'tis to commence, ſuch Leaſe is meerly Void without more Circumſtances; but yet that the Iſſue in Tail had his Election to make it good by accepting the Rent, or by diſtraining and Avowry, which amounts to an Admittance of the Leaſe, and ſo eſtops and concludes the Iſſue to deny it.

1 Cro. 302.

So that the Election of the Iſſue in that Caſe is only to ſupport and make good the Leaſe by ſome Act of his own Concluſion, and not an Election to avoid it by his own Act, becauſe there is no ſuch Act neceſſary; for the Law eſteems it void ipſo facto by the Death of the Tenant in Tail, ut ſupra, unleſs the Iſſue doth by ſome Act make it good; and ſo is the Opinion in 1 Inſt. 46. and the ſame cited in * Smith and Stapleton's Caſe, which the Chief Juſtice held to be good Law, but the other three Juſtices doubted.

1 Roll. Rep. 190.

* Plow. Com.

And Holt Chief Juſtice put theſe Caſes, (viz.) If Tenant for Life, and he in Reverſion in Fee join in a Fine or Feoffment to a Stranger, the Eſtate for Life is merged, ſo

Litt. ſect. 625, 626. Dyer 12, 54. 1 Inſt. 345.

ſo likewiſe where he in Remainder in Tail, joins with the Tenant for Life ut ſupra; and yet in the laſt Caſe the Feoffee or Cogniſee ſhall hold, during the Life of the Tenant for Life, tho' the Tenant in Tail be dead without Iſſue; quod nota.

Nota; Juſtice Dolben ſaid, that the Caſe of Opy and Thomaſius was miſreported by Sid. for he was then at the Bar, and no Judgment was given in that Caſe.

Carter *verſus* Cawthrop. Hill. 3 W. & M. B. R. Rot. 506.

WRIT of Error on a Judgment in the Court of Hull, in an Action on the Caſe for ſtopping the Plaintiff's Lights by erecting a new Structure, and concluded his Declaration thus, (viz.) per quod the Plaintiff loſt the Light and Comfort of his Windows from ſuch a Day to the Time of the Plaint levied, and then goes farther, (viz.) Et magna pars prædict' meſſuagii (of the Plaintiff) occaſione præmiſſorum magna tenebritate obſcurat' fuit & adhuc exiſtit unde dicit, &c.

3 Lev. 345. 4 Mod. 152. Where the Plaintiff declared for Damages after the Commencement of the Action.

Upon Not guilty pleaded the Plaintiff had a Verdict, and upon a Writ of Error, it was aſſigned for Error, that the Plaintiff had declared for Damages after the Time of his Plaint levied even to the Time of his Declaring, (viz.) That his Houſe was darkned, & adhuc exiſtit, which ought not to be, for he ſhall not have Damages for any Matter after the Action commenced, becauſe if another Action ſhould be brought for the ſame Thing, this former Action cannot be pleaded in Bar to it; and therefore the Jury having given entire Damages in this Caſe, 'tis naught, for they have given Damages for the adhuc exiſtit darkned, which is Matter ſubſequent to the Action, and the Caſe of * Hambleton and Vere was relied on as an Authority in Point.

See antea Venables *ver.* Daffe.

* 2 Sand. 170.

But it was anſwered and ſo reſolved per Curiam, that this Caſe was not like that in Sanders, for the adhuc in this Caſe ſhall refer to the Time of the Plaint † levied, and not to the Time of the Declaration.

† Co. Ent. 246, 247, 290. Raſt. Ent. 206, 550.

Wherefore the Judgment was affirmed.

1 Sand. 87, 88. Co. Ent. 11, 12. Dyer 250. Co. Ent. 14, 15. 9 Rep. Batten's *Caſe*. Winch. Ent. 146. Hern 140.

In

In the arguing this Caſe, another was cited, between Hext and Barton in C. B. Mich. 1 Jac. 2. Rot. 425. which was an Action for ſtopping Lights, &c. with an adhuc exiſtit, as here, and it was moved in Arreſt of Judgment upon the ſame Exception of entire Damages; but that Court over-ruled it, and held the Declaration good, and the Plaintiff in that Caſe had his Judgment.

This laſt Caſe is reported in 3 Lev. 246.

Davis *verſus* Speed. Hill. 3 W. & M. B. R. Rot. 261.

4 Mod. 153. Salk. 675. Limitation of the Uſes of a Fine, becauſe there was no Diſpoſition of the Freehold to ſupport the contingent Uſes.

IN a ſpecial Verdict in Ejectment, the Caſe was thus: ff. Husband and Wife ſeiſed in Fee in the Right of his Wife, joined in a Fine with Proclamations, &c. and by Deed declared the Uſes, (viz.) That the Conuiſees ſhould ſtand ſeiſed to the Uſe of the Heirs of the Body of the Husband, begotten on the Body of the Wife, and for Want of ſuch Iſſue, to the right Heirs of the Husband; they had Iſſue between them, but died in the Life-Time of the Husband and Wife; then ſhe died, and afterwards her Huſband died without Iſſue, and the Leſſor of the Plaintiff was Heir at Law to the Husband, and the Defendant was Heir at Law to the Wife.

The Queſtion was, Whether this Limitation of the Uſes of this Fine was void in Law, becauſe there was no Diſpoſal of the Freehold in preſenti to ſupport the contingent Uſes.

And in Eaſter-Term, Anno 5 W. & M. it was adjudged by the whole Court for the Defendant; for they held the Limitation ſupra to be void for Want of a particular Eſtate, and preſent Diſpoſition of the Freehold, as a Foundation to ſupport the contingent Uſes; for otherwiſe the whole Inheritance muſt be in Abeyance, which cannot be; and to prove this Matter the Caſes in the * Margin were cited.

* 1 And. 328. 4 Leon. 293. 3 Cro. 334. Moor 349. Mod. Rep. 121, 159.

And Holt Chief Juſtice arguendo put theſe Caſes, (viz.) If a Feoffment in Fee is made to the Uſe of A. and the Heirs of his Body begotten, the Remainder in Fee to the right Heirs of T. S. who is then living, that in ſuch Caſe the Fee-ſimple is not in Abeyance, nor in the Feoffee; but the

the Uſe of the Fee ſhall reſult to the Feoffor, and remain in him until the Contingency, (viz.) the Death of T. S. ſhall happen.

(2.) If T. S. covenants to ſtand ſeiſed to the Uſe of the Heirs of his own Body begotten after the Death of E. G. this is a good Limitation of a ſpringing Uſe in Tail, and the old Eſtate remains in the Covenantor until the Contingency happens; and this was the Opinion of the Ch. Juſtice Hale.

The King *verſus* Marriott.

THE Defendant was indicted at the Seſſions for Keeping an Ale-houſe without Licenſe, and being convicted of the Offence, it was moved in Arreſt of Judgment, that an Indictment will not lie in this Caſe, becauſe 'tis no Offence at Common Law, but is made ſo by particular * Statutes, which preſcribe expreſs and particular Puniſhments, by Impriſonment and Forfeitures, and therefore the Offender is not to be puniſhed in any other Manner than ordained by the † Statute which creates the Offence.

4 Mod. 144. Indictment lies for Keeping an Ale-houſe without Licenſe.

* 5 & 6 Ed. 6. cap. 25. 3 Car. 1. cap. 3.

† 2 Cro. 643, 644, 647, 648. Palm. 388.

7 Rep. 36. Godb. 341. 2 Roll. Abr. 84, 247, 398. 1 Mod. 34. 1 Saund. 249.

See in 4 Mod. this Indictment was quaſhed for the Reaſon ſupra, but it was againſt the Opinion of Holt Ch. Juſt. becauſe an Indictment being a ſummary Way of Proceeding, is more beneficial for the Subject.

'Tis prohibited by the Statute 22 Car. 2. to travel with more than five Horſes at Length; this is a new Law and a new Offence; yet an Indictment will lie againſt the Offender, tho' a particular Puniſhment is directed by that Statute.

Wharton *verſus* Liſle. Hill. 3 Will. & Mar. B. R. Rot. 36.

IN Trover for 20 Cart-Loads of Flax, a ſpecial Verdict was found at the Aſſiſes in Eſſex, (viz.) That the Plaintiff was Impropriator of the Pariſh-Church of Thorp in that County, and that the Defendant was Vicar of the ſame Church, and that the Impropriators uſed to have Omnes de-

3 Lev. 365. 4 Mod. 183. Tithes of Flax belong to the Vicar, as being ſmall Tithes.

cimas

cimas magnas cujuſcunq; generis vel ſpeciei, coming of all the Lands of the ſame Pariſh, and that there are 520 Acres of arable Land, 720 Acres of Paſture, and 60 Acres of Meadow, in the ſaid Pariſh; and that 26 Acres of the arable Land had, for eight Years laſt paſt, been ſown with Flax, and that no Flax had at any Time before the ſaid eight Years, been ſown in the ſaid Pariſh, and that the Flax in the Declaration, &c. was the tenth Part ſevered and ſet out for Tithes of the ſaid 26 Acres of Flax; and they conclude, that if the ſaid Tithe Flax are Magnæ Decimæ, then they find for the Plaintiff; but if they were Minutæ Decimæ, then for the Defendant.

And by the Opinion of three Judges, the Tithes of this Flax are ſmall Tithes, and belong to the Vicar; and Juſtice Gregory cited a Caſe ruled in the Exchequer when he was a Baron, concerning Clover-Graſs, that the Tithe of it belonged to the Vicar, who had the Tithe-Hay, except only ſuch Clover as was neceſſarily cut amongſt the Corn where it did grow.

Sed per Holt Ch. Juſtice, Theſe are not ſmall Tithes, for Decimæ ſunt minutæ with Reſpect only to the Quantity, and not to the Quality of the Thing; but Judgment was given for the Defendant by the Opinion of the other three Judges.

Dupratt *verſus* Teſtard.

Special Bail ſhall not be put in by an Executor upon a Suggeſtion of a *Devaſtavit*; otherwiſe if the Sheriff return a *Devaſtavit*.

JUdgment againſt the Defendant, as Executor of T. S. whereupon the Plaintiff brought an Action of Debt in the Debet & Detinet, ſuggeſting a Devaſtavit by the Defendant.

The Queſtion was, If the Defendant ſhould be held to ſpecial Bail; and the Court took this Difference, (viz.) That where upon ſuch Judgment Execution is taken out, and the Sheriff hath returned a Devaſtavit, in ſuch Caſe the Defendant, upon an Action of Debt, ut ſupra, ſhall put in ſpecial Bail, becauſe of the Sheriff's Return, but not upon a bare Suggeſtion of a Devaſtavit, for there the common Bail ſhall ſerve.

Howard *verſus* Tremaine.

4 Mod. 146. 1 Salk. 278. Depoſitions taken *de bene eſſe* upon a Bill to perpetuate the Teſtimony of Witneſſes where there was no Anſwer put in, may be read in Evidence.

At a Trial in Ejectment at the Aſſiſes in Exon, one Langford (who was the Leſſor of the Plaintiff) amongſt other Things, offered to give in Evidence ſome Depoſitions of Perſons then dead, and taken de bene eſſe, upon a Bill in Chancery brought by the ſaid Langford againſt Tremaine, to perpetuate the Teſtimony, &c. and the Defendant Tremaine had not put in his Anſwer, neither had the Plaintiff taken out any Proceſs of Contempt to compel him to anſwer, according to the Practice and Courſe of the Court, and altho' the Bill had been filed a Year and more.

And a Caſe being made of all this Matter, and referred to the Court of B. R. whether theſe Depoſitions taken de bene eſſe upon a Bill, to which there was no Anſwer, and by Conſequence no Iſſue joined, ſhould be admitted to be read as Evidence, or not; and after much Debate the Court was of Opinion, that theſe Depoſitions might be given in Evidence; otherwiſe a Bill in Equity to perpetuate the Teſtimony of Witneſſes, would be to very little or no Purpoſe.

Hardres 315, 332, contra. Raym. 335, 336.

Broddeck *verſus* Briggs *the Marſhal.*

Immaterial Traverſe is but Matter of Form.

Eſcape againſt the Marſhal, who pleaded, that the Defendant was an Alien Enemy, born beyond Sea, at ſuch a Place in France.

The Plaintiff replied, that he is a Denizen born in England, and traverſed, that he is an Alien born modo & forma, &c.

And upon a general Demurrer to this Replication, it was held by the Court, that the Traverſe was ill, becauſe no Venue can ariſe from a Place beyond Sea; therefore the Plaintiff ought to have relied upon the firſt Part of his Replication, (viz.) That he is a Denizen, and then a Place of Trial might be laid here, &c.

But the Defendant having demurred generally, no Advantage can be now taken of this immaterial Traverſe, which is but Matter of Form; and if the Defendant had taken Iſſue upon the Plaintiff's being a Denizen, as he

See Nicholls *v.* Pawlett poſtea.

might, it ſhould be tried where the Action is laid, becauſe 'tis but a tranſitory Matter.

The Plaintiff had Judgment.

Lamb *verſus* Archer. Hill. 3 Will. & Mar. B. R. Rot. 828.

1 Salk. 225. Limitation of a Term by Way of executory Deviſe.

IN a ſpecial Verdict in Ejectment, the Caſe was thus: *Ff.* John Bull being poſſeſſed of the Lands in Queſtion for the Term of 3000 Years; and having demiſed Parcel thereof to his Son Richard for a leſs Term, and other Parcel, to Luke Sutton, in like Manner, did by his Laſt Will deviſe in theſe Words:

Item, Whereas *Richard Bull*, my Son, hath an Eſtate in the Living where he now lives, in *Hunton*, for 99 Years, if the ſaid *Richard* and *Mary* his Wife ſo long live; my Will and Meaning is, that he the ſaid *Richard* ſhall have and enjoy all that the aforeſaid Living, with the Appurtenances, and alſo all that Part of the Living, with the Appurtenances, after the Widowhood of *Elizabeth* my Wife, which I now live in, during the Remainder of the Years which I have to come and unexpired, which *Luke Sutton* did formerly Rent, to him and the Heirs Males of his Body begotten, and to be begotten; and for Want of ſuch Iſſue, then my Son *John*, and his Heirs Males for ever.

The ſaid *Richard* paying and diſcharging all ſuch Legacies as hereafter ſhall be given by me; and if the ſaid *Richard* ſhall happen to die before his ſaid Mother, without any Iſſue, as aforeſaid, I do then give and bequeath unto my Son *John*, and his Heirs Males, as aforeſaid, after the Expiration of the aforeſaid Leaſe made unto my Son *Richard*, and *Mary* his Wife, the aforeſaid Living, which *Richard* my Son liveth in, as alſo the other Living which *Luke Sutton* did formerly rent, after the Widowhood of my now Wife, he the ſaid *John* paying and diſcharging all ſuch Legacies and Payments, as the ſaid *Richard* is and was to pay in Caſe he had lived.

The Jury found, that Richard Bull died without Iſſue Male, living his Mother; and that Mary his Wife was likewiſe dead, that Archer the Defendant married Mary, the Daughter of the ſaid Richard Bull, who in his Life-time had granted the whole Term to the ſaid Archer, and his Wife; and that John Bull, the Son of the Teſtator, was Leſſor of the Plaintiff.

The ſingle Queſtion upon this Verdict was, Whether the Limitation of the Term to John Bull upon the Contingency of Richard dying without Iſſue Male living his Mother, was a good Limitation in Law.

And upon the firſt Argument it was reſolved by the whole Court without any Difficulty, that it was a good Limitation by way of Executory deviſe to John, and did not tend to a Perpetuity, as it was ſuggeſted.

It was alſo held, that the firſt Limitation to John upon the Death of Richard without Iſſue Male generally, was a void Limitation, becauſe it tended to a Perpetuity, but upon the laſt Clauſe Judgment was given for the Plaintiff.

And the Caſe of * Child and Baily which is reported in ſeveral Books was denied to be Law, but that the eſtabliſhed Law in Caſes of this Nature, is according to the Reſolution in the Duke of Norfolk's Caſe.

* 2 Cro. 459. 2 Roll. Rep. 129. Palm. 48, 333. W. Jones 15.

DE

Term. Paſchæ.

5 Will. & Mariæ B. R.

Hall *verſus* Cupper. Paſch. 5 W. & M. B. R. Rot. 292.

Demand *ore tenus* need not be made to the Perſon, nor at the laſt Hour of the Day.

THE Plaintiff ſold to the Defendant a Share of Five Hundred Pounds in the Eaſt-India Stock, and the Defendant covenanted to transfer the ſaid Share unto the Plaintiff, provided that he (the Plaintiff) did upon ſuch a Day by Word, or by Writing, left at the Eaſt-India Houſe in Leadenhall-Street, demand the ſaid Stock to be transferred unto him.

In an Action of Covenant brought by the Plaintiff, the Breach aſſigned was, that upon the Day, &c. he (the Plaintiff) demanded to have the ſaid Share of Five Hundred Pounds to be transferred to him, ſcil't, at the Eaſt-India Houſe in Leadenhall-ſtreet, ſecundum formam ſcripti, and that he was then and there ready, and offered to pay the Price agreed on, &c. if the Defendant would have transferred, &c. but the Defendant adtunc & ibidem penitus inde defecit ac ill transferre ſeu transferri cauſare omnino recuſavit contra formam, &c.

(1.) And

(1.) And upon a Demurrer to this Declaration it was objected, that this Demand of the Transfer being made ore tenus, and not by Writing, it ought to be made to the very Perſon of the Defendant; for that the Words (at the Eaſt-India Houſe) have Reſpect only to the Demand which was to be made in Writing, and not to the Demand ore tenus; but here the Plaintiff hath alledged a Demand by Word at the Eaſt-India Houſe, and not of the Perſon of the Defendant.

(2.) The next Objection was, That this Demand is not laid to be made at the laſt Hour of the Day, as is uſual in Caſes of Pleading a Demand for Rent.

Sed per Curiam, it was anſwered and reſolved, that the Words (at the Eaſt-India Houſe) have a Reſpect as well to the Demand ore tenus, as to a Demand in Writing; and 'tis the Uſage amongſt Merchants to make all their Demands ore tenus upon ſuch Bargains, as well as ſometimes by Writing at the Eaſt-India Houſe, and not to ſeek after the Perſon of the Vendor. Curia.

And as to the ſecond Objection they held, that the Demand was well laid as to the Time, for a Day and Place certain were appointed, and the Plaintiff hath laid it upon the ſame Day; and farther alledged, that the Defendant transferre recuſavit, which is ſufficient.

Judgment for the Plaintiff.

Williams *verſus* Williams. Paſch. 5 W. & M. B. R. Rot. 170, 171, 172.

THE Plaintiff Thomas Williams being a Goldſmith in Lombard-Street, brought an Action on the Caſe againſt Joſeph Williams the Projector of the diving Engine, and declared upon a Note drawn by one John Pullin, by which he promiſed to pay 12l. 10s. unto the ſaid Joſeph Williams on a Day certain; and he endorſed the Note for Value received unto one Daniel Foe, who endorſed it to the Plaintiff for like Value received. Cuſtom of Merchants concerning Bills of Exchange is Part of the Common Law.

And now the Plaintiff as ſecond Endorſee, declared in this Manner, ff. That the City of London is an ancient City, Quodq; habetur & a tempore cujus contrarium memoria hominum non exiſtit habebatur quædam antiqua & laudabilis conſuetudo inter mercatores & al' perſonas com- 2 Vent. 298. This Way of declaring held good.

commercium exercen' infra hoc regnum Angliæ reſiden' uſitat' & approbat', videl't, &c.

So ſets forth the Cuſtom of Merchants concerning Notes ſo drawn and endorſed ut ſupra, by which the firſt Endorſor is made liable as well as the ſecond, upon Failure of the Drawer, and then ſets forth the Fact thus:

ff. Cumque etiam quidam Joh'es Pullin exiſten' perſona quæ per viam Merchandiſand' commercium habuit, &c. (on ſuch a Day) apud London' prædict', videl't, in parochia beatæ Mariæ de Arcubus in Warda de Cheap' ſecundum uſum & conſuetud' mercatorum quandam Billam ſive notam in ſcriptis nomine ſuo ſubſcript' fecit geren' dat', &c. Et per eandem Billam ſive notam promiſit ſolvere, &c. ſetting forth the Note; and farther that it was endorſed by the Defendant to Foe, and by Foe to the Plaintiff, ſecundum uſum & conſuetudin' mercatorum; and that the Drawer having Notice thereof, refuſed to pay the Money, per quod the Defendant, ſecundum uſum & conſuetud' mercatorum, became liable to the Plaintiff, and in Conſideration thereof promiſed to pay it, &c. alledging that they were all Perſons who traded by way of Merchandiſe, &c.

To this the Defendant pleaded a frivolous Plea, and the Plaintiff demurred, and upon the firſt Opening the Matter had Judgment in B. R. and now the Defendant brought a Writ of Error in the Exchequer-Chamber, and the only Error inſiſted on was, That the Plaintiff had not declared on the Cuſtom of Merchants in London, or any other particular Place, (as the uſual Way is) but had declared on a Cuſtom thro' all England, and if ſo, 'tis the Common Law, and then it ought not to be ſet out by way of Cuſtom; and if 'tis a Cuſtom, then it ought to be laid in ſome particular Place from whence a* Venue might ariſe to try it.

* 9 Rep. 75. *b.* 11 Rep. 85. *b.* Dyer 54. *a.* 2 Leon 114. 1 Inſt. 110. Hardr. 485. 2 Vent. 310. *adjudged good.*

To which it was anſwered, that this Cuſtom of Merchants concerning Bills of Exchange is Part of the Common Law, of which the Judges will take Notice ex officio, as it was reſolved in the Caſe of † Carter and Dowriſh; and therefore 'tis needleſs to ſet forth the Cuſtom ſpecially in the Declaration, for 'tis ſufficient to ſay that ſuch a Perſon ſecundum uſum & conſuetudinem mercatorum drew the Bill; therefore all the Matter in the Declaration concerning the ſpecial Cuſtom was meerly Surpluſage, and the Declaration good without it.

† 3 Mod. 226. *See* Megadora *and* Holt, *and* Lidlow, *and* Boynton.

Surpluſage.

The Judgment was affirmed.

Hinks

Hinks *verſus* Harris.

PRohibition, &c. the Caſe was, Hinks and Elizabeth his Wife were proſecuted in the Court-Chriſtian for an inceſtuous Marriage, for that the ſaid Elizabeth was Siſter to the firſt Wife of Hinks.

Elizabeth died pending the Suit, whereupon the ſurviving Husband pleaded in Abatement the Death of his Wife; but that Court rejected the Plea, and afterwards gave Sentence, that the Marriage was inceſtuous, void and null.

And it was now moved, that the Wife being dead, the Spiritual Court ought not to have proceeded to annul the Marriage, for that Hinks and his Wife had Iſſue between them now living, and by that Means the Iſſue would be made Baſtards after the Death of the Parent, which is contrary to the Rules of Law laid down in * Kenn's Caſe.

And after Debate, a Prohibition was granted, quoad the Annulling the Marriage only, but that the Spiritual Court might proceed againſt Hinks after the Death of his pro ſalute animæ, to puniſh him for the Inceſt, but they ſhould not make the Marriage void, ſo as to baſtardiſe the Iſſue, for that was againſt Law; and the Authority in Kenn's Caſe was the Rule in this Caſe.

4 Mod. 182. 2 Salk. 548. Libel in the Spiritual Court againſt Huſband and Wife for an inceſtuous Marriage, and pending the Suit the Wife died, which the Husband pleaded in Abatement; but that Court proceeded to make the Marriage void: A Prohibition was granted.

* 7 Rep. Caſu ultimo.

Knight *verſus* Keech. Trin. 3 Will. Rot. 364. in C. B. Mich. 4 Will. & Mar. B. R. Rot. 60.

THIS was a Writ of Error on a Judgment in C. B. wherein the Plaintiff declared upon a ſpecial Agreement, (viz.) That whereas Knight was poſſeſſed of a Moiety of ſuch a Ship, then in a Voyage, and had ſuch a Share of the Profits of the ſaid Voyage; it was agreed between him and Keech, that he (Knight) ſhould ſell and convey to the ſaid Keech, all his Intereſt in the ſaid Ship, and Profits of the ſaid Voyage, and that the Sale ſhould be in Writing, and that Keech ſhould pay unto Knight 600 l. for the ſame, viz. 23 l. in Hand, and the Reſidue at the Execution of the Writing; and then lays a reciprocal Promiſe, that Knight, in Conſideration that Keech had paid 23 l. in Hand, and had promiſed to perform the ſaid Agreement

4 Mod. 188. S. C. 3 Lev. 319. S. C. Where the not aſſigning a particular Breach of a Promiſe is cured by a Verdict.

He ſhould have ſet forth ſome particular Inſtance of the Breach of this Agreement.

ment in all Things on his Part, he promiſed to perform the ſaid Agreement in all Things on his Part, and then lays the general Breach, (viz.) That Knight agreamentum ſuum prædict. hucuſq; aliqualiter non performavit, tho' on ſuch a Day, &c. he was ſpecially requeſted ſo to do, &c.

Upon Non Aſſumpſit pleaded the Plaintiff had a Verdict and 73 l. Damages; and now upon a Writ of Error brought, it was inſiſted, that this Breach of the Agreement in theſe Words, (viz.) Agreamentum ſuum hucuſq; aliqualiter non performavit, was too general and incertain, for he ought to have ſet forth ſome particular Inſtance of the Breach of the Agreement.

'Tis true, the Promiſe is general, but yet the Breach thereof muſt be particularly ſhewn, to entitle the Plaintiff to his Action, and to give the Defendant an Opportunity of making and applying his Defence.

* 3 H. 6. 8. 9 H. 6. 16. Dyer 297. Yelv. 40. 1 Sid. 173, 270, 447. 2 Saund. 350.

Sed per Curiam, This might be good Matter upon a Demurrer, but that the Plaintiff in the original Action was helped by the * Verdict, for it ſhall be intended, that ſome particular Breach was given in Evidence to the Jury; otherwiſe the Plaintiff could not have recovered a Verdict.

Tippin *verſus* Coſin. Hill. 5 Will. & Mar. B. R. Rot.

4 Mod. 380. Contingent Remainder which the Heir ſhall take by Purchaſe and not by Deſcent.

IN a ſpecial Verdict in Ejectment, the Jury found as followeth:

That Edward Coſin was ſeiſed in Fee of the Lands in Queſtion, which by Deed and Fine he ſettled on his own Marriage, (viz.) To the Uſe of himſelf and his Heirs, until the Marriage ſhould take Effect, and afterwards to the Uſe of the Wife for Life, and after her Death, then to the Uſe of the Conuſees in the ſaid Fine, and their Heirs, during the Life of the ſaid Edward Coſin, upon Truſt, to permit and ſuffer him to take the Profits, &c. and afterwards to the firſt and every Son of that Marriage in Tail Male; and for Want of ſuch Iſſue, to the Heirs of the Body of the ſaid Edward Coſin; and for Want of ſuch Iſſue, to the ſaid Edward Coſin and his Heirs for ever.

The Marriage took Effect, and they had Iſſue only one Daughter, ſince married to George Tippin, who likewiſe had Iſſue by his ſaid Wife one Daughter, an Infant, and Leſſor of the Plaintiff.

Edward Coſin, the Father, upon ſome Diſpleaſure at the ſaid Marriage, levied another Fine with Proclamations and Warranty to the Uſe of the Defendant Coſin, and his Heirs for ever.

The Wife of Tippin died, then her Father, Edward Coſin, died without any other Iſſue; and his Widow entered and enjoyed the Lands during her Life, and died.

The Queſtion was, Whether the Daughter of George Tippin, who was certainly the right Heir of Edward Coſin, her Grandfather, was barred by the laſt Fine, with Proclamations; and that Queſtion did ariſe upon the Limitation of the Uſes, &c. (viz.) If thereby Edward Coſin took an Eſtate-tail veſted in himſelf, or whether the Remainder limited to the Heirs Males of his Body was a contingent Remainder, which his Heir ſhall take as a Purchaſer, and not by Deſcent.

For if his Heir ſhall take by Purchaſe, then the laſt Fine levied by Edward Coſin ſhall be no Bar to the Heir, becauſe ſhe doth not claim under the Conuſor of the ſaid Fine, but under the Marriage-Settlement ſupra.

And it was argued for the Plaintiff (the Heir at Law) that this Caſe differs from that of * Fenwick and Mitford, for there no Uſe at all was limited for the Life of the Feoffor; ſo that there was a Vacancy which the Law would not ſupply by Implication.

* 1 Inſt. 22. b. Moor 284. 1 Leon. 182.

But in the principal Caſe there is an expreſs Eſtate limited to the Conuſees, during the Life of Edward Coſin, ſo there is no Room left for any Implication; beſides, in Mitford's Caſe it was held to be no other than the old Reverſion ſubſiſting in the Feoffor; but the Limitation here is of a new Eſtate, (viz.) An Eſtate-tail, and therefore cannot be any Part of the old Eſtate, which was a Fee-ſimple.

On the other Side it was argued againſt the Heir, that the Limitation of the Profits to *Edward Coſin*, during his Life, was a Remainder veſted in him by the Statute of Uſes.

Econtra for the Defendant.

Sed per Curiam, that was denied, for then there would be an Uſe upon an Uſe.

Then it was farther argued, that the Law would imply an Eſtate for Life in Edward Coſin, intermediate between the Eſtate of the Conuſees and that to the firſt Son of that Marriage, becauſe it was poſſible that they (the Conuſees) might forfeit or ſurrender.

And moreover, that there might be a Tranſpoſition of the Name (Edward Coſin) which precedes the laſt Remainder in Fee, and to place it immediately before the Limitation to the Heirs Males of his Body, and then he would have an Eſtate-tail in Remainder veſted in him.

There was another Point ſtirred, (viz.) The Deſcent of the Warranty upon the Heir at Law, but ſhe being an Infant, that was waived on both Sides.

And upon the firſt Argument, the whole Court was clear in Opinion, that this was a contingent Remainder, and ſuch as the Heir ſhould take by Purchaſe, and not by Deſcent, and that this Caſe differs from that of Fenwick and Mitford, for the Reaſons ſupra.

And Judgment was given for the Plaintiff.

Prigg *verſus* Adams.

2 Salk. 674. Where a Judgment is not *ipſo facto* void, tho' declared by a private Act of Parliament, that it ſhall be void.

IN an Action of Falſe Impriſonment, the Defendant pleaded a Judgment in the Town-Court in Briſtol, obtained againſt Prigg, and that he was arreſted and impriſoned by Virtue of an Execution thereon, &c.

The Plaintiff replied, and ſet forth a private Act of Parliament lately made, by which a Court of Conſcience was erected in that City, to have the ſole Conuſance in the ſeveral Actions therein expreſſed, concerning all Matters under 40 s. to be brought againſt any poor Inhabitant of that City, and that all Judgments elſewhere for ſuch Matters ſhould be meerly void.

Then he ſets forth, that he is a poor Inhabitant of the ſaid City, and that the Matter for which the Judgment was obtained was under 40 s. and that the Action was within the ſaid Statute.

There was a frivolous Rejoinder to this Replication, and thereupon a Demurrer; and the Queſtions were,

(1.) Whether this Judgment againſt Prigg was by Force of this Act of Parliament ipſo facto void, or whether it is voidable by Writ of Error, or by Plea.

(2.) Whether Prigg hath now loſt the Benefit of the ſaid Act by not Pleading it in the original Action to the Juriſdiction of the Court; and ſetting forth, that he was a poor Inhabitant of that City, ſo as to entitle him to the Benefit of that Act.

(3.) What Remedy, if any now remained to Prigg, (after Judgment) to avoid the ſame.

And after Argument it was reſolved by the Court,

That this Judgment was not ipſo facto void, ſo as to make the Plaintiff in the original Action, and the Officers (who ſerved the Execution) Treſpaſſers; and that the regular Way to take the Benefit of the Act was for the Defendant below to have pleaded this Matter, and ſo to have entitled himſelf to ſuch Benefit. Where a private Act of Parliament ſhould be pleaded.

That ſince the Judgment was not abſolutely Void, and tho' Prigg had neglected to plead the Statute to the Juriſdiction of the Court below, yet he was not without Remedy.

For he may come in upon the Return of the Ca. ſa. in Cuſtody below, and then plead this Statute with the neceſſary Averments in Diſcharge of the Execution.

As upon the Statute of * Additions which hath the ſame Words, (viz.) That the Outlawry ſhall be void if there is no Addition; and yet in that Caſe it hath been always held, that the Perſon ſo outlawed muſt either reverſe it, or plead it off ut ſupra, and † Turner's Caſe was cited and allowed for Law; for an irregular Judgment is no Judgment, and that was vacated before the Action brought, ſo that the Plaintiff might have replied nul tiel Record to the Defendant's Pleading the Judgment. * 1 H. 5. c. 5. † Turner *ver.* Felgate. 2 Sid. 125. Raym. 73, 74.

Judgment for the Defendant, quod quer' nil capiat, &c.

Benſon *verſus* Scott. Hill. 4 W. & M. B. R. Rot. 566.

IN a ſpecial Verdict in Ejectment, the Caſe was as followeth: 3 Lev. 385. 1 Salk. 158.

ſt. Copyholder in Fee, where by the Tenure the Widow was entitled to her Free-Bench, ſurrendered his Copyhold into the Hands of two Tenants according to the Cuſtom to the Uſe of T. S. and his Heirs. Where the Widow was defeated of her Free-Bench in a Copyhold.

This Surrender was preſented at the next Court, but after, and before the ſecond Court the Surrenderor died, and at the next Court after his Death, the ſaid T. S. and the Widow were admitted.

And the Queſtion was, If the Widow was defeated of her Free-Bench by the Admittance of the Surrendree, or whether the Widow's Eſtate being attached by her Husband's dying ſeiſed, ſhould ſuſpend the Operation of the ſubſequent

Admittance of the Surrendzee until after the Marriage, or the Death of the Widow.

1 Inſt. 59. *b.* 3 Bulſt. 219. 2 Cro. 100. Cro. Car. 410.

And upon the firſt Argument it was adjudged without Difficulty, for the Surrendree againſt the Widow; for tho' by the bare Surrender, no Eſtate paſſeth out of the Surrenderor, and by Conſequence he died ſeiſed in Fee of the Copyhold; yet it was not of an abſolute, but a defeaſable Eſtate of Inheritance, ſubject to be deſtroyed by the ſubſequent Admittance of the Surrendree; and therefore the Widow's Eſtate which is derived out of that Eſtate of which her Husband died ſeiſed, muſt neceſſarily partake of the ſame Quality, and remain defeaſable in her, as it was in her Husband.

And the Admittance of the Surrendree ſhall have Relation to the Time of the Surrender made, as well to defeat all mean Acts made by the Surrenderor, as all other cuſtomary Eſtates derived out of his Eſtate; for 'tis very clear, that her Title by the Cuſtom doth not commence by the Marriage, (as it doth in Dower at Common Law) for if he did, then the Husband could not defeat it by any Act, which he may in Caſe of Free-Bench, for there the Husband muſt die ſeiſed, otherwiſe the Widow hath no Title.

So Judgment was given for the Plaintiff, the Leſſee of the Surrendzee.

Hibbert *verſus* Courthope. Hill. 4 W. & M. B. R. Rot. 231.

In *aſſumpſit* for Work and Labour, the Plaintiff need not ſet forth what Manner of Work or Labour.

Aſſumpſit, &c. and Judgment againſt the Defendant by Default, and now upon a Writ of Error brought, the Error inſiſted on was, that the Declaration was general, (viz.) That the Defendant was indebted to the Plaintiff in ſo much Money pro opere & labore ipſius (the Plaintiff) pro prædicto (the Defendant) ad ſpecial' inſtantiam & requiſitionem prædict' (the Defendant) ante tempus illud fact' & performat', without ſetting forth what Sort or Manner of Work or Labour it was, ſo that it might appear to the Court to be lawful; for it might be about ſome unlawful Matter, for which the Law will not imply any Promiſe, &c.

Sed non allocatur, for per Curiam, the only Reaſon why the Plaintiff is bound to ſhew wherein the Defendant is indebted, is, that it may appear to the Court that 'tis not a Debt on Record or Specialty, but only upon ſimple Contract; and any general Words, by which that may be made to appear, are ſufficient.

The Judgment was affirmed.

An-

Andrews *verſus* Whittingham. Trin. 4 W. & M. B. R. Rot. 815.

IN Ejectment in the County Palatine of Durham, the Plaintiff declared upon a Demiſe de mineris carbonum in parochia de D. &c. generally, not ſaying how many Mines, &c.

4 Mod. 143. 1 Salk. 255. Ejectment *de mineris Carbonum*, good.

Upon Not guilty pleaded, the Plaintiff had a Verdict, and Judgment, and upon a Writ of Error brought, the Error aſſigned was in the Declaration, becauſe of the Incertainty thereof, for not ſetting forth the Number of Coal-Mines, ſo as the Sheriff might know of how many to give Poſſeſſion.

And for this Reaſon the Court inclined, that the Judgment was erroneous; but then the Plaintiff producing ſeveral Precedents in Durham, and alledging that all the Entries there in Ejectments for Coal-Mines were the ſame as in this Caſe, the Judgment was affirmed.

The King *verſus* Gallwich. Paſch. 5 W. & M. B. R.

THE Defendant was indicted in Middleſex, for being a Pawn-broker, and it was moved to quaſh it, for that this Indictment was in Nature of an Action of Trover, for it was, that the Defendant on ſuch a Day, &c. had lent Mary the Wife of T. S. 2 s. 6 d. and at the ſame Time did receive of her an Under-Petticoat of Silk as a Pawn for the Re-payment of the Money, and that he (the Defendant) had illicite & deceptive refuſed to deliver the ſaid Petticoat, notwithſtanding that the ſaid Mary had tendered to him the ſaid 2 s. 6 d. with Intereſt for the ſame, ad damnum of the ſaid T. S. & in malum exemplum, &c. ſo that at moſt this is only a Breach of Contract, which is actionable, but not indictable.

Indictment in Nature of an Action of *Trover* againſt a Pawn-broker.

But the Court would not quaſh the Indictment (abſente Holt Chief Juſtice,) becauſe of the Abuſe by Pawn-brokers.

Sed quære, for if the Defendant had demurred to this Indictment, it could not have been maintained by Law.

DE

Term. Sanct. Trin.

5 Willi. & Mariæ, B. R.

An Infant being Bail, and taken in Execution, 'tis diſcretionary to diſcharge him on Bail, or not.

In an Action of Aſſault, the Proceſs was marked for ſpecial Bail.

Loyd *verſus* Ogle, *and* Loyd *verſus* Eagle.

AN Action of Aſſault and Battery was brought by Loyd againſt Ogle, and the Battery being outragious, the Plaintiff procured the Proceſs to be marked for ſpecial Bail.

Thereupon Ogle was arreſted, and Eagle entered into a Recogniſance before a Judge as Bail in the original Action, and afterwards Loyd the Plaintiff recovered 100 l. Damages againſt Ogle for the Battery, and had Judgment; and after the Return of the Ca. ſa. againſt the Principal, he ſued out a Sci. fa. againſt Eagle the Bail, and had Judgment thereon, and then Eagle was taken in Execution for the Damages.

Whereupon he brought an Audita querela ſuggeſting his Infancy, and the Writ being brought into Court, he appeared in propria perſona, and it was moved, that he might be inſpected, and his Witneſſes examined; and thereupon his Mother peremptorily depoſed, that at that very Time he was 20 Years old and no more, and a Maid Servant gave circumſtantial Evidence to the ſame Purpoſe, and hereupon it was moved, that he might be bailed.

But per Curiam, 'Tis Matter of Diſcretion, either to admit him to Bail, or to refuſe it, he being in Execution; but if he had brought this * Audita querela before he had been taken in Execution, he muſt have a Superſedeas of Courſe.

* 1 Roll. Abr. 383. 2 Roll. Abr. 113.

The Court would not bail him, tho' the long Vacation was near, but required the Evidence to be ſtrengthened by a Copy of the Regiſter where he was born, which being in Yorkſhire, he appeared again in Michaelmas-Term in Cuſtody, and a Copy of the Regiſter was produced, and ſworn to be a true Copy; and the Mother and the Maid being again ſworn, ut ſupra, and all agreeing in the ſame Thing, Eagle was then diſcharged by the Court.

Co. Ent. 87. b. 88. a.

The Inhabitants of Shermanbury *in* Suſſex *verſus* Bolney *Pariſhioners.*

A Widow having three Children married an Inhabitant of another Pariſh, the Children ſhall not follow the Mother, unleſs they were Nurſe-Children.

THE Caſe, (viz.) A poor Man who was lawfully ſettled in the Pariſh of Bolney, married a Widow, who was an Inhabitant of the Pariſh of Shermanbury, who at that Time had three Children (living) by her firſt Huſband, all under the Age of ſeven Years, and maintained by the Pariſh of Shermanbury, at the weekly Allowance of 3 s.

After this Marriage, the Mother and her three Children were ſent to the Pariſh of Bolney, where her Husband was ſettled.

Hereupon the Juſtices, upon the Complaint of the Pariſh-Officers of Bolney, made an Order, that the Pariſhioners of Shermanbury ſhould continue to pay the 3 s. per Week towards the Maintenance of the Children; which Order was confirmed upon an Appeal.

And being removed into B. R. by Certiorari, it was now moved to quaſh it, becauſe the Juſtices had no Power to make an Order for ſuch Payment towards the Maintenance of the Children now they dwelt in another Pariſh.

Sed per Curiam, The Marriage of the Mother into the Pariſh of Bolney ſhall not ſettle the Children there, unleſs they were Nurſe-Children, for ſuch muſt go with the Mother; but it was doubted, whether theſe Children, being under 7 Years old, ſhall be reputed to be Nurſe-Children.

Then it was objected, that it did not appear in this Caſe but that the Father in Law was of ſufficient Ability to maintain theſe Children.

To

To which it was anſwered by Juſtice G. Eyre, that where the Relations are obliged to maintain their poor Friends, ſuch poor People ſhall not be removed out of their own Pariſh where they are ſettled, unto that Pariſh where their Relations live; for by that Means, upon the Death of ſuch Relations, the Pariſh where they lived may become chargeable, which ought not to be, and therefore the poor Perſon ſhall continue in his own Pariſh, and his Relations ſhall maintain him there.

Et per Curiam, This Caſe is within the Equity of the Statute for the Relief of the Poor; and there is no Reaſon that Shermanbury ſhould be diſcharged of the Children by their Mother's Marriage.

King & Ux' *verſus* Phippard. Trin. 5 Will. & Mar. B. R. Rot. 383.

In an Action of Aſſault and Battery, where the Pleadings are good without a Traverſe.

IN an Action of Aſſault and Battery brought by Huſband and Wife for an Aſſault, &c. on his Wife.

The Defendant pleaded, that the Plaintiff Mary, die & anno ſupradicto apud H. prædict. in ipſum (the Defendant) in ultum fecit & ipſum adtunc & ibidem verberavit & vulneravit ac ipſum vulnerare & mahemiare voluiſſet, and ſo juſtifies in his own Defence, &c.

The Plaintiff replied, quod prædicto tempore quo, &c. the aforeſaid Aſſault by the ſaid Mary, upon the Defendant, was ſuppoſed, the Plaintiff King was poſſeſſed of an Houſe ſituate in, &c. and that the Defendant eodem tempore quo the Aſſault by the ſaid Mary, upon the Defendant, is ſuppoſed, entered into the ſaid Houſe upon the Poſſeſſion of the Plaintiff King, & ipſum diverſis injuriis & contumeliis laceſſit ſuper quo (the Plaintiff King) required the Defendant to depart out of his Houſe, but he refuſed ſo to do, and thereupon the Plaintiff Mary, per Mandatum of her Huſband (the Plaintiff King) molliter manus impoſuit on the Defendant, to put him out of the Houſe, ſuper quo the Defendant ira motus aſſaulted and beat the Plaintiff Mary, as in the Declaration, & hoc parat. ſunt verificare.

And upon a Demurrer to this Replication, it was inſiſted for the Defendant, that the Replication was ill for Want of a Traverſe, (viz.) Abſq; hoc, that the Plaintiff Mary verberavit & vulneravit the Defendant, becauſe that is poſitively alledged in his Plea, or at leaſt ſhould have

traverſed ab'q; hoc quod inſultum fecit ad vulnerandum the Defendant, as is done in the like Pleading in the Books of Entries, or if they did not traverſe, ut ſupra, it was neceſſary, at leaſt, that in the Concluſion of the Replication, the Plaintiffs ſhould have averred that to be the ſame Aſſault, which the Defendant had mentioned in his Plea. Raſt. Ent. 612. a. Old. Ent. 155.

Sed per Curiam, The Replication is good and as it ought to be, and that the Traverſes, ut ſupra, had been immaterial, becauſe the Matter of the Plea was confeſſed and avoided; and the Words verberavit & vulneravit in the Plea doth not differ it from the common Bar Son aſſault Demeſne, but only makes the Plea informal; and as to the Averment, there is no Need of it in this Caſe, becauſe the Matter of the Replication is laid to be done at the ſame Time and Place; and 'tis a Rule, that if a Juſtification be at the ſame Time and Place, 'tis needleſs to aver that 'tis the ſame Treſpaſs. Where a Juſtification is at the ſame Time and Place, 'tis not neceſſary to aver it to be the ſame Treſpaſs. 21 H. 7. 39. Savill 45. 2 Saund. 5.

Et per Curiam, The Replication ought to be ſpecial, (as 'tis) becauſe this Matter could not be given in Evidence upon the general Replication de injuria ſua propria.

Judgment for the Plaintiff.

Gale *verſus* Till.

TILL brought an Action on the Caſe in the Common Pleas againſt Gale, as Adminiſtrator of T. S. and there was a Verdict and Judgment againſt him; thereupon he brought a Writ of Error in B. R. and there the Judgment was affirmed; and now it was moved, that the Adminiſtrator might pay Coſts upon this Writ of Error, becauſe it was his own Act, and lay in his own Knowledge, and was brought in dilatione Executionis, in which Caſe the * Statute gives double Coſts. 4 Mod. 244. 3 Lev. 375. Judgment againſt an Adminiſtrator was affirmed on a Writ of Error; he ſhall not pay Coſts. Sid. 183. * 13 Car. 2. cap. 2.

But after an Adjournment on Monday 27 Novemb. 1693. it was reſolved, that the Adminiſtrator ſhould not pay any Coſts, for that he was not a Perſon within the Intent of the ſaid Statute.

Lawrence *verſus* Atherton.

Foreign Attachment pleaded ill.

DEBT upon Bond, &c. the Defendant pleaded the Cuſtom of Foreign Attachments in London, (viz.) That on ſuch a Day T. S. entered a Plaint, &c. againſt the Plaintiff Lawrence in London; and upon Proceſs againſt him Non eſt inventus was returned, and thereupon a Suggeſtion was made, that he had ſo much Money in the Hands of the Defendant Atherton, and that he the ſaid Atherton was attached by the ſaid Money, and ſo ſhews all the Proceedings thereon.

Raſt. Ent. 57. *or* 157. *a.*

And upon a Demurrer to this Plea it was adjudged ill, becauſe it was laid, that the Defendant (who was the Garniſhee) was attached by the Money in his Hands, whereas it ought to be, that Lawrence (the Defendant in the Action in London) was attached by the Money in Atherton's Hands, for ſo is the Cuſtom, and ſo the Defendant had laid it to be in his Plea.

Lampton *verſus* Collingwood. Trin. 5 Will. & Mar. B. R. Rot. 509.

1 Salk. 262. 4 Mod. 314. Where an *Audita querela*, and not a Writ of Error, will lie.

COllingwood obtained a Judgment for 40 l. Debt, and 40 s. Damages againſt Edward Craſter and Robert Lampton; and after the Year, &c. he brought a Sci. fa. upon that Judgment againſt Anne Lampton, Relict and Adminiſtratrix of the ſaid Robert Lampton, ſuggeſting the Recovery ſupra, and that Craſter died, and Robert Lampton him ſurvived, and then he died, and that Anne Lampton was Adminiſtratrix; and upon two Sci. fa's and Nichils returned againſt her, he obtained Judgment againſt her as Adminiſtratrix of the ſurviving Debtor Robert Lampton.

Upon which Judgment the ſaid Anne Lampton brought a Writ of Error in the ſame Court where the Judgment was, (viz.) Error coram vobis reſiden', and for Error aſſigned Matter of Fact, contrary to the Suggeſtion of the Sci. fa's.

1ſt. That where by the Sci. fa's it is ſuggeſted, that Craſter died firſt, and Robert Lampton him ſurvived, ſhe averred, that Robert Lampton died firſt, and Edward Craſter him ſurvived,

vived; upon which Iſſue was taken, and found for Anne Lampton the Plaintiff in the Writ of Error, (viz) That Craſter ſurvived; and now it was moved in her Behalf, that the Judgment might be reverſed, and no Body appearing for the Defendant,

Per Holt Chief Juſtice, a Writ of Error will not lie in this Caſe, but an Audita querela only; becauſe the Fact aſſigned for Error is in the Suggeſtion of the Writ it ſelf, and not in any of the Proceedings in the Cauſe; & adjournatur.

But afterwards it was adjudged, that a Writ of Error would not lie, wherefore the Plaintiff brought an Audita querela.

DE

Term. Sanct. Mich.

5 Willi. & Mariæ in B. R.

Seymour *verſus* Greenvill.

Elegit not taken out within a Year and a Day after the Judgment, but there being Continuances on the Roll, may be taken out at any Time without ſuing a *Sci' fa'*.

IN Hillary-Term, 30 & 31 Car. 2. in B. R. Rot. 108. The Plaintiff Sir Joſeph Seymour obtained a Judgment againſt the Defendant Bernard Greenvill, Eſq; for 1000 l. Debt, and 8 l. Damages, but no Execution was taken out, nor any Writ of Elegit actually ſued within a Year and a Day after the ſaid Judgment

was obtained; and that the Plaintiff, without ſuing out any Sci. fa. againſt the Defendant in the Action, had now taken out an Elegit directed to the Sheriff of Berks, returnable the firſt Day of this Term; and thereupon an Inquiſition was had, and the Lands of the Defendant delivered, &c. in Execution.

But the Plaintiff had now entered on the Roll of the ſaid Judgment an Award of an Elegit, as of the ſame Term with the Judgment; and had continued it down with Vicecomes non miſit Breve to the Time of the Suing out the preſent Elegit.

And now it was moved to ſet aſide the Execution of this Elegit, and to have Reſtitution, &c. becauſe the Suing out this Elegit was inſufficient, for it ought to be actually taken out ſome Time within the Year and the Day after the Judgment; otherwiſe ſuch an Award as this is, may be entered at any Time, paying only for the Continuances; and then the Party will thereby be tricked out of the Benefit which the Law gives him of Pleading any Matter poſt factum, upon the Sci. fa. which ought firſt to have been brought.

Curia. Et per Curiam, That unleſs a Writ of Elegit was actually taken out within the Year and a Day, that the Award thereof afterwards would be to no Purpoſe; and therefore this Elegit was irregular without a Sci. fa. firſt ſued out.

But, upon Examination of ſeveral of the ancient practiſing Clerks then in Court, it appeared, that it had been the conſtant Practiſe amongſt them for many Years, only to award an Elegit with Continuances on the Roll, and to take out that Writ at any Time afterwards, without ſuing out any Sci. fa. therefore the Court conſidering the Inconveniency of opening a Gap to deſtroy ſo many Executions, for this Irregularity, and becauſe the Practice had prevailed ſo long, that it was now become the Law of the Court, ordered that the Execution ſhould ſtand good.

Turner *verſus* Felgate.

Raym. 73. Sid. 125. 1 Lev. 95. A Caſe by the ſame Names, but to a different Purpoſe.

IN Replevin for taking a Silver Tankard, &c. the Defendant Felgate avowed the Taking, &c. for that he was ſeiſed in Fee of an Houſe in London, and being ſo ſeiſed, he by Indenture dated 9 Febr. 1680. demiſed the ſame to one Harris for ſixty Years rendring Rent; and that afterwards

wards he ſold a Moiety of the Reverſion to one Palmer, and for 150 l. de medietate redditus prædict' for 7 Years after the Sale of the other Moiety to the ſaid Palmer, he (the Defendant) avowed the Taking, &c.

Where a Traverſe to Part is ill.

The Plaintiff pleaded in Bar, That at the Time of the Leaſe made to Harris, and at the Time of the Defendant's Sale to Palmer, one Mary Chown was ſeiſed in Fee of a Moiety of the ſaid Houſe, and died ſeiſed; and that it deſcended to Thomas Chown her Son and Heir, who is ſtill ſeiſed thereof; and that the Defendant was ſeiſed of the other Moiety, and ſold it to Palmer, as he had ſet forth; by which Palmer was ſeiſed, and ſo the Defendant took the Tankard de injuria ſua propria, and traverſed that the Defendant was ſeiſed in Fee of a Moiety of the ſaid Reverſion, at the Time of the Taking the Tankard, or at any Time after the Sale to Palmer.

And upon a general Demurrer, the Plea in Bar was held ill, becauſe the Plaintiff had laid a Seiſin in Fee of one Moiety of the Houſe in Mary Chown, at the Time of the Demiſe to Harris, and had not traverſed the Defendant's Seiſin of the Whole, as he had alledged in his Avowry, which was the principal Point to be traverſed.

Judgment for the Defendant.

Smith *verſus* Kemp, & al'.

4 Mod. 186. 2 Salk. 637. Treſpaſs *vi & armis* lies for taking Fiſh *in libera piſcaria.*

Treſpaſs by Levi Smith of Newbury againſt Kemp and others, Servants to one Harris, Parſon of Newton in Hampſhire.

Upon Not guilty pleaded, the Cauſe was tried at Wincheſter Aſſiſes, and the Plaintiff had a Verdict, and 2 d. Damages; and it was now moved in Arreſt of Judgment, that the Declaration was ill, and that the Plaintiff could not maintain this Action.

The Declaration was, That the Defendants vi & armis clauſum ipſius (the Plaintiff) vocat' Peckſmead apud paroch' de T. in Com' prædict' fregerunt & intraverunt & liberam piſcariam ipſius (Plaintiff) in clauſo prædicto cum retibus piſcat' fuerunt & piſces inde, (viz.) 200 trutas, &c. ceperunt & aſportaverunt, &c.

The Exception to this Declaration was, that Treſpaſs vi & armis cannot be maintained by him who hath only liberam piſcariam, for he is no more than a Commoner, and hath only a Liberty of Fiſhing with others, and not the entire

entire Fiſhing himſelf; for he hath neither the Property or Poſſeſſion of the Fiſh in libera piſcaria, but only a Privilege of taking them there; and therefore cannot maintain * Treſpaſs vi & armis, no more than he who hath Common of Paſture.

*1 Inſt. 122. a. Cro. Car. 553. And a Caſe adjudged between *Peak and Tucker.* Hill. 1 & 2 Jac. 2. *B. R.* Where Judgment was arreſted upon the Motion of Mr. *Pollexfen* for this very Cauſe.

And Juſtice G. Eyres cited a Caſe between Up John and Dawkins in the Reign of Ch. 2d. where the like Action was brought, and Judgment arreſted for the like Cauſe, ut ſupra, and that he was Counſel for the Plaintiff in that Caſe, which is reported in 3 Mod 97.

Sed per Holt Chief Juſtice and Dolben, the Plaintiff had Judgment in Eaſter-Term 1693. Eyre Juſtice being of a contrary Opinion, and Gregory abſent; and the Chief Juſtice grounded his Opinion upon the Authority of the Writ in the Regiſter. Fo. 95. b and F. N. B. 88. g.

But Juſtice Dolben ſeemed to differ this Caſe from the Regiſter, becauſe here it was laid to be libera piſcaria in Clauſo (of the Plaintiff) which amounts to ſeparalis piſcaria.

Delabaſtide *verſus* Reynell.

4 Mod. 183. *Homine replegiando*, the Proceedings therein.

THE Plaintiff being a Switzer, married the Daughter of Mrs. Reynell by one Vincent her former Huſband, and ſometime afterwards a Difference ariſing between the Switzer and his Wife, ſhe departed from him, and then the Husband procured out of Chancery a Homine replegiando directed to the Sheriff of Devon. to replevy his Wife, ſuggeſting in this Writ, that Mr. Reynell and his Wife had taken and detained her; and after an Alias & pluries, the Sheriff returned on the Pluries into B. R. (where the Writ was, and ought to be returnable) that Reynell and his Wife had eſloined the Plaintiff's Wife ad loca ignota, &c. ſo as he (the Sheriff) could not make Delivery, &c.

Nota; This Pluries was returnable quinden' Paſchæ, and upon the very Day of the Return, the Defendants entered their Appearance with the Philazer of Devonſhire in B. R. but notwithſtanding this Appearance, the Plaintiff ſued out a Capias in Withernam againſt the Defendants; and thereupon their Agent having Notice of it, ſummoned the Plaintiff before the Ch. Ju. Holt, who ſtayed the Withernam; and thereupon they moved the Court for a Superſedeas to it, becauſe they had entered their Appearance ut ſupra, and were ready, and did offer to plead non ceperunt, &c.

This was oppoſed by the Counſel for the Plaintiff; firſt, becauſe this Plea is an Averment againſt the Sheriff's Return, and therefore ought not to be admitted; beſides, admitting this Matter might be pleaded, yet before the Plea is received, the Defendant ought to Gage Deliverance, by giving Bail to make a Delivery of the Plaintiff's Wife, if the Iſſue non ceperunt ſhould be found againſt them.

Sed per Holt Ch. Juſtice, Upon ſuch a Writ, the Sheriff (not finding the Party) can make no other Return, but an Elongavit; for he cannot falſify the Suggeſtion of the Writ, and return Non ceperunt, becauſe as to that Matter he is concluded by the Writ, and a Plea of Non ceperunt is not a direct Averment againſt the Sheriff's Return of Elongaverunt.

Therefore 'tis but reaſonable, that ſince the Sheriff cannot return Non ceperunt, the Parties ſhould be admitted to plead it in their own Defence; and as to the Gaging Deliverance, it ought not to be upon this Plea, becauſe the Defendants deny the Taking, and therefore cannot Gage Deliverance of that which they have not; for a Gager of Deliverance is in no Caſe but where the Defendant admits the Taking, &c. and controverts the Property.

But in the principal Caſe, the Court obliged the Defendants to plead no other Plea than Non ceperunt, and that without any Delay, and thereupon they had a Rule for a Superſedeas to the Withernam.

And Peter's Caſe, Mich. 1 W. & M. and Trevill's Caſe, Mich. 3 W. & M. were cited as Authorities for this Practice of the Defendant's Appearing upon the Return of the Homine replegiando, &c.

The King *verſus Pariſhioners of* Huntingdon.

THE Caſe, ſt. One Andrew Lucas, a poor Man, dwelling in Lancaſhire, was by Order of two Juſtices of that County, removed unto the Pariſh of Huntingdon in Cheſhire, as being laſt legally ſettled there.

Order of Removal quaſh'd, becauſe it was not ſet forth, that the Place to which the poor Man was ſent, was the laſt Place of his legal Settlement.

After this Removal, two Juſtices of Cheſhire make an original Order, reciting, that the ſaid Lucas, ſince his Reſidence in the Pariſh of Huntingdon aforeſaid, was legally ſettled in the Pariſh of Stook in the County of Hereford, and therefore they removed him to Stook; and now this Cheſhire Order being removed into B. R. by Certiorari,

The

The chief Queſtion was, Whether a foreign County is ſo far obliged by the Order of two Juſtices of another County, that they have no other Remedy but by Way of Appeal from that Order to the next general Quarter-Seſſions held for the County where the Order was made.

Or whether two other Juſtices of the foreign County may make another original Order; and ſend the poor Man to a third Place, ut ſupra.

And it was inſiſted, that this Cheſhire Order ſupra, is good, otherwiſe a foreign County would be without Remedy, becauſe the Appeal muſt be to the next Seſſions where the firſt Order was made; and it may happen that Seſſions may be over before the foreign County may have Notice of the Order, or at leaſt before they can poſſibly come to the Place where the Seſſions is held, if the Counties are at a great Diſtance, and the Order ſhould be made a very little Time before the Seſſions.

And farther, that in this Caſe the ſecond Order did not interfere with the Firſt, becauſe the Perſon chargeable is not ſent back to the Place from whence he came, but to a third Place, which was the Place of his laſt Reſidence.

The Court doubted of this Matter, and raiſed a Queſtion, Whether the next Seſſions ſhall be taken to be the next after the Making the Order, or the next after the Parties find themſelves aggrieved.

But it was agreed by all, that two Juſtices of the foreign County could not, by an Order, ſend the poor Man back again to the Place from whence he came, for that would make an Interfering of Juriſdiction.

At laſt this Order was quaſhed, as being informal, (viz.) for that it did not recite, that Lucas was laſt lawfully ſettled at Stook, but only that he was ſettled there ſince he reſided at Huntingdon; and ſo the Points ſupra were not determined.

Cook *verſus* Darbiſon.

In Ejectment, the Demiſe was laid before the Plaintiff had any Title.

ERROR to reverſe a Judgment in Ejectment in C. B. given for the Plaintiff; and the Error aſſigned was, that it appeared upon the Record, that the Demiſe to the Plaintiff was made on the 20th Day of January, 1692, which was the Eſſoin-Day, and ſo the firſt Day of Hillary-Term.

And it appeared likewiſe by the Placita, &c. that the Declaration was of the ſame Hillary-Term, which relates alſo to the firſt Day, and ſo the Action was brought by the Plaintiff before his Title accrewed, or at leaſt on the very ſame Day, which cannot be, becauſe the Law allows no Fractions of Days.

Sed per Curiam, This being after a Verdict, the Chief Juſtice ſaid, that if the Plaintiff in Error would take Advantage of this Matter, he ſhould have alledged Diminution, and procured the original Writ to be certified; and if that was returnable before the Plaintiff's Title, it would have been Error. 4 Leon. 98.

Midgley *and* Gilbert *verſus* Lovelace. Trin. 5 Will. & Mar. B. R. Rot. 625.

THE Caſe was, ſi. One Keightley demiſed an Houſe to Jones for a certain Term of Years, rendring Rent; Jones aſſigned the Term to the Defendant Lovelace, and Keightley by his Laſt Will, deviſed a Moiety of the Reverſion unto Midgley, and the other Moiety to Gilbert, and died; and now Midgley and Gilbert join in an Action of Covenant, and aſſign the Breach in Nonpayment of the Rent. Tenants in Common may join in an Action of Debt or Covenant.

The Defendant pleaded, that after the Rent became due, and before the Action was brought, the Plaintiffs had by Fine, &c. granted Reverſion to one Hawkins, and concluded in Bar.

And upon a Demurrer to this Plea, two Queſtions were made:

(1.) Whether the Plaintiffs ought to ſever in this Action, or in an Action of Debt for this Rent, becauſe they are not joint Leſſors, but have each of them a ſeveral and diſtinct Intereſt to a Moiety of the Reverſion.

To which it was anſwered and reſolved, that the Plaintiffs are Tenants in Common, who may join or ſever (at Election) in an Action of Debt for Rent reſerved.

Sed per Holt Ch. Juſtice, If they ſever in Debt, &c. they muſt not each of them make his Demand of ſuch a certain Sum, which amounts to a Moiety, but the Demand muſt be de una medietate of the whole Rent, and therefore if they may join in Debt, they may likewiſe join in Covenant. Sid. 402. contra

Covenant lies againſt an Aſſignee of a Term upon the Privity of Contract.

(2.) The other Queſtion was, Whether the Arrears of Rent are not loſt to the Plaintiffs, by their Granting the Reverſion to another, becauſe the Privity between them and the Defendant was thereby deſtroyed.

As to that Matter it was anſwered likewiſe and reſolved, that this Action was maintainable for the Arrears of the Rent, notwithſtanding the Reverſion was out of the Plaintiffs; for tho' the Defendant was but an Aſſignee of a Term, yet the very Privity of Contract was transferred by the Statute of H. 8. which gives the Action for and againſt Aſ-

Sid. 157,402. Raym. 80.

ſignees; and the Contract ſtill remains, tho' the Privity of Eſtate is gone.

Et per Curiam, Debt will lie in this Caſe for Arrears of Rent, a fortiori Covenant, &c.

Judgment for the Plaintiff.

Leonard qui tam, &c. *verſus* Beech.

Popular Action not within the Statute 21 Jac. 1. cap. 4. Curia.

DEBT qui tam, &c. for the King and the City of London, as for himſelf for 300 l. upon the Statute 1 Jac. 1. cap. 22. par. 37. againſt the Defendant, a Searcher and Sealer of Leather in London.

The Declaration was general, that the Defendant being a Searcher and Sealer, and ſworn according to the Statute primo die Septembris Anno 4. &c. apud H. colore officii ſui præd. allocavit & ſigillavit 150 Coria inſufficienter tannat. &c. contra formam Statuti, per quod he had forfeited 300 l. (viz.) 40 s. for every Hide.

Upon Not guilty pleaded, the Plaintiff had a Verdict; and it was now moved in Arreſt of Judgment, that the Offence was laid to be on one Day, and not as it ought to be, (viz.) diverſis diebus & vicibus, between ſuch a Day and ſuch a Day.

Beſides, 'tis not laid, that the Defendant ſeparatim allocavit & ſigillavit, ſo that it doth not appear, but that the 150 Hides might be tack'd together, and the Allowance of them but one Act, and ſo but one Offence, and then but one 40 s. is forfeited, and no more.

(2.) That this Caſe is within the Statute 21 Jac. 1. cap. 4. which reſtrains popular Actions to be brought within the proper County, and to be tried before the Juſtices of Peace; therefore this Action being brought in B. R. tho' laid in London, 'tis coram non judice.

To which it was anſwered, and ſo reſolved per Curiam, that this Offence was well laid, and that it could never be intended, that the One Hundred and Fifty Hides were all allowed at one Time, becauſe 'tis enacted by the Statute, that every Hide ſhall be ſeverally ſealed, and there is no other Method of Allowance, but by Sealing; and if but one Offence, and that committed on one Day, the Statute would be illuded and uſeleſs. Curia.

And as to the laſt Objection, per Curiam, this is not within the Statute 21 Jac. becauſe that Statute doth not give any Juriſdiction to the Juſtices of Peace, and they have no Power to enquire of any Offence againſt that Statute. Cro. Car. 112, 146. 1 Sid. 303, 400.

Et per Curiam, Not guilty is a good Plea to this Action.

Judgment for the Plaintiff.

Yaxley's *Caſe*.

HE was committed by the Earl of Nottingham, Secretary of State, by Virtue of the Statute 35 Eliz. for refuſing to anſwer, being demanded, whether he was a Jeſuit, Seminary, or maſſing Prieſt; and now he brought an Habeas Corpus, and prayed to be bailed. 35 El. c. 2. Par. 11. Commitment ill concluded.

And an Exception was taken to the Commitment, for that the Concluſion thereof was, (viz.) There to remain until he ſhall be from thence diſcharged by due Courſe of Law, when the Words of the Statute are, until he ſhall anſwer unto the Queſtions; and therefore the Commitment ought to be ſpecial, according to the Statute, and the * Churchwardens of Northampton's Caſe was cited, and relied on. * Antea.

Beſides the Commitment ought to be by a Juſtice of Peace, and a Secretary of State is no ſworn Juſtice; and it was objected, that the Habeas Corpus Act had ſuſpended this Statute.

Sed per Curiam, both theſe laſt Objections were over-ruled, but for the firſt, the Court held the Commitment ill.

Then they asked the ſame Queſtions of the Defendant, who anſwered openly and directly in the Negative; and thereupon he was diſcharged.

Gilmore *verſus* Harris.

Power of Revocation where well purſued.

UPON a ſpecial Verdict in Ejectment, the Caſe was as followeth:

Sr. Edward Mountford ſettled his Lands now in Queſtion to the Uſe of himſelf in Tail, Remainder to Simon Mountford, and the Heirs Males of his Body lawfully begotten, Remainder to Sir Edward Mountford in Tail, Remainder in Fee to his own right Heirs.

In this Deed of Settlement there was a ſingle Power of Revocation reſerved to Edward Mountford, to revoke the Eſtate only limited to Simon Mountford, and to limit new Uſes inſtead thereof.

Afterwards the ſaid Edward Mountford, by a Deed ſubſequent to the ſaid Settlement, reciting, that whereas he had a Power to revoke the Uſes limited by the ſaid Settlement unto Simon Mountford and his Heirs Males, and ſo miſrecites the Eſtate of Simon, by omitting the following Words, (viz.) of his Body begotten; he declared that he did revoke the ſaid Uſes to Simon Mountford and his Heirs Males, and afterwards in the ſame Deed, by way of new Uſe, he limits the ſaid Eſtate to the ſaid Simon and his Heirs Males, without ſaying of his Body begotten

And upon this Verdict two Queſtions were made.

(1.) Whether this was a good Revocation of the firſt Uſe, becauſe of the Miſrecital of the Eſtate of Simon.

And adjudged that it was a good Revocation; for ſuch are to be favoured, and the Intent of the Party is to be obſerved.

(2.) The next Queſtion was, Whether this new Eſtate limited to Simon Mountford, was a Fee-ſimple, as ſpringing out of all the Eſtates of Edward Mountford; or otherwiſe whether it was the like Eſtate-Tail by Intendment, as before.

And adjudged that it was an Eſtate-Tail; for if it ſhould be conſtrued a Fee-ſimple, then the Remainder to Sir Edward Mountford would be deſtroyed, which Edward had not Power to do.

Neath

Neath *verſus* Reeve. Trin. 5 W. & M. B. R. Rot. 188.

ERROR in B. R. of a Judgment in the Palace-Court in an aſſumpſit, and the Error inſiſted on was, That the Plaint which is the Original in that inferior Court was general, (viz.) Johannes Reeve queritur de T. Neath de placito tranſgreſſionis ſuper Caſum in the Plaintiff's own and proper Right, but he declared as Executor of Felix Bayram for ſo much Money received to the Uſe of the Plaintiff as Executor, &c.

Judgment reverſed for a Variance in the Declaration.

Et per Curiam, This is ſuch a Variance as is inconſiſtent, and therefore the Judgment was reverſed.

The King *verſus* Barlow *and* Jeans, *Churchwardens of the Pariſh of St.* Warburgh *in* Derby.

THE Churchwardens were indicted upon the Statute * 14 Car. 2. reciting, that whereas A. B. and C. &c. Conſtables of the five Pariſhes within the Hill of Derby, had expended ſuch Sums of Money in conveying Perſons by Paſſes, and that J. S. and E. G. two Juſtices of the Peace, had iſſued out their Order unto the Conſtables, Churchwardens, and Overſeers of the Poor of the ſaid five Pariſhes, commanding them to meet at ſuch a Time and Place, to make a Rate for the Reimburſement of the ſaid Conſtables; and that the Defendants did accordingly meet, but refuſed to join in making ſuch Rate, &c.

* 14 Car. 2. cap. 12. Paragraph 18. Indictment for not making a Rate to reimburſe the Conſtables.

This Indictment being removed into B. R. it was moved to quaſh it.

(1.) Firſt, That the Warrant of the two Juſtices was to make a joint Rate for all the five Pariſhes, which is ill, becauſe 'tis not according to the Direction of the Statute, nor equal in it ſelf, becauſe the Charges of ſeveral Conſtables, may be unequal; and every Pariſh is liable only to the Charges of its own Conſtable.

Beſides, they are not compellable by the Statute to make a Rate, for the Words are, that they may make one, and ſo at their Election.

But the Court would not quaſh the Indictment, becauſe the Defendants were blameable, it being very reaſonable that

that the Conſtables ſhould be reimburſed; and therefore as to the firſt Objection, (viz.) The Inequality of the Charges of the ſeveral Pariſhes, it ſhall be taken Reddendo ſingula ſingulis.

And as to the other Objection, that the Words of the Statute are, that they may make a Rate, and ſo 'tis at their Election, whether they will make one or not: Per Curiam, where a Statute ſaith, that ſuch a Thing may be done, 'tis always underſtood it muſt be done.

DE

Term. Sanct. Hill.

5 Willi' & Mariæ, B. R.

Child & al' *verſus* Sands. Trin. 4 W. & M. B. R. Rot. 129.

4 Mod. 176. S. C. Salk. 31. S. C. 3 Lev. 351. S. C.

WRIT of Error on a Judgment in C. B. upon a ſpecial Verdict there found in an Action on the Caſe, grounded upon the Statute 13 R. 2. 15 R. 2. and 2 H. 4. cap. 11. for ſuing in the Court of Admiralty, &c.

Action for ſuing in the Admiralty.

The Caſe upon the ſpecial Verdict appeared as followeth:

ff. Sands was a Merchant of London, and ſole Owner of ſuch a Ship, whereon he and ſeveral other Merchants

had loaded Goods to a very great Value, deſigning a Voyage to the Eaſt Indies.

Whilſt this Ship lay thus loaded in the River Thames ready to ſail, Sir Joſiah Child, and others, Members of the Eaſt-India Company, made Application to King Car. 2. (in Behalf of the Company) and his Council, for the King's Warrant to ſtay this Ship from her intended Voyage, ſuggeſting that ſhe was an Interloper, and about to trade contrary to the Prohibition of the Charter of that Company, and thereupon the King's Warrant was obtained.

Afterwards the ſaid Sir Joſiah Child, and others, &c. applied to the Court of Admiralty, for Proceſs to arreſt the ſaid Ship and Goods, and accordingly they obtained a Warrant from that Court in Nature of an Attachment, in Virtue whereof the ſaid Ship and Goods were actually arreſted, by which Means the Voyage was loſt.

And Sands alone (who was the only Owner of the Ship and of ſome Part of the Goods) brought this Action againſt Sir Joſiah Child, and others, Members of the Eaſt-India Company, who acted in this Matter; and the Jury found for the Plaintiff, and gave 750 l. Damages; and after Argument, the Plaintiff had Judgment for the ſaid Damages in Duplo, (viz.) for 1500 l. and alſo double Coſts, according to the Statute 2 H. 4. which Judgment was obtained in the Court of Common Pleas.

And now upon a Writ of Error brought in B. R. it was argued, that this Judgment was erroneous.

(1.) For that this Action is brought by Sands alone, when all the Part-Owners of the Loading ought to have joined.

To which it was anſwered, and ſo reſolved, that this Action was grounded meerly on a Tort, therefore 'tis ſeverable in its Nature, and not like the Caſe of Boſon and Sandford in B. R. for that was an Action grounded on a Contract in Law, and therefore all Parties to ſuch a Contract muſt be likewiſe Parties to the Suit; but this is in Nature of a Treſpaſs. 18 Ed. 3. 25. 29 Aſſis, pl. 23. 14 Ed. 3. 23. b. Dyer 159, 251.

(2.) Objection, If. There is nothing found in this Verdict to bring the Defendants in the original Action within the Penalty of the Statute 2 H. 4.

Becauſe it appears, that the Ship was ſtopped by Virtue of the King's Warrant, which in this Caſe the King might well do, for the Warrant is no general Prohibition to trade, but a particular Prohibition to trade with Infidels; and as a Security only againſt ſuch ſpecial Trading. Dyer 177, 196.

Beſides,

Beſides, the Proſecution which is found to be made by Sir Joſiah Child, &c in the Admiralty-Court, is not ſuch a Proſecution as is intended by the Statute, becauſe there was no Suit in that Court againſt Sands, but only a Warrant to arreſt the Ship, and no Libel againſt any Perſon; and the Words of the Statute are, That the Party grieved ſhall have his Action againſt him who purſues in that Court, which muſt be intended of a Suit by Way of Libel, inter partes; beſides, it appears that Sir Joſiah Child, and the others, were but Agents to the Company, (i. e.) no other but their Attornies; and an Attorney of the Party ſuing in the Admiralty is not within the Penalty of this Statute; for it being a penal Law, it cannot be extended by any Conſtruction.

Reg. 282. 2 Brownl. 296.

To all which it was anſwered, and ſo reſolved, that it plainly appeared by what was found upon Record, that the Defendants in this Action had incurred the Penalty of the Statute 2 H. 4. for the common Courſe of Proceedings in the Admiralty, in Caſes of this Nature, is by Proceſs to arreſt the Ship; and 'tis that which brings in the Proprietors pro intereſſe ſuo, and then the Libel follows; therefore he who procures this firſt Proceſs out of that Court, doth proſecute and purſue therein, which are the Words of the Statute.

Therefore the Defendants being found to have procured the Admiralty Proceſs, and the Ship and Goods to be arreſted thereon, this is a full Proſecution according to the Courſe of that Court, and ſuch Evaſions have always been diſallowed.

Hob. 87.

(3.) The third Objection was, that this Action is laid for conſequential Damages, (viz.) per quod he loſt the Profits of his Voyage, which ought not to be in an Action grounded on this general Statute.

Godb. 385, 387.

(4.) And laſtly, that the Plaintiff ought not to have double Coſts.

To both which Objections it was anſwered, and ſo reſolved, that as to the conſequential Damages, the Laying it ſpecially was but Matter ex abundanti, for thoſe Damages might have been given in Evidence, tho' not mentioned in the Declaration, as in Battery or Maihem for Breaking a Limb, &c. the Loſs of the Plaintiff's Time may be given in Evidence upon the common Declaration; therefore in this Caſe the Plaintiff ought to recover conſe-

quential Damages for his Loss; and the Laying them ſpecially cannot hurt.

And as to the Coſts, which are doubled, as well as the Damages, 'tis a Rule, that in all Caſes where Damages and Coſts are given at Common Law, and a Penalty is added by a Statute, with double Damages, that alſo draws double Coſts. See the Caſe between *Lawſon* and *Story*, *poſtea*. Dyer 159.

As to the Excuſe, that the Defendants were only Agents to the Company, 'tis not found that they commanded them ſo to do; or if they had, it would not have excuſed them from the Penalty, for 'tis at their Peril to obey ſuch illegal Commands.

And the King's Warrant will not mend the Matter, becauſe the Defendant's Application to the King in Council was illegal; and for that the Statute 16 Car. 1. cap. 10. par. 5 was cited.

It was agreed, that the King may grant Embargoes on Ships in Time of War, or may employ the Ships of his Subjects in Time of Danger, for the Service and Defence of the Nation; but this Warrant was not in the Nature of an Embargo, for it was only to ſtay a ſingle Ship, and not in any Time of War or Danger, or for the Defence of the Nation; and the Pretence of a Prohibition for not trading with Infidels, goes no farther than thoſe named in the Charter of this Company, ſo that it appears all was done with a private Reſpect only, wherefore 'tis altogether void. Moor 892.

And for the Reaſons aforeſaid the Judgment was affirmed.

The Lord Banbury's *Caſe*.

HE was indicted at the Old Baily for Murder, by the Name of Charles Knolls Eſq; and being brought up to the Bar by Habeas Corpus, this Indictment was removed, and this Matter returned for the Cauſe of his Impriſonment. 2 Salk. 509, 512. Plea of a *Miſnoſmer* in Abatement to an Indictment.

Then he exhibited his * Plea ready engroſſed in Parchment, which upon his Prayer was received; and it was a Plea in Abatement of the Indictment, and began thus: * *Nota*, This Plea was put in *Hillary* 4.

ſſ. Carolus comes Banbury ſub cuſtodia Willi. Richardſon Gen. cuſtode Gaolæ Dominorum Regis & Reginæ de

Newgate virtute brevis Dominorum Regis & Reginæ de habend. Corpus ad ſubjiciend. &c. ei direct. in cujus cuſtodia præantea ex cauſa prædict. per nomen Caroli Comitis Banbury alias dict. Caroli Knolls Ar. comiſſ. fuit ad barram hic duct. in propria perſona ſua & ſtatim de præmiſſis ei ſuperius impoſit. allocutus qualiter ſe velit inde acquietari dicit quod ipſe eſt perſona in indictamento prædict. mentionat. & intenſ. per nomen Caroli Knowles de paroch. Sancti Egidii in Campis in Com. Middleſex, &c. & verſus quem indictamentum prædict. prolat. exiſtit pro felonia & murdro prædict. & dicit quod ipſe ad indictamentum illud reſpondere compelli non debet quia dicit quod Dominus Carolus primus nuper Rex Angliæ, &c. per literas ſuas patentes now produced, &c. created his Grandfather an Earl of this Kingdom, &c. and thereby the Honour was entailed upon the Male Line, and then ſhews his own Deſcent; and that he is Heir Male, and Earl of Banbury, and concludes with hoc paratus eſt verificare, unde ex quo non nominatur in indictamento prædict. per nomen Comitis Banbury petit judicium de indictamento illo & ſi ipſe ad indictamentum ill. ulterius reſpondere compelli debeat, &c.

The Attorney General replied, ſetting forth, by Way of Eſtoppel, an Order of the Houſe of Lords, in the then laſt Seſſions of Parliament, by which it appeared, that upon the Petition of the Defendant to the Houſe of Peers, to be admitted therein as a Peer of this Realm; his Right of Peerage was thereupon examined, according to the Courſe of that Houſe, and afterwards carried againſt him, (viz.) That he had no Right to ſit in that Houſe as a Peer of the Realm; and this was relied to be ſuch a Determination of the Matter, that all inferior Jurisdictions were concluded.

See Style 80. *The Lord* Rivers's *Caſe.*

But the Defendant's Counſel finding ſome Errors in the Plea, moved for Leave to amend them, by adding two neceſſary Averments.

1ſt. That his Uncle, who was of the elder Branch, was dead without Iſſue, and that he himſelf was a Peer at the Time of this Plea pleaded; and after ſeveral Debates, it was at laſt, by the Opinion of Dolben and Eyre Juſtices, amended in both theſe Points, (Gregory Juſtice being abſent) and Holt Ch. Juſtice of another Opinion againſt the Amendment, and thereupon the Lord Banbury was bailed.

And afterwards he demurred to this Replication, and the Matter being argued and debated, it was at last adjudged.

(1.) That a Plea in Abatement is proper to an Indictment, and in particular this Plea of Misnosmer.

(2.) That this Plea was well concluded with hoc paratus est Verificare generally, although it was very much insisted on, that it should be concluded prout patet per Recordum, because Peer or no Peer is triable only by Record, which was admitted per Curiam; but then 'tis in a Case where a Man is made a Peer by Writ only, (viz.) by being summoned to sit in Parliament in the House of Peers by Writ, which was the ancient Method of creating such Honours.

But in this Case the Creation was by Patent of Record, which was brought into Court, and proves it self, (viz.) by the Great Seal; besides here are several Descents which are Matters of Fact, and triable only by the Country, so that the Defendant doth not claim the Honour from the Crown immediately, but only mediately as Heir Male descended from him to whom the Honour was first given. 22 Assise placito 14, 24. 2 Leon. 48. Stile 257, 177. W. Jones 9.

But if the Defendant was the very Person ennobled either by Writ or Patent, then there would be nothing to try, but Matter of Record.

(3.) It was adjudged, that this Order of the House of Lords would not conclude this Court in a Case properly within their Jurisdiction, and in a Matter concerning the Right of the Subject, and coming before the Court in a judicial Way; and as this Case is, the Judgment of this Court will not lessen the Authority of that Order, for be it either way, it will not influence the Defendant's Right of Peerage, or give him any Right to sit in the House of Lords as a Peer, for as to that Matter he must stand or fall by the Judgment of that House. 4 Inst. 126, 127, 355. Plowd. 117. Dyer 101. Staundf. 155, 153. 1 Inst. 9. 16. 9 Rep. 49, 117. 11 Rep. *Ld.* Delamer's *Case.* Riley pl'ta *Parliament* 12, 44. Cott. Record' 703. Stile 234 Sid. 22, 23.

So that the Judgment of this Court is upon no other Point than whether the Defendant ought to have the Addition of Comes Banbury given him in the Indictment, or not; and per totam Curiam, the Plea was held good, and the Replication ill; therefore the Indictment was abated, and the Defendant was discharged.

DE

Term. Paſchæ.

6 Will. & Mariæ B. R.

Foden *verſus* Haines. Trin. 5 W. & M. B. R. Rot. 1040.

Pleadings in Debt upon a Sheriff's Bond.

DEBT upon Bond of One Hundred and Twenty Pounds; the Defendant craved Oyer of the Condition, which was for the Payment of Sixty Pounds to the Plaintiff, by the Defendant, or one Kinnerſly, at a Day certain, &c.

Then the Defendant pleaded in Bar the Statute of
23 H. 6. H. 6. concerning Sheriffs Bonds, and then ſet forth that Kinnerſly was taken by Virtue of a Capias Utlegatum in a civil Action by T. S. then Sheriff of Staffordſhire, and that the Plaintiff was at the ſame Time Under-Sheriff to the ſaid T. S. of the ſaid County of Stafford, and that Kinnerſly being then under an Arreſt, and in Cuſtody, he together with the Defendant Haines ſealed and delivered the Bond in the Declaration mentioned pro Eaſimento & favore præfat' T. Kinnerſly de impriſonamento ſuo prædict' per eundem T. Foden tunc ſubvic' prædict' Com' Stafford' exiſten' demonſtrand' & pro deliberatione ejuſdem T. Kinnerſly abinde habend' & obtinend', &c.

The Plaintiff replyed, that the Defendant pro meliore ſecuritate ipſius T. Foden quod prædict' T. Kinnerſly non evaderet extra Cuſtodiam ipſius T. Foden ſed remaneret in ſalva cuſtodia ipſius T. Foden fecit ſcriptum obligatorium prædict' in narratione prædicta nominatum abſque hoc quod prædict' Joh'es Haines pro eaſimento & favore præfat' T. Kinnerſly

nerſly de impriſonamento ſuo prædict' dand' ſeu demonſtrand' ſcriptum obligatorium prædict' in prædict' narratione mentionatum præfat' Tho. Foden ſigillavit & ut factum ſuum deliberavit modo & forma, &c.

And upon a general Demurrer to this Replication, after ſeveral Debates the Court gave Judgment for the Defendant, becauſe the Plaintiff of his own Shewing had made the Bond void at Common Law; it appearing upon Oyer of the Condition, that it was made for the Payment of a certain Sum of Money; and yet in the Indictment to the Traverſe in his Replication, he alledged, that it was made for the Sheriffs Security, that Kinnerſly ſhould not Eſcape.

Now this is an Averment againſt the Condition of the Bond, to which an Obligee ſhall never be admitted; beſides 'tis not lawful for the Plaintiff to take an abſolute Bond with a Condition to pay Money, under Pretence of Security againſt Eſcapes, without mentioning it.

Sed nota; The Obligor in this Caſe, and alſo in the Caſe of Simony and Uſury, is admitted to aver againſt the Condition of a Bond, or againſt the Bond it ſelf, for Neceſſity's Sake; wherefore the Plaintiff hearing the Opinion of the Court, moved for Leave to diſcontinue upon Payment of Coſts; which was granted.

Abney *and* Hedges, *Sheriffs of* London, *verſus* White.

THE Plaintiffs brought an Action of Debt againſt the Defendant White upon a Bail-Bond, and declared generally as upon other Bonds, (viz.) That the Defendant bound himſelf to them in ſo much Money without ſaying per nomina Vicecomitum Civitat' London, as is uſual in ſuch Caſes. Debt upon a Sheriff's Bond.

The Defendant prayed Oyer generally of the Bond and Condition, and made the Entry in the uſual Form, (viz.) petit auditum ſcripti obligatorii prædict' & ei legitur, &c. petit etiam auditum conditionis ſcripti illius & ei legitur in hæc verba.

Then he pleaded the Statute 23 H. 6. againſt Sheriffs Bonds, &c. and ſets forth an Arreſt, &c. and that this Bond was taken for Eaſe and Favour.

The

The Plaintiffs perceiving their Miſtake of omitting per nomina Vicecom', enter upon the Record the Defendants praying Oyer of the Bond, &c. and then they ſet forth the Bond it ſelf, as well as the Condition thereof, & petunt quod ſcript' præd' irrotuletur & irrotuletur in hæc verba; by which it appeared, that it was taken by them, by the Name of Sheriffs of the City of London, in expreſs Words, as uſual.

Then they reply and confeſs they were Sheriffs of London, &c. and the Arreſt, &c. and the Bond was taken by them per nomina Vic' Civitatis London' ſub conditione prædicta to diſcharge the Party from the Arreſt, abſq; hoc, that it was taken for Eaſe and Favour.

And upon a Demurrer to this Replication, it was held per Curiam, that notwithſtanding the Defendant had entered the Oyer of the Bond with an, &c. only, (viz.) & ei legitur, &c. yet the Plaintiff might enter it at large on the Record; and by ſo doing he had avoided the Defendant's Plea of the Statute, becauſe now it appeared on Record, that the Bond was taken by the Plaintiffs, by the Name of Sheriffs, &c. and that the Variance between the Bond and the Declaration was not material; neither was it any Departure in the Replication to ſay, it was taken by them per nomina Vic'; ſo the Plaintiffs had * Judgment.

* The like Judgment in C. B. between *Blewit, &c. Vic' London'* verſus Comley, Trin. 10 Will. Rot. 1336.

Nichols *verſus* Pawlett.

Plea in Abatement, that the Plaintiff was an Alien Enemy. *See* Raſt. Ent. 252. *b.* Aſhton Ent. fo. 11. Hern 361, *the like Replications.*

THE Defendant pleaded in Abatement, that the Plaintiff was an Alien Enemy, born in ſuch a Place in France.

The Plaintiff replyed, That he is Indigena, and born at ſuch a Place in the Kingdom of England, & non alienigena modo & forma prout, &c. & hoc petit quod inquiretur per patriam.

And upon a Demurrer to this Replication, it was held per Curiam to be ill, for that the Plaintiff did not rely upon the firſt Part of it, that he was born in England, and ſo conclude with an Averment, that an Iſſue might be taken by the other Side, (viz.) That he was not born in England, and that this Matter might be triable by a proper Viſne; but here he hath put Alien, or not Alien, in Iſſue,

(viz.) Non alienigena modo & forma, which cannot be tried for Want of a Viſne; ſo Judgment was given, that the Bill ſhall abate.

Nota; If the Plaintiff had concluded his Replication with an Averment only, the negative Clauſe, Non alienigena, had been only Surpluſage, and helped upon a general Demurrer. Surpluſage.

Clerke *verſus* Moor. Mich. 5 Will. & Mar. B. R. Rot. 458.

SIR Robert Clerke and Peter Peel brought an Audita querela againſt Moor, ſuggeſting that he (Moor) had obtained a Judgment againſt them for 40 l. Debt, and 4 l. 8 s. 2 d. Damages, and that Peel had been taken in Execution by Virtue of a Ca. ſa. upon that Judgment, and afterwards was ſuffered to eſcape, and go at large, by Conſent of the ſaid Moor, who had again very lately taken out a new Execution on the ſame Judgment againſt both the now Plaintiffs, upon which they pray to be relieved, and likewiſe pray Proceſs againſt Moor, and thereupon a Sci. fa. was awarded againſt him, and after that an alias Sci. fa. and after two Nichils returned, the Plaintiffs entered their Prayer, that the Court would proceed to examine the Matter, and that they might be diſcharged, &c. 1 Salk. 92. *Audita querela*, the Proceſs thereon.

And this Cauſe being put in the Paper for a Concilium, the Defendant Moor appeared, and by his Counſel informed the Court, that he had been ſurpriſed, and had no Notice of theſe Sci. facias's; and farther inſiſted, that Proceſs of Sci. fa. did not lie in this Caſe, becauſe the Audita querela was not grounded on any Deed, but upon a meer Suggeſtion of Matter of Fact only, and therefore the Proceſs ought to be a Venire facias; wherefore it was prayed, that the Sci. facias's might be quaſhed.

And after ſeveral Debates it was quaſhed, for per Curiam ſuch Proceſs doth not lie in this Caſe.

Et per Curiam, Where an Audita querela is brought by a Perſon actually in Execution; or if at large, and he founds his Writ upon ſome Deed of the other Party; in both theſe Caſes a Sci. fa. is the Proceſs.

But where 'tis brought by a Perſon at large, and upon a bare Suggeſtion of Matter of Fact (as in the preſent Caſe)

Moor 811. See the Books of Entries.

Caſe) there the only Proceſs is a Venire facias, and upon that a Diſtreſs infinite.

Alſton & al' *verſus* Buſcough. Hill. 5 Will. & Mar. B. R. Rot. 470.

2 Cro. 70, 362. Debt for not ſetting out Tithes, the Declaration was ill, and for what Reaſon.

IN an Action of Debt upon the Statute 2 Ed. 6. of Tithes, wherein the Plaintiff demanded the treble Value, &c.

Upon Nil debet pleaded, the Plaintiff had a Verdict in C. B. and upon a Writ of Error brought in B. R. it was very much inſiſted on, that the Declaration was ill, becauſe the Plaintiffs had only alledged, that the Defendant had carried away the Corn, without ſetting out the Tithes; but did not aver that the Defendant had not made any Agreement with them for the Tithes, for the Statute gives the Penalty where the Tithes are carried off without any Agreement made for ſo doing; therefore if the Defendant had agreed with the Plaintiffs for carrying off the Corn, without ſetting out the Tithes, (as it doth not appear but he might) then it had been no Forfeiture.

Sid. 218. Verdict cured a Fault in a Declaration.

And the Court was of that Opinion, (viz.) That the Declaration was ill, for the Reaſon ſupra, if it had been upon a Demurrer; but this was helped by the Verdict; for if there had been any Agreement proved at the Trial, the Plaintiff could not have obtained a Verdict.

Hool *verſus* Burgoigne. Paſ. 6 Will. & Mar. B. R. Rot. 330.

Taliter proceſſum fuit, where good, where not.

IN an Action of Debt the Plaintiff declared, that whereas he farmed of the Defendant ſeveral Lands lying in Winsford in the County of Somerſet, under an yearly Rent; and whereas on ſuch a Day he had paid 10 l. Parcel thereof, to the Defendant, he by his Deed dated on the ſame Day, in Conſideration of the Receipt of the ſaid 10 l. did oblige himſelf and his Heirs, &c. unto the Plaintiff in the Sum of 20 l. to defend him againſt Julian Whitfeild, who had lately made a pretended Claim to the Eſtate, which the Plaintiff held of the Defendant; and alſo to defend the Plaintiff againſt any Perſon or

Perſons whatſoever, prout per ſcriptum prædict. plenius apparet.

Then the Plaintiff averred in Fact, that afterwards, (viz) In ſuch a Term, the ſaid Julian Whitfeild implacitavit eidem (the Plaintiff) in the Court of Exchequer, before the Barons, &c. in placito debiti pro recuperatione prædict. ſummæ 10 l. eidem (the Defendant) per eundem (the Plaintiff) ſic ut præfertur ſolut. inter alia, for the Rent of the ſaid Land, which the Plaintiff, at the Time of the Making the ſaid Deed, farmed of the Defendant; and that the ſaid Julian, by Proceſs of the ſaid Court of Exchequer, had compelled the Plaintiff to appear to anſwer him in the Plea aforeſaid. Co. Ent. 324.

Taliterq; ſuperinde in eadem Curia de Scaccario in placito illo proceſſum fuit quod poſtea ſcilicet (in ſuch a Term) conſideratum fuit per eandem Curiam quod præd. Juliana Whitfeild recuperaret 80 l. Debt, and 7 l for Damages, &c. prout per Recordum inde in Curia de Scaccario prædict. apud Weſtm. prædict. remanen. plenius liquet & apparet, to the Execution of which Judgment the Plaintiff ſtands daily liable; and farther avers, that he gave the Defendant Notice of this Proſecution the ſame Day on which it commenced, but that the Defendant had not defended the Plaintiff againſt the ſaid Julian Whitfeild, and refuſed ſo to do, unde actio accrevit, &c.

To this Declaration the Defendant demurred ſpecially, ſhewing for Cauſe, that the Record of the Recovery ſpecified in the Declaration was not ſufficiently alledged, and the Plaintiff joined in Demurrer.

The Queſtion was, Whether this brief Way of Pleading the Recovery inter alia, was ſufficient in this Caſe where the Recovery is the only Breach, and alledged as the Cauſe of Action.

And it was inſiſted for the Defendant, that the whole Record of the Recovery ought to be ſet forth at large in the Declaration. 22 Ed. 4. 8. *put in* Plowden 65.

Sed per Curiam non allocatur, for at this Day 'tis otherwiſe practiſed; and 'tis ſufficient to plead, that the Plaintiff recovered with a Taliter proceſſum fuit, without reciting the whole Record.

Et per Holt Chief Juſtice, This Declaration is too general, and that the Plaintiff ſhould at leaſt have ſet the Matter out in this Form:

ſt. That he was impleaded in an Action of Debt for ſo much Money certain (of which this was Parcel) or have ſet forth the whole Declaration in the Action brought by Julian Whitfeild, with Taliter ſuperinde proceſſum fuit, ſo as it might appear to the Court, that the Recovery was againſt the Plaintiff for the ſame Matter, againſt which he was to be defended by the Defendant, for that in this Caſe he could plead no other Plea than Nul tiel Record; and upon his Opinion

Judgment was given againſt the Plaintiff.

The King *and* Queen *verſus* Larwood.

Where the Defendant ſhall not be permitted to diſable himſelf.

AN Information was exhibited againſt the Defendant, for refuſing to take upon him the Office of Sheriff of the City of Norwich, being thereunto duly elected.

13 Car. 2. cap. 1. par. 12.

The Defendant pleaded the Statute 13 Car. 2. by which 'tis enacted, that a Perſon elected into any Office in a Corporation, ſhall be ſuch as within one Year before hath taken the Sacrament, according to the Church of England, or elſe the Election ſhall be void; and averred, that he had not taken the Sacrament, &c. at any Time within one Year next before the Election of him to be Sheriff, &c. wherefore the Election was void.

The Attorney General replied, and ſet forth that Part of the Act of Uniformity, by which every Perſon is obliged to take the Sacrament three Times in the Year, according to the Liturgy, &c.

The Defendant rejoined, and ſet forth the new Act of * 1 W. & M. Parliament for tolerating * Diſſenters, to which there was a Demurrer.

Et per Holt Ch. Juſtice & Curiam, after many Arguments, Judgment was given againſt the Defendant.

And firſt as to the Pleading, they held, that the Defendant's Rejoinder was a Departure from his Plea, and therefore he could have no Advantage of the Act of † Toleration, ſuppoſing it was for his Purpoſe, for 'tis a private Statute, and muſt be pleaded, and therefore no Opinion was given concerning the Influence of that Statute in this Caſe, becauſe it was not judicially before the Court; ſo they grounded their Opinions upon the Inſufficiency of the Plea, taking it to ſtand ſingly upon the Statute 13 Car. 2.

† There is a Difference where a ſecond Statute affirms the firſt, and where 'tis of new Matter, as here, 1 Cro. 256.

And as to that Matter they held, that the aforeſaid Statute was not made in Favour of the Diſſenters, but the contrary, and was rather to exclude them from beneficial Offices, than to eaſe them from Offices of Charge, &c. ſo that this Caſe is not within the Meaning of that Statute.

But that which they principally relied on was, That the Defendant ſhould not be allowed to diſable himſelf to avoid an Office, no more than a Man could be allowed to ſay, that he was an Ideot, or non Compos, and ſo to avoid an Act done by himſelf; beſides, great Inconveniences may happen to the Government, if this ſhould be allowed.

Juſtice Sam. Eyre contra in omnibus, and cited the Caſe of the * Mayor of Guilford in Point, and another Caſe between Box and Woolaſton, Anno 1655.

See Sir † John Read's Caſe, the like Judgment as in the principal Caſe; and it hath been * adjudged, that a Refuſal of Oaths enjoined to be taken by the Statute 13 Car. 2. amounts to a Refuſal of the Office, ſo as by the Charter he may be fined as for refuſing the Office.

* *Mayor of* Guildford *ver.* Clerke. 2 Vent. 247, 248.
† 2 Mod. 299.
* 3 Lev. 116.

Oſmere *verſus* Sheafe. *In* C. B. Trin. 5 W. & M. Rot. 1487. *but adjudged this Term.*

IN Replevin, &c. The Defendant made Cogniſance nomine diſtrictionis for a Rent-charge, ſetting forth, that John Chapman granted a Rent-Charge of 14 l. per an. unto Moraria Taylor, Spinſter, and to her Heirs, iſſuing out of the Place where, &c. with a Clauſe of Diſtreſs, that ſhe by her Deed (hic in curia prolat') in Conſideration of the Love and Affection which ſhe bore to her Kinſman Sir William Brodanex, covenanted to ſtand ſeiſed of the ſaid Rent, to the Uſe of Sir William Brodanex and his Heirs, from and after her own Death, if ſhe ſhould die without Iſſue, living at or after her Death, and avers the Death of the ſaid Moraria without Iſſue.

3 Lev. 370. 2 Lutw. 1209. Pleading a Deed by way of Covenant to ſtand ſeiſed, good.

And farther, That the ſaid Sir William Brodanex granted this Rent to Nath. Willmott, after whoſe Death (the Lands out of which, &c. being Gavelkind) the Rent deſcended to his four Sons A. B. C. D. and for a fourth Part of the ſaid Rent happening to D. the youngeſt Son, and for his Share, the Defendant bene cognovit captionem, &c.

The Plaintiff prayed Oyer of the Deed of Covenant to ſtand ſeiſed from Moraria, &c. to Sir William Brodenax, which was entered in hæc verba, and then he demurred to the Cogniſance.

(1.) For that the Words of the Deed are, Give and Grant, and not a formal Covenant to ſtand ſeiſed, as the Defendant had pleaded it.

(2.) This being a Rent-Charge in Fee, will not paſs by Way of Uſe, &c. therefore the Grant cannot operate by Way of Covenant to ſtand ſeiſed.

(3.) This Deed is by way of Grant, and as ſuch 'tis void, becauſe the Limitation of the Eſtate is in futuro, for the Difference is thus:

Where a New Rent is created, tho' for Life, or in Fee, it may in its Creation be limited to take Effect at any Time in futuro, becauſe it hath no Exiſtence till that Time comes, and ſo no Suſpenſion of any Freehold.

But 'tis otherwiſe, where an old Rent is granted for Life, or in Fee, to commence in futuro, for there the Grant is void, becauſe there is a Rent in Eſſe, and ſo the Freehold of that Rent will be ſuſpended, and therefore ſuch Grant is void; Quod fuit conceſſum per Curiam.

But they reſolved this was a good Conveyance by Way of Covenant to ſtand ſeiſed, the Conſideration being expreſſed to be for Love and Affection to her Kinſman, &c. and that an Old Rent in Eſſe may well paſs by way of Uſe.

See Antea. Baker *verſus* Lade. 4 Inſt. 111, 112. 2 Leon. 121, 122.

And farther, That the Defendant had done well in Pleading it, as a Conveyance by way of Covenant to ſtand ſeiſed; for if he had pleaded it as a Grant of the Rent, it would have been void.

Judgment for the Defendant, that the Conuſance was good.

DE

Term. Sanct. Trin.

6 Willi. & Mariæ, B. R.

Reev *verſus* Long. Trin. 1 W. & M. B. R. Rot. 1050.

ERROR of a Judgment in C. B. in a ſpecial Verdict in Ejectment, wherein the Caſe appeared to be as followeth:

3 Lev. 408. 1 Salk. 227. 4 Mod. 282. What ſhall be a contingent Remainder, and what an executory Deviſe.

That John Long was ſeiſed in Fee of the Houſes and Lands in Queſtion, and had three Brothers all of them now dead, but each of them left Iſſue Male.

John Long, by his laſt Will, deviſed the Lands now in Queſtion, to the eldeſt Son of his elder Brother for Life, and after his Death, then to his firſt, ſecond, third, fourth and tenth Son in Tail Male ſucceſſively; and for Want of ſuch Iſſue unto the eldeſt Son of his next Brother for Life, Remainder in Tail to his Sons ut ſupra, the like to the eldeſt Son of his three Brothers, &c. in Tail Male.

Then John Long died, and the eldeſt Son of his elder Brother entered, and married, and died without Iſſue living at the Time of his Death; but left his Wife big with Child, which was afterwards a Son born, and his Mother as his Guardian, kept the Poſſeſſion of the Lands, as in his Right, many Years, againſt whom the eldeſt Son of the ſecond Brother brought an Ejectment.

And the ſole Queſtion was, Whether the Deviſe of this Eſtate to the firſt Son of the eldeſt Son of the Brother of the

the Teſtator ſhould be taken as an executory Deviſe, or otherwiſe by way of contingent Remainder, as it was adjudged in the Common Pleas; for it was agreed, That if this Deviſe to the firſt Son of the eldeſt Son of the Brother, was a contingent Remainder, then ſuch Remainder was loſt and deſtroyed, becauſe the Contingency did not happen during the particular Eſtate; and ſo the Remainder never veſted, which is Archer's Caſe, lib. 1. expreſly.

But it was inſiſted, that this Will ſhould be ſo expounded, that the Intention of the Teſtator might have its Effect, and his Intent is very plain, that the Sons of his ſecond Brother ſhould take nothing whilſt any of the Iſſue Male of his elder Brother were living; and therefore this Deviſe muſt be executory.

Sed per Curiam, This is a contingent Remainder, and the Contigency not happening till after the particular Eſtate was determined, the Remainder is deſtroyed as in Archer's Caſe.

And 'tis a certain Rule, That a Will ſhall never operate by way of executory Deviſe, if it might take Effect by way of Remainder, (viz.) If there is a particular Eſtate ſufficient to ſupport it.

And Serjeant Pemberton, who argued for the Defendant in Error, laid it down for Law, that two Things are neceſſary to an executory Deviſe.

(1.) There muſt be a Limitation after, or upon a Fee precedent.

(2.) Such Limitation muſt be to take Effect upon a Condition precedent.

In both which Caſes no Remainder can ſubſiſt, and therefore the Law for the Sake of the Teſtator, and to perform his Intent, hath ſtretched it ſelf to make it operate by way of executory Deviſe, ut res magis valeat.

Moreover he inſiſted, that if one Limitation of a Deviſe is taken to be executory, then all the ſubſequent Limitations muſt likewiſe be ſo taken; for the ſeveral Limitations of a Deviſe of one and the ſame Thing, ſhall never be made to operate ſeveral Ways, (viz.) Some by way of executory Deviſe, and others by way of Remainder; and in this Caſe, if all the Limitations ſhould be taken by way of executory Deviſe, then it would plainly tend to a Perpetuity, which is ſo much avoided by the Law.

See the Statute 10 & 11 *Will.* c. 16. the Law altered.

Afterwards, upon a Writ of Error brought in the Houſe of Lords, this Judgment was reverſed.

The

The Biſhop of Exceſter *verſus* Hele. Trin. 5 Will. & Mar. B. R. Rot. 134.

ERROR of a Judgment in the C. B. in a Quare Impedit brought by Sampſon Hele Eſq; againſt Jonathan Biſhop of Exceſter and Gawen Hayman Clerke, wherein Hele declared, that he was ſeiſed in Fee of the Manor of Southpool in Devonſhire, to which the Advowſon of the Church of Southpool was appendant; and that he had preſented one Ultramere thereunto, who was admitted, inſtituted and inducted, and is now dead; whereupon the Church is void, and it belongs to him to preſent, &c.

3 Lev. 313. 4 Mod. 134. 2 Salk. 539. Caſes Adj 88. 2 Lutw. 1094.

Plea in a *Quare Impedit*, not good.

The Biſhop pleaded, that he claimed nothing but as Ordinary, but ſets out farther, that this Church is a Benefice with Cure of Souls, and that it became void 15 April, Anno 2 Will. & Mar. by the Death of the ſaid Ultramere, that on the 19th of May following, the Plaintiff preſented one Francis Hodder as his Clerk, and that the ſaid Hodder, Tempore præſentationis illius fuit perſona in literatura minus ſufficiens ſeu capax ad habendum dictam Eccleſiam; upon which he (the Biſhop) examined the ſaid Hodder concerning his Ability; and upon Examination found him fore perſonam in literatura inſufficien. & ea ratione perſonam inhabilem & minus idoneam ad habend. prædictum beneficium cum Cura Animarum, and therefore he (the Biſhop) refuſed to admit the ſaid Hodder.

That afterwards, (viz.) 20 Junii next following, he gave the Plaintiff Notice of this Matter, that he might preſent a new Clerk, but the Plaintiff preſented no other, ſo that the Church was vacant more than ſix Months after the Deceaſe of the ſaid Ultramere; wherefore, after the ſix Months were paſſed, he (the Biſhop) collated the other Defendant Hayman by Lapſe.

Hayman, the Incumbent, pleaded the ſame Plea mutatis mutandis; the Plaintiff replied, that Hodder, at the Time of the ſaid Preſentation was, and yet is, Vicar of the Pariſh-Church of Ugborough in the ſaid County, and that he was lawfully admitted, inſtituted and inducted thereunto, and that he is a Man in ſacred Orders by Epiſcopal Ordination, and that he was a Preacher licenſed and allowed by Anthony late Biſhop of Exon, and had the

Cure

Cure of Souls for many Years, and that he was sufficiently qualified, as well to celebrate Divine Service as to administer the Holy Sacraments, &c.

There was a frivolous Rejoinder, and the like Surrejoinder, thereupon the Defendant demurred; and Judgment was given for the Plaintiff in C. B.

The Points controverted were; First, Whether this Replication was material; and next, if the Defendant's Plea was good in Manner, as 'tis set forth.

As to the Replication it was insisted, that it was good by Way of Conclusion against the Defendant to say, that Hodder was minus sufficien. in literatura, because he was at that Time a Priest in Orders, and had a Cure of Souls; but this Point was not fully resolved; yet the Court inclined, that the Replication was ill, and that Hodder (tho' a Priest in Orders) was yet subject to an Examination of his Ability upon a new Promotion.

As to the Plea, two Objections were made to it.

1 Leon. 31, 32. 3 Cro. 119. Albany's *Case.*

(1.) That the Bishop was a Disturber by his own Shewing, for that it appeared by his Plea, that he gave no Notice to the Plaintiff until thirty-two Days after his Refusal of Hodder, wherefore this long Delay of Notice amounted to a Disturbance ipso facto, because the Bishop in such Cases is bound to give Notice to the Patron with all possible Speed; but the Court gave no Opinion in this Point.

(2.) The chief Objection to the Plea was, that the Matter thereof is very incertain, and so general, that no Issue could be taken; for 'tis not sufficient for the Bishop to say in general Terms, that Hodder was persona in literatura minus sufficien. but he ought to set forth in what particular Part of Learning he was insufficient, because there are several Sorts of Learning which are not necessary to qualify a Man to be a Divine; therefore the Bishop in such Cases ought to set forth the Cause of his Refusal to admit the Clerk of the rightful Patron; and this in a very particular Manner, that the Court may judge, whether the Cause is sufficient or not; and for this Reason the Judgment was affirmed; for both Courts were unanimous, that the Plea was ill for this Cause; and * Specot's Case was held to be an Authority in Point.

2 Inst. 632.

* 5 Rep. 57.

But the Biſhop brought a Writ of Error in Parliament, and there the Judgment was reverſed; all that was urged was, that Hodder did not underſtand the Latin Tongue; for upon the Biſhop's Examination he could not tranſlate the Number thirty-nine into Latin.

The King *and* Queen *verſus* Biſhop of London *and* Dr. Lancaſter. Hill. 4 Will. & Mar. B. R. Rot. 964 *and* 965.

QUare Impedit to recover the Preſentation to the Church of St. Martin in the Fields in the City of Weſtminſter, upon an Avoidance by the Promotion of Dr. Tenniſon, the laſt Incumbent, to the Biſhoprick of Lincoln.

3 Lev. 377. 4 Mod. 200. Caſes Adj. 164. There is no Avoidance by Ceſſion till the Biſhop is conſecrated.

The Declaration was, that Humphrey late Biſhop of London was ſeiſed in Fee in Right of his Biſhoprick, of the Advowſon of the Vicarage of the Pariſh-Church of St. Martin in the Fields, ut de uno groſſo per ſe, and that the ſaid Biſhop collated Dr. Tho. Lamplugh to the ſaid Vicarage, then void; who by Virtue of that Collation was put in the corporal Poſſeſſion thereof; that afterwards the ſaid Dr. Lamplugh was promoted to the Biſhoprick of Exceſter, by Reaſon whereof the late King Car. 2. Ratione prærogativæ ſuæ, preſented Dr. William Lloyd, who was afterwards made Biſhop of St. Aſaph, per quod the ſame King Car. 2. ratione prærogativæ ſuæ preſented Dr. Tho. Tenniſon, who on ſuch a Day, &c. was created Biſhop of Lincoln, per quod the Vicarage vacavit per promotionem prædict. Dr. Tenniſon, and that it belonged to the King and Queen to preſent ratione prærogativæ ſuæ, &c.

The Defendants appear and pray Oyer of the original Writ, which was entered in hæc verba, and it appeared to be a common and general Writ, ſhewing the King's Title no otherwiſe, but by the common Words Quæ vacat & ad noſtram ſpectat donationem.

Quo lecto & audito, the Defendants plead in Abatement of the Writ and Count, becauſe of the Variance between them in this Matter, (viz.) for that the King and Queen had entitled themſelves in the Writ generally pleno jure, but in the Declaration they had ſet forth their Title to be ratione prærogativæ ſuæ.

To this Plea the Attorney General demurred, and upon Argument per Curiam, the Writ and Declaration are

good, for there is no special Writ in the Register in this Case, and therefore the Writ must be general, and the Declaration special; so the Judgment was, that the Defendants answer over.

Whereupon they pleaded in chief, and set forth the Title of the Bishop of London to the Advowson of the said Vicarage, in Right of his Bishoprick, and the Plenarty by Dr. Tenniſon; and that on such a Day Dr. Tenniſon was elected Bishop of Lincoln, and afterwards, on such a Day, was consecrated Bishop, &c. and that the said Dr. Tenniſon procured a Dispensation to hold the said Vicarage in Commendam until such a Day, which happened to be six Months and three Days after his Consecration; that this Dispensation tenere in Commendam was confirmed by the King and Queen, and that Dr. Tenniſon held the said Vicarage in Commendam accordingly, (viz.) Six Months and three Days after his Consecration, &c. & hoc, &c.

The Attorney General likewise demurred to this Plea, and two Points were made:

1. (1.) Whether there is any such Prerogative belonging to the Crown as to have the next Presentation, where the Avoidance of a Church is by Promotion of the Incumbent to be a Bishop.

And as to this Point, the Law being settled by many Authorities for many Years, the Court was not willing to have it stirred, tho' there were as many Authorities against such a Prerogative; and therefore without Difficulty adjudged for the * Plaintiffs as to this Point.

* Broke Preſentment al Egliſe, pl. 3, 14, 61. Moor 399. 2 Cro. 695. 3 Cro. 542. Cro. Car. 780. 2 Roll. Abr. 345. Vaugh. 18. 4 Inſt. 356.

(2.) The second Point was, if this Dispensation tenere in Commendam, being three Days longer than six Months, and the Confirmation thereof by the King shall amount to a Presentation by the King and Queen, and thereby their Turn to present ratione prærogativæ well served.

To which it was answered and resolved per Curiam, that this Confirmation or Dispensation by the King, &c. cannot operate two Ways, first to suspend their Title for six Months, and longer, and also to pass a Right out of them, (viz.) their Right of Presentation; for a Dispensation tenere in Commendam for six Months † suspends the Right of Preſentation till that Time shall be expired.

† Hob. 143. Vaugh. 26.

Moreover it was held and resolved, that the Church did not become void by the Election of the Incumbent to be a

Biſhop, but the Vacancy accrewed by his * Conſecration, and not till then.

Judgment for the King and Queen to recover.

* 41 Ed. 3. 5. *b.* 11 H. 4. 37. Vaugh. 19.

Reynell *verſus* Long & al'. Mich. 3 W. & M. C. B. Rot. 347.

Profert hic in Curia where neceſſary, and where not.

QUare Impedit by Edmond Reynell, Eſq; againſt Richard Long and Thomas Long Clerks, for the recovering his Preſentation to the Vicarage of Broadcliff in Devon.

And of a Variance between the Writ and Count.

ſi. The Plaintiff declared, that George Reynell his Great Grandfather was ſeiſed in Fee of the Advowſon of the Vicarage of Broadcliff in groſs, &c. and being ſo ſeiſed, granted the next Avoidance to Elizabeth Boroughs Widow, and ſhe granted it over to one William Segar; and that the Church became void by the Death of Robert Stennings the laſt Incumbent; and thereupon the ſaid William Segar preſented one John Segar, who was admitted, &c.

And then George Reynell by Deed granted the ſaid Advowſon (inter alia) unto Arthur Champernoon and others, and to their Heirs to the Uſe of the ſaid George for Life, and afterwards to the Uſe of Edmond Son and Heir of George, and the Heirs Males of his Body, begotten on the Body of Urſula his then Wife; and for Want of ſuch Iſſue, to the Uſe of the Heirs Males of the Body of the ſaid Edmond.

By Virtue of which Grant, and of the Statute for transferring Uſes into Poſſeſſion, the aforeſaid George was ſeiſed of the ſaid Advowſon for his Life, Remainder to Edmond his Son in manner as aforeſaid; and that afterwards George died, and Edmond his Son was ſeiſed in Tail, ut ſupra, &c.

That Edmond the Son of George had Iſſue by his Wife Urſula George Reynell his Son and Heir, Father of the Plaintiff; that during the Seiſin of Edmond the Grandfather, the Church became again void, which happened in the Time of the Uſurpation, (viz.) 1656. and thereupon within ſix Months after the Vacancy, one John Copleſtone (at the Nomination of one George Reynell who had no Right) was put into actual Poſſeſſion of the ſaid Church, by the then Perſons in Authority, who was afterwards by the Statute 12 Car. 2. (which he ſet forth) confirmed in the ſaid Church for his Life.

That afterwards Edmond the Grandfather died seised as aforesaid, and that George the Father was seised in Tail Male, and had Issue the Plaintiff his Son and Heir; and then George the Father died, and the Advowson descended to the Plaintiff in Tail Male, and then the Church became void by the Death of Copleſtone; whereupon it belonged to the Plaintiff to present to the said Church, but he was disturbed by the Defendants.

The Defendants demurred in Law, and shew for Cause of Demurrer, that the Plaintiff had not pleaded the aforesaid Grant of the Advowson by George Reynell, &c. unto Champernoon with a Profert hic in Curia, and the Plaintiff joined in Demurrer.

And now two Objections were made by the Council of the Defendants.

(1.) That the Deed of Settlement supra, by which the Advowson of the Vicarage is pretended to be entailed, ought to have been pleaded with profert hic in Curia, so as the Defendants might have Oyer of it; for here the Deed is neceſſary ex inſtitutione legis to make it a good Grant, for without the Deed the Advowson will not pass.

To which it was answered and so resolved, that the Plaintiff in this Case shall not be compelled to produce the Deed for the Reasons following:

(1.) First, Because the Deed doth not belong to him who is only Ceſtui que truſt, but it belongs to the Grantees.

(2.) Because he hath no Remedy in Law to get Poſſeſsion of the Deed.

(3.) He is in meerly by Operation of Law, and not in the Per; and for Authorities the Cases in the * Margin were cited.

* Dyer 277. 2 Cro. 217. Noy 135, 145. W. Jones 377. Cro. Car. Stockton *verſus* Hampton. 2 Roll. Abr. 31.

(2.) Objection, ſi. There is a Variance between the Writ and the Count, for the Writ is quod permittunt eum præſentare ad Vicariam Eccleſiæ de B. and the Concluſion of the Declaration is quod ad ipſum Edmundum ad Eccleſiam prædict' ſic vacantem, &c. pertinet præſentare, &c.

So that the Writ is quod permittat, &c. præſentare ad * Vicariam, and the Declaration is ad Eccleſiam pertinet præſentare.

* Hob. 327. 2 Cro. 515.

To

To which it was answered, and so resolved per Curiam, quod omnis Vicaria est Ecclesia, and 'tis so held expressly in several * Books; and therefore no Variance in Substance, but only in Form, and this was not shewn for Cause of Demurrer.

* 3 Bulst. 88, 90. 1 Roll. Rep. 235, 237.

And the † Precedents are as in this Case; wherefore Judgment was given for the Plaintiff, and thereupon the Defendants brought a Writ of Error, and a Bill in Chancery, &c.

† Rast. Ent. 522. Co. Ent. 491, *b.* 509.

The King and Queen *versus* Tucker. *Judgment was given in* Easter-Term, 6 Willi.

THE Defendant was indicted for High Treason before special Commissioners of Oyer and Terminer by Letters Patent of Jac. 2. at their Sessions held at Wells in the County of Somerset, 21 Day of March, ann. 3 Jac. 2. and the Substance of the Indictment was for his being in actual Rebellion against King James, in assisting the late Duke of Monmouth in the Insurrection in the West.

4 Mod. 162. *Cases* Adj. 126. Salk. 630. 3 Lev. 396. Indictment of High Treason must conclude *contra Ligeantiæ suæ debitum.*

This Tucker amongst several others confessed the Indictment, and thereupon Judgment of Death (as in Cases of High Treason) was pronounced against him, and then he was pardoned.

Afterwards Anno 2 & 3 Will. & Ma. he procured Leave to bring a Writ of Error on the Judgment of his Attainder; and hereupon several Errors were assigned.

(1.) That the Direction of the Letters Patent of Oyer and Terminer was ill, for that it was coram A. B. C. D. Justiciariis, &c. per literas patentes ipsius Domini Regis sub magno sigillo Angliæ confect' eisdem A. B. C. D. & al' aliquibus tribus vel plur' eorum direct'.

Sed per Curiam, This is well enough, and in the Earl of * Leicester's Case, the Direction was in the same Manner, tho' it was objected, that the Direction ought to have been to all of them, and then the Authority afterwards given to any three of them.

* Plowd. 384.

(2.) That upon the Arraignment of Tucker, and others upon the same Indictment, the Entry is (after the Prisoners were brought to the Bar) & statim de præmissis in indictamento præd' specificatis eis imposit' per Curiam hic allocat' qualiter se velle acquietari, &c. separatim dicunt, &c. whereas

whereas it ought to have been ſeparatim allocut', for they ought to have been arraigned ſeverally.

Sed non allocatur; for it ſhall be expounded ſeverally, and ſo are many Precedents.

(3.) That Judgment was given upon the Confeſſion without any Prayer made by the King's Counſel in Behalf of the King.

Sed non allocatur; for ſuch Prayer is not of Neceſſity.

(4) For that the Judgment is erroneous, it being quod ad locum executionis trahantur, but not ſaid * ſuper hurdellum trahantur, & ſuper furcas ibidem per collum ſuſpendantur & uterque eorum ſuſpendetur, omitting per Collum ſuſpendetur; that the Clauſe quod ſecreta membra ſua amputentur was wholly left out of the Judgment, which is a neceſſary Part thereof; and that it was quod corpora eorum & utriuſque eorum in quatuor partes dividantur, but did not ſay, & corpus utriuſq; eorum in quatuor partes dividatur.

* 3 Inſt. 210, 211. Co. Ent. 361. *b.* Plowd. 387, 551. Staunf. 182. Tit. *Judgment* 19.

But per Curiam, all theſe Exceptions were over-ruled upon View of ſeveral Precedents, both ancient and modern, wherein Judgments had been defective in theſe Particulars, (viz.) many in every Point, and many in ſome, and not in others, from the Time of H. 8. to this preſent Time.

(5.) Objection to the Judgment was, That it was not ſaid quod interiora, &c. in ignem ponantur, which Clauſe was wholly omitted.

Sed per Curiam, upon View of Precedents, that Objection was likewiſe over-ruled.

(6.) At laſt there was an Error aſſigned in the very Indictment, becauſe it did not conclude contra ligeantiæ ſuæ debitum, neither was it laid to be contra ligeantiæ ſuæ debitum in any Part of the Indictment.

Calvin's *Caſe*. 7 Rep. Dyer 155. 1 Inſt. 129. 3 Inſt. 11.

To which it was anſwered, that there were Words in the Indictment which did amount to that Clauſe; for it was laid, that they on ſuch a Day contra dominum Regem ſupremum verum naturalem & indubitat' dominum ſuum, with a Multitude of Perſons to the Number of four Thouſand, had aſſembled with Drums, Colours, &c. in open War, &c. all which was apparently againſt their Allegiance.

But after many Arguments, per Curiam, the Judgment was reverſed for this Error only; which Judgment of Reverſal was afterwards affirmed in Parliament; & per Curi-

am, 'tis an Eſſential to an Indictment of High Treaſon, that the Fact ſhould be laid to be done contra Ligeantiæ ſuæ debitum; and moſt properly in the Concluſion thereof: Sed per Holt Ch. Juſtice, It would be ſufficient, if it had been in the Body of the Indictment; but it muſt of Neceſſity be ſomewhere, unleſs in Caſes of Treaſon, made ſo by any new Act of Parliament, where ſuch a Concluſion is not neceſſary.

And it was held, that the Word Proditorie is as eſſential in an Indictment for High Treaſon, as the Words Felonice and Burglariter in Indictments for Felony or Burglary.

But laſtly, The Attainders of Sir Henry Vane and General Lambert were produced, and there the Clauſe contra Ligeantiæ ſuæ debitum was omitted, as here.

Nota; This Reverſal was ſtrongly oppoſed by Mr. Hall, afterwards Serjeant Hall, of the Middle Temple, who had purchaſed under this Attainder.

Philips *verſus* Bury.

Upon a Reverſal of a Judgment of B. R. in Parliament, that Court muſt give a new Judgment.

THIS was a Controverſy between the Biſhop of Exon. and Dr. Bury, Rector of Exceſter-College in Oxford, concerning the Biſhop's Right of Viſitation of that College, and the Deprivation of the Doctor by the Biſhop as Viſitor, &c. and after a Special Verdict in Eſtrement brought by one Painter againſt Dr. Bury, who was choſen Rector upon the Deprivation of the Doctor; Judgment was given in B. R. for the Doctor; and the Suit being by Original and not by Bill, a Writ of Error was brought on this Judgment in Parliament, and there it was reverſed; and the Record of the Reverſal remitted into the Court of King's Bench.

And it was moved in Behalf of the Plaintiff (Painter) that the Court of B. R. would give a new Judgment, (viz.) Quod querens recuperet, &c. and for this the Caſe of * Faldo *verſus* Ridge was cited; and it was inſiſted, that there would be a Failure of Juſtice, unleſs this Court would do ſo, becauſe the Houſe of Lords had only a Tranſcript of the Record, and no Rolls to enter any Judgments.

* Yelv. 75. 2 Cro. 206. 2 Roll. Abr. 774.

Sed per Curiam, A new Judgment cannot be given by the Court contrary to that which had been already given; but that the ſame Court which reverſed the Judg-

ment

ment must give a new Judgment for him in whose Favour it was reversed.

'Tis true, in the Case of Faldo and Ridge supra, the Court of Exchequer-Chamber, after the Reversal, &c. gave Judgment quod querens recuperet; but because they wanted Power to award a Writ of Inquiry, which was necessary in that Case, the Judgment being on a Demurrer, therefore it was sent back into the King's Bench for the Execution of that Writ, and thereupon to give the final Judgment.

But 'tis otherwise where the Judgment is against the Plaintiff in B. R. upon a special Verdict, and that Judgment reversed in the Exchequer-Chamber, for in that Case (no Writ of Inquiry being requisite) that Court doth, besides the Judgment of Reversal, give a compleat Judgment for the Plaintiff in the Action, (viz.) quod recuperet; and to prove this Diversity, the Cases in the * Margin were cited.

* Dyer 343, 373. 4 Inst. 72. F.N.B. 19. D. Yelv. 118, 119. 2 Saund. 234, 256.

And hereupon the Court of B. R. were of Opinion they could not give a new Judgment in this Case, and therefore the Plaintiff resorted back again to the Parliament; and there upon Debate a new Judgment was given, quod querens recuperet, which was entered accordingly, and executed.

The King *versus* Haines, *Alderman of* Glocester.

Where the Defendant shall be compelled to plead *instanter*.

AN Information was exhibited against the Defendant for executing the Office of Alderman and Justice of Peace, not having taken the Oaths within three Months, according to the * Statute; and he appearing, it was moved, that he might be compelled to plead instanter, but he insisted to have an Imparlance.

* 25 Car. 2. cap. 2.

Sed per Curiam, upon Debate it was agreed by them and the Master of the Crown-Office, that if Process of Subpœna issue out of that Office, and the Party is returned summoned, and doth not appear at the Return of the Process, and thereupon an Attachment issueth, and Non est inventus returned; upon which a Capias goes out, and the Party is taken thereon; or if he came in voluntarily at any Time after the Capias is gone out; in such Case he shall plead instanter without any Imparlance.

And this was the Defendant's Caſe, for he came in voluntarily after the Capias was gone forth, wherefore he was ordered to plead inſtanter.

But then he inſiſted, that there was no Information filed againſt him at the Time of the Return of the firſt Proceſs, (viz.) Of the Subpœna, and therefore all the ſubſequent Proceſs againſt him are irregular, to which the Court agreed, if the Fact was ſo.

Therefore it was referred to the Maſter of the Office to examine that Matter; and this Information being afterwards (Trin. 7 Willi.) tried at the Bar, the Defendant was acquitted.

Nota; It was agreed per Curiam, that if the Party is brought in by a Judge's Warrant, without any Proceſs againſt him, in ſuch Caſe he ſhall have an Imparlance, and not be compelled to plead inſtanter.

Lawſon *verſus* Story.

Where the Coſts ſhall be treble as well as the Damages.

SIR Wilfred Lawſon, after the new Statute concerning Diſtreſſes, made Anno Will. & Mar. diſtrained his Tenant Story for Rent in arrear, who reſcued the Diſtreſs, whereupon Sir Wilfred (according to the Directions of that Statute) brought an Action on the Caſe againſt the Reſcuer, and had a Verdict and treble Damages; and now the Queſtion was, Whether the Plaintiff's Coſts, as well thoſe given by the Court de incremento, as thoſe given by the Jury, ſhould be trebled, as well as the Damages, the Words of the Statute being, that the Plaintiff ſhall recover treble Damages and Coſts; and the Queſtion was, Whether the Word Treble ſhall extend to the Coſts as well as to the Damages, or whether it ſhall relate to the Damages only; and after ſeveral Debates it was reſolved per Curiam, that the Coſts given by the Court and Jury ſhould be trebled as well as the Damages; and that it was ſo ruled by this Court in the Caſe of Sands and Child, where the Action was brought againſt Sir Joſiah Child, for ſuing in the Court of Admiralty concerning Matters, of which that Court had no Juriſdiction, upon the * Statutes which give double Damages, without mentioning Coſts; yet Sands had double Coſts.

See Dyer 159. b.

* Ric. 3. 2 H. 4. c. 11.

St. Leger *verſus* Pope. Trin. 6 Will. & Mar. B. R. Rot. 556.

1 Lutw. 484. 4 Mod. 406, 410. 5 Mod. 4. 1 Salk. 344, 484, 487. Variance between a ſpecial Agreement and the Declaration.

DEBT in the Debet and Detinet for 107 l. 10 s. the Declaration was upon a ſpecial Wager for 100 Guineas (which the Plaintiff averred were worth 107 l. 10 s.) concerning a Game at Tables, where a Queſtion aroſe, whether he who only toucheth his Table-man, ought to remove him; and the Deciſion of this Queſtion was, by Agreement in Writing, referred by the Parties to the Groom-Porter, who determined it for the Plaintiff in the Action, (viz.) That he who only toucheth a Man is not bound to remove him; and the Plaintiff concluded his Declaration, that the Defendant licet ſæpius requiſit. had not paid the 107 l. 10 s.

The Plaintiff had Judgment in the Common Pleas; and now upon a Writ of Error brought, three Things were inſiſted on:

(1.) That this Action ought to be brought in the Detinet only for the 100 Guineas in Specie, and not in the Debet and Detinet.

Sed non allocatur; for 'tis well enough in the Debet and Detinet.

Yelv. 136. Raſt. Ent. 158. *b.* Hardres 320.

(2.) That the Plaintiff ought to have concluded his Declaration in the Diſjunctive, (viz.) That the Defendant had not paid the 100 Guineas, or the 107 l. 10 s. becauſe he had Liberty to pay either the one or the other.

(3.) That the Plaintiff had demanded more than the Guineas for which they were coined, and the Court will ex Officio take Notice of the Engliſh Coins; now a Guinea was firſt coined for 20 s. and no more, and is current and legal Coin for no more than 20 s.

The Court doubted as to theſe Two laſt Exceptions, but eſpecially concerning the ſecond Exception, which they inclined to think a fatal Fault.

But afterwards the Judgment was reverſed for another Fault in the Declaration.

For per Holt Ch. Juſtice, There is a Variance between the Declaration and the ſpecial Agreement in Writing; ſo that the other Points were not adjudged.

Now the Variance was, for that the Plaintiff had declared, that the Defendant per ſcript' ſigillo ſuo ſigillat', had bound himſelf in the Wager; but there was no ſuch thing in the Writing or Note, for that was only to ſtand to the Judgment of the Groom-Porter upon a Caſe ſtated and ſigned by the Parties.

Martin *verſus* Wilsford. *In the Exchequer*; Intratur *there* Trin. 6. *adjudged* Term. Paſch. Anno 8 Willi.

After Judgment upon an Information, for a Seiſure of Goods forfeited, the Property of ſuch Goods is deveſted from the right Owner.

MARTIN brought an Action of Treſpaſs in the Court of Exchequer againſt Wilsford and one Nicholls, and laid his Action in Devon', and declared, that the Defendants at Taviſtock in the County of Devon, 5 April, Anno 6 W. & Mar. had taken and carried away two Pieces of Cloth, called Kerſies, of him the Plaintiff, to the Value of Thirty Pounds, and had converted them to his own Uſe.

The Defendant pleaded in Bar, that the two Pieces of Cloth in the Bill mentioned, being Goods and Merchandize for which a Subſidy was due to the King and Queen, were between the firſt of Octob. 5 W. & M. and the 30th of Auguſt then next following, expoſed to Sale at Ratcliff in the County of Middleſex, before they were ſealed with the Seal of the Collector of the ſaid Subſidy, according to the true Intent of a certain Act of Parliament in that Part made and provided againſt the Form of the ſame Statute; by reaſon whereof he the ſaid Wilsford, then and yet being one of the Deputy Aulnegers and Collectors of the Subſidy of Woollen-Cloth, vendible in the ſeveral Counties of Devon and Cornwall, lawfully conſtituted and authorized, did according to the Duty of his Office, and the Defendant Nicholls as his Servant, and by his Command, between the ſaid firſt Day of October, Anno 5. and the ſaid 30th of Auguſt following, at Ratcliff in the County of Middleſex, within the Port of London, bona prædict' ob cauſas prædictas ſeiſiverunt & ad opus dictorum Domini Regis & Dominæ Reginæ tanquam forisfacta arreſtaverunt; and the ſaid Wilsford tunc Officiarius prædict' ut prefertur exiſten' afterwards, (viz.) the ſame 30 Auguſt, by the Name of Thomas Wilsford gen', one of the Deputy Aulnagers and Collectors of the Subſidy of Woollen Cloth, vendible in

the ſeveral Counties of Devon and Cornwall, qui pro eiſdem Dom' Rege & Domina Regina ſequebatur dedit Curiæ hujus ſcaccarii intelligi & informari, that he between the 1ſt of Octob. ann. 5. and the 30th of Aug. next following, at Ratcliff in the County of Middleſex, had ſeiſed and arreſted to the King and Queen's Uſe as forfeited, two Pieces of Woollen Cloth called Kerſies, de bonis & catallis perſonæ ignotæ, for that the ſaid two Pieces of Cloth being made and wrought to ſell and utter, for which Subſidy was due, were, within the Time aforeſaid at Ratcliff aforeſaid in the County of Middleſex, expoſed to Sale before they had been ſealed with the Seal of the Collector of the Subſidy aforeſaid, contra formam ſtatuti in ea parte edit' & proviſ. & petit adviſamentum Curiæ, &c. and that the Cloth might remain forfeited according to the Form of the Statute aforeſaid.

Et ſuperinde taliter proceſſum fuit, &c. that afterwards, (viz.) 23 Octob. ann 6. it was adjudged by the Barons of the Exchequer, that the Goods aforeſaid for the Cauſe aforeſaid ſhould remain forfeited, and that Wilsford ſhould be charged with, and ſatisfy to the King and Queen 20l. being the Value of the ſaid Goods, prout per Record' inde plenius apparet.

And that he the ſaid Wilsford afterwards, (viz.) 8 Nov. Anno 6 Willi. paid the ſaid Twenty Pounds into the Exchequer, prout patet per Record' prædict' per quod the ſaid Wilsford, and the ſaid Nicholls as his Servant, &c. upon the Day laſt mentioned, at Ratcliff aforeſaid in the ſaid County of Middleſex, prædict' duas pecias panni lanei in informatione & judicio prædict' exiſten' duas pecias panni lanei in Billa ipſius (the Plaintiff) ſuperius mentionat' in uſum ipſius Tho. Wilsford converterunt & diſpoſuerunt prout eis bene licuit quæ ſunt eadem captio aſportatio converſio & diſpoſitio prædict' duarum peciarum panni lanei unde (the Plaintiff) ſuperius ſe modo quæritur & hoc, &c.

To this the Plaintiff reply'd, Proteſtando non cognoſcendo aliqua, &c. pro placito dicit quod prædict' duæ peciæ panni lanei in Billa ipſius (the Plaintiff) ſuperius mentionat' non expoſit' fuerunt venditioni antequam ſigillat' fuerunt ſigillo collectoris ſubſid' prædict' modo & forma prout & hoc petit quod inquiratur per patriam, &c.

And upon a general Demurrer to this Replication, it was inſiſted, that it was naught, for that the Validity of the Seiſure (after it appears on Record, that the Goods were condemned) cannot be put in Iſſue; but that the Plaintiff in this Action was concluded as to that Matter by the Judgment and Condemnation upon the Information; for he had Time to have appeared and pleaded to the Information; and upon Iſſue joined the Legality of the Seiſure might have been tried, (viz.) Whether the Cloth was expoſed to Sale, or not, before it was ſealed; but he having ſlipt that Opportunity, he is now forecloſed from trying the Merits.

Beſides it hath been always held, that after Judgment upon an Information for a Seiſure of Goods for the King, the Property of thoſe Goods are altered thereby, ſo as neither Trover or Treſpaſs will lie for him who was the Owner; and 'tis not reaſonable that a Judgment ſhould be ſubverted by a collateral Action. Hardr. 194, 195. Raym. 336.

To which all the Barons agreed, and declared it to be the ſtanding Rule of the Court.

But then it was inſiſted for the Plaintiff, That the Plea was ill, for the Reaſons following: *Contra* for the Plaintiff.

(1.) For that by the * Statute, which gives the Forfeiture of the Cloths expoſed to Sale before they are ſealed with the Seal of the Collector of the Subſidies, 'tis appointed, that ſuch forfeited Cloths ſhall be ſeiſed for the King, by the Collector or Aulneger, or by the Deputy of one of them, or elſe by the Bailiffs of the Town where the Cloths were expoſed to Sale; ſo that no other Perſon hath Power to ſeiſe, but thoſe named in this Statute. * 27 Ed. 3. cap. 4. Hard. 16, 17.

And it appears by the Plea, that the Defendant Wilſford was only a Deputy Aulgener and Collector for Cloths vendible in the Counties of Devon and Cornwall; and by Conſequence had no Power to ſeiſe elſewhere out of thoſe two Counties; and yet by his own Shewing it appears, that he ſeiſed, &c. at Ratcliff in the County of Middleſex, which was out of his Deputation, and where he had no manner of Power.

The ſame Matter likewiſe appeared in the Body of the Information pleaded; ſo the Judgment therein was ipſo facto void, becauſe the Information was felo de ſe ſhewing that the very Informer had no Power to ſeiſe, and then by Conſequence the Court could not condemn Goods

Goods upon a Seiſure which appeared on Record to be void and illegal.

(2.) The Plea is likewiſe ill for another Reaſon, (viz.) becauſe it was at large without Reſpect to the Time or Place laid in the Declaration, and this being a tranſitory Action, the Defendant by his Plea ought to have followed the Plaintiff both in Time and Place, ſince his Juſtification was not local, or at leaſt he ought to have added a Traverſe, (viz.) Abſque hoc, that he was guilty aliter vel alio modo, &c.

So that the Plaintiff might have an Opportunity of taking Iſſue upon ſuch Traverſe, and ſo to maintain his Declaration.

(3.) The Plaintiff hath laid the Converſion, *&c.* to the Uſe of both the Defendants; and they have confeſſed a Converſion, but to the Uſe of one of them alone, which doth not meet with the Plaintiff's Declaration.

The Court gave their Opinions ſeriatim.

Curia. Ff. Powes, Turton and Ward Ch. Baron, that the Plea was ill for the firſt two Reaſons ſupra, for they held that no Perſon hath Authority to ſeiſe the Cloth forfeited by the Statute 27 Ed. 3. aforeſaid, but only thoſe very Officers expreſſed in that Statute; and it appears, that the Defendant had no Authority to ſeiſe at Ratcliff, for by his own Shewing, his Deputation extended only to Devonſhire and Cornwall.

Where a Traverſe is neceſſary. They alſo held, that the Defendants in this Caſe ought to have added a Traverſe to their Plea, (viz.) Abſque hoc, that they were guilty aliter vel alio modo.

And the Chief Baron Ward added, that it was a certain Rule in Pleading, that where the Action is Tranſitory, the Defendant in his Plea muſt follow the Plaintiff, unleſs his Juſtification is local, and then he muſt traverſe, abſque hoc, that he is guilty extra.

But in this Caſe the Action is Tranſitory, and the Juſtification is not local, and yet the Defendant hath neither followed the Plaintiff, nor added any Traverſe, wherefore the Plaintiff remains unanſwered.

Now if the Defendant had pleaded well, he ſhould have ſet forth, that he ſeiſed the Cloth at Taviſtock upon the Day mentioned in the Declaration; and thereupon he informed this Court as upon a Seiſure at Ratcliff, with the neceſſary Averments, that all was the ſame, and then have ad-

added a Traverſe, abſq; hoc, that he was guilty aliter vel alio modo, which would have been ſufficient without adding vel alio tempore.

And ſo it was adjudged in a Caſe of a Seiſure made at Salisbury, and thereupon an * Information and Condemnation, as upon a Seiſure in Middleſex; and in an Action of Treſpaſs the Matter was pleaded ſpecially, with the like Traverſe, ut ſupra. * Hill. 29, 30 Car. 2. Smith *verſus* Ekins.

And the like ſpecial Juſtification and Judgment in another Caſe between Cole and Powell; and he ſaid he could not find any Precedent in this Court to warrant ſuch a Form of Pleading as in the principal Caſe; and farther, that in thoſe collateral Actions, after a Condemnation upon a Seiſure, the Rule is, (viz.) If the Action is Trover, the Condemnation may be given in Evidence upon the general Iſſue, becauſe thereby the Property is deveſted out of the Party; but if the Action is Treſpaſs, then the Matter may be ſpecially pleaded; and tho', if well pleaded, it might have been a good Bar to the Action, yet now 'tis ill pleaded, the Court cannot take any Notice of the Matter it ſelf, but muſt give Judgment upon the Inſufficiency of the Pleading.

Laſtly, Where a Statute makes a Forfeiture, and gives Power to ſeiſe generally, without naming any Perſons who ſhall ſeiſe, in ſuch Caſe any Perſon, tho' he is no Officer, may ſeiſe for the King; but here the Statute names the Perſons by their Offices, who ſhall ſeiſe for him upon this Forfeiture; and tho' there are no negative Words, (viz.) That no other Perſon ſhall ſeiſe, yet in this Caſe expreſſum facit ceſſare tacitum, and the Negative is implied by the expreſs Affirmative.

But Baron Letchmere was of Opinion for the Defendants for no other Reaſon, but becauſe a Condemnation did appear on Record, and the Defendant charged with the Value, and therefore no Action will lie by the firſt Proprietor after ſuch Condemnation, and the Defendant being an Officer, ought to be favoured in Matters concerning his Office; and in this Plea 'tis ſaid, that the Cloth in the Declaration and in the Information are the ſame, and that is ſufficient; but he could not cite any Precedent of the Court for ſuch Sort of Pleading.

The Plaintiff had Judgment by the Opinion of three Barons.

Pullen

Pullen *verſus* Palmer. Intratur Trin. 6 Will. & Mar. B. R. Rot. 179; *but depended until* Trin. 8 Will.

5 Mod. 71. One Jointenant cannot avow for Rent, nor maintain an Action of Debt for Rent.

IN Replevin, &c. the Defendant began his Avowry in this Manner:

Ff. Et prædictus Samuel per T. S. Attorn. ſuum venit & defend. vim & injuriam quando, &c. & bene advocat captionem Averiorum præd. in præd. loco in quo, &c. & juſte, &c. quia dicit quod, &c. and then ſets forth, that A. was ſeiſed in Fee of ſuch Lands, unde, &c. out of which he granted a Rent-charge of 6 l. per Annum unto B. C. D. E. with a Clauſe of Diſtreſs (being thirteen Perſons in all) and unto their Heirs and Aſſigns for ever, for the Uſe of the Poor of the Pariſhes of Beckington and Rhode in Wilts, and this Grant was 6 Feb. Anno 20 Eliz.

Then he ſets forth ſeveral Aſſignments of this Rent to new Truſtees, &c. whereof the laſt was dated 20 April, 3 Car. 2. which was to the Defendant Palmer and twelve other Perſons, and to their Heirs, for the Uſe of the Poor, &c. ut ſupra, then he ſhews that Four of the laſt Aſſignees were dead, and that he and nine of the reſt, (viz.) A. B. C. D. &c. ſurvived, and then makes his Concluſion.

Ff. Et quia 7 l. & 10 s. de redditu prædict. pro uno Anno & un. quarter. unius Anni finiti ad feſtum, &c. Anno, &c. eodem tempore quo, &c. præfat. Samueli & prædict. A. B. C. D. (naming the other Eight ſurviving Truſtees) aretro fuerunt & inſolut. idem Samuel bene advocat captionem averiorum prædict. in prædicto loco in quo, &c. & juſte, &c. ut in tenementis diſtriction. (of him and the other ſurviving Truſtees) in forma prædicta onerat. & obligat. &c.

The Plaintiff pleaded in Bar, that Puis darrein Continuance, one of the other Eight ſurviving Truſtees had releaſed to the Plaintiff all Actions and Suits depending concerning the Rent aforeſaid, between the Plaintiff and the Defendant.

And upon a Demurrer by the Defendant, it was argued for the Plaintiff, that the Avowry was ill, both in Subſtance and Form.

As to the Form, it was objected, that the Concluſion of the Avowry was ill, becauſe 'tis ſaid, that ſo much Rent was behind, but did not expreſly avow the Diſtreſs to be

taken for that Rent, but avowed generally, without shewing the Cause for what; whereas after (bene advocat. captionem) he ought to have added this Clause pro prædictis 7 l. 10 s. de redditu præd. sic ut præfertur aretro existen. &c.

Sed non allocatur; because 'tis said & quia such Rent was behind, he avowed, &c. so that the Word quia shews the Cause of the Distress.

But the chief Objection was as to the Matter in Law, for that the Defendant being Jointenant of this Rent, cannot avow alone, without making himself Bailiff to his Companions; and therefore in this Case he should, both in the Commencement and in the Conclusion, have avowed in jure suo proprio, and also made Conusance, ut Ballivus, to the rest of his Companions, because Jointenants cannot sever in an Avowry for Rent, either for Part or for the Whole arrear. 3 Brownl. Entr. 339, 340. Rast. Ent. 565. a. 1 Brownl. Ent. 17, 18. Old. Ent. 94, 95. 1 Roll. Abr. 320.

On the other Side it was argued, this Omission was but Form, since the Defendant had by his Avowry expressly alledged, that the Rent for which he distrained was due to all the Jointenants, and avows the Taking, &c. as in Lands subject to the Distress of all of them, which amounts to as much as if he made an express Conusance as Bailiff to them; and farther, that one Jointenant may distrain for the whole Rent. Econtra.

Sed per Curiam, The Avowry is ill upon the second Objection; for tho' one Jointenant may distrain for the whole Rent, yet he cannot avow for the Whole; for an Avowry is in Nature of an Action, and is a Demand in Law of the Rent.

And one Jointenant cannot maintain an Action of Debt for Rent without his Companion; and therefore in this Avowry, which is the same with an Action, he ought to make himself Bailiff to his Companions, so as they may be privy to the Suit, and he entitled to their Shares upon his Recovery thereof, in their Right; and his Alledging, that the Rent was due to all, doth not mend the Matter, but rather makes it worse, for thereupon the Objection doth arise.

And the Defendant perceiving the Opinion of the Court, desired the whole Matter might be referred to Justice Eyre, because it concerned a Charity, which was done accordingly.

DE

Term. Sanct. Mich.

6 Willi. & Mariæ in B. R.

Cook *verſus* Tucker.

Words, where actionable.

ACtion on the Caſe for ſcandalous Words ſpoken of the Plaintiff, late Mayor of Exon. ſetting forth, that he was a Merchant, and that the Defendant having Communication of him and his Trade and Family, ſaid, he, (the Plaintiff) is a pitiful Fellow, and not able to pay his Debts, *&c.*

After a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that theſe Words are not actionable, and for an Authority, the Caſe in the * Margin was cited.

* Sid. 424.

Sed per Curiam, The Words, as they are laid, are actionable; and a Caſe was remembered between Garrett and Shelſon, Anno 36 Car. 2. where the Words following were ſpoken of a Weaver concerning his Trade, (*viz.*) He is a pitiful idle Raſcal, and not worth a Groat, and held actionable.

Wilſon *verſus* Law. Paſch. 6 W. & M. B. R. Rot. 22.

JOhn Law a Scot, Gent. was indicted for the Murder of Edward Wilſon in a Duell in Bloomsbury-Square, upon which Indictment, he the ſaid Law was tried at the Old-Baily, and convicted of Murder, and had Judgment of Death, but was reprieved.

Thereupon Robert Wilſon, the Brother of the Perſon killed, and who was his Heir, ſued forth an original Writ of Appeal for Murder directed to the Sheriff of Middleſex, in whoſe Cuſtody Mr. Law remained, (viz.) in Newgate-Goal returnable in Eaſter-Term, ann. 6 W. & M. in R. R.

And then moved for an Habeas Corpus to the ſame Sheriff, commanding him to bring up the Body of Law on ſuch a Day certain, which was quarto die poſt the Return of the Writ of Appeal; and upon that Day the Sheriff was called in Court to make his Return.

Thereupon the Sheriff brought up the Body of Law in Cuſtody, and returned the Habeas Corpus, ſhewing the Cauſes of his Impriſonment, (viz.) The Warrant of Commitment by the Juſtice of Peace, and alſo his Conviction and Attainder of Murder; and farther, that by Virtue of the Writ of Appeal, he had attached his Body, which Writ he thus returned; ſt. Virtute iſtius brevis mihi direct' attachiari feci infranominat' Johannem Law per corpus ſuum cujus quidem corpus ad diem infracontent' coram Domino Rege & Domina Regina ubicunque, &c. paratum habeo prout interius mihi præcipitur.

Then Law was brought to the Bar, and arraigned, and the Plaintiff in Appeal counted againſt him; then his Counſel prayed Oyer of the Writ of Appeal, and the Return thereof, which being granted, two Days Time was deſired for him to conſider what to plead, which was likewiſe granted, but then he was to plead tunc pro nunc.

And Law being committed to the Marſhal of B. R. was on that Day brought by him to the Bar; a Demurrer was put in for him in this Form, (viz.) Quibus lectis & auditis prædict' Johannes Law defend' vim & injuriam quando, &c & omnem feloniam & quicquid, &c. & petit judicium de brevi originale & narratione prædict' quia dicit quod breve illud & Retorn' inde necnon narratio prædict' ſuper-

Co. Ent. 56. *See* ſuch a Plea and Demurrer.

inde minus ſufficien' in lege exiſtunt ad compellend' eundem Johannem Law ad inde reſpondend' quodque ipſe ad breve prædict' ſic ut præfertur retornat' ſeu ad narrationem prædictam ſic ut prefertur declarat' neceſſe non habet nec per legem terræ tenetur reſpondere & hoc, &c. unde petit judicium de brevi retorn' & narratione prædict' & quod breve ill' caſſetur, &c. & quoad feloniam & murdrum præd' idem Johannes Law dicit quod ille non eſt inde culpabilis & de bono & malo ponit ſe ſuper patriam & præd' Rob'tus Wilſon ſimiliter, &c.

It ſeems not neceſſary to plead over to the Felony.

The Plaintiff in the Appeal joined in this Form.

ſſ. Et prædict' Robertus Wilſon quoad prædict placitum prædicti Johannis Law ſuperius ad breve ipſius Rob'ti Wilſon prædict' in forma prædict' placitat' dicit quod breve illud ac Retorn' inde ac materia in eiſdem content' bona & ſufficien' in lege exiſtunt ad prædictum Johannem Law adinde reſpondere compellend' & hoc parat eſt verificare unde ex quo dictus Johannes Law nichil allegavit aut aſſignavit in quo breve illud ſive Retorn' ejuſdem malum vitioſum ſive defectiv' exiſtit idem Robertus Wilſon petit judicium & quod idem breve ſuum & dict' Retorn' ejuſdem bona & ſufficien' in lege adjudicentur & quoad dict' morationem in lege ſive placitum prædict' Johannis Law ad narration' ipſius Roberti Wilſon ſuperius in forma prædicta placitat' **the Plaintiff joined in Demurrer in the common Form.**

And now the Counſel for the Defendant Law made ſeveral Objections following:

4 Rep. 40. Young's *Caſe.*

(1.) **That in the Declaration, the Wound was incertainly deſcribed,** (viz.) In & ſuper ſuperiorem partem ventris ipſius Edwardi Wilſon juxta pectus & medium Corporis ejuſdem Edwardi adtunc & ibidem felonice, &c. percuſſit pupugit & inforavit.

To which it was anſwered, that the Deſcription of the Wound was as certain as the Nature of the Place where it was given could poſſibly bear; and Young's **Caſe was allowed to be good Law, but it differed from this Caſe.**

(2.) **The Word** Dans **in the Declaration was incertain,** (viz.) percuſſit pupugit & inforavit Dans eidem Edwardo Wilſon adtunc & ibidem cum gladio prædicto in & ſuper, &c. unum vulnus mortale **which ought to be poſitively alledged by the Word** Dedit, **and not participly by the Word** Dans.

To which it was anſwered, that the Participle Dans was more certain than Dedit; for being a Participle, it depends upon all the foregoing Matter.

(3.) The next Objection to the Declaration was, That the Fact was laid to be done circa horam primam poſt meridiem, and for that * Egerton's Caſe, and the Statute of Glouceſter were cited. * 1 Buſt. 78. Stat. Glouc. cap. 9.

To which it was anſwered, That the Manner of declaring the Time by the Word circa is warranted by many Precedents. 2 Inſt. 318.

(4.) The next Objection to the Declaration was, That the Fact was laid to be done apud parochiam Sancti Egidii in Campis, which is no legal Viſne in this Caſe, the Matter being laid in a County at large, and not in a City (which makes the Diverſity) for the Statute of Glouceſter is, that the Vill, and not the Pariſh ſhall be ſet out. 2 Inſt. 319. Staundf. 80.

To which it was anſwered, That the Laying the Fact to be done apud parochiam is good, becauſe by Intendment of Law, every † Pariſh is a Vill, unleſs 'tis ſhewn to the contrary. † 1 Inſt. 125

'Tis true the Statute of * Additions ſays, the Town, Hamlet or Place where the Party dwells ſhall be added, but in 5 Ed. 4. 28 & 128. and † 22 H. 6. 41. the Addition was de parochia, and upon an Objection to it, ruled good, which is an Authority in Point. * 1 H. 5. c. 5. † Upon peruſal of the Book 22 *H.* 6. I find the Opinion there contrary, for the Writ was abated.

But admitting the Pariſh of St. Giles did contain more Vills than one, then the Defendant might have pleaded, that Matter in Abatement, but the Courſe in all Indictments is to lay the Fact apud parochiam.

(5.) The fifth Objection was to the Return of the Writ, firſt that it was attachiari feci infranominat' Johan' Law per Corpus, &c. Whereas it ought to be attachiari or cepi Corpus, becauſe the Command of the Writ is Perſonal, (viz.) quod attachias, and not attachiari facias, and every Return muſt anſwer the Command of the Writ; ſo the Return of every Capias is Cepi, and not Capi feci, and the Words attachias per Corpus are in Effect the ſame with Capias Corpus. Co. Ent. 56, 57. Dyer 199. *a.*

Beſides, it doth not appear to be done by any Bailiff of a Liberty, for then it ought to be Mandavi Ballivo, &c. and if done by a Bailiff Errant, then it ought to be returned as done by the Sheriff in Perſon, as in Caſe of the Capias ſupra; but here for ought appears to the contrary, the Body was attached without any Authority. To

To which it was answered, That Attachiari feci was sufficient, because the Sheriff is not bound to execute the Writ in Person; besides 'tis good, because 'tis said to be done Virtute Brevis, which by the Conclusion paratum habeo amounts to Attachiavi.

Kitch. 258.

But per Holt Ch. Justice, it would have been ill if the Words Virtute Brevis had been omitted; and that 'tis sufficient if the Substance of the Writ is answered, tho' not in the same Words; & per Curiam, if the Return of this original Writ had been ill, the Appearance of the Party could not have helped it, as was strongly insisted on by the other Side, for 'tis oppositum in objecto.

(6.) The next Objection to the Return was, That 'tis absurd, for it was cujus quidem Corpus ad diem infracontent' coram Domino Rege & Domina Regina ubicunq; &c. parat' habeo.

Now all Returns are supposed to be made in Court, and the Place where the Courts sit is certain; therefore to say, that he hath the Body here in Court ready, &c. (wherever the Court be) ubicunque, &c. is absurd and Nonsense.

46 E. 3. 30. Surplusage.

To which it was answered, That the Word Ubicunque was Surplusage and void.

(7.) Objection that here is a Discontinuance, or at least a Miscontinuance as to Part, for the Defendant hath demurred to the Writ, to the Return, and to the Count jointly, and the Plaintiff hath joined in Demurrer only as to the Count.

And his Answer to the Demurrer to the Writ, is quoad placitum prædicti Johannis Law superius ad breve placitat', &c. whereas there was no Plea to the Writ, but only a Demurrer, so no Answer.

And as to the Demurrer to the Return, 'tis discontinued, and there is no Manner of Answer made to it, for the Quoad is single, (viz.) Quoad placitum ad breve placitat', and not ad breve & Retorn' inde placitat', 'tis true the Return is mentioned afterwards; but that will not help, because the Reply is confined to the Writ only by the Quoad, which always governs the Plea and Demurrer, &c. with respect to their Extent, &c. and if the Matter shewn is larger than the Quoad, 'tis useless and void, and sometimes makes the whole vicious.

To which it was answered and so resolved, as in all the Points supra, that the Word Placitum doth comprehend Demurrers, and all Pleadings whatsoever, for 'tis nomen collectivu', and is used promiscuously to express any

Part of Pleading; and the Joinder in Demurrer here follows the Defendant in his own Form, because the Commencement of the Demurrer is Petit judicium de brevi & narratione prædict. not saying de retorn. brevis; and this is in Nature of a Plea and Demurrer, for it concludes in Abatement of the Writ only, (viz.) Quod breve ill. cassetur; wherefore no Discontinuance or Miscontinuance of any Part. Co. Ent. 56, 57, 89.

Nota, That afterwards the Defendant escaped from the Marshal, which he confessed in open Court on the Continuance-Day, which was then recorded; and the Plaintiffs proceeded to the * Exigent against him. * Rast. Ent. 56. b.

DE

Term. Sanct. Hill.

6 Willielmi 3. B. R.

Curry *versus* Stephenson. Hill. 5 Will. & Mar. B. R. Rot. 37.

Salk. 421. 4 Mod. 376. Statute of Limitations pleaded to an Action brought by an Administrator; he shall have six Years next after the Granting the Administration.

THE Plaintiff Curry and his Wife, as Administratrix of one Jackson, brought an Indebitatus Assumpsit against the Defendant, wherein they declared, that the Defendant on such a Day Indebitatus fuit to the Plaintiffs William and Anne, as Administratrix of one Jackson in 25 l. for so much Money by the Defendant ad usum ipsorum Will. & Annæ ut Administratrici,

ſtratrici, &c. of Jackſon ante tempus illud habit. & recept. which he promiſed to pay.

And then they ſhew, that Letters of Adminiſtration were committed to the Wife on ſuch a Day by the Archbiſhop of York, in the ſame Year in which the Action was brought, with a Profert hic in Curia.

The Defendant pleads, that cauſa actionis prædict. non accrevit præfat. Will. & Annæ ad aliquod tempus infra ſex Annos, &c.

The Plaintiffs replied, that Jackſon died on ſuch a Day, and at ſuch a Place inteſtate (which in Truth was above ſix Years before the Action brought) but that no Adminiſtration of his Goods was committed to any Perſon until ſuch a Day, (viz.) The Day in the Declaration mentioned, upon which Day Adminiſtration of all his Goods was committed to Anne, the Wife, now Plaintiff, as in the Declaration is ſet forth. Et ſic cauſa actionis prædict. accrevit (to the Plaintiffs) infra ſex Annos prox. ante diem exhibitionis Billæ, &c. (viz.) On the Day on which the Adminiſtration was committed, Et hoc petunt quod inquiratur per patriam.

And upon a Demurrer to this Replication the Cauſe was debated ſeveral Times; and it was argued for the Defendant, that the Replication was ill, becauſe of the ſpecial Matter, for the Plaintiff ſhould have replied generally, Quod cauſa actionis accrevit infra ſex Annos, without ſaying more.

Surpluſage. To which it was anſwered, that the ſpecial Matter could not hurt, if it did no good, for then it would be but Surpluſage; and here was an Iſſue offered in the Plea; and that it was like a ſpecial Replication upon a Plea of Nil habuit in tenementis, which concludes, Et ſic habuit ſufficien. ſtatum, &c. Et hoc petit, &c.

But Holt Ch. Juſtice took two Exceptions to the Declaration.

(1.) Firſt, That it was alledged that the Defendant was indebted to the Plaintiffs William and Anne, ut adminiſtratrici, &c. which could not well be, for if the Receipt of the Money was after the Death of the Inteſtate, then it was received to the Uſe of the Plaintiffs generally, and not as Adminiſtratrici, &c.

As where Money due to an Inteſtate is paid to a third Hand, to be paid over to the Adminiſtrator, there the Adminiſtrator

miniſtrator muſt declare againſt the Defendant, for ſo much Money received to his Uſe generally.

But to this it was anſwered, that in this Caſe the Plaintiffs could not declare in any other Manner, becauſe this 25 l. was left in Caſh by the Inteſtate, and the Defendant took it after his (the Inteſtate's) Death, and long before any Adminiſtration granted; and for Authorities in this Point the Caſes in the * Margin were cited.

* 2 Saund. 208. *See* Champernon *ver.* Darby, antea.

The 2d Exception made by the Chief Juſtice was, that the Money was laid to be received by the Defendant, ad uſum of the Husband and Wife, when it ought to be ad uſum of the Wife alone, ſhe being Adminiſtratrix.

To which it was anſwered, that in all Actions brought by Husband and Wife, who is Executrix or Adminiſtratrix, the Concluſion is or ought to be ad damnum ipſorum, which could not be, unleſs the Husband had ſome Sort of Right or Property; and in this Caſe it could not be to the Damage of the Husband, unleſs the Money was received, as well to his Uſe as to the Uſe of his Wife.

But at length, per Holt Chief Juſtice, the Declaration is good, for it was now the uſual Form in ſuch Caſes; and he likewiſe held, that the Plea was good (tho' it was objected, that the Defendant ought to have pleaded Non Aſſumpſit infra ſex Annos), becauſe it appeared that the Cauſe of Action did accrue to the Plaintiff as ſoon as the Adminiſtration was granted, and not before, as by the Letters of Adminiſtration produced.

But per Holt Chief Juſtice, the Replication is ill, becauſe 'tis concluded to the Country, by which Means the Defendant is excluded to give any Manner of Anſwer to the ſpecial Matter alledged; and the Plaintiff ſhould have relied on that ſpecial Matter, and concluded with hoc parat. eſt verificare.

But as to the Matter in Law concerning the Operation of the Statute of Limitations, he was of Opinion, that the Adminiſtrator ſhall have ſix Years from the Time of Granting the Adminiſtration, according to Sanford's Caſe cited in Saffin's Caſe. 2 Cro. 60, 61.

Judgment againſt the Plaintiff.

Jackſon *verſus* Colegrave. *In the* Exchequer-Chamber, *Saturday* 2 Feb.

Indebitatus Aſſumpſit will not lie for a Wager, or Money won at Play.

ERROR on a Judgment in B. R. in an Action on the Caſe, wherein the Plaintiff declared, that the Defendant indebitat. fuit eidem quer. in 50 l. pro tant. denariorum ſumma eidem (the Plaintiff) debit. & ſolubil. pro & ſuper pignore, Anglice, a Wager, inter eos ante tempus illud fact. & per ipſum (the Defendant) eidem (the Plaintiff) deperditum, and being ſo indebted, he promiſed to pay, &c.

Upon Non aſſumpſit pleaded, the Plaintiff had a Verdict and Judgment; and now upon a Writ of Error brought that Judgment was reverſed, becauſe a general Indebitatus Aſſumpſit will not lie for Money won on a Wager, or at Play, but it muſt be laid by Way of mutual Promiſes ſpecially; but the chief Reaſon of this Opinion was, becauſe the Court would not countenance Gaming, by giving ſuch an eaſy Remedy for Money won at Play.

* 3 Lev. 118. Egleton *ver.* Lewin. Hill 33, 34 Car. 2. B. R. Rot. 534.

But there was a * Precedent ſhewn, where an Indebitatus Aſſumpſit was brought for Money won at a Game called Banquefilet, and Judgment for the Plaintiff, and that Judgment affirmed in a Writ of Error in the Exchequer-Chamber; but this would not prevail, for the Reaſon ſupra.

So the Judgment was reverſed.

At the ſame Time it was allowed per Curiam, that a general Indebitatus Aſſumpſit will lie by an Inſurer of a Ship, for the Præmium for which he enſured, altho' the Conſideration of ſuch Inſurance, (viz.) The Hazard of Loſs is but a Contingency.

Edmonds *verſus* Probert. Hill. 6 Will. 3. B. R. Rot. 156. *but adjudged* Paſ. 7 Will. 3.

Where Matter of Law and Fact is aſſigned for Error, 'tis double, and the Plaintiff may have Advantage of it upon a Demurrer, but not after *In nullo eſt Erratum* pleaded.

DEBT upon Bond againſt Edmonds in C. B. Upon Non eſt factum pleaded, the Plaintiff had a Verdict and Judgment; and now upon a Writ of Error brought in B. R. there were three Errors aſſigned:

(1.) That the Declaration was minus ſufficiens in lege.

(2.) That Judgment was given for the Plaintiff, when it ſhould be for the Defendant.

(3.) That Probert the Plaintiff in the Action died before the Verdict given.

After which the Entry on the Record was in this manner.

ſſ. Et prædict' Henricus Probert per Johannem Lilly attorn' ſuum venit & dicit quod nec in recordo & proceſſu prædict' nec in redditione Judicii prædict' in ullo eſt erratum & petit quod Curia, &c. procedat ad examinandum Errores.

And upon opening this Record, it was agreed per Curiam, that this Aſſignment of Matter of Fact, and Matter of Law, was double, and would have been ill upon a general Demurrer; but the Advantage thereof is now loſt by Pleading in nullo eſt Erratum.

It was likewiſe agreed, that the Entry on Record of Probert's coming by Attorney after it was alledged in the Aſſignment of the Errors, that he was dead before the Verdict, is ſenſleſs and abſurd.

But as to this Matter, the firſt Fault was in the Plaintiff in the Writ of Error; for after he had alledged the Death of the Plaintiff in the original Action, he ought not to have made the common Concluſion as in other Caſes; but he ſhould have concluded by praying a Sci' fa' ad audiend' Errores againſt the Executor or Adminiſtrator of Probert; and if the Sheriff had returned, that Probert was alive, then he might come in and plead in nullo eſt Erratum ut ſupra; but if he returned Scire feci the Executors or Adminiſtrator, that would be a ſufficient Ground for the Court to proceed and to examine Errors, &c.

Wherefore, becauſe the Plaintiff in the Writ of Error had not purſued this Method, the Judgment was affirmed, no Body appearing for him.

However, in * Dove and Darcy's Caſe, the Error in Fact was aſſigned, that the Plaintiff in the Ejectment, died before Judgment, and his Attorney pleaded in nullo eſt Erratum, for that the Plaintiff was living at ſuch a Place, &c. upon which they were at Iſſue, and it was found, that he was dead; and thereupon the Judgment was reverſed, for this Error found by the Jury; and Holt Chief Juſtice remembered this Caſe, and ſaid, that it puzzled the Court for ſome Time, and that it was not fully reported, and that he took the Law to be otherwiſe.

* Sid. 93. Raym. 59.

Ward *verſus* Everard. Hill. 6 Willi. 3. B. R. Rot. 718.

5 Mod. 25. 1 Salk. 390.

IN Replevin, &c. of Cattle taken in Quarrington in Lincolnſhire.

Grant of an Annuity of 100 *l. per ann.* to 5 Perſons, (*viz.*) 20 *l.* to each of them, &c. this is a ſeveral Rent.

The Defendant made Conuſance as Bailiff to Carina Hetley, and Elizabeth Engliſh, Widows, for that the Place where, &c. was Parcel of a Meſſuage whereof Sir Robert Carr, Bar. was ſeiſed in Fee; and being ſo ſeiſed, did, upon the ſecond Day of March, Anno 1638. per quoddam ſcriptum ſuum obligatorium (& quoad diem & menſem ſine datu) ſed geren' datum in eodem ann. 1638. grant unto the ſaid Carina and Elizabeth by the Name of Carina Cromwell, and Elizabeth Cromwell, and to Pembroke Cromwell, Henry Cromwell, and Anne Cromwell and their Aſſigns, one Annuity or yearly Rent of * One Hundred Pounds by the Year of lawful Engliſh Money, (*viz.*) Twenty Pounds a-piece, to be equally and reſpectively divided amongſt them, and to be iſſuing and going out of the Locus in quo (inter alia) to have and to hold, perceive and enjoy the ſaid Annuity or yearly Rent of one Hundred Pounds by the Year unto the ſaid Pembroke Cromwell, and the other Four, and to their Aſſigns reſpectively to every of them Twenty Pounds, from and immediately after the Death of the Lady Anne Carr their Mother, for and during the ſaid Term or Terms of the natural Lives of them the ſaid P. H. A. C. E. and the Lives of them, and every of them reſpectively, payable yearly during the ſaid Term or Terms at Michaelmas and Lady-Day.

* Theſe are the very Words of the *Deed.*

And farther, that upon the Death of one of the ſaid Parties, (*viz.*) P. H. A. C. or E. which ſhall firſt happen, the Annuity or yearly Rent of Twenty Pounds per ann. formerly due to the Party ſo deceaſed as aforeſaid, ſhall be yearly paid to the other four ſurviving Parties at the Feaſts aforeſaid, during their ſeveral natural Lives; (the like upon the Death of the ſecond and third Party, but no farther,) and that then the ſaid ſeveral Annuities or yearly Rents due to the laſt two ſurviving Parties, amounting to the Sum of Fifty Pounds a-piece, ſhall be paid to them reſpectively at the Feaſts aforeſaid by equal Portions, during their natural Lives.

I

And

And if the ſaid Rent of a Hundred Pounds by the Year, ſeverally divided to the Parties aforeſaid, or any Part thereof ſhall happen to be behind, then to diſtrain, *&c.*

Then the Defendants ſet forth, that all the Grantees were dead except the ſaid Carina and Elizabeth.

Et quia omnis illa annuitas ſive annualis redditus quinquaginta librarum ſeu ſeparal' annuitas viginti & quinque librarum ipſos Carinam & Elizabetham ſic ut præfertur contingen' pro quindecim Annis & dimid' unius Anni finit' (at Lady-Day 1672.) in toto ſe attingen' ad 775 l. necnon omnis illa annuitas ſive annual' Redditus 100 l. ſeu ſeparal' annuitas 50 l. ipſas Carinam & Elizabetham ſic ut præfertur contingen pro viginti Annis & dimid' unius Anni finit' (at Lady-Day) prox' ante prædict' tempus quo, &c. in toto ſe attingen' ad 2200 l. eiſdem Carinæ & Elibazabethæ aretro fuer' & inſolut', (viz.) Medietas inde utrique eorum, &c. for this the Defendant made Conuſance, &c.

The Plaintiff prayed Oyer of this Grant, and it appeared to be by Deed Poll thus:

If. To all Chriſtian People, *&c.* and concluded thus, In Witneſs whereof the Parties to theſe preſent Indentures their Hands and Seals interchangeably have ſet, the Day and Year firſt above-written 1638.

But there was no Day or Year before named throughout the whole Deed.

Then the Plaintiff pleaded a private Act of Parliament made ann. 16 Car. 2. by which Sir Robert Carr's Eſtate was ſettled, and put out of his Power to charge at any Time after 1 April 1639. and avers, that this Grant was not made upon, or at any Time before the ſaid 1 April 1639. and Iſſue was joined upon that Point, which was tried at Bar, and the Defendant had a Verdict.

And now it was moved in Arreſt of Judgment in Behalf of the Plaintiff, for that the Defendant had made a joint Conuſance in the Name of Carina Hetley, and Elizabeth Engliſh, which cannot be done by Law; for they were neither Jointenants, or Tenants in Common, becauſe by the Grant, the Rents are ſeveral, and not one entire Rent, for the Grantor deſigned to grant five ſeveral Rents, (viz.) 20 l. per ann. to each Grantee, and that no Survivorſhip ſhould take Place, which is very plain by his Granting over the Annuity to the Survivors of them who firſt died, which would have been idle, if they had a joint Eſtate before.

Be-

Beſides the Words reſpectively and ſeverally are uſed in all the neceſſary Places of the Grant, which ſhews that the Grantor intended to give ſeveral Rents; for the Nature of the Word Reſpectively is to make that ſeveral, which otherwiſe would be joint, and to avoid vain Repetitions of one and the ſame Expreſſion, which muſt be uſed without the Word, as it appears by the Form of * Pleading.

* 11 H. 6. 11. *b.* Raſt. Ent. 622, 625. *a.*

Therefore it was concluded, that theſe were ſeveral Rents, and could not be joined in one and the ſame Avowry or Conuſance; but that the Diſtreſſes and the Avowries ought to be † ſeveral, as being upon ſeveral Titles to diſtinct Perſons, &c.

† 17 Aſſ. placito 10. Dyer 306, 309.

Cro. Eliz. 340, 341. 637 651. Yel. 23, 24. Cro. Car. 154. W. Jones 207.

Econtra.

On the other Side it was argued, that this Grant was joint, and that it was one entire Rent of 100 l. per ann. granted to all the Grantees, for that the very Words of the Grant are of one Annuity or yearly Rent of 100 l. by the Year, and the Words, (viz.) 20 l. a-piece to be equally and reſpectively divided amongſt them are ſubſequent, and come under a * (viz.), which ſhews that they ſhould ſhare it equally between them, but doth not ſever the Grant which was joint before.

* Knight's *Caſe.* 5 Rep. 2 Roll. Abr. 90. 4 Leon. 187. 2 Cro. 259.

After ſeveral Debates, Juſtice Sam. Eyre delivered his Opinion for the Plaintiff, that theſe were ſeveral Rents; but Holt Chief Juſtice doubted, and there being no more Judges in Court, no Judgment was given.

But ſometime afterwards the Grantees took new Diſtreſſes ſeverally, and upon new Replevins brought, they made ſeveral Avowries as for ſeveral Rents, and then the Parties agreed, and nothing farther was done.

See Mich. 14 Car. 2. Rot. 583. Hamerton *verſus* Cleyton & al' in C. B. which was an Avowry upon this very Grant, and the Defendants made Conuſance (in Replevin) as Bailiffs to the ſaid Henry Cromwell, Anne, Carina, and Elizabeth jointly for Rent Arrear.

And upon a Demurrer to the Conuſance, the Plaintiff had * Judgment, for the Reaſon ſupra, becauſe theſe were ſeveral Rents.

* The Rule for Judgment was *Paſ.* 16 *Car.* 2.

Leigh *verſus* Brace. Hill. 6 Will. 3. B. R. Rot. 929.

UPON a ſpecial Verdict in Ejectment, the Caſe was as followeth:

ſſ. Walter Brace being ſeiſed in Fee of the Lands in Queſtion, made a voluntary Feoffment thereof to A. and B. and their Heirs, to the Uſe of Walter Brace for Life, and afterwards to the Uſe of Thomas Brace and his Heirs for ever; and for Default of Iſſue of the Body of Thomas Brace, then to the Uſe of the right Heirs of the ſaid Walter Brace.

5 Mod. 266. Conveyance by Way of Uſe ſhall be conſtrued according to the Intention of the Parties.

Walter Brace died, and Thomas entered, and by his Will deviſed thoſe Lands to the Leſſor of the Plaintiff, and then died without Iſſue, and the Defendant was right Heir to Walter the Feoffor.

The Queſtion was, Whether by the Limitation of the Uſes in this Feoffment, Thomas Brace took an Eſtate in Fee-ſimple, or elſe but an Eſtate-tail only, (as if it had been in a Will) for it was agreed on all Sides, that ſuch a Limitation in a Will would be only an Eſtate-tail, becauſe the * Limitation of a Remainder over upon his dying without Iſſue of his Body, ſhews, that it was only intended the Heirs of his Body, and the Intention of the Teſtator governs his Will.

* 1 Roll. Abr. 839. Lit. Rep. 253, 285. Style 315, 344. Beek's *Caſe*.

But this being a Conveyance in the Life-time of the Feoffor, would make a Difference, as it was objected.

Sed per Curiam, It makes no Difference, becauſe it was a Conveyance by Way of Uſe, which hath been always conſtrued like Wills, with Reſpect to the Intention of the Parties, and is not tied up to the ſtrict Forms of Conveyances at Common Law.

And ſo it was adjudged in C. B. upon this very † Deed, upon a ſpecial Verdict there, upon which Judgment the now Defendant recovered the Poſſeſſion; and ſo the Leſſor of the Plaintiff brought his Ejectment here.

† *Between* Coke *verſus* Roberts. Hill. 2 Will. in C. B. Rot. 575.

Judgment for the Defendant.

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Term. Paſchæ.

Anno 7 Willielmi 3. B. R.

Maſters *verſus* Lewis.

5 Mod. 75, 92. Proceedings on a Foreign Attachment, not good.

ONE Maſters, who was late Husband of the Plaintiff, was indebted to Gosfright, and Lewis was indebted to Maſters by ſimple Contract.

Maſters died Inteſtate in London, and the Plaintiff Alice, his Widow, ſues for Letters of Adminiſtration in the Spiritual Court, againſt which Gosfright entered a Caveat, and pending the Diſpute about the Caveat, he levied a Plaint in the Sheriff's Court of London againſt the * Archbiſhop of Canterbury; and upon Non eſt inventus returned, a foreign Attachment iſſued to attach the Debt in the Hands of Lewis, which was accordingly done; and afterwards there was Judgment againſt Lewis the Garniſhee, for the Non-appearance of the Archbiſhop, according to the Uſage in Caſes of Foreign Attachments.

* Becauſe, till Adminiſtration granted, the Ordinary repreſents the Perſon of the Inteſtate.

Afterwards Adminiſtration was committed to the Plaintiff, and ſhe, as Adminiſtratrix to her late Husband, brings an Aſſumpſit againſt Lewis for the Money due to her Inteſtate.

Upon Non Aſſumpſit pleaded, theſe Proceedings were given in Evidence for the Defendant in his Diſcharge at the Niſi prius at Guild-hall, London, before Holt Ch. Juſtice; and he ordered the whole Matter to be drawn up, and a Caſe made of it, which was accordingly done.

And now it was argued for the Defendant Lewis, that here was a Judgment againſt him for this Money upon the Foreign Attachment, which he could not avoid, and there-

foꝛe no Reaſon that he ſhould be doubly charged; and if this Judgment is erroneous, the Plaintiff, oꝛ the Archbiſhop may bꝛing a Writ of Erroꝛ, oꝛ the Adminiſtratrix may put in Bail foꝛ the Archbiſhop in the Sheriff's Court, and ſo tꝛy the Cauſe of Action there.

And it was farther argued, that the Oꝛdinary is accountable, even after Adminiſtration granted, &c.

On the other Side it was ſaid foꝛ the Plaintiff, that the Queſtion is not, Whether there is ſuch a Cuſtom in London, ut ſupra; but whether this Caſe is within the Cuſtom of Foreign Attachments; and certainly no Action will lie againſt the Ordinary, unleſs he hath Aſſets in his Hands at that Time when the Action is bꝛought, which of Neceſſity muſt be alledged, both in the Writ and in the Declaration. *Econtra* for the Plaintiff. F.N.B.120.B 9 Rep. Henſloe's *Caſe*.

And it was inſiſted, that no Suit could be maintained againſt the Archbiſhop, and 'tis plain that he could not have any Action againſt Lewis foꝛ the Recovery of this Debt; foꝛ the Oꝛdinary could neveꝛ maintain an Action foꝛ the Aſſets of an Inteſtate.

And 'tis to be obſeꝛved, that in theſe Caſes of Foreign Attachments, the Suit againſt the Garniſhee is in Right of the Defendant againſt whom the oꝛiginal Plaint was leꝛied; but heꝛe the Archbiſhop, who was the oꝛiginal Defendant, could not maintain any Action againſt the Garniſhee, and by Conſequence no otheꝛ Peꝛſon can do it in his Right. Dyer 247. *a*.

Wheꝛefoꝛe the Summons of the Archbiſhop, by attaching the Debt in his Hands was meeꝛly void, becauſe he had no Right to the Debt, noꝛ any Means to recoveꝛ it.

And if this Pꝛactice ſhould be allowed, then Debts upon ſimple Contract would be paid befoꝛe Judgments, becauſe the Cuſtom of London waꝛrants a Plaint in Debt by an Executoꝛ upon a ſimple Contract; beſides, this would be a Means foꝛ eveꝛy Cꝛeditoꝛ to be his own Caꝛveꝛ, and ſo waſte the Goods of the Inteſtate without Remedy.

Et per Curiam, The Foreign Attachment is only a Means to enfoꝛce the Defendant in the oꝛiginal Action to appeaꝛ by Attaching his Goods on Debt in the Hands of a third Peꝛſon, who is the Garniſhee; but heꝛe the Oꝛdinary hath no Right to the Debt, and theꝛefoꝛe out of the Reaſon of the Cuſtom. Sed Adjournatur. Curia.

In Michaelmas-Term, 7 Willi. This Caſe was moved again, and then per Curiam, the Judgment was given foꝛ the Plaintiff, and that this pꝛetended Cuſtom was unreaſonable, and void, tho' the Defendant pꝛoduced ſeveꝛal Re-

cords of this Uſage for about 100 Years laſt paſt, but none were controverted.

Fuller *verſus* Fotch & al'.

Action againſt Commiſſioners of Exciſe.

TReſpaſs againſt Fotch and other Commiſſioners of Exciſe, and their under Officers, for Taking the Money of the Plaintiff by Virtue of a Warrant from the Commiſſioners, upon a Judgment given by them againſt the Plaintiff, upon an Information againſt him for erecting a new Waſh fat, and uſing it without Notice, againſt the Statute 3 & 4 W. & M. which was made for ordering the Duty on Low Wines; and the Money was taken for the Forfeiture given by that Statute.

The Defendant having pleaded Not guilty, the Cauſe was tried at the Niſi prius before Holt Ch. Juſtice in London, and he gave in Evidence this Information, Judgment, and Warrant, &c.

To which it was objected,

(1.) That the Copy of this Conviction was no Evidence, but that the original Book of Entry ought to be produced.

Sed per Holt Ch. Juſtice, The Copy may be given in Evidence.

(2.) That it ought to be proved, that the Commiſſioners did give the Judgment recited in the Copy of the Conviction.

Which Holt Ch. Juſtice denied, becauſe it proved it ſelf.

(3.) That this Judgment is not peremptory, for the Plaintiff in this Action is at Liberty to diſprove the Truth of the Matter of Fact, upon which they grounded their Judgment.

Sed per Curiam, That was denied upon this Diverſity, (viz.) That if the Commiſſioners had intermedled with a Thing which was not within their Juriſdiction, then all is coram non judice, and that may be given in Evidence upon this Action; but 'tis otherwiſe if they are only miſtaken in their Judgment in a Matter within their Conuſance, for that is not inquirable, otherwiſe than upon an Appeal.

Hardres 478, 480, 481. Cro. Car. 395. 1 Vent. 273.

The King *verſus Inhabitants of* Titſhall *in* Norfolk. *Filed amongſt the Orders* Hill. 6 Will. & Mar. N° 21.

Where a poor Man coming in with a Certificate ſhall gain a Settlement, where not.

ONE Searle, and his Wife, came from the Pariſh of Titſhall to the Pariſh of St. Nicholas in Ipſwich, and there he dwelt from the Year 1680, to the Year 1694,

which was fourteen Years, in which Time he had two Children born there; and being very poor, the Recorder of Ipſwich and another Juſtice made an Order to remove him to the Pariſh of Titſhall, reciting,

That whereas Searle and his Wife had for ſeveral Years been permitted to dwell in the Pariſh of St. Nicholas upon a Certificate from the Parſon, Churchwardens and Overſeers of the Poor, and of ſeveral other chief Inhabitants of the Pariſh of Titſhall, owning him the ſaid Henry Searle to be an Inhabitant there; and thereby promiſing to receive him, his Wife and Family at any Time after, and when he or they ſhould be ſent to the ſaid Pariſh of Titſhall, or ſhould be likely to be chargable unto the ſaid Pariſh of St. Nicholas; and Oath having been made before us, or one of us, of the Truth of the ſaid Certificate; and the Churchwardens of St. Nicholas now complaining, &c. and whereas upon due Examination of them the ſaid Henry Searle and Martha his Wife by us, we find that the laſt Place of the legal Settlement of them and their two Children was, and is at Titſhall aforeſaid; theſe are therefore, &c.

This Order was confirmed upon an Appeal, and afterwards both the ſaid Orders were removed into B. R. by Certiorari; and now it was moved to quaſh the original Order, for that the Judgment of the two Juſtices was founded on a Miſtake of the Law, they apprehending that this Certificate did prevent the Operation of the Law in gaining a Settlement to Searle, &c. Whereas a Certificate amounts to no more than a perſonal Contract, upon which an Action might lie, but could not poſſibly bar Searle, from that Right of Settlement which he had gained in the Pariſh of St. Nicholas by his long Reſidence there.

And for this Reaſon the Order was quaſhed.

Nota; The Law is ſince ſettled by the Statute 9 & 10 Will. by which 'tis made certain by what Means a Man having a Certificate, ſhall gain a Settlement, and where not.

Young *verſus* Rudd, un', &c. Intratur Paſch. 7 Will. B. R. Rot. 181.

INdebitatus aſſumpſit, for Wares ſold and delivered.

The Defendant pleaded, that after the Promiſes in the Declaration mentioned, (viz) on ſuch a Day he gave and delivered unto the Plaintiff a Bever-Hat in Satisfaction and Diſcharge of the ſaid ſeveral Promiſes in the Declaration;

5 Mod. 86. 2 Salk. 627. Where Acceptance muſt be pleaded in Satisfaction.

ration; and that the Plaintiff then and there had, and accepted the ſaid Hat in full Satisfaction and Diſcharge of the Promiſes, & hoc, &c.

The Plaintiff replyed Proteſtando, that the Defendant never gave him (the Plaintiff) any ſuch Hat in Satisfaction and Diſcharge of the ſaid Promiſes, pro placito dicit, that he never accepted a Bever-Hat in Satisfaction and Diſcharge of the ſaid Promiſes, prout, &c. & hoc petit quod inquiratur per patriam.

And upon Demurrer to this Replication, it was very much inſiſted, that the Iſſue in this Caſe ought to be upon the giving in Satisfaction, and not upon the receiving in Satisfaction, becauſe every Gift or Payment muſt be directed by him who gives or pays, and not by him who receives it, as it was reſolved in * Pinnell's Caſe.

* 5 Rep.

Wherefore if the Plaintiff did receive the Hat of the Defendant, and he gave it in Satisfaction, &c. then the Plaintiff had it in Satisfaction, &c. tho' he might take it with an Intent to apply it otherwiſe; and therefore the Iſſue ſhall not be upon his Acceptance, but upon the Payment which is the principal Matter that guides the other; ſed adjournatur.

* Winch. 76. Stile 239. 3 Brownl. Ent. 142. Aſton Ent. 451. 9 Rep. 78. *at the End of* Peytoe's *Caſe.*

And upon Monday 18 Nov. 1695. it was moved again, and the Caſes in the * Margin were cited to maintain the Iſſue ſupra.

Et per Curiam, The Iſſue is well enough, and that the whole Matter concerning the Payment as well as the Acceptance in Satisfaction would be tried upon this Iſſue; and it may be taken either Way, (viz.) Upon the Delivery in Satisfaction, or upon the Acceptance in Satisfaction, at Election, &c.

Another Objection by the Plaintiff's Counſel was to the Form of this Plea; for that it was pleaded to be given in Satisfaction and Diſcharge of the Promiſes, &c. when it ſhould be pleaded in Satisfaction of the Money mentioned in the Promiſes, and not of the very Promiſes.

Sed non allocatur; So Judgment was given for the Plaintiff, that he had tendered a good Iſſue wherein the Defendant ought to have joined.

The King *verſus* Walcott, *on the Crown-Side.*

4 Mod. 395. *Caſes* Adj. 127. 2 Salk. 632.

WRIT of Error brought by John Walcott, Son and Heir of Thomas Walcott, to reverſe an Attainder

of High Treaſon againſt his ſaid Father, who was executed, &c.

This Writ was directed to the Juſtices of Goal-Delivery of the Priſoners in Newgate, for that Tho. Walcott was tried and convicted at the Old-Baily, as being concerned againſt the Life of Car. 2. in the Rye-houſe-Plot; and the Indictment, Conviction and Judgment thereon being certified upon the Writ of Error, it appeared that the Judgment was thus: Attainder in High Treaſon reverſed for omitting theſe Words *ipſoq; vivente comburentur.*

ſſ. Conceſſum eſt per Curiam hic quod prædict' Thomas Walcott ducatur ad Gaolam dicti Domini Regis de Newgate unde venit & ibidem ſuper Bigam ponatur & abinde uſque ad furcas trahatur & ibidem per collum ſuſpendatur & vivens ad terram proſternatur & quod ſecreta membra amputentur & interiora ſua extra ventrem ſuam capiantur & in ignem ponantur & ibidem comburentur & quod caput ejus amputetur quodque corpus ejus in quatuor partes dividatur & quod caput & quarteria illa ponantur ubi Dominus Rex ea aſſignare voluit, &c.

The Error inſiſted on was, the Omiſſion of the following Words in the Judgment, (viz.) Ipſoque vivente, or in conſpectu ſuo, between the Words in ignem ponantur and the Word Comburentur, for the Words ipſoque vivente and in conſpectu ſuo are all one. Staundf. placita Coronæ 182.

And after long Debate, the Court of B. R. reverſed the Judgment for the Omiſſion ſupra; for it was held to be a material Part of the Judgment, and upon a Writ of Error in the Houſe of Lords, this Judgment of Reverſal was affirmed by a Majority of one Vote. 3 Inſt. 211.

Nota, That upon great Search of Records of Attainders for Treaſon, for the Space of 150 Years back, it appeared, that theſe Words were generally inſerted in the Judgment; but then ſome other Circumſtances which are mentioned in Staundford and Coke are omitted, and amongſt them all this Judgment ſeems to be neareſt thoſe two Books; for this is full in every Thing, but only the Omiſſion of theſe Words.

And 'tis to be obſerved, that even Staundford and Coke differ in the ſeveral Forms of a Judgment in Treaſon by them ſet down; and it appeared upon Search ſupra, that before the Time of H. 7. the Judgment in Treaſon was very incertain, and that there are ſcarce two Records which agree in the ſame Form.

DE

Term. Sanct. Trin.

Anno 7 Willielmi 3. in B. R.

The King *verſus* Kemp.

ADjudged by Holt Chief Juſtice, and Sir Sam. Eyre, the laſt Day of this Term, Juſtice Giles Eyre being lately dead, and Juſtice Gregory abſent by reaſon of Infirmity.

4 Mod. 275. S. C. 2 Salk. 465. S. C. A Caſe upon the King's Grant of an Office.

The Caſe was upon a Sci. fa. brought by the King, &c. againſt Kemp, to repeal a Patent granted to him for the Office of a Searcher for the Cuſtoms in the Port of Plymouth; this Writ iſſued out of the Petty-Bag in Chancery; and upon the Pleadings, there was a Demurrer, and Joinder in Demurrer; and then the Record was tranſmitted into the King's Bench to have the Matter in Law determined on the Demurrer.

Upon the arguing this Caſe ſeveral Times, it appeared to be as followeth:

ff. King Car. 2. by Letters Patent granted this Office of Searcher unto John Martin, durante beneplacito of the King.

Afterwards the ſame King taking Notice of this Grant to Martin, made another Grant of the ſame Office unto one Fryer for Life, habendum poſt mortem ſurſum redditionem ſive foresfacturam of the Eſtate of John Martin.

After that the ſame King Car. 2. by another Patent reciting the Grant to Fryer, in Conſideration of the Surrender of Fryer's Patent, granted the ſaid Office unto Kemp for Life, by Virtue whereof he was now in Poſſeſſion of that Office, &c.

The ſole Queſtion was, upon the Validity of Fryer's Patent, againſt which it was objected, that it was void for the Reaſons following:

(1.) Becauſe it was to commence poſt mortem ſurſum redditionem ſive forisfacturam of Martin, when Martin had no more than an Eſtate at Will, which could neither be ſurrendered or forfeited, becauſe any Act of Surrender or Forfeiture is a Determination of the Will, and puts an End to the Eſtate.

(2.) This Grant to Fryer was void, becauſe it was of a Freehold, and yet limited to commence in futuro, whereas a Freehold cannot expect and be in Suſpence in the mean Time.

Then it was argued, that the King was deceived, both in his Grants to Fryer and Kemp; he was deceived in his Grant to Fryer, becauſe he was miſtaken as to the Time of the Commencement thereof, and alſo as to the Quality of the Eſtate which Martin had in this Office; for the King apprehended that Martin had ſuch a durable Eſtate as might have ſupported a future Grant by Way of Reverſion; and ſuch which might be forfeited or ſurrendered.

Wherefore he intended, that Fryer's Grant ſhould not commence, but upon one of theſe three Contingencies, (viz.) The Death, Forfeiture, or Surrender of Martin, whereas the Two laſt of theſe three Things were impoſſible; and where the King hath been * miſtaken in his Grants, they are always held void.

* 3 Leon. 5. 5 Rep. 94. 6 Rep. Green's *Caſe*. 1 Inſt. 57. *a*. 2 Brownl. 241. Dyer 197.

Beſides, at leaſt the Grant to Fryer was no other than a Grant of an Office to take Effect when the King pleaſed, which is altogether incertain, and would be void in the Caſe of a common Perſon, a fortiori againſt the † King.

† 3 Leon. 244. 1 Inſt. 4.

Now if the King had died in the Life-time of Martin, that would have determined Martin's Eſtate, and yet the Grant to Fryer could not commence until after Martin's Death, ſo that by that Means there would be an intermediate Vacancy between the Determination of the firſt and the Commencement of the ſecond Grant; and then if Fryer's Grant was void, the Grant to Kemp, which was made in Conſideration of that void Grant, muſt alſo be void, for 'tis apparent the King was deceived in the Conſideration of that Grant.

There was another Exception to the Form of the Patent made to Kemp, in which the principal Word was Aſſignavimus the ſaid Kemp to have and execute the Office, &c. when it ſhould be Conceſſimus, but that Word was omitted,

Objection to the Form of the Patent.

omitted, and the Clauſe pro hæredibus & ſucceſſoribus noſtris was likewiſe omitted, ſo that this Grant would not bind the King's Succeſſors.

14 Ric. 2. 10. Dyer 107.

To which it was anſwered, that Aſſignavimus is the moſt proper Word, becauſe this is not an Office wherein the King had an Eſtate, but 'tis only an Employment, and therefore cannot be properly granted but appointed; and in ſuch Caſe there is no Need, that it ſhould be pro hæredibus & ſucceſſoribus, for 'tis good againſt the Succeſſor, without theſe Words.

See Rutland's *Caſe*. 2 Brownl. 328. 1 And. pl. 201. Plowd. 452. *Sir* Tho. Wroth's *Caſe*.

And as to the other Objections it was anſwered, that the Grant to Fryer was not a Grant of a Reverſion, nor did it need any Support from a particular Eſtate to make it good, but it was only a Grant of a future Intereſt to commence upon a Contingency.

* 3 Leon. 31. Dy. 259, 270. 3 H. 7. caſu ult. 1 Cro. Young *verſ.* Stowell. Dyer 80. Hob. 150.

And the Books make a Difference between the King's Grant of an Office in Reverſion and ſuch a Grant in Reverſion by a Subject; for in the firſt Caſe it hath always been held good, tho' in the laſt Caſe there hath been a Diſtinction taken between a Grant in Reverſion and a Grant to commence in * futuro.

9 H. 4. 5.

And as to the Objection, that here is a Grant of a Freehold to commence in futuro, it was anſwered, that there is a Difference between this Caſe and a Grant of a Freehold in Lands, or of an antient Office, or of a Rent in eſſe, for in all theſe Caſes ſuch a Grant as this to commence in futuro, would be void, becauſe the Freehold was in Being at the Time of the Grant, and before.

Of a Grant to commence *in futuro*.

But here this Office (if it may be ſo called) had no Exiſtence before the Grant, but receives its Being from it; and 'tis the ſame exactly with a Grant of a Rent de novo, for Life or in Fee, which may be limited to commence in futuro, upon any Contingency that the Grantor ſhall appoint; for there is no Freehold in Being till the Grant takes Effect, and by Conſequence no Suſpenſion of any Freehold.

'Tis not doubted, but that ſuch an Office as this may be granted to commence in futuro, when there is no Body in Poſſeſſion of it; and by the ſame Reaſon it may be ſo granted when one is in Poſſeſſion of it, for the Quality of the Grant is the ſame in both Caſes; and the latter is not a Grant of a Remainder or Reverſion, ſo as to need the Support of ſome particular Eſtate, but 'tis only a Grant of a future Intereſt, or of an Intereſt to commence in futuro, when there is one in Poſſeſſion, for this Office conſiſts only

in Grant, and hath a Being no longer than the Grant endures, but is afterwards extinct in the King.

So that this Office is different from Offices of Inheritance which come to the King by Forfeiture, for they have still an Existence, and therefore cannot be granted over to commence in futuro, for then the Freehold would be in Abeyance.

But in this Case all the Right the King hath is a Right only of Nomination, and the Office exists, and ceaseth to exist at the King's Pleasure, and he who hath it must have it by Way of new Creation. 9 Rep. 47. 2 Roll. Abr. 154.

So then this Grant cannot be said to be void, because it was to commence upon three Contingencies, whereof Two were impossible, but that is no Damage to the King, but the less worth to the Grantee, because it should not take Effect till after Martin's Death.

And Holt Ch. Justice argued, that tho' the Grant of the Office to Martin was at the Will of the King, yet Martin had no Power to determine his Employment, but by Surrender, for this is not like the common Cases of Estates at Will, which are ever at the Will of both Parties.

But here the Grantee having Authority from the King by a Patent of Record, 'tis requisite for him to make a Surrender on Record, to determine his Employment, as in the Case of the Lord Ch. Justice Hall, and other Judges, who held their Places only durante beneplacito, yet when they desired to desist, they made actual Surrenders on Record before a Master in Chancery.

So that in this Case it was a proper Commencement after the Surrender of Martin, who might also forfeit his Estate by Misbehaviour, &c. of which the King doth not arbitrarily take Notice, but by Way of Inquisition, upon which the Misbehaviour is found and returned; and therefore the Commencement of the Patent upon the Forfeiture of Martin, is likewise proper.

And for the Reasons supra, Judgment was given against the King for the Defendant Kemp, &c.

Redshaw *versus* Hesther. Trin. 7 Will. 3. B. R. Rot. 178.

DEBT against an Heir, who pleaded Riens per Descent on the Day of the Bill: The Plaintiff replied specially, that the Obligor (Father of the Defendant) died on such 5 Mod. 122. Debt against an Heir, who pleaded *Riens per Discent*

ſuch a Day, and that the Defendant (after the Death of his Father) and before the Day of the Bill, &c. (viz.) On ſuch a Day, which was a Day after the Death of the Obligor, had Lands by Deſcent from his Father in Fee-ſimple, Unde prædicto (the Plaintiff) de debito prædict. ſatisfeciſſe potuit, (viz.) apud H. prædict. & hoc parat. eſt verificare, unde petit judicium, according to the new * Statute.

* 3 & 4 W. & M. c. 14.

To this the Defendant made a frivolous Rejoinder, and thereupon the Plaintiff demurred.

The Queſtion was, If the Replication was good in Purſuance of the new Statute; for it was objected that it was ill, becauſe the Plaintiff had put the Value of the Lands in Iſſue by theſe Words, Unde, &c. de debito prædicto ſatisfeciſſe potuit, which ought to have been omitted, becauſe the Statute is expreſs, that after the Iſſue tried the Jury ſhall inquire of the Value; ſo that 'tis Matter of Inqueſt only ex officio, and not to be the Point of the Iſſue.

And by this new Statute, the Plaintiff is only to recover pro tanto againſt the Defendant, with Reſpect to the Value of ſuch aliened Aſſets, and is not to have a general Judgment againſt the Heir, as at Common Law, upon a falſe Plea.

Curia. Sed per Curiam, Upon Debate this Replication was held good, and as it ought to be; and that if Unde, &c. de debito prædicto ſatisfeciſſe potuit had been left out, it might have been a good Cauſe of Objection; for the Statute doth not give Occaſion to alter any more of the Form of the Replication common in ſuch Caſes, but only as to the Time concerning the Aſſets by Deſcent; and the Concluſion, which (before the Statute) was to the Country, muſt now be with an Averment only, becauſe the Defendants may have an Opportunity to anſwer the new Matter alledged in the Replication.

The Plaintiffs had Judgment.

Davis *verſus* Stringer. Trin. 7 Will. 3. B. R. Rot. 373.

Juriſdiction of a County Palatine muſt be pleaded.

THIS was an Action of Annuity by Way of Bill brought againſt the Defendant in Cuſtodia Mar', &c. according to the uſual Form; and in the Margin of the Declaration it appeared, that the Action was laid in Cheſter, and the Viſne was laid at Tarvin in Com. Cheſter.

To this Declaration the Defendant demurred ſpecially, and ſhewed for Cauſe, that it appeared by it, that this Court had no Juriſdiction of this Cauſe, for that the Matter did ariſe in a County Palatine. 4 Inſt. 212.

Sed per Curiam, The Defendant cannot take Advantage of this Matter by way of Demurrer; but if he would have any Benefit by it, he ſhould have pleaded to the Juriſdiction of this Court; for without ſuch Plea this Court doth never allow the Juriſdiction of the Counties Palatine, ſo far as to ſuperſede their own Proceedings; beſides, it appears by this Declaration, that the Defendant is in Cuſtodia Mar', and ſo out of the Reach of a County Palatine. Curia. 4 Inſt. 219.

Et per Curiam, Where a Defendant pleads to the Juriſdiction of this Court, (viz.) That the Cauſe of Action did ariſe within a County Palatine, it muſt be averred in ſuch Plea, either that the Defendant dwelleth in the County Palatine, or that he hath Goods and Chattels therein ſufficient, by which he may be attached, otherwiſe the Plea cannot be allowed leaſt a Failure of Juſtice ſhould enſue.

For if the Defendant or his Eſtate are out of the Reach of the County Palatine, the Courts at Weſtminſter muſt neceſſarily hold Plea of the Matter, tho' it did ariſe within the County Palatine; otherwiſe the Law would be deficient; and therefore the Court in this Caſe were ready to give Judgment for the Plaintiff.

But then another Objection was made, (viz) In the Memorandum in the Beginning of the Record, it was laid to be in placito debiti, but the Declaration was in a Plea of Annuity, and ſo a Variance. *Memorandum* amended.

To which it was anſwered, That the Memorandum was only the Entry of the Clerk who ought to have purſued the Declaration; and therefore it was moved, that the Court would amend this Miſtake.

And at another Day the Court ordered the Memorandum to be amended, it being no other than the Miſtake of the Clerk; and the Defendant could not demur upon this Miſtake, becauſe the Memorandum is never entered till after a Demurrer joined, &c.

Huſſey *verſus* Jacob. *The Declaration was of* Eaſter-Term, 6 W. & M. *but the Plea was not entered till* Trin. 7. *ſo that the Record is of that Term; and Judgment was given by* B. R. Trin. 8 Will.

5 Mod. 175. 1 Salk. 344.

THE Plaintiff Huſſey brought an Action againſt Jacob a Goldſmith, upon a Bill of Exchange drawn by the Lord Chandos upon the ſaid Jacob for 120 Guineas, which Bill was accepted.

Action upon a Bill of Exchange for Money won at Play.

The Defendant Jacob pleaded in Bar, that after the 29th Day of September 1664. and before the Making that Bill of Exchange, (viz.) on ſuch a Day, the ſaid Lord Chandos and the Plaintiff Huſſey played together with Dice at a certain Play called Hazard upon Tick and Credit without ready Money; and that the Lord Chandos, then and there at one Time and Meeting loſt to the Plaintiff the ſaid 120 Guineas upon Tick; and that for the Security of the Payment of the ſaid Guineas loſt as aforeſaid, the ſaid Lord Chandos on the Day and Year in the Declaration, &c. made the ſaid Bill of Exchange, and directed it to the Defendant, requeſting him to pay the Guineas, ut ſupra.

And that the Defendant did accept of the ſaid Bill, and aſſume upon himſelf as the Plaintiff had declared.

* 16 Car. 2. cap. 7. *See* 1 Vent. 153, 154. 2 Mod. 54. 1 Sid. 394.

Quorum præmiſſorum prætextu & vigore * ſtatuti in eo caſu edit' & proviſ. the ſaid Bill of Exchange ſo by him accepted, and the Acceptance thereof, and the Promiſe of the ſaid Defendant ſo as aforeſaid made, devenerunt & fuerunt & modo ſunt vacua & nullius vigoris in lege & hoc, &c.

To this the Plaintiff demurred, and ſhewed for Cauſe, that it amounted to the general Iſſue.

And in the Arguing this Caſe, the Queſtion in Law was, Whether this Bill being accepted, and the Action not being brought againſt the Perſon who loſt the Money, nor upon the firſt Contract, but againſt the Defendant who was a Stranger to the Gaming, and upon a collateral Contract, (viz.) upon the Acceptance of the Bill according to the Cuſtom of Merchants, was within the Intent and Meaning of the Statute made againſt Gaming.

And it was argued, that if this Case should be taken to be within that Statute, it would very much endanger the Credit of English Bills of Exchange, if they might be defeated by such collateral Matter; for it would be injurious to the publick Trade of England, both Foreign and Domestick.

Sed per Curiam, The Plea is good both as to the Matter and Form; and that it did not amount to the general Issue, and 'tis not a Rule, that because such a Matter may be given in Evidence; therefore it ought not to be pleaded specially, for it often happens to be in the Election of the Defendant, either to plead it specially, or not as he should be advised.

Curia. Where a Thing may be given in Evidence in some Cases, it need not be pleaded specially.

As for Instance, the Pleading a Release, Coverture, or Infancy in an Assumpsit is certainly good, and yet those Things might be given in Evidence upon non assumpsit pleaded; however the Defendant sometimes may not be willing to put such Matters of Law to the Judgment of the Jury, or perhaps may design to save the Costs of a special Verdict.

And as to the Inconveniency concerning Trade, there can be none in this particular Case; because the Bill is gone no farther than to the first Hands, (viz.) to the Hands of the Plaintiff Hussey who won the Money; and so no Damage could here accrue to any Person but to him who is certainly a Person within the Statute.

But if this Bill had been negotiated and endorsed to any other Person for Value received, then it might have another Consideration.

Judgment for the Defendant.

Vinkinstone *versus* Ebden. Trin. 7 Will. B. R. Rot. 45. *but adjudged*, Trin. 9 Will.

IN Trover, &c. for an Anchor, Cables and Sails of a Ship, *&c.*

5 Mod. 359. 1 Salk. 248. What Goods are distrainable, what not.

Upon Not guilty pleaded, the Cause was tried at Newcastle, and a special Verdict was found to this Effect:

If. That the Plaintiff's Ship was in the Harbour of Newcastle, and there had taken in her Lading of Sea-Coals; and that by a Custom in Newcastle Time out of Mind, &c. a Toll of Five-Pence for every Chaldron of Coals there shipped off was due to the Corporation, in Consideration of their Charge in maintaining the Port, which

which they were bound to do, and had done Time out of Mind, and that the Cuſtom was to diſtrain, (for Non-Payment of this Duty) any Goods of the Owner of ſuch Ships which were diſtrainable by Law.

Then they find that this Duty was demanded of the Plaintiff, and that he refuſed to pay it; thereupon the Anchor, Cable and Sails were taken by way of Diſtreſs; and if thoſe Goods were diſtrainable by Law, then they find for the Plaintiff, but if not, then they find for the Defendant.

Weſt. c. 18. 21 H. 7. 16. 14 H. 8. 25. 2 Roll. Abr. 202. 2 Inſt. 132. 3 Cro. 710.

And it was inſiſted, that thoſe Things are not diſtrainable for a cuſtomary Toll, becauſe they are abſolutely neceſſary to the Plaintiff's Trade as a Mariner, for without them he cannot navigate his Ship.

1 Roll. Rep. Hill. *verſus* Hawks. 1 Mod. 104.

That this Diſtreſs for a cuſtomary Toll ought not to be made on any Thing elſe, but on that Commodity out of which the * Toll is payable.

* Fitz. Avowry, placito 192.

And laſtly, that this is a void Cuſtom, becauſe the Charge of maintaining a Port is not a ſufficient Conſideration, as it would have been, if the Charge had been for maintaining a Key, which differs from a Port, becauſe there is Coſt and Charge to repair a Key, for the Defence of Ships in Time of need, but 'tis otherwiſe of a † Port.

† 1 Vent. 71.

Econtra for the Defendant.

On the other Side it was argued, that ſince the Jury have made a ſpecial Concluſion ut ſupra, the Point which is the Doubt, is if the Goods in the Declaration mentioned are ſuch which are diſtrainable for this Duty.

* Dyer 312. Owen 139. Godb. 67, 110.

Now admitting that theſe Goods were Implements of Trade, and * neceſſary to carry it on; yet they may be diſtrained for any Thing to the contrary appearing in this Verdict; and the very Implements of Trade may be diſtrained if no other Diſtreſs can be taken; for ſuch Implements are only † privileged at ſuch Times when other Goods may be taken, for ſpare Implements of Trade, or catalla otioſa, for which there is no preſent Occaſion for the Owner to uſe, thoſe are diſtrainable.

† 11 H. 8. 25. Moor 214. 1 Inſt. 47. 2 Inſt. 133.

But Holt Chief Juſtice objected to the Finding in this Verdict, for that the Cuſtom which is found to diſtrain is general, whereas it ſhould be found that the Uſe, Time out of Mind was to diſtrain the like Goods.

And as to the Reaſonableneſs of the Cuſtom, he held the Conſideration to be ſufficient, and that 'tis a good Cuſtom in Law; and he cited the Caſe of * Malden in Eſſex, where there is a † cuſtomary Duty of 10 d. out of every Mark of the Purchaſe-Money of any Borough-Lands, payable to the Borough in Conſideration of their Charge in Maintaining and Cleanſing the Port and Haven there, which was tried at Bar before the Lord Chief Juſtice Hale, and adjudged a good Cuſtom. Adjournatur.

* Hill. 25, 26 Car. 2. B. R. Rot. 706.

† *See* New Terms of the Law, *printed* 1685, *where this is called* Landcheap.

But the Cauſe was adjourned, and in Michaelmas, 10 Will. 3. 1698. it was argued, that this Cuſtom (as found by the Verdict) is void, for 'tis not ſhewed that any Benefit accrewed to the Plaintiff in Lieu of this Duty; for tho' 'tis found that the Corporation uſed to repair the Port, yet 'tis not found that the Port was in good Repair, neither hath the Plaintiff any Means to compel the Corporation to repair it; and it was farther inſiſted, that the Things in the Declaration were not diſtrainable for the Reaſons ſupra.

5 Rep. Gray's *Caſe*. Hob. 42. Dyer 117. 2 Bulſt. 201. 1 Roll. Rep. 1. 1 Bulſt. 201.

To which it was anſwered, that in Dyer 117. a Ferry-boat was diſtrained for Rent; and no Reaſon can be given why a Ship in a Dock might not be diſtrained for the Rent of the Dock, 'tis like diſtraining a Cart which carries the Owner's Corn to Market; and a Cart is as much an Implement of the Husbandman's Occupation, as a Ship is of a Mariner's Trade.

Et per Holt Ch. Juſtice, 'Tis found that the Corporation are bound to repair, *&c.* the Port, which is ſufficient without finding, that it was then in Repair, for 'tis the Obligation which lies on them to do the Thing, and not the Performance of the Thing it ſelf, which is the Conſideration of the Duty.

Judgment for the Defendant.

DE

DE

Term. Sanct. Mich.

Anno 7 Willielmi 3. B. R.

Hawkins *verſus* Rous.

5 Mod. 389. Libel for not paying towards a Rate to repair the Church and Chancel.

PRohibition to the Conſiſtory-Court of the Biſhop of Exon. where the Libel recited, that T. S. Dean rural, &c. had preſented, that the Church and Chancel of D. in the City of Exon. was out of Repair, &c. and that the Church-wardens of the ſaid Pariſh did make or cauſe to be made a certain Rate upon the Inhabitants thereof, towards the Charge of Repairing the ſaid Church and Chancel, and that the Church-wardens had accordingly repaired the Church and Chancel, and beautified the ſame with Ornaments; and that Hawkins was a Pariſhioner of the ſaid Pariſh, and refuſed to pay his Proportion of the ſaid Rate.

2 Mod. 222, 254.

The Plaintiff now ſuggeſted for a Prohibition, that of common Right the Chancel ought to be repaired at the Charge of the Parſon only, without any Contribution from the Pariſhioners.

And farther, that every Rate made for the Repair of any Pariſh-Church, ought to be made by the Pariſhioners, or the greater Part of them, and not by the Church-wardens alone, without the other Pariſhioners.

Et per Holt Ch. Juſtice, By the Civil and Canon Law, the Parſon is obliged to repair the whole Church; and 'tis ſo in all Chriſtian Kingdoms but in England; for 'tis by the peculiar Law of this Nation, that the Pariſhioners are charged with the Repairs of the Body of the Church.

Beſides, this is one entire Rate as well for Repairing the Chancel, to which the Pariſhioners are not liable, as for Repairing the Church to which they are liable, ſo as it cannot be diſtinguiſhed how much was aſſeſſed towards the Repairs of the one and the other ſeparately.

And for theſe Reaſons a Prohibition was granted generally to the whole Suit upon this Rate; tho' it was very much inſiſted on the other Side, that the Prohibition might go quoad the Rate for Repairs of the Chancel only.

Baſtard *verſus* Hancock in C. B. Intratur Hill. 6 Will. 3. 1482. *Adjudged* Mich. 7 Will. 3.

DEBT upon the * Statute of Tithes, in which the Plaintiff declared for 72 l. the treble Value, ſetting forth, that he was the lawful Proprietor of the Tithes ariſing within the Pariſh of Lanlivery in Cornwal; and that the Defendants were Occupiers of thirty-five Acres of Land within that Pariſh, and that they had ſown ſo many Acres thereof with Corn and Grain, and had carried it away without ſetting out the Tithes.

* 2 Ed. 6. Debt upon the Statute, &c. for carrying away his Corn without ſetting out the Tithes.

Upon Nil debet pleaded, the Cauſe was tried at Launceſton Aſſiſes before Holt Ch. Juſtice; and the Jury found that the Defendant Hancock debet 18 l. but quoad the other Defendants Nil debent.

And now it was moved in Arreſt of Judgment, for that this Verdict had abated the Action of the Plaintiff, becauſe 'tis an Action of Debt grounded on a Contract which is entire; and here the Plaintiff hath founded his Action upon a Contract made with three Perſons, and the Jury find it quoad one of them alone.

So that the Plaintiff was miſtaken in his Action, for he ought to have brought it againſt Hancock only, and not againſt the Two other Defendants, and this was compared to the common Caſes in Actions upon general Contracts and Promiſes.

But after great Debate, the Court of C. B. in Michaelmas-Term, 7 Will. 3. unanimouſly reſolved, that this Action was founded on a Tort, and not upon a Contract, for Non culpabilis is a good Plea to it, and therefore one may be found guilty and the other acquitted, as in other Actions upon Torts.

The Plaintiff had Judgment.

Herbert *verſus* Waters & al'.

5 Mod. 118. 1 Salk. 205.

IN Replevin, &c. the Defendants avowed the Taking, &c. as Overſeers of the Poor of the Pariſh of H. in the general Form, according to the Direction of the * Statute.

* 43 Eliz. c. 2. par. 19.

The Plaintiff replied de injuria ſua propria abſq; tali cauſa, as the Statute likewiſe preſcribes.

Writ of Inquiry granted after a Nonſuit in Replevin, where the Defendants avowed as Overſeers of the Poor to inquire of the treble Damages.

And at the Trial the Plaintiff was nonſuit, and thereupon the Jury was diſcharged without any Inquiry of the treble Damages given to Officers by the Statute ſupra.

And now it was moved, that the Avowants might have a Writ of Inquiry awarded to ſupply this Defect; and after much Debate it was granted, (viz.) to enquire of the Damages ſuſtained by the Defendants; and the Difference is this,

ſſ. Where the Matter omitted to be inquired by the principal Jury is ſuch as goes to the very Point of the Iſſue; and upon which, if 'tis found by the Jury, an Attaint will lie againſt them by the Party, if they have given a falſe Verdict; there ſuch Matter cannot be ſupplied by a Writ of Inquiry, becauſe thereby the Plaintiff may loſe his Action of Attaint, which will not lie upon an Inqueſt of Office.

10 Rep. 118. 1 Roll. Rep. 272. 2 Roll. Rep. 112. Plowd. 408. Cro. Car. 143. Dyer 135. Sid. 380.

But where the Matter, omitted to be inquired by the principal Jury, doth not go to the Point in Iſſue, or neceſſary Conſequence thereof, but are Things meerly collateral, as Damages are in this Caſe, and the Four uſual Inquiries on a Quare Impedit, ſuch may be ſupplied by a ſubſequent Writ of Inquiry, without any Damage to the Party; becauſe if the ſame had been inquired into by the principal Jury, it would have been (as to thoſe Particulars) no more than an Inqueſt of Office, upon which an Attaint will not lie.

Stephens *verſus* Squire. Intratur Paſ. 7 Will. 3. *Adjudged* Mich. 7. *poſtea.*

5 Mod. 205. S. C. but upon another Point.

AN Action on the Caſe was brought againſt the Defendant, who was an Attorney of Clements Inn, who pleaded his Privilege thus:

Privilege of an Attorney not well pleaded.

ſſ. Et prædict. Arthurus in propria perſona ſua dicit quod ipſe eſt & prædicto tempore exhibitionis Billæ ipſius Thomæ Stephens fuit un. Clericorum Tho. Winford Ar. un. pronotar.

pronotar. Curiæ Domini Regis de Banco apud Weſtm. in Com. Midd. in officio ſuo quotidie intenden. and concluded with an Averment generally without annexing any Writ of Privilege to his Plea.

To this the Plaintiff demurred generally, and two Objections were made to this Plea.

(1.) For that the Defendant did not ſay venit as well as dicit, ſo he was not in Court when he pleaded.

(2.) For that he hath not laid any Viſne, ſo as the Fact of his being a Pronotary's Clerk might be tried, for 'tis a Matter iſſuable, and the rather becauſe the Defendant hath not ſhewed any Matter of Record to prove his Privilege.

Et per Curiam, both the Objections were allowed, and the laſt was Fatal, becauſe this is Matter of Fact triable by a Jury, for Pronotaries Clerks are not enrolled, wherefore 'tis neceſſary to lay a Viſne in this Plea.

Judgment for the Plaintiff, (viz.) that the Defendant anſwer over.

Bowers *verſus* Cook.

5 Mod. 136, 145. 1 Salk 298. *by the Name* Powers *verſ.* Clerk.

DEBT againſt the Defendant as Executrix of John Cook her late Husband.

Debt againſt an Executrix, when ſhe was Adminiſtratrix. *See* Yel. 115. 2 Vent. 178.

The Defendant pleaded in Abatement that John Cook in the Bill mentioned, died on ſuch a Day and Place Inteſtate, and that afterwards the Ordinary of that Place granted Letters of Adminiſtration to her of the ſaid Inteſtate's Goods, &c. prætextu quarum ſhe had adminiſtred ſeveral Goods which were the Goods of the ſaid Inteſtate, in quo caſu the Plaintiff ought to name her Adminiſtratrix, and not Executrix, & hoc parat' eſt verificare, &c. and then concludes thus:

Such Plea without a Traverſe and Replication as here, and held good.

ſt. * Unde ex quo ſhe was not named Adminiſtratrix in the Bill, petit judicium ſi ipſa ad Billam prædictam reſpondere compelli debeat, &c.

* This is in Bar.

And upon a Demurrer to this Plea, the Objection was, that the Defendant ought to Traverſe, abſque hoc, that ſhe had adminiſtred as Executrix.

Traverſe where not neceſſary.

Sed per Curiam, The Plea is better without ſuch Traverſe, for if the Truth was, that the Defendant had adminiſtred in her own Wrong before Adminiſtration was actually granted to her, that Matter ought to come in by way of Replication by the other Side, as it is in the Caſes cited in the * Margin.

*3 Leon. 197. 3 Cro. 102, 565. 3 Bulſt. 252. 3 Cro. 810.

But Holt Chief Juſtice objected againſt the Concluſion of this Plea, which being a Plea in Abatement, ought to be petit judicium de Billa & quod Billa' ill caſſetur; but the Concluſion ſupra is proper only to a Plea in Non-ability of the Perſon, or to the Juriſdiction of the Court, and for this Reaſon only, Judgment was given againſt the Defendant, Quod reſpondeat ouſter.

Page *verſus* Stedman.

Coparceners cannot ſever, but muſt join in an Avowry for Rent.

IN Replevin, &c. for taking 500000 Bricks in a Place called Walfeild in the Pariſh of St. Pancras in Middleſex.

The Defendant made Conuſance as Bailiff of John Bennet, Eſq; and Grace his Wife, for that Simon Bennet, Eſq; was ſeiſed in Fee of the Place where, &c. and that 10 Decemb. ann. 33 Car. 2. he made a Leaſe thereof (amongſt other Things) unto Thomas Griffith for Forty-four Years, rendring 180 l. Rent every Year; that afterwards the ſaid Simon Bennet died ſeiſed of the Reverſion, which deſcended to the ſaid Grace, and to Frances Counteſs of Salisbury as Daughters and Heirs of the ſaid Simon Bennet; that afterwards the ſaid Grace intermarried with John Bennet, and becauſe 45 l. one Moiety of 90 l. of the ſaid Rent for one Half Year ended at Mich. ann. 6 W. & M. to the ſaid John and Grace, in Right of the ſaid Grace, præd' tempore quo, &c. aretro fuerunt & minime ſolut', the Defendant, as Bailiff of the ſaid John Bennet and Grace his Wife, made Conuſance for the ſaid 45 l. one Moiety of the ſaid 90 l. &c.

To this Conuſance the Plaintiff demurred.

Curia.

Et per Curiam, the Conuſance is ill, becauſe Coparceners cannot ſever, but muſt join in Avowry for Rent; therefore the Defendant in this Caſe ought to have made Conuſance for the whole Rent as Bailiffs to both Siſters.

So where one Siſter diſtrains, ſhe muſt avow in her own Right, and alſo as Bailiff to her other Siſter for the entire Rent, and not for a Moiety only in her own Right.

The Plaintiff had Judgment.

DE

Term. Sanct. Hill.

7 Willielmi 3. B. R.

Inhabitants of Wotton Rivers *verſus Inhabitants of* Marlborough *in* Wilts.

MOVED to quaſh an Order of two Juſtices of the Peace for the Settlement of a poor Perſon, &c. (1.) The firſt Objection was, That the Order recited, that upon Complaint made concerning the Perſon, &c. they had ſo ordered, &c. and it did not appear by the Order who it was that made the Complaint; and the Juſtices of Peace have no Power to remove any Perſon, but upon the Complaint of the Churchwardens and Overſeers of the Poor; and therefore it ought to be ſo expreſſed in the Order to give them Juriſdiction.

5 Mod. 149. S. C. 2 Salk. 422. S. C. Order of two Juſtices for the Removal of a poor Perſon muſt be made upon Complaint of the Churchwardens and Overſeers of the Poor.

(2.) It was not alledged in this Order, that the Perſon removed, &c. did not rent 10 l. per ann. in the Pariſh from whence he was removed, for if he did, he is not removeable, tho' he is likely to be chargeable.

To the firſt of theſe Objections it was anſwered, That admitting 'tis neceſſary, that it ſhould appear the Order was made upon the Complaint of the Churchwardens and Overſeers of the Poor; yet that Defect was helped by the ſpecial Return of the Certiorari by the Juſtices in the Caption, &c. where 'tis expreſly alledged, that the Order was made upon the Complaint of the Churchwardens, &c.

And as to the other Objection it was anſwered, That upon Search in the Crown-Office, moſt of the Orders of Settlement there filed are without Allegation of not renting

ing 10 l. per ann. and yet a great Number of them were confirmed by this Court.

Curia. But after ſeveral Debates it was reſolved per Curiam, That the laſt Objection of not renting 10 l. per ann. was not material, eſpecially becauſe of the Precedents mentioned ut ſupra, ſo that this Order was quaſhed upon the firſt Objection only.

For per Curiam, 'tis abſolutely neceſſary, that in the Body of the Order it ſhould be expreſly ſhewn, that it was made upon the Complaint of the Churchwardens and Overſeers of the Poor, for otherwiſe the Juſtices have no Authority to make it.

And the ſpecial Caption made upon the Return of the Certiorari could not help the Defect in the Body of this Order, for that ought to be ſufficient of it ſelf.

The King *verſus* Gately.

5 Mod. 138. 2 Salk. 471. The Juſtices Power to diſcharge Apprentices.

An Order of Seſſions was made in Middleſex to diſcharge one Green a Surgeon's Apprentice from his Maſter for not inſtructing him the ſaid Green in the Art of Surgery, but Gately the Maſter being a Mountebank kept the Apprentice for a Tumbler on the Stage.

It was inſiſted againſt this Order, that the Juſtices of Peace had no Juriſdiction in this Matter, becauſe a Surgeon is not one of the Trades mentioned in the Statute 5 El. and the Juſtices have Power only over ſuch Apprentices who are bound to the Trades therein named, and not over the Apprentices to other Trades.

And Mr. Luckener's Caſe of Suſſex was cited, which was, Two Juſtices made an Order to compel him to pay his and his Wife's Coachman's Wages; which Order for that Reaſon was quaſhed.

* 1 Sand. 313. On the other Side the Caſe of * Hawkſworth and Hillary was cited, where the Order was for diſcharging a Merchant's Apprentice, which is not named in the Statute 5 Eliz.

To which it was reply'd, that in that Caſe it might be agreed upon drawing the Order not to inſiſt on that Point, but only upon the Power of the Juſtices diſcharging an Apprentice upon his own Default.

And after ſeveral Debates, this Order was diſcharged upon the Point of Juriſdiction objected, &c.

But

But ſome of the Juſtices who made this Order, being Lawyers, were very much inclined to have it quaſhed, becauſe this Apprentice, who had procured himſelf to be diſcharged from his Maſter for not teaching him the Art of Surgery, immediately afterwards became a Tumbler to another Mountebank, ſo that it appeared he had only a Mind to change Maſters, but not Trades.

Walker & al' *verſus* Stokoe. *Judgment was given* 31 January, Anno 7 Will. 3.

ERROR of a Judgment in C. B. in an Action of Treſpaſs brought by Stokoe againſt Walker, and Four other Defendants; and a Verdict for Stokoe, and Judgment there entered againſt all the five Defendants.

5 Mod. 16, 69. Amendment not granted where 'tis to reverſe, and not to affirm a Judgment,

And now Walker, and Three more of the five Defendants brought this Writ of Error, and aſſigned for Error, that one of the five Defendants, againſt whom Judgment was entered, died before the Verdict, but they did not conclude this Aſſignment of Error in Fact with hoc parati ſunt verificare.

Wherefore the Defendant in Error pleaded In nullo eſt erratum generally, and afterwards the Plaintiffs perceiving their Miſtake, moved the Court to amend, by adding the Averment ſupra, (viz.) hoc parati ſunt verificare.

But after Debate it was denied to amend it, becauſe it was not to affirm but to reverſe a Judgment.

Then the Plaintiffs moved to quaſh their own Writ of Error, becauſe it was brought only in the Names of four Perſons, when it appeared by the ſame Writ, that the Judgment was joint againſt five Defendants, and the Writ did not ſet forth that the Fifth was dead, for which Reaſon it was ill, becauſe all the Defendants muſt be joined in a Writ of Error, and if any refuſe, they muſt be afterwards ſevered.

Where the Judgment is joint againſt Five, the Writ of Error muſt be brought by all of them,

And it was agreed by all, that this Writ of Error was ill for the Reaſon ſupra, but then it was much inſiſted on by the Counſel for the Defendants in the Writ of Error, to have this Matter amended by the Inſtructions to the Curſitor who made out the Writ; who being ordered to attend, produced his Inſtructions given by the Plaintiffs in Error, to this Effect:

ff. I. Stokoe *verſus* T. Walker, & B. C. D. & E. naming the Plaintiffs and the Defendants in placito tranſgreſſionis.

Make

Make a Writ of Error for the Defendants: Note, The Defendant E. is dead.

And now it was insisted, that this is such an Instruction that the Cursitor, ex officio, ought to take Notice of it, and to shew the Death of E. in the Body of the Writ of Error, and therefore the Omission of it was but Vitium Clerici, and amendable.

Econtra. To which it was answered, that this was the Ignorance of the Cursitor, and a Mistake of his Pen, for it may be, that he did not know the Law, that it was necessary to alledge the Death of E. in the Body of the Writ; he might think it sufficient that the Writ was only in the Name of the Survivors, for that his Instructions did not direct him to express the Death of E. in the Writ, but only to take Notice that E. was dead; but if he had made the Writ as well in the Name of E. as of the Survivors, then he had not pursued his Instructions.

And it was argued farther, that a Writ of Error was not amendable in any Case, it being not within the Reason of any of the Statutes of Amendments, which are made for the Affirmance and Support of Judgments; but this Writ is to reverse a Judgment, therefore should not be favoured.

Moreover, if it was amendable, yet the Writ of a Plaintiff shall never be amended at the Instance of a Defendant against a Plaintiff who purchased it, for that would be to enforce the Plaintiff to bring such a Writ as would please the Defendant, whereas the Plaintiff should please himself therein.

Curia. And after several Debates, it was resolved by the whole Court, that a Writ of Error is not amendable in any Case, because it goes in Reversal of Judgments.

Writ of Error not amendable.

And that if it was amendable, it could never be at the Instance of the Defendant, because the Plaintiff's Writ or Declaration, or the Defendant's Plea, shall in no Case be amended at the Prayer of the Adversary, for a Plaintiff shall not be compelled to bring his Action, or a Defendant to plead, otherwise than he himself will.

Moreover, the Defect in this Writ is fatal, and that it was not a Mistake only, but Ignorance in the Cursitor, in not setting forth the Death of E. in the Writ of Error, for he had pursued his Instructions as far as they led him, in that he made the Writ in the Name of the Survivors only.

Writ of Error *coram vobis* is no *Superfedeas*. And hereupon the Plaintiffs prayed a new Writ of Error, coram vobis resident. which was granted; and the new

Writ being allowed in Court, the Plaintiffs on another Day moved for a Superſedeas, becauſe this Writ was not a Superſedas of it ſelf, as the firſt Writ of Error was, and a Superſedeas was granted, and the Plaintiffs put in *Bail thereon.

* *Quere*, If neceſſary ſo to do.

And afterwards the Plaintiffs upon this new Writ of Error (wherein the Death of E. was alledged) did aſſign the ſame Matter of Fact for Error, (viz) The Death of E. before the Verdict, adding the neceſſary Averment Et hoc parati ſunt verificare.

Thereupon the Defendant Stokoe pleads as to C. one of the Plaintiffs in the Writ of Error, quod ipſe ad breve de Errore prædicto ulterius proſequend. admitti non debet quia dicit quod poſt ultimam continuationem, &c. the ſaid C. had by his Deed of Releaſe (produced, &c.) releaſed all Errors, &c. Et hoc parat. &c. unde petit judicium ſi prædict. C. ad breve de Errore prædict. ulterius proſequend. contra ſcriptum ejuſdem C. proprium ſic ut præfertur fact. admitti debeat, &c. Et idem Ricardus Stokoe ulterius dicit quod judicium prædict. ſic ut præfertur reddit. ob. Errores prædict. per prædictos (the other Plaintiffs) ſuperius aſſign. revocari non debet quia dicit, that the ſaid E. did not die before the Verdict, Et de hoc ponit ſe ſuper patriam & prædict. (the other Plaintiffs in Error) ſimiliter.

Et quoad prædict. placitum præfat. Ricardi ad præcludend. præfat. C. ab ulterius proſequend. breve de Errore prædict. plitat. idem C. dicit quod ipſe per aliqua, &c. præcludi non debet, and ſo pleads Non eſt factum to the Releaſe, and Iſſue was taken thereon.

As to the firſt Iſſue, the Jury found, that E. was dead before the Verdict in the original Action; and as to the laſt Iſſue, they found the Releaſe to be the Deed of C.

Whereupon the Plaintiffs in Error having entered the Iſſues, the Poſtea and Verdict upon the firſt Roll of the Writ of Error as they ought, they in Michaelmas-Term, 8 Will. 3. ſet the Cauſe down for the Judgment of the Court in pronouncing the Reverſal of the Judgment as to them.

But then an Exception was taken on the other Side as to the Writ of Error coram vobis reſiden. which was in the Name of the King, reciting the Judgment to be in the Court of the King and the late Queen, before the Juſtices of the King and the late Queen, inter, &c.

31 Aſſis pl. 1. Dy. 75, 356. 4 Leon. 107. 2 Cro. 160, 161. Sid. 138, 139. 2 Saund. 291.

Ac recordum & proceſſum prædict. in Curia noſtra coram nobis cauſa Erroris intervenien. Venire fecimus & coram nobis jam reſiden.

And becauſe it appeared that the firſt Writ of Error was quaſhed, upon which the Record was removed into B. R. which Writ was in the Time and in the Name of the late Queen as well as of the King; therefore this laſt Clauſe was a wrong Deſcription; and this Writ was no Warrant for the Court to proceed thereon.

Curia.

And after ſeveral Debates, the Court in Hill. 8 Will. 3. quaſhed the Writ for this Reaſon, tho' it was inſiſted on, that according to a grammatical Conſtruction, the Relatives and Verb being in the plural Number, the Clauſe would extend to the Queen as well as to the King; and that this Writ of Error would be ſufficient without this Clauſe (quod fuit conceſſum per Curiam), yet it being to defeat a Judgment, it ſhall not have a favourable Conſtruction.

Whereupon the Court was moved, that a new Writ of Error coram vobis reſiden. might be allowed, and alſo a Superſedeas, which was granted upon putting in Bail to proſecute, &c. tho' the Superſedeas was oppoſed, as being the third Writ of Error.

Sed per Curiam, This is the firſt Writ coram nobis reſiden. for the other Writ was void; and the Iſſues being found again by the Jury, ut ſupra, thereupon Judgment was given as to him who releaſed, quod nil capiat per breve de Errore; and quoad the reſt, that Judicium reverſetur, &c.

2 Cro. 116, 117.

Jones *verſus* Bodinner. Intratur Hill. Anno 7 Will. 3. Reſolutio Cur. Trin. 8 Will. 3. &c.

5 Mod. 310. 1 Salk. 1. S.C. But upon another Point.

TReſpaſs for Taking one Gelding, one Mule, and five Colts at Zennen in Cornwall.

The Defendant pleaded in Bar, that in Hillary-Term, Anno 6 Will. & Mar. nuper * Reginæ, a Writ iſſued out of the Exchequer, directed to the Sheriff of Cornwall, reciting that one Thomas Treſilian had been outlawed in the Court of Common Pleas, and that upon a ſpecial Capias Utlegatum iſſuing out of that Court, it was found and returned, that the ſaid Tho. Treſilian was ſeiſed in Fee of a Tenement called Skewack in the Pariſh of Zennen, of the yearly Value of 30 l. and the King and Queen commanded the Sheriff to levy the Iſſues and Profits thereof, and to

*There could be no ſuch Writ of *Hillary-Term*, becauſe the Queen died about *Chriſtmas* before.

return the Money, a die Sancti Martini in quindecim dies tunc prox' sequen', and that upon this Writ, the Sheriff of Cornwall made a Warrant to the Defendant his Bailiff, by Virtue whereof the Defendant on such a Day before the Return of the Writ, finding the said Cattle Levant and Couchant on the said Tenement called Skewack, did there take them for the Issues and Profits of the said Tenement, and delivered them over to the Sheriffs, &c.

The Plaintiff replyed, That the Defendant took the Cattle upon his (the Plaintiff's) own proper Land in Zennen aforesaid, absque hoc, that they took them upon the Tenement called Skewack, upon which they were at Issue, and the Plaintiff had a Verdict, and twenty Pounds Damages.

And now it was moved in Arrest of Judgment, That this Issue was not material to this Action, because the Defendants had by their Plea confessed the Trespass; and the Matter set out for their Justification was all void; for it was impossible that there could be any such Writ of Hillary-Term, 6 Will. & Mariæ, because the Queen died about Christmas before, and so all that Matter about the Writ and Warrant being impossible, it was all void: and the Defendant's Plea amounted in Effect to a plain Confession of the Action; wherefore the Plaintiff should have demurred, and not taken Issue to no Purpose.

Econtra for the Plaintiff.

On the other Side it was insisted for the Plaintiff, that the Defendant ought not to take Advantage of a Fault in his own Plea, and the Issue was for his Benefit.

Besides, this is only a Slip of the Clerk, and therefore amendable, for in Truth the Writ was Teste Trin. 6 W. & M. when the Queen was living; and so the Mistake was only in the Word Hillary, for Trinity, and after all, 'tis helped by the * Verdict.

* Cr. El. 722. Hob. 326, 113. Moor 696, 697, 695.

Sed per Curiam, This is an immaterial Issue, for the Reason supra, and that this Mistake was not amendable, nor cured by the Verdict, and that there shall be no Repleader.

Curia.

But upon the Confession of the Defendants in their Plea, there shall be a Writ of Inquiry to ascertain the Plaintiff's Damages, and for this Course the Authority of the Case between † Lacy and Reynolds was relied on.

Writ of Inquiry to ascertain the Damages.

And according to this Opinion, a special Entry was made on the Roll immediately after the Return of the Postea, thus:

† Cro. El. 214. 2 Roll. Abr. 99. 1 Cro. 29. 22 Ed. 4. 46.

ff. Super quo viſis & per Cur' dicti Domini Regis hic plenius intellectis omnibus & ſingulis præmiſſis præd' videtur Curiæ dicti Dom' Regis hic quod præd' Henricus Jones ſuper placitum præd' Willi' Bodinoe modo & former præd' placitat' damna ſua occaſione tranſgreſſion' præd' recuperare debeat & q'd præd' Will'us Bodinoe in placito ſuo præd' ſuperius placitat' exiſtit cognovit materiam in narratione prædict' ſuperius allegat' & nullam ſufficientem materiam in lege in Barram ſive præcluſionem prædict' Henrici Jones ab actione ſua præd' verſus eundum Will' Bodinoe placitavit Ideo conſideratum eſt quod placitum præd' Henrici Jones ſuperius replicando placitat' & exitus ſuperinde inter eoſdem Henricum Jones & Will'um Bodinoe junct' & proceſſus ſuper eundem exitum fact' nec non veredictum præd' in forma prædicta reddit' penitus evacuentur & pro nullo habeantur & quod ſuper cognitione prædicti W. B. in placito ſuo prædicto ac materiis in narratione prædict' ſuperius verſus eundem W. B. per ipſum Henricum Jones allegat' prædict' Henricus Jones recuperet damna ſua occaſione tranſgr' prædict' in narratione prædicta ſuperius ſpecificat'.

See ſuch an Entry at large in 2 Roll. Abr. 99.

Sed quia Cur' dicti Dom' Regis nunc hic incognit' exiſtit quæ damna prædict' Hen' Jones ſuſtinuit occaſione tranſgreſſionis præd' Ideo præceptum eſt vic' quod per ſacramentum, &c.

DE

DE

Term. Paſchæ.

Anno 8 Willielmi 3. B. R.

Yeomans vid' *verſus* Bradſhaw.

ELizabeth Yeomans as Adminiſtratrix of Henry Yeomans her late Husband brought an Action on the Caſe upon a Bill of Exchange againſt John Bradſhaw; the Action was laid in London, and the Adminiſtratrix declared upon a Bill drawn by Bradſhaw in London, upon one George Aiery of Newcaſtle upon Tine, and that the Bill was refuſed by him; whereupon Bradſhaw the Drawer became liable to pay the Money according to the Cuſtom of Merchants; and ſhe alledged in the Declaration, that Adminiſtration was granted to her by the Vicar General, and principal Official of the Biſhop of Durham, cui commiſſio Adminiſtrationis prædict' de jure ſpectabat, &c.

Debt upon a Bill of Exchange is not equal with a Debt on a Bond, but follows the Perſon of the Debtor.

The Defendant craved Oyer of the Letters of Adminiſtration which, were entered in hæc verba.

Quibus lectis & auditis idem Johannes Bradſhaw petit judicium de Billa prædicta quia dicit quod Civitas London' prædict' ſemper fuit & eſt extra Diœceſin Dunelm' prædict' infra Diœceſin London' quodque ipſe idem Johannes Bradſhaw ad & ante tempus mortis præfat' Henrici Yeomans & ſemper poſtea hucuſque fuit & adhuc eſt inhabitans & commorans extra Diœceſin Dunelm' prædict' videl't apud London' prædict' in parochia & Warda præd' infra Diœceſin London' exiſten' & hoc, &c.

And upon a general Demurrer to this Plea, the Queſtion was, Whether in the Caſe of a Bill of Exchange (as this

this was) the Right of granting Adminiſtration doth belong to that Ordinary of the Place where the Bill was at the Time of the Death of the Inteſtate, as in the Caſe of a Bond or other Specialty; or whether 'tis no more than a Debt upon ſimple Contract, and ſo follows the Perſon of the Debtor where-ever he is; for if ſo, then the Right of granting Adminiſtration belongs to the Ordinary of the Place where the Debtor was at the Time of the Death of the Inteſtate, as it is held in the Caſes cited in the * Margin.

*Dyer 305. a. 1 Roll. Abr. 909. Cro. El. 472. 2 Rep. 29.

Curia. Et per Curiam, This Debt upon a Bill of Exchange was not upon an Equality with a Debt upon Specialty; but is no more than a Debt upon ſimple Contract which follows the Perſon of the Debtor; and therefore this Adminiſtration is void, for this was Bona notabilia in London, and therefore the Rule was, that the Bill ſhould abate.

Harris *verſus* Pett. Intratur Paſch. 8 Willi. B. R. Rot. 173. *and adjudged* Trin. *following.*

5 Mod. 243. Where *non damnificatus* is a good Plea, where not.

DEBT upon Bond, &c. the Defendant craved Oyer of the Condition, which appeared to be in the Manner following:

ſſ. If the above bounden Sampſon Pitt, his Heirs and Aſſigns, do free and keep harmleſs the above-named Daniel Harris, his Heirs and Aſſigns, of, and from all ſuch Coſts and Damages as may ariſe againſt the ſaid Daniel, by reaſon of a Law-Suit now depending between the ſaid Daniel and one Philip Couch late of Liskard Pariſh, that then, &c.

Hereupon the Defendant pleaded in Bar, quod prædict' Daniel ad aliquod tempus poſt confectionem ſcripti obligatorii præd' hucuſq; in aliquo modo non damnificatus fuit ratione dictæ ſectæ ad legem tempore confectionis ſcripti illius obligatorii dependen' inter præfatum Danielem & Dominum Philippum Couch in conditione prædict' ſuperius nominat' & hoc, &c.

And upon a ſpecial Demurrer to this Plea, the Plaintiff ſhewed for Cauſe, that the Defendant ought to have ſet forth how he had had indemnified the Plaintiff.

For the Plaintiff. And it was inſiſted for the Plaintiff, that non damnificatus was not a good Plea, but that the Defendant ought to have pleaded in the Affirmative, and have ſet forth

in what Court the Suit was, and what Damages had aroſe thereon; and the Manner how the Defendant had indemnified the Plaintiff from thoſe Damages.

And the Reaſon inſiſted on for differing this Caſe from the common Caſes of Counter-bonds to indemnify and ſave harmleſs, was, becauſe in the Condition of this Bond the Word Free is added, which is of the ſame Signification as the Word Acquit, or the Word Diſcharge, and where thoſe Words are in the Condition, there Non damnificatus is no good Plea, but it muſt be ſpecially ſhewn how the Plaintiff was acquitted or diſcharged; and the Caſe in the * Margin was cited and relied on as an Authority in Point.

* 1 Leon. 71. Brett *verſus* Andrews. Gouldſ. 63. S. C. Owen 7. S. C.

But on the other Side it was argued for the Defendant, that this Plea in the Negative was a good Plea, becauſe the Condition of this Bond doth not refer to any certain or particular Thing from which the Defendant ſhould free the Plaintiff, but relates only to generals, which may or may not happen; and it lies properly in the Knowledge of the Plaintiff only, Whether he had any Damages by Reaſon of the Suit mentioned in the Condition of this Bond.

For the Defendant.

And the Difference of theſe Caſes is as followeth:

3 Cro. 913, 914. 2 Cro. 638. Co. Ent. 36, 37. His own Opinion upon the Caſe.

1ſt. Where the Condition is, that the Defendant ſhall diſcharge or acquit, or free the Plaintiff of or from ſuch a Bond or Rent, or Action, or from any other particular Thing aſcertained in the Condition, there the negative Plea Non damnificatus is not good, becauſe the Defendant hath undertaken to do an Act in Diſcharge of the Plaintiff.

But where the Condition is only to Free or to diſcharge, or indemnify the Plaintiff from any Damage, or Coſt or Trouble which ſhall or may happen by Reaſon of ſuch Bond, Rent or Action, or other particular Thing therein mentioned; in ſuch Caſe the negative Plea is ſufficient, becauſe it doth not appear that any Damage hath happened to the Plaintiff; and if no Damages hath happened then 'tis impoſſible that the Defendant ſhould ſhew in the Affirmative the Manner how he had freed or diſcharged the Plaintiff, therefore it lies on the Part of the Plaintiff by Way of Reply, wherein he was damnified.

Et per Curiam, Judgment was given for the Defendant, and that the Law was according to the Diverſity aforeſaid; whereupon the Plaintiff prayed Leave to diſcontinue upon Payment of Coſts; which was granted.

Judicium pro Defendente.

Oldham

Oldham *verſus* Pickering. Paſ. 8 Will. 3. B. R. Rot. 87.

2 Salk. 464. An Eſtate *pur auter Vie* is a Freehold, and not diſtributable.

IN a Prohibition, and upon a Demurrer to the Declaration, the Caſe appeared to be, that A. (who had Lands limited to him during the Life of B.) died Inteſtate, and the Plaintiff took out Adminiſtration (B. the Ceſtuique Vie) being ſtill living; and now there being Aſſets ſufficient, beſides this Eſtate pur auter Vie, to pay all the Debts, &c. The next of Kin to the Inteſtate libelled in the Spiritual Court againſt the Adminiſtrator, to have this Eſtate pur auter Vie diſtributed, ſuppoſing the * Statute, which makes ſuch Eſtates Aſſets in the Hands of an Executor or Adminiſtrator, had changed the Nature of the Eſtate, and made it a mere Chattel in their Hands, and ſo ſubject to a Diſtribution, as other the perſonal Eſtate of the Inteſtate.

* 29 Car. 2. cap. 3. par. 12.

Curia. Sed per Curiam, Such an Eſtate ſtill remains a Freehold, and the Adminiſtrator is Tenant of ſuch Freehold, againſt whom the Præcipe muſt be brought if a Common Recovery ſhould be had againſt him of the Lands; and the Deſign of this Statute was only in reſpect to Creditors, to make an Eſtate pur auter Vie Aſſets for Payment of Debts, and for that End only the Adminiſtrator is made an Occupant, but in all other Reſpects the Quality of the Eſtate remains the ſame as it was before at Common Law; and the Spiritual Court never had any Juriſdiction in Caſes of Freehold.

22 & 23 Car. 2. cap. 10. Et per Holt Ch. Juſtice, Since the Statute 22 & 23 Car. 2. it hath been held, that the Statute 31 Ed. 3. cap. 11. is thereby repealed; and he held, that the Reaſon of Diſtribution of the Inteſtate's Goods by the Ordinary, before the Statute 22, 23 Car. 2. was, becauſe there was no Property of thoſe Goods in any Body, therefore the Ordinary having the Poſſeſſion, he diſpoſed them at his Pleaſure, for there was no Proprietor to control him.

And he doubted, Whether this Eſtate pur auter Vie was ſubject to the Payment of general Legacies, in Caſe it came to the Hands of an Executor or Occupant by Force of the Statute 29 Car. 2. cap. 3.

Quære, Whether it ſhall go to the Adminiſtrator de bonis non, &c. for that it is not within the Letter of the Law; and it was made a Doubt in the Argument of this Caſe.

Bands *verſus* Bodinner. Paſ. 8 Will. 3. B. R. Rot. 382.

IN Trover for a Cow, &c.

The Defendant pleaded his Privilege as an Attorney of the Court of C. B.

Filing Bail for an Appearance doth not ouſt the Privilege of an Attorney.

The Plaintiff replied, that at the Time of exhibiting his Bill againſt the Defendant, (viz.) On ſuch a Day, the Defendant was in Cuſtody of the Marſhal of the Court of B. R. at the Suit of one Katharine Maddern, Widow, in a certain Plea of Treſpaſs, and then and there the Defendant, by the Court aforeſaid, Tradit. fuit in Ballivum in placito prædicto ad ſectam dictæ Katharinæ Maddern prout patet per Recordum inde, &c. ſuper quo poſtea ſcilicet eodem die, the Plea aforeſaid of the ſaid Katharine Maddern being not determined; the Plaintiff, according to the Courſe of the Court, Time out of Mind uſed and approved, exhibited his Bill againſt the Defendant here in Court prout ei bene licuit, & hoc, &c.

To this Replication the Defendant demurred generally, and after Debate it was adjudged Hill. 8 Will. 3. that the Matter in the Replication was not ſufficient to ouſt the Defendant of his Privilege of an Attorney; for tho' an Attorney, or other privileged Perſon of the Court of Common Pleas or Exchequer, doth file a Bail in the Court of B. R. for his Appearance in that Court upon an Arreſt by Proceſs, &c. yet this doth not amount to a Waiver of his Privilege, becauſe 'tis no more than a bare Appearance, without which he cannot plead and take the Benefit of his Privilege; and therefore he may not only plead it in the ſame Action, in which he appeared by filing Bail; but in any other Action upon Declarations filed againſt him in the ſame Term by the By, according to the Courſe of the Court.

And tho' this Filing Bail in the firſt Action giveth an Opportunity to others to deliver Declarations againſt him by the By the ſame Term, according to the Courſe of the Court of B. R. yet that Practice doth not extend to exclude ſuch Defendant from any Advantage by Pleading to the Juriſdiction of the Court, or otherwiſe.

Curia. Sed per Curiam, If the Defendant had waived his Privilege by Pleading in Chief to the firſt Action, and the Plaintiff in this Action had ſhewn that Waiver in his Replication, then the Defendant would have been ouſted of his Privilege in this Action; becauſe a Waiver of Privilege in a prior Action depending in the Court of B. R. is a Waiver in all other Actions commenced in that Term.

Bro. Tit. Bill. pl. 6, 7, 13. 22 Aſſ. pl. 83. 27 H. 6. 6. a. 2 Roll. Abr. 275. 2 Bulſt. 207, 208. Et per Curiam, If an Attorney of the Court of C. B. is in actual Cuſtody of the Marſhal of the Court of B. R. by Proceſs; there he cannot plead his Privilege in any Action on any Bill filed againſt him, for if he ſhould there would be a Failure of Juſtice.

So if an Attorney of C. B. is brought into the Court of B. R. at the Suit of an Attorney there, which is an Eſtoppel to the Defendant's Privilege, even in ſuch Caſe the Defendant ſhall be ouſted of his Privilege in all other Actions commenced againſt him in B. R. in the ſame Term, becauſe the Juriſdiction of this Court was attached upon him by the firſt Action.

The Judgment was quod Billa caſſetur.

Freeman *verſus* Bernard. Intratur Paſ. 8. B. R. Rot. 219. *and adjudged* Paſ. 9.

1 Salk. 69. Award, where 'tis ill pleaded to an Action. ACtion on the Caſe upon a ſpecial Promiſe made by the Defendant to deliver a Parcel of Hops to the Plaintiff on ſuch a Day and Place, on a certain Price agreed on, &c.

The Defendant pleaded in Bar, that after the Promiſe made, both he and the Plaintiff referred all Matters between them to Arbitration, and that the Arbitrators awarded, that the Defendant ſhould releaſe the Plaintiff, and that he ſhould releaſe the Defendant of all Actions and Demands whatſoever; and alledged, that from the Time of the Award hitherto, he was always ready, and yet is, to releaſe the Plaintiff according to the Award, &c.

And upon a Demurrer to this Plea, after ſeveral Debates, it was adjudged, Trin. 9 Will. 3. that this Award was no Bar to the Action, becauſe nothing was awarded but only mutual Releaſes from each other; ſo that the Award itſelf is no Bar, but the Thing awarded when executed would be a Bar.

And a Difference was taken where any Thing is awarded in Satisfaction, there the Award it ſelf is a Bar before 'tis perform'd; but where nothing is awarded, but Releaſes on both Sides, there when the Award is executed, the Releaſe will likewiſe be a Bar, but not before, for the Award without the Releaſe is no Bar. Curia.

Sed per Curiam, the Defendant may bring his Action againſt the Plaintiff, for not releaſing according to the Award, and therein ought to recover all his Damages and Coſts loſt in the Action againſt him. Curia.

DE

Term. Sanct. Trin.

Anno 8 Willielmi 3. in B. R.

Row *verſus* Gatehouſe. Trin. 8 Willi. 3. B. R. Rot. 466.

IN an Action on the Caſe on two Promiſes wherein the Plaintiff declared, firſt, that the Defendant Row was indebted to him in 42 l. 2 s. 3 d. for Meat and Drink found by the Plaintiff, for the Defendant, and he being ſo indebted ſuper ſe aſſumpſit, &c. to pay the Money. 5 Mod. 305. 2 Salk. 663. Caſe, &c. upon two Promiſes, where one of them was void.

Cumque etiam die & anno ſupradict' apud S. prædict' in conſideratione quod prædict' (the Plaintiff) ad conſimiles inſtanc' & requiſionem ipſius Antho. Row inveniſſet & providiſſet pro eodem Anthonio & aliis perſonis ad ſpeciales inſtanc' & requiſition' ipſius Anthonii al' Eſculent', &c. * ſuper ſe

* When it ſhould be the Defendant *ſuper ſe aſſumpſit.*

ſe aſſumpſit & eidem Thomæ adtunc & ibidem fideliter promiſit quod ipſe præd' Anth'us tant' denar' ſummas quant', &c. and ſo there was no nominative Caſe to the Verbs ſuper ſe aſſumpſit & promiſit, and by Conſequence no Promiſe of the Defendant.

After a Verdict for the Plaintiff upon non aſſumpſit pleaded, and Judgment, the Defendant brought a Writ of Error in B. R. and this Matter was inſiſted on for Error; and that ſince entire Damages were given upon both Promiſes, and one of them was void, the * Judgment upon this Verdict was erroneous.

* 3 Cro. 913. Noy 50. Yel. 93, 94. 1 Leon. 170, 171. 2 Cro. 115. 1 Sid. 306. 2 Vent. 141.

Sed per Curiam, ſince 'tis poſitively affirmed at firſt, that the Defendant ſuper ſe aſſumpſit, that nominative Caſe, (viz.) Defendens ſhall go to the ſubſequent Verbs.

Hallett *verſus* Byrt. Trin. 8 Will. 3. B. R. Rot. 23.

5 Mod. 252. 2 Salk. 580.

TRespaſs for Taking three Cows at Beomiſter in Dorſetſhire.

Where the Plea amounted to the general Iſſue.

The Defendant pleaded ſpecially, that the Biſhop of Sarum was ſeiſed in Fee of the Hundred of Beomiſter in Right of his Biſhoprick; and that he and all his Anceſtors Time out of Mind, had an Hundred-Court of all perſonal Actions under 40 s. and of Replevins within the ſaid Hundred, from three Weeks to three Weeks to be held before the Free Suitors.

And that the Biſhop and all thoſe whoſe Eſtate, &c. had uſed Time out of Mind by their Steward of the ſaid Hundred upon Complaint made, &c. to replevy Cattle unjuſtly taken at any Place within the ſaid Hundred; and that the Biſhop had demiſed the ſaid Hundred unto Carleton Whitlock, Eſq; for three Lives; by Virtue of which he was ſeiſed, &c. and that the Plaintiff and T. S. took thoſe Cows, being the Cows of one E. G. at Beominſter within the ſaid Hundred, and impounded them there; and that thereupon the ſaid E. G. complained to Henry Samway's Steward of the ſaid Carleton Whitlock of his Hundred-Court aforeſaid, of the unjuſt Taking the ſaid three Cows; and that thereupon the ſaid Steward made his Precept to the Bailiff of the ſaid Hundred, &c. to replevy thoſe Cows, by Virtue whereof the Defendants took them, and delivered them to the ſaid E. G.

The

The Plaintiff demurred ſpecially to this Plea, and ſhewed for Cauſe, that it amounted to the general Iſſue Not guilty; and it being twice argued, it was adjudged 9 Paſc. Will. for the Plaintiff, and that for two Reaſons.

(1.) Becauſe this Plea in the Form as it was drawn, did amount to the general Iſſue; for that the Defendants had not admitted by their Plea ſo much as a Poſſeſſion of the Cows in the Plaintiff at the Time of the Taking, &c. for they ſay, the Cows were then impounded, which is the Cuſtody of the Law, and not of the Party, ſo that the Defendants by their Plea had not given any Colour of * Action whatſoever to the Plaintiff.

* *Quære*, If the Defendants had admitted a bare Poſſeſſion in the Plaintiff, whether that would have been Colour ſufficient, it being but a tortious Poſſeſſion only.

Et per Holt Chief Juſtice, If the Defendants had admitted a bare Poſſeſſion, &c. that would have been a ſufficient Colour for the Defendants to juſtify ſpecially under the Precept for Replevin, becauſe the Cows were expreſly mentioned in the Precept, and they were commanded to take them, and therefore they might juſtify the Taking, &c. although the Property was not in that Perſon who brought the Replevin.

And no Action of Treſpaſs will lie againſt the Defendants, (the Officers) for taking Goods or Cattle by Virtue of a Replevin, unleſs he who hath the Poſſeſſion, claims a Property when the Officers come to demand them, and they take them notwithſtanding ſuch Claim of Property; and this ſpecial Matter muſt come in by way of Replication by the Plaintiff. Treſpaſs will not lie againſt the Officers for replevying Goods.

And ſo there is a Difference between a Replevin and other Proceſs of Law, with Reſpect to the Officers; for in the firſt Caſe, (viz.) in Replevin, they are expreſly commanded what to take in Specie; but in Writs of Execution, the Words are general, (viz.) To levy of the Goods of the Party, and therefore 'tis at their Peril if they take another Man's Goods, for in that Caſe an Action of Treſpaſs will lie.

(2.) This Preſcription for a Steward of an Hundred-Court to grant Precepts of Replevin out of a Court upon a Parol Complaint made to him, is a void Preſcription, and againſt Law; for even the Steward himſelf hath no ſuch Power by the Common Law, but his Authority in Preſcription for a Steward of an Hundred to grant Replevins on Parol, not good.

* Cap. 21. † Cap. 17. 1 Inſt. 145. 2 Inſt. 139, 140.

in that Matter is given to him by the Statutes of * Marlbridge, and † Weſtm. 1. and thoſe Statutes do not extend to any other Perſon, but the Sheriff only; and if the Sheriff who is Steward of the County-Court had no ſuch Power at Common Law, it follows that the Steward of an Hundred-Court which is derived out of the County-Court cannot have any ſuch Power as to grant Replevins out of Court.

5 E. 4. 34. *a.*

But it was agreed, that the Hundred-Court, and other Courts of Lords of Manors may by Preſcription hold Plea in Replevin, and ſo may incidently have Power to replevy Goods or Cattle taken; but that muſt be by Proceſs of the Court after a Plaint entered, but not by a Parol Complaint * out of Court.

* Co. Ent. 294. *a.* Dyer 245, 246. F. N. B 73.

Nota; All Plaints in Replevin in any inferior Court which hold Plea therein by Preſcription muſt be in the Detinet only, becauſe the Goods, &c. are not replevied, but by Proceſs ſubſequent to, and grounded on the Plaint.

Bennett *verſus* Talboys.

1 Salk. 212. Where the Concluſion of a Declaration *contra formam ſtatuti* is good, where not.

TReſpaſs for breaking his Cloſe, treading his Graſs pedibus Ambulando, and eating his Graſs with Cattle mentioned in the Declaration.

Necnon de eo, That the Defendant hunted in the ſaid Cloſe, being an inferior Tradeſman, (viz.) a Clothier, & alia enormia, &c. & contra pacem dicti Dom' Reg' nunc, &c. & contra formam ſtatuti in hujuſmodi caſu edit. & provis'.

After a Verdict for the Plaintiff, and 2 d. Damages given by the Jury on the Trial at Sarum Aſſiſes, it was moved in Arreſt of Judgment, that the Concluſion of this Declaration, (viz) contra formam ſtatuti went to the Whole; whereas the firſt Part of the Declaration was for a Treſpaſs at Common Law, and not grounded on any Statute whatſoever.

Curia.

And after ſeveral Debates it was ruled, Paſch. 9 Willi. that the Plaintiff ſhould have his Judgment; for per Curiam, theſe Words contra formam ſtatuti ſhall be applyed to that Part of the Treſpaſs which was grounded on the New Statute againſt Hunting by inferior Tradeſmen, which gives full Coſts, tho' the Damages are under Forty Shillings.

2

Et

Et per Holt Ch. Juſtice, 'Tis ſufficient to lay in the Declaration, that the Defendant hunted in the Plaintiff's Ground, without concluding contra formam Statuti, for that ſhould come in Evidence.

The King *verſus* Ingram & al'.

SEveral Perſons were convicted of a Riot by Inquiſition taken before two Juſtices, upon the * Statute of H. 4. which Inquiſition was traverſed, and a Verdict found againſt the Defendants; and upon a Motion in Arreſt of Judgment, the Exceptions were, 2 Salk. 592. * 13 H. 4. c. 7. In what Caſes the Sheriff ought to be preſent upon the Conviction for a Riot.

1ſt. This Conviction was before the Juſtices of Peace only, and not before the Sheriff, who by the expreſs Words of the Statute muſt be joined in the Certificate of the Fact to this Court, and conſequently it muſt be intended, that he ought to be preſent, for otherwiſe how can he certify the Fact; and ſo much alſo may be collected to be the Intent of the Statute * 19 H. 7. upon Conſtruction of the whole Statute. * 19 H. 7. cap. 13.

Sed non allocatur; For neither of thoſe Statutes appoint, that the Sheriff ſhould be preſent at the Taking the Inquiſition by a Jury; for the Difference is,

2ly. Where the Conviction of a Riot is made on the Statute 13 H. 4. upon View only, there the Preſence of the Sheriff or Under-Sheriff muſt be neceſſary; but 'tis not ſo where the Conviction is upon an Inquiſition taken after the Riot is ended. Raym. 386.

(2.) Obj. (viz.) It appears that two Inquiſitions were taken of this Riot; it appears alſo that the whole Fact was done before the Taking the firſt Inquiſition, and therefore the Inquiry ought not to be partial, but the Whole ſhould have been found upon the firſt Inquiſition.

Sed non allocatur; There being nothing in this Objection.

(3.) Obj. (viz.) That the Jurors, upon the Enqueſt are charged only ad inquirendum pro Domino Rege, without ſaying, Et pro Corpore Comitatus, or juxta formam Statuti.

Sed per Curiam, 'Tis well enough without it,

(4.) Obj. (viz.) That the Fact was found, not only Vi & armis, but alſo Manu forti, of which the Juſtices had no Power to inquire by thoſe Statutes.

Sed

Sed non allocatur.

Inquiſition may be taken after the Month.

(5.) Obj. (viz.) That appears by the Record, that the Fact was done more than one Month before the Time of the Taking the firſt Inquiſition; and then the Time which the Statute allows being lapſed, the Juſtices have afterwards no Power to take the Inquiſition, becauſe the * Statute is expreſs, that the Inquiry ſhall be made within a Month after the Riot is committed; beſides, the Juſtices have no Power to take ſuch Inquiſition any where but in their Seſſions.

* 13 H. 4.

Sid. 186. The King *verſus* Coſins.

To this it was anſwered, that 'tis very true, the Statute is mandatory, (viz.) That the Inquiſition ſhall be taken within a Month, under a Penalty in the neighbouring Juſtices; but after the Month 'tis ſtill diſcretionary in the Juſtices to take an Inquiſition, &c. and that by Conſtruction of the laſt Clauſe of the Statute 13 H. 4. and it hath ever been the Practice to take ſuch Inquiſitions out of Seſſions.

Dyer 210. *b.* 1 Sid. 186.

The Defendants were fined.

The King *verſus* Thorp & al'.

5 Mod. 221. Guardianſhip by the Father continues till his Son is 21 Years old in Reſpect to his Body, but not to his Lands.

THIS was an Information in Nature of a Conſpiracy againſt Thorp the Gaoler of Wincheſter, and others, for procuring a Marriage between Edward Mitchel and Cornelia Holton; and the Charge againſt the Defendants was, that Edward Mitchell being a Scholar at Wincheſter-School, the Defendants did entice and perſwade him to leave his Father, and to come to Thorp's Houſe, and there did procure and compel the ſaid Edward Mitchell to drink ſtrong Liquors, and to be drunk, and then did introduce the ſaid Cornelia Holton (a Perſon of ill Fame, and worth nothing) into the ſaid Mitchell's Company, and by fair Speeches did procure the ſaid Edward Mitchell to marry the ſaid Cornelia Holton.

The Defendants were found guilty of all, except compelling the ſaid Mitchell to be drunk.

And now it was objected in Arreſt of Judgment, that the Matter for which the Defendants were convicted, was not a Crime within the Law of the Land, for 'tis a lawful Act for any Man to procure a Marriage between Perſons of lawful Age to marry; and in this Caſe Edward

Mitchell was more than fourteen Years old; and that there is no more Reason to maintain an Information at the Instance of the Father of this young Man, than for him (the Father) to maintain an * Action for the Loss of the Marriage of his Son, which (as it hath been adjudged) will not lie.

* 3 Cro. 55. 1 Leon. 50. W. Jones 411. Raym. 259.

(2.) Obj. Since the Gist of this Information consists in the unlawful Means used by the Defendants in procuring this Marriage, therefore it should specially and particularly be set forth in the Information what those unlawful Means were, that the Court might judge Whether they were so, or not.

And as to the Enticing him to leave his Father, he (the Son) was of sufficient Age to make his Election, whether to stay with him (his Father) or not; and as to the Enticing him to Thorp's House, it doth not appear but that the School-master gave him Leave to go thither.

On the other Side it was argued, that the Procuring a lawful Act to be done by any unlawful Means and wicked Practices, is an Offence punishable by the Law; and to prove that Matter, the Cases in the * Margin were cited.

Contra for the Plaintiff.

* Raym. 474. 1 Vent. 234.

Et Adjournatur.

And afterwards, in Michaelmas, 9 Will. 3. it was argued again for the Defendants, and insisted, that all Guardianships whatsoever (excepting only in Chivalry) determine at the Infant's Age of fourteen Years, that being the only Guardianship which continues to his Age of twenty-one Years, which is upon a particular Reason:

For the Defendants.

1. Because till then the Infant is not capable of performing Knights-Service.

8 Ed. 4. 6. Litt. §. 103, 108, 114.

On the other Side it was argued, that this was a great Offence, and that also in Respect to the Father, because every Father hath a Right of Guardianship of the Body of his Son and Heir, until he attain the Age of twenty-one Years; and to prove it, the Cases in the * Margin were cited.

For the Plaintiff.

* 9 Ed. 4. 55. 27 Assise, pl. 73. 33 H. 6. 55. Litt. §. 114. 1 Inst. 84. Rast. Ent. 263.

That when Tenures of Knights-Service were in Being, the Guardian in Chivalry could not have the Custody of the Body on the Marriage of the Ward as long as his Father was living; but all which such Guardian could have was the Custody of the Lands which were descended to the Infant from his Mother, or other collateral Ancestor.

1 Inst. 75. Fleta, lib. 1. 13.

Cro. Eliz. 769. Sid. 387.

Now the true Reaſon of Guardianſhip is not with Reſpect to the Benefit of the Lord by Tenure, but with Reſpect only to the good Education of the Infant.

And there is a Difference between an Action on the Caſe brought by the Father Quare filium & hæredem ſuum rapuit, and an Information, as here, for the later is to puniſh the Offence, but the firſt is to recover Damages.

Et per Holt Ch. Juſtice, The true Reaſon why by the Law of England the Father hath not the Guardianſhip of his younger Children is, becauſe by our Law the younger Children cannot inherit any Thing from their Father.

That the Guardianſhip of the Father, which is a Guardianſhip by Nature, continues till the Son and Heir apparent attain to the Age of twenty-one Years, but that is with Reſpect to the Cuſtody of the Body only.

No Judgment.

Prince *verſus* Moulton. Trin. 8 Will. 3. B. R. Rot. 215. *Adjudged* Paſ. 9 Will. 3.

2 Salk. 663. Where entire Damages for a Thing which in it ſelf is impoſſible.

TReſpaſs, &c. wherein the Plaintiff declared, that upon the ſecond Day of July, Anno 5 Will. 3. &c. and from thence to the Time of the Action, he was poſſeſſed of two Meadows adjoining to a River, and that the Defendant the 2d of Auguſt, in the ſame Year, exalted his Mill-banks to that Degree, that thereby the Water overflowed his (the Plaintiff's) Meadows, per quod he loſt the Uſe and Profit of his Meadows, from the ſaid ſecond Day of July unto the Time of the Action, &c.

Upon Not guilty pleaded, the Plaintiff had a Verdict and entire Damages; and it was moved in Arreſt of Judgment, for that the Damages being entire, the Plaintiff hath recovered Damages for that which in it ſelf is impoſſible, for in his Declaration he laid the Tort, (viz. The Exalting the Mill-bank) to be done on the ſecond Day of Auguſt, and yet he alledged, that he loſt the Uſe and Profit of his Meadows from the ſecond Day of July before, which could not be by exalting the Mill-bank; for that was not done till the ſecond Day of Auguſt following; ſo the Jury having given Damages for the Whole, as the Plaintiff had laid it, the Judgment ought to be ſet aſide.

1 Vent. 103.

But on the other Side, the Caſe of * Bridges and Horner was cited, which was Treſpaſs with a Continuando from a Day before the original Treſpaſs laid in the Declaration, and entire Damages given, but upon a Motion in Arreſt of Judgment, it was held good, becauſe it was impoſſible that a Treſpaſs ſhould be continued before it began, and the Jury could not have any Conſideration of that Time. Econtra. * *See* antea. 1 Roll. Abr. 577. Allen 22. Simms *verſus* Gregory.

Holt Chief Juſtice. The Plaintiff hath laid, that he loſt the Uſe as well as the Profits of his Meadows for all the Time; now 'tis poſſible, that he may loſe the Profits, for all the Time, becauſe the Meadows might be hained up for a Cut of Hay; but he could not loſe the Uſe before the Fact done.

And after ſeveral Motions, the Judgment was arreſted chiefly upon the Authority of † Harbin's Caſe, which was; † Harbin *ver.* Green. Hob. 189. S. C. Moor 887. S. C.

If. Caſe, &c. for not grinding his (the Defendant's) Corn at the Plaintiff's Mills, and derived his Title under a Leaſe made to him, &c. 11 Jac. then ſets forth, that the Defendant at ſeveral Times from 2 Jac. to 12 Jac. did grind his Corn elſewhere, the Plaintiff had a Verdict, but could never get Judgment, becauſe the Damages were aſſeſſed for all that Time, (viz.) from 2 Jac. to 12 Jac. when the Plaintiff's Leaſe commenced, 11 Jac. and not before; ſo that Damages were given to the Plaintiff before he had any Title.

DE

Term. Sanct. Mich.

Anno 8 Willielmi 3. B. R.

The King *verſus* Hornely *and* Williams.

* 31 El. c. 1. 16 Car. 2. cap. 2.

IN the Court of Exchequer-Chamber for reverſing a Judgment given in the Court of Exchequer, according to the Statute * 31 Ed. 3. cap. 12. in the great Caſe of the Bankers of London, to whom Part of the Revenue of Exciſe was granted by King Car. 2. for Payment of perpetual Intereſt for the Sum of 600000 l. lent to him.

The Lord Keeper Somers did then declare, That the Queſtion had been put to all the Judges of England, Whether the Judgment of that Court ought to purſue the Opinion of the Majority of the Judges, and he ſaid the Judges had delivered to him their Opinions in Writing.

Ll. Holt Chief Juſtice, Powell and Eyre Juſtices were of Opinion, that the Majority of the Judges ſhould govern this Judgment.

But the Chief Juſtice Treby, Chief Baron Ward, Nevell Rokeby, Turton, Letchmere and Powis were of a contrary Opinion; and therefore the Lord Keeper pronounced a Reverſal of the Judgment in the Court of Exchequer meerly upon his own Opinion, and of Treby Chief Juſtice, and Baron Letchmere againſt the Opinion of all the reſt of the Judges.

Blackall *verſus* Eale. Acton *verſus* Eundem.

UPON a Motion in Arreſt of Judgment after a Verdict for the Plaintiffs, the Caſes appeared to be, (viz.) The firſt was a common Action of Battery brought by Blackall, who was Servant to Acton the Plaintiff in the other Cauſe; and the ſecond was an Action brought by the ſaid Acton the Maſter, for the Battery of his Servant Blackall, per quod ſervitium amiſit.

Where an impoſſible Day was laid in the Declaration, it was cured by a Verdict.

The Declarations were of Eaſter-Term, ann. 8 Willi. and in both the Fact was laid to be done on the firſt Day of February, ann. 8 Will. which was a Day not yet come, and poſſibly might never come, for that the King began his Reign on the 13th Day of February; and therefore the firſt Day of February, in the 8th Year of his Reign, will not be till February next, if the King happen to live ſo long, ſo that it was impoſſible ſuch Facts ſhould be done in the Manner as the Plaintiffs had declared; therefore by the Plaintiffs own Shewing they had no Cauſe of Action at the Time of thoſe Actions brought.

To which it was anſwered, that theſe Caſes were not like the common Caſe wherein it appears, that the Plaintiff commenced his Suit before the Cauſe of Action did ariſe; becauſe here the Time as 'tis laid appears to be impoſſible, and ſo 'tis no more than a Declaration, laying a Fact without mentioning a Day when it was done, for an impoſſible Day is the ſame with no Day; and if the Defendant had demurred to theſe Declarations, they would certainly have been adjudged ill.

But he having pleaded to Iſſue, and a Verdict againſt him, the Defect is cured by that Verdict, for 'tis a Rule, that a Verdict helps every Thing which is neceſſary to be proved upon the Trial, and without Proof of which no Verdict could be given for the Plaintiff; wherefore in theſe preſent Caſes, unleſs the Plaintiffs had proved the Battery to be done before that Time, it was impoſſible for the Jury to find the Defendant guilty, and the certain Day is no longer material ſince the Defendant is found guilty of doing the Fact; and now it ſhall not be intended, that it was done at any Time after the Action brought.

And

* Between *Lewin* and *Sorrel.* Mich. 26. Car. 2. *in B. R.* in Point.

And a * Caſe was cited, which may be ſeen in the Margin where an impoſſible Day was laid in the Declaration ut ſupra, and held good after a Verdict.

Wherefore the Plaintiffs had their Judgment.

Linſey *verſus* Sir Talbot Clerk.

In Actions *vi & armis* the *Capiatur* need not be entered by the Statute.

THE Plaintiff had a Verdict in Ejectment upon an Original in B. R. whereupon a Writ of Error was brought in Parliament; and now to prevent Error, it was moved to have the Opinion of B. R. upon the New Statute 5 & 6 W. & M. (which takes away the Capiatur Fine in Caſes of this Nature) whether ſince this Statute any Judgment, quod Defend' capiatur ought to be entered on Record of Judgments in Actions vi & armis, &c. or whether any other ſpecial Entry ought to be made in lieu thereof, and taking Notice of the Statute.

Curia.

And after Debate it was held per Curiam, that this New Statute having taken away the Fine; therefore no Judgment of Capiatur ſhall be entered againſt the Defendant, nor any Thing in lieu thereof; but that Clauſe ſhall be totally left out of the Judgment.

Patrick *verſus* Balls. Mich. 8 Willi. 3. B. R. Rot. 200. *but adjudged* Hill. 8.

In Ejectment, the Plaintiff declared on a Demiſe made by a Corporation,

IN Ejectment in C. B. the Plaintiff declared upon a Demiſe made to him by the Aldermen and Burgeſſes of Bury St. Edmond in the County of Suffolk, and did not ſet forth that it was by Deed, or under Seal of the Corporation.

and did not ſet it forth by Deed, or under the Common Seal.

†2 Cro. 613. Swadling *ver.* Piers.

Upon Not guilty pleaded, the Plaintiff had a Verdict and Judgment; and thereupon a Writ of Error was brought in B. R. and the Error inſiſted on was, that this Demiſe was void, becauſe a Corporation aggregate can do nothing but by Deed under their † Common Seal, and the Caſe in the † Margin was cited as a parallel Caſe, for that was an Ejectment for Tithes, and a Verdict for the Plaintiff; but the Judgment was arreſted, becauſe the

Plaintiff had not declared upon a Demiſe by Deed, for Tithes will not paſs without a Deed.

Sed per Curiam, Since that Caſe in 2 Cro. aforeſaid, the Law is altered as to this Point concerning Declarations in Ejectment, for now they are grounded on Fictions only.

The Judgment was affirmed.

Gillam *verſus* Harnage. Mich. 8 Will. 3. B. R. Rot. 197.

ERROR of a Judgment in the Court of Marſhalſea, and afterwards a Sci. fa. was brought againſt the Bail, wherein it was recited, that the Judgment was in the Marſhalſea-Court, Quod quidem Recordum certis de cauſis coram nobis Venire fecimus; and upon Motion this Writ was quaſhed, becauſe by the Form of it, videlicet certis de cauſis, the Record was removed by Certiorari, and they ſhall not make uſe of this Court to execute the * Judgments of other Courts, unleſs they are affirmed here on a Writ of Error.

B. R. will not execute the Judgments of inferior Courts, unleſs affirmed on a Writ of Error.

* Hutt. 117. 1 Sid. 213.

Wherefore the Plaintiff brought a new Writ of Sci. fa. altho' the Truth was, that the Record came hither by Writ of Error, but then the Sci. fa. ſhould recite thus, (viz) Quod quidem Recordum coram nobis cauſa Erroris corrigend. Venire fecimus.

DE

DE

Term. Sanct. Hill.

8 Willielmi 3. B. R.

Hicks *verſus* Woodeſon. *Adjudged* Hill. 8.

Libel for Tithes of Agiſtment for Cattle, a Cuſtom was ſuggeſted.

THE Plaintiff Woodeſon, Rector of Huntſpill, within the Hundred of Huntſpill in the County of Somerſet, libelled in the Spiritual Court againſt Hicks, for the Tithes of Agiſtment of Cattle, not uſed for the Plough or the Pail.

And Hicks moved for a Prohibition upon a Suggeſtion of ſeveral Modus Decimandi as to other Demands of Tithes, and as to the Agiſtment of Cattle, he ſuggeſts a Cuſtom Time out of Mind, within the Hundred of Huntſpill, that no Tithes were ever paid to any Rector or Vicar of any Pariſh within that Hundred, for the Agiſtment of any Cattle not uſed for the Plough or Pail.

And hereupon a Prohibition was granted, and the Plaintiff declared upon this Cuſtom in non Decimando, which (amongſt others) was put in Iſſue; and it was at Wells, Summer Aſſizes, Anno 1695, where the Jury found the Cuſtom as the Plaintiff in the Prohibition had laid it.

Selden 236, 407. Hob. 295. 2 Bulſt. 285. Hetley 111. 13 Rep. 13.

But notwithſtanding this Verdict, Woodeſon moved for a Conſultation as to ſo much which concerned the Agiſtment of Cattle, alledging, that this Cuſtom in non Decimando was void, for that no Preſcription or Cuſtom could eſtabliſh a Non Decimando.

Et per Curiam, 'Tis a void Cuſtom, and ſo a Rule was given for a Conſultation, nullo habito reſpectu to the Verdict. Cuſtom in *Non Decimando*, not good, unleſs 'tis for Tithes of Wood.

And in arguing this Caſe, it was much inſiſted on, as well by the Court as the Defendant's Counſel, that there is not any Caſe to be found in the Books, of a Cuſtom in non Decimando, excepting for Wood in the Welds of Kent and Suſſex, which was no Authority for allowing ſuch a Cuſtom as to any other Thing, which was titheable of common Right.

For per Curiam, Wood is not titheable of common Right, being Part of the Freehold, but 'tis titheable by Cuſtom only; quod nota. 1 Roll. Abr. 653. 1 Roll. Rep. 22.

For if Wood is titheable only by Cuſtom, and not of common Right, then all the Libels for Tithe Wood ought to be founded on the Cuſtom alledged; and if ſo, then there could be no Suggeſtion of a Modus Decimandi againſt a Libel for Tithe-Wood, for it would be abſurd to ſuggeſt one Cuſtom againſt another, for one and the ſame Thing; for if the Duty ariſes by Cuſtom only, it cannot be diſcharged by another contrary Cuſtom; and yet many ſuch Modus's have been allowed againſt Libels for Tithe-Wood. Ideo quære. March 25. 1 Sid. 321, 361. Litt. Rep. 151.

The King *verſus* Rees.

MAndamus to the Archdeacon of St. Aſaph, to ſwear Rees a Church-warden of the Pariſh of, &c. within his Archdeaconry, for the Year enſuing, he being duly elected by the Pariſhioners, &c. according to Cuſtom there uſed Time out of Mind. 5 Mod. 325.

The Archdeacon, in his Return to this Mandamus, confeſſed the Cuſtom, and that the Right of Election was in the Pariſhioners, and that Rees was elected and nominated Church-warden according to the Cuſtom.

Then he certified, that this Rees was a poor Dairy-man, and had no Eſtate, and that he was perſona minus habilis & idonea for that Office, therefore he refuſed to ſwear him.

Sed per Curiam, A peremptory Mandamus ſhall go, for an Archdeacon hath no Power to refuſe the Swearing a Church-warden, who was duly elected and nominated according to Cuſtom.

Liſle's *Caſe.*

1 Salk. 60. Proceedings in an Appeal for Murder.

Lieutenant Liſle was indicted at the Summer Aſſiſes at Carliſle, for the Murder of one Armſtrong, and found guilty of Manſlaughter, and acquitted of the Murder; and immediately after the Verdict the Brother and next Heir of the Deceaſed, exhibited his Bill of Appeal inſtanter againſt the ſaid Lyſle, before the Juſtices of Gaol-delivery there; and he was arraigned upon the Appeal forthwith, and being put to anſwer he refuſed to plead; and nothing more was done upon the Verdict or Appeal at that Aſſiſes, but Lyſle continued in Cuſtody at Carliſle, until Michaelmas-Term, 1696.

And then the Court of B. R. was moved for a Certiorari, and for an Habeas Corpus, the one to remove the Indictment, and the other to remove the Perſon hither, which was granted, tho' oppoſed by the Appellant; and about the later End of this Term the Writs were returned; and Lyſle was brought to the Bar in Cuſtody; and the Record of the Indictment, Conviction, and alſo of the Appeal, were likewiſe brought into Court, and the Returns filed, and Lyſle was committed to the Marſhal.

Then it was debated concerning the Matter of the Appeal, (viz.) Whether it was neceſſary that the Appellant ſhould appear at that Time in Court, and pray to have the Priſoner arraigned de novo upon the Appeal; and if ſo, then whether it was neceſſary for him to appear in propria perſona, or whether he might do it per Attornatum.

Curia. Et per Curiam, In Caſes where an Appeal is commenced below, and afterwards removed, as in this Caſe, 'tis neceſſary that the Priſoner ſhould be arraigned de novo, upon the ſame Bill of Appeal, and not to exhibit a new Bill againſt him here in cuſtodia Marr. &c.

And that the Appellant was not demandable at this Time, becauſe by the Certiorari he had no Day in Court, and therefore in ſuch Caſe the only Courſe is, for the Priſoner to ſue out a Writ of Scire facias againſt the Appellant, reciting the whole Matter, and ſo to warn him to appear at a Day certain, to proſecute his Appeal in this Court; and then if the Appellant ſhould make Default

fault on that Day, the Court upon Demand might nonſuit him, but not otherwiſe.

Sed per Curiam, The Appellant may come in gratis, if he will, and proſecute his Appeal without a Sci. fa.

Afterwards Hill. 8 Willi. the Priſoner being brought again to the Bar, it was moved that he might be bailed, becauſe he had lain more than a Year in Cuſtody; and the Appellant refuſed to come in gratis to proſecute his Appeal.

But this was oppoſed by the Appellant, and a Warrant of Attorney was produced from him, and it was moved, that it might be filed, and then the Appellant would proceed per Attornatum.

But the Court at that Time would not give Leave to file this Warrant, for they were not ſatisfied whether the Appellant could make his Attorney or not before he had once appeared here in propria perſona, for afterwards it was clear he might make his Attorney; for the Defendant could not wage Battle in this Appeal, becauſe he was convicted of Homicide, and this depended upon the Conſtruction of the Statute 1 H. 7.

Then it was moved in Behalf of the Appellant, that Lyſle, before he was bailed, on the Conviction, might give Bail on the civil Side to anſwer the Appellant.

Sed per Curiam, He ſhall be bailed on the Crown-Side to appear de die in diem, and that could be no Inconvenience to the Appellant; for he might proceed againſt him upon the Appeal at any Time, and he was bailed accordingly.

Afterwards 1 die Febr. Lyſle appeared at the Bar again, and then the Solicitor General (by the Procurement of Lyſle) moved the Court in Behalf of the King, that Lyſle might be demanded what he had to ſay why Judgment ſhould not be awarded againſt him upon the Verdict ſupra, and having procured the Ordinary to attend with his Book to be ready upon his praying the Clergy.

But this was oppoſed by the Appellant's Counſel, for if Clergy ſhould be allowed him, the Appeal would be at an End; becauſe Autrefoits convict of Homicide, and Clergy had, is a good Bar to an Appeal.

And at another Day he was demanded by the Court ut ſupra, and he prayed the Benefit of Clergy, and had it, & legit ut Clericus & cauterizatur.

Dalbury & Foſton *Pariſhioners in Com.* Derby.

5 Mod. 330. What Notice is neceſſary to be given of a poor Man's coming into a Pariſh.

TWO Juſtices made an Order for the ſettling Robert Blood and his Wife, reciting that he was by Trade a Smith, and that at ſuch a Time he came from Dalbury, the Place of his Birth, into the Pariſh of Foſton, and there rented a Smith's Shop of a ſmall yearly Value, and wrought at his Trade for a whole Year, and was employed by moſt of the Inhabitants there, and particularly by one Everard a Juſtice of Peace; and therefore they adjudged that this amounted to Notice as required by the Statute 2 Jac. and for this Reaſon, they by this Order ſettled him at Foſton.

And upon an Appeal to the Seſſions from this Order, in which all the Matter ſupra was ſpecially ſet forth, it was held, that this did not amount to ſuch Notice as was required by the Statute, therefore they vacated that Order.

And now the Seſſions Order being removed into B. R. by Certiorari, it was moved, that it might be quaſhed, for that this Matter appearing in the Order, did in Law amount to Notice ſufficient within the Meaning of that Statute.

Sed per Curiam, All this Matter will not ſupply the Notice which is now required by the explanatory Statute of W. & M. and they diſtinguiſhed thus:

ff. That when one Act is made Explanatory of another, this Court cannot carry the Explanation farther then is expreſſed in that Act; but upon an original Statute, the Court will make Conſtruction according to Equity.

Wherefore the Order of Seſſions was confirmed.

Chamberlain *verſus* Harvey. Intratur Trin. 7 W. 3. *adjudged* Hillary 8.

5 Mod. S. C. Treſpaſs will not lie for taking away a Negro.

TReſpaſs, &c. for that the Defendant vi & armis unum Æthiopem (Anglice vocat') a Negro ipſius querentis pretii 100 l. apud London', &c. took and carried away, and kept the Plaintiff out of Poſſeſſion of the ſaid Negro from that Time uſque diem exhibitionis Billæ prædict' per quod he (the Plaintiff) loſt the Uſe of his ſaid Negro.

Upon Not guilty pleaded, the Jury gave a ſpecial Verdict, the Subſtance whereof was as followeth:

ſſ. They find that the Negro had been baptized after the Taking, &c. and the Matter was argued upon that Point, (viz.) Whether the Baptiſm was a Manumiſſion, and as to that the Court gave no Opinion.

Sed per Curiam, An Action of Treſpaſs will not lie, becauſe a Negro cannot be demanded as a * Chattel, neither can his Price be recovered in Damages in an Action of Treſpaſs, as in Caſe of a Chattel; for he is no other than a ſlaviſh Servant, and the Maſter can maintain no other Action of Treſpaſs for taking his Servant, but only ſuch which concludes per quod ſervitium amiſit, in which the Maſter ſhall recover for the Loſs of his Service, and not for the Value, or for any Damages done to the Servant.

* 2 Lev. 201. Adjudged on a ſpecial Verdict, that *Trover* did not lie for a Negro.

Judgment quod querens nil capiat per Billam.

Boreham *verſus* Waltham, *Pariſhes in* Suſſex.

THE Caſe was, Heſter Wood an unmarried Woman being big with Child, was by an Order of two Juſtices removed from Waltham to Boreham as her laſt Place of Settlement, from which Order Boreham appealed; but before the next Seſſions, ſhe was delivered of this Baſtard Child at Boreham; and afterwards the Order of the two Juſtices was vacated upon the Appeal, and upon that the Woman and her Child were ſent back to Waltham.

A Baſtard Child born pending the Appeal.

Then two Juſtices made a new Order, by which the baſe Child only was ſent to Boreham, becauſe it was born there; which Order being removed into B. R. by Certiorari, it was moved to quaſh it.

Sed per Curiam, The Child ought to follow the Mother in this Caſe, becauſe Boreham could not remove the Woman (who was ſent thither by an Order) till the Appeal was determined; ſo they had no Remedy to prevent the Birth of the Child in their Pariſh.

Parker

Parker *verſus* Mellor, & al'. Hill. 8 Will. 3. B. R. Rot. 59.

In Replevin the Defendant pleaded Property in another, &c.

IN Replevin, &c. for taking two Heifers,

The Defendants plead in Bar, that at the Time of the Taking, &c. the Property of theſe Heifers was in one John Bamford, abſque hoc, that the Property of them was in the Plaintiff, Et hoc parat' eſt verificare unde petit judicium ſi prædict' R. Parker actionem ſuam prædict' inde verſus eos habere ſeu manutenere debeat & petunt etiam Retorn' averiorum ſibi adjudicari, &c.

See Antea. Butcher *verſus* Porter. *The like Opinion.* 39 H. 6. 35. 2 Cro. 519. 2 Roll. Rep. 64.

And upon a Demurrer to this Plea, it was adjudged Paſch. 9 Will. 3. that this was a good Plea in Bar; and that the Defendant ſhould have a Return of the Cattle awarded, without any ſpecial Suggeſtion for that Purpoſe.

The King *verſus* Broom.

Ship condemned in the Court of Admiralty as Prize.

BROOM being Maſter of a Ship belonging to the African Company, he in the Northern Parts of Guinea (near a Port called Biſaw) took a French Ship on the high Seas richly laden, the French being then at Enmity with us.

As ſoon as this Matter came to the Knowledge of the Admiralty in England, a Libel was exhibited in the Court of Admiralty (in common Form) againſt the Ship ſo taken, and her Loading, and againſt Broom, & contra omnes, &c.

And after the uſual Notice upon the Exchange, this French Ship and Goods were, by Sentence of the Court of Admiralty, delared as lawful Prize; and hereupon Franklin the King's Proctor in that Court exhibited a Libel againſt Broom to call him to anſwer the King the Value of the Prize.

See Poſtea. Brown *verſus* Franklin.

In this Libel the Matter of Fact was ſet out at large, and that the Taking was upon the high Seas, but that preſently after Broom ordered the ſaid Prize-Ship, and Part of the Goods, to the Iſland of Barbadoes, and there ſold them; and that he had ſold and converted all the reſt to his own Uſe, and then the aforeſaid Sentence was ſet out; and upon the Whole, that Broom might account and anſwer for the Value to the King. To

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To this Broom pleaded in the Court of Admiralty, and inſiſted, that he was not the Maſter of the Engliſh Ship which took this Prize, but that one John Brooker was the Maſter, and he but Lieutenant; nevertheleſs there was a Sentence againſt Broom to anſwer the Value of 3000 l. to the King, from which Sentence he appealed to the Court of Delegates; and after his Appeal, (viz.) Paſch. 9 Will. 3. Broom moved the Court of B. R. for a Prohibition, ſuggeſting, that by the firſt Sentence of Condemnation as Prize, the Property of the Ship and Goods were veſted in the King, ſo as he might and ſhould have his Action to recover, &c. in the Courts of Common Law, where Property ought to be determined; and thereupon a Rule was made for a Prohibition, niſi, &c.

Yelv. 134, 135. Cro. Eliz. 685. 2 Saund. 259. 1 Sid. 320. *See* antea Edmondſon *v.* Walker.

And in Trin. 9 Will. 3. this Matter was fully debated; and it was inſiſted by the Counſel for Broom, that this ſecond Libel againſt him was in Lieu of an Action of Trover, of which the Court of Admiralty cannot hold Plea.

1 Roll. Abr. 532. 2 Roll. Rep. 80. Cro. Car. 69. Latch 253. 1 Vent. 173.

Winch 8. 2 Brownl. 34. 12 Rep. 77. 2 Roll. Abr. 319.

Sed per Curiam, It was anſwered and reſolved, that no Prohibition ſhall go, becauſe the Court of Admiralty had Juriſdiction of the original Cauſe, which was the Capture upon which the King's Title immediately accrued, and the Embezilment was immediately upon the Capture, and ſo all was but one continued Act; and this ſecond Libel was but a Continuance of the firſt Suit, and a Charge grounded on the firſt Sentence by Way of Execution thereof.

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Term. Paſchæ.

Anno 9 Willielmi 3. B. R.

Duke of Norfolk *verſus* Alderton.

Viſne not changed in an Action for Scandal.

THE Duke brought his Action qui tam, &c. upon a Scandalum Magnatum, and laid the Action in Middleſex, and the Defendant moved to change the Viſne into the County of Suſſex, upon the common Affidavit, that the Words (if any ſuch) were ſpoken there.

* 1 Vent. 363.

And the Lord * Shaftsbury's Caſe was cited, where in the like Action laid in London, the Viſne was changed into Middleſex.

Sed per Curiam, That was becauſe of the great Influence that Lord had at that Time in London.

So the Motion was denied.

What ſhall be an Hiring and what a Service.

Cheſterfield *verſus* Hamlet of Walton.

5 Mod. 328. 2 Salk. 478.

UPON a Motion to quaſh an Order of Seſſions for the County of Derby, by which an Order made by two Juſtices was confirmed; and by which one Jerriſon and his Wife were ſettled in the Hamlet of * Walton, which lies within the Pariſh of Cheſterfield, which Order of Seſſions was ſpecial, reciting, that this Jerriſon had been a Foot-boy to Sir Paul Jenkinſon, who lived in the Hamlet of Walton, ſo long as to gain a Settlement there, (viz.) For three Years, and more.

* *Nota, Walton* maintains its own Poor diſtinct from the Pariſh of *Cheſterfield.*

Then Sir Paul put him out to one Thorpe, a Barber, (who lived in Cheſterfield, but out of the Hamlet of Walton) for one Year, to learn to Shave, and the Barber was to have the Benefit of the Boy's Work, and that Sir Paul gave the Maſter ſome Money to teach the Boy to ſhave, who lived with the Barber accordingly in the ſaid Pariſh for one Year; but no Notice of his coming was given by him to the Pariſh, nor any Warning from them to him.

The Queſtion was, If this made a Settlement of the Boy in the Pariſh of Cheſterfield, as an hired Servant, within the Intent of the * explanatory Statute, concerning the Settlement of poor People.

* 3 & 4 Will. & Mar.

Et per Curiam, This is not ſuch an Hiring or ſuch a Service as is within the Intent of the Statute, becauſe here was no reciprocal Contract between the Boy and the Barber, for the Boy was not obliged to ſtay in the Service of the Barber, and he had no Remedy to compel him to ſerve; and every Hiring within that Statute muſt be reciprocal; but here the Boy was in Nature of a Scholar, and not of a Servant, ſo the Order of Seſſions was affirmed.

Puleſton *verſus* Warburton.

IN Ejectment tried at Bar, in which the Plaintiff had a Verdict in Michaelmas-Term, Anno 8 Will. 3. 1696. and now it was moved to amend the Declaration, it being delivered as of Trinity-Term before; and the Demiſe upon which the Plaintiff declared, was laid to be made 10 April, Anno 1697, inſtead of 1696. Habendum from the 25th of March then laſt paſt, ſo that the Trial appeared to be had half a Year before the Demiſe, upon which the Plaintiff declared; and now it was moved to ſtrike out the Word Septimo and put in Sexto; and a Rule of Court was produced between * Parr and Cawley, where, after Error brought upon a Judgment by Confeſſion in Ejectione firmæ, ſuch Amendment was made in the Declaration; but that being a Judgment by Conſent of Parties, was held to be no Authority in this Caſe.

5 Mod. 332. 1 Salk. 48. Where it was denied to amend a Declaration in Ejectment.

* 1 Mod. 250, 252.

Sed per Curiam, This ſhall not be amended, and therefore a new Trial was had at Bar between the ſame Parties in Michaelmas-Term, 9 Will. 3. &c.

Nota, The Declaration in Ejectment between Thompſon and Leech, amongſt other Things, was of ſo many Acres Ligni inſtead of Boſci; and before that Cauſe was tried at Bar, it was moved to amend it, but it was denied, and therefore the Jury were informed to find ſeparate Damages as to that particular.

And in the Caſe of Hutchins and Baſſet, the Court denied to enlarge the Term in Ejectment, which after a ſpecial Verdict was expired, without the Conſent of Sir William Baſſett; but in the Caſe of * Dighton and Greenvill the Term was enlarged, tho' the Defendant refuſed to conſent.

* *See* antea.

Chumley *verſus* Broom.

5 Mod. 335. Plea to the Juriſdiction of the Court is never ſworn, but a foreign Plea is. Style 225. Litt. Rep. 236. 1 Sid. 330. 1 Saund. 97. 1 Mod. 81.

An Action of Debt was brought in B. R. and the Plaintiff laid the Viſne in ſuch a Place within the County Palatine of Cheſter, which County was alſo in the Margin of the Declaration.

The Defendant did not imparl, but pleaded by Attorney, that he is, and at the Time of the Action brought, was reſident at the ſaid Place within the ſaid County Palatine of Cheſter, and ſo prayed Judgment, if the Court of B. R. ought to hold Plea of this Matter.

But the Plaintiff rejected this Plea, becauſe it was not ſworn by the Defendant (taking it to be a Foreign Plea) and therefore he ſigned Judgment for Want of a Plea.

Sed per Holt Ch. Juſtice, A Foreign Plea is where the Action is carried out of the County where 'tis laid, which in this Caſe was not done, ſo that this is only a Plea to the Juriſdiction of the Court, which is never ſworn; ſo the Judgment was ſet aſide.

Fiſher *verſus* Pomfrett.

THE Caſe was, ſ. a Bill of Exchange payable to T. S. who endorſed it in this Manner.

Bill of Exchange indorſed, and made payable to *the Order* of the Plaintiff.

ſ. Pay the Contents of this Bill unto the Order of Mr. Fiſher, who brought his Action as Endorſee, averring he had made no Order to any Body to receive the Money.

The Defendant demurred to the Declaration, ſuppoſing that Fiſher could not maintain the Action, becauſe the Indorſement was not to him, but to his Order.

Sed per Curiam, The Action is well brought againſt the Indorſer, for amongſt Tradeſmen this Form of Indorſement is commonly uſed, altho' 'tis intended to be made payable to the Perſon whoſe Order is mentioned.

The Plaintiff had Judgment.

Whaley *verſus* Reynolds, & al'. Intratur Paſch. 9 Will. 3. B. R. Rot. 113.

SCI. fa. reciting that Whaley alias ſcil't Termino Sancti Hillari anno 7 Willi. implacitaſſet per Billam ſine Brevi Johannem Lawrence, &c. pro eo videl't quod cum, reciting the whole Declaration in an Action on ſeveral Promiſes, and concluded in the preſent Tenſe, unde dicit quod deteriorat' eſt & damnum habet, &c. Cumque pendente Billa prædicta ſcil't Termino Paſchæ extunc prox' ſequen' Johannes Reynolds & Thomas Lindſey became Bail (as in common Form) Cumque etiam poſtea in eadem Curia, &c. taliter ſuperinde proceſſum fuit, that Whaley recovered againſt Lawrence 17 l. 14 s. 6 d. &c. and ſo concluded in common Form, &c.

Whether the Bail ſhall be permitted to aver againſt the Record.

The Defendants appeared and pleaded in Bar, quod tempore Exhibitionis Billæ prædict' by Whaley againſt Lawrence, ſeu ad aliquod tempus infra prædict' Terminum Sancti Hillari anno 7 ſupradicto, the ſaid John Lawrence non fuit priſonarius in Cuſtodia Marr' hujus Curiæ & hoc, &c.

And upon a Demurrer to this Plea, the Queſtion in Law was, Whether the Bail ſhall be permitted to aver againſt the Record in the original Action where the Declaration was againſt Lawrence in Cuſtodia Marr' in Hillary-

Term ann. 7 Willi. now if he was not in Cuſtody in that Term, as the Defendants in their Plea have averred, then this Bail cannot be taken to be in the ſame Action.

And the Court inclined againſt the Plea, but afterwards this Sci. fa. was quaſhed, becauſe the Declaration was all ſet out by way of Recital; but was concluded in the preſent Tenſe ut ſupra, ſo the Matter in Law was not determined.

DE

Term. Sanct. Trin.

Anno 9 Willielmi 3. in B. R.

Penoyer *verſus* Brace.

5 Mod. 338. 1 Salk. 319. Judgment againſt ſeveral Defendants, who all join in a Writ of Error, and before the Return one died; the Writ is abated.

IN Aſſault and Battery againſt ſeveral Defendants, and Judgment againſt all of them; they all join in a Writ of Error, and then one of them died before the Return of that Writ, which the Plaintiff in the original Action perceiving, he forthwith took out Execution upon the Judgment againſt the Survivors, without ſuing out a Sci. fa. againſt them, and took the Goods in Execution.

And now it was moved to have Reſtitution, for that in this Caſe there ought to have been a Sci. fa. againſt the ſurviving Defendants before any Execution ſhould go againſt them; but if it ſhould be otherwiſe, yet the Plaintiff in the Action could not in this Caſe take out Execution without Leave of the Court, becauſe a Writ of Error was ſued forth and allowed, and thereby all Execution ſuperſeded.

Sed

Sed per Curiam, After ſeveral Debates it was reſolved, that Execution might be taken out againſt the ſurviving Defendants without a Sci. fa. againſt them, for 'tis not neceſſary.

Iſham's *Caſe*. Moor 367. 2 Inſt. 471. 21 H. 7. 16. *b*. Dyer 175. Noy 150. Carter Rep. 112, 193.

But here being a Writ of Error brought and allowed, and the Execution once ſuperſeded, the Plaintiff in the Action cannot ſue out Execution until the Court is informed of the Abatement of the Writ of Error, by the Death of one of the Plaintiff's in Error, before the Return of the Writ; for in Strictneſs, that Matter ought to be ſuggeſted on Record, and the Court ought to adjudge the Writ abated, &c.

Reſtitution was awarded.

The King *verſus* Paine.

THE Defendant being a Clergyman in Briſtol was indicted there, for compoſing, making, writing, and publiſhing a ſcandalous Libel upon the King and late Queen, and their Government; which Indictment being removed into B. R. and carried down to be tried at the Niſi prius, it was tried accordingly, and the Jury acquitted the Defendant as to the Publiſhing the Libel, and as to the reſt they found a ſpecial Verdict to this Effect:

5 Mod. 163. 1 Salk. 281. Whether Writing a Libel ſhall be the Making it.

If. That the Defendant did write this Libel dictated to him by a Perſon unknown to him, and to the Jury; and that the ſaid Stranger dictated all the ſubject Matter according as he (the Defendant) wrote it.

The Queſtion was, Whether this doth amount in Law to a Compoſing and making a Libel.

And it was argued againſt the Defendant, that the Writing the Matter is the Making the Libel, for tho' 'tis never ſo bad, 'tis no Libel till written; for 'tis Writing which is the eſſential Part of a Libel, and the Caſe de * Libellis famoſis was relied on.

* 5 Rep.

On the other Side it was ſaid, that the Writing is Evidence proper to be given to a Jury to induce them to believe, that the Writer did make and compoſe the Libel; but here the Jury have diſtinguiſhed the Compoſing from the Writing, for they expreſly find that the Words were dictated to the Defendant by another Perſon; and if another did compoſe the Words, then the Defendant did not, and * Lamb's Caſe was cited where there is a full Deſcription

Contra for the Defendant.

* 9 Rep. 59.

tion and Definition of a Libel and a Libeller, but it doth not extend to the principal Case. Moor 813.

And as to the Transcribing a Libel, the Cases in the * Margin were cited.

*Hob. 62. 215. Poph. 139. 12 Rep. 35. Cro. Car. 125. 3 Inst. 174. 1 Vent. 31.

Then it was objected as to the Verdict, (viz.) That the Jury have left a Matter of Fact undetermined; for 'tis laid in the Indictment, that the Defendant did make, compose, write and publish this Libel seditiously, and with an Intent to subvert the Government; and they have found nothing as to the Intent, like an Indictment for Perjury, if the Jury find only the false Swearing, and say nothing as to the Corruption and Malice, the Verdict is imperfect and void, and so here.

Curia: This Case differs from transcribing a Libel, for here it appears, that this was the first Time the Matter was reduced into Writing, for it was written from the Mouth of the Author, so that the Writing seems to be the very making this Libel.

He who dictated cannot be indicted for making this Libel, because he did not write it; then if the Defendant cannot be punished, this Crime is unpunishable.

The King *versus* Peckham.

Where Time in a Statute is expressed by the Year, it shall be computed by Solary Months; but where Months are mentioned, it shall be Lunary Months.

MOVED to quash a Conviction for Deer-Stealing, made by a Justice of Peace upon the Statute 3 & 4 Willi. the Exceptions were;

1st. That by the Words of the Statute, the Prosecution ought to be within twelve Months after the Fact; but by this Conviction it appears that twelve Lunary Months were expired after the Fact, and before any Prosecution commenced.

(2.) That Aylesworth, which was the Place where the Fact was laid to be done, is not expressed in the Conviction to be a Parish, which ought to appear to be a Parish, because one Part of the Penalty is given to the Poor of the Parish where the Fact was committed.

And now the Record of the Conviction being produced, it appeared that the Prosecution was commenced before the End of 12 Kalendar Months, but after the End of 12 Lunary Months; and thereupon a Question did arise in what manner the Months mentioned in this Statute should be computed, either by the Sun or the Moon.

And

And this Difference was taken, to which the Court agreed, (viz.) Where Time mentioned in any Statute is expreſſed by the Year, half Year, or Quarter of a Year, 'tis always computed in Law by ſolary Months, (viz.) twelve Kalendar Months for a Year; but where Months are mentioned in a Statute, and not Years, thoſe are always computed by the Moon, (viz.) Four Weeks to the Month; therefore this Statute appointing the Proſecution to be within twelve Months after the Fact; and twelve Lunary Months being expired before any Proſecution, for that Reaſon the Conviction was quaſhed.

Hob. 179. 2 Inſt. 320. 2 Roll. Abr. 522. 2 Cro. 167. 1 Sid. 186.

No Notice was taken of the ſecond Exception.

The King *verſus* Bear.

Indictment for a Libel containing Words *Juxta tenorem & ad effectum*, good.

THE Defendant was indicted at the Summer Aſſizes in Exceſter, Anno 8 Will. 3. for libelling the King and Government; and the Indictment was in this Form following:

ſſ. After the Introduction and Words of Aggravation, with Reſpect to the King, as uſual in ſuch Caſes, it was laid.

That he (the Defendant) 19 Octob. 7 Will. 3. at Buckland all Saints in the County of Devon, ſubdole falſo & malitioſe compoſuit ſcripta & fecit & componi ſcribi & fieri cauſavit ac ſibi procuravit & induſtrie collegit ſeparal. ſcandaloſos falſos & ſeditioſos libellos continen. in ſe de dicto Domino Rege nunc & ejus æqua juſta & clementiſſima gubernatione quamplurima falſa malitioſa & ſeditioſa verba & ſententias materias diction. & expreſſion. (viz.) in uno libello eorum intitulat. The Belgick Boar, to the Tune of Chivy-Chaſe, continetur inter alia juxta Tenorem & ad effectum ſequen. (videlicet) reciting the Words in Engliſh, and after that ſeven other libellous Ballads were ſet out in the Indictment in the ſame Manner as the Firſt, with juxta Tenorem & ad effectum ſequen', and then the Indictment was thus concluded, (viz.) Quos quidem falſos & ſcandaloſos Libellos (quorum diverſi fuerunt impreſſi) ipſe prædict. Johannes Bear adtunc & ibidem ſcilicet eodem 19 die Octob. Anno 7. ſupradicto apud Buckland tout Saints prædict. & diu poſtea in manibus & cuſtodia ſuis & penes ſe ſcienter & adviſate clandeſtine & ſeditioſe habuit & cuſtodivit in promptu & parat. ad eoſdem inter ſubditos dicti Domini

Domini Regis & factioſas ſeditioſas & malitioſas perſonas diſpergend. divulgand. & publicand.

This Indictment being removed into B. R. it was ſent down to be tried by Niſi prius, and the Jury found the Verdict following:

ſſ. Quoad ſcriptionem & collectionem libellorum in indictamento mentionat. tantum quod defendens eſt culpabilis & quoad totum reſiduum in eodem indictamento content. quod defendens non eſt inde culpabilis.

And now it was moved in Arreſt of Judgment, and two Objections were made for that Purpoſe.

(1.) Firſt as to the Form of the Indictment, for that the Charge which was laid to the Defendant was not ſo certain and particular as it ought to be, for the Libels are not ſet forth in hæc verba, as they ought, neither is the Defendant charged directly with the Writing or Making the very Words and Sentences expreſſed in the Indictment, but only, that he made and wrote Libels, in which inter alia continetur juxta Tenorem & ad effectum ſequen.

So that it appears the Words ſet forth in the Indictment are not the very Words which the Defendant did write, but other Words ſecundum effectum & tenorem of the Defendant's Words; now no Perſon hath Power to judge criminally of the Effect of a Man's Words, for that muſt be left to the Law; and how is it poſſible that the Law ſhould make any Judgment of the Effect of Words, unleſs the very Words themſelves ſpoken or written are ſet down in the Record; and it would be of very dangerous Conſequence in a Courſe of Juſtice, if it ſhould be in any Man's Power to make a Conſtruction of another Man's Words and Expreſſions, ſo as the Law ſhould judge upon ſuch Conſtruction; for if that ſhould be admitted, then every Man would be at the Mercy of his Enemy; for they would not be judged upon their own Words and Meaning, but upon a wreſted Expoſition of their Adverſaries.

Therefore to prevent this Miſchief, the Law hath always been very ſtrict in Indictments, and in Actions on the Caſe for Words or Libels, requiring the very Words and Expreſſions in the Record to be punctually proved, otherwiſe the Defendants have always been acquitted.

'Tis true, a Libel in Engliſh Words, may in the Indictment or Action be tranſlated into Latin, but then it muſt be directly and poſitively alledged, that the Defendant fecit or ſcripſit, or dixit, &c. but not juxta tenorem & effectum; for

that is no Allegation of Matter of Fact directly, but only by Way of Conſtruction and Expoſition of the Senſe and Meaning, &c. Wherefore it was inſiſted, that this Indictment ought to be quaſhed for this Reaſon.

(2.) Obj. was to the Verdict, (viz.) That no Judgment ought to be given againſt the Defendant upon this Verdict, becauſe the Jury had acquitted him of all that Part of the Indictment which was criminal, and found him guilty only of writing and collecting Libels, which is rather a Folly than a Crime.

And here the Writing cannot be taken to be Making or Compoſing the Libel, as it was inſiſted on in Paine's Caſe, for the Jury have expreſly found, that he did not make or compoſe the Libels, nor intend to publiſh them; ſo that all which is found, is no more than that the Defendant did copy, tranſcribe and collect thoſe Libels which were made and compoſed by Another, which the Defendant never did, or intended to publiſh; and in Lamb's Caſe, 'tis expreſly reſolved, that the Defendant muſt be found to be either the Contriver or Procurer, or Publiſher of a Libel, otherwiſe he cannot be convicted for a Libeller; and the Defendant in this Caſe is not found guilty of any of theſe Things, and therefore not a Libeller in Conſtruction of Law.

Sed per Curiam, It was agreed, that if the Indictment had been for a Libel, containing inter alia ad effectum ſequen. it would have been naught, but that juxta tenorem ſequen. would have been good, becauſe Tenor is the ſame as hæc verba; and 'tis good notwithſtanding the Clauſe inter alia, becauſe the Words laid in the Indictment are not capable of any Qualification by other Words, ſo as to excuſe the Crime. Curia. 1 Sid. Thinn's *Caſe*. Reg. 169.

That upon Indictments thus laid by Way of Juxta tenorem & ad effectum ſequen. the very Words laid in the Indictment, and not the Subſtance and Effect of them, muſt be proved as ſtrictly as if laid to be in hæc verba.

That the Tranſcribing and Collecting this libellous Matter was highly criminal, without publiſhing it, and that it was of dangerous Conſequence to the Government; for tho' the Writer or Collector never publiſhed theſe Libels, yet his having them in Readineſs for that Purpoſe, if any Occaſion ſhould happen, is highly criminal; and tho' he might deſign to keep them private, yet after his Death they might fall into ſuch Hands as might be injurious to

the Government, therefore Men ought not to be allowed to have ſuch evil Inſtruments in their Keeping, &c.

Jones *verſus* Morley. Intratur 4 Jac. B. R. Rot. 146 *or* 176, *and argued* Trin. 9 Will. 3.

4 Mod. 261. 2 Salk. 677. Fine and Deed between Huſband and Wife.

THIS Caſe in Effect was as followeth:

ff. Husband and Wife were ſeiſed in Fee of Lands in Right of the Wife; and by Indenture made between them and others, bearing Date 29 January, it was recited, that a Fine was intended to be levied by the Husband and Wife of theſe Lands, by which Indenture they covenanted to levy the ſaid Fine, as of the next Hillary-Term, and then the Uſes were declared to which the ſaid Fine ſhould enure after it was ſo levied.

ff. To the Husband and Wife, and the Heirs of the Huſband.

About two Days afterwards, (viz.) 31 January, there was another Indenture executed, to which Indenture the Husband and Wife only were Parties, by which it was agreed and covenanted between them, to the Effect following:

ff. That all former Contracts, Covenants and Agreements made between them ſhould be ſuſpended, and take no Effect until the Husband ſhould ſettle ſuch a Manor upon his Wife for Life, as an Addition to her Jointure.

Afterwards the Fine was levied accordingly in the very ſame Hillary-Term, in which both the Indentures did bear Date.

The Husband did not convey his Manor according to the laſt Indenture, but died without Iſſue; and now the Queſtion was (after the Death of the Wife) who ſhould have her Lands, (viz.) Whether the Heir of the Husband, or the Heir of the Wife, who was Leſſor of the Plaintiff.

The Objections againſt the Heir of the Wife were theſe:

(1.) That the ſecond Indenture could not controul the Firſt, becauſe it was not made between all the ſame Parties, which were to the Firſt.

(2. Obj.) That the ſecond Indenture is void, becauſe it is made only between Husband and Wife, who are but one

Perſon in Law; and therefore they cannot covenant with one another, for if they do, thoſe Covenants are of no Effect.

(3. Obj.) For that the Wife hath by the firſt Indenture given her Conſent, and agreed with her Husband, that the Uſes of the Fine ſhould be as therein is declared; and therefore ſhe cannot afterwards recede, but is bound by the Limitations to which ſhe had conſented.

But it was agreed by thoſe who argued for the Defendant, that a ſecond Agreement by Deed made between the ſame Parties, if made before the Fine levied, would control the Former. *Econtra* for the Heir of the Wife.

It was argued, that the Husband and Wife are not ſo united, but that he may obliquely, though not directly make a Conveyance to the Uſe and Benefit of the Wife, (viz.) by way of Feoffment to a Stranger to her Uſe.

Now the Point of this Caſe is not with Reſpect to any ſubſtantive Deed which requires an exact Form and Parts, becauſe theſe Indentures do not convey any Thing but are only Matter of Evidence, declaring the Intent of the Parties concerning the Operation of the Fine.

And as for that Purpoſe, there can be no Reaſon why a ſubſequent intervenient Agreement in Writing without a Seal ſhould not controul a precedent Writing with a Seal; for that with a Seal doth not operate properly as a Deed to paſs or convey any Thing, but conſiſts wholly in Covenant, and 'tis at moſt but a declaratory Deed; and in this Caſe the firſt Indenture is in Strictneſs no more the Deed of the Wife, than the ſecond, becauſe a * Feme-Covert cannot make a Deed. * Dyer 307. 2 Roll. Abr. 798.

And here the firſt Indenture was not utterly defeated by the ſecond, but explained only and ſuſpended quouſque the Husband had performed his Part in conveying his Manor, &c. in Jointure to the Wife. Brigdm. 111.

Laſtly it was objected, That here was a Variance between the firſt Indenture and the Fine, for by that Indenture the Fine was to be levied the next Hillary-Term, the Indenture bearing Date 29 January, which is in Hillary-Term, ſo that the next Hill. Term muſt be a Year after; but this Fine was levied in the ſame Term with the Date of the Deed; and therefore an intervenient Parol Agreement may be averred. Gouldſ. 137. 2 Cro. 646. 2 Roll. Abr. 799.

Curia. Et per Holt Chief Juſtice, Where a Deed is made between ſeveral Parties to lead the Uſes of a Fine to be levied between ſuch Perſons, and afterwards a Fine is levied of the ſame Lands, but is different from the Deed in the Circumſtances of Quantity of Acres, Time of levying it, or Parties to the Fine; yet it ſhall operate to the Uſes of that Deed, unleſs a contrary Intent or Agreement is proved; and in ſuch Caſe a Proof of a Parol Agreement intervenient between the Deed and the Fine, that the Uſes ſhould be otherwiſe than in the Deed, ſhall be admitted, becauſe of the Variance.

But if the Fine is purſuant to the Deed which leads the Uſes thereof, and they agree in Circumſtances, in ſuch Caſe no Parol Averment of any other intervenient Agreement (without Deed) can be admitted againſt ſuch Deed; but a ſecond Deed of Uſes intervenient and agreeing alſo in all Circumſtances with the Fine, ſhall control the Firſt.

But the firſt Deed cannot be controled by any other Deed made after the Fine is levied, much leſs ſhall any ſubſequent Agreement by Parol control any precedent Deed, and in the principal Caſe if this ſecond Writing is not properly a Deed, becauſe made only between Husband and Wife; then the Queſtion will be, if it amounts to any more than an Agreement put into Writing; and if ſo, then if 'tis any other than a Parol Agreement which cannot be admitted againſt the firſt Deed.

The Plaintiff had Judgment, and upon a Writ of Error brought in the Houſe of Lords, that Judgment was affirmed.

Bacon *verſus* Dubarry.

1 Salk. 70. 2 Salk. 787. Award *ex parte* void.

DEBT upon a Bond of Submiſſion to an Award, and upon Oyer of the Condition, it appeared to be to this Effect:

ſ. It recited that there was a Difference between the Plaintiff Bacon, and one James de Rutter, who lived at Hamburgh, and that the Defendant Du Barry, as Attorney for the ſaid James De Rutter, and the Plaintiff Bacon, had ſubmitted all Matters, &c. between the Plaintiff and De Rutter unto the Arbitrators, &c. therefore if the Defendant did perform the Award then, &c.

The Arbitrators awarded, that the Defendant Du Barry on the Behalf of De Rutter ſhould pay to the Plaintiff Bacon 300 l. and that he (the Plaintiff) ſhould execute a general

Releaſe unto the Defendant Du Barry, and this Award being ſet forth in the Declaration, the Defendant demurred.

And it was argued that this was an Award only ex parte, and therefore void, for that there was nothing awarded on the Part of De Rutter who was the principal Perſon concerned, for the Differences were between him and the Plaintiff, and not between him and the Defendant; and therefore the Awarding the Plaintiff to Releaſe the Defendant ſignified nothing, becauſe De Rutter can take no Benefit by ſuch Releaſe, for he will ſtill remain liable to, and charged with the Demands of the Plaintiff Bacon; for the Award hath not determined the Differences to which the Parties ſubmitted, for thoſe were between the Plaintiff and De Rutter, and not between the Plaintiff and the Defendant.

And after many Debates upon this Cauſe, it was adjudged, that this Award was void, for the Reaſons ſupra, (viz.) it being an Award ex parte.

Sed per Curiam, The Submiſſion by the Defendant as Attorney for De Rutter is good, and would have obliged him to pay the Money awarded, if the Award had been reciprocal with reſpect to De Rutter alſo.

Submiſſion by one as Attorney for another is good.

Giles *verſus* Hart. *Argued* Trin. 9. *and adjudged in* Michaelmas-Term 9. *following.*

THIS was an Indebitatus aſſumpſit for Goods ſold, and the Plaintiff had laid in his Declaration a ſpecial Requeſt at a Day certain, which was ſubſequent to the Day in which the Promiſe was laid to be made in the Declaration.

2 Salk. 622. 'Tis a good Plea to ſay *ſemper paratus & profert hic in Curia*, without a Tender

The Defendant imparled ſpecially with a Salvis ſibi, &c. in common Form, and afterwards he pleaded in Bar to the Action, that he tendered the Money demanded to the Plaintiff on that very Day in which he had laid the ſpecial Requeſt ſupra, and from that Day forward ſemper paratus fuit to pay it, & profert hic in Curia, &c.

And upon a Demurrer to this Plea, after ſeveral Debates, it was adjudged ill.

Firſt, Becauſe it was pleaded after an Imparlance, which is contradictory to that Part of his Plea, (viz.) ſemper paratus, and the ſpecial Imparlance makes no Difference,

ference, for it appears thereby, that he was not ſemper paratus.

The Plea is likewiſe ill, becauſe the Defendant hath not ſaid any Thing as to the Time between the Promiſe and the Requeſt, and the Money was due on the Day of the Promiſe; and therefore the Defendant ought to have pleaded the Tender on that Day, and that he from that Day was always ready; for the ſpecial Requeſt laid in the Declaration is only Surpluſage; therefore the Day on which the Requeſt was made is immaterial; and when once the Cauſe of Action accrued, a ſubſequent Tender could not take it away.

Surpluſage.

Sed per Holt Chief Juſtice, In theſe Caſes the beſt way of Pleading is to plead generally ſemper paratus, &c. & profert hic in Curia, without Pleading any Tender.

Holland *verſus* Hatton.

Where a Mortgage was made, and afterwards a ſecond Mortgage of the ſame Lands by Deed and Fine to another, and 6 Years paſs, the Mortgagee being all that Time in Poſſeſſion, and paying the Intereſt.

THE Caſe was thus, (viz.) Edward Lord Griffin being ſeiſed in Fee of the Lands in Queſtion, made a Mortgage thereof to Samuel Mountford for five Hundred Years, and continued ſtill in Poſſeſſion, and paid the Intereſt of the principal Sum ſecured by this Mortgage for one Year, and then he made a ſubſequent Mortgage in Fee by way of Leaſe and Releaſe of the ſame Lands to the Defendant Hatton, and levied a Fine with Proclamations to Hatton, &c.

The Lord Griffin ſtill continued in Poſſeſſion, and paid Intereſt to Mountford for eight Years together, and afterwards Hatton entered on the Lord Griffin, and took Poſſeſſion by Virtue of this ſubſequent Mortgage and Fine.

Thereupon Mountford the firſt Mortgagee and Leſſor of the Plaintiff, brought his Ejectment, and the Cauſe was tried at Northampton Aſſiſes, ann. 9 Will. and a Caſe was made of it, &c.

The Queſtion was, Whether this Fine and five Years Nonclaim, was a Bar to Mountford the firſt Mortgagee; and it was the Opinion of the Judge, before whom the Cauſe was tried, and to whom the Caſe was referred, that it was no Bar, becauſe the Lord Griffin continued ſtill in Poſſeſſion, and paid the Intereſt, and ſo was Tenant at Will to the firſt Mortgagee; and admitting that

the Fine did work any Diſſeiſin, yet the Entry of the Lord Griffin immediately upon ſuch Diſſeiſin, did purge it, and he became again Tenant at Will, as before; the * Caſes cited were.

* 2 Cro. 660. 3 Rep. 77, 79. 9 Rep. 105.

Sid. 337, 460. Hardres 400, 401. Carter 37, 82, 208. Raym. 148. 1 Vent. 241, 242. 2 Vent. 329.

If the Law ſhould be otherwiſe, the Inconveniencies with Reſpect to Mortgages would be intolerable, therefore the Plaintiff had the Poſtea delivered out to him, and ſo had Judgment upon his Verdict.

Woodyer *verſus* Greſham.

1 Salk. 116. Husband and Wife brought a *Sci. fa.* upon a Judgment had by the Wife *dum ſola*, and they got Judgment on the *Sci. fa.* then the Wife died, the Debt ſhall ſurvive to him. *See* Obrion *verſus* Ram.

A Feme Sole obtained a Judgment in Debt for 200 l. and then ſhe married, and afterwards the Husband and Wife brought a Sci. fa. upon this Judgment, to have Execution thereof againſt the Defendant in the original Action; and they had likewiſe Judgment on the Sci. fa. (viz.) That the Husband and Wife Habeant Executionem againſt the Defendant; then the Wife died, and after her Death the Husband in his own Right brought another Sci. fa. againſt the Defendant, reciting the Judgment in the original Action, and the Award of Execution upon the firſt Sci. fa. (viz.) To have Execution of the Judgment, &c.

To this the Defendant demurred, and Judgment was given in the Court of Common Pleas for the Husband, the Plaintiff, upon which the Defendant in the original Action brought a Writ of Error in B. R.

And the Queſtion was, Whether the Award of Execution on the firſt Sci. fa. to Husband and Wife, had veſted ſuch an Intereſt in the Husband to this Debt, as to intitle him to it by Right of Survivorſhip after the Death of his Wife, as it doth where the Husband and Wife bring an Action and obtain Judgment againſt the Debtor of the Wife whilſt ſole.

And adjudged, that the Award of Execution is attached in the Husband by the Judgment in the firſt Sci. fa. and ſhall ſurvive to him.

Savill

Savill *verſus* Roberts. Trin. 9 Will. 3. B. R. Rot. 724. *but adjudged* Mich. 10 Will. 3.

5 Mod. 394. 1 Salk. 13. Several Sorts of Damages which are a Foundation for an Action.

ERROR of a Judgment in C. B. in an Action on the Caſe in Nature of a Conſpiracy brought by Roberts againſt Savill and others, for maliciouſly cauſing him (Roberts) to be indicted, with others, for a Riot, about ſtopping up a Way, of which he had been duly acquitted.

Upon Not guilty pleaded the Plaintiff had a Verdict; and upon a Motion in the Court of Common Pleas in Arreſt of Judgment, Whether this Action would lie, or not; it was held by three Judges that it would, but Treby Ch. Juſtice was of another Opinion.

And now after ſeveral Debates in B. R. the Judgment was affirmed by three Judges, the other, (viz.) Juſtice Sam. Eyre being dead.

Et per Holt Ch. Juſtice, who laid it down for a Rule, that there were three Sorts of Damages, either of which was a ſufficient Foundation for an Action.

(1.) Where a Man ſuffers Damage in his Fame and Credit.

(2.) Where any Damage is done to his Perſon, as by Impriſonment, Battery, &c. for that Reſpects his Liberty.

(3.) Where a Man ſuffers any Damage in his Property.

* 8 Ed. 3. 19. 3 Aſſ. pl. 13. 7 H. 4. 31. Yelv. 46. 2 Cro. 42. 1 Saund. 128. Raym. — *in the Caſe of* Sir Andrew Henley *v.* Burſtall.

Wherefore, in this Caſe, tho' the Plaintiff had not ſuffered any Damage in his Fame, or in his Perſon, yet becauſe he had ſuffered Damage in his * Property by the Expences laid out in his Acquittal, this Action will lie; for no Man who is indicted can be diſcharged or acquitted, without conſiderable Expences and Fees laid out to defend himſelf againſt the Charge in the Indictment, therefore this Action is maintainable for the Reparation of this Loſs in his Property.

And he diſtinguiſhed between this Action on the Caſe, which was in Nature of a Conſpiracy, and a Writ of Conſpiracy at Common Law; for in this Caſe the Damage ſuſtained is the Ground of the Action, and not the Conſpiracy.

But in the other Caſe the Action is founded meerly on the Conſpiracy; and if the Defendants are convicted thereon, a † villanous Judgment is given againſt them; and

† That they ſhall not be of any Credit afterwards, nor lawful for them, in Perſon, to approach the King's Court; that their Lands and Goods ſhall be ſeiſed into the King's Hands, their Trees rooted up, and their Bodies impriſoned

therefore a Writ of Conſpiracy doth not properly lie in any Caſe but where the Conſpiracy was to indict the Party either of Treaſon or Felony at leaſt, by which his Life was put in Danger, and that was the Reaſon of the villainous Judgment; but all other Caſes of Conſpiracy mentioned in the old Books, were but Actions on the Caſe, and not properly Writs of Conſpiracy.

And if the Defendants are all found guilty in an Action on the Caſe in Nature of a Conſpiracy, yet no villainous Judgment is to be given againſt them, but Judgment only for the Damages ſuſtained by the Plaintiff, that being the End of this Action.

Now in the principal Caſe, the Jury having found, that Roberts was indicted maliciouſly, and without Cauſe, tho' the Indictment was but for a Treſpaſs, yet 'tis reaſonable the Plaintiff ſhould have Judgment for the Loſs which the Jurors find he hath ſuſtained by the malicious Proſecution made by the Defendant; but withal the Chief Juſtice expreſly declared, that theſe Kind of Actions are not to be encouraged, but that the Judge before whom any of them are tried ought to hold the Plaintiff to a Proof of expreſs Malice in the Defendant in his Proſecution by Way of Indictment, for if it doth not appear that the Proſecution was grounded on Malice, the Action is not maintainable, but the Plaintiff muſt be nonſuit.

And a * Caſe was cited, which was thus: A. was indebted to B. and C. and B. without the Knowledge of C. takes out Proceſs in both their Names againſt A. who afterwards proſecuted B. upon the † Statute for ſo doing, but B. was acquitted, and then he brought an Action on the Caſe againſt A. for this malicious Proſecution; but adjudged that would not lie, becauſe B. might have demurred to the Action on the Statute, for the Caſe was not within the Statute, and ſo it was his own Fault, that he was put to Charges by the Trial.

* Preſcott v. Chamberlaine. Sid.

† 8 Eliz. c. 11. For procuring one to be arreſted in another Man's Name. *See* Cro. Eliz. 236.

Parkhurſt *verſus* Foſter. Intratur Trin. 9 Will. 3. B. R. Rot. 363.

TReſpaſs for entring the Plaintiff's Houſe and billeting a Dragoon upon him (the Plaintiff) againſt his Will.

5 Mod. 427. 1 Salk. 389.

A Soldier cannot be quartered on those who live at *Epsom*, and sell Beer to their Lodgers without a License.

Upon Not guilty pleaded, a special Verdict was found, by which it appeared, that the Plaintiff lived at Epsom, and lodged Strangers in the Season for Drinking the Waters, and dressed Victuals for them, and sold Beer to his Lodgers, and to none else, and found Hay for their Horses.

That he did not keep a Publick House, and that he had not a Licence for selling Drink from any Justice of Peace.

That the Defendant was Constable, and upon the Coming of a Party of Dragoons there, he quartered one of them upon the Plaintiff against his Will.

The Question was, Whether this was a Victualing-house or Ale-house within the * Statute, so as the Defendant might justify the Quartering a Soldier upon the Plaintiff by Virtue of that Statute.

* 4 *or* 5 Will. 3. cap. 13.

And it was argued for the Plaintiff, that his House was no Inn, and that the Plaintiff was not an Hospitator, such as is described in † Calye's Case, and that an Action will not lie against him, as it doth against an Inn-keeper, if he refuse to entertain a Guest.

† 8 Rep. 1 Roll. Abr. 80.

That the Lodgers in the Plaintiff's House had such an Interest in their Rooms, that they might maintain an Action of Trespass against any one who should enter there against their Will.

That the Selling Victuals and Beer is meerly occasional at the Season of the Year, and 'tis at the Will and Pleasure of the House-keeper; and as for the Plaintiff's Keeping Horses, 'tis expressly found, that he kept none but only for his Lodgers.

In the Case between the King and Marriott, it was adjudged, that a Victualler might sell Beer to those who eat at his House, without any License, but to no Body else.

Econtra. It was agreed, that this House was neither an Inn or an Ale-house, or a Victualling-house, or a Livery-stable abstractedly, but that it was complicated, that it was all Four of them; and that the Plaintiff was expressly within the Act, because he sold Beer within his House; but if the Selling had been without Doors it might have been otherwise.

Sed per Curiam, Judgment was given for the Plaintiff.

DE

Term. Sanct. Mich.

Anno 9 Willielmi 3. B. R.

Smalcomb *verſus* Buckingham, & al'. Vicecom' London.

THERE being ſeveral Judgments obtained againſt T. S. there were two diſtinct Writs of Fi. fa. brought to the Sheriff on the ſame Day, one whereof was at the Suit of Smalcomb, which Writ was delivered to the Sheriffs an Hour after the other Writ of Fi. fa. but did bear Teſte before it; the other Writ being Teſte after Smalcomb's Fi. fa.

5 Mod. 376. 1 Salk. 330. Where two Writs of Execution are delivered to the Sheriff in the ſame Day, he muſt execute that which was firſt delivered.

Hereupon the Sheriffs made a Bill of Sale to Smalcomb of the Goods of the Debtor, tho' his Writ was delivered to the Sheriffs an Hour after the other Writ.

But afterwards and before the Return of theſe Writs, the Sheriffs (apprehending they were in the Wrong) they made a new Bill of Sale of the ſame Goods to the other Creditor, whoſe Fi. fa. firſt came to their Hands, tho' it was Teſte after the other, and then they return Nulla Bona upon Smalcomb's Fi. fa.

Whereupon he brought Trover againſt the Sheriffs, for the Goods ſold to him by the firſt Bill of Sale, by which he ſuppoſed that the Property was altered and veſted in him.

The Cauſe was tried before Holt Chief Juſtice, who made a Caſe of it, which was argued ſeveral Times in B. R. and the Point was upon the Conſtruction of the * Statute of Frauds, &c. by which 'tis enacted, That the

* 29 Car. 2. cap. 3.

Goods ſhall be bound from the Delivery of the Writ to the Sheriff, and not from the Teſte, &c.

* The Sheriffs.

And it was inſiſted on for the * Defendants, that the Statute doth not make any Fraction of Days, and that this is Caſus omiſſus, for when ſeveral Executions are delivered to the Sheriff in one Day, he hath Election which to execute firſt; and the Priority of the Delivery can be tried only by the Endorſement of the Writ, and that ſhall be concluſive Evidence againſt the Sheriff.

3 Cro. 174. 1 Sid. 271.

Econtra for the Plaintiff.

On the other Side it was inſiſted on for the Plaintiff, that in this Caſe the Sheriff's Bill of Sale which was firſt made to the Plaintiff, ſhall work as an Eſtople in Evidence againſt him.

Eſtople.

But after ſeveral Debates, the Judges were of Opinion for the Plaintiff, to which they rather inclined, for that it appeared, that the other Creditor did not demand an Execution of his Writ.

Et per Holt Chief Juſtice, Where a Writ of Fi. fa. is delivered to the Sheriff to Day, and another to Morrow; and the Sheriff executes the laſt firſt by making Sale of the Goods, ſuch Sale will ſtand good; and the Vendee ſhall hold the Goods againſt him who firſt delivered the Writ to the Sheriff, and his Remedy is only by Action againſt the Sheriffs.

But if two Writs of Execution are delivered to the Sheriff on the ſame Day (as in the preſent Caſe) he hath not Election which to execute firſt, but is bound to give Preference to that which was firſt delivered; but if in Fact he execute that firſt, which was laſt delivered, and make Sale of the Goods, as in this Caſe was done to the Plaintiff; the Vendee hath a good Title to them, which cannot be defeated by a ſubſequent Execution of that Writ which was firſt delivered.

But the Party concerned in ſuch Writ, is put to his Action againſt the Sheriff; and the Reaſon is for the Quiet of Purchaſers under Sheriffs upon Executions, for otherwiſe it would be dangerous to make ſuch Purchaſes of Sheriffs, and that might make Writs of Execution of no Effect.

Dr. Groenvelt *verſus* Dr. Burnell, & al'.

THE Plaintiff brought his Action againſt the Defendants (who were late Cenſors of the College of Phyſicians in London) for falſe Impriſonment, which was by Colour of Proceedings had before them in that College, and that the Plaintiff had requeſted of the preſent Cenſors to have a Copy of the ſaid Proceedings, but they denied to give him any Copy thereof, &c.

Where a Copy of Proceedings ſhall not be delivered till after Iſſue joined.

Wherefore he now moved for a Rule of Court to the Cenſors, &c. to cauſe a Copy of the ſaid Proceedings to be delivered to him (the Plaintiff) at his own Charge.

See Preface to 10 Report upon 46 *Ed.* 3.

But this was oppoſed, becauſe there was only a Plea pleaded, but no Iſſue joined, therefore the Plaintiff may demur if he think fit.

Sed per Curiam, 'Tis uſual to make ſuch a Rule for the ſake of Evidence after Iſſue joined, but not by way of aſſiſting the Defendant to plead.

'Tis likewiſe uſual for the Judges of Gaol-Delivery to deny a Copy of an Acquittal to him who intends to bring an Action thereon, when there was a probable Cauſe for a criminal Proſecution, for the Court will never help any litigious Suit.

The Court denied to make any Rule in this Caſe.

The King *verſus* Greep.

THE Defendant was indicted for Perjury in giving Evidence for the Earl of Mountague in the great Cauſe between him and the Earl of Bath, concerning the Duke of Albermarle's Eſtate, which was tried at the Common Pleas Bar in Replevin, wherein the Iſſue was, Whether the late Duke of Albermarle died ſeiſed in Fee of Lands, &c. or not.

5 Mod. 233. Salk. 513. Indictment for Perjury wherein the Perjury was too generally aſſigned.

And to prove that he did not die ſeiſed in Fee, a Deed of Settlement was produced, by which he was made Tenant in Tail, Remainder in Fee to the Earl of Bath, to which Deed one Richard Strode of Newnham in Devon, (amongſt others) was a Witneſs, who made Oath of the Execution of that Deed by the Duke here in Town, at his houſe called Albermarle Houſe.

* As a Witneſs for the Ld. *Mountague* who claimed under a Will made by the Duke, &c.

In Oppoſition to which Oath the Defendant Greep was * produced, who ſwore that at the Time this Deed bore Date

Date, the ſame Richard Strode was at Newnham, and for this he was indicted for Perjury, and convicted; and now it was moved in Arreſt of Judgment, for that the Perjury was too generally aſſigned, (viz.) That the Defendant Greep had depoſed that Richard Strode tali die, &c. was at Newnham, * (innuendo Newnham, the Houſe of the ſaid Richard Strode in Com. Devon.) ubi revera & in facto the ſaid Richard Strode eodem die, &c. non fuit apud Newnham prædict'; now this Innuendo was not ſufficient to aſcertain that which of it ſelf was incertain; and for that the Aſſignment of the Perjury related only to that Newnham mentioned in the Innuendo, which was Newnham, the Houſe of Richard Strode in Com. Devon, and that was more than the Defendant had ſworn, that being that he tali die, &c. was at Newnham generally, without any Addition.

* 3 Cro. 428. Hob. 6. Gould. 191. 4 Rep. 17.

And for this Reaſon the Judgment was arreſted, and Juſtice Eyre in his Argument held, that if a Man ſwears falſly in a Matter which is not material to the Iſſue, 'tis not Perjury, and to prove that Matter, he cited the Caſes in the * Margin; and moreover, that the Statute 5 El. againſt Perjury purſues the Common Law, and adds nothing new but the Penalty; and that in this Caſe, the Matter in which the Perjury was aſſigned was immaterial to the Iſſue; and therefore no Perjury puniſhable by † Indictment.

* 3 Inſt. 164. 2 Bulſt. 150. Hob. 53. 11 Rep. 113. 1 Cro. 353. Palm. 135. 2 Roll. Rep 41. 369. Yel. 111. Stile 136. † Hct. 97.

Sed per Holt Ch. Juſtice, 'tis Perjury to ſwear falſly in any Circumſtance which conduceth to the Iſſue, or to the Diſcovery of the Truth; but where 'tis only in ſome impertinent or minute Circumſtance (as where the Witneſs dined ſuch a Day) which is uſual amongſt the Vulgar in giving Evidence; 'tis not Perjury becauſe it doth not conduce to the Iſſue, or to the Truth of the Matter to be tried.

1 Cro. 352. Stile 336.

But if the Credit of a Witneſs is in Queſtion, and another Perſon to ſupport it ſwears, falſly this is Perjury; and he ſaid the ſame Certainty is required in an Indictment for Perjury at Common Law as there is upon the Statute 5 Eliz. becauſe that Statute doth not make any Thing Perjury which was not ſo before; 'tis true if a Man is convicted of Perjury at Common Law, the King may pardon him, but if upon the Statute he cannot.

3 Cro. 46, 426. The King *ver.* Bolt.

2 Leon. 201.

And this Judgment being arreſted and entered of Record, a Writ of Error was brought in the Houſe of Lords, and in Hillary Vacation, anno 10 Will. it was reverſed, and the Defendant was taken, &c.

Thermolin *verſus* Sands.

THE Caſe, ſ. The Defendant had ſeiſed a Ship by Virtue of a Proceſs out of the Admiralty; and upon that Seiſure the Plaintiffs libelled in the Court of Admiralty, ſetting forth, that they were Proprietors of the ſaid Ship, and that ſhe was taken out of their Poſſeſſion by Violence; but this was not laid to be ſuper altum mare. Libel in the Admiralty, but did not ſet forth that the Ship was taken upon the High Sea.

Thereupon Thermolin came in and claimed Property, ſetting forth, that the ſaid Ship was taken as Prize in the French War by one Dubart, a French Captain, of whom he bought her at Bergen, and that ſhe was taken upon the High Sea near Norway.

Upon this they proceeded to Proof, and ſuch Taking upon the High Sea was proved; but becauſe there was no Sentence of Condemnation by the Court of Admiralty in France againſt this Ship as Prize, or at leaſt no ſuch Sentence could be made out, our Court of Admiralty decreed the Ship to the Defendant Sands, &c. the old Owner, from which Decree Thermolin appealed to the Delegates; and now moved for a Prohibition, upon a Suggeſtion, that the Suit there was but in Nature of a Trover or Detinue; and he relied on the Caſe of * Radley and Egglesfeild.

* 1 Vent. 173, 308. S. C. 2 Lev. 25. S. C. 2 Saund. 259. S. C. 1 Sid. 367. 1 Roll. Abr. 318. Cro. Car. 97.

But on the other Side it was ſaid, that there is a Difference between the old Proprietor, and he who is Vendee of a Prize under a Sentence of the Admiralty, for the Vendee may well purſue there upon the Seiſure of ſuch Ship, becauſe 'tis but as an Appendix to the precedent Sentence under which he claims; and in this Caſe a Prohibition ought to go, becauſe upon the Face of the Libel it doth not appear, that the Capture from the Defendants was ſuper altum mare. Econtra.

To which it was anſwered, that in thoſe general Libels againſt a Ship, 'tis not the Courſe of the Admiralty to lay the Capture to be ſuper altum mare.

Beſides, if it was the Courſe, this Defect is helped by the Plea of Thermolin in the Admiralty-Court; and by the Proofs taken there, by which the Taking was confeſſed, and proved to be upon the High Sea, &c.

And the Court was divided, (viz.) Holt Ch. Juſtice and Rokesby were for the Prohibition, becauſe of that Defect in the

the Libel, but Turton and Eyre contra; for they held that the Pleading and Proofs had ſupplied that Defect; ſo no Rule for a Prohibition.

Shadow *verſus* Painter.

Where the Plaintiff had full Coſts.

TReſpaſs Quare warrenam & clauſum ipſius (the Plaintiff) fregit & intravit & herbas depaſt. &c. ac in eadem Warrena & clauſo cum canibus cuniculoſis, Anglice, Coney-dogs, venebatur, Anglice, did hunt, ſine licentia & contra voluntatem ipſius (the Plaintiff) eodem (the Defendant) exiſten. Artifice inferiori, (viz.) Fabre Ferrario & non exiſten. qualificat. ad ſervand. canes cuniculoſos & alia enormia, &c.

After a Verdict for the Plaintiff, and 7 s. Damages, it was moved, that the Plaintiff ought not to have full Coſts upon the new Statute.

(1.) Becauſe the Matter is not laid contra formam Statuti.

(2.) Becauſe 'tis not laid, that the Defendant hunted and killed any Game, but only that he hunted, generally.

Sed non allocatur; ſo the Plaintiff had Judgment, &c.

Beresford's *Caſe*.

Suit upon the Writ *de libertatibus allocandis*.

MR. Beresford, as Deputy Bailiff of the Liberty of Taunton-Dean, under the Biſhop of Wincheſter, had ſued out a Writ de libertatibus allocandis, directed to the Sheriff of Somerſetſhire, thereby reciting, Quod conſtat Regi, that his Progenitors by ſeveral Charters, had granted to the Biſhops of Winton the ſaid Liberties, with the Execution and return of all Writs within the Precinct, &c. and that the ſaid Biſhops had enjoyed the ſame accordingly, &c.

To this Writ the Sheriff made this Return, (viz.) Quod non apparet mihi, that there were any ſuch Charters as in the Writ mentioned; & ulterius, that the preſent Biſhop of Winton, or his Predeceſſor, never enjoyed ſuch Liberties, &c.

And now it was moved for a Rule on the Sheriff to amend this Return, but the Court would make no Rule, becauſe it was an extraordinary Courſe to try the Right of

Liberties in an Action for a falſe Return of a Writ; whereas, if the Plaintiff is aggrieved, he may bring an Action againſt the Sheriff for infringing his Liberties, &c.

Turbervill *verſus* Stamp.

CASE, &c. wherein the Plaintiff declared, that the Defendant ignem ſuum apud ſuch a Place tam negligenter & improvide cuſtodivit quod perinde the Plaintiff's Field, containing ſo many Acres of Furze, was burnt and conſumed. 1 Salk. 13. Action for negligently Keeping his Fire in a Field.

Upon Not guilty pleaded, the Plaintiff had a Verdict; and now it was moved in Arreſt of Judgment, that this Action would not lie, becauſe it was founded only on the Negligence of the Defendant; and an Action cannot be maintained upon ſuch Negligence, unleſs there is a Truſt repoſed in the Defendant, or upon the ſpecial Cuſtom of England, which implies a Truſt, but that extends no farther than to the Fire in a Man's Houſe, and not to a Fire in the Field, as this Caſe was, for the Defendant, in a proper Seaſon, did ſet Fire to ſome Heath and Furze in his own Ground, which Fire was by a ſudden Wind carried over into the Plaintiff's Cloſe adjoining, tho' the Defendant's Servants did all in their Power to prevent it, but wanted Number.

Wherefore it was inſiſted for him, that if an Action would lie, it muſt be upon the ſpecial Matter, and not upon the Negligence.

But it was argued for the Plaintiff, that the Defendant is as much obliged to take Care of his Fire in the Field as he is in his Houſe, and that the common Cuſtom of England, which is the Common Law, extends as well to the one as to the other; and the Caſes in the * Margin were cited, where in the Declaration the Fire was not alledged to be in a Houſe, but generally at ſuch a Place; and the Court being of this Opinion,

Judgment was given for the Plaintiff.

* 2 H. 4. 18. 14 Aſſiſe pl. 9. Fitz. Abr. tit. Iſſue, pl. 88. Double Plea 31. 28 H. 6. 7. 31 H. 6. 11. *b.* Old. Entr. 219. Raſt. Entr. 8.

Sanders *verſus* Owen.

2 Salk. 467. S. C. 5 Mod. 386. S. C. † 1 Will. 3. cap. 21. A verbal Appointment of a Clerk of the Peace by the *Cuſtos* is ſufficient.

THE Caſe, ſ. The Earl of Winchelſea being Cuſtos Rotulorum of the County of Kent, after the Making the new Statute * 1 Will. 3. concerning the Nomination of the Cuſtos Rotulorum, and Clerk of the Peace for every County, he 15 Julii, 1 Will. 3. in open Seſſions then held for that County, when the Defendant Owen was preſent in Court, ſaid theſe Words, (viz.) I do nominate the ſaid Philip Owen to be Clerk of the Peace, according to the Act of Parliament; whereupon he was forthwith admitted and ſworn into the Office, and executed it during the Life of the Earl of Winchelſea.

After whoſe Death the Lord Rumney was appointed Cuſtos Rotulorum, and he by Deed granted this Office to Saunders, who entered and diſſeiſed Owen, who brought an Aſſiſe in the County of Kent, all which Matter was found ſpecially before the Chief Baron Ward, who adjourned the Aſſiſe into the Court of Common Pleas, where the ſingle Point argued was:

ſ. Whether by Virtue of this Statute the Cuſtos Rotulorum might nominate and appoint a Clerk of the Peace by Parol, without any Deed or Writing.

And it was adjudged in that Court for Owen, the Plaintiff in the Aſſiſe, (viz.) That a verbal Nomination was ſufficient; whereupon a Writ of Error was brought in B. R. and after ſeveral Arguments, the Court una voce agreed, that a parol Nomination was ſufficient.

But yet the Court of B. R. reverſed the Judgment, becauſe the Form of the Words uſed by the Earl of Winchelſea in the Nomination of Owen, was inſufficient, for he did not name any certain County of which he ſhould be Clerk of the Peace, nor diſtinguiſh what Statute he intended, for there are † two Statutes which concern this Matter; and moreover, by his adding this Word, (viz.) ſaid Philip Owen, 'tis altogether inſenſible.

† 27 H. 8. 1 Will. 3.

Upon this Judgment a Writ of Error was brought in the Houſe of Lords, and there the Judgment of B. R. was reverſed.

Winter *verſus* Lovedaz.

5 Mod. 244, 378. S. C. 2 Salk. 537. S. C. Copyhold Lands are Parcel of Demeſnes of a Manor.

ſſ. IN a ſpecial Verdict in Ejectment, the Caſe appeared to be as followeth: George Powlett being ſeiſed in Fee of the Manor of Gotehurſt in Somerſetſhire, did upon the Marriage of his Son, ſettle the ſame to the Uſe of himſelf for Life; and afterwards to the Uſe of his Wife for Life, then to the Uſe of his Son in Tail, and for Want of ſuch Iſſue to his own right Heirs, in which Deed of Settlement there was this Proviſo.

ſſ. That it ſhould be lawful for the ſaid George Powlett during his Life, and for his Wife after his Death, during her Life, by Deed indented, to make Leaſes either in Poſſeſſion for the Term of one, two, or three Lives, or for the Term of thirty Years, or for any other Term or Terms, Number or Numbers of Years, determinable upon one, two, or three Lives, or in Reverſion for one or two Lives, or for thirty Years, or for any other Term or Number of Years determinable upon one or two Lives, ſo as ſuch Demiſe be not made of any the ancient Demeſne Lands, Parcel of the ſaid Manor, or of any other Lands which for the Space of ſeven Years had been uſed as Demeſne Lands, and ſo as the ancient Rent was reſerved.

It was found that the Lands now in Queſtion were Copyhold Lands, Parcel of the ſaid Manor, and being in the Tenure of Richard Blanchflower, for the Term of two Lives, by Copy of Court-Roll under a certain Quit-Rent, he the ſaid George Powlett (after the ſaid Settlement) made a Leaſe thereof to Robert Blanchflower by Deed indented, for thirty Years abſolute, to commence after the two Lives then in Being, reſerving the ſame Rent as in the Copy to Richard Blanchflower.

The two Lives being now dead, the Leſſor of the Plaintiff claimed as Heir in Tail to his Grandfather George Powlett, by Virtue of the ſaid Settlement; and the Defendant claimed the Term of thirty Years under Robert Blanchflower.

There were two Points made in this Case.

(1.) Whether these Lands being Copyhold were within the Intent of this Proviso which gave the Power of Leasing, especially since all the Demesne Lands of the Manor were excepted out of the Power; and all Copyhold Lands are * Demesnes, for 'tis an inseparable Quality of every Copyhold, that it was Time out of Mind Parcel of the Manor.

* *Nota*, It was found, that there were other Lands which the Lords of this Manor used to hold in Demesne.

(2.) If Copyhold Lands should be within this Power, then whether such Power is well pursued by this Lease for 30 Years absolute, or whether this Lease doth not exceed the Power, because it should have been for 30 Years, or for any other Number of Years determinable upon the Death of One Life, being a Lease in Reversion after two Lives in Possession.

And after several Arguments at the Bar, the Court gave their Opinion seriatim, (viz.) Holt Chief Justice, Turton and Eyre for the Defendant, (viz.) That Copyhold Lands were not within the Power of Leasing, because they were within the Exception of all Demesne Lands; but as to the second Point, they held that a Lease for 30 Years absolute in Reversion after two Lives might be made by George Powlett or his Wife, of any Lands which were in their Power of Leasing.

Power of making Leases doth not extend to Copyhold.

But Justice Rokesby was of another Opinion in both Points, for he held first that Copyhold Lands were not within the Intent of this Proviso; and that if the Demesne Lands had not been excepted by express Words, yet the Power of Leasing would not have extended to them; for if it did, it would destroy the Tenure, because Copyhold Lands once leased, are for ever enfranchised; and therefore it shall never be presumed, that the Tenure was intended to be destroyed without express Words of the Parties for that Purpose.

(2.) As to the second Point, all Leases to be made by Virtue of this Power for 30 Years, or any other Number of Years, ought to be determinable upon the Death of one, two, or three Lives, as the Case shall happen with respect to the present Possession, and to the Reversion; and because this was a Lease in Reversion after two Lives in Possession, and for 30 Years absolute, therefore 'tis not good, for it ought to be for 30 Years, if one Life lived

ſo long, there being two Lives then in Being; for otherwiſe there will be no Proportion between a Leaſe for one Life in Reverſion after two Lives in Being, and a Leaſe for thirty Years abſolute, in Reverſion after two Lives, for thirty Years is always accounted an Equivalent to three Lives in Poſſeſſion; therefore for this Reaſon alſo the Leaſe made by George Powlett is void.

Et per Holt Chief Juſtice arguendo, A Leaſe made to commence at any Day to come is properly a Leaſe in Reverſion, but in this Caſe it ſignifies a Leaſe to commence after ſome Intereſt in Being at that very Time when the Leaſe in Reverſion was made. 1 Inſt. 54.

That this Power to Leaſe for Life in Reverſion muſt be taken to be a Leaſe of the Reverſion it ſelf, and not a concurrent Leaſe, and it cannot be otherwiſe, becauſe a Freehold cannot commence in futuro.

And where there is a Power given to make Leaſes in Poſſeſſion and Reverſion, in ſuch Caſe if a Leaſe is made in Poſſeſſion, and afterwards ſome Life dyes, he cannot make a new Leaſe in Reverſion of the ſame Lands, becauſe his Power is executed by making the firſt Leaſe. 2 Roll. Abr. 262. *And* Hill. 27, 28 Car. 2. Walker *verſus* Walker.

That where a Qualification is annexed to a Power of Leaſing, which if obſerved goes in Deſtruction of the Power, the Law will diſpence with ſuch Qualification.

As for Inſtance; Where there is a Power to make a Leaſe of a Manor, or of any Part thereof, ſo as the ancient Rent is reſerved, yet he may by this Power make a Leaſe of the Services, Parcel of the Manor upon which no Rent can be reſerved, otherwiſe the expreſs Power would be defeated.

The Plaintiff had Judgment.

Aſhton *verſus* Sherman & ux'. Intratur Hill. 8 Will. 3. B. R. Rot. --- *But adjudged*, Michaelmas 9.

DEBT upon a penal Bill of Thirty Pounds againſt Sherman and his Wife as Adminiſtratrix to William Feild. An Adminiſtratrix ſued, pleaded ſeveral Judgments,

and concluded to the Country, when it ſhould be *& hoc parat' eſt Verificare.*

The

The Defendants pleaded in Bar a Judgment for 400 l. recovered against him and her as Adminiſtratrix, &c. by Robert Waring, and another Judgment upon a Bond for 100 l. recovered against them by Gilbert Eaſt; another Judgment upon Bond for 100 l. recovered against them by Margaret Barton, Widow; another Judgment upon Bond for 100 l. recovered against them by Nathaniel Axtell; another Judgment upon Bond for 20 l. by Nathaniel Hickman; and another Judgment upon Bond for 100 l. at the Suit of Henry Corniſh, and that they had not Aſſets, but of the Value of 10 l. which were not ſufficient to ſatisfy thoſe Judgments.

The Plaintiff replyed præcludi non, &c. quia quoad the Judgment for 100 l. recovered by Gilbert Eaſt, there was but thirty Pounds of it a juſt Debt, which was ſatisfied after the ſaid Judgment obtained; and that the Defendants kept that Judgment on Foot by Fraud to deceive their Creditors, & hoc paratus eſt verificare unde petit judicium & debitum ſuum prædict' una cum damnis ſuis occaſione detentionis debiti illius ſibi adjudicari, &c.

Et quoad the Judgment recovered by Henry Corniſh, that only 28 l. of it was a juſt Debt, which he was always ready and offered to accept in full Satisfaction and Diſcharge of the Judgment for 100 l. and that the Defendant delayed the Payment thereof, and kept that Judgment on Foot by Fraud, & hoc, &c. and concluded ut ſupra.

Et quoad the Judgment of 100 l. recovered by Margaret Barton, that but 30 l. of it was a juſt Debt, which was paid ſince the Judgment, and that it was kept on Foot by Fraud, & hoc, &c. and concluded again ut ſupra; the like as to the Judgment recovered by Hickman, that it was all paid with the like Concluſion, &c.

Et prædict' Nicholas Aſhton ulterius dicit quod præfat' Johannes & Maria, (the Defendants) die exhibitionis of the Plaintiff's Bill, had divers Goods and Chattels, which were the Inteſtate's at the Time of his Death, in their Hands, to be adminiſtred to the Value of the Debt demanded by the Plaintiff præterquam bona & catalla ſufficien' to ſatisfy the ſaid Bobert Waring and Nathaniel Axtell of their Debts recovered as aforeſaid; and alſo to ſatisfy the ſaid real Debt of 28 l. due to Henry Corniſh (ſcil't apud H. in Com. W.) & hoc petit quod inquiratur per patriam.

And upon a Demurrer to this Replication, it was much inſiſted on, that it was naught, becauſe of the ſeveral Concluſions, Et hoc, &c. Unde petit judicium, &c. which were ſeverally made after the Pleading the Frauds to the ſeveral Judgments; for as this Replication had but one Commencement, with a Præcludi non, &c. ſo it ought to have been concluded with one Averment, (viz.) Et hoc parat. eſt verificare, and Prayer of Judgment.

Sed non allocatur, upon the Authority of the Caſes cited in the * Margin.

* 8 Rep. Turner's *Caſe.* 9 Rep. Meriell Treſham's *Caſe.* 1 Saund. 336. 2 Saund. 49.

Then it was objected, that in this Replication the Plaintiff had made an ill Concluſion as to that Part of it, wherein he had alledged, that the Defendant had Aſſets ultra the Debt due to Waring and Axtell, &c. by putting that Matter to be tried by the Country, for he ought to have concluded with an Averment, (viz.) Et hoc paratus eſt verificare, ſo as to give Leave to the Defendants to rejoin to this new Matter.

To which it was anſwered, that the Defendants in their Plea have poſitively alledged, that they had no Aſſets, but only to the Value of 10 l. and therefore they could not depart from that Allegation; and ſo here a good Iſſue was offered by an Affirmative to a Negative, and therefore the Replication ought to conclude to the Country; and ſo it was in the Caſe of * Hancock and Prowte.

* 1 Saund. 336.

Sed per Holt Ch. Juſtice, who gave the Rule, this Replication is naught for the Reaſon ſupra, for ſince the Plaintiff had undertaken to anſwer thoſe Judgments to Waring and Axtell, and the 28 l. to Corniſh, by an Allegation of Aſſets ultra thoſe Debts, he ought to have concluded with an Averment, ſo as the Defendants might have rejoined.

And moreover, in this Caſe, it was not neceſſary for the Plaintiff, in his Replication, to make a particular Anſwer to every one of the Judgments pleaded in Bar to the Action; for if the Plea is falſified in one Part, 'tis naught in the Whole, and therefore he held, that in this Caſe the Plaintiffs might have omitted to give any Anſwer to the Judgments of Waring and Axtell, and have reſted upon the other Matters pleaded to the other Judgments, without going farther.

Judgment was given againſt the Plaintiff for the Reaſon ſupra.

Sparks

Sparks *verſus* Crofts.

The Defendant was ſued as general Adminiſtrator, and pleaded in Abatement, that he was a ſpecial Adminiſtrator, &c.

ACtion againſt the Defendant as general Adminiſtrator. He pleaded in Abatement, that he was but a ſpecial Adminiſtrator during the Minority of his Wife, but did not aver, that ſhe was ſtill under Age; and for that Reaſon there was Judgment againſt him to anſwer over.

Then he pleaded in Bar, that Puis darrein Continuance his Wife died, which was from the laſt Term; but this was over-ruled, becauſe it was contrary to what was now admitted on Record; ſo Judgment was given againſt him.

Gale *verſus* Noble.

Lands granted *tenendum ſecundum conſ. Manerii* are not Copyhold, but cuſtomary Freehold.

See 5 Rep. 84. Perriman's *Caſe*. 2 Vent. 144.

UPON a Trial at Bar in Ejectment for Lands, Parcel of the Manor of Corſham in Wilts, which by very antient Books of that Manor, appeared to be Parcel of the Dutchy of Cornwal, and ſtill paſs by Surrender and Copy of Court-Roll, but yet are not Copyhold, becauſe it did not appear in any of the Rolls or Copies now produced, that they are granted ad voluntatem Domini Manerii, but only tenendum ſecundum conſuetudinem Manerii; therefore it was reſolved by the Court, that theſe Lands are not Copyhold, but a cuſtomary Freehold; and for that Reaſon the Verdict was for the Plaintiff, againſt whom the Verdict was found at the Niſi prius for a Forfeiture by committing Waſte, the Plaintiff in that Action taking it to be Copyhold, as all the Tenants had conſtantly done.

Dawny *verſus* Caſhford.

Preſcription by a *Que Eſtate* of a Term for Years, not good.

CASE, &c. for Stopping a Way, in which the Plaintiff declared, that he was poſſeſſed of ſuch a Meſſuage for the Reſidue of a Term for Years yet to come, and Time out of Mind had uſed to have a Way leading to ſuch a Place, which the Defendant had ſtop'd, &c.

Upon Not guilty pleaded the Plaintiff had a Verdict; and it was now moved in Arreſt of Judgment, that here was a Preſcription by a Que Eſtate of a Term for Years; beſides here was a Terminus ad quem, but no Terminus a quo the Way did lead.

As to this laſt Matter it was held, that the Defect was cured by the Verdict, but the firſt was an incurable Fault; ſo the Judgment was arreſted.

Bonner *verſus* Hill. Intratur Mich. 9 Will. 3. B. R. Rot. 558.

THIS was an Action on ſeveral Promiſes, &c.

The Defendant pleaded in Abatement a frivolous Plea, (viz.) That the Plaintiff had impleaded him in the Court of Common Pleas pro eadem cauſa actionis. Where a Replication is well concluded in Bar.

The Plaintiff replied Nul tiel Record in the Court of Common Pleas, and concluded his Replication in Bar, (viz.) Unde petit judicium & damna ſua, &c.

And upon a Demurrer to this Replication it was inſiſted, that the Action was diſcontinued; and the Caſe of * Biſs and Harcourt was cited as an Authority in Point. *See* antea Carter *verſus* Davis. * Antea.

Sed per Holt Ch. Juſtice, This Caſe differs from that, becauſe here the Plea is ill, and the Judgment in this Caſe was upon the Inſufficiency of the Plea.

But in that Caſe the Plea was good, and the Judgment was upon the Replication, for that the Plaintiff had thereby prayed a wrong Judgment.

And he ſaid, that if Matter of Fact is pleaded in Abatement triable per Pais, the Plaintiff may conclude his Replication in Bar, becauſe final Judgment is to be given after a Verdict in that Caſe.

Therefore the Rule was, that the Defendant anſwer over.

Whitechapel *Pariſh verſus* Stepney *Pariſh.* Paſ. 1 Will. 3.

THE Caſe was, one Borer had two Children, both born in the Pariſh of Whitechapel; the Father died, and the Mother married again, and not long afterwards the Husband and Wife ran away, and deſerted theſe Children, who were afterwards privately drop'd in the Pariſh of Stepney, one of them being two Years old, and the other four Years old; whereupon the Children were by Order of two Juſtices removed to Whitechapel, but that Where the Parent is a Vagabond, the Birth of a legitimate Child gains a Settlement where born.

Order was vacated upon an Appeal; and the Reaſon expreſſed in the Seſſions Order was, becauſe Stepney could not prove, that Borer the Father of the Children was ever legally ſettled in Whitechapel, tho' in the ſame Order it was acknowledged by expreſs Words, that both the Children were born in Whitechapel.

And now it was moved to quaſh this Order of Seſſions, the Queſtion in Law being, if the Birth of theſe legitimate Children ſhall gain a Settlement of them where the Parent is dead, and the Place of his laſt Settlement unknown, and ſo muſt be eſteemed as a Vagabond.

It was agreed by all, that the Birth of a Baſtard-child gains a Settlement for that Child, and alſo that a legitimate Child gains no Settlement by its Birth, when the Place of the Parents laſt Settlement is known, but that ſuch Child muſt follow the Settlement of the Parent.

Sed per Curiam, This Order of Seſſions was quaſhed, and the Order of the two Juſtices confirmed, becauſe where the Parent is a Vagabond, the Birth of a legitimate Child gains a Settlement; otherwiſe it will be born a Vagrant.

DE

Term. Sanct. Hill.

9 Willielmi 3. B. R.

Thompſon *verſus* Leach.

IN Ejectment at a Trial at Bar, a ſpecial Verdict was found, the Subſtance whereof was as followeth:

3 Mod. 301. Surrender made by an Ideot is void in Law.

ff. That Nicholas Leach was ſeiſed in Fee of the Lands now in Queſtion, lying in Devonſhire, who by his laſt Will deviſed the ſame to his Brother Simon Leach for Life; and after his Death to his firſt, and every Son in Tail; and for Want of ſuch Iſſue, then to the Defendant Sir Simon Leach in Tail, Remainder to his own right Heirs.

That Nicholas died ſeiſed, that Simon his Brother entered and was ſeiſed for Life, and married, and his Wife being great with Child, and within three Months of the Time of her Delivery, the ſaid Simon her Husband by the Perſuaſion of Unton Croke (whoſe Daughter he married) executed a Deed to the ſaid Unton Croke, to the Uſe of the Defendant Sir Simon Leach, which ſaid Deed purported a Surrender of all his Meſſuages, Lands and Tenements whatſoever unto the Defendant Sir Simon Leach, without any Conſideration.

That within three Months afterwards a Son was born, and named Charles Leach, who was the Leſſor of the Plaintiff.

That about five Years afterwards, and not before, the Defendant Sir Simon Leach had Notice of this Deed of

Surrender, and then he aſſented to it, and entered, and had the Poſſeſſion.

That Simon Leach the Father was not Compos mentis at the Time he executed the ſaid Deed of Surrender, and that he was now dead, and that Charles Leach (the Leſſor of the Plaintiff) was his Son and Heir.

The Queſtion upon this ſpecial Verdict was, Whether this Deed of Surrender was void ab initio, or only voidable by way of Plea, or by Sci. fa. for the King, in the Life-time of Simon Leach the Lunatick; for if it was at any Time effectual to merge the Tenancy for Life of Simon Leach the Father, before the Birth of his Son, then the contingent Remainder would be deſtroyed; and tho' this Surrender ſhould be afterwards avoided by any Means in Law; yet the contingent Remainder being once extinct, could not be revived by any Matter ex poſt facto.

Another Point was made, upon which this ſpecial Verdict was found, and which did ariſe from the Difference taken in * Beverley's Caſe, (viz.) Becauſe Charles Leach claimed by way of Remainder, and not as Heir at Law, and ſo only privy in Eſtate, who (as that Book is) cannot avoid the Acts of an Ideot.

* 4 Rep.

Sed per Curiam, This Surrender is void ab initio, and never had any Effect in the Law, becauſe of the Ideocy of him who executed it; and therefore any Perſon may take Advantage of it.

That there is a Difference between a Feoffment and Livery made propriis manibus of an Ideot, and the bare Execution of a Deed by Sealing and Delivery thereof, as in Caſes of Surrenders, Grants, Releaſes, &c. which have their Strength only by executing them; and in which the Formality of Livery and Seiſin is not ſo much regarded in the Law; and therefore the Feoffment is not meerly void, but voidable; but Surrenders, Grants, &c. by an Ideot, are void ab initio.

The Plaintiff had Judgment.

Courtney *verſus* Connet.

Treſpaſs and Caſe cannot be joined in the ſame Action.

TReſpaſs brought by Sir William Courtney againſt the Defendant quare vi & armis clauſum ipſius (the Plaintiff) fregit & in ſolo effodit ac piſces ſuos cepit, necnon de eo quod (the Defendant) quaſdam excluſas & defenſas

cujuſdam cataractæ fregit attollit & ſubſtraxit per quod Aqua ab eadem cataracta decurren' piſcariam & ſtagnum ipſius Willielmi ibidem in tanto inundavit quod per Curſum aquæ illius & inundationem prædict' non ſolum piſces in piſcaria & ſtagno prædict' exiſten', videl't, (ſo many Trouts, &c.) ad Valentiam, &c. exiverunt verum etiam idem Willielmus & ſervientes ſui a captione piſcium in eiſdem piſcaria & ſtagno exiſten' impedit' & obſtruct' fuerunt, &c.

Upon Not guilty pleaded, the Plaintiff had a Verdict, and it was moved in Arreſt of Judgment, that this laſt Part of the Declaration was in Treſpaſs upon the Caſe, and the firſt Part was a meer Treſpaſs which could not be joined in one Action, becauſe it was incompatible.

But after ſeveral Debates, the Plaintiff had his Judgment; for per Curiam, this laſt Matter was in its Nature a Treſpaſs as well as the Firſt.

Morrice *verſus* Golder.

IN Replevin, &c. The Defendant avowed the Taking, &c. for ſo much Rent due in Money, and alſo for ſo many Hens, and after Iſſue joined, and a Verdict for the Avowant, it was moved in Arreſt of Judgment, for that upon the Face of this Avowry it appeared, that the Hens were * not due at the Time of the Diſtreſs taken, and here the Damages and Coſts were entire.

Where the Damages and Coſts were entire, and the Plaintiff releaſed Part of the Damages after a Verdict, good.

* Hob. 133. 1 Brownl. 179. 9 H. 7. 4. 11 Rep. 45. *b.* 11 H. 6. 55. *a.* 5. *a. b.* 9 H. 7. 13. *a.* 2 Inſt. 503. 1 Send. 282.

But the Plaintiff offered to releaſe the Damages, and alſo Rent for the Hens, and take Judgment only for the Rent in Money, which was oppoſed, unleſs the Plaintiff would likewiſe releaſe the Coſts.

To which it was anſwered, that there was no Neceſſity of releaſing the Coſts, and to prove it a * Caſe was cited, and a Copy of the Record was produced, where in the like Caſe, the Rent which was not due, and all the Damages were releaſed, and the Avowant had Judgment for the Reſidue, and alſo for all the Coſts.

* Bynns *ver.* Newton. Trin. 28 Car. 2. *B. R.* Rot. 728.

And the Court was of that Opinion in the principal Caſe; wherefore the Avowant entered a Remittitur of all the Hens and the Damages, and took Judgment for the Rent in Money.

Brewſter

Brewſter *verſus* Kidgell.

5 Mod. 368. 1 Salk. 198. Covenant that an Annuity ſhall be paid clear of all Taxes, in ſuch Caſe the parliamentary Taxes ſhall be intended.

IN a ſpecial Verdict in a feigned Action the Caſe was thus:

ſſ. That Robert Langford 5 Nov. 1649. in Conſideration of 800 l. by him received of Ellen Brewſter, Widow, did by his Deed grant to her and her Heirs a Rent-Charge of 40 l. per ann. to be iſſuing out of his Manor of Butlers in Bucks, with a Clauſe of Diſtreſs, and a Covenant for farther Aſſurance.

That upon this Deed, theſe Words were endorſed, (viz.) * Memorandum, It is the true Intent and Meaning of theſe Preſents, that the ſaid Ellen Brewſter, her Heirs and Aſſigns ſhall for ever hereafter be paid the ſaid Rent-Charge without any Deduction or Abatement of Tax, Charge or Payment out of, for or concerning the ſaid Rent, or the ſaid Manor or Lands charged therewith, which Endorſement was ſigned, Robert Langford.

* *See* Giles *ver.* Hooper, antea.

That afterwards 8 July 1652. the ſaid Robert Langford by another Indenture enrolled in Chancery, did give, grant and confirm the ſaid Rent unto the ſaid Ellen Brewſter and her Heirs, and thereby did covenant with her, that the ſaid Rent of 40 l. per ann. freed of all Taxes, ſhould be for ever after duly paid at the Times and Places of Payment thereof.

Then the Jury concluded ſpecially, that if the Court ſhould be of Opinion, that it was not lawful for the Tertenant to abate, deduct, and retain in his Hands (in reſpect to the Tax payable to the King, &c. by Virtue of the Acts of Parliament by which 4 s. per Pound were given) for the Arrears of the ſaid Rent for two Years and an Half ended on the 20th of May before, then they found for the Plaintiff, otherwiſe for the Defendant.

The Queſtion was, Whether the parliamentary Taxes ought to be deducted out of this Rent-Charge pro tanto, or that the Rent was payable free of all Taxes, as well parliamentary as other Taxes.

Et per Curiam, (after ſeveral Arguments) this Rent was payable free of all Taxes, and that no Deduction could be made by the Tertenant for the parliamentary Taxes of 4 s. per Pound.

It was presumed, that the Indorsement of the Memorandum on the first Deed, concerning the Payment of the Rent-charge, without Deduction for Taxes, was made and indorsed before that Deed was executed, and so was Parcel thereof; and the rather, because that Matter was pursued by the Covenant in the second Deed.

Et per Holt Ch. Justice, Who delivered the Opinion of the Court, the special Reason of the Judgment, and which governed this Case, was grounded upon the Circumstance of Time, when this Grant was made, which was Anno 1649, for at that Time those parliamentary Taxes now in Use were first invented, and one of them was at that Time in Being.

But if this Grant had been in the Year 1640, which was before these Sort of Taxes began, then he should have been of another Opinion, for at that Time, and likewise sometime before, the Taxations were by Way of Subsidies, Tenths, and Fifteenths, and it would be hard to extend the Word Taxes to such Impositions which were not in Use at the Time of the Grant; and if a Tax had been given by the Parliament for rebuilding St. Paul's Church, that would have been out of this Covenant. 2 Inst. 76, 77.

But now these parliamentary Taxes have a Sort of Existence at all Times, because the constant Revenues of the Crown have been found not to be sufficient for the Emergences of the Government, and therefore these Taxes came in from Time to Time as a Supply; and the King may grant by Patent, that a Man shall be acquitted of a future Tax to be given by Parliament, therefore such Taxes do in some Measure exist, otherwise such a Grant would be void. 19 H. 4. 62.

The Word Taxes comprehends Rates for the Church and Poor, and those Rates imposed by Commissioners of Sewers.

That tho' the Act, which gives 4 s. in the Pound, hath a Clause, that the Tertenant shall deduct it out of the Rent charged thereon, yet that doth not repeal the Covenant to pay it without Deduction, for he doth not offend the Statute if he doth not deduct; but he breaks his Covenant if he doth deduct, wherefore his Covenant ought to be performed.

Moreover, the Words of this Covenant, (viz.) To pay the Rent-charge without any Deduction for Taxes, can have no other Respect but to parliamentary Taxes, for the Tertenant

Tertenant hath no Power to deduct in any other Caſe whatſoever, and therefore if the Covenant did not extend to thoſe Taxes, it would be of no Uſe.

The King *verſus Biſhop of* Cheſter.

5 Mod. 297. 2 Salk. 560. An Eſquire may take by a Grant to him by the Name of Knight, tho' that being a Name of Dignity, is Parcel of his Name.

WRIT of Error upon a Judgment in C. B. in a Quare Impedit, and after ſeveral Arguments it was reduced by the Court to a ſingle Queſtion upon the Pleading, as it appeared on the Record.

The Title againſt the King was by Virtue of Letters Patents made by Car. 1. by which the Advowſon, &c. was granted Willielmo Theackſtone tunc Armigero & poſtea Militi; and upon Oyer of the Letters Patents they were recited in hæc verba, by which it appeared that the Grant was made to William Theackſtone, Knight; and the Queſtion was, Whether this could be intended the ſame Perſon.

2 Inſt. 583, 594, 666.

Et per Holt Chief Juſtice, It could not be intended the ſame Perſon, becauſe Knight is a Name of Dignity, but Armiger or Eſquire, a Name of Worſhip; and if he is afterwards made a Knight, the Name of Eſquire is thereby extinguiſhed; and therefore a Grant made by the King to William Theackſtone, Knight, when there was no ſuch Man a Knight, was a void Grant, and William Theackſtone Eſq; could not take thereby, becauſe Knight is not an Addition, but Part of a Man's Name, for it being a Name of Dignity, it becomes as much a Part of a Man's Name as his Name of Baptiſm; and for that Selden's Tit. Honour, &c. was cited.

2 Cro. 679.

That a Man who is reputed a Knight, but in Truth is not ſo, cannot take any Thing by Way of Grant, by the Name of Knight; for ſuch Grant is void, it being a Thing in Reputation, without any colourable Ground for it; but a Grant to a Duke's eldeſt Son, by the Name of a Marqueſs, or to the eldeſt Son of a Marqueſs, by the Name of an Earl (& ſic de ſimilibus) would be good, becauſe of the common Curteſy of England, and their Places in Heraldry.

Litt. Rep. 121. 1 Bulſt. 21.

Juſtice Rokesby was of a contrary Opinion, for he held that W. T. Eſq; might take by a Grant made unto him by the Name of W. T. Knight, & ſic vice verſa ſi conſtat de perſona ut res magis valeat, &c.

But by the Opinion of the other three Judges, the Judgment was affirmed, and thereupon a Writ of Error was brought in Parliament, where this Judgment was reverſed, for in Truth it was only a Miſtake of the Pleader, the ſaid William Theackſtone being a Knight at the Time of the Grant made.

Britton *verſus* Cole. Intratur Trin. 7 Will. 3. B. R. Rot. 181. *and Judgment given* 8 Feb. Anno 9 Will. 3. *Hillary-Term.*

IN Treſpaſs for Taking his Cattle, &c.

The Defendant juſtified by Virtue of a Writ of Levari facias iſſued out of the Court of Exchequer, directed to the Sheriff of Somerſetſhire, wherein it was recited, that one Francis Criſwick had been outlawed at the Suit of the now Defendant Cole; and that upon a ſpecial Capias Utlegatum an Inquiſition had been taken and returned into the Court of Common Pleas, whereby it was found, that the ſaid Francis Criſwick, at the Time of the Outlawry, was ſeiſed in Fee of ſuch Lands, &c. to the yearly Value of, &c. beyond Repriſes; and that this Inquiſition had been eſtreated and tranſmitted into the Court of Exchequer; wherefore this Writ commanded the Sheriff to levy the Iſſues and Profits of theſe Lands from ſuch a Time to ſuch a Time, according to the Rate and Value aforeſaid, and to anſwer it in the Court of Exchequer, &c.

1 Salk. 395. 5 Mod. 112. The Cattle of a Stranger levant and couchant on Lands extended upon an Outlawry may be taken upon a *Levari facias* for the King.

That the Defendant Cole requeſted the Sheriff to execute the ſaid Writ, and thereupon he made his Warrant to the other Defendants (his Officers) by Virtue of which they entered on the Lands, and there found the Plaintiff's Cattle Levant and Couchant, per quod they took his Cattle for the Iſſues and Profits of the Land extended, according to the Command of the Writ, &c.

To this the Plaintiff demurred, and the Point in Law in this Caſe was, Whether the Cattle of a Stranger, which were levant and couchant on Lands extended on an Outlawry, may be taken for the King upon a Levari facias, as the Iſſues and Profits of the Lands.

And after ſeveral Arguments, it was reſolved per Curiam, that ſuch Cattle might be taken lawfully, becauſe the Defendant averred, that they were levant and

couchant on the Lands extended, which Averment is very neceſſary in this Caſe.

And Holt Chief Juſtice, who gave the Rule, gave alſo theſe Reaſons for the Judgment.

(1.) Firſt, becauſe the Cattle are properly the Iſſues of the Lands, tho' they are not the Cattle of the Owner of the Lands, for otherwiſe there might be no Iſſues at all; and the King cannot intermeddle with the Soil, becauſe nothing but the Iſſues thereof are forfeited upon an Outlawry; and the Cattle of the Perſon outlawed cannot be the Iſſues of his Lands, for thoſe are forfeited to the King before; and if after the Outlawry he purchaſeth any more, the Property of them is immediately veſted in the King.

2 Inſt. 453. Fleta 68.

(2.) The Land is Debtor to the King, therefore he may levy what ſhall be found levant and couchant there: And if the Perſon outlawed ſhould, after the Inquiſition, make a Feoffment of his Lands, the Cattle of the Feoffee may be taken for the Iſſues of thoſe Lands; and if ſo, a fortiori the Cattle of a Wrong-doer, who hath no Pretence of a Title.

1 H. 7. 7. 19 H. 7. 30. 21 H. 7. 7. 5 Cro. 431.

If Tenant for Life impanelled on a Jury loſe his Iſſues by Default, the King may levy them upon the Reverſioner after the Death of the Tenant for Life, becauſe it was a Charge upon the Land.

But if Tenant for Life is outlawed and die, it may be a Queſtion, Whether the Iſſues arrear can be extended on the Reverſioner.

2 Roll. Abr. 157, 159. Lane 79.

If the Owner of the Soil is outlawed, the Cattle of a Commoner cannot be taken as Iſſues; but if they ſhould be taken, he muſt plead his Title in the Exchequer, unleſs his Right of Common is found by Inquiſition on the Outlawry.

Hardres 101. Raym. 17.

So it is likewiſe if the Perſon outlawed do alien his Lands before any Inquiſition taken for the King, which he may lawfully do, yet the Alienee muſt plead off the Extent in the Exchequer, by ſhewing his Title precedent.

Mich. 22 Car. 2. Riſdon *verſus* Rainer.

If Cattle eſcape into Lands charged with a Rent-charge, they may be diſtrained for the Rent, becauſe the Land is the Debtor; and a * Caſe was now cited, where the very ſame Point was adjudged in the Exchequer in the Lord Chief Baron Hale's Time, and 'tis great Reaſon it ſhould be ſo, for otherwiſe the Perſon outlawed may take in other Men's Cattle to agiſt, and ſo defeat the Outlawry, and in

* 18 Car. 2. Hodſon *v.* Tobickle.

this Caſe, the Plaintiff might claim under the Perſon outlawed, for any Thing appearing to the contrary; wherefore the Plea was held good in Subſtance.

But then there were three Exceptions taken to the Form of it.

(1.) Firſt, That 'tis not alledged, that the Writ was delivered to the Sheriff; ſed non allocatur, for that ſhall be preſumed until it appear to the contrary. 1 Sand. 29.

(2.) This being an Outlawry at the Suit of the Defendant Cole, the Defendant ought to begin with the Outlawry in C. B. and to have ſet forth all the Proceedings, and not to begin ſhort with the Proceſs of Levari only.

Et per Holt Chief Juſtice, All Strangers who juſtify under Proceſs of Execution (except Officers) ought to ſet forth the Judgment, and ſo muſt the Party who is Plaintiff, if he juſtifieth; but here 'tis only recited in the Writ, that the Outlawry was at the Suit of Cole, but not poſitively alledged ſo to be. 2 Vent. 91.

(3.) Where the Defendants (the Officers) juſtify by the Command of the Sheriff to them, 'tis ſaid per quod præd' J. R. & Johannes, inſtead of Joſephus, took the Cattle, ſo not the ſame Man, and for this Miſtake only, the Judgment was given againſt the Defendants. Where by a Miſtake of the Name of one of the Officers, the Judgment was reverſed.

DE

Term. Paſchæ.

Anno 10 Willielmi 3. B. R.

Silly *verſus* Dally & al'. Intratur Hill. 9 Willi. 3. Rot. 747. *and Judgment given* Paſch. 10 Will. 3.

In all Bars, Avowries and Replications, where a Title is made under a particular Eſtate, the Commencement of that Eſtate muſt be ſet forth in the Pleading.

IN Replevin for taking his Cattle in a Place called the Newpark, in the Pariſh of St. Breock in the County of Cornwall.

The Defendants made Conuſance as Bailiffs to John Tregeagle, Eſq; for that long before the Taking, &c. ſcil't, 31 Julii ann. 1645. one John Tregeagle his Grandfather, poſſeſſionat' fuit de & in quodam meſſuagio & 44 Acris terræ cum pertinen' vocat' Trevanion Tenement' in prædicta parochia de St. Breock (unde the Locus in quo, &c. was Parcel) pro quodam termino Quingentorum annorum computand' a Triceſimo die Julii anno illo, &c. and being ſo poſſeſſed, he 31 Julii anno 1645. demiſed the ſame to John Carter, and to Richard Carter for the Term of 499 Years, and three Quarters of a Year, two Months, and three Weeks, rendring a Rent of 16 l. per ann. and then they derived a Title to John Tregeagle the Grandſon to the Reverſion of this Term of 500 Years, as Executor to the Legatee of his Grandfather, and made Conuſance for 52 l. Rent Arrear for three Years, and one Quarter of a Year, ended 1 Feb. 1696.

And upon a Demurrer to this Conuſance, the ſingle Point was upon the Pleading, (viz.) Whether the Defen-

dants, who derived only a particular Eſtate for Years to him in whoſe Right they made Conuſance, ought to ſhew how that Eſtate commenced, by ſetting forth ſpecially who had the general Eſtate in the Land, and who made this Leaſe of 500 Years to the Grandfather, ſo as the Plaintiff who was a Stranger, and for ought appears, a Purchaſer, might have an Opportunity of traverſing the Title of the Leſſor, or of any other Perſon under whom he might claim; or whether this general Way of alledging a Poſſeſſion of a Term for Years was ſufficient in an Avowry, or in a Bar, where the Defendants are to make out a Title ſo as to juſtify the Taking another Man's Cattle.

Et per Curiam adjudged that this Conuſance was ill, because the Commencement of the particular Eſtate was not ſet forth according to the general Rule in Pleading, (viz.) That in all Bars, Avowries and Replications where a Title is made under a particular Eſtate, be it for Years, for Life, or in Tail, the Commencement of ſuch Eſtate muſt be ſhewn; for in thoſe Parts of Pleading, none but the general Eſtate in Fee-ſimple (which may be gained by Wrong as by Diſſeiſin) may be alledged generally. Curia. 1 Inſt. 303. *b.* March 1. Cro. Car. 571. Yel. 147, 148. Cro. Car. 138. 2 H. 7. 1, 2.

But in a Declaration where 'tis only an Inducement to the Action, and not traverſable, 'tis otherwiſe; as for Inſtance, where an Action of Debt for Rent was brought by an Executor for Rent grown due after the Death of the Teſtator who had only a Term for Years in the Land, 'tis ſufficient to declare that the Teſtator being poſſeſſed for a certain Term for Years not yet expired, did Demiſe to the Defendant, &c. because this is grounded upon a Privity of Contract.

But in the principal Caſe, the Poſſeſſion comes in by Way of Title, and in lieu of a Title, which the Plaintiff might traverſe, for no Iſſue can or ever was taken upon a Poſſeſſion only, (viz.) Poſſeſſionatus vel non, ſo that the Plaintiff by this Means will be deprived of all Opportunity to controvert the Title to the Land; for which Reaſon Judgment was given for the Plaintiff. 2 Mod. 70. *See* Antea Sanders *ver.* Huſſey.

Upon which a Writ of Error was brought in Parliament anno 2 Annæ, and in Hill. Vacation that Judgment was affirmed, pro the Plaintiff Silly.

Butcher

Butcher *verſus* Andrews.

1 Salk 23. *Indebitatus aſſumpſit* will not lie againſt the Father, at whoſe Requeſt the Plaintiff lent Money to his Son.

ACtion on the Caſe on ſeveral Promiſes, one was for ſo much Money lent by the Plaintiff unto R. A. the Defendant's Son, at the Inſtance and Requeſt of the Defendant.

Upon non aſſumpſit pleaded, there was a general Verdict for the Plaintiff, and entire Damages; and now it was moved in Arreſt of Judgment, that a general Indebitatus aſſumpſit would not lie againſt the Defendant upon this Lending of Money unto his Son, for in reſpect to the Defendant 'tis a collateral Promiſe, upon which the Plaintiff ought to have declared ſpecially, becauſe upon the Lending to the Son, the Law cannot raiſe a Promiſe by the Father, but it will in the Son who borrowed the Money; and the Damages being entire made all naught, and the Court was of that Opinion.

Sed per Holt Chief Juſtice, If it had been an Indebitatus for ſo much Money paid by the Plaintiff at the Requeſt of the Defendant unto his Son, it might have been good, for then it would be the Father's Debt, and not his Son's; but when the Money is lent to the Son, 'tis his proper Debt, and not the Father's.

The Judgment was arreſted.

Atkinſon *verſus* Corniſh.

5 Mod. 395. Adminiſtrator *durante minore ætate* was Plaintiff, to whom the Adminiſtration was granted as Guardian to the Infant; this ſhall continue till the Infant is of full Age.

THE Plaintiff declared as Adminiſtrator durante minore ætate of T. S. and after ſome Pleadings there was a Demurrer, and Joinder in Demurrer; and now an Exception was taken to the Declaration, becauſe the Plaintiff had not averred, that T. S. was ſtill under Age of ſeventeen Years.

Sed per Holt Chief Juſtice, There is a Difference where Adminiſtration is granted to one as Guardian to an Infant, who hath a Right to adminiſter, but is incapable to take it by Reaſon of his Minority, as in the principal Caſe, and where an Adminiſtration is granted during the Minority of an Infant Executor; for in the laſt Caſe the Adminiſtration determines as ſoon as the Executor attains the Age

of ſeventeen Years; but in the other Caſe it continues till the Infant attains his full Age, (viz.) twenty-one Years; and that the Law is ſo practiſed amongſt the Civilians, wherefore

The Plaintiff had Judgment.

Burr *verſus* Atwood.

JUdgment in the Court at Maidſtone in Kent, and upon a Scire facias againſt the Bail, Execution was awarded againſt them; and a Writ of Error was brought and proſecuted by Burr, who was one of the Bail for the Defendant in the original Action; and the Writ was, Tam in redditione judicii quam in adjudicatione Executionis againſt the Bail, &c.

1 Salk. 89. Writ of Error by the Bail *Tam in redditione judicii* of the original Action, when the Bail are not entitled to ſuch Writ.

And now it was moved to quaſh this Writ, becauſe the Bail is not entitled by Law to a Writ of Error upon the Judgment, againſt the Principal in the original Action; to which the Court agreed.

And they quaſhed the Writ of Error Quoad all that related to the Judgment in the original Action, and no more; and the Writ was ruled to ſtand good Quoad the Judgment againſt the Bail upon the Sci. fa. and accordingly the Plaintiff Burr proceeded therein.

Dobertine *verſus* Chancellour.

CASE, &c. to which the Defendant pleaded a frivolous Plea in Abatement; and upon a Demurrer to the Plea, there was Judgment againſt him to anſwer over.

5 Mod. 392. In a Plea in Abatement there was Judgment to anſwer over, then the Defendant pleaded *Non Aſſumpſit*, and there was a Verdict and Judgment againſt him, which was ſet aſide, becauſe in the Record of *Niſi prius*, there was no Mention made of the Plea in Abatement.

Thereupon he pleaded Non Aſſumpſit, upon which they were at Iſſue, and the Plaintiff had a Verdict; and upon a Motion in Arreſt of Judgment this Verdict was ſet aſide, becauſe in the Niſi prius Record there was no Entry made of the Plea in Abatement, and the Proceedings thereon, but only of the Plea Non Aſſumpſit, and all the reſt omitted; and the Reaſon given was, becauſe there was no Plea-Roll to warrant the Niſi prius Roll; for upon the Plea-Roll (which was in Court) between theſe Parties, it appeared, that ſuch Proceedings and Judgment had been

upon

upon a Plea in Abatement before the Plea of Non Aſſumpſit, but the Niſi prius Roll mentioned no ſuch Thing, therefore it could not be taken to be in the ſame Cauſe.

The King *verſus* Maurice, *Mayor of* Lincoln.

5 Mod. 402. *Mandamus* to reſtore an Apprentice to his Freedom.

MAndamus to the Mayor of Lincoln, to admit T. S. to his Freedom of that City, he having ſerved an Apprenticeſhip there for ſeven Years, with a Citizen, who was a Mercer by Trade; this Writ ſuggeſted, that T. S. was a Quaker, and therefore could not in Conſcience take the uſual Oaths, &c. but that he had offered to do the ſame Thing by Way of ſolemn Affirmation, according to the * new Statute, but that the Defendant refuſed to admit him.

* 7 & 8 W. 3. cap. 34.

The Return of this Mandamus was, that the Freedom demanded by the Quaker was a Place of Profit, for thereby he would have a Right to vote in chuſing Members for Parliament, and alſo a Right to have Common of Paſture in the Waſtes there.

† (viz.) *That no Quaker, by Virtue of that Act, ſhall be qualified to have any Office or Place of Profit in the Government.*

† And this was intended to bring the Caſe within the Exception in the ſaid Act of Parliament, ſo as the Quaker ſhould be obliged to take the Oaths according to the Form of the Church of England, or otherwiſe be excluded from his Freedom.

Sed per Curiam, This is not a Place of Profit within the Meaning of the Exception; ſo the Quaker was afterwards admitted to his Freedom.

The Lady Caverly *verſus* Sir John Leving.

Where the Iſſue is local, and not tried in the right Place, this is cured by the laſt Statute of Jeofails.

THE Plaintiff demiſed a Houſe to the Defendant, ſituate in the City of Cheſter, and the Defendant covenanted to repair, &c. and an Action of Covenant being brought for not Repairing, it was laid in the County of Cheſter at large, and the Viſne at Tarvin; and upon Iſſue joined, the Cauſe was tried in the County, and the Plaintiff had a Verdict; and now it was moved in Arreſt of Judgment, for that this Iſſue was local, and therefore it ought to have been tried in the County of the City of Cheſter.

Sed per Curiam, This is cured by the laſt Statute of Jeofails.

Judgment for the Plaintiff.

Wangford *and* Brandon *Pariſhes in* Suffolk, *moved in this Term, but not determined till* Michaelmas-Term *following.*

Warrant of removing a poor Man directed to the Conſtables, &c. without naming the Church-wardens or Overſeers, yet good if executed by the Conſtable.

THE Caſe, ſ. An Order was made by two Juſtices, which was confirmed by the Seſſions upon an Appeal: And it was directed to the Conſtables of, &c. but not to the Church-wardens or Overſeers of the Poor.

The Body of this Order was to remove three Men (naming them) with their Families, from the Pariſh of Brandon to the Pariſh of Wangford; and the Exceptions to this Order were as follow:

ſ. (1.) That the Direction of this Order was ill, becauſe it was to the Conſtables alone, who are not proper Officers for this Purpoſe.

Sed per Curiam, Since the Conſtables have executed the Order, 'tis well enough, tho' in Strictneſs they are not bound to obey it, tho' directed to them; for if a Juſtice directs a Warrant to any Perſon by Name, who is no Officer, the Perſon is not bound to obey it; but if he doth, and 'tis a Matter within the proper Juriſdiction of a Juſtice of Peace, the Warrant will bear him out, and he may juſtify under it.

(2.) This Order is void for the Incertainty of the Meaning and Extent of the Word Family, for Servants and Lodgers may be comprehended under that Word, whoſe Settlements are diſtinct from the Settlement of the Maſter of the Family, and are not to follow him as a Charge to the Place of his laſt Settlement.

But the Court was unwilling to quaſh the Order upon this Exception, until they were better informed of the Truth of the Fact; whereupon it was agreed on both Sides to produce Affidavits thereof, which was done, and the Fact was thus:

ſſ. Three poor Men of Wangford came into the Pariſh of Brandon, and there married with three poor Widows of that Pariſh, who received Relief, &c. and each of the ſaid Widows had Children by their former Husbands, ſome of

them (the Children) being under the Age of ſeven Years, and others above that Age; and this Order was not only to remove the three Men and their Wives, but alſo their Children, to the Pariſh of Wangford, as their laſt Place of Settlement.

Nurſe children muſt follow their Mother, but others not.

Et per Holt Chief Juſtice, The Children are not removable into the Pariſh of Wangford, to charge that Pariſh by ſettling them there; but as to the Nurſe-children under the Age of ſeven Years, they might be ſent thither with their Mothers for Nurture, but ſtill the Pariſh of Brandon muſt relieve them there, and not the Pariſh of Wangford; and as to the other Children above the Age of ſeven Years, they ought not to be removed at all, being ſettled Inhabitants in the Pariſh of Brandon, and the Removal of their Mothers ſhall have no Influence on the Settlement of their Children.

Therefore ſince the Juſtices had made an ill Uſe of this general Word Family; per Curiam, the Order was quaſhed.

The King *verſus Dean and Chapter of* Norwich.

Mandamus to the Juſtices to ſign a Poor-Rate.

A Mandamus to the Dean and Chapter of Norwich, who were Juſtices of the Peace within the Precinct of the Cloſe of the Cathedral Church of Norwich; and the Writ ſuggeſted, that the Overſeers of the Poor within that Precinct, had made a Rate for the Relief of the Poor there, and that the Defendants refuſed to ſign it and allow it; ſo they were commanded by the Writ to ſign, allow, and confirm that Rate, or to ſhew Cauſe to the contrary.

The Dean and Chapter return, that the Rate made by the Overſeers was partial, and they ſhewed ſeveral Inſtances of Partiality, as that A. rented a Houſe there at 10 l. per Annum, and B. rented another Houſe there at the ſame Rent, and yet A. was rated 7 s. and B. but 3 s. and farther, that they had ſigned and allowed another Rate, which was a Pound Rate, and an equal Rate, according to the yearly Rent of every Houſe.

The Court doubted of this Return, and thereupon an Exception was taken to the Form of the Writ.

1ſt. It was to command the Defendants to ſign, allow, and confirm the Rate; whereas the * Statute requires only, that the Juſtices ſhall conſent to it.

* 43 Eliz.

Adjournatur.

5

Nota,

Nota, The Diſpute was, Whether the Churchmen ſhould be rated for their perſonal Eſtates there, or only according to the Rent of their Houſes, and ſo pay no more than an Ordinary Tradeſman. 1 Sid. 377.

DE

Term. Sanct. Trin.

Anno 10 Willielmi 3. in B. R.

Iveſon *verſus* Moor & al'.

CASE, &c. wherein the Plaintiff declared, that he was poſſeſſed of a Colliery and Mine of Coals for a Term of Years yet to come, lying in the Bowels of ſuch a Cloſe within the Pariſh of Whitekirk in Yorkſhire, prope adjacen' to an Highway leading from ſuch a Hill, and from thence in, by and thro' another Hill, & ſic retrorſum, through which Way the Plaintiff upon all Occaſions uſed to carry his Coals to the Neighbourhood for Sale; and averred that he had a great Quantity of Coals, (viz.) ſo many Hundred Loads which lay in his Cloſe ready for Sale; and that the Defendant miliciouſly deſigning to deprive the Plaintiff of the Uſe and Benefit of his Coal-Mine, and to ſeduce his Cuſtomers to the Coal-Mine of the Defendant Moor, which lay near in the ſame Pariſh, they had (on ſuch a Day) caſt four Loads of great Stones, and the Root of a great Tree, in and upon the ſaid Highway, in ſuch a Part thereof, per quod the Way in that Place was ſo ſtopt up and obſtruct- 1 Salk. 15. Whether an Action on the Caſe will lie for ſtoping an Highway.

ed, that the Carts and Carriages of the Plaintiff could not pass to carry his Coals abroad, &c.

This Obstruction was laid with a Continuance for a Month, per quod the Plaintiff lost the Benefit of his Coal-Mine for all that Time, &c.

Upon Not guilty pleaded, the Plaintiff had a Verdict, and 40 l. Damages; and now it was moved in Arrest of Judgment, that this Action (as it was laid) could not be maintained.

See Paine ver. Partridge, antea.

(1.) Because it appears by the Declaration, that this is a Publick Nusance in an Highway, for which an Action on the Case is not maintainable, but it ought to be punished by Indictment, or may be removed at Pleasure, &c.

(2.) Admitting an Action will lie where a Man hath any particular Injury or Damage by a Thing which is a common Nusance, as by falling into a Pit made cross a Highway; yet in this Case there are not Averments sufficient to bring it under that Rule, for 'tis not averred that the Plaintiff lost any particular Customer by Name, but only in general, that he lost the Profits of his Coal-Mine which is not sufficient.

Bro. Acc. Case, placito 1. & *Nusance* placito. 3 Cro 664. 2 Cro. 446. 1 Inst. 56. *a.* 1 Roll. Abr. 36, 63. Vaughan 335.

Like an Action of the Case for Words, which are actionable meerly because of Loss of Trade, or the Loss of Marriage; the Plaintiff must alledge the Names of the Customers, and of the Suitor, otherwise it hath been always held that the Declaration is ill.

2 Bulst. 276. 3 Bulst. 75. 1 Cro. 140. 2 Rep. 79. 1 Roll. Abr. 56. 2 Sand. 115.

Moreover, to maintain this Action 'tis necessary, that the Injury and Damage done to the Plaintiff should be direct and positive, and not consequential only; and therefore it must be for some Hurt or Loss which the Plaintiff hath received in passing that Way, and not for any consequential Loss in being hindered to pass, for if he would, he might have removed the Nusance.

The Chief Justice Holt and Rokesby were against the Action, for the Reasons supra, but Justice Turton and Gould were for the Action; and Justice Turton who tried the Cause, reported that the Way was stopped maliciously by the Defendant, and on Purpose to injure the Plaintiff; therefore the Action as laid is maintainable, and that it would hold upon a Demurrer to the Declaration.

That

That the Gift of this Action was the per quod the Plaintiff loſt the Profits of his Colliery, becauſe Carriages could not paſs that Way; for which the Caſes in the * Margin were cited, and they held that in the principal Caſe, the Certainty of the ſpecial † Damages need not be ſet forth; and that per quod he loſt his Buyers, is good without naming them, becauſe that would make a Prolixity, as in Indictments for Barretry the Names are never inſerted.

* 1 Roll. Abr. 89. Godb. 343. 1 Cro. 510. 1 Leon. 206. Allen 22. T. Jones 156. 1 Vent. 113.

† Hob. 284. 9 Rep. 53.

But the Chief Juſtice and Rokesby were of a contrary Opinion, & per Holt Chief Juſtice, if it had been laid that the Coals which the Plaintiff had ready for Sale, were ſpoiled or damnified, or loſt, becauſe he could not carry them off, in ſuch Caſe, the Action had been maintainable.

The Court being divided, the caſe was adjourned before all the Judges.

Pullen *verſus* Birkbeak.

THIS was a Motion to quaſh an Inquiſition taken upon an Elegit, quoad the Extent of the Land only, for that it appeared upon the Return of this Inquiſition, that the Sheriff had delivered Poſſeſſion of more then a * Moiety.

Upon an *Elegit*, the Sheriff delivered more than a Moiety.

* Dyer 299. 1 Inſt. 290.

2 Cro. 693. Townſend Judgments 129 Tit. Elegit. 1 Vent. 259. 1 Sid. 91. 239 Cro. Car. 162.

Et per Holt Chief Juſtice, If upon an Elegit, the Sheriff delivereth a Moiety of an Houſe without Metes and Bounds, ſuch Return is ill, and ſhall be quaſhed for Uncertainty; but the Return in the principal Caſe is not void, but voidable by Writ of Error or Audita querela.

Theobald *verſus* Long.

THE Defendant in this Action pleaded in Abatement another Action depending in this Court prior to the Action now brought; and now the Counſel for the Plaintiff craved Oyer of the Record of the Action thus pleaded, and moved for a Rule of Court, that unleſs the Defendant gave

Where a Record of the ſame Court is pleaded in Abatement.

1 Inſt. 128. Keilw. 95, 96.

gave Oyer of it the next Day, that Judgment final might be given againſt him.

Poſt. Cremer *verſus* Wickett.

Et per Holt Chief Juſtice, Where a Record of the ſame Court is pleaded in Abatement, and the Plaintiff demands Oyer of that Record, and 'tis not given him in convenient Time, the Plea ought not to be received, but the Plaintiff may ſign his Judgment; and the Rule was, that unleſs the Defendant gave Oyer of the Record the next Day, Judgment ſhould be for the Plaintiff.

Roſwell *verſus* Prior.

2 Salk. 459. Mod. *Caſes* 116. Caſe for ſtopping his Lights.

IN an Action on the Caſe, the Plaintiff declared, that on ſuch a Day, and from thence to the Time of exhibiting his Bill, he had been poſſeſſed of ſuch a Houſe, in ſuch a Pariſh in the County of Middleſex, in which Houſe during the ſaid Time there were ſuch Windows, and for all that Time the Light de jure debet to come into his ſaid Houſe from thoſe Windows, & inferri conſuevit, and that the Defendant had built a new Houſe ſo near the Plaintiff's Houſe, that thereby his (the Plaintiff's) Windows were darkned, ad damnum, &c.

Bro. Horſ. de Son Fee placito 1. Fitz. Abr. Brief placito 674. Owen 109. 3 Cro. 335. 1 Roll. Rep. 13, 393. 9 Rep. 53. 8 Rep. 87. Cro. Car. 575. 2 Cro. 43.

Upon Not guilty pleaded, the Plaintiff had a Verdict, and now it was moved in Arreſt of Judgment, and inſiſted that this Caſe differs from all the Caſes of the like Nature, which had been adjudged good only upon the Word debet, as in the Caſes for diverting a Watercourſe, for ſtoping up Ways, for hindering a Commoner to enjoy his Common.

For in all theſe Caſes ſome tortious Act was charged on the Defendants, but in this Caſe there can be no Tort, becauſe 'tis lawful for the Defendant to build a Houſe on his own Land; and therefore it was neceſſary that the Plaintiff ſhould ſet forth in his Declaration, that his Houſe was an ancient Houſe, and that Time out of Mind, the Light came from his Windows, otherwiſe he is not entitled to this Action.

To which it was anſwered, That where an Action is brought againſt the Defendant as a wrong Doer, and nothing elſe appears upon the Face of the Declaration, there the Words de jure debet are ſufficient to maintain his Action.

Et per Curiam, This is good after a Verdict, because of the Words Inferri consuevit, for that implies a Prescription, and must have been proved at the Trial; but it would have been otherwise upon a Demurrer to the Declaration. Curia

Judgment for the Plaintiff.

Shaw's *Case*.

TWO Justices of the Peace for the County of Essex, adjudged Shaw to be the reputed Father of a Bastard-Child, and by their Order he was charged to maintain it, from which Order he appealed to the next Quarter-Sessions, after Notice, where, upon Debate, the Order of the two Justices was vacated.

Order of Bastardy vacated at Sessions; the Appeal was to the next General Quarter-Sessions, when it should be to the next Quarter-Sessions.

And now it was moved to quash the Order of Sessions, for that it recited the Order of the two Justices, and Shaw's Appeal to the next General Quarter-Sessions, &c. whereas the * Statute which gives the Appeal directs, that it shall be to the next General Sessions, and probably there might be a General Sessions held for the County of Essex, between the Time of Notice of this Order and the General Quarter-Sessions when this Order was made; and if so, then this Appeal was irregular, and the Court of Quarter-Sessions had no Jurisdiction, for which Reason the Sessions-Order was quashed.

* 18 Eliz. cap. 3.

Johnson *versus* Long. Intratur Trin. 10 Will. 3. Rot. .

IN an Action on the Case for a Nusance, the Plaintiff declared, that on 21 April, Anno 8 Will. 3. and ever since, he was possessed of an antient Work-house, wherein Time out of Mind there had been a Window, and that the Defendant for all that Time was possessed of a Piece of Land adjoining; and on the same 21 April, quandam parietem super prædict. parcellam terræ ipsius (the Defendant) tam prope officinam prædict. de novo erexit & edificavit ita quod per eandem erectionem parietis, the aforesaid Window was darkned from the said 21 April, to the Exhibiting this Bill, per quod he lost the Benefit of the Light for all that Time.

1 Salk. 10. Case for a Nusance, the Defendant pleaded in Bar another Action depending for darkning the Lights.

The Defendant pleaded in Bar, that in Easter-Term, Anno 7 Will. 3. the Plaintiff impleaded the Defendant in an

an Action on the Caſe, in quo quidem placito, the ſaid Plaintiff narrando verſus eum tunc dixit quod cum, &c. reciting all the Declaration in hæc verba, which appeared to be the very ſame with the Declaration in the Action now depending verbatim, only with this Difference concerning Time, for that in this Declaration the Erection of the Nuſance was laid to be 21 April, Anno 8 Will. 3. and the Loſs of the Light from thence to the Exhibiting the Bill, but in the former Declaration the Erection was laid to be 10 October, Anno 7 Will. 3. ita quod per eandem erectionem parietis the Window was darkned, and he loſt his Light from thence to the 20th of April, Anno 8 Will. 3.

And the Defendant pleaded farther, Quod taliter ſuperinde proceſſum fuit quod poſtquam (the Defendant) placitaſſet ad inde non culpabilis & per quandam Juratam patriæ culpabilis invent. fuit poſtea ſcilicet the Plaintiff had Judgment againſt the Defendant to recover 14 l. for his Damages and Coſts, and concluded his Plea, with an Averment, that the Work-houſe, the Window, and the Erection of the Wall, in this, and that, the Action were all the ſame.

To this Plea the Plaintiff demurred, ſuppoſing, becauſe of the different Times laid with Reſpect to the Loſs of his Light, as well as to the Erection of the Wall, the former Recovery could be no Bar to this Action, becauſe this was Damages ſubſequent to the Time of the firſt Action.

But it was adjudged for the Defendant, becauſe the Plaintiff had not laid any Continuance of the Nuſance in his Declaration, and he ſhall not recover twice for one and the ſame Offence, but for the Continuance of the Nuſance he may have a new Action.

DE

Term. Sanct. Mich.

Anno 10 Willielmi 3. B. R.

The King *verſus* Sir Richard Raines.

MAndamus to Sir Richard Raines, Judge of the Prerogative Court of Canterbury, commanding him to grant a Probate of the Will of Edith Pinfold, Widow, to one Watts, whom ſhe had made Executor thereof.

1 Salk. 299. *Mandamus* to grant a Probate of a Will to an Executor, becauſe inſolvent.

The Return was, that Watts abſconded and was become inſolvent; and that he had refuſed to give Caution to pay the Legacies given by the Will to ſome infant Relations, which amounted to above 500l. for which Reaſon he had denied to grant the Probate to him.

And now Dr. Waller came into Court to maintain this Return, who argued, that by the Civil and Eccleſiaſtical Law, the Judge in Caſes of non ſolvendo was bound to take Caution for the good Adminiſtration of the Goods; and that what had been diſputable in the like Caſes was, Whether the Teſtator had any Notice of the Inſolvency of his Executor, and alſo upon whom the Proof of that Matter ſhould lie, (viz.) Either upon the Executor or thoſe who oppoſe him.

For if the Teſtator had Notice of the Inſolvency, and yet made or continued him Executor, in ſuch Caſe no Caution could be required of him, tho' he was inſolvent; but where the Teſtator had no Notice of the Inſolvency, or if it happened after the Teſtator's Death, in ſuch Caſe

Caution is always required before any Probate shall be granted.

And if the Executor should refuse to give Caution, such a Refusal amounts to a Renunciation of the Executorship, and thereupon Letters of Administration cum Testamento annexo shall be granted, as was the constant Practice with Respect to Quakers, who were made Executors, (before the Statute made for their solemn Affirmation) and refused to take the usual Oath given to Executors upon Probate; such Refusal was taken as a Renunciation of the Executorship.

Linwood, lib. 3. tit. 13. de Testamentis chap. —Staturum, &c.

But the other Side, against the Return, could get no Civilian to argue against their Jurisdiction; however, per Curiam, a peremptory Mandamus was granted, because since the Testatrix had thought fit to appoint Watts to be her Executor, without any previous Qualification, therefore the Judge before whom the Will is to be proved, ought not to interpose and demand Caution of the Executor, when the Testatrix required none.

See Selden de Ecclesiasticis Jurisdictionibus, fol. 9.

And moreover, this Inconvenience would happen to all Creditors and Legatees, (viz.) Whilst this Matter is in Controversy, there will be neither Executor or Administrator against whom an Action may be brought to recover their Debts or Legacies; or if Administration should be granted upon such Refusal, and then the Administrator should bring an Action, it would be a good Plea, that there is a Will, and an Executor appointed.

Hereupon those who were concerned for the infant Legatees, exhibited a Bill in Chancery against Watts the Executor, and that Court enjoined him from intermeddling with the Assets any farther than to satisfy the Legacy given to himself; for in Equity he is but a Trustee for the Infants; and where a Trustee is insolvent, the Court of Chancery will compel him to give Security before he shall enter upon the Trust.

Matthews *verſus* Erbo.

ERBO who was a Foreign Merchant, and never in England, was outlawed at the Suit of Matthews in an Action on ſeveral Promiſes for Goods ſold and delivered, and upon a ſpecial Capias Utlegatum, a Ship and other Effects belonging to Erbo were ſeiſed as forfeited upon this Outlawry.

A Foreigner was outlawed, and a Ship was taken upon a ſpecial *Capias Utlegatum*; now tho' the Perſon outlawed never was in *England*, the Court would not vacate the Outlawry.

And now it was moved, that this Outlawry might be vacated, and Reſtitution awarded, upon Affidavits produced and read, that the Defendant was never infra legem, (i. e.) That he never was in England; and therefore could not be outlawed, becauſe that was putting him extra legem.

Sed per Curiam, This Outlawry ſhall not be vacated upon ſuch Affidavits, but the Defendant may bring a Writ of Error, which he was compelled to do; and thereupon to put in Bail to the Action in which he was outlawed, according to the new Statute, and then the Plaintiff conſented to the Reverſal of the Outlawry.

Nota; This was a very good Project to get Bail from a Foreigner.

Jackſon *verſus* Piggot.

THE Caſe, ſt. One Dunkin drew a Bill of Exchange upon the Defendant Piggot dated 25 March Anno 1696. in which the Money was made payable on the 29th of April next enſuing.

Caſe againſt the Defendant upon the Acceptance of a Bill of Exchange.

This Bill was not preſented to Piggot till after the ſaid 29th Day of April, but yet he accepted the Bill; and upon this Acceptance this Action was brought, in which the Plaintiff declared, that on ſuch a Day in the Year 1696 the Bill was preſented at ſuch a Place, and that the Defendant then and there accepted it, and promiſed to pay the Money ſecundum tenorem & effectum Billæ excambii prædictæ, which he had not done, &c.

Upon non aſſumpſit pleaded, the Plaintiff had a Verdict, and it was moved in Arreſt of Judgment, that it was impoſſible for the Defendant to pay the Money ſecundum tenorem Billæ, becauſe upon the Plaintiff's own Shewing the Bill was not preſented or accepted until about a

Year after the Day when the Money was made payable by the Tenor of the Bill.

Sed per Curiam, The Acceptance of the Bill, though after the Day the Money was payable, is binding to the Defendant; and therefore this Action is maintainable; and as for these Words secundum tenorem & effectum Billæ, the Effect of the Bill is the Payment of the Money, and not the Day of Payment, or at the most this is but Surplusage in the Declaration.

Surplusage.

The Plaintiff had Judgment.

Coot *versus* Lynch.

5 Mod. 421. 1 Salk. 321. *Ca. sa.* brought here for Costs given in *Ireland* is irregular.

LYNCH brought an Ejectment in the Court of Common Pleas in Ireland as Lessee of the Lord Viscount Gormanstone against Colonel Coot, one of the Sons of the Earl of Montrath; and upon a Trial at Bar, Lynch had Judgment, upon which Coot brought a Writ of Error in B. R. in Ireland, where the Judgment was affirmed.

Then he brought a Writ of Error in the Court of King's Bench in England, where the Judgment of B. R. in Ireland was likewise affirmed; and lastly he brought a Writ of Error in the House of Lords here, upon which the last Judgment was also affirmed.

In each of the Courts in which these Writs of Error were brought, there were several and distinct Costs awarded to the Plaintiff in the original Action; and after the Judgment was affirmed in Parliament, Lynch brought a Capias ad satisfaciend' in B. R. here, as well for the Costs given by the Courts in Ireland, as for those given by the Courts here; upon which Writ Colonel Coot was taken in Execution here, and paid all the Money in order to obtain his Liberty.

4 Inst. 73. 3 Cro. 371.

And now it was moved for a Supersedeas, and to set aside this Execution as irregular and illegal, and to have Restitution of the Money he had paid, because no Execution could go out (in this Case) here, for all ought to be transmitted to the King's Bench in Ireland, with a mandatory Writ, commanding that Court to award Execution.

But at least there was no Colour to have Execution here, for the Costs which were given in Ireland, whatever might be done concerning the Costs here.

On the other Side it was ſaid, that an Action of Debt might be brought upon the Record which is here for the Coſts of Suit, the Judgment being affirmed, and by the ſame Reaſon Execution may be ſued. Yel. 118. 2 Cro. 514.

Sed per Curiam, This is irregular and illegal, for 'tis an original Ca. ſa. which cannot iſſue into a Foreign County; but there muſt be a Teſtatum Ca. ſa. (after the firſt Writ) into the County where the Action was brought; and here 'tis not poſſible that there ſhould be any ſuch Thing.

Therefore it was ſuperſeded.

Hill *verſus* Vaux.

IN a Prohibition, &c. the Suggeſtion was founded on a Cuſtom in the Pariſh of, &c. that upon the ninth Day of May in the Evening, and on the tenth Day in the Morning, every Year, and from thence every 9th Night and tenth Morning, until a Lamb fallen in that Pariſh ſhould be heard to bleet, they had uſed to pay all the Milk of their Cows to the Vicars, &c. at the Place where they were milked; and by Reaſon thereof were diſcharged of all Tithe-Milk for the Reſidue of the Year, and of any other Payment for the ſame. 2 Salk. 656. Cuſtom to pay Tithe-Milk void.

And now it was inſiſted againſt the Prohibition, that this was a void Cuſtom, becauſe it was a Modus of leſs than a tenth Part of the Thing it ſelf in Specie, which is contrary to the Nature of a Modus, for that is ſomething which is given in loco decimarum, and not Part of the Thing it ſelf for Tithes, as in this Caſe Part of the Milk was to be paid as a Modus, in lieu of the whole Tithe for Milk.

(2.) It was argued, that this Cuſtom was void for Incertainty, becauſe there is no Place certain where this Tithe-Milk ſhould be paid, but generally at the Place where the Cows are milked; ſo that 'tis in the Power of the Owner upon the tithing Nights and Mornings to ſeparate his Cows, and to milk them in ſeveral Places, and there leave the Milk, which being to be paid in the ſame Evenings and Mornings it would be impoſſible for the Vicar to have ſo many Servants to attend at every milking Place to take the Milk; and by this Means he might be deprived of the Milk. Hob. 107, 175. 3 Bulſt. 326. Raym. 277.

Be-

Beſides, by the Law Tithe-Milk in Kind ought to be carried by the Proprietor either to the Parſonage Houſe, or to the Church-Porch.

Curia. The Court was of Opinion, that this Cuſtom was void, for both the Reaſons ſupra; and therefore a Prohibition was denied.

Yard *verſus* Ellard.

1 Salk. 117. Husband and Wife need not be joined in the Action.

CASE, &c. wherein the Plaintiff declared, That whereas the Defendant was indebted to him (the Plaintiff) and Elizabeth his Wife, Executrix of one Toller in 5 l. for Arrears of Rent due to her Teſtator in his Life-time, he (the Defendant) in Conſideration the Plaintiff would give him Time for Payment of the Money until Michaelmas next following (which was about three Months), he would pay the Money; and the Plaintiff averred, that he had given the Defendant that Time, and that his (the Plaintiff's) Wife was ſtill living, but that the Defendant had not paid the Money.

Upon non aſſumpſit pleaded, the Plaintiff had a Verdict, and now it was moved in Arreſt of Judgment, that this Promiſe was void in Law; for if the Husband ſhould recover upon it, ſuch Recovery will be in his own Right, and the Damages will not be Aſſets of the Teſtator.

Beſides, if this Promiſe hath any Effect in Law, the Wife who is Executrix, and upon whoſe Account the Husband is entitled to demand the Money, ought to have been joined in the Action.

Econtra. To which it was anſwered, that this was a good Promiſe in Law, and grounded upon a good Conſideration; for the Husband had the abſolute Power of demanding the Money, and of proſecuting the Defendant to recover it; he had alſo full Power to releaſe the Debt without the Conſent of his Wife, and the Conſideration of the Promiſe was a Benefit to the Defendant, and a Loſs to the Plaintiff.

Moreover, the Damages recovered in this Action would in Law be accounted Aſſets of the Teſtator, becauſe upon the Face of the Record it would appear, that the Action was founded upon a Debt due to him; or at leaſt ſuch a Recovery by the Husband alone would amount to a Devaſtavit in Law pro tanto, ſo as to charge both Husband and Wife in their own Right, and by that Means the Teſtator's Eſtate will not be diminiſhed. And

And as to the Objection, that the Wife ought to be joined in this Action, it was impoſſible ſo to do, becauſe ſhe was no Party to the Contract or Agreement between her Husband and the Defendant, and they would have been nonſuited if they had been joined in this Action, becauſe a Promiſe made to the Husband alone, is not the ſame with a Promiſe made to the Husband and Wife; and the Caſe in the * Margin was cited as an Authority in Point for the Action.

* Lea *verſus* Mimme. Yelv. 84.

And the whole Court was of this Opinion, only per Holt Ch. Juſtice, the Recovery by the Husband would amount to a Devaſtavit pro tanto: Sed per Rokeby Juſtice, it would be direct Aſſets at Law.

Pool *verſus* Gardner.

A Prohibition was granted Anno 9 Will. 3. to ſtay a Suit in the Conſiſtory-Court at Wells for Tithe-Hay and Seed of Clover-Graſs, upon a Suggeſtion of a Modus to pay 4 d. per Acre for all Upland Meadows, which Modus was pleaded below, and Depoſitions taken there.

Modus muſt be proved within ſix Months, or a Conſultation ſhall go.

And in Trinity-Term, Anno 10 Will. 3. this Court was moved for a Conſultation, becauſe the Plaintiff in the Prohibition had not proved this Modus within ſix Months; and thereupon a Conſultation was awarded; and then the Spiritual Court proceeded to Sentence againſt Pool.

And now it was moved for a new Prohibition, becauſe the Conſultation was awarded for Default of proving the Modus in Time, and not upon the Merits of the Cauſe, ſo not within the * Statute of Ed. 3. by which 'tis enacted, that no Prohibition ſhall be allowed after Conſultation duly granted, ſo as the Matter in the Libel is not charged.

3 Cro. 277, 736. Yelv. 102. Poph. 159. * 50 Ed. cap. 4.

And the Court was of this Opinion; whereupon a Prohibition was granted upon Payment of † double Coſts, according to the † Statute, tho' it was ſtrongly oppoſed, becauſe after Sentence.

† 2 & 3 Ed. 6. cap. 13. par. 14.

Shoreditch

Shoreditch *Pariſh's Caſe*, &c.

Where Part of the Inhabitants appeal from a Poor-Rate, the Seſſions may vacate the Whole.

ſſ. THE Church-wardens and Overſeers of the Poor of the Pariſh of Shoreditch, made a Rate towards maintaining their Poor, which was ſigned and allowed by two Juſtices of Peace.

And upon an Appeal of ſome of the Inhabitants to the Seſſions, this Rate was vacated, becauſe it appeared to be partially made, charging the Lands only, and omitting the perſonal Eſtates.

Afterwards the Church-wardens and Overſeers, &c. made a new Rate, charging all real and perſonal Eſtates, from which ſeveral of the Inhabitants did likewiſe appeal to the Seſſions, complaining, that tho' the perſonal Eſtates were named in the Rate, yet the Lands were charged with nine Parts in ten more in Proportion than the perſonal Eſtates.

And this being found to be true in Fact, the Seſſions vacated this ſecond Rate, and ordered the Church-wardens to make a new and more equal Rate.

And now it was moved, that this laſt Seſſions Order might be quaſhed, for that upon an Appeal of ſome of the Inhabitants only, the Seſſions had no Authority to vacate the whole Rate, but only to relieve the Parties appealing.

Sed per Holt Chief Juſtice, 'Tis impoſſible to give Relief to every particular Perſon, becauſe the whole Rate was illegal, and the Words of the * Statute concerning Appeals are very large.

* 43 Eliz.

That the Juſtices in Seſſions have Authority upon an Appeal to vacate the whole Rate, if they find it to be illegal, and that in ſuch Caſe they might have made a new Rate themſelves, or they might have directed the Church-wardens to do it.

Wherefore the Order was confirmed.

Chedwick *verſus* Hughes.

School-maſter keeping a School without Licenſe.

† 1 Jac. 1. cap. 4. par. 9.

PRohibition to ſtay a Suit in the Eccleſiaſtical Court againſt a School-maſter for Keeping a School without a Licence, purſuant to the † Statute, upon a Suggeſtion, that the ſaid Statute gives a Penalty of 40 s. per Diem,

against every such School-master, and that by Law nemo puniri debet bis pro uno & eodem delicto.

Et per Curiam, A Prohibition was granted, and so it was in the Case of Oldfeild *versus* Sir Richard Raines, upon the like Suggestion. *See* 1 Vent. 41. Bates's *Case*.

Nota, per Holt Chief Justice, At the Sittings in Westminster, 9 Novemb. 1698. in a Case of Perjury tried before him, between the King and Perkins, he said, that it was the Opinion of all the Judges of England, upon Debate between them. In capital Cases a Juror cannot be withdrawn.

(1.) That in capital Cases a Juror cannot be withdrawn, tho' all Parties consent to it.

(2.) That in criminal Cases, not capital, a Juror may be withdrawn, if both Parties consent, but not otherwise.

(3.) And that in all civil Causes, a Juror cannot be withdrawn, but by Consent of all Parties.

The King *versus* Galle.

AN Information was brought by the Attorney General against the Defendant, founded on the Statute of * Ed. 6. for that he had sold Cattle alive in Norfolk, within the Space of five Weeks after he had bought them, by which he had forfeited double the Value of the Cattle. 1 Salk. 372. * 5 & 6 Ed. 6. cap. 14.

Upon Not guilty pleaded there was a Verdict against the Defendant; and now it was moved in Arrest of Judgment, that no such Information would lie in this Court, because the Statute * 21 Jac. expressly enacts, that all Informations brought by the Attorney General, upon any Penal Statute in any of the Courts at Westminster, shall be void and of no Effect. Informationsbrought by the Attorney General upon any Penal Statutes, are void. * 21 Jac. 1. cap. 4.

But on the other Side it was endeavoured to distinguish this Case from those Cases upon Statutes, which give Justices of Peace in their Sessions the ordinary Jurisdiction only; because this Statute of Ed. 6. gives the Sessions Power to proceed upon it, as well in a summary Way, by examining two Witnesses to the Fact (which is an extraordinary Jurisdiction) as well as by Trial by a Jury. Econtra.

And it was never intended by the Statute 21 Jac. to confine any Proceedings to inferior Courts, but in Cases only where the Trial of the Fact is directed by the Statutes to be by Jury in such Courts, because of the great

Entrenchment upon the Common Law, which allows no Trial but that of twelve Men on Oath.

But the Court, upon Reading both the Statutes, was of Opinion, that since it was clear, the Defendant might have been prosecuted at the Sessions by Way of Indictment upon this Statute of Ed. 6. therefore this Case was plainly within the Restraint of the Statute 21 Jac. and against the express Words thereof, it being an Information by the Attorney General.

That it hath been always ruled, this Statute 21 Jac. doth not give any new Jurisdiction to Justices of Peace, Justices of Oyer and Terminer, &c. where they had none before; and therefore it doth not extend to any Penal Laws, upon which the Prosecutions can only be in the superior Courts at Westminster.

And upon this Reason are the Opinions founded in those Books, where it hath been held, that an Action of Debt upon a Penal Law will still lie in the superior Courts, because no such Action can be commenced before the Court of Sessions, or before Justices of Nisi prius, or Oyer and Terminer.

The Information was quashed.

Hawkins *versus* Cardy.

1 Salk. 65. A Note was indorsed to pay *Part of* the Money, not good.

THE Defendant had given a Note under his Hand to pay unto E. G. or Order, a certain Sum of Money, and E. G. by Indorsement on this Note, ordered Part of the Money to be paid to the Plaintiff; upon which this Action was brought; and a special Custom amongst Merchants was laid in the Declaration, according to the Plaintiff's Case.

And upon a Demurrer to this Declaration, it was adjudged per Curiam, that this is a void Custom, because by this Means the Defendant would be subject to as many Actions as the Person to whom the Note was given should think fit, and that upon a single Contract; wherefore the Plaintiff prayed Leave to amend upon Payment of Costs, to which the Defendant consented.

Harriſon *verſus* Cage & ux'.

ASſumſit, &c. againſt the Defendant and his Wife, upon a ſpecial Promiſe of the Woman before Marriage, which was, that in Conſideration the Plaintiff Harriſon being a Bachelor, had on ſuch a Day and Place promiſed to take her (whilſt ſole) to Wife, ſhe whilſt ſhe was ſole, &c. promiſed the Plaintiff to take him for her Husband; then he averred in Fact, that he had tendered himſelf to marry her, and had requeſted her to marry him, but that ſhe refuſed, and afterwards married the Defendant.

1 Salk. 24. *Aſſumſit* upon reciprocal Promiſes between a Man and Woman, to marry each other, and the Woman refuſed.

Upon non aſſumpſit pleaded, the Cauſe was tried at the Aſſiſes in Norfolk, and there was a Verdict for the Plaintiff, and 400 l. Damages, the Woman being worth 3000 l. when the Plaintiff courted her, and afterwards by the Death of her Brother worth double that Sum.

And now it was moved in Arreſt of Judgment,

(1) Becauſe this Action would not lie upon the Promiſe of Marriage made by the Woman, for the Law doth not intend, that the Man is advanced by Marriage; and therefore ſuch a Promiſe of Marriage to him is of no Conſideration in Law, and by Conſequence no Action can be founded thereon.

But 'tis otherwiſe where a Man promiſeth to marry a Woman, becauſe in the Eye of the Law Marriage is an Advancement to the Woman.

(2.) This Promiſe is void for Incertainty, for there was no certain Time agreed on when the Marriage ſhould take Effect.

To which it was anſwered and ſo reſolved per Curiam, that here were reciprocal Promiſes; and therefore as her Promiſe to him was a good Conſideration to make his Promiſe obligatory, ſo by the ſame Reaſon his Promiſe to her was a ſufficient Conſideration to make per Promiſe binding in this Caſe as well as in any other mutual Agreements.

1 Roll. Abr. 22. 77. Hob. 10. 2 Bulſt. 276. 3 Bulſt. 48. 3 Cro. 323. Carter Rep. Dickenſon *ver.* Holecroft.

And the Court did not allow that Diſtinction between the Advancement of a Man and of a Woman in Marriage, and that this was a good Promiſe, tho' the certain Time of Marriage was not agreed on, eſpecially ſince the Plaintiff averred, that he had offered to marry her, and that ſhe re-

refuſed, which (in this Caſe) was neceſſary to be done to entitle the Plaintiff to this Action.

Nota; It had been moved before for a new Trial, becauſe of the exceſſive Damages; but upon Reference to the Chief Baron Ward who tried the Cauſe, he certified that the Promiſe of the Woman was well proved, and that the Damages were more than he expected, but that he did not think them ſo exceſſive as to ſet aſide the Verdict.

So the Plaintiff had his Judgment.

Goodwin *verſus* Beakbean.

How many Days there ought to be between the Teſte and Return of a *Sci. fa.*

SCire facias againſt an Adminiſtrator upon a Judgment obtained againſt the Inteſtate; this Writ was Teſte 24 Octob. returnable die Lunæ prox' poſt menſem Michaelis, which was the 31 Day of October, and an Alias Scire facias was taken out Teſte upon the Day of the Return of the firſt Writ, (viz.) 31 Oct. which laſt Writ was returnable die Lunæ prox' poſt craſtinum amimarum, which was the 7th of November.

Upon two Nichils returned, Judgment was againſt the Defendant by Default; and thereupon the Inteſtate's Goods were taken in Execution by Virtue of a Fieri facias.

And now it was moved to ſet aſide the ſaid Judgment, and to have Reſtitution, becauſe theſe Writs of Scire facias were irregular; for between the Teſte of the firſt and the Return of the laſt, there were not fifteen Days excluſive of the very Days of the Teſte and Return.

To which it was anſwered, that theſe Writs were as they ought to be, for there are eight Days inclusive between the Teſte and Return of each Writ; and the ſecond Writ muſt always bear Teſte upon the ſame Day on which the firſt was returnable; and therefore of Neceſſity, that Day muſt be reckoned twice.

See T. Jones 228.

Beſides, no Manner of Objection can be made to the Writs ſingly; therefore if each Writ is good as it ſtands alone, the putting them together ſhall not make them irregular by a joint Computation of the Time.

And the whole Court was of that Opinion; ſo the Plaintiff had Judgment.

Holland *verſus* Serjeant.

A Declaration was delivered to the Defendant in Cuſtody of the Sheriffs of London for Want of Bail according to the * Statute; and thereupon the Plaintiff proceeded and obtained Judgment againſt the Defendant being ſtill in Cuſtody of the Sheriffs. 1 Salk. 98.

And now it was moved for a Superſedeas to diſcharge him out of Priſon upon filing common Bail, becauſe two Terms were paſt ſince the Plaintiff had Judgment, and the Plaintiff had not in that Time charged him (the Defendant) in Execution; and his Counſel inſiſted, that ſince by this Statute, the Plaintiff is enabled to declare againſt the Defendant in Cuſtody of the Sheriff, 'tis the ſame in Reaſon with the Practice before; where any Plaintiff declared againſt the Defendant in Cuſtodia of the Marſhal, if he had Judgment, and did not charge him in Execution within two Terms afterwards, the Defendant had a Superſedeas upon filing common Bail to the Action.

* 4 & 5 Will. c. 21. If after Judgment a Priſoner is not charged in Execution within 2 Terms, he ſhall have a *Superſedeas*, &c.

And the Court being of that Opinion, a Rule was made for a Superſedeas.

Nota; The Statute is, That in all Declarations againſt Priſoners by Virtute of any Proceſs out of B. R. it ſhall be alledged in Cuſtody of what Sheriff, Bailiff, &c. ſuch Priſoner is, at the Time of the Declaration delivered; which Allegation ſhall be as effectual as if the Priſoner was in Cuſtody of the Marſhal, &c. 4 & 5 Will. cap. 21.

The King *verſus* Albert Alverſton.

BY an Order of two Juſtices, &c. of Middleſex, the Defendant being adjudged the reputed Father of a Baſtard Child, was thereby charged to maintain it; which Order was ſpecial. Order to charge a Man to be the Father of a Baſtard begotten on a married Woman, but doth not ſay that her Husband was beyond Sea forty Weeks.

II. It recited that Mary Spence, the Wife of Jonathan Spence Mariner, was delivered of a Male Baſtard Child, and that it appeared to them upon Oath of, &c. That Jonathan Spence her Husband was in the King's Service at Cadiz in Spain, and not within the King of England's Domi-

Dominions, at the Time when the ſaid Child was begotten or born; which Order was confirmed upon an Appeal.

And now it was moved to quaſh both the ſaid Orders, becauſe the Statute * 18 Eliz. concerning Baſtard Children doth not extend to this Caſe, for the Juſtices have no Juriſdiction, but where the Child was born out of lawful Matrimony.

* 18 Eliz. cap. 5.

If this Woman had been delivered alone of a Child without crying out for Help, 'tis certain this would not have been Felony within the Statute 21 Jac. cap. 27. tho' no Proof could be made that the Child was born dead.

(2.) 'Tis impoſſible there ſhould be a reputed Father when there is a known Father of whom the Law takes Notice; and tho' this Child may be a Baſtard in Regard to any Right of Inheritance, yet that is not ſufficient to bring it within the Conuſance of the Juſtices of the Peace, by Virtue of this Statute.

(3.) The third Exception was to the Form of the Order, (viz.) for that it is not alledged therein, that the Husband was beyond Sea, for the Space of forty Weeks before the Birth of the Child, and 'tis not ſufficient to ſay, that he was beyond Sea at the Time of the Conception, becauſe that is what in Nature cannot certainly be known.

And for this laſt Reaſon only, theſe Orders were quaſhed; but the Court bound the Defendant by Recogniſance to appear at the next Quarter-Seſſions for Middleſex, being inclinable to bring the Caſe within the Intent of the Statute 18 Eliz. becauſe of the frequent Miſchiefs of this Kind which have happened amongſt Seamens Wives.

Heylin *verſus* Haſtings.

5 Mod. 425. 1 Salk. 29. Where a conditional Promiſe ſhall revive the Debt, and bring it out of the Statute of Limitations.

INdebitatus aſſumpſit by Heylin, Executor of one Read a Sadler, againſt Haſtings, for Goods ſold by the ſaid Read to the Defendant.

The Defendant pleaded non aſſumpſit to the Teſtator infra ſex Annos, and upon Evidence at the Trial before.

Holt

Holt Chief Juſtice. The Caſe was thus:

If. The Plaintiff meeting with the Defendant Haſtings, demanded ſo much Money of him for Saddles which he bought of the Teſtator more than ſix Years paſt, before that Time of their Meeting.

The Defendant denied that ever he had ſuch Goods of the Teſtator, but promiſed that he would pay the Plaintiff for the Saddles, if he could prove that he (the Defendant) had them, which the Plaintiff fully proved at the Trial, and had a Verdict.

Whereupon a Caſe was made of this ſpecial Matter by Conſent of both Parties, to be determined by the Opinion of the Chief Juſtice, and the Verdict was to follow the Succeſs of that Determination; and now the Caſe was moved in Court, by the Direction of the Chief Juſtice, to hear the Opinion of the other Judges.

The Point in Law was, Whether this conditional Promiſe made upon the Denial of the Debt demanded, ſhould revive this Debt, now the Condition of the Promiſe was performed, (viz) by Proof of the Debt, ſo as to bring it out of the Statute of Limitations.

It was admitted by all, that if this conditional Promiſe did revive the Debt, tho' it was made to the Executor after the Death of the Teſtator, yet it was ſufficient to maintain the Iſſue, (viz.) That the Teſtator Aſſumpſit, becauſe the Promiſe did not give any new Cauſe of Action, but only revived the old Cauſe, and was of no other Uſe but to prevent the Bar by the Statute of Limitations.

Nota, That 2 Feb. 10 Will. 3. Anno 1698, All the Judges of England met at Serjeants Inn in Chancery-lane upon this Caſe; and they all agreed in Opinion, that this Promiſe, tho' conditional, (and ſince the Condition was performed) did revive the Debt and prevent the Bar by the Statute; and that a bare Acknowledgment of the Debt within ſix Years of the Action, is ſufficient to revive it, and prevent the Statute, tho' no new Promiſe was made.

That this conditional Promiſe amounted to a Waiver of the Statute; and tho' no Promiſe was made, yet an Acknowledgment of the Debt is an Evidence of a new Promiſe.

So the Plaintiff had Judgment.

Lacy

Lacy *verſus* Williams. Intratur Mich. 10 Will. 3. B. R. Rot. 586.

2 Salk. 568. Common Recovery ſuffered by the Tenant in Tail, good.

ERROR of a Judgment in C. B. upon a ſpecial Verdict in Ejectment, in which the Caſe appeared to be as followeth:

Ff. William Lacy Eſq; was Tenant in ſpecial Tail of the Lands in Somerſetſhire, being the Lands now in Queſtion, (viz.) To him and the Heirs Males of his Body, upon the Body of Suſan, his Wife, begotten, Remainder to himſelf and the Heirs Males of the Body of his Father, Remainder to his own right Heirs.

William Lacy had Iſſue by his Wife Suſan, one Daughter named Sarah (the Leſſor of the Plaintiff) and no more: And being thus ſeiſed, and intending to make Proviſion for the ſaid Sarah, a Writ of Entry was brought in the Poſt, by George Keat, returnable in Michaelmas-Term, (viz.) In quindenam Sancti Martini, and this was againſt * Miles Corbett, who appeared as of that Term, and vouched to Warranty the ſaid William Lacy, the Tenant in Tail; and thereupon a Summoneas ad Warrantizandum iſſued, returnable Octab. Hillarii following, which is the firſt Return of that Term, when William Lacy appeared by Warrant of Attorney, and vouched to Warranty the common Vouchee; and the Recovery was perfected and entered on Record in common Form.

* Who was made Tenant to the *Præcipe* by Leaſe and Releaſe.

But it was found, that the Leaſe and Releaſe which William Lacy made to Miles Corbett, to make him Tenant to the Freehold, was not executed till long after Michaelmas-Term, in which the Writ of Entry was brought againſt him, (viz.) about the Beginning of January next following.

So that the general Queſtion was, Whether this was a good Recovery, or not, the Uſes whereof were declared by the ſaid William Lacy, to his Daughter Sarah, and her Heirs: And he afterwards died without any other Iſſue; and Lacy the Defendant in the original Action, and Plaintiff in the Writ of Error, was the next Brother to William Lacy, and claimed the Lands by Virtue of the old Entail, (viz.) as Heir Male of the Body of their Father.

The Objection inſiſted on againſt the Recovery was, that Miles Corbett who was made Tenant to the Præcipe, had nothing in the Lands at the Time of the Return of the

Writ of Entry, and therefore the Recovery was of no Effect, otherwise than by Eſtoppel, or Concluſion to the Parties and Privies thereunto; but the Defendant was neither Party or Privy to it, for he claimed by a Title Paramount, and therefore as to him this Recovery was void.

And it was inſiſted, that the Writ of Entry did ipſo facto abate, becauſe the Tenant to that Writ had nothing in the Land; and to prove it, the Caſes in the * Margin were cited.

* 41 Ed. 3. 5. 1 H. 6. 1. 19 Ed. 4. 12. 18 Ed. 4. 17 H. 6. 19, 20. 3 H. 6. 34. 1 Roll. Abr. 865.

But it was agreed, that if once there had been a good Tenant to the Præcipe, his Alienation afterwards could not hurt; nor if he ſhould ſuffer another Recovery againſt him upon a puiſne Title, for that would be † fraudulent.

† Brook Brief, pl. 75, 77.

And in this Caſe the Voucher muſt likewiſe be void, becauſe the Tenant, at the Time of the Voucher, had nothing to warrant; and a Voucher is in Lieu of an Action; and here the Tenant had no Cauſe of Action when he made the Voucher.

1 Inſt. 102, 365. 9 Ed. 3. 12. 21 H. 6. 4, 49. Hob. 21.

But it was adjudged in the Court of Common Pleas, that this was a good Recovery, becauſe before the Return of the Summons ad Warrantizandum, the Vouchee came in, and the Tenant to the Writ was Tenant of the Freehold, and had a ſufficient Eſtate to warrant, and upon which the Warranty did operate.

And this Judgment was now affirmed in B. R. per totam Curiam.

DE

Term. Sanct. Hill.

10 Willielmi 3. B. R.

Brown *and* Burton *verſus* Franklyn, *the King's Proctor.* In Scaccario.

Prize or no Prize is within the Juriſdiction of the Admiralty.

PRohibition to the Court of Admiralty, ſuggeſting the Statute of Ric. 2. and that Pleas of Treſpaſs on the Caſe for the Converſion of any Goods or Merchandiſe, as alſo the Trial of the Property of any Goods, &c. and the Cogniſance thereof belongeth to the King and his Crown, and not to be tried before the Admiral, &c.

That nevertheleſs the Defendant being the King's Proctor, had libelled againſt the Plaintiffs in the Admiralty concerning the Property of a certain Ship called the Francis, and her Furniture, as alſo of 6000 Chequins of foreign Money, 200 Elephants Teeth, 300 Pieces of Muſlin, 300 Pieces of Callico, &c. Ubi revera navis prædict. fuit Wrecca Maris in the Eaſt-Indies, out of the King's Dominions; ac ubi revera navis prædict. and her Loading, were not the Goods of the French King, or of any of his Subjects, Enemies to our King, but did belong to the Subjects of the King of Portugal, who is in Amity with us; ac ubi revera all the ſaid foreign Money, and the Goods and Merchandiſe aforeſaid, came to the hands of the Plaintiffs ſuper terram in the Eaſt-Indies, and there were by them ſold, &c.

Upon opening this Case, the Fact appeared to be thus:

ſſ. The Plaintiffs were Maſters of two Ships belonging to the Eaſt-India Company, and being in a Port there they had Intelligence, that about the Iſland Joanna, there was a rich French Ship which might eaſily be ſurpriſed; and accordingly they ſailed thither, and found the Ship whole, but ſtranded near the Shoar, and the Ship's Crew were at Land.

That the Plaintiffs landed their Men, and ſurpriſed the Enemy on Shore, and found the Chequins quilted in their Cloaths about their Bodies, and the Reſt of the Goods were in the Ship where the Plaintiffs took it, and brought all away, but left the Ship behind being ſtranded.

The News whereof coming to England, it being in the Time of War between the Engliſh and the French; the Defendant by Libel purſues for the King in the Court of Admiralty to have the Ship, Money and Goods condemned as lawful Prize, (as a Perquiſite of the Admiralty) and accordingly after general Admonitions on the Exchange, as uſual in ſuch Caſes, and no Perſon coming in to claim Property, there was a Sentence whereby all the ſaid Things were condemned as lawful Prize.

And upon that Sentence this Libel was founded againſt the Plaintiffs, charging them that all came to their Hands, and that they had imbezziled it, and converted the ſame to their own Uſe, and that they might account for the Value.

And now it was inſiſted for a Prohibition, that it was unreaſonable the Plaintiffs ſhould be concluded by the Sentence upon the general Libel to which they were not Parties, neither had they any Notice thereof; for at that Time they were in the Indies; and therefore it was moved, that the Plaintiffs might ſtill have an Opportunity upon a Prohibition to try their Property, and to controvert their Right againſt the ſaid Sentence, if Prize or not, and whether the Capture was at Land, or on the Sea.

And the Court inclined, that the Plaintiffs ought to have an Opportunity to be heard, and to controvert the Matter of Fact; and thereupon a Day was appointed to hear a Civilian upon this Queſtion.

ſſ. Whether the Plaintiffs, upon this Libel depending againſt them in the Court of Admiralty, might controvert their Property there againſt the Tenor of the firſt Sentence.

And at another Day Dr. Lane acquainted the Court, that it was the conſtant Practice amongſt them to admit of Appeals from ſuch general Sentences for Prize, and that the Appellants were always let in to controvert their Right, and to diſprove the Prize, notwithſtanding the Sentence; becauſe upon an Appeal their Method was to exhibit new Allegations, and thereupon to receive new and farther Proofs, ſo that the Cauſe was many Times another Thing before the Delegates than what it was at the Time of the firſt Sentence.

And it was then made appear to the Court, that the Plaintiffs had actually appealed from this Sentence of Condemnation for Prize, and ſo were in the proper Method to controvert their Right.

See Antea, King *verſus* Broom.

Wherefore, and for that the Court apprehended (as it was inſiſted on the other Side) that Prize or no Prize was a Matter not triable at Common Law, but altogether appropriated to the Juriſdiction of the Admiralty,

The Prohibition was denied.

Machin *verſus* Moulton.

5 Mod. 450. Libel in the Conſiſtory Court at *York* for Tithes of Lands there, when the Defendant lived in *Lincoln.*

* 23 H. 8. cap. 9.

PRohibition to the Conſiſtory Court at York, for that Moulton had libelled there againſt Machin, for Tithes of Lands lying within that Dioceſe, whereas he (Machin) lived at Lincoln within the Dioceſe of Lincoln, and out of the Dioceſe of York; and thereupon he ſuggeſted the Statute * 23 H. 8. which prohibits the Citing any Perſon out of his proper Dioceſe where he lives.

Godb. 191. 2 Brownl. 12. 13 Rep. Porter *verſ.* Rocheſter. Hardres 421.

The Truth was, that the Plaintiff was accidentally at York, and was there cited by Surpriſe.

And now the Queſtion was, Whether the Suit was local, and muſt neceſſarily be brought in the Dioceſe of York, becauſe the Lands out of which the Tithes ariſe lie in that Dioceſe, or whether the Suit muſt follow the Perſon according to that Maxim in the Civil Law, Forum ſequitur reum.

Cro. Car. 97.

It was inſiſted for the Defendant, that this Suit is local, and could not be maintained out of the Dioceſe where the Lands lie; and therefore this Caſe is not within the Meaning of that Statute 23 H. 8.

The

The Definition of the Word Dioceſe is no other than Juriſdiction, and 'tis the Locality of the Lands which gives Juriſdiction, and the Owner being cited in the Dioceſe where the Lands lie is cited within the proper Juriſdiction, for 'tis his Lands which ſubject him to the Juriſdiction of the Conſiſtory Court at York; * therefore if a Man lives in a Place where there is no Juriſdiction over the Cauſe (as the Plaintiff doth in this Caſe) he may and muſt be cited to the Place which hath Juriſdiction, otherwiſe there will be a Failure of Juſtice.

* 1 Levintz 96. *in Point.* 1 Roll. Rep. 529, 448. 2 Brownl. 121. Winch. Ent. 570.

It was ſaid, that when a Man hath Lands in one Dioceſe, and lives in another, he may be ſued for the Tithes of thoſe Lands in the Conſiſtory Court of that Dioceſe where he lives. 2 Brownl. 27, 28.

Et per Curiam, This Suit is local; and therefore of Neceſſity the Plaintiff muſt be ſubject to a Citation out of the Dioceſe where he lives, or elſe the Defendant will be without Remedy for his Tithes.

A Prohibition was denied.

DE

Term. Paſchæ.

Anno 11 Willielmi 3. B. R.

The King *verſus* Dr. Burnell.

* 25 Car. 2. cap. 2. Whether a Cenſor of the College of Phyſicians is an Officer, and ſo bound to take the Oaths.

† 15H. 8. cap. 5.

INformation againſt the Defendant for not taking the Oaths purſuant to the Statute * 25 Car. 2. by which 'tis enacted, That all Perſons admitted to any Office ſhall take the Oaths of Allegiance and Supremacy, &c.

In this Caſe a ſpecial Verdict was found, wherein the Patent granted to the Phyſicians in and about London, was ſet forth according to the Statute † 15 H. 8. and that the Defendant on ſuch a Day was choſe one of the Cenſors of the College of Phyſicians, and that he received the Sacrament the next Sunday after the Election, but that he had not taken the Oaths, as directed by the Statute 25 Car. 2. &c.

The Queſtion was, Whether a Cenſor of this College was an Officer within the Meaning of the ſaid Statute.

And it was argued that he was, for the Word Officium principally implies a Duty, and in the next Place the Charge of ſuch Duty; and 'tis a Rule, that where one Man hath to do with another Man's Affairs againſt his Will, and without his Leave, that is an Office, and he who is in it is an Officer.

That the King hath the Care of the Perſons of his Subjects, and conſequently of their Health; and this is called Munus officii noſtri in the King's Patent, found by

the Jury, and by that Patent he hath delegated ſo much of his Office unto thoſe Cenſors, which concerns the Phyſicians in and about London in general, and he is an Officer ſubordinate, who hath any Part of the King's publick Care delegated to him by the King.

Officers are diſtinguiſhed into Civil and Military, according to the Nature of their ſeveral Truſts; and every Man is a publick Officer who hath any Duty concerning the Publick; and he is not the leſs a publick Officer where his Authority is confined to narrow Limits, becauſe 'tis the Duty of his Office, and the Nature of that Duty, which makes him a publick Officer, and not the Extent of his Authority.

It was argued for the Doctor, that no Offices were within the Intent of the Statute 25 Car. 2. but ſuch which related to the Revenue, or to the Conſervation of the Peace, and that particular Powers created for particular Purpoſes were not within that Statute. Econtra.

That the Overſight and Inſpection of Medicines is private in its Nature, and no more than the Care of a School-maſter, it being a Matter which concerneth a particular Science.

That he who is choſen Cenſor cannot refuſe or avoid the Election, and his Power is with Reſpect to the Phyſicians and Apothecaries, and in that only about their Medicines, but not any Way touching their Morals.

It concerns their Skill and Art, and nothing elſe, and in this Reſpect is the ſame with a Trade; and in many Trades there are Inquiſitors of the like Nature, and Powers given by ſeveral Acts of Parliament of puniſhing in Matters of Trade; as for Inſtance; in the Caſe of Barber-Surgeons and Goldſmiths; and yet theſe were never thought to be within this Statute.

And laſtly, This is no Patent-Office; there is no Oath annexed to it, and the Cenſors have not ſo large an Authority as thoſe excepted by the Act expreſly.

Adjournatur.

London

London *City verſus* Vanacker.

5 Mod. 438. 1 Salk. 142. Cuſtom to amend old By-Laws, and to make new.

THE Defendant was choſen one of the Sheriffs for the City of London, but refuſed, and thereupon an Action was brought againſt him in London, in the Mayor's Court, and in the Name of the Corporation, for the Fine of 500 l. according to a By-Law: And upon an Habeas Corpus all this Matter was returned into B. R. which Return conſiſting of ſeveral Cuſtoms and By-Laws in London, was very long; but the following Exceptions were taken to it.

(1.) For that a Cuſtom is returned to amend old By-Laws when defective; and ſo by Virtue of that Cuſtom this By-Law was made, 20 July, about ſixty Years ſince.

The By-Law, whether good, or not.

Which By-Law is, that no Freeman choſen Sheriff, &c. ſhall be excuſed, unleſs he voluntarily ſwear he is not worth 10000 l. and bring ſix other Citizens to vouch in like Manner on their Oaths, that they believe it to be true; and if he openly refuſe to take the Office, then to forfeit the Sum of 500 l. (viz) 400 l. to the City, and 100 l. to the next Man who ſhall hold the Office.

Now this is not a proper Subject for a By-Law, becauſe the Power of making By-Laws conſiſteth in the Corporation, and extends no farther than to what concerns the good thereof; but the Sheriffwick of London and Middleſex was a particular Franchiſe granted to the Citizens, &c. long after they were incorporated; and the Office of Sheriff of Middleſex is not within their Limits or Juriſdiction, therefore not within the Power of their By-Laws, which Power cannot extend beyond the Limits of the * Corporation; and if the Sheriffwick of Middleſex is out of the Reach of this By-Law. and the Sheriffwick of London within it, yet the whole By-Law is void, becauſe the Penalty is entire.

T. Jones 145. * Moor 563. Godbolt 107.

1 Rep. 77. 2 Vent. 183, 248. Carter 121.

(2.) They have by this By-Law changed the Form and Manner of chuſing Sheriffs, which by their Grant was to be by Citizens; but the By-Law gives the Election of one of them to the Mayor for the Time being.

(3.) This By-Law is unreaſonable, for they have Liberty to chuſe any Freeman qualified, and that without any Exception of Ideotiſm or old Age.

(4.) An Oath is imposed by this By-Law, whereas an Authority cannot be given by a By-Law to any Man to administer an Oath.

(5.) The Injunction to bring six other Citizens to vouch, on Oath, is still more extravagant, for 'tis imposing on another what they who made the By-Law have no Power to do: Besides, those Vouchers must be Citizens, who are entitled to Part of the Fine, (viz.) Part of the 400 l. for that goes to the Corporation, and they must be such as the Mayor and Aldermen shall approve, who are likewise Persons interested in the Fine, and therefore none of them proper Judges. Godb. pl. 126.

(6.) 'Tis not provided by this By-Law, that Notice shall be given of the Election to the Person elected; but the Forfeiture is to incur by Non-Acceptance of the Office within such a Time, tho' the Person chosen had never any Notice of the Election. Keilw. 116. 1 Roll. Abr. 443. Dyer 240. Allen 78. March 163, 187.

'Tis true, every Member of a Corporation is bound to take Notice of their By-Laws, but not of every collateral Fact which arises in Consequence of a By-Law, as in this Case, tho' the Defendant is to take Cognisance of this By-Law; yet there being one elected before him who had paid the Fine, the Time of a second Election is incertain, and depends upon the Pleasure of the Mayor and Aldermen, and therefore no Man can be bound to take Notice of it ex officio, or of what is done at that Time. Style 13, 124. Cro. Car. 497. 2 Roll. Rep. 136. Janes *versus* Tinny.

And in this Case the Mayor and Aldermen are to be Judges of the Reasonableness of the Excuse, and they are likewise to have the Fine; so that the Case is, those very Persons who are to have the Money as forfeited for not accepting this Office, are to be Judges, whether they will have the Money, or not: It was for that Reason, that in the Case between the Company of Stationers and Salisbury, their By-Law was held void, because the Company who was to have the Fine were Judges of the Forfeiture. 1 Roll. Abr. 164. March 179. Sid. 115.

On the other Side it was said, that the Question is not, Whether this By-Law is reasonable or convenient for the Citizens, for if it doth not derogate from the Prerogative, and is not directly against Reason, 'tis sufficient; because they who made the Law are proper Judges, whether 'tis for the Benefit of the City, or not; and 'tis not material if they impose new Laws on themselves, so they are not contrary to the general Laws of the Land. Econtra.

Grotius de jure Belli. Hob. 256. 3 Leon. 265. Moor 75. Raym. 446.

Every Law implies the Aſſent of all who are repreſented, and therefore they muſt be bound by it, and for that Reaſon every Freeman of London is bound by this Law.

'Tis true, no Man is compelled to be made free of the City, for that is voluntary and at his own Choice; but if he accept it, he muſt take it with the Conditions annexed to it, for by this Means he hath ſubjected himſelf to the Laws of the Place in Perſon, for this By-Law is perſonal, becauſe it doth not concern the Office it ſelf, but the Perſon who is to be the Officer.

As to the Objection, that the Sheriff of Middleſex is not within the Reach of this By-Law, becauſe out of the Juriſdiction of the City; it was anſwered, that the Sheriff of London and Middleſex make but one Officer, and the Sheriff of Middleſex, was by the King's Grant annexed to the City.

Then as to the Objection, that an Oath cannot be impoſed by a By-Law; admitting it to be true, 'tis not this Caſe, for the Oath is not impoſed, but voluntary, the Words of the By-Law being, He ſhall not be excuſed unleſs he voluntarily ſwear he is not worth 10000 l. &c.

And as to the Objection, for Want of Notice, &c. 'tis impoſſible it ſhould be given to every individual Citizen who is a Freeman, for they are bound by their Oath of Freedom to attend all theſe Aſſemblies; beſides, if the Defendant was aggrieved for Want of Notice, he ought to have pleaded it in the Mayor's Court in his own Defence; and if Judgment had been given againſt him there, and he had found himſelf aggrieved by it, he might have a Writ of Error immediate before the Judges at St. Martins le grand. 34 H. 6. 42. Reg. 131, 132.

Afterwards, (viz.) in Trinity-Term following:

Per Holt Chief Juſtice, who gave the Opinion of the Court, that this was a good By-Law for the Reaſons given by him as followeth:

Hob. 111. 1ſt. That the making By-Laws is incident to every Corporation aggregate, for that Power is included in the Incorporation.

5 Rep. 62. Clerk's *Caſe*. That every By-Law, by which the Benefit of the Corporation is advanced, is a good By-Law for that very Reaſon, that being the true Touchſtone of all By-Laws.

That the Charter of King John, by which the Sheriff-wick of Middleſex was granted to the City, doth neceſſitate the making By-Laws concerning it, becauſe they are bound by that Charter to nominate thoſe Officers every Year, and cannot execute thoſe Offices by themſelves, or their Deputies; and therefore that Power muſt be included in the Conſtitution; and by the Acceptance of this Charter, every Member of the Corporation is bound to thoſe Things which are incident thereunto, as in Benefit ſo likewiſe in Charge; as where a Common is granted to a Corporation, every Member takes ſome Benefit by it as incident to his Freedom.

And 'tis likewiſe a Thing neceſſary of common Right, that there ſhould be a coercive Power in every Corporation to compel their own Members to ſubmit to their Conſtitutions; and it will be a Forfeiture of that Charter, if the Office of Sheriff is not yearly ſupplyed; and therefore to prevent this Miſchief, 'tis of Neceſſity, that they ſhould make By-Laws concerning it; and now the Sheriffwick of Middleſex being by the King's Grant annexed to the Corporation, it muſt be executed by the Members thereof, and ſo ſubject to their By-Laws. 5 Rep. *in* Snelling's Caſe.

An Adminiſtrator was held to be within the Cuſtom of London, tho' the Commencement of Adminiſtrations was within Time of Memory, becauſe it was within the general Reaſon of the Cuſtom. Litt. Rep. 94, 105, 124.

The Excuſe which this By-Law gives, is for the Eaſe of the Members of this Corporation; otherwiſe nothing but an invincible Incapacity could have excuſed a Citizen who was elected Sheriff, as it was held in * Larwood's Caſe, and the ſix Compurgators are in Imitation and Nature of the like in a Wager of Law, ſo no new Thing. 3 Cro. 469. Sid. 281. * Antea.

As to the Objection, that Fools and Madmen are not excepted by this By-Law, thoſe are tacitly excepted out of all Laws whatſoever; and therefore it would have been ridiculous to have made an expreſs Exception of them.

As to the Objection, that the Excuſe is referred wholly to the Mayor and Aldermen, 'tis true that it is ſo, but 'tis for the Eaſe of the Party, becauſe their Allowance will bind the whole City; but if they ſhould refuſe a reaſonable Excuſe, the Party is not bound by ſuch Refuſal, becauſe he may give it in Evidence upon nil debet pleaded in an Action of Debt brought for the Forfeiture, and there the Validity of the Excuſe will be tried by a Jury.

And as for Want of Notice, every Citizen is bound to take Notice of the By-Laws of the Corporation, becauſe they are virtually preſent by their Repreſentatives; and the making every By-Law, and the chooſing Sheriffs, is one of the moſt notorious Acts in the City of London, and done in the moſt publick Place.

As by the Statute Weſtm. 2. cap. 45. Proclamation of Outlawry being to be made in the County-Court, every Freeholder is ſuppoſed to be there, becauſe there he ought to be; and therefore bound to take Notice of it.

*24 Ed. 3. 19 H. 8. 30 H. 8. 6 Ed. 6. 13 Eliz.

See the Caſes in the * Margin about By-Laws for theſe Offices.

Biſhop *of St.* Davids *verſus* Lucy.

Selling a Curacy, and taking Money for admitting Perſons into Orders, is Simony.

DR. Watſon, Biſhop of St. Davids, was convened before his Provincial, the Archbiſhop of Canterbury, at Lambeth, to anſwer certain Articles exhibited againſt him before the Archbiſhop, at the Promotion of the Defendant Lucy.

By which Articles he was charged with Simony, and other high Misdemeanors in his Office of Biſhop, and they were above thirty in Number; ſome of them were as followeth:

1. That the Biſhop, in Conſideration of 200 l. by him received, did covenant by Deed with one Brooks a Clergyman, to make him Curate of his (the Biſhop's) Rectory of Borony-green in the Dioceſe of Ely, which he held in Commendam, and that he had privately given a Bond to the ſaid Brooks to reſign to him in ſome ſhort Time.

(2.) Another of the Articles was for taking ſeveral Sums of Money from ſeveral Perſons (naming them) to admit them into Orders, and for Collations and Inſtitutions more than what was the cuſtomary Fees allowed; and it was alledged, that originally no Fee ought to be paid in ſuch Caſes; and this was alſo charged againſt him as * Simony.

* *See* Sparrow's *Collection*, *Canon.* 135.

(3.) Another of the Articles was, That the Biſhop of that Dioceſe for the Time Being, was formerly made Viſitor of a publick School of Charity, and that this Biſhop had perverted the Charity to other Perſons than directed by the Founder; and upon his Viſitation had carried away all the Books which concerned the Charity, and the very Grant

Grant it ſelf, by which it was given and governed now at his Pleaſure.

(4.) That the Biſhop had made Certificates under his Epiſcopal Seal, that ſeveral Perſons who had Inſtitution, had likewiſe taken the Oaths of Allegiance and Supremacy to qualify them, which was falſe in Fact, and ſo had abuſed the authentical Seal. *See* Otho's *Conſtitutions* 605.

(5.) That the Biſhop had given compleat Ordination to one Owen who was but nineteen Years of Age, whereas he ought to be twenty-four Years old.

And now it was moved for a Prohibition; and as to the firſt and ſecond Articles, admitting them to be true, the Biſhop was only guilty of a Miſdemeanor, for what is charged in thoſe Articles is not Simony. Keilw. 39. 2 H. 4. 10. *See* Generale conſilium 357. *and Canon* 810.

But it was objected, that the Archbiſhop had no Juriſdiction to convene before himſelf any Suffragan for a Miſdemeanor.

Sed Curia of another Opinion, & per Holt Chief Juſtice, the Selling the Curacy, and taking Money to admit Men into Orders, is Simony, and puniſhable by the Metropolitan. 1 Roll. Abr. Tit. Fees. Davis Rep. 3. *b.*

And 'tis very plain, that all the Clergy are bound by the Canons confirmed only by the King, but they muſt be confirmed by the Parliament to bind the Laity.

And after many Debates a Prohibition was denied, but only quoad the Matter about the School, which was held to be meerly Temporal.

And afterwards they proceeded at Lambeth againſt the Biſhop upon the Reſt of the Articles; and there a Sentence of Deprivation paſſed againſt him, from which he appealed, and that Sentence was affirmed by the Delegates; and then Dr. Watſon withdrew himſelf out of the Kingdom ſecretly.

Sir Joſeph Tyly & al' *verſus* Morrice.

A Bag ſealed up, was delivered to a Carrier, and ſaid to contain 200*l.* when there was 450, the Carrier was robbed, he ſhall be anſwerable only for 200 *l.*

THE Caſe, ſſ. The Defendant was a Common Carrier from London to Exeter, and the Plaintiffs by their Servant delivered to his (the Defendant's) Book-keeper 2 Bags of Money ſealed up, and told him that it was 200 l. and deſired a Receipt for the Money; thereupon the Book-keeper gave a Receipt for his Maſter to this Effect: ſſ. Re-

ff. Received of, *&c.* two Bags of Money ſealed up, ſaid to contain 200 *l.* which I Promiſe to deliver on ſuch a Day at *Exeter* unto *T. Davis*, he to pay 10 *s. per Cent.* for Carriage and Riſque.

The Carrier was robbed of this and other Money on Hounſlow-Heath in the Night-Time, but he paid 200 l. to Davis at Exeter.

And now an Action was brought againſt him in common Form, upon the Cuſtom of England, wherein the Plaintiffs declared, that on ſuch a Day and Place they had delivered unto the Defendant 450 l. to be carried from London to Exeter, &c. and at the Trial it was proved, that there was full 450 l. in Gold and Silver contained in thoſe two Bags at the Time they were delivered to the Carrier for 200 l.

And the Queſtion was, Whether the Carrier ſhould anſwer for the whole Money; it was the Opinion of the Chief Juſtice, that he ſhould anſwer for no more than 200 l. (which was acknowledged that he had paid to Davis) becauſe in this Caſe there was a particular Undertaking by the Carrier for the Carriage of 200 l. only, and his Reward was to extend no farther than that Sum, and 'tis the Reward which makes the Carrier anſwerable; and ſince the Plaintiffs had taken this Courſe to defraud the Carrier of his Reward, they had thereby barred themſelves of that Remedy which is founded only on the Reward.

So the Jury was directed to find for the Defendant.

The ſame Carrier was at the ſame Time robbed of ſix other Bags of Money, which the Book-keeper received ſealed up, to be carried to Exeter, and there to be delivered to Mr. George Gould, which Bags were brought by the Servants of John and Joſeph Fiſher, and delivered to the Book-keeper for 300 l. who gave a Receipt for ſo much, when in Truth there was 400 l. in the ſaid Bags; and the two Fiſhers and Gould who were Partners brought the like Action againſt the Carrier for 400 l. but had the like Verdict.

* Allen 93. Nota; the Caſe of * Kenrigg and Eggleſtone was cited as an Authority for the Plaintiffs; ſed non allocatur; for the Court held that Caſe different from the preſent Caſes.

Lane *verſus* Cotton & al'. Intratur Paſ. 11 Will. 3. B. R. Rot. 403.

CASE againſt the Defendants Cotton and Franklin, the General Poſt-maſters, ſetting forth the Statute 2 Car. by which the Poſt-Office was created, and that in Purſuance of that Statute a General Poſt-Office had been erected and ſettled in Lombard-ſtreet, London, and a Poſt eſtabliſhed to carry Letters from London to Worceſter, and from thence back again to London; and that the Defendants were conſtituted General Poſt-maſters, by Patent from King William and Queen Mary, and that the Plaintiff was poſſeſſed of two Exchequer-Bills for 300 l. which he encloſed in a Letter directed to ſuch a Perſon in Worceſter; and that he delivered the ſaid Letter with the Bills encloſed, unto the Defendants in their Office in Lombard-ſtreet; and that this Letter with the Bills was not conveyed to Worceſter, but loſt by the Negligence of the Defendants and their Servants.

The Pleadings. 2 Mod. 108. 5 Mod. 455. 1 Salk. 17, 143. Action will not lie againſt the Poſt-maſter for a Letter miſcarried in which there were Exchequer-Bills. *Sed Holt* Ch. Juſtice *contra*.

And all this Matter being found ſpecially, the Queſtion was, Whether this Action would lie againſt the Defendants for this Neglect and Nonfeaſance.

And it was argued for the Plaintiff, that this Action is maintainable, for the Poſt-maſters are not appointed only as Officers to take Care of the King's Revenue, but as Officers in Purſuance of the Act of Parliament, to take Care of Letters, &c. ſo as to anſwer the End of the Statute, which is to advance Trade and Commerce for the Benefit of the Subject chiefly, and not as an Act for the Revenue, for that is but accidental. For the Plaintiff.

And tho' theſe Officers were newly created when the Poſt-Office was firſt erected, yet they are under the ſame Conditions as Officers at Common Law, and therefore liable to an Action for Breach of Truſt.

And a Nonfeaſance is as good a Cauſe of Action againſt an Officer of Truſt as a Misfeaſance, (i. e.) for the Neglect of any Thing, which by the Duty of his Office he is obliged to do; as in the Caſes againſt common Carriers, or for negligent keeping Fires, 'tis ſufficient to declare in the Negative, (viz.) That the Defendant hath not done ſo, &c. F. N. B. 93. Fitz. Abr. Proces 55. Bro. Action on the Caſe, pl. 67. 21 Ed. 3. 43. 1 Roll. Rep. 63.

Moor 135. 1 Roll. Abr. 99. 12 Rep. 128. 1 Roll. Rep. 47.

That

That where an Act of Parliament appoints a certain Person to do such a Thing, and he neglects to perform it, by which Negligence another is damnified, he may have an Action on the Case to recompence him for the Damages.

And 'tis not sufficient to say, that the Defendants have not the Præmium for Carriage of Letters; 'tis true, they have not the Whole, but they have a Salary which arises out of the Præmium; and in that Respect 'tis like the Case of a Sheriff, who accounts for the Profits of his County, and yet stands liable to Actions for any Neglect of his Duty.

See Hardres 53. Sid. 71.

And as to the Case of a Master of a Ship, where the Care of Provisions is in the Purser, yet the Master stands liable for the Default of the Purser; but here the Neglect was not in a Stranger, but in an Officer under the Defendants, for 'tis found that Brees, to whom the Letter was delivered, was placed in the Office by the Defendants; and they have Power by the Statute to remove Under-Officers, and to supply their Places; and the whole Office is entirely under the Control of the Defendants.

And it was insisted, that there was no Difference in Law between a Carrier of Letters and a Carrier of other Things, and that it was not material who had the Recompence, but that the Plaintiff having paid for the Carriage of his Letter, that gives him a Title to this Action.

And tho' it should be granted that this Office is virtually in the King (for he cannot have an Office actually) yet the Defendants are liable to this Action, as the Master of a Ship is liable, tho' another is the Owner; and for this Purpose the Case of * Morse and Sluice was relied on.

* 1 Mod. 85. 1 Vent. 19. Raym. 220.

As the Freight of a Ship is the Mother of Wages to the Sailors, so if the Freight is lost, the Wages are likewise lost; so here the Defendant's Salary comes out of the Profits of the Office, and if no Profits they can have no Salary; and they have their Salary as well in Consideration of their Hazard as of their Care in safe Carriage of Letters and Packets; and by their Care their Hazard is lessened.

Now if this Action should not lie against the Defendants, the Plaintiff would be without Remedy, for no Action will lie against Brees, who received the Letter at the Window, and threw it back into the Office at the Place appointed.

And 'tis plain, that the Statute 12 Car. 2. principally deſigned to make all People ſafe, by ſetting up certain Perſons who ſhould be reſponſible for the ſafe Delivery of Letters, and therefore it takes away the Liberty of ſending them by any other Hand.

The Hackney Coachmen are put under a Regulation by a late Act of Parliament, and they pay an annual Revenue to the Crown, yet ſtill they remain liable for Goods delivered to them; and the Multitude of Under-Officers and Servants belonging to the Defendants is no Excuſe to them for any Negligence, becauſe they are obliged to anſwer for all of them: And though thoſe Under-Officers give Security to the King, yet that doth not alter the Caſe, becauſe they are Servants to the Defendants, and they may take other Security of them; for the Statute doth not give any Direction concerning that Matter.

And the Clauſe in the Defendant's Patent, that they ſhall not be anſwerable for their Under-Officers, makes no Alteration of the Law; 'tis true, 'tis a Royal Promiſe to indemnify them, and the Defendants know how to make uſe of it as ſuch; 'tis like a Grant made to a Sheriff, that he ſhould not be anſwerable for his Bailiffs, which would be a void Grant in reſpect to the Subjects.

Laſtly, The very Acceptance of a publick Office is an Undertaking to perform it with Care and Diligence; and the Preamble of this Act ſhews, that there were Poſt-Offices before; therefore it cannot be ſuppoſed that this Statute, which was made for the Eaſe and Benefit of the Subject in reſpect to Commerce and Trade, ſhould aboliſh thoſe old Offices where the Officers were liable for any Negligence or Miſcarriage of Letters, and erect new Offices where they ſhould not be liable.

On the other Side it was argued for the Defendants, from the Nature of the Office, from the Smallneſs of the Præmium, and from the Terms upon which the Office was granted to them. Econtra.

(1.) And firſt as to the Nature of this Office, 'tis ſo very extenſive, both at Sea and Land, that 'tis not reaſonable the chief Officers ſhould anſwer for ſo great a Number of Under-Officers and Poſt-Boys who are worth nothing; and for a Misfeaſance every Man is an-

ſwerable for himſelf; but for a Nonfeaſance ſeveral Perſons cannot be charged with an Action.

In the Caſes of Carriers and Inn-keepers there is a general Undertaking, and they have it in their Power to ſecure themſelves; but 'tis not ſo in this Caſe, for the Defendants have no Poſſibility to ſecure themſelves againſt the Multitude of Servants which are of Neceſſity to execute this Office.

And the Under-Officers, tho' nominated by the Defendants, yet they are in under the King, to whom they are reſponſible and give Security.

(2.) The Rates for Poſtage are all fixed with Reſpect to the Bulk and Weight and Value; and are ſo ſmall that it cannot be intended a Præmium to warrant the ſafe Delivery of all Letters brought into the Office; for Jewels to the Value of 10000 l. may be ſent in a Letter, the Carriage whereof may not amount to one Shilling; but the Caſe of a Carrier is different, for he may refuſe the Carriage of Goods, unleſs paid in Proportion to their Value; but the Defendants cannot refuſe any Letters, for they muſt take in all which are brought to the Office.

(3.) The Grant is ſuch, that the Defendants have no Means to ſecure themſelves againſt the Under-Officers, by taking Security, &c. becauſe all is to be taken in the King's Name, which likewiſe differs this Caſe from that of a common Carrier.

Beſides, here is no expreſs Neglect found upon the Defendants, but only that the Letter was delivered to Brees, who was nominated by them.

Heretofore there was not any valuable Thing ſent by Letter, and the Statute never intended that ſo great a Charge ſhould be laid upon the Poſt-maſter.

Bills of Exchange differ from theſe Exchequer-Bills, becauſe he who comes to the Poſſeſſion of Exchequer-Bills, is thereby entitled to the Money, but Bills of Exchange muſt be indorſed; and it ſeems that the Carriage of Exchequer-Bills is not within the Duty of this Office, becauſe the Statute by which it was erected mentions only the Carriage of Letters and Packets, and not a Word of the Carriage of Goods or Money; but as for theſe Matters any Man may ſend them by whom he will.

Now theſe Exchequer-Bills being eſtabliſhed by Act of Parliament, are thereby made currant Money for many Purpoſes; and therefore if they are ſent encloſed in a Letter, he who ſends them muſt make a ſpecial Contract with the Poſt-Maſter; for the Nature of them is ſuch, that he who hath the Poſſeſſion is entitled to the Money, ſo are as hazardous with reſpect to the Care of the Poſt-Maſter as ready Money.

'Tis Diſpatch and Expedition which is required of the Poſt; and therefore 'tis neceſſary to ride by Night, when if robbed, there can be no Remedy againſt the Hundred, 'tis true as to the Furniſhing thoſe with Horſes who are willing to ride Poſt, 'tis ſuch a Duty that probably an Action might lie againſt the Defendants for their Neglect in not providing them; but as to Letters they are only Directors.

As to the Caſe of a Maſter of a Ship, he is Maſter only of one Veſſel, and he may be perſonally preſent therein, and he is upon his own Contract, and may agree for his Præmium in Proportion to his Care and Hazard, which the Defendants cannot do.

Curia. But by the Opinion of three Judges, Judgment was given for the Defendants, againſt the Opinion of Holt Chief Juſtice, who held that the Action would lie.

Dr. Groenvelt *verſus* Dr. Burnell, & al'. Intratur Paſch. vel Michaelis 9 Willi. 3. B. R. Rot. 178.

Action againſt the Cenſors of the College of Phyſicians, who juſtify the Commitment *pro mala praxi*, good.

IN an Action of Aſſault and Battery, and falſe Impriſonment, brought againſt the Defendants who were Cenſors of the College of Phyſicians, and againſt Cole their Officer who ſerved their Warrant, &c.

The Defendants plead as to the Battery & totum reſiduum tranſgreſſionis prædict' præter the falſe Impriſonment Not guilty; and as to the Impriſonment they juſtify by Virtue of their Charter confirmed by Act of Parliament, and by the Statute 14 H. 8. by which they have Power to fine and impriſon pro non bene utendo facultate medicinæ; then they ſet forth, that the Plaintiff at ſuch a Time and Place had adminiſtered unwholſome Medicines to A. B. and ſo juſtify the Taking and Impriſoning pro mala praxi, &c.

There was a Replication and Demurrer, but the Counſel for the Plaintiff did not inſiſt upon the Replication, but only on the Plea, which as they argued was inſufficient both in Form and Subſtance.

1 Roll. Rep. 176, 264. 1 Bulſt. 326. 1 Vent. 256.

(1.) In Form, becauſe the Aſſault was not directly anſwered in the Body of the Plea.

(2.) In Subſtance, for that the Defendants have not ſet forth the particular and ſpecifick Matters wherein the Mala praxis of the Plaintiff did conſiſt, which ought to have been done, becauſe 'tis a Matter which is traverſable, as it was agreed in * Dr. Bonham's Caſe, this being an inferior Juriſdiction.

*8 Rep. 121. 1 Sand. 74.

(3.) It was objected, that the Defendants had exceeded their Authority, becauſe they had both fined and impriſoned the Plaintiff; whereas they had only Power to do one of thoſe Things at their Election, but not both; and for this alſo Dr. Bonham's Caſe was cited.

(4.) The Defendants have not ſhewn that the Plaintiff was a licenſed Phyſician, and if not licenſed, they cannot cenſure him pro mala paxi, but ought to proceed againſt him for the Penalty of 5 l. per Month upon the Statute for practiſing without a License.

Contra for the Defendants.

On the other Side it was argued for the Defendants upon theſe two Points.

(1.) Whether this Action would lie againſt them.

(2.) Whether the Plea was good or not.

As to the firſt Point it was inſiſted on, that this Action would not lie, becauſe the Cenſors of the College of Phyſicians were in this Caſe as Judges, and what they had done was as ſuch, and Judges are not to be ſued for any Matters done by them unleſs ex malo animo, and there is no Difference between Judges who have a general Juriſdiction, and thoſe who have a limited Juriſdiction in this reſpect, ſo long as thoſe inferior Judges keep within their proper Bounds; therefore if they miſtake the Law in a Matter within their Conuſance and Juriſdiction, ſuch Miſtake ſhall no more ſubject them to an Action, than it will a ſuperior Judge.

And the Reaſon is to prevent Multiplicity of Actions, which is the Cauſe why an Action will not lie againſt a Lord of a Manor, for not admitting a Man to his Copyhold; and as to that Matter the Caſes in the * Margin were cited.

*9 H. 6. 60. Bro. Judges placito 10. 12 H. 6. 3. 1 Leon. 123, 124, 189.

2 (2.) As

Hutt. 12, 13. Bracton Exception, c. 15. Hardres Rep. Huntingdon *verſ.* Terry.

(2.) As to the ſecond Point it was argued, that the Plea was good both in Form and Subſtance.

Now the Objection as to the Form was, that there was no direct Anſwer to the Aſſault; and the Authority of the Caſe of * Wilſon and Dodd was cited, which was an Action of Aſſault, Battery, Taking and falſe Impriſonment; the Defendant pleaded as to all præter the Aſſault, Taking and falſe Impriſonment, Not guilty, and as to the Taking and Impriſonment, he pleaded a ſpecial Plea, and ſaid nothing as to the Aſſault; and upon a Demurrer to this Plea, Judgment was given againſt the Defendant, becauſe he had not anſwered the whole Declaration. * 1 Roll. Rep. 176.

'Tis true, the Authority of that Caſe was not denied, but it was ſaid, that it was different from the preſent Caſe; for there the Defendant did not undertake any Way to anſwer the Aſſault; it was not anſwered under the Not guilty, neither was it taken in under the Præter, ſo that the Aſſault was totally excluded in that Plea; but here the Defendants in their Plea did, in the Commencement thereof, undertake to anſwer the Aſſault; for 'tis entered quoad totum reſiduum tranſgreſſionis prædict' præter, &c. beſides, in the Body of the Plea, they have expreſly juſtified the Impriſonment which includes the Aſſault.

Next it was argued, that the Plea was good in Subſtance, for it was not neceſſary, or indeed reaſonable, to ſet forth the Particulars of the Mala praxis, becauſe the Defendants have a general Juriſdiction over all Phyſick within their Bounds; beſides if ſuch Particulars were ſet forth, this Court cannot judge of the Praxis, whether good or not, becauſe 'tis a particular Science of which the Judges of the Common Law are not required to be conuſant; and if every Drug ſhould be ſet forth in the Plea, it would be perplexed with Multiplicity; and therefore a * general Pleading hath been always allowed. * 20 H. 6. 31. b. 8 Rep. 121. 3 Cro. 916.

Beſides, the Nature of the Thing is ſuch, that none but Phyſicians can judge of it; for that which is good Phyſick for one Perſon may not be ſo for another, according to their different Conſtitutions, or according to certain Seaſons of the Year; and therefore it would be very impertinent as well as prolix in this Caſe, to ſet forth the Perſon's Conſtitution to whom this Phyſick was adminiſtered by the Plaintiff, or the Diſtemper or Seaſon of the Year, as well as all the compound Drugs, &c. of the Phyſick adminiſtered.

After-

Afterwards in Trinity-Term, anno 12 Willi. Judgment was given for the Defendants.

And per Holt Chief Juſtice, who delivered the Opinion of the Court, the Plea is good, becauſe the Defendants have thereby ſufficiently ſhewed their Authority over the Perſon of the Plaintiff, and they have ſhewed the Fact for which he was puniſhed to be within their Juriſdiction as Cenſors, which Fact is not * traverſable in this collateral Action, becauſe the Cenſors are made Judges to hear and determine; and therefore they are not liable to an Action for what they do by Virtue of their judicial Power; and he laid it down for a Ground, that wherever a Statute gives a Power to fine and impriſon, the Perſons to whom ſuch Power is given are † Judges of Record, and their Court is a Court of Record.

* *Per Holt Ch. Juſtice*, as to that Point in Dr. *Bonham's* Caſe, 'tis not Law, but only an Opinion delivered, and not a Reſolution.

† 8 Rep. 38. 2 Inſt. 308, 382, 208. 27 Aſſiſe placito 18.

In Dr. Bonham's Caſe, they impriſoned him for practiſing Phyſick without a Licenſe, which they could not do, for in ſuch Caſe they have no Power by the Statute to commit, but they ought to ſue for the Penalty of Five Pounds per Month, qui tam, &c. but in this Caſe of mala praxis they have an undoubted Power to commit.

'Tis true, no Writ of Error will lie upon this Judgment, becauſe 'tis a Court inſtituted de novo, and by the Inſtitution they are not bound up to the Formalities of other Courts, (viz) they are not bound to draw up their Judgments with Ideo conſideratum, &c. but 'tis ſufficient for them to ſhew the Conviction in other Words.

And yet the Party thus convicted is not without Remedy, for he may remove this Conviction by the Cenſors into B. R. where it may be quaſhed for Inſufficiency, and this may be done by Certiorari to any new conſtituted Court or Juriſdiction of Record, becauſe B. R. hath a Power to keep all limited Juriſdiction within their proper Bounds.

3 Cro. 309, 489.

But if the Plaintiff had not a Remedy in any other Court, it doth not follow from thence, that the Fact upon which this Conviction is grounded, ſhould be traverſable in a collateral Action, becauſe the Power which the Cenſors have is given to them by Statute, by which they are (as it were) a Jury to try the Fact whether the Praxis is good or not; and if a Jury find contrary to Evidence, yet no Action lies againſt them, becauſe they are on their Oaths; therefore what they find cannot be traverſed.

And laſtly, If the Mala praxis was traverſable, yet this Plea is ſufficient, becauſe 'tis not neceſſary to ſet forth the Particulars of the Medicines, for this Court can make no Judgment, whether they were wholſome, or not; and the Defendants have alledged, that the Medicines adminiſtred by the Plaintiff were unwholſome.

And as to the Objection concerning the Aſſault, he ſaid, that was included in the tot. reſiduum tranſgreſſionis, and anſwered by the Juſtification of the Taking and Impriſonment.

Judgment for the Defendants.

DE

DE

Term. Sanct. Trin.

Anno 11 Willielmi 3. in B. R.

The King *verſus* Harris.

1 Salk. 260. Where a Man is found guilty of a forcible Entry, Reſtitution muſt be awarded forthwith.

HARRIS was found guilty of a forcible Entry upon an Inquiſition taken before Juſtices of the Peace, according to the Statute 8 H. 6. but no Reſtitution was awarded upon this Conviction, nor any Thing farther done for three Years now paſt.

In which Time Harris brought an Action about the ſame Matter, and had a Verdict, and ſtill continued in Poſſeſſion after the Conviction, to this Time: And now after three Years, and after the Proceedings, as aforeſaid, the Juſtices coram quibus, &c. awarded Reſtitution upon the ſaid Conviction, and Harris was put out of Poſſeſſion.

Thereupon he procured the Conviction, &c. to be removed into B. R. by Certiorari, and ſeveral Objections were made to the Form of it, but they were all overruled; and then it was inſiſted on, that this Award of Reſtitution, ſo long after the Conviction, was illegal and void; for that a preſent Remedy was intended by the * Statute, therefore the Reſtitution ought to follow the Conviction in convenient Time.

* 8 H. 6.

So upon the Statute 15 Richard 3. if a Man is convicted of a forcible Entry or Detainer, upon View of a Juſtice of Peace, he ought to commit the Perſon forthwith, or not at all; for if ſo long a Delay ſhould be allowed as three Years, no Purchaſer could be ſafe in his Poſſeſſion, who had purchaſed the Lands bona fide, between the Conviction and the Reſtitution; and the whole Court being of that Opinion,

Reſtitution of the Poſſeſſion was awarded to Harris.

DE

Term. Sanct. Mich.

Anno 11 Willielmi 3. B. R.

Pliſſe *verſus* Smith. Die Veneris 10 Novemb. 1699.

To ſay of a Widow, ſhe was never married, is a Spiritual Defamation.

A Rule was obtained to ſhew Cauſe why a Prohibition ſhould not go to the Eccleſiaſtical Court to ſtay a Suit there by Smith, a Widow, againſt Pliſſe, for theſe Words:

ſſ. She was never married, and never had a Husband, (and what is her hopeful Son) innuendo, that ſhe was a Whore.

And upon Debate the Rule was diſcharged, for the Court was clear in Opinion, that theſe Words were a Spiritual Defamation.

Harpur *verſus* Davy.

Where a new Trial was granted.

ASSUMPSIT, &c. upon Non Aſſumpſit pleaded, the Plaintiff had a Verdict, and afterwards, upon a Motion, the Defendant obtained a Rule for a new Trial upon Payment of Coſts, and bringing the Damages into Court which were found in the former Trial; which was

done accordingly, and the Rule was to try the ſame Iſſue, &c.

Now the Plea-Roll of that Action was of Eaſter-Term Anno 11. and by the Memorandum it appeared, that the Bill was exhibited in Hillary-Term before; and upon the Rule for a new Trial, the Plaintiff did not proceed upon the ſame Roll, but made up a new Plea-Roll as of this preſent Michaelmas-Term, and a Memorandum of a Bill exhibited in Trinity-Term laſt paſt; and hereupon a Trial was had, and the Plaintiff had another Verdict, but upon a Motion it was ſet aſide for Irregularity, becauſe this was another Cauſe, as it now appeared to be, and the Plaintiff had not purſued the Rule of Court for a new Trial, which was to try the ſame Iſſue which was tried before in the firſt Action.

And in this Caſe, that between * Dubartine and Chancellour was cited, which was an Action of Treſpaſs, Quare uxorem abduxit cum bonis viri, &c. * 5 Mod. 392.

The Defendant pleaded in Abatement only for Delay; and upon a Demurrer to the Plea there was Judgment, that the Defendant ſhould anſwer over; whereupon he pleaded the general Iſſue, and there was a Verdict againſt him, but it was ſet aſide for Irregularity, becauſe in the Record of niſi prius, the Plaintiff had omitted all the Proceedings on the Plea in Abatement, and made it up as if there had been no ſuch Plea, but only the general Iſſue.

The Caſe of Abingdon *Town.*

A Mandamus was directed to the Mayor, Bailiffs, and all the capital Burgeſſes (except John Selwood and John Spinage) ſetting forth that by their Charter at ſuch a certain Day, the Commonalty are yearly to chooſe two out of the capital Burgeſſes, and to preſent them to the Mayor, Bailiffs and the Reſt of the capital Burgeſſes, and they are to elect one of thoſe two thus preſented, &c. to be Mayor of the Town for the Year enſuing. 2 Salk. 431, 432. The Court cannot refuſe the Return of a *Mandamus* by a Mayor, becauſe he is the principal Officer to whom 'tis directed.

That Selwood and Spinage being two of the capital Burgeſſes, were elected and preſented by the Commonalty, and that the Mayor, Bailiffs and the Reſt of the capital Burgeſſes refuſed to proceed to the Election of a

Mayor out of those two for the next Year; and the Writ was to command them to go to the Election of a Mayor out of those two Persons thus presented.

This Writ being delivered to the Mayor in Possession, he upon the Receipt thereof summoned the Bailiffs and capital Burgesses to an Assembly, who appearing upon the Summons, the Majority of them were for making a new Election of a Mayor according to the Command of the Writ.

But the Mayor in Possession (being of another Party) disagreed to it, and forthwith dismissed the Assembly; and afterwards he made this Return to the Writ, (viz.) That those two Persons presented to him in Order to choose one of them for Mayor, &c. were not qualified for that Office, not having received the Sacrament in due Time according to the Corporation Act made, Anno Car. 2.

And now the Court was moved in Behalf of the Majority of the Bailiffs and Burgesses, &c. to stay the Filing this Return, because made against the Votes of the Majority of those unto whom the Writ was directed; and that the Mayor might shew Cause why an Attachment should not go against him for this Practice, and accordingly a Rule was made for him to shew Cause, &c. upon the whole Matter.

And afterwards it was debated several Times upon this single Point, whether the Return offered by the Mayor might be stayed, or whether the Court were bound to receive it, notwithstanding the Practise as aforesaid, and at last the Court came to the following Resolution.

1. That they could not refuse the Mayor's Return, because he is the principal Officer to whom the Writ was directed, and to whom the Writ was actually delivered, and all that the Court could do was to compel a Return to be made to the Writ.

And if the Mayor had made any Return contrary to the Votes of the Majority concerned, it was at his Peril, and that the Way to punish him was by Information in B. R. and therefore the Rule supra was discharged, and the Mayor's Return was filed; but upon Debate it was held to be no good Return.

Where-

Whereupon in Easter-Term, 12 Willi. the Counsel for the Mayor took an Exception against this Writ of Mandamus which was, that it was ill directed, because it was not to the whole Body politick by its corporate Name, nor to any Persons natural by their proper Names, but to the Mayor, Bailiffs, and all the * capital Burgesses except two; and Sir Thomas Holt's Case on a Mandamus was cited, which was to the same Town, but quashed for this very Reason. T. Jones 52.

But this Court denied that Case to be Law, so that it was most proper the Writ should be directed only to those who are bound to obey it; wherefore a peremptory Mandamus was granted.

* *Nota*, They were incorporated by the Name of Mayor, Bailiffs, and Burgesses, and not *capital* Burgesses.

The King *versus* Chandler.

THE Defendant being convicted upon the † Statute for killing Deer in the King's Chase called Enfield-Chase, this Conviction was removed by Certiorari into B. R. and the following Exceptions were taken to it.

(1.) For that the Fact was not laid to be done upon any certain Day, but generally that the Defendant did between such Days hunt and kill so many Deer, whereas he ought to set forth the certain Day.

(2.) It was laid to be done without the Consent of the King proprietar' damarum, &c. but did not say tunc proprietar' so as to fix it at the Time of killing the Deer.

(3.) It was laid to be done without the Authority of any Person entrusted with the Keeping the Deer at the Time when they were killed; whereas 'tis possible that the Defendant might have Authority from some Person entrusted with the Keeping, &c. at that Time when the Authority was given, but not be entrusted, &c. at the Time of the Killing; and if so, the Defendant is excusable, unless he had Notice when the Trust was determined.

(4.) It doth not appear, that any Summons was awarded against the Defendant, or that he was brought in by any lawful Process.

(5.) The Judgment is informal, being short of what is required by the Statute; for here is no conditional Judgment of setting the Defendant on the Pillory, si, &c.

† 3 & 4 Will. cap. 10. 1 Salk. 378. 5 Mod. 446. Several Exceptions taken to a Conviction for Deer-stealing.

But

But as to this Matter it was anſwered, that this conditional Part ought not to be added, and for that the Caſe in the * Margin was cited, which was upon the Staute 23 Eliz. cap. 1. as a Caſe in Point.

* 1 And. 138. Cuffe's *Caſe.*

(6.) It did not appear that the Juſtices of Peace coram Quibus, &c. did give Judgment upon Evidence of Witneſſes, or upon Confeſſion of the Party, for 'tis Quia viſis, &c. omnibus præmiſſis, &c. conſtat to the Juſtices, that the Defendant eſt culpabilis; ſo for any Thing appearing to the contrary, it may be partly upon Evidence, and partly upon Confeſſion; which ought not to be.

The King *ver.* Speed. 1 Salk. 379.

And in ſome ſhort Time afterwards another Conviction was returned upon one Speed for killing one Deer in the ſame Chaſe, and the ſame Counſel took Exceptions to this Conviction.

(1.) For that it was too generally laid in the Circumſtance of Killing, for it was only ſaid unam damam, Anglice a Fallow Deer, not ſaying whether Buck, Doe, or Fawn, and 'tis quod illicite occidit, without ſhewing how, (viz.) whether by Gun, Arrow, Net, *&c.*

(2.) It did not appear that the Witneſs gave Evidence Face to Face, ſo as the Defendant might have an Opportunity to croſs-examine him.

(3.) The Fact is laid to be done ſine conſenſu proprietar', &c. without ſaying vel alicujus eorum.

(4.) 'Tis ſaid, that the Defendant was convicted upon the Evidence of ſuch a One, credibilis teſtis, in ea parte, when it ſhould be in hac parte.

(5.) The Fact is not laid to be done contra pacem Regis; which ought to be in all Convictions upon forcible Entries before Juſtices of Peace.

Nota; Theſe Convictions depended till Trinity-Term, Anno 12 Will. and then they were both affirmed.

The Objection which ſeemed to be of moſt Weight, was the firſt, which was made in Chandler's Caſe, (viz.) That the Fact was not laid to be done on any certain Day, &c. to which it was anſwered, that all Informations in the Exchequer were in this Form; and ſeveral Precedents were cited in this Point, which may be ſeen in the † Margin.

† Raſt. Ent. 410.

Hern's Pleader 549, 507, 508. Winch. Ent. 541, 547. Thompſon Ent. 92. Brown formula placitandi 50, 251, 260, 250, 252. Vidian Ent. 186. Coke Ent. 158.

And it was held per Curiam, that the Manner of the Killing need not be shewn specially, and that it was not necessary to lay it to be contra pacem; and that there needs no formal Judgment upon this Conviction, with an Ideo consideratum est, but that 'tis sufficient to say, Ideo convictus est, or Ideo forisfaciet, &c.

Nota; These were the first Cases of Controversy upon any Conviction on the last Statute against Deer-stealing. See postea the same Case 508.

The King *versus The Town of* Hertford.

UPON a Motion Leave was given to file an Information in Nature of a Quo Warranto against the Corporation of Hertford, for assuming a Right to make Freemen of Foreigners to the Town and Corporation.

Information shall not be filed in the Crown-Office before the Informer gives Security to answer the Costs, if the Defendant is acquitted.

The first Process out of the Crown-Office was a Venire facias in Nature of a Summons, which was made returnable in Easter-Term, Anno 11 Will. 3. upon which a Distringas issued, returnable Cro. Trin. and upon that Return a second Distringas was made returnable in fifteen Days in the same Trinity-Term, and upon the Return thereof a third Distringas was made Teste in that Term, and returnable in this present Michaelmas-Term, Anno 11 Will. 3.

And now it was moved in Behalf of the Corporation, that these two last Distringas's might be discharged for Irregularity, for that the Process in these Cases are to be returnable de Termino in Terminum, and not quicker; but that in Trinity-Term there issued two Distringas's, which ought not to be.

This Matter being referred to Sir Sam. Astry, the Master of the Crown-Office, he reported that the Proceedings were regular, and that no more than fifteen Days is required to be between the Teste and Return of these Process's; but it was still insisted for the Corporation, that there were above forty Precedents in the Office in such Informations against Corporations, where all the Process was made de Termino in Terminum.

But Holt Chief Justice answered, That Crown Office work was like Church-work, very slow in its Progress, it being usual for the Clerks to make all such Process out together, and of the same Teste and Return from Term to Term; but no Law requires that it should be so.

Where-

Wherefore the Proſecutors moved for a ſpecial Rule to eſtreat the Iſſues upon theſe Proceſs's, but no ſuch Rule was made, but the Iſſues were left to be eſtreated in due Time, according to the Courſe of the Court.

And in Eaſter-Term following, Anno 12 Will. 3. it was moved again for the Corporation to quaſh all the Proceſs that had been againſt them, becauſe the Informer had not given Security in the Crown-Office for the Coſts in Caſe of Acquittal of the Defendants, according to the Statute Anno 4 & 5 Will. 3. By which 'tis enacted, that the Clerk of the Crown-Office ſhall not receive or file any Information for Treſpaſs, or other Miſdemeanor, or iſſue any Proceſs thereon, before he ſhall have taken, *&c.* a Recognizance from the Informer in the Penalty of 20*l.* to proſecute with Effect; and that if the Defendant ſhall appear and plead to Iſſue, and upon a Trial the Defendant ſhall have a Verdict, the Court ſhall award him Coſts, *&c.*

4 & 5 Will. 3. cap. 18.

But it was inſiſted, that Informations in Nature of a Quo Warranto (as this was) were not within that Statute, for that extended only to Informations for Treſpaſſes, &c.

Sed per Curiam, Every Information, which in its Nature may be vexatious, is within the Purview of that Statute, and for that Reaſon Security ought to have been given before any Proceſs had iſſued; and ſo all the Proceſs in this Caſe was quaſhed by Rule of Court.

Alanſon *verſus* Brookbank.

Prohibition denied where the Plaintiff was cited on a Sunday.

THE Plaintiff moved for a Prohibition to the Court of Durham, becauſe ſhe was cited by their Proceſs on a Sunday, in a Cauſe of Incontinency with the Earl of Arg. who had deſerted his Wife, and lived with the Plaintiff in Adultery.

The Suggeſtion for this Prohibition was founded on the * Statute 29 Car. 2. by which 'tis enacted, that no Perſon on the Lord's Day ſhall ſerve any Proceſs (except in Caſes of Treaſon, Felony, or Breach of the Peace) but ſuch Service ſhall be void, *&c.*

* 29 Car. 2. cap. 7.

Now it appeared by the Return of the Apparitor upon the Citation, that he ſerved it on a Sunday; the Court adjourned

journed this Matter till the laſt Day of this Term, and then the Prohibition was denied.

The Biſhop of Salisbury & al' *verſus* Phillips.
Intratur Mich. 11 Will. 3. B. R. Rot. 377.

QUare Impedit brought by Phillips againſt the Biſhop of Salisbury and Berrow, for hindering him to preſent, &c. to the Church of Stanton Fitzwarren in the County of Wilts.

1 Salk. 43. Where Joint-tenants of an Advowſon made Partition by a Deed of Covenant between themſelves.

After ſome ſpecial Pleadings in the Court of Common Pleas, where this Action was brought, there was a Verdict and Judgment againſt the Biſhop, and thereupon he brought a Writ of Error in B. R. The Title in the Declaration was thus laid:

ſt. That John and Richard Organ were ſeiſed in Fee of the Advowſon in groſs, and being thus jointly ſeiſed, they by Indenture dated 26 Junii, Anno 13 Jac. and made between themſelves concluſerunt & agreaverunt inter ſe, that from thenceforth they would be ſeiſed in Common, and not jointly of the ſaid Advowſon of this Church, (viz.) That the ſaid Richard Organ ſhould ſtand and be ſeiſed, and have and enjoy one Moiety of the ſaid Advowſon to him and his Heirs; and that the ſaid John Organ ſhould ſtand and be ſeiſed, and have and enjoy the other Moiety, &c. to him and his Heirs, and that they and their ſeveral Heirs, as often as the ſaid Church ſhould become vacant, ſhould ſeverally preſent by their ſeveral Turns, alternis vicibus modo & forma ſequen. (viz.) That Richard Organ and his Heirs ſhould preſent for the firſt Turn, and John Organ and his Heirs for the ſecond Turn, and ſo alternis vicibus as often as the Church ſhould become vacant.

That afterwards Richard Organ preſented in his Turn one John Woodbridge, and after the Death of Woodbridge, John Organ in his Turn preſented Thomas Hotchkis; and afterwards Richard died, and John Organ ſurvived, and that Richard's Moiety deſcended to his Brother, who granted the Advowſon to Richard Hippeſly, from whom it deſcended to John Hippeſly his Brother, who granted the next Avoidance to William Phillips the Plaintiff's Teſtator, in whoſe Life-time the Church became

came void by the Death of Hotchkis, and for that Reaſon it belonged to the ſaid Teſtator to preſent, &c. and that the Defendants ipſum injuſte impediverunt, and that the Teſtator died whilſt the Church was void, having made the Plaintiff Executor, & ea ratione it belonged to him to preſent.

27 Ed. 3. 8. *b.* Co. Litt. 164. *b.*

Now it was inſiſted on for Error, that the Plaintiff had no Title, even by his own Shewing, becauſe the Jointenancy was not ſevered by this Indenture of Agreement made between Richard and John Organ, for that the Operation of that Deed was only by Way of Covenant, and the Inheritance of the Advowſon remained entire, as before, for Jointenants cannot grant to one another, tho' they may releaſe; but this Deed could not operate by Way of Releaſe, becauſe then they muſt be croſs Releaſes, and both at one Inſtant of Time.

But if it ſhould be admitted, that after this Indenture, Richard and John Organ were Tenants in Common, yet

5 H. 7. 8. Co. Litt. 198. *a.*

the Law would be againſt the Plaintiff, becauſe Tenants in Common muſt join in their Preſentation, and one Tenant in Common alone cannot grant the next Avoidance.

So that quacunq; via data the Plaintiff hath no Title, for it appears by his own Declaration, that John ſurvived Richard Organ, under whom he makes his Title;

* 2 Mod. 97.

and the Caſe of * Croſſman and Churchill was cited as an Authority in Point.

11 H. 4. 3. Co. Ent. 496, 590. Dyer 29. F. N. B. 62. D. 2 Inſt. 365.

Sed per Curiam, This is a good Partition of the Inheritance of this Advowſon, for by this Agreement a ſeparate Intereſt is veſted in each of the Organs to preſent by Turns; and being executed on both Sides, the Inheritance is thereby ſevered.

Child *verſus* Harvey.

1 Salk. 48. Where the Day of *Niſi prius* was after the Day in Bank, 'tis not amendable.

MOVED to amend the Record of Niſi prius in the Jurata and Diſtringas, to make them agree with the Plea-Roll; the Miſtake was thus, (viz.) It was in Iſſue in B. R. of laſt Trinity-Term, in an Action laid in Middleſex, to be tried before the Chief Juſtice at Weſtminſter, and the Day in Bank in the Jurata and Diſtringas, was a die Sanctæ Trinitatis, when it ſhould have been a die Sancti Michaelis in tres ſeptimanas Niſi prius, &c.

Now Tres Trin. which was the Day in Bank, happened to be on the 26th Day of June, vel coram Johanne Holt, &c. ſi prius venerit 27th of June, ſo that the Day of niſi prius was after the Day in Bank, when it ought to have been before.

The Plaintiff had a Verdict, but it was ſet aſide, for this was not amendable, and if ſo, then the Chief Juſtice had no Authority to try the Cauſe.

Argent *verſus* Sir Marmaduke Darrel.

New Trial not to be granted after a Trial at Bar.

ON a Trial at Bar in Eſcament, the Plaintiff had a Verdict contrary to the Opinion of the whole Court; and therefore the Defendant moved for a new Trial.

But per Curiam, a new Trial was denied, and it was laid down for a Rule, that after a Trial at Bar, no new Trial ſhall be granted in any Caſe, unleſs it appeareth that there hath been ſome Corruption or Misdemeanor in the Jury.

DE

Term. Sanct. Hill.

11 Willielmi 3. B. R.

The King *verſus* Chandler. Antea 501.

See Antea 501. The Method of Proceedings againſt Deer-ſtealers.

CHANDLER was commited by a Juſtice of Peace upon a Conviction grounded on the Statute 3 & 4 Will. cap. 10. made againſt Deer-ſtealing, and being brought up into B. R. by Habeas Corpus in Hillary-Term, 11 Will. the Court was moved, that he might be diſcharged, for that the Commitment was illegal for the Reaſons following.

(1.) Becauſe the Method intended by this Statute was not purſued; for the Warrant to diſtrain was directed to all Conſtables generally; now upon ſuch Direction to them by Name of their Office, a Warrant cannot be executed by any Conſtable out of the Precincts of his own Pariſh, for he is a Conſtable no where elſe.

Now upon this Warrant, the Conſtable of Southmims hath made a Return, that the Defendant had nothing in Hadley where by he might be diſtrained, or elſewhere: Whereas Hadley is another Pariſh, where the Conſtable of Southmims hath nothing to do; therefore ſuch a Return of a Matter out of his Precinct was not ſufficient whereon to ground a Warrant of Commitment.

(2.) If the firſt Warrant to diſtrain had been formal, yet the Return upon the Habeas Corpus is ill, for there is only a Recital of the firſt Warrant made in the Warrant of Commitment, but no Record thereof certified as it ought,

& per Curiam, for these Reasons the Commitment is void.

Et per Holt Chief Justice, the Method of Prosecution upon this Statute must be thus:

1. The Person convicted if present may be detained in Custody for two Days, in which Time the Justice ought by Warrants, &c. at his Discretion, to make what Enquiry he can, so as to inform and satisfy himself whether the Penalty may be levied by Distress.

And if he finds that there is nothing to distrain, then he must make a Record thereof by Way of Adjudication, (viz.) That it appearing to him the Party hath not any Goods by which the Penalty may be levied by Distress; therefore in Pursuance of that Statute, he doth award him to Prison (at the End of two Days, but not before).

If the Person is absent when convicted, then the Justice must make a Warrant to distrain; and if there is nothing upon which a Distrain may be made, then after two Days he must make a Record thereof *ut supra*, and then issue out his Warrant of Commitment; wherefore Chandler was discharged.

Nota; These Warrants to distrain and commit, were made by the Recorder of London, who convicted the Defendant.

Starke & al' *versus* Cheesman. Intratur Trin. 11 Will. 3. *but adjudged in* Hill. Term, 11, 12 Febr. 1699.

Case upon a Bill of Exchange protested.

CASE upon a Bill of Exchange drawn by the Defendant Christopher Cheesman in Virginia upon Christopher Cheesman of Ratcliff, London, which in Truth was upon himself; and in this Action the Plaintiffs declared, that the Defendant Christopher Cheesman 10 Junii, anno 1692. in quodam loco vocat' Virginia in partibus transmarinis, scil't, apud London' in parochia, &c. secundum usum mercatorum feciſſet tres Billas excambii, all of them of the same Date and Contents, and directed the said Bills to Christopher Cheesman in Ratcliff; and by the second of the said Bills he requested the said Christopher after 20 Days Sight thereof (the first and third of the said Bills not being paid) to pay to the Plaintiffs 15 l. for like Value received at Virginia.

Cum-

Cumque etiam prædict' C. C. unto whom the ſaid Bill was directed, from the Time of making the ſaid Bills, uſque & ſuper 23 die Decembris Anno 1699. at Ratcliff aforeſaid, ſeu alibi infra hoc regnum Angliæ non fuit inventus & prædict' quindecim libræ in Billa prædicta mentionat' were not paid to the Plaintiffs, per quod prædicto 23 die Decembris Anno 1699. prædicta ſecunda Billa billarum illarum debito modo & ſecundum conſuetudinem mercatorum proteſtat' fuit per quod ſecundum uſum mercatorum the Defendant became and is chargeable to pay the Money to the Plaintiffs, who likewiſe declared upon an Indebitatus aſſumpſit, quantum meruit and inſimul computaſſet, and had Judgment by Default; and upon a Writ of Inquiry executed entire Damages were found.

And upon a Motion in Arreſt of Judgment, it was objected againſt the Declaration, for that it was not therein averred, that the firſt and third Bill of Exchange was not paid, which ought to be averred, becauſe the Bills are conditional, (viz.) To pay the ſecond Bill, if the firſt and third was not paid.

To which it was anſwered, That the Allegation that the Money in Billa prædicta mentionat' was not paid, did ſupply the Want of that Averment, becauſe the Sum was the ſame in all the Bills.

(2) It was objected, That to entitle the Plaintiffs to a Proteſt, they had only ſaid, that the Perſon upon whom the Bill was drawn non fuit inventus in ſo long a Time, without ſhewing that they had made an Enquiry after him.

To which it was anſwered, That it was according to the Cuſtom amongſt Merchants, and according to the common Form in the like Caſes.

(3.) It was objected, That the Plaintiffs had not laid in their Declaration, that the Defendant promiſed to pay the Money to them after the Proteſt made, or that he had any Notice of the Proteſt.

1 Sid. 160, 306.

But it was anſwered, That the Law did raiſe the Promiſe upon the Cuſtom of Merchants; and therefore it was not neceſſary of laying an actual Promiſe, and the Caſes

* 2 Cro. 306. Cro. Car. 302.

in the * Margin were cited as Authorities in Point.

Judgment for the Plaintiff.

Gage *verſus* Acton. Intratur Hill. 8 Will. 3. B. R. Rot. 293. *Adjudged* Hill. 11 Will. 3.

ACtion of Debt for Rent upon a Demiſe of Lands by Indenture made by the Plaintiff to John Acton, the Defendant's late Husband, who died Inteſtate, and the Action was brought againſt the Defendant Elizabeth Acton, as Adminiſtratrix.

1 Salk. 325. Where a Bond with a Condition, &c. given to a Feme ſole is not diſcharged by her marrying the Obligor. *Contra per Holt* Ch. Juſt.

The Defendant pleaded in Bar, that before her Intermarriage with the ſaid John Acton, he by his Writing obligatory became bound to the ſaid Elizabeth, whilſt ſole, by the Name of Elizabeth Reynolds, Spinſter, in the penal Sum of 2000 l. ſolvend. eidem Elizabethæ cum inde poſtea requiſit. eſſet cum conditione prædict. ſcripto obligatorio ſubſcript. recitando, That whereas a Marriage was intended between the ſaid *John* and *Elizabeth*, then if the ſaid *Elizabeth* ſhould happen to ſurvive the ſaid *John*, and he to die before her, then if the ſaid *John Acton* ſhould leave, or if his Heirs, Executors or Aſſigns ſhould pay to the ſaid *Elizabeth*, her Executors, Adminiſtrators or Aſſigns, the full Sum of 1000 *l.* within one Month after the Death of the ſaid *John Acton*, then the Bond to be void.

That afterwards the Marriage did take Effect, and John Acton died Inteſtate, and did not leave to the ſaid Elizabeth the Sum of 1000 l. or one Penny thereof; and that ſince his Death the Sum of 1000 l. or any Part thereof, hath not been paid by the Heirs or Aſſigns of the ſaid John; and that on ſuch a Day, &c. Adminiſtration of the Goods and Chattels of the ſaid John was by ſuch, &c. committed to her; and that afterwards ſeveral of the Goods, &c. which were her Husband's Goods, to the Value of 230 l. and no more, came to her Hands, which Goods ſhe doth retain in Part of Satisfaction of the Bond aforeſaid.

And upon a Demurrer to this Plea, two Points were made,

Debt due for Rent, and Debt due on a Bond are in equal Degree.

(1.) Whether a Debt due for Rent reſerved upon a Demiſe by Deed was ſuperior to a Debt on a Bond, becauſe

cauſe the Rent iſſues out of the Realty, or whether thoſe Debts are in equal Degree.

And as to this Point the Court was unanimous in Opinion, that theſe Debts were in equal Degree, and that the Law was the ſame if the Rent had been reſerved upon a Parol Leaſe, becauſe it iſſues out of the Realty.

(2.) The other, which was the chief Point, was, Whether the Intermarriage of the Obligor with the Obligee had extinguiſhed the Debt, or not.

And after ſeveral Arguments at the Bar, the Court conſiſting of three Judges, gave their Opinions ſeriatim, and Gould and Turton Juſtices, were of Opinion, that the Bond was not deſtroyed, nor the Debt extinguiſhed by the Marriage.

They agreed, that all Contracts and Debts in præſenti, tho' they are to be performed or paid in futuro, eſpecially if a certain Day of Payment is prefixed, ſuch are all extinguiſhed by the Intermarriage; nay, if 'tis upon ſuch a Contingency which might poſſibly happen during the Coverture.

But there are ſeveral Things, which upon ſeveral Occaſions are kept in cuſtodia Legis, to preſerve a Right; and a Suſpenſion of a perſonal Action doth not always extinguiſh that Action.

Modus & conventio vincunt Legem, and no Fiction of Law ſhall work a Wrong; if a Feme Executrix marrieth the Debtor, yet the Law preſerves the Debt, leaſt a Wrong ſhould happen to the Creditors.

Now in the principal Caſe, this Bond was a Proviſion for the Wife in the Perſonalty, which the Law will preſerve for her Livelihood, as well as it preſerves her Dower, which is in the Realty.

Dyer 6, 7. Moor 236, 855. 8 Rep. 134. Sir John Needham's *Caſe*. Cro. Car, 372. Webb *v.* Dorcheſter

Where the Debtee takes the Debtor to be her Huſband, 'tis reaſonable that the Debt ſhould be extinguiſhed, becauſe it ſeems to be the Agreement of the Parties, that it ſhould be ſo; but here 'tis expreſly againſt the Intent of the Parties, that the Debt ſhould be extinguiſhed, and therefore the Law will preſerve it, and not work a Wrong.

That there is no Difference in Reaſon between a Bond with a Condition before Marriage, and a Promiſe or Covenant before Marriage; and by the Caſes in the

* Margin it appears, that a Releaſe of all Demands will not releaſe a Bond with a Condition, upon a Contingency, and not broken. * Hob. 156, 216. 2 Roll. Abr. 407. 2 Cro. 170. Litt. Rep. 87. Hutt. 17. Sid. 58, 59.

But Holt Chief Juſtice was of a contrary Opinion, becauſe this was in the Caſe of a Bond with a Condition, which was diſtinct from the Bond, and therefore immediately upon the Execution of the Bond there was a Debt in præſenti, which ſtill exiſts, and the Condition is ſubſequent to the Bond; and he relied upon † Hoe's Caſe, † 5 Rep. to make out the Difference between a Covenant, a Promiſe, and a conditional Bond, and a Bond with a Condition in Nature of a Defeaſance; for in an Action on this Bond, if the Defendant doth demur, the Plaintiff will have Judgment without ſhewing a Breach.

If this Bond had been given by a Stranger to the Woman when ſole, the Husband might have releaſed it by the Words of all Debts and Demands; and this Bond is the ſame as if it had been ſingle and a Defeaſance by another Deed; for the Condition thereof is not the Thing releaſable, but the Bond, which is a Duty in præſenti; and he agreed the Caſes of Promiſes and Covenants before Marriage, but inſiſted that this was different.

But by the Opinion of the other two Judges, the Defendant had Judgment, upon which a Writ of Error was brought in the Exchequer-Chamber; but the Plaintiff in Error perceiving the Court enclined to affirm the Judgment, did not proceed.

Nota; It was ſaid by Holt Chief Juſtice, That if an Action ſhould be brought on this Bond, and the Defendant demur to the Declaration, the Plaintiff ſhall have Judgment without ſhewing any Breach, but that muſt be if the Defendant pray Oyer of the Bond and Condition, and 'tis entered in hæc verba, for then the Condition is Parcel of the Defendant's Declaration, and not of the Defendant's Plea, and then if the Defendant demur, Judgment ſhall be againſt the Plaintiff, if by the Condition it appears he had no Cauſe of Action.

Hiliard *verſus* Jennings. Intratur Trin. 10 Will. 3. B. R. *Adjudged this* Hillary-Term.

A Will was atteſted by three Witneſſes, of which the Deviſee was one, he is no good Witneſs.

THIS was an Iſſue directed out of Chancery to try the Validity of a Will, and the Jury found a ſpecial Verdict.

Sſ. That Thomas Jennings was ſeiſed in Fee of the Lands in Queſtion, lying in Somerſetſhire; and being of the Age of twenty-one Years, he by Will dated 17 April, 1695, (which they found in hæc verba) deviſed the ſaid Lands to his Couſin William Hilyard (the now Plaintiff) whom he made ſole Executor thereof.

They found likewiſe, that the ſaid Thomas Jennings ſigned, ſealed, and publiſhed that Will in the Preſence of the ſame William Hilyard, Walter Lewis and Elizabeth Bernard, and no other Perſon, and that thoſe three Witneſſes did ſubſcribe their Names as Witneſſes to the ſaid Will, and atteſted the ſame in the Preſence of the ſaid *Thomas Jennings* the Teſtator.

The Queſtion was, Whether this was a good Will, quoad the Deviſe of the Lands to the Plaintiff within the * Statute of Frauds, by which 'tis enacted, that a Will by which Lands are deviſed muſt be ſubſcribed and atteſted in the Preſence of the Teſtator, by three or four credible Witneſſes.

* 29 Car. 2. cap. 3.

And upon the firſt Argument the Court was of Opinion, that this Will was void quoad the Deviſe of the Lands to the Plaintiff, becauſe he being the Perſon to whom the Lands were deviſed, cannot by Law be allowed to be a credible Witneſs to prove the Execution of the Will on his own Behalf; wherefore with Reſpect to this Deviſe, the Will was atteſted only by two Witneſſes, which is not ſufficient to anſwer the Statute; and,

Judgment was given for the Plaintiff.

The Caſe of Bridewel Precinct.

ONE who had been an Apprentice for ſeven Years to a Maſter of Bridewel Hoſpital, and being out of his Time, and having received the 10 l. Charity-Money towards ſetting up his Trade according to the Inſtitution of the Hoſpital, removed from thence, and ſet up his Trade in Clerkenwel, where he married, and had Children; and now being chargeable to that Pariſh, was by the Order of two Juſtices ſent to the Precinct of Bridewel, as being the Place of his laſt legal Settlement; and it being recited in the Order, that Bridewel was extraparochial, for that Reaſon this Order was quaſhed, becauſe the Statutes concerning Settlement of the Poor do not extend to extraparochial Places, but that is Caſus omiſſus.

Extraparochial Places may be taxed to contribute to the Relief of the Poor.

Sed per Holt Chief Juſtice, extraparochial Places may be taxed by way of Contribution in Aid of a Pariſh overcharged with the Poor.

Dodſon *verſus* King.

THE Plaintiff having obtained a Judgment in the original Action (wherein there was ſpecial Bail given by the Defendant) brought an Action of Debt againſt the Bail upon their Recogniſance.

The Defendants in this Action of Debt pleaded, that no Ca. ſa. had iſſued againſt the Defendant in the original Action.

The Plaintiff replyed and ſet forth the Ca. ſa. and the Return thereof; and thereupon the Defendants (the Bail) demurred.

And afterwards upon a Motion, the Court being acquainted that the Defendants (the Bail) had rendered the principal Defendant in Diſcharge of their Recogniſance before the Return of the Latitat, upon which they were arreſted, and praying that they might have the ſame Privilege in this Action of Debt brought againſt them, as they ſhould have, if the Plaintiff had proceeded againſt them according to the uſual Courſe, by way of Sci. fa. upon the Recogniſance, (and not by way of Action of Debt,) wherein upon

Debt upon the Recogniſance againſt the Bail, who had rendered the Principal before the Return of the *Latitat* againſt him, which Render is good, as a Render before the Return of the ſecond *Sci. fa.*

Motion they may render the Body at any Time before the Return of the ſecond Sci. fa.

Upon Debate of this Matter, the Court was of Opinion, that for as much as the Bail (who were Defendants in this Action of Debt) had rendered the Body of the principal Defendant before the Return of the Latitat (in this Action) upon which they were arreſted, the Bail ought to be diſcharged from their Recogniſance; for a Render before the Return of the Latitat in an Action of Debt upon ſuch a Recogniſance is equivalent to a Render before the Return of the ſecond Sci. fa. when the Plaintiff proceeds that Way, and accordingly the Rule was to ſtay the Plaintiff from any farther Proceedings in this Action, and to enter an Exoneretur upon the Bail-Piece, notwithſtanding the Plea, Replication and Demurrer before this Motion.

Bedingham *and* Kingſton Bowſey, *Pariſhes in* Suſſex.

Order of Removal confirmed on an Appeal is final as to the contending Pariſhes only.

A Poor Man by the Order of two Juſtices was removed from the Pariſh of St. M. to the Pariſh of Kingſton Bowſey as the Place of his laſt legal Settlement, from which Order Kingſton appealed to the next Quarter-Seſſions where this Order was diſcharged.

Afterwards this poor Man went to Bedingham, from whence by another original Order of two Juſtices he was again removed to Kingſton Bowſey, which laſt Order being removed by Certiorari into B. R. it was now moved, that it might be quaſhed, becauſe upon the Appeal Kingſton had been diſcharged, which could not be, if that had been the laſt Place of his lawful Settlement; therefore it was inſiſted that Kingſton was finally acquitted.

Sed per Curiam, The Order made upon the Appeal is final to none but to the contending Pariſhes who were Parties to the Appeal, and not to Strangers, as Bedingham is in this Caſe.

Creamer

Creamer *verſus* Wickett.

IN an Action of Battery and falſe Impriſonment brought in B R.

The Defendant pleaded in Abatement, another Action depending for the ſame Matter, in the ſame Court.

Plea in Abatement, that there is another Action depending for the ſame Matter in the ſame Court.

The Plaintiff replied, Quod non habetur aliquod tale Recordum & petit quod Recordum illud, &c. inſpiciatur, without giving Liberty to the Defendant to rejoin quod habetur tale Recordum.

And upon a Demurrer to this Replication, the Plaintiff had Judgment, becauſe this being a Record of the ſame Court in which it was pleaded, the Plaintiff might pray, that it might be inſpected by the Court, if any ſuch there was as 'tis reported in * Dier, which was the Precedent by which the Plaintiff was guided in this Caſe.

* Dier 227, 228.

Et per Curiam, Upon this Plea the Plaintiff might have prayed Oyer of the Record pleaded, and for Want of Oyer might have ſigned Judgment, which is the quickeſt Method of Proceeding.

DE

Term. Paſchæ.

Anno 12 Willielmi 3. B. R.

Clay *verſus* Snelgrove.

1 Salk. 33. Prohibition to a Suit in the Admiralty on Suggeſtion, that the Contract was made at Land.

THE Adminiſtrator of a Maſter of a Ship libelled for Wages in the Admiralty Court, which were due to the ſaid Maſter and his Man; and alſo for Money paid by the Maſter to the Mariners for their Wages.

And upon a Motion, the Queſtion was, Whether a Prohibition ſhould go upon the common Suggeſtion, that the Contract was made on Land.

It was agreed, that if the Mariners had libelled for Wages, no Prohibition ſhould go, but this being for the Wages of the Maſter who is not ſhipped as the Mariners are upon a general Undertaking of the Maſter; but he comes in by a ſpecial Contract by Charter-Party with the Owners, and his Remedy for his Wages is by Action againſt them.

But in this Caſe it happened, that the Owner was beyond Sea, and the Counſel for the Adminiſtrator inſiſted, that no Prohibition might go, unleſs ſome ſufficient Perſon would appear and put in Bail in an Action to be brought againſt him; otherwiſe this Debt might be loſt; the Court thought it was reaſonable ſo to do; but afterwards a Rule was made for a Prohibition abſolutely without any Condition.

Tilney *verſus* Norris. Intratur Trin. 9 Will. 3. B. R. Rot. 182.

AN Action of Covenant was brought againſt the Defendant as Aſſignee of Leſſee for Years, reciting the Leaſe made to E. G. &c. cujus ſtatus & reſiduum termini Annorum, &c. devenit (to the Defendant) per aſſignationem; and the Leſſee having covenanted in this Leaſe to repair, the Breach aſſigned againſt the Defendant was for not repairing, &c. and in Evidence upon the Trial of the Cauſe it appeared, that the Defendant was only Adminiſtrator to the Aſſignee of the Leſſee; and that by Virtue of ſuch Adminiſtration he entered and was poſſeſſed; and the Premiſſes being out of Repair, this Action was brought againſt him as Aſſignee, and not as Adminiſtrator.

Covenant againſt Aſſignee of Leſſee for Years, who in Truth was Adminiſtrator of the Aſſignee, but ſued as Aſſignee, and held good.

And it was made a Caſe for the Opinion of the Court, Whether this Action was well brought againſt him as Aſſignee; for if it was, then he is chargeable de bonis propriis, and not de bonis inteſtati; and it was adjudged for the Plaintiff, that the Action was well brought againſt the Defendant, by the Name of Aſſignee.

Moor 399. 5 Rep. Hargrave's *Caſe*. W. Jones 245. Allen 42.

Duke of Ormond *verſus* Bierly. Intratur Paſ. 11 Will. 3. B. R. Rot. 76. *Adjudged* Paſ. 11.

AN Action was brought upon a Bond in Replevin to proſecute his Suit with Effect, and alſo to make Return, &c.

1 Salk. 99. What ſhall be a Proſecution with Effect.

The Defendant pleaded, that E. G. did levy a Plaint in Replevin in the Court before the Steward of Weſtminſter, and that afterwards, and before the Suit was determined, (viz.) On ſuch a Day, &c. E. G. died, per quod the Suit abated.

The Plaintiff replied, quod bene & verum eſt, that E. G. levied ſuch a Plaint againſt the Defendant, who immediately afterwards exhibited an Engliſh-Bill in Exchequer againſt the Plaintiff in that Suit, and by Injunction hindered the Proceedings below until ſuch a Day, &c. on which Day the ſaid E. G. died, ſo that he did not proſecute his Suit with Effect.

And

And upon a Demurrer to this Replication the Defendant had Judgment, for per Holt Chief Juſtice, This was a Proſecution with Effect, becauſe there was neither a Nonſuit or Verdict againſt E. G. and ſo 'tis upon a Recognizance on a Writ of Error, which is alſo to proſecute with Effect; if the Plaintiff is not nonſuit, nor the Judgment affirmed, the Recognizance is not forfeited.

Tonkyn *verſus* Crocker.

2 Salk. 604. Lutw. 1211. The ſame Names, but not the ſame Point.

WRIT of Error of a Judgment in C. B. the Writ recited the Loquela to be in Curia noſtra, when it was a Loquela in the Time of the King and Queen.

Amendment not allowed to be made by the Inſtructions of the Curſitor.

And now it was inſiſted, that this Writ might be amended by the Inſtructions to the Curſitor who made it out, which being produced in Court, appeared to be right.

* 1 Roll. Abr. 754. 28 H. 6. 12. Dyer 206. 2 Cro. 254. 1 Leon. 134. *See* Blackmore's *Caſe.*

But this was oppoſed by the Counſel on the other Side, for that this Writ could not be amended by the Statute 8 H. 6. 'tis true, that Statute gives the Juſtices Power to amend Writs and Records, where it ſhall appear to them to be the Miſpriſion of the Clerk, but then ſuch Amendment muſt be in * Affirmance of the Judgment; but this to reverſe the Judgment.

This Writ, as it now ſtands, is a good Writ, and needs no Amendment; but 'tis an Alteration, and not an Amendment, which is deſired on the other Side, for a wrong Record is now returned; and if the Writ is altered to the Record, then it would be a right Record, the Conſequence whereof will be, that here will be a Record or no Record, according to the Alteration, or no Alteration of the Writ.

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