CASES

IN

LAW and EQUITY,

Chiefly during the Time the late Earl of MACCLESFIELD presided in the COURTS

OF

KING'S-BENCH

AND

CHANCERY.

By a Barrister of the *Inner-Temple.*

In the SAVOY:
Printed by E. and R. NUTT, and R. GOSLING, (Assigns of *Edw. Sayer*, Esq;) for T. Ward in the *Inner-Temple-lane*, and E. Wicksteed at the *Black Swan* in *Newgate-street*. MDCCXXXVI.

THE PREFACE.

THE *following Papers, among many other leſs material ones, were at firſt, only deſign'd for private Uſe.*

But as the Author, has for ſeveral Years laſt paſt, been ſettled in a remote Part of the Kingdom; he thought, he could not employ ſome few leaſure Hours more ſerviceably to his Country, than in correcting and tranſcribing the beſt Part of his Notes, for the publick Benefit.

As to the Value and Uſefulneſs of the Work; the Reports being now before the World, they muſt be left to ſpeak for themſelves.

The Reader will, no Doubt, obſerve, That they conſiſt of a great Variety of remarkable Caſes; very few of which are yet to be found extant in other Reports.

The Author could have made this Work much larger, by having inſerted ſeveral valuable Caſes, given him in Manuſcript by his Friends: But as they were not communicated to him for that Purpoſe, (tho' with no Limitation or Reſtriction whatſoever) he has forborn publiſhing any of them; and contented himſelf with preſenting nothing to the World, but what he took with his own Hand.

For which Reaſon, he can with greater Aſſurance acquaint the Reader, That in every Thing here publiſhed, he has faithfully endeavour'd to give him the Senſe, tho' not the Words, of both Bench and Bar.

THE

NAMES

Of all the

CASES

Reported, or Cited at large, Alphabetically diſpoſed, in ſuch a double Order, as that the Caſes may be found by the Names either of the Plaintiffs or Defendants.

N.B. Where *verſus* follows the firſt Name, it is *that* of the Plaintiff; where *and*, it is the Name of the Defendant.

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DE
Term. S. Trin.
8 *Annæ*,
In CURIA CANCELLARIÆ.

Anonymus.

THE Caſe before the Court was, a vexatious Perſon having tried his Right in an Ejectment at Law five ſeveral Times, the Court of *Chancery* was moved for a perpetual Injunction to ſtop all further Proceedings at Law.

Lord *Cowper* of Opinion it could not be granted.

The Juriſdiction of the Court of Chancery, is generally divided into three Parts, *Fraud*, *Truſt*, and *Accident*. Juriſdiction of Chancery. Diviſion of it.

It is plain the Court has not a Power to do what is deſired in Virtue of the two firſt Branches of its Juriſdiction; nor can it, I think, under the laſt; for by *Accident* is meant when a Caſe is diſtinguiſhed from others of the like Nature by *unuſual Circumſtances*. For the Court of Chancery cannot controul the Maxims of Common Law, becauſe of general Inconveniencies; but only when the Obſervation of a Rule is attended with ſome unuſual and particular Circumſtances that create a perſonal and particular Inconvenience. Chancery cannot overrule Maxims of Common Law.

Maxim of Common Law, that a Man may try his Right by Ejectment as often as he pleaſes.

This now is the Caſe before the Court; for it is a known Maxim of the Common Law, that a Man may try his Title as often as he pleaſes in an Ejectment. Now for this Court to determine, that one, two, three or more unſucceſsful Trials by Ejectment, ſhould be peremptory, *quid aliud* than to aſſume a legiſlative Power, and alter the Maxims of Common Law.

Objection 1.

But it may be objected, this is ſometimes done; for is not the Penalty of a Bond due by Law, in caſe of Non-payment of the Money upon the Day? And yet this Court decrees not only upon extraordinary Caſes, where the Payment of the Money at the Time appointed, by reaſon of ſome Accident or Misfortune, was become difficult, or impoſſible, but even in all Caſes, where the Obligor might have complied with the Condition, that the Penalty is not forfeited.

Anſwer.

But to this it may be anſwered, that the Court in this Conduct is ſure of doing Juſtice with an unerring Hand, and in all Events; for the Court never ſaves the Obligor from the Penalty of the Bond, before he has made a full Satisfaction to the Obligee, both in reſpect to Principal, Intereſt and Coſts.

But now ſhould the Court decree, that two, three, or more unſucceſsful Trials by Ejectment ſhould be peremptory, the Court would be very far from doing Juſtice in all Events. For Proceedings at Common Law, are tied up to very ſtrict Rules, and a Man that has a very good Title may be caſt through ſome Slip in the Proceedings, or a Man may have better Evidence at one Time than another. Beſides, as often as the Plaintiff loſes in an Ejectment, the Court gives Coſts, which is by Law intended as a Recompence, and tho' where Fees are liberally given, it does not near come up to it, yet if Things were managed more frugally, it would come much nearer.

Objection 2. Where the Court of Chancery directs two Trials by Ejectment, and the Plaintiff is caſt in both, this is peremptory; and what Difference is there between Trials at Common Law by Ejectment directed out of Chancery, and thoſe not directed? Objection 2.

Anſwer. Where Trials are directed by Court, the Court has a previous Knowledge of the Evidence, and ſo the Court can the better judge. Certainly it does not follow, that becauſe in Trials relating to Cauſes originally belonging to the Juriſdiction of this Court, and which are directed to be tried at Law by this Court, that becauſe in theſe Caſes, the Court determines how many Trials ſhall be peremptory, that therefore this Court may grant a perpetual Injunction to Proceedings at Law, in Matters triable at Law and not in Equity, and that only for doing what the Law allows. *Anſwer.*

But after all, the very Ground of this Objection fails; for even in Caſes of Ejectments directed by this Court, two unſucceſsful Trials are not ſo peremptory, but that upon good Cauſes another may be granted, which ſtrengthens the Reaſon of the Common Law.

Objection 3. *Boni eſt judicis ampliare legem.* Objection 3.

Anſwer. This Maxim not to be underſtood as that a Judge in Equity ſhould alter the Maxims of the Common Law, for this would be to aſſume a Power *paramount* to the Law. The utmoſt that can be meant by this Maxim, if it has any Meaning in it, is, that this Court, provided it has the Law to juſtify it, ſhould ſometimes uſurp upon the Juriſdiction of the Courts at Law.------If this Court ſhould extend its Juriſdiction in this Point, it might by Parity of Reaſon extend it in other Points, *viz.* determine how often Diſtreſſes ſhould be taken.------A collateral Warranty was certainly one of the harſheſt and moſt cruel Points of the Common *Anſwer.*

mon Law, becauſe there was not ſo much as an intended Recompence, yet I do not find this Court ever gave Relief in it. Should I have been inclined to enlarge the Juriſdiction of the Court, I think it extremely difficult to fix any ſtanding Rule in this Caſe.

Caſe of Andrew Artemonowitz Mattueof, *Ambaſſador of* Muſcovy. *B. R.*

Ambaſſador.

THE Queſtion was, whether an Ambaſſador could by Law be arreſted for Debt.

Sir *James Mountagu*, Attorney General.

Whether he may be arreſted for Debt.

He cannot. If the Privileges of an Ambaſſador may be broken in upon and invaded for the Preſervation of the Property of a private Subject, and this is declared to be Law, Princes will be cautious of ſending Ambaſſadors to us; ours muſt expect the like Treatment, and few will be prevailed with to take that Character upon them.

Should an Ambaſſador be liable to the Reſtraints of the Law of the Land to which he goes, how eaſy wou'd it be upon an Emergency, to take off his Attendance upon his Maſter's Buſineſs?

Does the Law of *England* privilege the Body of a Member of Parliament, and of a Soldier, and ſhall it not that of an Ambaſſador?

The Perſon of an Ambaſſador has ever been held ſacred and inviolable, by the Law of Nations.

Grotius.

The Goods of an Ambaſſador not liable to Diſtreſs, *a fortiori*, not his Perſon. An Ambaſſador muſt be intreated, and upon refuſal ſent back to his Maſter. If an Ambaſſador commits a Crime of a tranſcendent Nature, the King *a quo*, *non ad quem* muſt puniſh him.

My Lord *Cook* ſays, *legatos violari contra jus gentium*; nor does he add (as certainly he would, had he thought ſo,) that tho' this be ſo in the Civil Law, it is not ſo in ours.

An Ambaſſador does by Fiction of Law repreſent the Perſon of his Maſter: Thus *Coke*, upon Stat. 25 *Ed.* 3. affirms it High Treaſon at the Common Law to kill an Ambaſſador. Now certainly no Body will ſay the *Czar* himſelf might have been arreſted. The ſame Fiction of Law that makes him repreſent the Perſon of his Maſter, makes him *extra-parochial, & quaſi* in the Dominions of his Maſter. The ill Treatment of Ambaſſadors is a Thing of a dangerous Conſequence, for it may involve the Nation in a War, and it would be very inconvenient that this ſhould be in the Power of any private Perſon whatſoever.

High Treaſon to kill an Ambaſſador.

Contra, it was ſaid. If this be ſo, a Subject may be left without Remedy for the Recovery of his Debt, which wou'd be a Defect in Law.

Juſtice ought always to be reciprocal, but an Ambaſſador may arreſt. *Ergo, &c.*

It is a Maxim in Law, that the Royal Prerogative does no Wrong, and ſhall the Prerogative of an Ambaſſador ſurmount that of the Crown?

Maxim of Law, King can do no Wrong.

Such a Law as this would be a Nullity, becauſe contrary to *Magna Charta, cap.* 29. *nulli vendemus, nulli negabimus aut differemus juſtitiam vel Rectum.*

An Ambaſſador by his Contract renounces his Privileges as far, as to ſubject himſelf to the Laws in Force in that Country where the Contract was made.

This Suit occaſion'd an Act of Parliament, 7 *Annæ, cap.* 12. whereby all Proceedings againſt this Ambaſſador in this Cauſe were declared null and void, and the Privileges of Ambaſſadors fully ſettled as to this Matter.

DE

Termino S. Mich.

8 *Annæ*,

In BANCO REGIS.

Anonymus.

BY a Return to an *Habeas Corpus*, it appeared, that in the City of *London*, there was ſuch a Cuſtom, that if a Feme Covert exerciſes any Trade, in which her Huſband does not at all concern himſelf (*intromitteret*) ſhe may be ſued as a Feme Sole, for Debts contracted in the carrying on of that Trade; and if ſhe has not Goods that are not her Huſband's, ſhe muſt be impriſoned until ſhe pay them; and as ſhe may be ſued, ſo ſhe may ſue as a Feme Sole for Debts owing her, in her Way of Trade, and within the City. She has a ſpecial and ſeparate Intereſt in the Profit of her Trade, or elſe it were an unreaſonable Cuſtom.

Cuſtom of London.

DE

Termino S. Hill.

8 *Annæ*,

In Banco Regis.

Hadley and *Styles.*

IN a Writ of Error upon a Judgment in the Court of Common Pleas, the Error inſiſted upon was this, an Action of Debt was brought, and the Jury found for the Plaintiff as to Part, and for the Defendant as to the reſt. Now it was objected this Verdict was naught, becauſe a Debt is an intire Thing; and upon a *nil debet*, the Jury cannot ſever; and ſhould a Man bring an Action of Debt for 80 Pounds, and declare for leſs, this would be a Variance between the Writ and the Count, unleſs he ſhew how the reſt was ſatisfied.

Debt.

Not ſo intire but Jury may ſever in their Verdict, and find Part for the Plaintiff, Part for the Defendant.

This the Court agreed to, but yet were of Opinion, that if the Party brought an Action for the whole Debt, and a Part of it was paid, the Jury might, upon a *nil debet* ſever, as in Caſe of Rent. *Adjournatur. Vide* this Caſe, *Salk. Rep. pag.* 664.

DE

Term. Paſchæ,

9 *Annæ*,

In Banco Regis.

Sir Edward Seymour's *Caſe*.

IN a Trial of Ejectment between Sir *Edward Seymour* and his Mother-in-Law, the Court did allow the Contents of a Deed to be given in Evidence, by Witneſſes; nay Witneſſes who put the Contents of the Deed in Writing upon Memory, four or five Days after reading the Deed.

The Court ſeem'd of Opinion, that in Caſe a Deed was loſt by ſome inevitable Accident, that there it might be proved by a Copy. But in Caſe there was no Copy, the Contents of it could not be proved from the Memory of thoſe that knew the Deed; and though it were hard for a Man that had no Copy, to loſe the Benefit of his Deed, yet the Inconveniencies of admitting that Sort of Evidence would be greater.

But here the Opinion of the Court was founded upon a particular Reaſon, for the Deed by which the Plaintiff was to prove his Title, was not loſt, but proved to be in the Hands of the Defendant; ſo that in this Caſe the Danger of allowing this Sort of Evidence was none at all; for if the Defendant was wronged by the parol Evidence, it was in his Power to ſet all right by producing the Deed.

DE

Term. S. Trinitatis,

9 *Annæ*,

In Banco Regis.

Anonymus, or Pariſhes of Honiton *and St.* Mary Axe.

A. IS ſent from the Pariſh of *H.* to the Pariſh of *C.* with a Certificate, ſubſcribed by the Churchwardens of *H.* and two Juſtices of the Peace; whereby at the Time of his Removal he is acknowledged a ſettled Inhabitant of the Pariſh of *H.* *A.* grows chargeable to the Pariſh of *C.* who by Virtue of that Certificate ſend him back to *H.*

The Queſtion was, whether this Certificate of the Pariſh of *H.* ſhall not be a Concluſion or an Eſtoppel to the Pariſh of *H.* from ſaying that his laſt Settlement was at ſome other Pariſh; not only with Reſpect to *C.* (for of that there was no Doubt) but with Reſpect to any other Pariſh whatſoever.

Settlement by Certificate is an Eſtoppel upon the Pariſh granting the ſame, from finding any other Settlement againſt the whole World.

Reaſons urged why this Certificate ſhould be an Eſtoppel only with Reſpect to the Pariſh of *C.* were,

1*ſt*, And eſpecially a Caſe of two Pariſhes in the Town of *Northampton*, 2 *Annæ*, where, upon an Order removed by *Certiorari* into *B. R.* this very Queſtion was ſo determined.

Vide 2 *Salk.* 530.

2*dly*, Upon Suppoſition that this Certificate was to be eſteemed an Eſtoppel, from finding out any Settlement whatſoever, it will make Church-wardens very cautious of putting their Hands to ſuch Certificates, which will
8 & 9 *W.* 3. in a great Meaſure prevent the Benefit of the Act.

3*dly*, Not reaſonable the Indemnification ſhould extend farther than the Damnification; if therefore the Pariſh of *C.* that is the only Pariſh damnified, be indemnified, this is enough.

4*thly*, No Injury is done to any one by this Interpretation of the Act, for if the third Pariſh to whom he is ſent, can ſhew that he had not his laſt Settlement there, then all Things are in *ſtatu quo*; but if the Truth is, that he was really ſettled there, then that Pariſh ought to provide for him. But taking the Law to be the other Way, *viz.* that according to the Meaning of the Act, the Certificate is a Concluſion from finding any Settlement in any Pariſh whatever, the Pariſh granting it may be obliged to maintain him in their own Wrong.

5*thly*, Not fit it ſhould be in the Power of Church-wardens to prejudice the Pariſh in Matter of Property.

6*thly*, The Statute mentions the two Pariſhes only.

Arguments for the other Side of the Queſtion;

1*ſt*, Expedient, or not expedient, no good Argument againſt the expreſs Letter of a Law.

The Parliament never ſuppoſed, that the Church-wardens and Juſtices of the Peace would certify a Falſhood; and therefore the Act ſays, that the Certificate ſhall oblige the Pariſh that gives it, to receive and provide for, *&c.* when he becomes chargeable; but according to this Conſtruction the Pariſh is not obliged, *&c.*

As to what was ſaid, that this would make People cautious of granting Certificates, it may be anſwered, that the eaſing the Pariſh for a Time, and it may be for ever, will be Motive enough.

The Statute of the 3*d* of King *William* ſays, that the paying of Taxes ſhall make a Settlement; if therefore he pay Taxes at *C.* and by Virtue of this Certificate is ſent back to *H.* the third Pariſh to which by this Conſtruction he muſt be ſent, will loſe an Advantage that the Law gives it. Beſides, what ſhall hinder the third Pariſh from ſending him back to *C.* and ſo by Conſequence the End of the Act, which was moſt certainly the Indemnification of *C.* will be fruſtrated.

There is no Doubt but it is in the Power of Churchwardens to damage the Pariſh, and that in Matter of Property too, as by taxing an indigent Perſon, and ſo conſequently making a Settlement. According to this Conſtruction the Inconvenience is little or none, for it is but to take Care to certify the Truth. But according to the other Conſtruction all will be ſet a-float again, and poor Perſons harraſs'd and oppreſs'd by being ſent for ever from Pariſh to Pariſh.

And the Court were clearly of this Opinion, but took Time to conſider of the *Northampton* Preſident; but afterwards (*ut audivi*) held the Certificate an Eſtoppel upon *H.* againſt the whole World. *Vide* this Caſe 2 *Salk.* 535.

DE
Termino S. Mich.
9 *Annæ*,
In Banco Regis.

Buckley and *Pirk.*

Debt for Rent pleading.

IF an Executor takes Poſſeſſion of the Term of the Teſtator, and an Action is brought againſt him in the *Debet* and *Detinet* for Rent or Non-repairs, it is abſurd for him to plead no Aſſets *ultra* what will ſatisfy ſuch and ſuch Judgments; becauſe in ſuch a Caſe, the Surplus of the Profits, Rent and Repairs deducted, is all that is Aſſets, and liable to the Judgments; and therefore the reſt of the Profits are ſo appropriated to the Payment of Rent and Repairs, as not to be exhauſted by Debts. *Vide* 1 *Salk.* 316.

Baniſter and *Hopton.*

Spiritual Court Juriſdiction.

IN a Motion for a Prohibition in this Caſe, it was agreed, that tho' a Preſcription, as whether a whole Pariſh or a ſelect Veſtry ſhould chuſe Church-wardens, be a Matter triable at Common Law by a Jury, yet Sentence is to be given in the Spiritual Court according to their Verdict; and therefore tho' this be a Matter triable at Common Law, yet if the Party ſubmit to a Trial in the Spiritual Court, by not demanding a Prohibition, it will be too late after Sentence to move for one.

2 *Salk.* 548.

Forte and *Buviere.*

Church.

Pariſhioners taxable for building a Gallery.

THE major Part of the Pariſh, aſſembled in Veſtry, tax'd the Pariſh for building of a Gallery, each Pariſhioner ten Times the Value of an ancient Rate. One Pariſhioner refus'd Payment, and was ſued in the Spiritual Court, whereupon he pray'd a Prohibition.

1*ſt*, Becauſe a Pariſh could not be tax'd for building a Gallery, which was neither uſeful nor ornamental to a Church; but this not much regarded by the Court.

2*dly*. The oldneſs of the Rate. But the Caſes produced to maintain the Prohibition on this Head, did not come up to it; they being granted in Caſes, where the Rate was to continue always the ſame: But here there was a new Rate model'd by the old; and if ten Times the Value of the old Rate had been put into one intire Sum, it would have been plain; beſides, no need for the Pariſh to depart from an old Rate, until it grows unequal.

Pariſh of St. Mary *of* Reading, verſus *St.* Lawrence *of* Reading, *about Settlement of* Joſeph Marlow.

ONE *Joſeph Marlow* was firſt an Inhabitant of St. *Mary* in *Reading*, afterwards he came into the Pariſh of St. *Lawrence* of *Reading*, and during his Stay there, was choſen Church-warden for the Borough, and exerciſed that Office as well in that Pariſh, as in ſome others; after which he removed to St. *Mary*'s, and there became chargeable.

Settlement.

Exerciſing the Office of Warden, in the Pariſh where a Man lives, is a Settlement within 3 & 4 *W.* & *M.* tho' he be not choſen by the Pariſh, and exerciſes his Office through the whole Borough.

The Queſtion was, whether his reſiding in the Pariſh of St. *Lawrence*, and exerciſing the Office of Warden, in that Pariſh, (tho' he did it in others too,) was a Settlement, by the 3*d* and 4*th* of King *William*, or no?

It was inſiſted by the Counſel for St. *Lawrence's*, that to make a Settlement purſuant to that Act, two Things were requiſite; 1*ſt*, The Office muſt be a publick and annual Office for the Pariſh; but this was not an Office for the Pariſh but Borough, neither was he choſen by the Pariſh.

Settlement. Payment of Scavenger's Rate, becauſe a Ward Rate no Settlement within that Act.

2*dly*, It muſt be executed in the Pariſh; but this Office tho' it was executed in the Pariſh of St. *Lawrence*, was ſo in other Pariſhes too; and upon this Ground it was very lately adjudged, that the Payment of a Scavenger's Rate, being a Ward Rate, was no Settlement within the Act.

Judge *Powell* of Opinion, that this was a Settlement within the Act, and that a Man exerciſing an Office in a Pariſh, tho' in another too, and tho' not choſen by the Pariſh only, might yet be eſteem'd properly enough a Parochial Officer.

Parker Chief Juſtice. The Words of the Act are as general with reſpect to the Payment of Taxes, as to the Exerciſe of Offices; and therefore ſince the Payment of a Scavenger's Rate did not, in the Opinion of the Court, becauſe a Ward Rate, amount to a Settlement, by a Parity of Reaſon, neither will the Exerciſe of ſuch an Office.

Powis of Opinion, That he was a Parochial Officer and more, therefore a Settlement.

Eyre, Stat. 1 *Jac.* 2. *cap.* 17. made Notice in Writing left with the Overſeer of the Pariſh neceſſary to a Settlement. Payment of Taxes and exerciſing of Offices upon the Equity of that Act, judged equivalent to a Notice in Writing, and this Act of the 3*d* and 4*th* of King *William* ſeem'd to him made for the corroborating the equitable Conſtructions upon that Statute. He was of Opinion it was a Settlement, and that there was a vaſt

Difference, in Point of the Notoriety, between Payment of a Scavenger's Rate, and exerciſing the Office of a Scavenger; for the one might eſcape the Notice of the Pariſh, the other not.

Parker Chief Juſtice. If the Reaſon of the Act be founded upon the Notoriety of the Fact, *Eyre* in the Right; but he was of Opinion, that the Act went upon this Reaſon, *viz.* that a Perſon choſen to a Parochial Office, or aſſeſs'd a Parochial Rate, was not a Perſon likely to become chargeable; and this was the Reaſon, why hiring for a Year, and Service accordingly, makes a Settlement.

Next Term, by Conſent of all it was adjudged a Settlement.

Cook and *Parſons.*

AT a Trial at *Niſi Prius* at *B. R.* in *London*, the Caſe was this, it was ſaid at the Concluſion of a Will, ſigned, ſeal'd and deliver'd by ſuch a one, Teſtator, and then ſubſcribed by three Witneſſes. It appear'd by Depoſitions in a Chancery Cauſe, whereof the Bill and Anſwer were loſt, that they ſubſcribed the Will in the Preſence of the Teſtator, but at three ſeveral Times: The Verdict was for the Plaintiff; but a Caſe of two Points was agreed upon for further Arguments: 1*ſt*, Whether the Bill and Anſwer being loſt, the Depoſitions cou'd be admitted as Evidence? 2*dly*, Whether the Signing of three Witneſſes, but at three ſeveral Times, was a good Execution of the Will within the Statute of *Frauds and Perjuries?* *Evidence.*

As to the firſt Point, *Parker* Chief Juſtice, who try'd the Cauſe, was of Opinion that the Depoſitions ſigned by the Witneſſes, tho' the Bill and Anſwer were loſt, might be allowed as Evidence to ſupply any Point where the Will was ſilent, but not to contradict the Will.

DE
Termino S. Hill.
9 *Ann.*
In Banco Regis.

Anonymus. *Or* Goodwin *and* Godwin.

Debt.
Whether Debt will lie upon a Judgment in *B. R.* pending Error in Exchequer Chamber.

THE Point in Queſtion was, Whether an Action of Debt founded upon a Judgment in *B. R.* might be brought, pending Error in the Exchequer Chamber.

It was argued in Favour of the Affirmative, that the Judgment was not ſuſpended by the Writ of Error; becauſe if it was, a Releaſe of all Demands would not be a Releaſe of a Judgment pending a Writ of Error, which undoubtedly it is.

It was ſaid likewiſe, that the Record was not removed by Writ of Error, but that only a Tranſcript was ſent.

It was alſo ſaid to be a received Rule in the Common Pleas, that an Action of Debt would lie upon a Judgment in the Common Pleas, pending a Writ of Error in the King's Bench; and that by Parity of Reaſon it ought to do ſo upon a Judgment in *B. R.* pending Error in the Exchequer Chamber: And all this was fortified by ſeveral Caſes in Point.

The Point in Queſtion was given up upon Account of the Number of Caſes in Point, that Debt would lie pending Error. But it was ſtrongly inſiſted upon, and the Statute of 27 *Eliz. cap.* 28. rely'd upon for that Purpoſe; that the very Record itſelf was, in Point of Law, removed by the Writ of Error; and that therefore the Declaration was naught, being of a Record in *B. R.* whereas it ſhould have been upon a Record in the Exchequer Chamber.

Court. Theſe Actions of Debt pending Writs of Error never favour'd by *Hales* nor *Holt.*

To be conſider'd, whether, tho' in Fact, a Tranſcript was only ſent, yet whether in Point of Law, the Record itſelf was not removed; becauſe without it the Judgment itſelf, could not be affirmed or reverſed: And alſo whether they could ſuppoſe the Record in two Places at once, in the one Place to ſupport Debt, in the other Error.

The Authorities only kept the Court from rejecting theſe Actions, and therefore tho' they held the Writ of Error to be no Plea in Bar, yet they doubted whether they might not admit it as a Plea in Abatement.

In theſe Kind of Actions, to diſcourage them, Bail never allowed. *Adjournatur.* 3 *Salk.* 55.

DE

Termino Paſchæ,

10 *Ann.*

In Banco Regis.

Jeffry and *Barrow.*

Caſe upon Stat. 3 & 4 *W.* & *M.*

THIS was an Action of Debt upon Bond, brought againſt the Heir, and upon *Riens per Deſcent* pleaded, the Plaintiff Replies that he had Lands, &c. ſufficient to diſcharge, &c. the Jury find for the Plaintiff, *viz.* that ſufficient Lands to diſcharge, &c. did deſcend.

Moved in Arreſt of Judgment, that this Pleading being grounded upon 3 & 4 *W.* & *M.* that Act ought to have been exactly purſued; and then the Iſſue ſhould have been only, whether any Lands deſcended, and not the Value of the Lands; and if the Jury found for the Plaintiff, then the Jury were to inquire of the Value.

Parker Chief Juſtice, ſeem'd to incline to the Defendant meerly upon this Point, that it did not appear by this Verdict, whether, when the Jury found the Deſcent of ſufficient Lands, they meant ſufficient in reſpect to the Debt in Equity, or at Common Law, *viz.* the Penalty; probably the Jury intended, the equitable Debt only; whereas Judgment muſt be given upon the Penalty.

Plaintiff put himſelf to great Hazard, in this Way of Pleading, for tho' it had been found that Lands were deſcended, yet if theſe Lands were found inſufficient, Judgment muſt have been given for the Defendant.

Powell doubted, whether this not being an immaterial Iſſue, but a material one and more, it was not helped by 32 *H.* 8.

He doubted likewiſe, whether if it were not, yet this being an Iſſue appointed by this Act and more, it might not be ſupplied by another Inquiſition by another Jury.

Powis and *Eyre* of another Opinion as to this Point, for the Stat. ſays *the Jury*, *viz.* the Jury that try'd the Cauſe.

As to the principal Matter, *Powis* concurred with *Parker*, Chief Juſtice.

Eyre of Opinion, that this Verdict was equivalent to an Inquiſition.

The End of the Act of Parliament was by the Court thought to be, helping the Creditor in Caſe of Alienation, and alſo the Heir, that he might not run ſuch a Riſque in pleading *riens per Deſcent*, as to ſubject himſelf to the Payment of the whole, if ſo be that but a Penny was found to be deſcended.

Gibſon and *Albert. In Canc.*

Obiter, If a Man unneceſſarily makes any one a Defendant, he thereby cuts himſelf off from the Benefit of his Evidence, for it is his own Fault. Evidence. Chancery.

But where ſeveral are made Defendants, it will not hinder any one of the *Defendants*, from the Benefit of the Evidence of any others that are made ſo.

Indeed

Indeed in Caſe of Truſtees, it is neceſſary that they be made Defendants, and therefore there the *Plaintiff* may have the Benefit of the Evidence.

Brown and *Litton. In Canc.*

Trade.

Maſter of a Ship goes a Trading Voyage, dies, Succeſſor opens publickly the Effects of the Deceaſed, and then ſends a Letter inclos'd with a Bond to the Widow, to be anſwerable for Intereſt at the Rate of *reſpondentia* Bonds. Decreed *per Harcourt* Lord Keeper, that the Succeſſor was a Truſtee, and ſhould be anſwerable for what he actually made of the Money.

MASTER of a Ship went a Trading Voyage beyond Sea; the ſucceeding Maſter opens the Effects of the deceas'd, in the Preſence of the Crew; and then ſends a Letter with a Bond incloſed, to the Widow of the deceaſed, whereby he binds himſelf to anſwer to her, *the Sum of* 300l. *if the Ship arrives ſafe*; the Sum the deceaſed left being 200 *l.* which was the Rate of *reſpondentia* Bonds there. The Maſter trades and makes 300 *l. per Cent* of the Money.

The Queſtion was, whether he ſhould be bound to any more than this Bond, or anſwer to the Widow the Profits of the Money made in the Way of Trade.

The Counſel for the Maſter would have reſembled it to the Caſe of an Executor or Truſtee, who ſhall be accountable for the Intereſt only, and formerly for the Money only.

It was ſaid alſo, that if this Money had been loſt in the Way of Trade, the Maſter would have been accountable.

The Counſel on the other Side, and Lord Keeper too, thought it differ'd from the Caſe of an Executor; becauſe the Ship was to go a Trading Voyage, and the Money was deſigned to be laid out in Trade, and the ſucceeding Maſter is in Effect but a Truſtee for the Repreſentative of the former.

And they held, that if he traded with the Money as with his own, with Care and Prudence, and then through any Accident the Money was loſt, he would not be accountable.

It was therefore decreed that he ſhould account to the Widow for the Profit made by the Trade, deducting reaſonable Allowance for Labour and Skill.

The *Lord Keeper* thought this Reſolution neceſſary for the Encouragement of Trade; it being a Comfort to a Man to know, that if he ſhou'd die, the Improvement of his Effects in the Way of Trade by the ſucceeding Maſter, ſhou'd be for the Advantage of his Family.

If a Truſtee impower'd to put Money to Intereſt, let the Money lie by him, he ſhall be accountable for Intereſt.

Lord Keeper ſeem'd of Opinion, that if a Truſtee ſhould trade with the Money, he ſhould be accountable, not for Intereſt only, but the Profit of the Trade; and that at his own Peril, becauſe he acted of his own Head, without applying to the Court of Chancery for Direction in diſpoſing of the Money.

Sadler and *Daniel. B. R.*

Prohibition.

THE Queſtion was, whether a Man might be ſued in the Spiritual Court, for taking away the Goods of an Inteſtate from the Adminiſtrator; or whether a Prohibition ſhould not go?

Reſolved there ſhould be a Prohibition: For when an Adminiſtrator is made, the Power of the Ordinary is determined; and there being a compleat Remedy, at the Common Law, for the Adminiſtrator, in an Action of Trover, the Party would by this Means be doubly harraſs'd; for an Excommunication could never be pleaded in Bar of an Action of Trover.

It is difficult to ſay when this Power was firſt veſted in the Ordinary, but probably Superſtition was the Cauſe. However, now by the Statute Law, the Ordinary muſt grant Adminiſtration, and then his Power is determined; and the Adminiſtrator, when put in by

the Ordinary, derives his Power not from the Ordinary, but the Law,

Biſhop and *Eagle.* *B. R.*

Account againſt Church-wardens.

THIS was an Action of Account brought by the preſent Church-wardens againſt the former ones. They plead that the Plaintiffs are no Church-wardens. Iſſue joined, Verdict for the Plaintiffs, and Judgment, *quod computent.*

Before the Auditors they plead, that they received ſuch a Sum of Money as Church-wardens through a Miſtake, when none was due to the Pariſh; that perceiving the Miſtake, they repaid the Money; to this Plea the Plaintiffs demur.

Pro Quer. It was ſaid, that no Plea that had been a good Bar of the Action, could be pleaded before Auditors. It is true they could not have pleaded *ne unques Receiver*; for they did receive, and for the Uſe of the Pariſh; but they might have pleaded it ſpecially, and ſo ſhewn that they were not accountable at the Time of the bringing the Action.

It was allowed by the Defendants Counſel, that no Plea, which wou'd have been a good one to the Action, could be pleaded before Auditors. But here as *ne unques Receiver* could be no Plea, ſince they did receive and for the Uſe of the Pariſh; ſo that had they been robbed, or not repaid the Money, they muſt have remained accountable; certainly a fair Defence, and admitted for true by the Demurrer.

Judge *Powell* of Opinion *pro quer'*, for they might have pleaded this Matter ſpecially, tho' they could not plead *ne unques Receiver* generally.

Parker Chief Juſtice, of Opinion with the Defendants. Admitting this to be a good Plea before Auditors, it will be neceſſary for the Church-wardens to plead ſuch a

Plea, as ſhews them to be honeſt Men, *viz.* not only that it was paid them by Miſtake, but repaid. Whereas taking it the other Way, and to be a good Plea in Bar, Receipt by Miſtake will be no Receipt at all, and it will not be neceſſary to ſhew Repayment, but only that the Money did not belong to the Pariſh; this therefore inclined him to ſupport the Plea as far as poſſible. Beſides, had they paid this Money to the Pariſh, before the Knowledge of this Miſtake, the Pariſh would have been charged with this Money; Repayment was therefore an Act done in diſcharge of the Pariſh, and therefore a proper Plea before Auditors.

Whether or not, the Church-wardens, after Payment of the Money to the Pariſh, *viz.* the Uſe for which they received it, and this before Knowledge of the Miſtake, could have been charged in an *Indebitatus Aſſumpſit* for the Money? *Powell* and *Parker* differ'd; the former thought they might, the latter that they could not.

There was another Point in this Caſe, *viz.* whether the Church-wardens ſhould be allow'd their Expences, and Surpluſage, in Caſe their Expences out-ballanced, *&c.*

Church-wardens more than Receivers.

Court clear that they ſhou'd; for Church-wardens are more than bare Receivers; they are in all Reſpects Bailiffs.

Bailiffs.

The Rule generally taken, that a Bailiff ſhall be allowed Expences and Surpluſage, in an Action of Account, but not a Receiver, holds true only of a bare Receiver; and as to him the Reaſon is evident. But where the Nature of the Thing ſhews, that the Receiver muſt be put to Trouble and Expence, the Rule is falſe.

DE
Term. S. Trin.
10 *Annæ*,
In Banco Regis.

Whetherborn and *Wright.*

Special Bail. WHERE a Debt is ten Pounds or upwards, by Courſe of the Court, Special Bail is required; otherwiſe not. Not common, where an Action of Debt is brought upon a Bond of 20 *l.* Conditioned for the Payment of nine Pounds, to hold to Bail; for tho' the Penalty which is the legal Debt, exceeds ten Pounds, yet the real and equitable Debt is leſs. But upon ſome particular Caſes, as where it is to be fear'd a Perſon will run away, *&c.* The Court will hold to Bail, for the legal Debt exceeds ten Pounds.

Templeman and *Caſe. B. R.*

Action upon Caſe. ACTION upon the Caſe for entering the Houſe and taking the Goods of the Plaintiff in the ſaid

Pleading. Houſe. Defendant pleads in Bar, that he entred in Aid of a Bailiff who had a Writ of Execution, and took the Goods of another, and not of the Plaintiff. Plaintiff demurs.

Upon

Upon the Demurrer three Points aroſe, 1*ſt*, That this Plea amounted to no more than the general Iſſue. 2*dly*, That this Plea was naught for want of ſhewing how the Goods came there; whether wrongfully, or rightfully. 3*dly*, Naught, becauſe ſaid in Aſſiſtance, and not by Command of the Bailiff.

Court. Bar good; notwithſtanding theſe Exceptions. For as to the 1*ſt*, a poſſeſſory Right is ſufficient to maintain an Action of Treſpaſs or Caſe, tho' not a Replevin; and upon Not Guilty pleaded, this given in Evidence, that they took another Man's Goods, and not the Goods of the Plaintiff, would not have maintained ſuch a general Plea; becauſe tho' the Goods ſhould not in Reality be the Plaintiff's, yet being in his Houſe and Poſſeſſion, they are ſo far his, as to maintain this Action.

As to the 2*d*, impoſſible for the Defendant to ſhew how.

As to the 3*d*, Command or Deſire of the Bailiff not neceſſary; for every one not only may, but is by Law bound to give their Aſſiſtance to Officers in Execution of Juſtice.

Petworth *Pariſh.* B. R.

MOVED to quaſh an Order of Juſtices, three Exceptions taken.

1*ſt*, That there was a former Order from the Pariſh of *A.* to that of *Petworth*, and this Order being affirmed upon an Appeal to the Seſſions, it was final not only between the Pariſhes that were Parties, but all others, except a ſubſequent Settlement could be found out; that therefore this Order, which was to remove one *William Pack* and *Katharine* his Wife, together with their Children, from *Petworth* to *Ringmore*, ſhould be quaſhed.

Order about Settlement affirm'd upon Appeal to Seſſions, final.

Mod. Caſes in Law and Equity 337.

2*d* Exception, That the Ages of the Children not appearing, they may have gain'd a ſubſequent Settlement.

3*d* Exception, No Adjudication to become chargeable, but likely to become chargeable.

Court. 1*ſt* and 2*d* Exceptions good; the 1*ſt* a Point lately ſettled. As to the laſt, Order is good notwithſtanding.

Player and *Bandy.* B. R.

Statute for Amendment of the Law.

RESOLVED that in an Action of Debt upon a Bond, tho' the Money be tender'd before Action brought, which is refuſed; that yet the Plaintiff muſt have Coſts. For the Statute for the Amendment of the Law gives the Court no Juriſdiction, until after Action brought, and therefore they cannot take Notice of a Tender before: Beſides, ſaid by *Powell*, and contradicted by none, that that Statute had enabled the Defendant to plead Payment, or to bring the Money into Court; but not to plead Tender, Refuſal, and *uncore priſt.*

Queen and *Mathews.* B. R.

Conviction upon Game Act.

THIS was a Conviction upon 4 and 5 of Queen *Anne*, for the Preſervation of the Game.

Objections.

Two Exceptions taken, 1*ſt*, That the Charge ſetting forth that the Defendant *Matthews* not being a Perſon ſo and ſo qualified, and enumerating diſtinctly the ſeveral Qualifications in the Act of *Car.* II. for the Preſervation of the Game, omitted a new Qualification allowed by this Act, *viz.* That he was not a Perſon authorized by a Lord or Lady of a Manor to kill Game for their Uſe.

2*dly*, That the Perſon was here charged with ſo many five Pounds as he killed Hares in the ſame Day; where-

as the Offence in the Statute was the keeping of Dogs, Engines, *&c.* not killing Hares.

Court of Opinion, That had it been laid generally thus, that he not being a Perſon qualified according to Law, it had been enough; but the Qualifications being diſtinctly and ſeverally mentioned, Omiſſion of one fatal.

As to the 2*d* Point, the Court was of Opinion, that the Offence for which the Statute gave the Forfeiture, was the keeping of Dogs and Engines, not killing the Hares. If a Man not qualified, go a hunting, and kill never ſo many Hares upon the ſame Day, he wou'd forfeit but one 5*l.* for it is but one Offence. But if a Man keeps Dogs, and goes a hunting ſeveral Days, and kills Hares; if it had been thus laid, that he ſuch a Day kept Dogs and kill'd, *&c.* and then again ſuch a Day; by laying it thus ſeverally, the Offence is ſever'd, and he ſhall forfeit five Pounds for each Offence. *Adjournatur.*

Michill and *Reynolds.* B. R.

Vide poſt. Term. Paſch. *and Term.* Hill. 11 Ann.

Trade. A Bond conditioned for reſtraining a Man from the Exerciſe of his Trade for a certain Time, and in a certain Place, when enter'd into upon a fair and reaſonable Conſideration, good.

AN Action of Debt was brought upon a Bond; the Condition whereof was, that whereas *A.* had taken the Shop of *B.* who was a Baker, for the Term of ſo many Years, and had given *B.* ſo much Money for it. The Condition of this Obligation was ſuch, that if during thoſe Years, *B.* ſhou'd not exerciſe the Trade of a Baker, within the Pariſh where the Shop was, that then the Bond ſhould be void, otherwiſe, *&c.*

Whether this Bond was good, or not, was the Queſtion.

It was argued that the Bond was good.

In 3 *Levinz* 241. there was, it muſt be confeſſed, a Difference taken between a Bond and a Promiſe; and

it

it is ſaid that a Bond in this Caſe would be void, but a Promiſe good; and in other Caſes quoted in that Caſe, as in *Cro. Jac.* 597, this Difference is warranted. The Reaſons aſſigned for this Difference are two, 1*ſt*, Becauſe in a Bond, the Jury cannot mitigate the Damages, but muſt give the whole Penalty, be the Damage to the other by ſetting up the Trade ever ſo ſmall. 2*d* Reaſon is, That the publick Intereſt is concerned, to promote and encourage Trade; and therefore ſuch a Condition is againſt the publick Intereſt, againſt *Magna Charta*, and *malum in ſe*, and therefore the Bond void.

As to the 1*ſt* of theſe Reaſons, it holds againſt all Bonds in general as well as this. Beſides the Difference is not true; for even in a Promiſe, if it be certain, it was ſaid, that the Jury have no diſcretionary Power in giving Damages.

As to the 2*d* it was anſwered, that how prejudicial ſoever, to the Publick, a general and abſolute Reſtraint of a Man from his Trade may be, certainly a particular Reſtraint, limited to one Place only, as the preſent Caſe is, can be none at all; for how is the Publick concerned whether a Man exerciſes his Trade in *Holborn* or in the *Strand?* There is a great Difference between the Opinion of the Court upon Matters before them, and what is ſaid *obiter*, and collateral to the Caſe in Queſtion; and this Caſe has never been judicially determined: But if ſuch Opinions are of Weight, in the Caſe of *Thompſon* and *Harvey*, Sir *Bar. Showers*'s *Rep. fol.* 2. there is a Difference taken between a Bond, where the Condition is a general Reſtraint, and where a particular one. The Bond there is adjudged to be void, becauſe it is a general Reſtraint from the Exerciſe of a Man's Trade; but there it was admitted to be good, had it been, as here it is, only a Reſtraint in a particular Place.

As to the Reaſon of the Thing in general, there may certainly be a very good Reaſon for the making of ſuch Bonds. Suppoſe a Gentleman has a noiſy, ſtinking Trade near him, he may be willing to give him a

valuable Conſideration for removing further off. Suppoſe a Man gives his Apprentice ſuch a Sum of Money, provided he will enter into a Bond of ſuch a Penalty, not to ſet up within ſuch a Diſtance. If this Bond be adjudged void, what is the Conſequence, but a mere Circuit of Action? *viz.* the forcing of him to bring an Action upon the Promiſe, and give this Bond in Evidence.

To prove the Bond void, the Difference taken in the Books between Bond and Promiſe, was ſtrongly inſiſted upon; and the Caſe in 3 *Levinz*, where the aforeſaid Difference is taken, was back'd by other Authorities, *viz. Moore* 115, 242. 3 *Leonard* 217. *Marſh* 191. One Reaſon more was offer'd, not taken Notice of in the Books, that the allowing of ſuch Bonds might be a Means of introducing Monopolies. Argument *pro* Defendant.

Judge *Powell.* Where an Action is brought upon an *Aſſumpſit*, tho' the Promiſe be never ſo certain, the Jury may mitigate the Damages, and give what Sum they pleaſe. Many are the Authorities that maintain the Difference between Bond and Promiſe; no Bond ever yet adjudged good that reſtrained a Man from the Exerciſe of his Trade: Of Opinion Bond was void.

Parker Chief Juſtice. I never yet knew ſuch a Bond adjudged void. The Caſe in *Cro. Jac.* 596. is the leading Caſe, as to the Difference between Bond and Promiſe, and the Difference itſelf ſuppoſes the Condition lawful, and moſt certainly there may be many good Reaſons for entering into ſuch a Bond.

I know of no Caſe, beſides that of an Infant, (and that ſtands upon another Conſideration,) where a Promiſe ſhall be good, and a Bond enter'd into for the Performance of that Promiſe void. Something extraordinary, that a Court of Juſtice ſhould endeavour to render the Breach of a juſt and fair Promiſe as eaſy as poſſible; for that would be all the Conſequence of our

Judgment, ſhould we adjudge the Bond void; for if the Plaintiff ſhould fail in this Action, he may yet have Recourſe to an Action upon the Promiſe, and give the Bond in Evidence of it. And as for the Reaſon given for the Difference between Bond and Promiſe, there is this to be ſaid againſt it, that as a Jury may give leſs than the Penalty, ſo they may give more. Now ſuppoſe it were my Intention to bind myſelf in ſuch a Penalty, not a very great one, not to uſe my Trade nigh ſuch a Perſon; with Deſign, that if I ſhould afterwards think that the Uſe of my Trade, would be of more Advantage to me than the Penalty, it ſhould be at my Election: Is it reaſonable, that a Jury, contrary to my declared Intention in Writing, ſhould have it in their Power to give twice the Penalty, if they think fit, or the other Party is ſo much damnified by my Breach of Promiſe?

Judge *Eyre* of ſame Opinion with *Parker.*

Adjournatur. Vide poſt. Term. Paſch. 11 Ann. *and again* Term. Hill. 11 Ann.

Lure and *Reſt.* B. R.

Delay of the Court ought not to prejudice Suitors.

AFTER a Writ of Inquiry executed, and before Entry of the Judgment, which was delayed by Act of Court, the Plaintiff dies. Moved that this happening by the Delay of the Court, Judgment might be entred as of two or three Terms ago. In Behalf of the Motion was cited the Caſe of 1 *Ventris*, *Philip* and *Jackſon*, where ſaid, that if the Court delay Entry of the Judgment, there Judgment may be enter'd as of two or three Terms ago, without entring of Continuances.

Thomlinſon and *Dighton.* B. R.

Vide this Caſe 1 *Salk.* 239.

Vide poſt. Term. Mich. 10 Ann.

THIS was a Writ of Error upon a Judgment in the Court of Common Pleas in an Ejectment: The Caſe was this.

A Tenant in Fee of the Lands in Queſtion deviſed the Lands to his Wife for Life, *then* to diſpoſe of according to her Pleaſure, provided it were to ſome one of the Teſtator's Children. The Huſband the Deviſor dies, and leaves behind him a Son and a Daughter, the Wife marries again; then the Wife, by Leaſe, Releaſe and Fine levied Covenants to ſtand ſeiſed, to the Uſe of herſelf for Life, without Impeachment of Waſte, Remainder to her Daughter by her firſt Huſband in Tail.

Tenant in Fee of Lands in Queſtion, demiſs'd the Land to Wife for Life, *then* to diſpoſe of according to her Pleaſure, provided it was to ſome one of the Teſtator's Children. Deviſor dies, leaves behind him a Son and Daughter, the Wife marries again; then the Wife by Leaſe and Releaſe, and Fine levied, Covenants to ſtand ſeiſed to the Uſe of herſelf for Life, without Impeachment of Waſte; Remainder to her Daughter by her firſt Huſband in Tail. Reſolved 1*ſt*, that the Wife took by this Will an Eſtate for Life; and 2*dly*, that the Power in this Caſe was well executed.

The Queſtion was, Whether this Conveyance of the Lands were a good Execution of the Power, ſo that they ſhould go to the Daughter; or elſe, being bad, to the Heir at Law, *viz.* the Son.

The Court of Common Pleas gave Judgment for the Daughter. And now a Writ of Error being brought into *B. R.* it was argued by Mr. *Lutwyche* for the Plaintiffs in Error, and by *Peer Williams* for the Defendant.

Argument *pro quer.* in Error.

The Points conſiderable in this Caſe are two, 1*ſt*, What Eſtate the Wife takes by the Deviſe, whether an Eſtate for Life or in Fee. 2*dly*, Whether the Power be well executed.

As

Eſtate for Life.

As to the 1*ſt* clear, that ſhe has but an Eſtate for Life; for it is expreſly deviſed to her for Life. And tho' the Words following be to diſpoſe of according to her Will and Pleaſure, provided it be to any of her Children by the Teſtator, theſe Words give her but a naked Power and Authority and no Intereſt; as was reſolved in the Caſe of *Daniel* and *Uply*, where the Deviſe was to the Wife to diſpoſe to which of the Children ſhe pleas'd. But the principal Caſe is here much ſtronger, for it is in expreſs Words deviſed to the Wife for Life, *& quoties in verbis nulla ambiguitas, &c.* 3 *Leon. fol.* 71.

2*d* Point.

As for the 2*d* Queſtion, Whether the Power was well executed; it is true that there are Caſes, where the Conveyance ſhall take Effect by Way of Covenant to ſtand ſeiſed, when it can no other Way elſe whatever. So is *Croſſing* and *Scudamore*'s Caſe, and other Caſes there cited, as reported by *Ventris*; but there in 2 *Ventris* 318. 1 *Sid.* 25. 1 *Rolls* 329. it is ſaid, that where there is a Tranſmutation of the Poſſeſſion, there the Eſtate ſhall never paſs by Way of Covenant to ſtand ſeiſed.

This is a very improper Sort of Conveyance, for here the Eſtate is conveyed by Leaſe, Releaſe and Fine, Acts not proper for Tenant for Life.

It is a Rule that a Power and Authority ought to be ſtrictly purſued, and in *Co. Litt.* there is this Difference taken, that if a Perſon authorized does leſs than his Authority warrants him, it is void; but if he exceeds it, it ſhall be good for as much as falls within the Power, and the reſt ſhall be but Surpluſage: Now here the Power is to give in Fee, but is executed only in Tail. By the Method of the Conveyance, very plain that the Intention of the Wife was to paſs the Eſtate as Owner, and not by Virtue of the Power; and the rather becauſe the Wife is here poſſeſs'd of an Eſtate, *viz.* an Eſtate for Life: Beſides, the Eſtate paſſes by the Fine.

Peer Williams argued for the Defendant, That by this Deviſe the Wife took an Eſtate in Fee. Had the Deviſe been only thus, *to the Wife to diſpoſe of at Pleaſure*, it had been very plain that ſhe had had a Fee-Simple, according to 1 *Inſt.* 113. *a.* *Dallington* 58; then the Words after added, *provided ſhe diſpoſe of it to ſome of the Teſtator's Children*, make it a conditional Fee-Simple, ſo reſolved in *Daniel* and *Uply*'s Caſe, 1 *Jones* 137: but Being put in Mind that in this Caſe it was expreſly deviſed for Life, he gave up this Point. Argument for Defendant.

But then admitting the Wife to have but an Eſtate for Life, he argued, 1*ſt*, that the Woman's Marriage was no Suſpenſion of the Power; 2*dly*, that the Power was ſufficiently tho' improperly executed.

1*ſt*, That the ſecond Marriage was no Suſpenſion of the Power, he proved from the Caſe of *Daniel* and *Upton*, 1 *Roll.* 329, where the Caſe is, A Man deviſes that his Wife ſhall ſell his Land, Huſband dies, the Wife marries; reſolved that the Wife might not only ſell the Land, but even ſell it to her ſecond Huſband, which is a much ſtronger Caſe than the preſent.

2*dly*, That this was a good tho' improper Execution of the Power.

Judges are ſaid to be *aſtuti* to do Right; and therefore this Power, inſtead of a ſtrict Interpretation, ought to have a large and extenſive one; ſo that any Writing whatever, that was but enough to ſignify the Intention of the Parties, where the Power is ſo general, and no particular Way of Execution is preſcribed, would have been enough; and if ſo, then certainly the Power is well executed. For a Deed of Leaſe and Releaſe was a ſufficient Declaration of her Mind; and as for her Eſtate being limited without Impeachment of Waſte, *that* ſhall be rejected as Surpluſage, which even in pleading *non nocet.*

As for the Objection, That the Method of this Conveyance ſeemed, as if ſhe deſigned it as Owner of the Land; and the rather here, becauſe ſhe was ſeiſed of an

Eſtate for Life : He anſwered, that there is a Difference between a Perſon's having ſuch an Eſtate as will enable him to make ſuch a Conveyance, for there it ſhall operate by Way of Gift as from an Owner; and where a Man has not ſuch an Eſtate, as will enable him to make ſuch a Conveyance, for there the Deed ſhall operate by Way of Execution of the Power, and ſo is Sir *Edward Cleer*'s Caſe; and tho' there be no Recital of the Power, yet if the Grant cannot work without the Power, it ſhall with it. But here the Deed of Leaſe and Releaſe recites the Power, which carries it in the higheſt Preſumption of the Intention of the Parties that it ſhould ſo operate, which makes it a much ſtronger Caſe.

And then if it operates as an Appointment, the Eſtate ſhall not paſs from the Truſtee, but the Appointee ſhall be in from the Will. The *grand* Intention of the Parties is the paſſing of the Eſtate, and not the *How* or *Manner* in which this is done, whether by Virtue of the Power, or Deed of Leaſe and Releaſe, *&c.* And the Court will be more ſolicitous to uphold the primary Intention of the Parties, than that which is only a ſecondary one; without Doubt they will never adhere to the latter, to the Deſtruction of the former: And therefore, tho' the Intention of the Parties were to paſs the Land by Leaſe, Releaſe and Fine, yet when it cannot paſs ſo, it ſhall as an Execution of the Power; *Quum quod ago, non valet ut ago, valeat quantum valere poteſt.* 3 *Levinz* 372. 1 *Jones* 392. *Stapleton*'s Caſe. 1 *Ventris*, *King* and *Melling*. *Gier* and *Oſſiter*, 1706.

The laſt of theſe Caſes full in Point; and tho' it be but the Opinion of a ſingle Judge at an Aſſize, yet it being the Opinion of ſo great a Man as the late Lord Chief Juſtice *Holt*, it may be of ſome Weight. That Caſe was ſhortly thus, A Man by Will was made Tenant for Life, with a Power to jointure or ſettle upon his Wife; and tho' the Conveyance was, *there* as *here* by Leaſe and Releaſe, yet that Judge was of Opinion, that it was a good Execution of the Power. Now in that

Caſe, the ſame Objections might have been made as here, and with equal Force: For if it be ſaid here, that the Eſtate paſſes by Virtue of the Fine; it may be anſwered, that if a Leaſe and Releaſe ſhall operate, as an Execution of the Power, and ſignify no more than the Declaration of the Intention of the Parties, then will the Appointee be in by Virtue of the Power in the Will, precedent to the Fine, and the Fine being ſubſequent will ſignify nothing. In 1 *Ventris* 368. *Herring* and *Brown*, it was reſolved, that where the Fine is precedent to the Deed, that there it is an Extinguiſhment of the Power; but if it had been ſubſequent, as here it is, the Power would have been well executed, notwithſtanding the Fine; and in the Exchequer Chamber, reſolved to be good even tho' the Fine were precedent, 2 *Levinz* 14.

As for the Objection, That the Power is to diſpoſe in Fee, and executed only in Tail, nothing in it; more implies leſs. A Power to paſs an Eſtate in Fee, is moſt certainly ſufficient for paſſing an Eſtate Tail.

Judge *Powell.* The main Queſtion of the Caſe is, Whether the Power be well executed? A Feoffment to a Man's own Son, ſhall operate as a Covenant to ſtand ſeiſed, rather than the Intention of the Parties ſhould be fruſtrated. Sir *Edward Cleer*'s Caſe is expreſs, that where it can paſs no other Way than by Virtue of the Power, it ſhall paſs that Way, tho' the Intention of the Parties were, that it ſhould paſs another. And as for her own Eſtate being limited without Impeachment of Waſte, as to the Impeachment of Waſte it ſhall be void, becauſe it exceeds the Power: The Intention of the Parties plain.

Of Opinion *pro* Defendant.

Parker Chief Juſtice. In Sir *Edward Cleer*'s Caſe it was reſolved, That where, according to the Way the Parties intended, the Conveyance would have no Effect at all, that there it ſhould paſs another Way: But where, ſhould

ſhould the Eſtate paſs the Way the Parties intended, the Conveyance would have ſome Effect, tho' not all that was intended by the Parties, there it ſhould paſs no other Way than the Parties deſigned. But this Point ſince has been carried much farther, as that, where it would have ſome Effect, but not all intended by the Parties; that there, to the End the main Deſign of the Parties may be obſerved, the Eſtate ſhall paſs in another Way than the Parties intended. For Example, Suppoſe a Woman ſeiſed of an Eſtate for Life, with a Power to make a Leaſe for three Lives, or 21 Years, ſhe marries, and then ſhe and her Huſband join in making the Leaſe, and Huſband and Wife both die before the Leaſe is expired; here tho' the Huſband in Right of his Wife, and ſhe in her own, are poſſeſs'd of an Eſtate for Life, and therefore can as Owners make a Leaſe, and there appears no Intention of the Parties (imagining perhaps that they ſhould have outlived the Leaſe) that this Leaſe ſhould be made by Virtue of the Power; yet becauſe the Leaſe, ſuppoſing it made by them as Owners, cannot have all the Effect the Parties intended, for ſome it would have (it would be a good Leaſe during the Lives of the Husband and Wife) yet becauſe it cannot have all, it ſhall be eſteem'd made by Virtue of the Power. But in the preſent Caſe the Conveyance, as intended by the Parties, would be wholly void.

Of Opinion *pro* Defendant, and that the Judgment in *C. B.* muſt be affirmed.

Louviere and *Laubray.* B. R.

Whether Drawer of a Bill may bring an Action as Indorſee.

AT *Niſi Prius* in the Court of Queen's Bench, *London*, the Caſe happened to be this. *Louviere* uſed to furniſh *Laubray* with great Quantities of Stockings; *Louviere* draws a Bill upon *Laubray*, payable to ſuch a one; *Laubray* accepts the Bill, but ſome Time after proteſts it. Upon this the Bill is indorſed to *Louviere* the Drawer, who brings an Action as Indorſee.

The Queſtion was, Whether the Drawer of a Bill could maintain an Action as Indorſee?

Parker Chief Juſtice of Opinion, that upon Evidence given to the Court, that there were Effects of *Louviere* in the Hands of *Laubray*, enough to anſwer the Bill; and that conſequently the Acceptance of the Bill, was not upon the Honour of the Drawer, the Action was well brought. For when a Merchant draws a Bill upon his Correſpondent, who accepts it, this is Payment; for it makes him Debtor to another Perſon, who may bring his Action. This therefore is ſuch a Payment as may be ſet off upon a former Account, and pleaded in Bar of ſuch an Action: But if there were no Effects, then the Action would not lie; for it would have been an Acceptance upon Honour only, and the Money wou'd be recovered only to be recovered again.

N. B. Intereſt ruled to be paid from the Time of the Proteſt.

Oſway and *Briſtow*. B. R.

AN Action of Treſpaſs for taking Cows in the Plaintiff's Cloſe. Defendant pleads in Bar, That they were Damage Feaſant *in Clauſu ſuo*. Plaintiff demurs, becauſe he ſet forth no Title to the Cloſe. Treſpaſs.

Reſolved that it was well without it; for a poſſeſſory Right is ſufficient to maintain an Action of Treſpaſs. And this Difference was taken, that where the Defendant juſtifies to a Place ſpecially laid down in the Declaration, there a Title muſt be ſhown; but where no Place is ſpecially laid down, as here there is none, there he need not.

DE
Termino S. Mich.
10 *Annæ*,
In Banco Regis.

Rumball and *Ball.*

Debt upon Note.

ACTION of Debt upon a Note to this Effect; I acknowledge myſelf indebted to ſuch a one ſo much, which I promiſe to pay upon Demand. Moved in Arreſt of Judgment, that tho' upon a Note acknowledging a Debt it was not neceſſary to alledge a Demand; yet where it is Part of the Agreement, there a Demand is neceſſary.

But the Court were of another Opinion, for it is a Debt *in præſenti*; and the Words *promiſe to pay*, import no more, than that I am ready to pay the Money at any Time, and ſhall not reſtrain or qualify the other Words; this being no Debt ariſing upon the Performance of a certain Condition, but a Debt plainly precedent to the Demand. Beſides ſuppoſing the Demand neceſſary, Action itſelf perhaps is a Demand.

2

Shorer

Shorer and *Shorer.* In Canc.

A MAN marries a Wife worth 700*l.* and binds himſelf by Marriage Articles, to inveſt 1400*l.* in Land to ſuch and ſuch Uſes, *viz.* to himſelf for Life, Remainder to the Heirs of their Bodies begotten, the Remainder to his right Heirs. The Huſband dies, the Marriage Articles unperformed, and by his Will deviſes a Houſe value 25*l. per Annum* to the Wife, and 90*l.* a Year to his Nephews, having no Children; then comes the Clauſe in his Will, *and all my other Lands in* York, *or any other Part of* Great Britain, *I leave to my Nephews.*

Marriage Agreement that 1400*l.* ſhould be laid out in Land, this not done, Queſtion, Whether ſince it ought to have been done, it ſhould not in a Court of Equity be conſider'd as done, ſo as to paſs by Will under the Word Land. Held *per* Lord Keeper *Harcourt* that it ſhould.

The Queſtion was, Whether the 1400*l.* tho' not actually inveſted in Land, ſhould notwithſtanding in Equity be deem'd Land, ſo as to paſs by the Word *Land* in the Will, ſaving to the Wife her Intereſt for Life; or, Whether it ſhould go with the Perſonal Eſtate?

The Wife being Executor contended, that it ſhould be looked upon as Perſonal Eſtate, becauſe then ſhe ſhould come in for a Share in the Surplus, unexhauſted by Debts or Legacies.

The Court did nothing in the Affair, but ordered a Reference to the Maſter to ſtate the Matters of Fact.

But Lord Keeper *Harcourt* declared it to be his preſent Opinion, that where there is ſuch a Marriage-Agreement for ſo much Money to be laid out in Land, that the Money, in Caſe the Huſband died the Agreement unperformed, ſhould in Equity be eſteem'd Land, and may be deviſed as ſuch, ſubject in the firſt Place, to the Uſes declared in the Marriage-Settlement.

Harvey

Harvey and *Wright.* B. R.

Rule of Court.

THERE was this Queſtion raiſed concerning underſtanding a Rule of Court: The Rule was, if a Cauſe was not at all proſecuted in four Terms, neither Party could revive Proceſs, without giving the other a Term's Notice: Now whether Notice at any Time within the Term, as *e. g.* the laſt Day of the Term would ſatisfy the Rule; or whether the Rule does not require a whole Term's Notice?

The Court, upon Time taken to conſult the reſt of the Judges, that all the Courts might be uniform in their Practice, deliver'd their Opinion, that by a Term's Notice was meant, that a whole Term ſhould intervene between Notice and Trial, that ſo either of the Parties may have Time and Opportunity to apply to this Court. In the Courts of *C. B.* and *Exchequer*, where they had the ſame Rule in ſo many Words, it was ſo underſtood.

Lord Say *and* Seal's *Caſe.* B. R.

UPON a Trial at Bar in *B. R.* in an Ejectment brought by the Heirs at Law, againſt the Lord *Say* and *Seal*, who claim'd as Heir in Tail, The ſingle Queſtion was, Whether or no a common Recovery, that was ſuffer'd in order to dock the Intail, was good or not?

The Objection to the Recovery was, that there was no Tenant to the *Præcipe*.

To prove the Recovery good, a Deed bearing Date 23 *Oct.* 1701, directing the Uſes of the Recovery, and the Fine, *viz.* the Chirograph of the Fine, and Common Recovery were produced.

Evidence.

The Counſel for the Lord *Say* and *Seal*, deſired to call one *Knight* an Attorney at Law, to prove, that tho'

the Deed was dated *Oct.* 23. it was not executed until five Months after, *viz.* in *March. N. B.* The Attorney was the Perſon intruſted in ſuffering the Common Recovery.

Attorney's Privilege.

The Counſel for the Heirs at Law, oppos'd the ſwearing the Attorney: Becauſe as an Attorney has a Privilege, not to be examined as to the Secrets of his Client's Cauſe, ſo the Attorney's Privilege was likewiſe, the Client's Privilege; for the Client intruſts an Attorney with the Secrets of his Cauſe, upon Confidence not only that he will not, but alſo that tho' he would, yet he ſhould not be admitted by the Law to betray his Client, and for this *Holbeche*'s Caſe was relied upon. Beſides, it was ſaid that his Evidence would tend to accuſe himſelf, either of Ignorance, Negligence, or ſomething worſe; and in *Moore*'s *Reports*, antedating Deeds Felony.

The Court were of Opinion, that *Holbeche*'s Caſe was good Law; and that an Attorney's Privilege, was the Privilege of his Client; and that an Attorney, tho' he would, yet ſhould not be allowed to diſcover the Secrets of his Client. But notwithſtanding this, they thought *Knight*'s Evidence was to be received; for that a Thing of ſuch a Nature as the Time of executing a Deed, could not be call'd the Secret of his Client, that it was a Thing he might come to the Knowledge of without his Client's acquainting him, and was of that Nature that an Attorney concerned, or any Body elſe might inform the Court of.

Knight being call'd in, ſwore, that it being fear'd the Common Recovery would be good for nothing, becauſe it was doubted whether there was a good Tenant to the *Præcipe*, at the Time of the Common Recovery ſuffer'd; it was agreed upon as the beſt Expedient, that there ſhould be a Fine as of *Sancti Michaelis* levied to make a Tenant to the *Præcipe*, which was five Months before

the fine was actually levied; and that there ſhould be a Deed, which ſhould declare the Uſes of the Fine and Recovery, and recite the Fine to be of *Sancti Michaelis*; and that the Deed was executed when the Fine was taken, *viz.* in *March*.

Then the Chirograph of the Fine was produced, according to which the Fine was levied as of *Michaelmas* Term; and if ſo, without Controverſy, there was a Tenant to the *Præcipe*, and ſo all was well.

Chirograph of a Fine. Evidence.

The Counſel for Lord *Say* confeſs'd, that the Chirograph of a Fine was *prima facie* good Evidence; that it was an Evidence of ſo high a Nature, as that no Parol Evidence ſhould be allowed to falſify it: But they ſaid it might by Matter of Record. To clear the Way, they mentioned the Clauſe in the Stat. of 5 *Hen.* IV. that orders the Enrolment of Fines, and that of 23 *Eliz. cap.* 3. which directs, that the Date of the Concord, ſhould be certified by the Judge, before whom the Fine was levied.

Then they ſaid that the Concord of the Fine was certified by Lord Chief Juſtice *Trevor*, to be taken upon the 2*d* of *March*; and this Evidence being an Evidence of Record, they offer'd to falſify the Chirograph.

But to this it was objected, that the Chirograph of a Fine was a Record of ſo high a Nature, that unleſs it be void, and not only voidable, it cannot be vacated by any Evidence whatſoever, but Writ of Error only. And that it was not a Nullity and void, they cited 2 *Ventris* 47. and *Hobart* 330; where *A.* and his Wife acknowledged the Note of a Fine the 26th of *March*, before Commiſſioners, by *dedimus poteſtatem*; the Wife died the 27th of the ſame Month, the 28th Compoſition was made in the Alienation Office, upon a Writ of Covenant, returnable in *Hillary* Term before, and the King's Silver was entred as of the ſame *Hillary*

Term. This Fine upon Debate reſolved to be good. *Dyer* 202, *Carril*'s Caſe. *Dyer* 89. *b.* *Cro. Eliz.* 275; where it appear'd by the Record, that the Caption of the Conuzance of the Fine was the 27th of *March*, and the Writ of Covenant and *dedimus poteſtatem*, were dated the 9th of *April*; and it was now, in a Writ of Error to reverſe the Fine, objected, that the Conuzance was taken without any Warrant, and that by 23 *Eliz.* the Caption was always to be certified: But the Court overruled this Exception, and would not hear it argued; becauſe, it would ſhake ſeveral Fines, *&c.* And it is a common Practice, that a Fine levied in the Vacation, may, at the Choice of the Parties, be a Fine of either the precedent or ſubſequent Terms, which differs from the Caſe at Bar only in this, that here there is an intervening Term; and whether this will occaſion ſuch a Difference, as that in the one Caſe the Fine ſhould be good, in the other not only voidable but void and null, depends upon the Practice of the Court of Common Pleas, where this Matter ſhould *properly* have been canvaſs'd. Tho' a Fine preſuppoſes a Writ of Covenant, yet the common Practice is now to levy them without. *Clerk* and *Ward* was a Caſe, and the only Caſe where a Fine was attempted to be deſtroy'd by Evidence, and this was in a Court of Equity, *viz.* the Chancery, and yet *there* it was not ſuffered; and this Opinion was confirm'd upon Error in the Houſe of Lords. As for the Stat. of *Eliz.* it only extends to Fines taken by *Dedimus*, and only to regulate not annul Fines, as the Clauſe of *any Attornment*, *&c.* *Sect.* 5. ſhews, for *Exceptio probat regulam in rebus non exceptis.* *Statute de donis* ſays, ſuch Fines ſhall be *ipſo jure* null; yet this has been interpreted voidable only: And a Diſcontinuance Outlawry is ſaid by an Act of Parliament to be *ipſo facto* void, and yet it has been held voidable only by Writ of Error; and if this Conſtruction prevails in an Outlawry penal in its Nature, *a fortiori*, it ought in Things ſo much favour'd as Fines.

Maxim of Law.

Counſel

Statute of 23 *Eliz.*

Counſel for the Lord *Say* contended the Fine to be void, by 23 *Eliz.* for if it be interpreted, to make Fines voidable only, it will help none but thoſe that are intitled to a Writ of Error, and not Remainder Men, who are not ſo; ſo that according to this Conſtruction, the Act will relieve but half of thoſe it was deſigned to relieve.

Peer Williams of Counſel for the Plaintiffs, the Heirs at Law, replied to this, that there might be found ſome Caſes in Law, where the Party grieved was without Remedy; and inſtanced in the Caſe of Bail, who, tho' as much grieved by an erroneous Judgment as the Principal himſelf, can yet bring no Writ of Error to reverſe it.

Court. Very harſh Doctrine to be laid down in a Court of Juſtice, that there may be a Wrong without a Remedy! Eſpecially when the preſent Caſe requires no ſuch Argument; for if the Lord *Say* ſhould be wronged by our Refuſal of this Evidence, he has yet a very proper and eaſy Remedy, *viz.* to apply to the Court of Common Pleas to vacate the Fine; if in Truth it be voidable.

It is agreed, by both Sides, that it is common Practice for a Fine levied in Vacation Time, to be at the Election of the Parties, a Fine either of the precedent or ſubſequent Terms, which yet according to this Doctrine muſt be a meer Nullity. Whether the intervening of a Term can make ſuch a Difference, as that in the one Caſe the Fine ſhall be good, in the other utterly void, cannot be diſcover'd from the Reaſon of the Thing, but muſt depend intirely upon the Practice of the Court of Common Pleas; a plain Argument that *that* is the proper Court to relieve, every Court being Judge of its own Rules. In the Caſe of *Clerk* and *Ward*, ſuch Kind of Evidence, was refus'd even by a Court of Equity, *viz.* the Chancery; and this Judgment was confirmed on a Writ of Error in the Houſe of Lords.

As

As for the Acts of Parliament mention'd, it ſeems unreaſonable to put ſuch a Conſtruction upon them, as that more Exceptions ſhould make Fines null, ſince thoſe Statutes, which were deſigned to protect and ſupport them, than before.

Beſides, theſe Statutes extend only to Fines taken by *Dedimus*; and tho' now moſt Fines are in Fact taken ſo, yet they are recorded as taken in Court, and this to prevent Queſtions about Captions.

This Caſe not to be diſtinguiſhed, in the Reaſon of the Thing, from the Caſe of a Warrant of Attorney to confeſs Judgment, and before Judgment confeſs'd Party dies, and Judgment is confeſs'd after his Death; where the Judgment can be avoided by Error only. While a Fine remains a Record, intire Credit muſt be given to it.

Beſides, this Evidence if allowed will not be concluſive; for it will not follow that if there be a Caption returned ſuch a Day, there was no other taken before; for there may be twenty Captions, there may perhaps be another Fine really had.

If a Caption and Covenant were of the Eſſence of a Fine, they ought to be given in Evidence to prove a Fine, but this is never done.

Common Recoveries, tho' no Tenant to the *Præcipe*, good by Way of Eſtoppel, againſt the Party that ſuffer'd it; tho' not againſt Remainder Men ſtrangers *&c.*

After this, there was a Deed of Bargain and Sale inroll'd produc'd, which would have made a good Tenant to the *Præcipe*, had the Opinion of the Court been againſt the Plaintiffs, as it was for them.

But to this Deed this Objection was made, that it was a *tripartite* Deed, and ran to this Effect; *This Indenture made the Day of between of the one Part and of the ſecond Part, and of the third Part, witneſſeth, That for and in Conſideration*

of the Sum of 5 s. *to him in Hand paid, hath given and granted*, &c.

The Grantor omitted in a Deed.

Now here they ſaid the Perſon granting is wanting, *Hath granted*, without ſaying *who hath granted*, and conſequently this Deed paſſes nothing, and can therefore make no Tenant to the *Præcipe*.

By Way of inforcing this Objection, it was ſaid, that to make a good Deed proper Words are requiſite; there muſt be a Grantor and Grantee, and it is not for a Court of Law to ſpell out the Intention of the Parties. If the Failure had been of a Grantee as it was of a Grantor, for Example thus, *In Conſideration of* 5 s. *paid by* A. *that therefore the Lord* Say *did grant*, without ſaying to whom, nothing moſt certainly would have paſs'd, where yet the Preſumption would have been full as ſtrong. *Haſlewood*'s Caſe 2 *Ventris* much relied upon.

If the Conſtruction of a Deed is always to be govern'd by the Intention of the Parties, a Grant of Land to a Man for ever, would convey a Fee; and a Grant to a Man and his Iſſue, an Eſtate-tail, as well as in a Will.

To this it was replied by the Counſel for the Plaintiffs, That it was not a Thing to be doubted, but there muſt be a Grantor and Grantee; but the Queſtion was, Whether tho' this Deed be not as exact in Form as it might have been, yet a Grantor may not with Certainty enough be collected from the whole Deed. As to the Caſe 2 *Ventris* 196. *Ventris* was againſt the Judgment; beſides, that was a Caſe upon Pleading, where Forms are more ſtrictly required and adhered to than in Deeds; and in 2 *Ventris* 141. there is a Caſe clear contrary. In *Beniger* and *Forgaſſa*'s Caſe in *Plowden*'s *Commentaries*, there is a Collection of Caſes where Names ſhall be ſupplied. And it is a Maxim of Law that a Deed ſhall never be conſtrued void, if it can by any Means be made good; and what the Intent of this Deed was, and that according

Maxim of Law.

according to *that* the Lord *Say* was Grantor, was proved beyond Diſpute from ſeveral Parts of the Deed. 3 *Levinz* 21. a Man was bound in an Obligation not ſaid to whom, yet this was ſupplied by the Intention. 1 *Lutw.* 234. was a Caſe even in Pleading.

The Law will, as much as it can, aſſiſt the Frailties and Infirmities of Men in their Employments, who in drawing long Deeds may eaſily make a Slip. The Caſe at Bar is the Caſe of a Bargain and Sale, where the Conſideration of Money carries ſo violent an Intendment, that a Grant to a Man upon a valuable Conſideration without ſaying, *for his Heirs*, ſhall yet give him a Fee, which is much ſtronger than the Caſe at Bar; becauſe *there* without ſuch a Conſtruction, there would have been a *quid pro quo*, an Eſtate for Life, and the Grant would not be altogether void, as here it would.

Court of Opinion, The Deed was good. Had this been a *tripartite* Deed, without this Slip, there had been no Doubt at all in the Caſe: But the Deed is *tripartite*, and *hath* in the ſingular Number, and therefore all the Doubt is to *whom* the *hath* refers.

Deeds are to be interpreted, as much as poſſibly, according to the Intention of the Parties. The Caſe in 2 *Ventris* 196. was a Caſe upon Pleading, where greater Strictneſs is required; and therefore does not come up to the Caſe in Point. The Caſe in 2 *Ventris* 141. does. Many are the Inſtances where the Penalties of Bonds are put into very ſtrange and even falſe *Latin*, and yet held good. The Caſe in Queſtion is the Caſe of a Bargain and Sale, and therefore to be interpreted more favourably than a Deed. By the Common Law nothing paſs'd by Deed of Bargain and Sale but the Uſe, and Remedy was only in Chancery; but now Statute Law has paſs'd the Eſtate to the Uſe. The Intention of the Deed is plain, if this Deed does not make Lord *Say* Grantor, as to him it wou'd have no Effect at all, who yet ſeal'd it. According to the common Rules of Indenture, the

Salk. 462. 3 *Salk.* 74. 1 *Mod. Caſes in Law and Equity* 342.

Words

Words of the Deed are the Words of all the Parties, but Lord *Say* is a Party, therefore he has granted.

The Truth of the Matter was, that it being fear'd this Slip in the Deed would be fatal to the Recovery, this other Contrivance of the Fine was judged to be the beſt Way of ſupporting it. Tho' the Opinion of the Court was clear and plain for the Plaintiffs, in both Points; yet the Lord *Say* and *Seal* pray'd a Bill of Exceptions.

Motion for Mandamus *to Sir* Gilbert Heathcote, *Lord Mayor of* London. B. R.

The Learning of *Mandamus's.*

THE Court of Queen's Bench was moved for a *Mandamus*, to be directed to Sir *Gilbert Heathcote*, late Lord Mayor of the City of *London*, to return ſuch and ſuch Perſons, by Name, to the Court of Aldermen as the Perſons choſen by the Wardmote of *Broad-ſtreet*; or to ſhew Cauſe why he would not. Now Sir *Gilbert* had in Fact made a Return, but a Return of different Perſons, (as to three of them) than what (the Counſel moving ſaid) appear'd upon the Scrutiny to have been really choſen.

Arguments for the *Mandamus.*

It was ſaid that they were before a Court, that had a Juriſdiction over all Inferior Magiſtrates whatſoever, to compel them to do their Duty. That as it would without Doubt be proper to apply to this Court, ſhould a Lord Mayor refuſe to hold a Court of Aldermen, or refuſe to make any Return; ſo it was no leſs proper in the preſent Caſe, where he makes a falſe one.

If it he objected that the proper Remedy lies in the Court of Aldermen, the Anſwer is, that the Lord Mayor preſides over that Court, *&* *nemo debet eſſe*

Maxim of

judex

judex in propria cauſa; and tho' it may here be ſaid, that the Lord Mayor, who made the Return, is out of his Office, yet this in general muſt be precarious and uncertain; it might have been otherwiſe, and a legal Remedy ought to be certain in all Events. If the Court of Aldermen are the final Electors, and have alſo a Power of allowing or diſallowing Returns, they will have an abſolute Power of chooſing whom they pleaſe; whereas according to the ancient Cuſtom and Practice, they are only to chooſe one of the Perſons returned to them. It is true the Court of Aldermen have rejected Returns, upon the Account of the Inſufficiency of the Perſons returned; or where the Return has either fallen ſhort, or exceeded the juſt Number, as when five or three have been returned; but not becauſe of its being a falſe Return. But ſuppoſing the Court of Aldermen have a Juriſdiction, why may not this Court have a concurrent one? It was confeſs'd, that this was an unprecedented *Mandamus*, that was deſired: But then (it was ſaid) the Reaſon was, becauſe no Lord Mayor before, had ever made ſo bold an Attempt upon the Liberties and Privileges of the City; and as there was no Precedent for the *Mandamus* deſired, ſo there was no Inſtance to be found, in which ſuch a *Mandamus* had been denied. Law.

Then ſeveral Caſes were quoted, where the Court (tho' doubtful whether a *Mandamus* lay) had yet granted a *Mandamus*, in order to conſider further upon the Return. 1 *Levinz* 121. Duke of *Ormond*'s Caſe. Dr. *Blithe*'s Caſe. And if the Court will act ſo in Caſes, comparatively ſpeaking, of a private Nature; much more will they do ſo in Offices of a publick Nature, as that of an Alderman of the City of *London*.

Arguments againſt the *Mandamus*.

Firſt, It was ſaid, that the Cuſtom, generally, was for the Perſon injured to pray for a *Mandamus*, and the Words of the Writ are *ad damnum* of thoſe that are choſen; whereas

whereas in this Caſe, the Counſel moving for the *Mandamus*, are Counſel for the City.

Then, it was inſiſted upon, that there was no Occaſion for this *Mandamus*; for that the Lord Mayor was only a Miniſterial Officer, and the Court of Aldermen were not concluded by this his Return.

Cuſtom of *London*.

By the Cuſtom of the City, founded upon the By-Law of *Hen.* IV. they are to chooſe one of the Perſons *choſen*, not one of thoſe *returned*.

Court of Aldermen, their Power over Returns.

To prove the Authority and Power of the Court of Aldermen over Returns, the following Inſtances were produced. 2 *Nov.* 1696, Sir *John Moor* was returned two ſeveral Times to the Court of Aldermen, and as often rejected; and the Court of Aldermen proceeded to a new Election themſelves, without any more Returns. 13 *July* 1699, they ordered a new Return to be made for *divers Reaſons* only, not ſaying what. 30 *Jan.* 1694, a new Return was commanded for *diſorderly Proceedings*.

In the Caſe of *Queen-Hithe*, the Record ſays *ideo conſideratum eſt per Curiam*, that this Return be rejected; and when five or three have been returned, the Court of Aldermen have rejected them. If now, ſuch an overruling Power has been exerciſed over Returns, by the Court of Aldermen; this Court will not, certainly, interpoſe, and deprive the Court of Aldermen of their Right in this Matter.

The common Reaſon, why *Mandamus's* concerning Fellows of Colleges have been refuſed, *viz.* becauſe their proper Remedy was, to apply to the Viſitor, will hold in this Caſe.

But ſuppoſing the Return did conclude the Court of Aldermen; yet the Court will never grant a *Mandamus* in this Caſe, becauſe four are already returned. Should the Court direct a *Mandamus* for four more to be returned, ſuch a Command, wou'd make the Lord Mayor, ſubject to Actions upon the Caſe, for falſe Returns; for one Return muſt neceſſarily falſify the other, it being impoſſible that both can be true.

Suppoſe Sir *G. H.* in Obedience to ſuch a *Mandamus*, returns another four, the Conſequence is, the Court of Aldermen will have two Returns before them; and either they have a Right to examine which was the true Return, or they have not; if they have not, they can do nothing; if they have, then they may now examine into this preſent Return, and reject it if they ſee Cauſe.

Acceptance neceſſary to a Return, and this Return being already compleat by Acceptance of the Court of Almen, another cannot now be made.

Judge *Eyre* propos'd, an Objection, to this *Mandamus*, for the Conſideration of the Counſel.

The Objection was, That no Inſtance could be produced, where Obedience to a *Mandamus*, ſhall expoſe a Man to any Trouble or Inconvenience. Whereas in this Caſe, if Sir *G. H.* obeys the *Mandamus*, he will be liable to an Action for a falſe Return to the Court of Aldermen: But if he returns, That the Perſons already return'd, are thoſe that were truly choſen, he will be liable to an Action, for a falſe Return to the *Mandamus*, and afterwards to an Action for a falſe Return to the Court of Aldermen; for the one Action and Verdict cannot be given in Evidence in the other Action.

Reply by Counſel for the *Mandamus*.

As for that Objection againſt the *Mandamus*, that the Court of Aldermen had a Power over the Return, and that therefore this Court ought not to interpoſe, any more than they will in the Caſe of a Fellow of a College, where there is a Viſitor; They ſaid the Difference taken in the famous Caſe of Dr. *Perry*, Biſhoy of *Exeter*, which paſs'd the Houſe of Lords, would anſwer that Objection; *viz.* that as to ſuch Corporations, as were erected for private Ends only, the Court would leave theſe to Viſitors and not interpoſe, as in the Caſe of Colleges, *&c. contra* as to Corporations founded upon publick Accounts, as for the Government of great Cities,

&c.

&c. and in the Caſe at Bar, the Metropolis of the whole Kingdom was concern'd.

They ſaid it was very unreaſonable, that the Court of Aldermen, ſhould have an abſolute Power over Returns, and be final Electors too; for then, in Effect, they have the intire Election in themſelves, and the Liberties of City are precarious, depending upon the Pleaſure of the Court of Aldermen,

As for the Inſtances produced, of the Power of the Court of Aldermen over Returns; five of them only were inſiſted upon, and in ſome of them, the Returns carry'd along with them evident Marks of Error, as where three or five were returned. The reſt were Inſtances of ſuch Nature, as would make one ſorry, that ſuch a Power ſhould be placed in ſuch a Court, if ſo it is, as where they rejected a Return for *divers Reaſons*, and another for *diſorderly Proceedings.*

To the Objection, That the Power of the Lord Mayor was already executed, and the Return made; it was anſwered, that the Force of this Objection only amounted to this, that an Officer becauſe he has done Wrong muſt not do Right: That the firſt Return if wrong was a Nullity, and no Return at all: That this would be an Objection againſt all *Mandamus's*; and that by this Rule an Archdeacon might return to a *Mandamus*, that he had ſworn in ſuch a one, that his Power was executed, and therefore he could not obey the *Mandamus.*

To the Objection, That this *Mandamus* would expoſe Sir *G. H.* to Actions, whether he obey'd it or made a Return to it, in which it differ'd from all other *Mandamus's*; It was anſwered, that if he obey'd the *Mandamus*, as he ought if he has already done wrong, that it was his doing wrong and not his Obedience to the *Mandamus* that expos'd him to Actions: That, if he had done right, in Caſe of Diſobedience to the *Mandamus*, no Action could be ſucceſsfully brought againſt him; for that, in theſe commandatory Writs, there is always an Alterna-

tive ; *ſi ita eſt* ſays one, *ſi vobis conſtare poterit* ſays another, and this Writ now in Debate, *vel cauſam nobis ſignifices*; in all which Caſes, the firſt Part of the Writ, is only to be obey'd if true. Some ſpecial Caſes there are, wherein Officers may be liable to Actions, meerly for executing the Proceſs of the Law ; but in no Caſe, can an Action be carried on ſucceſsfully, in Caſe he has behaved impartially. For Example, upon a *Fieri facias* directed to a Sheriff, put the Caſe there are Goods, in which (as it often happens) others claim a Property ; in this Caſe whether he returns *Fieri feci*, or *nulla bona*, (and one he muſt) he will be liable to an Action. But if it ſhall appear that he has acted fairly and indifferently, the Law ſhall ſecure him whatever Return he makes, and whether his Return be true or falſe.

Bonds taken by a Sheriff to indemnify him, in ſuch a Caſe, have been held good.

As to that Part of the Objection, that this diſtinguiſhes this Caſe from all other *Mandamus's* ; they ſuppos'd the Law to be otherwiſe, and that ſhould an Archdeacon, in Obedience to a *Mandamus*, ſwear in a wrong Perſon, he would be liable to an Action.

1 *Rolls* 108 was cited, where it was ſaid, that an Action lay againſt an Archdeacon for not inducting a Clerk.

Inſtances were urged, wherein Court tho' doubtful granted *Mandamus's* ; and it was ſaid that they were better ſpoken to, and with more Certainty upon the Return.

Mandamus's founded upon *Magna Charta, cap.* 29.

The laſt Day of the Term, the Court, *viz.* the three Judges then preſent, delivered their Opinions *ſeriatim* to the following Effect.

Judge *Eyre.*

The Queſtion is, Whether the Court ought to grant the *Mandamus* deſired ? The Deſign in aſking it, is ſaid to be, not ſo much for the Sake of deciding the preſent

Controverſy, as to know what Remedy the Inhabitants of a Ward have, to be repreſented by one of the four truly choſen by them, in the Court of Aldermen. It is agreed, that the Wardmote are to chooſe four and return them to the Court of Aldermen; and that the Court of Aldermen are to be the final Electors, for they are to chooſe one of the four. It is agreed, the Court of Aldermen have quaſh'd Returns; ſometimes for the Number and Inſufficiency of the Perſons return'd, ſometimes for Irregularities in the Choice. It muſt likewiſe be agreed, that this Court has a general Juriſdiction in this Matter, and is to take Care, that publick Offices be diſcharged by Perſons, that are duly elected; and that *Mandamus's* have been the Way, whereby this Power has been generally executed. I agree therefore, that unleſs ſome *Mandamus*, I ſay ſome *Mandamus* will lie in this Caſe, there is no Remedy; for as for Actions upon the Caſe for falſe Returns, they lie only in Damages, but can never reſtore the Perſons wronged, to the Poſſeſſion of their Right.

It ought to be the Concern of a Court of Juſtice to take Care, that whilſt they are granting a Remedy to one, they do not at the ſame Time expoſe others to great Inconveniencies; and likewiſe, that the Remedy be ſuch, as may prove effectual.

Bag's Caſe in 11 *Co. Rep.* And the laſt *Mandamus* Act, do not concern the preſent Queſtion; for the former treats of *Mandamus's* in general, and the latter only ſpeeds the Proceedings upon *Mandamus's*, but does not give any new *Mandamus*.

It is confeſs'd of all Hands, that the *Mandamus* deſired is without a Precedent; all *Mandamus's* being either to reſtore Perſons turn'd out, or to admit thoſe refuſed. I ſay not this, by Way of Objection, againſt the *Mandamus*; but only to ſhew, that the Reaſon of other Caſes, muſt be our Guide. Caſes quoted have been of *Mandamus's* to Archdeacons to ſwear in Church-wardens, or to Corporations to admit Burgeſſes: But theſe Caſes cannot warrant

rant this *Mandamus*; becauſe this is a *Mandamus* liable to greater Inconveniencies, and leſs effectual than either of thoſe; for an Archdeacon is perfectly ſafe in obeying a *Mandamus* directed to him: But here in the Caſe before us, Obedience to this *Mandamus*, (ſuppoſing him to have done right already) will be no Defence in an Action upon the Caſe, for a falſe Return; for it would be of very dangerous Conſequence that it ſhould; for 1*ſt*, The Perſons being named in the *Mandamus*, is no Evidence of their being choſen, but is barely the Suggeſtion of the Party; and 2*dly*, The Conſequence would be, that the Perſon who ſhould be ſo diligent or fortunate, as to get the firſt *Mandamus*, whether choſen or not choſen, could not be removed.

Tho' no Caſe has been quoted to ſhew (and the Reaſon I am ſure is becauſe there are none) that an Archdeacon ſwearing in a wrong Perſon, in Obedience to a *Mandamus*, was liable to an Action for ſo doing; yet it has been attempted to be proved, that in the Reaſon of the Thing, an Action ought to lie; and for this Purpoſe it has been ſaid, that an Action will lie againſt an Archdeacon for not admitting, or refuſing to ſwear in, *&c.* But certainly it does not from hence follow, that Obedience to a Mandatory Writ of this Court, will ſubject him to an Action. Further yet, this *Mandamus* may poſſibly expoſe Sir *G. H.* to a double Vexation. Suppoſe he returns that the Perſons before returned were truly choſen, he will be liable to an Action for a falſe Return to the *Mandamus*, and likewiſe to an Action for a falſe Return to the Court of Aldermen; for the Evidence given in one Action will not be Evidence in the other.

This Objection receives an additional Strength from the late *Mandamus* Act, where there is a ſpecial Clauſe to ſecure Men from double Vexation.

But the greateſt Objection againſt this *Mandamus*, is, that it muſt prove vain and fruitleſs; whereas in all other Caſes, the *Mandamus* is an immediate and effectual Remedy. For the Court of Aldermen cannot be bound by

by the Proceedings upon this *Mandamus*, being Strangers to it; and conſequently, according to the Verdict given upon the Trial in a ſecond *Mandamus* to the Court of Aldermen, and without any Regard to the Trial, Proceedings and Verdict upon the firſt *Mandamus*, it is, that the peremptory *Mandamus* muſt go; ſo that to me it ſeems to have no Effect at all. It is highly proper there ſhould be a Remedy; but for theſe Reaſons, I cannot think this a proper Remedy.

The *Abingdon* Caſe, as appears to me, points out the *Mandamus*, that ought to go in this Caſe.

By the Conſtitution of that Corporation, the Freemen were to chooſe two, and preſent them to the Mayor, Aldermen and Burgeſſes, who were to elect one of them: Now in this Caſe, there was a *Mandamus* granted to the Mayor, Aldermen and Burgeſſes; ſuggeſting that ſuch a one, and ſuch a one were the Perſons choſen, and commanding them to chooſe one of them. That the Court of Aldermen are to elect one of the four, choſen by the Wardmote, and not one of them returned by the Lord Mayor, is very plain from the Power by them exerciſed over Returns. Now therefore, as appears to me, we ſhould grant a *Mandamus* to the Court of Aldermen; ſuggeſting ſuch four to be choſen, and commanding them to chooſe one of them. This ſeems to me not liable to thoſe Objections and Inconveniencies, the other Way is attended with; and alſo anſwers that Objection rationally ſtarted, that they are in Truth the ſole Electors. Beſides, ſuppoſing the Court of Aldermen have, as is pretended, ſuch a Power over Returns, they are the propereſt Perſons to return their own Privileges. As to the Objection, That the Lord Mayor preſides in the Court of Aldermen, and, having a Power to adjourn the Court at Pleaſure, may prevent any Return ungrateful to him; The Anſwer is, that in ſo doing, he would be guilty of a Contempt; and ſo would the Court of Aldermen, ſhould they refuſe to obey, or return to the *Mandamus*.

Judge *Powys.*

I am of Opinion this *Mandamus* ought to go. *Bag*'s Caſe is ſaid to have been the Beginning of *Mandamus's*; but certainly they are of much greater Antiquity: In Dr. *Widdrington*'s Caſe, 1 *Levinz* 23, they are ſaid to have been as old as *Edw.* II. and *Edw.* III.

There have been poſitive Affidavits read of Miſbehaviour, which is Ground enough for us to look into it.

My Brother *Eyre* has own'd, that there is no Way of coming at this Matter, but by a *Mandamus.*

I cannot ſee, of what Uſe, a *Mandamus* directed to the Court of Aldermen would be; for they can do nothing upon ſuch a *Mandamus*; the Perſons not coming before them in a legal Way, *viz.* by the Return of the Lord Mayor. Beſides, to grant a *Mandamus* at firſt to the Court of Aldermen, would be to proceed *per ſaltum*, neglecting the proper Degrees to be obſerved in this Matter.

But it is objected, That an Application to the Court of Aldermen is the proper Remedy: I anſwer no; for that would be to appeal from the Lord Mayor to the Lord Mayor, for he preſides in that Court, and can hold or adjourn it at Pleaſure. It is out of that Court the Lord Mayor is choſen, and as every Member there lives in Expectation of the Chair in his Turn, that Court will conſider the Privileges of the Lord Mayor, as their own. It ſeems very unreaſonable that the ſame Body of Men, ſhould be to chooſe out of the Return, and have an abſolute Power over the Return too. There have, indeed, been Inſtances produced of their Power over Returns, ſome of which did not come up to the Point; and one was of ſo arbitrary a Nature, as was never before practiſed, nor I hope ever will again.

It is objected, That Sir *Gilbert* has already executed his Power, and would you have him do it over again? A ſtrange Objection! Where an Officer's having done wrong, is uſed as an Argument againſt his being obliged to do

Juſtice. Suppoſe meer Strangers had been return'd: Muſt this have been look'd upon as an Exerciſe of his Power? No certainly; a falſe Return is no Return. Would it be a good Return for an Archdeacon to ſay, I have already ſworn in a wrong Church-warden, therefore I cannot obeyt he Writ? No, it would not. *Mandamus's* are never peremptory; but have always a Disjunctive, *vel cauſam nobis ſignifices.* If he has made a Return, and a true Return, he may return *non electi:* But if theſe Men are really choſen, it is abſolutely neceſſary for them to be returned; ſince that is the only legal Way, by which they can be brought before the Court of Aldermen. It is objected, That this *Mandamus* will be ineffectual: I ſay no; for it will have its proper Effect, which is not, that theſe Men ſhould be Aldermen; but put in a Capacity of being ſo, by being returned.

As to Sir *G. H.*'s being expoſed to Actions, nay to double Vexation; *that* is not to be put in the Scales with the Peace and Quiet of the City. In the next Place, no Action can be brought againſt him ſucceſsfully, in Caſe he has done right. And in Caſe of double Vexation, the Damages a Jury would give upon ſuch a ſecond Trial, after the Merits had been fairly tried before, would be inconſiderable. But it is objected, That the *Mandamus* deſired, differs from all others; they being either to admit or reſtore, but this for a Poſſibility only: I ſay not; for it is for a Nomination.

Thus much of the *Mandamus's* lying *de jure:* But now ſuppoſing it doubtful; yet I think we ought to grant it. Many are the Inſtances, where this Court have granted *Mandamus's* in doubtful Caſes, 1 *Sid.* 169, Treaſurer of the New River Water. 1 *Levinz* 23, Fellow of a College; and 2 *Levinz* 14. *All* Caſes of *Mandamus's* granted *hæſitante Curia*; and the Ground they went upon was this, That it would be better ſpoken to upon the Return. Now, if this Court has acted thus, in Matters of an inferior Nature; *a fortiori*, will it do ſo in a Caſe

of this Importance. The Return of Sir *G. H.* may give ſome further Light in the Matter: If we ſhould err in granting this *Mandamus*, the Error retrieveable; it may be quaſh'd, *ironice emanavit.* But ſuppoſing there is another Remedy, that is no Objection; for the Law in many Caſes, gives a double Remedy; as ſuppoſe a Clauſe in a Will, that whatever Controverſy ſhall ariſe upon the Conſtruction of it, ſhall be decided by ſuch and ſuch Arbitrators; the Parties will have their Election to decide their Controverſies, either by Arbitrators, or by Law.

Chief Juſtice *Parker.*

This being a Caſe of Conſequence, I ſhall not only give my Opinion; but freely declare *that*, which ſeems to me the beſt and propereſt Remedy in this Affair.

Among the Inſtances produced, to prove the Power of the Court of Aldermen over Returns, one was their rejecting a Return, becauſe the Lord Mayor, Sir *Samuel Garrard* had refus'd a Poll.

This, I ſuppoſe, they did upon a Complaint brought before them; which ſeems to me in this Caſe, the moſt proper Remedy. The Effect of this *Mandamus* is, to have ſuch and ſuch returned; the Conſequence of which will be, the Court of Aldermen will have ſeven before them; and then they muſt conſider, who the four were, that were choſen by the Wardmote, that ſo they may chooſe one of them: For unleſs they do this, there muſt go another *Mandamus* to the Court of Aldermen; the Conſequence of which is, that this Election may come to be tried twice; *viz.* upon the Return of Sir *G.* to his *Mandamus*, and of the Court of Aldermen to theirs; ſo that this Way the Right may not, poſſibly, be ſettled without much Expence and Length of Time.

When Perſons are falſly returned, the proper Way is, for the Perſons grieved to complain to the Court of Aldermen for Redreſs; and if they refuſe, then this Court will grant a *Mandamus* to the Court of Aldermen,

men, who are the propereſt Perſons to return their own Privileges.

As for the *Mandamus* deſired; two Things to be conſider'd, 1*ſt*, Whether it lies? 2*dly*, Whether it ought to be granted, in Caſe it be doubtful whether it lies, or not?

As to what has been ſaid concerning the Juriſdiction of this Court; *that* is out of Diſpute. But tho' a Court has Juriſdiction, yet it ought not to be exerted, but where it is neceſſary; and if the Court of Aldermen are to chooſe one of the four elected by the Wardmote, and not returned by the Lord Mayor, then ſure I am that this *Mandamus* cannot be neceſſary; for then it will be juſt the ſame Thing, whether the Perſons choſen come before the Court of Aldermen, by Way of Complaint, or by the Return of the Lord Mayor, in Obedience to this *Mandamus*. As this *Mandamus* is unneceſſary, ſo will it be uneffectual; for the End of it is only to bring the Perſons choſen before the Court of Aldermen, which may be done as well by Complaint of the Perſons injured. And after this *Mandamus* granted, the Aldermen muſt do juſt the ſame Thing, they are bound to do now upon Complaint, *viz.* conſider which are the Perſons choſen by the Wardmote. The Darkneſs complain'd of in the Scrutiny, only prevents that Examination, which upon a Complaint may be had. One Difference there is between proceeding by Complaint and *Mandamus*, that the former is more compendious and leſs expenſive.

Now, as to the Perſons that may be affected by this Way of proceeding: To begin with the Court of Aldermen; they will be under a Neceſſity of returning their own Privileges to a *Mandamus*, conſequent of this now aſked; or, no Means being left them to know which were truly choſen, of obeying the Writ blindly, without knowing whether they do wrong or right.

As for Sir G. if he obeys the Writ, he is ſubject to an Action for a falſe Return to the Court of Aldermen; and no Inſtance yet has been produced, where Obedience to a Mandatory Writ of this Court expoſes a Man to an Action. If he returns *non electi*, he is liable to an Action upon both Returns.

Actions have indeed been brought againſt an Archdeacon for refuſing, but never (as my Brother *Eyre* has obſerved) for paying Obedience to a Mandatory Writ of this Court.

It has been objected, There are ſome Caſes, wherein Perſons by meer executing the Proceſs of the Law may become ſubject to Actions: But, ſurely, ſuch a Conſequence, is a very good Reaſon, for not giving Way to an unprecedented Proceſs; unleſs otherwiſe there would be a Failure of Juſtice.

It has been objected, That it is highly unreaſonable for the ſame Perſons, to be Judges of the Goodneſs of the Return, and to chooſe one of them too: I anſwer it is unreaſonable, that they ſhould be at Liberty to take which four they pleaſe; but not at all, that they may conſider which of the Parties were really elected. It does by no Means follow, that becauſe they are not the final Electors, that therefore they are not the proper Judges to do Right, and judge which four were duly elected; and if they do Wrong, then is the proper Time for this Court to interpoſe by granting a *Mandamus*.

Indeed it has been ſaid, that a *Mandamus* will not lie, in the firſt Place, to the Court of Aldermen; that the Aldermen have no Authority but upon the Return of the Lord Mayor, and conſequently that a *Mandamus* to the Court of Aldermen can be of no Uſe, unleſs it be ſubſequent to the *Mandamus* to Sir *G. H.* This Objection ſuppoſes, the Court of Aldermen concluded by the Return of the Lord Mayor; and if this be ſo, then there is no Way to let theſe Perſons into their Right, but by ſetting aſide the Return already made; which cannot be

done by *Mandamus*, but by Action of Deceipt only. Even in the Caſe of a Sheriff, where the Return is into our own Court, no Way of doing it, but by Deceipt; much leſs can it be done in the Caſe of a Return to a foreign Court. If this be ſo, the *Mandamus* will ſignify nothing; for the Court of Aldermen will be concluded by the firſt Return.

I was once conſidering, Whether a ſecond Return, made in Obedience to a *Mandamus* of this Court, might not vacate the former: But then, I ſaw, this Inconvenience would ſtill attend the Court of Aldermen's being bound by the Return, tho' this ſhould be ſo; *viz.* That if a Return ſhould be made in the long Vacation, then ſuch a Return tho' a falſe one, and evidently ſo, muſt yet conclude the Court of Aldermen; it being then impoſſible to apply for a *Mandamus*.

But another Abſurdity enſues from this Opinion, *viz.* two concluſive Returns: I ſay two; for if the laſt is not a concluſive Return and the former is, this *Mandamus* is vain; and if the firſt be not concluſive, why ſhould the laſt?

But this Opinion is confuted by the By-Law of *Hen.* 4. which directs them to chooſe one of the four *choſen* not *returned*. Likewiſe all the Inſtances produced, of the Power of the Court of Aldermen over Returns, confute this Fancy. In ſhort, the Way by Complaint is a compendious one; that by *Mandamus*, long and intricate: For upon theſe two *Mandamus's*, *viz.* that deſired, and the ſubſequent one to the Court of Aldermen, there may be contrary Verdicts; which will leave it at laſt doubtful, whether Right is done or not.

As to the ſecond Point, Whether the Court may not grant this *Mandamus*, tho' doubtful whether it lies, or not; there is no Doubt, but this Court have granted *Mandamus's*, when doubtful: But as they may grant, ſo, moſt certainly, they may refuſe; which I think we ought to do in the preſent Caſe, where the granting of it will

probably long continue that Confuſion in the City, that a little good Advice may ſoon put an End to.

Queen and *Williams.* B. R.

See this Caſe *Salk.* 384.

HUSBAND and Wife indicted for keeping a Bawdy-Houſe. Huſband and Wife indicted for keeping a Bawdy Houſe.

Moved in Arreſt of Judgment, that Huſband and Wife could not be jointly indicted for keeping a Bawdy Houſe. 2 *Rolle* 8. *Brook*'s Caſe.

But it was anſwered, That the Indictment was not only for keeping a Bawdy Houſe; but for procuring Lewdneſs, *&c.* That Crimes are in their Nature ſeveral: That Huſband and Wife may be found guilty of Nuſance, Battery, or the like: That the Reaſon, why in Burglary, Larceny, *&c.* Wife is excus'd is, becauſe ſhe could not tell what Property the Huſband may claim in them.

Hillary Term, 2 *Annæ*, *James Cook* and his Wife jointly indicted for keeping a Bawdy Houſe; Huſband fin'd, Wife ſet in the Pillory.

Court. Indictment good. Keeping the Houſe does not neceſſarily import Property; but may ſignify that Share of Government, which the Wife has in a Family, as well as the Huſband.

D'aeth and *Baux.* B. R.

THE Court was moved for a Prohibition, to the Spiritual Court, for ſuffering a Feme-Covert, to ſue *ſingly* upon the Statute of Diſtributions: Becauſe it was for a Property, ſo veſted in the Huſband, that it might be releas'd by him. Prohibition.

The

The Court ſaid no Prohibition lay, for this was a Choſe in Action, and ſo much the Wife's that ſhe ſhall have it by Survivorſhip; and if the Huſband had been joined in the Suit, it would have been only for Conformity. This Caſe differs not from the Caſe of a Legacy; for which, it is the Courſe of the Spiritual Court to admit Feme-Coverts to ſue alone: But, ſuppoſing it was not the Practice of the Spiritual Court to ſuffer a Feme-Covert to ſue without her Huſband, the Party's Remedy is by Appeal, not Prohibition.

However a ſhort Day being given to ſhew Cauſe;

Upon the laſt Day of the Term, Dr. *Pinfold* argued againſt the Prohibition: Becauſe it was a Caſe, where the Spiritual Court had confeſſedly a Juriſdiction, and therefore they ought to proceed according to their own Rules; that according to theſe, a Woman, tho' a Feme-Covert, was admitted to ſue ſole in every one of the following Caſes, *viz.* when Executrix, when Adminiſtratrix, when Legatee, when Legatary, when Defaming, when Defamed; that if this were not ſo, the Party ſhould have appeal'd, not moved for a Prohibition.

In what Caſes a Feme-Covert may ſue alone in the Spiritual Court.

The moſt material Thing replied to this, was, That tho' the Eccleſiaſtical Courts had Juriſdiction in this Matter, yet deriving this Juriſdiction from the Temporal Law, *viz.* the Statute of Diſtributions, they ought to conform their Proceedings to the Rules of Common Law. The Court ſaid, ſo they ought in Matters of Subſtance, but not Form, as this moſt certainly was.

Court.

Whitehorn, Mayor of *Portſmouth*. B. R.

Information in Nature of a *Quo Warranto*.

THIS was an Information in Nature of a *Quo Warranto* againſt *Whitehorn*, for exerciſing the Office of Mayor, in the Town of *Portſmouth*; and againſt others for exerciſing the Office of Aldermen.

2

Whitehorn

Whitehorn pleads the Charter of King *Charles* I. incorporating the Town of *Portſmouth*, *&c.* and ſets forth a particular Clauſe in the Charter, whereby it is declared, That if the Mayor ſhould die, or for juſt Reaſons be removed, it ſhould be lawful for the Aldermen to chooſe another Mayor for the remaining Part of the Year, until the Time to elect, came about again; then he ſets forth that the Mayor died, and that he was choſen, by the Majority of the Aldermen, *Secundum formam Chartæ prædict.* The Attorney General replies *non Electus modo & forma, &c.*

The Aldermen plead their being choſen under the Mayoralty of *Whitehorn.* Iſſue joined upon *non Electi modo & forma, ſecundum formam Chartæ.*

Upon Trial at the Aſſizes, it was inſiſted, That the Defendants, to prove the Iſſue, muſt firſt prove themſelves qualified, by receiving the Sacrament according to the Act of King *Charles* II. which Point, inſtead of being found ſpecially, was ſav'd by the Judge who tried the Cauſe.

Subſtance of an Argument for the Defendants.

It was ſaid, That this Act of Parliament could not be underſtood to make Elections void, but voidable: That the Act was made for regulating, not diſturbing Corporations; as it would do, if it made all Elections of Perſons not qualified, according to it, Nullities.

That there were other Statutes with Words altogether as ſtrong as thoſe uſed by this Act, which have yet received ſuch an Interpretation.

The Stat. 5 *Ed.* 6. *cap.* 4. ſays, That the Offender ſhall be *ipſo facto* excommunicated; yet a precedent Conviction has been held neceſſary. Stat. 5 *Ed.* 6. *cap.* 4.

De facto Officers.

It was ſaid, That Acts done by Officers *de facto*, tho' not *de jure*, in Execution of their Office, are good, *Cro. Eliz.* 669, *Harris* verſus *Jays*. *Cro. James* 552. if therefore *Whitehorn* was a *de facto* Mayor, that was enough to ſupport the Election of the Aldermen.

Suppoſing upon a General Iſſue, of *Electi vel non electi*, it wou'd have been incumbent upon the Defendants to prove themſelves qualified, by taking the Sacrament; that yet upon this Special Iſſue of *Electi vel non electi ſecundum formam Chartæ*, this cou'd not be neceſſary, the Charter being altogether ſilent as to theſe Qualifications.

When Iſſue is joined upon a Plea, no Advantage ſhall be taken of any Matter collateral, 2 *Anderſon* 82. In *Hobart* 72, upon an Iſſue *feoffavit vel non*, the Jury found a Feoffment, but a covinous one; and the Court was there of Opinion, that upon this Iſſue, a covinous Feoffment was a Feoffment; and that if the Party wou'd have taken Advantage of the Covin, he ought to have done it by ſpecial Pleading. It is there likewiſe ſaid, that a *non eſt factum* cannot be pleaded upon the Statute of Uſury, or Sheriff's Bonds; nor can a Letter of Attorney by an Infant be avoided without Special Pleading; the Reaſon of all which Caſes ſeems to be this, That theſe Things have the Appearances of Feoffments, Bonds, *&c.* tho' they want the Validity.

As it would have been no Evidence, upon this Iſſue, to have ſhewn a Title by a ſubſequent Charter; not reaſonable the other Side ſhould take Advantage of a ſubſequent Act of Parliament.

Vide this Caſe *Salk.* 386, 387.

Earle and *Peale*. B. R.

Infant, how far his Contract for Neceſſaries good.

THIS was an Action brought upon a Note, for Money lent an Infant, for his Support and Maintenance.

After a Verdict and Judgment for the Plaintiff, upon Error brought in *B. R.* it was argued that this Action did not lie.

1 *Inſt.* 172, It is indeed ſaid, that an Infant may bind himſelf to pay for his neceſſary Meat and Drink: But this was never carried farther; 2 *Cro.* 497. it is held, that the Contract of an Infant for Wares, for the neceſſary carrying on of his Trade, whereby he ſubſiſts, ſhall not bind him. 3 *Salk.* 196.

It was agreed by the other Side, that in Caſe the Money thus lent upon this Note, was not actually laid out by the Infant for Neceſſaries, the Plaintiff could not recover upon it: But, it was ſaid, the Plaintiff could never have obtained this Verdict, without firſt proving, that the Money was actually ſo laid out.

Court. There is a great Difference between lending an Infant Money to buy Neceſſaries, and actually ſeeing the Money ſo laid out. In this Caſe the lending for ſuch a Purpoſe only put in Iſſue, which might be maintained without ſhewing how the Money was actually laid out; that if the Fact was ſo, the Plaintiff ſhould have declared as for Money ſo laid out, and not ſo lent. The Law knows of no Contracts, but what are good or bad at the Time of the Contract made; and not to be one, or other, according to a ſubſequent Contingency. Accordingly next Term the Judgment was reverſed *Niſi.* *Salk.* 279.

Dummer ver. —— B. R.

THE Court was moved to amend an *Elegit*, that ſets forth, that Judgment was given upon the 9th of *January*, when in Fact it was given upon the 23d of *October*, and ſigned the 9th of *January*. Amendment of Writs. *Elegit.*

Caſes

Writ of Inquiry.

Caſes cited in Behalf of the Motion; *Cro. Jac.* 372. *Cro. Eliz.* 677, where Writs of Inquiry, which are judicial Writs, are held amendable. *Vavaſor*'s Caſe, *Hill.* 6 *Ann.* *Herſy* and *Whitlock*, about the ſame Time in *C. B.* 44 *Ed.* 3. *Brook*, *Elegit*; where an *Elegit* held amendable.

Court of Opinion not amendable; Becauſe it might occaſion an Alteration in a Verdict upon a Writ of Inquiry; for between the 23d of *October* and the 9th of *January*, he might have Lands that he had not the 9th of *January*. *Adjournatur.*

Queen and *Wooton.* B. R.

Juſtices of Peace. Their Juriſdiction about Servant's Wages. *Salk.* 441, 442.

JUSTICES of Peace have no Juriſdiction to judge of Wages except in Caſe of Huſbandmen: But yet the Court, in Favour of Servants, will always, unleſs the contrary appears upon the Face of the Order, preſume Servants to be Servants in Huſbandry, and will admit of no collateral Proof to the contrary.

Dr. *Harriſon* and *Archbiſhop of Dublin.* B. R.

Biſhop, notwithſtanding Appropriation, may viſit and ſuſpend, but not deprive.

THIS was a Writ of Error out of *Ireland*, and the Queſtion was, Whether or no the Appropriation of a Rectory to a Priory, or a Dean and Chapter, did exempt this Rectory from the Viſitation of the Biſhop, in whoſe Dioceſe it lay; and if it did not, Whether he might not upon Viſitation, proceed to the Suſpenſion of the Incumbent *ab Officio & Beneficio?* Deprive him, it was clear he could not.

The Court ſeem'd of Opinion, That the Biſhop notwithſtanding the Appropriation of the Benefice, might

yet

yet viſit to ſee how the Church was ſerved, Sacraments adminiſtred, *&c.* and might proceed to Suſpenſion. *Adjournatur.*

Stafford and *Beneath.* B. R.

Debt.

In Actions upon Specialties or Contracts, where the Sum is certain, the Plaintiff cannot abridge his own Demand, without ſhewing how the reſt is ſatisfied. *Contra* in Actions that lie in Damages.

AN Action of Debt for 15 *l.* the Plaintiff declares upon two Demiſes, and that upon the one Demiſe there was 10 *l.* Rent behind, and upon the other 12 *l.* To this the Defendant demurs. Afterwards the Plaintiff enters a *Remittitur*, for all that appears due from the Declaration, over and above the 15 *l.* demanded in the Writ.

It was argued for the Defendant, That ſuppoſing the Declaration naught, the *Remittitur* would not help it. 1 *Saunders* 285, *Duppa* and *Mayo*, where it is expreſly reſolved, that a *Remittitur* in ſuch a Caſe would ſignify nothing at all; and the Reaſon given for it was, becauſe a Man that had a good Cauſe of Demurrer, at the Time of his demurring, might by this Means be tricked out of it. To prove the Declaration bad, this Ground was laid down, That in an Action of Debt for Rent, the Plaintiff cannot abridge his own Demand, without ſhewing how the reſt was ſatisfied. 2 *Cro.* 499, *Pemberton* and *Shelton*, this Difference is taken, That where an Action is grounded upon a Specialty, or upon a Contract where the Sum is certain, or upon a Statute which gives a certain Sum for the Penalty, no Demand can be of a leſſer Sum, without ſhewing how the reſt was ſatisfied: But where a Perſon, if he recovers, is to recover not a Sum certain, but according to what a Jury will give; not according to his Demand in the Declaration, but according to the Verdict; there it is otherwiſe. 1 *Cro.* 447. *Thornton* ver. *Kemp*, the abating of 10 *l.* not ſhewing how, adjudged naught. 2 *Levinz* 4. *Hulm* ver. *Sanders*, Action of Debt for Rent, Demand

was for 100 *l.* and by the Declaration it appear'd that 111 *l.* was due; the Court were of Opinion, tho' after a Verdict, that the Judgment ought to be reverſed. 2 *Levinz* 57. Judge *Hales* took the Difference between Covenant and Debt before-mentioned in 2 *Cro.* 499. and held, that even in Covenant, upon ſpecial Demurrer, ſuch Demand was naught.

Court of Opinion for the Defendant, And thought the Difference taken between Actions brought for a Sum certain, and Actions that lay in Damages to be good Law. They ſaid, that upon this Declaration, they could give Judgment for no leſs than 22 *l.* which is more than was demanded in the Writ.

As for the *Remittitur,* if that could have alter'd the Judgment, the Court might have done it without.

Judge *Eyre* deſir'd the Counſel before they ſpoke to it again, to conſider of two Caſes, that he took to be Caſes in Point for the Defendant, *viz. Cro. Eliz.* 308. *Cro. Eliz.* 434. *Adjournatur.*

Queen and *Morgan.* B. R.

Stat. 5 *Eliz.* about Trades expounded. *Salk.* 67.

RESOLVED *obiter* by the Court upon the 5th of *Eliz.* about Trades, that ſerving five Years to a Trade out of *England,* and two in *England,* was enough, and ſatisfied the Statute. But there muſt be a Service of a full Time either in *England,* or out of *England:* Therefore ſerving five Years in a Country, where by the Law of the Country more is not required, will not qualify a Man to uſe the Trade in *England.*

A Wife living with her Huſband ſeven Years, may after his Death continue the Trade, for the Act does not require a Man or Woman to be an actual Apprentice; but the Words are *tanquam* an Apprentice.

Salk. 613.

If a Man lives with another that uſes a Trade, which other is not qualified for uſing it, ſeven Years, he may ſet up the Trade, as well as if he had lived with one never ſo well qualified.

Anonymus. B. R.

MOVED to quaſh a *Writ de Excommunicato capiendo.* Writ *de Excommunicato Capiendo.*

1*ſt* Exception was, That the Writ ſays only *Cauſa defamationis*, but does not ſay what Defamation; now there are ſome Defamations that are not of Spiritual Conuzance: This Objection over-ruled by the Court, who ſaid, they would not preſume, that any Court would exceed its own Juriſdiction, unleſs it appear'd plainly it had done ſo. Objections againſt it over-ruled.

2*d* Exception was, That the ſtanding 40 Days excommunicated, did not appear in the Writ; *Sed non allocatur per Cur.* for the 40 Days never inſerted in the Writ, but the *ſignificavit* only: Beſides, this Objection not proper here, but in Chancery; the 40 Days Excommunication, being the very Foundation upon which the Court grants the Writ.

3*d* Exception; There muſt be a proper Addition; now the Word was *Chiothecario*, inſtead of *Chirothecario*. *Sed non allocatur.*

Thomlinſon and *Dighton.* B. R.

Vide Ante 31.

LORD Chief Juſtice *Parker* gave the Reſolution of the Court, to the following Effect.

Queſtions Two,

1*ſt*, Whether the Wife by this Deviſe took an Eſtate in Fee, or for Life?

2*dly*, Whether her Power was well executed?

Eſtate for Life.

As to the 1*ſt*, all of Opinion, That ſhe took but an Eſtate for her Life. *Firſt*, Becauſe the Will expreſly gives her an Eſtate for Life. *Secondly*, The Power of diſpoſal does not at all alter her Eſtate, becauſe it is a diſtinct Clauſe. Caſes relied upon by the Court, for their Opinion in this 1*ſt* Point. 3 *Leonard* 71, upon which great Streſs was laid. 1 *Jones* 137, *Daniel* and *Uply*. 2 *Levinz* 104, Deviſe to a Wife for Life, with a Power to diſpoſe of it, to which of her Children ſhe pleas'd.

2*dly*, We are all of Opinion, That the Power is well executed.

Power well executed.

For as to the 1*ſt* Objection, That the Power was extinguiſhed by the Fine; it may be anſwered, That if the Power was well executed, it was executed by the Deed, which was antecedent to the Fine; and therefore it is impoſſible for the Power to be extinguiſhed by the Fine.

As to the 2*d* Objection, That the Power ought to have been executed by Will, and not by Deed; which is built upon the Word *then*, importing, as they ſay, that very Inſtant of Time, when her Eſtate determines; *then, and not till then*, her Power enables her to diſpoſe, and which muſt neceſſarily be done by Will.

To this Objection we anſwer, 1*ſt*, That the Words of the Power do not expreſly mention any particular Way of Conveyance, by which this Power ſhould be executed, but leave it indifferent. *Hobart* 312, *Dicitur*, That all Forms and Circumſtances of Powers are to be obſerved; but then it is added, that this is to be underſtood of ſuch Forms and Circumſtances as are expreſs'd, not imagin'd: Now here no particular Sort of Conveyance is expreſs'd. That Caſe laſt mentioned in *Hobart*, was indeed the reverſe of this; for there the Queſtion was concerning the Revocation of a Power, but

here of the Execution. However it fits the preſent Caſe; for there the Queſtion was, Whether a Revocation could be executed by Will; for from the Words of the *Proviſo, then and thenceforth*, it was argued, that no Revocation could be good, that was done by Will. For a Will (as was ſaid) is revocable, and is of no Force at all until the Death of the Teſtator; whereas (it was urged) the *Proviſo* ſays *then*, and from *thenceforth*, *viz.* from the Time of Sealing, *&c.* the Power ſhall be revoked, which a Will cannot do. But the Court held the Power might be revoked by Will, and that the Words *then* and *thenceforth* ſhould be rejected as Surpluſage.

2*dly*, The Word *then* refers to the remaining of the Lands, and not to the Time of the diſpoſing them, *viz.* that *then* her Diſpoſal, *when* ſo made, ſhall take *Effect.*

3*dly*, *Then* is equivalent to *after her Death*, which ſhews it cannot be done by Will, 3 *Leonard* 71.

3*d Objection:* That it was executed by a Conveyance to the Parties, and not Truſtees. *Reſp.* Theſe Powers are executed by all Sorts of Conveyances; 1 *Rolls* 329, *Dike* and *Rich.* 1 *Ventris* 228, *King* and *Melling.*

4*th Objection:* This Conveyance left in her an Eſtate for Life, without Impeachment of Waſte, which was not in her Power to do.

Anſwer: The Children will be in, not by Virtue of her Conveyance, but the Will, and ſo will over-reach her Eſtate without Impeachment of Waſte; and conſequently that Clauſe in the Conveyance, *without Impeachment of Waſte*, will have no Operation; for the Children may notwithſtanding, bring an Action of Waſte againſt her.

DE
Termino S. Hill.
10 *Annæ*,
In BANCO REGIS.

Queen and *Sutton.*

Information in Nature of a *Quo Warranto.*

THIS was an Information in Nature of a *Quo Warranto* againſt *Sutton*, for uſurping the Office of a Common Burgeſs of the Town of the *Deviſes* in *Wiltſhire*; and upon a Trial at Bar upon this Iſſue, Whether *Sutton* was choſen a Capital Burgeſs, by Mayor, Recorder and Capital Burgeſſes, the following Points aroſe.

Evidence.

The Recorder had made a Deputy Recorder, by Writing under his Hand and Seal, and afterwards had revoked this Deputation by another Writing, a Copy of which was offer'd in Evidence of the Revocation. But this held not good Evidence; becauſe it did not appear, but they might have produced the Original.

Deputation of an Office, is in its own Nature grantable by Parol; and therefore tho' it ſhould happen to be granted by Writing, yet ſince it is in itſelf grantable by Parol, it may be revoked by Parol.

Conſtruction of Charters.

By the Charter that incorporates this Town, the Mayor, Recorder, and in his Abſence, Deputy-Recorder, and Capital Burgeſſes, *vel major pars eorundem*, are impower'd

power'd to chooſe Capital Burgeſſes: Now the Queſtion was, Whether upon *theſe* Words of the Charter, Acts done by the Mayor and Majority of the Burgeſſes, without the Preſence of the Recorder, or his Deputy, were good? And the Court ſeem'd to incline, that they were good; becauſe the Word *eorundem* refers not only to the Capital Burgeſſes, but Mayor, Recorder and Capital Burgeſſes; and yet the Reaſon why the Preſence of the Mayor is neceſſary to corporate Acts, is not becauſe he is particularly named, but becauſe he is the Head of the Corporation; and if this were not ſo, the Addition of theſe Words in Charters *quorum* Recorder *unus*, would be uſeleſs and unneceſſary.

Another Queſtion was, Whether ſuppoſing it not neceſſary by the *Charter*, that the Recorder ſhould be preſent, yet the *Iſſue* did not oblige them to prove him preſent at the Election? To this it was ſaid by the Counſel, that *conceſſo* the Charter did not require the Preſence of the Recorder, the Queſtion was no more than this, Whether they ſhould be obliged to prove an immaterial Part of the Iſſue. It was ſaid farther, that by a Parity of Reaſon, it might be expected, that they ſhould prove the Preſence of every one of the common Burgeſſes: That by the Iſſue no more was meant, than that the Election was made by thoſe that had a Power to do it: That *ubi Major pars, ibi tota, viz.* the Authority of the whole. And of this Opinion was the Court.

Another Queſtion ſtarted, was, Whether in a Corporation, that was by Charter to conſiſt of Mayor, Recorder, Common Burgeſſes, *&c.* the ſame Perſon might not be both Mayor and Deputy-Recorder?

Another Point was moved upon the Words of the Charter, which appoints the ſwearing of a common Burgeſs to be done before the Mayor, Recorder, common Burgeſſes, or the Majority of them, *tunc ibi præſentium*;

ſentium; whether or no, a Majority of the whole Body was by theſe Words neceſſary to be preſent at the ſwearing, or whether a Majority of thoſe that were preſent was only requiſite, tho' they ſhould not be the Majority of the whole?

It was ſaid, That upon the Reaſon of the Thing, it was not neceſſary that the ſwearing in ſhould be done with the ſame Solemnity, as the chooſing in. For the Choice is a voluntary deliberate Act; the ſwearing in, on the contrary, is what a Perſon once choſen may challenge as his Right, and may by *Mandamus* compel them to do. And if this Conſtruction did not prevail, the Words in this Clauſe of the Charter concerning the ſwearing, *tunc ibi præſentium*, which are not in the Clauſe concerning the Election, would ſignify nothing.

As for the Objection, that it ſeems abſurd to ſay a Man muſt be ſworn before a Majority of thoſe that are preſent, ſince if they are preſent he muſt unavoidably be ſworn before them *all*; the Anſwer is, That this Clauſe is to be underſtood of being ſworn in by the *Conſent* of a Majority of thoſe that were preſent.

Another Queſtion was, Whether by a Charter that requires Acts to be done by a Majority of the Corporation, a Perſon might not be removed by a Majority of that Body, excluding the Perſons that are to be removed, and cannot vote in their own Cauſe? But the whole Court were of Opinion, that a Removal being an Act of an odious Nature, all Clauſes concerning it muſt receive a ſtrict Interpretation; and that therefore the Word *Majority* ſhould be underſtood of a Majority of the whole Corporation.

Another Queſtion raiſed, was, Whether not ſummoning to a Meeting Members *de facto* disfranchis'd, tho' afterwards upon Re-examination, it ſhould appear they were ſtill lawful Members, ſhould vacate Acts done

in thoſe Meetings? Court inclin'd to think it would not vacate them.

Some of theſe Points were directed to be found ſpecially.

Aſſievedo and *Cambridge.* B. R.

UPON a ſpecial Verdict the Caſe in Subſtance appear'd to be this: *Aſſievedo* had inſured ſo much Money upon a Ship called the *Ruth*, for ſuch a Voyage, in which Ship *Aſſievedo* is found by the Verdict not to be at all concerned, in Point of Intereſt. It happened that this Ship was taken by the Enemy, and kept in their Poſſeſſion for nine Days, and then, before it was carried *infra præſidia, viz.* a Place of Safety, it was retaken by an *Engliſh* Man of War: And whether or no, this was ſuch a Taking, as ſhould enable the Plaintiff to recover the Sum inſured againſt *Cambridge*, was the Queſtion.

Ship inſured, and taken by the Enemy. What *Taking* ſuch a one as to make the Inſurer liable.

It was argued by Dr. *Floyer* for the Plaintiff, and Dr. *Henchman* for the Defendant.

The Subſtance of the Argument for the Plaintiff was, That this was rather to be eſteem'd a Wager, than an Inſurance; *a ſpei emptio & venditio*, and not *a verſio periculi*, which in the Books of the Civil Law, is look'd upon as a proper Definition of an Inſurance; that therefore whatever Acts of Parliament are made about Inſurances, muſt be underſtood of proper Inſurances, and not Inſurances of the Goods of Strangers. That whether or no this is ſuch a Taking, as will diveſt the Property out of the Owners, is a Queſtion properly between them and the Retakers. But the Queſtion between *Aſſievedo* and *Cambridge*, is only whether the Ship be taken.

Argument *pro quer.*

Definition of an Inſurance by Civil Law.

This Caſe was compared to a Man laying a Wager, that he ſhould not be robbed in going to ſuch a Place; he is robbed, but taking ſome along with him, purſues the Robber, and recovers what he loſt; here, tho' the Money is recovered, yet the Wager is loſt.

So if the Wager had been, that ſuch Perſons ſhould not be married together; they are married, and afterwards divorced, *præcontractus cauſa*; yet the Wager is loſt.

It was ſaid further, That without this Expoſition, *Cambridge* would have two Chances, *viz.* that it is not taken, or that it is re-taken; but *Aſſievedo* would have but one, *viz.* the taking.

Grotius. *Grotius* in his Treatiſe *de Jure belli & Pacis, Lib.* 3. *cap.* 6. *ſect.* 3. lays this down as a Rule, *Placuit gentibus, ut is cepiſſe rem intelligatur, qui ita detinet, ut recuperandi ſpem probabilem alter amiſerit.* Now in our Caſe the Ship was for nine Days together in the Poſſeſſion of the Enemy.

Albericus Gentilis. By the Laws of *Spain* and *France*, a Continuance in the Poſſeſſion of the Enemy for twenty-four Hours, is an Alteration of the Property; and *Albericus Gentilis* tells us that a Pernoctation with the Enemy, would by our old *Engliſh* Law alter the Property. And *Grotius* immediately after the Place before-mentioned, ſays, That *recentiori Jure gentium inter* Europæos *Populos introductum videmus, ut talia capta cenceantur ubi per horas viginti quatuor in poteſtate Hoſtium fuerint.*

Argument *pro* Defendant. For the Defendant it was argued, that ſurely the Law would not put an Inſurer *non bona fide*, or a Wagerer, in a better Condition than one that inſured *bona fide*, and ſay that any taking ſhall enable a Wagerer to recover; but that no taking, but ſuch as alters the Property, ſhall enable a real *bona fide* Inſurer to recover.

This Queſtion in the Court of Admiralty would not have born a Diſpute; for the Law is clear, that not Length of Time, but the bringing *infra præſidia*, into a Place of Safety, is that which diveſts the Property. And for that the Caſe of —— and *Sands* in the late War was cited; where the Ship was taken by *Dubart* in the Year 1691 off of *Yarmouth*, carried to *Northbergen*, then ſold to *A.* afterwards ſold to *B.* *B.* ſends her to the *Weſt-Indies*, afterwards to *France*, and in the Year 1695 to *England*; where ſhe being retaken, it was reſolved that the Property was not alter'd. The Words of the Judgment in this, and the like Caſes, are very remarkable: *In præſenti pertinere*, is Part of the Sentence; ſo that the Sentence does not give a new Right, but confirms an old one.

In the Civil Law Alteration of Property is a Thing of an odious Nature; and therefore the Law even by a Fiction prevents it, as in the *Jus poſtliminium*; where in Order to preſerve Property in the Perſon returning *Jure poſtliminii*, the Law eſteems him never to have been a Captive, that ſo *manente cive maneant ſua bona.* *Jus Poſtliminium.*

Lud. Molin. *de Juſticia, in diſputatione* 118. *Prioribus Dominis reſtituenda quæ capta fuerint ab militibus, quibus numerantur ſtipendia. Bello res per vim uſurpantur, quando ad locum tutum &c.* *Lud. Molin.*

Petrinus Bellus, *Part* 3. *N°* 11. *de poſtliminii Jure reverſis. Inſuper ſciendum, hoſtibus capta non ſtatim hoſtium fieri. Milites dicunt*, that Things ſo long in the Poſſeſſion of the Enemy *eorum fieri: Jura hoc non dicunt, cum fieri poteſt* that the Property may be altered by the Poſſeſſion of a ſhorter Time, *& forſan* not alter'd *diuturniori poſſeſſione.* *Petrinus Bellus.*

Conſulat. del mare, cap. 287. a Book of great Authority, lays down the Security of the Place into which *deducuntur capta*, as that which cauſes the Alteration of Property; otherwiſe, after a proper Reward to the Retakers, *prioribus*, &c. *Conſulat. del mare.*

Albericus

Albericus Gentilis, in the Place quoted by the Advocate for the Plaintiff, has for his Title theſe Words: *Rem non fieri Hoſtis ante deductionem infra præſidia:* And his Determination is purſuant to his Title, and expreſly againſt what the Doctor quoted.

Grotius, lib. 3. *cap.* 9. *ſect.* 16. *Eæ vero res, quæ infra præſidia perductæ nondum ſunt, quanquam ab hoſtilus occupatæ, ideo Poſtliminii non egent, quia Dominum nondum mutarunt ex gentium Jure.*

As for the Quotation out of *Grotius, Recentiori Jure &c. Grotius* builds there upon a miſtaken Foundation; for he quotes *Albericus Gentilis, lib.* 3. and there is no third Book. Indeed in *cap.* 3. *lib.* 1. there is ſomething like it; but *Grotius* quoted there Part of an Argument without conſidering the Concluſion, which is directly againſt his Quotation, *perductionem omnino deſiderunt omnia* ſays the Book.

The Court ſeem'd to be of Opinion for the Defendant. They thought that the Plaintiff's being found by the Verdict to have no Intereſt in the Ship which he inſured, ſhould make no Difference.

1*ſt*, Becauſe they never would be more favourable to an Inſurer *non bona fide*, or Wagerer, than to one that inſured *bona fide*.

2*dly*, Becauſe to make a different Interpretation of this Deed from what is commonly put upon Policies of Inſurance, would be to run counter to the Deſigns of the Parties, who have made Uſe of the very ſame Words that are uſed in ſuch Policies; nay who have expreſly provided for this very Caſe, by thoſe Words, *Intereſt or no Intereſt*; which Words ſignify nothing at all, unleſs the *ſame* Loſs intitles to a Recovery where the Inſurer has no Intereſt, and where he has; and that the Property is not altered by the *taking*, they held to be very plain.

To be argued next Term by common Lawyers.

Queen and *Doughton.* B. R.

THE Caſe was this, A Man ſettled in a Pariſh removes into an extraparochial Place, where he gains a Settlement, then removes into another Pariſh, and there becomes chargeable. *Extraparochial Places.*

The Queſtion was, What this laſt Pariſh can do with him? Whether, by Virtue of that Act of Parliament, that enables them to ſend ſuch a one to the laſt Pariſh, where he was legally ſettled, they may ſend him to the Pariſh he lived in before ſuch Time as he removed to the extraparochial Place? For ſend him to the extraparochial Place they cannot, for want of Officers to receive him. What is to be done with Perſons ſettled in them.

Judge *Powell* took this to be *caſus omiſſus*, and what ought to be moved in Parliament; theſe extraparochial Places being many in Number, and of great Extent. *Salk.* 486.

Whitlock and *Squire.* B. R.

THIS was an *Indebitatus Aſſumpſit* for Goods ſold and delivered. The Defendant pleads in Bar, That before the Time of bringing the Action, he made a Tender of the Money, and that ever ſince the Tender *paratus fuit* to pay the Money. It was inſiſted upon, that the Plea in Bar was not compleat enough; for he ought to have pleaded, That he has been ready to pay the Money, not only ever ſince his Tender, but from the Time the Goods were delivered, *viz.* from the Time the Money firſt became due. And the Court ſeem'd to think this a material Omiſſion; for it may be the Money was demanded before the Tender, and then there is a good Cauſe of Action. *Indebitatus Aſſumpſit.* Pleading. *Salk.* 623. 3 *Salk.* 343.

Silk and *Hill.* B. R.

Writ of Inquiry. Whether, as in other Writs, there ſhould be fifteen Days between the *Teſte* and the Return.

THE Queſtion was, Whether in a Writ of Inquiry, it was not neceſſary, that there ſhould be fifteen Days between the *Teſte* and the Return, as well as in other Writs?

The Court ſeem'd not to think it neceſſary, even by Common Law; but if it were neceſſary by Common Law, that it was helped by the Equity and Intention of 13 *Car.* 2. *cap.* 2. *ſect.* 6.

They did not think it neceſſary by the Common Law; becauſe the Statute of *Articuli ſuper chartas*, *viz.* 28 *Ed.* 1. *cap.* 15. made in Affirmance of the Common Law, requires fifteen Days between the *Teſte* and the Return of all Summons and Attachments, as a reaſonable Time, in which the Party, in whatſoever Part of *England* he is, may be brought to Court: But now a Writ of Inquiry is no Summons, nor in Nature of a Summons; for both Defendant and Jurors are out of Court.

Stat. 28 *Ed.* 1. *cap.* 15.

Writ of Inquiry no Summons.

But ſuppoſing, That by the Common Law fifteen Days are required, yet they thought it might be within the Equity and Intention of the Statute of *Car.* 2. the Words whereof are, That in all Actions of Debt, and all other Perſonal Actions, and Actions of Ejectment, after an Iſſue joined therein to be tried by a Jury, and after *any Judgment* had in any ſuch Action, there ſhall not need to be fifteen Days between the *Teſte* and the Return of the Writs of *Venire facias*, *Habeas Corpora Juratorum*, *Diſtringas Juratores*, *Fieri facias*, *Capias ad Satisfaciendum*; and that the Want of fifteen Days between *&c.* in any ſuch Writ, ſhall not be a Cauſe of Error.

Stat. 13 *Car.* 2. *cap.* 2. *ſect.* 6.

Now the Words *any Judgment* ſuppoſe more than one Sort of Judgment; but after a Verdict, there are but two Sorts, *viz.* Final and Interlocutory Judgments. Now after an Interlocutory Judgment there never goes any Writ, but a Writ of Inquiry; therefore ſhould not this Statute extend to a Writ of Inquiry, the Word *any* would be improperly uſed.

After Verdict two Sorts of Judgments, Final and Interlocutory.

And then the Concluſion of the Statute, *Nor ſhall the Want &c. in any ſuch Writ, &c.* are Words ſo general, that they need not be tied up to the Writs before mentioned in the Statute; but may very well be underſtood of Writs of the ſame Nature, and following ſuch Judgments: If indeed the Concluſion had been, in any of the Writs *before recited*, the Statute could not have born ſuch an Interpretation.

But the *C. B.* differing in their Practice, in this Particular, from *B. R.* according to the Reports of the Clerks; it was judged proper, for the Judges of both Courts, to meet and eſtabliſh one uniform Rule of Practice.

DE
Termino Paſchæ,
11 *Ann.*
In Banco Regis.

Anonymus.

Order of Juſtices, when final.

IF ſo be, that a poor Perſon be removed from the Pariſh of *A.* to the Pariſh of *B.* by Order of two Juſtices, and the Pariſh of *B.* remove him to the Pariſh of *C.* the Order of the Juſtices removing him to the Pariſh of *B.* is become final; becauſe *B.* did not appeal to the Quarter-Seſſions.

Anonymus. B. R.

Order of Juſtice for the Maintenance of a Baſtard.

AN Exception was taken to an Order of Juſtices made for the Maintenance of a Baſtard Child, that it was not ſet forth in the Order, that the Baſtard Child was likely to become chargeable to the Pariſh; which is the very Foundation of the Juriſdiction of the Juſtices of Peace.

Baſtard Children preſumed likely to become chargeable.

Sed non allocatur; for the Law preſumes, that Baſtard Children will become chargeable; becauſe Nobody is bound to provide for them; and therefore this need not appear in the Order.

Another Objection was, That the Order was for the reputed Father to pay ſo much a Week for the Maintenance of the Child, until the Child ſhould come to the Age of eight Years; whereas the Order ought to have been conditional, if the Child continue ſo long chargeable.

Sed non allocatur; for ſuch Orders in the very ſame Form have often been allowed; and the Words of the Order, *Towards Maintenance of the Child*, do imply ſuch a Condition.

N. B. In Caſe of Baſtards, Complaint not neceſſary, to the giving Juſtices of the Peace Juriſdiction; as it is in the Caſe of Poor.

Complaint not neceſſary in Baſtards as in Poor.

Mitchell and *Reynolds*. B. R.

Vide ante, Pag. 27.

THAT the Bond was void, theſe Caſes cited: 2 *Hen.* 5. 3 *Levinz* 24. 3 *Cro.* 208, where if a Sheriff takes a Bond for his Execution Fees, it ſhall be void; but held that a Promiſe would have been good.

On the other Side it was ſaid, That an Infant could not, either by a parol Contract, or a Deed, bind himſelf, even for Neceſſaries, in a Sum certain; for ſhould an Infant promiſe to give an unreaſonable Price for Neceſſaries, *that* would not bind him; and therefore it may be ſaid, That the Contract of an Infant for Neceſſaries, *quatenus* a Contract, does not bind him any more than his Bond would; but only ſince an Infant muſt live, as well as a Man, the Law gives a reaſonable Price to thoſe, who furniſh him with Neceſſaries. 2 *Hen.* 5. was but the extrajudicial Opinion of a ſingle Judge; and then it was a total Reſtraint for a particular

Contracts of Infants.

Time; whereas this is but a Reſtraint in a particular Place. And for the Caſe of Execution Fees, upon the Statute of 28 *Eliz. cap.* 4. it was to prevent Oppreſſion; for the Sheriff might threaten the Perſons concern'd, that he wou'd not let them have the Execution, unleſs they would enter into ſuch a Bond.

The Judges retained the ſame Opinion, they had in a former Argument upon this Caſe.

And Judge *Eyre* ſaid, That if the Bond was void, the Reaſon muſt be, becauſe it was *malum in ſe*; and then ſeveral Cuſtoms, which ſtand upon the ſame Reaſon, and have been adjudged good, will be overthrown; and he was of Opinion, That the Jury had no more Power in an *Aſſumpſit*, where the Promiſe was certain, to mitigate the Damages, than they had in Caſe of a Bond; and if ſo, the Reaſon of the Difference between Bond and *Aſſumpſit*, that has been ſo much inſiſted on, falls to the Ground. *Vide Poſtea*, Hill. 11 *Ann.*

Widdrington and *Charleton.* B. R.

Appeal for Murder.

THIS was an Appeal, brought by the Wife, for the Murder of her Huſband; and upon a Demurrer, theſe two Points were inſiſted upon.

1*ſt*, That in the Writ, the t. in the Word *Appellat* was turned up; and therefore the Writ was inſenſible, and in the Eye of the Law no Writ at all. 3 *Cro.* 182, 467. *Mich.* 1693, *Ball* and *Roe.*

2*d* Exception was, That there was a Diſcontinuance; for in the Exigent, the Words *de morte ſui viri, unde eum appellat* were omitted; and therefore it did not appear, that this Exigent was ſued out in this Action.

To the 1*ſt* it was anſwered, That the turning up of the t. being no known Abbreviation, ſhould go for nothing.

To the 2*d* Point it was ſaid, That this was an Exigent, ſued out between the ſame Parties that the *Capias* was; and that there is no Variance between the *Capias* and the Exigent; tho' there is ſomething more contained in the *Capias*, then what is in the Exigent. And upon Prayer of Oyer of meſne Proceſs in this Action, this Exigent was recited, and thereby admitted to be the Exigent in this Suit.

It was argued further, That this Diſcontinuance, if it was one, was aided by Appearance; and that the Difference taken, That Appearance and Pleading-over does aid a Diſcontinuance, but not Appearance and Demurrer, was not Law. 9 *Hen.* 5. *fol.* 2. 2 *Cro.* 284. *Roll. Abr.* 789. *Co. Rep.* 4*th Vol. Boſſe*'s Caſe. 1 *Ventris* 7.

Serjeant *Cheſhyre* for the Appellant, Mr. *Reeves* for the Appellee. *Adjournatur.*

Rogers and *Wood.* B. R.

Releaſe Pleading.

IN this Caſe, a Releaſe of a Recognizance was pleaded to be, *ante Emanationem Scire facias*, which is naught; for it might be made before the Action brought, and the Plea true, and then the Releaſe is void. 5 *Co. Rep.* 70, *Hoe*'s Caſe. 1 *Inſt.* 265. *Goldsb.* 166. *Moore* 469.

D E

DE

Termino S. Mich.

11 *Annæ*,

In BANCO REGIS.

Ruſh and *Seymour*.

Amendments of Pleas. *Salk.* 47. 3 *Salk.* 31.

STATUTES of Amendment extend only to Pleadings of Record; therefore Pleadings while in Paper are amendable by Common Law.

Salk. 520.

Anciently all Pleas were *ore tenus* at the Bar; and then, if any Error was ſpied in 'em, it was preſently amended. Since that Cuſtom is changed, the Motion to amend, becauſe all in Paper, ſucceeded in the Room; and it is a Motion that the Court cannot refuſe: But they may refuſe it, if the Party deſiring it refuſe to pay Coſts; or the Amendment deſired ſhould amount to a new Plea.

Radcliffe and *Roper*. In Canc.

See this Caſe 2 *Caſes in Law and Equity*, 167, 181.

Vide poſt. Paſch. 13 Ann. *in Houſe of Lords.*

THIS being a Caſe of Conſequence, Sir *Simon Harcourt*, Lord Keeper, was aſſiſted by Sir *Thomas Parker*, Lord Chief Juſtice of *B. R.* Sir *Thomas Trevor*, Lord Chief Juſtice of *C. B. Powell*, Judge of *B R.* and Sir *John Trevor*, Maſter of the Rolls.

In this Caſe three Points reſolved; 1*ſt*, If an Eſtate be deviſ'd to be ſold for Payment of Debts, Surplus to a *Roman* Catholick, That this Surplus is in Nature of a real Intereſt, and as ſuch, void, by Act of King *William*. Reſolv'd 2*dly*, That the Word Purchaſe, in that Act, does include Deviſe. Reſolv'd 3*dly*, That a ſubſequent Deviſe to *A.* tho' *A.* be incapable of taking, is a Revocation of a precedent Deviſe to *B.*

The Caſe in Subſtance was;

A *Roman* Catholick deviſes his Land to four Truſtees, two Papiſts and two Proteſtants, to be ſold for Payment of Debts and Legacies; and by a Codicil, amongſt other Legacies, he deviſes the Remainder, whether in Lands or Perſonal Eſtate, to two Papiſts and their Heirs.

For a more a more full State of the Caſe, *Vide poſt.*

Now, Whether this was a good Deviſe, ſo as to diſinherit the Heir at Law, being a Proteſtant, notwithſtanding the 11th and 12th of *Will.* 3. *chap.* 4. made for the preventing the Growth of Popery, was the Queſtion.

For the better underſtanding the Force of the Argument on each Side the Queſtion, it will be proper to premiſe the aforeſaid Act.

By the ſaid Act it is provided, 'That from and after 'the 29th of *September* 1700, if any Perſon educated 'in the Popiſh Religion, or profeſſing the ſame, ſhall 'not within ſix Months after he or ſhe ſhall attain the 'Age of eighteen, take the Oaths of *&c.* and ſubſcribe '*&c.* every ſuch Perſon ſhall in Reſpect of him or her'ſelf only, and not to or in Reſpect of any of his or her 'Heirs or Poſterity, be diſabled and made incapable to 'inherit or take, by Deſcent, Deviſe or Limitation, in

Stat. 11 and 12 *Will.* 3. *cap.* 4. for preventing Growth of Popery, Argued largely upon.

'Poſſeſſion, Reverſion or Remainder, any Lands, Tene-
'ments or Hereditaments; And that during the Life of
'ſuch Perſon, or until he or ſhe do take the ſaid Oaths,
'and ſubſcribe *&c.* the next of his or her Kindred,
'which ſhall be a Proteſtant, ſhall have and enjoy the
'ſaid Lands, Tenements and Hereditaments, without
'being accountable for the Profits, by him or her re-
'ceived during ſuch Enjoyment thereof, as aforeſaid;
'But in Caſe of any wilful Waſte committed on *&c.* by
'the Perſon ſo having or enjoying the ſame, *&c.* the
'Party diſabled, his or her Executors and Adminiſtra-
'tors, ſhall recover treble Damages for the ſame, *&c.*
'And that from and after the 10th of *April* 1700, every
'*Papiſt*, or Perſon making Profeſſion of the Popiſh Re-
'ligion, ſhall be diſabled, and is hereby made incapable,
'to purchaſe either in his or her own Name, or in the
'Name of any other Perſon or Perſons, to his or her
'Uſe, or in Truſt for him or her, any Manors, Lands,
'Profits out of Lands, Tenements, Rents, Terms or He-
'reditaments; And that all and ſingular Eſtates, Terms,
'and any other Intereſts or Profits whatſoever out of
'Lands, from and after the ſaid 10th of *April*, to be
'made, ſuffer'd, or done, to or for the Uſe or Behoof
'of any ſuch Perſon or Perſons, or upon any Truſt or
'Confidence, mediately, or immediately, to or for the
'Benefit or Relief of any ſuch Perſon or Perſons, ſhall
'be utterly void and of none Effect, to all Intents,
'Conſtructions and Purpoſes whatſoever.

Argument for *Roman* Catholicks.

It was argued in Favour of the Deviſe, That there was nothing in the Act to prevent Papiſts from ſelling their Land; but the Deſign of the Act was rather to oblige them to ſell, and turn their Real into Perſonal Eſtate: For the Continuance of ancient Seats in the Hands of Papiſts, was eſteemed the chief Bulwark and Support of Popery; thither reſorting Jeſuits, *&c.*

If a Roman Catholick may ſell, he may certainly give away the Money ariſing from the Sale to a Catholick.

If now a Papiſt may do this in his Life-time, Why may he not, as to the Reaſon of the Thing, appoint this to be done, by Truſtees, after his Death?

If it be objected, That tho' the Eſtate, being by the Will appointed to be ſold, muſt be in Common Law looked upon as Perſonal Eſtate, yet it is Land in Equity; becauſe it is a known Rule in Equity, That the Reſiduary Legatees, may come into the Court of Chancery, and pray that they may have the Land, upon their paying the Debts and Legacies, for Payment of which the Land was to be ſold. Maxim of Equity.

It may be anſwered, That if a Perſon has his Liberty to take either Land or Money, the Court will not compel him to take the Land; for Where then would be his Liberty?

Beſides, for the Court, as this Caſe is, to decree him the Land, were to take from him, what the Law allows him to take and enjoy, and give him *that*, which an Act of Parliament diſables him from taking; and conſequently would altogether overturn the Will of the Teſtator. Neither is this the only Caſe, where this Rule of Equity may happen to fail. For ſuppoſe the Surplus were deviſed to an Alien, whom the Law diſables to take Land, Shall this Court decree him the Land, *that*, which the Law will not ſuffer him to enjoy? Should this be eſteem'd as a Real Eſtate, it would follow, That a Roman Catholick could not charge his Lands, with Portions, for younger Children of his own Perſwaſion, or Payment of his Popiſh Creditors; becauſe, by the ſame Rule of Equity, if the Land were but ſufficient for the Payment of Debts, *&c.* the Creditor might come into a Court of Equity and pray the ſame Thing.

If it be objected, That the Teſtator himſelf calls it Land; for in the Codicil, he deviſes the Remainder, whether *in Lands &c.* It may be anſwered, That this

was

was but the Flouriſh of a Lawyer's Pen; and that if the Will were complied with, there could be no Remainder of any Real Eſtate.

Thus far it was argued, upon Suppoſition, That a Roman Catholick was, by this Act of Parliament, diſabled from deviſing Real Eſtates to a Papiſt. But that he was not, it was argued to this Effect:

That this Act of Parliament, as to the firſt Clauſe of it, which reſpects thoſe under the Age of Eighteen, did not create an abſolute, but a conditional Diſability only; *viz.* if after the Age of Eighteen, he did not do ſo and ſo; *&c.* and if he did not, it did not even then create a total and abſolute Diſability; but only made, *quaſi*, a Sequeſtration of the Profits during Life, or Non-compliance.

Then comes the ſecond Clauſe, which creates in every Papiſt, an abſolute Diſability to purchaſe Lands, *&c.*

Purchaſe. Legal Import of it.

It is true that ſpeaking as a Common Lawyer, the Word *Purchaſe* ſtands oppos'd to Deſcent, ſo that whatever Eſtate a Man does not come to by Deſcent, he does by Purchaſe, and then Purchaſe neceſſarily includes Deviſe. But it is not always taken in ſuch a comprehenſive Senſe; and even in this Court, the Word *Purchaſe* is frequently uſed by Way of Contradiſtinction to voluntary Settlements. And that it is here to be underſtood in the vulgar and more common Acceptation of the Word, appears from the former Clauſe, reſpecting Infants; where the Act makes Uſe of the Words *Deviſe*, *Limitation* and *Deſcent*. Now had they underſtood the Word *Purchaſe* in the legal Acceptation, that Word alone might have ſupplied the Place both of Limitation and Deviſe.

Beſides, the Words in the Act immediately ſubſequent to purchaſe *viz.* in his Name, or to his Uſe, *&c.* ſeems to reſtrain and confine the Word *Purchaſe*, to ſome Act

to be done by the Party, to whom the Eſtate moves; and not from whom.

And then for the third and laſt Clauſe, *viz.* That all and ſingular Eſtates, Terms, and other Intereſts, or Profits whatſoever out of Lands, from and after the 10th of *April*, to be made, ſuffer'd, or done, *&c.*

It was argued, That this Clauſe ſhould not make a Deviſee a Purchaſer; becauſe it was not an independent Clauſe, but explanatory of the foregoing; the Word *ſuch* plainly coupling it to *that*, to which it was only the Addition of a Penalty. For the preceding Clauſe incapacitating a Papiſt to purchaſe, it might be aſked, but what if he ſhould? then comes this Clauſe, and anſwers the Queſtion, ſaying it ſhould be void.

To underſtand this Clauſe in another Manner, were to ſet one Part of the Act, at Variance with the other. For whereas the firſt Clauſe creates but a conditional Diſability of taking by Deviſe; *viz.* if they do not ſo and ſo, after the Age of eighteen; *&c.* this Clauſe thus underſtood makes an abſolute one.

All this was ſtrengthened by obſerving, That Penal Laws muſt receive the moſt mild and favourable Interpretation.

Argument for the Proteſtant Heir at Law.

On the Side of the Proteſtant Heir at Law, it was inſiſted, That this was a real Deviſe, or a Deviſe of Land.

For as to the Objection, That this Court could not, in this Caſe, decree the Land to the reſiduary Legatee; becauſe that would be for this Court to decree him what he is by this Act unqualified for enjoying:

It was anſwered, That before this Act of Parliament it would have been Land in Equity; and ſurely, it cannot be pretended, That there is any Thing in the Act to alter it. It would be very ſtrange, if this Court ſhould, after an Act of Parliament made for the preventing the Growth of Popery, make one Rule for a Proteſtant, and another in Favour of a Papiſt; and look upon

the ſame Deviſe, as Real, if made to a Proteſtant; but as Perſonal, if to a Papiſt.

As for the Caſe put of Remainder to an Alien; it was anſwered, That an Alien may take, but not for his own Advantage, but that of the Crown, who, in that Caſe, would have the Land.

Profits out of Land, will at Law paſs the Land itſelf.

Land would even at Common Law paſs by the Words Profits out of Land: But here the Teſtator himſelf in his Codicil calls it Land, which makes it a ſtronger Caſe; and then the Word Remainder, which imports a Fee, according to *Lutwyche* 762, and makes it go to the Heirs, not Executors, ſhews that it has the Nature of a Real Eſtate, and was eſteem'd of as ſuch, by the Teſtator.

As for the Objection, That this would fall hard upon younger Children and Creditors of Papiſts; it was anſwered, That the Deſign of the Act was to lay Difficulties upon Roman Catholicks. And beſides, this Caſe differs from *that*; becauſe it was here the Caſe of a Reſiduary Legatee: And whether as to Creditors, and younger Children, it might not be conſider'd as Perſonal Eſtate, tho' Real to the Reſiduary Legatee; and whether becauſe the Reſiduary Legatees might pray to have the Land, the Creditors might do ſo too, the Counſel of the ſame Side, differ'd in Opinion.

Latter Deviſe tho' void, yet a Revocation of a former, if inconſiſtent.

And becauſe the Counſel for the Proteſtant Truſtees had argued, That if the Deviſe was void as to the Popiſh Truſtees, the whole ſhould go to them: It was urged by the Counſel for the Proteſtant Heir at Law, That the Codicil was a Revocation of the Will. And to this Purpoſe, 1 *Rol. Abr.* 614. was cited, where Land is deviſed to one, and after, the ſame Land is deviſed to the Poor of the Pariſh, who are incapable of taking; and it was held, notwithſtanding, the laſt Deviſe was a Revocation of the former.

As to the Act of Parliamnent, That a Papiſt was diſabled by it, from taking Land by Deviſe, it was ar-

gued from the Deſign of the Act in general; which would be wholly vain, and by no Means anſwer the End it was deſigned for, unleſs this Interpretation was put upon it. Proteſtant Heirs of Popiſh Anceſtors, will be always diſinherited; and it will be very eaſy to conceal a Gift under a Deviſe; one need only ſuppoſe a Papiſt makes his Will, and enters into a Bond not to revoke it.

It ſeems ſtrange to imagine, the Legiſlators intended to leave Roman Catholicks free to take Land by Deviſe, a Way that coſts them nothing; and tie them up from taking Land by Purchaſe, a Way, in which they are to pay a valuable Conſideration for it.

It had been a more reaſonable Intention, to have incapacitated the Papiſts, from taking Land, this Way, of all others. For making a Will is a ſerious Act, done often in *extremis*, at a Time when Men are more than ordinarily ſolicitous, ſo to diſpoſe of their Poſſeſſions, as they think, and will be told, at leaſt, by their Prieſt, is moſt for the Good of their Souls, *viz.* to thoſe of their own Communion.

Unleſs this Interpretation prevails, grown Papiſts will be in a better Condition than thoſe under Age, which ſurely was never the Intention of the Law-Makers.

As for its being a Penal Statute; the Queſtion is not about extending Penalties, but whether the Act ſhall not be in a Manner uſeleſs.

Beſides, Penal Laws made for the preventing publick Miſchiefs, have been, and may be extended. As the Statute of 1 *Rich.* 2. that gives an Action of Eſcape againſt the Warden of the *Fleet* only, extended by Equity, to all Goalers whatever. Statute of Petty-Treaſon for a Servant to kill his Maſter; extended to Miſtreſs.

1 *Rich.* 2. *Eſcape* by Equity. *Petty-Treaſon* by Equity.

The Word *Purchaſe* in a legal Senſe includes Deviſe; and Legiſlators may well be ſuppoſed to be acquainted with the legal Import of Words.

2 *Caſes in Law and Eq.* 177.

But

Third Clauſe of the Act an independent Clauſe, and not explanatory of the former.

But the *third Clauſe* was *that* relied upon, which (it was ſaid) was not explanatory, but an independent Clauſe, referring to thoſe above the Age of eighteen. For as for the Word *ſuch*, that did not make it explanatory of the preceding Clauſe; but only referr'd it to the Perſons ſpoken of before, *viz.* Perſons profeſſing the Popiſh Religion. And beſides, it has a new Commencement, a plain Mark of its being a new independant Clauſe. But ſuppoſing it an explanatory one, certainly the precedent Clauſe is to be govern'd by the explanatory one, and not *vice verſa*.

And, without Doubt, the Words in the third Clauſe do include Deviſe; for the Words *Profits out of Lands*, may be conſtrued of Profits ariſing from Sale, as well as continuing Profits. Certainly a Deviſe to a Papiſt, will fall under theſe Words, *Eſtates, Terms, Intereſts, &c.* to be made, done, or ſuffer'd, to the Uſe, Benefit and Relief of Papiſts.

Note, It was ſaid, That a Purchaſe for a valuable Conſideration could not be included under the Word *Relief*; becauſe the Worth being paid, it could not be deem'd any Relief. *Contra* of a Will.

Vide poſt. Paſch. 13 Ann. *in Houſe of Lords.*

Lord Lanſdown's *Caſe.* B. R.

THIS was an Ejectment brought by three Coheirs againſt the Lord *Lanſdown*. And upon a Trial at Bar, two Points aroſe, which at length came to be found ſpecially; as appears from the following Notes of what paſs'd at the Trial at Bar.

The Earl of *Bath*, the common Anceſtor, made his Will dated 24th of *October* 1684, under which Will the Lord *Lanſdown* claims: This Will afterwards in 1696, ſtood revoked, by Act in Law, as to all the Real Eſtate deviſed by it; but not the Perſonal.

Some Years after he told Mr. *Nicholls*, then in the ſame Coach with him, that he deſigned to republiſh his Will. The Day after, in the Preſence of ſeveral People, he brings with him his Will in one Hand, and two Codicils of the ſame Import in the other, and ſays, *This* is my Will, by which I have ſettled my Eſtate; and *This* I deſign as a Codicil to my Will, to be taken as Part and Parcel thereof. Then the Codicils were duly executed, according to the Statute of Frauds and Perjuries; and the Will and one Codicil were ſealed up in one Paper, with the Earl of *Bath*'s Seal, and the other Codicil in another Paper, with the ſame Seal; and theſe Papers were, after his Death, produced by thoſe, with whom they were depoſited.

Neither Will, nor Codicil were read at the Time of Republication.

In the Codicil he takes Notice of his Will in the following Manner;

Whereas I made my Will in 1684, *which I do not intend wholly to revoke; but in reſpect of many Alterations ſince happening, &c.*

Whether this amounted to a Republication of his Will; the Will not being ſeal'd and ſubſcribed, as the Statute for preventing Frauds *&c.* was the Queſtion. Doctrine of the Republication of Wills.

This Point, before it was found ſpecially, was ſpoken to, by the Counſel for the Plaintiff, to this Purpoſe.

That when the Will was revoked, it became a meer Scroll; a Paper, indeed, in which there was Writing, but of no Force, and no more capable of becoming a Will, than any other Paper whatever.

In 1 *Roll. Abr.* 618, it was held, even before the Statute of *Frauds and Perjuries*, That the inſerting of a new Legacy, or making another Executor, did not amount to a new Publication.

2 *Vern.* 625, 722.

It appears from the Caſe of Sir *Litton Strode* and Lady *Falkland*, that the making a Codicil, *quatenus* a Codicil, is no new Publication. For in that Caſe, a Man by his Will deviſes all his Lands, afterwards he purchaſes other Lands, and after that he makes a new Codicil to his Will, executed according to the Statute of *Frauds and Perjuries*; and whether this was a new Publication of his Will, ſo as to take in the Lands after-purchas'd, was the Queſtion, and reſolved by Lord *Cooper*, Chief Juſtice *Trevor*, and Judge *Tracy*, that it was not; for ſince the Statute of *Frauds*, the ſame Forms are neceſſary to the republiſhing of a Will, as to the firſt making.

Same Forms neceſſary to republiſhing as making a Will.

Caſe of *Cotton* and *Cotton*, 2 *Vern.* 209. *contra.*

In *Trevanion*'s Caſe, a Man holds up a Paper, and ſays, this is my Will; where it was held, that theſe Words did not make it his Will, becauſe it was not read; and this before the Statute of *Frauds*.

That no Parol Declaration referring to a Paper in Writing, would make a Republication, even before the Statute of *Frauds*, is plain from the Caſe of *Bret* and *Rigden*, in *Plowden*'s *Commentaries*. And here is nothing pretended in Writing, that imports a Republication; for as for the Words in the Codicil, no one that reads them, can think they do: And for the Parol Declaration, it was literally true; for it remained a Will, as to his Perſonal Eſtate.

Plowd. 342.

Laps'd Legacy. 2 *Vern.* 722.

Second Point was, That ſuppoſing the Will republiſh'd, yet it cou'd convey no Title to the Defendant; becauſe he claims as Iſſue Male, to the Deviſee in Tail, *Bernard Granville*, who died, living the Teſtator; and therefore it was a laps'd Legacy.

And of this Opinion was the Court.

But the Counſel inſiſting that this was a Deviſe in Tail, and therein different from the Caſe of *Bret* and *Rigden*, in *Plowden*; and that in this Will, the Teſtator declares, that he ſo devis'd it for the Preſervation of his Name and Family; and that the Republication was after the Teſta-

tor knew of the Death of *Bernard Granville*; and therefore could not intend that *Bernard*, who was dead, could take; and deſiring, upon their Reputation, a ſpecial Verdict, it was granted.

Caſes cited in reſpect to this ſecond Point, were *Fuller* and *Fuller*, *Cro. Eliz.* 422. which Caſe is alſo taken Notice of in *Moore*'s *Rep. Steed* and *Burier*, in which Caſe, reſolved, by both Courts, That there is no Difference between a Deviſe in Fee, and in Tail, as to this Purpoſe.

The Counſel for Lord *Lanſdown* offer'd in Evidence, Parol Declarations of the Teſtator, that it was his Intention, the Iſſue Male ſhould take by the Will: But this was oppos'd *per* Counſel for the Plaintiffs; and refus'd by the Court.

2 Vern. 98, 337, 339. *Evidence.* Parol Declarations not to be allow'd as Evidence to explain Wills, unleſs in Affirmance of the Common Law.

Caſes quoted as to this Purpoſe, 2 *Cro. Rep. Molineux* and *Molineux*; where held, that if a Will refers to a Thing in Writing, that it is altogether as good, as if the Writing referr'd to, were inſerted in the Will *verbatim*: But *contra*, where the Will refers to a Parol Declaration; for no Regard to be given to it, tho' referr'd to by the Will. 2 *Leon.* 70. 5 *Co. Rep. Cheyney*'s Caſe. *Rigden*'s Caſe, *Plowd. Com.* Caſe of *Berty* and *Falkland*, before Lord *Somers*. The Caſe of *Littlebury* and *Buckley*, which was to this Purpoſe: A Rule had obtain'd in Equity, that where there are ſpecifick Legacies, and no Reſiduary Legatee, That there the *Reſiduum* ſhould be divided according to the Statute of Diſtributions, contrary to the Common Law, which gives it to the Executor: Now here the Court did receive Parol Evidence, to prove it to have been the Intention of the Teſtator, that the Executor ſhould have the *Reſiduum*; and that it ſhould not be divided. But the Reaſon, why the Court did this, is expreſly aſſigned to be, becauſe it was in Affirmance of the Common Law; whereas here the Evidence is offer'd in Contradiction to the Common Law, *viz.* to enable

2 Vern. 648, 737. 2 *Caſes in Law and Equity* 9.

enable the Iſſue to take by Purchaſe, who by Rules of Common Law was to take by Limitation. This Point was likewiſe fully ſettled in the Caſe of *Litton* and *Falkland*, that went thro' the Houſe of Lords.

2 *Vern.* 624, 625.

It was obſerved, that moſt of theſe Caſes, being before the Statute of *Frauds and Perjuries*, ſtood only upon the Statute for Wills in Writing, and muſt receive an additional Force from the Statute of *Frauds*.

In Wills Parol Evidence good by Way of Averment, where two Things, or two Perſons are of the ſame Name. 2 *Vern.* 593.

Indeed if a Man deviſes an Eſtate to his Son *John*, and there are two Sons of that Name; or if a Man deviſes the Manor of *Dale*, and there are two of that Name; Parol Evidence ſhall be allow'd to explain which of the two the Teſtator meant.

Reaſon of the Law in this Point clear and ſtrong; for if Parol Evidence be once allowed to explain a Will, and give it another Senſe, than what can be collected from the Words of the Will ſtanding alone, What Purchaſer under a Will can be ſafe? Or what Lawyer can give his Opinion upon a Point that depends upon a Will?

Queen and *Borough of Aldborough.* B. R.

Mandamus to reſtore a Capital Burgeſs.

THIS was a *Mandamus* to the Mayor and Burgeſſes of *Aldborough*, commanding them to reſtore one *Sparhawk* to the Office of Capital Burgeſs of that Borough.

To this they return, for Cauſe of not obeying the Writ, That he had not taken the Sacrament within a Year before the Election, according to the Statute of 13 *Car.* 2.

Stat. 13 *Car.* 2. call'd *Qualification Act.*

To this Return it was objected, by Sir *James Mountagu*, That the Act of 13 *Car.* 2. as to taking the Sacrament, was only directory, as to the Electors, what Sort of Man they ſhould chooſe, and did not make a Nullity of the Office.

And

And to maintain this Point, the Caſe of the King and *Larwood*, *Hill.* 6 *W.* 3. was quoted, which was an Information againſt *Larwood*, for not taking upon him the Office of Sheriff of the City of *Norwich*, of which Office he was capable; he pleads to the Information, that he had not taken the Sacrament within a Year, *&c.* and ſo was incapable; Demurrer, and Judgment on the Side of the Information. This a Caſe in Point; for whether the not receiving the Sacrament created an Incapacity, was the Foundation of the Demurrer. *Vide Salk.* 167.

Court. This Interpretation of the Act, was never offer'd to any Court, before the Caſe of *Whitehorn*; and ſhould it prevail the Act would ſignify very little.

As to the Authority of the Caſe of the King and *Larwood*; it amounts to no more than this, That a Man ſhall not defend one Crime by another; *viz.* his not taking upon him the Office, by his not receiving the Sacrament.

See *pag.* 64. Perſon put into an Office not having receiv'd Sacrament, in Point of Law no Officer.

A ſecond Objection to this Return was, That it did not ſhew, that this Corporation was in Being, at the Time, when this Act was made. *Sed non allocatur*; for the Act extends to all Corporations created before and after. 2 *Ventris* 243.

Stat. 13 *Car.* 2. extends to all Corporations created before and after that Act.

A third Objection to this Return was, That it did not appear, that the Perſon was ſummon'd to ſay what he could for himſelf.

To this it was anſwered, That this Return amounted to a ſpecial *non electus*, which muſt be as good as a general one, becauſe it did imply it. And to prove a general *non electus* would have been a good Return, theſe Authorities were quoted: *Dunch* and the City of *Norwich*, *Eaſter* Term 1706. 1 *Siderfin* 209, reported likewiſe by 1 *Keble* 716, where the Return was *non debito modo electus*; held there indeed, That the *Debito modo*

Returns to *Mandamus's*.

Vide Salk. 436.

was wrong, becauſe it made the Party a Judge of the Legality of the Choice; but without that, the Return had been good. 1 *Shower's Rep. Farrington's* Caſe, the Return was *nunquam fuit electus & perfectus*; Leave was given to amend the Return, by ſtriking the *perfectus* out.

Parker Chief Juſtice.

Whether Corporations can expel Members without firſt hearing them?

I think it very proper, a Corporation ſhould hear a Man before they expel him. No Inconvenience in holding Corporations to this; for it can only keep thoſe in, that are qualified to ſtay in: And if Corporations will unjuſtly, after hearing, expel Men, it aggravates the Fault; becauſe done againſt Knowledge. It is true the Party has an Action to be reſtored; but then, in the mean Time, he is wrongfully kept out.

Powell. Very reaſonable that Corporations ſhould do this; but whether by Law we can oblige them to it, is the Queſtion. If a general *non electus* had been a good Return, why not that which amounts to a ſpecial *non electus?* Surely the adding the Reaſon does not make the Return worſe.

No Opinion given in this Point.

Parker and *Lilly.* B. R.

Chancery. If after Aſſignment of a Bond, the Aſſignor gives a Warrant of Attorney to acknowledge Satisfaction upon Record, this relievable only in Chancery.

A MAN aſſigns his Bond to *B.* *B.* ſues this Bond in the Name of the Aſſignor, has Judgment; a Writ of Error brought, and Judgment affirmed; after Execution taken out, but before it was returned, the Aſſignor gives a Warrant of Attorney to confeſs Satisfaction upon Record, which is accordingly done, and upon this a *Superſedeas* taken out to ſtop the Execution; and now the Court was moved to ſet aſide the *Superſedeas.*

1

1ſt,

1*ſt*, Becauſe after Aſſignment, the Court will not ſuffer the Aſſignor, to give a Warrant of Attorney, to acknowledge Satisfaction; and for this 1 *Keble* 803, was quoted.

But, as to this, it was ſaid, that the Aſſignment was Matter of Equity, and was more proper for Chancery than for this Court; and a late Caſe was quoted in the Common Pleas, where a Bond was taken in Truſt for another, and the Obligee dying while the Suit upon this Bond pended, it was held that *Ceſtuy que Truſt* could not go on in the Action; becauſe this Court could not take Notice of the Truſt, or of any other Plaintiff, than who appear'd to be ſo upon Record.

Courts at Law can take no Notice of Truſts, but Courts of Equity only.

And of this Opinion was the Court.

But then 2*dly*, in Favour of the Motion, it was further inſiſted upon, that after Execution was gone out, it was not regular to grant a *Superſedeas*, without a Judge's Hand.

Practiſe. Whether, after Execution, a *Superſedeas* can iſſue, without a Judge's Hand?

Court took Time to inquire into the Practiſe.

Ongly and *Peed.* B. R.

THIS was a Writ of Error out of the Common Pleas; and the Caſe was no more than this, A Man deviſes his Land to *A.* and his two Brothers *ſucceſſive*; but not to be enter'd upon or enjoy'd by any of them, until after Marriage. *A.* was by the Verdict found to be the eldeſt Brother: And, Whether this Will was void, by Reaſon of the Uncertainty, *who ſhould take*, was the Queſtion?

A Deviſe to *A.* and his two Brothers *ſucceſſive*, not void for Uncertainty; for the Law directs who ſhall take firſt.

The Court were all of Opinion, That the Will was a good Will, and certain enough; for being in the Caſe of *Brothers*, the Common Law was a Guide to the Expoſition of the Word *ſucceſſive*; *viz.* that the eldeſt ſhould, after his

his Marriage, enjoy it *firſt* for his Life, *then* the ſecond, and *then* the third; eſpecially, when *he* who was named in the Will, is by the Verdict found to be the eldeſt Brother: Had the Deviſe been to *A. B.* and *C.* to take *ſucceſſive*, it would have been void for the Uncertainty.

Caſes quoted in the Argument, were *Co. Litt.* 377. *Hobart* 313. *Raym.* 82, 83. *Styles* 434, 435. *Moore* 636.

Sawkill and *Warman.* B R.

Inſimul computaſſet.

THIS was an *Inſimul Computaſſet:* The Count, upon which the Queſtion aroſe, was, That upon an Account taken the 9th of *Jan.* the Defendant appearing to be indebted to the Plaintiff, in the Sum of 150 *l.* promiſs'd Payment, upon the 30th of *Jan.* Defendant pleads *non aſſumpſit infra ſex Annos.* To this it was demurred; becauſe the ſix Years are to be computed from the Time of the Performance, and not of the Promiſe; and therefore this Plea might be true, and yet the Plaintiff not barr'd by Statute of Limitations; and therefore the Plea ſhould have been, *actio non accrevit infra ſex annos.* And of that Opinion was the Court.

Pleading. When the Plea ſhould be *Actio non accrevit infra ſex annos*, inſtead of *Non aſſumpſit.*

In *Hillary* Term following, there was another Caſe, parallel *in omnibus.*

Caſes quoted were, *Buckler* and *Moor*, *Mod. Rep. Cro. Car.* 139.

See *Tawny*'s Caſe, *Salk.* 531.

Inhabitants of Ware. B. R.

Pariſh Taxes. A Rate cannot be made to reimburſe an Overſeer of a former Year.

IN *Tawny*'s Caſe, which does not materially differ from this, the Queſtion was, Whether a Rate might be made to reimburſe an Overſeer of a former Year; and reſolved it could not, and upon this Ground, That the preſent Inhabitants are, by Law, bound only to the Maintenance of the preſent Poor; for at that Rate no Body, that comes into a Pariſh, can tell what he is to truſt to.

Company of Stationers, ver. — B. R.

THIS was a Point of Law, directed out of Chancery, for the Opinion of the Judges of *B. R.*

Iſſue directed out of Chancery.

The Queſtion was, Whether the Grant of the Crown, to the Company of *Stationers*, to have the ſole printing of Almanacks, provided they were licenſed by the Archbiſhop of *Canterbury* and Biſhop of *London*, were a good Grant; or void, becauſe againſt the Liberty of the Subjects?

Queſtion, Whether Patent to Company of Stationers, for ſole printing Almanacks, good, or not?

Againſt the Patent it was argued, That Printing was an handicraft Trade; and therefore no more to be reſtrained than other Trades. For to ſay, That the Crown has a Power over all Trades, that may prove *malum per accidens*, wou'd carry the Prerogative of the Crown, no Body knows whither.

Argument againſt Legality of the Patent.

Where the Crown has no Right of Copy, it cannot appropriate the Printing to particular Perſons: But where the Crown has a Right to the Copy, there it may; as in the Caſe of the Tranſlation of the *Engliſh* Bible, and the Year-Books. 2 *Chan. Rep.* 76. gives the King an Intereſt in the Statute Book; and the ſame may be ſaid of the Book of Common Prayer.

In 1 *Mod. Rep. Seymour*'s Caſe, it is indeed ſaid, That an Almanack is but a Copy of the Calendar, out of the Book of Common Prayer.

1 *Mod. Rep.* 256.

In anſwer to this, *res aliùs repetenda.*

Before the Reformation, the Book of Common Prayer was ſubject to the Alteration of the Ordinary; and there were almoſt as many Common Prayer Books, as Dioceſes, as appears from *Linwood* 103. *Oxford* Edition. Every Biſhop had the appointing of the Feaſts, that were to be obſerved in his own Church and Dioceſe. In the Year Book of 9 *Hen.* VII. 14. b. it is ſaid, That

An Almanack no Part of the Calender of the Book of Common Prayer.

the Calendar is of no Authority. So that before the Reformation, the Calendar could be no Creature of State: And as for the Almanack's being ſaid to be a Copy of the Calendar, no Reaſon for it; indeed both are Regiſters of Time, the one for prophane, and the other for ſacred Uſes.

Monopolies. Then it was argued, That the Patent was void, becauſe introductory of a Monopoly. 2 *Inſt.* 47. where Monopolies ſaid to be contrary to *Magna Charta*. *Regiſter* 105, 107. about Monopolies. *Moore* 674. Liberty of the Subject precarious before *Magna Charta*. That Statute does not annul Monopolies then in being; but prevented any more. 3 *Mod.* 76, *Darcy* and *Allen*. A Grant to make all Playing Cards, judged to be a Monopoly.

Argument in Favour of the Patent. For the Patent it was argued, That the Crown had a peculiar Right and Intereſt in the Book of Common Prayer, and conſequently in the Calendar, which is a Part of it; and the making ſome Additions to it, ſhall not diveſt the Crown of their Intereſt in it.

Since the Art of Printing was found out, it has been more under the Care of the Crown, than any other Art whatſoever. 1*ſt*, Becauſe it was an Art introduced by the Care of the Crown; ſo ſaid in *Carter*'s Caſe, which gives the Crown a Property in the Trade. 2*dly*, Becauſe of the Greatneſs of the Inconvenience, that may redound to the Publick, from the Miſmanagement of the Preſs. *Carter Rep.* 89, the Controverſy was about the Printing *Rolle*'s *Abridgment*; decreed in Chancery, in Favour of the Patentees, and this Decree confirmed in the Houſe of Lords. *Mich.* 24 *Car.* 2. the Queſtion was about the Patent for ſole Printing of all Law Books; Judgment againſt the Patentee in *B. R.* for the Uncertainty of what ſhould be eſteemed a Law Book: But this Judgment was reverſed in the Houſe of Lords. 1 *Mod.* 256. *Seymour*'s Caſe, full in Point, the ſame Objections made as here. In 34 *Car.* 2. Company

Law Books. Patent for ſole Printing Law Books, judged good in the Houſe of Lords.

of *Stationers* ver. *Skinner*; Patent allowed for *Primers*, *Pſalters*, *Pſalms* and *Almanacks*. 34 *Car.* 2. in *Chancery*, Company of *Stationers* ver. *John Gale*; no Decree, indeed, for Printing *Pſalms*, *Pſalters* and *Almanacks*; but the Reaſon was, becauſe the Perſon controverting the Patent ſubmitted without. 25 *Jan.* 34 *Car.* 2. *Company* ver. *Wright*, Patent for Printing *Pſalms* allowed. *Mich.* 33 *Car.* 2. *Company* ver. *Lee*, another Patent for *Pſalms*. *Trin.* 12 *W.* 3. *Company* ver. ——— Patent for *Almanacks*. In Stat. 9 *Annæ*, this very Patent, now in Queſtion, taken Notice of. 3 *Cro.* 227. *Almanacks* of Authority in Trials.

Court. Patent for ſole Printing of Law Books, not now to be ſhaken, having had the Sanction of the Houſe of Lords: Monopolies odious; this Caſe therefore, to be diſtinguiſh'd, by deriving to the Crown ſome ſpecial Intereſt in *Almanacks*.

No Opinion given: To be ſpoken to again.

Queen verſus *Mayor and Burgeſſes of* Pomfret. B. R.

THIS was a *Mandamus*, directed to the Mayor and Burgeſſes of *Pomfret*, to reſtore *William Lee* to the Office of Burgeſs. To this they return, That he was ſuch a Day *Electus & perfectus*; then ſhew for Cauſe of removing him, his Non-Attendance at the Seſſions; then they come and ſay, That he had not taken the Sacrament, within a Year before his Election, and that therefore his Election was null and void.

Mandamus to reſtore a Burgeſs.

The Court was of Opinion, That this Return was bad, by Reaſon of the repugnant and contradictory Matter, contained in it.

Return, if it contains Matter repugnant and contradictory, naught.

For

For 1*ſt*, They return, That he was ſuch a Day *Electus & perfectus*; then ſhew for Cauſe of removing him, his not attending at the Seſſions, according to his Duty; and then ſhew Matter, that proves him never to have been elected; and conſequently, that it was ſo far from being his Duty to attend, that it would have been an Act of Preſumption for him to have done it: And tho' ſeveral Cauſes may be returned, yet they muſt not contradict one another; according to the Caſe of *Dunch* and the City of *Norwich*, *Paſch.* 5 *Annæ.*

Silk. 436.

Non uſer of publick Offices, a Forfeiture: *Contra* in private ones, without Requeſt or ſpecial Loſs by Reaſon of ſuch *non uſer.*

2*dly*, They held, That Non-Attendance at the Seſſions was not a good Cauſe of removal: For tho' they agreed the Difference taken 9 *Co. Rep.* 99. between publick Offices, that concern the Adminiſtration of Juſtice, and private Offices; *viz.* That *Non Uſer* in the one, is no Forfeiture without a Requeſt, and ſome ſpecial Loſs occaſion'd thereby, as it is in the other; and that the Office of Burgeſs is a publick Office, *&c.* yet this Caſe was different; for the Abſence of a ſingle Alderman does not hinder the holding of Courts, or the Validity of the Acts of that Court; ſo that, here, abſence does not amount to a *Non Uſer* of the Office.

The Court was likewiſe of Opinion, That Returns to *Mandamus's*, were to be kept to the ſame Strictneſs, ſince the *Mandamus* Act, *nono Annæ*, as before.

Preremptory *Mandamus* granted.

Stennil verſus *Brown*, at *Niſi Prius*, B. R. *Guildhall, London.*

Evidence.

A Condemnation of a Ship as Prize, in the Admiralty Court of *France*, was attempted to be proved by a Copy of the Condemnation, ſubſcribed by the Officer of the Court: But Chief Juſtice *Parker*, who tried the Cauſe, would admit of no Evidence, but an

Exemplification of the Condemnation under the Seal of the Court.

A Copy of a Rule of Court, ſigned by the Officer of the Court, is no Evidence in any other Court, unleſs the Judge of the Court ſet his Hand to it himſelf: But at *Niſi prius*, Hand of the Officer enough, becauſe it is the ſame Court.

Nickſon and *Brohan*, at *Niſi Prius*. B. R. *Guild-Hall, London.*

THE Caſe was this, A *Maſter* ſends his Servant, that was uſed to tranſact Affairs of that Nature for him, on *Saturday* Morning, with a Note drawn upon Sir *Stephen Evans*, with Orders to get from Sir *Stephen* either Bank Bills, or Money, and turn them into Exchequer Notes; but the Servant having other Buſineſs of his Maſter's upon his Hands, to ſave himſelf the Time and Trouble of going to Sir *Stephen*, goes to *B.* and prevails with him to give him a Bank Bill for Sir *Stephen*'s Note; and then in Purſuance of his Maſter's Orders, inveſted it in Exchequer Notes, which he brought to his Maſter, not letting him know but that he had gone to Sir *Stephen.*

Maſter and Servant. Of the Credit a Servant derives from his Maſter, in being uſed to tranſact Affairs for him.

Sir *Stephen Evans* failing upon the *Monday* following, Upon whom this Loſs ſhould light, *B.* or the Maſter, was the Queſtion.

Chief Juſtice *Parker*, who tried the Cauſe, was firſt of Opinion, That it ſhould fall upon *B.* becauſe the Servant acted directly contrary to his Maſter's Orders, and *B.* by furniſhing the Servant with a Bank Bill, did the Maſter no Service at all; for if he had not done it, the Servant muſt in Obedience to his Maſter's Orders, have gone and received *himſelf* the Money from Sir *Stephen*; and cited the Caſe of *Ward* and *Evans*, where re- *Salk.* 442.

ſolved, That if a Servant ſent to receive Money, takes a Bill in *lieu* of it, the Maſter is not bound by the Act of the Servant, unleſs the Bill is anſwered.

But one of the Jury informing him, that he took the Practice to be otherwiſe, (for that whether a Servant, uſed to act upon the Credit of his Maſter, went againſt the Orders of the Maſter, was a Fact, that could not be known to a third Perſon) he quitted his Opinion; but directed the Counſel to move the Court of *B. R.* which was accordingly done.

The Subſtance of what was ſaid, upon the Motion, in Favour of the Maſter, was, That the Servant going contrary to his Orders, and there being no ſubſequent Conſent of the Maſter, who knew nothing of the Matter, the Act of the Servant ſhould not bind the Maſter, according to the Caſes of *Ward* and *Evans*. *Mich.* 2 *Ann.* *Hanky* and *Watts*. *Thorold* and *Smith*, 2 *Cro.* 471. Maſter commands his Servant to ſell his Horſe, Servant ſells him as a good one; no Action againſt the Maſter.

Salk. 442.

But the Court were all of Opinion, That the Verdict was well given, and that the Maſter was chargeable, and he only. For a Servant by tranſacting Affairs for his Maſter, does thereby derive a general Authority and Credit from him; and if this general Authority ſhould be liable to be determined for a Time, by any particular Inſtructions or Orders, to which none but the Maſter and Servant are privy, there would be an End of all dealing but with the Maſter.

The Maſter has put himſelf in the Power of the Servant, by truſting him with the Bill. *Monk* and *Clayton*, was a Caſe, where the Act of a Servant, tho' out of Place, bound his Maſter, by Reaſon of the former Credit given him by his Maſter's Service; the other not knowing that he was diſcharged. And as for the Caſes put, there was this main Difference between them, That nothing came

to the Maſter's Uſe; as here the Notes did. In ſome of thoſe Caſes there was a *prior* Debt; but none here.

It was agreed by the Court, That the Property of the Note, was not transferr'd and veſted in *B.* but was only in Nature of a *depoſitum* or Security to him, for there is no Indorſement; nor could he have ſued upon the Bill; and tho' Practice cannot alter the Law, yet it may explain an Agreement.

They were likewiſe of Opinion, That the Maſter could not recover it of the Servant; the Loſs being occaſion'd by a meer Accident, and not either Folly or Negligence.

If a Maſter frequently ſend a Servant to Market without ready Money, ſo that the Servant is truſted upon the Maſter's Account; if in ſuch a Caſe, the Servant imbezils Money when he is ſent with it, and buys upon Truſt, Maſter is chargeable; *contra*, if always ſent with ready Money. 3 *Keble* 625.

Arne and *Johnſon.* B. R.

AN Action was brought for theſe Words ſpoken of an Upholſter, *You are a Soldier, I ſaw you in your red Coat doing Duty, your Word is not to be taken.* *Action for Words.*

The Words ruled to be actionable: Becauſe it is known to be a common Practice for Tradeſmen to protect themſelves againſt their Creditors by a counterfeit liſting; nor can it be worth a Tradeſman's while for any other Purpoſe, but defrauding his Creditors, to ſubject himſelf to the Power of an Officer. A Soldier has by Act of Parliament, which the Court muſt take Notice of, the Privilege of not being held to ſpecial Bail; and thoſe Words, *Your Word is not to be taken*, is plainly an Inference from the former.

Alice

Alice and *Gale.* B. R.

Pleas in Abatement.

A MAN may plead in Bar, or Abatement to a *Scire facias*, as well as to other Actions.

It is the Concluſion, not Matter of the Plea, that makes it a Plea in Abatement, or in Bar.

It is the Concluſion of a Plea, and not the Matter of it, that makes a Plea in Abatement: So that ſhould a Man plead a Plea, that for the Matter of it, might have been pleaded in Bar, and conclude *petit quod breve caſſetur*, it would be but a Plea in Abatement; and the Judgment could be no other than a *Reſpondeas Ouſter.* So *vice verſa*, a Plea in Abatement, pleaded in Form of a Plea in Bar, would be a Plea in Bar, tho' an ill one. To a *Scire facias*, the Plea in Bar, is always concluded by an *Executio non*; as in other Caſes by an *actio non.*

Diſcontinuance.

If a Defendant pleads a Plea in Abatement, and the Plaintiff replies as to a Plea in Bar, This is a Diſcontinuance.

D E

DE

Termino S. Hill.

11 *Annæ*,

In Communi Banco.

Thornby and *Fleetwood*, alias *Dutcheſs of Hamilton*'s Caſe.

Vide poſt. Hill. 3 Geo. 1. *& Trin.* 4 Geo. 1.

Pedigree of the Caſe found by the Jury.

Thomas Lord *Gerard*, *ob.* 1617.

- *Lord* Gilbert, *ob.* 1623.
  - *Lord* Dutton, *ob.* 1640.
    - *Lord* Charles, *ob.* 1667.
      - *Lord* Digby, *ob.* 1684.
        - Elizabeth, *Dutcheſs of* Hamilton, *Leſſor of the Plaintiff.*
  - Alice, *married to* Roger Owen.
    - Thomas
      - Roger, *living.*
- John, *ob.* 1673.
  - Richard, *ob.* 1679.
    - *Lord* Charles, *ob.* 1707, *without Iſſue.*
    - William, *ob. in Life time of* Charles, *without Iſſue.*
    - Philip, *living.*
    - Joſeph, *ob.* 1705, *without Iſſue.*
    - Frances, *Wife of the Defendant* Fleetwood, *living.*

This was an Ejectment in the Court of Common Pleas, which ended in a ſpecial Verdict, wherein the Jury found, That *Charles* 1. Lord *Gerard*, in *November* 1660, ſettled the Eſtate in Queſtion, to the Uſe of himſelf and the Heirs Males of his Body, with Remain-

der to the Heirs Males of the Body of *Thomas* firſt Lord *Gerard*, Remainder to his own right Heirs. In 1684, *Charles* 2. Lord *Gerard*, upon the Death of *Digby* Lord *Gerard* (only Son of Lord *Charles*) without Iſſue Male, enter'd upon the Eſtate in Queſtion (not in Jointure) claiming the ſame as Heir Male of the Body of *Thomas* firſt Lord *Gerard*, by Virtue of the ſaid Limitation in that Settlement; and by Virtue of this Title enjoy'd this Eſtate above twenty two Years, and the Reſidue, when the Jointure fell in; and during the Time of this his Enjoyment, ſuffer'd ſeveral Recoveries, and ſettled the Eſtate upon his Marriage in the Year 1689, and died without Iſſue, in the Year 1707; leaving *Philip* his only Brother then ſurviving, who is Heir Male of *Thomas* firſt Lord *Gerard*, and is now living.

Charles and his Brother *Philip* were in the Year 1676, ſent by their Father to *St. Omers*, and educated there for five Years in the *Roman* Religion, which Religion they profeſs'd. The laſt Lord *Charles* died in 1707: And upon his Death, the Dutcheſs of *Hamilton* claim'd the Eſtate, as right Heir of the firſt *Charles* Lord *Gerard*; notwithſtanding the Eſtate-Tail, limited to the Heirs Males of the Body of *Thomas* firſt Lord *Gerard*, ſtill ſubſiſts in *Philip*; alledging that the laſt Lord *Charles* and his Brother *Philip* being ſent abroad, and educated in a Popiſh Seminary, are made ſo utterly incapable of taking any Eſtate, that ſhe has the Right of Entry.

The grand Queſtion was, Whether one brought up in a Popiſh Seminary, was, notwithſtanding any Incapacity by him incurr'd on that Account, ſtill capable of ſuffering a Common Recovery?

Argument for the Plaintiff. 1ſt Point.

Sir *Thomas Powys* inſiſted for the Plaintiff, That the Statute *primo Jacobi*, did incapacitate a Perſon ſent beyond Sea, not only from a Pernancy of the Profits, but from having the Eſtate ever veſted in him.

He inſiſted ſecondly, That this Statute, as to this Point, ſtood unimpeached by the ſubſequent Statutes of *tertio Jacobi*, and *tertio Caroli.* 2d Point.

In *Day* and *Savage*, in *Hobart* 87, it is indeed ſaid that an Act of Parliament may be void from its firſt Creation, as an Act againſt natural Equity; for *Jura Naturæ ſunt immutabilia, ſunt leges legum.* But this muſt be a very clear Caſe, and Judges will ſtrain hard rather then interpret an Act void *ab initio.* *First Point.* *Maxim.*

The Words of the Act of Parliament, as to the Incapacity are, *Shall be incapable in reſpect of himſelf only, but not his Heirs or Poſterity, to have, inherit or enjoy, any Lands, Tenements, Goods, Chattels, &c.* Words ſo comprehenſive, as muſt take in all Manner of Ways, whereby an Eſtate can veſt in a Man; unleſs reſtrain'd by ſome after Limitations. Now the Words of Reſtriction or Limitation are thoſe, *In reſpect of himſelf only, but not his Heirs or Poſterity.* *Roman Catholicks:* Stat. *primo Jacobi*, what Incapacity it lays upon them.

Here it was obſerved, *firſt*, That this rather confirm'd the Diſability in him, according to the known Rule, that *exceptio firmat regulam in rebus non exceptis.* *Secondly*, That tho' a Saving might qualify and reſtrain the Purview; yet it was never allowed to overthrow it quite. The Purview ſays, He ſhall not *have, enjoy, inherit*; the Saving (as is pretended) ſays, He *ſhall. Thirdly*, This Interpretation quite overthrows the Intention of the Reſtriction itſelf: For it was a Saving intended in Favour of the Iſſue and Poſterity; but according to this Interpretation, the Saving is fatal and prejudicial to them. For it gives the Perſon ſo educated a Power of alienating, which Power he will very probably execute in Caſe of a Proteſtant Poſterity; whereas, according to our Interpretation, the Eſtate never veſting in him, he cannot alien. *Maxim* in Law.

As to the Queſtion that will be aſked, Who ſhall have the Eſtate in the mean Time, if ſo be that he is not to have it, and yet his Iſſue, if he ſhould have any, muſt have

have it after his Death? I anſwer, There is a Difference when the Incapacity is in *him*, that is to take by *Purchaſe*; and when in *him*, that is to take by *Deſcent*. For where the firſt Purchaſer is incapable, there none ſhall take, that muſt derive their Title under him; but where the Incapacity happens in Courſe of Deſcent, there the Eſtate will go over to him, to whom it ſhould go, if the Perſon made incapable were really dead.

Deſcent. Monk, Alien. Tenant in Tail has Iſſue two Sons, eldeſt is a *Monk*, or an *Alien*, or abjures the Realm; in all theſe Caſes the younger Brother ſhall inherit. 1 *Inſt.* 132, *Belknap*'s Caſe. In Lord *Delaware*'s Caſe, 11 *Rep.* it is true indeed, that he did not ſit in the Houſe of Lords in his Father's Life-time; but to this it may be anſwered, 1*ſt*, That it did not appear the Son ever attempted it, and ſo brought it legally in Queſtion. 2*dly*, 1 *Inſt.* 155. A great Difference is made between a Title of Honour, which may be ſuſpended; and a Freehold which cannot. Had our Caſe been that of an Heir, there had been more Difficulty in it, becauſe of that Maxim in Law, *Non eſt Hæres viventis*; tho' even then, the Word *Heir*, may in an Act of Parliament, be underſtood in the vulgar Acceptation of the Word, *viz. Heir apparent*.

Maxim of Law.

It may be objected from the Clauſe, *That if ſuch a one ſhall conform, &c. that from and during the Time of ſuch his Conformity, he ſhall be freed and diſcharged from the aforementioned Incapacity*, That this proves the Eſtate to have been in him before. But to this it is anſwered, 1*ſt*, That the Intention of the Proviſo was, that after the Time of his Conformity, he ſhall be capable of taking any Eſtate, that ſhould afterwards come to him; not that he ſhall then have that very Eſtate, which at the Time when it deſcended, he was incapable of taking, and by Reaſon of this Incapacity never veſted in him, and was now actually veſted in another. But 2*dly*, Admitting that to be the Meaning of the *Proviſo*, the Inference is by no Means juſt. For nothing more com-

mon than for Eſtates to diveſt out of one, and veſt in another; as where a Man dies, leaving his Wife big with a Son, *&c.* 3 *Rep. Lincoln College* Caſe. Veſting and Diveſting of Eſtates, common in Law.

It was urged further in Favour of this Interpretation, That the very ſame Words, that were made Uſe of with reſpect to diſabling him in Real Eſtate, were made Uſe of to diſable him in Perſonal Eſtate, and that therefore they muſt have the ſame Interpretation; but to underſtand them of taking the Profits of Goods, Money and Chattels, *&c.* abſurd. It was ſaid that this Interpretation, was more agreeable to common Senſe, and what every Body but a Lawyer would make.

It was obſerved, That the other Interpretation quite took away the Penalty of the Act. For, Who will be at the Coſt and Trouble of a Suit, to hinder ſuch a Perſon from enjoying the Profits; when by Alienation, he may in a Moment exclude him from all Advantages of his Suit?

Summa eſt lex quæ pro religione facit; Acts of Parliament made for the Advancement of Religion, muſt receive as ſtrong an Interpretation for the Attainment of that End as poſſible, *Hobart* 107. And ſure, it cannot be doubted but the Act we are now upon is ſuch a one. *Maxim* of Law.

Again, it is another Maxim, That Acts of Parliament, made for preventing of publick Miſchief, tho' penal ones, may yet be extended by Equity. And this Act of Parliament may likewiſe be conſidered under this Notion too; Popery being a Conſpiracy againſt the State, as well as Religion. Acts of Parliament, tho' penal, ſometimes extended by Equity.

It is a Rule both in Civil and Common Law, that *in dubio, hæc legis conſtructio quam verba oſtendunt:* So that *cæteris paribus*, our Interpretation the better; becauſe moſt literal. *Maxim* of Law.

It was in the next place argued, That this Act *primo Jacobi*, ſtood unimpeach'd and unrepeal'd, as to this Point, by the Statute of 3 *Jac.* or 3 *Car.* *Second Point.* *Primo Jacobi*, not repeal'd by *tertio Jacobi*, or *tertio Caroli*.

Maxim. It muſt be admitted, That the Rule, *Poſteriores leges prioribus derogant*, is a true Rule: But then at the ſame Time, it muſt be remembred, That theſe Repeals by Implication, are Things diſfavour'd by Law; never allowed of, but where the Inconſiſtency and Repugnancy is plain, glaring and unavoidable. For theſe Repeals carry along with them a tacit Reflection upon the Legiſlators, That they ſhould ignorantly and without knowing it, make one Act repugnant to, and inconſiſtent with another; and ſuch Repeals have been ever interpreted ſo, as to repeal as little of the precedent Law as is poſſible. 11 *Co. Rep.* 56. 1 *Rolle's Rep.* 88. *Foſter's* Caſe.

Repeals by Implication odious, and why.

It was argued from the Occaſion of making the Act *tertio Jacobi, viz.* the *Gunpowder Treaſon*, That it could be no Inducement to the Legiſlators to take off any Difficulty or Incapacity already laid upon the Papiſts; but quite contrary. And as the Occaſion could not move them to it, ſo their Intention thro' the Tenor of the Act looks quite another Way; and ſurely not reaſonable to ſuppoſe, that they would lay upon them more Incapacities of a lower Nature, as Law-Practice, Phyſick *&c.* and take off thoſe of an higher Nature.

It was ſaid further, That the Perſons, Subject-matter, and Penalties of this Act, are all different from thoſe of *primo Jacobi*; and could not therefore be a Repeal of that.

As to 3 *Car.* 1. *cap.* 2. it was obſerved, That this very Act was a Proof, that *primo Jacobi*, was not repeal'd by *tertio Jacobi*. For the Preamble of 3 *Car.* takes Notice of this Act *primo Jacob.* as an Act in Force, and that ought to be put in Execution, but takes no Notice at all of 3 *Jacobi*; ſo that ſuppoſing it repeal'd by 3 *Jacobi*, it would ſtand revived by *tertio Car.* As to what follows in 3 *Car.* it would be very material, were it our Caſe, which it is not: For *tertio Car.* has Reſpect to Eſtates already veſted; but, in our Caſe, the Perſon was diſabled from taking before the Deſcent, ſo that the Eſtate never veſted in him.

Serjeant *Cheſhyre pro* Defendant.

Argued, That ſuppoſing *primo Jacobi*, was, as to this Point, yet in Force, it did not hinder the Eſtate from veſting. Argument for Defendant.

It was obſerved, That the *Purview* and *Saving* were not, as was inſinuated, ſeparate and divided Sentences; but inſeparably conjoin'd and incorporated together.

The Maxim *Summa eſt lex quæ pro Religione facit*, muſt be admitted as a true Maxim; but from hence it does by no Means follow, that we are to make the moſt rigid and ſevere Interpretation we can, tho' contrary to our Reaſon and Underſtanding. This were to be guilty, ourſelves, of what we ſo juſtly condemn in the *Roman Catholicks*. *Maxim.*

It has been ſaid, That their Interpretation is more obvious to the Vulgar; our's ſuch as none but Lawyers could approve. This, put into other Words, is a Confeſſion, That our's is the Interpretation of the moſt learned and competent Judges, their's of the ignorant and unlearned.

The Death of *Charles* without Iſſue, can occaſion no Difference in the Conſtruction of an Act of Parliament; for *that*, ſurely, muſt not depend upon Contingencies, ſuch as dying with, or without Iſſue. I will therefore for Argument Sake ſuppoſe, that there is a Son of *Charles* now living. Then, the *Caſe* before us would be *that* of a Father guilty of the Offence and the Son innocent, the *Queſtion* upon this Act of Parliament, What becomes of the Eſtate-tail? Why they ſay, this Act of Parliament, is to enure as a Revocation of that Part of the Settlement, as if the Name of ſuch an Offender had never been in it; but certainly this goes too far, for it quite excludes his Poſterity, contrary to the plain Intention of the Act. An Heir can never take but by Deſcent from his Anceſtor; but this is impoſſible, on Suppoſition that the Eſtate never veſts in the Anceſtor.

Alien,

Alien, Tenant in Tail, Remainder to a *Subject*: He in Remainder ſhall never come in, until the Eſtate-tail be ſpent; tho' the *Alien* be incapable of taking an Eſtate-tail for his own Benefit.

A Deviſe to *B.* after the Death of a Monk without Iſſue; nothing paſſes to *B.* until the Death of the Monk without Iſſue. 1 *Leon.* 195. *Scatterwood* and *Edge*, *Trin.* 9 *W.* 3. *Fuller*, 3 *Cro.* 432. *Salk.* 229.

If it be objected, That the Law will never caſt an Eſtate upon a Perſon diſabled to take, (*Alien*, Attaint, *&c.*) it may be anſwered, That this comes not up to the Caſe in Queſtion; becauſe the very ſame Act that provides for the Diſability, excepts the Heirs and Poſterity.

A Remainder can never take Place but upon the Ceſſer of an Eſtate-tail; but if the Eſtate never veſted in the Father, it could not in the Son, nor in the Remainder; for an Eſtate which never took Effect, can never be ſaid to ceaſe.

Shelly's Caſe, 1 *Rep.* was quoted, to prove that the Son may have an Eſtate by Deſcent, tho' it never veſted in the Anceſtor; but well obſerved it proves no ſuch Thing.

This *Dilemma*, then, remains plain and ſtrong upon them, That either the Eſtate muſt veſt in the Father, for the Advantage of his Poſterity; or elſe the Poſterity muſt be excluded, contrary to the plain Intention of the Act.

As to the Act of Parliament, it has plainly a twofold View; the firſt is to diſcourage Popiſh Education abroad; the ſecond is to ſave the Eſtate for their Poſterity: It ought therefore to have ſuch a Conſtruction put upon it, as that both Intentions may ſtand together; and this they will do, if the Father be made to loſe the Profits, during his Non-conformity. But then the Difficulty is, Who ſhall take the Profits in the mean Time? And in this Point it muſt be acknowledged, that the Act is ſilent; and therefore according to the common Rule,

where an Act gives a Penalty, but does not ſay to whom, there the Crown ſhall have it.

It is true, that where a Penalty is given by Way of Damage, that *there*, tho' not ſaid to whom, the Penalty ſhall follow the Loſs; and this Difference is taken, 2 *Ventris* 267. *Moore* 238.

This is not an Interpretation that lowers the Penalty of the Act: For what is the Land but the Profits of the Land? and a Grant of the Profits, does even in Law carry the Land along with it. And certainly, no where could the Pernancy of the Profits be lodged better, than in the Crown. Who ſo zealous and able to put the Law in Execution? *Tutiſſima eſt Cuſtodia quæ ſibi creditur.* *Maxim.*

Before the Statute of *Hen.* 8. by which entail'd Land was forfeited for Treaſon, the Land was preſerved, in Caſe of Treaſon, to the Children, by general, and as Lord *Hobart* 340, terms them, cunning Words. And if Tenant in Tail, before thoſe Laws in *Hen.* 8. had, after Forfeiture for Treaſon, been vouched in a common Recovery, the Recovery would have barred the Iſſue.

As to the Caſes brought to prove, That there is no Difficulty, for Eſtates to diveſt out of one and veſt in another; as in Caſe of an after-born Child *&c.* It may be anſwered, That theſe Caſes are not to the Purpoſe; becauſe it is the ſame Eſtate that is diveſted out of one, and is veſted in another; but here we are in the Caſe of a Remainder, which is another Eſtate.

It is againſt the Rules of Law, that *Philip* ſhould be dead as to the Remainder Man; but alive in reſpect to his Iſſue, if he ſhould have any: And that the ſame Eſtate ſhould ceaſe as to one, and revive as to another. 9 *Rep.* 140, *Beaumont*'s Caſe.

It was obſerved, That this Act diſabled him from purchaſing with reſpect to himſelf only, but not with reſpect to his Iſſue; and that he might purchaſe to loſe the Profits, but not to retain them; and that if this Interpretation might be put upon the Word *Purchaſe*, it

muſt likewiſe be put upon the Word *inherit*, for they are joined both together.

It was added, in Favour of this Interpretation, that a Perſon attainted may take by Deſcent; but then indeed it is not for his own Advantage, but that of the Crown. So for the *Alien*. The ſame Law as to a *Villain*, for the Advantage of his Lord. And ſurely *Charles*, or *Philip*, not in a worſe Condition than *Aliens*, *Villains*, and Perſons attainted.

As to what was ſaid to Lord *De la Ware*'s Caſe, That, had he attempted it, he might poſſibly have ſat in the Houſe of Lords, living his Father: It ſeems a ſtrange Puniſhment, That the Father ſhould not be allowed to ſit in the Houſe of Lords himſelf; but he may ſend his Son thither, to act and vote, juſt as he himſelf would do.

As to the Interpretation put upon the Clauſe concerning Conformity, That this comes too late after the Deſcent of the Eſtate; it does, in a Manner, ſubvert the chief Deſign for which the Clauſe was put in, *viz.* an Encouragement to Conformity. For Children are ſent over very young; and if after the Deſcent, no Advantage is to be gain'd by Conformity, there will remain but little Time, wherein this Clauſe can be any Inducement to them to conform.

As to the Objection, That this Interpretation gives them a Power of alienating: It may be ſaid, That this Power is not properly given; but only remain'd as a Conſequence of the Eſtate, that was ſtill in them. And even the Stat. of 11 *W.* 3. does not go about to reſtrain a Papiſt from alienating.

As to the *ſecond* Point, That the Statute *primo Jacobi*, ſtood repeal'd, by Reaſon of the Inconſiſtency there was with the ſubſequent Statutes: It was ſaid, that all three Statutes had the ſame End in View; but differ'd in the Means of promoting it.

It was denied, That a Repeal by Implication is any Reflection upon the Legiſlators. Nothing more common then to repeal in one Seſſion, Laws made in another. How many Laws are made temporary upon this very Conſideration, That they are not ſure how well they will anſwer the Deſign of their Inſtitution? In a Word, it is no Reflection, that Men are but Men.

As to what was urged from the Occaſion of making this Act, *viz.* the *Gunpowder Treaſon*: It was acknowledged, that the Deſign of the Parliament was rather to lay more Hardſhips upon the Papiſts, and make more effectual Laws againſt them; and accordingly three great Defects in the Act *primo Jacobi*, are all ſupplied by *tertio Jacobi*. The firſt Defect is, That *primo Jacobi* hinders not, but that Perſons might be ſent abroad to be bred Papiſts; provided they were not ſent to Seminaries and Colleges *&c.* but 3 *Jacobi* provides againſt this. 2*dly*, The Penalty not being given to the Informer, no Encouragement to proſecute upon the Act; but this altered by *tertio Jacobi*. 3*dly*, Act ſilent who ſhall take the Profits in the mean Time; and tho' they muſt therefore go to the King, yet he is according to the Phraſe of our Books, *occupatus de arduis negotiis Regni*, and will often let ſuch Matters eſcape his Notice; but this is ſettled by *tertio Jacobi*, in the next of Kin.

According to the Interpretation, the Plaintiff would put upon the Statute *primo Jacobi*, it may happen, That a Roman Catholick, unfortunately happening to have a foreign Education, ſhall be excluded, only to make Way for a rigid Papiſt bred up at home.

Tertio Car. goes further than any of the former; the Purview is greater, and ſo is the Penalty.

As to the Objection, That *tertio Car.* takes Notice of *primo Jacobi*, as a Law in Force and fit to be put in Execution; and that ſuppoſing it was repeal'd by *tertio Jacobi*, it would ſtand revived by *tertio Car.* It was anſwered, That it was not repeal'd by *tertio Jacobi* in the whole, but in Part only: That the Act *primo Jacobi*, contains

contains ſeveral Proviſions that are not either in *tertio Jac.* or *tertio Car.* as 1*ſt*, very penal upon the Officer of the Ports, that ſhall ſuffer them to paſs; 2*dly*, very penal upon the Maſter of the Ship; and 3*dly*, upon the Mariners. And for the Sake of the unrepeal'd Clauſes, the Statute *tertio Car.* takes Notice of the Act, as an Act ſtill in Force, and what ought to be put in Execution.

Then a great deal of Time was taken in proving the Act *primo Jac.* to ſtand repeal'd by *tertio Jac.* from the Inconſiſtencies of the one Act with the other.

Pardon. After this, it was inſiſted upon, That there had been ſeveral general Pardons, and one particularly in the Year 1690; by which the Offence being pardoned, the Diſability was ſo *ex conſequenti*. And this Pardon coming out before the Death of *Charles*, *viz.* before *Philip* now living could make his Claim, muſt have the ſame Effect, with reſpect to him, as his Conformity would; and for Purpoſe, 3 *Levinz* 332, was quoted.

It was further urged, That *Charles* by his Entry had gain'd a tortious Fee, which was ſufficient, until defeated, to maintain the Recovery. 3 *Rep.* 59. *Hobart* 252. Land given to an *Alien* in Tail, *Alien* ſuffers a common Recovery: Recovery good; for an *Alien* a good Tenant to the *Præcipe*, until Office found. The ſame Law for a Perſon attainted.

A Monk is indeed ſaid to be dead in Law; but that is a meer Contrivance for the Advantage of the Papal Grandeur. For if the Monk ſhould be afterwards made a Biſhop, he is then alive to purchaſe for the Benefit of his Church; for as Lord *Coke* informs us in another Place, the Rule is to be interpreted for the Church, not againſt it. If now *Charles* may be allowed to purchaſe for the Advantage of his Iſſue, as a Monk for that of the Church, the Caſe of a Monk will be an Authority for us; for *Charles* by his Entry while incapacitated, committed an Act of Diſſeiſin, which may be conſidered

as a new Purchaſe, a Word uſed in the Act *primo Jacobi*. *Goldsborough* 102. 4 *Leon.* 84. Many are the Authorities, which prove a Monk may be Diſſeiſor; but it particularly appears to be ſo by this, That a Writ of Aſſize lies againſt a Monk, the Judgment in which Writ is *quod recuperet ſeiſinam*, which ſuppoſes a Monk to have a Freehold.

It was added, That common Recoveries are favour'd in Law, eſpecially when ſuffer'd in Favour of a Purchaſer for a valuable Conſideration; which is the preſent Caſe, being *that* of a Marriage with 10,000*l.* Portion, beſides twenty five Years unmoleſted Poſſeſſion under the common Recovery.

Vide poſt. Hill. 3 Geo. 1. & *Trin.* 4 Geo. 1.

Caſe of Univerſity of Cambridge. B. R.

AN Action of Aſſault and Battery was brought againſt one of the Members of the Univerſity of *Cambridge*, and a general Imparlance given from one Term to another. The Chancellor of the Univerſity comes and claims Conuſance of the Pleas, by Virtue of a Charter in Queen *Elizabeth*'s Time, whereby *cognitio placitorum*, with excluſive Words *non alibi &c.* was given to the Court of the Vice-Chancellor, to proceed *ſecundum legem & conſuetudinem Univerſitatis*, in all Caſes where any of the Body of that Univerſity ſhould be Defendants; which Charter was confirmed by Act of Parliament, of which they produced a Copy. And, Whether this Claim ſhould be received was the Queſtion?

Caſe was, Univerſity of *Cambridge* had a Charter granted to them by Queen *Elizabeth*, whereby *cognitio placitorum*, with excluſive Words, *non alibi &c.* was given to the Court of the Vice-Chancellor, to proceed *ſecundum legem & conſuetudinem* of the Univerſity, in all Caſes, where any of the Body are Defendants; which Charter was confirmed by Parliament. Reſolved, That after Imparlance, it was too late to make that Claim.

That it ſhould not, was thus argued by Mr. *Page*, Mr. *Lechmere*, and Mr. *Whitaker*.

It was ſaid, and admitted to be ſo by the Court, That ſuch a Grant was not good of itſelf, without the help of an Act of Parliament. For tho' the Crown may

Argument againſt the Univerſity.

grant Conuſance of Pleas to proceed *ſecundum legem terræ*, it cannot to proceed by other Laws; for *that* would be to make new Laws, which the Crown, as being but one Branch of the legiſlative Power, cannot do.

A Copy of an Act of Parliament no Evidence, unleſs the Act had been before allow'd of, and ſo made a Record of this Court; for otherwiſe nothing ſhall be allowed of, as a ſufficient Evidence of the Act, but the Exemplification of it under the great Seal. And the Reaſon is, Becauſe the Court is Party, which cannot pray *Oyer* as the Party may; ſo that the Court would be in a worſe Condition than a common Perſon, if they were to receive for Evidence a Copy offer'd them. 35 *H.* 6. 14. And this was allowed to be ſo *per Cur.*

Conuſance of Pleas *triplex.*

In *Hardr. Rep.* Caſe of *Caſtle* and *Litchfield.* Conuſance of Pleas is ſaid to be of three Sorts. 1*ſt*, *Tenere placita:* And this is where the Courts are co-ordinate, and have a concurrent Juriſdiction; in which Caſe, Priority of Suit only, gives one Court the Preference to the other.

2*dly*, *Cognitio Placitorum:* And this muſt be limited as to Place.

3*dly*, *Cognitio Placitorum* with excluſive Words *& non alibi:* And this may follow the Perſon, and need not be confined to any Place.

Difference between Conuſance of Pleas with, and without excluſive Words.

The Difference between *Cognitio Placitorum* without excluſive Words, and when with, is not, That the laſt has an excluſive Juriſdiction, the former not; for *Cognitio Placitorum* does, *ex vi Termini*, exclude all other Courts, and imports the Words *& non alibi. Palmer* 416. *Rolle's Abr.* 489. *Terms of the Law*, Tit. *Conuſance.*

But the *firſt* Difference is, That the former muſt be local, confined to ſome Place; the latter may follow the Perſon, and be as to Place univerſal.

Secondly, In the former, if the Lord wave his Privilege, there ſhall be Re-ſummons, and Proceedings ſhall begin where they left off; but in the latter, in caſe of Waver or the like, the Proceedings in the Court excluded by this Juriſdiction, muſt begin *de novo*.

Thirdly, The former is for the Advantage of the Lord only, and therefore the Lord only can claim it, and not the Party; but where there are excluſive Words, the Party may claim it as well as the Lord: In *Moore* 249, 276. 9 *Hen.* 7. *fo.* 10, 11, 12, theſe Differences fully and clearly laid down.

Here it was obſerved, That the third Sort of Conuſance of Pleas, which was with excluſive Words *& non alibi*, That even this did not go ſo far as to make a Nullity of Proceedings in Courts of Law.

Then it was ſaid, That this Claim being made after Imparlance, was too late, and that the Univerſity had lapſed their Time.

In *Reſtall's Entries* all Claims of *Cognitio Placitorum* are entred before Imparlance. 3 *H.* 6. *fo.* 10. 14 *H.* 4. 20. *Hill. Shower's Rep.* 352, Univerſity of *Oxford.* 16 *H.* 7. 16. 5 *Ed.* 2. 159. *Paſchæ.* 35 *H.* 6. 24. too late to claim Conuſance of Pleas after Eſſoin, and by Parity of Reaſon after Imparlance. 6 *H.* 7. 9. Tho' an Imparlance be only given to a Day in the ſame Term, it is doubted, Whether even upon ſuch an Imparlance, it was not too late to pray it? 1 *Siderfin* 103, Biſhop of *Ely*. Plea to the Juriſdiction not to be received after an Imparlance; and this Claim of Conuſance of the ſame Nature with that Plea. 11 *H.* 4. 41. This Difference is laid down with Reſpect to the Time of claiming Conuſance, that where the Matter is local, ſo that it appears upon the Face of the Record, that there is Ground for ſuch a Claim, it muſt be made *primo die viz.* when the Writ was returned; but where the Matter is tranſitory, it muſt be made upon the Day given to plead. And the Reaſon of all theſe Caſes is this, That otherwiſe there would

Conuſance of Pleas, when to be claimed.

would be a great Delay of Juſtice; unleſs ſuch Claims are made as ſoon as poſſible.

In the Report of *Hardreſs* in the Caſe of *Caſtle* and *Litchfield*, it is ſaid, That upon Notice (indefinitely) the Court muſt ſurceaſe their Plea; from whence it is inferr'd, That the Time of Notice is not material: But Mr. *Lechmere* produced a better Report of that Caſe in Manuſcript, whereby it appear'd, that nothing ſaid in that Caſe could warrant ſuch an Inference.

From this Manuſcript it was obſerved, That the *Quo*
3 *Salk.* 383. *minus*, a device to entitle common Perſons to ſue in the Court of Exchequer, did not take away ſuch Privilege, if demanded before Imparlance. It was alſo obſerved, That the Lord Chancellor is included under the Word *Juſticiarius*.

If it ſhould be objected, That theſe Authorities are not to the Purpoſe, becauſe it was not the ſame Kind of Conuſance, that was claim'd in *them* as *here*. It may be anſwered, That there is nothing in the Nature of the Conuſance now claim'd, that can give the leaſt Shadow of Reaſon, why longer Time ſhould be allowed for Claim *here* than in thoſe. For *firſt*, tho' ſome of them ſhould be only Conuſance of Pleas without excluſive Words, yet that can make no Difference; ſince *ante oſtenſum*, That *Cognitio Placitorum* does, *ex vi Termini*, import an excluſive Juriſdiction.

Secondly, The Difference between theſe two, That the latter, *viz. that* now claim'd is for the Advantage of the Party as well as the Lord, and may therefore be claim'd by the Party as well as the Lord, is rather a Reaſon why leſs Time ſhould be allowed for this Claim, than why more.

Thirdly, This being a Claim of a Conuſance, where the Proceedings are to be, not *ſecundum legem terræ*, but *Univerſitatis*, ought rather to be diſfavour'd, and have leſs Time allowed for that Claim, than where the Proceedings are to be *ſecundum legem terræ*. 27 *H.* 8. *c.* 24, This

Reaſon

Reaſon is given for the Reſumption of many Franchiſes, That they are derogatory to the Prerogative, and tend to the Delay of Juſtice.

On the Side of the Univerſity, it was argued, That tho' there is good Reaſon, why there ſhould be a Time fix'd, as ſoon as poſſible, for the Party himſelf to make his Claim; yet there is no ſuch Reaſon for the Univerſity, who is a Stranger to the whole Proceeding, to be ſo bound down. Argument for the Univerſity.

It was ſaid, That this was a Perſonal Privilege, and therefore the Perſon might be arreſted out of the Juriſdiction of the Univerſity; ſo that it was not almoſt poſſible, at leaſt not probable, That the Univerſity ſhould have Notice, Time enough to make their Claim before Imparlance.

It was urged, That this was a Charter of very extenſive Words, and confirmed by Act of Parliament; and was, therefore, to have an advantagious Interpretation.

Cro. Car. 9. *Stiles* 90, where after Imparlance, a Plea of ancient Demeſne (a Plea of the ſame Nature) was received. 1 *Levinz* 89, Juſtice *Windham* uſed to ſay it was very hard, That a Stranger ſhould be bound to claim before Imparlance.

And to the Caſes quoted by the other Side, this general Anſwer was given, That they were little to the Purpoſe; all of them almoſt, relating to Conuſances, that had no excluſive Words.

The Court were all of Opinion, That the Claim, being made after Imparlance, was made too late: That the Act of Parliament was out of the Caſe; for that related only to the Matter of the Conuſance, and was only neceſſary to ſupport a Charter, which the Crown had no Power to grant; for tho' the Crown may grant Conuſances, yet it cannot grant them with Power to proceed by any other Law than the Common Law. But *Prerogative.* Crown cannot grant Conuſances to proceed by any other Law than the Common Law.

as to the Time and Manner of granting, the Act is wholly ſilent; theſe therefore to be governed by the Rules of Law. Hence it is, That it is neceſſary for this Privilege to be pleaded; and no Reaſon in the World, why the Rules of Law ſhould not govern as well the Time of pleading it, as make it neceſſary for it to be pleaded at all. There is no Difference, in the Reaſon of the Thing, between Conuſances with excluſive Words and Conuſances without, as to this Point; and therefore all theſe were eſteem'd good Authorities.

Mitchell and *Reynolds.* B. R.

Vide ante. 27, 85.

THE Reſolution of the Court was delivered by *Parker*, Chief Juſtice, to the following Effect:

An Action of Debt is brought upon a Bond thus conditioned, That whereas *A.* had taken the Shop of *B.* who was a Baker, for the Term of ſo many Years, and had given *B.* ſo much Money for it; the Condition of the Obligation was ſuch, 'That if during the Term afore-'ſaid, *B.* ſhould not exerciſe the Trade of a Baker, 'within the Pariſh where the Shop was, that then the 'Bond ſhould be void; otherwiſe remain in full Force, '*&c.*' And whether this be a good or a void Bond is the Queſtion.

Trade.

What Sort of Bonds in Reſtraint of Trade good, and what void.

We are all of Opinion, That the Bond is good, and that the true Diſtinction is not between Bond and Promiſe, That Bond ſhould be void and Promiſe good; but between Contracts, whether by Bond, Covenant or Promiſe, enter'd into upon a juſt, fair and reaſonable Conſideration; and thoſe enter'd into upon no Conſideration or a vicious one, whether it be by Bond, Covenant or Promiſe, That the former will be good, the latter void.

Caſes of Reſtraint of Trade, are either involuntary or voluntary. Reſtraints of Trade.

Involuntary are of three Sorts: 1*ſt*, By Grant or Charter; 2*dly*, Cuſtom; 3*dly*, By-Laws. Involuntary Reſtraints.

1*ſt*, By new Charter granted, 8 *Rep.* 121. Grant of ſole Uſe of a Trade void, 11 *Rep.* 84; but a Grant of a Trade newly invented, and for a Time good, *Godbolt* 125. For the Publick has an Advantage in the Invention of a uſeful Trade, which after a limited Time, is to be publick; and the Inventor's Induſtry is ſufficiently encouraged, by the ſole Uſe of it ſecured to him, by Charter, for ſuch a Time: But a ſecond Grant would be void even in this Caſe; and the Statute 21 *Jac.* 1. limits the Time, for which ſuch Grant may be made, to fourteen Years. Reſtraint by Charter.

2*dly*, By Cuſtom: And this is either, *firſt*, for the Advantage of ſome particular Perſon, that has Stock enough to ſerve the Place, 2 *Bulſtrode* 135. 1 *Rolle* 561; or *ſecondly*, for the Advantage of the Corporation or Community of a certain Place, *Dyer* 279. *Jones* 162. *Carter* 114. 8 *Rep.* 121. 11 *Rep.* 53; or *thirdly*, where Perſons not ſuppos'd to uſe the Trade, have yet a Prerogative, That no body ſhall uſe ſuch a Trade, within ſuch a Compaſs, without Licence from them firſt obtain'd; and this is *ratione Dominii*. The Archbiſhop of *York*, *Regiſter* 105. *b*. Reſtraint by Cuſtom.

3*dly*, By By-Laws: *Carter* 114. 68. By-Laws to exclude Foreigners, where there is no Cuſtom to juſtify them void; but if in Affirmance of a Cuſtom good, 1 *Rolle* 364. By-Laws to cramp and lay Difficulties upon Trade void, *Moore* 576. 1 *Bulſtrode* 11. Stat. 20 *Car.* 2. But By-Laws to regulate Trade good; whether they are for the Advantage of the Town, *Siderfin* 284. *Raymond* 288. or of Trade, 5 *Rep.* 62. 2 *Keble* 309. Reſtraint by By-Laws.

Now I come to voluntary Reſtraints: And here, Of voluntary Reſtraints.

1*ſt*, All Contracts for Reſtraint of Trade over all *England* void, whether by Bond, Covenant or Promiſe; whether

whether of that Trade a Man is brought up to, or any other Trade he after falls into. *Cro. Eliz.* 872. 2 *Cro.* 596. *Allen* 67.

2*dly*, Contracts to reſtrain Trade in a particular Place, void; if not done upon a fair, juſt and good Conſideration. 2 *H.* 5. 5. *b.* The main Caſe to this Point, *Moore* 115, 242.

3*dly*, Where the Contract for the Reſtraint of Trade in a particular Place, appears to have been made upon a fair and juſt Conſideration, the Contract is good; be it by Bond, Covenant or Promiſe, 2 *Bulſtrode* 136. The Caſe there not well ſtated; but may be found 11 *Jac. Rot.* 223. 2 *Cro.* 596. *Jones* 13, *Joliffe* and *Brode*. A remarkable Caſe. The Plaintiff and Defendant were Mercers, living near to one another; the Defendant deſired the Plaintiff to buy his old Goods, which the Plaintiff did at ſuch a Price, upon Conſideration, That the Defendant would not exerciſe his Trade, within ſuch a Place. In this Caſe it was firſt obſerved, That it was a voluntary Reſtraint; and the Rule is *volenti non fit injuria*. Secondly, That it was made upon a valuable Conſideration; the Uſe of his Trade being compenſated to the Defendant, by the Price given him for his old Goods. Thirdly, That the Agreement was neither *malum in ſe*, nor *malum prohibitum*. Fourthly, A Man may bind himſelf not to live in ſuch a Place; and by Conſequence not to trade there. Fifthly, Theſe Kind of Bonds are very frequent in *London*.

In this Caſe the material Difference I firſt laid down is eſtabliſhed; and the Judgment in this Caſe, as appears 2 *Cro.* 597, was affirmed upon Error in the Exchequer-Chamber.

Palmer 172. *March* 77. *Allen* 67. A remarkable Caſe. And the Streſs was laid upon the Conſideration; not whether it was by Bond, Covenant or Promiſe.

Shower's Rep. 2, 3. where (tho' but an imperfect Report) the Caſe was of a Reſtraint from buying of a particular Perſon, and the ſame Difference taken. 2 *Saunders* 155.

I ſhall now make a few uſeful Obſervations: *Obſervations.*

As 1*ſt*, That a Reſtraint, to obtain the ſole Uſe of Trade, thro' all *England* is void; for it is a Monopoly.

2*dly*, That a Reſtraint from uſing one's Trade in a particular Place, if done fairly, and upon a good and lawful Conſideration, and with no ill Intention, is good.

3*dly*, That this is not in itſelf unlawful or unreaſonable; for then Cuſtom could not make it good; all unjuſt and unreaſonable Cuſtoms being void.

4*thly*, That ſince it is agreed on all Hands, That an Action upon the Caſe would have lain, which concludes *ad damnum*, and there can be no *damnum abſque injuria*, it follows, That the Law reckons the Breach of ſuch a Contract, an unjuſt and injurious Action.

5*thly*, That it is not unreaſonable to inforce By-Laws with a Penalty; ſince no By-Law, which is either unjuſt or unreaſonable, can ever be good.

6*thly*, The Reſtraint of it muſt be upon good Conſideration, and the Breach of it muſt apparently tend to the Damage of the other; for elſe the Reſtraint void, tho' for a particular Place.

I ſhall now give my Reaſons, why of involuntary and voluntary Reſtraints ſome are void; others good.

And, *firſt*, For involuntary; Grants, Charters *&c.* erecting Monopolies, void for two Reaſons. 1*ſt*, Becauſe againſt the Freedom and Birthright of the Subject. 2*dly*, Becauſe contrary to *Magna Charta*.

But it is otherwiſe, where the Grant or Charter is to inforce a Cuſtom; for if the Cuſtom be good, the Charter inforcing muſt be ſo too. Or where the Grant or Charter is made for the good Regulation and Government of Trade; for the publick Good is ever to be preferred to a private Loſs.

Next, In giving the Reaſons of voluntary Reſtraints, I ſhall proceed, firſt, *Negatively*, and ſhew what are not the

true Reaſons; and ſecondly, *Poſitively*, and point out the true ones.

1*ſt*, That they are againſt *Magna Charta*, no good Reaſon; becauſe *Magna Charta* provides againſt Force and Power, not voluntary Acts of Men.

2*dly*, That they are againſt the Liberty of the Subject, no good Reaſon; for what a Man parts with is no longer his own. If I ſell my Liberty to trade, it is no longer mine, but his to whom I ſell it.

3*dly*, It is not a good Reaſon, That the Condition is againſt Law in a proper Senſe, 1 *Inſt.* 206. *b.* For every Thing that is againſt Law in a proper Senſe, muſt be either, *firſt*, *malum*, 1 *Inſt.* 206, 216. *Perkins* 139. *Carter* 229. 2 *Keble* 140, 153. Or, *ſecondly*, Omitting or neglecting what is a Man's Duty. *Palmer* 172. *Fitzherbert* 13. Or *laſtly*, Encouraging the Commiſſion of an evil Action, *Brook Condition* 34. 2 *Hen.* 4. *fol.* 9. *Hobart* 12.

I ſay Conditions againſt Law in a proper Senſe, muſt fall under one of theſe Heads. And this laſt Head explains the Reaſon of the Difference, taken 1 *Inſt.* 106. 8. between a Feoffment and a Bond: That a Feoffment to a Man upon Condition, he will kill *B.* ſhall be good; but a Bond with ſuch a Condition void. For in the one Caſe, leſt the Man ſhould have any Temptation to do the Act, the Law ſecures to him the Poſſeſſion of the Land, without performing the Condition; and, in the other, frees him from the Penalty of the Bond; ſo that the Law has the ſame End in View, in making the Feoffment good, and the Bond void, *viz.* the Prevention of the Fact.

Wherever there can be a Way found out to perform the Condition without Breach of the Law, the Bond ſhall be eſteem'd good: *Perkins* 778. 1 *Rep.* 22. *a.* *Hobart* 12, *Norton* and *Syms.* 3 *Cro.* 705.

All Things that may be prohibited by Law, may be ſo too by the Condition of a Bond, 13 *H.* 7. 23, 24.

The Condition of the Bond before us, is neither *malum in ſe*, nor *malum prohibitum*; for then neither Cuſtom, nor Covenant could make it good.

I come now to ſhow *affirmatively* what are the true Reaſons, why of Contracts in Reſtraint of Trade, ſome are void and others good.

1*ſt*, Becauſe it is a depriving the Party of a Means of a Livelyhood.

2*dly*, Becauſe of the great Abuſe ſuch Bonds are liable to; as the enabling Corporations to exclude Foreigners, which they have no Right to do; and Maſters to lay Hardſhips upon their Servants, Apprentices, *&c.*

3*dly*, Becauſe it is a Condition of no Uſe to the other Party. *Puffendorf de jure Naturæ, lib.* 5. *cap.* 2. *ſect.* 3. makes all uſeleſs Agreements, as an Agreement not to waſh ones Hands, *&c.* void. 21 *H.* 7. *fol.* 20. *Cui bono* is ever of great Weight in all Agreements.

4*thly*, There may be ſeveral Caſes, where Agreements for Reſtraint of Trade in particular Places, may be of Advantage to ſome, and no Diſadvantage to the reſt; and there they are good: As for Example, where a Town is overſtock'd with Perſons of the ſame Trade; or in Caſe before cited of *Jolliffe* and *Brode*, where a Man grown old and unable to carry on his Trade without Blunders, and having a good accuſtom'd Shop, *quid damni* in ſuch an Agreement, as was there enter'd into, to either? but an apparent Advantage to both.

5*thly*, Thoſe Contracts in Reſtraint of Trade are void, where the Performance is attended with an immediate and apparent Damage to the one Side, only to free the other from the Fear of a diſtant Damage, that may or may not happen. Caſe of *Taylors* of *Ipſwich*. In the Caſe of *Barrow* and *Wood*, *March Rep.* 191, it is ſaid, That an Agreement not to ſow one's Land is void; but the Caſe of *Mich.* 7 *Ed.* 3. 64. upon which this Aſſertion is founded, warrants no ſuch general Poſition, *Allen* 67

6*thly*,

6thly, Suppoſing it did not appear in the Condition of the Bond, whether it were upon a fair and juſt Conſideration or not; Are theſe Bonds *prima facie* to be eſteem'd void? Or ſhall they be eſteem'd good, until the Party for whoſe Advantage it is, ſhew in Evidence the Illegality of the Conſideration upon which they are founded? I anſwer, firſt, as to Equity, the Law might be ſettled either Way, provided it were known. But ſecondly, as the Law now ſtands, they are *prima facie* void; and for theſe Reaſons: 1. On Account of the Benignity of the Common Law, and the tender Regard it has for the Liberty and Right of the Subject. 2. For the apparent Miſchief to one Side, and no viſible Advantage of the other Side to counterballance it; which Miſchief, in the firſt Place, is not barely a private one, but has an Influence upon the Publick, *that* being intereſted in a Man's Trade. And in the ſecond Place, there is not only a viſible Prejudice of the one Side, and no *apparent* Advantage of the other, but a great Probability that there is *none*; ſince to its being an Advantage to a Man to leave his Trade, ſo many ſpecial Circumſtances neceſſary, as are never to be preſumed, where they do not appear.

Hinc Conſtat, 1*ſt*, That all Bonds for Reſtraint of Trade, and no Reaſon given, are *prima facie* void.

2*dly*, Where the Condition of the Bond aſſigns a juſt and fair Reaſon, the Bond is good, until that Reaſon can be falſified.

3*dly*, From hence it appears, Why a Bond for Reſtraint of Trade all over *England*, be the Conſideration what it will, is void; becauſe without Doubt, ſome Place or other may be found, where the Party entring into ſuch a Bond, may uſe his Trade, without any Prejudice to the Obligee; unleſs the Obligee intend, by this Bond, to make a Monopoly of the Trade, which Reaſon is better let alone then given.

4*thly*, By this, the Difference taken in ſome of our old Books, between Bond and Covenant or Promiſe, may be very well accounted for; *viz.* becauſe upon a Bond,

there is no Neceſſity for the Reaſon and Nature of the Contract to appear; whereas in Promiſe or Covenant, the whole Nature and all the Circumſtances of the Contract, muſt appear to the Jury, before they can determine the Damages they are to give for the Breach of the Covenant.

5*thly*, This not only accounts for the Judgments given, but alſo the Expreſſions uſed in thoſe Caſes; as 2 *H.* 5. the Conſideration of the Bond not appearing, and therefore being to be preſumed an oppreſſive Bond, the Indignation of the Judge, tho' not the Way of expreſſing it (ſwearing) may be excuſed. Perhaps it was ſuch a Caſe as *this*, A Weaver forced by the Neceſſity of his Circumſtances to ſell to his Loſs, another takes him thus chagrin'd to the Tavern, where for a Trifle he extorts ſuch a Bond from him, and when the Cries and Tears of his half ſtarv'd Wife and Children call him again to the Loom, this Bond is put in Suit againſt him. This were a Crime, I am at a Loſs to find a Name for; if according to *Puffendorf*, by the Laws of Nature, uſeleſs Contracts are void, how much more oppreſſive ones?

And now I come to conſider the Caſe of 3 *Levinz* 241, wherein it is ſaid, That ſuch a Contract by *Bond* is void, by *Promiſe* good.

And here 1*ſt*, upon the Face of it, this appears very harſh Doctrine. For a Bond may be conſidered in a twofold Reſpect; Firſt, as a Security for not breaking this Contract; and can a Man be bound too faſt, not to break his Word? Secondly, The Penalty may be conſidered as a Compenſation for the Breach of the Agreement, as a Price of repurchaſing the Liberty reſtrain'd by the Bond; and this ſettled by Perſons of full Age, that are both moſt capable of it, and have likewiſe the beſt Right to do it.

As a Man may *cedere ſuo Jure*, ſo he may do it upon what Terms he thinks fit. A Man may ſay, I will not abſolutely exclude myſelf from doing ſuch a Thing; but

I will bind myſelf in a Bond of ſuch a Penalty not to do it, that ſo if I think fit to forfeit the Penalty, I may be at my Liberty, *vide Bracton, lib.* 3. *cap.* 2. And certainly very ſtrange, That the Law of *England*, that delights ſo much in Certainty, ſhould make a Bond void, only becauſe the Damages are there aſcertain'd by the Parties themſelves, who are the propereſt Perſons to do it; and make a Covenant or Promiſe good, only becauſe the Damages muſt there be reduced to Certainty by a Jury.

2*dly*, As this is very harſh Doctrine, ſo it was an Opinion not at all neceſſary for the Judgment given in that Caſe, which ſtands unimpeach'd upon the Ground, I have all along gone upon in this Caſe; ſo that it is only the Reporter's Opinion, founded upon *March* 77, 191; a very indifferent Reporter. And the Reaſon given for the Difference, *viz.* that in a Bond the whole Penalty is forfeited; whereas in a Contract it was to be recovered in Damages to be aſſeſs'd by a Jury, was a Reaſon, that held as well againſt all Bonds in general as *this*.

There can be but two Reaſons for leaving it to a Jury: Either, that the Jury may ſee, Whether it is a lawful Contract or not; which is proper for the Conſideration of the Court, not the Jury: Or elſe, *quia neſcitur quod damnum*; but this no Reaſon here, becauſe the *Damnum* is fix'd by the Conſent of the Parties.

Let it be further conſidered, that the Party can ſuffer nothing but by being a Knave; and ſhall a Court of Juſtice aſſiſt a Man to play the Knave?

Freedom to Trade as much bound by Conſent as Cuſtom: And the Caſe of Penalties made for the Enforcement of ſuch a Cuſtom, ſeems to me a ſtronger Caſe; for there the Party is, as it were, Judge in his own Caſe; whereas here the Penalty is fix'd by Conſent of both Sides.

Such an Agreement in taking an Apprentice good; and may be conſidered not as a prejudicial or reſtraining Agreement, but as a favourable and advantageous one, as putting an Apprentice in a Capacity of getting his Living in any Part of *England*, but where it wou'd be

to the Prejudice of his Maſter; when without it, he can gain it no where.

This Caſe has been compared to *that* of an Infant, whom a Contract for Neceſſaries will bind, but not a Bond.

But this nothing to the Purpoſe: For it ſtands clearly upon the Incapacity of the Infant to make any Contract at all, but ſuch as ſhall be for his Advantage; and it can never be for his Advantage to enter into a Penalty. That this is ſo, is plain from hence, that if an Infant and a Surety enter into a Bond for Neceſſaries for the Infant, the Bond is good as to the Surety, tho' not the Infant: So that it is not the Nature of the Bond, but Incapacity of the Infant, that makes the Bond void.

This Caſe has alſo been compared to Bonds taken by Sheriffs for their Fees, which are void.

But here 1*ſt*, The Sheriff, by the Common Law, was to take no Fees at all for doing his Office; and therefore as theſe Fees are given by Act of Parliament, the Act muſt be ſtrictly purſued.

But 2*dly*, and principally, Thoſe Bonds are void from the apparent Probability, that they will make Uſe of them to ſupport their Oppreſſion.

There is but one Objection, that ſeems to have any Colour in it, *viz.* That falſe Recitals of Conſiderations will make thoſe Bonds good, that ought to be void.

But 1*ſt*, This is to be fear'd no more than falſe Teſtimony. 2*dly*, This ſpecial Matter may be given in Evidence.

To conclude, The Bond in the Caſe before us *good*, and enter'd into upon a juſt and fair Conſideration; for the Reſtraint is exactly proportioned to the Conſideration, *viz.* the Term of ſeven Years only; and the Intereſt of the Publick is not at all concerned.

Skinner

Skinner and *Newton.* B. R.

Vide poſt. Trin. 12 *Ann.*

Treſpaſs. Judgment reverſed *niſi*, for want of uſing the Word *Clauſum* inſtead of *Pecias.*

TRESPASS in an inferior Court, Plaintiff declares, That the Defendant *vi & Armis tres* pecias *terræ fregit &c. ipſius* the Plaintiff, containing ſo many Acres, in ſuch a Place. Defendant juſtifies by Preſcription for a Way. Iſſue join'd, Verdict *pro quer.* and Judgment accordingly.

Upon Error brought it was inſiſted, That the Declaration ſhould have been worded, *clauſum terræ* inſtead of *pecias.* For Treſpaſs is a formed Action, and no Sort of Treſpaſs for which a Form is not ſet down; and in thoſe Actions for which a Form of Words is provided by the Law, it is not in the Power of the Plaintiff to uſe what Words his Fancy ſhall lead him to; but he muſt uſe the Words the Law has ſo appropriated, that they can be expreſs'd by nothing elſe. Every Man's Ground is in the Eye of the Law fenced.

Treſpaſs a form'd Action.

Treſpaſs will lie for the Veſture of Land; but even there the Declaration muſt be not *veſturam terræ*, but *clauſum terræ.* 1 *Inſt.* 4. *b.* 8 *H.* 6. 9, Treſpaſs for breaking into Church-yard; held that it muſt be *clauſum terræ. Dyer* 285, where a Man has only Herbage of Land, he muſt declare *quare clauſum fregit.* 8 *Co.* 48. *Web*'s Caſe, the Difference is taken between theſe Actions that are form'd, *viz.* have ſet Forms of Words preſcribed for them, and thoſe that have not. Indeed in *Hobart* 51, a Variance from the Regiſter, in a *Formedon*, where the Variance was not material, was not regarded. In *Hobart* 84, there is an Inſtance of a material Variance from the Regiſter, and held good; but then there was this particular Reaſon, That all the Courſe of Precedents, were of the Side of the Variation, which muſt all otherwiſe have been overthrown. 2 *Ventris* 73, the Declaration was *quare*

Clauſum fregit, & diverſa onera of Gravel *&c. per quod viam ſuam amiſit*; Judgment arreſted.

22 *Edw.* 4. 12. *a.* The Word *Clauſum* imports Poſſeſſion, without which Treſpaſs not maintainable; for Tenant at Will or for Years, Reverſion to another, he in Reverſion cannot maintain an Action of Treſpaſs, during the Life of Tenant for Years: But *Pecia terræ* does not import Poſſeſſion; for *terra revertens*, is *terra* ſtill.

It was argued of the other Side, That tho' *Clauſum* was the Word in the Regiſter, yet it was but Matter of Form; and therefore pleadable indeed in Abatement, but not aſſignable for Error, after a Verdict and Judgment. *Moore* 442, *Pecias terræ* held good in an Ejectment. It is true that Judgment was reverſed; but the Reaſon why, was, becauſe there was not certainly enough to direct the Sheriff what Land to deliver to the Party, for whom the Judgment ſhould paſs: Whereas here was as much Certainty as could be deſired; for it was not *tres Pecias terræ* barely, but the Declaration goes on and ſays, *ipſius* the Plaintiff, (which proves him to have been in Poſſeſſion, and ſo obviates that Objection) containing ſo many Acres in ſuch a Place.

Parker Chief Juſtice, and Judge *Powell.* No Want of Certainty in this Declaration; and after a Verdict and Judgment hard for meer Form to reverſe *&c.* Indeed in real Actions, that are form'd Actions, Men are tied up ſtrictly to the Form preſcribed in the Regiſter: *Sed aliter* in Perſonal Actions.

Judge *Eyre* was of the ſame Opinion, and gave this additional Reaſon, That Error does not remove the Writ nor Plaint, but the Proceedings only; and the Plaintiff in Error, could not be let in to make this Objection, but from the one or the other. But ſuppoſing the Plaint was removed, it could not appear in the Plaint; for that

is only *in placito tranſgreſſionis ſuper caſum*, without going further.

Judge *Powell*, thought this Reaſon of no Weight. Becauſe he was of Opinion, That a Writ of Error, in a Judgment given in a ſuperior Court, does not indeed remove the Record or Plaint, but Proceedings only; becauſe *here* Diminution may be alledged: But he was of Opinion, That Writs of Error, of Judgments in an inferior Court, removed all; becauſe *there* was no alledging of Diminution. *Adjournatur. Vide poſt. Trin.* 12 *Ann.*

Hacket and *Glover*. B. R.

Covenant.

WRIT of Error, out of the Court of Common Pleas, upon an Action of Covenant, wherein the Plaintiff declares, That the Defendant ſold him Goods for ſo much Money, and covenanted to defend and warrant the Goods to the Plaintiff *contra omnes perſonas*; and aſſigns for Breach of the Covenant, That at the Time of the Sale, the Defendant had neither the Poſſeſſion, nor the Property of the Goods: To this the Defendant demurs, and Judgment for the Plaintiff.

Breach well aſſigned.

Upon Error brought, Sir *Peter King* inſiſted, That this was no Breach of the Covenant; for the Intention and Deſign of the Covenant, was only to ſecure the Poſſeſſion; and therefore until an Eviction, the Covenant was not broken. *Co. Lit.* 365. *a.* it is ſaid, That an Eviction is of the very Eſſence of a Warranty; and tho' *Warrantia Chartæ* may be brought before Eviction, it is only a Charge upon the Land. *Vide Terms of the Law. Fitzherbert* 134. *b.* Suppoſe a Man having only an equitable Intereſt in Goods, ſells thoſe Goods, and covenants that he is Owner of thoſe Goods, and will warrant and defend *&c.* ſhall the Vendee, in this Caſe, bring an Action of Covenant before Eviction, and ſupport it only

by ſaying, That the Property, *viz.* the legal Title was in another, at the Time of the Sale? 2 *Saunders* 175. *Hobart* 51. 1 *Rolle Rep.* 519. *Moore* 175. *Hobart* 34, 35. *Dyer* 328.

Note, Moſt of the foregoing Caſes proved only, That a Covenant for Enjoyment againſt all Interruption, extended only to legal Interruption. *Quod conceſſum per curiam; ſed nihil ad rem.*

Mr. *Lutwyche* argued on the other Side, That ſince it was confeſs'd by the Demurrer, that he that ſold them had neither the Poſſeſſion, nor the Property; the Buyer could not take Poſſeſſion of them, without expoſing himſelf to an Action of *Trover.*

The Word *Dimiſi* in a Leaſe, imports a Covenant in Law; and in ſuch an Action it had been enough to aſſign for Breach, That the Leſſor had no Title at the Time of the Leaſe, without ſhowing an Eviction. 2 *Cro.* 474. 3 *Mod.* 261. 1 *Siderf.* 178.

Parker Chief Juſtice. Plaintiff cannot uſe the Goods without being liable to an Action, which is a Damage. If the Caſe had been, that the Defendant had had the equitable Right, but another the legal one, it had been proper for you to have laid it before the Court by pleading it.

Judge *Eyre.* Warranty, in the Nature of it, imports as well Warranty of the Property as Poſſeſſion. 1 *Rolle* 90. *Warner* and *Tallard:* The Caſe upon the Word *Dimiſi*; a ſtrong Caſe. For *that* a Covenant in Law; and if not neceſſary *there* to ſet forth Eviction, a *Fortiori* not *here.*

Judgment affirmed.

Sheppherd

Sheppherd and *Maidſtone.* B. R.

Debt upon Bond.

Whether the Breach aſſign'd, was a Breach of the Condition of the Bond?

DEBT upon Bond: Upon Oyer of the Bond it appear'd, That the Condition was, 1*ſt*, That the Defendant ſhould perform all Covenants comprized in ſuch a Deed of Indenture. 2*dly*, That he would upon Requeſt come to an Account with the *Eaſt-India* Company, for whatever of their Goods ſhould come to his Hands, or the Neat Produce of them. 3*dly*, That he would pay them whatever, upon ſuch an Account taken, he ſhould be found in Arrear to them. In the Deed of Indenture referred to, it was covenanted, That the Defendant ſhould, within ſuch a Time, go for *Fort St. George*, and ſerve the Company faithfully there, as a Factor, for five Years.

The Breach aſſigned was, That ſo many *Rupees* belonging to the Company, came to his Hands, which *illicite & fraudulenter imbezilavit, & in proprium uſum &c. contra tenorem Indenturæ &c.*

Upon Demurrer the Queſtion was, Whether the Breach aſſigned, was a Breach of the Condition of the Bond?

Reſolved by the Court, That it was not. For the Defendant was not barely intruſted with the Cuſtody of the Company's Goods, but was their Factor; and as ſuch, had a Power to inveſt their Money and Goods in whatever he thought moſt for the Advantage of the Company, and was not to account for the Goods themſelves, but the Neat Produce of them: So that he might convert to his own Uſe, the Stock that was the Company's; provided he anſwered it to them out of his own.

Indeed in Caſe of an Apprentice, the Caſe is different; for he has only the Cuſtody of his Maſter's Goods

and Caſh, and therefore the Breach here aſſigned, would have been a Forfeiture of his Indentures.

But, Serjeant *Pingelly* being retained to ſpeak to it. *Adjournatur.*

Parker and *Langly.* B. R.

Vide poſt. Hill. 12 Ann.

THIS was an Action upon the Caſe for a malicious Proſecution, wherein the Plaintiff declares, That the Defendant arreſted him in the Sum of 100 *l.* on Purpoſe to hold him to Special Bail, where not one Penny was due: Defendant demurs ſpecially, and ſhews for Cauſe of Demurrer, That the Plaintiff had not, in his Declaration, ſhewn what became of this malicious Proſecution.

Caſe for malicious Proſecution.

Declaration naught, for want of ſhewing what became of the malicious Proſecution.

They that argued for the Defendant owned, That after a Verdict, Judgment could not have been arreſted for this Defect in the Declaration; becauſe it could not be intended, that the Plaintiff could have had a Verdict, unleſs it had appear'd that the Proſecution was malicious: But upon Demurrer, and that a Special one, it was inſiſted upon as a good Exception.

No Action will lie for a malicious Indictment, without ſhewing what became of that Indictment.

Caſes quoted *arguendo*, were 2 *Rich.* 3. 9. *b. Salk.* 15. *Hobart* 205. *Keilway* 99. *b. Godbolt* 76. 1 *Saunders* 228, 229. 1 *Jones* 312. *Siderfin* 124. *Yelverton* 117. *Cro. Car.* 291.

The Reaſon of all which Caſes is founded in this, That otherwiſe, there might be a claſhing of Juriſdictions, and contrary Verdicts: As here it is poſſible, That the Defendant may be found guilty of a malicious Proſecution; and it may afterwards be adjudged, in a proper Place, that the Proſecution was not malicious.

It was argued for the Plaintiff, That this Action was founded upon Malice, and brought for holding to exceſſive Bail, which was collateral to the Proſecution; and therefore not to wait the Event of *that*, which if they did, the Statute of Limitations might poſſibly bar them. *Styles* 451. 3 *Lev.* 210.

It was urged, That there was a Difference between an Action upon the Caſe for a malicious Proſecution, and an Action of Conſpiracy: That in the latter, the Plaintiff muſt indeed ſhow the former Action to be determined; but then it appears from the Regiſter, *p.* 134, that this does not proceed from the Nature of the Action, but the Frame of the Writ; and this held to be the Reaſon, 1 *Ventris* 12. 1 *Jones* 93. 9 *Co. Poulter's* Caſe. *Cro. Jac.* 130.

Court inclin'd in Favour of Defendant. *Sed Adjournatur. Vide poſt. Hill.* 12 Ann.

Queen and *Corporation of* Durham. B. R.

Mandamus to reſtore a Town-Clerk.

THIS was a *Mandamus* to reſtore *H.* to the Office of Town-Clerk; and to the Return two Exceptions were taken.

1*ſt*, That they ſaid, that ſuch a Year of Queen *Elizabeth*, and long before, they were a Corporation; and ſo did not intitle themſelves by Preſcription, which is ever Time out of Mind. 10 *Rep. Sutton Hoſpital.* 3 *Cro.* 168. 12 *Edw.* 4. *fo.* 8. *b.* 11 *Rep. Bag's* Caſe. *Raſtall's Entries* 3. *b. Dyer* 7.

2*dly*, It was not returned, That the Town-Clerk was actually choſen annually, but only that he was *annuatim eligibilis*; whereas Time and Uſage are neceſſary to Preſcription. 1 *Inſt.* 110. 1 *Lev.* 262. 3 *Cro.* 110.

Beſides, the Office of Town-Clerk is, in the Nature of it, in the Eye of the Law, an Office for Life; and will be ſo intended, until the contrary appear. 1 *Ventris* 82.

As to the 1*ſt*, the Court were of Opinion, That a Corporation muſt either be by Charter, or Preſcription, which is ever Time out of Mind; and therefore the Authorities were allowed for Law: But yet the Exception was diſallowed; becauſe it was only failing in a Matter of Surpluſage.

But for the 2*d* Exception, the Court held it good: For the Office of Town-Clerk, is an Office for Life; unleſs reſtrain'd by Charter, or Preſcription, which ought to be ſhewn upon the Return; but this not done.

Beſides, tho' he be *annuatim eligibilis*, he may continue Town-Clerk, and will do ſo until they chooſe another: But this does not appear to be done; the Exception therefore good for both theſe Reaſons.

If the Return had been *eligibilis pro uno anno tantum*, his Office would have expired at the End of the Year, whether they had choſen another or not; but otherwiſe, as this Return is.

Merril and *Joſſelyn.* B. R.

Debt upon Bond.

Pleading.

Solvit ante diem pleaded, Iſſue joined, Verdict for the Plaintiff, yet Judgment muſt be for the Defendant.

WRIT of Error out of the Court of Common Pleas, where the Action was Debt upon a Bond, conditioned for Payment of Money upon the 25th of *March.* Defendant pleads Payment upon the 20th; Plaintiff replies, That he did not pay it upon the 20th. Upon this Iſſue join'd, Verdict for the Plaintiff, and Judgment accordingly; and upon this Error was brought.

If the Verdict had been found for the Defendant, and Judgment given accordingly, all had been right; for Payment

Payment upon the 20th, is Payment upon the 21ſt, and ſo on: But now the Verdict is found for the Plaintiff, the Iſſue is immaterial; for Non-Payment upon the 20th, can be no Evidence of Non-Payment upon the 25th, for it might be paid in the mean Time. 2 *Cro.* 434. *Cro. Eliz.* 828. *Hill. nono Annæ, Maſon* and *Price.*

Parker, Chief Juſtice. It is hard, That the Defendant ſhould take Advantage of his own immaterial pleading: But we cannot help it; *Hill* and *Manby*, in Court of Common Pleas, is a Caſe in Point.

Judgment revers'd.

Jones and *Gwynn.* B. R.

Vide Salk. 15.

Vide poſt. Hill. 12 Ann.

Action upon the *Caſe*, for falſe and malicious Indictment.

THIS was an Action upon the Caſe, for falſly and maliciouſly indicting a Man, for uſing the Trade of a Bager, without a Licenſe to do it.

One Exception to the Declaration was, That the Indictment was ſaid to be *falſo & malicioſe*, and not *abſque probabili cauſa.*

But reſolved, That in Caſe of an Indictment, *falſo & malicioſe*, without *abſque probabili cauſa* was enough: But had it been an Action for a malicious Proſecution, thoſe Words muſt have been in. 2 *Cro.* 193, 490. 2 *Mod.* 51. *Jones* 93, 94.

But another Exception was taken by the Court, That this was an Action brought for an Indictment for uſing *&c.* and not being licenſed; and yet the Plaintiff does not ſhew, That he was licenſed.

Then it was doubted, Whether this were a Matter indictable? and then the Queſtion would be, Whether

an Action would lie, for falſly and maliciouſly indicting a Man for a Matter not indictable, nor yet containing Scandal?

And the Court inclined to the Opinion, That it would not; and that the Law ſtood thus: 1*ſt*, That a falſe and malicious Indictment, for a Matter not indictable, yet containing Scandal, was actionable. But,

2*dly*, If it was neither indictable, nor ſcandalous, That it was not actionable. *Raymond* 135. 2 *Siderfin* 162. and the late Caſe of *Savil* and *Roberts*. *Salk.* 13.

3*dly*, That if it were for a Matter indictable, tho' it did not import Scandal, it was actionable.

To this Opinion of the Court, it was objected by the Counſel, That in the Reaſon of the Thing, they could not ſee, why its being for a Matter indictable, or not indictable, ſhould occaſion ſuch a Difference; ſince a Perſon by being falſly and maliciouſly indicted for a Matter not indictable, is put to the ſame Expence and Trouble, as if it were for a Matter indictable; and the Maliciouſneſs of the Proſecution rather more.

This Way of reaſoning the Court allow'd to have Weight in it.

Adjournatur. Vide poſt. Hill. 12 Ann.

Thornicraft and *Barns*. B. R.

WRIT of Error brought upon a Judgment given in the Court of Common Pleas, where the Action was Debt upon a Bond of 1000 *l*. Penalty, condition'd, That if ſuch a one being an Apprentice, ſhould purloin or imbezil any Thing to his Maſter's Damage, that then he ſhould make it good. Breach aſſigned was, That he did imbezil and purloin 200 *l*. Upon this Iſſue joined, Verdict for the Plaintiff, and Judgment accordingly. *Debt upon Bond.*

Now upon Error brought it was inſiſted, That the Breach was not well aſſigned; for the Condition of the Bond, tying it up to ſuch purloining as ſhould be to the Damage of the Maſter, the Plaintiff in the original Action, ſhould have averr'd, That this was a Purloining to the Damage of the Maſter.

Purloin and *Imbezil* are always underſtood in a bad Senſe.

But the whole Court thought, the Judgment of the Court of Common Pleas was well given. For the Words *Purloining* and *Imbeziling*, are always taken in a bad Senſe, and *ex vi Termini* import Damage to the Maſter; and what appears plainly needs not be averred; according to that Maxim of Law, *Quod conſtat clare non debet verificari.*

Maxim.

Judgment affirm'd *niſi.*

Queen and *Inhabitants of* Hornſey. B. R.

Publick Way.

PARKER, Chief Juſtice. If a Vill be erected, and a Way laid out to it, if there be no other Way but *that* to the Vill, not material *quo animo* it was laid out, it ſhall be deem'd a *publick* Way.

Evidence.

No one living in a Hundred, ſhall be allowed an Evidence for any Matter in Favour of that Hundred, tho' ſo poor as upon that Account to be excuſed from the Payment of Taxes; becauſe tho' poor at preſent, he may become rich.

2

DE
Termino Paſchæ,
12 *Ann.*
In BANCO REGIS.

Corporation of the Town of Bewdley.

THOSE that produce an Evidence, ought to examine him in Chief only: But they, *againſt whom* he is brought, may examine him upon a *voir dire*, if they pleaſe, Whether he is concerned in Intereſt. *Evidence.*

The Matter in Iſſue was, Which was the Charter by which the Corporation of the Town of *Bewdley* was to act; whether by the ancient one, or one of later Date?

Now an Evidence being brought to eſtabliſh the ancient Charter, his Evidence was excepted againſt, as being a Mortgagee under the old Corporation, which they proved by an Anſwer of his to a Bill in Chancery. But this Anſwer being ſo uncertainly penned, as that it might be true, and yet his Mortgage of ſuch a Nature, as not to prevent his Evidence, it was inſiſted that he might be called to explain the Ambiguity of his Anſwer.

And the Court was of Opinion he might, ſince his Anſwer depended upon his Veracity, as much as the Evidence he could then give; and if the one be to be credited, Why not the other?

But

But afterwards his Evidence was rejected upon another Conſideration, *viz.* That in his Anſwer he lays the whole Streſs of his Defence upon the Matter then in Iſſue, *viz.* the ſubſiſting of the preſent Corporation.

Queen and *Ridpath.* B. R.

Recognizance ad reſpondendum generally, the Nature of it.

A Recognizance was entered into by *Ridpath*, with Securities, whereby he was bound to appear the firſt Day of the Term *ad reſpondendum &c.* (in the mean Time to his good Behaviour) and not to depart without the Licence of the Court.

An Information is preferred againſt him by the Attorney General; to which Information, by Reaſon of ſome Defect in the Pleading, the Attorney General though fit to enter a *Nolle Proſequi*; and then the Attorney General exhibits another.

It was inſiſted in Favour of *Ridpath* and his Securities; 1. That the Words *ad reſpondendum*, muſt be extended to thoſe Crimes only, the Suſpicion of which, was the Cauſe of his Commitment, and entring into the Recognizance; and not to the Crimes he ſhould afterwards commit, or be charged with. For then it would be utterly impoſſible for a Man to get any Body to be bound in a Recognizance with him; an Opinion of the Innocence of the Perſon as to the Crime charged, being probably the only Motive, that can be ſufficient to induce Men to become bound for others.

2. That *ad reſpondendum*, refers to the firſt Day of the Term, when he was bound to appear.

3. That the entring of a *Nolle proſequi*, was a Bar to the Offence contained in the Information; at leaſt, That it was a Diſcharge from any further Proſecution for it: And that it was all one, whether he was diſcharged from the Recognizance, by Rule of Court made for that

Purpoſe;

Purpoſe; or by a Judgment, that by a neceſſary Conſequence, amounted to a Diſcharge.

But the Court were of Opinion, That the Recognizance extended to all Crimes, whatever he ſhould be charged with; and that if it had Relation to any particular Crime only, it muſt be mentioned in the Recognizance: But *that* is only *ad reſpondendum* generally.

That there was no ſuch Inconvenience as was pretended; the Bail in this Caſe being bound in a Sum certain, and not to ſtand in the Place of the Principal, as in civil Caſes: That the Perſon's not appearing according to his Recognizance, his Abſence (be the Cauſe or Reaſon of it what it will) was the Cauſe of the Forfeiture of the Recognizance.

That anciently in Special Bail in Civil Actions, where the Bail is to ſtand in the Place of the Principal, Bail to one Action was to ſtand Bail to all Actions, that he ſhould be charged with, when in Court. That this was hard in Caſe of Special Bail, and is therefore now altered, tho' altered only by Rule of Court; and that as to Common Bail the Law is ſtill the ſame. *Bail.*

That the *Nolle proſequi* was neither a Bar, nor Diſcharge. *Salk.* 21.

Turner and *Goodwin.* B. R.

Vide poſt. Mich. 12 Ann. *& Paſch.* 13 Ann.

THIS was an Action of Debt upon a Bond, for 3000 *l.* condition'd for the Payment of 1500 *l.* The Condition of the Bond recites, That whereas *Dibble* was indebted to *Turner* in a Bond of 3000 *l.* conditioned for the Payment of 1500 *l.* and had recovered Judgment for this Money; *Goodwin* upon Conſideration that the Plaintiff would forbear ſuing out Execution upon *Dibble*, promiſed to pay the Money to *Turner* upon Requeſt; *Debt* upon Bond, conditioned to pay ſo much Money, the Plaintiff aſſigning over to the Defendant ſuch a Judgment. Defendant pleads, Plaintiff had not aſſigned. Plaintiff re-

plies, That he was ready to aſſign. Judgment *pro quer.* For ſaid, That Payment of the Money, and Aſſignment of the Judgment were concomitant Acts; and therefore the Defendant could not excuſe himſelf meerly upon the Neglect of the Plaintiff; but ought to have pleaded Tender of this Money; tho' he was not bound to have paid the Money, in Conſequence of that Tender, unleſs the Judgment was at the ſame Time aſſigned over to him.

Requeſt; he aſſigning over to him the Judgment he had againſt *Dibble*.

Defendant pleads in Bar, That the Plaintiff had not aſſigned the Judgment: Plaintiff replies, That he was ready to aſſign.

Defendant demurs, and Plaintiff joins in Demurrer.

It was argued for the Defendant, That thoſe Words *aſſigning over the Judgment*, was in Nature of a precedent Condition. 1*ſt*, Becauſe otherwiſe the Defendant would be without Remedy, *viz.* any Remedy at Law, for the Aſſignment of his Judgment; the Obligee only being able to ſue upon this Bond. But on the other Hand, no Inconvenience to the Plaintiff, in interpreting this a precedent Condition; becauſe he can put the Bond in Suit for his Money.

Dubious Words in the Condition of a Bond, to be underſtood in the moſt favourable Senſe for the Obligor.

2*dly*, Suppoſing the Words might with an equal Probability admit of either Interpretation, conſidered ſimply in their own Nature, yet being the Words of the Condition of a Bond, which is always in Eaſe and Favour of the Obligor, they muſt upon that Account be interpreted here a precedent Condition. 1 *Lutwyche* 490, 596. 1 *Ventris* 147. Covenant to pay ſo much Money, the Plaintiff making to the Defendant ſuch an Eſtate in ſuch Land, and declared *licet paratus &c.* he had not paid the Money: Defendant pleads, Plaintiff had not made ſuch an Eſtate. Upon Demurrer, Judgment for Defendant; *this* being reſolved to be a precedent Condition.

The Court were divided in their Opinion: *Parker* and *Powys* for the Plaintiff, and *Eyre* for the Defendant.

The two former were of Opinion, That the ſingle Queſtion was, Who was to do the firſt Act? And that

the Obligor was to do it. For tho' the Obligor be not bound to part with the Money, unleſs the Judgment be at the ſame Inſtant of Time aſſigned to him; yet he is bound to ſeek out the Obligee, bring the Money, and tell him, Sir, here is your Money, if you will aſſign the Judgment.

Eyre was for the Defendant; being of Opinion, That the Words *aſſigning the Judgment*, did amount to a precedent Condition. 1*ſt*, Becauſe the Form of ſpeaking, *yielding*, *paying &c.* did always import ſo; unleſs the Nature of the Thing ſpoke the contrary. And 2*dly*, Becauſe if the Judgment was aſſigned firſt, the Bond might be put in Suit for the Money; but if the Bond was paid firſt, there lay no Remedy at Law for the Judgment.

Adjournatur. Vide poſt. Mich. 12 Ann. *& Paſch.* 13 Ann.

Queen and *Bradley*. B. R.

Conviction of a Baker.

THIS was a Conviction upon the Statute 10 *Annæ*, about the Aſſize of Bread.

There were two Queſtions in the Caſe: The firſt was, Whether the Crime was certainly enough charged in the Indictment, upon the Defendant? The ſecond, Whether the ſame Perſon could be both Informer and Witneſs?

The Crime was thus charged, that the Bread wanting ſo much Weight of *&c.* was bought in the Shop of *Bradley*, a common Baker.

And the Court were of Opinion, That the Crime was not certainly enough charged. For the whole Charge may be true, and yet the Defendant innocent; for it is poſſible that it might be the Bread of another Perſon, ſold in the Defendant's Shop; that therefore he ought

to

to have been charged *directly* with the Sale of ſo much Bread.

It is true indeed, that when a Servant ſells it in his Maſter's Shop, it is good Evidence of its being the Maſter's Bread: But it is ſtill but Evidence; and it is a conſtant Rule, That *that* which is but Evidence, cannot be laid in an Indictment.

Rule in Indictments.

Same Perſon cannot be Informer and Witneſs.

As to the ſecond Point, the Court ſeem'd to be of Opinion, That the ſame Perſon could not be both Informer and Witneſs. For as to the Objection, That this would render Convictions impoſſible, unleſs Perſons were ſo fortunate as to have Witneſſes with them, there was nothing in it; for an Informer is only nominal, and any Body's Name may be made Uſe of.

Manners and *Pern.* B. R.

Coſts.
See *pag.* 125.

THIS was the Cauſe, in which the Univerſity of *Cambridge*, had the laſt Term, claim'd Conuſance of Pleas. And now the Plaintiff moved the Court, that the Defendant might pay all the Coſts, for all the Motions about that Conuſance.

It was ſaid, that when a Defendant makes Default at *Niſi prius*, he is from that Moment out of Court, and his Motion in Arreſt of Judgment, is but as *Amicus Curiæ*; and yet the Plaintiff has always Coſts.

But the Court rejected the Motion; for they knew no Precedent, nor ſaw any Reaſon, that becauſe a third Perſon claim'd Conuſance of Pleas and is refuſed, that therefore the Defendant ſhould pay the Plaintiff Coſts.

Beſides, in this Caſe the Defendant by imparling, had as far as lay in him, ſhewn himſelf deſirous of having the Cauſe tried in this Court.

Add to all this, That the Motion was by no Means without Foundation; for the Univerſity only came a Moment to late.

Queen and Inhabitants of Gruelthorp. B. R.

THIS was an Action upon the Statute of *Weſtminſter* 2. *cap.* 46. which enacts, That if any upon juſt *Approvement*, do make a Hedge and Ditch for that Purpoſe, and it is thrown down afterwards by ſome, that cannot be diſcovered, by Verdict of the Aſſize or Jury, and the Towns adjoining will not indict ſuch as are guilty of the Fact; in ſuch Caſe, the ſaid Towns ſhall be diſtrained to make again ſuch Hedge or Ditch, at their own Coſts, and ſhall alſo yield Damages. Action upon Stat. *Weſtm.* 2 *cap.* 46.

It was urged by the Defendant, That the preſent Proceedings upon this Statute were much too quick; it being in all, not above three Weeks, ſince the Crime committed.

The Statute gives this Action conditionally, *viz.* if the Inhabitants do not indict the Perſons guilty of the Offence; and therefore ſome Time muſt be allowed for notifying the Offence, ſome Time for inquiring who the Offenders are. Lord *Coke*, 2 *Inſt.* 406. allows the Inhabitants a Year and a Day's Time for indicting the Offenders. 1 *Rolle's Rep.* 365, The ſame Objection taken. And all the Precedents are, at leaſt, a Year's Time, ſubſequent to the Offence.

The Court were of Opinion, That the Time was too ſhort; and that the Statute ſuppoſes a reaſonable Time ought to be allowed for indicting.

If for a Robbery committed in the Day-time, the Hundred is not chargeable until forty Days after the Offence; certainly leſs Time muſt not be allowed here, where the Offence is committed in the Night-time.

In this Caſe, an Objection was taken to the Defendant's Plea. For this Statute not extending to every

Lord, but ſuch Lord only as had right to approve; the Defendants to ſhew the Lord had no Right to approve, pleaded a Preſcription to Common thus, That *divers* Freeholders had a Right to Common, without confining their Preſcription to any certain particular Tenements. It was admitted, by Way of Cuſtom this general Way of Pleading had been good; but not by Way of Preſcription. And to this Opinion the Court inclined. *Adjournatur.*

Preſcription.

Cuſtom.

Sail and *Kitchingham.* B. R.

Action of *Covenant.*

ACTION of Covenant, and ſeveral Breaches aſſigned; but that Covenant, upon which moſt Streſs was laid, was, That the Leſſee ſhould Lime and Dung the Land, *durante Termino*, which was ſix Years.

This Action was brought by the Plaintiff as Heir at Law to the Leſſor. And the Breach of the Covenant was thus aſſigned, That after the Deſcent of the Land, he did not, *durante Termino*, Lime and Dung the Land.

It was objected by the Defendant, 1*ſt*, That Covenant is a Perſonal Action, and that therefore the Executors were the proper Perſons to have brought this Action; tho' they indeed, upon their recovering, ſhall be Truſtees for the Heir at Law.

Where Covenants relate to Land, they run with it, attend upon the Reverſion, and the Heir may bring the Action.

But the Court were of Opinion, That this was a Covenant relating to the Land, and for the Advantage of the Reverſion: That it would have gone to an Aſſignee without his being named in the Covenant, which proves it to be a Covenant that runs with the Land, and attends upon the Reverſion; and by Conſequence a Covenant, to which the Heir at Law will be intitled, as he is to the Reverſion.

Breach not well aſſigned.

2*dly*, It was objected by the Defendant, That the Breach was not well aſſigned; becauſe the not dunging it and liming it ſince the Deſcent, is no Breach of the

Covenant, if it was limed and dunged ſo ſufficiently before, that it did not need it. And of this Opinion was the Court. *Adjournatur.*

Inhabitants of Weſtham *in* Eſſex. B. R.

THE Court was moved to quaſh an Order made by the Commiſſioners of Sewers, charging the Inhabitants of *Weſtham* in *Eſſex*, for erecting of a tumbling Bay (to prevent an Inconvenience occaſioned by *Conden* Lock, which in the very Order is ſaid to have been erected for a private Benefit) and of a Lock, to prevent the Damage, the tumbling Bay would occaſion to the Navigation. *Commiſſioners of Sewers, their Power.*

The Court was of Opinion, That the Order could not be maintained; becauſe it was out of the Power of Commiſſioners of Sewers, to charge Inhabitants, for finding an Expedient, how a Thing erected for a private Benefit, may be continued, and yet be no Nuſance; their Buſineſs ſhould have been to have abated the Nuſance.

Commiſſioners of Sewers have no Power to make a River navigable; nor even to improve the Navigation of a River, beyond what it was before. Preſerve it they may in the State it was, by removing Obſtructions, and other *natural* Ways; but they cannot even help the Navigation by erecting Locks, or any ſuch *artificial* Methods.

DE
Term. S. Trin.
12 *Annæ*,
In BANCO REGIS.

Miles and *Williams*.

Vide poſt. Trin. 13 Ann.

Bankrupcy. Debt upon Bond, brought againſt Man and his Wife: They plead a Diſcharge by the Bankrupcy of the Huſband, and conclude *hoc parati ſunt verificare*. Special Demurrer. Court of Opinion, That the Bond was diſcharged *per* Bankrupcy of the Huſband; but being alſo of Opinion, that they ought to have concluded their Plea to the Country; and this being one of the Cauſes aſſign'd for Demurrer, Plaintiff had his Judgment.

DEBT upon Bond, brought againſt the Defendant and his Wife: They plead in Bar, That the Bond was entered into by the Wife, *dum ſola*; that a Commiſſion of Bankrupcy iſſued out againſt the Huſband, who in all Points conformed himſelf to the Statute about Bankrupts in the 4th Year of the Queen; and ſo both Defendants ſay, That by Virtue of the Statute of the 4th of the Queen, and other Statutes, he became a Bankrupt, *per quod*, the Debt was diſcharged, *Et hoc parati ſunt verificare.*

To this Plea Plaintiff demurs ſpecially.

1*ſt*, Becauſe a Bond enter'd into by the Wife, *dum ſola fuit*, is not diſcharged by the Bankrupcy of the Huſband.

2*dly*, Becauſe they ought to have concluded their Plea to the Country.

It was argued in Favour of the Plaintiff by Mr. *Salkeld*, That, at the Common Law, no Perſons were allowed to avoid Actions, by pleading Diſability in themſelves. *Cro. Eliz.* 516. 4 *Co. Rep.* 123. *Beverley*'s Caſe.

That, properly ſpeaking, no Man can be ſaid to be a Debtor, but *ex ſuo contractu.*

It is not pretended, That an Executor would be excus'd and diſcharged, by this Statute, of all Debts he ſtands charged with, as Executor; and yet the Executor as properly a Debtor, as the Huſband in this Caſe, Marriage not at all altering the Nature of the Contract; for it was not in the Power of the Wife, by any Act of hers, to diſſolve her own Contract; nor could the Husband, for he is a third Perſon. This indeed the Husband can do, he can make himſelf liable; and this he has done *ratione connubii*; but this hinders not, but that the Wife may ſtill remain chargeable, *ratione contractus.*

If the Huſband die, his Executor not chargeable with this Debt; and if the Wife dies, Huſband not liable, which plainly ſhews it to be *properly* the Debt of the Wife.

In *Hobart* 184, it is reſolved, That a Debt of the Huſband and a Debt of the Wife, cannot be joined in one Action, brought againſt Huſband and Wife; which certainly they might, if ſo be, that after Coverture, the Debt of the Wife, was, in a ſtrict and proper Senſe, the Debt of the Huſband.

1 *Levinz* 17. *A.* and *B.* Obligees, one of them becomes a Bankrupt; reſolved, that this Debt was not aſſignable. If this Bond had been made to Huſband and Wife, it had reach'd the Equity of the preſent Caſe; for it ſeems plainly againſt Equity, That a Debt, due from the Wife, ſhould be diſcharged by the Bankrupcy of the Huſband; and yet that the Creditors of the Huſband cannot have the Benefit of Debts due to the Wife.

More Caſes quoted in the Argument.

43 *Ed.* 3. 95. *Fitzherbert Nat. Brev.* 1211. *C.* 12c.

The Caſe of *Drue* and *Horn*, reported in *Allen. Hill.* 6 *Ann. Ludlam* and *Brownhill.*

And tho' Chattels perſonal, cannot remain in Jointure after Marriage; yet Choſes in Action may. The Husband cannot ſue alone upon a Bond given to the Wife, *dum ſola*; which proves it a Debt ſtill due to the Wife.

As the Nature of the Contract is not altered by the Marriage, but only the Power of the Wife ſuſpended; ſo neither is the Nature of the Contract altered by bringing of the Action.

But, indeed, after Judgment, *tranſit in rem Judicatam*; and it is the Judgment, that gives the Huſband a new Right, and will make it go to his Executors.——But ſurely this Court, will never eſteem an Act of Bankrupcy, of equal Force with a Judgment.

Maxim of Law.

The Plea ought to cover the Wife as well as the Huſband; but the Wife is not a Bankrupt, becauſe the Huſband is ſo; for by the Law of *England*, the Wife ſhall ſhare in the Honours and Advantages, but not in the *pœnis & criminibus* of her Huſband.

A Man covenants not to ſue Huſband and Wife, upon a Bond enter'd into by the Wife, *dum ſola*, during the Life of the Husband; afterwards, contrary to this Agreement, he puts the Bond in Suit; this Covenant cannot be pleaded in Bar, but muſt be pleaded in Abatement only.

It was further inſiſted upon, That no Plea could be good for the Husband and Wife, but ſuch a Plea as would have been good for the Wife, had ſhe remained unmarried.

Argument for Defendant.

Caſes quoted, *Noy* 142, 505. 2 *Keble* 331. 1 *Chancery Rep.* 71.

Mr. *Forteſcue pro Def.* inſiſted, That what was due to the Wife was in the ſtricteſt Senſe, a Debt belonging to the Huſband. For the very Definition of a Debt, according to *Bracton*, *lib.* 3. *cap.* 1. is what a Man can recover by Action; and that to his own Uſe. The laſt Part of the Definition was what he chiefly relied upon, as that which diſtinguiſh'd it from the Caſe of 1 *Levinz* 17, about the joint Obligees; and alſo from the Caſe of an Executor,

who ſues *jure repreſentationis*, *in alieno jure*; and recovers not for himſelf, but for another's Uſe.

In *Calvin*'s Lexicon a Debtor is defined to be one that may be ſued againſt his Will; and ſo may the Huſband.

Againſt an Executor, who is ſued as ſuch, the Action muſt be in the *Detinet* only; for the Word *Debet* would not be true, ſince he is not ſued for his own Debt, but the Teſtator's. Whereas an Action brought againſt Huſband and Wife muſt be in the *Debet* and *Detinet*; which ſhews, That the Law of *England*, upon Marriage, conſiders the Debts of the Wife, as the Debts of the Huſband, 20 *H.* 6. 22. 9 *Edw.* 4. 24.

In this Caſe, no Remedy is to be had againſt the Wife: She cannot be taken in Execution; and therefore the Huſband, who alone is liable to execution, is Debtor.

A Releaſe by the Huſband in Caſe of a Debt to the Wife, would be a Releaſe in his own Right; whereas an Executor releaſes *in alieno jure*. *Hales*'s *Analyſis of the Law*, *pag.* 47.

So when the Huſband ſues, he ſues in his own Right, derived to him from the Marriage, 47 *Ed.* 3. 23.

It is true, That a Debt due upon a Bond, made to the Wife, *dum ſola*, will (unleſs recovered by the Husband) *ſurvive* to the Wife: But from thence it neceſſarily follows, That this muſt have been a Debt veſted in the Huſband, at the Time of his Death; according to the Rule among Joint-tenants, That nothing accrues to the Survivor, but what was in Jointure at the Time of the Death of his Companion. *Nihil accreſcit ei, qui nihil habuit in re unde accreſceret jus.* If now a Debt due to the Wife, *dum ſola*, does veſt in, that is, become due to the Huſband; by a Parity of Reaſon, a Debt due from the Wife, *dum ſola*, ought to be eſteem'd a Debt from the Huſband, that is, a Debt of the Huſband's. Nor is it any Objection againſt its being eſteem'd his Debt, That he is chargeable with it during his Life only. For as a Feoffment made by Tenant in Tail creates a Fee-ſimple, tho' it is poſſible the Fee-ſimple may

Maxim of Law.

may laſt but an Hour; ſo tho' the Huſband is only chargeable with this Debt during his Life, yet as long as he lives it is his Debt.

27 *H.* 6. 9. Choſes in Action are aſſignable. By Stat. 1 *Jacobi*, Debts for the Benefit of the Bankrupt are aſſignable.

Then it was argued, That there was no Inconvenience in making the Debts due to the Wife aſſignable; for this is no harm to the Wife, ſince ſhe knew, That the Huſband had Power to receive or aſſign her Intereſt, 1 *Cro.* 187. 1 *Ventris* 10. 1 *Keble* 167. But great Inconvenience of the other Side, by enabling the Bankrupt to ſhelter all his Eſtate (by aſſigning it) in the Name of his Wife, and ſo putting it out of the Power of the Commiſſioners of Bankrupcy. Suppoſe in Caſe of ſuch an Aſſignment, the Bankrupt *will* not, (becauſe it is not for his Intereſt) and the Aſſignees of the Commiſſioners *can* not ſue, What becomes of the Eſtate in the mean Time?

If then Debts due to the Wife, are, as well as other Debts due to the Huſband, aſſignable to the Commiſſioners, Common Equity requires, That Debts due from the Wife ſhould be diſcharged by the Statute of Bankrupcy, as well as thoſe that are due only from the Huſband.

This Conſtruction even advantagious to the Plaintiff, by preventing him from ſuing a Bankrupt, one that he can get nothing by; unleſs he be a Felon, which is not to be ſuppoſed.

It is ſomething ſtrange, that a Man ſhould be both a Bankrupt and not a Bankrupt at the ſame Time; a Bankrupt as to his own Eſtate, but not his Wife's.

It was obſerved from the Clauſe in the Act, whereby it is criminal for Bankrupts to conceal Moneys or Effects, whereof any Perſon in Truſt for them ſtands poſſeſs'd, That it is plain, that the Bankrupt is bound to diſcover a Bond enter'd into *to* the Wife, *dum ſola*; and if he is bound to diſcover, then it muſt be aſſign-

able; and conſequently, by Parity of Reaſon, a Bond Debt *from* the Wife, *dum ſola*, muſt be diſcharged.

Reply for Plaintiff.

The Caſe of the Releaſe not to the Purpoſe. For it muſt be a Releaſe of all *Demands*; and *that* will releaſe the Debt to the Wife, becauſe the Husband only could demand it: But a Releaſe of all *Actions* would not releaſe it, 21 *H.* 7. 29. *b.*

Noy 6. Bond given to a Feme-Sole, not forfeited by the Outlawry of the Husband.

As to the Caſe of a Bond given to a Feme-Sole, who marries, and her Husband dies; it is an improper Expreſſion to ſay the Bond *ſurvives* to the Wife, it does indeed *remain* to her.

It is true, That Debts in Truſt for the Bankrupt are aſſignable: But ſurely, it does not from thence follow, That a Bond enter'd into, to the Wife *dum ſola*, is ſo; for ſuch a Debt can never be ſaid, in the Original or Creation of it, to be a Debt in Truſt for the Husband. And if ſuch a Bond is not diſcoverable, it is not aſſignable; and by Parity of Reaſon this Debt not diſcharged.

As to the Inconvenience pretended, That this would open a Way to ſhelter an Eſtate under the Wife's Name; the Anſwer is eaſy, that *that* can never be done without Fraud, which will viciate the whole Contrivance.

Sir *Thomas Powys* lately a Judge of *B. R.* deſired the next Time this Caſe was ſpoken to, it ſhould be more diſtinctly argued, Whether upon Suppoſal, that a Bond made *to* the Wife *dum ſola*, was aſſignable to the Commiſſioners, it did neceſſarily follow, that the Bankrupcy of the Husband would diſcharge a Bond given *by* the Wife *dum ſola?*

Vide poſt. Trin. 13 Ann.

Groſvenor and *Stephens.* B R.

Writ of *Error.*

THIS was a Writ of Error; and an Error in *Fact* was aſſigned, *viz.* That the Plaintiff was a Feme-Covert, at the Time of the Action brought. *Sed non allocatur*; becauſe it might have been pleaded in Abatement. And it is a general Rule not to ſuffer *that* to be aſſigned for Error in Fact, which might have been taken Advantage of, by being pleaded in Abatement.

Weltale and *Glover.* B. R.

Debt upon *Bond.*

ACTION of Debt upon a Bond, Releaſe pleaded; Plaintiff replies, that the Releaſe was not by Deed, *Et de hoc ponit ſe ſuper patriam.*

Pleading.

Defendant demurs ſpecially, Becauſe he ought not to have concluded, *Et de hoc ponit ſe ſuper patriam,* but *Et hoc petit quod inquiratur per patriam.* Joinder in Demurrer.

Mr. *Dee* argued for the Defendant, That tho' indeed both Forms of Speech bore the ſame Senſe, yet that the Form of Entries was always ſo: *Et de hoc ponit &c.* was the Concluſion of the Defendant his Bar, *Et hoc petit &c.* of the Plaintiff's Replication. That known and received Forms were to be obſerved; and that to depart or vary from 'em, was an Obſtinacy not to be encouraged, particularly when ſpecially demurred to. 8 *H.* 6. 19. it is ſaid, That every Plea muſt have its proper Concluſion. *Plowd. Com. fol.* 66. (*Dyve* and *Manningham*) ſays, That after pleading the ſpecial Matter, the Concluſion of the Plea muſt be, *& ſic non eſt factum*; which can be only for Form ſake, for the Matter of ſpecial Pleading, ſhews the Bond to be void without the Concluſion. *Dyer* 143. 2*d* Deliverance, *& de tali ſtatu ſuo obiit inde ſeiſitus*, a Form always obſerved; and therefore the Words *de tali ſtatu ſuo* being omitted, tho' other Words of the

ſame Import were put in, yet held naught, and ordered to be amended. And if Forms of Law unſupported by any Neceſſity, nor founded in the Reaſon of the Thing, are to be ſtrictly adhered to, the Plaintiff ought not to be allowed the Liberty of varying the received and known Concluſion of his Plea; tho' he has uſed Expreſſions, it muſt be own'd, equivalent in Senſe.

Mr. *Agar* argued for the Plaintiff, That this Way of Pleading occaſion'd no Inconvenience, or Alteration of Law; and that the Law does not always tie up Men to any certain Forms, provided they uſe other Words as proper.

When the Plea is in the Negative, as the Plaintiff's Replication here was, *Et de hoc ponit &c.* a more proper Concluſion, than *Et hoc petit &c.* for a Negative is not to be proved. And the Reaſon, why moſt commonly, the Plaintiff concludes one Way, and the Defendant another, may perhaps be thus accounted for, That moſt of the general Pleas being in the Negative, it were ſomewhat abſurd, for a Man that concludes his Plea in the Negative, to deſire that his Plea may be inquired of *per patriam.*

He confeſs'd, That the general Courſe of Entries were againſt him; and that *Co. Lit.* 126. ſays it is ſo, but not that it muſt be ſo. Then he quoted *Raſtall's Entries*, 20. *b.* 36. 324. 500. 616. *b.* 633. 1 *Levinz* 281. where the Precedents were all with him.

Parker Chief Juſtice. The Difference taken by Mr. *Agar*, between Negative and Affirmative Pleas, ſeems to me very reaſonable. And I think it highly probable, That the original Reaſon, why the Entry for the Defendant has been *Et de hoc ponit &c.* and *that* for the Plaintiff *Et hoc petit &c.* might be, That for the moſt Part, general Iſſues are in the Negative, and Replications in the Affirmative.

The Queſtion is not which Way the Stream and Current of Precedents run, for *that* Mr. *Agar* gives up, and he

he muſt do ſo; but whether it be a Form ſo neceſſary, that a ſmall Variation (and that not in Senſe) from it, will be erroneous; and, upon a ſpecial Demurrer, prevent the Plaintiff's having his Judgment. And not one Authority has been cited to prove this.

Mr. *Agar* has mentioned four or five Precedents, not to overthrow or alter the general Form of Precedents; but only to prove, That this Form of Words is not eſſentially neceſſary.

Beſides, it is to be conſidered, That theſe Words now objected to, are legal Words, not fanciful Words of the Party's own Invention. For the Writ of *Venire* recites of both Parties, *quod poſuerunt ſe ſuper patriam*; and then the Entry, *prædictus ſimiliter* the Plaintiff *&c.* imports, that he too *ponit ſe ſuper patriam*; the very Words here objected to, as improper for the Plaintiff. So again, when the Plaintiff concludes, *Et hoc petit quod inquiratur per patriam &c.* the Entry is, *Et prædictus Defendens ſimiliter &c. viz. hoc petit &c.* from whence it manifeſtly appears, That neither of theſe Expreſſions are improper, for either of the Parties to uſe.

The reſt of the Judges being of the ſame Opinion; Judgment *niſi, pro quer.*

Skinner and *Newton.* B. R.

Vide ante. 140.

THIS Caſe was again ſpoken to this Term, and it was inſiſted, That the Declaration was naught, by Reaſon of the Words *tres pecias terræ*, us'd inſtead of *Clauſum.*

It was obſerved, That there were ſeveral diſtinct Species of Actions of Treſpaſs; *viz. quare domum fregit*, where Treſpaſs in Houſes; *quare clauſum*, where in Land; *quare parcum*, when in Parks; *quare piſcariam &c.* when in Fiſheries.

Might it not now be ſaid, that *terram fregit* would do for any of theſe? For a Grant of the Land paſſes Fiſhery, Houſe *&c.* No; by no Means; for if that might be allow'd, the various Species of Actions of Treſpaſs would be all confounded.

The Word *Clauſum* imports Poſſeſſion; but ſo does not the Word *Pecea.* And from *Yelverton* 224, it appears, that there muſt be Words, ſetting forth the Poſſeſſion of the Plaintiff, by a neceſſary and not an argumentative Implication.

Rol. Abr. Tit. *Indict.* 80. ſame Rule laid down in forcible Entries.

That the Word *Clauſum* imports Poſſeſſion, appears from the Definition of the Word in *Du Freſne's Gloſſary. Somner* in his *Saxon* Dictionary, the beſt of the Kind, ſays, That the Expreſſion *Clauſum fregit*, is very ancient, and ſynonymous to our *Engliſh* Word Hedge-breaking; the Law making the Encloſure. 26 *H.* 7. 14. Treſpaſs in a Common where all is open, muſt yet be *Clauſum fregit.* So is 2 *Lutwyche* 1344.

This Way of Declaration will ſerve for a Highway, to which every Body has a Right. Where a Man has a Grant only of the Herbage or Veſture, he muſt declare *Clauſum &c.*

1 *Rol.* 334, the Word *Tenementum* in forcible Entries held bad for the Uncertainty; and ſo is 2 *Roll. Abr.* 80. In 2 *Keble* 358. the Word *Curtilagium*, tho' more certain than *Tenementum*, yet held bad in an Indictment for Treſpaſs. *Carucatam terræ fregit* bad for Uncertainty, *Pecea terræ* bad in an Ejectment, *Moore* 422. 2 *Ventris* 174.

This is a form'd Writ in the Regiſter; and therefore exactly to be complied with.

If it be ſaid, This ought to be pleaded in Abatement; it may be anſwered, That by 1 *Roll.* 176, it appears, that this may be taken Advantage of, in Arreſt of Judgment. And 1 *Rolle's Rep.* 2. this Difference taken, That where it appears to the Court from the Writ it ſelf, that

it ought to abate, *there* the Court *ex officio* ought to give Judgment againſt the Plaintiff, tho' the Defendant does not plead it in Abatement; otherwiſe, *where* this does not appear in the Writ.

For Defendant in Error it was argued, That the Word *Clauſum* does not, *ex vi Termini*, import Poſſeſſion, without the Addition of the Words *ipſius* the Plaintiff. That the only Queſtion was, Whether there was Certainty enough, in the Deſcription of this Treſpaſs, for the Defendant to plead the Recovery in this Action of Treſpaſs, in Bar of another Action brought for the ſame Treſpaſs. And it appears from the Declaration, that for this Purpoſe there is Certainty enough. The End of a Declaration in Treſpaſs is, to deſcribe the Treſpaſs ſo certainly, that the Defendant may know how to anſwer.

Judge *Eyre*. It is indeed a barbarous Expreſſion; but if *Gardinum fregit* be good and in the Regiſter, and alſo *Boſcum fregit*, why may not *Terram fregit* be good too? The Word *Terra* in legal Proceſs, muſt be underſtood of Arable Ground; tho' in Way of Grant, it may ſignify any Thing. And if it be *Terram* of the Plaintiff, it is *Clauſum* of the Plaintiff; for the Law makes the Incloſure. Beſides, the Defendant after pleading to it, cannot take Advantage of it in Error.

But notwithſtanding (*ut audivi*) in Term *Trin.* 13 *Ann.* Judgment was reverſed *niſi*.

Nutton and *Crow*. B. R.

Indebitatus Aſſumpſit.

THIS was an *Indebitatus aſſumpſit* upon three Promiſes, brought by the Plaintiff as Executor to *B.* As to the two firſt Promiſes, the Declaration ſtood thus, That *Crow* the 22*d* of *Jan.* 1708, *in vita Teſtatoris* being indebted *&c.* and upon the Defendant's craving Oyer of the Letters *Teſtimentary*, a Probate is recited as made four Months before the Time of the Promiſes.

The third Promiſe was a Promiſe to the Executor himſelf, upon the ſtating the Accounts, between the Executor and Defendant, touching *only* the Dealings between the Teſtator and him.

The Plaintiff enter'd a *Remittitur damna* upon the two firſt Promiſes given; and obtained Judgment upon the third in the Court of Common Pleas.

Upon Error brought, two Things were chiefly inſiſted upon, *viz.* 1*ſt.* That it appear'd of the Plaintiff's own ſhewing, that this Will was proved in the Life-time of the Teſtator, and ſo was a void Probate. And it was ſaid, That this was an Objection, that went to all the three Promiſes; and therefore was not helped by the *Remittitur.* For a void Probate is no Probate at all; and tho' an Executor may releaſe before a Probate, yet he cannot bring an Action. 9 *Co.* 38. *Co. Lit.* 292. *b. Plowd. Com.* 203. 1 *Roll. Abr.* 917.

Sed non allocatur; for as natural to ſay, that the Time alledged for making the Promiſes was miſtaken, and then the Probate may be good; as to ſay, *vice verſa*, the Promiſes were well ſet forth, and the Probate void; eſpecially when the Party has, by entring a *Remittitur*, yielded the Promiſes to be naught.

The 2*d* Objection to the Judgment was, That here were Promiſes made to the Teſtator, and a Promiſe made to the Executor, all join'd in one Action; which ought not to be.

It was owned, That there is a Difference taken 2 *Lev.* 228. between Actions brought *by*, and Actions brought *againſt* an Executor or Adminiſtrator. That an Executor might join in one Action, a Debt owed him in his own Right, and a Debt owed him as Executor; but an Executor could not be ſued in one and the ſame Action, for a Debt due from him as Executor, and a Debt due from him on his own Account. And the Reaſon aſſigned for this Difference, is, That in the firſt Caſe the Judgment remains

remains ſtill the ſame, notwithſtanding the joining the two Debts; whereas in the other, the Judgment muſt be different, *viz.* in the one Caſe *de bonis Teſtatoris*, and in the other *de bonis propriis.*

But then it was ſaid, by way of Anſwer to this Caſe, That the Reaſon given to ſupport the Difference, had no Weight. For tho' indeed, in the firſt Caſe, the Judgment muſt be the ſame; yet the Effect of that Judgment is very different; for the one Debt is recovered to his own Uſe, the other Debt, when recovered, will be Aſſets. And then *Cro. Car.* 227. *Shower's Rep.* 366. *Cook* and *Rogers*, contradict this Caſe.

A Caſe in *Hobart* 88, was owned a ſtrong Caſe againſt them; but they endeavoured to oppoſe it by other Authorities, as *Hutton* 27. 2 *Lev.* 110. and it was ſtrongly inſiſted upon, That the Nature of the Action was changed, at leaſt a new Remedy given, by the taking of this Account.

For the Defendant in Error it was urged, That Actions upon the Caſe, came in the Place of Actions of Debt upon ſimple Contract, and were introduced merely to avoid the Defendant his waging his Law; and therefore both Sorts of Actions *were* to be governed by the ſame Reaſon, and the ſame Rules.

That the Nature of the Action was not changed by the Account, appears from the Nature of the Thing; for the Debt after the Account, as well as before, is due to him *jure repreſentationis*, 20 *H.* 6. 4 & 5. 9 *H.* 6. 11. It was ſaid, that the Law had a great Regard to the Original of a Debt. *Cro. Eliz.* 326. *Savile* 130. 2 *Cro.* 545. 1 *Lutw.* 893. all of 'em Authorities, wherein reſolved, that from a Conſideration had to the firſt Riſe and Original of the Debt, the Action muſt be brought in the *Detinet*. *Lane* 79. *Hobart* 88. ſtrongly relied upon.

The Court were of Opinion, That the Promiſes might very well be joined in one Action: That the taking of

the Account did not at all vary the Nature of the Debt: That the Plaintiff lay under a Neceſſity, to introduce the Cauſe of Action, of naming himſelf Executor: That the Pleading being here the ſame, Judgment the ſame, and the Effect of the Judgment the ſame, as it would have been in ſeparate Actions, there could be no Reaſon given for dividing them, but multiplying Actions; which the Law abhors, and againſt *Magna Charta, nulli negabimus nulli differemus &c. Hobart* 88. held to be a ſtrong Authority for the Defendant in Error.

It was agreed by the Court, Than an Executor could not be ſued for Debts due from the Teſtator and himſelf, in one and the ſame Action; becauſe the Judgment is different. *Adjournatur.*

An Executor may not be ſued in one and the ſame Action, for for Debts due from the Teſtator and himſelf; becauſe the Judgment is different.

Queen and *Corporation of* Buckingham. B. R.

THIS was a *Mandamus* to the Corporation of *Buckingham*, to reſtore one *Muſcot*, to the Office of a Common Burgeſs of that Corporation. *Mandamus.*

The Return in Subſtance was, that *Muſcot de facto fuit electus*; but that he not having received the Sacrament, within a Year before his Election, according to the Act of 13 *Car.* 2. his Election was void. Stat. 13 *Car.* 2.

It was argued by Mr. *Lechmere* againſt the Return.

The very Foundation of a *Mandamus* to reſtore, is the wrongful turning a Man out, of at leaſt a poſſeſſory Right, to a Franchiſe; and therefore properly, and in its own Nature, it is a Writ of Reſtitution. And accordingly in the *Analyſis of the Law*, now publiſhed from a Manuſcript of Judge *Hale's*, it is expreſly call'd a Writ of Reſtitution; which, *ex vi termini*, imports Poſſeſſion.

Not neceſſary for one that has a poſſeſſory Right to a Franchiſe, to have a legal Title to it. This is in

its own Nature a Freehold; and becauſe it is *juris publici*, the Law has a greater Regard to the Poſſeſſion of ſuch a Freehold, than to any of a private Nature. If upon a Preſentment without Title, Inſtitution and Induction follow, the Party has ſuch a poſſeſſory Right, as he ſhall not loſe without a *Quare Impedit.*

The *debite admiſſus* according to the Conſtitution of the Borough, being not at all anſwered by the Return, muſt now be look'd upon as true; and for the ſame Reaſon, it muſt now be taken for granted, that he has been guilty of no Miſbehaviour ſince his Election.

The Admiſſion, not the Election, makes the Officer; and tho' the Statute ſays the Election ſhall be void, it ſays nothing of the Admiſſion.

There are various Returns made to *Mandamus's* to reſtore. *Non fuit amotus*, is the moſt common Return; and this Return goes to the very Foundation of the Writ. *Non fuit admiſſus*, a good Return: Amotion depends upon the Admiſſion; and therefore *non fuit admiſſus*, is but a ſpecial *non fuit amotus*, *Hill.* 11 *Will.* 3. *King* and Town of *Cambridge*, *Mandamus* to admit *Love* and others. A Return of any ſubſequent Inapacity, a good Return. Confeſſing the Amotion and juſtifying, a very common Sort of Return.

1 *Siderfin* 209, 10.

1 *Lev.* 162.

He obſerved, That in all theſe Returns the Election was not anſwered; from whence it follows, That it is not a neceſſary and eſſential Part of the Writ. In *James Smith's* Caſe, juſt after the Revolution, the Election was anſwered; but then it was anſwered in ſuch a Manner, as plainly ſhews it not neceſſary to be anſwered. Beſides, the Argument does by no Means hold, that becauſe it was to be found in ſome Returns, that they had anſwer'd the Election, therefore it is a neceſſary Part of the Writ; but the Argument holds ſtrong the other Way, that becauſe it is often not anſwered, therefore no neceſſary Part of the Writ. He obſerved, That unleſs the Reaſon returned for not reſtoring him, was a good Reaſon for their turning him out, it was not a good Reaſon.

4 *Mod. Rep.* 52.

He affirmed, That a Corporation, after their Admiſſion of him as duly elected, had no Power or Authority to call in Queſtion the Title of him, or the reſt of their Members; and that it muſt by no Means paſs for granted, that they may diſfranchiſe a Man for every Cauſe, for which he may be proceeded againſt upon a *Quo Warranto*. Becauſe there is this great Difference between Proceedings by *Quo Warranto's*, and the turning a Man out, That in the former Caſe, the Man remains in Poſſeſſion of his Franchiſe, during the Time the Right is in diſpute; whereas in the other, the Man is all the while out of Poſſeſſion; which is a Wrong, that reſtoring him afterwards, does not make him ſufficient amends for. *James Bagge's* Caſe in *Co. Rep.* is a leading Caſe as to *Mandamus's*, and this was a *Mandamus* to reſtore; and there it was laid down, That a Diſfranchiſement ought to be founded upon ſome Act done againſt the Duty of a Burgeſs. 11 Co. 93.

A Power of Diſfranchiſement is not a Power incident to a Corporation, and what the Court can *ex officio* take Notice of; but it muſt be given by expreſs Words in the Charter, and pleaded; which here it is not.

If Corporations have a Power to judge of Elections, they muſt neceſſarily judge of Acts of Parliament concerning them, they muſt judge the Right of Electors *&c.* a Juriſdiction too great to be ſuppos'd veſted in a Corporation.

It ſeems abſurd, for a Corporation to turn a Man out, for an Act of their own, and not any Fault committed by him. For the Election is a corporate Act; and ſhall they after they have allowed and admitted it good, by owning and receiving him as a Member, be allowed to come and call this a void Election?

Then it was urged, that this is a very dangerous as well as needleſs Power; becauſe it would give a Corporation a Power to rid themſelves of what Members they pleaſe; for let a Man have ever ſo much Right on his ſide, yet he muſt loſe his Franchiſe during the whole Time

Time of Diſpute. And it is likewiſe a very needleſs Power; becauſe the Law has ſufficiently provided for it by *Quo Warranto's*.

Another Exception was, That it was not averr'd in the Return, that the Reaſon they give for not reſtoring him, was the Reaſon for which they turn'd him out. And that this is neceſſary, appears from *Bagge*'s Caſe, where it is expreſly ſaid in the Return *ex cauſis prædictis amotus fuit.* And if this were not ſo, a wrongful Expulſion might come to be a rightful one; for if it need not appear in the Return, for what Cauſe he was expelled, any Accident happening between the Removal and the Return, will in Fact juſtify the Removal.

11 *Co.* 97.

Then it was obſerved, That the Return was contradictory to itſelf; for it was ſaid, in the firſt Place, that *de facto fuit electus*, and afterwards that his Election was void, he not having received the Sacrament. Now *electus* in one Part of the Return, muſt bear the ſame Senſe as in the other; unleſs the Addition of the Words *de facto* makes any Alteration, which he ſuppoſed they did not.

Mr. *Lutwyche* for the Return.

Caſes quoted in Favour of the Return. 2 *Jones* 131. *King* and *Thacker*. *King* and *Slatford*, 8 *W.* 3. *Salk.* 428. 5 *Mod.* 316. 11 *W.* 3. N° 30. in the Crown Office, *King* and Mayor of *Abingdon*, *Salk.* 431. 2 *Lev.* 184.

The Act of Parliament of 13 *Car.* 2. ſays, That the placing, Election or Choice of a Perſon not having *&c.* ſhall be void; and where an Act of Parliament makes a Thing abſolutely void, every Perſon may and ought to take Notice of it.

No Precedent to be found of any *Mandamus* without the Suggeſtion of *debite electus & præfectus*, which ſuppoſes it a neceſſary Part of the Writ; and then neceſſary for it to be anſwered. There is a Difference between an Election void and voidable; *that* in the preſent Caſe is not voidable, but void. And the Act of Parliament in ſaying the Election ſhall be void, has in Effect ſaid, there ſhall be no Proceedings by *Quo Warranto's*.

As to the Caſe of the Advowſon, *nihil ad rem*; becauſe no Act of Parliament in the Caſe. But in the Caſe of a Symoniacal Preſentation, notwithſtanding Inſtitution

or even Induction, the Preſentation is abſolutely void; and the Church may be preſented unto as void, without bringing any *Quare Impedit.*

In Caſe of an Ejectment, unleſs the Perſon turned out, tho' by one that has no Right, can prove his Right, he ſhall not recover, and this is a poſſeſſory Action.

As to the Objection, That this Way, a Corporation may have it in the Power to rid themſelves of what Members they pleaſe: The Anſwer is, That this Objection implies Malice; and if a Corporation be malicious, they may turn a Man out for nothing, and then may return for Cauſe, any falſe Crime they think fit; and in the mean Time the Man is out of his Franchiſe.

Reply *per Lechmere.*

A great Part of Mr. *Lutwyche*'s Argument turns upon this, That the Statute makes the Admiſſion, as well as Election void; whereas the Statute ſays not a Word of Admiſſion, unleſs the Word *placing* be interpreted to mean *that.* Now from the Word *placing* being put *before* Election, it is highly probable, that it had no Relation, in the Intention of the Legiſlators to Admiſſion, an Act *ſubſequent* and *conſequential* of Election; and *ex vi Termini*, *placing* no more imports Admiſſion, than it does Election. Poſſibly the Term *placing*, may, in the Act, ſignify ſome other Way of coming in, than by Election, *viz.* by Patent; a frequent Practice in thoſe Days, when the Act was made. The Reply.

As for the Advowſon; *that* was mention'd only to ſhew, That the Law allows of a poſſeſſory Right, even in Matters of an incorporeal Nature, as well as in Land.

As to Simony, the Act of Parliament relating to that Matter, very different from this, for it makes all void, as if the Incumbent were naturally dead. *Adjournatur.*

Queen and *Corporation of* Buckingham. B. R.

SIR *Peter King* made another Argument, in the Caſe of another Perſon; but where the Return was the very ſame as before.

He objected, That in the Return they had not ſet forth, that the Act of Parliament made the Election void; only ſaid, that in Default thereof, ſuch placing *&c.* was void, but not ſaid by what Authority void.

He objected again, That the Return had not brought the Office within the Act of Parliament; for the Office of Capital Burgeſs is not named in the Act of Parliament. It was, indeed, attempted to be brought within it two Ways: 1*ſt*, By ſetting forth, That it was an Office relating to the Government of the Town. But this not enough; unleſs they had gone one Step further, and ſhewn *how* the Office concerned the Goverment of the Town, that ſo the Court might judge, whether it did or not.

The 2*d* Way is, that, as the Act does mention Common-Council-Men, they ſay *Quod quilibet Communis Burgenſis*, was and has been ſince, a Member of the Common-Council. But this not enough; for they ought to have ſaid, that *Quilibet Communis Burgenſis, virtute officii prædicti*, was a Member of the Common-Council.

He objected further, That the Return had not ſufficiently anſwered the Writ.

The Writ avers him to be *debite electus & præfectus*; the Return is, That *de facto fuit electus*, which is no Anſwer. They ſhould have done, as in pleading to Bond uſurious, or ſimoniacal, admitted the Fact, *viz.* *Quod debite fuit electus*, and that *electio devenit vacua.*

As the Election is not properly anſwered, ſo neither is the *præfectus.* A Man may come in either by Election or Prefection, *viz.* placing in of the Crown. They ſay,

That he was never at any other Time *electus*; but it is not ſaid, That he never was at any other Time *præfectus.*

Upon a former Argument in this Caſe, Judge *Powys, junior*, had deſired the Counſel to conſider, Whether the Act did not make the taking the Sacrament, a precedent Condition to the Office?

In Anſwer to *This*, Sir *Peter* put the following Caſe: Suppoſe a Man having received the Sacrament within the Year, applies to be ſworn in, is refus'd, then gets a peremptory *Mandamus*, afterwards he refuſes to ſubſcribe, Can any Man ſay, that contrary to the expreſs Judgment of this Court, he was never elected? And yet the Act of Parliament is as ſtrongly penn'd, to make the Election void, for not ſubſcribing, as for not taking the Sacrament; therefore it is plain, That neither the Omiſſion of the one or the other makes the Election void, but only capable of being avoided.

This further appears from the Caſe of *King* and *Larwood* 4 *Mod.* 269; for if the taking *&c.* had been in Nature of a precedent Condition, *Larwood* could never have been puniſhed; becauſe he would not have been legally choſen into the Office.

Salk. 167. 3 *Salk.* 134. *Vid. contra* 2 *Ventris* 247, *Clerk's* Caſe, where Election held void for want of taking *&c.*

The Statute *de donis*, ſays, A Fine ſhall be *ipſo jure nullus*; and yet the Meaning is not, That it ſhall be abſolutely void; but only, That it ſhall not be a Fine to bar the Iſſue; for it is a Fine to make a Diſcontinuance, *&c.*

The Statutes relating to Sheriff's Bonds, and uſurious Bonds penn'd in very ſtrong Terms; and yet the Bonds void only as to their Efficacy; for in thoſe Caſes, one cannot plead *non eſt factum.* 3 *Cro.* 915. *Dyer* 375. *b.*

Statutes of Sheriff's and uſurious Bonds.

Hob. 72, 166.

Statute about ſtriking in Church-yards, ſays, That the Party *ipſo facto* ſhall be excommunicate; and yet a proper Proceſs is neceſſary.

Statute of ſtriking in Church-yards.

If by the Statute of Simony, the ſimoniacal Preſentation were entirely, and to all Intents and Purpoſes void, the

Statute of Simony.

the Queen would have no Title at all to preſent; for it is the Manner of the Preſentation, that gives the Queen the Title.

Hobart 166. A Thing may be void, and yet not to be avoided in every Manner.

He argued from the Reaſon of the Caſe in *T. Jones* 215, *King* and *Turner*, That it did not lie in the Breaſt of the Corporation, contrary to their own Admiſſion, to call in Queſtion the Validity of the original Election; and tho' this would be no good Anſwer to the Crown, yet to the Corporation it is, You have admitted him.

In the laſt Place, he held it neceſſary for it to appear in the Return, That they had ſummoned him.

See *Queen* and Borough of *Aldborough*, *Ant.* 101, 102.

Court.

Judge *Eyre* declared his preſent Opinion to be, That the Acts of Parliament inſtanced in to prove the Election not void, but only voidable, did not reach the preſent Caſe; becauſe all of them related either to Matters of Record or Specialties enter'd into with ſome Ceremony; and therefore altho' the Statutes made them void, yet it muſt be underſtood in a proper Manner, and Acts of Parliament do always ſuppoſe neceſſary Incidents: But now this Caſe, is the Caſe of an Election; a Matter in *pais*, and ſo very different.

DE
Termino S. Mich.
12 *Ann.*
In BANCO REGIS.

Backhouſe and *Wells.*

THIS was an Ejectment; and the Queſtion aroſe upon the Conſtruction of a Will, Whether the Words of it made the Deviſee only Tenant for Life, or Tenant in Tail?

Ejectment. Queſtion, Whether Deviſee was Tenant for Life, or Tenant in Tail?

The Deviſor being ſeiſed in Fee of the Lands in Queſtion, makes his Will thus:

'To the Intent that all my Lands ſhould remain in 'my Name and Blood, I deviſe to *J. S.* my near Kinſ-'man, ſuch and ſuch Lands *&c.* to have and to hold, 'for the Term of his natural Life only, without Im-'peachment of Waſte; then, to the Iſſue Male of his 'Body lawfully to be begotten, if God ſhall bleſs him 'with ſuch Iſſue; Remainder to the Heirs Males of 'the Body of that Iſſue.

It was argued in Favour of the Plaintiff, That the Deviſee was by this Will only a Tenant for Life; and ſo conſequently had no Power to levy a Fine, or ſuffer a common Recovery, under which the Defendant claim'd.

Argument for Plaintiff.

That this was the Intention of the Teſtator, appears 1*ſt*, from the Preamble, which ſignifies it to be his *Intention, That his Lands ſhould remain in his Name and Blood*; from whence it is not probable, That he would, by making the firſt Deviſee Tenant in Tail, put it in his Power, by ſuffering a common Recovery, to bar *&c.*

2*dly*, This appears to have been his Intention, from the Words of the Will, which are, *To have and to hold for the Term of his natural Life only.*

The Clauſe likewiſe, *without Impeachment of Waſte*, had been needleſs, if ſo be the Teſtator had deſigned to make him Tenant in Tail.

And from the Words *to the Heirs Males of the Body of that Iſſue*, it was inferr'd, That the Teſtator plainly deſigned to veſt the Intail in the Iſſue, and not the firſt Deviſee.

6 *Co. Rep.* 16, *Wylde's* Caſe. If in a Will ſuch proper Words are made Uſe of, as would in a Deed paſs ſuch an Eſtate, nothing but the plain Intention of the Teſtator to the contrary, ſhall ever put another Conſtruction upon the Words.

Deviſe to a Man and his Children, where the Man has no Children, muſt paſs an Eſtate-Tail; becauſe it muſt be the Intention of the Teſtator to have it ſo, and otherwiſe the Word Children would be of no Signification.

The Caſe of *King* and *Melling* reported in 2 *Lev.* 58, and 1 *Vent.* 225, very different from the Caſe at Bar. There was not in that Caſe the reſtrictive Word *only*, and the Clauſe without Impeachment of Waſte, as in ours: Beſides, *there*, *Hale* argued ſtrongly from the Intention of the Teſtator, which in a Will, and alſo in an Eſtate-Tail, of which the Statute ſays *Voluntas donatoris &c.* ought to carry great Weight.

Now *here* the Intention of the Teſtator is ſtrongly with us.

From the Difficulty, with which the Judgment was given, in the Caſe of *King* and *Melling*, it appears, the Judges went as far as they could go.

The Caſe of *Tayler* and *Sayer*, 1 *Ventris* 229. *Raym.* 82. *Pollexfen* 106. ſeveral Times denied to be Law.

It was argued for the Defendant, That no ſuch Intention could be collected either from the Preamble, or Words of the Will. Argument for Defendant.

As to the Preamble; it muſt be conſidered, as a general Preamble, that extends to the whole Will; and conſequently to all the Deviſes in the Will, as well as the Deviſe in Queſtion. And therefore, from the Preamble, it cannot appear, That it was his Intention to make this Deviſee Tenant for Life, any more than ſome others, that he has confeſſedly made Tenants in Tail.

Indeed it does appear, what were his Motives in the Choice he made of Deviſees, *viz.* their being of his Name and Family; but nothing further.

As for the Obſervation made from the Clauſe, *without Impeachment of Waſte*; it is in other Parts of the Will needleſly inſerted, and ſo it may here.

As to the Inference made from thoſe Words, *if God ſhall bleſs him with ſuch Iſſue*, That they import a Deſign of giving a contingent Remainder to that Iſſue: It was anſwered, That the preceding Words, *viz.* the Remainder *To the Iſſue Male of his Body lawfully to be begotten*, were the operative Words, and which, conjoined with thoſe that precede them, veſted an Eſtate Tail in the Deviſee.

As to the Inference from the Words, *to the Heirs Males of the Body of that Iſſue*, That the Eſtate-Tail was veſted in the Iſſue: It was anſwered, That whether the Eſtate-Tail was veſted in the Deviſee or Iſſue, thoſe Words muſt be ſuperflous; for Iſſue, being *nomen collectivum*, without ſaying more, imports an Eſtate-Tail. 1 *Vent.* 229.

As to the Expreſſion, *for the Term of his natural Life only*; if the Word *only* were left out, ſince the Caſe of *King* and *Melling*, it could be no Objection. And as to that

that Word, it is plain Tautology; for an Eſtate for Life, is an Eſtate for Life only; and then the Caſe remains the ſame with the Caſe of the King and *Melling.*

Iſſue, no appropriate Word of Purchaſe, in a Will, tho' perhaps in a Deed it may be ſo; and yet *Mich.* 8 *Annæ*, *Lee* and *Bruce*, the Word Iſſue was uſed in a Deed, as a Word of Limitation.

In a Will it is a Word that has no determined Signification, but muſt be govern'd by other Circumſtances; and moſt commonly it is uſed as a Word of Limitation.

Lutwyche pro Quer. Lechmere pro Def.

Court. In the next Term, Chief Juſtice *Parker* delivered the Opinion of the whole Court, That by the Deviſe the Deviſee was made Tenant for Life, Remainder to the Iſſue in Tail. The Words of the Will, he ſaid, were ſo expreſs to this Purpoſe, that neither any Words that could have been uſed, or any Arguments could make it plainer. This, he ſaid, was both the obvious and legal Import of theſe Words, and what they would have imported in a Conveyance.

Jackſon and *Laveright.* B. R.

Caſe for incloſing of Common. THIS was a Writ of Error of out the Court of *C. B.* where an Action upon the Caſe was brought for encloſing ſo many Acres of Land, Parcel *communiæ Paſturæ &c.*

Judgment in *C. B.* affirm'd; becauſe the Word *Communia*, uſed in the Declaration, does in common Parlance, and in Acts of Parliament, ſignify a Common, tho' in legal Proceed- Now it was urged, That the Word *communia* did ſignify, not the Place, but the Right of commoning; and a Right being a Thing of an incorporeal Nature, was no more capable of being incloſed than a Rent, *Bracton*, *lib.* 4. *cap.* 4. and this Definition of the Word is given in *Fleta*, *lib.* 4. *cap.* 19. That it did import any Right, which a Man was to enjoy in common with others in *alieno fundo*; as *communia Paſturæ*, *Piſcandi*, *&c.* A Grant

of *communia* alone would paſs nothing. A *Grant* of *communia Paſturæ* would not paſs the Soil, *Cro. Jac.* 579; *a Fortiori* in *Pleading*, it cannot import the Soil. *Nec non* in Pleading amounts to an Affirmative, *contra* in a Grant. The Reaſon of the Difference is, That in Pleading the Rules of Grammar muſt take Place; but in Grants, the Intention of the Party ſhall govern the Conſtruction. The Word *Tenentes* in Pleading never ſignifies Tenants for Years, but *Tenentes terrarum* Tenants in Fee. Caſe of *Rookby*, *Mich.* Term, 9 *Annæ.*

ings it is generally uſed for an incorporeal Right. Caſes quoted *pro quer.* in Error, 1 *Ventris* 260. 2 *Cro.* 272. 2 *Ventris* 262, 174, 73. Caſe of *Bradick* and *Wilſon*, two Years ago.

Plaintiff himſelf, in another Part of his Declaration, has uſed the Word *communia*, in the proper Senſe, as ſignifying a Right, *ratione inde communiam &c. habuit.*

If it be objected, That the Word *communia* may be rejected as Surpluſage, yet even then the Declaration will remain Nonſenſe; for then it will be for incloſing ſo many Acres *terræ*, *viz.* Arable Land (for that is the legal Import of the Word *terra*) Parcel *Paſturæ.*

Ant. 170.

It was urged in Favour of the Defendant in Error, That this Word *communia*, if it made the Declaration Nonſenſe, ſhould be rejected as Surpluſage. But it was ſtrongly argued, That this Word *communia*, not being a Claſſical, but a legal and Technical Word, and being a Word, which in common Parlance, nay in Acts of Parliament, ſometimes ſignifies the Place as well as Right of Common, might, eſpecially after a Verdict, be received in the ſame Senſe; and many are the Caſes, where improper and impoſſible Words, have been aided by a Verdict. 3 *Levinz* 336. 1 *Rolle's Abr.* 577. *Styles* 296.

For the Defendant in Error.

Juſtice *Eyre.* Very hard, That after a Verdict, this Word ſhould not receive that Senſe, which it will do in common Parlance, nay in Acts of Parliament, and very good Authors; as in *Du Freſne's Gloſſary, Vol.* 1. upon this Word.

1 *Mod. Caſes in Law and Equity*, 240.

Powys junior of the ſame Opinion; for if the Word was not capable of receiving this Senſe, he did not ſee, why it might not, after a Verdict, be eſteem'd a Miſtake of the Clerk, inſtead of *communis*.

He likewiſe thought it might be rejected as Surpluſage; for tho' the legal Import of the Word *terra* when ſtanding alone is arable, yet the Word *terra* in Conjunction with other Words will ſignify all Sorts of Land; as here *acras terræ*, is conjoined with the following Words *parcel. Paſturæ terræ vocat. &c.* and thus no Abſurdity at all follows the Omiſſion of the Word *communia*. *Adjournatur*.

Ant. 170.

Judgment afterwards given *pro Def.* in Error.

Queen and *Nun*. B. R.

Indictment for Words.

THIS was an Indictment, found before the Juſtices of Peace, at the Seſſions, for theſe Words ſpoken of Juſtices of the Peace by *Nun*, at ſuch Time, as he was by Warrant brought before them.

This is no Juſtice of Peace's Buſineſs, you ſhall not try this Matter, have a care what you do, I have Blood in me, if I had you in another Place.

Not Guilty pleaded; but upon being found Guilty,

It was moved in Arreſt of Judgment, That theſe Words were not indictable.

Mod. Caſ. 125. *Salk.* 697. 3 *Salk.* 190. What *Words* are *indictable.*

In the Caſe of *Queen* and *Langley*, 2 *Annæ*, Term *Hill.* and in 2 *Rolle's Abr.* 78, 79, reſolved, That Words are not indictable, unleſs they have a direct and immediate Tendency, and not by Conſtruction and Implication, to the Breach of the Peace.

Salk. 698.

Queen and *Wrightſon*, *Paſch.* 7 *Ann.* calling a Juſtice of Peace, *Aſs, Fool, and Coxcomb, for making ſuch a Warrant*, held not indictable.

Queen and *Good*, *Mich.* 4 *Ann.* ſaying of a Juſtice of Peace, *That he would judge in any Cauſe brought before him according to his Affection*, held not indictable.

Queen and *Lycaſſel*, *Hill.* 1712. ſaying of a Juſtice of Peace, *He deſerved to be hanged for making ſuch a Numskull Order*, held not indictable.

1 *Mod.* 3. *Laying his Hand upon his Sword*, and ſaying, *If it were not Aſſize-Time, I would not take ſuch Language from you*, held no Aſſault.

It was likewiſe inſiſted upon, That if theſe Words were indictable, yet they were not indictable before Juſtices of the Peace, but Oyer and Terminer.

To maintain the Indictment, the Caſe of Lord *Darcy* in the *Star-Chamber*, *Hobart* 120, was quoted, where *You lie, and I will maintain it, with my Life*, held Words finable. *N. B.* Theſe Words were in a Letter.

That this was a Caſe in the *Star-Chamber*, is no Objection to its Authority; becauſe whatever Authority that Court exerciſed lawfully, the ſame may this Court.

It was likewiſe ſaid, That the preſent Caſe differ'd, from all thoſe cited, in *this*, That tho' they were Words ſpoken of Juſtices of the Peace, yet it was of Juſtices when abſent; whereas here the Juſtices were preſent, and preſiding at the Seſſions.

Court inclined to the Opinion, That the Words were not indictable, as laid in this Indictment; becauſe they did not carry any neceſſary Intendment of a Challenge, or Intent to break the Peace, as in Lord *Darcy*'s Caſe the Words do; eſpecially when it appears in this very Indictment, That this *Nun* was a Wheelright, and ſo not likely to challenge or be challenged.

Queen

Queen and *Stafford.* B. R.

Outlawry for Treaſon.

Form in reverſing it.

STAFFORD had been outlawed, for High Treaſon; and had obtain'd from the Crown, a Writ of Error to reverſe this Outlawry; and the Attorney General had Orders to confeſs in Court, the Error aſſigned; which was an Error in *fact*, *viz.* That he was outlawed by a wrong Addition, which the Attorney did accordingly: The Court was therefore prayed, That the Outlawry might be reverſed.

Whether *Scire facias* to Ter-tenants neceſſary?

But Chief Juſtice *Parker* was of Opinion, That tho' in Outlawry for Treaſon, there is no need of warning the Lords, of whom the Lands are held, by a *Scire Facias*, before the Outlawry be reverſed, as muſt be done in Caſe of Felony, becauſe in Treaſon the Forfeiture is to the Crown; yet he ſaw no Reaſon to diſtinguiſh, between Outlawry for Felony, and Outlawry for Treaſon, as to the Ter-tenants; for in Caſe of Treaſon, where the Forfeiture is to the Crown, the Crown may grant theſe Lands to others, who ought to be heard, what they can ſay for themſelves, before they loſe their Lands.

He thought therefore, there ſhould have been a *Scire Facias* to the Tertenants; and grounded himſelf, pretty much, upon a Caſe in *Hen.* 4. where there was a *Scire facias* to the Tertenant; and tho' this was an Outlawry for Felony, yet the King's being immediate Lord, made it all one as if it had been an Outlawry for Treaſon.

And the Entry, in Caſe of Felony, as may be ſeen *Cook's Entries* 318, mentions the ſuing out of a *Scire Facias*, as a Thing of abſolute Neceſſity, without which the Judge could not reverſe the Outlawry.

But upon the ſearching into Precedents, it was found, That in Fact, in Outlawry for Treaſon, there uſed to be no *Scire Facias*; and the Precedents being ſo, and it

being a Suppoſition, not of Neceſſity, that the Crown ſhould grant theſe Lands, and then out the Patentees, by ſuffering a Writ of Error to be brought, the Outlawry was reverſed.

Turner and *Goodwin.* B. R.

Vide Ante. 153.

THIS Caſe had been argued laſt *Eaſter* Term, and came now to be ſpoken to again. It was an Action of Debt upon a Bond, condition'd for the Payment of ſo much Money, the Plaintiff aſſigning over to the Defendant ſuch a Judgment againſt *D.*

For the Defendant.

Serjeant *Pratt* for the Defendant, inſiſted, That the aſſigning was a Condition precedent to the Payment.

Caſes quoted *arguendo.* 1 *Saund.* 320. 1 *Jones* 189, *Spring* and *Cæſar.* 3 *Lev.* 132, *Edwards* and *Hammond.* *Cro. Car.* 433. 5 *Co. Rep.* 78, *Grey's* Caſe. 1 *Ventris*, *Large* and *Cheſhyre.*

It was ſaid, That in the Obligation, there were very proper and ſignificant Words to make a Condition, either precedent or ſubſequent; that therefore it ſhould be taken either one Way or the other, as would beſt anſwer the Intention of the Parties.

Now the Intention of the Parties undoubtedly was, that the Plaintiff ſhould have the Money, and the Defendant the Judgment. But now this Intention could never be ſupported, taking it to be a Condition ſubſequent; for the Money once paid, cannot be brought back again, in Caſe the Judgment ſhould not be aſſigned over.

The Law lays ſuch a Streſs upon ſupporting the Intention of the Parties, that it will interpret Words not at all proper, to amount to a Condition, rather than the Intention of the Parties ſhould be violated; as the common Caſe of *Co. Lit.* 24. Grant of an Annuity *pro concilio impendendo.*

It cannot be objected, That the Defendant ought to have concurred in doing this Act, and requeſted the Plaintiff to aſſign *&c.* becauſe this was an Act, that it was in the Power of the Plaintiff to perform alone; for the Judgment, would immediately upon the Aſſignment,

1 *And.* 348. *Poph.* 87. 3 *Co.* 25.

veſt in the Defendant, before his Acceptance of it. Caſe of *Butler* and *Baker.*

For the Plaintiff.

Serjeant *Cheſhyre* inſiſted for the Plaintiff, That the Defendant was bound to do the firſt Act, *viz.* to offer to pay the Money, tho' he acknowledged that the Payment of the Money, and Aſſignment of the Judgment, were to be concomitant Acts in the Execution.

He relied much upon the Replication of the Plaintiff, which, the Defendant having demurred to it, muſt be admitted as true. In this Replication the Plaintiff ſays, that he was ready to aſſign *&c.* and requeſted the Defendant to pay the Money, which the Defendant refuſed. This Refuſal the Serjeant inſiſted to be an abſolute Refuſal, and not a conditional one, *viz.* unleſs the Judgment was aſſigned. And this abſolute Refuſal of the Defendant, to pay the Money, he inſiſted upon, to be a ſufficient Diſcharge to the Plaintiff, from preparing the Aſſignment.

In 1 *Lutwyche* 245, *Thorpe* and *Thorpe*, moſt of this Sort of Learning is ſtated.

Vide poſt. Trin. 13 *Ann.*

Seſtern and *Cibber.* B. R.

Debt by Aſſignee of Bail-Bond.

THIS was an Action of Debt, upon a Bond, brought by the Plaintiff as Aſſignee of a Bail-Bond; and upon Demurrer, theſe Objections were taken to the Declaration.

1ſt Objection to the Declaration.

1*ſt*, That the Breach of the Condition, was ſet forth to be, his not appearing *ſecundum exigenciam brevis, & ſecundum formam brevis*; whereas it ought to have been, his not appearing at the Return of the Writ. 1 *Levinz* 145. 3 *Levinz* 243.

2*dly*, It was objected, That the very Foundation of the Action, *viz.* the Breach, was ſet forth by Way of Recital, *Cumque etiam non apparuit*; which ought to have been expreſly averred, that ſo the Defendant might have the Liberty of traverſing it. *Cro. Eliz.* 441. 2 *Jones* 197. 2 *Levinz* 206. 2d Objection.

3*dly*, Not ſet forth upon what Day the Writ was returnable; and then *non conſtat*, Whether he did, or did not appear *ſecundum exigenciam brevis*; Whether the Bond was, or was not forfeited. 3d Objection.

Judge *Eyre*. This Caſe differs very much, from the Caſe of a Sheriff, ſuing this Bond himſelf; for there he has nothing to do, but declare upon the Bond: But where the Action is brought by the Aſſignee, there it is the Forfeiture that gives the Action; which here is the Non-appearance, and is a Matter traverſable, and muſt not be ſet forth by Way of Recital, but muſt be poſitively averred. *Court.*

It is true, That the declaring in an *Indebitatus Aſſumpſit*, is *Cumque etiam*, he was indebted; ſo in a Bond, *quod cum per quoddam ſcriptum ſuum obligator*. But then in the firſt Caſe, it is the Promiſe, and in the ſecond, the Breach of the Condition, which gives the Action; both which are ever poſitively averred, and not ſet forth by Way of Recital.

Chief Juſtice *Parker*. Not true, That there is no traverſing, what is only ſet forth by Way of Recital; for the Pleas of *Non Aſſumpſit*, and *non eſt factum*, are both of them Pleas that traverſe Matters, in thoſe reſpective Actions, that are pleaded by Way of Recital.

The Return of the Writ not being ſet forth, a fatal Objection.

Vide Caſe of *Norton* and *Syms* in *Hobart*'s *Rep.* 12. and *Turnor*'s Caſe in 8 *Co. Rep.* 132. *Adjournatur.*

Johnſon

Johnſon and *Altham.* B R.

Vide poſt. Hill. 12 Ann.

Writ of *Error* upon Action upon the Caſe.

THIS was a Writ of Error, out of the Court of *C. B.* in an Action upon the Caſe; and it was inſiſted upon for Error, That there ſhould have been no final Judgment, but a *Reſpondeas Ouſter.*

Queſtion, Whether the Plea was a Plea in Bar, or in Abatement?

But it was inſiſted by the Defendant in Error, That it was the Concluſion of a Plea, that made it either a Plea in Bar, or a Plea in Abatement, be the Matter of the Plea what it will; and that here the Plea was concluded with a *petit judicium de Narratione*, which is always the Concluſion of a Plea in Bar; and therefore a final Judgment was rightly given.

Court. It is true, That it is the Concluſion of a Plea, be the Matter what it will, that makes a Plea, a Plea either in Bar, or Abatement.

It is true likewiſe, that *petit judicium de Narratione*, is generally the Concluſion of a Plea in Bar; for where there is either a Writ or a Bill, the demanding Judgment of the Declaration, is a Confeſſion that the Writ or Bill is good: But the Difficulty, in this Caſe, ariſes from hence, that here is no Writ or Bill; but the Declaration is the firſt Step. *Adjournatur.*

Queen and *Muſcot.* B. R.

Evidence. Whether Evidence for the Crown, may be examin'd upon a *Voyer dire?*

A QUESTION was ſtarted in an Indictment for a judicial Perjury, Whether one produced as an Evidence for the *Queen*, might not be examined upon a *Voyer dire*, as the common Uſage is in civil Actions?

It was inſiſted by the Counſel for the *Queen*, that the Queſtion ſhould not be put; becauſe the Conſequence

would be, that no ſuch Proſecutions could ever go on. For there is ſcarce any Proſecutor, but if aſked, whether he be intereſted in the Event of a Cauſe, muſt ſay he is. For Example, where the Owner proſecutes an Indictment of Felony for ſtol'n Goods, he is concerned in Intereſt; for he will be intitled to Reſtitution, and yet his Evidence is admitted. So likewiſe, where an Indictment is removed, by *Certiorari*, from the Seſſions into *B. R.* notwithſtanding the Proſecutor in that Caſe, if the Defendant be convicted, is by the Statute intitled to his Coſts, yet he is allowed as a Witneſs.

In ſome criminal Caſes intereſted Perſons are allowed as Witneſſes.

So likewiſe there are ſeveral Caſes, where, tho' a Man will, in Caſe of Conviction, be intitled to forty Pounds; yet his Evidence ſhall be received.

And as to the Caſes of the *Queen* and Duke of *Leeds*, and the *Queen* and *Cobham*, where the Informer was refuſed to be an Evidence; there is this Difference between thoſe and the preſent Caſe, That there it did appear upon the Face of the Record, that the Parties produced as Witneſſes were intereſted.

In Hue and Cry, the Evidence of the Perſon robbed always allowed as Evidence.

Chief Juſtice *Parker*. It is a Principle of the Common Law, That every Man ſhall be tried by a fair Jury; and that Evidence ſhall be given by Perſons diſintereſted. The Law gives the Party tried his Election, to prove a Perſon offer'd as Evidence, *intereſted*, two Ways; *viz.* either by bringing other Evidence to prove it, or elſe by ſwearing the Perſon himſelf upon a *Voyer dire*; but tho' he may do either, he cannot have Recourſe to both. It was never objected before, that a Perſon ſhould not be ſworn upon a *Voyer dire*; nor will it (I hope) ever hereafter. Objections have, indeed, been ſtarted, as to the Nature of thoſe Queſtions, that ſhall be put to a Witneſs upon taking ſuch an Oath.

Court. Two Ways of proving Witneſſes to be intereſted Perſons, *viz.* either by bringing other Evidence to prove it; or elſe by ſwearing the Witneſſes themſelves upon a *Voyer dire*. But *both* theſe Ways muſt not be made Uſe of at the *ſame* Time.

As to the Caſe of the Robbery; That is founded upon the Neceſſity of it, and *that* only.

Intereſted Perſons allow'd to be Witneſſes only in Caſes of Neceſſity.

As to the Caſes put upon the Statutes where forty Pounds Reward *&c.* They admit of this Anſwer, That the Intention of thoſe Acts will be quite defeated, if ſo be the Reward is to take off their Evidence.

The ſame Anſwer likewiſe, may ſerve to the Caſes put upon an Indictment of Felony for ſtol'n Goods, and where the Indictment is removed by *Certiorari &c.* For who in the firſt Caſe but the Owner can prove the Property of the Goods? And in the ſecond, if the giving of Coſts ſhould take off the Evidence of the Proſecutor, that Act of Parliament which was deſigned to diſcountenance the removing of Suits by *Certiorari*, would give the greateſt Incouragement to 'em that is poſſible. As for the Diſtinction taken, between the Intereſt of the Witneſs appearing upon Record, and its appearing ſome other Way; it is an irrational Diſtinction, and a Reflection upon the Wiſdom of the Law.

As to the Objection, taken from the Inconvenience of putting the general and common Queſtion; becauſe probably he muſt anſwer it in the affirmative: Nothing in it; for he may be aſked to explain the Nature of his Intereſt, that ſo the Court may be Judge, whether his Intereſt is ſuch as ought to exclude his Evidence.

He was accordingly ſworn upon a *Voyer dire.*

Chief Juſtice *Parker.* (In ſumming up the Evidence, *inter alia*) 'There is this Difference between a Proſecution for Perjury, and a bare Conteſt about Property, That in the latter Caſe, the Matter ſtands indifferent; and therefore a credible and probable Evidence ſhall turn the Scale in Favour of either Party: But in the former, Preſumption is ever to be made in Favour of Innocence; and the Oath of the Party will have a Regard paid to it, until diſprov'd. Therefore to convict a Man of Perjury, a probable, a credible Evidence not enough; But it muſt be a ſtrong and clear Evidence, and more

Strong Evidence neceſſary to prove Perjury.

numerous than the Evidence given for the Defendant; for elſe only Oath againſt Oath.

A Miſtake not enough to convict a Man of Perjury; the Oath muſt be not only falſe, but wilful and malicious. A Miſtake no Perjury.

I remember a Caſe, ruled by my Predeceſſor, where a Perſon ſwore, that he ſaw and read ſuch a Deed, and it proved upon the Trial to be only the Counterpart, which he ſaw; and yet held no Perjury, becauſe only a Miſtake.

It is my Opinion, That Perjury may be committed in a circumſtantial Matter, tho' I do not remember that, in Fact, it was ever carried ſo far. I have heard a Caſe mentioned in King *William*'s Time, where the Queſtion being put about the ſealing of a Deed, it was ſworn that the Party was, at ſuch a Time, in ſuch a Place, and conſequently could not ſeal the Deed; and upon this Oath he was convicted of Perjury. But now tho' the Matter of this Oath was but a Circumſtance, conſidered in Relation to the Point in Queſtion, upon the Trial, in which the Oath was given; yet it was all his Oath, his entire Evidence. Whether Perjury may be committed in Matters of Circumſtance only? *Salk.* 513.

But if Perjury may be committed in Matter of Circumſtance, it muſt be a material Circumſtance; a Circumſtance of that Weight, that without it he could not hope to find Credit with the Jury

DE

Termino S. Hill.

12 *Annæ,*

In Banco Regis.

Harriſon and *Thornborough.*

Action for Words.

THIS was an Action for Words, *viz.* Harriſon *got a Witneſs to forſwear himſelf in ſuch a Cauſe, you or he* (*innuendo* the Plaintiff) *hired one* Bell *to forſwear himſelf.* And for theſe following Words, ſpoken at another Time, *Two Dyers are gone off,* (*innuendo* become Bankrupt) *and for ought I know,* Harriſon *will be ſo too, within this Time twelve-month*; Verdict for the Plaintiff, and joint Damages given. And now the Court was moved, in Arreſt of Judgment, That the Words were not actionable.

Objections in Arreſt of Judgment.

For tho' the firſt Branch of the Words, if they were alone, are certain enough; yet when he goes on and ſays, *You, or the Plaintiff, hired one* Bell *to forſwear himſelf,* it becomes altogether uncertain to whom the Words relate. And to this Purpoſe were cited 1 *Rolle*'s *Abr.* 81. and 1 *Cro.* 497, where the Words were, *One of you three &c.*

Hob. 268.

It was objected likewiſe, That the Words were not actionable; becauſe they did not ſet forth that what the

Witneſs was forſworn in, was a material Point in the Cauſe.

It was ſaid further, That ſuppoſing theſe Words were actionable; yet if the following Words, that were ſpoken at a different Time, were not actionable, That then the Damages being joint, the Judgment muſt be arreſted.

And it was ſaid, that thoſe Words were not actionable, becauſe the Word *Gone off* was a Word capable of various Conſtructions; and was therefore to be taken in the moſt favourable Senſe. 3 *Mod.* 155. Action brought for theſe Words, *broken, run away, and will never return again*; and Court divided.

And if the Words themſelves were not actionable, the *Innuendo* will not help it; for an *Innuendo* is not to ſet forth new Matter, but to refer to ſomething already mentioned in the Declaration. *King* and *Greepe*, *Newnham*, *innuendo Newnham* in *Devonſhire*. 4 *Co. Rep.* 20. *a.* burnt my Barn, *innuendo* full of Corn. In both theſe Caſes *innuendo* void; becauſe it ſets forth new Matter. Office of *Innuendos*. *Salk.* 515.

It was likewiſe ſaid, That the Action would not lie, unleſs *Bell* had actually forſworn himſelf; which perhaps the Words *got &c.* do not neceſſarily imply.

Court of Opinion, That the Plaintiff ſhould have Judgment. Precedents, not of equal Authority, in Actions for Words, as in other Actions; becauſe *Norma loquendi*, is the Rule for the Interpretation of Words; and this Rule is different in one Age, from what it is in another. The Words that an hundred Years ago, did not import a ſlanderous Senſe, now may; and ſo *vice verſa*. *Court.* Precedents, in Actions for Words, not of the ſame Authority, as in other Actions; becauſe Words alter in their Signification.

In this Kind of Actions for Words, which are not of very great Antiquity, the Courts did at firſt, as much as they could, diſcountenance them; and that for a wiſe Reaſon, becauſe generally brought for Contention and Vexation; and therefore when the Words were capable of two Conſtructions, the Court always took them *mitiori ſenſu*. Actions for Words of no great Antiquity. *Hob.* 268. 4 *Co.* 20. 3 *Cro.* 277.

But latterly theſe Actions have been more countenanced; for Men's Tongues growing more virulent, and irreparable Damage ariſing from Words, it has been by Experience found, that unleſs Men can get Satisfaction by Law, they will be apt to take it themſelves. The Rule therefore, that has now prevailed, is, That Words are to be taken in that Senſe, that is moſt natural and obvious; and in which, thoſe to whom they are ſpoken, will be ſure to underſtand them.

The Words *you or he &c.* do not render the former uncertain; for they relate not to the *getting &c.* but to new Matter, *viz.* who paid the Money.

Beſides, if the Words were *A. or D. did &c.* either *A.* or *D.* might bring an Action; but then there muſt be an Averment, that neither of them did it.

Not neceſſary to the maintaining of this Action, that *Bell* did in fact forſwear himſelf.

The Signification of the Words *gone off*, very well known among Merchants.

Hob. 2, 3, 6, 45. The Doctrine laid down concerning *Innuendos*, undoubtedly true, when underſtood of Matters of Fact: But here the *Innuendo's* were not introductory of new Matters of Fact; but only explanatory of the foregoing Words.

Judgment *pro quer.*

Caſes quoted, by the Counſel for the Plaintiff, in Anſwer to the Uncertainty of the Words, were *Latch* 219. 2 *Keble* 718. *Styles* 142. 2 *Cro.* 407. *Raym.* 217. 1 *Levinz* 277. 1 *Cro.* 236. *Dyer* 72.

Queen and *Delme.* B. R.

Information for exerciſing Office of Alderman.

THIS was an Information againſt *Delme*, for exerciſing the Office of Alderman, in the City of *London*, not being duly choſen. When the Trial came on,

Challenges to the Array.

the Counſel for the *Queen*, challenged the Array; be-

cauſe

cauſe one of the Sheriffs, was one of thoſe returned to the Court of Aldermen. This Challenge being allowed, a *Venire facias* was directed to the other Sheriff; and then the Counſel for the Defendant, challenged the Array; becauſe returned by a Sheriff, that was concerned in Intereſt, as he was a Freeman of the City of *London*. Upon this a *Venire* was directed to the Coroner. *Salk.* 152. *Salk.* 152. *Hob.* 235.

But before any Return, the Counſel for the *Queen*, entred a Suggeſtion upon Record, ſetting forth, that the Queſtion to be decided upon this Trial, being, Whether the Right of Election was in the Freemen only, or in all thoſe who paid Scot and Lot, (Freemen or no Freemen) it appear'd from the Nature of the Thing, that it was impoſſible for an impartial Jury to come out of *London*; and therefore they prayed a *Venire* to the Sheriff of *Surrey*, the adjacent County.

The Court was now moved to ſet aſide this Suggeſtion, as being out of Time, and inconſiſtent with what they had before admitted upon Record. Motion to ſet aſide a Suggeſtion enter'd upon Record.

For it was inſiſted, That this Suggeſtion containing no new Matter ariſing ſubſequent to, or not known at the Time, when, upon the Allowance of the Challenge to the Array, for the Partiality of one Sheriff, the *Venire* was pray'd to the other and granted, it was now too late to make it.

But what was moſt ſtrongly urged was, That the Counſel for the *Queen*, by challenging the Array, and praying a *Venire* to the other Sheriff of *London*, had thereby admitted upon Record, that an impartial Jury might come out of *London*; and therefore they ſhould not now, in Diſaffirmance of what they had before admitted, be allowed to make this Suggeſtion.

It was ſaid that theſe Suggeſtions were in their Nature odious, as tending to put Things out of the uſual Courſe of Law.

Theſe Suggeſtions being in the Nature of Challenges, whatever Caſes would prove ſuch Sort of Challenges unlawful,

unlawful, muſt, by Parity of Reaſon, prove the Illegality of the Suggeſtion.

Caſes quoted, were 22 *Ed.* 4. *f.* 3. *placito* 11. *Cro. Jac.* 35, 36. 15 *H.* 7. 9. *Robinſon's Entries, pa.* 144. *Moore* 894. 4 *Ed.* 4. 6. *Dyer* 25. 2 *Rolle* 637. Earl of *Kent's* Caſe, 2 *Rolle* 643.

Econtra. In the following Term, it was inſiſted, in Favour of the Suggeſtion, That the Defendant, by his Challenge to the Array, had deſtroyed, whatever Admiſſion upon Record, the ſuing out the *Venire* to the other Sheriff, might amount to.

For the Sake of having Trials fair, and to prevent Delay of Juſtice, Challenges are favour'd in Law; hence allowed by Law to make ſeveral Challenges at the ſame Time. *Co. Lit.* 158.

Tho' a Challenge be *in eſſe* at the Time of the former, yet if the Party had not, by reaſonable Intendment, Notice of the Cauſe of Challenge, he is not eſtopped: Now this Suggeſtion depends intirely upon the Knowledge of the Cuſtoms of the City of *London,* which Cuſtoms the Crown is a Stranger too.

Crown has ſeveral Privileges in Pleading. Beſides, there is no arguing from Proceedings at Law between Subjects, to Suits where the Crown is Party; becauſe the Crown has ſeveral Privileges above a Subject; as the Crown may waive their Demurrer, take Iſſue and waive that Iſſue, *Vaughan* 65. *Dyer* 53. 1 *Ventris* 17, the Crown may change their own *Venue.* The Queen may amend her Pleadings at any Time; nor will any Eſtoppel bind the Crown, *Hobart* 339. 1 *Siderfin* 412. *Adjournatur.*

Abrahat and *Brandon.* B. R.

Award. THE Arbitrators taking Notice of the Difference between the Parties, award, That the Defendant ſhall pay to the Plaintiff, ſo much Money upon the 1*ſt* of *April,* ſo much upon the 1*ſt* of *May*; and that the Parties ſhall pay one Pound five Shillings each, to the Arbitrators, for their Trouble; and that upon Payment

A Releaſe awarded to be made to the Time of the Award, good; for not to be intended that any new Difference has

prædict' monet' upon the 1*ſt* of *May*, the Parties ſhould give mutual Releaſes, to the Time of the making the Award. ariſen between the Time of the Submiſſion, and of the Award.

A Releaſe of all *&c.* to the Time of the Submiſſion, a good Performance of an Award, ordering a Releaſe to be given of all *&c.* to the Time of the Award; for that Part of the Releaſe, which extends to the intermediate Time, out of the Power of the Arbitrators.

It was objected to this Award, that it was made *ex parte tantum*; for nothing was awarded in Favour of the Defendant but the Releaſe, which the Defendant had no Remedy for at Law; for the Plaintiff was not by the Award, bound to make the Releaſe, until after Payment *monet' prædict'* upon the 1*ſt* of *May*. Now *monet' prædict'* refers not only to the Sums awarded to be paid upon the 1*ſt* of *May*, but all the Sums, and therefore to the Sum awarded to be paid to the Arbitrators; which Part of the Award is entirely void. *Hob.* 49, 50.

Beſides, the Releaſe awarded by the Arbitrators, is a Releaſe exceeding their Power, which extends only to the Time of Submiſſion; whereas the Releaſe, according to the Award, extends to the Time of the Award made.

Court of Opinion, the Award good: For *monet' prædict'* ſhall refer to all the Sums, that concern the Juſtice of the Award; but not that Sum which does not, and as to which the Award is void.

And as to the ſecond Objection, it is capable of two Anſwers; one a common one, *viz.* That it ſhall not be intended, that any new Difference has ariſen between the Time of the Submiſſion, and of the Award; unleſs it be ſhewn eſpecially that there has. *Salk.* 74. *Salk.* 75.

The other Anſwer is, That a Releaſe of all, *&c.* to the Time of the Submiſſion, is a good Performance of an Award, ordering a Releaſe to be given of all *&c.* to the Time of the Award. This Chief Juſtice *Parker* ſaid he took down from Chief Juſtice *Holt*'s own Mouth, in the Caſe of *Freeman* and *Bernard*, 8 *Will.* The Counſel likewiſe quoted *Lutw.* 524, 549. to the ſame Purpoſe. The Reaſon is plain; becauſe that Part *Salk.* 69.

of the Releaſe, which extends to the intermediate Time, exceeds the Power of the Arbitrators.

Queen and Corporation of Helſton, *in* Com. Cornwall. B. R.

Motion for a *new Trial.*

THE Queſtion was, If upon a Trial, a Point in Law be ſtarted by the Judge, and the Counſel do not take it up, but inſiſt upon other Facts, which are found againſt them; whereas had the Counſel inſiſted upon the Matter of Law ſtirr'd by the Judge, the Verdict muſt have paſs'd for them, Whether this is ſufficient Cauſe to move for a new Trial.

When granting new Trials began.

Chief Juſtice *Parker.* The granting of new Trials of late original; it began about the Year 1652, when the firſt new Trial was granted for exceſſive Damages. Ex-

Where grantable. *Salk.* 649.

perience ſhews, That they are grantable, as well for a Fault in the Judge, as Jury, in Cauſes tried at *Niſi Prius*; becauſe a Judge of *Niſi Prius* acts rather in a Miniſterial than judicial Capacity; and the Ground and Foundation of granting new Trials, when either the Judge or Jury are to blame, is one and the ſame, *viz.* doing Juſtice to the Party.

The Queſtion in this Caſe, I take to be this, Whether we are ſo bound down by Forms of Law, as that tho' we ſee a Verdict given contrary to a Point of Law, (which the Judge himſelf took Notice of, and yet for Want of the Counſel's doing their Duty to their Client, was not inſiſted upon) we cannot grant a new Trial.

When a Point of Law ariſes, Whether the Counſel inſiſt, or not inſiſt upon it, Judge bound to direct the Jury accordingly.

But yet, if the ſupporting of this Verdict, be of no more ill Conſequence, than in Point of Coſts, and the Party has another Remedy left him, then I am of Opinion, that the Party ought to ſuffer for the Neglect of

his Counſel. But if the Verdict binds and concludes the Right of the Party, then I think it hard, that the Party ſhould loſe his Right, by a Miſtake, or Slip of the Counſel.

Powys ſenior. It would be of vaſt Inconvenience, if the bare ſtirring of a Point at *Niſi Prius*, and which for ought appears, neither Judge, Counſel or Jury thought upon more, ſhould be a Ground for granting a new Trial; for it may be, the Reaſon why it was not inſiſted upon by the Counſel was, becauſe they knew the other Side had Evidence, that would give it a full Anſwer, by quite altering the Fact. What happens now accidentally, may hereafter happen deſignedly; Matter may be ſlided in by the Counſel, and then dropt, only in order to move for a new Trial; and it is better to ſuffer a particular Inconvenience, than open the Way to a general Miſchief.

Eyre. Miſtake of Judge or Jury, a good Cauſe of granting a new Trial; but never yet heard, That the Miſtake of the Counſel was ſo. The Counſel ſtands in the Place of his Client; and therefore, if the Counſel waive a Point, it is the ſame as if the Client did it himſelf.

Miſtake of Judge or Jury a good Cauſe for granting a new Trial; but not the Miſtake of Counſel.

Powys junior. If a Defendant, in an Action of Debt upon a Bond, who has a good Defence upon the Merits, ſhould, by Advice of Counſel, hazard his Cauſe upon a Demurrer, which is adjudged againſt him, This Miſtake of Counſel, would not be allowed in Chancery, as a good Cauſe of Relief.

In Debt upon a Bond, if the Defendant, who has a good Defence upon the Merits, ſhould hazard his Cauſe upon a Demurrer, he can have no Relief afterwards.

Parker Chief Juſtice. There muſt be no new Trial. And I ſo far aſſent to my Brothers, That tho' a Verdict ſhould leave the Party remedileſs; yet if the Counſel does not only, not inſiſt, but expreſly waive it, That then there ought to be no new Trial.

Barnardiſton

Barnardiſton and *Foulyer.* B. R.

Award.

CHIEF Juſtice *Parker*, deliver'd the Reſolution of the Court.

The Points in this Caſe two:

1*ſt*, Whether the Award be a good Award? And,

2*dly*, Whether the Breach be well aſſigned?

1*ſt* Point.

As to the 1*ſt*, we are of Opinion, That the Award is a void Award, tho' it was not inſiſted upon by the Counſel; and *that* for this Reaſon.

The Award was made the 23*d* of *June*, and the Award orders ſo much Rent, which by the Award itſelf, appear'd not to be due until the 24*th*, to be paid by *A.* to *B.* in Satisfaction of ſix Pounds, which the Arbitrators did judge to be owing to *B.* Now, this Rent being due upon a Day ſubſequent to the Award, That the Clauſe in the Award concerning it, was void, 1 *Rol. Abr.* 245. *pl.* 8. is an expreſs Authority. And the Reaſon is plain, *viz.* becauſe the Rent may become extinct, either by Surrender, or Eviction, before it is due.

And this Clauſe being void, the whole Award becomes void too. For tho' an Award may be void in Part, and good for the reſt; yet this muſt not be, when it is void in that Part, that concerns the Juſtice of the Award, which is the Caſe here; for if mutual Releaſes are to be given, tho' the Rent be not paid according to the Award, *B.* will be without Remedy, for that Money, which the Arbitrators acknowledge to be due to him. *Saunders* 292. 2 *Cro.* 584.

Ant. 201.

2*d* Point.

Bnt 2*dly*, Suppoſing this to be a good Award, we are of Opinion, That the Breach is not well aſſigned. For the Submiſſion being of all Suits &c. between *A.* and *B.* and the Award purſuing the very Words of the Submiſſion, *viz.* that all Suits &c. between *A.* and *B.* ſhould

ceaſe;

ceaſe; it is evident that neither the Parties to the Award, nor the Arbitrators did deſign, the former that their Submiſſion, or the latter that their Award, ſhould extend to Suits depending between *A.* and *B.* and others. But be the Intention of the Parties what it will, the Law is plain, that the Proſecution of a Suit, between *A.* and *B.* and others, is no Breach of ſuch an Award. 1 *Rolle's Abr.* 246, Caſe of *Brockas* and Sir *John Savage*, a much ſtronger Caſe; becauſe Huſband and Wife, are to many Purpoſes in Law, conſidered as one Perſon.

A *Certiorari* to return the Record of a Suit between *A.* and *B.* Return of a Record between *A.* and *B.* and *C.* the Record not removed. *Mich.* 12 *Gulielmi*, Indictment in this Court, *Brown's* Caſe. The ſame Law as to Orders. *Salk.* 146.

Judgment *pro Def.*

Caſes quoted *arguendo.* 2 *Mod.* 227, *Green* and *Stanford.* 2 *Rich.* 3. 18. 1 *Rolle's Abr.* 261. 2 *Rolle's Abr.* 412. 20 *H.* 6. 41. *Gle* and *Rell* 1704, affirmed in the Houſe of Lords.

Aubry and *Forteſcue.* B. R.

PLAINTIFF declares, That the Defendant being indebted to the Plaintiff, *pro opere & labore &c.* promis'd him on the 1*ſt* of *April*, to pay him the Money upon the 1*ſt* of *May*, *&c.* The Defendant pleads in Bar, *Non Aſſumpſit infra ſex annos*; Plaintiff replies, that he was beyond Sea at the Time the Action accrued, and that the Action was begun within ſix Months *poſt reditum*; upon which Defendant demurs, and Plaintiff joins in Demurrer. *Aſſumpſit.*

For the Plaintiff, *Turnor's* Caſe, 8 *Rep.* 132. was quoted, That if the Bar be bad in Subſtance, and that there is a Replication only to avoid the Bar, which Replication is

vicious, and to this Replication the Defendant demurs, yet the Plaintiff muſt have his Judgment; becauſe tho' the Replication be naught, yet not being to inforce the Cauſe of Action, but to avoid the Bar, which is bad in Subſtance, (for the Bar ſhould have been *Actio non accrevit*, and not *Non Aſſumpſit*) it is no Prejudice to the Plaintiff.

Ant. 104.

What was moſt materially inſiſted upon for the Defendant, was, That the whole Record was, what the Court were to found their Judgment upon; that therefore, if it appear'd upon the whole Record, That the Plaintiff had no Cauſe of Action, whether by Reaſon of Declaration, Bar, Replication *&c.* (not material which) the Plaintiff could never have Judgment. And here the Plaintiff by his own Replication had quite deſtroyed his Cauſe of Action; for he did admit, that he had not brought his Action within ſix Years, after the Cauſe of Action accrued, but took Sanctuary in the ſaving Clauſe of the Statute of Limitations. The Queſtion therefore was, Whether the Matter ſet forth in his Replication, does bring him within the ſaving Clauſe of the Act.

Statute of Limitations.

Actions of *Aſſumpſit* not mentioned in the ſaving Clauſe; and conſequently it is plain, that the Plaintiff is not intitled to the Benefit of the ſaving, by the Letter of it.

And that the Saving in the Statute of Limitations is not to be extended, according to Equity, the Reſolution in *Bynion*'s Caſe, That the ſhutting up of Courts *tempore Guerræ*, does not likewiſe fall under the Saving (a Reſolution often approved of by Chief Juſtice *Holt*) is an expreſs Authority.

Salk. 420, 422.

Court ſtrongly of Opinion *pro quer.* *Sed Adjournatur.*

Univerſity of Cambridge, verſus *Archbiſhop of* York; *or Vavaſor* and *Crofts.* B. R.

THIS was a Writ of Error, out of the Court of C *B.* upon a *Quare Impedit* brought by the Chancellor and Scholars of the Univerſity of *Cambridge*, againſt the Archbiſhop, *&c.* founded upon the Statute of *tertio Jacobi* 1. *cap.* 5. which diſables Popiſh Recuſants Convict, from preſenting *&c.* and veſts ſuch Preſentations in the Chancellor and Scholars of the two Univerſities reſpectively. *Quare Impedit.*

The Queſtions upon this Caſe were two:

Firſt of all, Whether the Defendant, his Plea in Abatement, *viz.* that the Univerſity of *Cambridge* were incorporated by the Name of Chancellor, Maſters and Scholars *&c.* and that therefore they had ſued by a wrong Name, were a good Plea; for if ſo, the Court of *C. B.* erred in awarding a *Reſpondeas Ouſter.* 1ſt Point.

It was inſiſted in Behalf of Plaintiff in Error, That it was a good Plea in Abatement; and for this Purpoſe were cited, 4 *Ed.* 4. 7. 22 *Ed.* 4. 34. 13 *H.* 7. 14. Name of a Corporation compared to the Name of Baptiſm, *Fitzherbert Abr.* Tit. *Deviſe, placito* 27. For the Plaintiff in Error.

It was argued by Serjeant *Cheſhyre* for Defendant in Error, That a Corporation may have one Name by which they may take, and another by which they may ſue. 1 *Rolle's Abr.* 513. therefore *non ſequitur*, That, becauſe the Univerſity was incorporated by this Name, they cannot be impleaded, or ſue by another. For the Defendant in Error.

He argued, That the Act of Parliament, veſting this Right in them by the Name of Chancellor and Scholars, was an incorporating of them by that Name, *quoad* this particular

particular Purpoſe. This, he ſaid, could be done by Letters Patents, 2 *H.* 7. 13. 4 *Leon.* 190. a *Fortiori* by Act of Parliament; and if this ſhould be ſo, then the very Act of Parliament, is a Falſification of the Plea.

Co. Lit. 303. a Plea in Abatement, muſt be certain to every Intent.

It was ſaid likewiſe, That there was another Rule as to Pleas in Abatement, *viz.* That the Defendant muſt never ſet aſide the Writ of the Plaintiff, without ſhewing him a better.

He inſiſted laſtly, That this Variance was not a material one; becauſe a Man by becoming Maſter, does not ceaſe to be a Scholar.

The Reply. To this it was replied, by the Counſel for the Plaintiff in Error, That if the Caſe were really ſo, that the Univerſity of *Cambridge* had one Name to take, and another to ſue by, *this* ought to have been ſhewn by the other Side. That the Act of Parliament operated only by Way of *deſcriptio Perſonæ*, as in a Deviſe, and not by Way of incorporating them.

That admitting this Statute did incorporate them, as to this Purpoſe, by the Name *&c.* Yet the Acceptance of a new Charter by another Name, made it neceſſary for them to ſue by that Name.

Court. *Parker* Chief Juſtice. The Declaration ſets forth the Act of Parliament, as an Authority to ſue by that Name, which puts it upon the Defendant to ſhew ſome ſpecial Matter to avoid it, as the Acceptance of another Charter by another Name, ſubſequent to the Act.

Powys ſenior. Chancellor and Scholars is ſuch a Name, as comprehends the whole Univerſity; for it includes both Head and Members.

Eyre and *Powys junior.* *Non ſequitur*, that what will be ſufficient to amount to a *deſcriptio Perſonæ* to enable a Perſon to take, will be ſufficient for him to ſue in.

The ſecond Queſtion in the Caſe, was, That the Univerſity of *Cambridge* had not ſufficiently pleaded the Conviction, for Want of *ideo convictus eſt.* 2d Point.

But to this it was anſwered, That the Record of the Default, was a Conviction of itſelf; and therefore the ſpecial Concluſion of *ideo convictus eſt*, ſuperfluous and unneceſſary.

And to this Opinion the Court inclined.

This laſt Queſtion depended upon Stat. 1 *W. & M. Seſſ.* 1. *cap.* 26. *Adjournatur.*

Parker and *Langly.* B. R.

Vide Ante. 145.

CHIEF Juſtice *Parker* delivered the Reſolution of the Court to be, That the Declaration was naught, for want of ſhewing what became of the former Action; whereas it ought to have been ſhewn, That *that* was falſe and hopeleſs. Action upon *Caſe* for malicious Proſecution, and upon Demurrer, Judgment *pro Def.* becauſe Plaintiff had not in his Declaration ſhewn what became of the malicious Proſecution.

As the Declaration now ſtands, the firſt Suit may either, 1*ſt*, be determined; or 2*dly*, it may be deſerted; or 3*dly*, it may be ſtill regularly going on; *& non conſtat*, which of theſe three is the Matter of Fact.

If the 1*ſt*, *non conſtat* whether determined for, or againſt the Plaintiff; if for the Plaintiff, then there is no Colour for this Action.

If the 2*d* were the Matter of Fact, Deſertion is an Indication of its being falſe and hopeleſs, and then indeed this Action would be maintainable; and for this Purpoſe there is a very ſtrong Caſe in *W. Jones* 93.

If the 3*d* be the Matter of Fact, then the Action is brought too ſoon. 2 *Rich.* 3. 9. Held by all the Judges, That the firſt Action muſt be firſt determined; becauſe *non intelligitur*, ſays the Book, *quouſque terminetur*, that the Action was unjuſt. *Dyer* 285. *Hobart* 267. *Salk.* 15.

No Man can ſay of an Action ſtill depending, that it is falſe or malicious. The ſame Rule holds in criminal

Caſes. *Yelverton* 116. *Siderfin* 15. 1 *Saunders* 228. 2 *Keble* 476. In an Action for a malicious Indictment, the Plaintiff muſt in his Declaration, ſhew what became of the Indictment.

A Verdict, or a Plea in Bar, admitting and confeſſing the firſt Action to be falſe and hopeleſs, may cure this Defect in a Declaration. *Raym.* 418. 2 *Keble* 456, 753. 3 *Keble* 781.

The admitting this Declaration to be good, notwithſtanding this Omiſſion, would introduce great Abſurdities, *viz.* inconſiſtent and incongruous Verdicts in different Actions.

Indeed, if the firſt Action goes off by Nonſuit; it may be ſaid, That in another Action brought for the ſame Cauſe, there may be a Verdict given, inconſiſtent with the Verdict given in the preſent Cauſe: This may be; but the Poſſibility of ſuch a Verdict in a future, and not exiſting Action, ſhall not hinder a Man from bringing ſuch an Action as this. The Entries uphold this Opinion. *Aſhton* 40. *Brownlow Redivivus* 61. *Robinſon* 91.

Judgment given *pro Def.*

Obiter dictum by the Chief Juſtice in this Reſolution, That where the Title is of one Sort of Action, *there* the Declaration can never change it to another; but it may make a fatal Variance between the Writ and the Declaration. 1 *Ventris* 19. 2 *Rolle's Rep.* 49.

Johnſon and *Altham.* B. R.

Vide Ante. 192.

Pleading.

CHIEF Juſtice *Parker* delivered the Reſolution of the Court to be, That the Judgment of the Court of *C. B.* ſhould be affirmed.

Petit judicium de Billa, the Form of pleading in Abatement.

Petit judicium de Narratione, Form of pleading in Bar.

Demanding Judgment of the Declaration, is underſtood to be demanding Judgment of the Caſe in the Declaration.

The demanding Judgment of the Bill, is as much as to ſay, ſince the Declaration is your Caſe, which it is always ſuppos'd to be, you have brought a wrong Bill.

In this Caſe, there being no Bill upon the File, and the Declaration being the very firſt Step in the Cauſe (which undoubtedly is erroneous, for every Cauſe muſt begin either by Writ or Bill) neither of theſe two Forms of Pleading were proper: Not *petit judicium de Billa*, for there was none; not *judicium de Narratione*, for it was not the Caſe in the Declaration, but want of a Bill that was the Error. The Defendant therefore in the original Action, ſhould have concluded his Plea thus, *petit judicium ſi reſpondere compelli debeat.*

Queen and *Blagden.* B. R.

Vide poſt. Paſch. 1 Geo. 1.

Information in Nature of a *Quo Warranto.*

THIS was an Information, in Nature of a *Quo Warranto*, againſt the Defendant, to know by what Authority *Blagden* exerciſed the Office of Port-reve in the Borough of *Honiton.*

The Defendant in his Bar, ſets forth his Right to that Office; and concludes with a Traverſe, *Abſque hoc* that the Defendant uſurped the Office. The Crown in its Replication, taking no Notice of the ſpecial Title ſet forth by the Defendant, joins Iſſue upon the Traverſe *quod uſurpavit &c.* and upon this Demurrer is joined.

Powys junior. I ever took it, That in this Caſe, the *Abſque hoc &c.* was but meer Matter of Form, and a reſpectful Way of concluding the Plea.

Parker

Parker Chief Juſtice. The Queſtion turns upon this, Whether the Traverſe be only Matter of Form? For if ſo, the Crown cannot take Iſſue upon it; but if it be a material Part of the Plea, moſt certainly the Crown may do it.

Vide poſt. Paſch. 1 Geo. 1.

Queen and *Green.* B. R.

Exceptions to a *Conviction.*

THE Court was moved to quaſh a Conviction upon the Statute 8 *Annæ*, againſt a Baker, for ſelling of Bread.

1*ſt* Exception.

Exceptions taken to the Conviction were, That here it appears upon the Conviction, that Information was given the 8th Day, of an Offence done upon the 5th; and the Act of Parliament requires the Information to be given in three Days, after the Offence committed.

Parker Chief Juſtice. Not ſettled, whether the Time in this Act of Parliament is to be taken incluſively, or excluſively; for the Law allows no Fraction of a Day. Generally Computation of Time in penal Laws, is taken incluſively.

Eyre. This a Point never ſettled.

Powys ſenior, was of Opinion, That the three Days were to be reckoned excluſively.

2*d* Exception.

Another Exception was taken, That the Conviction ſets forth the Bread to be bought *apud domum manſionalem ſive Shopam* of the Baker, ſituate in the Pariſh of St. *Sepulchre*, in *Com. Midd. infra juriſdictionem* of the Juſtices. It was ſaid that it was uncertain whether the

Bread was bought at the Shop or the Houſe; and uncertain which of the two were ſituate in *Com. Midd. infra &c.* and conſequently uncertain whether the Juſtices had Juriſdiction?

Powys ſenior. Both Houſe and Shop muſt be ſituate *&c.* for the Word *ſituate* plainly relates to both.

Then it was objected to the Conviction, That the Conviction ſets forth, that being *debite ſummonitus*, and not appearing, they proceeded *&c.* whereas natural Juſtice requires, that the Defendant ſhould have had a reaſonable Time allowed him, for the making his Defence. 3d Exception.

Parker, Chief Juſtice. This a material Objection: Not ſaid that he was ſummon'd to appear at a certain Time, or any Time, or when the Summons was made.

Powys junior, To be conſidered, Whether, when it is ſaid, that he was *debite ſummonitus*, the Word *debite* does not import all reaſonable Circumſtances relating to that Summons; and I am of Opinion it does.

Another Objection to the Conviction, was, That the Evidence upon which he was convicted, is not ſet forth. Said indeed that the Witneſs was ſworn *de veritate præmiſſorum*; but it does not appear what the Anſwer of the Witneſs was. It is indeed ſaid, that it did appear, from what was ſworn, to the Juſtice, that he was guilty; but it ought to have appear'd ſo to the Court, from the Nature of the Evidence, ſpecially ſet forth.

And of this Opinion was the Court. 4th Exception. Witneſs *ſworn de veritate præmiſſorum* not ſufficient in Convictions; becauſe it does not appear what his Evidence was. (But *Oath made de veritate præmiſſorum* ſufficient. *Salk.* 369.)

Eyre. There may be another Exception taken to the Conviction; for I am very doubtful, whether a Juſtice of Peace could, by this Statute, upon Default proceed to Judgment.

Conviction quaſh'd *niſi.*

Salk. 428. *Regina* ver. *Barrett*, *Salk.* 383.

That Appearance ſupplies Want of Summons, theſe Caſes quoted. *Mich.* 8 *Gulielmi*, Mayor and Burgeſſes of *Wilton*. *Queen* and *King*, *Mich.* 10 *Annæ.*

Jones and *Gwynn.* B. R.

Vide Ante. 148.

Action upon the *Caſe*, for a malicious Indictment.

THIS was an Action upon the Caſe; wherein the Plaintiff declares, That he had always maintained a good and honeſt Character, among his Neighbours; and that he got his Livelihood by exerciſing *legitimo modo*, the Faculty of a Badger of Corn or Grain. That the Defendant *præmiſſorum non ignarus, ſed malitioſe intendens &c.* cauſed him to be indicted for exerciſing the Trade of a Badger, without a Licence, *contra formam Statuti.*

Upon this Declaration there is a Joinder in Demurrer.

And *Parker* Chief Juſtice, deliver'd the Reſolution of the Court, That Judgment ſhould be given for the Plaintiff.

1ſt Exception to the Declaration.

Exceptions taken to the Declaration, were four; and the firſt and moſt material one was, That the Indictment was declared only to be brought *falſo & malitioſe*, but not *abſque rationabili & probabili cauſa.*

Anſwer. Tho' an Action upon the Caſe for a malicious Indictment, cannot be ſupported, unleſs the Indictment was groundleſs and without a probable Cauſe; yet theſe very Words *abſque rationabili & probabili cauſa*, not always neceſſary to be us'd.

To this I ſay, This Action cannot indeed be ſupported, unleſs the Indictment was groundleſs and without a probable Cauſe; yet no one Authority cited to prove theſe very Words neceſſary to be uſed. Many Authorities wherein they are wanting. *Cro. Jac.* 193. 1 *Rolle's Abr.* 113, *&c.*

If Averment of the Plaintiff's Honeſty *&c.* and that the Defendant *præmiſſorum non ignarus*, will import theſe Words, then here they are.

But the true Anſwer to this Objection is, that the Word *malitioſe*, implies it to be *abſque rationabili & probabili cauſa*, and a great deal more. Import of the Word *Malice.*

Malitia is an Abſtract of *Malus*, which imports what is wicked, and can admit of no Poſſibility of Excuſe. Among the *Romans* it ſignified a Mixture of Hatred and Fraud, and what was utterly repugnant to Simplicity and Honeſty. Thus it is defined by *Cicero* in his 3d Book *de Natura Deorum*; and in his 3d Book of *Offices*.

Thus it is uſed in the Civil Law, and thus in our's. What we call *Malice implied*, is Murder attended with ſuch Circumſtances, as can admit of no Excuſe.

My Lord *Coke* in his Expoſition of Stat. *Weſt.* 2. *cap.* 12. ſays, That an Appeal brought *per malitiam*, is an Appeal that wants a Foundation, and is groundleſs. Stat. *Weſtm.* 2. *c.* 12.

In Conſpiracy, theſe Words are uſed, *Stamford Pl. Coron.* 172. *B.*

Indictment of a Man, for what a civil Action might have been brought, imports Malice, 2 *Mod.* 306.

2*d* Exception to the Declaration was, That the Plaintiff had not averred, that he was licenſed to exerciſe the Trade. 2*d* Exception.

Anſwer. This had been neither neceſſary nor proper. But he has ſaid enough, *viz.* That *legitimo modo* he exerciſed the Trade of a Badger. *Anſwer.*

3*d* Exception to the Declaration was, That it was not ſaid, that he was acquitted by Verdict. 3*d* Exception.

The *Anſwer* is, That the Word *acquietatus*, imports Acquittal by Verdict. *Anſwer.*

4*th* Exception to the Declaration was, That the Proſecution of this Indictment, could not be a malicious one, becauſe the Plaintiff, in his very Replication, has confeſs'd *that* which was a probable Cauſe for it, *viz.* the uſing the Trade of a Badger. 4*th* Exception.

To

Anſwer. To this it may be anſwered, That this is no probable Cauſe; for it is not the Exerciſe of the Trade, but doing it without a Licenſe, that conſtitutes the Crime.

Point in Law. And now I come to the Matter in Law, *viz.* That the exerciſing the Trade of a Badger, not being *&c.* is not an Offence indictable; and if ſo, it is ſaid, The Action is not maintainable.

The Force and Strength of this Objection, may be reſolved into the ſix following Points.

1*ſt*, Acquittal upon an inſufficient Indictment, will not intitle a Man to the Plea of *autrefois* acquitted, to another Indictment for the ſame Offence.

2*dly*, That Conſpiracy lies not where the Indictment was inſufficient.

3*dly*, That Conſpiracy lies not but for ſuch an Indictment, upon which, the Defendant was ſo acquitted, as that he may plead his Acquittal in bar of another Indictment.

4*thly*, By a Parity of Reaſon, it may be inferred, That an Action upon the Caſe will not lie likewiſe, upon an Indictment for a Matter not indictable; and upon which conſequently, there could not be ſuch an Acquittal, as could be pleaded in Bar of another Indictment.

5*thly*, Where the Matter of the Indictment, tho' it be not indictable, is infamous and ſcandalous; an Action upon the Caſe will lie. *Contra* where the Indictment contains Matter neither indictable, nor ſcandalous.

6*thly*, This Action lies not, becauſe upon this Indictment, the Party was never in Danger; for Judgment could not poſſibly be given againſt him.

I ſhall meet with all theſe Points, in ſpeaking to the four following Propoſitions.

1*ſt*, That to the ſupporting of this Action, it is not at all material, whether the Indictment were ſufficient, or inſufficient.

2*dly*, That there can be no Argument drawn from a Parity of Reaſon, between Actions of Conſpiracy, and Actions upon the Caſe.

3*dly*, That there is no Foundation for ſuch a Diſtinction, as where the Matter of the Indictment is ſcandalous, and where it is not.

4*thly*, That the Party's being in Danger, or not in Danger upon the Indictment, is not at all material.

As to the 1*ſt* Point, *viz.* That the Sufficiency or Inſufficiency of the Indictment, is not at all material to the ſupporting this Action.

Action upon the Caſe lies for a malicious Indictment, tho' an inſufficient one.

It is to be conſidered what the Grounds of this Action are; and theſe are two.

Upon the Plaintiff's Side, *Innocence.*

Upon the Defendant's, *Malice.*

The Damage a Perſon may ſuſtain, by an Indictment, may relate either to his Perſon, his Reputation, or his Property. And each of theſe reſolved to be a juſt Ground of this Action, in the Caſe of *Savil* and *Roberts*; and Damage in the laſt Reſpect, *viz.* Property, *there* look'd upon as ſtrong as any. *Salk.* 13.

It is true, That in *Raymond* 135, in the Caſe of *Chamberlain* and *Preſcot*, there is a Reſolution not ſo agreeable with *that* of *Savil* and *Roberts*, which yet the late Chief Juſtice *Holt*, in his excellent Argument, upon the Caſe of *Savil* and *Roberts*, where he gives the Reſolution of the Court, ſeems unwilling to deny to be Law, tho' he might.

Caſe of *Chamberlayne* and *Preſcot* denied to be Law.

I own my Opinion to have been, at firſt, That where the Indictment was neither ſcandalous, nor ſufficient, this Action would not lie, but upon further Conſideration have changed my Mind. See *p.* 149.

For Impriſonment, Vexation, Expence, the ſame upon

upon a groundleſs and inſufficient Indictment, as a good one.

For quaſhing an Indictment, is not always in a Man's Power; demurring is hazardous, and what a Man in Prudence would not do, when he is ſure of being clear'd by a Verdict. And if upon a Demurrer, there be any Difficulty, it is equally expenſive with an Acquittal upon Verdict.

But it is the Expence, not the *Quantum* of the Expence, which is material. 1 *Cro.* 291. 3 *Edw.* 3. *fo.* 19.

And as the Plaintiff is equally damnified by an inſufficient, as ſufficient Indictment; ſo the Malice of the Defendant, is not at all leſs, becauſe the Matter was not indictable, nay it is rather an Aggravation. 1 *Rolle's Abr.* 112.

The fear of diſcouraging juſt Proſecutions no good Objection.

The only *remora* to thoſe Actions, is the Fear of diſcouraging juſt Proſecutions; but to this, Malice is a full and ſufficient Anſwer. 3 *Cro.* 563. *Raym.* 135.

Certainly not reaſonable, that more Favour ſhould be ſhew'd to a bad Indictment, than a good one.

It ought to be conſidered, that a ſmall Slip vitiates an Indictment; and if that ſhall protect a Man from an Action, a Way is open'd for the Malicious to ruin the Innocent; for how eaſily may a Slip be made on Purpoſe?

To the Caſes cited, in Maintenance of the Objection, I anſwer, That one is 9 *Edw.* 4. 12. an Action of Conſpiracy; and there I allow the Law to be ſo. The other is 1 *Rolle's Abr.* 110. which is indeed a Caſe to the Purpoſe; but then I obſerve, that the Foundation of the Reſolution is built upon the Parity of Reaſon, that was ſuppoſed to be between Conſpiracy and this Action now before us.

Caſe and Conſpiracy ſo different, that there is no arguing from one Sort of Actions to the other.

And therefore I come now to my 2*d* Point, *viz.* to ſhew, That there is no arguing from one Sort of Actions to the other.

Actions of Conſpiracy, the worſt Sort of Actions in the World to be argued from; for more Contrariety and Repugnancy of Opinions in them, than in any other Species of Actions whatever.

Greater Difference of Opinions, about Actions of Conſpiracy, than any other.

I readily admit, That unleſs the Indictment be either determined, or deſerted, this Action is not maintainable. *Yelverton* 116.

Caſe for malicious Indictment, not maintainable, unleſs the Indictment be determined or deſerted.

Conſpiracy lies not without Acquittal; and the Reaſon of this, and the only one is, becauſe this is a formed Action, and the Form of the Writ in the Regiſter is ſo. 17 *Edw.* 2. 509. *Regiſter* 134. *b.* 9 *Rep.* 56. *b.* 2 *Cro.* 130. 1 *Rolle's Abr.* 114. A notable Caſe reported *W. Jones* 94. and 1 *Cro.* 15. and likewiſe 1 *Rolle's Abr.* 112. where ſeveral good Diſtinctions taken between Caſe and Conſpiracy.

Conſpiracy lies not without Acquittal; becauſe a form'd Action; and the Form of the Writ in the Regiſter is ſo.

Certainly no arguing from an Action, which is a form'd one, for which there is a formal Writ in the *Regiſter*, to an Action upon the Caſe, that is tied down to no Form at all.

Action upon the Caſe, not tied to any Form.

If an Action upon the Caſe, be brought upon an Indictment, where the Jury find *ignoramus*, there is no Poſſibility that there can be an Acquittal. 2 *Cro.* 190. 1 *Rolle's Abr.* 114. 3. 2 *Cro.* 490. *Palmer* 44, 45. *Styles* 10. *Raym.* 180. *Similiter* where Indictment *coram non Judice*, *Styles* 372, 378. *Similiter* where an Indictment is inſufficient, and goes off on that Account. 2 *Cro.* 32. *Yelverton* 45. *Styles* 372, 157. 3 *Keble* 141.

Will lie upon an Indictment, where there can be no Acquittal. *W. Jones* 94.

3*d* Propoſition was, That there was no Reaſon for making a Difference, when the Matter of the Indictment is ſcandalous, and when not.

No Difference whether the Matter of the Indictment be ſcandalous or not.

The Caſes before mentioned, ſpeak not a Word of this Difference; and if Scandal is mentioned, it is only mentioned in the Nature of Damage. *W. Jones* 93. *Styles* 378.

4*th*

4*th* Propoſition was, That the Danger of the Party was not material.

Not the Danger but the Expence of the Party indicted, Ground of Damage. *Pag.* 218.

1. Not Danger, but Expence, ground of Damage.

2. All the Danger in this Caſe, if the Indictment had been good, would only have been incurring a Fine; *& antea oſtenſum*, the *Quantum* of the Damage not material.

3. When upon an Indictment *ignoramus* is returned, or when the Indictment is *coram non Judice*, the Party is in no Danger at all, yet this Action lies.

Judgment *pro quer.*

Queen and *Inhabitants of* Mancheſter. B. R.

Order of *Juſtices* for Relief of *H.* and four poor Children, quaſh'd, becauſe not expreſs'd, that *H.* was indigent.

MOVED to quaſh an Order of Juſtices, for the Payment of two Shillings *per Week*, until further Order, to *H.* for the Relief of herſelf and four poor Children.

The 1*ſt* Exception was, That the Order did not ſet forth that *H.* was indigent, which is the very Foundation of the Juſtices Juriſdiction; and for this Reaſon quaſh'd.

Order to pay Money for the Relief of a poor Perſon until further Order, ill. *Sed vide contra Salk.* 534.

There was another Fault in the Order, *viz.* That the Money was made payable until further Order; whereas it ſhould have been during her Poverty.

Order for *Settlement* of *H.* and Children, too general. *Salk.* 488.

Judge *Eyre.* Had this been an Order for Settlement, the not naming the Children had been a Fault.

1 *Mod. Caſes in Law and Equity* 337.

Queen and *Dunn. Or Pariſhes of* Halifax *and* Overton, *in the Weſt Riding of* Yorkſhire. B. R.

AN Order made upon the Father-in-Law, for maintaining the Widow of the Son, quaſh'd; becauſe not ſet forth in the Order, that the Father was of ſufficient Ability, in which Caſe only the Act enables the Juſtices *&c.*

Order of *Juſtices* upon *H.* to maintain his Son's Widow, quaſh'd; becauſe not expreſs'd, that he was of ſufficient Ability.

DE
Term. Paſchæ,
13 *Annæ*,
In BANCO REGIS.

Turner and *Goodwin.*

Vide Ante. 153, 189.

MR. *Salkeld pro Def.* Mr. *Reeves pro Quer.*

It was agreed on both Hands, That the Queſtion was no more than this, who was obliged to do the firſt Act. For if the Judgment was to be aſſigned, before Payment of the Money, then Judgment muſt be for the Defendant; but if *&c.*

Argument for the Defendant.

For the Defendant it was ſaid, That theſe Acts of paying the Money, and aſſigning the Judgment, were alternate Acts, which cannot go on *æquis paſſibus*, but there muſt be a Priority in Law.

That in Law, proper and formal Words of Condition, are not required either in Wills, Grants, or Contracts.

Not in Wills; *Cro. Eliz.* 46, 454. 2 *Rolle's Rep.* 68.

Not in Grants; 1 *Inſt.* 204, Grant of an Annuity *pro conſilio impendendo.* The Reaſon aſſigned by *Coke*, not a good one; but the true Reaſon is, that the Law

 implies

implies a Condition, becauſe elſe there would be no Remedy. 5 *Rep.* 78, *Gray's* Caſe.

The Caſe chiefly relied upon for the Defendant, was 14 *H.* 4. *pla.* 19. which was Debt upon Bond, conditioned, that if the Defendant reſigned his Living by ſuch a Time, for a certain Penſion to be convey'd to the Parſon, then *&c.*

For the Plaintiff it was urged, That the Words *aſſigning the Judgment*, did not make a Condition precedent, from the neceſſary Import of the Words; and to ſhew this, ſeveral Authorities were quoted, where this Way of Expreſſion was uſed, and yet not held a Condition precedent. 3 *Cro.* 204, 454, 146. 2 *Rol.* 68. *T. Jones* 205, 206. Argument for the Plaintiff.

Object. 1. Condition of a Bond always to be taken in that Senſe, that is moſt favourable to the Obligor, which is that this ſhould be a precedent Condition. *Object.* 1.

Anſwer. This Rule generally true, but not always. 5 *Rep.* 23. *b.* 1 *Vent.* 255. 2 *H.* 7, 8, 9. *Anſwer.*

Object. 2. If the Money muſt be firſt paid, the Defendant is without Remedy for the Judgment. *Object.* 2.

Anſwer. No, for the Plaintiff in that Caſe, becomes a Truſtee to the Defendant, for the Judgment; the aſſigning of the Judgment, being only a Deed to manifeſt that Truſt. (But to this it was replied, That this was not a Remedy in Law, but Equity.) *Anſwer.*

1 *Mod.* 113. Aſſigning over a Choſe in Action, interpreted as a Covenant againſt the Aſſignor; and therefore if the Money be paid, and no Judgment aſſigned, it is a Breach of Covenant.

In Caſe of a Mortgage, Money is always paid firſt.

This Aſſignment muſt make Mention of the Money as paid firſt; ſince otherwiſe it will want a good Conſideration, and be void, for it will be Maintenance. 3 *Leon.* 234. *Noy* 52. 3 *Cro.* 552, 170. 34 *H.* 6. 30. *Bro. Main.* 8.

1 *Bulſt.*

1 *Bulſt.* 187. (To this it was anſwered, That the Aſſignment need not recite the Money as paid; but only the Bond and the ſpecial Agreement.)

Laſtly, This Diſtinction was offer'd by the Counſel for the Plaintiff, in anſwer to ſeveral Caſes, That if by the Agreement of Parties, two Acts are to be done, and Time is limited for the doing of one, and no Time for the other; *there* if the Nature of the Thing will bear it, that Thing is to be done firſt, for which the Time was limited. 1 *Ventris* 147. 1 *Saunders* 319. 1 *Lutwyche* 251. 1 *Cro.* 384, 5. 2 *Saunders* 350, 352. 1 *Lutwyche* 490, 565.

Afterwards, in next Term, Judgment was given for the Plaintiff.

Timber and *Gardiner.* B. R.

Action upon the *Caſe.*

ACTION upon the Caſe for ſeveral Promiſes; Defendant pleads, That he gave the Plaintiff ſuch a Quantity of *&c.* and the Plaintiff accepted it in full Satisfaction of the ſaid Promiſes. Plaintiff demurs, and Defendant joins in Demurrer.

It was inſiſted for the Plaintiff, That the Defendant's Plea was naught; becauſe not ſaid that the Defendant gave it in Satisfaction. 5 *Co. Rep.* 117.

Court. If the Defendant gave it with one Intention, and the Plaintiff accepted it with another, the Intention of the Donor muſt prevail; but the Queſtion here is, whether the Words *full Satisfaction,* ſhall not as well relate to the Verb *give,* as the Verb *accept*; eſpecially becauſe of the Conjunction *et,* which ſeems to difference it from the Caſe mentioned. *Adjournatur.*

Shiply and *Shiply.* B. R.

A WRIT of *Dower* is brought in the Court of Common Pleas. The Defendant pleads, *quoad* all the Lands lying in the Vill of *B.* a Bar by Reaſon of a Fine levied; as to all the Lands lying in the Vill of *C.* beſides 24 Acres, a Bar by Releaſe; and as to thoſe 24 Acres in *C.* the Defendant pleads non Tenure. Writ of *Dower.*

The Demandant in her Replication, admits, That as to all the Acres, beſides the 24, the Fine and the Releaſe are ſufficient Bars, and joins Iſſue upon the non Tenure. A Verdict is found for the Demandant, and Judgment given for the Demandant, as to the 24 Acres; and as to the reſt, the Judgment was, That the Demandant *pro falſo clamore ſuo ſit inde in Miſericordia, &c.* and that the Defendant *eat inde ſine die &c.*

Upon Error brought, of this Judgment, in *B. R.* it was inſiſted upon, That the Judgment itſelf was erroneous for Want of a *nil capiat per breve*; and for this was cited, 8 *Co. Rep.* 62. *Co. Entries* 320, 323, 326. 2 *Cro.* 284.

In anſwer to this, it was urged by Counſel for Defendant in Error, That if this were a good Cauſe to reverſe the Judgment, it would ſhake the Authority of a thouſand Judgments; Caſes being endleſs, where the Words *nil capiat per breve* are omitted, *Townſhend* 1*ſt* Book of *Judgments* 53, 54. *Co. Ent.* 657. *Raſtall's Entries* 654, 677. And then it was inſiſted upon, That if this were a Fault, it would be aided by 16 & 17 *Car.* 2. *cap.* 8. where are theſe Words, *and all other Matters of like Nature.*

Court. The utmoſt Conſequence of this Objection is, That we muſt give the ſame Judgment, that the Court of Common Pleas ought to have done. *Salk.* 262, 401.

It was objected by the Counſel for the Defendant in Error, That the Writ of Error was ſo general and uncertain, that the Court could not ſay the Record was before them; for there being ſeveral Sorts of Dower, and this Writ of Error being only *Dotis* generally, it was uncertain what Record the Writ of Error was to remove.

It was objected likewiſe, That the Writ of Error ſhould have ſet forth the Vill. *Co. En.* 248.

But theſe Objections were over-ruled, as being of that Nature, as if it was neceſſary for the whole Declaration to be ſet forth in the Writ of Error.

In Debt, tho' there are ſeveral Sorts of Debt, the Writ of Error is *de placito debiti*, without ſaying more, whether Bond *&c.* 2 *Saunders* 43. 328. So in Treſpaſs, the Writ of Error is *de placito tranſgreſs*; and yet ſeveral Treſpaſſes.

The principal Point inſiſted upon for the Plaintiff in Error was, The Want of Abridgment. It was ſaid, That if the Lands out of which Dower was demanded, had been all in one Vill, and it had appear'd by the Demandant's own Confeſſion, that the Demandant had made too large a Demand, in that Caſe the Demandant ought to abridge her own Demand: But if the Land lies in two Vills, then this Abridgment is not permitted; but the Writ muſt abate for making too large a Demand. But granting that an Abridgment of the Demand may be permitted, where Land lies in two Vills, (as *Fitzherbert Plaint, pl.* 17. ſeems to allow) yet the Judgment was erroneous, becauſe here is no Abridgment. 14 *H.* 6. *fol.* 3, 4. 9 *H.* 6. 43. *a.* 19 *H.* 6. 13. 7 *Ed.* 3. *fo.* 10. *Raſtall* 232. *a. b.* 234. *b.* *Robinſon's Entries* 281.

Judgment given in Court of Common Pleas, was affirmed *niſi*; and the Earl of *Clanrickard's* Caſe relied upon, as a Caſe in Point.

Hob. 273.

African

African Company verſus *Maſon.* B. R.

DEBT upon Bond: Upon Oyer of the Bond, the Condition of the Bond appear'd to be, That *Maſon* ſhould be Factor for the Company at *Briſtol*, and ſhould behave himſelf faithfully in that and all Affairs he ſhould be employ'd in by the Company; and ſhould, when required, pay to the Uſe of the Company, all the Sums of Money in his Hands and in his Poſſeſſion, received by him for the Company. The Defendant pleads Performance of the Condition generally. *Debt* upon Bond. *Pleading.*

The Plaintiff in his Replication, aſſigns for Breach, That the Defendant, after the making of the ſaid Bond, and before the bringing of the Action, did at *London* receive of *Jacob Reynolds* and divers others, for the Uſe of the Company, ſeveral Sums of Money, to the Value of 376 *l.* and that he was requeſted to pay this Money, and had not paid it. The Defendant demurs. Breach aſſign'd.

It was objected to the Replication;

1*ſt*, That to ſay the Defendant received ſeveral Sums of *Jacob Reynolds* and others, to the Value of 376 *l.* was uncertain and double. Indeed in Covenant, becauſe the Party is to recover Damages, in Proportion to the Damages aſſign'd by the Breach, and to prevent Prolixity, ſuch a Way of Pleading is permitted; *contra* in a Bond, becauſe, if the Plaintiff had aſſigned but one particular Sum, how ſmall ſoever, the whole Penalty of the Bond is forfeited. *Brigſtock* and *Stannian*, 8 King *William* in *C. B.* 1*ſt* Objection. In Debt on Bond to perform Covenants, the Breach aſſign'd in the Replication, muſt be certain and ſingle; but *contra* in Action of Covenant. *Salk.* 140.

2*d* Objection was, That the Replication was not within the Condition of the Bond; for the Receipt was by the Condition to be at *Briſtol*, and the receiving was, in the Replication, ſet forth to be at *London*, and not ſaid to be received upon Account of the Affair of *Briſtol*. 2*d* Objection.

3d Objection. 3*dly*, Not ſet forth in the Breach, That the Money, when demanded, was in his Hands and Poſſeſſion.

4th Objection. 4*thly*, Not ſaid, That he was employed to receive the Money.

For the Plaintiff. For the Plaintiff it was inſiſted, that the Breach was well aſſigned; for in Breaches of a complicated Nature, ſuch a general Kind of Aſſignment allowed. 1 *Levinz* 94. *Lutwyche Entries* 580. *Mich.* 4 *Annæ*, *Chambers* and *Prieſtland.*

Anciently no Allowance made to avoid Prolixity in Pleading, and therefore Performance generally was not allowed; but this was alter'd in Queen *Elizabeth*'s Time, where pleading as general as this allowed. *Cro. Eliz.* 253, 749, 916.

The Breach aſſigned is ſingle; for the not paying when required is the Breach, the receiving *&c.* but Matter of Inducement.

Plaintiff obtain'd Leave to diſcontinue, upon Payment of Coſts. The Plaintiff perceiving the Opinion of the Court to be ſtrongly againſt him, eſpecially upon the 1*ſt* and 3*d* Objections, obtained Leave to diſcontinue, upon the Payment of Coſts.

Muſton and *Tateman.* B. R.

Vide poſt. Paſch. 1 Geo. 1.

Treſpaſs. THIS was an Action of Treſpaſs: The Defendant pleads, That Sir *Thomas Freke* was ſeiſed of a Place call'd *Ten Acres*, and demiſed the ſame to the De-

Juſtification. fendant for 99 Years; and that Sir *Thomas Freke*, and all thoſe whoſe Eſtate he had, did Time out of Mind, uſe ſuch a Way *&c.* Plaintiff replies *de injuria ſua propropria Abſque hoc quod prædictus Thomas Freke*, and all thoſe whoſe Eſtate he had, did Time out of Mind *&c.* Upon this Iſſue joined, and Jury find that Sir *Thomas*

Freke, and all thoſe whoſe Eſtate he had, did Time out of Mind *&c.*

It was moved in Arreſt of Judgment, That the Juſtification was naught, becauſe it was *ſeiſitus* generally, and the Eſtate not ſet forth of which he was ſeiſed, whether Life, Tail, or Fee; and that therefore, ſince every Man's Plea is to be taken in that Senſe, that is moſt prejudicial to the Pleader, (becauſe in Law a Man is always preſum'd to make the beſt of his own Caſe) by *ſeiſitus* here muſt be intended a Seiſin for Life, which will not ſupport Preſcription. Motion in Arreſt of Judgment. Every Man's Plea ſhall be taken ſtrongeſt againſt himſelf. *Hob.* 234, 242.

This Objection was alſo turned another Way, *viz.* That this Plea was naught for the Uncertainty; it might be a Seiſin for Life, Tail, or in Fee.

It was urged in Support of the Plea, That the Jury could not poſſibly have found the Verdict they gave, unleſs it had been a Seiſin in Fee; and ſeveral Caſes were quoted to ſhew, That a Verdict cures all Defects, where it was impoſſible for the Verdict to have been given, unleſs *that* had appear'd which was wanting in the Pleading. *Hutton* 54. Sir *Tho. Jones*'s *Rep.* 132. *Raym.* 487. 1 *Levinz* 308. *Econtra.*

Parker Chief Juſtice. It muſt have been given in Evidence, that he was ſeiſed in Fee; for he that has an Eſtate only for Life, has no Body's Eſtate but his own; and then impoſſible for the Jury to find, as they have done, *viz.* That Sir *Thomas Freke*, and all thoſe whoſe Eſtate he had, did *&c.* Court.

Eyre Judge. Seis'd *de feodo*, always the Form of Pleading; and therefore neceſſary. Whether the Verdict has cured it, I cannot ſay.

Powys junior. Preſcription for the Way, the only Matter in Iſſue; the Seiſin only Inducement, and paſs'd over at *Niſi prius.*

Where Defects in Pleading are cur'd by the Verdict.

Chief Juſtice *Parker.* The only Queſtion is, Whether the Iſſue be a material Iſſue; for if it be, then by expreſs Words of the Act, all Defects in Pleading, cured by the Verdict.

Adjournatur. Vide poſt. Paſch. 1 Geo. 1.

See this Caſe 2 *Mod. Caſes in Law and Equity* 167, 181.

Roper verſus *Radcliffe,* in the *Houſe of Lords.*

Vide Ante. 89.

Deed of Truſt.

JOHN ROPER being ſeiſed in Fee of Lands in *Cornwall, Glouceſter,* and *Monmouth,* did by Leaſe and Releaſe, convey the Premiſſes to *William Conſtable, Richard Snow,* and *Daniel Hickman,* and their Heirs, in Truſt to ſell the ſame, and out of the Purchaſe Money, and Rents until Sale, to pay a Debt of 4000 *l.* due to *Elizabeth* and *Heſther Walden,* by Mortgage of the Premiſſes, with Intereſt; then, in Truſt for the Payment of Debts, mentioned in a Schedule, to the Deed annexed; and the Overplus of the Money ſo to be raiſed, to be paid as the ſaid *John Roper,* by any Writing atteſted, or by his Will, ſhould appoint; and for Want of ſuch Appointment, in Truſt for the Benefit of the ſaid *John Roper* and his Heirs. This Deed bore Date the 18th of *Jan.* 1708.

The Will.

On the 5th of *March* 1708, the ſaid *John Roper* made his Will, reciting the ſaid Leaſe and Releaſe, and the Power reſerved to him, in the Surplus of the ſaid real Eſtate, and bequeathed ſeveral pecuniary Legacies in the Will mentioned, to his Relations, and the Reſidue of

all his *Real* and Perſonal Eſtate he gave to the Reſpondents *William Conſtable* and *Thomas Radcliffe*, to *Robert Hewit* and *Daniel Hickman*, and to their Heirs and Aſſigns for ever.

1 *April*, 1709, the ſaid *Roper* added a Codicil to his Will, and thereby gave the ſeveral further Legacies therein mentioned, and all the Remainder, whether in *Lands* or Perſonal Eſtate, he gave to his Executors, the Reſpondents *Radcliffe* and *Conſtable*, and ſoon after died. Codicil.

The Reſpondents *Thomas Radcliffe* and *William Conſtable* brought their Bill in Chancery againſt the Appellant, and alſo againſt the ſaid *Hickman*, *Hewit*, *Snow* and others, to have the Truſt-Eſtate ſold, and for an Account of Profits, and after the Debts and Legacies paid, to have the Surplus Money ariſing by Sale, equally divided between the Reſpondents, according to the Codicil. The Reſpondents their Bill in Chancery.

To which Bill the Appellant put in his Anſwer, inſiſting he was Heir at Law to the Teſtator, and entitled to all ſuch *Real* Eſtate as was undiſpoſed of by him; and that the Reſpondents *Radcliffe* and *Conſtable* are, and at the Time of the Teſtator's Deceaſe were Papiſts, and as ſuch, the Appellant was adviſed, That by Virtue of an Act in 11 and 12 *Will.* 3. made for the preventing the Growth of Popery, the Reſpondents were rendered *incapable of purchaſing in their own Names, or the Names of any other Perſons, to their Uſe, or in Truſt for them, any Manors, Lands, Profits out of Lands, Tenements, Rents, Terms or Hereditaments, and that all and ſingular Eſtates, Terms, and any other Intereſts or Profits whatſoever out of Lands, to be made, ſuffer'd, or done, to or for the Uſe or Behoof of any ſuch Perſon or Perſons, or upon any Truſt or Confidence, mediately, or immediately, to or for the Benefit or Relief of any ſuch Perſon or Perſons, ſhall be utterly void, &c.* And that all Intereſts or Profits made out of Lands, to the Uſe of the Reſpondents were void. The Appellant's Anſwer. Stat. 11 & 12 *W.* 3. for the preventing the Growth of Popery.

And

And the Appellant being Heir at Law, and a Proteſtant, claimed the Benefit of the ſaid Eſtate, and inſiſted he was entitled to the ſaid *John Roper*'s *Real* Eſtate not ſufficiently deviſed or convey'd by him, ſubject to ſuch Incumbrances, as he *bona fide* had charged thereon, and by Law was capable of doing, and demanded the Judgment of the Court, Whether he ſhould be decreed to join in the Sale?

The Anſwer of the Proteſtant Executors and Deviſees.

Robert Hewit and *Daniel Hickman*, inſiſted by their Anſwer, That the Real Eſtate deviſed by the ſaid Will, ought to be conſidered, as to the remaining Part of the Teſtator's Lands, after a ſufficient Part ſold for the Payment of Debts and Legacies, as *Land*, and not as Perſonal Eſtate; and that ſo much only ought to be ſold, as would be ſufficient to pay the Debts; and in Caſe the Reſpondents were incapable of taking, then the ſaid *Hewit* and *Hickman*, the Proteſtant Executors, claim'd the Eſtate, as being the only Deviſees capable to take the ſame; and inſiſted, That the Codicil, with Reference to the Deviſe of the Remainder of the Teſtator's Lands, did not controul the Deviſe thereof, mentioned in the Will; for that, if the Reſpondents were incapable to take the Lands, as Purchaſers, by the Deviſe, they were to be eſteem'd as Perſons not *in eſſe*; and that the Codicil, in ſuch Caſe, as to the Deviſe of the ſaid Lands, was void in Law.

Judges call'd to the Aſſiſtance of the Lord Chancellor.

Lord Chancellor *Harcourt*, at the preſſing Inſtance of the Appellant's Counſel, call'd in to his Aſſiſtance Chief Juſtice *Parker* of *B. R.* Chief Juſtice *Trevor* of *C. B. Powell* Judge of *B. R.* and Sir *John Trevor* Maſter of the Rolls.

Caſe made before the Lord Chancellor.

And a Caſe was made by Conſent, conſiſting of three Queries.

1*ſt*, Whether a Papiſt can convey his Land by Deed to Truſtees, to be ſold for the Payment of Debts and Legacies, the Surplus of the Money to go to Papiſts?

2*dly*, Whether he may do this by Will?

3*dly*, Whether a Papiſt be diſabled, by this Act of Parliament, from taking Land by Deviſe?

Upon Argument before Lord Chancellor and theſe Judges, it was reſolved by the Conſent of all, but *Parker* Chief Juſtice, That the Deviſe of the Surplus-Money (after Debts and Legacies paid) to the Reſpondents *Conſtable* and *Radcliffe*, was a good Deviſe, notwithſtanding the ſaid Statute for diſabling Papiſts from purchaſing Lands; the Surplus-Money being a Perſonal Intereſt in them, and therefore not made void, either by the Words, or Intention of that Act. Lord Chancellor's Decree.

As to *Hewit* and *Hickman* (who had brought their Croſs-Bill) they were diſmiſs'd without Coſts; the Court being of Opinion, That the Codicil, whereby the Teſtator gives his Remainder, whether in Lands or Perſonal Eſtate, to the Reſpondents *Radcliffe* and *Conſtable*, was a Revocation of the Deviſe in his Will, of the Reſidue of his Perſonal and Real Eſtate, to *Conſtable*, *Radcliffe*, *Hewit* and *Hickman*; even ſuppoſing, the Perſons nam'd in the Codicil were diſabled by the Act. A ſubſequent Deviſe to *J. S.* tho' *J. S.* be incapable of taking, is a Revocation of a precedent Deviſe to *A.*

From this Decree an Appeal was brought, into the Houſe of Lords; and it was argued for the Appellant by Sir *Joſeph Jekyll* and Mr. *Lechmere*, and for the Reſpondents by Sir *Robert Raymond*, Solicitor General, and Serjeant *Pratt*.

N. B. The latter Part of the Decree, as to the Revocation, was not controverted in the Houſe of Lords, but approved of by the Counſel of both Sides, as good Law.

The 3*d* Queſtion was ſpoken to firſt, *viz.* Whether by this Act of Parliament, a Papiſt was not excluded from taking Land by Deviſe? Argument for the Appellant.

And it was inſiſted, for the Appellant, That he was; for otherwiſe the Intent of the Act would be quite overthrown, which was moſt certainly, to prevent Papiſts from making new Acquiſitions. A Papiſt incapable of taking Land by Deviſe.

And abſurd to imagine, that the Law-makers, ſhould reſtrain Papiſts from purchaſing Eſtates, when they are to pay a valuable Conſideration; and leave it free for them to take Land by Deviſe, where they are to pay nothing for it.

Purchaſe, what.

No one Word in the Law, of a more determin'd and fix'd Signification than Purchaſe; for it will not be controverted, but that the Word Purchaſe, ſtands by Law oppoſed to Deſcent; and whoever does not come to Land by Deſcent, is in the Language of the Law, ſaid to take by Purchaſe.

Legiſlators are preſumed to ſpeak the Language of the Law. They certainly who make Laws, muſt know what the legal Import of Words is; and therefore Acts of Parliament are to be underſtood in a legal Senſe, unleſs the Subject-Matter of the Act does apparently hinder it.

2 *Mod. Caſes in Law and Equity* 177, 201, 202.

So in the Statute of Mortmain, it has been held, That the Clauſe, whereby a Licence is given to purchaſe Lands, did include taking by Deviſe.

Lands devis'd to be ſold for Payment of Debts and Legacies, Surplus to a Papiſt, This Surplus is in Nature of a Real Intereſt, and as ſuch void by Stat. 11 & 12 *W.* 3.

The other two Queſtions were reſolved into one, *viz.* Whether the Intereſt, that was given by the Will and Codicil, was ſuch an Intereſt, as a Papiſt was reſtrained by the Act from taking?

For to ſtate the Caſe, Whether a Papiſt be incapacitated by the Act, to take the Overplus, is to narrow it too much.

The Diſability is to be conſidered, as it ſtands at the Time of the Death of the Teſtator, and not at a future Time, *viz.* the Sale of the Land.

That the Act of Parliament deſigned to prevent Papiſts from taking equitable Intereſts, as well as legal ones, is ſo very plain from the Words of the Act, that it can admit of no Diſpute.

And, indeed, unleſs the Act of Parliament had done this, it had done nothing at all; ſince the Uſe of Truſts is become ſo general and univerſal; and there is as ſure

a Remedy for a Breach of Truſt in Chancery, as for any legal Right in a Court of Law.

Objection. The End of the Act of Parliament is plainly to oblige Papiſts, to turn their Real Eſtate into Perſonal; and therefore here being a Proviſion for the Sale of the Land, by poſitive Words in the Deed of Truſt, the End of the Law is ſatisfied.

Anſwer. If the Meaning of the Act be to be diſcover'd from the Words of it, it meant this and more, *viz.* That Roman Catholicks ſhould have no Handle, no Influence over, or Intereſt in the Eſtate, ſo much as for an Hour.

For all this Decree, the Eſtate may be continued on, and the Land never ſold; and until the Land is ſold, the Profits of the Land belong to *Radcliffe.*

If any Advances, have in Fact been made towards a Sale, this may be wholly owing to the Diſturbance, this Suit has given them.

Who is there that will diſturb them in the Enjoyment of the Land; and inforce this Part of the Decree, that relates to the Sale? ſince nothing can be got by it, but only obliging a Papiſt to turn a Real Eſtate into a Perſonal one.

There is a Caſe now depending in the Court of Chancery, wherein the Conveyance is ſettled according to this Precedent, with this Variation only, that the Truſtees are there impower'd to ſell, whenever they think convenient. *Vane* ver. *Fletcher.*

Poſitive Directions to Truſtees to ſell, do not oblige them to ſell; and they are never blamed by a Court of Equity for not ſelling, as long as *ceſtuy que truſt* enjoys the Profits, and as long as his Intereſt does not require a Sale.

Radcliffe according to the Decree, is in Effect to have the Profits even before Sale; for ſince they are to be applied to the Payment of Debts, the *Reſiduum* will conſequently be the larger.

Here-

Hereditament, what.

Hereditament one of the Words of the Act; and this imports any Thing, that is deſcendable from Anceſtor to Heir.

2 *Mod. Caſes in Law and Equity* 189.

In the Earl of *Meath*'s Caſe, 1692, that went up to the Houſe of Lords, a Daughter being to have ſuch an Intereſt as Money ariſing from the Sale of Land, it was eſteem'd ſuch an Heirſhip, as would give her the ſame Privilege, that an Heir had.

If ſuch an Interpretation be offer'd to be put upon an Act of Parliament, made *pro bono publico*, as will make the Act void, *that* is Reaſon enough to reject it.

If it be objected, That the Church was by the Statute *de Religioſis*, diſabled from taking Lands by any Manner of Conveyance, and thereupon this Evaſion was found out, and ſuffer'd to take place, *viz.* the Church brought their Action for ſuch Land, as they had a Mind to purchaſe, and Judgment was ſuffer'd to go by Default, and this was held unanimouſly to be out of the Statute; and yet this an Act made *pro bono publico*, and the Intent of it as plainly eluded, as here it can poſſibly be.

2 *Inſt.* 459.

Maxim of Law.

The Anſwer is, That this Reſolution ſtood upon a particular Maxim of Law, *viz. Judicium redditur in invitum*, and therefore the Law will never preſume a Fraud; but no Judgment in the preſent Caſe.

Objection. By this Means a Papiſt will be incapacitated to pay his Debts.

Reſp. We are not bound to account for all Accidents, that may poſſibly happen.

Suppoſe the Will out of the Caſe, and that it had ſtood intirely upon the Deed of Truſt; muſt not the Truſt have attended the Inheritance? Would not Mr. *Roper*'s Widow have had a Claim to Dower out of it? Or would not there, *mutatis mutandis*, have been a Tenant by Courteſy out of ſuch an Eſtate? If this be ſo, then undoubtedly it is a Real Eſtate; for it is the Courſe of Succeſſion, and the Law of Deſcent, that is

the true Characteriſtick of, and which conſtitutes the proper Difference between Real and Perſonal Eſtates.

This ſo true, that an Annuity is the only Perſonal Intereſt, that can be thought of, which is deſcendable to the Heir.

Nor is there any Thing in the Will, to turn this into a Perſonal Intereſt. On the contrary, we find the Teſtator himſelf in his Will (which ſhews what he thought of it) calling it *Real* Eſtate. Nor was this an Expreſſion, that fell from him by Chance; for tho' it is indeed true, that in the Codicil he varies his Expreſſion; yet he makes Uſe of one, that does more emphatically import the ſame Thing, *viz. Land*; his Words are, *And all the Remainder, whether in Lands or in Perſonal Eſtate.*

That the Death of the Teſtator, is the only proper Time to conſider, whether this Intereſt was a Real or Perſonal one, appears plainly from hence, That this Will would not be a Diſpoſition of it, unleſs atteſted with three Witneſſes, and duly executed, according to the Statute of *Frauds and Perjuries.*

A Deviſee ſtands in the Place of the Teſtator, and cannot take any other Eſtate, than what it was, at the Time the Will took Place, *viz.* the Death of the Teſtator.

Upon the Death of the Reſpondents, ſuppoſing them capable, the *Reſiduum* would go to their Heirs.

If Land be conveyed to Truſtees, to be ſold for the Payment of Debts, Remainder to their Heirs, is not this Remainder the very Reverſion and Eſtate? the Addition of the Power to ſell makes no Alteration in the Intereſt: It does not imply a Neceſſity to ſell; but only a Power to do it upon Occaſion.

The ſelling, or not ſelling, remains intirely in the Power of the Truſtees, and the *Ceſtuy que Truſt.*

The Heir can compel a Conveyance in Chancery, upon Payment of the Debts; nay, he may determine what Part of the Land, the Truſtees ſhall ſell.

Upon the whole, this plainly appears to be ſuch an Intereſt, as carries along with it, all the Authority, Power and Influence of the Land, which the Act moſt certainly deſigned to prevent.

If Land be appointed to be ſold for the Payment of Debts, the Heir is intitled to the Surplus-Money, tho' no Directions about it.

If a Mortgagee ſells, the Surplus-Money is to be anſwered to the Heir at Law, and not to the Executor.

This is an Eſtate deviſed for the Behoof and Benefit of a Roman Catholick; becauſe he is to have the Surplus, the *Quantum* not material. Land in its own Nature, Land between Proteſtants; but it muſt be Perſonal Eſtate only to elude the Act.

At the Inſtant the Teſtator died, the Right accrued, and therefore the Incapacity muſt then attach, and likewiſe the Intereſt then veſted in Mr. *Roper*; and the turning it afterwards into Money, will not diveſt an Intereſt, already veſted in the Heir at Law.

To interpret a Law ſo that the Letter ſhall remain, but the End be defeated, is in Effect to aſſume a Legiſlative Power.

Every Roman Catholick, will be inſtructed in an eaſy Way, how to elude and fruſtrate this Act of Parliament.

It is but contracting a Debt, or giving a Legacy: It may be done by Deed as well as Will; for if this Surplus be to be conſidered as Perſonal Intereſt, they are not diſabled from conveying a Perſonal Intereſt.

They may convey without Conſideration, if they conceal it: Nay it cannot be diſcovered; for a Bill would not lie in Equity for this Purpoſe; becauſe the Diſcovery would induce a Forfeiture.

Argument *pro Reſpond.*

For the Reſpondents.

N° 12.

The Word Purchaſe, in the vulgar and common Acceptation of it, does not import Deviſe. The Word Purchaſe, is in *Littleton's Tenures*, defined to be the Poſ-

ſeſſion

ſeſſion of Land, that a Man comes to by his own Act; a Definition not applicable to deviſe.

Perſons may come to Land by Deſcent, notwithſtanding this Act; and therefore why not by Deviſe? unleſs the Legiſlators thought fit to prevent it.

Two Rules to be obſerved in the Interpretation of Statutes, 1*ſt*, ſuch an Interpretation muſt be made, as will ſupport the Intention of the Act. 2*dly*, Such an Interpretation muſt be made, as will make the whole conſiſtent with itſelf.

The general Intention of this Act was 1*ſt*, by gentle and eaſy Methods to bring Papiſts to Conformity.

2*dly*, To prevent the Increaſe of their landed Intereſt.

And therefore the firſt Clauſe expreſly provides, That the Incapacity of the Anceſtor ſhall not deſcend upon his Poſterity.

And whenſoever the Perſon diſabled conforms, the Diſability is gone.

If an Heir be under the Age of eighteen at the Time of the Deſcent, he is diſabled by the Act from taking the Eſtate, unleſs within ſuch a Time he conform *&c.*

Whereas a Perſon over that Age may take by Deſcent, or Deviſe, without any Reſtriction at all. The Reaſon of which Difference was poſſibly this, The Legiſlators look'd upon Perſons under the Age of eighteen, to be ſo young, that they were capable of any Impreſſion, and might be eaſily made Proteſtants; whereas from that Age and onwards they would be ſo riveted and confirm'd in their Prejudices, that their Converſion muſt be eſteem'd as next to an Impoſſibility.

Now, if the Word *Purchaſe* in the latter Clauſe be extended to take in Deviſe, the latter Clauſe will in many Reſpects be repugnant and contradictory to the former.

For whereas by the former Clauſe, a Perſon under the Age of eighteen, on the 29*th* of *September* 1700, may take by Deviſe, if within ſix Months after he attains that Age, he takes the Oaths *&c.* The latter Clauſe thus

thus interpreted, makes ſuch a Perſon abſolutely incapable.

By the former Clauſe, tho' ſuch Perſon ſhould not within ſix Months *&c.* yet whenever he does conform, the Incapacity is removed, and the Deviſe ſhall take Place; whereas by the latter thus expounded, he ſhall not.

The Word *Purchaſe* therefore, cannot be interpreted to include Deviſe, without making the Act contradict itſelf.

The Word *ſuch*, is tied down to *Purchaſe*, and penal Laws never extended,

A Thing that is to be done, muſt be look'd upon as done. It is in the Power of the Truſtees, immediately upon the Death of the Deviſor, to ſell the Land.

As to the Objection, That it appear'd from the Decree, that the Profits of the Land until Sale, did in Effect go to *Radcliffe*; ſince the Application of them to the Diſcharge of the Debts, muſt increaſe the Surplus: It may be anſwered, That the Surplus would be more increas'd, by having the Land ſold immediately; the Intereſt of the Money ariſing from the Sale, much exceeding the Profits of the Land.

Tho' a Court of Equity will at the *Deſire* of the Heir, or Reſiduary Legatee, decree them the Land; yet it will not do this in ſpight of their Teeth.

Such a Surplus, is liable to pay Debts upon ſimple Contract; which Land is not.

If this Surplus be Perſonal Eſtate in itſelf, the Word *Real* in the Will, cannot alter or change the Nature of the Eſtate.

No Difference, whether the Money ariſes from the Sale of Land, or any other Way, as long as it is Money.

The Surplus of the Money ariſing from the Sale of the Land, is what is deviſed; and what the Reſpondents have by their Bill demanded, as ſoon as they could.

The Election, that a Court of Equity gives the Heir, or Reſiduary Legatee, to have either the Money or Land, is a Conſequence of his being intitled to the Surplus-Money. And therefore, to what Purpoſe can it ſerve for the Land to be ſold, if he will take upon him the Diſcharge of Debts and Legacies, and deſire to have the Land?

Where an Eſtate is devis'd to be ſold, for the Payment of Debts and Legacies, Chancery will give the Heir or Reſiduary Legatee their Election to pay the Money and take the Eſtate.

Now therefore, ſince a Court of Equity gives this Election in Favour of the Heir, or Reſiduary Legatee, ſtrange to ſuppoſe, That in the preſent Caſe, a Court of Equity ſhould take this Election away, and refuſe to decree him the Money, when by his Bill he deſires it; only becauſe, by Act of Parliament, he is incapacitated to take the Land.

As to the Objection, That at the Time of the Conveyance it is real Eſtate.

It may be anſwered, That the Reaſon why the Land, if not ſold before the Death of the Anceſtor, ſhall deſcend to the Heir at Law, or paſs to the Reſiduary Legatee, is, becauſe it is at his Election to chooſe either Land or Money; but here the Heir, or Reſiduary Legatee had no ſuch Election, which alters the Caſe.

The Chancery could not have decreed a Papiſt the Land, tho' he had deſired it; ſhould it have done ſo, the Decree would have been void.

As to the Objection, That the Land may not be ſold: The Anſwer is, That the Truſtees by not ſelling, will be guilty of a Breach of Truſt; and as a Breach of Truſt, is never to be preſumed, that cannot authorize a different Interpretation.

By *Profits out of Lands*, muſt be underſtood continuing Profits, and not Money ariſing from Sale.

It was replied for the Appellant.

The Reply.

That the Reſpondents preferring their Bill in Equity very ſpeedily, and claiming this as Perſonal Eſtate, not

at all to the Purpoſe; for not obliged to have done it at all.

As to the Definition of the Word *Purchaſe*; it will extend to Deviſe, for to *that* the Agreement of the Deviſee is neceſſary, which is an Act. *Co. Lit.* 10. *a.* ſpeaking of the ſeveral Conveyances of Purchaſe, uſes the Word in our Senſe.

As to what was ſaid, That to include Deviſe under the Word *Purchaſe* in the latter Clauſe, would make one Part of the Act of Parliament contradict the other: It may be anſwered no; for a general ſubſequent Clauſe, may be reſtrained by a precedent one.

The Rule that penal Laws are not to be interpreted by Equity, holds in Caſes of Laws, that are penal upon particular Perſons; but not where Laws are made for the publick Good, and the Peace and Safety of the Realm; which is the Caſe here.

Ant. 117.

As for the Objection fram'd from the Stat. *de Religioſis*; the true Anſwer is, That the Power of the Church was ſo very great in thoſe Days, as might probably have an Influence upon the Proceedings of *Weſtminſter-Hall*; but it is to be hoped now, that there will be no Partiality in Favour of Papiſts, and in Prejudice of a Proteſtant Heir.

Property will be very precarious, if a Court of Chancery can at Pleaſure, call a Real Eſtate a Perſonal one, or a Perſonal a Real one.

The Judges being ſummon'd to attend and give their Opinions, were divided, ſix againſt five; ſix for reverſing, and five for affirming the Decree. Had Lord *Trevor* been there, and ſtuck to his former Opinion, there had been ſix againſt ſix.

The Decree was reverſed by a great Majority of Peers.

DE

Term. S. Trin.

13 *Ann.*

In Banco Regis.

Miles and *Williams.*

Vide Ante. 160.

Bankrupcy. Debt upon Bond, brought againſt Husband and Wife: They plead a Diſcharge by the Bankrupcy of the Husband, and conclude *Et hoc parati ſunt verificare.* Special Demurrer. Court of Opinion, That the Bond was diſcharged by Bankrupcy of the Husband; but being alſo of Opinion, That they ought to have concluded their Plea to the Country; and this being one of the Cauſes aſſign'd for Demurrer, Plaintiff had his Judgment.

DEBT upon Bond, brought againſt Defendant and his Wife: They plead in Bar, That the Bond was enter'd into by the Wife, *dum ſola*; that a Commiſſion of Bankrupcy iſſued out againſt the Husband, who in all Points conformed himſelf to the Statute about Bankrupcy in the 4th Year of the Queen; and ſo both Defendants ſay, *quod vigore* of the Statute of the 4th of the Queen, and other Statutes, he became a Bankrupt, *per quod* the Debt was diſcharged. *Et hoc parati ſunt verificare.* To this Plea Plaintiff demurs ſpecially.

1*ſt*, Becauſe a Bond enter'd into by the Wife, *dum ſola fuit*, is not diſcharged by the Bankrupcy of the Husband.

2*dly*, Becauſe they ought to have concluded their Plea to the Country.

Chief

1ſt Point.

Chief Juſtice *Parker* deliver'd the Reſolution of the Court, as to the 1ſt Point to be, That ſuch a Debt, was a Debt within the Statute of the 4th of the Queen; and conſequently that it was diſcharged by the Bankrupcy of the Huſband.

Stat. 4 *Ann. cap.* 17. *ſect.* 7.

The Words of the Statute are, *Shall be diſcharged from all Debts by him, her, or them, due and owing at the Time that he, ſhe, or they did become Bankrupt.*

The Queſtion therefore will be, whether this be a Debt due and owing at the Time of the Bankrupcy?

It has been argued by the Bar, and very reaſonably, That if Debts due *to* the Bankrupt his Wife, are aſſignable by the Commiſſioners, then it is reaſonable, That Debts owing *by* the Bankrupt's Wife, ſhould be diſcharged by the Bankrupcy.

Debts due to a Bankrupt's Wife, aſſignable by the Commiſſioners.

Now in Order to know, Whether a Debt due to the Wife of the Bankrupt be aſſignable, the Intention of the Stat. of 13 *Eliz. cap.* 7. and 1 *Jac. cap.* 15. muſt be conſidered.

Stat. 13 *Eliz. cap.* 7. 1 *Jac.* c. 15.

By the Stat. *primo Jacobi*, which is explanatory of that of *Eliz.* it is provided, That the Commiſſioners ſhall have Power to grant and aſſign, or otherwiſe to order or diſpoſe all Debts due or to be due, to and for the Benefit of the Bankrupt, by what Perſon or Perſons ſoever, or in what Manner and Form ſoever, to the Uſe of the Creditors *&c.* and that the ſaid Aſſignment or Diſpoſition *&c.* ſhall ſo veſt the Property *&c.* in the Aſſignees as fully *&c.* as if the ſaid Bill, Bond *&c.* whereupon the ſaid Debts ſhall ariſe and grow, had been made to or with, or for the Aſſignees.

Now the Intention of this Act of Parliament is plainly this, That the Bankrupt being not thought a proper Perſon, to be intruſted with the Management of his own Eſtate, for fear he ſhould defraud his Creditors, therefore the Act puts the Commiſſioners in the Place and Stead of the Bankrupt; and conſequently, whatever Eſtate the Huſband can turn into Money, in order to

pay his Debts, the ſame is aſſignable by the Commiſſioners.

The beſt Way of interpreting Statutes, is by the Rules of Common Law, in like Caſes. Statutes beſt interpreted by the Rules of Common Law in like Caſes.

Thus the Statute *de donis*, which ſays, That a Fine levied of entail'd Lands, ſhall be *ipſo jure nullus*, has been interpreted, not to make a Nullity, but a Diſcontinuance; becauſe at the Common Law, if a Biſhop ſeiſed in right of his Church, or a Huſband of his Wife, had aliened by Fine *&c.* it was but a Diſcontinuance, 3 *Co.* 85, *&c.*

21 *H.* 7. *fol.* 19. Bond enter'd in to *two*, *one* grants the Bond to the King, the King may ſue alone.

Conſtant Practice in Outlawry to ſeiſe all the Debts due to the Wife; and yet the Words of the Writ *bona & catalla*, *terras & tenementa* of the Perſon outlawed, are rather weaker then the Words of the Statute.

Hobart 253, *Breadman* and *Coales* a ſtrong Caſe; for it proves 1*ſt*, That the Huſband may aſſign a Debt due to his Wife, by the Common Law. And 2*dly*, That he was not reſtrained by Stat. 7 *Jac.* becauſe, ſays the Book, it was the Huſband's own Debt; which brings it within the very Words of the fourth of the Queen.

It is certainly a very equitable Interpretation, That whatever may be applied by the Bankrupt, to the Payment of Debts, may be aſſignable by the Commiſſioners.

The contrary Opinion, That it is not aſſignable, promotes no good End in the World.

To the Objection, That the Statute does not extend to Debts due to the Bankrupt, as Adminiſtrator or Executor: It may be anſwer'd, That it is nothing to the Purpoſe; for he has no Intereſt in thoſe Debts to his own Uſe, and when he recovers them they are Aſſets, *&c.* 1*ſt* Objection.

2*d* Objection. But it is objected, That this Statute extends not to Debts due to him and another; and for this Purpoſe 1 *Levinz* 17, is quoted.

To this I anſwer, 1*ſt*, That there is no Judgment in that Caſe. 2*dly*, That I doubt whether it be certain, that the whole Debt is not veſted in the Crown, upon the Outlawry of one, where there are two Obligees.

That a Debt due from the Bankrupt and another, is within the Act, appears from the Stat. 10 *Ann. cap.* 5. a declaratory Law: But this is his Debt as he is *one* with his Wife.

3*d* Objection. Another Objection has been taken, That this Debt ſhall ſurvive to the Wife, if the Huſband die before he recovers it; and this Conſtruction will deprive her of this Contingency.

The Anſwer is, that the Huſband might by his Releaſe have diſcharged this Debt: Now this is a Diſcharge of the Legiſlature, applied in Eaſe of his Debts.

The Aſſignee has the ſame Remedy to recover it, that the Bankrupt himſelf had.

If a Note be payable to a Feme-Sole, or Order, and ſhe afterwards marries, her Huſband is the proper Perſon to indorſe this Note.

Debts due from the Bankrupt's Wife, diſcharged by the Bankrupcy of the Huſband.

Now, That this Debt due from the Wife is diſcharged by the Bankrupcy, ſeems to me to be clearer, than that a Debt to the Wife ſhould be aſſignable *&c.*

For this Conſtruction makes for the Benefit and Intereſt of the Bankrupt, Creditors, and Wife. As to the Bankrupt nothing can be harder, than that he ſhould be ſtripped of every thing, forced upon Oath, and at the Peril of Felony, to make a full Diſcovery; and yet after all, not be diſcharged. Intention of the *Capias*, only, that the Love of Liberty ſhould oblige to a full Diſcovery.

The Diſcharge of the Bankrupt ſtands upon this Reaſon, That he is ſtripp'd of every Thing, that ſhould enable him to pay.

This Reaſon holds equally to all the Debts, for which he may be ſued.

This Expoſition better likewiſe for the Creditors; for if this Debt be diſcharged, then is a Creditor of the Wife, a Creditor within the Statute, and to come in for an equal Proportion; which is far more eligible than an Action, good for nothing unleſs the Wife ſurvive, and perhaps not then neither.

As to the Wife, that this Expoſition is beneficial to her, is ſo plain, that it has been urged as an Objection, that it will be too beneficial.

Whether this be a temporary Diſcharge during the Coverture, or a perpetual one, is not now a Queſtion; but I am inclined to think it a perpetual one: Nor is this unreaſonable; for the Law looks upon the Debt as paid, ſince the Creditor is let into the common Fund.

Whether Debts due from the Wife be diſcharged by the Bankrupcy of the Husband for ever, or only during Coverture?

As to the Objection, That this may be a Fortune to a Woman; *Reſp.* Very reaſonable, That ſhe ſhould ſhare in the Advantages, as well as Diſadvantages of the Bankrupcy.

If a Suppoſition be made, That a Woman may, precedent to her Marriage, put her Eſtate into the Hands of Truſtees, for her ſeparate Maintenance; and ſo her Debts will be diſcharg'd by the Bankrupcy, and her Eſtate out of the Reach of the Creditors: The Anſwer is, No; for I am of Opinion that ſuch a Settlement or Conveyance, *quoad* the Creditors, ſhall be deem'd void and fraudulent.

Where a Woman puts her Eſtate, precedent to her Marriage, into Truſtees Hands, for her ſeparate Maintenance; her Debts ſhall not be diſcharged by the Bankrupcy of her Huſband; but ſuch Settlement or Conveyance, *quoad* the Creditors, ſhall be deem'd void and fraudulent.

As to the Objection, that this Diſcharge is a perſonal Privilege, and therefore not communicable to the Wife; the Anſwer is, that her Diſcharge is neceſſarily conſequential upon his.

As to the 2*d* Point, the Court was unanimouſly of Opinion, That the Plea of the Defendants in Bar, was naught

2*d* Point.

naught for not concluding to the Country; and therefore upon this 2*d* Point, (being ſpecially aſſigned for Cauſe of Demurrer) Judgment was given *pro Quer.*

Caſe of *Perry* and *Carleton*, *Trin.* 1715.

Queen and *Simpſon.* B. R.

Vide poſt. Mich. and *Hill.* 3 Geo. 1.

Conviction of Deer-ſtealing, upon Stat. 3 & 4 *W. & M. cap.* 10.

THIS was a Conviction of Deer-ſtealing, before Juſtices of the Peace, upon the Statute of 3 & 4 *W. & M cap.* 10.

Exceptions taken, were,

1*ſt* Exception to the Conviction.

1*ſt*, That no certain Time was laid for the Commiſſion of the Offence; but only that between ſuch a Time, and ſuch a Time, the Defendant did ſteal *unum Cervum.*

2*d* Exception.

2*dly*, That the Conviction was behind his Back, and without hearing him. Indeed he was ſummon'd; but the Act gives no Manner of Authority to proceed by Way of Summons.

3*d* Exception.

3*dly*, The Summons is inſufficient, ſuppoſing the Juſtices could proceed in that Way; for he is ſummon'd to appear at *Bolton*, which muſt be underſtood to be a Vill; and then how ſhould the Defendant know the Houſe where the Juſtices will be?

Then it is to appear ſuch a Day, but not what Time of the Day. Perhaps the Juſtices came at five o'Clock in the Morning; and the Defendant, not being there then, was convicted, tho' he came afterwards.

4*th* Exception.

4*thly*, Tho' in the Information, the Offence may be ſaid to be committed, between ſuch a Time and ſuch a Time; yet the Proof ought to be certain. Now the Oath is no more, than that the Defendant did within ſuch a Time, and ſuch a Time, ſteal *unum Cervum*; ſo that the Time is left as uncertain in the Evidence, as in the Information. And then *non conſtat*, That the Evidence relates to the ſame Deer; it ſhould have been *Cervum in informatione prædict' mentionat.*

As to the 1*ſt* Exception; in Behalf of the Conviction it was ſaid, That it had been taken in the Caſe of *King* and *Chandler*, and there over-ruled; and that it was the conſtant Courſe of Informations, in the Court of Exchequer, to ſet forth the Time, in the Manner it is here done. Anſwer to the 1*ſt* Exception. *Salk.* 378.

As to the 2*d* Exception, That the Act gave no Authority to proceed by Summons: It was anſwered, That no Way of proceeding whatſoever was directed by the Act; That therefore the Act being ſilent, in this Point, it muſt be left to the Diſcretion of the Juſtices; and that the Way of proceeding by Summons, was a Way very conſonant to Reaſon and Juſtice, in as much as it gives the Defendant Time and Oportunity to make his Defence. That the Want of Summons has been objected even in Caſes upon Acts of Parliament, that did not direct the Proceedings to be by Way of Summons; as in the Caſe of the *Queen* and *Peach*. This was inforced by Precedents, where, upon this very Act of Parliament, the Proceedings had been by Summons. Anſwer to the 2*d* Exception. *Mich.* 3 *Ann.*

As to the 3*d* Objection, taken againſt the Summons itſelf, *viz.* the Uncertainty of the Time and Place, when and where the Defendant was ſummon'd to appear: Anſwer to the 3*d* Exception.

It was anſwered, 1*ſt*, That this Objection ſuppoſes very great Abſurdities; as firſt, that the Defendant cannot find the Juſtice out; ſecondly, that the Juſtice ſhould come at an unreaſonable Hour, *&c.*

2*dly*, That the Return, which muſt be taken for true, is an Anſwer to the Objection. For the Return is, that the Defendant *licet debite ſummonitus ad hoc tempus et hunc locum*, did not appear; ſo that at whatever Time or Place he was convicted, it muſt be now taken for true, That he was ſummon'd to appear at that Time and Place.

As to the 4*th* Objection, *viz.* Want of Certainty in the Proof; it was anſwered, That it was next to impoſſible for the Witneſs to be able to ſwear to the very Anſwer to the 4*th* Exception.

Day; and not to be intended, that there were more Deer ſtol'n than one.

Court. Agreeable to the Courſe of the Common Law, that the Party ſhould be ſummon'd.

Chief Juſtice *Parker.* More agreeable to the Courſe of the Common Law that he ſhould be ſummoned. Nothing in the Objection as to the Evidence. Time muſt be taken to look into the Precedents.

That *between ſuch a Time and ſuch a Time* he ſtole a Deer, is well. *Salk.* 378.

Judge *Eyre.* As to the Objection, That the Time ſhould have been ſet forth with more Certainty, than that *between ſuch a Time, and ſuch a Time &c. that* has been ſufficiently ſettled in *Chandler*'s Caſe to be well enough.

It is true, that the *ad hoc tempus & hunc locum,* cannot be confin'd to a particular Hour or Place; but then it is not to be ſuppos'd, but that a Magiſtrate will adminiſter Juſtice with Integrity; and it is the Duty of the Party ſummon'd, to attend his Time and Place.

In Informations and Indictments, no Judgment can be given, unleſs the Defendant appears. The Defendant may indeed have Judgment of Outlawry paſs'd againſt him; but that is for his Contempt in not appearing. And if the Judges of ſuperior Courts, cannot proceed to Judgment, unleſs the Defendant appears; *a fortiori* Juſtices of the Peace cannot.

Some Acts of Parliament indeed give Juſtices of the Peace a Power of proceeding upon Default: But *Exceptio probat regulam in rebus non exceptis*; it ſeems to me therefore, that he ſhould have been apprehended by Warrant.

Tho' the Party do not appear; yet if he has been ſummon'd, it is ſufficient.

Powys junior. The Deſign of the Act of Parliament is to give a ſummary Way of proceeding. The Defendant has been ſummon'd, which ſurely is ſufficient; for abſur'd, that he ſhould take Advantage of his own Contempt.

Vide poſt. Mich. and *Hill.* 3 Geo. 1.

Cole and *Hawkins.* B. R.

Vide poſt. Hill. 3 Geo. 1.

IN *Aſſumpſit*, Plaintiff declares upon a Promiſe the 16*th* of *Jan.* 1706. Defendant pleads in Bar the Statute of Limitations. *Aſſumpſit.* *Pleading.*

Plaintiff replies, That the Bill was exhibited the 23*d* of *Jan.* 1713, and that *Cauſa Actionis accrevit infra ſex annos.* To this the Defendant demurs.

It was inſiſted by Mr. *Branthwayt* for the Defendant, That this Replication was a Departure from his Declaration. For tho' in tranſitory Actions, Time and Place are not material; and the Jury may, notwithſtanding the Promiſe, was at a different Time or Place, find for the Plaintiff; yet the Plaintiff ſhall not be at Liberty himſelf to vary from, or falſify his own Record. 5 *H.* 7. 28. 3 *Lev.* 348. 2 *Cro.* 364. *Book of Aſſiſe* 22, *pl.* 86. *Cro. Car.* 228, *Tyler* and *Wall.* *Raym.* 86. For the Defendant.

It was argued by Mr. *Salkeld* for the Plaintiff, That a Departure was always a going off from ſomething material, that had been alledged before; and not from Things immaterial. For the Plaintiff. Varying from that which is not materially alledged, is no Departure, *Salk.* 222.

Now in tranſitory Actions, Time and Place not material; upon Iſſue they are certainly immaterial. In tranſitory Actions Time and Place not material.

By the Common Law, Time was ſo far material, that the Time in the Declaration, muſt not be ſubſequent to the bringing of the Action.

In *Plowd. Com.* 90, *Pollard*'s Caſe, agreed, That if Treſpaſs be brought againſt two Defendants, and one of them dies *ante impetrationem Brevis*, the Action abates; otherwiſe, if pleaded that one of them died afterwards.

Raymond 86, *Lee* and *Raynes:* But the Caſe he ſaid was miſreported; for he had in his Hand a Manuſcript 1 *Lev.* 111.

ſcript Report of that Caſe, of Lord Chief Juſtice *Keyling*, wherein it appear'd, that the Opinion of the Court in that Caſe, was, That the Statute of Limitations, does not take away the Liberty of laying the Action at any Time; and therefore, if the Defendant make the Time material by pleading the Statute, the Plaintiff may follow him by varying from the Time ſet forth in the Declaration; provided it be not a Time ſubſequent to the Declaration. And this Caſe is cited to this very Purpoſe in 1 *Keble* 799.

Salk. 222. In Debt upon Bond, Plaintiff ſhall not vary the Day in his Repl. from that alledged in Narr. but otherwiſe in Treſpaſs.

Mich. 7 *Gulielmi B. R. Webley* and *Palmer*, Difference taken between Bond and Treſpaſs. In Action of Debt upon Bond, the Plaintiff ſhall not in his Replication, vary from the Date of his Bond in his Declaration; but in Treſpaſs, the Plaintiff may vary from the Day, if the Defendant neceſſitates him.

Court. Where Time material in Pleading.

Chief Juſtice *Parker*. Time material, if ſubſequent to the Declaration; Time material, if the Defendant anſwers to the Time; Time material upon the Statute of Limitations.

As the Matter ſtands upon the Pleading, the Plaintiff in his Replication ſhews, That his Bill was exhibited ſeven Years after the Cauſe of Action.

By Statute for Amendment of the Law, no Advantage can be taken upon a general Demurrer, of ſuch Faults in Form, as would be cur'd by Verdict.

Now this being a general Demurrer, it ſtands by Vertue of the Statute for the Amendment of the Law, as if there had been a Verdict; ſo that it muſt be conſidered, Whether this be a Matter of Form or Subſtance.

Powys ſenior. Time here material upon the Statute of Limitations: Not probable to lay it in the Declaration ſo many Years ago, unleſs the Fact was ſo; moſt commonly, People lay their Cauſe of Action, at a later Time than it really was.

In tranſitory Actions Time and Place laid only for Form's Sake.

Powys junior. In tranſitory Actions Time and Place muſt be laid for *Form's* Sake, as to the Defendant and

Jury ; for the Jury not bound by it, and the Defendant cannot traverſe it without a ſpecial Juſtification. Plaintiff indeed in his Replication has verified the Plea of the Defendant. He has now fix'd both the Boundaries ; in his Declaration he has ſhewn the Time of the Cauſe of his Action, in his Replication the Time when his Bill was exhibited. And yet if inſtead of a Demurrer, Iſſue had been joined, the Jury might have found for the Plaintiff, if in Fact his Cauſe of Action was within ſix Years. To be conſidered therefore, upon the Statute for the Amendment of the Law, whether this not being a ſpecial Demurrer, the Fault in the Pleading is not now cured.

Chief Juſtice *Parker*. This may be conſidered likewiſe, That notwithſtanding that Statute, it does not follow, that Judgment muſt upon this general Demurrer be given for the Plaintiff, becauſe upon a Verdict for the Plaintiff, it would have been ſo ; and that for this Reaſon, Becauſe upon a Verdict for the Plaintiff, a new Fact is laid before the Court, *viz.* That the Cauſe of Action did ariſe within ſix Years.

Adjournatur. Vide poſt. Hill. 3 Geo. 1.

Walter and *Laughton*. B. R.

THIS was an Action *qui tam* ; and the Objection was, That the Concluſion was *Et inde producit ſectam* generally ; and not *tam pro Domina Regina, quam pro ſeipſo.* Action *Qui tam.*

But reſolved that this muſt be ſo underſtood ; and Precedents being both Ways,

Judgment *Reſpondeas Ouſter.*

Anciently *Inde producit ſectam*, was producing Witneſſes. 17 *Ed.* 3. 48. *Fleta lib.* 2. *cap.* 62. *ſect.* 2. *cap.* 63. *ſect.* 9, 10, 11. 5 *Ed.* 3. 171. 10 *Ed.* 2. 291. *Inde producit ſectam*, anciently what it ſignified.

Johnſon and *Gardiner.* B R.

Queſtion, Whether an Executor, upon a Promiſe to pay a Debt of the Teſtator's at a future Time, ought to be ſued by that Name, or his own?

THIS was a Writ of Error out of the Court of *C. B.* and for Plaintiff in Error, it was inſiſted upon, That the Declaration was naught; becauſe Action brought againſt the Defendant, as Executor, upon a Promiſe made by the Executor *poſt mortem Teſtatoris*, That whereas the Teſtator was indebted to the Plaintiff in *March* for Goods ſold and delivered, he promiſed to pay upon the 23*d* of *November*.

For the Plaintiff in Error.

Now it was ſaid, That this Promiſe of the Executor, founded plainly upon the Conſideration of Forbearance, made it the Contract of the Executor; and therefore the Action ſhould have been brought againſt him in his own Name.

But ſuppoſing the Action well brought againſt him as Executor, then the Judgment was wrong, being *de bonis propriis*, inſtead of *de bonis Teſtatoris*.

For the Defendant in Error.

To this it was anſwered, That tho' the Defendant is named Executor, yet it appears by the Declaration, That the Executor is chargeable upon his own Contract, and the bare naming him Executor *non nocet*.

Always ſuppoſed, where there are Promiſes of Payment upon ſuch Conſiderations, That the Executor has Aſſets, and therefore not neceſſary to aver his having Aſſets; for unleſs he had, there was no Occaſion for ſuch a Promiſe. *Cro. Jac.* 602, 613.

Upon an *Aſſumpſit* by Executor, Judgment is always *de bonis propriis*; for all one as if the Executor had given a Bond for the Money. 9 *Co.* 93. *Cro. Eliz.* 91. 406.

Reply.

It was replied for the Plaintiff in Error, That the Conſideration was not the Forbearance, but the old Debt, the Debt of the Teſtator's; and that the promiſing to pay it barely, upon a future Day, will not make a new Conſideration.

Hob. 188. Judgment *de bonis Teſtatoris*, tho' non Repair, was in Time of the Executor.

Parker Chief Juſtice. The naming him Executor Surpluſage; becauſe it appears upon the Face of the Record, that the Demand was a Demand againſt him upon his own Contract. *Court.* *Hob.* 18.

In Effect the Forbearance is the Conſideration of this Promiſe; becauſe without Forbearance no Advantage can be taken of this Promiſe. *Yard* and *Ellard*, 10 *Will.* 3. *Salk.* 117.

And to this Opinion the reſt of the Court inclined.

Sed adjournatur.

Parker and *Crook.* B. R.

THIS was an Action of Covenant, upon a Deed indented. It was objected to the Declaration, That the Defendant is ſaid in the Declaration, to continue at *Fort St. George in Indibus Orientalibus.* And upon Oyer of the Deed, it bears Date at *Fort St. George*; and therefore the Court, as was pretended, had no Juriſdiction. *Latch* 4. *Lutwyche* 950. *Covenant* upon a Deed dated at *Fort St. George, in Indibus Orientalibus.*

Parker Chief Juſtice. An Action will lie in *England* upon a Deed dated in foreign Parts; or elſe the Party can have no Remedy; but then in the Declaration a Place in *England* muſt be alledged *pro forma.* Generally ſpeaking the Deed, upon the Oyer of it, muſt be conſiſtent with the Declaration; but in theſe Caſes, *propter neceſſitatem*, if the Inconſiſtency be as little as poſſible, not to be regarded; as here the Contract being of a Voyage to be performed from *Fort St. George* to *Great Britain*, does import that *Fort St. George* is different from *Great Britain.* An Action will lie in *England* upon a Deed, dated in foreign Parts; but a Place in *England* muſt be alledged in the Declaration *pro forma.* *Salk.* 659, 660.

Afterwards in *Hillary* Term, Plaintiff had his Judgment, notwithſtanding this Objection.

The

The Words *in Indibus Orientalibus* do not neceſſarily import the Place to be out of *England*.

The Words *in Indibus Orientalibus* do not neceſſarily import the Place to be out of *England*; there is a Place call'd *Holland* in *Lincolnſhire*; and there may be a *Fort St. George* in the Pariſh of *St. Martin's*. In *W. Jones* 69, ſame Objection taken and over-ruled.

DE

Termino S. Mich.

1 *Geo.* 1.

In Banco Regis.

Vincent and *Atwood.*

Scire facias againſt Bail; Defendant pleads Death of Principal before the Return of the *Capias*; Replication, That he did not die before the Return of the *Capias*; Defendant demurs. Judgment *niſi, pro Quer.*

SCIRE Facias brought againſt Bail; Defendant pleads that the Principal died before the Return of the *Capias*; Plaintiff replies, That the Principal did not die before the Return of the *Capias*; the Defendant demurs.

Agar pro Def. The Replication naught.

For the Defendant.

1*ſt*, Becauſe the Plaintiff has not ſet forth, That there was any *Capias* at all ſued out; but only that the Principal did not die before the Return of the *Capias*.

2*dly*, Becauſe by this Replication, there is an Iſſue form'd, wherein the Jury muſt at once try Matter of Law, Matter of Record, and Matter of Fact.

Branthwayt pro Quer.

When the Defendant pleads, That the Principal died before the Return of the *Capias*, he certainly admits, That there was a *Capias* ſued out; and the only Thing doubted is the Death of the Principal *&c.* Neceſſary for the Plaintiff only to anſwer the Defendant's Plea, and not ſet forth that which is admitted by the Defendant. For the Plaintiff.

In a *Scire Facias* not neceſſary to ſet forth the awarding of a *Capias*. *Lutwyche* 1281. 2 *Cro.* 97.

Condition of a Bond that *H.* marry the Daughter of *D.* before *Eaſter*. Debt brought upon this Bond; held, That if the Defendant pleads that the Daughter died before *Eaſter*, it is enough for the Plaintiff to ſay in his Replication, that ſhe did not die before *Eaſter*, without ſetting forth that he did not marry her. The Reaſon is, becauſe the not marrying is a Fact admitted; and the other the only Point in Queſtion. *Yelverton* 24.

Had the Plaintiff replied, there was a *Capias* ſued out, and the Defendant rejoin'd *Nul tiel* Record, the Rejoinder would have been a Departure from his Bar. How then can it in Reaſon be neceſſary, for the Plaintiff in his Replication, to ſet forth that, which the Defendant cannot deny in his Rejoinder, without a Departure?

Perkins and *Woolaſton*, 3 *Annæ*, Action of Debt againſt Bail. Defendant pleads no *Capias*; Plaintiff replies, there was a *Capias*; Defendant rejoins, That the Force of the *Capias* was ſuſpended by a Writ of Error. Reſolved, That this Rejoinder was a Departure from the Bar. *Mod. Caſes* 139. *Salk.* 321, 322. *Salk.* 221, 222. 3 *Salk.* 123.

Judgment *niſi*, *pro Quer.*

Queen and *Aires.* B. R.

Vide poſt. Hill. 3 Geo. 1.

Scire Facias to repeal Letters Patents for the Grant of a Fair.

A *SCIRE Facias* was brought by the late Queen, to repeal her own Letters Patents, whereby ſhe had granted ſome Fairs to *Th. Aires*, in the Town of *Winſter* in the County of *Derby.*

The *Scire Facias* ſets forth, That precedent to the Grant of the Fairs, a Writ of *ad quod damnum* did iſſue out; but that it was clandeſtinely executed, and ſo that the Jury found that the Grant was not *ad damnum* of any Body; when it was *ad grave damnum* of the Earl of *Rutland*, who had Fairs in the Manor of *Bakewell*, four Miles diſtant.

The Defendant *proteſtando*, that it was not clandeſtinely and fraudulently executed, pleads, That the Grant of the Fairs to him was not *ad damnum* of the Earl of *Rutland*, or any Body whatſoever. Upon this Iſſue join'd in Chancery.

A *Venire* awarded out of that Court, returnable into *B. R.* the Court of *B. R.* awards a *Diſtringas*; upon which the Cauſe is tried, and the Jury find, That it was *ad grave damnum* of the Earl of *Rutland.*

Motion in Arreſt of Judgment. 1ſt Exception.

Mr. *Salkeld* moved in Arreſt of Judgment.

His firſt Exception was, That the *Scire Facias* was abated by the Death of the *Queen.*

By the Common Law, no Difference between the King and the Subject; but the Death of the Plaintiff had in both Caſes abated the Suit.

Whether *Scire facias* be not ſometimes an Original, and not always a Judicial Writ?

Indeed were this an Original Writ, it would be helped by the Stat. 1 *Annæ, cap.* 8. but being a Judicial Writ it is not. 3 *Lev.* 220, Sir *Oliver Butler*'s Caſe; held, That a *Scire Facias* is a judicial Writ.

To this Exception it was anſwered by the Attorney General, That this was not a Judicial, but an Original Writ. That Judicial Writs are thoſe only, that are founded upon Judgment, and Judicial Proceſs; but that this was no Conſequence of any Judicial Proceeding, or founded upon the former Letters Patents, but purely the Fraud; and that there are many *Scire Facias*'s in the *Regiſter*, among the Original Writs.

Anſwer. Sir *Edward Northey.*

Of Judicial Writs, what.

His 2*d* Exception was, That upon Iſſue join'd, the Court of Chancery, (not being a proper Court for Trial of a Matter of Fact) is at a full Stand, and the Court of *B. R.* ought to have awarded the *Venire*; whereas here the *Venire* is awarded by the Court of Chancery, retornable into *B. R. Palmer*'s *Rep.* 410.

2*d* Exception.

To this Exception it was anſwered, That the conſtant Practice is, for the Chancery to award the *Venire facias*, retornable into *B. R.* So is the Caſe of *Jeffreſon* verſus *Morton* and *Dawſon*, 2 *Saunders* 6, 23. and Sir *George Reynel*'s Caſe. And the Caſe in *Palmer*, as reported in *W. Jones* 82, does not make againſt it.

Anſwer.

9 *Co.* 99. *a.*

Court. No other Way to give Day in this Court, but by awarding a *Venire* out of Chancery retornable here; and always done ſo.

When Iſſue is joined in Chancery, that Court awards the *Venire.*

His 3*d* Exception was, That the Fairs granted to Mr. *Aires* were four, one upon *June* 23, another *October* 17, a third *November* 28, another *April* 12; thoſe granted to the Earl of *Rutland* were upon *March* 29, *May* 17, *Auguſt* 25.

3*d* Exception.

It appears plainly that the Days are very different; and for ought appears upon the Record, the Places, where theſe Fairs are to be held, may be 40 Miles diſtant; for the Record ſays only, that they are four Miles diſtant, but does not add, and no more.

Now

Now it was ſaid, That it was not to be preſumed, that where Time and Place are ſo different, the one Sett of Fairs could be prejudicial to the other.

Anſwer. To this Exception it was replied by the Attorney General, That Time and Place were Matters of Evidence for the Jury, not the Court to conſider of: That Damage or no Damage very often depended upon different Circumſtances, and that it was poſſible for a Market to be held on the ſame Day, and cloſe by another without Prejudice, as in *London*.

Dyer 276. Sir *Oliver Butler*'s Caſe, 3 *Lev.* 220.

4*th* Exception. 4*th* Exception was, That a *Scire Facias* was not the proper Remedy; but that it ſhould have been by Action of Caſe, to have recover'd in Damages.

Anſwer. In Anſwer to this Exception, theſe Caſes were cited by the Attorney General. *Dyer* 197, 198. 11 *Co. Rep.* 74. 8 *Rep. Prince*'s Caſe. *Fitzherbert Tit. Brief* 651. 2 *Vent.* 344. Sir *Oliver Butler*'s Caſe, 3 *Lev.* 220. where held, That the Crown *de Jure*, ought to ſuffer the Subject to uſe their Name.

A *Scire Facias* held to be a Writ of Right, where the Patent is prejudicial to the Subject.

5*th* Exception. 5*th* Exception was, That the Earl of *Rutland* had not ſet forth a ſufficient Title to the Fair, by alledging it to be appendant to a Manor.

6*th* Exception. 6*th* Exception was, That being an Iſſue out of Chancery, and ſent to the Common Law only for Trial, the Record ought to be remitted into Chancery, and Judgment given there, and not here. *Raym.* 178.

Court. But this Point, the Court ſaid, had been ſo firmly ſettled, that they would not ſuffer it to be debated. Caſe *Jeffreſon &c.* 2 *Saunders* 26, 27.

Adjournatur. To be ſet down in the Paper.
Vide poſt. Hill. 3 *Geo.* 1.

Pariſhes of Pawlet and *Burnham.* B. R.

Poor.

Actual Service, as well as hiring for a Year, neceſſary to make a Settlement.

A COVENANT Servant for a Year, at the Rate of 3 *l. per Ann.* Wages, leaves his Maſter by Conſent, three Weeks ſhort of a Year; his Maſter deducting ſix Shillings for the three Weeks out of his Wages.

By Order of two Juſtices, it was adjudged a good Settlement.

Upon an Appeal to the Seſſions, the Court being divided, the Order of the Juſtices was confirmed. Stated ſpecially; and being removed by *Certiorari*, it was urged in Support of the Order,

1*ſt*, That it being ſet forth in the Order, That he was a Covenant Servant, it muſt be intended a Covenant in Writing; for the Law knows nothing of a Parol Covenant; if ſo, the Covenant could not be diſcharged by Parol; and conſequently in Point of Law, he continued a Servant to the End of the Year.

2*dly*, It was ſaid, that his Departure but three Weeks before the End of the Year, ſhews it to have been a Fraud, contrived to prevent a Settlement.

Court quaſh'd the Order; and held actual Service for a Year neceſſary.

Clerk and *Lee.* B. R.

Motion for *Prohibition.*

MARY CLERK being proſecuted in the Spiritual Court, by a Proctor, for his Fees, in a Suit brought by this *Clerk*, againſt her then Huſband *Young*, to be divorced, prays a Prohibition; ſuggeſting, 1*ſt*, That ſhe was a Feme-Covert; and as ſuch not liable to be ſued ſingly to pay the Fees. And 2*dly*, That all Actions upon the Caſe are ſuable at Common Law, *& non alibi.*

Now Mr. *Salkeld* came to ſhew Cauſe why a Prohibition ſhould not go.

Againſt the Prohibition. 1*ſt* Point.

As to the Suggeſtion of her being a Feme-Covert; he inſiſted, 1*ſt*, That it was now too late for her to take Advantage of it, becauſe it had not been pleaded in the Spiritual Court.

2*dly*, That after a Sentence of Divorce, the Wife ſtands in the Capacity of a ſingle Woman, and has a Property diſtinct from her Huſband.

Anſwer.

To this Point it was anſwered by Mr. *Darnell*, That it was very true, that after a Sentence of Divorce, Huſband and Wife are to be conſidered as ſingle Perſons; but that here there was no Sentence of Divorce, but the Marriage declared to be null and void.

2*dly*, That her Marriage to *Clerk*, was precedent to the Proctor's Suit for his Fees, in that Suit, where the Marriage between her and *Young* was declared null.

But this Point was thrown out of the Caſe; it appearing, that the Libel was brought againſt her not as a Feme-Sole, but againſt her and her Huſband *Clerk*.

2*d* Point. Whether a Proctor may ſue in the Spiritual Court for his Fees?

And then the ſingle Queſtion was, Whether a Proctor may not ſue in the Spiritual Court for his Fees.

Mr. *Salkeld* argued, That he might, 1*ſt*, from Authorities; 2*dly*, from the Reaſon of the Thing.

1*ſt*, From Authorities. 1 *Mod.* 167. 3 *Keble* 203, and this Reaſon given, That Fees are due by Provincial Conſtitutions. 1 *Ventris* 160, 165, If the Cuſtom be denied, then a Prohibition muſt go; not otherwiſe. 2 *Keble* 810, 845, Cuſtom denied, Prohibition muſt go; *non aliter*. And ſaid, That the Juriſdiction extended as much to Fees, as Coſts, 3 *Keble* 516.

2*dly*, Reaſon of the Thing.

Fees nothing but Wages, for Work done in a Spiritual Court, by a Spiritual Officer, in a Suit of Spiritual Conuſance.

A Proc-

A Proctor as much an Officer of the Spiritual Court, as an Attorney of a Court at Common Law.

The Spiritual Court an ancient Court, and has ancient Officers belonging to it, for theſe Ends; 1*ſt*, to carry on the Buſineſs; and 2*dly*, to preſerve the Honour of the Court: But impoſſible that theſe Ends can be attained, while the Court is bereaved of the Attendance of its Officers.

Mich. 8 *Will.* Proctor compellable by Law, to ſerve in his Imployment.

Co. Lit. 195, held, That an Attorney is ſo too: Conſequently the Attendance of neither of them ought to be hinder'd, by obliging them to ſue for their Fees in Foreign Courts. *Salk.* 87.

By the Stat. of *Eliz.* Juſtices of the Peace have Power to compel Men to ſerve in Huſbandry; in which Statute there is no expreſs Clauſe, whereby the Juſtices are enabled to redreſs ſuch Servants, in Caſe their Wages are denied; yet held by the Equity of the Statute, that ſince the Juſtices have a Power to compel their Service, they ſhould likewiſe have a Power to give them Redreſs as to their Wages. Juſtices of Peace, their Juriſdiction as to Servants Wages.

All Courts have proper Fees belonging to their reſpective Officers, of which Fees each Court is moſt certainly the propereſt Judge.

2 *Keble* 615, Spiritual Court has Juriſdiction to try Extortion in taking Fees.

Darnell for the Prohibition. For the Prohibition.

As to the Caſes quoted; *non negandum* but there have been Reſolutions that Way: But the Point is now ſettled in the Caſe of *Johnſon* and *Oxenden*, 4 *Mod.* 254, where moſt of the Caſes now quoted are taken Notice of; and this Reaſon given by Chief Juſtice *Holt*, That if Proctors might ſue in the Spiritual Court for their Fees, they would avoid the Statute of Limitations. *Salk.* 330, 333.

In the Caſe of *Brooker* and *Goodall*, a Prohibition was granted, where a Woman was ſued for Fees, in a Cauſe carried

carried on by her, againſt her Huſband; in order to bring the Matter judicially before the Court.

As to the Caſe of Extortion; no Weight to be laid upon it; becauſe no Favour is ſhewn to ſo odious a Crime.

As to the Arguments from the Reaſon of the Thing; if they prove any thing, they prove too much, *viz.* That a Proctor cannot ſue at Common Law.

Court. 1*ſt* Point. Often not neceſſary, to join the Huſband with the Wife, in Suits in the Spiritual Court; becauſe the Huſband, tho' not nam'd, may come in *pro Intereſſe ſuo*, and make Defence himſelf, ſhould the Wife deſert the Cauſe.

Parker Chief Juſtice. If the Spiritual Court has Juriſdiction, perhaps not neceſſary by the Forms of their Law, for the Huſband to be named in the Suit; as in the Caſe of an Executrix. And the Reaſon of the Difference between the Common Law and the Civil Law, is this, That in the Spiritual Court, the Huſband, tho' not named, may come in *pro Intereſſe ſuo*, and make Defence himſelf, ſhould the Wife deſert the Cauſe.

Whether therefore the Huſband muſt be join'd, muſt be determined by the Spiritual Law; and may be a good Cauſe for an Appeal, but can be none, for a Prohibition.

2*d* Point.

Whether the Fees may be ſued for in the Spiritual Court, a Matter much litigated, and Reſolutions both Ways.

Judge *Eyre*. No ſuing in the Court of Admiralty, or Court of Honour for Fees. Caſe of *Donvill* and *Oldiſh*, Prohibition granted by all the Judges of *England*.

Judge *Pratt*. I ſee no Reaſon, why Fees in the Spiritual Court, may not be recovered at Common Law, as well as Fees in Chancery. *Adjournatur*.

Potter

Potter and *Pinkney.* B. R.

TO an Action of Treſpaſs for Goods taken and carried away, the Defendant pleads that he was ſeiſed of ſuch a Leaſe; but in conveying his Title to the Leaſe, ſets forth ſuch Matter, as ſhewed the Leaſe to have determined, before it began; then goes on, and ſays, That *Virtute* of ſuch a Leaſe, he enter'd and made a Leaſe to the Plaintiff, reſerving ſuch Rent; and for the Rent behind, juſtifies the taking *&c.* Plaintiff replies, That the Goods diſtrained were ſold. Defendant in his Rejoinder, juſtifies the Sale, by Virtue of a late Act of Parliament. To this Rejoinder Plaintiff demurs; and the Defendant joins in Demurrer.

Action of *Treſpaſs. Pleading.*

For the Plaintiff it was inſiſted, That there was no good Title ſet forth to the Leaſe, in the Plea; but Matter directly deſtroying it; and that the firſt Leaſe failing, the ſecond muſt do ſo too.

Exception to the Defendant's Plea.

To which it was anſwered, 1*ſt*, That if the Defendant has fail'd in deriving to himſelf a lawful Ability to make the Leaſe to the Plaintiff, the Conſequence will only be, That that Entry, which he ſets forth to be *virtute* of the Leaſe, muſt be taken to be a Diſſeiſin, and a tortious Fee-ſimple, ſufficient to ſupport the Leaſe.

Anſwer.

2*dly*, It was ſaid, That the Plaintiff by his Replication, tho' he had not ſaid, *bene & verum eſt*, the Defendant made ſuch a Leaſe *&c.* yet by pleading ſuch Matter as Abuſe of the Diſtreſs, (Matter confeſſing and avoiding the Plea of the Defendant) that Plea muſt now be taken for true; as that there was ſuch a Leaſe made, and the Rent behind. And of this Opinion were the Court.

Court.

It was ſaid moreover by Chief Juſtice *Parker*, That the Title was but Matter of Conveyance or Inducement; that the Subſtance of the Plea was the Leaſe, and the Arrearages of Rent.

Exceptions to the Defendant's Rejoinder.

Then Exceptions were taken by the Plaintiff's Counſel to the Rejoinder.

1*ſt*, That Notice ſhould have been given to the Owner of the Goods; not to the Leſſee.

2*dly*, Notice in the Statute muſt be underſtood to be Notice in Writing; but not ſet forth in the Pleading, that this was Notice in Writing.

The fatal Exception.

3*dly*, Said in the Pleading, *quod immediate poſt diſtrictionem ſic captam*, he left Notice of taking &c. & *pro cauſa inde*; whereas the Cauſe ſhould have been ſet forth.

Anſwer.

As to the 1*ſt* Objection; it was over-ruled by the Court, who held, That the Statute did not require Notice to be given to the Owner, for he might not be known; but to the Leſſee.

As to the 2*d* Objection; it was ſaid by the Counſel for the Defendant, That if the Word Notice, did in the Act import Notice in Writing, it muſt do ſo too in the Plea, which purſued the very Words of the Act.

3*d* Objection good.

But the 3*d* Objection to the Rejoinder was by the Court held fatal, for that it was direct Nonſenſe; and that if it had been *cum cauſa*, tho' that had been Senſe, yet it had been inſufficient; for the Court ought to be inform'd upon the Pleading, what the Cauſe was that was left.

Judgment *pro Quer.*

Branthwayt pro Quer. Salkeld pro Def.

Weddall and *Manucaptors* of *Jocar.* B. R.

Vide poſt. Paſch. 1 Geo. 1.

Action brought upon Recogniſance enter'd into by Bail; they plead Death of Principal *ante emanationem Brevis.* Queſtion whether this be a good Plea?

ACTION brought in *B. R.* a Recogniſance enter'd into by the Bail, to render the Body of the Principal or pay the Condemnation; Judgment againſt the Principal for 105 *l.* for Damages and Coſts; Writ of Error brought into the Exchequer-Chamber; Judgment affirmed, and 9 *l.* additional Coſts given for the Delay *&c.*

Now a *Scire Facias* is brought againſt the Bail upon this Recogniſance; the Bail prays Oyer of the Recogniſance, which is ſet forth *&c.* And then the Bail pleads the Death of the Principal *ante emanationem Brevis*; to this Plea Plaintiff demurs, becauſe *Duplex placitum & carens forma.*

For the Plaintiff.

Mr. *Forteſcue* inſiſted for the Plaintiff, That this Plea was naught; becauſe it was impoſſible for any material Iſſue to be joined upon it. For tho' if the Jury find the Death of the Principal at the Time of the *Capias* iſſuing out, it would make all right; ſince he that died before the iſſuing out of the *Capias*, died certainly before the Return of it; yet ſhould the Jury find the contrary, That he did not die before the iſſuing *&c.* What is the Plaintiff the better? Since he might be alive at the iſſuing out of the *Capias*, and dead at the Return. Now ſhall a Plaintiff be compell'd to take Iſſue upon a Matter, which if found againſt him, he is gone; but if found for him, he is never the nearer?

This is the very Caſe of Debt upon Bond, and *Solvit ante diem* pleaded, in the Caſes of *Atwood* and *Coleman*, and *Merril* and *Joſſelyn.* Held, That in ſuch Caſes, there is no Way for the Plaintiff to help himſelf, but by Demurrer. *Ant.* 147.

Branthwayt

Branthwayt pro Def.

For the Defendant.

The Condition of the Bail-Bond is either to render *&c.* or pay the Condemnation.

To be conſidered what Pleas are good and proper for the Bail.

1*ſt*, The Condition of the Recogniſance being in the Diſjunctive, he may plead the Performance of either Part of the Diſjunctive.

2*dly*, By Way of Excuſe for not performing, he may plead the Death of the Principal, before any *Capias* iſſued out; or the Death of the Principal after the iſſuing out of the *Capias*, and before the Return.

For the Condition of rendering, is not to be underſtood of rendering the Body of the Principal, immediately after Judgment againſt him; but rendering upon Demand by due Proceſs of Law, *viz.* the Return of the *Capias*. The iſſuing out of the *Capias* is the Beginning, and the Return of it, is the Completion of the legal Demand. *W. Jones* 29, Death of the Principal before the iſſuing out of any *Capias* pleaded; Demurrer, and Judgment for the Bail. And this Difference taken, That when a Condition is in the Diſjunctive, if one Part of the Condition becomes impoſſible by Act of God, the Obligor is diſcharged from the Performance of the other Part.

See an Exception to this Rule in *Salk.* 170.

Hutton 47. *Moore* 432. Death before the iſſuing out of the *Capias*, is certainly Death before the Return.

As to the Duplicity of the Plea; the Anſwer is that no Advantage can be taken of it; becauſe but Matter of Form, and aided upon a general Demurrer. And this is no other; for tho' it be ſaid *quod Placitum eſt duplex & caret forma, that* not enough; for no Advantage to be taken of a double Plea upon Demurrer, without ſetting forth in the Demurrer, wherein the Doubleneſs of the Plea conſiſts. So determined in the firſt Caſe in *Lutwyche*'s *Reports*.

Chief Juſtice *Parker.*

Rendering is to be underſtood rendering upon Demand, *viz.* at the Return of the *Capias*; for then is the legal Demand compleated. Not rendering then, is a Refuſal; and then the Bail becomes liable and not before. Pleading therefore the Death of the Principal before the Return of the *Capias*, is moſt certainly a good Plea.

But pleading the Death of the Principal before the iſſuing out of the *Capias*, is certainly an immaterial Plea; becauſe material only in Caſe it be found one Way. For Death before the iſſuing out of the *Capias*, is Death before the Return of it. But ſuppoſe it be found, That the Principal did not die before the iſſuing out of the *Capias*, *that* is plainly nothing to the Purpoſe; for notwithſtanding this he may die before the Return of the *Capias.*

As for the Authorities, wherein the Pleading is, Death of the Principal before the iſſuing of the *Capias*; this Anſwer may ſerve, That the Objection was never taken; and that the Doubt in thoſe Caſes was, Whether the Bail was not bound to render the Principal, in convenient Time; or had Time to do it, until the iſſuing out of the *Capias.* This Objection therefore, the Strength of which lies upon this, that the Principal has Time until the *Return &c.* would have been abſurd, at a Time when it was a controverted Point, whether the Bail had Time until the *iſſuing* out of the *Capias.* But now the Law is ſettled, That he has Time until the Return. The Caſe at Bar, exactly the ſame of *Solvit ante diem* pleaded to a Bond.

Doubted *formerly*, Whether the Bail had Time for rendering the Principal 'till the *iſſuing* of the *Capias*, tho' it be *now* ſettled that he has Time until the *Return.*

The reſt of the Judges being of the ſame Opinion, the Plaintiff would have had his Judgment, had not another Objection been ſtarted, *viz.* That the *Scire facias* ſets forth all the Proceſs until Judgment in the Court of *B. R.* and likewiſe all the Proceedings upon a Writ of

Objection to the *Scire Facias.*

Bail not liable for Coſts upon Error.

Error, until Affirmance of the Judgment, and the Damages and Coſts in both Courts; and concludes with a Demand for *prædict' dampn' miſ. & cuſtag'* in both Courts; whereas Bail not liable for thoſe in the Exchequer-Chamber. 1 *Rolle's Abr.* 335.

Court. If Judgment be general, Execution muſt be ſo too; but ſince the Sums are in their own Nature ſeveral and diſtinct, why may not the Court enter the Judgment *pro dampn' miſ. & cuſtag' in Cur. Dom. Reg. Banc. recuperat.*

Adjournatur. Vide poſt. Paſch. 1 Geo. 1.

Shuttleworth and *Patterſon.* B.R.

Motion to ſet aſide Writ of Inquiry.

THIS was a Motion to ſet aſide a Writ of Inquiry for Want of theſe Words, *Et habeas ibi hoc breve.*

Defects in Form may abate Original; but not Judicial Writs.

Court. It is well enough. A known Difference between Original and Judicial Writs, That Defect in Form will abate the former, but Defect in Subſtance only can the latter; and thus reſolved in *Blackmore's* Caſe.

The Subſtance of the Writ, is only to command the Sheriff, to take an Inquiſition; and the Words omitted purely directory to the Sheriff; becauſe without returning the Writ, it cannot appear to the Court, That he had an Authority to take the Inquiſition; and if the Writ be returned, as here it is, all the Ends of thoſe Words, now omitted, are effectually anſwered.

Beſides, a Command to return the Inquiſition, is virtually and conſequentially a Command to return the Writ; becauſe the Inquiſition cannot be returned to any Purpoſe, unleſs the Writ be ſo too; for it cannot otherwiſe appear, that it is a Return to the Writ, or that the Sheriff had any Authority for taking the Inquiſition. *Si ſibi viderit expedire,* left out in *Scire Facias,*

yet held good for the very ſame Reaſon, *viz.* being a Judicial Writ, which ſhall not be abated for Want of Form.

King and *Miles.* B. R.

THIS was a Motion to quaſh an Order of Baſtardy.

Motion to quaſh an Order of *Baſtardy.*

1*ſt* Objection againſt the Order was, That it ſhould have been ſet forth, what Place the Child was born at; becauſe that gives the Juſtices their Juriſdiction.

Court. The adjudging ſuch a one the Father of a Baſtard Child, which was born in ſuch a Town, is a ſufficient ſetting forth the Place of his Birth.

2*d* Objection. Pariſh out of Time; the Child fourteen Years of Age.

Court. The Pariſh not confin'd to any Time by the Statute; and good Reaſon ſet forth in the Order, why the Pariſh did not complain ſooner, *viz.* that the Father ran away, and could not be found ſooner; and having no Eſtate, nothing could be done in his Abſence.

In Caſe of Baſtardy, the Pariſh not confin'd to any Time for Complaint.

3*d* Objection. Awarded by the Order, That the Father ſhall give Security, both for the Performance of the Order, and likewiſe for indemnifying the Pariſh for the future.

Court. The giving Security a Thing very reaſonable in itſelf; but ſince there have been former Opinions of the Court, That the Juſtices have not a Power, to award the giving Security for the due Performance of their Order, until ſuch Time as their Order has been contemn'd, (but then they have) the Order muſt be quaſh'd *quoad that:* But as for giving Security for indemnifying the Pariſh, it is right.

3 *Salk.* 66. Order to give Security for Performance of the Order, naught.

Pariſhes

Pariſhes of Newark and *Workſworth, in Com' Derby.* B. R.

Motion to quaſh an Order for *Settlement.*

ONE *Wheatcroft* with his Wife and Children, were by an Order of Juſtices removed to *Workſworth*, as the Place of their laſt legal Settlement.

Upon an Appeal to the Seſſions, it appearing *Newark* was the laſt legal Settlement of *Wheatcroft*, and conſequently of his Wife and Children, they are therefore all removed to *Newark.*

The Court was moved to quaſh the Order of Seſſions *quoad* Children; becauſe it was no Conſequence that *Newark* being the laſt legal Settlement of the Father muſt be ſo of the Children; for they might have gain'd a new Settlement.

Court. This not to be ſuppoſed.

Cottingham and *Lofts.* B. R.

Motion for *Prohibition.*

MOTION for a Prohibition; ſuggeſting, That where there is a Diſpute between a Peculiar, and the Prerogative Court, whether *Bona notabilia* or not, it muſt be tried by the Common Law. 1 *Mod.* 211.

Bona notabilia.

Court. This muſt often have happened; and if a Prohibition lay, there muſt have been frequent Inſtances of it.

Different Rules in Spiritual and Common Law, Reaſon of granting Prohibitions *pro defectu Triationis.*

Where a Prohibition is granted *pro defectu Triationis*, it is upon Suppoſition of different Rules eſtabliſhed by the Spiritual and Common Law; as in Caſe of Preſcription: But as to *Bona notabilia*, the Spiritual and Common Law the ſame.

Caſe quoted not much regarded.

DE
Termino S. Hill.
1 *Geo.* 1.
In Banco Regis.

Walter and *Warren.*

THIS was an Action brought by the Huſband for taking his Wife away, and raviſhing her, *per quod conſortium &c. per magnum tempus, viz. per ſpatium unius Anni amiſit &c.* Verdict *pro Quer.* and general Damages given.

Motion in Arreſt of Judgment.

Moved in Arreſt of Judgment, That a Year had not expired, from the 1*ſt* of *October*, the Time of the Offence, to the Time of the Verdict, and much leſs at the Time of the Action commenced; and therefore, general Damages being given, it was erroneous.

If general Damages be given, where by Law none can be given for Part, Judgment muſt be arreſted.

Hobart 189. 1 *Mod.* 271, *Horn* ver. *Chandler. Moore* 887. 2 *Saunders* 169, *Hambleton* and *Veere*; a Caſe full in Point.

On the other Side it was ſaid, That coming under a *per quod*, it was only conſequential, and laid by Way of Aggravation of Damages, and was not the Cauſe of Action; that the *per magnum tempus* was enough, and the *viz. per ſpatium &c.* ſhould be rejected as Surpluſage, becauſe impoſſible.

Parker Chief Juſtice. This Caſe widely different from the common Caſes of *viz.* a Time that is altogether impoſſible; as the 30th of *February &c.* for here the whole Time is not impoſſible; and it cannot be known for how much of it the Jury gave the Damages; moſt probably to the Time of the Verdict. *Adjournatur.*

Holroi and *Ebizſon.* B. R.

Court moved for Defendant in Error, to have Intereſt of the Damages from the Time of the Judgment, pending the Writ of Error, allowed him over and above his Coſts. Reſolved that he ſhould not.

ACTION brought in the Court of Common Pleas, upon ſeveral Promiſes; Judgment by Default; Writ of Inquiry executed, and 424 *l.* Damages given. Error brought into the Court of *B. R.* Plaintiff in Error *non proced.*

Stat. 3 *H.* 7. *cap.* 10.

The Court was moved upon 3 *Hen.* 7. *cap.* 10. that the Defendant in Error, ſhould beſides his Coſts, have Intereſt allowed him, for the Sum adjudged due to him, pending the Time of the Writ of Error, from the Judgment.

In Actions of Debt, Intereſt allowed by Way of Damages.

In the Statute lately made concerning promiſſory Notes, the Word *Damages* has been extended to Intereſt.

Where Judgment is by Default, Court may give the Damages, without a Writ of Inquiry. 2 *Saund.* 107.

Action of Debt; Judgment by Default; Intereſt allowed by Way of Damages, *occaſione detentionis debiti*, 2 *Saunders* 106. Where Judgment is by Default, Court give the Damages, without putting the Party to the Trouble of a Writ of Inquiry.

The Entries of Coſts and Damages in Writs of Error, ſeem to favour this Conſtruction.

Co. Entries 24, *b.* the Entry is *pro miſis cuſtagiis & dampnis*, which he had by Reaſon of the Delay.

Cro. Car. 145, A *Quare Impedit*; where a Writ of Error pending a Year, the Value of the Living for a Year, was given in Damages, by Reaſon of this very Statute.

It is true, That in Writs of Error into the Exchequer Chamber, Intereſt not allowed; but this Writ of Error is given by 27 *Eliz. cap.* 8. and therefore not affected by Stat. of 3 *H.* 7. *cap.* 10.

Stat. 27 *Eliz. cap.* 8.

On the other Side it was ſaid, That this was a Matter of Importance; for the Arguments if good, hold equally in all Actions, as well as this.

Econtra.

The Preamble takes Notice of Writs of Error being frequently uſed, only for Delay; and the Body of the Act, gives the Party Coſts and Damages, only for this wrongful Delay and Vexation.

A Writ of Error is a Writ of Right; it is founded upon the Fallability of Mankind, and a juſt Policy, that a Man had better be a little longer kept out of his Money, than a wrong Sentence given.

A Writ of Error, is a Writ of Right. *Salk.* 504, 264.

This Act and all others that lay Reſtraints upon Writs of Error, have received a ſtrict Interpretation; becauſe reſtrictive of the Common Law; for which the Counſel referr'd himſelf to Caſes, quoted in the Caſe of *Hammond* and *Webb*.

Poſt. 281.

From the Purview *conſtat*, That the Deſign of the Act was only to reſtrain the Abuſe of Writs of Error, and ought to be extended only to thoſe, that are brought for Delay.

The Words in the Act, at the Diſcretion of the Juſtices *&c.* ſhew plainly, that the Damages intended by the Act, muſt be ſuch Damages as are uncertain in their Nature; but legal Intereſt is a Certainty.

Coſts and Damages are in Law ſynonymous Terms; Damages do *prima facie* ſignify Coſts, tho' ſometimes *ex neceſſitate rei*, it is extended to ſignify that Damage which is the Cauſe of Action. *Co.* 10 *Rep.* 115. *b. Pilford*'s Caſe. In an Action of Debt, brought againſt an Executor, the Word *Damna* in the Judgment ſignifies the Coſts.

Damages and Coſts, are ſometimes but ſynonymous Terms. 3 *Salk.* 215.

As to 2 *Saunders* 106. the Reaſon given there, will not extend to this Caſe; and proves no more, than that the Court may do it, not that they will or muſt.

As

As to the Forms of the Entries *pro damnis & cuſtagiis*; they follow the Words of the Act, but do not prove what the Import of the Word *damna* is, Whether it is, or it is not ſynonymous with the Word Coſts.

To the Caſe of 3 *Cro.* 145. *Dyer* 77; it was anſwer'd, That it does not come up to the Reaſon of this Caſe. 1*ſt*, Becauſe the Value was there in its own Nature certain, and ſo much made of it by the other Side; but here by no Means certain what Intereſt would have been made of the Money. 2*dly*, To have made that Caſe come up to this, not only the Value, but the Intereſt of that Value ſhould have been allowed.

It was admitted, That the Practice of the Court of Exchequer, upon Writs of Error, is otherwiſe; and a poor Reaſon offer'd to account for that Difference.

For 1*ſt*, the Statute of 3 *H.* 7. ſays, all Writs of Error; and will therefore comprehend all ſubſequent Statutes, relating to Writs of Error.

2*dly*, Three Precedents of the Entries of the Judgments cited, were of Judgments in the Exchequer: Now if that Court think themſelves obliged to follow in their Entries, the Words of this Act, then ſure they think the Act extends to them.

As to Inconveniencies; the Queſtion is not about them, but what the Law is. Writ of Error, Judgment reverſed, and Reſtitution awarded; very reaſonable there ſhould be a Recompence, but there is not.

It is true indeed, That in Debt, a Jury will be direct-rected to give the Intereſt in Damages; but tho' this be done in Debt, it is never done in other Actions.

The Coſts are aſcertained by the Judgment, as well as the Damages; and therefore Intereſt by Parity of Reaſon, ought to be allowed for thoſe; but this not pretended to.

Executors and Adminiſtrators pay no Coſts in Writs of Er-

The Words of the Statute are general, *any Writ of Error*; yet ſome Caſes reſolved out of it; for Example, an Executor, or Adminiſtrator, ſhall pay no Coſts at all

in Writs of Error, tho' the Judgment be *de bonis propriis.* *Mich.* 5 *W. & M. Gale* and *Till*, 3 *Levinz* 375.

ror, tho' the Judgment be *de bonis propriis.*

It may be a Queſtion whether it can be judicially taken Notice of, that any Intereſt is lawful. 1 *Vent.* 198, *Seaman* and *Dee*; Action of Debt will not lie for Money and Intereſt. From whence it ſhould ſeem, that originally and judicially, Intereſt is not to be taken Notice of.

It was replied, That the *Quantum* of the Intereſt to be allowed, was in the Breaſt of the Court. That the Act was a remedial Law; and therefore ought to have a liberal Conſtruction. That tho' *damna* does ſometimes ſignify Coſts, yet when join'd with *Cuſtagia*, it muſt have a different Signification; and they are diſtinguiſh'd in every *Poſtea*, Damages ſo much, Coſts ſo much. *Vide* the *Entries*.

Reply.

Parker Chief Juſtice. No Man ſure of making Intereſt of his Money; a Man cannot always place his Money out to his Mind; he may loſe the Principal; and wherever Intereſt is made, a Hazard is run: But here is no Hazard at all; very low Intereſt when this Act was made.

Court.

However, if this were a new Caſe, I ſhould think it highly reaſonable, That Damages ſhould be given for the Delay; the Word Coſts in the Act, ſeems to me to relate to Vexation, and Damages to delay.

By the Common Law, in every Action of Debt, Damages are given, *Occaſione detentionis debiti*, either by Writ of Inquiry, or by the Court.

Where a penal Sum is recovered, Damages are never given. But upon a ſingle Bill, even by the Common Law, Damages are given for the Delay.

This a Key to the Statute. Whenever a Man is kept out of his juſt Debt, the Law implies and ſuppoſes a Damage. I doubt only by Reaſon of the different Practice in the Exchequer.

Afterwards in *Trinity* Term, it was reſolved by the whole Court, That the Defendant, upon a Writ of Error, brought into *B. R.* ſhould not have Intereſt allowed him, by Way of Damages, for the Sum adjudged due to him, from the Time of the firſt Judgment, pending the Writ of Error.

All Intereſt reputed unlawful in the Time of *H.* 7.

For at the Time of making the Statute 3 *H.* 7. *cap.* 10. which gives the Writ of Error, all Intereſt was reputed unlawful; and therefore that Statute could not give it.

In Fact, when Intereſt run higheſt, as at 10 *per Cent.* Intereſt has not been allowed.

In Writs of Error brought into the Exchequer-Chamber, Intereſt never allowed; and a Uniformity in Practice to be wiſhed and endeavoured.

King and *Tomb.* B. R.

Recognizances. Where they may be compounded, after they have been eſtreated.

COURT. If Recognizances are eſtreated into the Exchequer, becauſe not punctually complied with; yet if the Party appears and takes his Trial next Seſſion, he may compound for a very ſmall Matter in the Court of Exchequer; becauſe the Effect, tho' not the exact Form of the Recognizance, is complied with.

Judges of Oyer and Terminer, proper to determine, whether they ſhall be eſtreated, or not.

Judges of Oyer and Terminer the proper Judges, whether Recognizances ought to be eſtreated or ſpared.

No *Certiorari* ever granted to Judges of Oyer and Terminer, to remove Recognizances for Appearance.

No Inſtance can be produced, of any *Certiorari*, to remove a Recognizance for Appearance, from Judges of Oyer and Terminer; and it would be to take away a Juriſdiction that properly belongs to them.

It is for the Advantage of publick Juſtice, That it ſhould be in the Power of Juſtices of Oyer and Terminer, to ſpare the Recognizance, if upon the Circumſtances of the Caſe they ſee fit.

King and *Inhabitants of* Bury-Pomroi. B. R.

Settlement.

A POOR Child of the Pariſh of *Stock-Fleming*, is by the Church-wardens bound an Apprentice to *A.* in that Pariſh; and there lives with his Maſter two Years. Then *A.* removes to the Pariſh of *Bury-Pomroi*, but gains no Settlement; and there the Apprentice ſerves out the remaining five Years of his Time.

Salk. 533. 1 *Mod. Caſes in Law and Equity* 168, 169. 60, 61.

Held, That this was a Settlement of the Apprentice in the Pariſh of *Bury-Pomroi*; and that it was not neceſſary, that the Binding and Service ſhould be in one and the ſame Pariſh.

Stat. 12 *Ann.*

The Statute 12 *Annæ*, whereby it is declared, That a Servant can gain no Settlement, unleſs the Maſter does, relates only to Certificate Maſters.

King and *Weſton.* B. R.

Conviction for killing of Rabbits.

THIS was a Conviction before Juſtices, for killing of Conies, in a Warren inclos'd.

It was moved to quaſh this Conviction; 1*ſt*, Becauſe the Statute 3 *Jac.* 1. 13. which relates to Warrens inclos'd, does not give this ſummary Way of proceeding by Conviction; and the Statute of 22 *Car.* 2. 25. which does Authorize that Way of proceeding, relates not to Warrens inclos'd.

The Words of the Statute are to this Purpoſe: For as much as Conies are deſtroy'd in Warrens and Grounds not inclos'd; by Reaſon the ſame is not prohibited, by the Statutes in that Caſe provided, which extend only to Grounds inclos'd; therefore it is enacted, That whoever ſhall wrongfully enter into any Warren or Ground lawfully

fully us'd for keeping of Rabbits, tho' the ſame be not inclos'd *&c.*

Stat. 22 *Car.* 2. *cap.* 25. extends to Warrens incloſed; for the Words *tho' not inclos'd*, are not reſtrictive.

Court. Conviction well warranted by this latter Act; for whereas the former was a partial, this is an univerſal Law, *Into any Warren*, This ſatisfies the Preamble. A vaſt Difference between the Words *not inclos'd*, and *tho' not inclos'd*; the former are reſtrictive, but not the latter.

Unleſs this Act extends to Warrens inclos'd, they would be in a worſe Caſe, than thoſe not inclos'd; becauſe then an Offence in the latter would be puniſhable by the ſhort Way of Conviction before Juſtices, but not the former.

2*dly Objected*, Summons naught, for Want of Time given the Party to make his Defence.

Anſwer; Reaſon of Summons, and giving Time, founded on natural Juſtice, that a Perſon may have an Opportunity to make his Defence; but this Conviction being founded upon Confeſſion of the Party, the Objection vaniſhes.

Hayſon & al' *Aſſignees* verſus *Jeffreys*. B. R.

Motion for Leave to plead and demur; but refus'd, for demurring is not pleading.

THE Court was moved for Leave to plead a Plea, and demur to the Declaration, at the ſame Time, upon the 4th of *Ann.* The Words are, 'That it ſhall be 'lawful for any Defendant, or Tenant in any Action or 'Suit, or for any Plaintiff in Replevin, in any Court 'of Record, with the Leave of the ſame Court, to 'plead as many ſeveral Matters thereto, as he ſhall 'think neceſſary for his Defence. Provided nevertheleſs, 'That if any ſuch Matter, ſhall upon a Demurrer join-'ed, be judged inſufficient, Coſts, *&c.*

Court. The Words of the Act of Parliament are, That it ſhall be lawful to *plead* as many ſeveral *Matters &c.* Now a Demurrer is ſo far from being a Plea, that it is an Excuſe for not pleading. Here you plead, and at the ſame Time pray that you may not plead. The Word *Matter*, imports a Poſſibility that the other Party may demur to it; but there can be no Demurrer upon a Demurrer. This never attempted before.

There can be no Demurrer upon a Demurrer. *Salk.* 219.

Hammond and *Webb.* B. R.

HAMMOND gave a Bond to *Patchell*, conditioned for the Payment of ſo much Money by *Webbe*; *Webb* gives a Bond to *Hammond*, condition'd thus: *Whereas* Hammond *has given a Bond to* Patchell, *for the Payment of ſo much Money at ſuch a Day, by him the ſaid* Webb, *the Condition of this Obligation is ſuch, That if the Money be paid by* Webb, *according to the Condition of the ſaid Bond, then this Obligation is void; otherwiſe &c.* Action brought upon this laſt Bond; Judgment for the Plaintiff; Writ of Error brought.

Special Bail.

The Court was moved by Serjeant *Salkeld*, That upon this Writ of Error, the Plaintiff in Error ſhould find ſpecial Bail by Virtue of 3 *Jac.* 1. *cap.* 8. The Words are, *No Execution ſhall be ſtayed on any Writ of Error or Superſedeas, for reverſing a Judgment in any Action of Debt, or Contract for Payment of Money only, unleſs &c.* Now here the Bond is condition'd for the Payment of Money only; for the Condition properly ſpeaking, begins at theſe Words, *The Condition of this Obligation is ſuch*; what went before only Recital.

Queſtion, Whether Special Bail was to be put in by Plaintiff in Writ of Error, by Virtue of Stat. 3 *Jac.* 1. *cap.* 8.

1 *Mod. Caſes in Law and Equity* 122.

We are therefore within the very Words of the Act; and if ſo, I am ſure this Court will not conſtrue us out of the Meaning of the Statute; for this is a remedial Law, and ought therefore to have a large and liberal Conſtruction. Writs of Error are in Delay of that

Whether the Statute ought to be expounded by Equity?

Right, which the Judgment has given the Party; and therefore have always been look'd upon by the Common Law, with an evil Eye.

Statute of *Marlebridge.*

Statute of *Marlebridge* a penal Law; and yet becauſe a Remedial Law, it has been interpretd by Equity. That Act ſays, *Firmarii non faciant vaſtum*, and it has been reſolved that the Word *Firmarii* ſhould extend to Strangers; and that this Act extended to Waſte *omittendo*, tho' the Word is *Faciant*, which literally imports active Waſte.

Econtra.

Serjeant *Branthwayt contra.*

This Act ought not to be taken by Equity; becauſe it is to take away, or clog a Remedy, That the Party has by Common Law. And for this very Reaſon, there have been Caſes ruled, That this Statute ſhould not be taken by Equity. In Caſe of *Garret* and *Danby*, Action of Debt upon an Award, held not within the Statute, *Show.* 14. 2 *Keble* 131.

He mainly relied upon this Difference, where the Bond is conditioned for the Payment of Money in diſcharge of a Debt, and where the Payment of Money is in Defeaſance of ſome other collateral Matter. *Tout temps priſt*, muſt be pleaded, notwithſtanding a Tender, where the Money is to be paid, in Diſcharge of a Debt; *contra* where the Bond is in Defeaſance of a former Bond. This Difference taken *Co. Lit.* 207. *a.*

The Condition of this Bond, the ſame as to ſave harmleſs; which without Doubt out of the Act. 3 *Bulſtrode* 234.

Court.

Parker, Chief Juſtice. This Bond ſtands only as a Security for Damages; this Bond may be diſcharged, and the Plaintiff not paid one Penny; no Difference between this and a Bond to ſave harmleſs; out of the Meaning of the Act.

I

Pratt,

Pratt, Judge. The only Queſtion is, whether the Caſe be within the Meaning of the Act; for no Matter whether within the Words or not. And it ſeems to me, That the preſent Caſe, tho' poſſibly within the Words, is out of the Meaning of this Act, which is plainly this, That where a Recovery does neceſſarily import a Debt due, *there* this Act takes place; but not where a Recovery may, or may not, import a Debt due; and the Reaſon is, That Delay in the latter Caſe, is not eſteem'd ſo prejudicial, as in the former- *Adjournatur.*

Nutton verſus *Crow.* B. R.

THIS was a Writ of Error directed to *Thomæ Domino Trevor Capital' Juſtic' ſuo de Banco*; and the Return was *Reſponſ. Thomæ Trevor Mil. Capital' Juſtic' infranominat' &c. Placita irrotulat. coram Thoma Trevor Mil' &c.* Writ of *Error.*

The Court was moved to quaſh this Writ of Error, by Serjeant *Whitaker.* Motion to quaſh the Writ of Error.

Becauſe *Thom. Trevor Mil'* the Perſon that returned the Record, could not poſſibly be the ſame Perſon with *Thom. Dom. Trevor*, to whom the Writ was directed. *Yelverton* 211, where, tho' a Record before a Biſhop and ſeven, is a Record before a Biſhop and ſix; yet the Writ of Error quaſhed, becauſe wrong deſcribed.

Cro. Car. 371, held, That *Henry Ferrers* Knight, and *Henry Ferrers* Baronet, cannot be intended to be one and the ſame Perſon. *Salk.* 50.

Dyer 300, Lord *De la War*'s Caſe, was alſo cited. 2 *Cro.* 341, Writ of Error directed to *Thomæ Flemming Capital' Juſtic' ad placita*, quaſh'd, becauſe *coram nobis tenend' aſſignat'* omitted.

If it be objected, That there is but one Chief Juſtice of the Common Pleas; the Anſwer is, That a Writ of Error cannot be directed to the Chief Juſtice by Name of

of his Office, but his natural Name; and the Reaſon is, becauſe if no Return be made to the Writ of Error, there goes an *Alias*, then a *Pluries*, and then an Attachment, which muſt be directed to him by his natural Name. And the Caſe is ſtronger here; becauſe there is no Attachment againſt the Perſon, but the Goods of a Peer.

Serjeant *Salkeld contra*,

Econtra. *Latch* 161, a Commiſſion of *Niſi Prius*, to *Francis Harvey Armigero*, one of the Juſtices *Dom. Reg. de Banco*; the Return was, That the Trial was before *Francis Harvey Milite*, one of the Juſtices *&c.* yet held well. 1*ſt*, Becauſe he might be *Armiger* at the Time of the iſſuing out that Commiſſion; and *Miles* at the Time of the Trial. 2*dly*, Becauſe otherwiſe all the Trials of the Circuit would be overthrown.

As to the Caſe of Lord *De la War*; *that* was determined wholly upon the Pleading.

He agreed, from the Authority of 38 *H.* 6. 1. and *W. Jones* 346, That Knight and Eſquire, and Knight and Baronet, could not be one and the ſame Perſon. But that ſuch a one *Miles*, and ſuch a one *Dominus*, might be one and the ſame Perſon, he quoted the *Regiſter* 287. *b.* where the ſame Perſon, in the ſame Writ, is called in the Beginning of Writ *Miles*, and in the latter End of the Writ *Baro.* He quoted alſo *Savill*'s Caſe, *Cro. Car.* 205.

Curt. *Parker* Chief Juſtice, with the Conſent of the reſt.

The Writ of Error muſt be quaſh'd.

The different Additions of *Mil.* or *Dom.* make different Names, and muſt be underſtood of different Perſons.

Names are for the diſtinguiſhing of Perſons. Such a one *Miles*, and ſuch a one *Dominus*, two different Names; and therefore to be intended different Perſons. In Records and legal Proceedings the whole Name to be ſet forth; and therefore *Thom. Trevor Mil'* here in the *Placita*, muſt be intended of ſuch a one *Mil'* who was no Lord.

1

As

As to the Caſes cited, and the Difference taken between them and this, *viz.* That the ſame Perſon may be both *Miles* and *Dominus*, but cannot be Eſquire and Knight, or Knight and Baronet; the true Diſtinction is, That where this Alteration has been made in the Addition and held good, both the Additions have become conſiſtent, by Reaſon of the Difference of the Times; ſince he who was Eſquire at the Time of the Writ directed, may be a Knight at the Return; and ſo all thoſe Caſes may remain good Authorities.

As to the *Regiſter*; nothing to the Purpoſe. For the Writ is only a Direction, that he who at the Beginning of the Action was *Miles*, was now become a Peer, and that the Proceſs ſhould hereafter be againſt him as a Peer. That Writ does not import, that the ſame Perſon, was at the ſame Time, both Lord and Knight (tho' that be true) but that he who before was only a Knight, was now a Lord.

As to the Objection, That the Office aſcertains the Perſon, there being but one Chief Juſtice of the Common Pleas; I anſwer, That we muſt not judge by our own Knowledge, or the Knowledge of any Body elſe; but by the Record. Beſides, *Flemming*'s Caſe a full Anſwer to this Objection.

The Caſe of *Rider* and *Broderick*, the ſame with this, and the Court of the ſame Opinion; but no Judgment entred.

Afterwards in the ſame Term, two more Writs of Error, *viz.* *Fuller* and *Davis*, *Alexander* and *Symonds*, quaſhed, for the ſame Reaſon.

Aylwood and *Woolley*. B. R.

ACTION brought in the Court of *C. B.* upon three ſeveral Promiſes; the 1*ſt* for 55 *l.* the 2*d* for 65 *l.* and the 3*d* for 65 *l.* The Defendant pleads as to Part *non Aſſumpſit*, and as to Part in Abatement thus,

A Plea in Abatement muſt go to the whole.

thus, *viz. quoad* 50*l.* of the 1*ſt* Promiſe, 60*l.* of the 2*d*, and 60*l.* of the 3*d*, *quod breve caſſetur*, becauſe there were three Actions depending in the Court of Exchequer for the ſame Sums. Judgment of *Reſpondeas Ouſter* given in the Court of Common Pleas.

Upon Error brought, Court of *B. R.* of Opinion, That the Judgment in the Common Pleas was well given; for a Plea in Abatement muſt go to the Whole, and not to Part; and the three Actions depending in the Court of Exchequer, might have been pleaded in Bar of the Whole.

—— verſus *Ormſton.* B. R.

Action upon *Bill of Exchange.*

IN an Action brought upon a Bill of Exchange, made payable to the Order of the Plaintiff, the Declaration ſet forth, That the Defendant, by his Acceptance, became liable to pay it to the Plaintiff, *Secundum conſuetudinem Mercatorum.* Upon this Declaration there is a Demurrer.

For the Defendant.

It was urged for the Defendant, That the Plaintiff had only an Authority to indorſe the Bill, and then the Indorſee might maintain an Action; but that the Plaintiff was not intituled to receive the Money. It was compared to the Caſe of a Deviſe, That Executors ſhall ſell Land, where the Executors have only an Authority to ſell, but no Intereſt; and therefore immediately upon Sale, the Vendee is in, not from the Executors, but under the Will.

For the Plaintiff.

On the other Side it was ſaid, That if this was Law, Multitude of Bills of Exchange would be overthrown: That by the Cuſtom of Merchants, there is no Difference between payable to the Order of ſuch a one; or payable to ſuch a one, or Order; and that the Cuſtom is confeſs'd by the Demurrer.

That the ſame Strictneſs and Nicety, are not required in the Penning of Bills, currant between Merchant and Merchant, as in Deeds, Wills *&c.*

In Policies of Inſurance, warranted *to depart with Convoy*, has been reſolved to import a *Continuance* with that Convoy, as long as may be; and this not *ex vi Termini*, but becauſe underſtood in this Senſe by Merchants. *Salk.* 443. Uſage of Merchants, of what Force in Law.

Court. Even in Caſe of Land, a Grant or Deviſe of the Profits of Land, carries the Land: Order implies Property; no Difference between having a Power to diſpoſe of Money, and having the Money itſelf. What is an Order, but an Authority to appoint the Payment of it? which the Plaintiff here does to himſelf. A Grant or Deviſe of the Profits of Land, will carry the Land with it.

Judgment pro Quer.

Pariſhes of Brightwell and Henley. B. R.

THREE Weeks after *Michaelmas*, a Servant is hired until *Michaelmas* following; and upon *Michaelmas* he was hired for a Year until next *Michaelmas*, but did not ſerve out the Year; but his Service in both Years was above a Year. *Settlement.*

The Queſtion was, whether this was a Settlement. For tho' here was a hiring for a Year, and a Service for a Year; yet it was not a Year's Service ſubſequent to that Hiring.

Parker, Chief Juſtice, the reſt concurring. It is a Settlement; for here is a Hiring for a Year, and Service for a Year, tho' not under that Hiring; which reſolv'd not to be neceſſary, in the Caſe of *Overton* and *Steepleton*. Service for a Year, and Hiring for a Year, tho' the whole Year's Service be not ſubſequent to that Hiring, a Settlement.

A Servant, during a whole Year, is hired from Week to Week; then is hired for a Year, and ſerves one Week; this is no Settlement, for Want of Continuance in the Service 40 Days after the ſecond Hiring. But where there is not 40 Days Service under ſuch Hiring, no Settlement.

Kitſon

Kitſon and *Fag.* B. R.

Of Aſſignment of Bail-Bonds by *Sheriffs.*

THE Caſe was, one *Hamlin*, High-Sheriff, did by a legal Inſtrument, make *Lancaſter* his Under-Sheriff, in Truſt for *Altham*, who had been Under-Sheriff the Year before; neither *Lancaſter* nor *Altham* took the Oaths required by 27 *Eliz. cap.* 12. After *Hamlin*'s Year was expired, and before a new Sheriff appointed, *Altham* makes an Aſſignment of a Bail-Bond; and the Queſtion was, Whether *Altham* was ſuch a Perſon, as that his Aſſignment of the Bail-Bond, was a good Aſſignment, within the Statute for the Amendment of the Law.

And of *de facto* Sheriffs.

Queſtion.

N. B. Altham always acted as Under-Sheriff, and *Lancaſter* not at all.

Mr. *Robins* argued, That this Aſſignment was good.

This Caſe to be reſolved into two Points.

1*ſt*, Whether it is neceſſary that this Aſſignment be made by the High-Sheriff in Perſon?

2*dly*, If it be not, Whether this Aſſignment being made by *Altham* the Under-Sheriff *de facto*, be not a good Aſſignment?

1*ſt* Point.

It was formerly a Doubt, if the Sheriff returned a *Cepi Corpus*, (as he muſt, notwithſtanding by the Statute of 23 *H.* 6. *cap.* 10. he is obliged to bail him) and has not the Body in Court, at the Day of the Return, whether he was not liable to an Action. Law not ſettled in this Point until 21 & 22 *Car.* 2. 1 *Vent.* 55, when reſolved, That he is not liable to an Action.

3 *Salk.* 314, 315.

In the Statute for the Amendment of the Law, tho' Under-Sheriff not mentioned, yet he is far from being excluded; he may poſſibly be included under the Words, *other Officers.*

In all Miniſterial Acts, whatever is done by the Under-Sheriff, of the ſame Authority, as if done by the Sheriff himſelf. *Hob.* 13. 3 *Bulſtr.* 77. 9 *Co. Rep.* 48. 8 *H.* 4. 20.

Aſſignment of Bail-Bonds to the Plaintiff, no new Thing. A common Practice before the Statute; and tho' in Strictneſs of Law, a Bond being a Choſe in Action, ſuch Aſſignments were not good, yet ſuch Aſſignments have been taken Notice of in Courts of Law, and not ſuffer'd to be evaded. *Foſter* and *Jackſon*, 22 *Car.* 2.

Of the Act about the Aſſignment of Bail-Bonds by the Sheriff.

This Act not in Nature of an Authority to the Sheriff; but a Judgment in Parliament, that the Sheriff ſhall do it, and he is liable to an Action if he do not; and in Chancery may be compell'd to a ſpecifick Performance, according to this Act of Parliament.

Two Reaſons for making this Act of Parliament: The one to obviate the abuſive Practice of Sheriffs, in releaſing theſe Bonds; and thereby cutting off the Plaintiffs from the Advantage of them, for whoſe Security alone they were taken. The 2*d* Reaſon was to remove the Chicane of the Law, That theſe Bonds were not aſſignable, becauſe Choſes in Action.

Had the *Statute* only made the Bail-Bonds aſſignable, and not ſaid by whom, the *Law* would have ſaid, that the Sheriff was the Perſon to aſſign it.

If the Sheriff dies before Aſſignment, ſhall not the Executor of the Sheriff aſſign it?

As to the Objection, that may be made, That the Circumſtances, required by the Act of Parliament, to be obſerved in aſſigning, make it neceſſary for the Sheriff to do it in Perſon: It may be anſwered, That the Reaſon of preſcribing theſe Circumſtances, was only to make the Aſſignment more effectual; and to diſtinguiſh the Aſſignments by Virtue of this Act, from thoſe in Uſe before; and may therefore be compared to Fines, 3 *Co.* 88. But no Deſign to abridge the Power of the Under-Sheriff.

An Under-Sheriff, by Virtue of his Office, is included in ſeveral Acts of Parliament, tho' not named. *Weſtm.* 2. *cap.* 11. 25 *Edw.* 3. *cap.* 17. *Weſtm.* 2. *cap.* 18. *Elegit*, *Fitzh. N. B.* 266. *b.* 4 *Co.* 64, 5, *Fulwood*'s Caſe.

Maxims of Law. Execution the End and Life of the Law, 5 *Co. Rep.* 92. This a Mechanical Part of the Sheriff's Office. *Cro. Car.* 25, *Qui per alium facit, per ſeipſum facit.*

Salk. 589.

2*d* Point. As to the 2*d* Point, no more than this, Whether all Acts done by one that appears and acts as Under-Sheriff, ſhould be void for want of ſome Circumſtances, that none think themſelves oblig'd to inquire into, and concern the Under-Sheriff only.

Tho' there be an Under-Sheriff legally appointed; yet he not appearing, nor acting, it makes no Alteration at all in the Caſe.

Gaoler *de facto* bound to take Care of the Priſoners; and generally the Law is ſo, That Acts done by thoſe reputed in Authority, are good. 2 *Inſt.* 381, 382. *Cro. Eliz.* 699, *Harris* and *Jay*. *Moore* 112. *Cro. Eliz.* 34, ---- ver. *Howell* and others. 1 *Keble* 357. If Acts of Under-Sheriffs *de facto*, were void; in ſo many Acts of Parliament relating to Sheriffs, ſome Care would very probably have been taken about it.

Mr. *Reeves*, *contra*.

He inſiſted, That the Oath to be taken, was an Oath of Office: That *Lancaſter* was in a legal Manner conſtituted Under-Sheriff; but that *Altham* had no Deputation at all, but was a meer Intruder.

He inſiſted, That ſuppoſing the Aſſignment performed during the Year of *Hamlin*, might have been good; yet it would not now, being performed after. *Moore* 112. *Yelv.* 44. 2 *Cro.* 73. *Moore* 757. 34 *H.* 6. 3, 6. 1 *Rolle's Abr.* 894.

He took this Difference, Where a Statute appoints Things to be done by the Sheriff, and preſcribes no particular Manner for the doing of it, that makes it neceſſary to be a perſonal Act; *there* the Under-Sheriff may do it, tho' Sheriff only mentioned: But where the Manner and Circumſtances, injoined and preſcribed by the Act, make it a Perſonal Act; *there* the Under-Sheriff

cannot perform it; which Difference anſwers all the Inſtances, brought from Acts of Parliament.

Then he inſiſted, That the Statute injoining the Aſſignment, to be under the Hand and Seal of the Sheriff, did make it a Perſonal Act.

Indeed in *Engleſield*'s Caſe, 7 *Co. Rep.* 11, it is held, That tendering a Ring, is no Perſonal Act; but then, it is reſolved in the Duke of *Norfolk*'s Caſe, there quoted, That the Uſes being revocable by Writing under the proper *Hand and Seal* of the Duke, it was a Perſonal Act, and not capable of being perform'd by any Body elſe. This Caſe exactly the ſame with that at Bar; except the Addition of the Word *proper*, which according to 1 *Mod.* 40. and 1 *Ventris* 128, makes no Difference at all.

If the Sheriff dies before Aſſignment, his Executor cannot do it. This is *Caſus omiſſus*; and the Plaintiff muſt ſue in the Sheriff's Name, as at the Common Law, before this Act.

Whether the Sheriff's Executor may aſſign a Bail-Bond? Or whether the Plaintiff muſt ſue in the Sheriff's Name?

Adjournatur.

Reeves and *Symonds*. *Coram Parker* C. J. at *Niſi Prius*.

THIS was an Action brought by *Reeves* for a Quantity of Stockings, ſold to *Symonds*. The Defence of *Symonds* was, That it was not he, that bought the Stockings, but his Son, who ſent them to *France*, in Way of Trade; and to prove this, he would have call'd his Son.

Parker. He cannot be an Evidence; becauſe here is an Advantage made by Way of Trade; and to whom this Advantage ſhall accrue, depends entirely upon this Queſtion, Who made this Contract? and now one comes to ſwear, That he made the Contract himſelf. *Evidence.*

Serjeant

Serjeant *Darnell.* He may be a Witneſs; becauſe he will neither get nor loſe, by the Event of this Cauſe; for what is now given in Evidence, cannot be given in Evidence in another Action.

Parker. This you have often ſaid, and I as often anſwered.

Where Perſons are not immediately concern'd in the Event of a Cauſe; yet if they be any Way intereſted in the Queſtion, upon which the Cauſe depends, they muſt not be admitted as Witneſſes. *Hob.* 92. 2 *Vern.* 375.

If an Action be brought by a Commoner for his Right of Common, ſhall another Perſon that claims a Right of Common, upon the ſame Title, be allowed to give Evidence? No, and yet it is certain that he can neither get nor loſe in that Cauſe; for the Event of that Cauſe will no Way determine his Right. But tho' he is not intereſted in that Cauſe, he is intereſted in that Queſtion, upon which the Cauſe depends; and that will be a Biaſs upon his Mind. It is not his ſwearing the Thing to be true, that gives him any Advantage; but it is the Thing's being true; and the Law does judge, That it is not proper to admit a Man to ſwear *that* to be true, which it is plainly his Intereſt ſhould be true.

DE
Term. Paſchæ,
1 *Geo.* 1.
In Banco Regis.

Pariſhes of Frencham and *Pepperharrow.*

THIS was the Caſe of a Settlement; and in the Order of the Juſtices, the Fact was ſtated ſpecially. *Settlement.*

A Servant was hired two or three Days after *Michaelmas*, to ſerve until *Michaelmas* next; but he ſerves as many Days after *Michaelmas*, as made his Year compleat, and then receives his Wages.

Serjeant *Darnell* argued, That this was no Settlement; for the Court muſt take the Fact as ſtated by the Juſtices: And therefore tho' the Circumſtances ſet forth in the Order, might have been ſufficient to have induced the Juſtices, to have found this a Fraud, and that the real Hiring was for a whole Year; yet ſince they have expreſly ſtated the Fact otherwiſe, and that he was hired three or four Days after *Michaelmas*, until *Michaelmas* next, the Court muſt take the Fact for granted; and then there can be no Settlement, becauſe no Hiring for a Year, as the Law requires.

Hiring for leſs than a Year, tho' it be but for three or four Days leſs, no Settlement; notwithſtanding actual Service for a whole Year.

Adjournatur. But afterwards (*ut audivi*) held no Settlement.

Joſſelyn and *Lacier*. B. R.

Vide poſt. The laſt Caſe of the Term.

Aſſumpſit. Declaration as upon a Bill of Exchange.

THIS was a Writ of Error, upon a Judgment given in the Court of *C. B.* in an Action of *Aſſumpſit*, where the Plaintiff declared, That *Evans* drew a Bill upon *Joſſelyn*, requiring him to pay *Lacier* ſeven Pounds every Month, (the firſt Payment to begin in *December*, about two Months after the Date of the Note) *ex renovan. ſubſiſten.* of *Evans*, and place it to his Account; That *Lacier* carried the Note to *Joſſelyn*, who accepted it, and promis'd to pay it, *ſecundum tenorem Billæ*; by which Acceptance, according to the Cuſtom of Merchants, he became liable; That afterwards he refus'd to pay *&c.*

Defendant pleads *non Aſſumpſit infra ſex annos*; Judgment *pro Quer.* upon which Judgment the preſent Writ of Error is brought.

For the Plaintiff in Error.

Where the Plea muſt not be *Non Aſſumpſit infra ſex annos*, but *Cauſa Actionis non accrevit infra ſex annos.* *Ant.* 104. *Salk.* 422.

Serjeant *Branthwayt*, who was of Counſel for the Plaintiff in Error, owned that the Defendant's Plea was naught; for the Promiſe being to do an Act upon a future Day, the Plea ſhould not have been *non Aſſumpſit &c.* but that *Cauſa Actionis non accrevit infra ſex annos.* But he inſiſted, That the Declaration was vicious; for the Plaintiff declared upon the Cuſtom of Merchants, concerning Bills of Exchange; and yet ſets forth ſuch a Bill, as in the very Nature of it, appears not to have been a Bill of Exchange.

It is eſſential to a Bill of Exchange to be negotiable, which this cannot poſſibly be; becauſe it is to pay upon a Contingency, *ex renovan. ſubſiſten.* of *Evans.*

A naked Promiſe no ſufficient Foundation for an Action.

If it ſhould be objected, That there is ſet forth in the Declaration, an expreſs Promiſe to pay: It may be anſwered, That this will not help the Matter; becauſe a

naked Promiſe, a *nudum pactum* is not in Law, a ſufficient Foundation for an Action. *Ex nudo pacto non oritur Actio. Salk.* 129.

There muſt be a Conſideration; and the Conſideration muſt be particularly ſet forth in the Declaration, that ſo the Court may judge whether it be ſufficient to maintain an Action. Whether the Conſideration of the Promiſe ought to be particularly ſet forth?

Cro. Car. 31, Plaintiff declares, that the Defendant being indebted, promis'd to pay; Held that the Conſideration was not ſufficiently ſet forth, for that the Plaintiff ought to have ſpecified the Cauſe of the Debt; as Money lent, Goods ſold or delivered *&c.*

1 *Siderfin* 45. *Paululum Tempus* he ſhould forbear, held not a good Conſideration; becauſe no certain Judgment can be made, what Portion of Time that is. Conſideration of Forbearance for a convenient Time, will be good; but then there muſt be an Averment how much Time he did ſtay.

2 *Levinz* 152, In *Aſſumpſit per* Executor, Plaintiff declares, That the Defendant, being indebted 20*l.* to the Teſtator, according to an Agreement between them made, promis'd to pay: After Verdict for Plaintiff, upon *Non Aſſumpſit*, Judgment was arreſted; for Want of ſetting forth this Agreement.

4 *Mod.* 244. Strongly inſiſted upon, as a Caſe in Point, to prove, 1*ſt*, That this was not a Bill of Exchange. And 2*dly*, That a Declaration upon this, as a Bill of Exchange, was erroneous.

Mr. *Reeves*, in Affirmance of the Judgment, argued, 1*ſt*, That this was a good Bill of Exchange; for the Words *ex renovan. ſubſiſten.* do either import ſome Intereſt or Effects, that the Acceptor had of the Drawer, in his Hands; or they are idle and inſenſible. If the former, then the Caſe is in Effect this, *A.* draws a Bill upon *B.* requiring him to pay *C.* ſo much Money, out of the Money that is in his Hands: *Non refert* whether *B.* has any Money of *A.* actually in his Hands; for by his Acceptance, For the Defendant in Error.

ceptance, he is eſtopped from ſaying the contrary. But if the Words are inſenſible, then they are Surpluſage.

2*dly*, He argued, That ſuppoſing this not to be a good Bill of Exchange, there was an expreſs Promiſe laid, and a ſufficient Conſideration to ſupport it.

Labour and Trouble *&c.* as ſufficient a Conſideration to ſupport an *Aſſumpſit*, as a valuable one; for almoſt any Conſideration, tho' ever ſo ſmall, has been held ſufficient to ſupport this Sort of Action. 3 *Cro.* 77. 1 *Sid.* 369. 1 *Vent.* 71, 74.

He inſiſted, That the drawing the Bill was a Requeſt and Authority to demand the Money; and that the Trouble the Plaintiff was at in demanding the Money, was a good Conſideration.

Reply. To which *Reſponſum per* Serjeant *Branthwayt*, That the going of the Plaintiff to demand the Money, was no Part of the Contract, nor any Advantage to the Party that made the Promiſe.

Adjournatur. See the laſt Caſe in this Term.

Queen and *Blagden.* B. R.

Vide the Caſe *pag.* 211.

MR. *Reeves* for the Defendant.

He obſerved, That if the Crown had a Right to join Iſſue upon the Traverſe, yet the Iſſue was here ill joined; becauſe not joined in the Words of the Traverſe, but more narrow and reſtrictive.

The Information charges the Defendant, with uſing the Office, Liberties and Privileges, Franchiſes *&c.* of Port-reve of the Town of *Honiton*, and the Traverſe is taken in Words as general and comprehenſive as the Charge; but the Iſſue taken upon the Traverſe is *abſque hoc* that he uſurped the Office generally. Now a Man may uſurp the Office, and not uſurp all the Privileges *&c.* relating to that Office.

As to the main Queſtion, which was, Whether the Crown was at Liberty to take Iſſue upon the Traverſe, or not; The only Precedent, alledged in Behalf of the Power of the Crown, was that of the *Queen* and *Walcourt*, *Term. Hill.* 23 *Eliz. Rot. primo*; and there the Queſtion never received any judicial Determination, becauſe the Defendant died. *Pleading.* Whether the Crown may take Iſſue upon the Traverſe?

As to the Caſe of Sir *Gervas Clifton*, 3 *Leon.* 184; he ſaid, That it appear'd from a larger Report of that Caſe in *Godbolt* 91, that it was *nihil ad rem.*

Co. Entries 539, 540. in the Writ of Seiſin, where the other *Entries* are ſet forth, the Traverſe is omitted, which proves it immaterial.

To the Objection, That in an Information of Intruſion, King may take Iſſue upon the Uſurpation, tho' a Title be ſet forth; He anſwered, That an Information of Intruſion, was of a different Nature from this; becauſe *non ſequitur*, from his having a Title, that he is no Intruder; but it does, that he is no Uſurper. Of the Difference between Informations of Intruſion, and thoſe in the Nature of a *Quo Warranto.*

The Courſe of Precedents is ſo in Intruſion; but otherwiſe in this Kind of Information; which a preſumptive Argument that there is a Difference.

Another Difference there is, That in an Information of Intruſion, the Crown ſets forth its Title, and concludes *de præmiſſis &c.*

Then he argued, That the allowing the Crown to join Iſſue upon this Traverſe, in their Replication, would be inconvenient to the Crown, inconvenient to the Party, inconvenient to the Court; and *Argumentum ab inconvenienti fortiſſimum in Lege.* *Maxim* in Law.

In the firſt Place, it is inconvenient to the Crown: becauſe by this, the Matter is put at large; the Defendant may give any Thing in Evidence; and it amounts in Effect, to the General Iſſue of *non Uſurpavit. Co. Ent.*

372, *Heydon's* Caſe. All the Inconveniencies of allowing General Iſſues will follow upon allowing this.

If the King can take Iſſue upon this, he is bound to do it. Where the Defendant ſets forth his Title with Traverſe, and the King's Title is upon Record, *there* the King may either traverſe the Defendant's Title, or he may waive that, and take Iſſue upon the Defendant's Traverſe; but if his Title do not appear upon Record, then the King is bound to take Iſſue upon the Defendant's Traverſe. *Bro. Prerog.* 116. *Vaughan* 64.

As to the Objection, That no Prerogative of the Crown is here inſiſted upon, but only a Right common to every Subject: It is enough to anſwer, That the Attorney-General, would not be content in this Caſe, to be bound down by the ſame Rules of Pleading that the Subject is; the Subject could not have avoided taking the Iſſue, but no one will ſay the Crown was bound to do this.

2*dly*, This would be inconvenient to the Party: Becauſe it renders it almoſt impoſſible for him to prepare for his Defence; for the Crown may upon this Iſſue attack his Title, or may give in Evidence a Miſuſer or Forfeiture of his Office.

3*dly*, This would be inconvenient to the Court. For the Court cannot tell what Judgment to give, without being certified from the Judge that tried the Cauſe, what the Nature of the Evidence was; for the uſing an Office without a Title, and the forfeiting an Office by miſuſing, require different Judgments.

In the laſt Place, he inſiſted, That the Defendant by ſetting forth his Title, had anſwered the whole Charge of the Information, which was for him to ſhew *Quo Warranto &c.*

Court all of Opinion, That the Defendant ſhould have Judgment.

Parker, Chief Juſtice. No Body ever thought that *non Uſurpavit* was a good Plea; and the Reaſon why it

is not, evidently appears from the Nature of the Charge, which is for him to ſhew, by what Warrant or Authority *&c.* to which that Plea is no Anſwer. And if this could not have been pleaded in Bar, then moſt certainly that Replication, which does in Effect ſet up that Plea again, muſt be naught.

If *non Uſurpavit* were a general Iſſue, allowed in this Caſe, all the reſt of the Pleadings would be to no other Purpoſe but lengthning the Record. *Hob.* 127.

The Difference obſerved by Mr. *Reeves* between the Caſe before us, and an Information for Intruſion, is very juſt; for tho' the Defendant ſhould have a Title, yet it is very poſſible he may be an Intruder, but impoſſible that he ſhould be an Uſurper.

Powys, Judge. Of the ſame Opinion. The very Reaſon of joining Iſſues, is that the Party may come prepared to defend one ſingle Point. In Caſe of Barretry the Law is otherwiſe; but then it muſt be told what Point will be gone upon.

Pratt, Judge. I am of the ſame Opinion. For had *non Uſurpavit* been a good Plea, every Body would certainly have pleaded it; becauſe by this Means the Attorney-General would be kept in the Dark, and unacquainted with the Nature of the Defendant's Title; and the Hazard of ſetting forth a ſpecial Title, where the greateſt Certainty in Pleading is required, might be wholly avoided.

Beſides, the Labour of Pleading ſpecially is entirely loſt, if all may be ſet aſide by a general Replication.

Judgment *pro Def.*

Muſton

Muſton and *Tateman.* B. R.

Vide Ante. 228.

THE Court was moved for the Plaintiff, by Mr. *Forteſcue* in Arreſt of Judgment.

Pleading. Two Points conſiderable. 1*ſt*, Whether the Defendant's Plea was not naught? Becauſe it ſays only, That Sir *Thomas Freke* was ſeiſed generally; but does not ſay, that he was ſeiſed *in Dominico ſuo ut de Feodo*, which Eſtate only can ſupport a Preſcription.

2*dly*, Whether ſuppoſing the Plea to be naught for this Reaſon, the finding of the Jury had not cured this Defect?

Of Defects in Pleading being aided by Verdicts.

The 1*ſt* Point he waived as ſufficiently ſpoken to formerly; and argued 2*dly*, That this Defect in the Plea was not aided by the Verdict, becauſe the Seiſin was no Part of the Iſſue; but previous to the Uſage, and admitted by the Replication, whereby the Uſage only was put in Iſſue.

The general Reaſon, why Defects in Pleading are cured by Verdicts, is, becauſe it is to be ſuppoſed, That the Verdict could not have been found, unleſs there had been Evidence given at the Trial of that Matter wherein the Pleading is defective, 1 *Mod.* 161. But this not being Part of the Iſſue, can never be ſuppoſed to be given in Evidence. Nay this is not only no Part of the Iſſue; but it is not even a neceſſary Conſequence of the Iſſue; for there might be ſuch a Uſage, and yet the Party not ſeiſed in Fee. Had the Jury found a Title, that he was ſeiſed in Fee, it had been erroneous; or at leaſt it had been a void finding. 1 *Sid.* 96.

The only Caſe, where a bad Preſcription is held cured by a Verdict, is 1 *Cro.* 445. and that Caſe is eaſily anſwered; for 1*ſt*, How was it poſſible, that any finding of the Jury, could maintain that Preſcription, which

the Law ſays is naught? And yet that is the Caſe there; for there the Preſcription was, That the Defendant and all the Occupiers of the ſaid Cloſe, Time out of Mind, *&c.* This Preſcription was by the Court held too general; for Tenant at Will, or Diſſeiſor may be Occupiers.

2*dly*, This Caſe denied to be Law, *Mich.* 9 *Annæ*, *Thorn* and *Rookby*.

To the Caſe of *Hutton* 54, quoted when the Caſe was ſpoken to before; He anſwered, That *there* of Neceſſity the Verdict muſt help; becauſe a Grant of a Thing being alledged, which in its own Nature could not be granted but by Deed; unleſs the Jury had found the Deed, they cou'd have found no Grant at all.

Then he quoted ſeveral Caſes, wherein it was held, That bad and defective Pleadings are not aided by Verdicts. *Hob.* 189. 2 *Cro.* 245, *Aſſumpſit*, 3 *Cro.* 419, Caſe. *Hob.* 286. 3 *Cro.* 515. Debt upon Obligation. *Styles* 220, *Aſſumpſit*.

Serjeant *Salkeld* argued for the Defendant, and inſiſted, *Econtra.* That after a Verdict, this muſt be intended a Seiſin in Fee. In 1 *Ventris* 122, it is ſaid by the Chief Juſtice, that after a Verdict, the Court would make any Intendment to make the Caſe good.

1 *Siderfin* 218, proves that a Court will ſtrain very hard to ſupport a Verdict.

The Queſtion therefore is, Whether Seiſin can poſſibly be intended of a Seiſin in Fee? And without Doubt it may; for Seiſin is the *Genus*, Seiſin in Fee, in Tail, for Life, *&c.* are the *Species*.

The Word *ſeiſed*, does rather import Seiſin in Fee than any other Eſtate; becauſe Seiſin in Fee is the Mother Eſtate, and all the other particular Eſtates begin by Contract.

In the pleading of a Fine, it is *ſeiſitus* only; and yet always underſtood to be *de Feodo*.

Could not the Plaintiff have replied, That *Freke* was ſeiſed for Life, and have travers'd the Seiſin in Fee

modo & forma, as by the Plea was ſuppoſed? Certainly he might; for whatever is neceſſarily ſuppos'd in a Plea, may as well be travers'd as what is expreſs'd. *Paſch.* 3 *Ann. Gilbert* and *Parker.*

Whatever is neceſſarily ſuppos'd, is traverſable, as much as if it were expreſs'd. *Salk.* 629.

If this had been travers'd, then no Queſtion this had been in Iſſue. Evidence likewiſe might have been given by the Plaintiff to ſhew, that *Freke* was ſeiſed for Life, and not in Fee; and this had made an End of the Iſſue.

He likewiſe took a Difference between a defective Title in itſelf, and a Title defectively ſet forth; the former cannot be ſupported by a Verdict, but the latter may. For this Purpoſe he cited, *Paſch.* 9 *W.* 3. *Dorne* and *Caſhford. Hill.* 4 *Annæ*, *Crouther* and *Oldfeild. Hobart* 116, 117. *Palmer* 420. Same Caſe, *Latch* 110.

Salk. 363. *Salk.* 365.

From the Verdict found by the Jury, it is plain that it muſt be ſuch a Seiſin, as that thoſe whoſe Eſtate Sir *Thomas Freke* had, did Time out of Mind uſe ſuch a Way *&c.* Now this could not be any other Seiſin but in Fee; therefore the Verdict has helped the Plea.

3 *Salk.* 279.

Court.

Parker, Chief Juſtice. As clear as the Sun, That unleſs Evidence had been given to the Jury, of Sir *Thomas Freke*'s having an Eſtate in Fee, they could not have found ſuch a Verdict; and then according to the Rule laid down by Mr. *Forteſcue*, the Verdict has helped the Pleading.

Seiſin in Fee, as was ſuppoſed in the Plea, might have been travers'd.

Powys, Judge. Concurr'd with *Parker*. *Eyre* doubted.

Pratt, Judge. Concurr'd ſo ſtrongly with *Parker*, that he held the Plea would have been good, even upon a general Demurrer. The Word *ſeiſitus*, *ex vi Termini*, no more imports Seiſin for Life, than Seiſin in Fee. It is true that *Seiſitus* alone, ſhall be intended a Seiſin for Life; but the Reaſon is, becauſe it is a Maxim of Law,

Ant. 229. *Hob.* 242.

that *verba contra proferentem fortius accipienda ſunt*; and a Seiſin for Life, is the moſt prejudicial Seiſin to him that pleads it. *Maxim of Law.*

Therefore if any Averment follows in the ſame Plea, that does neceſſarily reſtrain the Seiſin to a Seiſin in Fee, upon a general Demurrer it is well. And this is the Caſe here; for the ſubſequent Averment, That he and all thoſe whoſe Eſtate he had, muſt be falſe, unleſs it were a Seiſin in Fee. And if this be neceſſarily included in the Verdict, as undoubtedly it is, then it is aided by it. The Authorities are innumerable. 3 *Salk.* 279.

Adjournatur.

Weddall and *Manucaptors* of *Jocar*. B. R.

See the State of the Caſe, *Ante* 267.

IN Anſwer to the Objection againſt the Plea, that had been made when the Caſe was ſpoken to laſt.

Mr. Serj. *Salkeld*, who was of Counſel for the Bail, inſiſted copiouſly upon a Difference between Pleas of Performance, and Pleas by Way of Excuſe. Had this been pleaded by Way of Performance, he owned it would have been naught; whereas he contended it was by Way of Excuſe, and therefore well. Of the Difference between Pleas of Performance, and Pleas in Excuſe. *Salk.* 520.

The only Matters that can be pleaded as a Performance, to this Recognizance, are either rendring the Body, or paying the Condemnation: But this none of thoſe; *ergo* a Plea in Excuſe.

Had it been a Plea of Performance, it had been naught; becauſe the Iſſue joined upon it, would then according to the Objection, have been material only one Way.

A Plea in Excuſe, in the very Nature of it, implies a Non-performance; and it is always deciſive and effectual; becauſe the Court will intend nothing in Favour of him that pleaded it, but what is contain'd in the very Plea: And therefore the Bail having pleaded here, That the Principal died *ante Emanationem Brevis*, by Way of Excuſe,

Excuſe, the Court ſhall never intend, the Death of the Principal, between the Emanation and the Return of the Writ; ſo that if at a Trial upon this Iſſue, there had been Evidence, that the Principal was alive at the Time of the Emanation of the Writ, Judgment muſt have been given for the Plaintiff; nor would any Evidence have been received of his Death, between the Emanation and Return. As for the Caſes of Debt upon Bond, and *Solvit ante diem* pleaded; not parallel, becauſe pleaded as Performance. *Cro. Jac.* 434. *Robinſon's Entries* 196. *Yelv.* 192. 7 *Co. Rep. Pinnell's* Caſe, 2 *Rolle's Rep.* 187.

There is no Doubt but Accord with Satisfaction, tho' before the Day, may be pleaded in Bar of Debt upon Bond; and yet the Objection will hold equally here, *viz.* That it is poſſible, that tho' this Plea ſhould be found againſt the Defendant, yet he might pay the Money according to the Condition of the Bond at the Day; and therefore the Iſſue joined upon this Plea, material only one Way. No, this is a Plea by Way of Excuſe, which ſuppoſes Non-performance.

Pleading is only ſetting forth that Fact which in Law is a good Diſcharge; if therefore the Death of the Principal *ante Emanationem Brevis*, be ſuch a Fact, as in Law does diſcharge the Bail; certainly the Bail may plead it.

Econtra. Mr. *Forteſcue contra.* What is a good Diſcharge may no Doubt be pleaded; but then it muſt be pleaded properly and in due Form.

The Bail's Plea. The proper Way of pleading it had been, That the Principal died before the Return of the *Ca. Sa.* So is *Thompſon's Entries* 280, and all the Precedents.

The End and Deſign of joining Iſſues, is to be final, and concluſive to determine the Matter one Way or other.

No Iſſue can be joined on this Plea, that can be material both Ways; and it is parallel with the Caſes of *Hill* and *Manby*, *Atwood* and *Coleman*, *Merril* and *Joſſelyn*, where *Solvit ante diem* pleaded, and held that the other Party had no Remedy, but by demurring to the Plea.

Ante 147. 1 *Mod. Caſes in Law and Equity* 345, 346.

As to the 2*d* Point; namely, the Objection taken by the Counſel for the Defendants to the *Scire facias*, *viz.* That the *Scire Facias* was brought not only for the Coſts and Damages given againſt the Principal in the original Action, but likewiſe for the 9*l.* additional Coſts adjudged upon the Writ of Error; whereas it appear'd upon Oyer of the Recognizance, that the Bail was only bound to pay, what was given againſt the Principal, in the original Action: The Objection taken to the *Scire Facias*.

Mr. *Forteſcue* anſwered, 1*ſt*, That the Word *prædict'* ſhould refer only to the 105*l.* and not both to the 105*l.* and the 9*l.* too. Anſwer.

2*dly*, That the Concluſion *Secundum formam & effectum Recogn' prædict'* did neceſſarily tie down the Word *prædict'* to ſuch Damages and Coſts only, as could be recover'd by that Recognizance.

3*dly*, That this Fault might be cured by entring of a *Nolle Proſequi* as to the 9*l.* and taking out Execution only for the 105*l.*

A *Scire Facias* is in Nature of an Action of Debt; and therefore to be governed by the ſame Reaſon.

If I demand too much, I may releaſe it; and this Releaſe is no falſifying the Writ. One may releaſe an ill Demand, as well as a good one, *Hobart* 133. *Mich.* 1 *Annæ*, *Incledon* and *Crips*. *Styles* 175. *Theſau. Brevium* 234. *Hob.* 178. *Salk.* 658, 659.

To this laſt Point Serjeant *Salkeld* replied, That he never before heard of *Nolle Proſequi*'s being entred upon Writs; that he had heard of abridging Counts, but never of abridging Writs; that this was not only a Writ, but a judicial Writ, which is the Act of the Court, and muſt have a Foundation on which it is warranted. Reply.

Parker, Chief Juſtice. There is no Doubt, a Difference between Pleas of Performance, and Pleas of Excuſe, in many Reſpects. But the Queſtion here is, Whether you can make that Time which is immaterial, Part of the Iſſue. *Court.* 1*ſt* Point. Of the Bail's Plea to the *Scire Facias*.

It ſeems to be a general Rule of Reaſon as well as Law, That Circumſtances ought never to be put in Iſſue, any further than they touch the Matter in Queſtion; and whatever Iſſue does otherwiſe is immaterial.

2*d* Point. Whether the *Scire Facias* be faulty?

As to the other Point, the Word *prædict'* muſt refer to the 9 *l.* as well as the 105 *l.* becauſe there is no other End or Purpoſe whatſoever, that the 9 *l.* is mentioned, but only that the *prædict'* may relate to it.

The Words *de placito prædict'* muſt relate to both Pleas, or elſe it is uncertain to which.

Scire Facias a Judicial Writ.

A *Scire Facias* a judicial Writ, founded upon Record; and therefore if a Writ iſſues out, not warranted by the Record, it muſt be quaſh'd.

Pratt, Judge. I did upon the firſt Argument, think the Plea naught; now am ſomewhat doubtful.

Of Pleas in Excuſe.

There is no Doubt but the Defendant might have pleaded, That the Principal died before the Return of the *Capias*; but ſince he has pleaded more to his Diſadvantage, I doubt he muſt prove his Excuſe, in the ſame Way that he has pleaded it.

Tho' this or that particular Day is immaterial, yet Time is material; and the pleading of the Death of the Principal generally, without confining it to ſome Time, would not have been good. Since therefore it was neceſſary for him to confine it to ſome Time, and he has confined it to this Time, tho' this be a narrower Portion of Time, than what he was obliged to, yet ſince it is his own Excuſe, he muſt ſtand and fall by it; and the Court will not intend a Fact in his Favour, which he neglected to plead.

Suppoſe a Bond of a 100 *l.* conditioned for the Payment of 50 *l.* the Defendant pleads 20 *l.* paid in Satisfaction. Upon the Trial of the Iſſue, it appears that ten Pounds were received in Satisfaction, the Verdict muſt go againſt the Defendant; and yet the Sum of ten Pounds, received in Satisfaction, is as good a Diſcharge

in Law, as the Sum of 20 *l.* but being a Plea in Excuſe, he is bound to prove it, as he pleaded it.

Parker, Chief Juſtice. The Difference in the Sum varies the Accord, but ſo does not a Variation of Time.

A different Sum pleaded to be paid in Satisfaction of a Bond, from what is found to have been really paid, varies the Accord. But it is otherwiſe where there is a Difference in Time only.

Suppoſe a Bond, conditioned for the Payment of Money before ſuch a Day; the Defendant pleads that he paid the Money ſuch a Day, according to the Condition of the Bond. Suppoſe upon Evidence the Fact comes out thus, That the Money was paid after the Day he pleaded Payment upon, but before the Day mentioned in the Condition of the Bond; and this is found ſpecially, what is to be done?

If it be once laid down as a Principle, That whatever is pleaded by Way of Excuſe, is neceſſary to be proved, and Part of the Iſſue, then my Brother *Pratt* is right.

Pratt Judge. (Opinion as to the 2*d* Point) If a Perſon has Judgment to recover two diſtinct Sums, and being ſenſible that he has a Right only to one, he releaſes the other, and takes out Execution for the one only, Can this Judgment be revers'd? and yet the Judgment is the Act of the Court.

2*d* Point. Judgment for two diſtinct Sums; Execution may be taken out for one only, and the other releas'd.

But here the *Scire Facias*, tho' it be the Act of the Court, yet it is not purely the Act of the Court, but grounded upon the Prayer of the Party.

Mr. *Forteſcue* has cited no Precedents; but I ſee nothing in the Nature or Reaſon of the Thing, why a *Nolle Proſequi* may not be entred as to the 9 *l.*

King and *Gully*. B. R.

ORDER of Seſſions quaſh'd; ordering the Father to pay ſo much *per* Week towards the Maintenance of his Daughter; becauſe it was not ſet forth in the Order, that ſhe was unable to Work, without which the Juſtices have no Juriſdiction.

Order for Father to pay ſo much a Week for the Maintenance of his Daughter, quaſh'd; becauſe not ſaid, that ſhe was unable to Work.

By

What the Statute means by a Perſon unable to work.

By unable to work, the Act means a Perſon, not able by Work to get his own Living; and not a Perſon that is able to get nothing at all.

There was another Exception to the Order; and that was, That this Allowance was to be paid until further Order; whereas it ſhould have been, as long as the Father continued able to allow, and the Daughter poor and unable to work.

Ant. 85.

Salk. 534.

But this Exception was over-ruled.

The King verſus *Biſhop of Meath* & al'. B. R.

THIS was a Writ of Error, upon a Judgment in a *Quare Impedit*, out of *Ireland*.

There were two Exceptions taken to the Writ of Error, by the Counſel for the Defendant in Error.

1*ſt* Exception to the Writ of Error.

The 1*ſt* was, That the Return to the Writ of Error, was by *Richard Cox Mil.* and not *Capital' Juſtic'*.

Anſwer.

Of Returns to Writs to Error.

In anſwer to this, Mr. Serj. *Salkeld* quoted ſeveral *Entries*. *Co. En.* 225. 228. 231. 234. 244. *Pla.* 6. 248. *Pla.* 8. 249. *Pla.* 9. 252. *Pla.* 10. 257. in ſome of which no Reaſons at all; but only *Record' & proceſſ. de quibus &c. ſequitur in hæc verba*; in ſome the Name of the Judge *infra nominat'* and no more; and produced in Court, ſeveral Precedents of Returns to Writs of Errors, out of *Ireland*, in the very ſame Manner, as in the principal Caſe.

Then he urged, That whenever any Record came into Court, the Time for debating whether the Record was returned by a proper Officer, was the firſt Term; for if it remains a Term undiſputed, it muſt be taken for granted, That it was returned by a proper Officer.

No Officer, but a Sheriff, and that by the Statute of *York*, obliged to ſet his Name to the Return.

The returning of a Record, by a Judge of an inferior Court, to a ſuperior Court, not a Judicial Act, but a Miniſterial one.

Another Exception was taken to the Writ of Error, That the Writ of Error was *Quia cum &c. per breve noſtrum de Quare Impedit*; whereas the Words of the Writ are *quod permittat ipſum preſentare &c.* and there is no ſuch Writ as *Quare Impedit.* 2d Exception to the Writ of Error. No ſuch Writ in Law as a *Quare Impedit.*

To this it was anſwered by Serjeant *Salkeld*, That *Bracton* 246, 247. diſtinguiſhes between the Writs of *Quod Permittat* and *Quare Impedit.* Anſwer.

That *Quod Permittat*, was either an antiquated Writ, or taken away by ſome old Statute now loſt. Statute 13 *Edw.* 1. *cap.* 5. and *Maynard Edw.* 2. *fol.* 300. *Mich.* 10 *Edw.* 2. cited to prove, there never was ſuch a Writ as *Quod Permittat.*

In all Judicial Records it is called a *Quare Impedit*, *item* in Writs of Inquiry, *item* in Writs to the Biſhop *de Cler. Admittend' Raſtall's Entries* 502. *Pl.* 1. 2. 4. 5. 8. 10. *Raſtall's Entries* 507.

The Book call'd *Officina Brevium* 9. and *Theſau. Brevium* 1. call it a *Quare Impedit*; and ſo do many Statutes. If now in Statutes, and in Judicial Records it is known by the Name of *Quare Impedit*, why may it not in Writs of Error?

Then the Serjeant went on to take Exceptions to the original Record.

Tho' in a *Quare Impedit*, both Plaintiff and Defendant may be Actors, *that* muſt be underſtood, when both are out of Poſſeſſion; for when the Defendant is in Poſſeſſion, Plaintiff cannot recover unleſs he make a Title, and the Defendant is not obliged either to make a Title or become Actor. *Hob.* 163.

In a *Quare Impedit* the Plaintiff muſt ſet forth both Seiſin and Vacancy; but here he has failed in both.

Exceptions, taken by the Plaintiff in Error, to the original Record.

1*ſt*, As to Seiſin, the Declaration ſtands thus, *Seiſitus fuit & in advocatione Eccleſiæ*; here the *Et* couples nothing, and *Seiſitus* refers to nothing.

2*dly*, Vacancy; Record thus, *Eccleſiæ præd' vacavit per ceſſionem &c.* Now this is pleading a Conſequence, without ſetting forth the Act, of which this is a Conſequence; it ought to have been pleaded thus, That the Parſon was made a Biſhop, or advanced to a Living incompatible *&c.* as the Fact was, *per quod Eccleſia præd' vacavit.*

3*d* Exception taken to the Record was, That the Concluſion was, *Et hoc paratus eſt verificare*, inſtead of *Inde producit ſectam*, and ſo no Suit before the Court. This not meer Matter of Form.

4*th* Exception, That the *Venire* was returnable upon a Day certain; whereas in a *Quare Impedit*, it ought to have been returnable, upon one of the common Return Days, *Noy* 120. This therefore a Diſcontinuance; and not helped by the Statute of Jeofails, becauſe the King is Party. *Tutchin*'s Caſe.

Salk. 51.

Mr. *Denton contra.*

Anſwer to the Exceptions.

To the Objection about Seiſin, the Word *Et* may be left out, or tranſpoſed thus, *Et de feodo et de jure.*

The Objections concerning the Vacancy, and the *Paratus verificare*, admit of this Anſwer, That Advantage might poſſibly have been taken of them by Demurrer, which Advantage loſt by taking Iſſue.

As to the *Venire*; it was anſwered, That there are two *Venire's*, and to the 1*ſt* there is an Entry of *Vicecomes non miſit breve*, and the 2*d* is returnable upon a common Return Day.

Court.

Court. The Objection of the Seiſin the ſtrongeſt; for it is Nonſenſe at preſent, and every Thing may be cured by leaving out and putting in. Poſſibly in tranſcribing, the Record *de* was omitted; and if the Fact be ſo, it

may be ſet right by a *Certiorari*. *De et in advocatione* would be well.

As to the Omiſſion of the *inde producit ſectam*, This would have excuſed the Defendant in not anſwering; but in Fact he has anſwered it.

As to the calling of the Writ *Quare Impedit*, inſtead of *Quod Permittat:* The Fact is, That there was formerly a Writ of *Quare Impedit*, now out of Uſe; and the Writ *Quod Permittat*, is now erroneouſly call'd by the Name of *Quare Impedit*. This Error has prevail'd in Judicial Writs, and Acts of Parliament; but never yet in Writs of Error. However it being become now a legal Name, the Writ of Error ought not to be diſallowed for uſing of it.

The old Writ of *Quare Impedit* is now out of Uſe; and what is called by that Name, is the Writ of *Quod Permittat*.

As to the Objection, to the Return of the Writ of Error; it ſeems to be wrong. *Capital' Juſtic'* without his Name, or *Richard Cox infra nominat'* had been well; however ſince ſeveral Writs of Error from *Ireland* have been returned in the very ſame Manner, this ought to be allowed.

As to the Objection about pleading the Vacancy: It ought to have been pleaded as Brother *Salkeld* would have had it; but the Vacancy is admitted, by their pleading a Preſentment under it.

Adjournatur.

Stafford and *Forcer* Adminiſtrator of *William Moore*. B.R.

THIS was an Action upon the Caſe, upon ſeveral Promiſſes. As to the 2*d* Promiſe, the Plaintiff declared in this Manner; That *William Moore* the Inteſtate, gave a Note to him the Plaintiff, bearing Date the 1*ſt* of *December* 1704, and reciting that whereas *Stafford* had at the ſpecial Inſtance of the Inteſtate, lent to *Auguſtin*

Motion in *Arreſt of Judgment*.

Stat. of *Limitations*.

Verdict will not help, where upon Face of the Declaration it appears, that it is impoſſible to be ſupported by any Evidence whatſoever.

Auguſtin Moore, Brother of the Inteſtate, the Sum of 100 *l.* and whereas the ſaid *Auguſtin Moore*, had given his Bond for the Repayment of the ſame, upon the 2*d* of *June* following with Intereſt; and for further Security had given a Warrant of Attorney to confeſs Judgment upon the ſaid Bond; the ſaid Inteſtate promiſed, if the ſaid *Auguſtin Moore*, did not repay the ſame with Intereſt, upon the 2*d* of *June* following, purſuant to the Condition of the Bond, that then he would pay the ſame with Intereſt. Avers *&c.*

To this Defendant pleads *Cauſa Actionis non accrevit &c.* Verdict for the Plaintiff,

Moved in Arreſt of Judgment, That notwithſtanding the Jury had found for the Plaintiff, he could not have Judgment; becauſe it appears upon the Face of the Declaration, That the Cauſe of Action, did accrue above ſix Years before the Death of the Inteſtate; for the Cauſe of Action accrued from the 2*d* of *June* following the 1*ſt* of *September* 1704.

Intereſt of Money.

Another Objection was taken, That here bringing of the Action for the Intereſt, as well as the Principal, vitiates the whole. 2 *Rolle's Rep.* 47. *a.*

Parker, Chief Juſtice. As to the Intereſt, we are upon an expreſs Promiſe; and an expreſs Promiſe to pay Intereſt, or Money won at Play will ſupport an Action.

In anſwer to the grand Objection, it was urged, That the Court ſhould take Notice of the common Practiſe of not putting Bonds in Suit, while the Intereſt was duly paid; that this was the Caſe here, that the Obligor did for ſome Time duly pay the Intereſt; and this moved the Jury to find as they did, for it was contended that the Cauſe of Action did not ariſe until the Obligor made Default in Payment of Intereſt.

It was urged that the Note was only the Form of the Promiſe, and Evidence of it; and therefore if a Promiſe made without a Note, be capable of Continuance, a Promiſe by Note muſt be ſo too.

1 *Ventris* 191, held, altho' it did appear by the Declaration, that the Cauſe of Action did ariſe above ſix Years *&c.* That yet the Defendant ſhould not take Advantage of it, without pleading it.

Raym. 86. Plaintiff declares as Executor, upon a Promiſe thirteen Years ago; *non Aſſumpſit infra ſex annos* pleaded. Replication, *Aſſumpſit &c.* Iſſue joined. Verdict and Judgment *pro Quer.* for tho' the Replication was a Departure from the Declaration, Defendant ſhould have demurred to the Replication, inſtead of joining Iſſue. *Ant.* 251, 252.

Here the Declaration aided by a Verdict.

Court. There is a Difference between Declarations upon a Parol Promiſe, and a Promiſe by Note; in the former the Day is not material, in the latter it is. Difference between Parol Promiſe, and Promiſe by Note.

The Iſſue here is upon a Promiſe by this very Note; and therefore impoſſible in the Nature of the Thing, that an Evidence of a ſubſequent Promiſe, or a ſubſequent Note, can prove a Promiſe by this Note.

As to the common Practice of not putting a Bond in Suit, until the Intereſt *&c.* The Anſwer is, That Default of paying the Intereſt, would never give a Cauſe of Action, unleſs there were one before. According to this Note, upon the Nonpayment upon the 2*d* of *June*, *Cauſa Actionis accrevit.* A Verdict will cure any Thing that a Verdict can cure; but not *where* upon the Declaration, it manifeſtly appears, That no Evidence whatever can maintain the Iſſue.

Formerly it was held, That the Parties ſhould not take Advantage of the Statute of Limitations without pleading it. But now the Law is otherwiſe.

Caſe of *Dean* and *Crane* was to this Purpoſe: There was a Promiſe to the Executor within a Year before the Action brought; but the Iſſue joined was, whether the *Salk.* 28.

Promiſe was made to the *Teſtator* within ſix Years before the Action brought; Verdict for the Plaintiff.

Moved in Arreſt of Judgment That it appear'd upon the Face of the Declaration, that the Teſtator was dead, above ſix Years before the bringing the Action; and therefore *&c.* Lord Chief Juſtice *Holt* was of Opinion at firſt, that the Verdict had cured it; but afterwards it was reſolved by the Opinion of all the Judges, That this was a Defect impoſſible for a Verdict to Cure.

Salk. 29. In the Caſe of *Heylin* and *Huskins* 10 *Ann.* there was a Queſtion, Whether a bare Acknowledgment of a Debt amounted to a new Promiſe? and reſolved that it did not. But in that Caſe there was an expreſs Promiſe, upon which the Plaintiff declared, *viz. I deny that I owe you any thing; Prove it, and I will pay you.*

Judgment in principal Caſe was arreſted.

Champney and *Champney.* In Canc.

Marriage Settlement. Conſtruction of it.

IN a Marriage Settlement, a Power was lodged in Truſtees to raiſe 3000 *l.* for a Daughter, to be paid her, at the Age of 21, or Day of Marriage, which ſhould firſt happen, when *Champney* and his Wife ſhould die without Iſſue Male; and in the mean Time an hundred Pounds *per Annum* to be paid her for her Maintenance.

Reſolved *per* Lord Chancellor *Cowper*, upon the Authority of the Duke of *Southampton*'s Caſe; That the Words *when* Champney *and his Wife ſhould die without Iſſue Male*, amounted to a Condition precedent; and that the Time of raiſing the Portion, did not commence, when one of them ſhould be dead without Iſſue Male, and ſo the other be Tenant in Tail, *aprês poſſibilité d' Iſſue* extinct; but when both of them ſhould be dead without Iſſue Male.

Reſolved, That the *mean Time* in which the hundred Pounds *per Annum* was payable for a Maintenance, muſt neceſſarily relate to the intermediate Time between the raiſing the Money and her attaining the Age of twenty one, or Day of Marriage.

Temple and *Welds.* B. R.

AN Action of *Indebitatus Aſſumpſit*, for Money received *per* the Defendant, to the Plaintiff's Uſe. *Aſſumpſit.*

Upon Evidence the Caſe came out thus, The Plaintiff and another laid a Wager; the Defendant held Stakes; the Plaintiff brought Evidence, that he had won the Wager. *Blencowe* that tried the Cauſe, being of Opinion, that the Plaintiff had miſtaken his Action; becauſe this Money, could not at the Time of the Action brought, be ſaid to be Money received to the Plaintiff's Uſe; ſince the Defendant was not to pay the Money, until the Wager was *proved* to be won, The Plaintiff was Nonſuit.

The Plaintiff now moved to ſet aſide his own Nonſuit; becauſe occaſioned by the Judge's miſtaking the Law.

Court. Action well brought; for upon the Wager won, the Money was actually the Plaintiff's, tho' he could not receive it before the Fact was made appear.

Sed adjournatur.

Betts, Executor of ---- verſus *Mitchell.* B. R.

ACTION upon the Caſe, for ſeveral Promiſes made by the Defendant to the Teſtator. Action brought as *Executor*, ſhould have been brought in his own Right.

As to the 5th Promiſe; Plaintiff declares, That the Defendant the 13th of *Auguſt* 1713, made a Promiſſory Note to him *ut Executori* of ſuch a one, payable to the Plaintiff

Plaintiff or Order; and then the Plaintiff concludes, That the Defendant not minding his Promiſe, did not pay *&c.* To this Declaration the Defendant demurs.

Inſiſted upon, That this 5th Promiſe was of ſuch a Nature, as could not be joined with other Promiſes made to the Teſtator. For tho' the Note is made to him as Executor, *that* is only a Deſcription of his Perſon. The Note is payable to the Plaintiff or Order; and by Virtue of the Statute, concerning Promiſſory Notes, it is transferrable by Indorſement; and the Indorſee might maintain an Action.

This as much a new Contract, as if a Bond had been given to the Plaintiff for this Money.

Defendant cannot plead to this Note *Plene Adminiſtravit*; but muſt plead *non Aſſumpſit*.

Plaintiff might have brought an Action upon this Note, without naming himſelf Executor.

This Note will go to the Adminiſtrator of the Executor, and not to the Adminiſtrator *de bonis non &c.*

Court clearly of this Opinion. Judgment *pro Def. niſi.*

Joſſelyn and *l'Acier*. B. R.

Vide Ante. 294.

PARKER Chief Juſtice deliver'd the Opinion of the Court.

Reſolved to be no Bill of Exchange.

In this Caſe, two Points conſiderable, 1*ſt*, Whether this be a good Bill of Exchange? We are all of Opinion, it is not a Bill within the Cuſtom of Merchants; it concerns neither Trade nor Credit; it is to be paid out of the growing Subſiſtence of the Drawer; if the Party die, or his Subſiſtence be taken away, it is not to be paid.

It may be never paid, and yet his Credit unimpeach'd; not payable to Order, nor for Value received.

It does not appear whether the Party, that is to receive it, is to receive it upon Account of a former Debt, or is to receive a Bounty.

As to the 2*d* Point, *viz.* Whether if the Bill by Cuſtom of Merchants, is not a good Bill of Exchange, it may not be ſupported by the Promiſe? All of us are of Opinion, that it cannot.

For as to that Matter it ſtands thus, *Quorum præmiſſorum ratione &c.* and *in conſideratione inde* he promiſed to pay *&c.* The Word *inde* plainly refers to the Bill, as ſupported by the Cuſtom; and conſequently if that fails, the Conſideration muſt do ſo too.

Judgment reverſed.

DE

Termino S. Mich.

2 *Geo.* 1.

In Banco Regis.

Doucett and *Chaplin.*

Writ of *Error.*

WRIT of Error out of the Court of *C. B.* Error aſſigned, want of an Original.

Tho' after a Verdict, want of an Original is, yet an ill Original is not aided by Statute of *Jeofails.* *Salk.* 267.

Upon a Return to a *Certiorari*, directed to the *Cuſtos Brevium*, it appear'd, That the Original was a *Quare Clauſum fregit*; an improper Original for an Action of Debt. And tho' after a Verdict, the Want of an Original, is aided by the Statute of *Jeofails*; yet an ill Original is not aided. 5 *Co. Rep.* 37.

It was anſwered, That a *Quare Clauſum fregit*, is no Original in an Action of Debt; and therefore the Caſe to be conſidered, as if there was no Original at all.

To this it was replied, That the Certificate from the proper Officer, was the only Way of Trial, what the Original in the Action was; and he has certified, That a *Quare Clauſum fregit* was the Original; and this Certificate the Court is bound to give Credit to. 2 *Cro.* 108. *Noy fol.* 4. *Cro. Car.* 272, 281. 1 *Brownlow* 96. *Yelv.* 108. 2 *Cro.* 479.

Court of the ſame Opinion, and would have revers'd the Judgment, becauſe of an ill Original; but Mr. *Reeves* deſiring to ſpeak to it. *Adjournatur.*

Leeds and *Carlton.* B. R.

Spiritual Court. Prohibition. Damages.

A MAN ſues in the Spiritual Court for a Matter, which upon the Face of the Libel, appears to be of Temporal Conuſance, and obtains a Sentence. The Defendant appeals firſt, and then ſues out a Prohibition. In the Declaration upon that Prohibition, and Proceſs thereupon, there is Judgment againſt the Defendant, by *Nil dicit*; and Writ of Inquiry of Damages awarded.

It was now debated, whether Damages were to be given by the Jury upon the Writ of Inquiry, for the Proceedings in the Spiritual Court, from the Beginning of the Suit in that Court; or only for the Proceſs in that Court, ſubſequent to the Delivery of the Writ of Prohibition.

Serjeant *Whitaker* contended, That the Plaintiff in Prohibition was to have Damages in this Caſe, for all the Proceedings in the Spiritual Court, from the Beginning of the Suit; becauſe the Matter appearing upon the Face of the Libel, to be of Temporal, not Spiritual Conuſance, *that* was in Point of Law, a Prohibition to proceed; and their proceeding at all, was both an Injury to the Party, and a Contempt to the Crown.

He labour'd to maintain this Difference, That where the Matter was originally of Spiritual Conuſance, and became Temporal only *propter defectum triationis*, there Damages were to be recovered only for Proceedings after a Prohibition; but that where the Matter was originally of Temporal Conuſance, there the Law was itſelf a Prohibition; and to this Purpoſe he quoted 2 *Inſt.* 299. *Fitzherbert Abr. Pla.* 15. *Tit.* Prohibition. 9 *H.* 6. 56. *Cro. Car.* 559. *W. Jones* 447.

Contra

Contra Serjeant *Darnell.*

This is a Declaration upon a Prohibition, in the common Form; the chief Thing complained of, is proceeding in Contempt of the Prohibition deliver'd.

The Jury upon the Writ of Inquiry are to inquire *de præmiſſis, viz.* the Thing complained of in the Declaration, which is the Contempt of the Prohibition. Were the Law as Serjeant *Whitaker* would have it, the Plaintiff ſhould have declared in another Manner. Poſſibly in a Declaration upon a Prohibition ſetting forth, Whereas all Cauſes, unleſs Teſtamentary or Matrimonial are of Temporal Conuſance *&c.* that yet *&c.* as in *Raſtall's Entries* 485, the Law may be with them; and yet in thoſe very Caſes, Iſſue often joined upon this very Point, *viz.* proceeding after Prohibition delivered *&c.*

For the Sheriff to take upon him to judge what Things are of Spiritual, and what of Temporal Conuſance, would be a Thing of a dangerous Nature; and yet this muſt be the Conſequence, if *&c.*

Parker Chief Juſtice of Opinion, That Damages were to be given, only for the Proceedings in the Spiritual Court, ſince the Prohibition delivered.

This is a Special Action for proceeding in Contempt of the Prohibition; this the very Giſt of the Action; upon this Iſſue is conſtantly joined, which according to what is now contended for, muſt be an immaterial Iſſue; for if the Iſſue be found with the Defendant, That he has not proceeded after the Prohibition delivered, yet if he had proceeded at all, the Plaintiff muſt have Judgment for his Damages. Nay according to this Doctrine, the very pleading this Plea, in this Sort of Actions, is very impertinent; and upon doing which, Plaintiff may ſign his Judgment; for he ought not to plead, That he did not proceed after Prohibition *&c.* but that he did not proceed at all.

No Action lies againſt a Man for ſuing in the Spiritual Court, where he has no Right.

Prohibition is to the Judge, not to the Party; and in this Caſe, this not a Prohibition to the firſt Judge, but to the Judge upon the Appeal.

A further Circumſtance of the Unreaſonableneſs of what is aſked for, is, That the Party deſires to have his Damages, for the Charge, Proceſs and Delay, occaſion'd by his own Appeal.

In a Prohibition, two Things to be conſidered; 1*ſt*, Whether the Party is to be puniſhed? 2*dly*, Whether he is to be eſtopped?

His not proceeding after the Prohibition delivered, prevents his Puniſhment, and excuſes him from Contempt; but cannot hinder the Plaintiff of his Judgment.

If upon this Iſſue, whether the Defendant did, or did not proceed after Prohibition deliver'd, Verdict be found for the Defendant, no Coſts is ever given.

The late Statute about giving Coſts unneceſſary, if this Doctrine had been true.

And of this Opinion was the Court. *Sed hæſitante Pratt* Judge. *Adjournatur.*

King and *Dorrel.* B. R.

UPON a Trial at Bar for compaſſing the Death of the King, it was debated, Whether a Promiſe of Pardon, did not diſable a Man from being an Evidence? *Treaſon. Evidence.*

Reſolved by the Court, That this was an Objection never allow'd, and of no Weight.

Treaſon and ſuch like Crimes, not to be diſcovered but by their Accomplices, who never will be prevail'd with to give Evidence, but in Expectation of a Pardon.

Several Acts of Parliament have incouraged the Diſcovery of Crimes, by the Promiſe of a Pardon. As to

the Opinion in *Keyling*, of Lord Chief Baron *Hale*, to the contrary; he was over-ruled by the reſt of the Judges.

Overt Act. Reſolved, That a conſpiring to levy War, in order to dethrone the King, which is the Civil Death of the King, is an Overt Act to prove the compaſſing the Death of the King.

But a conſpiring to levy War generally, is not an Overt Act to prove the compaſſing the Death of the King; becauſe there may be ſuch a levying War, as may be Treaſonable, without any Intention of depoſing the King; as pulling down Incloſures, Bawdy-Houſes, *&c.*

The Opinion in *Keyling*, *pag.* 20, as oppoſed to Lord *Coke*, held for good Law.

DE

Termino S. Hill.

2 *Geo.* 1.

In Banco Regis.

Baldwin and *Church.*

WRIT of Error out of the Court of *C. B.* The original Action, was an Action of Debt for 20 *l.* againſt two Executors. The one pleads *Plene Adminiſtravit* as to all the Aſſets in his Hands, *præter* 40 *s.* and concludes *Quare Actio non*; the other pleads *Plene Adminiſtravit* generally. Plaintiff demurs generally to both Pleas. Judgment in the Court of *C. B.* for the Defendants. Error brought. *Debt.* *Pleading.*

Mr. *Yorke* for Plaintiff in Error.

If a Man takes upon him to plead to the whole, and then pleads ſuch a Plea, as goes but to Part of the Action, the Plea is bad for the whole.

A Plea is in its Nature intire, and cannot be good in Part, and void or bad for the reſt.

The Defendant has here pleaded in Bar to the Action, ſuch Matter, as amounts to a confeſſing the Cauſe of Action; and conſequently, that the Plaintiff ſhould have recovered. The Defendant ſhould in this Caſe have confeſs'd the Cauſe of Action, that he had Aſſets unadmi-

Caſes quoted *arguendo*, *Rolle's Ab.* 805. *Cro. Car.* 167. 7 *Ed.* 4. *fo.* 8. 9 *Ed.* 4. 13. 21 *H.* 6. 45. *b.* *Dyer* 210. *Cro. Eliz.* 318. *Rolle's Ab.* 928. *Pla.* 5. *Raſtal* 309. *b.* *Pla.* 9.

 niſtred

niſtred to ſuch a Value, and was ready to pay, as far as his Aſſets would enable him.

The Plaintiff had good Cauſe of Demurrer, if one of the Defendants Pleas be ill; and the Court of *C. B.* ought not to have given Judgment for the Defendants.

Salk. 262. The ſame Judgment to be given by this Court, as the Court of Common Pleas ought to have given againſt both Defendants; and that Judgment ought to have been, againſt both Defendants *de bonis Teſtatoris*, and *de bonis propriis* of that Executor that pleaded an ill Plea, as to Damages and Coſts.

For each Executor has by Law an Intereſt in, and Power over the whole Eſtate; and therefore it is, that the Plea of each Executor, ſhall bind the Eſtate of the Teſtator.

If it be objected, That the Plaintiff has committed a Miſtake in his demurring, by uſing the Word *Placitum prædictum* in the ſingular Number; it may be anſwered,

Salk. 219. That *Placitum eſt nomen Collectivum*, and to be taken *reddenda ſingula ſingulis*, according to 1 *Saunders* 338.

Court. Judgment muſt be revers'd; and the ſame Judgment given here, as ſhould have been in the Court of Common Pleas. The Plaintiff muſt take Care to take his Judgment rightly.

The Plea undoubtedly ill; for it ſets forth ſuch Matter, as ſhews plainly, That the Plaintiff has good Cauſe of Action; and yet concludes *Quare Actio non*, which imports that the Plaintiff ſhould not have brought this Action at all.

If a Man bring an Action of Debt for 20*l.* and the Defendant ſhould plead, that he has paid 40*s.* and conclude *Quare Actio non*, *This* would be bad; and yet here the Plaintiff might have brought his Action for the 18*l.* only; whereas in the Caſe of an Executor, the Creditor muſt bring the Action for the Sum, the Debt that is really due, let the Aſſets be never ſo ſmall.

The Reaſon why, tho' the Aſſets be very ſmall, yet Judgment muſt be for the whole Debt, ſeems to be for the preventing a freſh Action, in Caſe of more Aſſets.

Taylor and *Matthews.* B. R.

IF pending the Conſideration of the Court, Plaintiff dies, Judgment may be entred without entring the Continuances; and then it will have Relation to the Day in Bank. *Latch* 92. 1 *Leon.* 187. *Baller* and *Delander*; a modern Caſe. A Continuance nothing but a *Curia adviſare vult.* *Practice.* *Ant.* 30. *Continuances.*

Tho' the Time when in Fact the Judgment was given, muſt be enter'd on the Roll, *that* is only in reſpect to Land, that it may not be bound until the Time of the Judgment given, and ſo Purchaſers over-reach'd. Before this Inconvenience was provided againſt by Stat. *Car.* 2. there might have been an Inconvenience, in entring Judgment without Continuances; there can be none now. *Salk.* 401.

DE
Termino Paſch.
2 *Geo.* I.
In Banco Regis.

Hurtſon and *Aglionby.*

Motion to *plead double.*

PLAINTIFF brings a Writ of Error to reverſe a common Recovery; Defendant moved for Liberty to plead double.

The Motion was oppoſed, becauſe the Act for the Amendment of the Law, whereby a Defendant, by the Leave of the Court firſt obtained, may plead double, was not to be underſtood of a Defendant in a Writ of Error, but a Defendant in an original Action.

But it was inſiſted upon, by the Counſel of the Side with the Motion, That this Act did extend to the Defendant in a Writ of Error, as well as in an original Action. That the one might have as great Occaſion of pleading double, as the other. That it had lately been reſolved, That a Writ of Error did not abate by the Death of one of the Plaintiffs; whereas, as the Law ſtood before that Act of Parliament, it would. That by the ſame Reaſon, by which the Word Plaintiff in that Part of the Act of Parliament, was to be extended to a Plaintiff in Error, the Word Defendant ſhould likewiſe.

It was further urged, That the pleading double was at their own Peril; for if the Court had not Power by this Act of Parliament, to grant them Leave to plead double, the other Side may demur.

And to this Opinion the Court inclined. But the Court made their Motion fruitleſs, by declaring, That one of the Things they deſigned to plead, did upon the Record, appear to be falſe.

Rench and *Britton.* B R.

DEBT upon Bond: The Condition upon Oyer was, That if the Defendant did appear *&c. ad reſpondend' præfat' Johanni Rench de placito tranſgr. ac etiam billæ.* The Defendant pleads the Statute 23 *H.* 6. about Sheriff's Bonds; Plaintiff demurs. *Debt* upon Bond.

For the Defendant in Demurrer, it was inſiſted, That the Condition of the Bond varied from the Writ. The Writ was *ad reſpondend' præfat' Johanni Rench de placito tranſgreſſionis &c. ac etiam billæ ipſius Johannis*; which Words *ipſius Johannis* are omitted in the Condition of the Bond. For the Defendant in Demurrer.

It was ſaid, That this Statute being made to prevent Oppreſſion, was to be taken ſtrictly; and ſeveral Caſes cited to prove, That the leaſt Variation, or Addition to the Condition of the Bond, not warranted by the Statute, makes the whole Bond void; as *Term. Mich.* 37 *H.* 6. *fol.* 1. 10 *Co.* 100. *b. Plow. Com.* 68. *b. Hobart* 13.

But the Caſe chiefly relied upon, as a Caſe in Point, was *Moore* and *Finch*, 2 *Lev.* 177, where the Action was Debt upon Bond, conditioned to appear before his Majeſty at *Weſtminſter*, to anſwer *A.* of a Plea of Treſpaſs, and alſo of a Bill to be exhibited againſt him for 100 *l.* The Defendant pleads the Statute of 23 *H.* 6. and ſhews that the Writ was to appear *coram Dom. Rege* at *Weſtminſter &c.* Plaintiff demurs. And upon Argument, the Opinion

Opinion of the Court was againſt the Plaintiff; 1*ſt*, Becauſe the Conditon of the Obligation was to appear before his Majeſty; whereas it ought to have been *Coram Dom. Rege.* 2*dly*, Not ſaid in the Condition, whoſe Bill he is to anſwer; ſhould have been *ipſius A.*

For the Plaintiff in Demurrer.

Serjeant *Branthwayt* inſiſted, That it muſt be intended the Bill of the Plaintiff; and quoted Caſes to ſhew, that Bonds varying in ſome minute Circumſtances from the Statute, have been ſupplied by Intendment, 2 *Lev.* 128. *T. Jones* 46, Condition of the Bond to appear before the King's Juſtices at *Weſtminſter*; it was objected, that this was not the Title of the Court; yet held good. *T. Jones*, *Wells* and *Denton*; where ſaid, That the Statute does not preſcribe any Form for the Condition of the Bond. 2 *Cro.* 286, Condition of the Bond to anſwer the Plaintiff *de placito debiti* only; and the Writ was to anſwer in a Sum certain; and yet held well.

Court.

Parker, Chief Juſtice. The Statute only requires, that the Sheriff ſhould take a Bond, conditioned for the Appearance of the Party ſuch a Day, at *Weſtminſter*; not ſaid even to anſwer the Plaintiff.

The Appearance mentioned is a perſonal Appearance.

The *ac etiam billæ*, goes only to the Matter of Bail; whether Common, or Special is to be required, and came in Uſe after the Statute.

If the whole Writ might be omitted, as certainly it may, ſince the Statute does not require it, then any Part of it may be ſo likewiſe; nor does this Bond vary from the Form preſcribed by the Statute. If the Party appear, he is bound to anſwer any Bill that ſhall be filed againſt him.

The Bill in the Condition of the Bond, cannot be intended of any other, than the Bill of the Plaintiff.

The reſt being of the ſame Opinion; Judgment *niſi pro Quer.*

Stone and *Taverner.* B. R.

ACTION of Debt upon Bond. Upon Oyer, the Condition of the Bond appear'd to be, Whereas *Stone* had lent *Taverner*, the Sum of 1000*l.* for which the better ſecuring, *Taverner* has executed to *Stone*, an Indenture purporting a Deed of Mortgage *&c.* the Condition of this Obligation is ſuch, That if *Taverner* ſhall from Time to Time, well and truly pay the Intereſt, that ſhall become due, according to the *Proviſo* in the Indenture, until the Principal be paid, then *&c.* Defendant pleads, That he has paid *tantum quantum* became due; Plaintiff demurs. *Debt upon Bond.* *Pleading.*

Squib, pro Quer. Defendant's Plea ill; becauſe he has not ſhewn, what was due, nor what he paid; ſo that no Iſſue could be taken upon it. 20 *H.* 6. 31. 2 *Cro.* 359, *Halſey* and *Carpenter*; Bond conditioned to pay *J. S.* and *J. N.* ſo much Money *tam cito* as they came of Age; Judgment upon Demurrer *pro Quer.* becauſe Defendant did not ſay when they came of Age.

Lord Chief Juſtice *Parker.* I am in Doubt in this Caſe, whether, tho' the Defendant's Plea be admitted bad, you can recover, without aſſigning a Breach of the Condition of this Bond, as this Caſe is circumſtanced.

Judge *Eyre.* The Plea of the Defendant is undoubtedly naught; becauſe this being a Bond for the Performance of Covenants in the Indenture, the Indenture ought to have been ſet forth by the Defendant; whereas all that we know of the Indenture is by Way of Recital in the Bond.

Chief Juſtice *Parker.* The Indenture need not be ſet forth. This not a Bond for the Performance of the Indenture; for that is in the Nature of a Deed of Mortgage for a Year, and is a Security for the Repayment of

the principal Sum with a Year's Intereſt; whereas the Bond is a Security, not for the Principal but Intereſt; nor for a Year's Intereſt only, but for the Intereſt of a 1000*l.* until it be paid, which now appears to be Nine Years more than the Deed. As for thoſe Words in the Condition of the Bond, *According to the* Proviſo *in the Indenture*; they muſt neceſſarily, and can relate only to the Proportion of the Intereſt.

Mr. *Squib* ſeeing the Court thus fluctuating in their Opinions, took another Objection to the Plea of the Defendant.

The Condition of the Bond was to pay to *John Stone*, his Executors, Adminiſtrators and Aſſigns; in his Plea the Defendant ſays, That he paid to *Robert Stone* the Intereſt that from Time to Time &c. and does not ſhew, that *John Stone* is dead, or that *Robert* is his Executor.

Judgment *pro Quer. Niſi.*

Child and *Pierce.* B. R.

Action upon the *Caſe.*

Pleading.

THIS was an Action upon the Caſe, upon ſeveral Promiſes, brought by the Plaintiffs, as Aſſignees of a Commiſſion of a Statute of Bankrupcy againſt *J. S.* Judgment by Default; and Writ of Inquiry executed.

For the Plaintiff in Error.

In a Writ of Error brought to reverſe this Judgment, it was inſiſted, That the Declaration of the Plaintiffs was naught. For they declare, That the Defendant was indebted to them, as Aſſignees of a Commiſſion of Bankrupcy againſt *J. S.* in the Sum of 320*l.* for ſo much Money had and received by the Defendant from the Bankrupt; and not ſaid, That the Money was the Money of the Bankrupt.

It was acknowledged, That in Pleas of Bar, which may be ſupported by common Intendment, this Way of

pleading might poſſibly be admitted, and the Money be intended the Money of the Bankrupt; but not in a Declaration, where the Words ſhall ever be taken in the ſtrongeſt Senſe againſt him that pleads them.

Formerly in Actions of Debt, the whole Agreement was us'd to be ſet forth; but now of late, a more conciſe Way of pleading, has in Actions upon the Caſe obtained. And yet even now to declare in an *Indebitatus Aſſumpſit*, for Goods ſold and deliver'd, would be naught upon Demurrer.

It was argued on the other Side, That this Declaration was good; for that firſt of all, this Declaration ſets forth, That the Defendant was indebted, and then goes on and ſhews how, *viz.* by Money received by the Defendant, *i. e.* by a neceſſary Intendment, ſuch Money as will create a Debt, the Money of the Bankrupt. *Econtra.*

Hicks and *Cockum*, *Term. Trin.* 12 *Annæ*, Judgment in *C. B.* by Default; and upon Error brought, it was inſiſted, That the Declaration being for Goods and Merchandizes *per* the Defendant *ab eodem* the Plaintiff before that Time ſold and deliver'd *&c.* and not ſaid the Goods of the Plaintiff was naught. But the Court was of Opinion, That the Word *Indebitatus* did neceſſarily import, that they were the Goods of the Plaintiff.

Athorpe and *Jones*, *Term. Trin.* 1 *Geo.* Judgment by Default in *C. B.* Writ of Error brought.

Declaration ſet forth, That the Defendant was indebted to the Plaintiff in ſo much Money for the Uſe of a Coach Horſe of the Plaintiff's, delivered by the ſaid Plaintiff to the Defendant.

It was objected, That this Delivery did not neceſſarily import a Debt; for poſſibly, the Defendant might be to pay nothing for the Uſe of him. But the Court were of Opinion, that ſuch a Delivery muſt be intended, as did create a Debt. *Adjournatur.*

DE

Term. S. Trin.

2 *Geo.* I.

In Banco Regis.

Clerk and *Elwick.*

Motion for a Rule upon a Witneſs to an Arbitration-Bond to make an *Affidavit.*

MOVED for a Rule againſt a Man to ſhew Cauſe, why he ſhould not make an Affidavit of his Name being ſubſcribed to an Arbitration-Bond; ſeveral Affidavits being produced, that he had ſeveral Times owned his being a Witneſs, but refuſed to make Affidavit.

Generally true, that Men muſt not be compell'd to make Affidavits.

Stat. 9 & 10 *W.* 3. *cap.* 15.

Urged in Behalf of the Motion, That tho' it be generally true, That no Man can be compell'd to make an Affidavit; yet it muſt not hold true in the preſent Caſe, becauſe then the Statute 9 & 10 *W.* 3. *cap.* 15. will be intirely eluded, *viz.* That all Perſons that agree to end their Differences by an Arbitration, may agree to have this their Submiſſion made a Rule of any of the Courts of Record, and may inſert this their Agreement in the Submiſſion, or Condition of the Bond, or Promiſe; and upon producing an Affidavit of ſuch inſerting, and upon reading and filing ſuch Affidavit, the ſame may be entred of Record in ſuch Court; and a Rule of Court thereupon &c.

Court firſt made a Rule upon him to ſhew Cauſe, why he ſhould not make the Affidavit deſired and the next Term, *viz. Trinity*, they made the Rule abſolute; being unanimouſly of Opinion, That they had a Power, by Rule of Court, to compel ſuch Perſons as are Witneſſes to an Award, to make Affidavits of their being ſo. And whereas it was objected, That there were no compulſory Words in the Act of Parliament; it was ſaid, That this was not neceſſary. That the very Nature of the Thing, gave the Court a Juriſdiction. That the Perſon by ſubſcribing his Name as a Witneſs, had undertaken to give Evidence at a proper Time, and in a proper Manner; and that here, the Act of Parliament having made it neceſſary for the Evidence to be given by Affidavit, the refuſing to do it was an Injury to the Party concern'd; and that in a Matter belonging to the Juriſdiction of this Court.

On Breach of an Award made a Rule of Court, the Party may proceed both by Action and Attachment at the ſame Time. *Salk.* 73.

And as to the Objection, That the Party had here made and determined his Election, which the Law gave him, either to proceed by Action upon the Arbitration-Bond, or to make the Award a Rule of Court: It was anſwered, That the Party might at Pleaſure reſort to this new Remedy given by the Statute; and *that* tho' he ſhould have got even Judgment upon the Bond; for perhaps, an Attachment upon this Rule of Court, a more quick and effectual Proceſs, than ſuing out an Execution upon a Judgment.

Writ iſſuing out of another Court, and returnable here, Court may compel proper Officer to make a Return.

Similiter, the Court may compel the making an Affidavit in the preſent Caſe.

—— *County of* Hereford. B. R.

Settlement. County Gaol as to Settlements, conſidered as ſituate in every Pariſh in the County.

SAID by Lord Chief Juſtice *Parker*, the reſt aſſenting, That the Gaol of the County was with Reſpect to Settlements, to be conſidered as ſituate in every Pariſh in the County. That therefore the removing of a Perſon to Gaol did not make any Alteration of the Settlement; and that conſequently a Baſtard Child born in the County Gaol, was to be eſteemed as gaining a Settlement by Birth, in that Pariſh, where the Parent was ſettled, when ſent to Gaol.

Harvey of *Comb*'s Caſe. B. R.

Commitment for *High-Treaſon Generally*, good.

A COMMITMENT for Treaſon generally, without expreſſing the Species of Treaſon, good; for the Proceſs the ſame in one Sort of Treaſon as in another.

High-Treaſon Bailable by *B. R. Salk.* 103, 104. But ſee 1 *Mod. Caſes in Law and Equity*, 93, *&c.*

The Court of King's Bench have Power to Bail in High-Treaſon, notwithſtanding the Suſpenſion of the *Habeas Corpus* Act.

And upon an Affidavit made, That the Priſoner was in ſuch an ill State of Health, that longer Confinement would bring his Life in Danger, it has been done. Lord *Montgomery*'s Caſe.

Carrington and *Warren*. B. R.

Motion for Leave to *plead double.*

COURT was moved, That the Executor being likewiſe Heir at Law, might have Leave to plead double, *viz. Solvit ad diem*, and *Riens per Deſcent*, to an Action of Debt upon a Bond.

An Heir ſhall not have Leave to

Court refuſed the Motion, without an Affidavit, that he had *Riens per Deſcent.* The ſame Law in Caſe of an

Adminiſtrator, who ſhall not be allowed to plead *Plene Adminiſtravit*, and no Aſſets, without Affidavit. For this a Matter incumbent upon the Plaintiff to prove, and yet lies more in the Knowledge of the Defendant than Plaintiff. Duty of the Court not to aſſiſt the Defendant, by giving Leave to plead double, but upon probable Ground, that the Demand of the Plaintiff, *quoad* the Defendant, cannot be maintained.

plead *Riens per Deſcent* with another Plea, except he make Affidavit, that he has *Riens per Deſcent*. Nor ſhall an Adminiſtrator have Leave to plead *Plene Adminiſtravit*, and no Aſſets, without an Affidavit that he has no Aſſets.

King verſus *Dixon and his Wife.* B. R.

THIS was an Indictment againſt *Dixon* and his Wife, charging, That they *& uterque eorum* did unjuſtly and unlawfully ſuch a Day *et diverſis aliis diebus & vicibus tam antea quam poſtea* keep a common Gaming Houſe, *contra pacem & formam Statuti &c.* And to this Indictment the Defendant demurs.

Indictment againſt Man and his Wife for keeping a *Gaming-Houſe.*

The 1*ſt* Objection taken againſt the Indictment was, That it ſhould not have been brought againſt the Huſband and Wife; but the Huſband only. 1.

Court. This Objection would have Weight in it, if the Property or Ownerſhip of the Houſe, was the Matter in Queſtion; but it ſignifies nothing here, where not Property, but a criminal Management of the Houſe, (in which the Wife may probably have as great, nay a greater Share than the Huſband) is the Fact charged.

This Caſe not to be diſtinguiſhed from the Caſe of the *Queen* and *Williams*, which was an Indictment againſt Huſband and Wife, for keeping a Bawdy-Houſe, and held good; for as there the Wife may be concerned in Acts of Baudry, ſo here ſhe may be active in promoting Gaming, and furniſhing the Gueſts with all Conveniencies for that Purpoſe.

Ant. 63. *Salk.* 384.

The

2. The 2*d* Objection was, That it was charged in the Indictment, that they *et uterque eorum* kept a Gaming-Houſe, *&c.* which was wrong; for two Perſons cannot jointly and ſeverally keep a Houſe; the keeping of the Houſe by the Huſband and Wife, is not a keeping the Houſe by the Huſband only, or by the Wife only. For this Purpoſe was quoted, 2 *Rolle*'s 51, an Indictment againſt four Perſons for uſing the Trade of a Plummer, *contra* Stat. 5 *Eliz.* The Indictment, That they four *et uterque eorum* uſed the Trade, held naught; becauſe the Uſer of the one could not be the Uſer of the other.

Salk. 382. *Court.* The Caſe in *Rolles* not applicable to the preſent Caſe. For there the uſing of the Trade, not being the Offence; but the uſing the Trade, without having ſerved an Apprenticeſhip, (an Act to be performed by each ſingly and ſeverally) it was an Offence that was in its own Nature impoſſible to be committed jointly: Whereas here this may be committed by both jointly, and the Addition of *uterque eorum*, is but a further ſpecifying and corroborating the former Charge; for whoever ſays that both of them did keep *&c.* does in Truth and Conſequence ſay, that each of them did ſo.

3. 3*dly*, It was objected, That this Indictment was upon a particular Statute, *viz.* Stat. 33 *H.* 8. *cap.* 9. *ſect.* 11. which Statute chalking out a particular Method of Proceeding, for the Recovery of 40*s. per* Day, the Party could not proceed by Indictment.

Keeping a Gaming-Houſe, a Nuſance at Common Law. *Court.* Keeping of a Gaming-Houſe, an Offence indictable at Common Law, as a Nuſance; nor will the Concluſion of the Indictment, *contra formam Statuti*, bar the Party from ſupporting the Indictment by Common Law, ſuppoſing it could not be maintain'd upon the Statute.

But the Court were clear of Opinion, That an Indictment was not taken away by any Words in the Statute: So far from it, that there were Words in the Statute, which unleſs they had relation to proceeding by Indictment, muſt have no Senſe nor Signification at all.

For the firſt, this Difference was taken, That where a Statute creates, or makes a Thing an Offence, that was not ſo before by the Common Law, gives a certain Penalty, and preſcribes a Method for the Recovery of it, *there* the Act muſt be purſued: *Contra* of an Offence at Common Law, for which an Act gives a new Penalty, or a new Remedy; for there the Remedy at Common Law, ſhall not be taken away without negative Words.

Where the Statute makes the Offence, no other Remedy can be purſued, but what the Statute gives; otherwiſe of a Crime indictable before. *Salk.* 460.

For the ſecond, the Words of the Act inſiſted on were, *to be recovered by &c. or otherwiſe*; where it was ſaid that all the Remedies, or different Ways of proceeding, beſides by Indictment, having been enumerated before, thoſe Words *or otherwiſe*, muſt be underſtood of Indictments, or nothing.

4. It was objected, That if this were to be conſidered, as an Indictment for a Nuſance at Common Law, it would not be good for want of concluding, *ad commune nocumentum* of the King's Subjects.

Court. Not neceſſary to conclude ſo here; the Offence in its own Nature, importing that it is ſo. Beſides, the Word *common* ſupplies this Defect, if it were one.

5. Laſtly, it was objected, That as this Indictment was laid, the Penalty of 40 *s.* a Day given by this Statute could not be recovered; for not ſaid that *per ſpatium* of one Day, or ſeveral Days they kept *&c.* but only that ſuch a Day *&c.*

Court. Keeping a common Gaming-Houſe any Part of the Day enough. Indeed more Days might have been

laid; for the Time ſo uncertain as to all but one Day, that only 40 *s.* recoverable.

Judgment *pro* King *niſi.*

DE

Termino S. Mich.

3 *Geo.* 1.

In Banco Regis.

Fazakerley, Chamberlain of London, verſus *Wiltſhire.*

By-Law of City of *London.* See *Salk.* 143, 192.

THE only Queſtion was upon the Validity of a By-Law in the City of *London*, That none but Free Porters ſhould intermeddle with the carrying or unloading of Corn, Salt, or Sea-coal, or any other Goods out of any Barge, Lighter *&c.* between *Stains* Bridge and *Kendal* in the County of *Kent*, that are to be imported into the Port of *London*, under the Penalty of forfeiting 20 *s.* for each Offence; except in Time of Danger, and to ſave the loſing of Goods.

It was argued againſt the By-Law by *Peer Williams* to the following Effect.

The By-Law reſtraining the Number of Carts in the Streets of *London*, did not prevail without the greateſt Difficulty; and the main Reaſon for which that By-Law was adjudg'd good, was, That an unlimited Number of Carts would occaſion Stops, and be a Nuſance to Paſſengers.

A Navigable River in all Reſpects like a Highway; to be free to all, and none ought to be debarred from uſing it.

A Man cannot certainly have a more natural Right to any Thing, than the free Uſe of his Bodily Labour; and therefore a By-Law, that ſhall reſtrain a Man from the Uſe of *that*, as this does, muſt be naught; eſpecially when no Recompence is given in lieu of it.

To the Performance of this Imployment, the ſerving an Apprenticeſhip not neceſſary; for it requires not Skill, but Strength.

This is a By-Law that enhances the Price of Carriage, and encourages Idleneſs.

The Extent of this By-Law, from *Stains* Bridge to *Kendal* in the County of *Kent*, much too great.

The King by his Proclamation could not make ſuch a By-Law; and certainly no derivative Power, can be greater than the primitive.

Not ſo much as an Exception in this By-Law, for the Owner of the Goods, or his own Servants; ſo that according to this Law, a Man can neither carry his own Goods, nor employ his own Servant, *&c.*

This By-Law penned in obſcure and ambiguous Words; very uncertain what Act may amount to intermeddling; perhaps the helping and aſſiſting a free Porter, tho' at his own Requeſt, may be conſtrued ſuch.

From all theſe Reaſons put together, he concluded, That this By-Law was both unreaſonable, and prejudicial to the Subject; and therefore void. Caſes quoted by him in his Argument were, *Lutwyche Rep.* 564. *Moore* 591. 1 *Rolle's Abr.* 304. 2 *Brownlow* 177. *Carter* 68, 118. *Jones* 144. 3 *Mod.* 158.

Banneaux

Banneaux and *Plaſtead.* B. R.

Memorandum, when neceſſary, may be enter'd upon Record, to explain the Day in the Term, to which the Declaration belongs.

A DECLARATION was delivered generally as of the laſt Term; and in that Declaration it did appear, That the Cauſe of Action did not ariſe before the Middle of that Term. Upon a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, That the Declaration being as of the laſt Term generally, muſt have Relation to the firſt Day of the Term; and conſequently the Declaration will in Point of Law, be antecedent to the Cauſe of Action.

It was urged by the Counſel for the Plaintiff, That by entring of a ſpecial Memorandum upon the Record, *viz.* ſuch a Day of the Term, which would not contradict but explain the Record, this Motion would fall to the Ground; and that this might be done without moving the Court.

Parker and *Pratt* of Opinion, That they might enter this Memorandum of Courſe, and without Leave; and the rather becauſe here was no Deceit, as to the Defendant; for he very well knew, that he was not arreſted, nor Bail put in, until the Middle of the Term; and conſequently that this Declaration could not be as of the firſt Day of the Term.

Eyre of Opinion, That the ſpecial Memorandum ought to be entred; but that the proper Way was by Motion.

Upon which Serjeant *Cheſhyre*, to end the Diſpute, moved for Leave; and had it.

Queen and *Simpſon.* B. R.

Vide Ante. 248.

THIS was a Caſe, that had been long depending; and the only Queſtion reſerved to be ſpoken to, was, Whether upon the Statute of 3 *&* 4 *W. & M. cap.* 10. about Deer ſtealing, the Juſtices of Peace, might convict the Offender in his Abſence, upon his Default to appear, being duly ſummon'd? Or whether the Juſtices ought not by iſſuing out their Warrant, for apprehending the Party, have compell'd him to appear?

Queſtion, Whether a Deer ſtealer having been ſummon'd, and not appearing, may not be convicted in his Abſence?

Stat. 3 & 4 *W. & M. cap.* 10. about Deer ſtealing

Reeves for the latter Side of the Queſtion.

The Statute being ſilent in this Matter, the Rules of Common Law ought to be purſued, as far as poſſibly they can.

The Judgment of the Juſtices in this Caſe, is final, and no Re-examination; natural Juſtice requires, that the Juſtices ſhould have the Party brought before them, if poſſible.

The Stat. 33 *H.* 8. *cap.* 20. the *firſt* Statute, that gave Leave for a Man to be tried in his Abſence; but this Statute was held to be by Conſequence and Implication, repeal'd by that Statute of *Philip* and *Mary*, whereby all Trials are left to the Courſe of the Common Law. *Staundforde* 90. *b.*

Stat. 33 *H.* 8. *cap.* 20. the *firſt* Stat. that gave Leave for any Man to be tried in his Abſence. *Alt.* 1 & 2 *P. & M.* 10.

The Conſequence of a Conviction upon this Statute, very penal, *viz.* for want of ſufficient Diſtreſs, a Year's Impriſonment and Pillory.

Subject Matter of this Statute a Treſpaſs at Common Law, in which Caſe a *Capias* lies; therefore the Juſtices here ought to have iſſued out their Warrant, which is their *Capias.*

A *Capias* lies for a Treſpaſs at Common Law.

No Words in this Statute, that give Juſtices a Power to convict without Appearance; if they have it by Implication,

plication, it is a greater Power than is veſted in the Judges of *Weſtminſter-Hall.*

By this Act of Parliament a corporal Puniſhment is to be inflicted; and according to the Rules of Common Law, where the Judgment is to be corporal Puniſhment, Judgment cannot be given in the Abſence of the Offender.

Even in Attainders by Parliament, Execution cannot be awarded without the Perſon be preſent, and aſked whether he has any Thing to ſay, why Judgment ſhould not *&c.*

But the very Statute we are now upon, plainly ſuppoſes the Party ſhould be preſent; for in the 4th Sect. Power is given, for Fear the Offender after Conviction ſhould eſcape, to the Conſtable, other Officer, or Perſon proſecuting, to *detain*; which plainly imports his being preſent.

It is obſervable, That tho' by the Statute, the Power of convicting, is given to the Juſtices of the County where the Offence is committed; yet in Caſe the Party fly, and is apprehended in another County, then this Power is devolved to the Juſtices of that County where the Party is taken, purely that the Party may be preſent when convicted.

As to the Objection, That this Conſtruction will render Convictions difficult; becauſe a Perſon may be ſummon'd, when he cannot be taken. The Anſwer is, that if Summons in this Caſe were ſufficient, it muſt certainly be a perſonal Summons; and he that can be perſonally ſummon'd, may be taken.

Forteſcue, Solicitor General, *contra.*

Contra. By the Statute which we are now upon, a new Judge and a new Way of proceeding is eſtabliſh'd. The very Deſign of the Statute is to prevent thoſe Delays, that attend the Forms of Common Law Proceſs. The Proceedings in this Caſe, where the Statute is ſilent, and does not interpoſe, to be conducted by the Rules of natural Juſtice.

He denied the Rule laid down, That in ſummary Proceedings the Rules of the Common Law are to be obſerved; eſpecially ſuch Rules, as would directly overturn the Nature of a ſummary Proceſs, and make it more prolix *&c.*

If this Act of Parliament had not intended to have pared away all the Forms of Common Law, ſome of the Proceedings by the Common Law, would have been taken Notice of by the Act.

It is very expreſly ſet forth in the Conviction, That the Party was duly ſummoned, and had Notice to appear and ſhew Cauſe, why he ſhould not be convicted.

This is all, that the Rules of natural Juſtice require; he might have appear'd if he pleas'd; and ſurely he ſhall not take Advantage of his own Wrong, or elſe it will be in the Power of any Perſon at Pleaſure, to avoid being convicted.

As there are no Words in the Act of Parliament, that give a Juſtice of Peace Power to convict in the Abſence of the Offender; ſo neither are there any Words in the Act, that make his Appearance neceſſary: If therefore the Act of Parliament is ſilent, and may be expounded either Way, that Expoſition ought certainly to prevail, which will render the Act moſt effectual.

This is not to be conſidered as a Criminal Proceeding, but a Civil one for a certain Sum of Money.

11 *Co.* 93. *Bagge's* Caſe; a Perſon may be disfranchis'd, loſe his Freehold, if when duly ſummon'd he will not appear; and the conſtant Practice is to proceed to Disfranchiſement, in the Abſence *&c.* if the Party being duly ſummoned refuſe to appear.

Nay this Point was carry'd one Step higher in *Glide's* Caſe, *Trin.* 4 *Will. & Mary*; for it is there held, That if the Party lives out of the Town, he need not be ſummon'd; and the Reaſon is, becauſe it was his Duty to attend.

N. B. There were two Convictions; and in one of them, the Party before Conviction was heard by his Attorney:

torney: Therefore it was obſerved by the Solicitor General, That tho' ſtrictly ſpeaking, according to the Forms of Law, the Offender could not make an Attorney to appear for him; yet in this Caſe, where the Proceſs is of a ſummary Nature, and the Rules of natural Juſtice principally to be regarded, it is material, that any Perſon was heard in his Behalf; becauſe then it cannot be ſaid, That the Perſon was condemned unheard.

No Caſe or Authority quoted to ſhew, That the Juſtice has a Power to apprehend.

It is true, That where an Act of Parliament is plain, Conſequences are not to be regarded; for that were to aſſume a legiſlative Authority: But where an Act of Parliament is doubtful, there the Conſequences are to be conſidered; and Care is to be taken, That ſuch an Interpretation, be not put upon the Act, as will quite elude the Force of it; and that will be the Caſe here, if there can be no Conviction, but upon the Appearance of the Party.

Hob. 97. Statutes ought to be ſo expounded, as not to elude the Force of 'em.

Whereas no Inconvenience, no Breach of any Rules of natural Juſtice attends the other Interpretation, Statute 5 & 6 *W. & M. cap.* 22. about Hackney-Coaches almoſt a parallel Caſe; and the general Practice of the Commiſſioners there, is to convict without Appearance, upon a Summons.

Uſual for the Commiſſioners of Hackney-Coaches to convict upon Summons, without Appearance.

Parker, Chief Juſtice. A Court may perhaps in Prudence, not care to give Judgment in the Abſence of the Party; but I ſee no Reaſon but that it may be done, and I take it to have been done in *Mawgridge*'s Caſe.

Judgment may be given in the Abſence of the Offender.

Execution cannot indeed be awarded but in the Preſence of the Party; but *that* depends upon this Reaſon, That there may poſſibly be a Miſtake of the Perſon; or ſome other Reaſon may have happened, ſubſequent to the Judgment, why Execution ſhould not be awarded, which it is but reaſonable the Party ſhould have an Opportunity to inſiſt upon.

But Execution cannot be awarded otherwiſe than in the Preſence of the Party, and why.

But here had the Party appear'd, it is taken for granted, Judgment might have been given in his Abſence.

I am of Opinion that the Summons muſt be perſonal; and therefore altogether as eaſy to take, as to ſummon.

The Act plainly ſuppoſes, That the Juſtices have a Power to apprehend him; or elſe the Clauſe would be a nugatory Clauſe, which ſuppoſes the Offender may be apprehended.

The Expreſſion of *detaining* does likewiſe ſuppoſe him preſent; otherwiſe the Act ſhould have run thus, *in Caſe he be preſent.*

It is a known and general Rule, That a Statute ought to be interpreted by the Rules of Common Law; and therefore ſince this is in Nature of a Treſpaſs, for which a *Capias* by Common Law lies; ſince the Act plainly ſuppoſes Juſtices of Peace have a Power to apprehend him, and that they will execute this Power; and ſince it is as eaſy to apprehend, as it is to ſummon, I am of Opinion at preſent, That the Juſtices ought to have the Party before them.

Statutes ought to be interpreted by the Rules of Common Law, in like Caſes.

Judge *Pratt.* If a Juſtice of Peace has a Power of iſſuing out his Warrant, for the bringing of the Party before him, it muſt be given him, either by the expreſs Words of the Statute; or as a Power, incident to the Juriſdiction, the Statute inveſts him with; if the latter Way, I fear, he muſt have the ſame Power allowed him in all ſummary Proceedings.

If a Summons be ſufficient, I know not why the ſame Summons ſhould not do here, as in other Caſes, *viz.* the leaving at the uſual Place of his abode, *where* the Party cannot be found; and then a Perſon may be ſummon'd, when he cannot be taken. *Adjournatur.*

Vide Poſt. Hill 3 *Geo.* 1.

Corporation of Banbury. B. R.

Whether a a Corporation can ſubſiſt without a Head? 1 *Mod. Caſes in Law and Equity* 129.

PARKER Chief Juſtice. If a Mayor be not choſen by the Time preſcribed by the Charter; and there be no Proviſion in the Charter for the old Mayor's continuing on, until a new Mayor is choſen in, the Corporation is diſſolved; and conſequently cannot proceed to a new Election.

Indeed ſome are of Opinion, That this may be cured, by the iſſuing out of a Writ under the Great Seal, impowering them to proceed to a new Election; but others are of Opinion that even this will not do, and that there is no other Remedy but to obtain a new Charter from the Crown. But Nobody ever thought, that in ſuch a Caſe, the *Quondam* Corporation could revive itſelf, by chooſing a new Head, without ſuch a Writ under the Great Seal.

Johnſon and *Louth.* B. R.

Queſtion, Whether a Gunner be ſuch a Soldier as is privileged from Arreſts for Debt?

THE Queſtion was, Whether a Gunner was within the late Act of Parliament, that orders thoſe liſted as Soldiers, to be diſcharged from Arreſts for Debt.

He is liable to the ſame Puniſhment, in Caſe of Mutiny and Deſertion, as other Soldiers.

It was objected, That they were not within the Act; becauſe they were Warrant Officers, and took a particular Oath; and becauſe the Makers of this Act of Parliament, ſeem'd apprehenſive that they would not have been liable to the ſame Puniſhment, in Caſe of Mutiny and Deſertion, as other Soldiers, unleſs they had by an expreſs Clauſe made them ſo.

It was likewiſe inſiſted, That the Deſign of the Act, being to encourage Men to enter into the King's Service, muſt not be extended to ſuch in the Army, whoſe Pay was ſo conſiderable, as that this alone would be a ſufficient Inducement. The Pay here was 1 *s.* 4 *d. per* Day.

Court. As to the Clauſe in the Act relating to Mutiny and Deſertion; the Act only ſuppoſes it poſſible, that there might be a Doubt; and therefore wiſely reſolves to make every Thing clear, where the Puniſhment to be inflicted is nothing leſs than Death.

But then the Act of Parliament reſolves the Doubt, as we do now, That he is a Soldier.

The Matter does not turn upon the *Quantum* of the Pay; if it did, a Trooper moſt certainly would be out of the Act, whoſe Pay is much more conſiderable than that of the Gunner, and who generally gives a good Sum of Money for his Place.

A Trooper privileged by the Stat. from Arreſts for Debt, as well as other Soldiers.

The Reaſons why a Gunner's Pay is more conſiderable than that of the Soldier, are, 1*ſt*, in Reſpect of their Skill; and 2*dly*, the Hazard they run; both which Conſiderations render their Service more neceſſary, and make it more reaſonable, that they ſhould not be taken away from the Service.

Accordingly he was diſcharged.

DE
Termino S. Hill.
3 *Geo.* I.
In BANCO REGIS.

Cole and *Hawkins.*

Vide Ante. 251.

Aſſumpſit. In tranſitory Actions Time and Place not material.

ASSUMPSIT. The Plaintiff declares upon a Promiſe made the 16th of *Jan.* 1706. The Defendant pleads in Bar, the Statute of Limitations; and that the Cauſe of Action did not accrue within ſix Years before the exhibiting of the Bill. The Plaintiff replies, the Bill was exhibited the 23d of *Jan.* 1713; and that Cauſe of Action did ariſe within ſix Years before exhibiting the Bill.

To this the Defendant demurs.

Now *Parker*, Chief Juſtice, deliver'd the Reſolution of the Court.

Such Defects in Pleading, as are only Matters of Form, and would be cur'd by Verdict, are now aided upon a general Demurrer, by Stat. for Amendment of the Law.

Judgment muſt be given *pro Quer.* For this being the Caſe of a Parol Promiſe, the Day in the Declaration is not material; and therefore the Plaintiff in his Replication, has only departed from an immaterial Part of his Declaration; which would be cured by a Verdict, and is now aided upon a general Demurrer, by Statute for Amendment of the Law.

Were it more than Matter of Form, a Verdict finding the Promiſe at another Day, could never cure it, as moſt certainly it would.

And for this Purpoſe, was quoted the Caſe of *Lee* and *Raynes*, 1 *Lev.* 110, reported likewiſe 1 *Keble* 566, 578, where this Learning laid down, That for the Plaintiff in his Replication, to vary from the Time or Place in his Declaration, in order to follow the Defendant's Plea, is not a Departure.

Varying in the Replication from the Time or Place laid in the Declaration, is no Departure in tranſitory Actions, *Salk.* 222.

In the old Books indeed this would have been a Departure, 22*d Aſſiſe* 86.

Tho' it wou'd have been a Departure by the old Books.

And unleſs what ſtrictly ſpeaking is a Departure, be ſometimes allowed; unleſs the Plaintiff, where the Defendant by his Juſtification, makes the Time or Place material, may follow the Defendant's Plea, tho' it lead him to another Time or Place; all that Doctrine, That in tranſitory Actions, where Time and Place are not material, the Plaintiff may declare at any Time or Place, muſt fall to the Ground.

In tranſitory Actions, where Time and Place are not material, the Plaintiff may declare at any Time or Place.

Judgment *pro Quer.*

Burgh and *Blunt.* B. R.

SERJEANT *Cheſhyre* moved for an Attachment, againſt the Judge of the Court of *Holderneſſe* in *Yorkſhire*, for diſobeying a *Tolt*, whereby the Cauſe was to have been removed into the County Court, from whence, as the Serjeant believed, the Parties deſigned by a *Pone*, to remove it into the Court of *C. B.* and tho' by a *Recordare*, it might have been removed at once, into the Court of *C. B.* yet the Parties might take this Way, if they pleas'd.

Motion for an Attachment for diſobeying a *Tolt.*

It was urged by the Serjeant, in Behalf of his Motion, That Diſobedience to the *Tolt* was a Contempt to the Law of the Land, over which the Court of *B. R.* were Guardians: That that Court was inveſted with a general

Ant. 48, 60. Juriſdiction over inferior Courts; and was to take Care, not only that they did not tranſgreſs their Juriſdiction, but likewiſe that they proceeded regularly in Matters confeſſedly within their Juriſdiction.

Judge *Eyre.* The more proper Way is firſt by *Mandamus* to oblige them to obey the *Tolt*; and if notwithſtanding *that*, they proceed, an Attachment may be granted for Diſobedience to the *Mandamus.*

I do not ſee, why we may not as well grant an Attachment, againſt the Judge of a Spiritual Court, for proceeding after an Appeal, as do what is now aſk'd.

Parker, Chief Juſtice. Several other Remedies beſides that deſired. You may have a Prohibition; or you need make no Defence, and bring your Writ of falſe Judgment; and when they ſhall return that they were ſerved with the *Tolt*, as they muſt, it will then appear, That all the Proceedings are erroneous; for their Juriſdiction fail'd, upon the Receipt of the *Tolt.*

But the Serjeant preſſing his Motion, and Serjeant *Page* affirming, that he had the Motion granted him, in the Caſe of *King* and *Langſton*, the Court made a Rule to ſhew Cauſe, why an Attachment ſhould not be granted.

King and *Theed.* B. R.

Motion to ſuperſede a Writ *de Excommunicato capiendo*, before the Return, and granted.

THE Court was moved to ſuperſede a Writ *de Excommunicato capiendo.*

The Objection to the Writ was, That it was too general; and that it did not appear, That the Cauſes for which the Party was to be impriſoned by the Writ *de Excommunicato capiendo*, were of Spiritual Conuſance;

for it was only *in quodam negotio* concerning the Correction and Reformation of Manners.

To this it was ſaid, That the ſame Strictneſs is not required in Writs as in Libels; and further it was much inſiſted upon, That he was ſaid to be excommunicated, according to the Canon; and the Caſes of the *King* and *Toſeland*, and the *King* and *Fowler* were quoted. *Salk.* 293.

But the Court were clearly of Opinion that the Writ was too general. In the Writ *de Excom. cap.* the Special Cauſe muſt be expreſs'd.

Then it was inſiſted upon, That the Motion for the *Superſedeas*, was made too early; becauſe before the Sheriff had returned the Writ; and to this Purpoſe 1 *Siderfin* 181, was cited.

Parker, Chief Juſtice. This is a Writ which Iſſues out of Chancery, returnable into this Court, and deliver'd to the Sheriff in the Preſence of the Juſtices; and this whole Matter is entred upon Record. Now when the Court of Chancery have iſſued out this Writ, and it is delivered to the Sheriff, the Chancery if applied unto for a *Superſedeas*, would probably ſay, they had nothing to do with it. Writ *de Excom. cap.* iſſues out of Chancery, returnable in *B. R.* Chancery can't ſuperſede it. *Salk.* 294.

And then if the Court of *B. R.* cannot grant a *Superſedeas* before the Return, the Conſequence will be, That a Subject may for a long Interval of Time, *viz.* between the Delivery of the Writ to the Sheriff and his Return, be wrongfully deprived of his Liberty, without Poſſibility of Redreſs.

The Command to the Sheriff to execute the Writ, is the Command of the King; and the Queſtion is, Whether this Court, ſhall let the Sheriff execute that Writ, when the Execution of it is intruſted to them, and an Entry of Record made of it, *where* the Writ appears to the Court to have iſſued out erroneouſly.

Certainly

Certainly this Court might have quaſh'd it, before it was deliver'd to the Sheriff; *a fortiori* therefore now; for it is no more than for us to correct our own Miſtakes, call back a Writ that iſſued thro' our Overſight.

Eyre, Judge. The Return of the *Habeas Corpus*, no Relation to the Writ *de Excommunicato capiendo*, which intirely deſtroys the Authority of the Caſe in *Siderfin*.

I take this Court to be poſſeſs'd of the Cauſe by the Entry of the Writ upon Record, and Delivery over to the Sheriff.

The Writs that go out of this Court, if they iſſue erroneouſly, are frequently ſuperſeded before the Return; tho' thoſe Writs as much out of the Hand of the Court, as this Writ.

Pratt, Judge. I take the Reaſon of the Proviſion, That this Writ iſſuing out of Chancery, and returnable into this Court, muſt firſt be open'd in this Court, and in the Preſence of the Juſtices of this Court be deliver'd to the Sheriff *exequend'*, to be a Proviſion in Favour of the Liberty of the Subject, That a Subject may not be deprived of his Liberty, by Writs that iſſue of Courſe out of Chancery, until ſuch Time as the Judges of this Court, ſee whether he has deſerved it or not.

To ſay this Writ cannot be ſuperſeded before the Return, is as much as to ſay, That this Court ſhall not correct their own Miſtake, until the Miſtake has occaſion'd as much Miſchief as poſſibly it can.

Chief Juſtice *Parker*, This Writ is actually entred upon Record; for the Entry is *Delib' fuit* in the Preſence of the Juſtices, to the Sheriff *exequend'*.

The Writs that iſſue out of this Court, never entred at large upon Record, before the Return, tho' in Strictneſs they ought; but here the Writ is always enter'd at large.

The ſuperſeding of our own Writs, before the Return, is a ſufficient Proof, that Writs may be ſuperſeded, tho' not in Court. The Obligation of the Sheriff to execute this Writ, reſults from an Act of this Court; and ought therefore to be ſubject to the Controul of this Court.

It is a general Rule, That whenever the Court is poſſeſs'd of a Record, they will proceed upon it. *Maxim.*

And upon this Ground it is, that if the Plaintiff in an Appeal becomes Nonſuit, the Court will nevertheleſs oblige the Party to plead to it.

In Fact theſe Writs have not been ſuperſeded before their Return; but I ſee no Reaſon why they may not. The Writ *de Excom. cap.* never ſuperſeded before the Return, until now.

A *Superſedeas* was granted accordingly.

College of Phyſicians verſus Dr. *Weſt.* B. R.

THE Queſtion was, whether a Man, that had taken his Degree of Doctor of Phyſick, in either of the Univerſities, might not practiſe in *London*, and within ſeven Miles of the ſame, without a Licence from the College of Phyſicians? Queſtion, Whether a Perſon having taken the Degree of Dr. of Phyſick, in either of the Univerſities, might not practiſe in *London*, without a Licence from the College?

The Court clear of Opinion, That a Licence from the College was neceſſary; and that by Reaſon of the Charter of Incorporation, confirmed by 14 & 15 *H.* 8. *cap.* 5. penn'd in very ſtrong and negative Words.

As to the Teſtimonials granted by the Univerſities, upon a Perſon's taking the Doctor's Degree; the Court was of Opinion, That theſe Teſtimonials might have the Nature of a Recommendation; they might give a Man a fair Reputation, but conferr'd no Right; and conſequently all thoſe Statutes, which have confirmed the Privileges of the Univerſities, could revive or confirm

nothing, but the Reputation, that this Teſtimonial might give ſuch Graduates.

And whereas it has been inſiſted, That by the laſt Clauſe of this Statute, it is ſaid, That none ſhall practiſe in the Country without a Licence from the Preſident and three Elects, unleſs he be a Graduate of one of the Univerſities; it was ſaid all the Inference from *that* would be, That poſſibly two Licences may be neceſſary where a Perſon is not a Graduate.

In the Caſe of Dr. *Levet*, Lord Chief Juſtice *Holt* did not think this a Queſtion worth being found ſpecially.

The College of Phyſicians without Doubt more competent Judges of the Qualifications of a Phyſician, than the Univerſities; and there may be many good Reaſons for taking a particular Care of thoſe, that practiſe Phyſick in *London*. *Adjournatur*.

Queen and *Aires*. B. R.

State of the Caſe, *Vide Ante*. 258.

LORD Chief Juſtice *Parker* gave the Reſolution of the Court.

We are all of Opinion that Judgment muſt be given for the King, and againſt the Defendant.

1. The firſt Objection is, that a *Scire Facias* is not the proper Remedy, the King not being concerned; but that an Action upon the Caſe ſhould have been brought.

A *Scire Facias* a Writ of Right, where the Patent is injurious.

As to this, Sir *Oliver Butler*'s Caſe, 3 *Lev.* 220, is an expreſs Authority, That a *Scire Facias* is the proper Way; and that the Crown *de Jure* ought to permit Subjects to ſue in the Name of the King.

2. The ſecond Objection, That there ſhould have been an Office found, may be anſwered by the ſame Authothority; for the Objection was there taken, and held,

That no Office was neceſſary, becauſe there was no Forfeiture.

As to the Objection ariſing from the Days upon which *&c.* the Anſwer to *that* is, That it is Matter of Evidence, of which the Jury are the proper Judges. 3.

Bracton Lib. 4. *cap.* 46, ſhews how the Law anciently ſtood, with reſpect to different Days and Diſtances, within which Fairs and Markets, could or could not be held.

Markets in *London* very cloſe upon one another; and the publick Good requires it ſhould be ſo, which will over-ballance a private Detriment.

Another Objection was, That it was ſaid, that the *Grant* was to the Prejudice; whereas it ſhould have been, that the *Markets* were to the Prejudice. And in Favour of this Objection, 11 *H.* 4. 5. was quoted. 4.

Anſwer. In the Caſe quoted, the Grant was conditional, *viz.* ſo far as it ſhould not be prejudicial; and therefore I doubt not, but in that Caſe, if there had been a Prejudice, an Action upon the Caſe would have lain, notwithſtanding the Grant; but the Caſe before us, is the Caſe of an abſolute Grant, which is to be ſet aſide, becauſe it breaks in upon another's Right.

The finding in the *Ad quod damnum* is thus, It would be no Damage if we grant. What would be no Damage? The Grant.

As to the Objection, That the *Scire Facias* was diſcontinued by the Death of the Queen; we are all of Opinion, That this is helped by the Stat. 1 *Ann. cap.* 8. penn'd in the ſtrongeſt Terms imaginable. 5.

Judgment was given againſt the Defendant.

Thornby

Thornby and *Fleetwood.* B. R.

Vide ante. 113.

JUDGMENT having been given for the Defendant in *C. B.* a Writ of Error was brought in *B. R.*

Argument *pro Quer.* in Error.

Mr. *Reeves pro Quer.* in Error.

This Caſe depends upon the Conſtruction of three Acts of Parliament; all of them Acts made *pro bono publico*, to prevent the Growth of Popery; and therefore they all ought to have a large and liberal Interpretation, ſuch an Interpretation as will beſt anſwer the Deſign of their making.

Stat. 1 *Jac.* not repeal'd either by 3 *Jac.* or 3 *Car.*

The firſt Queſtion in this Caſe is, Whether the Stat. *primo Jacobi*, is not repeal'd by *tertio Jacobi*, or *tertio Caroli*?

That it is not repeal'd by *tertio Jacobi*, plain enough; becauſe the Perſons, Offences and Penalties, in theſe two Acts of Parliament, are different.

Nor is it repeal'd by 3 *Caroli.*

It is not pretended to be repeal'd directly, and by ſo many expreſs Words; on the contrary it is ſaid in the Beginning of 3 *Car.* that the Stat. 1 *Jac.* ſhould be in full Force.

Such an Interpretation, if poſſible, ought to be put upon theſe two Acts, as that they may both continue in Force; eſpecially when the latter Act takes Notice of the former, as an Act in Force, and which ought to continue ſo.

If Statute *primo Jacobi* was repeal'd by *tertio Car.* then the Offenders againſt 1 *Jac.* would be in a better Condition after Stat. 3 *Car.* than before, which no one can imagine who reads the Preamble of Stat. 3 *Car.* But this would plainly be the Caſe; their Capacity to pur-

chaſe would be reſtored *&c.* The Stat. 1 *Jac.* as to Perſons already beyond the Seas would be intirely ineffectual; for contrary to Law, that Perſons out of the Land ſhould be outlawed, unleſs in ſome particular Caſes eſpecially provided for.

Lord *Coke* 3 *Inſt.* 178. is poſitively of Opinion, That Stat. 1 *Jacobi*, is in Force, notwithſtanding the Stat. 3 *Jacobi* and 3 *Caroli.*

Stat. *primo Jac.* about Roman Catholicks, how to be interpreted.

The ſecond Queſtion in the Caſe, is, Whether any Eſtate will veſt in the Offender, notwithſtanding the Stat. 1 *Jac.*

The Words whereof, as to this Purpoſe, are: *Shall in Reſpect of himſelf only, and not in Reſpect of his Heirs or Poſterity, be diſabled to inherit, purchaſe, take, have or enjoy, any Profits, Hereditaments, Chattels, Debts, Legacies &c. And that all Eſtates, Terms and Intereſts whatever to be made, ſuffer'd or done, to the Uſe of any ſuch Perſon, or upon any Truſt or Confidence, mediately or immediately, to or for the Benefit or Relief of any ſuch Perſon, ſhall be entirely void.*

Hard to imagine that all Manner of Conveyances whatever, ſhould be made void; and yet the Capacity of having the Lands veſt in him, not taken away.

As for thoſe Words, *Not in Reſpect of his Heirs or Poſterity*, the Meaning of that is only to enable the Heir to inherit from any remote Anceſtor, notwithſtanding this Incapacity or Diſability of the more immediate Anceſtor.

The Interpretation contended for on the other Side, is directly contrary to the Words of the Act. For whereas the Act ſays, *That in Reſpect of himſelf, he ſhall not inherit &c.* They ſay *he ſhall*, and by that Means be enabled by Fine *&c.* to bar the Heir; which if he be Proteſtant, will moſt certainly be done.

This then is an Interpretation flatly againſt the Words of the Act, in Favour of the Offender, and to the Prejudice of the Heir, who is by the Act of Parliament, deſigned to have all the Power over the Eſtate.

Hobart 336, mentions two Sorts of Rights, *viz. Jus acquirendi & Jus alienandi*, ſo that according to him, the Right of Alienating, is look'd upon as a Right or Intereſt.

As to the Objection, That if this be a Right or Intereſt, it is ſuch a one, from which no Advantage can poſſibly accrue to the Party; becauſe upon Sale the Money is forfeited: It may be anſwered, 1*ſt*, That Money may be diſpos'd of ſecretly, may be ſent beyond Sea, and the Forfeiture impoſſible to be come at.

Beſides 2*dly*, The Power of diſpoſing of the Eſtate is a very conſiderable Privilege, tho' he were not to get any Money by it.

To the Objection framed from thoſe Words, *And not in Reſpect &c.* beſides what has been ſaid before, they prevent Corruption of Blood, and make the Puniſhment Perſonal only.

To the Objection, That by Interpretation of Law, the Crown is to have the Profits, during Non-conformity:

Penalties impos'd by Statute, and not otherwiſe diſpos'd of, muſt go to the Crown.

It may be anſwered, That the Rule laid down by them, muſt be admitted for Law; *viz.* That in Penal Statutes, when the Act is ſilent to whom the Penalty is forfeited, the Crown ſhall have it. And ſo it muſt have been here, had the Words of the Act been, *ſhall forfeit*; and not ſaid to whom. But this is not the Caſe; for here the Act creates an Incapacity in the Offender to *take*; and if he cannot take, moſt certainly he cannot *forfeit*. 1 *Inſt.* 13. *a.*

Iſſues of Land forfeited to the King, upon Outlawry in Perſonal Actions; but Alienation before Inquiſition taken is a Bar.

If the King is to have the Profits only, and not the Eſtate, then has the King directly the ſame Intereſt, as he has upon Outlawry in Perſonal Actions; which is a very precarious Intereſt; for according to 21 *H.* 7. 7. *a.* this Pernancy of the Profits may be determined, by the Alienation of the Perſon outlawed. It muſt be owned, that this Caſe is not altogether Law, for reſolved *Raymond* 17,

mond 17, and *Hard.* 101, that after Inquiſition found, the Perſon outlawed cannot alien; and ſo is the Caſe of *Britton* and *Cole* 9 *W.* 3. But ſtill at any Time before Inquiſition found, the Intereſt of the King may be defeated, by the Alienation of the Perſon outlawed. *Salk.* 395.

The Act being ſilent, as to the Perſon, who ſhall take, it muſt be interpreted according to the Rules of Common Law. Statutes *where* ſilent to be interpreted by the Rules of Common Law.

And here it may be proper to conſider the Nature of Diſabilities at Common Law, which are of three Sorts. Of Diſabilities by Common Law.

1*ſt*, *Propter delictum*, as in Caſe of Attainder for Treaſon or Felony.

2*dly*, *Propter defectum ſubjectionis*, as in Caſe of an Alien.

3*dly*, *Cauſa profeſſionis*, as in Caſe of a Monk.

In the firſt Caſe, *viz.* Attainder for Treaſon, the Eſtate is forfeited to the King, and the Blood is corrupted. A Capacity is indeed left in the Party to purchaſe for the Advantage of the Crown; but a Perſon thus attainted can purchaſe nothing for his own Benefit; neither can he take by Deſcent. Diſability *Propter delictum.*

The Law is the ſame in an Attainder of Felony; ſave that the Lands are forfeited to the Lords of whom they are held.

Now the Diſability in this Act of Parliament, differs from the former in theſe Reſpects. 1*ſt*, It is temporary, during the Non-conformity. 2*dly*, It is a Perſonal Diſability only; for it does not corrupt the Blood. 3*dly*, The Party is intirely diſabled and incapacitated to purchaſe.

The ſecond Sort of Diſability at Common Law, is that *propter defectum ſubjectionis*, as an Alien. Diſability *Propter defectum ſubjectionis.*

And ſuch a one has no inheritable Blood in him; he cannot be Heir to any Body; nor can any Body be Heir to him. Indeed it is reſolved in the Caſe of *Collingwood*

wood and *Pace*, reported at large 1 *Ventris*, That this ſhall not hinder any collateral Relation from inheriting.

An Alien may purchaſe for the Advantage of the Crown. This Diſability comes nearer to the Diſability created by this Act; but yet differs from it: For firſt, the Iſſue is not diſabled by the Statute; and ſecondly, the Party is made intirely incapable of purchaſing.

Diſability *Cauſa profeſſionis.*

The third Sort of Diſability by Common Law, is that of a Monk; and this Diſability ſeems in every Reſpect to agree with the Diſability created by this Act.

A Monk cannot purchaſe; no more can the Offender againſt this Statute.

The Heir of a Monk not diſabled from claiming by him; ſo it is here.

The Monk when deraigned to be reſtored; the Offender here when he conforms.

When the Law ſays a Monk is *Civiliter mortuus*, this to be eſteem'd only a ſimilitudinary Expreſſion, and what is uſed concerning other Perſons, as one that had abjured the Realm; for a Monk with Reſpect to all the Advantages of the Church, is as much alive as any other Perſon whatſoever. 1 *Co. Inſt.* 132. *b.*

That Interpretation therefore ought to prevail, where the Act is ſilent, as will beſt ſquare with the Rules of Law, in like Caſes.

Thus in 3 *Co.* 85. *b.* we find the Statute *de Donis*, expounded in ſeveral Inſtances, by the Rules of Common Law.

This Statute will be made effectual, if interpreted by the Rules of Law in Caſe of a Monkiſh Diſability.

And this likewiſe will anſwer the grand Objection, What becomes of the Eſtate during the Life of *Philip*?

Fitzherbert Mortdaunc. 47, 55. A Man has Iſſue two Sons, the eldeſt Brother goes beyond Sea, Father dies, the ſecond Son in a Writ of *Mortdaunceſtor*, recovers the Eſtate, for it ſeems the being beyond Sea, was then look'd upon as an Incapacity; and yet there held, That upon the Return of the elder Brother, the

Land ſhould be diveſted out of the younger Brother, and reveſt in the elder.

Philip incurred the Diſability of being an Alien before the Deſcent; and becauſe the Law will not caſt a Deſcent upon a Perſon diſabled by Attainder or otherwiſe, therefore the Dutcheſs does not put up her Claim under any of the diſabled Perſons, but as a Reverſioner, 1 *Ventris* 417.

But to return to the grand Objection, *viz.* If the Eſtate in Fee ſhould go to him in Remainder, or Eſcheat, what is to be done in Caſe *Philip* have Iſſue, or conform himſelf?

To this it may be anſwer'd, 1*ſt*, That there are not in the Act any Words of Reſtitution with Reſpect to the Offender himſelf. Indeed after Conformity he is to be diſcharged from his Incapacity; but nothing appears in the Act, whereby he is to be reſtored, to what he has loſt during his Non-conformity.

In this Reſpect, it may be compared to the Effects of Denization, with Reſpect to Deſcents to and from Aliens, 1 *Ventris* 419.

But if it ſhould happen by Accident, that ſome of the Poſterity ſhould be hurt; yet is not this a ſufficient Objection?

It is a received Maxim of Law, That a Freehold can never be in Suſpenſe or Abeyance, ſave in Caſes of abſolute Neceſſity. 1 *Inſt.* 342. *b.* If then the Freehold muſt be in Somebody, where muſt this Freehold be but in the Reverſioner? *Maxim of Law.*

In *Plowd.* 48. *b.* there is an Inſtance of the dodging of a Freehold; and tho' this Caſe is in Part denied to be Law, in 3 *Co* 10. *b.* yet there it appears, the Freehold muſt veſt in the King, to prevent Abeyance.

But the Iſſue of *Philip* may be let in acccording to the Rules of Law. 49 *Edw.* 3. 16, there is this Caſe, A Tenant of the King, deviſes his Executors ſhall ſell his Land, and dies without Heir; Land ſhall veſt in the

King; and if the Executor afterwards ſells the Land, it ſhall reveſt.

To this Purpoſe, is the Caſe before cited, where, upon the Return of the elder Brother, the Land ſhall reveſt in him. And another Caſe there put, a Diſſeiſor dies without Heir, Land eſcheats, yet the Diſſeiſee may bring his Action for the Land againſt the Lord; which is a ſtranger Caſe than *that* before us; for not juſt that the Iſſue in Tail, ſhould ſuffer for the Act of Tenant in Tail. Lord *Coke* in his 3*d Rep.* 61. *b.* delivers it as his clear Opinion, That if a Man makes a Feoffment in Fee, to the Uſe of himſelf and his Wife in Tail, then to the Uſe of the Huſband in Fee, has Iſſue a Daughter and dies, leaving his Wife privily with Child of a Son, by which Means the Reverſion in Fee deſcends to the Daughter; and the Wife before the Birth of the Son levies a Fine, or ſuffers a common Recovery: In this Caſe, whether the Daughter enters, or does not enter; whether ſhe joined in the Fine, was vouched in the common Recovery, or did any other Act to diſable herſelf, yet the Son born afterwards ſhall have the Eſtate-Tail; for not reaſonable that any Act of the Daughter, ſhall prejudice the Son *in utero Matris.*

Tho' before a late Act of Parliament, it was cuſtomary to veſt an Eſtate in Truſtees, for the Preſervation of contingent Remainders; becauſe by a Principle of Law, a Remainder muſt veſt, either during, or at leaſt when the particular Eſtate determines; yet has it never been thought neceſſary in Caſe of a Remainder actually veſted, even before the late Statute, to veſt the Eſtate in Truſtees, for the Preſervation of the Inheritance to after-born Children.

The Dutcheſs might in a *Formedon*, deduce her Pedigree from the Donor, taking no Notice of the Donees, according to 8 *Co.* 88.

Serjeant *Cheſhyre* argued *pro Def.*

He argued, That the Eſtate muſt neceſſarily veſt in the Offender, to anſwer the *Proviſo* in Caſe of Conformity; for if the Eſtate does not veſt, the Encouragement to Conformity will be taken away; there being no Poſſibility according to Rules of Law, for the Heir to take, but thro' the Anceſtor. Argument *pro Def.* in Error.

He doubted whether the Anſwer to this Objection would hold, *viz.* That the Iſſue ſhould for his Benefit be allowed to ſay, that the Anceſtor did take, when every Body elſe muſt ſay that he did not take.

He obſerved, That the ſaving to the Poſterity, was inſerted in the very Body of the Act, and did not come in by Way of *Proviſo*; which ſhews it to have been firſt in the Thoughts of the Law Makers.

He obſerved, That it was enough for the Defendant, if the Eſtate muſt veſt in the Anceſtor for the Benefit of the Iſſue.

He obſerved likewiſe, That the Title of the Defendant, did not neceſſarily depend upon the Validity of the common Recovery; becauſe *Philip* was alive, and either had Iſſue, or (which was all one in Intendment of Law) was capable of having Iſſue.

Then he proceeded to ſhew, That that Interpretation of the Act, whereby the Eſtate was adjudged to veſt in the Offender, was *firſt*, more ſafe; *ſecondly*, more conſonant to the Rules of Law; and *thirdly*, would more effectually promote the Deſign of the Act.

1*ſt* More ſafe; becauſe if the Anceſtor does not take, the Act is altogether ſilent who ſhall. Beſides, as the Legiſlators did not intend to reſtrain the Offender abſolutely from purchaſing; for (in his Opinion) he might purchaſe for his Heirs to enjoy after him, but not to retain: So by a Parity of Reaſon, the Law Makers did not intend to reſtrain him from taking by Deſcent, for the

the Benefit of his Iſſue; but only from taking to retain for his own Benefit.

He urged, That their Interpretation created a Difference never thought of by the Law Makers, as to the Time, when the Deſcent happens; *viz.* if it happens before the Conformity of the Offender, then with Reſpect to that Eſtate, his Conformity (according to them) ſhall not at all avail him; but if it happen after Conformity, then he ſhall take.

The Act of Parliament would moſt certainly have provided for the Reverſioner, if they deſigned it ſhould go over to him.

As to what was ſaid concerning the Regard the Law paid to the Certainty of a Freehold, and that it ſhould not be in Abeyance, ſave in Caſes of abſolute Neceſſity, he allowed *that* to be Law, but thought it made entirely for him; becauſe unleſs the Eſtate did veſt in the Anceſtor, there could be no Tenant to the *Præcipe.*

He obſerved, That this came to be a Queſtion after the Death of the Offender, who, during his Life, had always been eſteem'd to have a good Title, and forty Years after the Offence committed: That a Writ of *Dower* had been brought againſt the Anceſtor, and Judgment againſt him in that Action; and this Judgment confirmed in Parliament, which could not have been, unleſs he had been a good Tenant to the *Præcipe.*

That unleſs this Interpretation prevailed, and the Eſtate allowed to veſt in the Offender, many Marriage Settlements and Purchaſes would be overturned; and Multitudes of Leſſees, all claiming under this Offender, muſt unavoidable be ruined. Upon theſe Accounts, he concluded his Conſtruction of the Statute, to be the moſt ſafe.

2*dly*, He argued, That this Conſtruction was moſt conſonant to the Rules of Common Law, *where* no particular Direction is given, how the Eſtate ſhould go; for *there* the Law always throws it upon the King.

And where can this Power be lodged ſafer than in the Crown? Who ſo zealous and able to put the Law in Execution? *tutiſſima eſt Cuſtodia quæ ſibi Creditur.* *Maxim.*

Thus in Outlawries, Attainders for Treaſon or Felony, the Offender may take for the Benefit of the Crown.

3*dly*, This Interpretation will more effectually promote the End and Deſign of the Law.

This is not, as is pretended by the other Side, a lowering of the Penalty. The Profits of the Land is both in Law and Reaſon the Land itſelf, *Co. Lit.* 4. *b.* And he who is excluded from taking the Profits, is excluded from the Land, as to all Purpoſes of Profit and Advantage for himſelf.

According to the Interpretation they would put upon the Act, it may ſo happen, that a Roman Catholick only thro' the Misfortune of a foreign Education, may be excluded, to make Way for a rigid Papiſt bred at home.

Then he argued, That this Offence being pardoned by Stat. 2 *W. & M. cap.* 10. *A. D.* 1690. the Diſability was ſo *ex conſequenti*; and that this Pardon coming out before the Time of the Deſcent, was equivalent to a Conformity, 3 *Lev.* 331, 332.

But it may be objected, That this is a Fact not found in the ſpecial Verdict.

To which he anſwered, That this Act being a general Law, the Court muſt *ex officio* take Notice of it. And had the Offender not been included in the Act, it would have been incumbent upon the other Side, to ſhew that he was excepted out of the Pardon, 1 *Levinz* 26, 88.

Then he argued from a Clauſe in the 2*d* of *William* and *Mary*, wherein it is expreſly provided, That that Act of Parliament ſhould be taken Notice of in Evidence, without pleading, That by a Parity of Reaſon, the Court ought to take Notice of it, though not found by Verdict.

Then by a nice and minute Obſervation of the Difference between the two Acts of *primo Jacobi*, and *tertio Caroli*, he ſhewed, That tho' the former was not repeal'd by the latter, yet it was ſtrengthned, enlarged and explained by it.

Then he inſiſted, That the Eſtate-Tail, ſubſiſting unſpent, it could not go over to him in Reverſion.

Philip in Judgment and Conſideration of Law, may have Iſſue as long as he lives. Nay, he further inſiſted, That he might have Iſſue at the Time of the Deſcent: Nay, That it muſt be ſuppos'd, that he has Iſſue now alive; That had the Caſe been otherwiſe, the contrary ſhould have appear'd in the ſpecial Verdict.

Notwithſtanding the Endeavours of the Counſel of the other Side, he ſaid it ſtill remain'd a Doubt, how in Caſe the Eſtate is to go over to the Reverſioner, by what Rules of Law, the Eſtate can be brought back again, for the Sake of the Offender, (in Caſe of Conformity) or for the Iſſue.

Ant. 360. The Caſe of *Fitzherbert Mortdaunc.* 47. a hard Caſe, and not Law now.

Ant. 362. As to the Caſe put of a Diſſeiſor dying without Heir: That Caſe proves no more, than that as long as the Tortious Eſtate did ſubſiſt, ſo long (and longer in the Nature of the Thing were impoſſible,) the Lord had a Right.

But no Caſe has yet been cited, where the Entry of him in Remainder or Reverſion, had been held lawful, the Eſtate-Tail ſubſiſting and remaining unſpent.

The veſting and reveſting of Eſtates, a Thing not at all favour'd in Law.

He acknowledged, That in 1 *Co. Rep.* 87. it is held, That a Grant of a Rent *de novo*, to ceaſe during the Minority of the Heir of the Grantee, was good, and would ceaſe accordingly.

But to this he anſwered, 1*ſt*, That this does not hold in Caſe of a Grant of Rent *in eſſe*.

2*dly*, That the Eſtate in the Rent itſelf, did not ceaſe; but the Eſtate was only exonerated in Point of Render, and not of veſting.

In 23 *Edw.* 3. 19. (the ſame Caſe with *that* juſt mentioned in *Co. Rep.*) it appears, That the Wife of the Grantee did recover the Rent in a Writ of Dower, with a *Ceſſet Executio*, during the Minority of the Heir; and that Judgment was affirmed in Parliament, which could not have been, if it had ceaſed intirely.

Hobart 346. Tenant in Tail attainted of Treaſon, and reſolved, That it worked no Corruption of Blood, Becauſe *that* would have produced a Ceſſer of the Eſtate-Tail, by which Means the Eſtate would have been taken from the King, and gone to him in the Reverſion, which the Act did not intend.

This Reaſon will hold here, for the Heir cannot take by Deſcent, where the Anceſtor did not take; for the Anceſtor is the Root from whence the Inheritance muſt be derived.

That the Donee died without Iſſue of his Body, neceſſary Words in all *Formedons*; which is a plain Proof, That a *Formedon* will not lie, but upon the Death of the Donee without Iſſue.

If a Monk had Iſſue at the Time of his Profeſſion, he in the Remainder cannot bring a *Formedon*. If the Dutcheſs had brought her *Formedon*, the Life of *Philip* had been an unanſwerable Objection.

Adjournatur. Vide poſt. Trin. 4 *Geo.* 1.

Cook and *Dutcheſs of Hamilton.* B. R.

THIS was a Writ of Error upon a Judgment in the Court of Common Pleas. The Court being about to give their Opinion for the Affirmance of the Judgment, it was moved by the Counſel for the Plaintiff

Writ of Error.

Queſtion, Whether the Record was removed; by Reaſon of a Variance be-

tween the Record deſcrib'd by the Writ of Error, and the Record return'd.

tiff in Error, That the Record was not removed; there being a plain Variance between the Record deſcribed by the Writ of Error, and the Record returned by the Court of Common Pleas.

The Caſe as to this Point, ſtood thus.

The Writ of Error run thus, *Quia in recordo & proceſſu acetiam in redditione judicii loquelæ quæ fuit in Cur. noſtra coram vobis & ſociis veſtris Juſtic. noſtris de Banco per breve noſtrum inter J. S.* and 31 Defendants there named, *Error intervenit &c.* And by the Record returned, it appear'd, That the original Action was between *J. S.* and the 31 Defendants before named, and one Defendant more; and that the Verdict was likewiſe had againſt the 32 Defendants; but that the 32*d* Defendant died before Judgment, and that Notice was taken by an Entry upon the Record of his Death; and the Judgment was given only againſt the 31 named in the Writ of Error.

This was urged, 1*ſt*, to be a Variance between the Writ deſcribed by the Writ of Error, and the Writ in the Record returned.

2*dly*, It was inſiſted, That the Offence or Treſpaſs mention'd in the Writ of Error, which was a Treſpaſs by 31 Defendants, muſt be a different Treſpaſs from *that* in the Record returned, which was a Treſpaſs by 32 Defendants.

Lord Chief Juſtice *Parker*, deliver'd the Reſolution of the Court, to the following Effect.

We are all of Opinion, That this Writ of Error is well brought, and the Record well removed, notwithſtanding both theſe Objections.

The firſt Objection is capable of three Anſwers.

1*ſt*, That the Word *Inter* does not refer to *Breve*, but *Loquelæ*. It is true, it may refer to either; ſo that the Court will, ſince the Rules of Language will admit of it, refer it to that, which will uphold the Writ of Error. If there be a *Comma* put between *per breve noſtrum*,

ſtrum, and the Word *Inter*, Then the Word *Inter* will plainly refer not to *Breve* but *Loquelæ*.

The Word *Breve*, only uſed to ſhow what Way the Suit was commenced, by Writ or Bill.

If the Writ of Error had been *ſine brevi*, then it had been impoſſible, from the Nature of the Thing, that the Word *Inter*, could refer to *Breve*.

2*dly*, Suppoſing the Chief Juſtice of the Court of Common Pleas, may be made by Writ, as well as the Chief Juſtice of the King's Bench, then the Words *per breve* may refer to the Chief Juſtice.

3*dly*, When any one of the Defendants die, it is no longer a Writ againſt him; and then the Caſe is all the ſame, as if he had never been named in the Writ. To this Purpoſe was quoted the Caſe of *Oliver* and *Hunning*, *Trin.* 13 *Gulielmi*, where it was reſolved, That an original Writ was determined by Outlawry; *a fortiori*, it will be ſo in the preſent Caſe by Death?

An Original Writ is determin'd by Death, or Outlawry.

To the 2*d* Objection we anſwer, That the Identity of the Treſpaſs, does not depend upon the Number of the Perſons that committed it; for the Treſpaſs may be the ſame, be it committed by five or ten Perſons. And to this Purpoſe the Caſe of *Hunt* and *Rawſon*, *Trin.* 10 *Gulielmi* was relied upon, as being a Caſe full in Point.

The Identity of a Treſpaſs, does not depend upon the Number of Perſons, ſaid to have committed it.

A Court of Juſtice ought to endeavour expounding Things ſo, that they may be brought to ſome End.

The Judgment given in the Court of *C. B.* was affirmed.

Woodright and *Wright*. B. R.

UPON a ſpecial Verdict found by the Jury, the Caſe was ſhortly this. The Teſtator deviſes the Land in Queſtion to *Edward Baſil* in Tail; Remainder to *Suſannah Wright*, and the Iſſue of her Body lawfully begotten; Remainder

Deviſe to *A.* in Tail, Remainder to *B.* and the Iſſue of her Body lawfully begotten; Remainder

to the right Heirs of *A.* for ever. *A.* dies without Iſſue, living the Teſtator; *B.* after making of the Will, had Iſſue *C.* Heir at Law to *A.* and dies, living the Teſtator. Reſolved that the Heir at Law to the Teſtator, and not *C.* ſhould have the Land.

begotten; Remainder to the right Heirs of *Edward Baſil* for ever. *Edward Baſil* dies without Iſſue, in the Life-time of the Teſtator.

Suſannah Wright ſome Years after the making of the Will, had Iſſue *Margaret Wright* the Defendant, who is found likewiſe to be Heir at Law to *Edward Baſil*; and then *Suſannah Wright* dies in the Life-time of the Teſtator.

The Plaintiff's Title was as Heir at Law to the Teſtator.

The Queſtion therefore was, Whether *Margaret Wright* could claim any Eſtate under this Will, either as Heir at Law to *Edward Baſil*, or as Daughter to *Suſannah Wright?*

The Arguments in this Caſe from the Bar, I did not hear; but the Reſolution of the Court, was by *Parker* Chief Juſtice deliver'd to the following Subſtance.

1*ſt* Point.

The 1*ſt* Point to be conſider'd is, Whether *Margaret Wright* is entituled to take by the Will, as Heir at Law to *Edward Baſil*, by Virtue of theſe Words, *The Remainder to the right Heirs of* Edward Baſil *for ever?*

And here the Queſtion is ſingly this, Whether thoſe Words do make the Heirs of *Edward Baſil*, Deviſees, and import any Deviſe to them? So that the Deviſe is not a lapſed Legacy, by the Death of *Edward Baſil*, in the Life-time of the Teſtator. Or whether *Edward Baſil* is not ſole Deviſee? And thoſe Words only uſed to denote and deſcribe the Nature and the Quality of that Eſtate, which was hereby deſigned to be ſolely given to *Edward Baſil*, *viz.* to ſpeak in the Language and *Idiom* of Law, Whether theſe Words are Words of Purchaſe or Limitation?

Whether the Words *right Heirs &c.* be Words of Limitation or Purchaſe?

The Caſe of *Bret* and *Rigden* in *Plowd. Com.* muſt be moſt certainly, and was on all Hands, allowed to be Law.

The 2*d* Point *only* in that Caſe, applicable to this; and that was ſhortly Thus. The Land was given to *Henry Bret* and his Heirs; and *Henry* dies in the Life-time of the Teſtator; and the Queſtion was, Whether the Son and Heir of *Henry Bret* ſhould take the Land by this Deviſe?

Manhood, who argued for the Son and Heir of *Henry*, urged moſt of thoſe Arguments, that have been now made Uſe of from the Bar, in Favour of the Defendant. He inſiſted, That the Heir was included in the Deviſe; and tho' perhaps the Teſtator deſigned that he ſhould take *mediante Patre*, *viz.* by Deſcent, yet this is but a Circumſtance relating to the Manner of his Taking: And therefore ſince by the Act of God, it is impoſſible that this Circumſtance can be complied with, and neceſſary that the Heir, if he takes at all, muſt take immediately, *That* is certainly the better and more preferable Conſtruction in Caſe of a Will, which ſupports the main End and Deſign, the Teſtator chiefly aimed at, tho' it cannot the Form and Manner, the Teſtator deſigned that End ſhould be brought about by; rather than *that* which overturns the ſubſtancial, as well as the circumſtancial Part of the Teſtator's Intention. And thoſe Caſes were put, Land deviſed to *A.* for Life, Remainder to *B.* in Tail; *A.* dies in the Life-time of the Deviſor; *B.* ſhall take by the Will, an Eſtate-Tail in Poſſeſſion.——Land deviſed to the Wife of *J. S. J. S.* dies; ſhe marries *J. D.* and then the Deviſor dies; ſhe ſhall have the Land. And yet the Teſtator deſigned in the firſt Caſe, That *B.* ſhould take an Eſtate-Tail in Reverſion; and in the ſecond, That the Wife of *J. S.* ſhould have the Land: But this being impoſſible, it was reſolved, That *B.* ſhould take an Eſtate-Tail in Poſſeſſion; and that the Wife of *J. D.* ſhould have the Land; in order to preſerve the Subſtance of the Will, when it was impoſſible to obſerve the Formality.

But for all this it was reſolved, That the Heir of *Henry Bret* could not take. For as in all Grants, there muſt be a Grantor and Grantee, at the Time when the Grant

Grant is to take Effect; ſo by Parity of Reaſon, in Caſe of a Will, there muſt be in Being a Deviſee at the Time of the Death of the Teſtator; *that* being the Time, when by Law, a Will is to take Effect.

And as to what was ſaid, That Heirs were named in the Deviſe; it was reſolved, That thoſe Words *his Heirs*, were inſerted only to limit and ſet out what Sort of Eſtate, the Deviſor intended *Henry* ſhould take by the Will, *viz.* a Fee-ſimple; and that conſequently, thoſe Words were put in as well to enable *Henry* to give away the Land from his Iſſue, as to let it deſcend to his Iſſue. That the Deſcent to the Iſſue, was but a Conſequence in Law, of a Fee-ſimple firſt veſted in *Henry*; and what lay entirely in the Breaſt of *Henry*, whether he would permit it to be ſo, or not.

That it was not a good Way of reaſoning, That Becauſe the Land would have deſcended to the Heir of *Henry*, if it had veſted in the Father firſt, therefore the Heir ſhall take immediately, tho' the Father died in the Life-time of the Deviſor; for then by a Parity of Reaſon, if *Henry* had died in the Life-time of the Deviſor without Heirs, the Lord would have had the Land by Eſcheat, and the Wife of *Henry* muſt be intitled to Dower.

This Caſe then being undoubtedly Law, and ſo allowed to be on all Hands; the next Thing to be done, is to ſee, whether the preſent Caſe can be diſtinguiſhed from it.

The Difference aſſign'd is this, That the Deviſe is not here as in *Plowden*, a Deviſe to *Edward Baſil* and his Heirs; but a Deviſe to *Edward Baſil* in Tail, Remainder to *Suſannah Wright* and the Iſſue of her Body lawfully begotten, Remainder to the Right Heirs of *Edward Baſil* for ever. So that between the Deviſe to *Edward Baſil* in Tail, and the Deviſe to the right Heirs of *Edward Baſil* for ever, there intervenes an intire Eſtate, *viz. that* to *Suſannah Wright*, *&c.*

2 But

But to this I anſwer, That this Difference produces no other Effect, than a diminiſhing or leſſening of the Eſtate in Fee-ſimple in Point of Value, that is by theſe Words of the Will to be convey'd to *Edward Baſil*, by carving an Eſtate-Tail out of it.

So that the only Difference on this Account, between the Caſe in *Plowden* and the preſent Caſe, is only this, That in *Plowden*, *Henry Bret* was to have taken a Fee-ſimple in Poſſeſſion; here *Edward Baſil* was to take a Fee-ſimple in Reverſion.

Littleton Sect. 578 (with the Comment of Lord *Coke*, *Co. Litt.* 319) it is held, That if an Eſtate be limited to the Anceſtor for Term of Life, Remainder to *B.* in Tail, Remainder to the right Heirs of the Anceſtor, the Words *right Heirs*, are Words of Limitation, and not of Purchaſe; as well as if the Eſtate had been limited *immediately* to the Anceſtor and his right Heirs, without intervening of the Eſtate-Tail in Remainder.

This is the very ſame Caſe with *that* before us; except that the Caſe of *Littleton* is the Caſe of a Grant, and this before us is the Caſe of a Will, which as to this Point makes no Difference at all.

If *Edward Baſil* had ſurvived, no Body can ſay, but that the Fee would have veſted in him, and in him alone; he would then have had the entire Power over the Eſtate, and the Deſcent to his Heir, would then have appear'd plainly to have been but a Conſequence of the Fee veſted in him, and which at his Pleaſure he might permit or prevent.

It is not his Living to take the Freehold, that does as it were accidentally turn theſe Words into Words of Limitation; but becauſe theſe are in their own Nature, and in all Events, Words of Limitation, therefore it becomes neceſſary that the Anceſtor muſt take, or no Body.

So that upon the whole, theſe Words, tho' they may, perhaps, carry ſomething in their Sound, that looks like a Deſign and Intention in the Teſtator of Favour towards the Heirs, in Reality are not ſo; but ſerve only

to deſcribe the Eſtate which paſſes to the Deviſee, and for his Benefit only. And then it comes out to be the ſame Point intirely with *that* reſolved in the Caſe of *Bret* and *Rigden.*

2*d* Point. It being clear then, That the Defendant can take nothing by this Deviſe, as Heir at Law to *Edward Baſil*; the next Point to be conſidered is, Whether ſhe can take any Thing as Daughter to *Suſannah Wright*, by Virtue of that Clauſe in the Will, *Remainder to* Suſannah Wright *and the Iſſue of her Body lawfully begotten?*

In ſpeaking to this Point, it will be neceſſary to ſee, 1*ſt*, Whether ſhe can have any Right, ſuppoſing the Words *Iſſue of her Body*, be look'd upon as a ſynonymous Expreſſion to the Heirs of her Body?

And 2*dly*, Whether ſuppoſing ſhe has no Right this Way, ſhe can derive any Right, by any other Interpretation, which the Word *Iſſue* is capable of?

As to the firſt, the Caſe differs not from *that* of *Bret* and *Rigden*; ſaving that *there* a Fee is deviſed, and here an Eſtate-Tail, which will make no Difference, in the Interpretation before us; for if here the Words *Heirs of her Body*, are not Words of Purchaſe but Limitation, the Point comes out juſt the ſame. For ſuppoſing *Suſannah Wright* had lived, ſhe and ſhe only would have taken by this Deviſe; and ſhe would have had a Power of barring the Iſſue by Fine. (I ſpeak not now of common Recoveries; becauſe tho' there the Iſſue is barr'd, yet in Conſideration of Law, he is recompens'd by a Judgment to recover over.) And here again by the ſame Reaſon that the Daughter of *Suſannah* ſhould take, the Huſband muſt be Tenant by Curteſy, which they for the Defendant will not ſay is Law. In ſhort, the only Difference that there is between a Deviſe in Fee, and in Tail, is this, That in the former Caſe, the Deviſee has a greater Choice and Variety of Ways, whereby he may defeat the Iſſue, than in the latter. But the Words to the *Heirs of the Body*, are as much Words of Limitation, and as

proper to expreſs an Eſtate-Tail, as the Word *Heirs* is to expreſs a Fee. And the Words in both, do not really import, any Deſign of Favour to the Heirs, but the Deviſee only; and ſo much the rather in the Caſe of an Eſtate-Tail, becauſe it is a known and a common Method, where the Teſtator or Grantor has a Concern or Regard for the Iſſue, to make the Anceſtor Tenant for Life only; and by that Means, tie up the Hands of the Anceſtor, from doing any Thing to the Prejudice of his Iſſue.

It cannot be denied to have been the principal Deſign of the Makers of the Statute *de Donis*, to ſecure the Eſtate to the Iſſue, and reſtrain the Anceſtor from conveying the Eſtate from the Iſſue; and therefore admitting, but not granting that this Deviſe, in thoſe Times, when that Statute reigned in full Force, would have imported a Deviſe as much to the Iſſue as Anceſtor; ſince the one was as certain to take by the Deviſe, in due Time, as the other; yet would it not be ſo now, after that Statute is ſo much altered by ſubſequent Statutes, or Judgments of Courts of Law, whereby the Anceſtor has it now in his Power by Fine *&c.* (I ſpeak not of common Recoveries for the Reaſon before given.) Stat. *de Donis.*

To ſhake the Law when firmly eſtabliſhed, is not to be done, without the greateſt Danger to the Eſtates and Properties of the Subject. And I muſt have thought my ſelf obliged to have ſubmitted to the Number and Weight of Authorities, tho' I had not been ſatisfied with the Reaſons upon which they were eſtabliſh'd.

This Doctrine eſtabliſh'd in the Caſe of *Bret* and *Rigden*, remain'd uncontroverted until *Hartop*'s Caſe, 33 *El. Cro.* 344, when it received a new Sanction.

So likewiſe it was again eſtabliſh'd in the Caſe of *Fuller* and *Fuller*, reported *Moore* 353. and 3 *Cro.* 422. And tho' it is ſaid, that two Judges differ'd in their Opinion; yet upon a narrower Inſpection it does appear, That thoſe very Judges that did diſſent, have by the Reaſons they gave for their Diſſent, confirmed the Law

Law now in Queſtion. For they were of Opinion, That the Deviſees might take as Purchaſers, but not by the firſt Deviſe; but by Virtue of the new Publication, which did in their Opinion amount to a new Will.

And now I come to conſider *2dly*, Whether the Defendant can put any other Conſtruction upon the Word Iſſue, by Virtue of which ſhe may claim under this Deviſe.

Import of the Word *Iſſue.*

In the Caſe of *King* and *Melling*, 1 *Ventris* 229, the Word *Iſſue*, is by Lord *Hale* affirm'd to be *nomen Collectivum*, and takes in the whole Generation; and is therefore a great deal ſtronger than the Word *Children*. It is there obſerved, That in all Acts of Parliament, the Word *Iſſue* is as comprehenſive, as *Heirs of the Body*; as in the Statute *de Donis*, and the Stat. 34 *H.* 8. of *Entails* ſettled by the Crown.

Tyler's Caſe, 34 *Eliz. B. R.* may ſerve to ſhew the Difference, between the Words *Iſſue* and *Children*. *Tyler* had Iſſue *A. B. C. D.* and deviſes to his Wife for Life, after her Death to *B.* his Son in Tail, and if he die without Iſſue, then to his own Children; *A.* had Iſſue a Son and died, and *B.* died without Iſſue; reſolved, That the Son of *A.* ſhould not take as one of the Children of the Teſtator.——Yet in *Wild*'s Caſe, 6 *Co.* 17, it is admitted, That if the Deviſe had been to the Children of the Bodies, it would have been an Eſtate-Tail; *a fortiori*, if it had been, as in our Caſe, the Iſſue of their Bodies lawfully begotten; becauſe Iſſue is *ex vi Termini*, *nomen Collectivum*, which Children ſingly is not, tho' by other additional Words it may become ſo.

The Caſe itſelf in *Wild*'s Caſe was only this, That if a Deviſe be made to a Man, and after his Death to his Children, or his Iſſue; and he has Iſſue at the Time of his Death, the Iſſue ſhall take by Way of Remainder.

Upon the whole it does appear, That theſe Words are Words of Limitation, and do moſt certainly in a

Will, give an Eſtate-Tail; and then the Point comes out juſt the ſame.

If the Deviſor had died juſt after the making the Will, it is plain, That *Suſannah* would have taken an Eſtate-Tail.

If it be objected, That the Eſtate-Tail reſults from an Operation of Law, That the Teſtator deſigned *1ſt*, an Eſtate to the Deviſee, then an Eſtate to the Heir; and that it is the Law that conjoins them, and creates an Eſtate-Tail out of both. I anſwer, That the Law creates an Eſtate-Tail, purely to uphold and preſerve the Intention of the Teſtator, which would be often deſtroy'd and defeated, if the Children of the Deviſee, that were in Being, either at the Time when the Will was made, or at the Time when the Will takes Place, *viz.* the Death of the Teſtator, were to be conſidered as ſo many diſtinct Deviſees. For Example, ſuppoſe an Eſtate, deviſed to *B.* and the Iſſue of his Body lawfully begotten, Remainder to *C. &c.* If *B.* has Iſſue at the Time of the Death of the Teſtator, *J. N.* and after the Death of the Teſtator has Iſſue *J. S.* According to this Notion, if *J. N.* dies without Iſſue, the Eſtate will go to the remainder Man, and not to *J. S.* which was moſt certainly the Intention of the Teſtator. And other Caſes might be put of the ſame Nature; ſo that taking by Limitation, and taking by Purchaſe, is not a meer Notion and Way of thinking; but will in Reality often let in other Perſons to take, than what the Teſtator deſigned, and in Effect amounts to the making a new Will.

The Suppoſition of Kindneſs in the Teſtator for the Iſſue, too precarious and ſlender a Foundation to build upon; and generally ſpeaking, the Deviſee is the only Perſon, out of Kindneſs to whom the Deviſe was made; eſpecially it ſeems to have been ſo here, where the Iſſue was born ſeveral Years after the making the Will, and conſequently could not be thought upon by the Deviſor.

The Beginning of the Will, whereby *Edward Baſil* is by general Words conſtituted Heir of all, (tho' how he was ſo is explained by the ſubſequent Clauſes of the Will) pleads ſtrongly, That the Deviſe was not out of pure Kindneſs to the Iſſue.

The Danger of this Conſtruction none; for upon Suppoſition, That the Deviſor intends a Favour to the Iſſue, he has it ſtill in his Power during his Life to alter his Will accordingly. So that the only Conſequence of this Conſtruction is, That it will oblige Men upon the Death of their Deviſees, to do what is certainly prudent and proper to do, *viz.* reconſider their Wills.

Judgment *pro Quer.*

Queen and *Simpſon.* B. R.

Vide Ante. 248, 341.

The Queſtion in this Caſe was, Whether upon Stat. of 3 & 4 *W.* & *M. cap.* 10. Juſtices of Peace might convict the Offender in his Abſence, upon his Default to appear, being duly ſummon'd. Court of Opinion they might.

THIS was a Conviction before Juſtices of the Peace, upon the Statute of 3 & 4 *W.* & *M. cap.* 10. for Deer ſtealing. Theſe Convictions (for there were Two or more of them) being removed by *Certiorari* into the King's Bench, Exceptions were taken to them, which were argued ſeveral Times. And now Chief Juſtice *Parker* gave the Reſolution of the whole Court, to the following Effect.

The great Objection againſt theſe Convictions is, That the Juſtices of the Peace have no Authority to proceed againſt the Party, and convict him of the Offence, in his Abſence.

As to this Matter we are all of Opinion, That the Conviction, is a good Conviction, tho' taken in the Abſence of the Party.

And here it is to be obſerved, That the Statute does not give the Juſtices any particular Direction, or preſcribe any particular Form, to be obſerved in the Convictions before them; all that the Statute requires is, That this Conviction be by Oath of one credible Witneſs.

So that the Juſtices are not obliged to the Obſervance of any Rules, unleſs thoſe of natural Juſtice, which all Men are bound to obſerve. One of thoſe Rules I readily own is, That the Offender ſhould be heard before he be condemned. But this Rule muſt admit of this Limitation, *viz.* unleſs the Party refuſes to appear. For as it would be unjuſt not to require the Juſtices to ſummon the Party, and give him Notice to appear and make his Defence; ſo to require more from the Juſtices, would be to put it in the Power of the Offender, to elude Juſtice, and render his Conviction impoſſible, by wilfully abſenting himſelf.

As to the Manner how this Notice is to be given, the Act being altogether ſilent, we muſt recur to natural Juſtice, which only requires the Party ſhould know, when and where he is to appear and make his Defence; and if he will then neither appear himſelf, not truſt his Defence to any Body elſe, it is highly reaſonable he ſhould be proceeded againſt; and not reap an Advantage from a wilful and criminal Abſence.

Statutes beſt expounded by Rules of Common Law.

But it is objected, That Statutes are beſt expounded by Rules of Common Law; and that it is more agreeable to the Forms obſerved by the Common Law, not to convict the Party in his Abſence.

I readily admit the Rule laid down by them, That Statutes are beſt expounded by Rules of Common Law in like Caſes; and will therefore examine, how the Common Law proceeds in Criminal Caſes, where the Party refuſes to appear.

Outlawry for Treaſon or Felony.

And firſt in Caſe of Outlawry for Treaſon or Felony, the Law interprets his Abſence, as a ſufficient Evidence of his Guilt; and without requiring further Proof or Satisfaction, the Law accounts him guilty of the Fact; Corruption of Blood, and Forfeiture of Eſtate enſues.

Real Actions.

In real Actions the 2*d* Default is final and concluſive; and the Court without regarding the Merits of the Cauſe, will give Judgment that he ſhall loſe his Land.

Outlawry

Outlawry for leſſer Crimes.

Outlawry in leſſer Crimes, or in Perſonal Actions, does not as in the firſt Caſe, in Judgment of Law, occaſion the Party to be look'd upon as guilty of the Fact; or as in the ſecond Caſe, occaſion a Judgment for the Thing in Demand; but is yet in its Conſequences more penal and fatal than if it did.

For a Reſtraint of the Liberty of the Party if he can be found, the Profits of the Land while the Outlawry remains in Force, and all his Goods and Chattels forfeited to the King, together with an Excluſion from the Benefit and Protection of the Law follow upon it.

But it will be ſaid, That for all theſe Proceedings, the Law has preſcribed and directed all the Forms and Circumſtances neceſſary to be obſerved in them.

I proceed therefore to Proceedings of a more ſummary Nature; and conſequently, more reſembling the Caſe before us.

Common Counſel-Man.

The Office of Common Counſel-Man, is in Law accounted a Freehold; and yet no Body will ſay, but a Man may be amoved from it in his Abſence.

Practice of Courts of Law.

To come now to Proceedings in our own Courts. Is it not our daily Practice to ſet aſide Judgments, irregularly obtained, grant Attachments *&c.* in Abſence of the Parties?

Notice indeed muſt be given; but if the Party will not appear, the Court proceeds without ſeeing or hearing.

It is obſervable, That in ſome of the Caſes put before, the Law proceeds to condemn the Party not only in his Abſence, but for his Abſence; or which is all one, eſteems his Abſence ſo ſtrong an Argument of Guilt, that further Proof is eſteem'd ſuperfluous.

Whereas here the Juſtices only proceed to examine, whether the Charge be true; and do not condemn the Offender, but on Proof by Oath.

The Caſe before us, is like to the Award of a Writ of Inquiry upon Default, by Common Law.

In many ſummary Proceedings, there is no Power given to oblige the Party to appear; and that is the Caſe here; there is no expreſs Words in the Act by which it is given.

By Implication it cannot be given, unleſs it were of abſolute Neceſſity to the doing of Juſtice; which I have ſhewn it is not.

If this Doctrine were true, it would follow that a Member of a Corporation, might be arreſted, in order to compel him to appear.

By this Rule the Party muſt appear, tho' he think fit to confeſs the Fact, and pay the Penalty.

If Courts of Law, that are armed with a coercive Power, to bring the Party in, do not in the Caſes I have before mentioned, think themſelves obliged, from the Nature of the Thing, to uſe this Power; certainly we cannot expect it from Juſtices of Peace, who really are deſtitute of this Power.

Beſides, I cannot ſee, to what Purpoſe, this Appearance before the Juſtices, is required. For when the Party is before them, can they oblige him to make his Defence? No, unleſs he pleaſes; and if he had pleas'd, he might have appear'd without Force; and yet the only End of his coming before them, is in order to make his Defence.

Laſtly, the Objection of not being forced to appear, cannot be made by the Party; becauſe if it be an Error, it is one in Favour of him that makes the Objection; for this would be contrary to the general Rule of Law in other Caſes. *Rule* of Law.

But it is objected, That the Summons is faulty; for it ought to appoint a particular Hour of the Day, Place, *&c.*

To this I anſwer, That as to this, the Record ſtands thus; *Licet ſummonitus &c. ad hoc tempus, et hunc Locum,*

Defaltam fecit. Now this in Strictneſs, does neceſſarily import, That the Summons was to appear upon that very Spot as to Place, and that very Inſtant as to Time, where and when the Juſtices were aſſembled; otherwiſe it could not have been a Default. And what the Juſtices have returned, muſt by us be accounted true in every Particular.

But it is objected, That theſe Sorts of Records, are, as is very well known, not made up by the Juſtices, according to the Truth of the Fact; but drawn up by Advice of Counſel, ſo as to obviate all the Objections that may be made againſt them. To this it muſt be anſwered, That we ought to give Credit to the Juſtices of Peace, in the Execution of that Power, the Law has intruſted them with; and that if the Juſtices ſhould make a falſe Return, whereby the Party and Juſtice are abuſed, they may be puniſhed.

The Convictions adjudged good.

King and *Hammond.* B. R.

THIS Caſe had formerly been argued; and now Chief Juſtice *Parker* gave the Reſolution of the Court.

Indictment. The Objections taken to this Indictment two; 1*ſt*, That the Place where the Nuſance was laid to be committed, was uncertainly alledged; for ſaid to be *in Communi ſtrata ſive alta Regia via.*

Highway. To this the Anſwer is, That the Words *Communis ſtrata*, and *Regia via*, are ſynonymous Expreſſions, and ſignify the ſame Thing. The proper Signification of the Word *ſtrata* ſignifies a paved Way; but now the Word is uſed in a more general Senſe; and for this Purpoſe, ſeveral Authorities both ancient and modern were quoted.

A navigable River eſteem'd a Highway, *Fitzherbert* 279. Tit. *Challenge.*

2*d* Objection is, That it was not ſet forth from what Place to what Place, the Highway led, in which the Nuſance was ſaid to be committed.

Reſpondetur. Latch 183. a Highway has no *Terminus a quo*, nor *Terminus ad quem.* 3 *Keble* 89. *King* and *Thompſon*, 10 *Gulielmi*, a Highway infinite.

Indictment good.

Smith and *Parks.* B. R.

A LEASE being in Strictneſs forfeited by Non-payment of Rent, the Leſſor brings an Ejectment. The Leſſee by bringing into Court, what was due for Arrears of Rent with Coſts &c. obtained a Rule to ſtay Proceedings upon the Ejectment. The Leſſor moves the Court to diſcharge the Rule, unleſs the Defendant would give Security for the Payment of Rent, upon an Affidavit that the Defendant was a Soldier, and ſo by Law intitled to a Protection.

In *Ejectment* for Non-payment of Rent, upon bringing in the Arrears of Rent with Coſts, Rule granted to ſtay Proceedings. 1 *Mod. Caſes in Law and Equity* 345.

Court. If you will have Equity you muſt do Equity; if by the Equity of the Court, the Plaintiff loſes the Benefit of the Forfeiture of the Leaſe the Law gives him; but reaſonable, that he ſhould have Security for the Payment of Rent; eſpecially when it appears upon Oath, that the Defendant is ſuch a Perſon, as is by Law privileged from Payment of his Debts.

Maxim. Upon Affidavit that the Defendant was a Soldier, and conſequently a privileged Perſon, he was order'd to give Security for the future Payment of his Rent.

Chaplain and *Southgate.* B. R.

THIS was an Action of Covenant. And the Caſe was this, The Defendant leaſed to the Plaintiff a Farm call'd *Dale*; and there being a Pretence of a Right of Common ſet up to two Cloſes, comprehended in the Leaſe,

Covenant for quiet Poſſeſſion.

Leaſe, the Leſſor covenants with the Leſſee, That he ſhall quietly enjoy the ſaid two Cloſes, againſt all claiming, or pretending to claim any Right in them. Upon this Covenant, the Leſſee brings his Action, and aſſigns his Breach thus, That ſuch a one having, or pretending to have a Claim Time out of Mind, did enter upon the ſaid Cloſes.

To this the Defendant demurs; and it was inſiſted upon by the Defendant's Counſel, That the Covenant extended only to legal not tortious Claims; and therefore that the Plaintiff ſhould have ſet forth, that the Claim of him that diſturbed him was a legal one. 2 *Cro.* 315. *Vaughan*'s *Reports* 119, 120, *Bickerſtaff*'s Caſe.

But the Court were of Opinion, That the Words of the Covenant, did extend to all Interruptions whatſoever; and ſo was the plain Intent and Meaning of the Parties; for if it was to extend to legal Claims only, then would the Tenant be put under the Hardſhip of trying the Right for the Landlord; which was the very Thing the Tenant plainly deſigned to prevent by this Covenant.

This Caſe very different from the Caſe of *Kirby* and *Hanſacre*; for there it did not appear, but the Diſturber might claim even under the Leſſee himſelf; but this impoſſible here, by Reaſon of thoſe Words, *Time out of Mind.*

Breach well aſſigned. Judgment *pro Quer.*

Savil & ux' ver. *Kirby.* B. R.

Action for Words in Spiritual Court.

Motion for a *Prohibition.*

Cauſe ſhewn againſt granting a Prohibition.

THE Spiritual Court had proceeded againſt the Defendant, for theſe Words ſpoken againſt the Wife, *You are a Bawd.* The Defendant moved for a Prohibition, ſuggeſting That theſe Words were ſpoken at *Weſtminſter*, and that the City of *Weſtminſter* is an ancient City, and that there is an ancient Cuſtom within the

ſaid City, That Whores ſhould be puniſhed by Impriſonment.

Suggeſting likewiſe, That an Action had been brought for theſe Words, in the Marſhal's Court, and Verdict and Judgment for the Plaintiff; and that *nemo bis pro eodem delicto &c.* That this Matter had been pleaded in the Spiritual Court; but that notwithſtanding they had proceeded to Sentence. *Maxim.*

A Rule was made to ſhew Cauſe why *&c.* And now Dr. *Andrews* a Civilian, and Mr. *Nicholls* came and ſhew'd Cauſe upon that Rule.

The Subſtance of their Arguments were, That Bawds were by the Spiritual Law accounted infamous, and their Evidence rejected in all Caſes. That there had been a Diſtinction taken between theſe Words, *you keep a Bawdy-Houſe*, and *you are a Bawd.* That the former Words might be puniſhable in the Temporal Courts, by Indictment, as importing a Breach of the Peace; but that the latter were puniſhable in the Spiritual Court only. *Salk.* 552.

A Multitude of Caſes were quoted to prove That an Action does not lie in the Temporal Courts for ſuch Sort of Words, as *Whore, Bawd &c. viz. Fitzherbert N. B.* 51. 2 *Rol. Abr.* 296. *pl.* 13, 16. 2 *Rolle's Abr.* 301. *pl.* 12. 5 *Co.* 31. *a.* 1 *Rolle's Abr.* 295. *pl.* 12. *Cro. Jac.* 327. *Cro. Eliz.* 582. *Carter* 55. 1 *Ventris* 220. 2 *Keble* 612. *Raym.* 115.

Then it was argued, That admitting theſe Words were actionable at Common Law, either ſo in themſelves, or accidentally ſo, by Reaſon of ſome Temporal Damage ſuſtain'd by the Words, yet this would not ouſt the Spiritual Court of their Juriſdiction; for that both Courts might have a concurrent Juriſdiction of the ſame Cauſe, where they proceed *Diverſo intuitu*, which was the Caſe here; for the Proceſs in the Spiritual Court was *pro ſalute animæ et reformatione morum, that* in the Tem-

poral Court for Reparation in Damages; and for this Purpoſe the following Inſtances were given.

Salk. 552. Recovery by Huſband in a Temporal Court of Damages againſt the Adulterer, no Bar to a Proſecution in the Spiritual Court at the Promotion of the Huſband.

The Statutes prohibiting under certain Penalties the the Clergy to marry without Licence, Non-reſidence and Farming, do not Out the Juriſdiction of the Spiritual Court.

In the Act of Uniformity 1 *Eliz.* and the late Act for preventing of Schiſm, there are ſpecial Proviſo's, That the Parties ſhall not be proſecuted in both Courts, and

Maxim. *Exceptio probat regulam in rebus non exceptis.*

The ſame Will often proved in both Courts, *viz.* Temporal and Spiritual; becauſe the Proof in the one Court, eſtabliſhes it for Lands, the other for Chattels only.

Regiſter, fol. 15, laid down as a general Rule, That if the Principal belongs to the Spiritual Court, the Acceſſory muſt be try'd there too.

Common in Temporal Courts, in Caſe of the Battery of a Servant, for different Actions to be brought for the ſame Battery; the one by the Maſter, the other by the Servant. Damages to be recovered in both; and yet Recovery in the one, not to be pleaded in Bar of the other.

It was argued, That the Party by ſtanding out thus until Sentence, and then moving for a Prohibition, did overturn the Proceedings in the Spiritual Court, and hinder the bringing of an Appeal, which by the Statute of *Hen.* 8. muſt be brought within fifteen Days after Sentence.

It was likewiſe inſiſted upon, That tho' it was pleaded, that there was a Proſecution in the Marſhal's Court, for the ſame Words; yet it was not ſaid for the ſame Words ſpoken at the ſame Time, without which the Plea can ſignify nothing.

An Objection was alſo taken to the Suggeſtion, *viz.* That the Wife only pray'd to have the Prohibition: For tho' by the Practice of the Spiritual Court, a Feme-Covert may ſue ſingly; yet in the Temporal Court, both Huſband and Wife, ought certainly to join in praying for a Prohibition.

As to the Cuſtom in *Weſtminſter* it was ſaid, That this was only Matter of Suggeſtion in this Court, without any Affidavit, and never laid by Plea before the Court.

That beſides, there was nothing more pretended in the Cuſtom, than what generally obtains all over *England*, *viz.* That ſuch Sort of Perſons are generally ſent to a Houſe of Correction.

The Rule was diſcharged.

DE

Term. S. Trin.

3 *Geo.* I.

In Banco Regis.

Pariſhes of South Sidenham and *Lamerton.*

Settlement. If a Perſon has two Settlements, he is ſettled where he lives.

THE Queſtion was about the Settlement of one *Wills* and his Wife, that were removed by an Order of the Juſtices, from the Pariſh of *Lamerton* to that of *South Sidenham.*

This Order was now quaſh'd by *B. R.* where it was reſolved, That if a Man ſhould have two Settlements, he is to be eſteem'd as ſettled there where he lives. And tho' it was at his Election to ſettle himſelf in each Place; yet it was not in the Power of the Juſtices, to remove him from the Place where he lives, and has a Right of Settlement, to another Place where he has likewiſe a Right of Settlement. So that admitting, there was a Settlement at *South Sidenham*; yet if there was a Settlement in *Lamerton*, the Place where he reſided, the Order of the Juſtices to remove him muſt be quaſh'd.

Whether he had gained a Settlement at *South Sidenham* depended upon this Queſtion, Whether *Wills* having by Law, a Right to take out Adminiſtration, and a Right to the Surplus of the Eſtate (Debts and Funeral Expences paid) of a Perſon poſſeſs'd of ſuch a Term, as would in Law intitle a Man to a Settlement, within the Statute of *Car.* 2. had before Adminiſtration actually taken out, ſuch an equitable Intereſt, as would in Law, amount to a Settlement? But this Queſtion being immaterial, by Reaſon the Court held him ſettled at *Lamerton*, the Court gave no Opinion in it.

Whether ſuch a Right of Adminiſtring &c. as would entitle to a Settlement, within the Stat. of *Car.* 2. ſhall be deem'd a Settlement before Adminiſtration actually taken out?

As to *Lamerton* the Caſe ſtood thus:

Wills takes a Leaſe of an intire Tenement, for the Term of 60 Years, if he and his Wife and the Leſſor ſhould live ſo long, Rent 13 *l.* 10 *s. per Annum.*

It was likewiſe ſtated in the Order, That ſo much of this Tenement as amounted to 4 *l. per Annum* was ſituate in *South Sidenham*, and but 9 *l.* 10 *s. per Annum*, with the Houſe in *Lamerton.* And whether this was a Settlement within the Stat. of 13 & 14 *Car.* 2. was the Queſtion?

Houſe and Land of 9 *l.* 10 *s. per Annum* in one Pariſh; and 4 *l. per Ann.* Rent in another Pariſh, Settlement in the Pariſh where the Houſe is, in Caſe the whole is one entire Tenement.

The Court was clearly of Opinion, That it was.

They obſerved 1*ſt*, That the Words of the Statute were, a Tenement of the Value of 10 *l. per Annum*; ſo that the Rent was not at all material.

2*dly*, It was obſerved, That the Statute ſays, a Tenement of the Value of 10 *l. per Annum*, and does not ſay that all the Tenement muſt be in the Pariſh where he lives.

So that this Caſe is a Settlement, within the Words and Letter of the Act; and as it is within the Letter, ſo it is within the Intention and Reaſon of the Act too.

For the plain Reaſon of the Law is this, That it is not probable that a Perſon ſhould become chargeable, who has ſo much Credit, as to be intruſted with the Management of a Farm of the Value of 10 *l. per Annum.*

Indeed, if a Man takes ſeveral diſtinct Tenements in ſeveral Pariſhes, and both or all of them amount to 10 *l.* this will not make a Settlement; but here the Tenement was one entire and diſtinct Tenement.

Service for a Year, and hiring for a Year, tho' but half the Year's Service be ſubſequent to the Hiring, make a Settlement. *Ant.* 287.

This Caſe was by Judge *Eyre* compared to the Caſe, where a Man ſerves half a Year, then is hired for a Year, and ſerves only half that Year; which is a Settlement within the Words and Meaning of the Act. The Words are ſatisfied by the hiring for a Year, and Service for a Year; and the Meaning is alſo ſatisfied, becauſe a Perſon of that Strength, as to be hired for a Year's Service, was not eſteem'd by the Act a Perſon likely to become chargeable, but able to maintain himſelf by his Bodily Labour.

Huet and *Bainard.* B. R.

Reſolved, That a Juror withdrawn from the Panel by Conſent of both Parties, in order that the Trial might go off *pro defectu Juratorum*, may be of the Jury when the Cauſe comes on again.

WRIT of Error brought of a Judgment in the Court of Common Pleas.

The ſingle Queſtion was, Whether a Juror, that was withdrawn from the Panel by the Conſent of both Parties, to the Intent that the Trial might for that Time go off, *pro defectu Juratorum*, may not be of the Jury, when the Cauſe comes to be try'd at a ſubſequent Time; and if he be, Whether *that* will be Error.

For the Plaintiff in Error.

It was inſiſted, That it would be Error; and that a Juror withdrawn from the Panel, was for ever after incapable to try the Cauſe. And a Caſe in 3 *Cro.* 430. was much rely'd upon, which was, That if a Juror, who had been once challenged, and the Challenge allowed of by the Court, ſhould after try the Cauſe, it would be Error.

Econtra.

To this it was anſwered, That the Caſe cited, was vaſtly different from the Caſe at Bar. For the Caſe in 3 *Cro.* is the Caſe of a Perſon, challenged by one of the Parties, as not ſtanding indifferent to both Sides; and

this Challenge allow'd of by the Court, which amounts to a Kind of Judgment; and therefore as long as it ſtood, tho' the Cauſe upon which that Challenge was founded, ceas'd, the Perſon was incapable to try the Cauſe. Whereas here the Juror is withdrawn from the Panel by Conſent of both Sides, for no other Reaſon, but that the Cauſe may be put off, *pro defectu Juratorum*: And therefore a Perſon ſo withdrawn to be conſidered, as if he had never been returned; and conſequently no more unfit to try the Cauſe than any other.

The Caſe in *Hill.* 25 *Edw.* 3. *Fitzherbert* 121. Title *Challenge*, was quoted, *where* after a Challenge to the Array, for the Partiality of the Sheriff, the very ſame Jury was returned by the Coroner, and allowed to be well. Which Caſe in the Reaſon of it, was ſaid to be ſtronger than *this*; becauſe tho' a Challenge to the Array, be upon Account of Partiality in the returning Officer, yet it is upon the Conſideration the Law has, That Partiality in the returning Officer, will produce a partial Jury. Whereas *here*, upon the whole Record, there is nothing that caſts the leaſt Reflection or Imputation of Partiality upon the Juror; nothing that hinders him from being *Talis &c.*

If this be Error, it would certainly be a good Cauſe of Challenge; and yet it is neither a principal Challenge, nor to the Favour, *Co. Inſt.* 157. *b.*

As to the Objection, That it ſhall now be preſumed, that there was a good Reaſon for his being withdrawn from the Jury, and agreed ſo by both Sides, tho' the ſame does not at preſent appear: It was anſwered, That the Reaſon why he was withdrawn does appear upon Record; and ſuch a Reaſon as does not at all impeach him of Partiality, *viz.* The Reaſon was, that it being neceſſary for the Jury to have a View, this Man happening to be the laſt upon the Panel was withdrawn, that ſo the Cauſe might be put off, *pro defectu Juratorum.*

The Court were clear in their Opinion, That this Man's trying the Cauſe was no Error.

Judgment was affirmed.

Pariſhes

Pariſhes of Horton and----*in Com.*----

Settlement.

THE Caſe as ſtated upon the Order, was thus: A Servant was hired for eleven Months, and then he goes home with his Cloaths to his Father for a Week; afterwards he is hired by the ſame Perſon for eleven Months more, then goes home for a Week; and ſo *&c.*

The Queſtion was, Whether this was a Settlement?

Againſt the Settlement.

And it was inſiſted upon, That it was not.

It appear'd by ſeveral Reſolutions, That there muſt be a Service for a Year, and a hiring for a Year.

Vid. Salk. 535.

In *Dunsfold* and *Ridgwick*, *Mich.* 9 *Annæ*, held, there muſt be a Hiring for a Year, as well as Service for a Year.

In the Caſe of *Overton* and *Steepleton*, a Servant was hired for half a Year, Service accordingly; then he is hired for a Year, and ſerves half a Year: *Here* tho' it was reſolved, That this was a Settlement, notwithſtanding the Service was not ſubſequent to the Hiring; yet ſtill it was held neceſſary, That there ſhould be a Service for a Year, and a Hiring for a Year.

Ant. 287.

See the Caſe *pag.* 293.

In the Caſe of *Frencham* and *Pepperharrow*, a Servant was hired from the 3*d* of *October* to *Michaelmas*, three Days ſhort of a Year; and then by Agreement, he ſtay'd as many Days longer as compleated the Year. Held to be no Settlement.

For the Settlement.

On the other Side it was ſaid, That if this be no Settlement, the Act of Parliament is eluded; and there will be no more Settlements in this Pariſh by Virtue of it. That the Fraud was very apparent from the Circumſtances of the Caſe; and that it is a Rule in Pleading, That nothing needs be averr'd, that appears ſufficiently without.

Maxim.

That the Reaſon upon which this Act of Parliament was founded, was, That a Perſon of that Bodily Strength, as that any Perſon ſhall think fit to hire him for a Year, is not ſuch a Perſon the Law preſumes likely to become chargeable. Beſides, ſome Regard was to be had to Servants that they ſhould gain a Settlement, and not be hurried from Place to Place. *Ant.* 390.

And of this Opinion was Chief Juſtice *Parker.*

Contra, Judge *Prat.* The Law muſt now be taken, That a Hiring for a Year, as well as Service for a Year is neceſſary.

I ſee not, but that if this Agreement was made purpoſely, by Way of Caution to prevent a Charge upon the Pariſh, the Intent was lawful, and we have nothing to do with it.

Beſides, we cannot judge of Fraud; *that* belongs to the Juſtices. We cannot adjudge, That a Demand and a Refuſal amount to a Converſion, tho' a Jury may and will. *Adjournatur.*

DE

Termino S. Mich.

4 *Geo.* 1.

In Banco Regis.

Parks and *Crawford.*

Action for an Eſcape, upon 8 & 9 King *William, cap.* 26. *ſect.* 8.

THIS was an Action of Eſcape, brought againſt the Marſhal of the King's Bench, upon the Statute of 8 & 9 *Gulielmi, cap.* 27. *ſect.* 9. The Words of which Statute are, *That if the Marſhal or Warden for the Time being, or their reſpective Deputies, ſhall after one Day's Notice in Writing, given for that Purpoſe, refuſe to ſhew any Priſoner, committed in Execution, to the Creditor at whoſe Suit ſuch Priſoner was committed, or to his Attorney, every ſuch Refuſal, ſhall be adjudged an Eſcape in Law.*

In this Caſe, the Notice was given by the Creditor, upon the *Friday*, to produce the Priſoner upon the *Tueſday.* At twelve o'Clock, the Priſoner was demanded of the Turnkey; but not being produced, the Action was brought.

This being the State of the Caſe, The *Poſtea* was ſtay'd by the Direction of Chief Juſtice *Parker*, who try'd the Cauſe.

And it was now objected, *firſt*, That the Notice was inſufficient; and that *ſecondly*, if the Notice was ſufficient, the Demand and Refuſal were not alledged as they ought to be.

It was obſerved, That this Statute was a penal Statute; becauſe it ſubjected the Gaoler to make Satisfaction to the Plaintiff, where poſſibly the Plaintiff was not at all injured: That therefore ſuch an Interpretation was to be put upon the Act, as might not ſubject the Gaoler, to unreaſonable, and unneceſſary Difficulties. *1ſt* Objection. The Notice for producing the Priſoner inſufficient.

It was likewiſe obſerved, That the Act of Parliament had directed no particular Sort of Notice; and that conſequently the Notice as to the Nature of it, muſt be governed by the Rules of Common Law.

The Statute is ſilent as to the Place where the Priſoner is to be produced; *this* the Law ſupplies, and ſays the Priſon; for it will not be pretended, That by this Statute, the Gaoler is bound to produce the Priſoner at whatever Place the Creditor ſhall pleaſe to appoint.

So again, as to the Time to be ſpecify'd in the Notice for the producing of the Priſoner, the Act is altogether ſilent; yet certainly there muſt be a Time ſpecified in the Notice; for it will not be pretended, That a Notice from the Creditor to produce the Priſoner generally, without appointing any Time, would be good. It will not be pretended, That upon ſuch Notice, the Marſhall will be obliged to produce the Priſoner, a Week, a Month, a Year after, whenever it ſhould pleaſe the Creditor to demand him; for this would be at once to blow up the Rules of the Priſon, which was certainly never the Intention of the Act, which in requiring a Day's Notice, does evidently ſuppoſe, the Priſoner may poſſibly have the Benefit of the Rules.

The Queſtion now therefore is, Whether the Time appointed by this Notice, be certain enough? Or whether it ought not to have been confined to ſome particular

cular Part of the Day; and not ſaid on ſuch a Day *generally?*

It was ſaid, That in confining the Notice to ſome particular Hour, or Portion of Time in the Day, the Inconvenience to the Plaintiff could be none at all; becauſe he had it in his own Power to appoint that Time which would be moſt convenient for him: Whereas on the other Hand, the Marſhal would be expoſed to the Trouble of an unneceſſary Attendance; as not knowing what Time of the Day, the Creditor would demand him.

2*d* Objection. Demand of the Priſoner improper in Point of Time.

1 *Mod. Caſes in Law and Equity* 70, 219.

But if it ſhould be ſaid here, as probably it may, That the Plaintiff having ſpecified no particular Time in the Day, the Law appoints a Time, *viz.* the laſt Hour in that Day, unleſs by mutual Conſent, the Parties do it ſooner; Then *ſecondly*, the Demand is faulty, being made at Twelve o'Clock at Noon, when the Defendant had until the Cloſe of the Evening for the Performance of it.

Demand inſufficient in Regard to the Perſon upon whom it was made.

A 2*d* Objection as to the Demand, was in Reſpect to the Perſon upon whom the Demand was made, *viz.* the Turnkey. It was obſerved from other Clauſes in the Act, That by the Word *Deputy*, was to be underſtood a Deputy Marſhal, *viz.* ſuch a Deputy as an Action may be brought againſt; and not any inferior Officer, as a Turnkey *&c.*

If it ſhould be ſaid, That the Deputy Marſhal ſeldom or never attends; and that conſequently it would be next to impoſſible for the Creditor to make the Demand of the Marſhal or his Deputy: It was anſwered, That it muſt be ſuppoſed, that the Marſhal or his Deputy are attending the Duty of their Office; and that ſhould a Creditor not be able by Reaſon of their Abſence, to have the Benefit of this Act of Parliament, the Court would puniſh them for their Non-Attendance.

Court ſeem'd inclin'd to think, That the Marſhal had all that Day, for the producing of the Priſoner. They ſeem'd likewiſe to think, That by the Word *Deputy*, was to be underſtood a Deputy Marſhal, and not a more inferior Officer; but that, however, the Plaintiff cou'd not ſuffer by their Non-attendance; becauſe a Demand at the Priſon, tho' no Body there, would be ſufficient.

Adjournatur.

Not neceſſary to produce the Priſoner before the laſt Hour of the Day.

By *Deputy* in the Stat. muſt be underſtood a Deputy-Marſhal; and not any inferior Officer.

Lord *Cowper* having ſurrender'd the Seals in the Vacation, they were given to Lord *Parker*, who was ſucceeded as Chief Juſtice of *B. R.* by Sir *John Pratt*, a Juſtice of that Court, who was ſucceeded by Baron *Forteſcue*, and he again by Sir *Francis Page.*

DE

Term. Paſchæ,

4 *Geo.* I:

In CURIA CANCELLARIÆ.

Slingsby verſus ----

THE Intereſt of 500 *l.* was ſettled to be paid to the Wife for Life; then the Principal and Intereſt to Truſtees to be paid to ſuch Daughter or Daughters, as ſhall be begotten upon the Body of the Wife, Share and Share like; but if the Huſband ſhould die without any

Deed of *Settlement.*

The Words, *to ſuch Daughters as ſhall be begotten*, relate as well to a Daughter in *eſſe* at the Time of the

Settlement, as thoſe that ſhall be born after.

any Daughters, then the Money was to be paid to the Wife.

At the Time of making this Settlement, there was a Daughter *Anne*; and the Huſband died without any other Daughter. And it was inſiſted upon, That this Daughter was intitled to nothing under this Settlement; becauſe being in *eſſe* at the Time when it was made, ſhe was not within the Words of the Settlement, which run in the future Tenſe, which *ſhall be begotten* upon the Body of the Wife, Share and Share like.

But *Parker* Lord Chancellor declared, That this was to put the moſt abſur'd Interpretation upon a Settlement, that could be ſuppos'd, *viz.* That Parents ſhould be ſolicitous for Children in *Embrio*, and unborn; and take no Care of a Child in *eſſe*. That the Futurity meant by the Settlement, did not relate to the Time of the Birth of the Daughters, but to the Death of the Huſband; at which Time all the Daughters then in Being, that were the Offspring of that Coverture, became intitled to the Money by this Settlement.

---- verſus *Mortimer Powell.* In Canc.

THIS was a Caſe ariſing from the Will of *John Rawlins.*

The Queſtion was, Whether a Debt ſhould be ſunk in a Legacy?

The Queſtion now reſerved for the Conſideration of the Court, upon a ſpecial Report of the Maſter directed by the Court was, Whether a Debt of 300*l.* due to *Powell* the Executrix, ſhould be ſunk in a Legacy of 500*l.* given her by the ſame Will?

The Bill was brought by next of Kin, againſt the Executrix, to have the Surplus of the Eſtate, undiſpoſed of by the Will, divided according to the Statute of *Diſtributions.* And the Defendant had by her Anſwer ſubmitted,

mitted, That the Surplus ſhould be divided according to that Statute; but inſiſted upon the Debt of 300 *l.* as what ſhe ought to have Satisfaction for, over and above her Legacy.

The Bill did beſides, ſeek a Diſcovery of the Aſſets of the Eſtate, in the Hands of the Defendant.

Upon this it was decreed, That the Defendant ſhould account for the Surplus, which ſhould be divided according to the Statute of *Diſtributions*; and as to the Debt, it was directed, That the Maſter ſhould look into it, and ſtate both the *Quantum* and Nature of it.

And now upon the Maſter's Report, who found the Teſtator's Debt to the Defendant, near that Sum; and that the Debt had ſprung from Dealings in Trade between them, It was urged, as a known Rule and Courſe of the Court of Chancery, That where a Debtor did by his Will give to his Creditor a Legacy, ſuperior in Value to the Debt due, the Debt was always ſunk in the Legacy; unleſs it did evidently appear from ſtrong Circumſtances in the Will, That it was intended otherwiſe as a beneficial Legacy. And this was ſaid to be founded upon that Maxim in the Civil Law, *Debitor non preſumitur donare.* *Maxim.* This was further enforced from *Chauncy*'s Caſe, where it had been ſo ruled by the Maſter of the Rolls, a Term or two ago.

This was oppoſed by the Defendant's Counſel, who diſtinguiſh'd this from the Caſe of *Chauncy* thus. A Servant-Maid had lived long in a Place without receiving any Wages; her Wages were at laſt by the Maſter computed to amount to 100*l.* and a Bond given for the ſame; the Maſter ſoon after dying, gave her a Legacy of 500*l.* which he thus expreſs'd *for her faithful Services.* Now it was ſaid, That this Bond being for Money due for her Service; and this Legacy being given her for her faithful Services, it was plain, That the Teſtator intend-

ed

ed this Legacy in Satisfaction of all that was due to her.

2 *Vern.* 593, 594. Then the Caſe of *Cuthbert* and *Peacock* was inſiſted upon, as reported by *Salkeld* 155, where the contrary was ruled by Lord *Cowper*, ſaying, It was good Equity to make the Teſtator both juſt and generous, if he intended to be both. This Interpretation moſt agreeable to the Words of the Will, where it is expreſs'd as a Gift. Now a Man is never ſaid to give, but pay a Debt.

It was ſaid further, That ſince it may be, the Executrix would not have been decreed to account for the Surplus without her Conſent, it would be the harder upon her to ſink her Debt.

Legacy to a Creditor, tho' greater than the Debt, taken as a Gift, and not in Satisfaction.

Whether a Legacy to an Executor, excludes him from the Surplus of the Eſtate undeviſed?

Lord *Parker*. Let her have her Legacy over and above her Debt. I have the more Compaſſion for this Executrix, becauſe of her Submiſſion to account for the Surplus. I am not ſatisfied with that Notion, That a Legacy to an Executor, excludes him from the Surplus; and therefore without her Submiſſion, know not whether I ſhould have decreed her to account for it.

How the Courſe of the Court has waver'd in Reſpect of the Surplus. 1 *Vern.* 473. 2 *Vern.* 674, 676, 677.

Upon this, Mr. *Cowper* told the Court, That the firſt Time this Doctrine prevail'd, was in the Caſe of *Foſter* and *Mount*; ſince which Time there have been ſeveral Decrees in Purſuance of it.

Parol Evidence admitted to explain the Intent of the Teſtator, conſiſtent with the Will, and in Affirmance of the Rules of Common Law.

But that the contrary Doctrine had prevail'd in the Caſe of *Littlebury* and *Buckley*; where it was reſolved, That notwithſtanding the Legacy, the Executor ſhould have the Surplus. Indeed there it appear'd by Parol Evidence, That it was the Intention of the Teſtator, that the Executor ſhould have the Surplus; Lord *Guernſey* (for it went up into the Houſe of Lords) being of Opinion, That Parol Evidence not repugnant to the Will, and in Affirmance of the Rules of Common Law, ſhould be allowed of. Since that Caſe, it has been

Ant. 99. 2 *Vern.* 593, 594.

been ſo decreed by Lord *Cowper*, without the Help of ſuch Evidence.

Aſhton verſus ----. In Canc.

Marriage Settlement. Portions for younger Children, decreed to be raiſed by Sale.

THE Queſtion in this Caſe aroſe upon the penning of a Marriage Settlement of Sir *Ralph Aſhton*, and upon that Clauſe of it which related to a Proviſion for younger Children.

By that Clauſe, after the creating of a Term of 99 Years, and veſting it in Truſtees for that Purpoſe, it was provided, That in Caſe he had both Sons and Daughters, the Daughters ſhould have a 1000*l.* each, to be paid them at the Age of 21, or Day of Marriage, which ſhould firſt happen; if there were no Son and but one Daughter, then ſhe was to have 5000*l.* but if there were more Daughters, then there was to be 8000*l.* equally divided among them; which Sums were to be raiſed out of the Rents, Iſſues and Profits of the Eſtate, *as ſoon as they conveniently could.* The Father died, leaving three Daughters and no Son; the three Daughters bring their Bill, to have the 8000*l.* rais'd by Way of Mortgage or Sale, and for the Intereſt of the Money, from the Time of their Father's Death.

It was urged for the Plaintiffs, That there had been many Caſes, where a Term being created for the raiſing of Portions for younger Children, to be paid out of the Rents, Iſſues and Profits of the Eſtate, and not ſaid by Sale or Mortgage; yet this Court has decreed a Sale or Mortgage, if that has appear'd to be the moſt convenient Way for the raiſing of it. *Stanhope* and *Packer*, 2 *Georgii.* 1 *Shower* 176. 2 *Chanc. Rep.* 204. 1 *Shower* 240. 2 *Vern.* 420, 421, 424.

Profits is a Word of large Extent; a Grant of the Profits of Land, is in Law a Grant of the Land itſelf. *Ant.* 94, 365.

It was obſerved, That this Practice of the Court of Chancery was very rational, and in Support of the Intention of the Parties; becauſe it was for the Preferment of Daughters in Marriage.

It was acknowledged by the Counſel of the other Side, That there were ſeveral Caſes, wherein this Court had decreed a Sale or Mortgage, tho' thoſe Words were omitted; but then they ſaid that this Diſtinction was to be obſerved, *viz.* That the Court of Chancery had exerciſed this Power, where a Time being limited for the Payment of the Portions, it appear'd altogether impoſſible that they could be rais'd within the Time ſo limited, by the Annual Profits, Rents, *&c.* but that here no Time at all was limited.

It was replied by the Councel for the Plaintiffs, That here was a Time limited for the Payment of theſe Portions, *viz.* upon the Death of the Father without Iſſue Male; for then ſays the Deed, the Portions ſhall be rais'd as ſoon as conveniently they may, which is in Judgment of Law preſently, from which Time the Portions are to carry Intereſt.

And of this Opinion was Lord Chancellor *Parker*, and decreed it accordingly.

See this Caſe *Rep. of Caſes in Equity* 149.

Target verſus *Grant.* In Canc.

Queſtion. Whether an Eſtate-Tail, or for Life only was devis'd?

A TERM was deviſed by *William Target* to *Henry* his Son, during his Minority; and if he attained the Age of 21, then it was deviſed to him for the Term of his Natural Life, *and no longer*; Remainder to ſuch of his Iſſue to be begotten, as he the ſaid *Henry* ſhould deviſe the ſame unto; and if he ſhould *die without Iſſue*, the reſt and Reſidue of the Term was deviſed to his Brother *Albinus Target.*

The Queſtion was, if this was an Eſtate-Tail in *Henry* or not? for if it was, or in the Nature of an Eſtate-Tail, the Remainder to *Albinus* would be void.

It was urged, That this was an Eſtate-Tail by Implication; becauſe it was, *And if he died without Iſſue* generally, and not *without Iſſue living at the Time of his Death.*

It was argued on the other Side, That this was not an Eſtate-Tail; for tho' an Eſtate-Tail has been held good by Way of Implication, *that* was ever in Maintenance of the Intention of the Deviſor; whereas *here*, to make an Eſtate-Tail by Implication, or an Eſtate in Nature of an Entail, was to defeat the Intention of the Deviſor, and make that Remainder void, which he intended ſhould be good. Caſes quoted in Argument of the Caſe, *Popham* and *Bamfeild*. *Peacock* and *Spooner*. *Salk.* 236. *Loddington* and *Kime*, 3 *Lev.* 431.

Lord *Parker*. *Henry* by this Will takes only an Eſtate for Life, with a Power of diſpoſing of it, to which of his Iſſue he thinks fit; the Words *no longer* plainly ſhow this to have been the Intention of the Teſtator.

In Caſe where an Entail is created by Implication, it is ever in Favour of the Heir at Law; to whom no Eſtate being given by the Will, ſo as to enable him to take by Purchaſe, and there being a Neceſſity, if he takes at all, of his taking by Deſcent; therefore to ſupport the Intention of the Teſtator that the Heir ſhould take, the Law creates by Implication an Eſtate-Tail in the Anceſtor, to veſt it in the Iſſue by Deſcent. But here this Reaſon entirely ceaſes; for here is a Proviſion, how it ſhall go to the Iſſue, *viz.* by the Deviſe of the Party; until when nothing veſts in the Iſſue. Of Entails by Implication.

The Words *dying without Iſſue*, are capable of two Senſes, *viz.* a legal one, and a vulgar one; a legal one, wherein a Man is ſaid to die without Iſſue, whenever his Iſſue fails, tho' ſome Ages after the Death of the Party. And in this Senſe, for the Support of the Intention of the Parties, the Words ſhall be underſtood; but never for the Deſtruction. The vulgar Acceptation of the Words which I embrace here, is *dying without Iſſue living at the Time of his Death*. The Caſe of *Loddington* and *Kime*, is wrong reported by *Levinz*, tho' of Counſel in it; but as to this Point it is right enough, and a ſtrong Caſe. Import of the Words *dying without Iſſue*. *Salk.* 224. 225.

Nab

See this Caſe *Rep. of Caſes in Equity* 146.

Nab verſus *Nab.* In Canc.

Truſt.

ONE of the Points in this Caſe, beſides Matter of Account, was this. A Daughter deviſes all her Perſonal Eſtate to her Mother, to diſpoſe of as ſhe ſhould think fit; and then adds by Word of Mouth, You may if you pleaſe, give 180 *l.* to my Niece; but I leave it intirely to you.

The Niece brings her Bill for this 180 *l.* and likewiſe ſuggeſts a ſecret Truſt in the Mother as to the 180 *l.* The Mother in her Anſwer owns the Will, and the Parol Declaration of the Daughter; and that ſhe once had it in her Thoughts to have made the 180 *l.* 200 *l.* but that the Niece had ſince behaved herſelf ſo, that ſhe was now reſolved to give her nothing.

It was proved in the Cauſe for the Plaintiff, That the Daughter after making the Will, had ſaid ſhe had left her Niece the Plaintiff 180 *l.* as a Legacy. But the Parol Declaration of the Daughter, appear'd only by the Anſwer of the Defendant upon Oath.

2 *Vern.* 559.

The Caſe of *Kingſman* and *Kingſman*, was chiefly inſiſted upon for the Plaintiff. There the Plaintiff thought fit to diſinherit his Son, in Favour of a Waterman, who had the good Fortune to be of his Name; and then tells the Waterman, If his Son ſhould behave himſelf reſpectfully to him, and not diſturb him in the Enjoyment of his Eſtate, he might, if he thought fit, give him twenty or forty Pounds *per* Quarter: And *here*, tho' an Ejectment was brought at Common Law by the Heir for the whole Eſtate, and after that a Bill in Equity, yet the Waterman was by this Court decreed to pay the 40 *l.* *per* Quarter. It was likewiſe held in this Caſe, That if the Statute of Frauds be not inſiſted upon, the Court will compel the Performance of an Agreement, tho' not in Writing.

Parker, Lord Chancellor. No Colour for this to be look'd upon as a Legacy; becauſe not in Writing within the Time appointed by the Act.* The Mother to be eſteem'd as a Truſtee for the Niece: Not neceſſary by the Statute of Frauds, for a Truſt that relates to the Perſonalty to be in Writing; if it were, it is now in Writing by the Anſwer.

* Six Days.

This not ſuch a Truſt, as not to be forfeited; but then the Mother ſhould have aſſigned ſome particular Inſtance of Miſbehaviour in the Niece, and not in general only.

The Mother muſt pay the 180 *l.* but without Intereſt.

As there is no Proof of the Parol Declaration of the Daughter, but by the Anſwer of the Mother, the Anſwer muſt be taken entirely as it is; and no Part of it muſt be impeach'd by any other Evidence.

Where the whole Proof of any Matter arifes from the Defendant's Anſwer, the Anſwer muſt be taken entire.

DE
Term. S. Trin.
4 *Geo.* I.
In BANCO REGIS.

Thornby and *Fleetwood.*

Vide Ante. 113, 356.

JUDGMENT being given for the Defendant in the Court of Common Pleas, and Writ of Error brought in *B. R.* Sir *Thomas Powys* argued for the Plaintiff in Error, to the following Purpoſe.

Stat. *primo Jacobi* about Papiſts.

The great and Chief, tho' not the only Queſtion in this Caſe is, The Conſtruction that is to be put upon the Stat. *primo Jacobi.*

It will be material to reflect a little, both upon the End of this Act of Parliament, and the Time when it was made.

As to the End and Deſign of it; it is plainly levell'd againſt Popery, and to ſecure and preſerve the reformed Religion.

As to the Time when it was made; every one converſant in our Hiſtory, knows the continual Struggles between the Popiſh and Proteſtant Intereſt, in the Time of Queen *Elizabeth.* And the Education of Youth in Popiſh Seminaries, being thought at that Time, a Thing of dangerous Conſequence to the Proteſtant Religion, it

was provided againſt by an Act of Parliament in the Time of Queen *Elizabeth*; but that Act of Parliament proving inſufficient, this Act of Parliament upon which the preſent Queſtion depends, was made in the firſt Seſſion of the firſt Parliament of King *James* the firſt.

Not therefore to be ſuppoſed, That this Statute relating to a Matter the Parliament ſhew'd ſuch an immediate Concern for, ſhould come into the World ſtill born, without Life and Energy.

This Act of Parliament conſiſts of two Parts: By the firſt the Roman Catholicks are diſabled from acquiring any Thing new; by the ſecond they are diſabled to retain what they are already poſſeſs'd of.

The preſent Queſtion depends upon the firſt of theſe.

It will not be deny'd, but that the Words in the Act (if the Savings, to the Poſterity, and in Caſe of Conformity, were out of the Way) are full and comprehenſive enough, to prevent any Eſtate veſting in Roman Catholicks.

Reſolved in Lord *de la War*'s Caſe, 11 *Rep.* That he never was a Baron; and yet the Words not ſtronger then theſe in this Act.

It muſt likewiſe be granted, That Papiſts are diſabled from taking any Manner of Way, by Stat. of 11 & 12 *W.* 3. and yet the Words there uſed, not ſtronger than thoſe uſed in this. Stat. 11 & 12 *W.* 3.

The ſame Words uſed in Statute of Queen *Elizabeth*, for Prevention of Simony. Now the Interpretation always put upon this Act has been, That whoever came in ſimoniacally, by Induction gained nothing. A ſimoniacal Contract has ever been eſteem'd a good Defence to an Action brought for Tythes. Stat. 31 *Eliz.*

The Words of the Act, as to the ſaving to the Heir, are, *In reſpect of himſelf only, but not his Heirs or Poſterity.* Hence it is argued, That the Eſtate muſt veſt in the Anceſtor, or elſe the ſaving to the Poſterity will be fruſtrated.

In

In Anſwer to this Objection, proper to obſerve, That this Clauſe relates equally to Goods, Chattels, Terms for Years, Caſes wherein the Heir is not concerned, as well as to Inheritances deſcendible to the Heir; that therefore the ſame Interpretation ought to be put upon the Act in both Caſes: Now it is plainly abſurd to underſtand the Act, of taking the Profits of Goods, Money, *&c.*

Maxim. It is a general Rule, that *Exceptio probat regulam in rebus non exceptis*; the ſaving therefore the Right of the Heir, works more ſtrongly and totally to the Excluſion of the Anceſtor.

Savings or Exceptions in Statutes, not to be ſo interpreted as to deſtroy the Purview. Another Rule to be obſerved in the Interpretation of Statutes, is, That a ſaving, or an Exception in a Statute, muſt never be ſo interpreted as totally to deſtroy the Purview. Now here the Counſel for the Defendant are endeavouring in Favour of the Heir, (a ſecondary Conſideration of the Parliament) to overthrow the primary and principal Intention of the Act, *viz.* the diſabling of the Anceſtor.

But then it will be aſked, What is the Uſe of the ſaving Clauſe?

To this it may be anſwered, 1*ſt*, That it was to ſhew that the Incapacity was only perſonal, work'd no Corruption of Blood, *&c.*

Nor is it any Objection againſt this, That in this Reſpect it is intirely unneceſſary; for ſaving Clauſes are often inſerted in Acts of Parliament for the Satisfaction of ignorant People.

2*dly*, The Heir is by this Means enabled to derive his Title from the Father, tho' never ſeiſed, as if he had actually been ſeiſed.

The Interpretation contended for by them, that inveſts the Roman Catholick with ſuch an Intereſt in the Eſtate, as will enable him to alien, and diſpoſe of the Eſtate, by Recovery *&c.* at Pleaſure, but reſtrains him only from taking the Profits, is ſuch a one as can neither be collected from the Words or Deſign of the Act.

It has been before obſerved, That theſe Words, *take, enjoy, &c.* are extended to Goods and Chattels, as well as Inheritances; and that this being one entire Clauſe, ought to receive a uniform Interpretation: But this Interpretation of theirs when applied to Chattels, plainly abſurd.

Beſides, this Interpretation is plainly contrary to the Words of the Act, which are univerſally excluſive, without any Exception or Qualification whatſoever: Whereas, according to this Interpretation, he muſt inherit, he muſt take, and be Owner; and as ſuch, alien and diſpoſe at Pleaſure, by Fine *&c.*

If the Queſtion is aſked them, Who ſhall take the Profits? They are much at a Loſs; a plain Argument that their Interpretation was never thought upon by the Law-Makers, who otherwiſe would in plain and clear Terms have told us, who ſhould take the Profits, as they have done in the following Act of 3 *Jacobi.*

The Act therefore being ſilent in this Caſe, they tell us, That according to the Rules of Law in other Caſes, the Crown ſhall take them. *Ant.* 358.

But this is to bring the Act to juſt nothing; for it is clear Law, That Alienation before Seiſin, will ouſt the Crown of this Intereſt they are ſo liberal in beſtowing upon it, *Raymond* 17. 5 *Mod.* 101. *Salk.* 395.

But then we are told, That however, the landed Intereſt of the Papiſts will be leſſen'd, ſhould they thus alien; which is a very odd Way of putting People into Eſtates, in Order to get them out afterwards.

Our Interpretation ſupports the Intention of the Act, inaſmuch as it plainly diſcourages Parents from ſending their Children for Education into Popiſh Seminaries; ſince by *that* they are cut off from their Country, and made *quaſi* Aliens, and outlawed Perſons.

Their Conſtruction directly contrary to all Rules of Interpretation, obſerved in Acts of the ſame Nature; and *that* whether this Act be conſidered, either as an Act made for the Advancement of Religion, or as an

Act made for the ſuppreſſing of publick Miſchiefs, and promoting the publick Good.

In *Hobart* 157, we are told, That Acts of Parliament made for the Advancement of Religion, ſhall in Support of that Intention be ſtretched even beyond the Words.

Now *here* the Words are plainly with that Interpretation, that beſt ſupports the Intention of the Act.

In 11 *Co. Rep. fol.* 7. ſeveral Inſtances are put of Acts of Parliament, made for the Advancement of Religion, that have had a large and liberal Interpretation put upon them.

In 11 *Co. Rep. fol.* 34. *a. Poulter*'s Caſe: Inſtances are given of Acts of Parliament, which tho' Criminal ones, have yet been extended by Equity; becauſe made for ſuppreſſing of publick Miſchief, and the Advancement of the publick Good.

It cannot be doubted, but that the Act of Parliament we are now upon, deſerves a large and liberal Conſtruction upon both theſe Accounts.

Maxim. Their Interpretation contrary to the Rule of the Civil Law, which is, *In dubio, hæc legis conſtructio, quem verba oſtendunt.* And none but Lawyers would ever have thought upon a different Interpretation from that which we put upon it.

It is pretended, That their Interpretation is made in Favour of the Heir; but yet by this Means the Anceſtor is enabled to alien, and ſo diſinherit the Heir; which if a Proteſtant, he will moſt certainly do.

But it will be demanded of us, Where is the Eſtate during the Life of the Perſons thus diſabled?

Here I anſwer in the *firſt* Place, That moſt certainly it ſhall not be in the Perſon diſabled, if there is a Poſ-
Maxim. ſibility that it may be elſewhere, *Maledicta expoſitio que corrumpit Textum.*

It is a Rule in the Interpretation of Statutes, That whatever is a neceſſary and unavoidable Conſequence

of an Act of Parliament, is as much a Part of that Act, as if inſerted *totidem verbis* in the Act, *Hobart* 293. *Brook* Tit. *Coron.* 204.

There is another Rule to be obſerved in interpreting Acts of Parliament, *viz.* That where any Point is plainly and directly enacted, ſuch an Interpretation muſt be held, as to render the plain Deſign of the Act practicable, notwithſtanding the Rules of Common Law, ſhould be hereby overthrown; for it is the proper Buſineſs of Acts of Parliament to make Alterations in the Common Law. Tho' at the ſame Time it muſt be acknowledged, That an Act of Parliament ought to be interpreted by the Rules of Common Law, as far as is conſiſtent with the preſerving the End and Deſign of the Act.

In the *next* Place I anſwer, That if the Land never veſted in the Party himſelf, as we ſay it did not, the King cannot have it, 1 *Inſt.* 13. *a.*

In the *third* Place I anſwer, it cannot go to the Iſſue of the Perſon diſabled, according to that Maxim of Law, *Non eſt hæres viventis.* *Maxim.*

Therefore it muſt neceſſarily go to him in Reverſion; as in Caſe of an Eſtate-Tail, upon Failure of Iſſue, it reverts to the Donor and his Iſſue; or in Caſe of a Fee-ſimple, it ſhall eſcheat to the Lord and his Heirs, of whom the Land is held.

But it is objected, if the Land is to go over to him in Reverſion, how can the Anceſtor have it back again in Caſe he conforms, as it is plainly provided by the Act that he ſhall?

To this it may be ſaid, That the Meaning of that Clauſe in the Act, is not, that upon Conformity he ſhall have back what is gone over and veſted in another; but that the Incapacity being removed by his Conformity, he ſhall from the Time he ſo conforms, be capable of inheriting whatever ſhall fall to him in a Courſe of Deſcent, as if he had never been diſabled.

But ſuppoſing for the encouraging of Conformity, that the Act ſhould look backwards, and give him that Inhe-

Inheritance, which would have veſted in him but for this Incapacity now removed; is it ſtrange or difficult to conceive, that an Act of Parliament may do it?

Of veſting and diveſting of Eſtates.

If an Act of Parliament repealing an Act of Parliament, be repealed, the firſt Act is conſequently ſet up again.

It appears from the Caſe of the Prince of *Wales*, in the 8th *Rep.* That for a State of Inheritance to veſt and reveſt, is not a new Thing, upon an Act of Parliament.

Raymond 355, It is ſaid, That an Act of Parliament can create an Eſtate-Tail without a Donor; and when we ſee Eſtates limited for a particular Purpoſe, we are not to meaſure the Validity of ſuch Limitations, by the ſtrict Rules of the Common Law; for the Parliament can controul the Rules of Common Law, 13 *Co.* 64. It can make an Eſtate of Freehold to ceaſe, as if the Party were dead; as in Caſe of a Parſon who accepts a ſecond Benefice, contrary to the Stat. of 21 *H.* 8. of Pluralities, 6 *Co.* 40. *b.* And for this Cauſe, Lord *Hobart* ſays *pag.* 346, *That Judges have Authority to mould Statute Laws according to Reaſon and beſt Convenience, to the trueſt and beſt Uſe*; eſpecially conſidering that the Parliament proceeds many Times, according to natural Equity, *ſecundum equum & bonum*, which is *lex legum*, without Reſpect to legal Ceremonies, *Hobart* 224.

So that where the Drift and ſole Intent of an Act of Parliament is moſt plainly diſcerned, as in this Caſe, and yet that Intention cannot be obſerved, were the ſame in a Deed, by Conſtruction according to the Rules of Law; we ought rather to preſume, That the Parliament (in whoſe Power it was ſo to do) reſolved to leap over and waive the Mechanical Rules of Law, and to make a particular Law for that Occaſion.

In *Hobart* 257, *Beaumond*'s Caſe, Reported 9 *Co.* 140, is put,

John Beaumond and his Wife being ſeiſed in ſpecial Tail, Remainder to *John Beaumond* in Fee; he alone levied a Fine to *Edw.* 6. in Fee, which Eſtate came to the Earl of *Huntington* in Fee; *Beaumond* having Iſſue died,

his Wife enter'd; the Earl of *Huntington* confirmed the Eſtate in the Wife *habendum*, to her and the Heirs of the Body of her and her Huſband. And it was ruled That the Confirmation wrought nothing, becauſe ſhe had as great an Eſtate before; and alſo the Iſſues could not be made inheritable, which were before barr'd by their Father's Fine, and the Eſtate-Tail as againſt them lawfully given to another. And it was further reſolved by Way of Admittance, That if that Remainder in Fee had not been to *Beaumond* himſelf, but to a Stranger, the Entry of the Wife had reſtored that Remainder to the Stranger, and had left nothing in the Conuſee, but a meer Poſſibility: So ſhe hath the Tail not only for herſelf, but to the Benefit of other Eſtates growing out of the ſame Root with his; and yet during the Life of *Beaumond*, the Entail had been barred, and all had been in the Conuſee, and the Wife had had nothing but a Poſſibility *via verſa*.

And upon this Caſe *Hobart* obſerves, That an Eſtate-Tail may ceaſe for a Time, and riſe again, and he in Reverſion may enter during the Ceſſer of the Eſtate-Tail.

Litt. Sect. 646, 647, 649, 650. there are Caſes put, where, by the Common Law, both Freehold and Eſtates-Tail ſhall be in Abeyance, *viz. in nubibus*, in Conſideration only of Law, for a Time, or, in other Words, ſhall ceaſe for a Time.

Litt. Sect. 613. Tenant in Tail grants all his Eſtate to another, *quoad* his Iſſue, this works no Diſcontinuance; but *quoad* himſelf, the Reverſion is in Abeyance, for he ſhall have none left in him againſt his own Grant.

1 *Co. Inſt.* 345. *a.* Tenant in Tail of Lands holden of the King, is attainted of Felony, the King after Office ſeiſeth the ſame, the Eſtate-Tail is in Abeyance.

Leſſee for Life becomes profeſs'd, there ſhall be no Occupancy, but the Leſſor may enter, for he is dead in Law; but upon his Deraignment, the Leſſee may re-enter *Ant.* 360.

upon the Leſſor, to whom the Land went during his Profeſſion, 2 *Rolle's Abr.* 150. *b.*

Tenant in Tail dies, (his Wife *enſient* with a Son) without Iſſue, the Donor may enter; but upon the Birth of the Son, the Eſtate-Tail is ſet up again, 7 *Co. Rep. fol.* 8. *b. Bedford's* Caſe.

As in that Caſe, the Expectation of the Birth of a Son, did not prevent the going of the Eſtate to the Donor; ſo by Parity of Reaſon, the Expectation of Conformity in our Caſe, will not hinder the Eſtate from going over to him in Reverſion.

In Caſe of a Fee-ſimple, where the Uncle enters before the Birth of a Child, that after-born Child is not intitled to the meſne Profits.

In like Manner in the Spiritual Court, in Caſe of a Divorce *a vinculo Matrimonii*, the Huſband is not anſwerable for the meſne Profit of his Wife's Eſtate.

But the Life of *Philip* is objected to us, and we are told, That he in Reverſion can never enter while there is Iſſue of Tenant in Tail alive.

To this I anſwer, That the Ground upon which this Objection is founded, is much too large: For according to *Hobart* 345, 346. and Sir *Nicholas Carew's* Caſe, quoted for it, it is not enough to keep out the Reverſioner, That there is Iſſue, unleſs this Iſſue be Heir; as in Caſe of the Attainder of the Anceſtor. Now *Philip*, tho' he is Iſſue, yet is not ſuch Iſſue as can inherit; and therefore is no more an Heir in Tail, than a Man can be ſaid to be Heir in the Life-time of the Father.

Nay not enough That there be Iſſue, or an Heir of the Body; nay, and that he may poſſibly inherit; but he muſt be then inheritable, or elſe it will go to the Reverſioner. *Co. Lit.* 24, 25. *a.* Lands given to a Man, and the Heirs Males of his Body; the Man has Iſſue a Daughter, who has Iſſue a Son: Here this Son is both Iſſue and Heir, and yet is not inheritable, becauſe his

Title muſt be convey'd thro' all Males; therefore the Reverſioner muſt have the Lands.

Where a Perſon is incapacitated to take by Deſcent, becauſe he is attainted, or an Alien, or a Monk; if this Incapacity be taken off, by Pardon, by Naturalization, Deraignment, he ſhall have the Land: But yet the Poſſibility that this Incapacity might be removed, at the Time when the Deſcent happened, cannot hinder the Reverſioner from entring; ſo neither can the Poſſibility of Conformity, hinder the Reverſioner from entring in our Caſe.

Afterwards this Caſe went up to the Houſe of Lords, and in the printed Caſe deliver'd by the Defendant, the Strength of the Objection ariſing from the Life of *Philip*, who by the ſpecial Verdict was not found to be without Iſſue, is thus expreſs'd.

Unleſs it appears That there is a good Title in the Leſſor of the Plaintiff, the Plaintiff cannot recover, whether the Defendants have any Title or not; for the Plaintiff muſt always recover by the Strength of his own Title, not the Weakneſs of the Defendant's. It ſeems very ſtrange and repugnant to all the Rules of Law, That there being an Eſtate-Tail, created to the Heirs Males of the Body of *Thomas* 1*ſt* Lord *Gerard*, and there being Iſſue of that Entail yet in Being, who may alſo have Iſſue Male, the Dutcheſs of *Hamilton* ſhould claim by Virtue of the Remainder to the right Heirs of *Charles* Lord *Gerard*, who ſettled the Eſtate, while that Eſtate-Tail hath a Continuance; her Remainder being to take Place upon the Death of Lord *Thomas* and all his Iſſue Male. And it ſeems ſtill more difficult for her to do this under an Act of Parliament, which is ſo far from giving any Thing to her, That it expreſly preſerves the Right of the Offender's Poſterity, (which is endeavour'd to be prevented and deſtroy'd by her) and *that* in the very Clauſe that lays the Diſability upon the Anceſtor.

And

And altho' there be a preſent Diſability in *Philip*, yet it is but perſonal; and the Eſtate-Tail muſt continue in him, for the Benefit of the Iſſue, which admitting he had none, he ſtill may have.

Willis and *Lucas*. In Canc.

Deviſe of an Eſtate by *Implication.*

J. S. had three Sons *A*, *B*, *C*. and Daughters, and being ſeiſed in Fee of Land, Part whereof was Gavelkind, deviſes it by his Will to *C*. his youngeſt Son, he or his Heirs paying 10*l*. *per Ann.* to *A*. 10*l*. *per Ann.* to *B*. ſo much a Year to the Daughters *&c.* for the Term of his Life; and after the Death of *C*. and his Wife, then it was to go to the Sons and Daughters of *C*. according as he ſhould have one or other, equally to be divided between them. *C*. dies, living his Wife; his Wife enters, as conceiving it a Deviſe by Implication to her for her Life. The Heir at Law, ſuppoſing the Land not at all diſpos'd of by the Will, during the intervening Time between the Death of *C*. and the Death of his Wife, and that it ought therefore in the Interim to deſcend to him, brought his Ejectment at Common Law; but the Wife protecting her Eſtate by Mortgage, nonſuited him. He therefore now brought his Bill to diſcover theſe Incumbrances, and whether they were not ſatisfied.

The Wife in her Anſwer, inſiſts, in the *firſt* Place, That this is a Deviſe to her by Implication for Life: And 2*dly*, That tho' by the rigorous Rules of Law, this ſhould not be ſo; yet that this Eſtate being her chief Dependance, and her Huſband having often told her before the Making of his Will, that he would give it her for Life, and having likewiſe after the Making the Will, declared that he had done ſo; ſhe hopes the Plaintiff ſhall not have the Aid of a Court of Equity to get *that* from her, which her Father-in-Law ſo plainly deſigned to give her.

The Difference taken in 13 *H.* 7. and 2 *Cro.* 75. as to Eſtates by Implication, *viz.* That where the Eſtate is deviſed after the Death of the Wife, to the Heir at Law, *there* the Wife ſhall take by Implication; but not where the Deviſe is over to a Stranger; inſiſted ſtrongly upon in Favour of the Plaintiff.

For the Plaintiff.

A Deviſe of Lands to the Heir after the Death of the Wife gives by Implication an Eſtate for Life to the Wife. Otherwiſe where the Deviſe is to a Stranger. 2 *Vern.* 572.

As alſo the Rule laid down in the Caſe of *Gardiner* and *Sheldon*, That an Eſtate ſhould never be rais'd by Implication, unleſs where it was a neceſſary and unavoidable one.

Maxim.

It was urged in Favour of the Wife, That by a neceſſary Implication in the Meaning of the Law, was not to be underſtood a natural Neceſſity, that the Eſtate could go no where elſe; but a Neceſſity ariſing from the plain Intention of the Teſtator in his Will.

For the Defendant.

It was alſo urged, That the Heir at Law by having 10 *l. per Annum* given him, when by Law he was entitled to the whole, was evidently by the Intention of the Teſtator, as much excluded from having the Land deſcend to him in the mean Time, as if the Deviſe had been to him after the Death of *C.* and his Wife; That if the Land ſhould deſcend to the Heir at Law, it would not in him be ſubject to the Payment of the Annuities, which would be plainly contrary to the Intention of the Teſtator.

It was alſo inſiſted upon, That Part of theſe Lands being in *Kent*, muſt be taken to be in the Nature of Gavelkind, and then all the Sons and their Repreſentatives make but one Heir, in which Caſe the Deſcent muſt be intire; but this cannot be, becauſe as to a Third of the Land, the Repreſentative of *C.* being Heir at Law, and the Perſon to whom the Deviſe is made, it will be a Deviſe of *that* by Implication to the Wife, according even to the Rule inſiſted upon by the other Side.

Then there remains two Thirds to deſcend, which will be a Deſcent, neither by Cuſtom, nor by the Common Law; not by the Cuſtom, for that is already broken in upon, by the Eſtate by Implication, rais'd by the Will; not by the Common Law, for theſe two Thirds muſt go to the two Sons, or their Repreſentatives, and the Repreſentative of *C.* And here again the Wife muſt have by Virtue of their own Rule, an Eſtate by Implication in the third Part of the two Thirds; becauſe the Deviſe is to the Repreſentative of *C.* Heir at Law, according to this Way of taking it, of a third Part of the two Thirds.

Court. Lord *Parker* was of Opinion, That the Wife ought to have an Eſtate for Life by Implication, the Heir at Law being excluded by the Annuity; but this being Matter triable at Law, he directed an Iſſue accordingly, where the Wife was ordered to wave her Incumbrances, and inſiſt only on her Title at Law.

No Regard to be had to Parol Declarations in a Deviſe of Land. 2 *Vern.* 98, 337, 339, 624, 625.

Parol Evidence was offer'd to prove the Intention of the Teſtator to give it his Wife; but the Chancellor refus'd to receive it.

3

D E

DE
Termino S. Mich.
5 *Geo.* I.
In CURIA CANCELLARIÆ.

Marks and *Marks.*

THE Teſtator did by his Will, bearing Date *April* 12, 1697, deviſe Land to his Wife *Anne* for Life, Remainder to his ſecond Son *Daniel* in Fee; provided and nevertheleſs, That if his third Son *Nathaniel*, ſhould within three Months after the Death of the Wife, pay the Sum of 500 *l.* to *Daniel*, his Executors or Adminiſtrators, then he deviſed it to *Nathaniel* and his Heirs. *Nathaniel* died in the Life-time of the Wife; afterwards the Wife dies, and *Daniel* enters.

Executory Deviſe.

What *Acts Perſonal*, what not.

Now the Queſtion was, Whether the Heir of *Nathaniel* ſhould be allow'd to perform the Condition, by Payment of the Money, and ſo be let into the Land?

The Reaſon why this, being a Point purely at Law, came to be ſpoken to in a Court of Equity, was, That by Reaſon of Marriage Settlements, meſne Incumbrances, *&c.* it became uncertain to whom the Heir of *Nathaniel* (admitting by Law he might perform the Condition) was to make the Tender: And therefore he brought his Bill in Equity for Relief and Direction, which Bill was filed within the three Months, limited for the Performance of the Condition.

This

This Term *Parker* Lord Chancellor, aſſiſted by Sir *Joſeph Jekyll*, decreed in Favour of the Plaintiff.

Sir *Joſeph* ſpoke firſt to the following Effect.

The Queſtion at Law to be reſolved in this Caſe, before any Decree can be made, is, Whether the Plaintiff as Heir of *Nathaniel*, can enter upon the Eſtate, upon Payment or Tender of the Money? I am of Opinion that he may; and that this is an Act not perſonal to *Nathaniel*, but what may be performed by the Heir. If this had been a Condition, the Law had been plainly ſo: So is *Litt. Sect.* 334, Feoffment upon Condition, That the Feoffor ſhall pay ſuch a Sum, at ſuch a Day *&c.* Feoffor dies before the Day *&c.* yet the Heir, tho' not mention'd, may tender *&c.* Nay held *Sect.* 336, That a ſecond Feoffee, who has only a Privity of Eſtate may do it.

But this is not the Caſe of a Condition, but of an executory Deviſe. In the Caſe of a Condition, the Heir has a Right antecedent to the Performance of the Condition; and he does not gain a new Eſtate, but reveſts an old one by the Performance of the Condition. *Cujus contrarium verum* here; for upon Performance of the Condition, the Payment of the Money, (to ſpeak in the Language of the Law) a new created Eſtate veſts in the Heir. *Co. Lit.* 219. *b.* Lord *Coke*'s Words are theſe, *That a Condition which is to create an Eſtate, is to be performed by Conſtruction of Law, as near the Condition as may be, and according to the Intent and Meaning of the Condition, albeit the Letter and Words of the Condition cannot be perform'd.*

Great Latitude of Conſtruction allowed in the Words of a Will, to ſupport the Intention of the Teſtator.

The Caſe before us, is a Caſe upon a Will, where the Law has ever allowed the greateſt Latitude of Conſtruction in Support of the Intention of the Teſtator.

Nobody can doubt but that the Intention of the Teſtator was, to give the Land to *Daniel* only in the Nature of a Security for 500 *l.* and that *Nathaniel* was to have the Fee-ſimple.

I am of Opinion *Nathaniel* had ſuch a future Intereſt or Poſſibility in the Inheritance, as might deſcend to the Heir, tho' it never veſted in the Anceſtor. *Lampet*'s Caſe is an expreſs Authority, That a future Intereſt in a Term ſhall go to the Executor; and it ſeems to me to fall in with the Reaſon of that Caſe, that a future Intereſt in an Eſtate of Inheritance ſhould deſcend to the Heir.

As a future Intereſt in a Term will go to the Executor, ſo a future Intereſt in an Eſtate of Inheritance will deſcend to the Heir.

Before the Statute *de Donis*, the Donor had but a Poſſibility, barrable after Iſſue, at the Pleaſure of the Donee; but yet this Poſſibility was deſcendible to the Heir. 2 *Inſt.* 335.

Stat. *de Donis.*

1 *Inſt.* 378. *b.* A Caſe is put, where the Heir ſhall be in by Deſcent of an Eſtate, which could never veſt in the Anceſtor during his Life. Land given to *A.* and *B.* ſo long as they live jointly together, the Remainder to the right Heirs of him that dieth firſt; *A.* dies, the Heir of *A.* ſhall have the Land by Deſcent; and yet the Remainder did not veſt during the Life of *A.* for the Death of *A.* muſt precede the Remainder.

Where an Heir may take by Deſcent, an Eſtate, which could never veſt during the Life of the Anceſtor.

In the Caſe of *Oates* and *Frith*, *Hobart* 130, it is ſaid, That the Heir is in Repreſentation in Point of taking by Inheritance *eadem perſona cum anteceſſore.*

That the Law is the ſame, in Caſe of an Act executed by Way of Uſe, is plain from the 3*d* Point in *Shelley*'s Caſe, 1 *Rep.* 98. *a.* And the Rule there laid down is applicable here, *viz.* That the Heir ſhall be in by Deſcent, where the Land might poſſibly have veſted in the Anceſtor.

Maxim.

The Caſe of *Spring* and *Cæſar*, *Rolle*'s *Abr.* 420, 469, a ſtrong Caſe to prove, That in a Conveyance by Way of Uſe, the Heir may pay the Money, if the Anceſtor died before the Day.

As to the Caſe of *Bret* and *Rigden*, *that* not applicable to this Caſe. For *there* was no compleat Deviſe; becauſe the Anceſtor to whom the Deviſe was made, dying in the Life-time of the Deviſor, there was no Deviſee at the Time when the Will was to take Effect: But *here* there

is a compleat Deviſe, and of ſuch an Intereſt or Poſſibility, as might have veſted in the Anceſtor.

But it is objected, That the Heir has his Election, whether he will pay the Money or not.

Reſp. True; but as this Election is in Favour of the Heir, it ought not to be turned to his Prejudice.

The four Reaſons given by Lord *Coke* in his Commentary upon *Litt. Sect.* 334, are all applicable to the Caſe in Queſtion; I am therefore of Opinion that the Heir may pay the Money, and ſhall take the Land as an Executory Deviſe, and by Way of Deſcent.

Executory Deviſe of a Fee upon a Fee.

And tho' before the Caſe of *Lloyd* and *Carew*, it ſeems to have obtained for Law, That no Executory Deviſe of a Fee upon a Fee ſhould be allowed of, unleſs upon a Contingency to happen during the Life of one or more Perſons in Being at the Time of the Settlement; and conſequently the Limitation to *Nathaniel* would have been void, becauſe dependant upon a Contingency to happen within three Months after the Death of the Wife; yet ſince that Caſe, which went thro' the Houſe of Lords, and is reported *Shower's Caſes in Parliament* 137, the Law is now ſettled, That in Caſe of a Contingency, that cannot in the Nature of it precede the Death of a Perſon, a reaſonable Time may be allowed ſubſequent to the Deceaſe of that Perſon for Performance of the Condition, and a Fee limited thereupon is good. In that Caſe, a Year was held no unreaſonable Time, *a fortiori*, not three Months, which is the preſent Caſe.

The Plaintiff has good Equity to be directed and indemnified in the Payment.

The Law allows great Favour in the Conſtruction of a Will, as ſuppoſing it to be made when a Man *is impos conſilii.* *Ant.* 120.

Parker Lord Chancellor. I am of the ſame Opinion with the Maſter of the Rolls; and in what View ſoever I conſider the preſent Queſtion, am the more confirmed in it. Tho' the Words of the Will are only, *That* Nathaniel *ſhould pay*, and not *Nathaniel* and his Heirs; yet this is only a plain Miſtake in the Will, which is a Conveyance, that the Law ſuppoſes to be made when a Man

is *inops Conſilii*, and therefore allows great Favour to be uſed in its Conſtruction.

The plain Intention of the Teſtator, was to provide for his Children; to the one he intended to give 500*l.* to the other the Land.

At Common Law, if *A.* had made a Feoffment to *B.* for Life, Remainder to *C.* in Fee, upon Condition, That if *B.* ſhould pay ſo much Money to *C.* that then *A.* ſhould have the Land; *A.* has a Right to take Advantage of the Performance of the Condition, which Right veſts in *A.* the Anceſtor, and is in its own Nature deſcendible to the Heir, but not aſſignable.

If *Marks* the Teſtator had made a Feoffment to *Daniel*, upon Condition, That if the Teſtator ſhould pay ſo much Money to *Daniel*, then *Nathaniel* ſhould have Fee; this is a Condition, the Right of performing which deſcends to the Heir of the Teſtator, and the Heir would be at Liberty to take Advantage of it; for the Limitation of the Fee over to *Nathaniel* would be void, by a particular Maxim of the Common Law, which will not allow a Fee to be limited upon a Fee; or by that other Maxim, which excludes a Stranger from taking Advantage of a Condition. *Maxims.*

Since the Statute of Wills, and Statute of Uſes, Executory Deviſes and ſpringing Uſes have been allowed of. Stat. of *Wills.* Stat. of *Uſes.*

Theſe were firſt allowed of with Reſpect to the Teſtator or Party himſelf, afterwards it came to be allowed of to other Perſons.

And therefore at this Day, in Deviſes and Limitations of Uſes, an Eſtate may be limited over to a third Perſon, upon the Defeaſance of a former Eſtate in Fee, if the Condition be not too remote in Point of Time. And tho' there have been Words found out to ſave in Appearance, the Maxims of the Common Law; yet in Effect and in Truth, the very Benefit and Advantage of the Condition is paſs'd over to a third Perſon; notwithſtanding the Maxim of Law, That a Stranger cannot take Advantage of a Condition.

In

In this Will the Caſe nothing but this.

The Teſtator gives the Land to *Daniel*, redeemable upon the Payment of 500 *l*; and he gives the Equity of Redemption to *Nathaniel*: *Nathaniel* therefore ſeems to me to have an Equity of Redemption, that remains open to him in a Court of Equity, as well after the Time limited, as before.

Indeed there might have been a Difference between this Caſe, and the Caſe of a common Mortgage, (where, tho' when the Day is paſt, and ſo the legal Eſtate is abſolutely veſted in the Mortgagee; yet in Equity a Right to redeem remains) had *Nathaniel* been here to come for Relief againſt the Heir at Law: But this is not the Caſe; for he comes for Relief againſt a third Perſon, who had the Eſtate veſted in him for no other Purpoſe but to make the Eſtate redeemable.

The Queſtion that remains is, Whether this Advantage be not loſt, by the Death of *Nathaniel* before the Day. Which imports theſe two Objections.

1*ſt*, That the Payment of this 500 *l.* is perſonal to *Nathaniel*; and therefore not to be performed by any Body elſe.

2*dly*, That the Contingency ſhould have happened in the Life-time of the Anceſtor; for the Heir is not to take by Purchaſe, but by Deſcent.

As to the firſt Point; I am of Opinion, That this is an Act not perſonal to *Nathaniel.*

Payment of a ſmall trifling Sum, may be conſidered rather as a Ceremony, than a valuable Conſideration; and this I take to be the Ground, upon which the two Judges went, who in the Caſe of *Spring* and *Cæſar*, held the Payment of the ten Shillings, to be a perſonal Act; for when the Sum comes to be conſiderable, as here it is 500 *l.* the Payment of it is never eſteem'd a perſonal Act: And this appears throughout *Engleſield*'s Caſe in the 7*th* Report.

The 334th *Sect.* of *Litt.* ſo often quoted, an expreſs Authority, That this is not a perſonal Act.

So that I am of Opinion, That if the Heir pays, the Anceſtor does to all Intents and Purpoſes of this Will, pay in him who is his Repreſentative.

As to the ſecond Point, That the Heir muſt take by Deſcent, and not by Purchaſe; I am of Opinion, That he does take by Deſcent, or in Nature of Deſcent.

In *Wood*'s Caſe, quoted 1 *Rep.* 99. *a.* it is held, That the Heir ſhall be adjudged to take in Courſe and Nature of a Deſcent, where neither Right, Title nor Action, but only a Uſe or Poſſibility deſcended, that might upon the Performance of the Condition, have veſted in the Anceſtor, and then the Heir would have claimed by Deſcent.

And it is laid down as a Rule in *Shelley*'s Caſe, That where the Heir takes any Thing, that might have veſted in the Anceſtor, there, altho' it firſt veſted in the Heir, and never in the Anceſtor, yet the Heir ſhall be eſteem'd in by Deſcent.

Here is a Right to the Performance of this Condition veſted in the Anceſtor, a Right by which the Eſtate might poſſibly have veſted in the Anceſtor, a Right that might have been releaſed by the Anceſtor, but not being releas'd deſcends to the Heir; and therefore the Heir may be properly ſaid to be in by Deſcent, ſince the Right to perform the Condition, of which the veſting of the Land is but a Conſequence, does deſcend to him.

The Caſe of the Feoffment in the *Section* of *Littleton*, is parallel in all Reſpects to the preſent Caſe; parallel as to the Condition, as to the Performance, as to the Effect of the Performance, and differs only as to the Perſon who is to take Advantage of the Performance of it. And this is ſupplied by the Statute of Wills, which gives the third Perſon as good a Title to take Advantage of it, as the Feoffor had by the Common Law. Stat. of *Wills*.

See this Caſe 2 *Vern.* 763.

Wilſon and *Fielding.* In Canc.

Difference in Equity, when a Debt by ſimple Contract is turn'd into a Debt of a ſuperior Nature by a Judgment confeſs'd by the Teſtator, and when by the Executor; the former ſhall have a Preference according to Law with Reſpect to ſequitable Aſſets, but not the latter.

THE Teſtator mortgaged his Land for ſuch a Sum of Money, and gave a Bond for the Performance of Covenants compriſed in the Mortgage Deed; and dies indebted to ſeveral Perſons by ſimple Contract. The Mortgagee gets a Judgment upon this Bond; and the Executor pays a great Part of this Judgment out of the Perſonal Eſtate, by which Means the Aſſets proved inſufficient to diſcharge the Debts by ſimple Contract.

A Bill was therefore brought by the Creditors againſt the Heir, to oblige him to refund, out of what he had been eas'd in reſpect to the Land deſcended to him, by the Diſcharge of a great Part of the Mortgage Debt out of the Perſonal Eſtate, as far as was neceſſary for the Diſcharge of Debts. And it was decreed accordingly that he ſhould refund.

One of the Creditors by ſimple Contract, had after the Death of the Teſtator, by Suit at Law againſt the Executor, turn'd his ſimple Contract Debt into a Judgment Debt. And the Queſtion was, Whether the Money ſo decreed to be refunded, and which was call'd equitable Aſſets, becauſe it could not have been Aſſets at all without the Aſſiſtance of a Court of Equity, ſhould be decreed to be refunded for the Benefit of all the Creditors equally; or for the Advantage in the firſt Place, of him that had turn'd his Debt into a Judgment Debt? The Executor and the reſt of the Creditors, had offer'd this Judgment Creditor, to be paid in equal Proportion with the reſt; but he refus'd, inſiſting upon his Judgment.

In Behalf of the reſt of the Creditors, it was inſiſted, That Debts by ſimple Contract, are in Juſtice and Conſcience as much Debts, as Debts by Bond or Judgment. That therefore, according to the Rule of Equity,

That he who will have Equity muſt do Equity; if a Judgment Creditor ſtands in Need of the Aſſiſtance of a Court of Equity, to make *that* Aſſets, which at Law would not be Aſſets; a Court of Equity will never give him this Aſſiſtance, unleſs he will conſent to come in equally with the reſt of the Creditors, who in Conſcience and Equity have as juſt a Demand as himſelf. *Master.*

Thus if a Man by Will ſubjects his Land to the Payment of Debts, the Court of Chancery always decrees, That all the Creditors, without diſtinguiſhing what the Nature of the Debts are, whether ſimple Contract, Bond or Judgment Debts, ſhall be paid in equal Proportion, out of the Land thus ſubjected by Will to the Payment of Debts.

It was urged by the Counſel of the other Side, That nothing was more common than Bills brought for the Diſcovery of Aſſets; that if it ſhould happen in this Caſe, that Bonds taken in Truſt for the Teſtator ſhould be diſcovered, it was never yet heard of, that a Creditor ſhould be told in this Court, Theſe Bonds are Aſſets in Equity, and you ſhall not have the Aſſiſtance of this Court, to make them Aſſets in Law, unleſs you will quit the Advantage the Law gives you, waive the Superiority of your Debt, and be content to ſtand upon a Level with the reſt of the Creditors.

Parker Lord Chancellor. The Doctrine that ſeems to be laid down by the Counſel for the Creditors, That there is this ſtanding Difference between Aſſets in Law, and Aſſets in Equity, That tho' the former ſhall go according to the Courſe of Adminiſtration preſcribed by the Law, yet the latter ſhall, without any Regard to this, go among the Creditors equally, however different the Nature of their Debts are, is a Doctrine without any Reaſon or Foundation; and would eſtabliſh a Rule in Equity, directly contrary to the known Rules of Law, as to the Order in which Debts are to be paid.

No Difference *commonly* between Aſſets in Law, and Aſſets in Equity; but both muſt be diſtributed in a Courſe of Adminiſtration. *Contra* 2 *Vern.* 62.

Indeed

Yet where Land is deviſed to be ſold for the Payment of Debts, the Profits ariſing from ſuch Sale ſhall be applied to the Payment of all Debts equally.

Indeed, as to the Caſe put of Land deviſed by the Teſtator to be ſold for the Payment of Debts, it is ſo; and this Court does always decree the Profits ariſing from the Sale, equally among all the Creditors: But then this Land may be conſider'd as a Gift of the Teſtator among all his Creditors; and as the Teſtator, the Donor, has not thought fit to make any Diſtinction between his Creditors, ſo this Court, which is in Nature of a Truſtee for the Teſtator, will make none neither.

But generally ſpeaking, there is no Difference between Aſſets in Law, and Aſſets in Equity; but both muſt be diſtributed by the Executor in a Courſe of Adminiſtration. Had therefore this Judgment Creditor, been in Poſſeſſion of his Judgment at the Time of the Death of the Teſtator, I would not have taken the Benefit of his Judgment from him; but would have decreed the refunding for his Benefit in the firſt Place.

An Executor has Power at Law by confeſſing Judgment, to give thePreference to what Creditors he pleaſes; but Equity ſhall never aſſiſt to the doing this, tho' it can give no Relief if done and the Money paid.

But this not the Caſe; this Judgment is obtained againſt the Executor, and whether voluntarily, does not appear, and it will be impoſſible for me to diſtinguiſh; it is enough that it may be voluntarily confeſs'd by the Executor, who has it by this Means in his Power to give a Preference to a ſimple Contract Creditor, at any Time, before a Bond Creditor, and ſo in Reality overturn the Courſe of Adminiſtration. And tho' this at Law may be done, ſo that had Payment been made to this Judgment Creditor, there had been no Remedy; yet a Court of Equity ſhall never be aſſiſting to the enabling of an Executor to the doing of it.

The Money was therefore decreed to be refunded for the equal Benefit of all the Creditors.

3

DE

Termino S. Hill.

5 *Geo.* 1.

In BANCO REGIS.

Anonymus.

THE *Habeas Corpus* Act directs, That if a Perſon committed for High Treaſon or Felony expreſs'd in the *Warrant* of his Commitment, ſhall make his Prayer and Petition in open Court, the firſt Week of the Term or Day of the Seſſions, to be brought to his Trial, and ſhall not be indicted in the next Term or Seſſions after ſuch Commitment, he ſhall be bailed *&c.*

Habeas Corpus Act.

Commitment in that Act muſt be underſtood of a Commitment either by a Juſtice of Peace, or Secretary of State; not Rule of Court.

Now it was doubted, Whether Perſons committed by Rule of Court, are intitled to the Benefit of this Act? And it was reſolved by two Judges, *viz. Eyre* and *Forteſcue*, (*abſente* Powys, *diſſentiente* Pratt,) That none are intitled to make their Prayer, but ſuch as are committed by a Warrant of a Juſtice of Peace, or Secretary of State, and not thoſe committed by Rule of Court; for *that* is not in the Meaning of the Act of Parliament, a Commitment by *Warrant*.

DE

Termino Paſch.

5 *Geo.* I.

In BANCO REGIS.

King and *Pariſh of* Burcleer.

Settlement.

A Copyhold of 20 *s. per Annum* enjoy'd by a Certificate Man in Right of his Wife, during her Life, will make a Settlement, notwithſtanding 9 & 10 *W.* 3. *cap.* 11.

BY the Statute of 9 & 10 *W.* 3. *cap.* 11. it is enacted, That no Perſon coming into a Pariſh by Certificate, ſhall have a legal Settlement in the Pariſh, unleſs he ſhall *bona fide* take a Leaſe of a Tenement of 10 *l. per Annum*; or ſhall be legally placed in, or execute ſome annual Office in ſuch Pariſh.

It was in this Caſe debated, Whether a Certificate Man, who enjoy'd a Copyhold of 20 *s. per Annum* Value, in Right of his Wife, during her Life, which laſted five Years after the Deſcent of the Copyhold upon her, did thereby gain a Settlement; the Statute being expreſs That a Certificate Man ſhall not gain a Settlement, unleſs by two Ways, of which this is none.

Reſolved by the Court, That this was a Settlement. For by the Preamble of this Act it is plain, That the Meaning of it was to hinder and debar Certificate Men, from gaining Settlements by ſome Act purſuant, and conſequential of this Certificate; as that the Certificate

ſhould not amount to a Notice in Writing, and ſo fall within the Statute of 1 *Jac.* 2. *cap.* 17. *&c.* Stat. 1 *Jac.* 2. *cap.* 17.

It was ſaid, That this Conſtruction was parallel to that which had been made upon the Statute of 13 & 14 *Car.* 2. *cap.* 12. whereby any poor Perſon coming to ſettle on a Tenement under ten Pounds, is removeable by two Juſtices, within forty Days after his coming. And yet reſolved, That a Perſon coming to reſide upon his own Eſtate, tho' under 10*l.* was not within the Statute, nor removeable within the forty Days; for that neither this, nor any other Act of Parliament did deſign to debar a Man from coming to look after and improve his own Eſtate; and whenever a Perſon comes to his own Eſtate, it was ſaid that ſuch a Perſon was unremoveable, *i.e.* ſettled. Stat. 13 & 14 *Car.* 2. *cap.* 12.

Anonymus. In Canc.

A Defendant refuſing to anſwer, and ſtanding out all Contempts, until an Order was made for a Sequeſtration, it was pray'd by the Plaintiff's Counſel, That the Bill might be taken *pro confeſſo.* To which it was objected by the Counſel on the other Side, that this could not be done; becauſe the Sequeſtration was neither under Seal, nor executed; and alſo becauſe the Plaintiff did not produce the Original itſelf, but only a Copy of it. Motion to have a Bill taken *pro confeſſo.*

Lord Chancellor *Parker.* Laſt Objection certainly a good one. But as for the other, there ſeems to me, to be no Reaſon for it; for the putting the Seal to the Sequeſtration, and actually executing it, ſeems to be then only neceſſary, when the Plaintiff is not ripe for a Decree upon his own Bill; but wants ſome Diſcovery from the Defendant's Anſwer, upon which the Decree may be founded: And therefore the actual executing a

Sequeſtration,

Sequeſtration, to extort an Anſwer, of which the Plaintiff has no Occaſion, ſeems to me very unneceſſary.

Atkin and *Berwick.* B. R.

Bankrupcy. Whether Goods delivered antecedent to an Act of Bankrupcy, but accepted ſubſequent, were bound by the Bankrupcy?

A. and *B.* living in two very remote Parts of the Kingdom, and having Dealings one with another, in Way of Trade; *A.* ſends up to *B.* a Quantity of Goods, *B.* apprehenſive that he ſhould ſoon become a Bankrupt, and not thinking it reaſonable, that theſe Goods ſhould go to the Payment of other Creditors, delivers a Quantity of Goods, being the greateſt Part of them the very individual Goods, that he had before received of *A.* into the Hands of *C.* for the Uſe of *A.* *B.* ſubſequent to the Delivery, and precedent to the Acceptance of them by *A.* becomes a Bankrupt.

And the Queſtion was, Whether theſe Goods were not ſo abſolutely veſted in *A.* and become his Property, by the Delivery of them to *C.* for his Uſe, as not to be ſubject to the Diſpoſal of the Commiſſioners of Bankrupcy.

And upon this appearing by Evidence at the Trial to be the Caſe, it was ſtated by the Direction of *Parker* Chief Juſtice, who try'd the Cauſe, for the Opinion of the Court; who all deliver'd their Opinion *ſeriatim* this Term, That the Property of the Goods was ſo veſted in *A.* by the Delivery of the Goods to *C.* for the Uſe of *A.* that they were not ſubject to the Diſpoſal of the Commiſſioners of Bankrupcy.

Chief Juſtice *Pratt* grounded himſelf pretty much upon the Authority of the Caſe of *Butler* and *Baker.*

Judge *Forteſcue* mentioned the Argument of Judge *Ventris* in the Caſe of *Thompſon* and *Leach,* (upon the

Reaſons of which the Judgment in the Houſe of Lords was given) as a Storehouſe of Law proper to this Head.

Caſes quoted in the Argument were, 2 *Cro.* 680, 687. 1 *Bulſtrode* 68. 3 *Cro.* 26. *b.* *Rolle's Abr.* 32. *pl.* 13. *Yelverton* 164. *Cro. Jac.* 667. *Dyer* 49. 2 *Rolle's Rep.* 39. 2 *Leon. fol.* 30. *Clerk's* Caſe.

Butler and *Duncomb.* In Canc.

LAND is by Marriage Articles, ſettled upon Huſband and Wife, for Term of their Lives, and after the Death of the longeſt Liver of them, then to Truſtees for the Term of 500 Years; which Term is declared to be in Truſt, for the raiſing *after the Commencement of the Term*, a Portion of 3000 *l.* for Daughters, payable at the Age of 21, or Marriage, which ſhould firſt happen; Remainder to Iſſue in Tail-Male *&c.* Huſband dies, leaving Iſſue a Daughter, and no Son; the Daughter married during the Life of the Mother.

Land ſettled upon Huſband and Wife for their Lives and the longeſt liver of them, then to Truſtees for a Term of Years, which Term was in Truſt for raiſing *after the Commencement of the Term*, a Portion of 3000 *l.* payable at 21 or Marriage. Huſband dies, leaving Iſſue a Daughter, who marries, living the Mother. *Decreed*, That the Portion ſhould not be rais'd by Sale or Mortgage of the Term, living the Mother, by Reaſon of thoſe Words, *after the Commencement* &c.

The Daughter and her Huſband bring their Bill to have the Portion raiſed immediately by Sale or Mortgage of the Term, during the Life of the Mother; it being inſiſted upon, That Caſes had very frequently happened in this Court, where in Favour of Proviſion for Children, Terms had been ſold in the Life of the Parents, by the Decree of this Court; which ſeems the more reaſonable here, becauſe it is made expreſly payable, at the Age of 21, or Day of Marriage, which ſhould firſt happen; which Words ſeem to be uſeleſs, as the Caſe has now fallen out, the Daughter marrying before the Death of the Mother, unleſs the Portion might be rais'd by Sale or Mortgage of the future Term.

Decreed by Lord Chancellor *Parker*, upon great Deliberation of the Caſe, That the Daughter when married, had a preſent Right or Intereſt veſted in her, that ſhould deſcend to her Executors or Adminiſtrators; but that it was a Right to a Portion to be raiſed after the Commencement of a Term, that could not take Place, until after the Death of the Mother.

The Reaſons of his Reſolution were, That he did not much approve of ſelling of future Terms, during the Life of both or either of the Parents; and was it *Res integra*, he ſhould with great Difficulty admit of it. He look'd upon the Care taken in many Settlements of late to prevent this, as ſo many Proteſtations againſt the Reaſonableneſs of this Sort of Decrees.

As for the Caſes of this Nature; he ſaid there were ſeveral, upon which, if he had Time, he could raiſe Obſervations pertinent to the preſent Queſtion: But he would only ſay this in general, That there was not one of them, that came up to this preſent Caſe, which is to have a Portion rais'd before the Commencement of a Term, when the Settlement is expreſs, that it is to be rais'd after.

In Marriage Settlements, it is not only to be conſidered, what is to be wiſh'd, but what the Eſtate will bear.

That the Words, to be raiſed *after* the Commencement of the Term, did import as ſtrongly the Negative, that it was not to be raiſed *before*, as the raiſing 3000 *l.* imports that no more ſhall be raiſed.

According to this Conſtruction, all the Words of the Settlement are ſatisfied; even the Words *payable at the Age of* 21, *or Day of Marriage* &c. are not uſeleſs, even as this Caſe has happened; for they ſerve to give the Daughter a preſent Right and Intereſt (which is deſcendible) to a Portion, to be raiſed indeed hereafter.

As to the Time of the Commencement of the Term; *that* is ſo plainly fixed to the Death of the Mother, as that it will admit of no Proof, for want of a clearer *Medium* to prove it by. And tho' a Term may poſſibly, in ſome particular Caſes, begin in Equity, before it does in Law; yet certainly it cannot here, where the Mother is entitled to the Perception of the Profits, until the Commencement of the Term.

But the Chancellor would not give the Defendant Coſts, becauſe the Matter was ſomewhat doubtful.

DE

Term. S. Trin.

5 *Geo.* I.

In CURIA CANCELLARIÆ.

Caſe upon Marriage Settlement, of Sir John Trevor, *late Maſter of the Rolls.*

Marriage Settlement.

SIR *John Trevor* did by Marriage Articles oblige himſelf, within two Years after his Marriage, to ſettle ſuch and ſuch Lands, to the Uſe of himſelf for Life, then to the Uſe of his Wife for Life, and then to the Uſe of the Heirs Males of that Marriage, and the Heirs Males of ſuch Heirs Males. It was alſo covenanted by the Articles, That he ſhould ſtand ſeiſed of theſe Lands, to the Uſes aforeſaid, and ſuch other Uſes as ſhould be declared by the Truſtees therein named, until ſuch Settlement ſhould be made. Sir *John Trevor* had Iſſue ſeveral Sons by that Marriage. He levies a Fine of theſe Lands, but does not declare to what Uſes the Fine ſhould be levied; but ſeveral Years after, he by Deed declares the Uſes of the aforeſaid Fine in Favour of his ſecond Son, and dies, without ever making any Settlement purſuant to the Articles, and left a very conſiderable Eſtate to deſcend upon the eldeſt Son not mentioned in the Articles.

A Bill is brought by the eldeſt Son to have the Fine ſet aſide, and the Lands compriſed in the Articles, convey'd as therein mention'd.

It was inſiſted in Favour of the Defendant, the ſecond Son.

1*ſt*, That in Caſe a Settlement had been literally made according to the Articles, then by Operation of Law, according to *Shelley*'s Caſe, an Eſtate-Tail would have been veſted in Sir *John Trevor*; and conſequently he would have been able to have done what he has now done, *viz.* levied a Fine, and barr'd the Iſſue.

2*dly*, It was urged, That the Covenant to ſtand ſeiſed *&c.* was in Law a Conveyance executed, and did actually veſt an Eſtate-Tail in Sir *John Trevor*; and conſequently the Fine was well levied.

3*dly*, It was urged, That if in Reſpect to thoſe Lands agreed by the Articles to be ſettled, the eldeſt Son had any Injuſtice done him, ſo as to entitle him to Relief in a Court of Equity, his Father had made him an abundant Satisfaction or Compenſation for it, by permitting an Eſtate not affected by the Articles, and of greater Value, to deſcend upon him, when he might have given it from him.

Parker Lord Chancellor decreed in Favour of the eldeſt Son: He ſaid that this Caſe was in Effect, no more than what was very common in Chancery, to decree ſuch a Conveyance, as was tho' not according to the Words of the Articles, yet according to the Intention of 'em, by taking Care that the Huſband ſhould be made only Tenant for Life, and ſo not have it in his Power to defeat the Intention of the Settlement.

Where by Marriage Articles a Settlement is to be made, Chancery will order one not according to the Letter, but Intent of the Articles, 2 *Vern.* 671.

That the Articles were but Minutes of the Settlement; and therefore not neceſſary to be verbally purſued. That what the Court, if applied to, would have decreed, they would ſo far conſider performed, as to ſet aſide the Fine.

Marriage Articles not perform'd, conſider'd as if they were, in Equity.

As to the 2*d* Point; he look'd upon the Covenant to ſtand ſeiſed, as what was deſigned to ſupply any Defect in the Conveyance, and not as an Execution of the Articles.

As to the 3*d* Point; There might have been ſome thing more to have been ſaid for it, if the Articles had been to ſettle Land generally, and not ſuch and ſuch Lands in particular, naming them.

This Decree was affirm'd in the Houſe of Lords. See 2 *Mod. Caſes in Law and Equity* 161.

Hancock verſus *Hancock.* In Canc.

Bond fraudulently obtain'd.

HANCOCK had Iſſue two Sons; the one married a Daughter of *Dolſwell*, the other being the youngeſt, having made his Addreſſes to a Lady, and all Things being adjuſted and concluded upon for the Wedding, *Dolſwell* took the young Gentleman aſide, ſhowed him a Bond ready drawn, which as he ſaid was prepared by the Direction of his Father, and told him, that unleſs he would execute it, his Father would not ſuffer the Match to proceed; and moreover, that he muſt not ſo much as mention any Thing relating to this Bond, as he valued his Father's Diſpleaſure.

The Condition of this Bond was, That if he ſhould die without Iſſue by that Marriage, he would leave 3000 *l.* to one or more of the Children of the elder Brother, who had married this Daughter of *Dolſwell.*

The young Gentleman under this Terror executes the Bond.

Afterwards he ſpoke to his Father of it, who denied that he ever gave ſuch Directions, and gave him 3000 *l.* to indemnify him againſt the Bond, which 3000 *l.* was, when this Bond ſhould be deliver'd up to him, to be diſtributed among the Grandchildren. The Father dies; the ſecond Son in his Life-time, and by his Will, gave

in Land and Money more than 3000 *l.* to one of the Children of his elder Brother, and dies without Iſſue. The only Evidence of the Manner by which this Bond was extorted, was a Recital in the Will of the ſecond Son. It was proved in the Cauſe, That when the younger Brother, was making theſe Gifts, in Favour of his elder Brother's Son, he was advis'd to declare, that this was in Satisfaction of the Bond; but his Anſwer was, that this would look like complying with a Bond which he had all along declared had been unjuſtly extorted from him.

This Bond was of fifty Years ſtanding.

Lord Chancellor *Parker*. I make no Doubt but this Bond was fraudulently extorted; but I know not how to come at it; for to allow a Recital in the Will of the Obligor, as Evidence to overthrow a Bond, may be a Thing of dangerous Conſequence. However I think the Bond has been ſatisfied; and the Reaſon given why he would not declare it to be in Satisfaction, does very plainly amount to a Declaration of his Intention, that he did not deſign to make the Gifts he did, over and above the ſatisfying his Bond.

Aſgill and *Hunt*. B. R.

PROCESS in Spiritual Court for calling a Woman Whore in *London*; after Sentence the Court of *B. R.* was moved for a Prohibition. Motion for a *Prohibition*.

But the Prohibition was refuſed; for ſaid by the Court, that it was a known Rule laid down in Books, That where it does appear upon the Face of the Libel, that the Matter is of Temporal and not Spiritual Cognizance, there a Prohibition may be granted after Sentence; *contra* where it does not appear, for there it muſt be taken Advantage of before Sentence. Now here the Offence in the Libel, is certainly a Matter of Spiritual Cognizance; and tho' it does appear in the Libel, that the

When Prohibition may be moved for after Sentence, and when not.

the Words were ſpoken in *London*, yet *that* would not take away the Juriſdiction of the Spiritual Court, were it not for a particular Cuſtom, by Virtue of which thoſe Words are puniſhable in *London*: But this being a particular Cuſtom, the Court can no more judicially take Notice of it, than they can of any other Cuſtom of the City of *London*; and if a Cauſe be removed out of the City Courts by *Habeas Corpus*, the Cuſtom muſt be returned, or no *Procedendo* can ever be granted.

Dr. *Bows* verſus *Jurat.* B. R.

Motion for a *Prohibition.*

DR. *Bows*, Vicar of *New Romney*, brought a Libel in the Spiritual Court, againſt the Defendant one of his Pariſhioners for *Eaſter* Offerings; ſuggeſting that they had, Time out of Mind, uſed to be paid in that Pariſh.

The Defendant made no Defence at all in the Spiritual Court; but after Sentence againſt him, moves the Court of *B. R.* for a Prohibition; the Motion was granted *niſi.*

The Reaſon why the Court doubted, Whether the Prohibition was to be granted or not, was their Ignorance of the Practice of the Spiritual Court. For the Court ſeem'd clearly of Opinion, That if the Practice of the Spiritual Court was agreeable to *that* of the Courts at Law, *viz.* to take every Thing *pro confeſſo* againſt a Defendant that makes no Defence, and ſo give Sentence for the Plaintiff without obliging him to prove the Truth of his Caſe, then the Prohibition was not to be granted; becauſe the Cuſtom ſet forth by the Plaintiff was not denied by the Defendant, and conſequently no Occaſion for Trial of the Cuſtom. But in Caſe the Practice of the Spiritual Court, was, not to give Sentence for the Plaintiff, even in Caſe of no Defence made by a Defendant, without Proof made to the Court by the Plaintiff of the Truth of his Caſe, That

then a Prohibition was to be granted; becauſe then the Sentence of the Spiritual Court was founded plainly upon Proof made before them of a *Cuſtom*, which is not to be permitted, becauſe the Proof required by them is very different from *that* required by the Common Law.

Dr. *Pinfold*, who ſpoke againſt the Prohibition, ingenuouſly owned, That it was the Practice of the Spiritual Court to require Proof. However the Court took Time to conſider, and would not make the Rule abſolute.

Uphill and *Halſey*. In Canc.

Deviſe of Perſonal Eſtate.

THE Clauſe of the Will upon which this Caſe turned, was this:

I make my Wife, whole and ſole Executrix of all my Perſonal Eſtate; and my Will is, That ſuch Part of my Perſonal Eſtate, as ſhe ſhall leave of her Subſiſtence, ſhall return to my Siſter.

The Intereſt of the Perſonal Eſtate was not ſufficient to maintain the Wife. The Wife after marries; and the Diſpute was between the ſecond Huſband of the Wife, and the Siſter of the firſt Huſband.

Sir *Joſeph Jekyll*, Maſter of the Rolls, before whom the Cauſe was heard, gave it in Favour of the Siſter.

He ſaid, That ſuch a Senſe, if poſſible, ought to be put upon a Will, as is agreeable to the Intention of the Party, and conſiſtent with the Rules of Law. And ſuch a one he thought this Will was capable of; for he underſtood it thus: *I deviſe the Uſe of my Perſonal Eſtate to my Wife, for her Life, with a Power* (the Intereſt not being ſufficient for her Maintenance) *to diſpoſe of as much of the Principal, as ſhall be neceſſary for her Subſiſtence*; and his Siſter to have the Reſidue.

He thought no Streſs was to be laid upon thoſe Words *All my Perſonal Eſtate*; for *that* is no more than what the Law implies; for when a Perſon is made Exe-

cutor, the Law veſts all the Perſonal Eſtate in him. But then it is true, That this Gift, that by Conſtruction of Law, is abſolute, may be qualified by the declared Intention of the Teſtator. Here it is reſtrained to her for her Life; but with a Power indeed, to diſpoſe of ſo much of the Principal, as ſhall be neceſſary to her Subſiſtence, over and above the Intereſt.

An Account was accordingly decreed to be taken, with Directions ſuited to this Conſtruction of the Will.

Farrington and *Knightly.* In Canc.

Queſtion, Whether the Gift of a Legacy, ſhould cut an Executor off from the *Reſiduum* undiſpos'd of by Will?

THE Teſtator made two Executors to his Will, and gave each of them a Legacy of 50 *l.* a-piece. He gave Legacies likewiſe to all, or moſt of his Relations; and then there being a Surplus of the Eſtate, to the Amount of about 1200 *l.* unexhauſted by Debts and Legacies, the Queſtion was how this Surplus ſhould go, Whether according to the Statute of Diſtributions, or to the Executors.

Lord Chancellor *Parker.* There are ſeveral ancient Laws, by which the Eſtate of an Inteſtate, was made diſtributable, in a Manner, as it is now by the Statute of *Car.* 2. So that this Law is in Reality but declaratory of what the old Law was; and yet, (which is very ſtrange) before that Statute, the Temporal Courts were uſed to prohibit the Spiritual Court, when they went about to compel the Party to make a Diſtribution, in Conformity to thoſe Laws.

As to the preſent Caſe; it is more material, it may be, that the Law ſhould be ſettled and known, than which Way it is ſettled.

The very Examination of Witneſſes in the Caſe of *Littlebury* and *Buckley*, is a plain Proof, That the Law is in this Point very unſettled.

2 *Vern.* 674.

It may perhaps be of miſchievous Conſequence to overthrow the Authority of the Caſe of *Foſter* and *Mount*, and the ſubſequent Reſolutions founded upon the Authority of *that*. Tho' highly probable, that if in the Caſe of *Foſter* and *Mount*, the Surplus had been leſs conſiderable, the Reſolution would have been otherwiſe; but the Executor being an Attorney, and a Stranger to the Teſtator, and the Surplus very conſiderable, it ſeem'd to be a very groſs Abſurdity to ſuppoſe, that the Teſtator could ever intend to give away ſo very conſiderable a Surplus, from his Relations, to ſuch an Executor. 2 *Vern.* 675.

He further obſerved that this Will carried with it, the Suſpicion of being unfiniſh'd and incompleat, for Want of the uſual Concluſion, *In Witneſs whereof I have put my Hand and Seal*; a very ſtrong Circumſtance to induce a Belief, that this Surplus was never deſigned for the Executors.

He took further Time to conſider of his Decree.

Anonymus. B. R.

SCIRE *Facias* in the Court of *C. B.* upon a Recognizance taken in an Action of Debt; Judgment *pro Quer.* and Error brought. *Sci. Fa.* upon a *Recognizance.*

Inſiſted in Behalf of the Plaintiff in Error, That the Breach was not well aſſign'd: For tho' it be a general Rule, That a Breach aſſigned in the very Words of the Condition, is a good Aſſignment; yet that Rule does not hold, where the Words are by Law interpreted contrary to their natural Signification, which is the Caſe here. For the Words of the Condition are, That he ſhould render himſelf in Execution of the Judgment; which Words in their natural Senſe, import an Act, that it is impoſſible for the Bail to do, for it is the Principal only that can render himſelf in Execution of the Judgment; ſo that the Meaning of the Words in this

this Caſe muſt be, to render himſelf in Order to Execution. And therefore the Pleading ſhould not have been, in the very Words of the Condition; but in ſuch Words as are expreſſive of that Senſe, that the Words of the Condition, are by Operation of Law, to be underſtood in.

If there are two Joint-Tenants, and the one by Deed grants all his Eſtate to his Companion, this will in Operation of Law, be underſtood and expounded as a Releaſe, *that* being the proper Conveyance in Law from one Joint-Tenant to another. But if the Party had in this Caſe pleaded *Quod conceſſit*, it had been naught; for tho' in a Deed, rather than it ſhould be void, it ſhall be expounded a Releaſe, it is not ſo in Pleading, where Words muſt be always underſtood in a ſtrict and proper Senſe. 2 *Saunders* 97.

This Objection was over-ruled by the Court, who were all of Opinion, That the Words in the Plea, muſt be underſtood in the ſame Senſe, as when uſed in the Condition of the Recognizance.

Then it was urged for the Plaintiff in Error, That there were Variances between the *Scire Facias* and the Recognizance.

The Counſel for the Defendant, acknowledged that there were Variances, and material ones; but inſiſted, That the Plaintiff could not now take Advantage of them; becauſe he had not by demanding Oyer of the Recognizance in the Court below, made it Part of the Record, and ſo brought it before this Court; and that as it ſtands now, the Recognizance is no Part of the Record. *Salkeld* 262, 264. 1 *Rolle's Abr.* 760. *pl.* 1, 2.

And the Court being of this Opinion, they gave Judgment *Niſi, pro Def.* in Error.

DE

Termino S. Mich.

6 *Geo.* I.

IN CURIA CANCELLARIÆ.

This Caſe was heard at the Rolls in *Michaelmas* 1718, and the ſame Decree given. See 2 *Vern.* 764.

Turton verſus *Benſon.*

Private Agreements on Marriage, derogatory and contradictory to that which is open and publick, relievedagainſt.

MRS. *Turton* a Widow, being poſſeſs'd of an Eſtate in Land, as her Jointure, to the Value of 400 *l.* *per Annum*, and having a Son at the Age of 22, and a Barriſter at Law, enter'd into a Treaty of Marriage for her Son, with Mr. *Benſon.* The Agreement was, That Mr. *Benſon* ſhould give with his Daughter a Portion of 3000 *l.* and in Conſideration of this Fortune, Mrs. *Turton* agreed to ſettle immediately the 400 *l.* *per Annum*, which ſhe had an Intereſt in for her Life, as her Jointure, upon her Son; and 300 *l.* *per Annum* of this very Land, was to be ſettled upon Mr. *Benſon*'s Daughter, as a Jointure proportionable to her Fortune. When all Things were thus agreed upon, and the Affections of the young People engaged, *Benſon* the Father of the young Lady, takes *Turton* the Son aſide, and tells him that his Circumſtances would not allow him to give 3000 *l.* with his Daughter, however he would do his utmoſt, *viz.* give him 2000 *l.* and let him have the other 1000 *l.* without Intereſt for ſeven Years; but that he muſt give a Bond for the Re-payment of this 1000 *l.* at the End

of ſeven Years; and that unleſs he complied with this, the Match ſhould not go on. *Turton* rather than the Match ſhould be broken off, gives the Bond. Afterwards a Settlement, to which Mrs. *Turton* the Mother, was one of the Parties, was prepared and executed, in Purſuance of the Agreement, and expreſly mention'd to be made in Conſideration of a Portion of 3000 *l.* and Mrs. *Turton* actually quitted to her Son, the Intereſt ſhe had for her Life, knowing nothing of this Bond; and the Marriage took Effect.

Mr. *Benſon* owed Sir *Theodore Janſen* a conſiderable Sum, for which he and his Son were both bound; but Sir *Theodore* not ſatisfied with this, procured from Mr. *Benſon* the Father, an Aſſignment of this Bond thus procured from *Turton* the Son-in-Law, as a collateral Security for his Debt.

Benſon the Father four Years after the Marriage dies, very conſiderably indebted to Sir *Theodore*, Mrs. *Richardſon* and others, both by Bond and ſimple Contract.

Aſſets left ſufficient to pay the Bond Debts; but not the Debts by ſimple Contract.

Mrs. *Benſon* the Widow takes out Adminiſtration. The Debt to Sir *Theodore* was immediately diſcharged; the Son being bound for it as well as the Father.

Afterwards the Adminiſtratrix and the Son, enter into a Deed of Compoſition with Mrs. *Richardſon*, and the major Part of the Creditors. By this Deed of Compoſition it was agreed, That the Adminiſtratrix ſhould pay ſmall Debts of a trifling Nature, as Servants Wages *&c.* to the Value of about 200 *l.* that an Office the Father had purchaſed for the Son, ſhould be ſold, and the Profits ariſing from the Sale ſhould be Aſſets; that all the Creditors, Parties to this Deed, ſhould be paid in equal Proportion out of the Aſſets, without Regard to the Nature of their Debts, whether Bond or ſimple Contract.

That the Adminiſtratix ſhould do her Endeavour, to get in all the Debts ſtanding out; and that the Adminiſtratrix

ſtratrix ſhould not be ſued or moleſted by any of the Creditors, Parties to this Agreement.

Whatever ſhould be hereafter got in or recovered of the Debts ſtanding out, was to be equally divided among the Creditors.

It was proved in the Cauſe, That Mrs. *Richardſon* hearing that this Bond was to be aſſigned to her, went to Mr. *Turton*, to talk with him about it; and that Mr. *Turton* told her, that if he had to do with the Family of the *Benſons*, he would never pay the Bond, for he had, he was ſure, Law of his Side; but if it was to be aſſigned to her, he would not diſpute it. This Diſcourſe was about ſix Weeks before the Deed of Compoſition; but was poſitively denied by *Turton* in his Anſwer.

The Queſtion was, Whether *Turton*, the ſeven Years being expired, ſhould be oblig'd to pay this 1000 *l.* for which the Bond was given, to the Creditors of Mr. *Benſon*.

There were ſeveral Authorities produced to ſhew, That Bonds of this Nature had been relieved againſt in Equity.

Kemp and *Coleman*, 1 *Salkeld* 156. Laid down as a Rule in Equity, That where the Son, without the Privity of Father or Parent, during the Treaty of the Match, gives a Bond to return, or refund any Part of the Portion, ſuch Bond is void.

Lord *Hamilton* and Lord *Mohun*, 1 *Salkeld* 158. One of the Covenants was, That the intended Huſband ſhould within two Days after the Marriage, releaſe to the Guardian of the young Lady, all Accounts of the meſne Profits of an Eſtate belonging to her.

Lord *Cowper* held this Covenant void, admitting it obtained neither by Surpriſe nor Fraud, becauſe it was for the private Benefit of the Guardian; and compared this Sort of Contracts to Brokage Bonds, but thought them of

of a more miſchievous Conſequence; and the Rule mention'd in the former Caſe was again laid down.

Goldſmith and *Bunning*. A Note for Payment of ſo much Money, was given to a Maid Servant, in Conſideration of the Endeavours ſhe was to uſe for the procuring ſuch a Match. The Maid Servant marries one that knew nothing of the Conſideration of the Note, but was induced to have her upon Account of the Money he thought her entitled to by the Note; ſo that he might be look'd upon as a Purchaſer of this Note for a valuable Conſideration, without Notice of the Reaſon for which this Note was given; and yet the Note was ſet aſide.

2 *Vern.* 466, 499. *Lamlee* verſus *Hayman & ux'* 1705. A Mother agreed to part with her Jointure, for the Advancement of her Son in Marriage; but took a private Security from her Son, to aſſign over to her, immediately after the Marriage, a Leaſehold Eſtate, that the Son was entitled to, and poſſeſs'd of as his own. This Agreement ſet aſide in Equity.

2 *Vern.* 500. *Peyton* and *Blaidwell*, *May* 9, 1684. *Blaidwell* upon the Marriage of his Kinſman, agreed to ſettle upon him ſuch an Eſtate in Poſſeſſion, and ſuch in Reverſion; but enter'd into a private Agreement with the Kinſman, That after the Marriage took Effect, he ſhould redemiſe *&c.* This Agreement was ſet aſide in Equity, and *Blaidwell* forced to account for the meſne Profits of what was thus redemiſed, in Purſuance of the private Agreement.

Sloan and *Fowler*. *Fowler* the Father told his Son, he would not give his Conſent to his Marriage with *Sloan*'s Daughter, except he would enter into Bond to pay him ſuch a Sum of Money, as he ſaid, he wanted for a Proviſion for his younger Children; upon which the Son, rather than the Match ſhould go off, gave his Father his Bond for the Sum requir'd. And this Bond the Son was relieved againſt, upon a Bill brought by himſelf and his Father-in-Law.

The Counſel for the Creditors inſiſted much upon the Age and Profeſſion of *Turton*, the one 22, the other a Barriſter at Law; but they ſeem'd to own, That with Reſpect to the Adminiſtratrix of Mr. *Benſon*, they ſhould have had a hard Caſe of it; but that now it being againſt Creditors, *that* would diſtinguiſh this Caſe from the reſt of the Caſes cited.

They inſiſted upon the Aſſignment of this Bond to Sir *Theodore*, upon the Acquieſcence of *Turton*, during the Life of Mr. *Benſon*, which was four Years after the Match; and upon the Diſcourſe that paſs'd between *Turton* and Mrs. *Richardſon*, which was an Inducement to her to come into this Compoſition.

The Caſe of *Ellis* and *Warner*, in 2 *Cro.* was cited, where an uſurious Contract was held good, in Favour of an innocent Perſon.

The Counſel for *Turton* in their Reply, quoted the Caſe of *Taylor* and *Wheeler*, 2 *Salkeld* 449, to ſhew That an Aſſignee could not be in a better Condition than the Bankrupt; from whence it was inferred by Parity of Reaſon, That the Creditors in the preſent Caſe, could not be in a better Condition than Mr. *Benſon*, or his Adminiſtratrix. 2 *Vern.* 564, 565, 566.

Lord Chancellor *Parker*. All Agreements of this Nature odious, and have as conſtantly been ſet aſide by this Court, as they have been brought before it, even in Favour of thoſe very Perſons that were Parties to the Agreement.

In this Caſe there are plainly two Agreements; the one open and above-board, the other ſecret and private, and derogatory of the former: By the firſt the Fortune is 3000 *l.* by the latter it is reduced to Two; and this plainly to the Deceit of the Mother, a Party to the Settlement, who upon Conſideration of this Fortune, ac-

tually quitted her Jointure, in Order to make this Settlement.

A Bond when aſſign'd, muſt remain liable to the ſame Equity as before. 2 *Vern.* 692.

And if this Bond be naught *quoad Benſon*, no Aſſignment of his can make it good. For if it ſhould, there is an End at once, of the Juriſdiction of this Court over Frauds; for then no Matter how vicious and fraudulent the Agreement be, make but an Aſſignment, and *that* will cure all.

When Bonds are aſſigned, the Meaning is, That the Aſſignee is to have all equitable Advantages, that the Aſſignor could have had.

Suppoſe a Bond is aſſigned, upon which both Principal and Intereſt are diſcharged, Shall the Aſſignee recover the Penalty, which the Obligee had no Right to?

I do not ſay this Bond is ſo void, as that no ſubſequent Agreement, upon good Conſideration, could make it valid. But nothing like this in the preſent Caſe.

As for Sir *Theodore* and the Aſſignment to him; his Debt being paid, he is entirely out of the Caſe.

As to the Deed of Compoſition, as it is call'd, between the Adminiſtratrix, and the Creditors; nothing in it to influence this Caſe, nor can there in the Nature of it, be found ſo much as one Reaſon, drawn from this Bond, to induce them to enter into it.

It is only an Agreement made between the Creditors, for preventing the waſting of the Aſſets in Law Expences, and reſtraining the Adminiſtratrix from giving that Preference to Debts, that by Law ſhe might. As for *Turton*'s Promiſe to Mrs. *Richardſon*, if true, (for poſitively denied by *Turton*) how far in Honour it may bind him, is nothing to me. It was a Promiſe, made upon Suppoſition of an Aſſignment, that was never made; nor can ſhe be ſuppos'd to become a Party to this Agreement upon Account of this Promiſe.

The making of the Profits ariſing from the Sale of the Office Aſſets, the Preference the Adminiſtratrix might have given to other Debts, had ſhe refus'd, are plain and

good

good Reaſons for her to come into it. Creditors are, it is true, intitled to Favour; but this is only with Reſpect to the Eſtate of the Debtor.

Blundell and *Barker*. In Canc.

Of the *Cuſtom of London* with Reſpect to the Eſtates of Freemen.

THE Bill was brought by Mr. *Blundell* in Right of his Wife, Daughter of *Ibbot* the Teſtator, and by the Widow of the ſaid Teſtator, againſt Mrs. *Barker*, the other Daughter of *Ibbot*, and Adminiſtratrix with the Will annex'd, to have a Diſcovery of the Eſtate of the deceas'd Mr. *Ibbot*, and to have the Will ſet aſide, as far as it was prejudicial to the Right of his Wife, as a Daughter of a Citizen of *London*; or to the Right of the Widow, as Wife of a Citizen.

Upon the Pleadings, the Caſe came out thus.

Ibbot the Teſtator had by his firſt Wife Iſſue, *Anne Barker* the Defendant; and by the ſecond, (his preſent Widow, one of the Plaintiffs,) *Eſther Blundell* married to the Plaintiff, againſt the Conſent of the Father. Upon the Marriage of Mr. *Ibbot* the Teſtator, with his ſecond Wife, now Widow, there were Articles of Agreement precedent to the Marriage, enter'd into by Mr. *Ibbot* and the preſent Widow. The Subſtance of which Articles were, That Mr. *Ibbot* ſhould leave her at his Death, an Eſtate in Land for her Life of 85 *l. per Annum*, 400 *l.* in Money, and all her Jewels; and that ſhe ſhould enter into a Bond of 3000 *l.* Penalty, in Truſt for Mr. *Ibbot*, the Condition of which Bond was, That if theſe Terms were made good to her, ſhe would within Two Months after the Death of Mr. *Ibbot*, releaſe to his Executors, all Right and Title, that ſhe might have to any Part of his Eſtate Real or Perſonal, by Dower, Cuſtom of *London*, or otherwiſe. The Bond was enter'd into accordingly; and in 1684, the Match took Effect.

In the Year 1706, Mr. *Ibbot* married his eldeſt Daughter Mrs. *Barker*, and gave her for her Portion, as appear'd by the Marriage Settlement, 4000*l.* in Money, beſides Lands and Tenements (amongſt which there was the reverſionary Intereſt of a Leaſe) to a conſiderable Value. To this Settlement, among others, Mr. *Ibbot* the Father was a Party; and the Certainty of Mrs. *Barker*'s Advancement appear'd no otherwiſe, than by the Father's being a Party to this Settlement, wherein no Value was put either upon the Freehold Eſtate, or the reverſionary Intereſt of a Leaſe ſettled upon her.

But precedent to the Marriage, the Father thought fit that Mrs. *Barker* his Daughter, ſhould before her Marriage execute to him a Releaſe, to which the Lawyer that drew the Settlement, and Mr. *Barker* the intended Huſband ſhould be Parties; wherein his Daughter ſhould in Conſideration of her preſent Advancement, releaſe to her Father, his Executors and Adminiſtrators, all Intereſt, Right and Title, *&c.* that ſhe had or ſhould have to any Part of his Eſtate, Real or Perſonal, by Cuſtom of the City, Statute of Diſtributions, or otherwiſe; ſave what her Father ſhould pleaſe to give her by his laſt Will. And this Releaſe was accordingly executed. Mrs. *Barker* before this, had ſome ſmall Matter in Land and Money left her by other Relations, the Intereſt and Profits of which were received by the Father; but no Account was ever made up between them.

Some Time after this, Mr. *Blundell* the Plaintiff, marries the other Daughter of the Teſtator *Ibbot*, without his Conſent.

Afterwards Mr. *Ibbot* makes his Will, which as far as is material to this Diſpute, was to this Purpoſe.

He gives to his Wife during her Life, the Intereſt of ſo much *Bank* and *Eaſt-India* Stock, as amounted to 1200*l. per Annum.* He gives his two Grandchildren by

Mrs. *Barker*, 5000 *l.* a-piece; then he gives a Leaſehold Eſtate in Truſt for Mr. *Blundell*, during the Life of his Wife, and after her Deceaſe, in Truſt for the Children of Mrs. *Blundell*, and in Default of ſuch, in Truſt for his own right Heirs. He gives all his Real Eſtate to Mrs. *Barker*; and likewiſe makes her Reſiduary Legatee of all his Perſonal Eſtate.

Ibbot dies, leaving a very conſiderable Eſtate, both Real and Perſonal.

The Points in this Cauſe were Three.

1*ſt*, Whether Mrs. *Ibbot* the Widow, be barr'd by the Articles of Agreement and the Bond, from claiming her cuſtomary Share?

2*dly*, If ſhe be barr'd, what is to be done with her cuſtomary Share? *viz.* Whether the Huſband is to be conſidered as dying without a Wife? And ſo the Eſtate is to be divided into Two Moieties; the one Moiety to go among the Children, the other Moiety to be the Teſtamentary Part of the Teſtator. Or whether this Agreement by which the Wife is barred, being founded upon the Conſideration of a Settlement upon her of a Real Eſtate, Mr. *Ibbot* ſhould not be conſidered as a Purchaſer of his Wife's Third, and ſo have a Right to diſpoſe of Two Thirds of his Eſtate by Will?

3*dly*, Whether Mrs. *Barker* is in this Caſe barred from claiming her cuſtomary Share? Either upon Account, *firſt*, of the Releaſe executed to her Father; or *ſecondly*, for Want of a ſufficient Certainty of her Advancement appearing under the Hand of the Father.

In Caſe the Widow is barred, and the Huſband is to be conſidered as a Purchaſer, and Mrs. *Barker* is barred, Mr. *Blundell* in Right of his Wife, will be intitled to one Third of the Perſonal Eſtate of the Teſtator.

In Caſe the Widow is barr'd, Mrs. *Barker* barr'd, and the Huſband is to be conſidered, not as a Purchaſer, but as dying without a Wife, then Mr. *Blundell* in Right of his Wife, has a clear Title to a Moiety.

But in Caſe the Wife is barred, and the Huſband is to be conſidered as a Purchaſer, and Mrs. *Barker* not barr'd, then will Mr. *Blundell* in Right of his Lady, be entitled only to a Moiety of the third Part of the Perſonal Eſtate of the Teſtator.

This Cauſe coming to a Hearing before Sir *Joſeph Jekyll* Maſter of the Rolls, he was pleas'd to decree, 1*ſt*, That the Wife was barred: But what the Conſequence of *that* was, Whether the Huſband was to be conſider'd as dying without a Wife; or whether, in Regard the Wife was compounded off by the Settlement of a Real Eſtate, the Huſband was to be conſidered as a Purchaſer of his Wife's Third, he ſent to the City to be certified what their Cuſtom was.

2*dly*, He decreed Mrs. *Barker* barred, both by the Releaſe, as a ſubſiſting Agreement in Equity; and alſo becauſe there was not ſuch a Certainty appearing under the Hand of the Father, as the Cuſtom of the City required to let her in to claim her Share. And conſequently he was of Opinion, That Mr. *Blundell* had in all Events, in Right of his Wife, a Title to one Third; but in Caſe by the Cuſtom of the City, Mr. *Ibbot* was to be eſteem'd as dying without a Wife, then to one entire Moiety of the Perſonal Eſtate of the Teſtator.

Mrs. *Barker* not acquieſcing under the Determination of the Maſter of the Rolls, the Cauſe was again brought on before *Parker* Lord Chancellor.

In Support of the Decree of the Maſter, and in Favour of Mr. *Blundell*, it was inſiſted upon, That the Wife may by an Agreement before Marriage, bar herſelf of her cuſtomary Share; and that when this is done, the Husband is always conſidered as dying without a Wife; and no Difference made when the Eſtate, by which the Wife is thus compounded off, is Real, and when Perſonal. In the Caſe of *Hancock* and *Hancock*, the Wife was barr'd by a Jointure of Land; and yet held expreſly, That the

2 *Vern.* 665, 666.

Eſtate ſhould be divided into Moieties. In the Caſe of *Rawlinſon* and *Rawlinſon*, the Wife was compounded off out of a Real Eſtate; and yet held That the Huſband ſhould have a Moiety for his Teſtamentary Share.

In the Caſe of *Clare* and *Acmooty*, the Children were all advanced in full; and it was held That in that Caſe the Father was to be conſidered as dying without Children, and the Eſtate was to be divided into Moieties, the one Moiety to go to the Wife, the other to be the Teſtamentary Share of the Father; and not at all conſidered, what the Nature of the Eſtate was, whether Real or Perſonal, out of which the Children were advanced. 2 *Vern.* 666.

It was urged, That as to the Bond given by the Wife, tho' in Law, it can bind no further than the Penalty; yet in Equity, the Bond and Articles make but one Agreement: And therefore not in the Liberty of the Wife, by incurring the Penalty of the Bond, to free herſelf from the Agreement.

As to the Releaſe given by Mrs. *Barker*; it was acknowledged, That at Law, as a Releaſe, it would be void; but it was urged, That it would ſubſiſt as a good Agreement in a Court of Equity.

It was urged, That if a Jointure made precedent to Marriage, could bar a Woman of her Dower; and that if a Woman could by an Agreement precedent to Marriage, bar herſelf of her cuſtomary Share; in neither of which Caſes, the Woman has ſo much as an inchoate Right at the Time of the Bar: *A Fortiori* may a Daughter releaſe that Right, which as a Right, is already by her Birth veſted in her, tho' not to take Effect in Poſſeſſion, until the Death of the Father.

As to the Objection, That if the Father be allowed to take Releaſes from his Children, it will leave Room for the Father to impoſe upon his Children, by that Authority, that a Father has naturally over his Child: It was anſwer'd, That this was not the Caſe *here*; the Advancement

vancement was a very handſome and a very conſiderable one; and the intended Huſband and the Lawyer that drew the Settlement, were Witneſſes to the Releaſe. Beſides, if Fathers cannot take Releaſes from their Children, ſome Way or other, it will be a Diſcouragement to Fathers, from advancing Children in their Life-time. And in the laſt Place, the Father has it in his Power, as the Cuſtom now ſtands, to cut off his Chilrden from their cuſtomary Share; for it is but to give them ſome inconſiderable Advancement, and take Care not to let it appear under his Hand what the Advancement was, and the Thing is done; it having been ſettled in the Caſe of *Fowk* and *Edwin*, That an Advancement in Marriage will cut a Child off, provided the Certainty of that Advancement does not appear under the Hand of the Father. Upon all theſe Accounts it was inferr'd, That the Objection taken againſt theſe Releaſes, from the Power it would give Parents to impoſe upon their Children, had very little in it.

As to the Certainty it was urged, That the Decree of the Maſter was right; firſt, becauſe the Father being indebted to the Daughter, for Intereſt of Money, and Profits of Land by him received at the Time of this Releaſe, and this Account having been never adjuſted, it was now utterly impoſſible to do it; and conſequently impoſſible to know the Certainty of that Advancement, which was the Remainder after the Debt deducted.

Another Reaſon of the Uncertainty of the Advancement was, becauſe no Value was put upon the Reverſionary Intereſt of the Leaſe, nor of the Freehold Lands in the Settlement.

It had been very eaſy for the Father, to have put a Value upon theſe Things; but it ſeems to have been omitted on Purpoſe to corroborate the Releaſe, That upon Suppoſition the Releaſe ſhould not prove effectual for the cutting her off, the Uncertainty of the Advancement in this Settlement might.

If it ſhould be ſaid, That *Id certum eſt quod certum reddi poteſt*; and that this Advancement, how uncertain ſoever it be upon the Settlement, is yet capable of being reduced to a Certainty:

It may be anſwered, That it is true it may ſo; *viz.* by the chargeable and dilatory Way of either a Trial at Law before a Jury, or by an Account before a Maſter; but this is not ſuch a Certainty as the Cuſtom requires, which on Purpoſe to avoid theſe Inconveniencies, has fix'd and preſcribed the Way, by which this Certainty is to appear, *viz.* the Hand of the Father. If this were not ſo, the Cuſtom as to the Certainty, would ſignify juſt nothing; for there is nothing but may ſome ſuch Way be reduced to a legal Certainty.

If it be objected, That the Cuſtom not extending to Land, the Uncertainty of the Freehold Eſtate is not material: The Anſwer is, That tho' the Cuſtom does not extend to Land, yet the Real Eſtate as well as the Perſonal, making Part of the Conſideration, upon which this Releaſe was given; it ſeems not reaſonable, That ſhe ſhould be releas'd from the Agreement, and yet retain ſo material a Part of the Conſideration of this Agreement. This falls in with the Equity of the Caſes of Jointures, *where* held, That tho' a Jointure after Marriage, in Conſideration the Woman ſhall quit her Dower, will not bind her from claiming her Dower; yet Equity will interpoſe, hold her to her Election, and not let her have both.

In the Caſe of *Atkins* and *Waterſon*, a Citizen of *London* jointures his Wife before Marriage with Land, to which the Cuſtom did not extend. Lord Chancellor ſent to the City to certify, Whether this Jointure did not bar her of her cuſtomary Right? It was certified, That it did not; becauſe not made in bar of her cuſtomary Part; but that had it been made in Bar, it would have bound her. *Rep. of Caſes in Equity* 94.

Lord Chancellor *Parker*. It ſeems to me, That admitting the Cuſtom of the City in general to be, that

the Huſband does not become a Purchaſer of his Wife's Third, when before Marriage, ſhe agrees to accept of a Settlement out of *Land* in Bar of her cuſtomary Share, any more than he would in Caſe the Settlement had been of Perſonal Eſtate; yet notwithſtanding, as this particular Caſe is circumſtanced, the Huſband muſt be conſidered as a Purchaſer; and conſequently will have two Thirds of his Eſtate for his Teſtamentary Share.

Suppoſe without any precedent Agreement, the Wife had, after the Death of the Huſband, releas'd to the Executors of her Huſband, all her Right to her Third by the Cuſtom, Muſt not the Executors of the Huſband have had the Benefit of the Releaſe? No Doubt they muſt. If ſo, What Difference in Reaſon is there, when the ſame Thing is done in Purſuance of a precedent Agreement, and when without?

Where the Huſband is to be conſider'd as dying without a Wife; and *where* as a Purchaſer of her cuſtomary Third.

The Notion, That in this Caſe the Huſband is to be conſidered as dying without a Wife, does neceſſarily ſuppoſe the Wife's Third ſo totally deſtroy'd, as to have no more Subſiſtence either in Law, or the Conſideration of the Parties, than if the Teſtator had never married: But here it is very plain, That the Wife's Right to her cuſtomary Share does ſtill ſubſiſt, both in Law, and in the Conſideration and Intention of the Parties, as a collateral Security to the Wife, for the Huſband's performing his Part of the Agreement; becauſe, had he fail'd, ſhe might have claim'd her Third.

As to the Releaſe executed by Mrs. *Barker*; when the Meaning of the Parties, the Perſon applying to this Court to make the Releaſe bind, and the Will come to be conſidered, I think it clear, Mr. *Blundell* is not intitled to reap any Advantage from it.

Mrs. *Barker* in Conſideration of her Marriage Advancement, releaſes to her Father all Right *&c.* that ſhe ſhall have to any Part of his Eſtate, either by Statute of Diſtributions, Cuſtom of *London* or otherwiſe, *ſave what he ſhall be pleas'd to give her by his laſt Will.* Now what

is to be underſtood by this Clauſe, *ſave &c.* It cannot be *ſave* what he ſhould give her out of his own Teſtamentary Share; for then it ſignifies juſt nothing, for the Releaſe did not extend to *that*, nor could the Parties think it did. It muſt then have Relation to ſome Part of the Eſtate, which it was thought by the Parties, the Releaſe did cut her off from. And then the Meaning muſt be this (and a very natural Meaning it is) That in Conſideration of ſo handſome a Settlement as I now make you, you ſhall promiſe me to be content with ſuch Part of your cuſtomary Share, as I ſhall think fit to give you by my Will; and conſequently it was the Meaning of the Agreement, That the Father ſhould be conſidered as a Purchaſer of his Daughter *Barker*'s cuſtomary Share.

And then the Meaning of the Agreement, which in a Court of Equity is chiefly to be conſidered, will be equally prejudicial to Mr. *Blundell*'s Right, as if it were left to its Fate at Law, where doubtleſs it would be void.

As to the Perſon, that now applies to make this Releaſe good; it is to be conſidered, That it is not the Father to whom this Releaſe was executed, that comes into this Court, to have the Benefit of it; but it is a Daughter married againſt the Conſent of her Father, that comes into this Court, to ſupport a Releaſe void at Law, as an Agreement in Equity, in Order in a great Meaſure, to break in upon the Will of her Father, to whom the Releaſe was executed.

Where an Agreement is void at Law, Equity will not carry it into Execution in Favour of a third Perſon, and contrary to the Meaning of the Parties.

It ſeems to me a very harſh Doctrine, and what, it may be, was never done, for a third Perſon to come into a Court of Equity, to enforce an Agreement void in Law, in direct Oppoſition to the Meaning of the Parties to the Agreement.

The Father had during his Life an abſolute Power over this Releaſe, and might if he had pleas'd, have diſcharged his Daughter from being bound by it.

The

The Queſtion is, Whether he has not done *that* which was equivalent to it? It ſeems to me that a Will, whereby he has given her all her cuſtomary Share, is virtually and in Equity, a plain Declaration, That it was never his Intention, ſhe ſhould be cut off from this Share by Virtue of her Releaſe.

If the Certainty of a Child's Advancement does not appear under the Father's Hand, it is cut off from claiming a Share by the Cuſtom. *Salk.* 427. 2 *Vern.* 630.

If therefore, for theſe Reaſons, the Releaſe will not ſtand in her Way, the next Thing to be conſidered is, Whether the Certainty of her Advancement does appear under the Hand of the Father, in ſuch a Manner as the Cuſtom requires; for if it does not, then this Advancement will cut her off from coming in.

And here the Queſtion is no more than this, Whether the Certainty of her Advancement does ſufficiently appear in the Marriage Settlement; for the Father being a Party to it, whatever appears there, does appear under the Hand of the Father.

Advancement by Land, no Bar to the Cuſtom. 2 *Vern.* 754.

As for the Uncertainty of the Freehold Eſtate, *that* nothing to the Purpoſe; for the Cuſtom extends only to Perſonal.

The Perſonal Eſtate in this Settlement is 4000*l.* in Money, expreſly declared in Part of her Fortune; and the reverſionary Intereſt of a Leaſe, without any Value put upon it.

The firſt Objection againſt this being a ſufficient Certainty, is the Uncertainty of the Value of this reverſionary Intereſt of the Leaſe.

If it appear under the Father's Hand what Things were given a Child, the Advancement is ſufficiently certain, tho' the Value of 'em be not expreſs'd.

In Anſwer to this, it is to be obſerved, That the Cuſtom of the City is not, that the Certainty of the Value of the Advancement, or the Certainty of the Sum, but the Certainty of the Advancement muſt appear under the Hand of the Father.

It ſeems to me that there cannot be a greater Certainty, and leſs Poſſibility of Fraud or Colluſion than when the Thing itſelf given to the Child, appears under the Hand of the Father. If a Father ſhould ſay, that he

he had given a Child ſuch a Diamond Necklace, deſcribing it, Is not this better than if he ſhould put a Value upon it; it may be more, it may be leſs, than the true Worth?

Beſides, had this reverſionary Intereſt of this Leaſe remained Part of the Teſtator's Eſtate *Tempore Mortis*, it muſt have been valued, and may therefore as well now.

The 2*d* Objection againſt the Certainty is, That Mrs. *Barker* had both Money and Land left her by another Anceſtor; and that her Father received in her Right, the Intereſt of the one, and the Profits of the other, and was at the Time of the Marriage, a Debtor to his Daughter upon this Account; and that therefore it is impoſſible to know the Certainty of that Advancement, which is the Remainder after this Debt deducted.

The Reaſon why the Cuſtom of the City, requires the Certainty of the Advancement to appear under the Hand of the Father, is certainly in Favour of the unadvanced Children, that the whole of the Advancement may be thrown into Hotchpot. If therefore, it does plainly appear, that a Child has not been advanced more than ſuch a Sum, for Inſtance 4000 *l.* nay, that the Child has not been advanced quite ſo much, but it is only uncertain how much ſhort of that Sum the Advancement was, by Reaſon of a trifling Debt to be deducted, that cannot be reduced to a Certainty; without Doubt ſuch an Uncertainty may be cured, by the advanced Child's quitting entirely this Debt, and bringing in the whole 4000 *l.* for the unadvanced Children cannot be prejudiced, by bringing more than the Advancement was. Not to admit this for an Anſwer, were to reduce the Cuſtom of the City to this Abſurdity, That when a Man has a Right to ſo much and more, he ſhall loſe *that* to which he has a certain Right, becauſe he cannot tell how much more he is intitled to.

Where it appears, a Child has not been advanced above ſuch a Sum, but ſomewhat leſs; the Uncertainty of the Advancement may be cur'd by the Child's bringing the whole Sum into Hotchpot.

If therefore Mrs. *Barker* quits her Debt, this Objection is at an End: But it is capable of another Anſwer, if this were inſufficient.

Mrs. *Barker*'s Marriage Portion, conſiſted both of Real and Perſonal Eſtate. If now the Freehold Eſtate, to which the Cuſtom does not extend, be eſteemed to go in Satisfaction of the Debt; then the Uncertainty of the Debt, will not create any Uncertainty in the Advancement, as far as the Cuſtom of the City is concerned in it. And this ſeems agreeable to the Juſtice of the Court in other Caſes; as where a Man indebted by Specialties and Simple Contract, dies, leaving both a Perſonal and Real Eſtate, this Court will not ſuffer the Debts by Specialty, to be flung upon the Perſonal Eſtate; and *that* being exhauſted, leave the Debts by Simple Contract unſatisfied, the Land not being liable to pay them; but will decree the Debts by Specialty to be ſatisfied out of the Land, and the Debts by Simple Contract out of the Perſonal Eſtate.

If in this Caſe, the Real Eſtate had not been ſettled upon Mrs. *Barker* upon her Marriage, but left her by Will, Mr. *Blundell* would have thought it very hard, That this Debt ſhould have been diſcharged out of the Perſonal Eſtate, and ſo leſſen his Wife's Share; when her Siſter had ſo conſiderable an Eſtate in Land left her, out of which this Debt might have been deducted.

As to the Demand of the Widow, Mrs. *Ibbot*, That ſhe ſhould not be bound further than the Penalty of her Bond; there is very little in it. For I eſteem the Bond and Articles of Agreement before Marriage, to make but one entire Agreement; and the Penalty of 3000*l.* as Circumſtances then ſtood, was thought more than a ſufficient Penalty for the Enforcement of it. And tho' this happens to prove otherwiſe, by an unexpected Increaſe of the Teſtator's Eſtate; yet certainly a Court of Equity will hold her to her Agreement.

Upon the whole, it ſeems clear to me, That Mr. *Blundell* is in Right of his Wife, intitled only to one Half of a Third of the Perſonal Eſtate of the Teſtator.

DE

Term. Paſchæ,

8 *Geo.* 1.

In CURIA CANCELLARIÆ.

Lady Coventry, *Widow of* Gilbert *Earl of* Coventry, *deceas'd.* Contra *the preſent Earl of* Coventry, *the youngeſt Brother of* Gilbert *deceas'd*; *and Lady* Anne Carew, *the Daughter and Heir, and ſole Executrix of the ſaid* Gilbert.

See this Caſe 2 *Mod. Caſes in Law and Equity* 12. *Rep. of Caſes in Equity* 160.

THIS was a Bill brought in the Court of Chancery to hold and enjoy 500 *l. per Annum* of the Real Eſtate of *Gilbert* late Earl of *Coventry*, purſuant to the Power reſerved by the Will of *Thomas* the Father, and the Marriage Articles enter'd into by *Gilbert* precedent to the Marriage with the Plaintiff; or to have a Satisfaction out of the Perſonal Eſtate of the ſaid Earl; to have likewiſe a Legacy of 3000 *l.* given her by the Will of her

Tenant for Life with Power to ſettle 500 *l. per Annum* out of ſuch and ſuch Lands on a Wife, enters into Marriage Articles, by which he covenants for himſelf and his Heirs &c. That he, or

her Huſband, and ſome other Proviſions made for her Jointure by theſe Articles; for as her Portion was 10,000*l.* ſo it was agreed in the Marriage Articles, that ſhe ſhould have 1000*l. per Annum* in Land or Money for her Jointure.

his Heirs would, in Purſuance of this Power, *or otherwiſe*, ſettle 500*l. per Annum.* The Marriage takes Effect,

and a Settlement is drawn accordingly by his Direction, of ſuch Lands as were comprized within the Power; but never executed. Queſtion, Whether this ſhould bind the Remainder-Man, or Whether the Wife ſhould have Satisfaction made her out of the Perſonal Eſtate? Decreed upon a ſecond Hearing, That the Lands ſhould be ſettled.

Thomas Earl of *Coventry*, Father of the ſaid *Gilbert*, ſettled his Eſtate by his Will, bearing Date *March* 24, 1698: Which Settlement, as far as concerns the preſent Queſtion, was to *Gilbert* his Son for his Life; then in Tail-Male to the *firſt*, *ſecond*, *&c.* Sons of *Gilbert*; Remainder to his *ſecond* Son the preſent Earl of *Coventry* for his Life, Remainder in Tail Male to his *firſt*, *ſecond*, *&c.* Sons, and ſo on. And further on in the Will, this Clauſe is added, *Provided nevertheleſs*, That notwithſtanding any Thing herein before contain'd, it ſhall be lawful for any Perſon or Perſons, that ſhall become ſeiſed of Lands or Tenements under the Limitations of this my Will, by any Writing under his or their Hands and Seal, to limit or appoint any Lands, not being Copyhold, nor leas'd out for Lives, not exceeding in the whole 500*l. per Annum*, to any Wife for her Jointure, that ſhall bring with her a Portion equivalent to ſuch Jointure.

Gilbert late Earl of *Coventry*, enters into Marriage Articles, bearing Date the 23*d* of *June* 1715, by which, in Conſideration of a Portion of 10,000*l.* paid, he covenants for himſelf, his Heirs, Executors, *&c.* with Sir *Strenſham Maſters*, the Father of the Plaintiff, his Heirs, *&c.* that he, *or his Heirs*, ſhould by Deed indented *&c.* at the Requeſt of the Father, but at the Charge of the Earl, his Heirs, Executors, *&c.* purſuant to this Power reſerved by the Will of his Father, *or otherwiſe*, ſettle upon the Plaintiff for her Jointure, or procure to be ſettled, Lands of the full Value of 500*l. per Annum.*

He further covenants to ſettle upon her, for an Addition to her Jointure, an Annuity of 250 *l. per Annum* during her Life; and that 5000 *l.* of her Fortune ſhould be laid out in Land, wherein ſhe was to have the Term of her Life for a Jointure, or the Intereſt of the Money until the Land ſhould be bought from and after her Huſband's Deceaſe.

The Marriage took Effect, the Portion was paid, and about 2000 *l.* laid out in Preſents.

Gilbert the late Earl, immediately after his Marriage, deſir'd one *Charles Parſons* to conſult with his Steward, what Lands were the propereſt to be ſettled in Purſuance of theſe Articles; and upon a diligent Search into his Eſtate and the Settlements of the Family, they could find no other Manor, but *that* of *Woolvey* proper to be ſettled, and *that* was but 400 *l. per Annum.*

This Steward leaving his Lord's Service and dying quickly after, occaſion'd further Delay; the new Steward being for ſome Time, unacquainted with the Concerns of the Family.

But the Earl often expreſs'd great Uneaſineſs at this Delay.

And afterwards, upon looking for another Manor to make up the 500 *l. per Annum*, they pitched upon one that had an Incumbrance upon it, that was neceſſary to be firſt clear'd. But however at laſt, Inſtructions were given and ſent to *London*, to be laid before Counſel, for preparing a Draught purſuant to the Articles. The Draught was prepared, engroſs'd and ſent down to the Earl, to be by him executed in the Country. The Earl after the Engroſſment of the Deed, being told what Lands were to be ſettled by this Deed, approv'd of their Choice; but the actual Execution of the Settlement was prevented, once by an accidental Viſit of Mr. *Sandys*, afterwards by Illneſs, and at laſt by the ſudden Death of the ſaid Earl. When the Earl expreſs'd his Uneaſineſs upon the Diſappointments he had met with, in making this

Settlement, he was told by Counſel, he might be very eaſy; for that if he ſhould die, a Court of Equity would eſteem it as done.

At the Time when the Earl made his Will, which was the Day he died, there was a Man and Horſe ſent to the Steward, who happened to be 50 Miles off, and had the Keys of the Place where the engroſs'd Deed lay; but before the Steward could come, the Earl died. By the Will he gave his Wife, over and above what was agreed to be ſettled upon her by the Marriage Articles, a Legacy of 3000 *l.*

The Defendant Lady *Anne Carew*, Daughter of the ſaid Earl, (who died without Iſſue Male,) and Executrix of his Will, ſwore in her Anſwer, That in Caſe the 500 *l. per Annum* was to be flung as a Burthen upon the Perſonal Eſtate of her Father, there would not be Aſſets enough, to anſwer all the Demands of the Plaintiff.

Argument for the Plaintiff.

It was argued by Sir *Robert Raymond*, Sir *Philip Yorke*, Serjeant *Cheſhyre*, and Mr. *Mead*, Counſel for the Plaintiff, and the Defendant Lady *Anne Carew*, who joined with the Plaintiff, in Order to throw the Burthen off the Perſonal Eſtate,

Of Powers to charge Eſtates. The Conſtruction of 'em.

That theſe Sorts of Powers receive always in a Court of Equity, a large and favourable Conſtruction; being Powers given to thoſe, who, had it not been for ſuch Settlements, in which theſe Powers are contained, would have been Tenants of the Fees themſelves. This uſed as a Reaſon by Lord Chief Juſtice *Holt*, for a large Interpretation of theſe Powers, in Caſe of Sir *Charles Orby* and Lord *Mohun*, in Lord *Cowper*'s Time.

It was obſerved, That theſe Marriage Articles want but one Circumſtance, *viz.* a Certainty of the Lands, to make 'em in Point of Law, a perfect Execution of the Power; but that this Defect, *viz.* Want of Certainty, was now remedied, at leaſt in Equity, by the

Steps that had been taken in the moſt ſolemn and deliberate Manner, towards the Execution of this Settlement.

What ought to be done in Purſuance of Covenants upon valuable Conderations, Equity looks upon as done.

It was ſaid, That a Court of Equity, will look upon a Thing covenanted to be done, and intended to be done, as done; and in Caſe of a legal Defect in the Execution of it, aid and aſſiſt that Defect: But indeed this muſt be underſtood of Settlements, Executions of Powers *&c.* founded upon valuable Conſiderations, not voluntary ones.

Inſtances of defective Executions of Powers aided by Equity.

The preſent Caſe, the Caſe of a Jointure, which is always favour'd, becauſe it comes in lieu of Dower.

Onions and *Tyrer* was a Caſe before Lord *Cowper*, *where* a former Will appearing to have been cancell'd, for no other Reaſon, but becauſe the Teſtator thought he had made another to the ſame Effect, which proved not to be duly executed; it was determin'd, That Equity would ſet up the former Will again. 2 *Vern.* 741. *Rep. of Caſes in Equity* 130. A Will cancell'd upon a falſe Suppoſition, ſet up again in Equity.

Rep. of Caſes in Equity 168. Power to charge Lands for younger Children in Writing atteſted by three Witneſſes; Execution with two, held good.

In the Caſe of *Parker* and *Parker*, a Man having Power to charge Lands for younger Children, by a Writing under his Hand, atteſted by three Witneſſes, did in Fear of ſudden Death, and being abſent from home, by a Paper atteſted by two Witneſſes, charge his Eſtate with 7000 *l.* for his Children; and this Defect was ſupplied, becauſe occaſion'd by his being abſent from home, and ſo not being able to have a Sight of the Deed, where this Power was contained.

Power to charge by Will under Hand and Seal; Seal wanting, and yet held good. For where the Intention of doing a Thing plainly appears, Want of Circumſtance ſhall not avoid the Act in Equity.

1 *Chancery Caſes* 264, *Smith* and *Aſhton*. The Power was to charge Lands, by Deed or Will in Writing under Hand and Seal; the Deed in which this Power was, was a voluntary one; and in the Execution of this Power, the Circumſtance of a Seal to the Will was wanting; yet this Defect was aided. For Circumſtances are but Cautions to prevent Impoſition, the ſubſtantial Part is to do the Thing; and therefore when it is clear and indubitable, That the Thing was deſigned to be done, the Neglect of Circumſtances ſhall not avoid the Act in Equity.

Circumſtances annex'd to Powers only to prevent Frauds.

2 *Chan. Rep.* 29, *Hele* and *Hele.* It was ſaid, That if *de facto* the Power had been executed, Equity would have ſupplied the Defects; for Circumſtances are only annex'd to Powers to prevent Frauds.

Where Articles are enter'd into for a Purchaſe, and the Money paid, tho' the Vendor confeſs a Judgment before Conveyance, yet the Purchaſer ſhall hold the Land.

In the Caſe of *Peach* and *Winchelſea*, Lord *Cowper* ſeem'd to be of Opinion, That in Caſe of a Covenant to convey Land, the Money being paid, a Judgment confeſs'd to a Creditor, between the Time of the Covenant and the Conveyance, ſhould not affect the Purchaſer; becauſe in Equity, the Land is eſteem'd to be ſold from the Time of the Covenant.

In Caſe of a Revocation, Want of Formalities and Circumſtances (when omitted thro' Neceſſity) ſhall be ſupplied by Equity. *Rep. of Caſes in Equity* 138. 2 *Mod. Caſes in Law and Equity* 14.

Juſtice *Powell*, in his Argument in Caſe of *Bath* and *Mountagu*, admits, That even in Caſe of a Revocation, which is not ſo much favoured, a Court of Equity may interpoſe in a Caſe of Diſability; as if the Duke of *Albemarle* had taken the Deed over with him to *Jamaica*, and *there* having an Intention to revoke it, had gone as far as he could, by making his Will with ſix Witneſſes, That this ſhould have been made good, tho' none of the Witneſſes were Peers, becauſe of the Diſability he was under to get Peers.

It was argued, That tho' poſſibly it might be objected, that the preſent Caſe did not come directly within the Authority of the Caſes quoted, becauſe *here* the Plaintiff did not come into Equity to eſtabliſh a Conveyance already executed, and only attended with ſome trivial legal Defect, but to ſet up a Conveyance that had not been at all executed; yet it did within the Reaſon of theſe Caſes, for all the Preparations, that were from Time to Time taken in Order to the Execution of it, manifeſt as fixed and reſolved an Intent to have executed it, as if it had actually been done.

And to ſpeak properly, a Deed or Power executed but defectively in ſome legal Circumſtance, is really not executed in Point of Law at all; ſo that in that Caſe, a Court of Equity may be ſaid to ſet up a Conveyance not executed, becauſe in Point of Law the whole Execution is null and void.

Had this Draught engroſs'd been a Will, it had been a good Will within the Statute of *Hen.* 8. and before the Statue of *Frauds*; for that Statute does not require the Will to be of the Hand-Writing of the Teſtator, but only to be reduc'd to Writing by his Direction. Stat. 32 *H.* 8.

A Covenant to ſell and convey, ſo far conſidered in Equity, as that the Court will compel the Heir to join in the Sale, tho' this be to his Diſinheriſon; for the Money will go to the Executors. Covenant to ſell and convey, Equity will compel the Heir to join in the Sale.

It is true, That *where* a Tenant in Tail contracts for the Sale of Land, and dies before Execution, the Court will not carry this into Execution againſt the Iſſue. But the Reaſon of this is, becauſe it is contrary to the Intention of the firſt Donor, who deſigned as the Statute *de Donis* ſays, that the Eſtate ſhould remain in the Blood *&c.* But where Tenant in Tail articles to ſell, and dies before Conveyance, the Iſſue is not bound. Stat. *de Donis.*

But yet if a Tenant in Tail having a Power to make Leaſes for three Lives, ſhould covenant to make ſuch a Leaſe, and die before Execution; the Court would carry this into Execution againſt the Heir, tho' they would not a Sale. Yet if Tenant in Tail, with Power to make Leaſes for three Lives, covenants to make ſuch a Leaſe, it ſhall bind the Heir.

Barkham and *Barkham* was a Caſe, in the Lord *Somers*'s Time, wherein he decreed a defective Jointure to be made good, againſt thoſe that claim'd under a Marriage Settlement, and within the Conſideration of the Marriage Settlement.

There may poſſibly be Caſes, where a Court of Equity has refus'd to do this, *viz.* to ſupport, or make good Conveyances, defective in ſome legal Circumſtance; but then this has been when it was demanded in Favour of voluntary Proviſions. Defects in *voluntary* Conveyances not much favour'd.

This 500*l. per Annum* Jointure, but a ſmall Incumbrance, in Compariſon of what the Eſtate of the preſent Earl is able to bear; and he is one that will be the leſs favour'd in this Court, upon Account of his being a Volunteer.

Accident one great Branch of the Juriſdiction of the Court of Chancery. See *Page* 1.

It was further urged, That as *Accident* is one great Branch of the Juriſdiction of this Court, no Caſe could ever come before it, attended with more and ſtranger Incidents of this Nature, to be intitled to Relief, than the preſent.

The great Difficulty of finding out Lands free from thoſe Incumbrances mentioned in the original Power, Death of the Steward, Fear to come up to *London* on Account of the Small-Pox, the accidental Viſit of Mr. *Sandys*, the Illneſs of the Earl, his Lady's Tenderneſs for his Health not ſuffering him to be diſcompos'd by Buſineſs, and the ſuddenneſs of his Death when the Phyſicians thought him out of Danger, are all ſo many Accidents concurring to prevent the Execution of this Deed, and which cry for Relief in this Court.

It was likewiſe ſaid, That the Opinion of Counſel in this Caſe, would be conſider'd as a favourable Circumſtance, who all inform'd the Earl, he need not be uneaſy; for if he died, a Court of Equity would conſider this Deed as executed.

For the Defendant.

Mr. *Cowper*, Counſel for the preſent Earl. The Queſtion *here* is not Whether a Court of Equity will ſupply ſome ſlight Defects in the Execution of a Power; but Whether this Court will entirely ſupply a Non-Execution; and *that* in Favour of a Perſon not without Remedy. For ſhe has a Covenant that binds the Heir at Law, and the Perſonal Eſtate that the Heir as Executrix is entitled to; which (we ſay) will, upon Inquiry, be found to amount to 2000 *l.* over and above the 5000 *l.* covenanted to be laid out in Land, (wherein the Paintiff is only to have her Life) and the 250 *l. per Annum* Annuity.

So that it cannot be pretended, That in this Caſe, here is any Want of Proviſion; there is one almoſt adequate to the Fortune, tho' ſhe ſhould not ſucceed in what ſhe now prays againſt the preſent Earl.

Lord Chief Juſtice *Holt*, in his Argument in the Caſe of *Bath* and *Mountagu*, ſtrongly inſiſts upon it, as a fix'd and ſettled Point in Law, That Powers are to be ſtrictly purſued; becauſe created by the Owner of the Land, in which Caſe *Stat pro ratione voluntas.*

A ſettled Point in Law, That Powers ought to be ſtrictly purſued.

Maxim.

When a Court of Equity decrees Conveyances to be made, and Powers to be executed, it is always in Caſes attended with Circumſtances of ſuch Weight, as to make it appear fit and proper to be done in the Judgment of Mankind; and without ſuch Circumſtances, a Court of Equity will never do it; it being *pro tanto*, a Departure and Variation from the Common Law.

Equity ought to decree Conveyances, or ſupply the defective Execution of Powers only in particular and extraordinary Caſes; *viz.* in Favour of Creditors and Purchaſers; or to make Proviſion for younger Children.

As to a Surrender in Caſe of Copyholds; there is no Doubt, but this Court may ſupply a defective Surrender, or decree one where there is none at all; but tho' the Court may do this, ſurely it is not bound to do this, and in all Caſes, and only becauſe it is aſked. No; it is to be done upon particular Circumſtances (as Equity Caſes turn upon Circumſtances) and in Favour of Purchaſers, or Perſons that in Law or Equity are conſidered as Purchaſers; as a Wife and Children unprovided for. Therefore Lord *Somers* in the Caſe of *Kettle* and *Townſend*, decreed a Conveyance of a Copyhold in Favour of a Grandchild unprovided for; but the Houſe of Lords revers'd the Decree, as thinking the Court had gone too far in extending this Power to Grandchildren. And this Court has refus'd to ſupply a defective Surrender in Caſe of a Wife provided for before.

Salk. 187. A Decree to ſupply a Surrender of a Copyhold in Favour of a Grandchild, revers'd in the Houſe of Lords.

Denied to be ſupplied in Caſe of a Wife provided for before. *Biſcoe* v. *Cartwright* 1716. *Rep. of Caſes in Equity* 121.

If the Caſes quoted for the Plaintiff be re-conſidered, ſome Circumſtances will be found attending upon them, as will turn them into ſo many Authorities in Favour of this Earl now Defendant.

As to the Caſe of *Smith* and *Aſhton*; Lord Chief Juſtice *Holt* takes Notice of it, in his Argument in the Caſe of *Bath* and *Mountagu*; and according to him, the Indulgence a Court of Equity ever ſhews to Proviſions made for younger Children, was the chief Ingredient in the Caſe.

Ant. 467.

2 *Vern.* 164.

Beſides,

Beſides, one very material Circumſtance, as it is reported in 1 *Chanc. Caſes* 265, was omitted, when quoted by the Counſel for the Plaintiff, which was, that an Iſſue was directed to be tried at Law, Whether ſuch Notes in Writing were Part of the laſt Will of *Ralph Aſhton*; and being found by the Verdict to be his Will, and in Favour of younger Children thus provided for, the Court decreed the Power well executed, tho' the Circumſtance of Sealing was wanting.

But is this an Authority, that the Court ſhould in the preſent Caſe, in Favour of one ſo amply provided for otherwiſe, decree the Execution of a Power *ab origine*, where it was not executed at all?

Ant. 468. As for the Caſe of *Hele* and *Hele*, it is indeed the Caſe of a Jointure, but as there is no Decree in it, the Authority of it cannot be great; and the Counſel in quoting it, ſeemed to make Uſe of it under the Head of Accident. But certainly, the Pretence the Plaintiff ſets up to be relieved in this Court, under the Head of that Branch of the Juriſdiction of it, (*Accident*) is the

Ant. 470. moſt groundleſs in the World.

The Articles were made in the Year 1715, the Earl died in 1719, four Years and a Half intervenes, and yet, according to them, it muſt be eſteem'd an *Accident*, that he died before he could make the Settlement, in Purſuance of the Articles; and to ſupport this Part of the Caſe, the Evidence gives us a Hiſtory of his *Steward*, his *Gout*, the *Doctor*, and the *Bath*.

If it muſt be look'd upon as an Accident that a Man dies in four Years, Why not in eight? Nay in eighty? I know not where to put the Bounds.

Were it proper or convenient to enter into the particular Circumſtances of this noble Family, it would appear, That the preſent Earl, is not ſo amply provided for, conſidering all the Incumbrances upon his Eſtate; and therefore it would be ſtill harder for this Court to interpoſe to his Prejudice, and in Favour of one, otherwiſe ſo well provided for, as this Lady is.

In the Caſe of Sir *Charles Orby* and Lord *Mohun*, 4 *Ann.* where Lord *Cowper* was aſſiſted by Chief Juſtice *Holt* and other Judges, a Bill was brought to have a defective Execution of a Power of making Leaſes ſupplied. In the Power it was expreſly enjoined, that the ancient Rent ſhould be reſerved; in the Execution of the Power the ancient Rent was reſerved, but not ſaid what the ancient Rent was. This, tho' ſuch a Defect, as this Court by ſending it to a Maſter might have ſupplied; yet this Court would not interpoſe, becauſe to the Prejudice of a third Perſon, the Remainder Man.

2 *Vern.* 531, 542.

Power to make Leaſes, reſerving the ancient Rent; ancient Rent reſerv'd in the Leaſe, but not ſaid what *that* was.

Leaſe held not good; becauſe to the Prejudice of a third Perſon, the Remainder Man.

This moſt certainly a Precedent, That what is now deſired of the Court is a diſcretionary Power, to be exerciſed by this Court, as the Circumſtances in every particular Caſe ſhall direct.

The Caſe of *Piggot* and *Penrice*, in Lord *Cowper*'s Time, *A. D.* 1717, was this, A Wife having a Power in a Settlement ſhe had made in Favour of her Huſband, to revoke the Uſes and limit new ones, writes to one to prepare a Deed to revoke the Uſes, and ſettle the ſame upon ſuch a Relation; in which Letter ſhe takes Notice of this Power in the Settlement, that did enable her ſo to do; falling ill ſhe ſends another Letter, preſſing the preparing of this Deed; for that it was her abſolute Will to revoke the Uſes, and give her Eſtate to this Relation.

Rep. of Caſes in Equity 137.

A Woman makes a Settlement in Favour of her Huſband, with Power of Revocation, and afterwards ſends Letters of Inſtructions to have a Deed prepar'd in Purſuance of this Power, for revoking that Settlement, and to give the Eſtate to ſuch a Relation; and yet dying before the Deed was executed, notwithſtanding her Intention plainly appear'd in the Letters, it was held to be no Revocation. But if ſhe had been hinder'd from revoking this Settlement by any Act of her Huſband's, the Court would then (as they ſaid) have been of the contrary Opinion.

In this Caſe the Court declared, that they would not interpoſe; that they muſt judge by what ſhe had done, not by what ſhe intended to do.

Had ſhe been hindred from the Exerciſe of this Power, by the Act of her Huſband; then the Court ſaid, they would have interpos'd: So poſſibly in this Caſe; had the Execution of this Power, been prevented by the Art and Contrivance of the preſent Earl, it had been a reaſonable Ground for this Court to interpoſe.

Ant. 469. Mr. *Talbot.* It muſt be admitted, That the Limitation, by which the preſent Earl enjoys, is a voluntary Conveyance: But then it muſt be conſidered, That he claims under the Will of the Father of the late Earl; and ſo by a Title paramount to *that* of the late Earl, who was himſelf a Volunteer; and then I do not ſee, how one Volunteer deſerves more Favour than another.

It is ſaid, That the preſent Earl claims under a Limitation clogg'd with this Power, which is true. And had Earl *Gilbert* been pleas'd to execute that Power, which he was perfectly at Liberty to do or not, the preſent Earl muſt have ſubmitted to it; but ſince the Power is unexecuted, it is juſt the ſame, as if there had been no Power at all ever created.

The executing, or not executing of this Power was a meer Contingency; and as the Earl muſt have been bound, if the leſs favourable Contingency had happened, very reaſonable that ſince the more favourable Contingency has happened, he ſhould enjoy the Benefit of it.

The Eſtate of the preſent Earl is already clogged with two conſiderable Jointures now ſubſiſting, and other Incumbrances; ſo that were the Intention of the creator of this Power of any Weight, it is very probable, he would not chooſe to have the Eſtate of the Family incumber'd at once with ſo many Jointures, which does not ſo well anſwer the End propos'd by him in creating the Intail, *viz.* the ſupporting the Honour and Dignity of the Family.

Ant. 466. It has been ſaid, That theſe Articles are even in Point of Law, an Execution of the Power. If this were ſo, the Plaintiff muſt take her Remedy at Law, not in Equity.

But there is not the leaſt Colour for this. For it plainly appears from the wording of the Articles, That however it might be primarily and originally, the Intention of the Parties to have made this Settlement, in Pur-

ſuance of the Power in the Will, yet that they never intended to confine and reſtrain themſelves to it.

The Covenant is, That Earl *Gilbert, or his Heirs,* at the Requeſt of the Lady's Father *&c.* ſhall by Deed indented *&c.* according to the Power reſerved by the Will of the ſaid Earl's Father, *or otherwiſe,* ſettle or procure to be ſettled, Lands of the Value of 500 *l. per Annum,* for her Jointure.

The Words *or otherwiſe* ſet the Articles looſe and at large as to the Power; for very evident that the ſettling of any Lands, tho' not within the Power, would have been a good Performance of the Articles.

The Covenant is, That Earl *Gilbert* or his Heirs ſhall do it; ſo that if the Heir did it, it would be a good Performance of the *Articles:* But it is impoſſible that a *Power* given to any Perſon claiming under that Settlement, to Jointure his Wife, can be an Authority for a Son (the Heir) to Jointure his Mother.

It is ſaid the Plaintiff is a Purchaſer; it is true, ſhe is ſo, but of what? Not of any Lands compriz'd in the Will of Earl *Thomas,* and to which this Power extends. All that ſhe is a Purchaſer of, is a Right to a Jointure; and as a Security for the Performance of it, ſhe has relied upon the Perſonal Covenant, which binds Earl *Gilbert* and his Heirs; and if there are Aſſets ſufficient for that Purpoſe, theſe are proper to be applied in Satisfaction of this Covenant. And to make the largeſt and moſt favourable Conſtruction for her; ſhe can only be eſteem'd a Purchaſer with Reſpect to *us, pro tanto* as the Aſſets fall ſhort of this 500 *l. per Annum.*

It has been ſaid, That whatever a Man does not give away from himſelf, remains in him; and that whatever Powers are reſerved by the Donor, (being Part of the old Dominion he had over his own Eſtate) ought to receive a large and benign Interpretation.

This Rule tho' true, not applicable to the preſent Caſe; for the Perſon againſt whom this Power is deſired to be executed. is one that receives his Eſtate from the

the ſame Bounty, that he who ſhould have exercis'd it did; and conſequently ſince both claim under the ſame Title, and from the ſame Donor, the one cannot challenge more Favour than the other.

Rules of Law, the Boundaries and Fences of Property.

It is a Matter of the higheſt Importance, That Rules of Law, the Boundaries, and Fences of Property, ſhould remain fix'd and ſettled, and be never broken in upon but with very good Reaſon, and that too as ſeldom as poſſible; and conſequently, a Court of Equity will not be forward to do it in Favour of Volunteers.

2 *Vern.* 69.

One makes a voluntary Settlement with Power of Revocation on Tender of a Guinea, and afterwards makes another voluntary Settlement of the ſame Lands to different Uſes; but the Tender of the Guinea not being proved, the Court refuſed to ſet aſide the firſt Settlement.

Therefore in the Caſe of *Arundel* and *Philpot*, mention'd in the Caſe of *Bath* and *Mountagu*, *where* there was a Settlement with a Power of Revocation, upon the Tender of a Guinea; the Plaintiff claiming under a latter Settlement, made in Purſuance of this Power of Revocation, could not prevail to ſet aſide the firſt Settlement, even in a Court of Equity, for want of being able to prove that little Circumſtance of the Tender of a Guinea; but being a Volunteer, was ſent to Law to have it tried, revoked or not revoked. Indeed at Law the Party was ſo fortunate as to prove the Tender.

Caſes of *Lanyon* and *Williams*, *Weale* and *Lower*, *Powell* and *Powell*. 2 *Vern.* 306.

Tenant in Tail covenanted to ſell, received the Money, ſtood in Contempt to this Court, for not ſuffering a common Recovery, and died in Contempt, without doing of it; yet this Court would not compel the Iſſue to do it.

Ant. 469.

It is ſaid indeed, That the Reaſon of this is, becauſe it is in Derogation of the Intent of the Donor. But this tho' ſpecious, and what might have held at the Time of making the Statute *de Donis*, cannot be ſaid with any Reaſon at this Day; for whoever gives an Eſtate-Tail, muſt be preſumed to intend to give it with all the legal Advantages. And as every Body is preſumed to know the Law, the Donor muſt be preſumed to know, that by proper Ways and Methods, the Tenant in Tail may diſpoſe of his Eſtate, and be willing he ſhould.

As to the Power exerciſed by this Court in Marſhalling of Aſſets; this Court never does it in Favour of a Reſiduary Legatee; and where it is done, it is done for the Sake of paying Debts, and in ſuch a Manner, as the Creditors might have done themſelves; and therefore *where* the Heir at Law can have no Reaſon to complain.

Replication for Plaintiff.

It was replied for the Plaintiff, That notwithſtanding what has been ſaid to the contrary, this is a favourable Caſe; being *that* of a Lady who brought a great Portion into the Family, and will otherwiſe be ſtripp'd of a great Part of that Jointure, ſhe covenanted and paid a valuable Conſideration for.

As to the Objection raiſed from thoſe Words in the Covenant, *or otherwiſe*,

It is capable of two Anſwers,

1*ſt*, That it is a common Caution, or Phraſe made Uſe of by Conveyancers to prevent any Danger, that may ariſe from Miſtakes, or Miſrecitals; Or,

2*dly*, It may relate to the Manner or Form of the Conveyance; for very improbable that it ſhould relate to Lands not comprehended in the Power, the Earl at that Time having no other.

In the Caſe of *Smith* and *Aſhton*, in 1 *Chan. Caſes*, the Doctrine is fully laid down, That Circumſtances annex'd to the Execution of Powers, are but in the Nature of Cautions to prevent Surpriſe; and therefore when the Intent is plain, a Court of Equity will diſpenſe with them. And as that Caſe is quoted by Mr. Juſtice *Powell*, in the Caſe of *Bath* and *Mountagu*, it is entirely put upon the Accident of Death preventing the Execution of the Power. *Ant.* 467, 471.

Caſe of *Hele* and *Hele*, 2 *Chanc. Rep.* 29, was a Caſe of a Non-execution of a Power; and tho' there was no Decree, yet the Lord Chancellor by directing the Plaintiff to amend a Fault diſcover'd in the Bill, plainly declared what his Senſe was. *Ant.* 468, 472.

The Diſtinction has always been taken between Settlements perfectly voluntary, and thoſe founded upon a valuable Conſideration. Mr. *Cowper* has indeed advanced another of Proviſion, and no Proviſion; but cited no Caſe in Maintenance of this Diſtinction.

In the Caſe of *Smith* and *Aſhton* there was a collateral Proviſion; and ſo it is an Authority againſt that Diſtinction.

Proviſion or no Proviſion, material in voluntary Conveyances; but not in thoſe founded on valuable Conſiderations.

Indeed in Caſes of voluntary Conveyances, the Court has thought the Matter of Proviſion or no Proviſion fit to be regarded; but never in Conveyances founded upon a valuable Conſideration.

Ant. 475.

As to the Objection, That had this Power been reſerved to the Party himſelf, it would have received a large Interpretation; but being to a Remainder-Man it muſt have a ſtrict one:

It may be anſwered, That this is a Power reſerved to a Son, who without this Settlement, being Heir at Law, would have had the whole Fee in him; and therefore is entitled to the ſame Favour; which is a Reaſon allowed of in Caſe of Sir *Charles Orby* and Lord *Mohun*. Indeed as to the Caſe itſelf, it was ſaid to be fit to be left to the Law; becauſe a voluntary and peeviſh Execution of the Power.

Ant. 473, 476.

The Caſes of *Pigot* and *Penrice*, and *Arundel* and *Philpot*, were Caſes relating to Powers of Revocation, not ſo much favour'd by this Court, and voluntary; ſo that tho' the Court denied Relief, they did it upon Grounds that we admit of.

Ant. 476.

As to the Caſe of Tenant in Tail; it is contrary to the Intention of the Donor, at leaſt the Primary one; tho' the Law gives the Tenant a Power to defeat this Intention, in a proper Manner.

Stat. *de Donis.*

It is contrary to the Statute *de Donis*, made in Support of this Intent of the Donor; and tho' this Statute has been ſo expounded, as that by feigned Actions *&c.* yet if that particular Way chalked out by the Law be not complied with, a Court of Equity may refuſe to interpoſe.

In the Caſe of Lady *Clifford* and Earl of *Burlington*, Lord *Clifford* had a Power to limit a Jointure of 1000 *l. per Annum* on Lands in *Ireland*. Upon his Marriage he covenanted accordingly to ſettle a Jointure of 1000 *l. per Annum*, ſends to his Steward in *Ireland* for Particulars, which were ſent, and the Conveyance made; but after his Death it was found that the Lands did not amount to more than 600 *l. per Annum*. A Bill was brought againſt the Remainder Man to have the Jointure compleated; and decreed by Sir *Nicholas Wright* againſt the Remainder Man.

2 *Vern.* 379. *Rep. of Caſes in Equity* 167.

One having a Power to limit a Jointure of 1000 *l. per Ann.* covenants upon Marriage to ſettle 1000 *l. per Ann.* The Conveyance is made according to a Particular, that was ſuppos'd to be of that Value,

but prov'd only 600 *l. per Ann.* Decreed the Jointure ſhould be made up by the Remainder Man.

That Clauſe in the Will of Earl *Gilbert*, wherein he gives her 3000 *l.* over and above what was ſettled upon her by the Articles, a plain Proof, that he did look upon the Articles as a good Execution of the Power by Way of Appointment.

Ant. 466.

As to what was ſaid, That this Caſe cannot fall under the Head of Accident, becauſe the Earl lived ſo long after the Marriage:

Ant. 472.

It is eaſy to anſwer, That four Years or more may be as much apologis'd for and cover'd by Accidents as one; and whether the preſent Caſe be not ſuch a one, muſt be ſubmitted to the Court upon the Evidence.

Lord Chancellor *Parker*. As to the 500 *l. per Annum*, the Lady *Coventry* has certainly a very ſtrong, and a very favourable Caſe; there can be no Queſtion *whether*, tho' there may *from whence*, ſhe ought to have it.

Court.

It does not appear to me, but that the Heir at Law may literally perform this Covenant; and then the Controverſy will be only between the preſent Earl and the Heir at Law.

I do not believe, the Defendant in her Anſwer, looks upon the 5000 *l.* depoſited for a Purchaſe, as Aſſets. Whereas the Plaintiff being intitled to Intereſt only for her Life, the Reverſion is Aſſets.

Suppoſe

Suppoſe the Plaintiff had brought her Action at Law, upon her Covenant, againſt the Heir at Law; it deſerves to be conſidered, whether the Heir at Law, could have come into this Court, to have been relieved againſt the Remainder Man, and to have had this Land ſettled in Eaſe of his Perſonal Eſtate, and Diſcharge of the Covenant laid on him by the Anceſtor.

Abſurd to imagine, That the Words *or otherwiſe* ſhould relate to the Manner of the Conveyance; or that the ſettling of other Lands, to the Value of 500 *l. per Annum*, than thoſe comprehended in the Power, would not have been a full Performance of the Covenant. And impoſſible that the Heir making a Settlement upon his Mother, could be ſuppos'd acting in Purſuance of a Power, enabling a Man to ſettle Land upon his Wife, for her Jointure.

This is a Caſe of great Importance. Marriage Settlements and Executions of Powers are of daily Uſe; and therefore I ſhall be very cautious of making Precedents.

I will not determine it without the Aſſiſtance of ſome of the Judges; in the mean Time I will direct an Inquiry into the Aſſets, that ſo I may know how far Lady *Coventry* is concerned in the Queſtion.

The preſent Earl being only Tenant for Life, no Decree that I can make will bind the Iſſue; and therefore more ſafe for the Lady to have a Satisfaction out of the Aſſets upon the Covenant, if there be enough to anſwer all her Demands.

N. B. When the Cauſe came on again, the Judges that Lord Chancellor called to his Aſſiſtance, were of Opinion, That the Marriage Articles enter'd into by Earl *Gilbert*, together with the Deed of Settlement, drawn by his Direction in Purſuance of the ſaid Articles, was ſuch an Execution of the Power reſerv'd in the Will of Earl *Thomas* his Father, as was binding in Equity. And accordingly it was decreed, That the Plaintiff ſhould have

for Jointure, the Lands mentioned in the ſaid intended Settlement.

Hill verſus *Filkins & ux'*. In Canc.

See this Caſe 2 *Mod. Caſes in Law and Equity* 154.

Vide infra. Trin. 11 Geo. 1.

A Grandmother having no Children, but only a Grandſon and Grandaughter, and being a Roman Catholick, ſhe made her Will *May* 8, 1716, by which Will ſhe deviſed her Eſtate to three Truſtees, whereof two were Roman Catholicks, the third a Proteſtant; the Eſtate ſhe deviſed to be ſold for the Payment of her Debts; ſhe gave 100 *l.* Legacy to her Grandſon, that was her Heir at Law; the Surplus ſhe directed ſhould be paid to her Grandaughter, at her Age of 21, or Marriage; provided that ſhe married with the Conſent of the two Popiſh Truſtees, the Proteſtant Truſtee being to be unconcerned in that Affair. Having made this Will, ſhe died in *July* 1716.

Caſe upon Stat. of 11 & 12 *W.* 3. *Roman Catholicks.*

In *Auguſt* 1717, the Grandaughter married a Proteſtant, by the Conſent of the Popiſh Truſtees. At the Time of the Death of the Grandmother, the Grandſon was but nine Years of Age, and educated in the Roman Catholick Religion. The Grandaughter at the Time of her Marriage was fifteen, and likewiſe educated a Papiſt, and profeſs'd that Religion, at the Time of making the Will, and of the Death of the Grandmother, and at the Time of the Marriage. Both Grandſon and Grandaughter have ſince conformed, taken the Oaths, *&c.* before they came to the Age of eighteen.

It was the Perſwaſion of Witneſſes examined in the Cauſe, That the true Motive that prevailed with the Grandmother to diſinherit her Grandſon, her Heir at Law, and give her Eſtate to the Grandaughter, was, that the Grandſon being but nine Years of Age, ſhe did not know but he might eaſily be brought up a Proteſtant; but the

Grandaughter being fourteen Years of Age, and ſo better grounded in her Principles, ſhe hoped would firmly adhere to the Roman Catholick Religion.

Tho' the Popiſh Truſtees conſented to the Match, and *that* with a Proteſtant; yet nothing was ſettled upon the Wife, but barely her own Fortune; and *that* too ſubject to a Power of Revocation by the Huſband and the Popiſh Truſtees.

Queſtion now before the Court was, Whether this Deviſe to the Grandaughter, was not void by the 11 & 12 *W.* 3. and ſo the Grandſon, intitled to have the Truſt of the Reſidue, decreed to deſcend on him, as Heir at Law, and having taken the Oaths *&c.* as that Act requires, within ſix Months after the Age of eighteen?

This Point depends upon two Clauſes in that Act.

The firſt Clauſe enacts, That from and after the 29th of *September* 1700, if any Perſon educated in the Popiſh Religion, or profeſſing the ſame, ſhall not within ſix Months after attaining the Age of eighteen, take the Oaths *&c.* ſuch Perſon ſhall in Reſpect of himſelf only, but not in Reſpect of his Heirs or Poſterity, be diſabled and made incapable, to inherit or take by Deſcent, Deviſe or Limitation, in Poſſeſſion, Reverſion or Remainder, any Lands, Tenements or Hereditaments; and that during the Life of ſuch Perſon, or until he or ſhe ſhall take the ſaid Oaths *&c.* the next of his or her Kindred, which ſhall be a Proteſtant, ſhall have and enjoy the ſaid Lands *&c.* without being accountable for the Profits.

The ſecond Clauſe enacts, That from and after the 10th of *April* 1700, every Papiſt, or Perſon making Profeſſion of the Popiſh Religion, ſhall be diſabled and made incapable, to purchaſe either in his or her own Name, or in the Name of any other Perſon or Perſons, to his or her Uſe, or in Truſt for him or her, any Manors, Lands, Profits out of Lands, Tenements, Rents, Terms or Hereditaments *&c.*

It was argued for the Grandſon, the Heir at Law, That it cannot be diſputed ſince the Caſe of *Roper* and *Radcliff*, that tho' the Eſtate is deviſed to be ſold for the Payment of Debts; yet as to the *Reſiduum*, it muſt be conſidered as a Deviſe of Land. For the Plaintiff. *Ant.* 93, 234, &c.

It muſt likewiſe be admitted ſince that Caſe, That the Word *Purchaſe* in the ſecond Clauſe, does include Deviſes, and all Manner of Ways of coming to Eſtates in Oppoſition to Deſcent; and conſequently, that if the Grandaughter be a Perſon that falls under the ſecond Clauſe, this Deviſe to her would be void. *Ant.* 95, 234, 242.

As to the Deſcription of the Perſons, to which the Word *Purchaſe* in the ſecond Clauſe does relate; it is only a Papiſt, and one profeſſing the Popiſh Religion. And certainly the Grandaughter, who is proved to have been educated in, and to have profeſs'd the Popiſh Religion at the Time when the Will was made, when the Teſtatrix died, (the Time when the Right to the *Reſiduum* veſted, tho' it was to take Effect *in futuro, viz.* 21 or Marriage) nay at the Time of the Marriage, and ſo zealous in her Religion as to declare ſhe would be torn to Pieces by wild Horſes before ſhe would turn Heretick, muſt be eſteem'd one that comes within the Deſcription in the Act, *a Papiſt, or Perſon making Profeſſion of the Popiſh Religion.* And tho' ſhe has ſince conformed, yet ſince ſhe did not do ſo at the Time when the Teſtatrix died, the Time when her Intereſt veſted, the ſubſequent Conformity will not replace that Intereſt which is now veſted in another. All this is ſo plain that it could not in the leaſt be controverted, were the Queſtion ſingly to be determined upon this Clauſe.

But it may be objected, There is another Clauſe in this Act, and Care muſt be taken, that ſuch an Interpretation be put upon both theſe Clauſes, as to make them conſiſt with one another. And this the Counſel for the Grandſon owned there muſt; but inſiſted that putting

putting of this Conſtruction upon the ſecond Clauſe, would not contradict any Thing enacted by the firſt.

For whoever conſiders the Act well, will find, That the Law-makers intended by the firſt Clauſe, to have Regard to the Eſtates that then were in Being. And as to theſe it is plain, That the Act never intended to break in upon, or interrupt the Courſe of the Deſcent; but only to create a temporary Incapacity or Diſability of taking the Profits, removeable by Conformity before ſuch an Age.

And tho' the Word Deviſe be in that Clauſe; yet it muſt be underſtood of ſuch Deviſes, as are deſigned to prevent the Deſcent; and conſequently muſt relate to ſuch Deviſees, who being Heirs at Law, would have taken by Deſcent, had it not been deviſed to them. And had they not done this, they had done nothing; for the Act might have been evaded with all the Eaſe imaginable.

As by the former Clauſe, the Statute provides for Eſtates then ſubſiſting; by the ſecond it intended to provide againſt all new Acquiſitions, by Perſons profeſſing the Roman Catholick Religion. And *here* the Legiſlators thought it reaſonable to provide againſt this, not by creating as in the former, a Temporary Incapacity removeable by Conformity; but a total and abſolute Incapacity to take at all.

As the Grandaughter appears thus plainly to have been within the Deſcription of the laſt Clauſe; ſo it is no leſs plain, That the Grandſon, being Heir at Law, has by his Conformity, within the Time preſcribed by the Act, in the firſt Clauſe of it, put himſelf in a Capacity of taking by Deſcent, as Heir at Law.

For the Defendant

In Favour of the Grandaughter it was argued, That the great Deſign of this Act of Parliament, was to encourage Roman Catholicks to turn Proteſtants, by making it their Intereſt ſo to do: Whereas this Interpretation, would be a great Diſcouragement; ſince by turning, they were to receive no Advantage. And therefore it was inſiſted,

ſiſted, That ſince this laſt Clauſe was in that Reſpect more ſevere, and created a total Incapacity, without reſtoring them upon their Conformity, it ſhould not be extended to any, that could poſſibly come within the former; and that therefore as the firſt Clauſe reſpected Perſons under the Age of Eighteen, ſo none ſhould be deem'd Perſons profeſſing the Popiſh Religion within the ſecond Clauſe, but ſuch as were above that Age at the Time of the Purchaſe. And that the firſt Clauſe may extend to the Grandaughter is plain, the Words being to take by Deſcent, Limitation or *Deviſe*.

Lord Chancellor *Parker*:

The Grandſon ſeems to me to have a ſtrong Caſe. It is admitted that the Grandaughter, is within the expreſs Words of the ſecond Clauſe; ſhe being proved to be a Perſon profeſſing the Popiſh Religion, at the Time of the making the Will, and of the Death of her Grandmother, and of her Marriage.

But it is ſaid, That this ſecond Clauſe muſt, as to the Perſons to whom it is to relate, be reſtrained by the firſt, ſo as not to extend to any comprehended in that Clauſe; for otherwiſe as the Diſabilities created by theſe two Clauſes are different in their Nature, the one Part of the Act would contradict the other.

The Meaning of the firſt Clauſe in this Act, has been very much miſtaken. It has been imagined that this Clauſe, has Relation to the Age of the Perſon at the Time of the Deſcent; whereas the Act ſays nothing at all to that Matter. For it is plain from the Act, that the Age of the Perſon, has Relation intirely to the Time of taking the Oaths, *&c.* not of the Deſcent: And therefore tho' when the Infant comes to the Age of Eighteen, the Deſcent has not happened; yet then it is that the Time preſcribed by the Act for qualifying *&c.* commences, in Order to become capable of what may hereafter deſcend to him. In Caſe he ſlips this Time, and

the Land deſcends afterwards, the Incapacity by the Act takes Place; nor is this any Hardſhip, ſince he had it in his Power by a timely Conformity to have been capable of taking it.

The firſt Clauſe in this Act of Parliament, has Reſpect to old ſubſiſting Eſtates. But whereas the Law-makers plainly foreſaw, That if they ſhould only uſe the Word *deſcend*, the Act would ſignify juſt nothing; therefore the Words, *Limitation and Deviſe* were added: The firſt to comprehend all thoſe Eſtates, where the preſent Poſſeſſor being only Tenant for Life, the Son in Remainder was to take by *Limitation*; the other of *Deviſe* to prevent the interrupting the Deſcent, and ſo evading the Act, by deviſing to the Heir at Law.

The ſecond Clauſe has Relation to Eſtates to be created *in futuro*. And as to theſe Eſtates, the Legiſlators thought it reaſonable to create not a Temporal Incapacity, removeable upon Conformity by a certain Age; but a total and abſolute Diſability to take at all.

From this View of the Act of Parliament, it appears, That the Words in the firſt Clauſe, *Deviſe* and *Limitation*, have a proper Uſe and Signification, without breaking in upon the ſecond Clauſe; for they extend to all ſuch Deviſes and Limitations, as are not made void by the ſecond Clauſe, of which many Inſtances could be given.

And thus it appears that the ſecond Clauſe, being intirely diſtinct from the firſt, the Age of Eighteen is intirely immaterial.

Even in the Opinion of the Counſel for the Grandaughter, the Legiſlators did not think proper to lay Perſons over the Age of Eighteen, and profeſſing the Popiſh Religion, under the Temptation of turning Proteſtants by giving them their Eſtates upon Conformity; and therefore the Argument drawn by the Counſel for the Grandaughter, from the Intention of the Legiſlators, to encourage Papiſts to turn Proteſtants by giving them their Eſtates again, is of no Force; for in the firſt

Clauſe it was their Intention, but in the ſecond moſt evidently it was not.

The only remaining Queſtion will be, to fix the Time when a Perſon may be ſaid to profeſs the Popiſh Religion; and this indeed will be extreamly difficult and perhaps impoſſible, upon Account of the Difference of Capacity, Education, *&c.*

I can be ſure that at one, two or three Years of Age, a Perſon cannot be ſaid to profeſs any Religion at all, and conſequently not the Roman; ſo at Eighteen and before, I can be ſure that Perſons may profeſs the Religion they are of, and conſequently the Roman.

This the Makers of the Act plainly ſuppoſed, when they enacted, That if any Perſon *profeſſing &c.* ſhall not within ſix Months after attaining the Age of Eighteen *&c.*

But for the exact Bounds, impoſſible to fix them; and they muſt therefore be left to the Diſcretion of the Judges, who will be very indulgent in this Matter.

The Caſe is a new one; and therefore I will have the Aſſiſtance of the Judges.

But his Lordſhip directed ſome Iſſues at Law, to bring the Caſe more fully before the Court.

Vide infra. Trin. 11 Geo. 1.

Mills verſus *Eden.* In Canc.

EDEN being indebted to *Mills* in the Sum of 500 *l.* for his better Security confeſs'd a Judgment to him.

In *July* 1712, *Eden* makes his Will, and deviſes his Lands to Truſtees to be ſold for the Payment of Debts, and dies. The Truſtees being dead or refuſing to act, Adminiſtration with the Will annexed, is granted to the

Care of Court of Equity to ſee Debts of the Teſtator paid.

the Plaintiff *Mills*, as being the largeſt Creditor, and *that* by Judgment.

Mills brings this Bill againſt the Widow, and others of his Creditors, to have an Account of the Eſtate, diſcover Incumbrances *&c.*

What was ſpecial in the Caſe was this, *Eden* made a Settlement upon his Wife after Marriage, of the Lands that were then his Father's, in Bar of Dower and Thirds; his Father joining with him. The Uſes in the Settlement, were to the Uſe of his Father for his Life, then of the Mother for her Life, Remainder to the Uſe of *Eden* for his Life, Remainder to *Mary Eden* his then Wife (the Defendant) for her Life, for her Jointure in Bar of her Dower, Thirds, *&c.* Remainder *&c.*

The Father was alive at the Time when the Defendant *Eden* put in her Anſwer; but died before the hearing of the Cauſe. She by her Anſwer waives this *Jointures.* Settlement, as being made after Marriage, and not to take Effect in the original Creation of it, immediately upon the Death of her Huſband, as the Statute about Jointures requires; for the Father might outlive the Huſband, and in Fact did ſo, and ſo might the Mother; and tho' they are ſince dead, yet *that* will not make the Jointure more binding: She therefore inſiſted upon having her Dower.

But the Lord Chancellor ſeeing in the Caſe, That if ſhe waived this Settlement, theſe Lands would go to the Heir at Law, not ſubject to the Payment of any Debts, ſince it was never Part of the Teſtator's Eſtate, the Father outliving him; and that if ſhe was to have her Dower, there would not be Aſſets to pay (as the Counſel ſaid) 5 *s.* in the Pound; and ſo that the Wife did this, in Favour of the Heir at Law, to the Prejudice of the Creditors.

He decreed, That ſhe ſhould take this Eſtate for her Life, under this Settlement; but that ſhe ſhould aſſign it over in Truſt for the Creditors, who ſhould convey to her a Third of the Land of her Huſband, for her Dower, free from Incumbrances.

He ſaid, that this was no more than what was agreeable with what the Court does in other Caſes; as in decreeing a Judgment Creditor, who has his Election at Law, to reſort for his Satisfaction to either Real or Perſonal Eſtate, to make ſuch an Election, as Simple Contract Creditors may not be defrauded.

Cock and *Goodfellow.* In Canc.

WALTER COCK deviſes by his Will, one Third of his Perſonal Eſtate to his Wife, the other two Thirds to be equally divided among his Children, with the Advantage of Survivorſhip, in Caſe any of them died before they came of Age. He made ſeveral, and among the reſt, his Wife, Guardians of his Children. He directed, That the Eſtate of the Children, ſhould be placed out to Intereſt, or other Way of Improvement, by the Conſent of the Majority of the Guardians; and he further directed, That his Wife ſhould have the Advantage of the Improvement of two Thirds of the Eſtate of the Children, without any Account, for their Maintenance; and that the Intereſt of the other Third, ſhould go towards the Increaſe of their Fortunes. He makes his Wife Executrix, and dies in *Auguſt* 1712, leaving behind him a very conſiderable Eſtate, both in Money and the Stocks. The Caſe.

His Wife proves the Will, and takes Poſſeſſion of the Eſtate.

In *May* 1714, *Peter Vandermaſh* one of the Wife's Brothers died, and left in Money to the Children about

2500 *l.* which Money came into the Hands of their Mother.

It was proved by the Book-keeper, That immediately upon the Death of the Father, an Account of the whole Eſtate was taken, and an exact Eſtimation made of what each Child's Share came to; and that the Accounts of every Child, with the Intereſt and Income belonging to his Fortune, were with great Exactneſs kept ſeparate and diſtinct until the Year 1719, when upon caſting up the Accounts, the whole Eſtate belonging to the Children was found to amount to about 24000 *l.*

In *May* 1720, Mrs. *Cock* the Mother, treated of a Match for her eldeſt Son, with a Daughter of Lord *Trevor*; and by Marriage Articles it was agreed, that 5000 *l.* ſhould be paid by the Mother Mrs. *Cock*, and 5000 *l.* by Lord *Trevor*, into the Hands of Truſtees, to be laid out in Land, and ſettled in the uſual Way of Marriage Settlements. Mrs. *Cock* covenanted beſides, That ſhe would purchaſe 100 *l. per Annum*, and ſettle it to the ſame Uſes as the former, except the Jointure.

About this Time, Mrs. *Cock* lays out about 10700 *l.* in a Purchaſe of Land of one *Scot.*

Mrs. *Cock* all this Time carried on a very great Trade. In *October* 1720, her Brother *Vandermaſh* in *Holland*, ſent her Word, that tho' he had in Effects more than enough to anſwer all Demands; yet ſo great was the Run upon him, occaſioned by the ſudden fall of Credit in *Holland*, that unleſs ſhe would ſupply him immediately with Money and Credit to the amount of 40,000 *l.* he could not ſtand it.

Mrs. *Cock* complied with his Deſire; but at the ſame Time, *viz.* the 19th of *October* 1720, ſhe makes a Deed, wherein taking Notice of the Will of her Huſband, and what was left thereby to her Children, and of the Will of the Uncle and what he left them, and of the Sum that appear'd due to the Children upon an Account taken in the Year 1719, and of the Marriage Articles of her Son, by which 5000 *l.* was to have been paid to

Truſtees for *&c.* and 100*l. per Annum* purchaſed *&c.* ſhe covenants that for the better ſecuring what thus appear'd to be due to her Children, ſhe would immediately transfer to Truſtees *&c.* all that ſhe had in the ſeveral Funds; and whereas the Books of the *South-Sea* Company were then ſhut, ſhe declares, that as to the *South-Sea* Stock, ſhe was but a nominal Truſtee for her Children, the Stock having been bought with their Money; and that as ſoon as the Books were open, ſhe would transfer *&c.* And in the ſame Deed, the Eſtate that ſhe had for her Life, was convey'd to the Truſtees for 99 Years, if ſhe ſhould live ſo long, as a further Security for her Children; the Eſtate likewiſe purchaſed by her of *Scot*, with a View, as ſhe ſaid, to have made good the Marriage Articles of her Son, was convey'd to Truſtees for that Purpoſe. The Truſtees (the Children's Demand ſatisfied) were to ſtand ſeiſed of the Surplus to the Uſe of the Mother. All the Stocks that were transferrable, were transferr'd next Day.

The 6th of *December* Mrs. *Cock* became a Bankrupt; the Children of Mrs. *Cock* bring their Bill, to have this Deed eſtabliſh'd, and to have the Preference of Mrs. *Cock*'s Creditors.

Great Queſtion was, Whether a Deed made by a Mother for ſecuring juſt Debts due to Children at a Time ſhe had Fears of becoming a Bankrupt, (tho' two Months before ſhe actually was ſo) ſhould be ſet aſide, or eſtabliſh'd againſt the reſt of the Creditors?

It was argued in Favour of the Children, That this Deed being made two Months before any Act of Bankrupcy, and for ſecuring *that*, to which the Children had a juſt Demand, was a good Deed.

Argument in Favour of the Deed.

It was ſaid, if the ſpecifick Aſſets of her Huſband and Brother, had remained in her Hands, unblended and unmix'd with her own, and then this Misfortune had befallen her, there could have been no Queſtion, Whether the Children's Eſtate could be ſubject to the Mother's Debts; and therefore the Queſtion can only ariſe, from the Mother's having blended, and mix'd thoſe Aſſets belonging to her Children, with her own Eſtate and Trade.

And

And ſince this was an Act, that it was impoſſible for the Children to prevent, and from whence they could not receive the leaſt Poſſibility of Advantage, but might be very great Sufferers, the Mother, if ſhe has been guilty of it, has broken the Truſt repos'd in her.

Now if the Mother, being ſenſible of this, has by this Deed endeavour'd, as in Juſtice and Conſcience ſhe ought, to prevent any Inconvenience they might otherwiſe have been liable to, from that Wrong ſhe had done them, in mixing their Eſtate with hers, *this* as it is an Act of Juſtice to her Children, will be always favour'd in this Court.

It would be very ſtrange to ſay, That if Mrs. *Cock* has been guilty of a Breach of Truſt, the Aſſignees who ſtand in her Place, ſhall take Advantage of it, when ſhe herſelf could not; and that in Conſequence of this, the Eſtate of the Children ſhall be veſted in the Aſſignees for their Advantage.

This Deed has done no more for the Children, than poſſibly, what by a Bill brought in this Court, ſhe might have been compell'd to.

2 *Vern.* 564. *Salk.* 449. Mortgagee or Purchaſer precedent, tho' by defective Conveyance, preferr'd before the Aſſignees of the Commiſſioners of Bankrupcy.

The Caſe of *Taylor* and *Wheeler* was quoted, as a ſtrong Caſe in Favour of the Children. *There* a Copyholder in Fee, ſurrendred to the Uſe of the Mortgagee in Fee; but before the Preſentment of the Surrender, became a Bankrupt. Lord *Comper*, upon the Queſtion brought before him, Whether the Aſſignees of the Commiſſioners of Bankrupcy ſhould be preferr'd, or the Mortgagee, decreed in Favour of the Mortgagee; becauſe the Aſſignees ought not to be in a better Caſe than the Bankrupt, who was bound in Equity, by this defective Conveyance.

So in the ſame Manner, as to the Stock transferr'd, Mrs. *Cock* being bound in Law and Equity; and as to *that* untransferr'd, in Equity, the Aſſignees who ſtand in her Place, muſt be ſo too.

Argument in Favour of the Aſſignees. *Contr.*

As to the Accounts that were ſaid to be kept ſeparate and diſtinct; it was ſaid, That as theſe Accounts were not binding on one Hand with Reſpect to the Children, ſo on the other Hand they ought not to prejudice the Creditors.

Theſe Accounts were kept merely for the Mother's Satisfaction, and were intirely under her Power. No Part of the Eſtate whatever ſpecificated by them, to the Children; and therefore they are not in the Caſe.

Then it was argued, That the Deed was void from the Time, Nature and End of it.

As to the Time; it was made but two Months before an actual Bankrupcy, which in all Probability ſhe then foreſaw.

As to the Nature of the Deed;

There is in it *ſuggeſtio falſi*; for that Part of it, wherein ſhe ſays, That the Stock was bought with her Children's Money, is entirely falſe; nor is the Price mentioned, at which the Stock is bought. So likewiſe, what ſhe ſays, That ſhe is but a nominal Truſtee for them, is all falſe; for it does not at all appear, That this Part of the Eſtate, conſiſting in the Stocks, was any Ways appropriated to the Children before this Deed.

Another Badge of Fraud in this Deed, is, That ſhe plainly appears to be putting every Thing out of her own Power, and covering every Thing by it; for her Eſtate for Life in Land, is by it veſted in Truſtees, as a further Security for the Children.

As to the End of the Deed; it is to give an undue Preference to her Children, who muſt be acknowledged to be Creditors.

And as far as the Preference is undue, *pro tanto* it is to defraud the reſt of the Creditors. And then this Deed itſelf, amounts to an Act of Bankrupcy; for it falls directly within the Deſcription of 1 *Jac.* 15. of a frau- Stat. 1 *Jac.* 1. *cap.* 15.

fraudulent Deed made on Purpoſe to defeat or delay Creditors.

Beſides, this Deed is plainly a voluntary one; for ſhe was at a perfect Liberty, Whether ſhe would or would not make it.

And it is made to prevent that Equality, which in a Court of Equity, is always accounted the greateſt Equity.

As to the Stock untransferr'd; it was ſaid, That the Aſſignees were within the common Rule of Equity, That having Law and Equity of their Side, they ought to prevail againſt the Children, who had an equitable Right only.

Ant. 492. As to the Caſe of *Taylor* and *Wheeler*; it was ſaid, That that Caſe differ'd from this.

For 1*ſt*, *there* the Money was lent upon that very Security of the Copyhold Land; and there being an Inchoation of a legal Eſtate, compleat *quoad* the Mortgagor or Surrenderer, there was, as Lord *Cowper* obſerved, a *Lien* upon the Land, and the Mortgagee might have compell'd a ſpecifick Performance; which in the Nature of the Thing is impoſſible here, one hundred Pound Stock being as good as another. And 2*dly*, It did not appear, That the Surrender was made upon a View of his becoming a Bankrupt.

As Children will reap the greateſt Advantage from their Parents Undertakings; ſo it is reaſonable, That they ſhould, at leaſt as much as Creditors, ſhare in the Misfortunes of their Parents.

Reply. It was replied in Favour of the Children, That no Deed could be a fraudulent Deed, ſo as to amount to an Act of Bankrupcy within the Stat. *Jacobi*, but what would be eſteem'd fraudulent againſt a Purchaſer, by Stat. 27 *Eliz.* 27 *Eliz.* which it can never be ſaid that this is.

Stat. 1 *Jac.* 1. *cap.* 15. The Deed in Stat. *Jacobi*, is ſuppos'd to be a Deed of Truſt, for the Advantage of the Bankrupt, and to avoid

the Payment of Debts: But this is a Deed in Truſt for Creditors, and for the Payment of Debts.

Nor will the Preference created by this Deed make it fraudulent. For an Executor may by Law, among Debts equal in their Nature, give a Preference to which he pleaſes; nay by confeſſing Judgment to a Creditor by ſimple Contract, he may give him a Preference to Creditors of a ſuperior Nature.

Every Man by paying a Debt, when he owes others, gives that Creditor a Preference.

If paying of the Children, if they had been of Age to receive it, had been lawful for the Mother, as moſt certainly it had, the giving Security for the doing of it, muſt be lawful too.

She was ſo far from being a Bankrupt at the Execution of this Deed, that it is plain, ſhe did not think of becoming one at the Time; for if ſhe had, ſhe never would have ſent her 40,000*l.* to have ſupported her Brother's Credit.

The Caſe of *Taylor* and *Wheeler*, reported by *Salkeld*, *Salk.* 449. is a ſtrong Caſe; for there the Mortgagee had no more Eſtate in Law in the Land, than the Children have here in the Stocks untransferred.

Articles of Agreement for a Jointure, have been held good againſt Aſſignees, tho' legal Eſtate in them.

Lord Chancellor *Parker*, after giving a Narrative of the *Court.* State of the Caſe, obſerved, That the Clauſe of the Will, that directs the Children's Fortunes to be placed out by Mrs. *Cock*, with the Conſent of the major Part of the Guardians, to Intereſt, or other Way of Improvement, muſt be underſtood excluſive of Trade; ſo that it was plainly never the Intention of the Father, That the Fortunes of the Children ſhould be hazarded in the Way of Trade.

He obſerved further, That whoever traded with her, knew that ſhe had but one Third of her Huſband's Eſtate; and therefore gave her Credit upon Account of that

that Third only. And for her to have hazarded the Fortunes of her Children in Trade, had been a plain Breach of Truſt in her.

He took Notice, That upon the Death of the Father, there was a great Part of his Eſtate in the Publick Funds; and that in the Year 1720, ſhe had a great deal of Money in the Funds, which as to a great Part of it, might be the very Original Stock of her Huſband, or at leaſt Stock replaced in the Room of it.

It is plain, That as her Ruin was owing to the Bankrupcy of her Brother, ſhe hoped this might have been prevented, by the ſpeedy Supply of 40,000 *l.* which ſhe ſent him at this Time. If ſhe had not thought this, it was directly flinging away ſo much Money. So that this Deed cannot be ſaid to have been made, upon a certain View of her becoming a Bankrupt. Fears, indeed, ſhe could not but have; ſhe might think, That tho' her Brother did aſſure her, that this Supply would ſupport his Credit; yet poſſibly it might not. And therefore at a Time when ſhe was ſtriking this bold Stroke to ſave her Brother, it was but juſt and prudent for her to reſolve in all Events, to ſecure what was due from her to her Children.

The Objection againſt this Deed, That it is a fraudulent one, and within the Statute of 1 *Jac.* 1. *cap.* 15. becauſe made ſo near the Act of Bankrupcy, a very frivolous one; for the Deeds meant by that Statute, are Deeds made to defraud Creditors, whereas this is a Deed made to ſecure a juſt Debt.

Stat. 1 *Jac.* 1. *cap.* 15.

But it is objected, That this Deed is made to give an undue Preference to her Children.

I know not what Law or Reaſon there is to favour this Objection. Any Body may make his Creditor Executor, and then the Law gives him a Preference; and not only ſo, but the Law allows this Executor to give any other Creditor, in equal Degree, a Preference. It is true indeed, ſometimes this Court will interpoſe, becauſe theſe Powers may be an Inlet to Fraud; but this Court

will never take from the Executor himſelf this Preference, the Law gives him.

Is not paying of a Debt, giving that Creditor as great a Preference as giving Security? And yet it was never pretended, That paying of a Debt ſhould be held an Act of Bankrupcy, becauſe but two Months before the Bankrupcy.

But it is ſaid, that this is done for Children; and they are the fitteſt Perſons to ſuffer in their Parents Misfortunes.

Caſe of Children is always favour'd in a Court of Equity; they are eſteem'd as Creditors of the Parents by Nature: If a Man by his Will gives Copyhold Lands to his younger Children, the Court will compel the Heir at Law to ſurrender to them. Very ſtrange Doctrine, That the Plaintiffs, becauſe Creditors by Nature as well as Juſtice, ſhould be in a worſe Condition than other Creditors. Very ſtrange, That it ſhould be eſteem'd a Fraud in a Parent, to follow the Voice of Nature; eſpecially when in doing this, ſhe does but what Duty and Juſtice require from her, as their Guardian and Truſtee. If the Mother had been going to Sea, and had made this Proviſion for her Children's Security, the very ſame Objections might have been made.

A Man that knows he muſt be a Bankrupt, may by Law pay off any of his Creditors. And this Power as it may be abus'd, ſo on the other Hand, may be very properly executed; there may be particular Obligations in Point of Gratitude *&c.*

Aſſignees can take nothing, but what the Commiſſioners can aſſign; and the Commiſſioners can aſſign nothing, but what the Bankrupt could *honeſtly* aſſign to them.

If Mrs. *Cock* had transferr'd (ſubſequent to the Deed) this Stock, for a valuable Conſideration, to Perſons without Notice, it had been a valid but *knaviſh* Act.

Agreement to transfer Stock, Transfer wanting; Agreement to ſurrender Copyhold, Surrender wanting, Caſes both alike; and therefore, as the Court will compel a Surrender, ſo it will a Transfer.

He ſaid, That a Purchaſer's being decreed to hold the Land againſt a Judgment, confeſs'd between the Time of Articles and the Conveyance, was a very ſtrong Caſe for the Plaintiffs.

He called the Deed an honourable Deed; and eſtabliſh'd it throughout.

DE
Term. S. Trin.
8 *Geo.* I.
In Curia Cancellariæ.

Le Croy verſus *Eaſtman.*

The Queſtion was, Whether a Truſtee of *South-Sea* Stock ſhould anſwer the Value of the Stock when ſold by him; or only be accountable for Stock and

Le Croy bought 990*l.* *South-Sea* Stock of *Le Grand*; but not caring to have this Stock in his own Name, it was at his Deſire, transferr'd to the Defendant; from whom the Plaintiff took a Note, declaring that he was a Truſtee of this Stock for the Plaintiff; and that he would be accountable to him for the Stock and Produce. Afterwards when the Stock was ſold for about 600*l. per*

Cent. the Plaintiff deſired that the Defendant would transfer the 990*l.* Stock to him: The Defendant accordingly transferr'd 500*l.* of this Stock, and told the Plaintiff that it would be inconvenient to him at that Time, to transfer more, but that it was all one, for he would be accountable for the Stock; and adviſed the Defendant as a Friend, not to part with that 500*l.* Stock, which he had transferr'd to him, for he was very ſure Stock would riſe very conſiderably; which Advice the Plaintiff admits he ſo far followed, as that the 500*l.* was ſtill unſold, believing the Defendant to have a greater Inſight into theſe Matters than himſelf. Upon the Fall of the Stock, the Plaintiff brings his Bill againſt the Defendant, praying that he might account for the 490*l.* Stock, at the Price the Stock then went, *viz.* 600*l.* inſiſting that when the Defendant told the Plaintiff, that he would be accountable for the Stock, he underſtood him to mean at the Price the Stock then went.

Dividends? Reſolved in Favour of the Truſtee, upon the Circumſtances of the Caſe.

It appear'd by the Defendant's Anſwer, That the Defendant had, ſome Time after he was a Truſtee, mortgaged 1000*l.* Stock to the *South-Sea* Company for 4000*l.* and that afterwards the Defendant ſold out all the Stock he had in his own Name, except 80*l.* but that he had more than Stock enough in another Perſon's Name, to have anſwer'd the Truſt, if the Plaintiff had inſiſted upon a Transfer. And he now offer'd to transfer to the Plaintiff the 490*l.* Stock and Produce.

Lord Chancellor *Parker*.

Not material to prove at what Rate the Defendant ſold the Stock, for the Sale was at his own Riſk. If the Stock had roſe he would ſtill have been accountable for the Stock, not the Money; and therefore as he muſt have ſtood to the Loſs in Caſe of the Riſe of Stock, reaſonable he ſhould reap the Advantage upon a Fall.

Indeed, if the Plaintiff has ſuſtained any Loſs, by the Truſtees meddling with the Truſt Stock, he ought to have a Satisfaction for it: But nothing of this appears;

on

on the contrary he believing Stock would ſtill riſe, has the 500 *l.* Stock actually transferr'd, by him unſold to this Day; as probably for the ſame Reaſon, he would have had the 490 *l.* Stock ſtill by him, in Caſe *that* likewiſe had been transferr'd to him.

Extremely hard to conceive, That when the Defendant told him he would be accountable for the Stock, he ſhould underſtand him of the Money ariſing from the Sale of the Stock; when it is plain, he took the Defendant's Advice of not ſelling, and believed the Stock would riſe; and therefore would naturally deſire, as in Reaſon he might, that the Defendant would be accountable for the Stock.

I take it to be very plain, That the Defendant has not ſold, but mortgaged the Truſt Stock. For ſince there is no ſpecificating one hundred Pound *South-Sea* Stock from another, a Court of Equity will never adjudge a Man to have broken his Truſt in a higher Degree, when he may with equal Reaſon be adjudged to have done it in a lower; and therefore the Stock mortgaged, muſt be eſteem'd the Stock of the Plaintiff, the Stock ſold, *th at* of the Defendant.

The Defendant muſt only account for the Stock and Produce. Let both Sides bear their own Coſts.

In Caſe the Defendant had failed, and the Stock been worth redeeming, he thought the Plaintiff would have had a clear Title to redeem; but then the Company muſt have had Notice of the Truſt.

Gore verſus *Gore.* In Canc.

See this Caſe 2 *Mod. Caſes in Law and Equity* 4.

WILLIAM GORE had Iſſue *Thomas* and *Edward*; and being ſeiſed in Fee of certain Lands, he deviſes his Lands to two Truſtees and their Heirs for the Term of 500 Years, for the Payment of 50 *l. per Ann.* to the eldeſt Son during his Life, the Remainder from and after the Determination of the ſaid Term, to the Uſe and Behoof of the firſt Son of the Body of the ſaid *Thomas* his eldeſt Son to be begotten, and the Heirs Males of the Body of the firſt Son; Remainder to the ſecond, third, and ſo on to the tenth Son over in Tail; and for Default of ſuch Iſſue, Remainder to *Edward* his ſecond Son. *N. B.* When the Teſtator died, his eldeſt Son *Thomas* had no Iſſue; but ſince his Death had Iſſue a Daughter, and very likely to have more Children.

Deviſe to Truſtees and their Heirs for 500 Years, for Payment of 50 *l. per Ann.* to eldeſt Son of Teſtator during his Life; and after Determination of the ſaid Term, to the Uſe of the firſt Son of the Body of the eldeſt Son to be begotten *&c.* Remainder over to the ſecond Son of Deviſor. The eldeſt Son had no Male Iſſue at the Time of the Teſtator's Death. Judges of *B. R.* of Opinion, That the Remainder to the firſt Son *&c.* was a void Remainder; and that the Remainder to the ſecond Son was a veſted Remainder. But Lord Chancellor thought the Intention of the Teſtator, That the Iſſue of the eldeſt Son ſhould not be diſinherited, ought to be ſupported if poſſible.

Lord Chancellor *Parker* made a Caſe of it, and ſent it to the Judges of the King's Bench for their Opinion.

The Judges certified their Opinion to be, That the Deviſe to the firſt Son of *Thomas Gore* was void; for it could not take Effect as a Remainder, becauſe there was no Freehold to ſupport it; nor by Way of executory Deviſe, becauſe it was not to take Place within that Compaſs of Time, the Law allows for that Purpoſe. They declared likewiſe their Opinion to be, That the Remainder to the ſecond Son, was veſted in him on the Death of the Teſtator.

When the Cauſe, upon the Certificate of the Judges, came back into Chancery for the Direction of the Court, the Attorney General Sir *Robert Raymond* was going to argue againſt the Opinion of the Judges; but was ſtop-

ped by the Lord Chancellor, who told him, That he thought he muſt be concluded by the Opinion of the Judges.

He admitted, That in Caſe he had ſent for the Judges to have aſſiſted him in the hearing of the Cauſe; and the Reaſon of the Judges had not convinced him, he muſt have acted according to his own Underſtanding, for it was to be his Decree, not theirs, (and this the Lord *Nottingham* did in the Caſe of the Duke of *Norfolk*) but that *here* he was not at that Liberty; having not heard the Arguments at Law before the Judges, nor been acquainted with the Grounds, on which their Opinion was founded; and that he look'd upon the Judges *here* in the Nature of Referrees.

Upon further Debate of the Caſe, the Lord Chancellor ſaid, it was as undoubtedly the Intention of the Teſtator, That the Iſſue of the eldeſt Son ſhould not be diſinherited, as it was that the eldeſt Son ſhould: That the Intention of the Teſtator, if it could poſſibly, by Rules of Law, ought to be ſupported, being a very reaſonable one; and that Judges have been commended for being *Aſtuti* in doing this.

Upon this it was ſaid, If the Son of the eldeſt Son ſhould take when born, it muſt be by Way of Executory Deviſe; and then the Conſequence muſt be, that the eldeſt Son would take until a Son was born; whereas the Teſtator plainly intended him nothing.

Lord Chancellor. I do not know, Whether this be a neceſſary Conſequence? And whether I cannot take a middle Way, and as there is a precedent Term, decree That after Debts paid, the Truſtees ſhall be accountable to the after-born Son for the Profits. Let it ſtand over.

Afterwards the Parties agreed before any Thing more was done in it.

Lewis verſus *Lord Lechmere.* In Canc.

THIS was a Bill brought by the Plaintiff for a ſpecifick Performance of Articles, bearing Date the 30th of *Auguſt* 1720, whereby the Lord *Lechmere* had covenanted to purchaſe ſuch an Eſtate at forty Years Purchaſe; provided the Plaintiff did on or before the 10th of *November* following, lay ſuch an Abſtract of the Title before Lord *Lechmere*'s Counſel, as they ſhould approve.

Bill for *ſpecifick Performance* of *Articles* for the Purchaſe of an Eſtate, diſmiſs'd with Coſts; becauſe the Title was not laid before the Vendee's Counſel within the Time limited.

The Bill was diſmiſs'd with Coſts; becauſe the Plaintiff had not laid his Title before Lord *Lechmere*'s Counſel, within the Time limited by the Articles; which Time, the Lord Chancellor was pleas'd to ſay, was very material; the Price of *South-Sea* Stock, from whence the Money for the Purchaſe was to be rais'd, being upon the 10th of *November* 260*l. per Cent.* and at the Time of the hearing the Cauſe, but 92*l. per Cent.*

Tho' this was *that*, upon which the Chancellor was pleas'd to found his Decree; yet there were ſeveral other Things in the Cauſe.

It was inſiſted upon by the Counſel for the Defendant, That the Greatneſs of the Price, double the Value of the Land, was Reaſon enough for a Court of Equity not to interpoſe, ſo as to inforce a Specifick Performance; *that* being intirely a diſcretionary Power, and what the Court *ex debito Juſtitiæ* is not bound to do.

1ſt Point. Whether it be conſiſtent with the Rules of Equity to decree a Performance *in Specie* of ſo extravagant and unreaſonable a Bargain as a Sale of Land at 40 Years Purchaſe? This Point not determin'd *here*; but ſee 2 *Vern.* 423.

It was acknowledged, That no Decree had been made purely upon this Point; but it was ſaid, there were ſeveral Caſes, where this Circumſtance had great Weight with the Court.

In the Caſe of *Hanger* and *Eyles*, of the laſt Term, where the Vendor brought his Bill for the Money, tho' the Decree was founded upon the Vendor's not being able

able to convey a Manor, according to his Covenant; yet it being acknowledged, that this Manor was of little or no Value, it is evident, That the other Circumſtance in the Cauſe, the unreaſonableneſs of the Price, was *that* which really inclined the Court, to lay hold upon a Point, too inconſiderable otherwiſe, to have been taken Notice of.

In the Caſe likewiſe of *Hicks* and *Phillips* of the laſt Term, which was a Bill brought by the Vendor for a ſpecifick Performance of Articles, the Bill was diſmiſſed; becauſe the Vendor had covenanted to convey Freehold, and one Acre or two proved Copyhold; even tho' the Vendor offer'd to procure an Enfranchiſement of this Land, or make any Compenſation in the Price; which ſhews the Regard had by the Court, to this other Circumſtance attending the Caſe, *viz.* the Unreaſonableneſs of the Price.

As to this Point it was anſwered by the Counſel for the Plaintiff, that if a Court of Equity were to ſet aſide Agreements upon this Account, it would make all Tranſactions precarious and uncertain, and inveſt a Court of Equity with a very arbitrary Power; the Value of Money and Land being always various and uncertain.

That if any Meaſure was to be laid down in this Caſe, the Point to be conſider'd muſt be, Whether the Contract was an unreaſonable one at the Time it was made.

And accordingly upon this Ground, it was lately determined in the Court of Exchequer, in this Caſe of *Keen* and *Stuckley* *, That they would inforce a ſpecifick Performance of theſe Contracts, if the Price was reaſonable at the Time the Contract was made, how diſproportionable ſoever after Accidents might make it.

* This Decree of the Exchequer reverſed in the Houſe of Lords. See *Rep. of Caſes in Equity* 155, 156.

2d Point.

It was inſiſted upon by the Counſel for the Plaintiff, That the Clauſe making void the Articles, in Caſe the Plaintiff did not by ſuch a Time, lay ſuch an Abſtract of

the Title before the Counſel of the Defendant, as they ſhould approve, had been obtain'd by Fraud and Surprize, and was an unreaſonable Clauſe.

As to the Fraud and Surpriſe they failed in their Proof; but inſiſted upon the Unreaſonableneſs of it; becauſe tho' the Title was never ſo clear and good, yet if the Counſel of the Defendant ſhould diſapprove of it, or give no Opinion of it at all, the Articles muſt be void.

But to this it was anſwered, That the Meaning of this Clauſe was no more than that the Plaintiff ſhould make out a good Title; for if the Counſel ſhould be ſuppoſed to act unreaſonably, and to diſapprove of a good and clear Title (ſuch a Title as a Court of Law or Equity would take to be a good Title) yet the Defendant would be bound notwithſtanding the Diſapprobation of his Counſel.

Covenant to make ſuch a Title to an Eſtate as the Vendee's Counſel ſhall approve of, means no more than that it muſt be a good Title, and fit to be approv'd of; ſo that if the Counſel diſapprove without Reaſon, the Vendee notwithſtanding will be bound by his Bargain.

It was ſaid by the Counſel for the Defendant, that tho' in Caſe of Articles enter'd into for the Purchaſe of Lands, the Vendee may undoubtedly exhibit his Bill in Equity for the Specifick Performance of theſe Articles; yet it might admit of a Doubt, Whether the Vendor might do the ſame.

3d Point.

Not the ſame Reaſon for admitting the Vendor to come into Equity for a Specifick Performance, as there is for the Vendee; ſince the one comes *there* to obtain *that* for which he has no Remedy at Law, *viz.* the Land; but the other wants nothing but the Money, which he may recover at Law in Damages. But this was determin'd in Favour of the Vendor; becauſe upon mutual Covenants there ought to be mutual Remedies.

As to the Vendee, tho' he has an Action at Law upon the Articles, yet *that* ſounds only in Damages; and therefore he may come into Equity for the Land, which on ſeveral Accounts, may poſſibly be more deſirable to him, than any pecuniary Compenſation.

But for the Vendor, he only deſires to have the Money; and *that* whether it be recover'd at Law in Damages, or in Equity, is but Money ſtill.

If it be ſaid, That at Law the Jury may at their own Liberty and Diſcretion, give him what Damages, they upon all the Circumſtances of the Caſe, think reaſonable; whereas upon a Bill in Equity, your Lordſhip has no Power to vary from the Sum contracted for in the Articles, be the Circumſtances of the Caſe what they will:

This ſeems to be a very odd Reaſon for coming into a Court of Equity, and the Reverſe of what generally intitles People to Relief in Equity.

But to this it was anſwered, That upon mutual Articles there ought to be mutual Remedies: That if the Vendee had a Remedy both in Law and Equity, the Vendor would not be upon a Par with him, unleſs he had ſo too: That the Remedy the Vendor had at Law, was not a Remedy adequate to what he had in this Court; for at Law they only could give him the Difference in Damages, whereas he might for particular Reaſons ſtand in Need of the whole Sum.

Beſides, by the Articles the Land is bound, and the Vendor is in Nature of a Truſtee for the Vendee; and whether a Recovery in an Action of Law upon the Articles, may make him ceaſe to be ſo, is not entirely clear.

Lord Chancellor was of Opinion, That the Remedy the Vendor had at Law upon the Articles was not adequate to *that* of a Bill in Equity for a Specifick Performance.

However he diſmiſs'd the Bill, upon the Point abovementioned at the Beginning of the Caſe.

DE

Termino S. Mich.

9 *Geo.* I.

IN CURIA CANCELLARIÆ.

Hobſon & ux' verſus *Trevor.*

THIS was a Bill brought for the Specifick Performance of an Agreement, made upon the Marriage of the Defendant's Daughter with the Plaintiff. The Caſe was this:

Bill for *Specifick Performance.*

Trevor gave Encouragement to the Plaintiff, a young Gentleman under Age, Son of Sir *Charles Hobſon*, eſteem'd a Man of very good Subſtance, to make Addreſs to his Daughter; and promis'd him, in Caſe he would marry her, That he would ſettle upon him and his Daughter, the Third of whatever Eſtate ſhould come to him, upon the Death, of his Father the Maſter of the Rolls; and did accordingly enter into a Bond to him, before the Marriage, in the Penalty of 5000 *l.* whereof the Condition was to this Effect. Whereas it is agreed between the Defendant and the Plaintiff, That in Caſe a Marriage, intended to be had between the Defendant's Daughter and the Plaintiff, take Effect, the Defendant ſhould within three Months after the Death of his Father, ſettle one Third of whatever Eſtate ſhould come to him, upon

T. in Conſideration of *H.*'s marrying his Daughter, enters into a Bond to *H.* to ſettle *&c.* one Third of whatever Eſtate ſhould come to him upon the Death of his Father. Decreed that the Condition of this Bond ſhould be ſpecifically performed; for the Deſign of the Agreement, of which this Bond was an Evidence, being to make

lasting Provision for Wife and Children, could never be satisfied by the Forfeiture of the Penalty, which would be all the Husband's.

upon his Daughter and the Plaintiff for the Term of their Lives, and the longest of them; Remainder to the Issue of the Body of his Daughter *&c.* and for Default *&c.* to the right Heirs of the Defendant *Trevor*. Now the Condition of this Obligation is such, That in Case such Settlement shall be made *&c.*

Upon the Death of the Master of the Rolls, Sir *John Trevor*, so considerable an Estate fell to the Defendant, as that the Third amounted to about 1600 *l. per Annum*. And therefore the Plaintiffs pray'd a Specifick Performance of the Articles, insisting that the Forfeiture of the Penalty, would not answer the End of this Agreement; for *that* being Money, would go as Money to the Executors of the Husband, and be intirely under the Husband's Power; whereas the Intention of this Agreement by the Nature and Manner of it, was to make a lasting Provision for Wife and Children. And it was insisted that this Bond was a plain and sufficient Evidence of this Agreement.

For the Defendant.

The Defendant insisted, That this Agreement was not absolutely to settle *&c.* but to settle, or in Case he did not, to forfeit the Penalty of 5000 *l.*

The Penalty of the Bond, in the very Nature of it, seems to be a Sum fix'd upon, by the Parties themselves, upon the Payment of which, the Party bound shall be loos'd from his Obligation. And if this is to be intended in any Case, it seems reasonable to intend it here, where not a Shilling is settled, or agreed to be settled by the Husband; so that this whole Provision is on the Defendant's Side, a perfect Bounty.

It was said, That the Father of the young Gentleman, tho' once a rich Man, had the Misfortune to lose most of what he had, in the Hands of a Banker that fail'd.

It was urged, That Agreements to make Settlements in the Life-time of Parents, and before any Estate descended, were of ill Consequence, and by no Means to be favour'd or supported in a Court of Equity.

As to the Objection, That the Forfeiture of the Penalty, would not anſwer the Deſign of the Parties, which was to make a laſting Proviſion for Wife and Children: It was anſwered, That ſince the 5000*l.* (the Penalty) came in Lieu of the Settlement, it would be in the Power of this Court, upon a proper Application, to have the 5000*l.* ſettled in the ſame Manner, for the Benefit of the Wife and Children.

For the Plaintiff.

But it was ſtrongly inſiſted in Behalf of the Plaintiff, That the Agreement of the Parties was to make the Settlement; and not to make the Settlement, or forfeit 5000 *l.*

That this plainly appear'd, by the Recital of the Bond, to be the Agreement.

That the End, and Deſign of the Agreement, was the making a Proviſion for Wife and Children, which would not be attained by the Forfeiture of the Penalty; for *that* would be a Debt due only to the Huſband, and ſubject intirely to his Diſpoſal. Very ſtrange to imagine, That the Defendant ſhould inſiſt upon a Proviſion for his Daughter and her Iſſue, in Caſe leſs than 15,000*l.* deſcended to him from his Father; but in Caſe more than *that*, he ſhould take no Care at all of her, but leave her intirely to the Mercy of her Huſband. For this the plain Conſequence of ſuppoſing the Agreement to be, either to make the Settlement, or forfeit the Penalty; ſince in Caſe the Defendant chooſes to forfeit the Penalty, then the only Proviſion for the Wife and Children is this Penalty; which being a Debt due to the Huſband, the Court of Chancery cannot oblige him to ſettle it, in the ſame Manner as the Land.

If the Circumſtances of Things as they ſtood at the Time of making this Agreement, and the Nature of this Agreement be conſidered, it will appear not only to have been a reaſonable Agreement, but an advantageous one on the Side of the Defendant.

The Plaintiff was the Son of Sir *Charles Hobſon*, a very rich Man; and tho' he had very conſiderable Loſſes afterwards, yet it does not appear in the Cauſe, but that this might be after the Time of the Agreement: So that there was a fair Expectation; and his Son was put out to a wholeſale Linnen Draper, a very good Trade, and requiring a very good Stock to ſet up with.

As to the Settlement from the Plaintiff, there was none to be expected, he being under Age; but in Conſequence of his Trade, he was to be a Freeman of *London*, and *that* would be a Proviſion.

As to the Defendant; it is well known, That tho' he was eldeſt Son to the late Maſter of the Rolls; yet he was under his Father's Diſpleaſure, and ſo not likely to have any Thing at all, or at leaſt but a Trifle from his Father.

And this is another plain Evidence, That this Agreement was to ſettle, not ſettle or forfeit; for his Expectations being ſo ſmall, the Penalty of 5000 *l.* muſt have been eſteem'd by the Parties, as a ſufficient Security, to inforce the Performance of this Agreement; and it is impoſſible to ſuppoſe, That the Defendant could be then providing in his Thoughts for that Election now inſiſted upon.

As to the Nature of the Agreement, highly reaſonable. A Father upon the Mariage of a Daughter, his only Child (and very like to continue ſo) agrees to ſettle a Third of his Eſtate upon a double Contingency; 1*ſt*, the Death of his Father before him; for if his Father had outlived him, the whole Agreement was void. And 2*dly*, In Caſe any Eſtate came to him from his Father; for in Caſe none came, as there was too much Reaſon to fear, then the Agreement was likewiſe void.

Upon this double Contingency, a Father agrees upon the Marriage of his Daughter, and only Child, to ſettle one Third of what he ſhould have upon the Death of his Father, upon her and her Huſband for Term of their Lives, and the longeſt Liver of them, then to the Iſſue

of that Marriage in Tail, Reverſion to his own right Heirs.

Here is nothing agreed to be ſettled but upon his own Child; the very Reverſion is to his own right Heirs. The Huſband has only an Eſtate for Life; and in Caſe of Iſſue, the Law itſelf had done as much for him, in making him Tenant by Curteſy.

This is an Agreement made by one of full Age, and not a Child; a Father upon the Marriage of his Daughter; and therefore not like the Caſes of young Heirs, unwarily drawn in, in the Life-time of their Parents, to part with Reverſions.

The Defendant himſelf encouraged the Match; look'd upon it to be ſo advantageous, as that he thought it reaſonable to have ſettled Half inſtead of a Third; and bragg'd how well he had provided for his Daughter, in Caſe his Father ſhould die and leave him nothing.

Lord Chancellor *Parker* decreed the Land to be ſet- *Court.*
tled purſuant to the Condition of the Bond. Declared, That if the Agreement had been to have made the Settlement, or forfeited the Penalty, it would have been a Debt due to the Huſband, and not in the Power of the Court to have taken Care of the Wife and Children, by ordering the 5000 *l.* to be ſettled.

Q. of this, it coming in Lieu of the Settlement.

D E

DE

Termino S. Hill.

9 *Geo.* I.

In CURIA CANCELLARIÆ.

Cartwright verſus *Cartwright.*

Roman Catholicks.

J. S. deviſes to Truſtees and their Heirs, for the Life of Sir *Charles Cartwright*, and two Years longer; and then taking Notice, that the Children of Sir *Charles Cartwright*, were all beyond the Seas educated Roman Catholicks, directs, That in Caſe any of the Sons of Sir *Charles Cartwright* ſhould within thoſe Years become a Proteſtant, and receive the Sacrament according to the Uſage of the Church of *England*, then the Truſtees were to hold the Eſtate in Truſt for ſuch Son in Tail; Remainder over *&c.* And in Caſe no one of the Sons ſhould conform; then in Caſe any one of the Daughters ſhould within thoſe two Years become a Proteſtant, and take *&c.* in Truſt for that Daughter in Tail; Remainder over *&c.* And then he charges his Eſtate with ſome Annuities, payable to the Sons and Daughters of Sir *Charles.* Sir *Charles* dies, no one of his Sons did within the two Years become a Proteſtant, or receive the Sacrament *&c.* but one of the Daughters did within the two Years receive the Sacrament twice according to the Uſage of the Church of *England*, and the Truſtees

actually permitted her to receive the Rents and Profits of the Land.

This Daughter brings a Bill in Equity, againſt the Truſtees, and all the Children, and one in Remainder being an Infant, (who had a Right to the Eſtate in Caſe the Daughter was not well intitled to it) to compel the Truſtees to convey to her, in Order to enable her to dock the Entail, by ſuffering a common Recovery, and ſo make a good Title to a Purchaſer.

The Truſtees by their Anſwer own, That they had permitted the Plaintiff to receive the Rents and Profits, conceiving ſhe was well intitled thereunto, by having received the Sacrament *&c.* the Teſt pitch'd upon by the Teſtator, of the Sincerity of her Converſion: Pray that a Receiver may be appointed; and that they may be diſcharged of the Truſt.

The Children all by their Anſwers conſent to the Sale the Eſtate, and that the Truſtees may convey; the Daughter having given a Bond to pay the Sum of 1500 *l.* in Satisfaction of the Annuities given to them, and charged upon the Eſtate.

Lord Chancellor *Parker.*

I am not ſatisfied of the Reality of the Converſion of the Daughter. As to the Proof offer'd for it; no more than the bare Act of having received the Sacrament twice; an Act very common for Roman Catholicks to do upon a Worldly Motive, and then we hear no more of them. Remarkable, That the Witneſs who ſwears to her Converſion, does not ſay that he believes her now to be a Proteſtant; but that four Years ago ſhe was one. The Readineſs of the Children in their Anſwers, to do what is deſired of them, looks very ſuſpicious. As to the Bond given for the Payment of 1500 *l.* I much ſuſpect a Defeaſance in Caſe this Bill miſcarry; and indeed I do

not ſee any Conſideration for the giving it; for the Annuities charged upon the Land, are certainly Profits ariſing out of Land; and the Children being all Roman Catholicks, the Deviſe is void as to *that.*

Indeed, if the Daughter had had a clear Title, and her Converſion been out of Doubt, there was no Occacaſion for coming here; for if the Daughter had ſuffer'd a common Recovery, or levied a Fine of the Truſt in Tail, it had been binding in Equity.

Let a Receiver be appointed, I will conſider further of the Decree.

It was preſs'd by the Counſel, That in the mean Time they might have Liberty to give further Evidence of the Sincerity of her Converſion; and they quoted the Caſe of *Rawlinſon* and *Rawlinſon*, before Lord *Cowper*, where that Liberty was indulged.

Lord Chancellor: I will do nothing now.

DE

Termino S. Mich.

10 *Geo.* 1.

In Curia Cancellariæ.

Parks and *Wilſon.*

See this Caſe 2 *Mod. Caſes in Law and Equity* 62.

Bill for *Specifick Performance.*

A. and *B.* Brother and Siſter; *B.* the Siſter has Iſſue two Daughters, and one Son call'd *Anthony*. *A.* the Brother being ſeiſed of an Eſtate of Copyhold, and intending that not his Siſter who was his Heir at Law, but *Anthony* her Son ſhould have the Land, reſolved to ſurrender it to the Uſe of his Will, and deviſe it to *Anthony*; but the Officers of the Court being out of the Way, and a Surrender not practicable, the Mother conſented to enter into a Bond to her Brother, That ſhe would at any Time, upon the Payment of 200*l.* and upon the Requeſt of *Anthony* her Son, ſurrender the Eſtate to him.

This Bond was executed in *November* 1713, about which Time *A.* died. After his Death, *Anthony* the Son received and enjoy'd the Rents and Profits of the Eſtate during the Life of the Mother; but no Surrender was ever made by the Mother to *Anthony* in Purſuance of the Condition of the Bond; nor was there any Requeſt for her ſo to do.

Anthony

Anthony dies without Iſſue and inteſtate, and his Mother took out Letters of Adminiſtration; and likewiſe after his Death, ſhe got herſelf admitted, and enter'd upon the Land, and received the Rents and Profits; and then deviſes the Land to one of her Daughters and dies. The other Daughter, and Siſter of *Anthony*, brings her Bill againſt her Siſter the Deviſee of her Mother, praying to have a Decree for a Surrender, and proper Conveyance of a Moiety of the Land, which ſhe would have been intitled to, had her Mother ſurrender'd to *Anthony* her Brother, as ſhe ought to have done, in Purſuance of the Condition of the Bond for that Purpoſe enter'd into.

For the Plaintiff. It was argued in Favour of the Plaintiff, That from the Nature of the Caſe, it appear'd plainly to be an Agreement between *A.* and his Siſter, that her Son ſhould have the Land; and that in a Court of Equity, this Bond would be interpreted as an undoubted Evidence of this Agreement; and that there were ſeveral Inſtances, where Bonds had been conſidered in this Light by the Court.

1 *Vern.* 296. It was ſaid, That in the Caſe of *Thynn* of *Egham*, a Perſon, being made Executor upon an antecedent Promiſe, that he would not thereby take any Advantage with Reſpect to any Part of the Perſonal Eſtate, but let ſuch a one have it; it was held that this Promiſe made him a Truſtee in this Court.

It was further inſiſted upon, That the Mother's Permiſſion of the Son to receive and enjoy the Profits of the Land, was a carrying this Agreement into Execution, which made it a *much* ſtronger Caſe.

And then if *Anthony* himſelf, had a Right at any Time during his Life, to have come into this Court, and inſiſted upon the Specifick Performance of this Bond; certainly Death, the Act of God, ſhall not in this Court, put his Heir in a worſe Condition.

For the Defendant it was inſiſted, That by the Evidence it did indeed appear, that it was once the Deſign of the Uncle, to have given his Nephew this Land; but that afterwards he changed his Mind, and gave him this Bond in the Room of it. For the Defendant.

It was ſaid, That this Bond, being gone in Law, upon Account that *Anthony* being dead inteſtate, the Mother the Obligor had taken out Letters of Adminiſtration; *and* alſo by Reaſon that there was no Requeſt made by *Anthony*, during his Life, for the Surrender; ought not to be ſet up in Equity.

It was ſaid, That poſſibly, *Anthony* having by his Mother's Conſent, enjoy'd the Profits of the Land, without having ever paid the 200 *l.* might for that Reaſon make no Will; as conceiving that the Bond being thereby extinguiſh'd, there would remain no Obligation upon the Mother to ſurrender.

Lord Chancellor *Parker*.

Plain from the Nature of this Tranſaction, That it was the fix'd Intention of the Uncle, that one Way or other, his Nephew ſhould have the Land. In Order thereunto he attempted more than once, to ſurrender to the Uſe of his Will, reſolving to deviſe it to his Nephew; but a Surrender not being practicable, by Reaſon of the Accidents ſet forth in the Evidence, he then had Recourſe to this Bond, as the next beſt Method to ſecure it to him. So that this Bond is not to be conſidered, as ſomething given in Lieu of the Land, which the Uncle once intended him, but as another Medium of ſecuring the Land to him; and on the Part of the Mother, it amounts plainly to an Agreement, That the Son ſhould have the Land. Court.

The Conſequence of which will very plainly be, That the Mother muſt be conſidered by this Court as a Truſtee for her Son; and then I ſhall have no Regard at all to the Niceties of Law, of the Bond's being extinguiſhed and

gone either by the Obligor's being Adminiſtratrix to the Obligee, or for Want of a Requeſt. The Authorities are many in this Court, That Bonds have been conſidered as Evidences of Agreements, and Obligors held to a Specifick Performance, and not allowed to forfeit the Penalty.

There muſt be therefore a Surrender and Conveyance: But then the Plaintiff muſt pay the 200 *l.* with Intereſt from the Death of the Uncle; *Anthony* having during his Life, by the Conſent of the Mother, received and enjoy'd the Profits of the Land.

See this Caſe 2 *Mod. Caſes in Law and Equity* 68.

Atcherley verſus *Vernon & al'.* In Canc.

The *Caſe.*

MR. *Vernon* made his Will *Jan.* 17, 1711, and by this Will he veſted the Bulk of his Eſtate, Real as well as Perſonal, in five Truſtees, for the Uſe of *Bowater Vernon &c.* and alſo he gave the Reſidue of his Perſonal Eſtate to the ſame Truſtees, to be inveſted in Land, and ſettled to the ſame Uſes.

He gave his Wife 500 *l.* to be paid her preſently by the Truſtees; and 1000 *l. per Annum*, free from all Taxes but Parliamentary ones, in full Satisfaction of Dower, Jointures, and all Demands out of his Real Eſtate, to be paid by the Truſtees. He gave her alſo all his Plate, and his *London* Houſe, and the Goods and Furniture; he gave her likewiſe the Uſe of his Houſe at *Hanbury*, with all the Demeſne Lands and Park that he kept in his own Hands, with all the Goods and Furniture, together with the Books, for her Life.

He gave his Siſter and Heir at Law, Mrs. *Atcherley*, 200 *l. per Annum* for her ſeparate Uſe; and his Neice *Leticia Atcherly* 1000 *l.*

After the making of his Will, he purchas'd ſeveral Eſtates in Land; ſome of which Purchaſes were compleated, and the Conveyances executed in his Life-time;

but in ſome they were only contracted for, Part of the Purchaſe-Money paid, but no Conveyance executed; and in ſome the Time limited by the Articles for executing the Conveyance was not come.

He purchas'd likewiſe a Copyhold Eſtate; but that Purchaſe was compleated, ſave that he was pleas'd, that the Vendor's Name ſhould be made Uſe of in Truſt for him.

Mr. *Vernon* being ſeiſed of the Manor of *Hanbury* in Fee, out of which there was payable to the Crown a Fee-Farm Rent of 35 *l. per Annum*, purchas'd this in, and took a Conveyance of this Fee-Farm Rent to himſelf in Fee.

Matters ſtanding thus, Mr. *Vernon* on the 2*d* of *Feb.* 1720, added a Codicil to his Will.

In which Codicil he firſt takes Notice, That he had made his Will, bearing Date on or about the 17*th* of *Jan.* 1711, and ratifies and confirms this his Will in every Part thereof; ſave what Alteration he ſhould make by that Codicil.

He further takes Notice, That he had by his Will given his Siſter and Heir at Law 200 *l. per Annum* to her ſeparate Uſe, during her Life, and 1000 *l.* to his Neice *Leticia Atcherly*; and by his Codicil makes the 200 *l.* 400 *l.* in Caſe ſhe ſurvived her Huſband; and encreaſes the Sum of One Thouſand Pounds to Six Thouſand Pounds to be paid his Niece, upon Day of Marriage or 21. And then declares, That his Will and Meaning is, that the reſpective Legacies of 200 *l. per Annum*, and the Six Thouſand Pounds, be taken and accepted of by his ſaid Siſter and Niece, in full Satisfaction of all Manner of Claims and Demands, they or either of them, had or might have upon any Part of his Eſtate, Real or Perſonal; and upon Condition that they do releaſe unto his Executors and Truſtees, all Manner of Claims and Demands, upon any Part of his Eſtate.

Then

Then he goes on and ſays,

Having thus provided for my Siſter and Niece, I do deviſe all the Lands purchas'd by me ſince the making my Will, to the Truſtees in my Will named, to and for the ſame Uſes and Purpoſes as the Manor of *Hanbury* ſtands ſettled by my Will. And I do hereby revoke that Part of my Will, wherein I make *A. B.* and *C.* three of my Truſtees; and I do deſire *J. S.* and *J. N.* to be two of my Truſtees, and do deviſe my ſaid Real Eſtate to them accordingly.

1ſt Point, How much of the Will ſtood revok'd by thoſe Words of the Codicil, *I do hereby revoke that Part of my Will, wherein I make* A. B. *and* C. *three of my Truſtees.*

Upon this Will and Codicil, the firſt Point inſiſted upon by Mr. *Atcherley* in Right of his Wife, Siſter and Heir at Law to Mr. *Vernon*, was founded upon that Part of the Codicil, *I do hereby revoke &c.*

It was inſiſted, That he had by theſe Words revoked that integral Part of the Will, that related to the Truſt, and the Uſes thereby limited. Had he not intended to have done ſo, he would not have uſed thoſe Words, *that Part of my Will*; but would have uſed ſome other Words, that would have manifeſted his Intention to have related only to the Perſons of the Truſtees.

It was ſaid, That if he had intended only this, it was very ſtrange that he ſhould repoſe any Truſt as to the new purchas'd Lands, in thoſe very Truſtees thus by him put out; yet *that* he plainly does, for he deviſes 'em *to the Truſtees in the Will named, viz.* all five.

Where the Words of a Will are dubious, the Heir at Law to be favour'd. 2 *Vern.* 340.

As the former Meaning ſeems to be the more literal one, ſo it is the more favourable one to the Heir at Law, who will otherwiſe be diſinherited by the Will.

Where Land is deviſed to Truſtees, and no Uſe declar'd, the Law will imply it to be to the Uſe of the Heir.

And it is likewiſe an Interpretation, that makes the Codicil uniform and conſiſtent with itſelf. For immediately after this, there follows a new Deviſe of all his Eſtate, to the two new Truſtees; which Clauſe, ſuppoſing the former not to be a Revocation, is plainly inconſiſtent, and itſelf a Revocation. And as there is no new Truſt appointed by this new Deviſe, the Law implies *that*, and ſays to the Uſe of the Heir at Law.

But admitting, That the Deviſe to theſe new Truſtees, by Virtue of the Word *accordingly*, ſhould be taken to be, to and for the ſame Uſes and Purpoſes as are mentioned in the Will; yet in as much as the Lands are deviſed to the Truſtees, only omitting the Words *and their Heirs*, they can take only an Eſtate for Life; and an Eſtate for Life, cannot ſupport a Uſe in Fee; at leaſt the Reverſion upon the Eſtate of the Truſtees for Life, will deſcend on the Heir at Law.

It being foreſeen by Mr. *Atcherly*'s Counſel, That the Clauſe of the Releaſe to be given by the Siſter and Niece, would be urged as a plain Proof that it was the Teſtator's Intention, that his Heir at Law ſhould have nothing more:

They endeavour'd to obviate that Objection, by ſaying, That as the Siſter had then a ſubſiſting Demand upon the Eſtate of Mr. *Vernon* (as it was admitted ſhe had) it was probable, that the Releaſe was directed by the Teſtator, with a View to *that* only, and not to any further Claim; it being very unlikely to ſuppoſe, That a Man who is Maſter of his own Eſtate, and may diſpoſe of it where he thinks fit, ſhould order his Heir to releaſe, in Order to cut him off from the Eſtate; when the very deviſing of it away, does *that* as effectually as 500 Releaſes poſſibly can.

On the other Side, it was ſaid by the Counſel for Mr. *Bowater Vernon*, For the Defendant.

That a Revocation was no more to be preſumed than the Diſinheriſon of an Heir.

That the only Uſe of Wills, is the diſinheriting of Heirs, and preventing that Deſcent, which would otherwiſe fall upon them.

It is the Buſineſs of all Courts, ſo to conſtrue a Will, as that the whole may be conſiſtent; and Revocations ariſing from Inconſiſtencies will never be admitted, but where the Inconſiſtency is plain and unavoidable: There- Inconſiſtent and contradictory Clauſes in a Will, muſt be ſo expounded if poſſible, as

not to deſtroy one another: Therefore if there be two Deviſes in a Will of the ſame Lands, the latter ſhall not be eſteem'd a Revocation of the former, but the Law will make the Deviſees Jointenants.

fore, if in the Beginning of a Will, Land is deviſed to *J. S.* and afterwards in the ſame Will, the ſame Land is devis'd to *J. N.* the Law will make them Jointenants, rather than the latter Part ſhould be eſteem'd a Revocation of the former.

But it is ſo far from being doubtful whether the Teſtator did intend to revoke the Diſpoſitions in the Will by this Codicil, that it is very plain, from the whole Tenor of it, that he intended the contrary.

In the very Beginning of his Codicil, he takes Notice of the making of this Will, and then ratifies and confirms it.

Then he makes an additional Proviſion for his Siſter and Niece; and then directs that they *accept* the ſame *in full Satisfaction &c.* Words that very plainly and ſtrongly import, that he intended them nothing more.

But if this Intention of his can be plainer, he has made it ſo, by the *Releaſe* he has directed them to give. For tho' poſſibly he might principally have in his View, the Demand he then knew, his Siſter had upon him; yet when ſuch general Words are uſed, as comprehend every Thing, it amounts to a Demonſtration, That he did not intend them the Bulk of his Eſtate. And not at all abſurd to ſuppoſe, that not being able to foreſee, what Diſputes might ariſe, what Points might be ſtarted, how frivolous ſoever, he might even to prevent theſe, as far as in him lay, direct and appoint this Releaſe.

After this, he goes on thus, *Having thus provided for my Siſter and Niece &c.* Words plainly again implying, he never intended them any other Proviſion.

The Expreſſion in the Codicil *Three of my Truſtees* plainly implies, That the Teſtator thought there remain'd more Truſtees, who had Truſts repos'd in them; all which could not be ſo, upon Suppoſition of a Revocation.

The following Expreſſion, *to be two of my Truſtees*, corroborates the foregoing Obſervation.

But this Obſervation, ſtands yet further ſtrengthen'd, from his appointing no new Truſts for the new Truſtees. For upon Suppoſition, That the Teſtator did ſuppoſe, as it is evident he did, that his Will was to continue; and that ſome of the Truſtees in his Will were to continue ſuch, and to the ſame Uſes and Purpoſes in the Will mentioned; *then* was there plainly no Occaſion to declare any new Uſe, but the bare making them Truſtees was abundantly enough; tho' if more were neceſſary, this one Word *accordingly*, being a relative Word to the Uſes in the Will, is tantamount to the repeating hem in the Codicil.

Beſides all this, his deviſing his Lands purchas'd ſince the making of his Will, to the ſame Uſes as his Manor of *Hanbury* ſtands limited by the Will, plainly proves, That the Teſtator imagined, that theſe Uſes were continuing Uſes; and that he was very well pleas'd with them.

Add to all this, That by interpreting this to amount to a Revocation, the Proviſion of a 1000 *l. per Annum* made for his Wife is quite overthrown; becauſe it takes away the Fund out of which it is to ariſe.

As to the Objection taken from the Omiſſion of the Word *Heirs* in the Deviſe to the new Truſtees; it was obſerved, That a Will is always to be interpreted according to the Intention of the Party; and that there is no legal Form of Words whatſoever neceſſary in a Will (as in a Deed there is) to paſs a Fee-ſimple; but whatever Words make it plain, the Teſtator intended it, will be ſufficient for that Purpoſe.

Not the ſame Exactneſs requir'd in the Words of a Will, as in thoſe of a Deed. *Salk.* 621.

And therefore *here* a Fee ſhall paſs to the Truſtees, without the Word *Heirs*; becauſe impoſſible that any other Eſtate, could ſupport the Uſes for which the Eſtate was given them.

A Deviſe of Lands to Truſtees, tho' the Words *and their Heirs* be omitted, ſhall convey an Eſtate in Fee to 'em, if that be neceſſary to ſupport the Intention of the Teſtator.

Abſurd to the laſt Degree to ſuppoſe, a Man ſhould in one and the ſame Breath, *viz.* the ſame Codicil, ratify and confirm his Will, and former Diſpoſition of his Eſtate, and then overturn all at once; and *this* in Favour

of

of his Heir at Law, for whom he had been providing in this very Codicil, and declaring very fully and expreſly, That he intended nothing elſe at all for her.

The Meaning of Mr. *Vernon* is ſo full and clear, that no one but a Lawyer could ever have miſtaken it. And after all, in Order to miſtake it, 'tis neceſſary to vary from the literal Meaning of his Words; for had he meant and intended what the other Side would have had him, he ought not to have ſaid, I hereby revoke that Part of my Will, but *that Clauſe*; for if it be aſked what is that Part of the Teſtator's Will, whereby *A. B.* and *C.* are made Truſtees, Is not the Anſwer barely their Names? So that in a literal Senſe, which is likewiſe the real and natural Senſe, no Part of the Will is hereby revoked, but that Part of the Will where theſe Truſtees are named, *viz.* their Names. The bare naming them made them Truſtees, and the revoking the naming of them, puts them out of the Truſt.

This Point was clearly decreed by the Lord Chancellor in Favour of Mr. *Vernon.*

Demiſe of a Shilling to an eldeſt Son in Satisfaction of all Claims, held ſufficient to exclude him from his diſtributory Share of the Teſtator's Perſonal Eſtate.

In the arguing of this Point, the Caſe of *Vachel* and *Vachel* was cited by Mr. *Vernon*'s Counſel; *where*, upon a Bill brought by the eldeſt Son, to have his diſtributory Share of the Perſonal Eſtate, it was decreed againſt him upon this ſingle Circumſtance, That the Teſtator by giving him a Shilling in Satisfaction of every Thing he might claim out of his Eſtate, had manifeſted his Intention to be, that he ſhould have nothing at all.

2*d Point*, Whether a Fee-farm Rent ſhould paſs in a Will by the Word *Lands?*

Another Point inſiſted upon by Mr. *Atcherley*'s Counſel was, That the Fee-farm Rent of 35*l. per Annum*, iſſuing out of the Manor of *Hanbury*, and purchas'd in by Mr. *Vernon*, did not paſs to the Truſtees by the Word *Lands.*

It

It was ſaid, That an Heir at Law, is never to be diſinherited, but by very clear and plain Words: That therefore the Word *Land*, ſhould never be extended to comprehend Fee-farm Rents, to the Diſinheriſon of an Heir at Law; unleſs where the Word can relate to nothing elſe, and ſo otherwiſe be totally void. And upon that Diſtinction went the Caſe of *Inchly* and *Robinſon* 2 *Leon.* 41, and 3 *Leon.* 165. The Deviſor being ſeiſed of a Fee-farm Rent iſſuing out of the Manor of *Fremington*, and of no other Land whatſoever, deviſed his Manor of *Fremington* to *J. S.* And it was there held, That the Deviſe of the Manor of *Fremington*, were Words in a Will, ſufficient to paſs the Fee-farm Rent iſſuing out of that Manor; for the Deviſor being ſeiſed of that Rent, and nothing elſe in that Manor, it was plain That the Teſtator meant the Rent, and could mean nothing elſe: So that otherwiſe the Will muſt have been intirely void.

For the Plaintiff.

There muſt either be expreſs Words in a Will, or a neceſſary Implication to diſinherit, an Heir at Law.

2 *Vern.* 571. 3 *Salk.* 128.

Where a Deviſe of the Manor of *F.* paſs'd a Fee-farm Rent iſſuing out of that Manor; becauſe otherwiſe the Will muſt have been void, the Teſtator being ſeiſed of nothing elſe in that Manor but the Fee-farm Rent.

To this it was anſwered by the Counſel for Mr. *Vernon*, That Mr. *Vernon* the Teſtator, being ſeiſed in Fee of the Manor of *Hanbury*, out of which this Fee-farm Rent did iſſue, had merged the Rent in the Inheritance, by taking a Purchaſe of it to himſelf in Fee.

For the Defendant.

Merger.

But it was further inſiſted upon, That ſuch a Rent would very well paſs by the Word Land.

The Caſe of *Inchly* and *Robinſon* proves, That the Word is ſufficient to paſs it, where the Intention of the Teſtator is plain that it ſhould paſs; for the Word *Land*, certainly as comprehenſive as the Words in that Caſe, *viz. the Manor of* Fremington; nor could the Circumſtance of the Teſtator's having nothing elſe to paſs, more ſtrongly ſhew the Intention of the Teſtator, that it ſhould paſs in that Caſe, than the Releaſe in the preſent.

Where a Man had a Portion of Tythes in Fee; held That *that* ſhould paſs in a Will, by the Words *all my free Lands*. It is true the Teſtator had in that Caſe nothing elſe; but that is a Circumſtance of no Weight, any

Where the Teſtator was ſeiſed of a Portion of Tythes in Fee, and nothing elſe;

Reſolv'd That *that* ſhould paſs by the Words *all my FreeLands.*

further than as it ſerves to ſhew what the Teſtator intended, which the Releaſe directed does abundantly in the preſent Caſe, *Style* 261.

Land will paſs in a Will by the Word *Livelihood.*

The Word *Livelihood* will paſs Land in a Will. Fee-farm Rent extendible upon an *Elegit*, and yet the Words of the Statute that give the Sheriff Authority are only *Land, medietatem terræ.*

Stat. *Weſtm.* 2. Fee-Farm Rents extendible upon an Elegit.

Court. Lord Chancellor merged in the Inheritance; and purchas'd by the Teſtator with a View that it ſhould be ſo. Beſides, the Word *Lands* ſufficient to paſs it; eſpecially in a Will, and where the Intention of the Teſtator is ſo very plain, as here it is, that it ſhould paſs.

3*d Point*, Whether Lands contracted for, but not convey'd, ſhould paſs by a Deviſe in a Codicil of all the Lands *purchas'd* ſince the making the Will?

Another Point inſiſted upon by Mr. *Atcherley*'s Counſel was, That the Lands contracted for where no Conveyance was executed, and eſpecially thoſe Lands where the very Time fixed by the Articles for executing Conveyances, was not come at the Time of the making the Codicil, did not paſs by it; and conſequently would deſcend to the Heir at Law.

It was admitted, That if there had been no other Lands purchas'd ſince the making of the Will, where the Conveyances had been executed, *there* poſſibly, rather than this Clauſe ſhould be intirely fruſtrated, they ſhould paſs: And in that Caſe, the Vendor would in a Court of Equity, be conſidered as a Truſtee for the Purchaſer; for Equity always conſiders Things that ought to be done, in the ſame Light as if they were done. But *here*, there being other Lands purchaſed ſince the making of the Will, where the Conveyances have been executed, the Words of the Codicil being ſatisfied by thoſe Lands, ought not to be extended any further; eſpecially to the diſinheriting of an Heir at Law.

Maxim of Equity.

Nay, in Caſe there were no other Lands, this Rule of Equity could be extended no further than to ſuch Purchaſes, where tho' no Conveyances were actually executed,

cuted, yet the Time fix'd by the Articles for the Execution of them was paſs'd; and then thoſe Lands where the Time limited for the executing of Conveyances was not yet come, will not paſs, but deſcend upon the Heir. If the Teſtator had intended otherwiſe, he might have made this very plain, by expreſſing himſelf thus, *Lands ſince purchas'd or contracted for.*

In anſwer to this it was ſaid, That upon all the Circumſtances of the Will and Codicil taken together, nothing could appear plainer than that it was the Intention of the Teſtator, they ſhould not deſcend to the Heir at Law, but paſs by the Codicil. And if the Intention be plain, it cannot be controverted, but that the Words made Uſe of by the Teſtator in the Codicil, *viz. All the Lands purchas'd by me ſince the making my Will*, and *my ſaid Real Eſtate* are large enough to take them in. For the Defendant.

It was admitted by the Counſel of the other Side, That the Words would have paſs'd them, in Caſe there had been no other Lands; and Why is that? Only becauſe it would have been then evident the Teſtator had intended them to paſs; and here the Releaſe ordered by the Teſtator ſpeaks this full as ſtrongly.

As to the Difference taken between *where* the Time limited for the executing of theſe Conveyances is paſt, and *where* yet to come; nothing at all in it, for *that* relates only to the Terms of the Truſt repos'd by Equity in the Vendor.

A material Circumſtance, That in every one of theſe Contracts, Part of the Purchaſe-Money was paid.

A known and eſtabliſhed Rule in Equity, That from the Time of the Contract, the Vendor is a Truſtee for the Vendee. Upon this Foundation it is, that a Bill lies in Equity againſt the Vendor for a Specifick Performance: Nay ſhould the Vendor afterwards, ſell this Land to another, having Notice of this precedent Contract, In Caſe of a Contract for the Sale of Lands, the Vendor is deem'd in Equity a Truſtee for the Vendee till the Convey-

ance is executed: And if the Vendor ſhould afterwards ſell the

tract, Equity ſtill transfers the Truſt; and the ſecond Vendee may in ſuch Caſe, be compell'd to a Specifick Performance.

ſame Lands to another, having Notice of the precedent Agreement; the firſt Vendee may in ſuch Caſe, bring his Bill againſt the ſecond Vendee for a Specifick Performance.

Theſe Words *contracted for* and *purchas'd* very commonly uſed promiſcuouſly.

Beſides, if this were not to be conſidered as Real Eſtate, then it muſt be Perſonal Eſtate, for there is no Medium; and if ſo, it is given to the Truſtees to be by them inveſted in Land, and ſettled to the ſame Uſes: But if it be to be accounted as Real Eſtate, and as ſuch deſcendible to the Heir at Law; then it is deviſable, and will paſs by the Words of the Codicil.

Affirm'd upon a re-hearing by Lord Chancellor *Cowper*. See *Rep. of Caſes in Equity* 91. *Ant.* 39.

Caſes quoted to this Purpoſe were, *Lingen* and *Souroy* in Lord *Harcourt*'s Time: A Man by his Will gave all his Land in the County of *York* and Kingdom of *England*, and had no Lands at the Time of his Death, but only had obliged himſelf by Marriage Articles to purchaſe Lands to the Value of 1400 *l.* And held that this 1400 *l.* ſhould be conſider'd as Real Eſtate, and was well paſs'd by the Will. In that Caſe, the Caſe of *Atkins* and *Atkins*, in Lord *Jeffrey*'s Time, was quoted.

2 *Vern.* 679. *Rep. of Caſes in Equity* 77.

The Caſe of *Woodier* and *Greenhill*: Freehold Land was deviſed to Truſtees, the Land was contracted for before the Will, *viz.* in *April*, the Will was made in *June*, Time fix'd by Articles for the Conveyance was at *Michaelmas*; yet held by Lord *Harcourt*, That the Land paſs'd, he being of Opinion, That had the Teſtator died before the Conveyance, and made no Deviſe of it, the Heir might have claim'd it as Land, and compell'd the Executor to have paid for it out of the Perſonal Eſtate; and conſequently, if the Deviſor had ſuch an Intereſt in the Land contracted for as was deſcendible, it was deviſeable. And Mr. *Vernon* the preſent Teſtator, being of Counſel in that Caſe, inſiſted very much upon the Abſurdity of ſuppoſing it neither Real nor Perſonal Eſtate;

Whatever is deſcendible to the Heir at Law as Real Eſtate, is deviſable *as ſuch*.

for if Perſonal Eſtate it muſt not deſcend to the Heir, which all held it would; if Real Eſtate and conſequently deſcendible, then it was well deviſed.

Caſe of *Prideaux* and *Gibbon*, 2 *Chancery Caſes* 144. A Man having contracted for an Eſtate, deviſes all his Land to be ſold for the Payment of his Debts; and after the making of the Will, the Land was actually convey'd to him in Purſuance of the antecedent Contract: The Court decreed the Land to be ſold for the Payment of his Debts. And if the Teſtator had Power to deviſe an Eſtate contracted for, before Conveyance, for the Payment of his Debts, he might certainly have deviſed it in any other Manner. Said in that Caſe, by the Lord Chancellor, That where a Man deviſes his Land to be ſold for Payment of his Debts, and he afterwards purchaſes Lands, Equity will decree a Sale, tho' there were no Articles enter'd into precedent to the Will.

If a Man deviſes his Land for the Payment of his Debts, Equity will decree a Sale of the Lands purchas'd after the Deviſe.

Lord Chancellor was of Opinion, That all the Lands contracted for by the Teſtator, as well as thoſe which had been actually convey'd to him, did paſs by the Codicil. *Court.*

Then Mr. *Atcherley*'s Counſel inſiſted, That the Copyhold Land did not paſs by the Codicil; but Held clearly that it did.

Copyhold Lands deviſable without a Surrender, if the Teſtator has only an equitable and not the legal Eſtate. 2 *Vern.* 680. See the State of the Caſe *Ant.*

Then it was inſiſted upon by Mr. *Atcherley*, That ſome Manuſcript Reports of Caſes in Chancery, found in the *London* Houſe, did belong to the Heir at Law, as Guardian of the Reputation of his Anceſtor.

Whether Manuſcripts ſhould deſcend to the Heir at Law?

It was ſaid, That if the Tomb or Monument of an Anceſtor be defaced or deſtroyed, an Action lies for the Heir at Law; and that by Parity of Reaſon, as thoſe Manuſcripts were intended by the Teſtator, as a Monument to tranſmit his Learning and Reputation to Poſterity, the Law would intruſt the Heir with the Care of

them, that they ſhould be printed in ſuch a Manner, as would be moſt for the Honour of Mr. *Vernon's* Memory.

The Printing, or not Printing theſe Papers, may as much affect the Reputation of Mr. *Vernon*, as any Monument or Tomb. Poſſibly, they are not fit to be printed; poſſibly they were never intended to be printed.

This not in the Nature of the Thing fructuary; and will not therefore, fall within that Clauſe, that gives the Reſidue of the Perſonal Eſtate to the Truſtees.

Suppoſe a Man of Learning, ſhould have the Misfortune to die in Debt; Can the Creditors come into this Court, and pray a Diſcovery of all his Papers, that they may be printed for the Payment of his Debts?

And if Creditors cannot do this; *a fortiori* not the Truſtees in the preſent Caſe.

If a Miniſter of State ſhould die, he may have a great Number of Papers, that may be very curious, may print and ſell well; yet ſurely, theſe will not be conſidered as Perſonal Eſtate, and go to the Executor.

As therefore Papers found in a Man's Study, not being in their Nature fructuary, are not conſidered as Perſonal Eſtate; and in Caſe of no Will, would not have gone to the Adminiſtrators of Mr. *Vernon*; ſo it was argued that they did not paſs under that Clauſe, where the Reſidue of his Perſonal Eſtate is given to the Truſtees.

Owen 124. Reſolved in the Earl of *Northumberland's* Caſe, That notwithſtanding all his Jewels were deviſed to his Lady; yet his Garter, and Collar of S S ſhould go to the Heir.

On the other Side, it was ſtrongly inſiſted upon, That it was Perſonal Eſtate; and was devis'd to the Truſtees by thoſe Words, *The Reſidue of my Perſonal Eſtate.*

It was inſiſted upon in Behalf of the Widow, That ſhe ought to have them, as included in the Deviſe of Houſhold Goods and Furniture.

The Court decided nothing in this Affair; becauſe all conſented to have them printed under the Direction of the Court, without making any Profit of them.

Thoſe Points being thus determined againſt Mr. *Atcherly*; Mr. *Vernon*'s Counſel in Virtue of a croſs Bill brought for that Purpoſe, prayed That the Court would decree Mrs. *Atcherly* and her Daughter to releaſe in the moſt effectual Manner, or elſe to wave their Legacies; for which the Caſe of *Thorold* and *Thorold* was cited.

This as highly reaſonable was directed by the Court.

There was another Point conteſted by Mrs. *Vernon* the Widow, which was this.

A Legacy of 200*l.* given to *V.*'s Wife by her Father, to be laid out by her in what ſhe ſhould think fit in Remembrance of him. Decreed ſhe ſhould have the 200*l.* over and above the Proviſion made for her by her Huſband's Will.

Sir *Anthony Keck*, Mrs. *Vernon*'s Father, did by his Will, made in 1695, deviſe the Sum of 200*l.* to his Daughter Mrs. *Vernon*, in theſe Words, *viz. To be by her laid out in what ſhe ſhall think fit in Remembrance of me*; he gave alſo another Legacy of 50*l.* to the deceaſed Mr. *Vernon*, and made him one of his Executors.

It was ſaid, That taking all thoſe Circumſtances together, it muſt be intended, That the Teſtator did plainly deſign this, as a Legacy to the ſeparate Uſe of his Daughter, tho' he does not uſe thoſe very Words; and therefore as the Teſtator never deſigned, that this Money ſhould be ſunk in the Eſtate of her Huſband, the Eſtate of the Huſband ought to be ſtill liable to this Demand, in the Hands of the Truſtees.

And it was accordingly decreed for Mrs. *Vernon*.

N.B.

A Deviſe of *all* the *Perſonal* Eſtate, will paſs whatſoever Perſonal Eſtate the Teſtator dies poſſeſs'd of. But by a Deviſe of *all* the *Real* Eſtate, nothing more will paſs than what the Teſtator had an Intereſt in at the making his Will.

N. B. It is a Point of Law very well known, That if a Man deviſes all his Perſonal Eſtate, and he dies worth double the Perſonal Eſtate he had at the Time of the making the Will, all his Perſonal Eſtate will paſs.

But if a Man deviſes all his Real Eſtate, no Land purchas'd after the making of the Will ſhall paſs by it.

The Reaſon of this Difference in Deviſes of Real and Perſonal Eſtate.

Stat. 32 *H.* 8. *cap.* 1. and Stat. 34 & 35 *H.* 8. *cap.* 5.

This Difference the Lord Chancellor was pleas'd thus to account for, That the Statute which made Lands firſt deviſable, uſes theſe Words, a Man *having Lands*: So that the Parliament ſeem'd to conſider Deviſe as another Inſtrument of Conveyance; and therefore the Rule has always been, that a Man can deviſe nothing, but what he might by Deed convey.

Quære of this. For admitting, That a Will is to be conſidered as a Conveyance, yet like other Conveyances that are not eſteem'd valid until ſeal'd and delivered; ſo a Will ought not to be reputed as a Will, until the Death of the Teſtator, when it takes Effect; and it might not ſeem unreaſonable to conſider a Will as wrote every Day of a Man's Life, that it lies by him unalter'd.

2 *Vern.* 688.

The true Reaſon of this Difference, as ſeems to me, muſt be taken from the fluctuating Nature of Perſonal Eſtate; ſo that Death is the only Time when this is capable of being reduced to a Certainty; it being next to impoſſible to diſcover what the Perſonal Eſtate of the Teſtator amounted to, or conſiſted in, at the Time of making his Will.

DE
Term. S. Mich.
11 *Geo.* 1.
In CURIA CANCELLARIÆ.

Oſgood and *Stroud.*

BY Marriage-Articles it was covenanted, That Land ſhould be ſettled upon Huſband for Life, Wife for Life, then to the Iſſue of that Marriage in Tail, Remainder to the fourth Son of the Huſband's Father. This fourth Son died, leaving behind him a Daughter married to the Plaintiff, who brings his Bill, the Eſtate-Tail being ſpent, and no Settlement made, to have the Articles performed ſpecifically, by ſettling &c. in Oppoſition to the Defendant, to whom, as Heir at Law, it would deſcend in Caſe of no Settlement.

Marriage-Setlement, How far the Conſideration extends to all the Uſes in the Settlement.

Argued for the Defendant, That tho' theſe Articles were founded upon the Conſideration of Marriage, yet they muſt be eſteem'd voluntary for ſo much of them as that Conſideration would not reach or cover; and a Court of Equity will not in Favour of Volunteers, aid a defective Settlement, much leſs decree one where there is none.

For the Defendant.

Ant. 469, 471, 476.

The Plaintiff, who is a Remainder Man after the Limitation to the Iſſue of the Marriage, is certainly a Volunteer; and then the Queſtion is ſingly, Whether the Court will interpoſe ſo far in Favour of a Volunteer, as to carry a Covenant to ſettle, into Execution, to the Prejudice of the Heir at Law, upon whom it would otherwiſe deſcend.

That the Court would not, the following Caſes were cited: The Caſe of *Robinſon* and *Kirſaire*, the Caſe of *Thompſon* and Lord *Haverſham* before Lord *Cowper*, the Caſe of *Bellingham* and *Louther*, 1 *Chancery Caſes* 243. This laſt Caſe much relied upon.

For the Plaintiff.

For the Plaintiff it was ſaid, That Truſts, tho' voluntary, muſt be performed; that they may be created as well by Articles as otherwiſe, and as well by Marriage Articles as any other Way. That *here* there being a Covenant to ſettle *&c.* the Queſtion was, Whether this not being perform'd by the Anceſtor, an implied Truſt to do this was not devolved upon the Heir.

In the Caſe of *Jenkyns* and *Keymis*, reported both in *Hardreſs* and the *Chancery Caſes*, expreſly affirm'd *per* Lord Chief Baron *Hale*, That the Conſideration of a Marriage-Portion, will extend and run thorough all the Uſes in that Settlement; and what Conſideration would be good by Way of Settlement, will be ſo by Way of Articles.

Court.

Lord Chancellor *Macclesfield.*

It ſeems clear to me, That where there is a Marriage Portion and Settlement, that Part of the Settlement only, which belongs to the Wife and Children by that Wife, can be eſteem'd to be founded upon the Conſideration of that Marriage; for abſurd to imagine, that the Friends of the Wife, ſhould be ſuppos'd as at all concerned about the remote Uſes of the Settlement, upon Perſons to whom they are entire Strangers. And as for the Caſe of *Jenkins* and *Keymis*; it ought

not to be underſtood in ſo abſur'd a Senſe, as that comes to. The Meaning of the Caſe is no more than this, That a Father, when he makes a Marriage Settlement upon one Son, has ſuch a proper, fair, and juſtifiable Opportunity offer'd him of providing for his other Children, as that if he thinks fit to lay hold upon and embrace it, by inſerting in the Settlement, Proviſions for them; ſuch Proviſion ſhall never be eſteem'd as fraudulent, and as ſuch ſet aſide in Favour of Creditors.

Therefore very plain to me, That the Plaintiff muſt be conſidered as a volunteer, if there was nothing more in the Caſe, than the Conſideration of the Marriage, and the Marriage Portion.

But upon Suppoſition, That the Eſtate, was neither all in the Father, nor all in the Son; ſo that neither could without the Aſſiſtance and Help of the other, have made this Settlement; *then* it may be very natural to ſuppoſe, That this Part of the Settlement, under which the Plaintiff claims, might be founded upon an Agreement between Father and Son. For very natural for the Father to tell the Son, I muſt provide for my other Children, as well as you; and therefore, unleſs you will conſent to this, I will not join with you in making this Settlement. And then this Remainder-Man the Plaintiff, muſt not be conſidered as a Volunteer, but as one claiming under the Conſideration of the Father's doing *that*, to enable the Son to make the Settlement, which he was not bound to.

This I take to be the State of the preſent Caſe; for by the Evidence it ſeems to me, That the Father had a Power of charging the Eſtate, with the Payment of 1300 *l.* which probably he might depart from, upon the Conſent of his Son to that Part of the Settlement, under which the Plaintiff claims.

Upon this Reaſon, without determining the Point that related to Volunteers, he decreed a Settlement to be made upon the Plaintiff, purſuant to the Articles.

DE

Term. S. Trin.

11 *Geo.* 1.

In Curia Cancellariæ.

Hill verſus *Filkins & Ux'.*

See the State of the Caſe, Page 481.

WHEN this Caſe was before Lord *Macclesfield*, he was ſtrongly of Opinion for the Plaintiff, the Heir at Law; but in Order to bring the Matter more fully before him, he made an Order directing ſome Iſſues to be tried; from which Order the Defendant appeal'd to the Houſe of Lords, as having directed Iſſues to be tried, that were not warrented by the Pleadings. The Houſe of Lords ſet the Order aſide, but gave the Plaintiff Leave to amend his Bill; which he did. And upon this amended Bill, and the Pleadings thereupon, the Point in Law came now to be ſpoken to again before Lord Chancellor *King*, *viz.* Whether the Granddaughter, the Defendant, having conform'd by taking &c. according to the Act &c. within ſix Months after attaining the Age of Eighteen, was capable of taking the Reſidue under this Will; ſhe being about Fourteen at the Time of the Death of the Teſtatrix.

Stat. 11 & 12 *W.* 3.

Lord Chancellor *King* clearly and ſtrongly decreed in Favour of the Defendant, contrary to the Opinion of Lord *Macclesfield.*

This Act of Parliament makes no Difference as to the Religion of thoſe from whom the Eſtates come, whether Proteſtants or Papiſts; but regards only the Religion, Age and Circumſtance of thoſe to whom they come.

In this Caſe, it muſt be admitted upon the Authority of the Caſe of *Roper* and *Radcliffe*, 1*ſt*, That the *Reſiduum* diſpos'd of by this Will is *Land.*

The *Reſiduum* of a Real Eſtate deviſed to be ſold for Payment of Debts and Legacies, to be conſider'd as Land. *Ant.* 93, 234.

2*dly*, Upon the Authority of that Caſe, it muſt likewiſe be admitted, That the Word *Deviſe* is included in the Word *Purchaſe*, in the ſecond Clauſe of that Act.

Purchaſe includes *Deviſe*. *Ant.* 90, 95, 234, 242.

And I think the Houſe of Lords were very right in that Determination; becauſe otherwiſe, this Clauſe in the Act, would in abundance of Caſes have been intirely uſeleſs.

But it does not from hence follow, That all Deviſes whatſoever, muſt be included under this Word; without excepting even Deviſes, that appear to me to be allowed of by the former Clauſe, or rather the firſt Part of this Clauſe, for the whole is indeed but one Clauſe.

The Legiſlators had two Sorts of Perſons under their View; *viz.* Perſons under the Age of Eighten, and Perſons over that Age.

As to the former, the Legiſlators look'd upon them as too young, to be fix'd upon rational Grounds, in any Religion whatſoever; and therefore laid upon theſe only a Temporary Diſability, removeable upon Conformity.

But for Perſons above that Age, and who might be ſuppoſed, fix'd and riveted in their Religious Sentiments, the Legiſlators thought it to no Purpoſe to expect their Converſion; and therefore laid a total Diſability upon them.

Not to underſtand the Act of Parliament in this Manner, would be to make the Legiſlators overturn their plain and apparent Intention in the firſt Clauſe, by the ſecond.

Papiſts conforming at Eighteen, capable of taking Lands that were devis'd to 'em under that Age.

The Defendant therefore is plainly capable of taking by Deviſe under this Will, being under the Age of Eighteen, at the Time of the Death of the Teſtatrix; and having perform'd thoſe external Acts, that were pitch'd upon by the Parliament, as a ſufficient Proof of her Conformity.

THE

THE

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